Summer 2016

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • Colorado • Texas

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CYBERSECURITY PRACTICE ANNOUNCED

"Cybersecurity" deals with the regulatory requirements and common law duties that require companies to keep the electronic form of a person's private data secured from others. This can include not only transactions involving money (credit cards, checks, social security numbers), but also information concerning such private information as medical records.

Companies can be exposed to fines and litigation for: (1) failing to keep data secure; (2) failure to promptly report a data breach; and (3) failing to increase data security after a breach has occurred.

Clients need to know which data must be secured, and which data does not. For example, if the client has customer or employee files stored in their systems, those files might contain such information as credit card numbers; social security numbers; health information; driver's license numbers; and bank account information for direct deposit of payroll. A failure to follow the numerous regulations that dictate how this information is to be encrypted and stored could lead to violations of both federal and state laws.

Our firm helps clients assess their legal obligations to identify and secure data covered by the various privacy regulations, and also determines insurance coverage for potential data breach failures should they occur in the future. We also assist clients in compliance with the numerous statutory notice requirements which have strict deadlines and detailed notification rules, once a breach has occurred. Finally, after a breach has occurred, we represent clients who are facing administrative or legal prosecution for violation of these private data security laws and regulations, as well as defending our clients from private lawsuits and class actions that arise thereafter.

If you would like more information about our firm's Cybersecurity Practice Group, please contact our Managing Member, Miles Dewhirst.

COLORADO

COLORADO SUPREME COURT HOLDS THAT AN AVALANCHE WAS AN INHERENT RISK OF SKIING UNDER THE SKI SAFETY ACT

Colorado Supreme Court: This case arose when the wife of a skier who had died in an avalanche sued the operator ski resort for negligence and wrongful death. The decedent was killed while skiing at Winter Park Resort. In the days leading up to his death, the Colorado Avalanche Information Center had predicted heavy snow storms and issued an avalanche warning that was

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to last through the day after the decedent died. The resort knew about the warnings and unstable snow on the run where decedent later died. However, the resort did not close the run or post signs to warn skiers of an avalanche risk.

The resort filed a motion for determination of law and judgment on the pleadings, on the basis that an avalanche was an inherent danger or risk of skiing under the Ski Safety Act. The district court granted the motion and the wife appealed. The Court of Appeals affirmed the dismissal in a split decision. It concluded that avalanches fall within the statutory meaning of the phrase "inherent dangers and risks of skiing" because they result from "snow conditions as they exist or may change," "changing weather conditions," and "variations of steepness or terrain." All of these phrases are specifically enumerated as "inherent dangers and risks" in the Act.

On appeal, the Colorado Supreme Court affirmed the lower court's ruling and held that the avalanche that killed the skier was an inherent risk of skiing under the Act. Therefore, the statute precluded skiers from bringing claims against ski area operators for injuries resulting from the kinds of avalanches in which the decedent was involved.

Fleury v. IntraWest Winter Park Operations Corp., 2016 CO 41 (Colorado Supreme Court, filed May 31, 2016, not yet released for publication in the permanent law reports).

DENIAL OF UIM COVERAGE HELD TO BE REASONABLE WHERE THE INSURANCE CONTRACT WAS UNAMBIGUOUS

Colorado Supreme Court: Plaintiff was injured in a motor vehicle accident and presented an underinsured motorist ("UIM") claim to American Family Mutual Insurance Company. She asserted coverage under an American Family auto policy on her vehicle. As proof of insurance, Plaintiff offered lienholder statements issued to her by American Family. However, the declaration page did not show her as an insured at the time of the accident. American Family therefore determined that Plaintiff was not insured and denied coverage. Plaintiff then filed an action asserting claims for breach of contract, common law bad faith, and statutory bad faith for unreasonable delay or denial of benefits under C.R.S. §§ 10-3-1115 -1116. Before trial, American Family reformed the policy to name Plaintiff as the insured and the parties settled the breach of contract claims. Trial still moved forward as to the bad faith claims.

The trial court ruled that the deviation in the records issued by American Family's agent and those produced by its underwriting department created an ambiguity in the policy as to the identity of the insured. The Court instructed the jury that an ambiguous contract must be construed against the insurer. The jury found in favor of American Family on the common law bad faith claims, but in Plaintiff's favor on the statutory bad faith claim, indicating that American Family had delayed or denied payment without a reasonable basis.

