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DEWHIRST & DOLVEN LLC
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LEGAL UPDATE

Utah • Wyoming • Colorado • New Mexico • Texas

IN BRIEF

COLORADO

- The Colorado Supreme Court found that a friend of the named insured under an insurance policy was permitted to reject UM/UIM coverage on behalf of the insured, under the common law agency rule of implied authority.

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UTAH

- The Utah Supreme Court held double recovery was not allowed for a man who was injured on-the-job, received workers' compensation benefits, and then sought to recover in full under his UIM policy. Rather, UIM benefits were secondary to the workers' compensation benefits.

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WYOMING

- In a workers' compensation case, a claimant did not object to an administrative finding that her injury was not work related. The Wyoming Supreme Court ruled that the claimant was not collaterally estopped from seeking recovery for medical costs associated with the injury, solely due to her non-objection of the administrative finding.

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NEW MEXICO

- The New Mexico Court of Appeals found that an insurer's UM/UIM rejection form was compliant with the express requirements for insureds to reject such coverage.

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TEXAS

- The Texas Court of Appeals ruled that a UIM policy was offset in full by the total amount of an underlying settlement in an injury case, based upon that policy's language.

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COLORADO

COLORADO SUPREME COURT RULES THAT IMPLIED AUTHORITY IS SUFFICIENT TO WAIVE UM/UIM COVERAGE

Supreme Court of Colorado: As he had done before, Brian Johnson tasked his friend with purchasing automobile insurance for a new car that they both purchased together. The friend did so and chose to reject the uninsured/underinsured motorist (UM/UIM) coverage on the new car. The car was subsequently involved in an accident with an underinsured driver. Johnson contended that his friend's rejection of UM/UIM coverage was not binding on him. In a prior decision, the Colorado Court of Appeals sided with Johnson, and State Farm Mutual Automobile Insurance Co. appealed the ruling to the Colorado Supreme Court.

On appeal were two issues: (1) Does the UM/UIM statute under C.R.S. § 10-4-609 require each named insured to reject such coverage, or is one named insured's rejection binding on all? (2) By enacting § 609, did the legislature abrogate the common law agency principles of implied authority and apparent authority?

As to the second issue, in Colorado, English common law is the rule unless repealed by the legislature. The Court found that the UM/UIM coverage statute did not abrogate the common law agency principles of implied authority and apparent authority. As such, § 609 did not preclude an agent from exercising either apparent or implied authority to reject UM/UIM coverage on behalf of the principal, as was permitted under English common law.

The Court determined that there was no evidence that Johnson gave his friend apparent authority to reject the coverage, since there was nothing signed by Johnson assigning authority for his friend to waive coverage. However, under the theory of implied authority, an agent may act on behalf of the principal if it is incidental to, necessary, or usual to perform a task for which the principal has given authority to the agent to accomplish. After purchasing the car, Johnson was unable to procure insurance for the car himself; rather, he delegated the responsibility to his friend. This was also his prior practice. As such, the Court found that Johnson's friend had Johnson's implied authority to waive the UM/UIM coverage.

In regards to the first issue, the Colorado Supreme Court did not consider the specific meaning of § 609 to determine whether or not both named insureds are required to reject coverage under the language of the statute. The Court did not interpret the statute because it was unnecessary based upon the facts of the case. This was because the common law

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agency principle of implied authority was satisfied by Johnson and his friend, which was sufficient to permit the friend's waiver to be on behalf of Johnson. Thus, the Court of Appeals' decision was reversed.

State Farm Mutual Automobile Insurance Co. v. Johnson, 2017 CO 68, 396 P.3d 651 (Supreme Court of Colorado, decided June 5, 2017).

IMMUNITY UNDER WORKERS' COMPENSATION ACT DOES NOT PRECLUDE UIM COVERAGE

Colorado Court of Appeals: Omar Ashour was severely injured when he was pinned by a thirty-foot truck to a nearby tractor-trailer at his place of employment. The accident was caused by the negligence of his co-employee, who failed to set the airbrake on the truck that rolled backward and pinned Ashour to the other vehicle.

