Spring 2018

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • Colorado • New Mexico • Texas

IN BRIEF

UTAH

- In a construction case, the Utah Supreme Court affirmed motions in favor of a developer and against the HOA. It held that the HOA lacked privity of contract under CC&R's for its claims, and that it failed to establish claims for breaches of fiduciary duties. .....*Page 1*

COLORADO

- The Colorado Court of Appeals denied an injured-plaintiff's request to reform a UM/UIM policy to increase the policy's limits to $1,000,000. .....*Page 2*

WYOMING

- In a trucking injury case, the Wyoming Supreme Court adopted the McHaffie rule, which provides: "Once an employer admits respondeat superior liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on other theories of imputed liability." .....*Page 4*

NEW MEXICO

- The New Mexico Supreme Court reversed a sales agent's $3.5 million jury verdict against Farmers Insurance for breach of contract, by upholding the termination clause of the parties' contract. .....*Page 4*

TEXAS

- The Texas Supreme Court held that a dealership's issuance of a loaner vehicle was not the proximate cause of a motor vehicle accident which occurred eighteen days later. .....*Page 6*

UTAH

UTAH SUPREME COURT AFFIRMS DIRECTED VERDICT IN FAVOR OF DEVELOPER AS TO HOA'S CLAIMS FOR BREACH OF FIDUCIARY DUTIES

Utah Supreme Court: Plaintiff Gales at Sterling Village Homeowners Association (HOA) brought an action against the developer, Defendant Castlewood-Sterling Village I, LLC. The lawsuit concerned a planned unit development. Plaintiff alleged breach of fiduciary duties and breach of the implied warranty of habitability. The claims related to alleged defects in the construction of residences within the development.

The developer counter-claimed against the HOA for indemnification. The district court granted summary judgment against the HOA. In doing so, it granted the developer's motion for directed verdict on the breach of fiduciary duty claim. The court also granted the developer's post-trial motion for indemnification of attorneys' fees. The HOA appealed those rulings.

One issue on appeal before the Utah Supreme Court was whether the HOA could establish privity of contract with the developer. "Utah law requires privity of contract to assert a claim for breach of the implied warranty of workmanlike manner and habitability." The Court ruled that the language of the declaration of covenants, conditions and restrictions (CC&R's) "must, at the very least, manifest a homeowner's intent to transfer her right to pursue claims … the statute contemplates an assignment that expresses some intent to actually assign a claim." As the subject CC&R's did not constitute an assignment of the homeowners' rights, the HOA thus did not have privity of contract against the developer. The HOA therefore could not maintain its action against the developer for breach of warranty of workmanlike manner and habitability.

As to the grant of the developer's motion for directed verdict as to the claim for breach of fiduciary duties, the Utah Supreme Court also affirmed that ruling. The Court held that the HOA had failed to present any evidence to establish the standard of care for establishing a sound fiscal basis under its fiduciary duties. The HOA also failed to articulate what material facts the developer failed to disclose under its fiduciary duties. Expert testimony was required on these subjects, and none was presented.

As to the developer's motion for indemnification by the HOA, the Court held that it was a cause of action which should have been tried at trial instead of via a post-trial motion. The Court thus

Continued on Page 2

IN THIS ISSUE

Continued from Page 1

reversed the grant of indemnification against the HOA.

Gables at Sterling Village Homeowners Association v. Castlewood-Sterling Village I, LLC et al., 2018 UT 4 (Utah Supreme Court, decided February 9, 2018, not yet released for publication in the permanent law reports).

PERSONAL JURISDICTION HELD NOT TO EXIST FOR NON-RESIDENT CORPORATION IN WRONGFUL DEATH HELICOPTER CRASH CASE

Utah Court of Appeals: This lawsuit stemmed from a deadly helicopter crash allegedly caused by a defective engine part manufactured by Defendant Continental Motors, Inc. (CMI). The guardians of the deceased individuals sued CMI in Utah. CMI is a nonresident corporation that moved to dismiss the lawsuit for lack of personal jurisdiction. The district court denied the motion, finding that CMI had sufficient minimum contacts with Utah to support specific jurisdiction for the lawsuit.