On appeal, American Family argued that the trial court erred in finding that the lienholder statements offered by Plaintiff created an ambiguity in the contract as to the identity of the insured. Thus, the contract was unambiguous such that the company had a reasonable basis to deny coverage. The Court of Appeals disagreed and held that the statements created an ambiguity. The Court also held that even if American Family's position was reasonable, it could still be held liable for statutory bad faith.

The Colorado Supreme Court reversed the Court of Appeals' decision. The Court found that because the contract unambiguously named the insureds at the time of the accident, the lower courts erred in relying on extrinsic evidence to find ambiguity in the contract. The Court noted that an ambiguity must appear in the four corners of the document before extrinsic evidence can be considered. Based on this, American Family's denial of the claims was reasonable and it could not be held liable for statutory bad faith.

Am. Family Mut. Ins. Co. v. Hansen, 2016 CO 46 (Colorado Supreme Court, filed June 20, 2016, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN HOSPITAL SLIP AND FALL CASE

Denver County: Plaintiff Laura Dieter was walking in a hallway at a hospital owned by Defendant Children's Hospital Colorado, when she slipped and fell on a liquid on the hallway floor. Plaintiff Dieter filed suit against Defendant for injuries she allegedly sustained from the incident.

She allegedly suffered injuries to a pre-existing back injury and her ankle, left knee, neck, and shoulder. Plaintiff claimed that Defendant was negligent by: failing to ensure a reasonably safe premise existed, failing to remedy the existing liquid floor hazard, and failing to warn of the existing unreasonable danger. Defendant denied negligence and liability and argued that Plaintiff was comparatively at fault. To support its defenses, Defendant presented evidence that nobody, including Plaintiff, saw the liquid on the floor. Defendant further asserted that Plaintiff was wearing flip flops and using her cell phone at the time the fall occurred. The jury found no liability on the part of Defendant and did not award Plaintiff with any recovery.

Dieter v. Children's Hospital Colorado, 2016 WL 3127313 (District Court of Colorado, Second Judicial District, decided March 7, 2016).

Utah

UTAH SUPREME COURT HOLDS THAT A JURY TRIAL IS CONSTITUTIONALLY GUARANTEED IN A TRIAL DE NOVO SMALL CLAIMS APPEAL

Utah Supreme Court: The issue in this case was whether the Utah Constitution guarantees the right to a jury trial in a trial *de novo* appealed from the small claims court.

Plaintiff Marcell Chilel sued Defendant Kristen Simler in small claims court for injuries arising from an alleged automobile collision between the parties. The small claims judge entered a judgment of "No Cause of Action" in favor of Defendant.

Plaintiff appealed to the district court, seeking a trial *de novo*. Defendant filed

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an answer, jury demand, and pretrial discovery requests in response to Plaintiff's appeal. The district court granted Plaintiff's motion to strike the jury demand, holding that it was procedurally improper under Utah law. Pursuant to U.C.A. § 78B-1-104(4), "[t]here is no jury in the trial of small claims cases."

Defendant then filed a petition for permission to appeal, claiming that U.C.A. § 78B-1-104(4) unconstitutionally denied her right to a jury trial. On appeal to the Utah Supreme Court, the Court noted that small claims actions are classified as "civil" in nature. Prior precedent ruled that there was a constitutional right to a jury trial which "extends only to cases that would have been cognizable at law at the time the constitution was adopted." The Court concluded that small claims cases were cognizable at the time of the adoption of the Utah Constitution. Accordingly, the Court held that U.C.A. § 78B-1-104(4) is an unconstitutional deprivation of the Constitution's guarantee of the right to jury trial in appeals from small claims judgments to district courts. The Court further held that the Utah Constitution guarantees the right to a jury trial in a small claims trial *de novo* in district court.

Simler v. Chilel, 2016 UT 23
(Utah Supreme Court,
filed June 1, 2016,
not yet released for publication
in the permanent law reports).

EMPLOYEE HELD BARRED FROM FILING SUIT FOR WORKPLACE INJURY WHERE EMPLOYER MET REQUIREMENTS FOR QUALIFIED IMMUNITY

Utah Supreme Court: This case concerned whether a general contractor qualified for immunity under the exclusive remedy provision of the Utah Workers' Compensation Act.

Plaintiff Rick Nichols worked for a subcontractor of Jacobsen Construction Company. While working, scaffolding came loose and fell on Plaintiff, causing him physical injury. He sued Jacobsen for negligence. Jacobsen moved for summary judgment, claiming immunity from suit under the exclusive remedy provision of the Utah Workers' Compensation Act. The district court granted the motion and held that Jacobsen procured work that was part or process of its trade or business, secured the payment of workers' compensation benefits, and created and maintained a written workplace accident and injury reduction program that met the requirements of U.C.A. § 34A–2–103(7)(f)(iii)(B).