After the accident, Ashour submitted a claim for workers' compensation and received benefits. He also submitted a claim to his employer's corporate liability insurance provider and received a settlement for that claim based on a policy rider that allowed for coverage of workplace injuries. Ashour then made a claim under his personal automobile insurance policy with American Family Mutual Insurance (AFI) for underinsured motorist (UIM) benefits to recover the remainder of his alleged damages.

After receiving Ashour's claim, AFI filed an action seeking a declaratory judgment that Ashour was not owed UIM coverage. AFI argued that the policy only permitted UIM benefits when the insured was "legally entitled to recover" from the owner or operator of an UM/UIM vehicle. AFI also argued that the Worker's Compensation Act of Colorado immunized the employers from suit by Ashour for work-related injuries. Thus, AFI asserted that there was no UIM coverage because Ashour was not "legally entitled to recover" under the UIM policy.

In response, Ashour contended that he was not required to show that he could proceed with a lawsuit against the tortfeasor. He instead asserted that the phrase "legally entitled to recover" meant that an insured must only establish fault of the tortfeasor, as well as the extent of his damages. The district court granted summary judgment in favor of AFI.

On appeal, the Colorado Court of Appeals recognized that the case involved application of two bodies of law: workers' compensation and UIM coverage. Under Colorado's workers' compensation law, employers who secure insurance to cover their employees' work-related injuries are generally not subject to liability for the employees' injuries. Under Colorado's UIM law, UIM coverage is limited to "protection of persons insured thereunder who are legally entitled to recover damages from [tortfeasors]…." This law is similar to the language of the subject UIM policy.

As such, the issue before the Court was whether Ashour was "legally entitled to recover" under the meaning of the UIM statute when he cannot sue the tortfeasor due to their immunity under the workers' compensation act. The Court held that Ashour's claim for UIM benefits under the AFI policy was not barred by the exclusivity provisions of the governmental immunity act, nor by the "legally entitled to recover" language of the policy. The Court stated: "AFI should not be allowed to deny coverage to Ashour when the purpose of the UM/UIM statutory mandate is to protect those with coverage from the financial burdens imposed by tortfeasors who are unable to pay for the full scope of damages they cause."

American Family Mutual Ins. Co. v. Ashour, 2017 COA 67 (Colorado Court of Appeals, decided May 18, 2017, not yet released for publication in the permanent law reports).

$11,500 JURY AWARD TO PLAINTIFF SEEKING $1.25 MILLION FOR FUTURE BOTOX INJECTIONS

Mesa County: Defendant Dylan McKenney was fifteen years old and had a learner's permit when he was driving with his mother, Sandra McKenney, in the car. Dylan was taking fifteen-year-old Cambree Staidl to a Homecoming Dance when he got lost on a country road. Dylan ran a stop sign and his car was T-boned by a truck pulling a trailer.

Jill Burke, Cambree's mother, filed a lawsuit on behalf of Cambree. She alleged that Cambree was injured as a result of the collision. Defendants disputed causation and the extent of the injuries and damages.

Cambree allegedly had a concussion and resulting headaches from the accident. Burke asserted that Cambree also had permanent impairment and could not complete a master's level education, all caused by the accident. Burke asserted that Cambree would need Botox injections until she was 62 years old. In addition, she claimed that Cambree's future life care plan expenses would cost $800,000 - $1,500,000. Those future costs were primarily for Botox injections. Cambree's past medical expenses were $74,000.

Plaintiff demanded $1.25 million at trial. The jury ultimately found for Plaintiff, but awarded only $11,500 total for economic and non-economic loss. Nothing was awarded for physical impairment.

Burke v. McKenney, Case No. 15-V-30432.