In support of its motion to dismiss, CMI filed an affidavit stating that CMI is not licensed to do business in Utah, does not maintain any office in Utah, does not have any warehouses or places of business in Utah, and does not have a Utah registered agent. It also did not have any accounts or property in Utah, and does not do any marketing in the state. In opposing the motion, Plaintiffs argued that CMI regularly does business in Utah and that business caused the accident in Utah. Plaintiffs also cited to CMI's advertisements in nationally circulated publications.

To subject a nonresident defendant to a court's judgment, the court must have personal jurisdiction. There are two types of jurisdiction: general and specific. General jurisdiction permits a court to exercise power over a defendant without regard to the subject of the claim asserted. Specific jurisdiction gives a court power over a defendant only with respect to claims arising out of the particular activities of the defendant in the forum state. For specific jurisdiction to exist, the defendant must have certain minimum local contacts that must be the basis for the plaintiff's claim.

Two tests have been identified for determining if there are sufficient minimum contacts with the forum state: the "arising out of" test and the "stream of commence" test. For the "arising out of test," the defendant's contacts "must be sufficiently related to the plaintiff's claims so that it can be said that the claim arises out of these contacts." The Utah Court of Appeals determined that CMI did not meet the "arising out of" test because CMI's alleged contacts with Utah did not relate to the claims asserted for products liability, negligence, and breach of warranty.

Under the "stream of commerce" test, jurisdiction is conveyed where the seller does not come in direct contact with the forum states but does so through intermediaries such as retailers or distributors. The Court of Appeals also held that this test was not satisfied. CMI's engine part was not placed into the stream of commerce as it was a component part of the engine to an end user outside of Utah. Thus, the Court determined that Utah did not have jurisdiction over CMI for the lawsuit.

Venuti v. Continental Motors Inc., 2018 UT App. 4 (Utah Court of Appeals, decided January 5, 2018, not yet released for publication in the permanent law reports).

$1.5 MILLION VERDICT IN PEDESTRIAN-CROSSWALK INJURY CASE

Salt Lake County: Plaintiff Carol Smith was struck by a vehicle driven by an employee of Enterprise Rent-A-Car. Smith was hit while walking in a crosswalk at the Salt Lake City Airport. Smith reportedly sustained a closed head injury, concussion, post-concussion syndrome, headaches, cognitive dysfunction, and loss of smell and taste. These injuries resulted in an eight-percent whole person neurological impairment.

Smith's allegations included that the Enterprise employee was negligent and reckless in failing to maintain a proper lookout, failing to yield to a pedestrian, and failing to pay attention while driving. Enterprise was also sued under a theory of vicarious liability for its employee's conduct. Plaintiff further asserted that Enterprise negligently hired, trained, monitored, and entrusted its employee. Enterprise denied liability.

Upon a jury trial, Plaintiff Smith was determined not to be at fault. A verdict against Defendant Enterprise was rendered in the total amount of $1.5 million.

Smith v. Enterprise Rent-A-Car Company of UT L.L.C. d/b/a Enterprise Rent-A-Car, Case No. 2015-09-06643.

ENACTED UTAH LEGISLATION

H.B. 279: Governor Herbert recently signed into law H.B. 279. This bill enacts U.C.A. § 13-8-7, concerning design professional liability.

The bill prohibits a provision in a design professional services contract that requires a design professional to indemnify, hold harmless, or reimburse a person for attorney fees or other costs. Excepted from this bill is such a provision relating to the design professional's breach of contract, negligence, recklessness or intentional conduct. The bill also prohibits a contractual provision that requires a design professional to defend a person against a claim alleging liability for damages. It also establishes a standard of care for design professionals. The law applies to a design professional services contract executed on or after May 8, 2018.

House Bill 279 (signed into law by Governor Herbert on March 19, 2018).

Colorado

REFORMATION OF UM/UIM POLICY COVERAGE LIMIT IS REJECTED

Colorado Court of Appeals: Plaintiff Rickey Airth was seriously injured in an accident while operating a semi-truck owned by his employer, Solar Transport Company. Airth's vehicle was struck by a negligent, uninsured driver. Solar had underinsured/uninsured (UM/UIM) insurance coverage of $50,000 for its employees through a policy issued by Defendant Zurich American Insurance Company.

Airth brought a claim against Zurich seeking to reform Solar's policy to provide UM/UIM coverage of $1,000,000. He alleged that he was entitled to a higher amount because

More on Page 3

Continued from Page 2

Zurich had failed, as allegedly required under C.R.S. § 10-4-609, to: (1) offer Solar UM/UIM coverage in an amount equal to its bodily injury liability coverage of $1,000,000; and (2) produce a written rejection by Solar of such an offer of UM/UIM coverage.