On appeal by Plaintiff, the Utah Court of Appeals affirmed the district court as to procuring work requirements, but reversed on the "securing the payment" requirement. The Court concluded that the length of time that passed before Jacobsen began making workers' compensation payments had an impact on whether it had secured those payments. The Court did not address the workplace accident and injury reduction program requirements.

Defendant Jacobsen Construction then appealed the decision to the Utah Supreme Court. The Supreme Court held that Jacobsen qualified as an "eligible employer" under the Workers' Compensation Act's exclusive remedy provision because Jacobsen had fulfilled all three of the requirements. The Supreme Court determined that an employer "secures the payment" of workers' compensation benefits when it provides its subcontractors and their employees with a qualifying insurance policy. As such, the issue of when actual payment was made under the insurance was immaterial to this requirement. The Court thus concluded that Jacobsen qualified for immunity from suit under the Act, and its motion for summary judgment was therefore granted.

Nichols v. Jacobsen Const. Co.,
2016 UT 19
(Utah Supreme Court,
filed April 28, 2016,
not yet released for publication
in the permanent law reports).

SALT LAKE CITY HELD NOT TO BE LIABLE IN POTHOLE TRIP AND FALL CASE

Utah Court of Appeals: Plaintiff Jeffrey Wood was seriously injured when he tripped in a pothole on a street located in and owned by Defendant Salt Lake City. Plaintiff Wood sued Salt Lake City for negligence, claiming it failed to identify and repair the pothole. The case proceeded to a bench trial.

At trial, Plaintiff presented evidence that the pothole had been there for approximately four months. He also presented evidence that Salt Lake City employees, including street sweepers and sanitation workers, had been on the street during the time the pothole existed. The City director testified that although City employees are asked to report potholes, they were not required to identify and report potholes. There was also testimony that the City's engineering department actively looked for and repaired potholes every day, and also responded to citizens' reports of potholes. The City's policy was to repair a pothole within twenty-four hours of it being identified. The district court decided in favor of the City and found that the City did not have the necessary notice to be liable for not repairing the pothole. As such, the City had not failed to exercise reasonable case.

On appeal, Plaintiff argued that the district court erred when it declined to find that the City's employees had a duty to report a dangerous condition they may observe within the course and scope of their employment. Although the Court agreed that an agent's knowledge may be imputed to its principal, the Court was not persuaded by Plaintiff's argument. There was no evidence any employee knew of the pothole. Due to this, the Court held that Plaintiff's argument failed because there was no evidence that any employee had actual or constructive notice of the pothole. Plaintiff therefore could not demonstrate that the lower court failed to impute a worker's notice to the City. The district court's finding was thus affirmed.

Wood v. Salt Lake City Corp.,
2016 UT App. 112
(Utah Court of Appeals,
filed May 26, 2016,
not yet released for publication
in the permanent law reports).

POST-ACCIDENT PHOTOGRAPHS OF VEHICLES AND EVIDENCE OF PLAINTIFF'S PREEXISTING MEDICAL CONDITIONS HELD ADMISSIBLE

Utah Court of Appeals: This case arose from an automobile accident wherein Defendant Joel Whitmer rear-ended Plaintiff Marie Schreib as she was entering a library parking lot. Plaintiff sued, alleging that Defendant Whitmer negligently caused the accident. Plaintiff alleged that she sustained personal injuries as a result of the accident.

Prior to trial, Plaintiff filed a motion in limine seeking to exclude post-accident photographs of the parties' vehicles on the basis that it would risk misleading the jury. Plaintiff also filed a second motion in limine seeking to exclude evidence of preexisting medical conditions and prior automobile accidents on the basis that the evidence was not relevant. The trial court denied both motions.

At trial, the parties presented conflicting evidence as to whether Plaintiff's injuries arose from the accident, her preexisting medical conditions, or her prior accidents. Plaintiff's expert doctor opined that she had been injured in the accident. Defendant testified that at the time of the accident, he was driving very slowly and did not observe any vehicle damage while the parties were exchanging information. Defendant also testified that Plaintiff did not complain of any pain.

After deliberation, the jury returned a verdict that the accident was not the legal cause of Plaintiff's alleged injuries. The trial court entered judgment for Defendant. Thereafter, Plaintiff appealed, asserting that the trial court incorrectly allowed evidence to be admitted as to her preexisting medical conditions, photos of the vehicles, and her prior accidents.

