Summer 2015

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LEGAL UPDATE

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

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- In a lawsuit alleging construction defects of a house, the Utah Court of Appeals held that the builders' statute of repose under U.C.A. § 78B-2-225(3)(a) cannot be equitably tolled.

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UTAH

BUILDERS' STATUTE OF REPOSE CANNOT BE EQUITABLY TOLLED

Utah Court of Appeals: Plaintiffs William and Paula Willis took possession of a new-build residential house on December 27, 2005. The house was constructed by Defendant DeWitt, who had discovered throughout construction that expansive soils were present. DeWitt removed soils from the affected areas and replaced it with compacted fill, believing that the fill provided a safe condition to build upon. Within a few months of taking possession, the Willises noticed defects in the home related to earth movement and settlement. The Willises filed suit in June 2012.

DeWitt moved for summary judgment, arguing that the Willises' claims were time-barred by the builders' statute of repose. As to some of the claims, the Court held that a question of fact existed, which allowed the Willises to "invoke the discovery rule and thereby toll the statute of limitations" as to those claims. Upon a renewed motion for summary judgment, the Court held that the Willises' contract-based claims were time-barred under the six-year limitations period for contract actions against a builder, U.C.A. § 78B-2-225(3)(a).

The Court of Appeals distinguished the difference between a statute of limitations and statute of repose: "A statute of limitations requires a lawsuit to be file within a specified period of time after a legal right has been violated or the remedy for the wrong committed is deemed waived. A statute of repose bars all actions after a specified period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action."

Section 225 governs actions against providers of construction services for work done on a building site. Under § 225(3)(a), "An action by or against a provider based in contract or warranty shall be commenced within six years of the date of completion of the improvement or abandonment of the construction."

The Utah Court of Appeals held that § 225(3)(a) is a statute of repose not subject to equitable tolling. This ruling was based upon the statute's plain language which bars all actions after a specified period following the date of completion/abandonment of the

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construction. There were no disputed facts concerning when the statute began running based upon the date of completion of the home. Thus, the Willises' claims were time-barred under the statute.

DeWitt Construction, Inc. et al., 2015 UT App. 123 (Utah Court of Appeals, decided May 14, 2015, not yet released for publication in the permanent law reports).

DEFENSE SUMMARY JUDGMENT AFFIRMED IN SLIP AND FALL CASE

Utah Court of Appeals: Plaintiff Aviva was injured when she slipped and fell in the entryway of a clinic owned by Defendant Intermountain Healthcare ("IHC"). Plaintiff filed suit, alleging that she slipped on a puddle of rainwater that IHC negligently allowed to accumulate on the tile floor. The district court granted summary judgment in favor of IHC, concluding that Gowe had failed to present any evidence that IHC knew that the puddle existed or had an opportunity to discover the unsafe condition before Gowe's fall.

"The owner of a business is not a guarantor that his business invitees will not slip and fall. Rather, a business owner is charged with the duty to use reasonable care to maintain the floor of his establishment in a reasonably safe condition for his patrons. Thus, the mere presence of slippery spot on a floor does not in and of itself establish negligence."

The Court of Appeals also ruled that, to prevail in a slip and fall case, a plaintiff must show either: (1) the presence of a permanent unsafe condition for which the defendant was responsible; or (2) a temporary unsafe condition that the defendant had notice of and an opportunity to remedy. Under the temporary unsafe condition theory, a plaintiff must show that the defendant had actual or constructive notice of the condition and that sufficient time elapsed such that the condition should have been remedied.

On appeal, Gowe argued that IHC's actual or constructive notice of the unsafe condition could be reasonably inferred from the evidence she presented in opposition to summary judgment. However, as to her argument of IHC's actual notice, the Court of Appeals found that Plaintiff failed to preserve the argument on appeal because she did not raise it at the district court level.

Concerning evidence of constructive notice of the puddle, the Court stated that it will not impute constructive notice where there is no evidence regarding the amount of time the unsafe condition has existed. Gowe did not produce any evidence concerning how the puddle may have entered IHC's clinic, nor the length of time it existed. Thus, the Court ruled that IHC did not have constructive notice of the puddle. Therefore, the grant of summary judgment in IHC's favor was affirmed.

Gowe v. Intermountain healthcare, Inc., 2015 UT App. 105 (Utah Court of Appeals, decided April 30, 2015, not yet released for publication in the permanent law reports).

ORDER COMPELLING ARBITRATION HELD NOT TO BE A FINAL, APPEALABLE ORDER

Utah Court of Appeals: Though there were other underlying issues raised in this appeal, the Court of Appeals first addressed the following issue: whether a district court's order compelling arbitration is a final order from which a party may appeal.