JURY VERDICT IN TRIP AND FALL CASE ON RETAIL PREMISES

Pueblo County: Plaintiff Debra Carpenter was the owner/operator of a clinic that used her nurse practitioner and chiropractor skills. She allegedly fell to the pavement when her foot was caught in clear plastic shrink wrap attached to a wooden pallet in the walkway of an outdoor yard retail premises owned by Defendant Big R. of Pueblo, Inc. Plaintiff claimed that she suffered multiple injuries from the fall, including a concussion with cognitive deficits; midline shift syndrome; tinnitus; near-daily headaches; a torn vitreous in her left eye; knee abrasions; injuries to her wrists, right shoulder, and neck; and emotional distress. Plaintiff also asserted that she was considering shutting down her clinic due to her injuries. She alleged that Defendant was negligent by allowing the shrink wrap danger to exist in the store's walkway, failing to remedy the existing danger, and failing to provide a warning of the danger.

Defendant denied any liability and contended that the subject shrink wrap was an open and obvious condition that the Plaintiff could have seen. Defendant noted that the fall occurred in an outside customer area, rather than

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inside of the store. Defendant also argued that Plaintiff's claimed injuries were pre-existing and/or caused by a subsequent serious motor vehicle collision in which Plaintiff was involved. Defendant further concluded that Plaintiff's own negligence had caused her fall.

Upon trial to a jury, the jury awarded Plaintiff with $200,000. The jury also held that both Plaintiff and Defendant were at fault. It apportioned 75 percent fault to Defendant and 25 percent fault to Plaintiff.

Carpenter v. Big R. of Pueblo., 2017 WL 2212144.

Utah

THE UTAH SUPREME COURT RULES THAT DOUBLE RECOVERY IS NOT PERMITTED IN A WORKERS' COMPENSATION CASE

Utah Supreme Court: Danny Rutherford suffered extensive injuries when the work van he was driving was struck by an underinsured driver who ran a red light. Rutherford was hit while in the course of his employment. He sought compensation from both his employer's workers' compensation insurer and Truck Insurance Exchange (TIE). TIE provided Rutherford's employer with underinsured motorist (UIM) coverage.

Rutherford argued that he could seek double recovery from both the UIM and workers' compensation insurers, under U.C.A. § 31A-22-305.3(4)(c)(iii). That code states that UIM coverage may not be reduced by benefits provided by workers' compensation insurance. Rutherford argued that the UIM insurer must therefore compensate him in full, up to the limits of the policy, irrespective of whether workers' compensation insurance has already covered a portion of the claim. In response, TIE argued that it should not have to pay benefits that workers' compensation has or should have covered. TIE relied on § 305.3(4)(c)(i), which states that UIM coverage is secondary to the benefits provided by workers' compensation.

The Utah Supreme Court held that UIM coverage is secondary or excess coverage and applies only after workers' compensation coverage has been exhausted. Therefore, TIE's status as a secondary insurer means that it must fully compensate Rutherford within its policy limits, but only for damages in excess of what workers' compensation paid. The Court found that doing so would avoid an unjust double recovery by Rutherford.

Truck Insurance Exchange v. Rutherford, 2017 UT 25 (Utah Supreme Court, decided April 27, 2017, not yet released for publication in the permanent law reports).

SWIMMING POOL INJURY CASE AGAINST A CITY IS DISMISSED UNDER THE GOVERNMENTAL IMMUNITY ACT OF UTAH

Utah Court of Appeals: Plaintiff Samantha Miller was swimming laps at a swimming pool owned by Defendant West Valley City (WVC). Plaintiff alleged that some teenage girls came into her lane and interfered with her laps. The lifeguard on duty allegedly did nothing to remove the girls from the pool. Subsequently, Plaintiff was doing the backstroke, ran into one of the girls, became disoriented, and collided with the pool's wall. Plaintiff sustained a closed-head injury, neck injuries, and other bodily injuries.

Plaintiff sued WVC under theories of premises liability and negligence, contending that she was an invitee. As such, she alleged that WVC had a duty to both keep the premises clear of hazardous conditions and to warn her of hidden or latent hazardous conditions. Additionally, Plaintiff contended that WVC undertook an obligation to monitor the swimming lanes and to keep them clear of hazards.