On appeal, the Court of Appeals held that the evidence of Plaintiff's preexisting medical conditions and prior accidents were relevant. In addition, the photographs of the vehicles post-accident, which showed minimal damage, were relevant and not unfairly prejudicial. This evidence was all relevant because it had a tendency to disprove Plaintiff's contention that the accident was the sole cause of her alleged injuries. Moreover, the evidence supported the jury's finding that the accident was not the legal cause of Plaintiff's injuries. The district court's judgment was thus affirmed.

Schreib v. Whitmer, 2016 UT App. 61, 370 P.3d 955 (Utah Court of Appeals, filed March 31, 2016).

Wyoming

PLAINTIFF IN PARKING LOT TRIP AND FALL CASE FOUND TO BE CONTRIBUTORILY NEGLIGENT

U.S. Dist. Ct., D. Wyoming: Plaintiff Jeanne Davenport, a 78-year-old woman, sued Defendants to recover for injuries she allegedly sustained from an accident. The accident occurred when Plaintiff walked across a rock landscape island in the parking lot of a retail store operated by Defendant Menard Inc. Plaintiff tripped and fell over a guy wire installed by the landscaper, Defendant Grand Avenue Nursery. The guy wire was installed to support a newly planted tree.

Plaintiff alleged several injuries, including an injury to her spine, right shoulder, and right eye. She argued that Menard was negligent for preparing and approving plans specifying the newly planted trees in the parking lot would be supported by guy wires. She alleged that the plans were made by Defendant without seeking the input of an engineer, architect or landscape architect. She also alleged negligence on the basis that Defendant failed to include visual or verbal instructions to place flags or warning devices on the guy wires.

Plaintiff argued that Defendant Grand Avenue Nursery was negligent for installing the guy wire in an area where pedestrians would be walking. She also alleged negligence due to Defendant failing to take reasonable precautions to alert pedestrians to the presence of the guy wire, and due to Defendant hiring personnel with no safety training.

Defendant Grand Avenue Nursery denied liability and claimed it followed the project plans given by Menard. Menard denied liability, arguing its plans for the island were appropriate and complied with industry standards. In addition, both Defendants also asserted that Plaintiff was contributorily negligent for using the rock island as a pedestrian walkway rather than remaining on the paved, level surface of the parking lot, especially in light of her extensive medical history and history of falls.

Upon jury trial, the jury returned a verdict in favor of both Defendants by allocating 60% of the fault to Plaintiff. Plaintiff was thus not awarded any damages.

Davenport v. Menard Inc., Grand Avenue Nursery, LLC, 2016 WL 3199454 (United States District Court, District of Wyoming, decided March 4, 2016).

SUPREME COURT ISSUES DECISION IN CONSTRUCTION DEFECT CASE AGAINST HOMEBUILDER

Wyoming Supreme Court: Plaintiffs entered into a contract and purchased a home in Evanston, Wyoming from Defendant Jeffrey Wright. The other Defendants, JWright Development and JWright Companies, were not parties to the contract. In the contract, Mr. Wright represented that there were no known violations of city, county, or state ordinances, laws, rules, or regulations at the property. The property was purchased "as is" and Mr. Wright gave no implied or express warranties.

After purchasing the home, Plaintiffs discovered several defects, including cracks in the walls and basement floor, leaks in the foundation, improper grading, and a lack of final electrical inspection of the home. Plaintiffs sued Defendants for breach of contract, negligence, breach of warranty, and negligent and intentional

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misrepresentation. The district court granted summary judgment in favor of Defendants and Plaintiffs appealed.

On appeal, Plaintiffs argued that Mr. Wright's alleged violations of codes and ordinances were material facts supporting the claim that Mr. Wright breached the contract. The Wyoming Supreme Court disagreed, noting that under the plain language of the contract, a breach did not occur simply because of a violation. The Court affirmed the district court and concluded that based upon the contract, a breach could only occur if Mr. Wright knew of a violation at the time the parties executed the contract.

Regarding Plaintiffs' intentional misrepresentation claim, the Court affirmed the lower court's judgment. It held that the undisputed evidence presented on the motion for summary judgment showed that no Defendants made any representations to Plaintiffs before the contract was executed or before the closing on the home.