The underlying case involved a lawsuit seeking recovery from a motor vehicle accident that occurred when Plaintiff Jason Hardman's vehicle struck a pipe protruding from the roadway in a road-construction zone. The zone was maintained by Defendant S.J. Louis Construction. The district court had issued an order compelling arbitration of Plaintiff's claims, due to the parties previously having agreed to arbitration. In doing so, the Court set aside a default judgment entered against Defendant. When Plaintiff appealed, the Court raised the issue of whether they have jurisdiction to address the appeal based upon the appeal being from an order compelling arbitration.

"Generally, a party may appeal only final orders and judgment from a district or juvenile court … The final judgment requirement is jurisdictional…." The Court further clarified: "A district court's order is a final judgment only if it ends the controversy between the parties by finally disposing of the litigation on the merits as to all claims and all parties. If any issue remains pending, the final judgment rule is not satisfied." Due to Plaintiff's claims remaining "live" and pending before the district court, the order compelling arbitration was thus not a final, appealable order. The appeal was therefore dismissed for lack of jurisdiction.

American Family Ins. et al. v. S.J. Louis Construction, Inc., 2015 UT App. 115 (Utah Court of Appeals, decided April 30, 2015, not yet released for publication in the permanent law reports).

COLORADO

COLORADO COURT OF APPEALS INTERPRETS PAYMENT METHOD FOR MEDICAID LIEN FROM SETTLEMENT PROCEEDS

Colorado Court of Appeals: Defendant S.P. was injured in a snowboarding accident at a ski area. She applied for Medicaid assistance and was accepted. Over the next several years, Medicaid paid $142,779 for her medical care necessitated by the accident. S.P. sued the ski area and eventually settled the case for $1 million. Under Colorado law, C.R.S. § 25.5-4-301, Medicaid was held a statutory lien against the settlement for repayment of the medical assistance it had provided. The settlement agreement, however, did not specify the portion of the settlement amount attributable to medical expenses, as opposed to other categories of damages.

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The Medicaid administration sued S.P. to enforce its lien. The trial court was then required to determine the repayment amount. The court applied its own formula and ordered S.P. to repay Medicaid $25,375. The trial court's formula was a proportional allocation formula based upon the proportion of medical expenses paid by Medicaid relative to the stipulated total value of the tort case. This proportion was then applied to the gross amount of the settlement.

On appeal, both parties argued that the trial court incorrectly calculated the amount. The administration argued that the amount providers billed should have been used in the calculation instead of the amount paid. S.P. argued that the formula should have been applied to the net settlement amount, less attorneys' fees and costs, instead of the gross amount.

The Court of Appeals held that the decision to rely on the amount paid rather than the amount billed by Medicaid was not clearly erroneous, and that the trial court's method in this case was neither unreasonable nor arbitrary. The trial court also did not err in applying its formula to the gross settlement amount, as Colorado law did not require fees and costs to be deducted. The judgment was thus affirmed.

State of Colorado Dept. of Health Care Policy and Fin. v. S.P., 2015 COA 81 (Colorado Court of Appeals, decided June 18, 2015, not yet released for publication in the permanent law reports).

STATUTE OF LIMITATIONS FOR UNDERINSURED MOTORIST CLAIM HELD NOT TO BE TOLLED

Colorado Court of Appeals: Plaintiff Edna Stoesz, an insured of Defendant State Farm, was injured when an underinsured motorist rear-ended her car. Plaintiff did not bring the UIM action against State Farm within the statutorily-required three years of the underlying accident. She entered into a policy-limits settlement agreement with the underinsured motorist's liability insurer, Progressive Insurance, three days before that three-year limitations period expired. Shortly after the limitations period had ended, State Farm approved the settlement at Stoesz's request.

Within two years of receiving the settlement payment from Progressive, Plaintiff commenced this action to recover underinsured motorist benefits from State Farm. The trial court entered summary judgment against Plaintiff on the basis that this settlement agreement did not constitute payment that would have extended the limitations period for an additional two years.

On appeal, State Farm argued that, pursuant to CRS § 13-80-107.5(1)(b), payment must be made during the three-year limitations period, which was not satisfied. In addition, it argued that a tolling agreement between Progressive and Plaintiff did not affect State Farm's rights. The Court of Appeals agreed and held that under the clear language of the statute, an insured is allowed an additional two years only if: (1) the underlying bodily injury liability claim against the underinsured motorist has been preserved by commencing an action against the underinsured motorist, or (2) payment of either the liability claim settlement or judgment has been made. These conditions were not satisfied in this case, and thus Plaintiff's action was not brought within the limitations period.