The district court entered summary judgment in favor of Zurich. It held that Zurich's documents put Solar on notice that it could make an intelligent decision for UM/UIM coverage, and that it offered sufficient coverage to Solar. The district court also held that there "is no requirement that the rejection of UM/UIM limits in an amount equal to liability limits must be in writing." On appeal, Airth argued that there was no premium quote or estimate for the higher coverage amount.

The Colorado Court of Appeals held that Zurich offered, in clear terms, Solar a Colorado-specific document for rejection of UM coverage. That document specified that Solar could select UM/UIM coverage in a higher amount. Thus, the Court determined that Zurich complied with its obligation under § 609.

The Court further held that § 609 did not require written rejection of the additional UM/UIM coverage. This was due to the statute not expressly providing such a requirement for written rejection. The Court thus affirmed summary judgment in favor of Zurich and held that the UM/UIM coverage was $50,000.

Airth v. Zurich American Insurance Company, 2018 COA 9 (Colorado Court of Appeals, decided January 25, 2018, not yet released for publication in the permanent law reports).

SET OFF OF SETTLEMENT AFFIRMED IN VICARIOUS LIABILITY REAL ESTATE DISCLOSURE LAWSUIT

Colorado Court of Appeals: The issue in this case concerned whether a monetary settlement made with a real estate agent must be set off against a jury verdict returned against the principal, when the principal's liability is entirely dependent on the doctrine of respondeat superior. (The principal was the real estate agent's realty company.) If such set off is required, is the setoff made before or after statutory prejudgment interest accrues on the jury verdict?

Elly Dilbeck, who was employed with Defendant Homeowners Realty, Inc., acted as Plaintiffs Sam and Audrey Marso's real estate agent in the purchase of their house. At the time of purchase, Plaintiffs did not know that the builder had used hazardous radioactive uranium mill tailings as fill material for the home. They learned of the uranium mill tailings two years later. They filed suit against Dilbeck and Homeowners Realty, alleging negligence against Dilbeck and respondeat superior against Homeowners Realty.

Before trial, Plaintiffs settled with Dilbeck for $150,000. Along with the settlement, Dilbeck admitted that her failure to disclose the uranium mill tailings fell below the standard of care for a real estate agent. The case against Homeowners Realty went to trial, and the jury returned a verdict of $120,000 in damages in favor of Plaintiffs. The jury was not informed of the amount of the settlement with Dilbeck.

The district court set off the $120,000 jury verdict with the $150,000 settlement amount. In doing so, it held that there was no recovery permitted for Plaintiffs. Plaintiffs appealed this ruling.

The Colorado Court of Appeals held that a set off of the settlement is required against the jury verdict. In ruling as such, the Court adopted the common law set off rule, and found that not applying a set off would result in a double recovery in respondeat superior cases. In addition, the Court determined that the set off is made after statutory prejudgment accrues on the jury verdict.

Marso v. Homeowners Realty, Inc. d/b/a Coldwell Banker Home Owners Realty, Inc., 2018 COA 15M (Colorado Court of Appeals, modified decision issued March 22, 2018, not yet released for publication in the permanent law reports).

$26,900 VERDICT IN MOTOR VEHICLE ACCIDENT WHERE PLAINTIFF SOUGHT ALMOST $2.5 MILLION IN DAMAGES

Douglas County: Plaintiff Joan Hill claimed she was injured in a motor vehicle accident when her vehicle was struck by Defendant Dianna Wenner's vehicle. Hill claimed that Wenner was negligent by failing to yield the right-of-way. Defendant admitted liability but denied causation as to Hill's alleged injuries and damages.

Hill alleged sustaining low back injuries from the accident, which resulted in multiple spinal surgeries and injections. Hill's past medical expenses were $1,290,799.89 and she claimed that she might need future spine surgery. She also sought recovery of $250,000 in future medical expenses, $500,000 for impairment/disfigurement, and $450,000 in non-economic damages. Plaintiff thus sought to recover a total of $2,490,799.89.