As to Plaintiffs' negligence claim, the Court noted that in Wyoming, home builders have a duty of care when building new homes and there is an implied warranty the builder built the home in a reasonable and workmanlike manner. The duty is independent of any contractual duties. As such, the Court held that the economic loss rule did not prevent Plaintiffs from bringing a negligence claim even though the damages they alleged were solely economic in nature. However, the "as is" clause in the contract constituted a waiver of any implied warranties against the seller.

The Court thus reversed the district court's ruling on the negligence claim, finding that there were issues of material fact as to whether the builder breached its duty.

Rogers v. Wright, 2016 WY 10, 366 P.3d 1264 (Wyoming Supreme Court, decided January 22, 2016).

Texas

University Held to Not Have Actual Knowledge of Dangerous Premises Condition

Texas Supreme Court: Plaintiff John Sampson was a tenured law professor at Defendant University of Texas. One evening, he arrived on campus and parked in a parking lot at the law school to pick up tickets from his office for a football game. The school was hosting a tailgate party on the law school lawn when he arrived. Plaintiff tripped over an extension cord strung across a walkway between the parking lot and the law school entrance. He purportedly tore his rotator cuff, which required surgery and physical therapy. The extension cord over which Plaintiff tripped was plugged into an outlet box on the law school's lawn and was powering lights in the trees. A third party had installed the lights. Plaintiff filed suit against Defendant, alleging negligence and that the school had waived its sovereign immunity.

Defendant argued that Plaintiff's claim was one for premises liability under the Tort Claims Act and there was no evidence that it had actual knowledge of an unreasonably dangerous condition on its premises. Plaintiff argued that the injuries were caused by a condition or use of tangible personal property, and alternatively, that the extension cord was a special defect or premises defect. It thus argued that Defendant had actual knowledge of a dangerous condition. The district court denied Defendant's motion to dismiss and motion for summary judgment.

On appeal to the Supreme Court, the Court held that under the Tort Claims Act, for a premises defect claim, the governmental unit only owes the claimant the duty that a private person owes to a licensee on private property. That is, a landowner has a duty to not injure a licensee by willful, wanton, or grossly negligent conduct. The landowner also has a duty to exercise ordinary care to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not. The Court concluded that the alleged negligence was a premises defect because it was created by the extension cord, which was a condition on the real property.

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About Our Firm

Dewhirst & Dolven, LLC is pleased to serve our clients throughout the intermountain west and Texas from the following offices: • Salt Lake City, Utah • Denver, Colorado • Colorado Springs, Colorado • Grand Junction, Colorado • Casper, Wyoming • Dallas, Texas • and Port Isabel, Texas. Please see our website at DewhirstDolven.com for specific contact information.

Dewhirst & Dolven, LLC has been published in the A.M. Best's Directory of Recommended Insurance Attorneys and is rated an "AV" law firm by Martindale Hubbell. Our attorneys have extensive experience and are committed to providing clients throughout Utah, Wyoming, Colorado and Texas with superior legal representation while remaining sensitive to the economic interests of each case.

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Accordingly, the Court held that Defendant did not have actual knowledge of a dangerous condition. To violate the duty, Defendant must have actually known of the dangerous position of the cord at the time of the accident, not merely of the possibility that a dangerous condition could develop over time.

Sampson v. Univ. of Texas at Austin, No. 14-0745, 2016 WL 3212996 (Texas Supreme Court, filed June 10, 2016, not yet released for publication in the permanent law reports).

PROOF OF COVERAGE HELD REQUIRED IN BAD FAITH ACTION AGAINST INSURER

Texas Supreme Court: A man died in an accident on a drilling rig and his parents, Plaintiffs, sued the company that owned the rig. The company then demanded that its CGL insurers defend it, but the insurers refused to defend, arguing that there was a lack of coverage. Plaintiffs subsequently obtained a judgment against the company and the company assigned its rights against the insurers to Plaintiffs. Plaintiffs then brought a bad faith action against the insurers.

The case proceeded to trial and the jury returned a verdict in Plaintiffs' favor. On appeal by the insurers, the Texas Court of Appeals reversed the trial court's judgment and award to Plaintiffs.

Plaintiffs appealed to the Texas Supreme Court. The Court held that Plaintiffs failed to establish insurance coverage, an essential element of a bad faith action. Thus, the Court held that recovery was precluded as a matter of law, and affirmed the Court of Appeals' ruling.

Seger v. Yorkshire Ins. Co., No. 13-0673, 2016 WL 3382223 (Texas Supreme Court, filed June 17, 2016, not yet released for publication in the permanent law reports).