Stoesz v. State Farm Mut. Auto. Ins. Co., 2015 COA 86 (Colorado Court of Appeals, decided June 18, 2015, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN SNOW PLOW ACCIDENT CASE

Denver County: Plaintiff Ashley Long was driving her vehicle on I-25 at about 1:00 p.m. when she collided with a snow plow operated by Defendant Heather VanBogart, an employee of Defendant Colorado Department of Transportation. VanBogart was operating the third of four snow plows that were clearing snow near the intersection of I-25 and I-225.

Plaintiff alleged that she sustained injuries as a result of the collision and claimed that Defendants were negligent. Plaintiff also said that she did not see the snow plows until the collision occurred. Defendants said that Plaintiff was comparatively at fault for driving too fast for conditions and that Plaintiff should have seen the snow plows and avoided the collision. Per Defendants, the snow plows should have been visible to Plaintiff for at least 13 seconds before the accident.

Plaintiff's past medical expenses were $85,000. She also claimed about 18 months of wage loss and that she sustained a permanent impairment. Her final demand before trial was $135,000, and Defendants' final offer was $25,000. Judgment was entered for Defendants, as the jury apportioned Plaintiff being 91% negligent and Defendant 9% negligent.

Long v. Colorado Dept. of Transp. et al., Case No. 2014 CV 31650.

Wyoming

COMPARATIVE FAULT OF VEHICLE'S PASSENGER AFFIRMED IN DRUNKEN DRIVER CASE

Wyoming Supreme Court: This case arises from a single car collision in which Plaintiff Mary Wise was the passenger and Defendant Steven Ludlow was the driver. On the date of the accident, Ludlow had consumed a significant amount of alcohol. Wise also had been drinking that day, met Ludlow at a bar, and then asked him for a ride in his Corvette.

Ludlow lost control of his car while driving 40 to 50 mph in a 30 mph zone, and totaled the vehicle after hitting a concrete stairway. He then admitted to officers that he was too drunk to drive. Wise filed suit against Ludlow, seeking recovery for her injuries. Upon jury trial, Ludlow was found to be 55% at fault. Wise was found 45% at fault, and the damages award was reduced by 45%.

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On appeal, Wise argues that the jury should not have been allowed to consider comparative fault. She argued that Ludlow admitted fault in his testimony and presented "little to no evidence" of negligence on her part. However, W.S.A. § 1-1-109 provides that a jury should determine the percentage of fault attributable to each actor, including the plaintiff, whose fault is determined to be a cause of the injury. The term "fault" is defined to include "acts or omissions, determined to be a proximate cause of the … injury to the person … that are negligent in any measure." W.S.A. § 1-1-109(a)(iv). Wyoming has adopted a comparative fault system whereby the damages a plaintiff receives are diminished in proportion to the amount of fault attributable to the plaintiff. W.S.A. § 1-1-109(b).

Wise argued that she could not have been comparatively at fault because Ludlow was the driver, and that she, as a passenger, could not be found at fault for Ludlow's negligent driving. However, the Wyoming Supreme Court disagreed. It found that the following facts supported a finding of Wise's comparative fault: Wise being impaired by her own alcohol consumption; Wise asking Ludlow for a ride without making a reasonable effort to determine if Ludlow had been drinking that day and how much; Wise testifying that it was unlikely for Ludlow to have been drinking soda at the bar when she observed him drinking from a cup; and Wise's testimony that she had been out with Ludlow to have drinks. Thus, the district court's award was affirmed.

Wise v. Ludlow, 2015 WY 43, 346 P.3d 1 (Wyoming Supreme Court, decided March 24, 2015).

DEFENSE VERDICT IN RETAIL SLIP AND FALL CASE

U.S. Dist. Ct., D. Wyo.: In a premises liability case, Plaintiff Jamie McBride reportedly suffered an anterior labral tear of her left shoulder and a lumbar strain after she allegedly slipped and fell on melted snow and ice. The accident occurred on the premises of a retail store owned and operated by Defendant K-Mart Corp.

Plaintiff claimed that Defendant knew or reasonably should have known of the snow and ice melt on the floor of the premises. She further argued that Defendant was negligent for failing to keep the floors in a clean and safe condition, failing to clean and remove the melted ice and snow from the floor, and failing to warn of the floor's dangerous condition. Defendant denied liability and disputed the causal connection between the accident and Plaintiff's claimed injuries. The jury returned a verdict in favor of Defendant.

McBride v. K-Mart Corp., Case No. 1:14CV00041.