Hill's final demand prior to trial was reported as $1,250,000. Wenner's final offer before trial was $25,000. A verdict was returned in favor of Plaintiff Hill in the total amount of $26,900 plus pre-judgment interest.

Hill v. Wenner, Case No. 16 CV 31172.

ENACTED COLORADO LEGISLATION

S.B. 18-098: Governor Hickenlooper recently signed into law S.B. 18-098. This bill amends C.R.S. § 13-21-101, concerning interest on damages. The bill was passed into law to reflect a 1996 decision by the Colorado Supreme Court that ruled certain language in that subsection violated the equal protection clause of the constitution.

Section 101 pertains to actions brought to recover damages for personal injuries sustained by a tort. The bill specifies that post-judgment interest is payable from the date of judgment through the date of satisfying the judgment, and is payable on the amount of the final judgment.

Senate Bill 18-098 (signed into law by Governor Hickenlooper on April 2, 2018).

Wyoming

Wyoming Supreme Court Adopts the McHaffie Rule in Vicarious Liability Semi-Truck Accident Case

Wyoming Supreme Court: Mariusz Bogdanski and Damian Budzik were co-drivers of a commercial semi-truck that was involved in an accident. Bogdanski was injured in the accident and sued Budzik, alleging that his negligence caused the accident. He also sued FedEx Ground Package System, which was the company whose trailers they were hauling, alleging both direct and vicarious liability for Budzik's negligence.

FedEx filed a motion for summary judgment. It argued that a plaintiff may not proceed against a principal on independent negligence theories after the principal has admitted vicarious liability. FedEx had agreed to be responsible for Budzik's negligence, if any such negligence were found. FedEx's motion also argued that there were no facts in the record showing that either FedEx or Budzik breached a duty of care or proximately caused Bogdanski's injuries.

The district court granted summary judgment in favor of FedEx, and Bogdanski appealed the order. On appeal, the one of the issues was: Can Bogdanski maintain a direct negligence claim in addition to a vicarious liability claim when FedEx has stipulated that it will be vicariously liable for Budzik's negligence (if any)?

As to that issue, the Wyoming Supreme Court adopted the McHaffie rule, which provides: "Once an employer admits respondeat superior liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on other theories of imputed liability." The Court explained that the McHaffie rule was adopted because if Budzik was negligent, then Bogdanski would be entitled to recover the same damages that he would recover under the direct negligence theory. The district court's ruling on the first issue was thus affirmed.

Bogdanski v. Budzik, 408 P.3d 1156, 2018 WY 7 (Wyoming Supreme Court, decided January 24, 2018).

Wyoming Governmental Immunity Act Upheld in Pedestrian Wrongful Death Action

Wyoming Supreme Court: This case involved the death of a seven year old girl who was struck and killed in a crosswalk on her way home from school. The driver that hit the girl held a valid Wyoming driver's license even though she had monocular vision, a glass eye, and could not have passed the eye exam. The eye exam was administered by an employee of the Wyoming Department of Transportation (WYDOT).

The child's parents sued WYDOT and several other governmental entities, asserting claims for wrongful death, negligent infliction of emotional distress, and loss of parental consortium on behalf of the child's surviving siblings.

The district court held that the claims against WYDOT were barred by the Wyoming Governmental Immunity Act, W.S.A. § 1-39-101 et seq. Those claims were thus dismissed and Plaintiffs appealed.

On appeal, Plaintiffs argued that WYDOT's action of providing the marked street crossing and the eye exam were exceptions to governmental immunity for operation of public utilities. Plaintiffs also argued that strict application of the Act is unconscionable.

As to the latter argument, the Wyoming Supreme Court recognized "the inherently unfair and inequitable results which occur in the strict application of the doctrine of governmental immunity." However, in seeking to balance the interests of injured persons verse taxpayers, the Act was enacted with exceptions to the governmental immunity protections.

As to Plaintiffs' argument that WYDOT's provision of the marked street crossing and the eye exam were services for which governmental immunity was waived, the Court disagreed. The Act specified types of utilities or services for which the exception to governmental immunity extended, such as gas, electricity, and water utilities. The Wyoming Supreme Court determined that provision of an eye exam and street markings were not of the same genre as those specified utilities.

Archer v. State ex rel. Wyoming Department of Transportation et al., 413 P.3d 142, 2018 WY 2 (Wyoming Supreme Court, decided March 14, 2018).