WVC moved to dismiss Plaintiff's lawsuit, arguing that it was immune from the claims under the Governmental Immunity Act of Utah (GIA). WVC contended that Plaintiff did not properly plead that immunity was waived due to a "defective or dangerous condition of a public building … or other public improvement," as allowed under the GIA. That is, Plaintiff did not allege that the defective and dangerous condition was related to the structures of the building, pool, or sides of the pool. Instead, Plaintiff incorrectly asserted that the teenagers were the dangerous condition. Thus, WVC argued, it was immune under the GIA because it requires that there be a defect in the physical condition of the improvement in order to be liable.

In response, Plaintiff argued that she asserted a sufficient negligence claim against WVC under Utah's pleading standard. She also argued that the Court should have made reasonable inferences in her favor as to facts of the accident. The district court found in favor of WVC and dismissed the case.

On appeal, the Utah Court of Appeals interpreted the language of the GIA, which states that governmental immunity is waived "as to any injury caused by … any defective or dangerous condition of a public building, structure, dam, reservoir, or public improvement." Plaintiff argued for a broader interpretation of the language to include immunity for dangerous conditions "in" a public building. The Court of Appeals disagreed with such an interpretation, finding that it was contrary to the statute's plan language that only permits immunity for dangerous conditions "of" a public building. Thus, the district court's dismissal of the action was affirmed.

Miller v. West Valley City, 2017 UT App 65 Utah Court of Appeals, decided April 13, 2017, not yet released for publication in the permanent law reports).

$12,300 JURY VERDICT IN MOTOR VEHICLE ACCIDENT INVOLVING PREGNANT WOMAN

Salt Lake County: Plaintiff Angelica Guillen stopped her vehicle while driving in West Valley City, Utah. Defendant Joshua Petersen turned right and allegedly collided with

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Guillen's vehicle. Guillen alleged to have sustained injuries from the accident and brought a lawsuit against Petersen.

Guillen alleged that Petersen negligently failed to yield the right-of-way to oncoming traffic and failed to heed existing traffic conditions. Guillen sought damages for past and future medical expenses, as well as missed time from work, travel expenses for medical appointments, pain and suffering, loss of enjoyment of life, emotional distress, and her physical injuries. She alleged to have sustained back pain, decreased lumbar range of motion, neck pain, right knee pain, abdominal pain, and pregnancy difficulties. Guillen was pregnant at the time of the accident. Upon a jury trial, the jury returned a verdict in favor of the Guillen for a total of $12,300.

Guillen v. Petersen, 2017 WL 2831386.

Wyoming

WYOMING SUPREME COURT ADDRESSES COLLATERAL ESTOPPEL IN ON-THE-JOB INJURY CASE

Wyoming Supreme Court: Lea Porter injured her left knee while performing her job, which required her to perform tasks in a squatting position. Porter reported her injury to her supervisor then went home and put ice on the knee. She continued to work for nine days before reporting her injury to human resources. Porter had not seen a doctor because she lacked health insurance. Human resources agreed to allow Porter to visit the on-site physician who found that Porter had previous injuries to her right knee and recommended an MRI to determine the nature of the injury to the left knee. The doctor's findings were then included in a report through her employer to the Wyoming Workers' Compensation Division (Division).

In August 2014, the Division issued a final determination informing Porter that it would not approve payment of benefits because it had determined her injury was not work-related. The Division determined that the injury stemmed from natural aging or day-to-day living. Porter did not object to that final determination or request a hearing. She did, however, object to an October 2014 final determination that denied payment of costs related to an MRI of her left knee. Her objection to the October 2014 denial was referred to the Office of Administrative Hearings (OAH), who granted summary judgment for Division. It held that Porter could not challenge the denial of benefits for the MRI under a theory of collateral estoppel, because Porter did not object to the August 2014 determination. Upon the district court affirming the OAH ruling, Porter appealed to the Wyoming Supreme Court.