ARIZONA

TWO DECISIONS ISSUED CONCERNING IMPOSITION OF RULE 68 SANCTIONS

Arizona Court of Appeals, Div. One: Division One of the Arizona Court of Appeals has recently issued two concurrent decisions addressing an award of sanctions under Arizona Rule of Civil Procedure 68.

Rule 68 concerns offers of judgment and generally provides: "If the offeree rejects an offer [of judgment] and does not later obtain a more favorable judgment … the offeree must pay, as a sanction, reasonable expert witness fees and double the taxable costs … incurred by the offeror after making the offer and prejudgment interest on unliquidated claims to accrue from the date of the offer."

In the first opinion, *Nyemah v. Forrer*, the parties were involved in a car accident. Plaintiff Nyemah was initially diagnosed with a neck strain. She later saw a chiropractor for back and neck pain, who referred her to a pain specialist, Dr. Hogan. Nyemah sued Forrer and his wife for negligence. A jury trial ensured. At the conclusion of Nyemah's case-in-chief, Forrer moved for judgment as a matter of law ("JMOL") on the issue of future medical expenses. The trial court granted the motion.

The jury awarded Nyemah $10,000 in damages, but found her to be 30% at fault, reducing her recovery to $7,000. Forrer had earlier made a pre-trial Rule 68 offer of judgment of $19,100. The court thus offset the jury's damages award with the Rule 68 sanctions and taxable costs to which Forrer was entitled. The net effect was a judgment against Nyemah in the sum of $687.41.

Nyemah appealed, arguing that the trial court erred in granting JMOL as to future medical expenses because Dr. Hogan's testimony offered proof of such expenses. Dr. Hogan had testified that Nyemah's injuries are permanent. However, the Court of Appeals noted that "permanency of an injury does not in itself constitute a sufficient basis for the award of future medical expenses." Rather, to establish future medical expenses, the need for future care must be reasonably probable and there must be some evidence of the probable nature and cost of the future treatment.

The deficiency of proof in this case concerned Dr. Hogan not having seen Plaintiff for at least nine months before the trial and not being able to testify concerning Plaintiff's current status. Dr. Hogan also testified that he would want to examine Plaintiff again before recommending future treatment. Thus, the Court affirmed the grant of Defendant's JMOL and affirmed the calculation and imposition of sanctions under Rule 68.

Nyemah v. Forrer, Case No. 1 CA-CV 14-0319, 2015 WL 3473025 (Arizona Court of Appeals, Div. One, decided May 28, 2015, not yet released for publication in the permanent law reports).

In the second opinion, *Villa et al. v. Furar,* Plaintiffs Amalia Villa and Santiago Alamillo filed suit against Defendant Donald Forar, seeking damages stemming from a car accident. Following a six-day trial, a jury awarded Villa $5,000 in damages and returned a defense-favorable verdict against Alamillo. Furar then sought sanctions under Rule 68, alleging that Plaintiffs failed to receive a more favorable judgment than Furor's initial offers of judgment. Applying Rule 68, the trial court imposed a $29,608.24 sanction against Alamillo and a $20,802.17 sanction

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against Villa. Plaintiffs appealed the imposition of Rule 68 sanctions.

Plaintiffs argued that Defendant's offers of judgment violated Rule 68 because they required Plaintiffs to "secure releases or satisfactions for any and all valid liens arising from the subject accident, and the amounts offered were so much less than Plaintiff's medical bills [that] the conditional offers could not realistically have been accepted." The Court of Appeals noted that Defendant's position remained consistent that the alleged injuries were not casually related to the accident. Moreover, whether the offer could "realistically" be accepted was not a relevant consideration in imposing Rule 68 sanctions.

As to whether an offer of judgment violates Rule 68 by requiring releases or approvals by lienholders, the Court found that such condition did not violate Rule 68. Rather, the Court noted that the failure to include such a protective, conditional language in a settlement agreement or offer of judgment could give rise to a legal malpractice claim. Facially, the offers thus complied with Rule 68. The Court therefore affirmed the imposition of Rule 68 sanctions against Plaintiffs.

Villa et al. v. Furar,
Case No. 1-CA-CV 13-0653,
2015 WL 3617872
(Arizona Court of Appeals, Div. One,
decided June 9, 2015,
not yet released for publication
in the permanent law reports).

New Mexico

NEW MEXICO SUPREME COURT RULES THAT REDUCTION OF STATE HOSPITAL LIEN IS CONSTITUTIONAL

New Mexico Supreme Court:
The issue in this case was: "whether an agreement by a state hospital to reduce the amount of a lien for medical services rendered violates Article IV, Section 32 of the New Mexico Constitution." This issue was presented to the New Mexico Supreme Court from certification by the U.S. District Court for the District of New Mexico.