New Mexico

New Mexico Supreme Court Reverses $3.5 Million Jury Verdict by Upholding Termination Clause in Insurance Agent Contract

New Mexico Supreme Court: Plaintiff Craig Beaudry and Defendant Farmers Insurance freely negotiated and entered into a clear and unambiguous contract for Plaintiff to sell Defendant's insurance policies. In the contract, Plaintiff consented to a provision allowing Defendant to immediately terminate the contract if he breached it in one of five different specified ways. One of those ways was if Plaintiff switched insurance from Defendant to another carrier.

Plaintiff subsequently breached the contract when an employee of Plaintiff cancelled an insurance policy with Defendant and switched it to a rival insurance carrier. Defendant then exercised its right to terminate the contract with Plaintiff. Plaintiff argued that the employee was new and acted without authorization of Plaintiff. Plaintiff also argued that the breach did not cause any significant damage to Defendant.

Plaintiff sued Defendant under numerous theories of liability for terminating the contract. The allegations included the doctrine of prima facie tort and alleging that Defendant had a nefarious reason for terminating the contract. Specifically, Plaintiff asserted that the contract termination was orchestrated as retaliation for Plaintiff's decision to go "up the chain of command" as to another new Farmers agent "poaching" his clients.

At trial, a jury awarded Plaintiff with $1,000,000 in compensatory damages and $2,500,000 in punitive damages. The sole cause of action the judgment was awarded for was the allegation of prima facie tort. The jury determined that Defendant did not conspire against Plaintiff.

On appeal, the New Mexico Supreme Court stated that to bring a claim for prima facie tort, a plaintiff must show: (1) an intentional and lawful act, (2) an intent to injure the plaintiff, (3) injury to the plaintiff as a result of the intentional act, and (4) the absence of sufficient justification for the injurious

More on Page 5

Continued from Page 4

act. On appeal, Defendant argued that Plaintiff could not satisfy the intent, injury, or justification elements of prima facie tort.

The Court determined that the justification element undermined Plaintiff's ability to pursue under a theory of prima facie tort. This is because allowing Plaintiff to proceed in a claim for prima facie tort would undermine important restrictions in contract law in not overturning legal contracts. The Court thus held that "when a contract is clear, unambiguous, and freely entered into, the public policy favoring freedom of contract precludes a cause of action for prima facie tort when the gravamen of the allegedly tortious action was the defendant's exercise of a contractual right." The Court then determined that Defendant had a right to terminate the contract because of Plaintiff's breach, and an inquiry into Defendant's subjective motives for exercising that right could not produce evidence sufficient to warrant tort liability. Thus, the Court directed that judgment was to be entered in favor of Defendant.

Beaudry v. Farmers Ins. Exchange et al., 2018 NMSC 12, 412 P.3d 1100 (New Mexico Supreme Court, decided January 22, 2018).

$165 MILLION JURY VERDICT IN WRONGFUL DEATH ACTION AFFIRMED

New Mexico Court of Appeals: This case concerned a motor vehicle accident on the highway between a FedEx tractor-trailer and a small pickup truck driven by Marialy Morga. Accompanying Morga was her four year old daughter, Ylairam and nineteen year old son, Yahir. The FedEx truck was operated by FedEx Ground Package System, Inc. through independent FedEx contractors, and the actual driver of the FedEx contractors was Elizabeth Quintana. Morga was either stopped or barely moving on the right-hand side of her traffic lane when the FedEx truck struck her vehicle from behind at 65 mph without slowing. Morga and Ylairam died, and Yahir was seriously injured. Quintana also died as a result of the accident.

Morga's heirs brought suit against Defendants FedEx, the contractors, and Quintana's estate. The lawsuit included wrongful death claims. At trial, the jury found all Defendants negligent and liable for Plaintiffs' claims. The jury awarded compensatory damages in the total amount of $165,533,000. Despite Plaintiffs' request, punitive damages were not awarded.

Defendants moved for a new trial or remittitur of the damages and argued that the verdict was excessive. The district court denied both motions, finding that the verdict was supported by evidence rather than being the result of passion, prejudice, or other improper factors. Plaintiffs were then also awarded prejudgment interest.