The University of New Mexico Hospital ("UNMH") treated Plaintiff Dara Hem for injuries. UNMH argued it had priority over settlement funds pursuant to an agreement between itself and Hem's initial attorney, Clay Miller, in which Miller agreed to subrogate his statutory priority to settlement funds to UNMH. In exchange, UNMH agreed to reduce the amount of the lien imposed for Hem's outstanding medical bills. Plaintiff's new attorney, Turner & Associates, argued that this agreement is unconstitutional, and that Turner therefore has priority to collect from the settlement funds prior to satisfaction of the hospital lien.

The Supreme Court answered the issue by ruling that Article IV, Section 32 of the New Mexico Constitution does not prohibit UNMH from agreeing to compromise the amount owed by a patient-debtor such as Hem. The Court also ruled that Section 32 simply requires that in order to extinguish debts or liabilities owed to the State, there must either by payment into the treasury or a proper court proceeding.

Hem v. Toyota Motor Corp., et al.,
Docket No. 33,775
(New Mexico Supreme Court,
slip opinion, decided June 25, 2015,
not yet released for publication
in the permanent law reports).

DEFENSE VERDICT IN PARKING GARAGE MOTOR VEHICLE ACCIDENT

Bernalillo County: Plaintiff Amber Eaton was a passenger in a vehicle operated by Co-Plaintiff Jason Jenkins. Jenkins allegedly was driving in the parking garage of Sandia Casino in Bernalillo County, N.M. Eaton and Jenkins claimed that the back end of a vehicle operated by Defendant Antonio Miranda struck the front of their vehicle as Miranda backed out of a parking spot.

Eaton and Jenkins both sustained unspecified injuries from the accident, and filed suit against Miranda to

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About Our Firm

Dewhirst & Dolven is pleased to announce that member Marilyn Doig has expanded her practice to include counseling concerning, and preparation of, wills, trusts, and estate planning. She is also a member of Wealth Counsel, a nationwide brain trust of attorneys, accountants, and other professionals who collaborate to tackle clients' toughest estate planning challenges. Ms. Doig also maintains her practice of defense of claims in the following areas: dental malpractice, medical malpractice, professional liability, and general liability.

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recover for their injuries. Plaintiffs alleged that Miranda was negligent in the operation of his vehicle. Defendant admitted to liability but disputed the nature and extent of Plaintiffs' injuries, as well as the causal connection between the accident and the alleged injuries. Upon jury trial, the jury returned a verdict in favor of Defendant Miranda and against Plaintiffs.

Eaton et al. v. Miranda, Case No. D-202-CV-2013-05856 (District Court of New Mexico, 2nd Judicial District).

Texas

TEXAS SUPREME COURT INTERPRETS OIL AND GAS LEASE AGREEMENT'S OVERRIDING ROYALTY PROVISION

Texas Supreme Court: Generally speaking, an overriding royalty on oil and gas production is free of production costs but must bear its share of postproduction costs unless the parties agree otherwise. The question in this case is whether the parties' lease expresses a different agreement.

The Hyder family (Plaintiffs) leased 948 mineral acres in the Barnett Shale. Chesapeake Exploration, LLC (Defendant) acquired the lessee's interest. The lease was negotiated and drafted by counsel for Defendants and the original lessee.

Plaintiffs, as mineral interest owners, brought suit against Defendant alleging breach of the oil and gas lease for subtracting post-production costs from overriding royalty payments. Following a bench trial, the district court entered final judgment in favor of Plaintiffs for $575,359.90, representing the postproduction costs that Defendant wrongfully deducted from their overriding royalty payments.

Though two other royalty provisions of the lease were clear that royalty payments do not bear post-production costs, the overriding royalty clause "is not as clear as either of the other two royalty provisions." Plaintiffs argued that the requirement that the overriding royalty be "cost-free" can only refer to post-production costs, since the royalty is by nature already free of production costs. Defendant argued that the "cost-free overriding royalty" phrase of the provision is merely a synonym for overriding royalty.

The Texas Supreme Court analyzed the lease agreement and held that the mineral interest owners (Plaintiffs) were entitled to overriding royalty payments free of all post-production costs. In doing so, it determined that a specified exception for production taxes undermined Defendant's argument. Production taxes are post-production taxes, and therefore it would "make no sense to state that the royalty is free of production costs, except for post-production taxes." Thus, the Texas Supreme Court affirmed the district court's award in favor of Plaintiffs.

Chesapeake Exploration, LLC et al. v. Hyder et al., Case No. 14-0302, 2015 WL 3653446 (Texas Supreme Court, decided June 12, 2015, not yet released for publication in the permanent law reports).