On appeal, the New Mexico Court of Appeals stated that a jury's damages award will be upheld unless it appears that the amount awarded "is so grossly out of proportion to the injury received as to shock the conscience." Defendants argued that the amount awarded far exceeded any prior awards for wrongful death in the state. Defendants also argued that the award

More on Back Page

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, New Mexico and Texas with superior legal representation while remaining sensitive to the economic interests of each case.

Dewhirst & Dolven is pleased to announce that Steven R. Helling has joined the firm as special counsel. Steven joins the firm's Colorado Springs, Colorado office. He is licensed to practice law in both Colorado and Wyoming state and federal courts, as well as the Tenth Circuit Court of Appeals and the United States Supreme Court.

Steven comes to the firm with significant litigation and trial experience. He has previously served as an administrative law judge for Wyoming, a deputy county and prosecuting attorney, assistant public defender, all in Wyoming, as well as having a previously appointment in Colorado as a Special Assistant Attorney General. He has been a member of the Colorado Springs Independent Ethics Commission since 2016. His practice now includes a full range of representing individuals and companies in civil litigation, including general liability, construction defect claims, employment law, automobile accidents, insurance defense and disputes regarding all areas of civil law.

Steven received his juris doctorate degree from the University of Wyoming School of Law. He previously received his bachelors degree from the University of Northern Colorado, with a double major in journalism and marketing.

About Our Firm

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, New Mexico 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, Utah 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

for economic injury was about three percent of the total award; thus, the damages awards were grossly disproportionate to the injury.

The New Mexico Court of Appeals ruled that the evidence supported the jury award. The Court further declined to adopt any mathematical ratio or formula for non-economic verse economic damages. The Court also refused to infer passion or prejudice by the jury. The Court stated that an award in a large sum does not alone infer passion or prejudice.

Morga et al. v. FedEx Ground Package System, Inc. et al, 2018 WL 797539 (New Mexico Court of Appeals, slip opinion, decided February 6, 2018, not yet released for publication in the permanent law reports).

Texas

DEALERSHIP'S ISSUANCE OF LOANER VEHICLE DETERMINED NOT THE PROXIMATE CAUSE OF AN ACCIDENT EIGHTEEN DAYS LATER

Texas Supreme Court: Defendant Allways Auto Group is an automobile dealer that sold William John Heyden a vehicle. Heyden did not have a valid driver's license in his possession but persuaded the salesman to accept a photocopy he had made of a prior Illinois license. Two days later, the vehicle broke down. Heyden called Allways to tow it to the dealership for repairs. Meanwhile, Heyden drank a six-pack of beer. Heyden testified that he was drunk when he arrived at Allways, but the salesman testified that Heyden did not seem to be impaired in any way. Heyden produced proof of insurance, and the salesman gave Heyden a loaner vehicle to use while the vehicle was being repaired.

Eighteen days later, Heyden drove the loaner into a truck driven by Plaintiff Steven Walters. On that day, Heyden had lost his job. He was drinking both whiskey and beer while driving. Heyden was legally intoxicated, as his blood-alcohol level was nearly twice the legal limit. Heyden testified that he intended to commit suicide by driving off of a bridge when the accident occurred. Heyden had surrendered his Texas license prior to purchasing the car from Allways due to refusing a breathalyzer test following another vehicle accident. Allways did not attempt to investigate Heyden's criminal record, which would have revealed that Heyden had a history of drinking and driving. Walters sued Allways for negligent entrustment of Heyden with the vehicle.

Allways moved for summary judgment, arguing that an accident occurring eighteen days after entrustment is too attenuated to constitute proximate causation of the accident. The trial court granted the motion, and Walters appealed. The Texas Court of Appeals reversed the trial court, concluding that fact issues regarding proximate causation remained.

On appeal, the Texas Supreme Court affirmed the trial court's grant of summary judgment in favor of Allways. "For entrustment to be a proximate cause, the defendant entrustor should be shown to be reasonably able to anticipate that an injury would result as a natural and probable consequence of the entrustment." The Court determined that Allways could not have foreseen that Heyden would get drunk eighteen days later and drive his vehicle into Walters' vehicle. Thus, Allways established that providing Heyden a loaner vehicle was not a proximate cause of the accident eighteen days later.

Allways Auto Group, Ltd. d/b/a Atascosa Chrysler Dodge Jeep Ram v. Walters, 61 Tex. Sup. Ct. J. 31, 530 S.W.3d 147 (Texas Supreme Court, decided September 29, 2017).