The Wyoming Supreme Court held that the Division's uncontested determination denying compensability for Porter's knee injury did not have preclusive effect on Porter's right to contest the Division's subsequent determination denying payment of the MRI costs. The Court ruled that "an appropriate diagnostic measure is not non-compensable merely because it fails to reveal an injury which is casually connected to the on-the-job injury." The case was then remanded to the OAH to determine whether Porter was entitled to benefits to cover the MRI costs.

Porter v. State of Wyoming, ex rel., Dept. of Workforce Services, Workers' Compensation Division, 2017 WY 69, 396 P.3d 999 (Wyoming Supreme Court, decided June 13, 2017).

$1.2 MILLION VERDICT IN WRONGFUL DEATH ACTION

U.S. Dist. Ct., D. Wyoming: Thomas Coffey, a 67-year-old truck driver, suffered fatal injuries when he slipped and fell about ten feet while working in a safety cage that was part of sulfur loading equipment. The equipment was provided by Defendant Chevron U.S.A., Inc. (Chevron) and was used to load molten sulfur into tanker trucks.

Coffey's estate brought a wrongful death action claiming that Chevron negligently removed the bottom rail of the safety cage, which allowed Coffey to slip through the bottom of the cage as he fell. The estate also asserted that Chevron failed to provide Coffey with fall protection equipment. The estate further argued that Chevron knew that the safety cage's missing guardrail and the inadequate fall protection created a risk of death to workers using the sulfur loading equipment. It asserted that Chevron's employees negligently ignored safety regulations, their training, and company policy in allowing the unsafe condition to remain in place. Chevron denied that it was negligent and alleged that Coffey's employer failed to provide him with proper training to use the sulfur loading equipment. Chevron also contended Coffey was negligent for parking his truck too far away from the loading rack, which created a gap that contributed to his fall. Chevron also argued that Coffey was at fault for failing to follow proper loading procedures by standing on his tanker truck's spill trough, instead of the dedicated loading platform.

A jury determined that the damages to Coffey's estate totaled $1,200,000. The jury also found that Chevron was 64% at fault for the accident. The court reduced the estate's award based on the jury's fault apportionment.

In re Coffey v. Chevron U.S.A., Inc., 2017 WL 1682812.

New Mexico

INSURANCE COMPANY'S UM/UIM REJECTION FORMS FOUND TO COMPLY WITH NEW MEXICO LAW

New Mexico Court of Appeals: This case came before the New Mexico Court of Appeals on interlocutory appeal. Defendant Safeway Insurance Company's motion for summary judgment, which sought dismissal of class action claims, was denied by the district court. In addition, Safeway's motion sought to prove that its insurance documents were legally adequate to support its rejection of claims of uninsured and underinsured motorist (UM/UIM) coverage benefits. The issue on appeal was: "whether Safeway has complied with New Mexico law in obtaining waivers of UM/UIM coverage insurance, including stacked coverage, from its insureds."

Plaintiff Betty Ullman stated the certified class to include New Mexico residents who were not provided the maximum amount of UM/UIM coverage allowed by law, and for whom Safeway did not obtain a valid waiver/rejection of UM/UIM coverage. An invalid waiver or

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rejection of UM/UIM coverage is one which did not include an offer of UM/UIM limits up to the liability limits and a disclosure of premium amount for each available level of coverage.

New Mexico law requires insurers to offer UM/UIM coverage that includes the maximum amount of UM/UIM coverage statutorily available equal to the liability limits of the policy. However, insureds have the choice to purchase a lower amount of UM/UIM coverage. Doing so functions as a rejection of the maximum amount of coverage statutorily possible. In addition, a valid rejection of UM/UIM coverage must be made after the insured has clearly and unambiguously been informed that a waiver has been made. As such, the following four requirements must be met for a valid rejection of UM/UIM maximum coverage limits: (1) offer the insured UM/UIM coverage equal to his or her liability limits; (2) inform the insured about premium costs corresponding to the available levels of coverage; (3) obtain a written rejection of UM/UIM coverage equal to the liability limits; and (4) incorporate that rejection into the policy in a way that affords the insured a fair opportunity to reconsider the decision to reject. If these conditions are not met, then the policy will be reformed to provide UM/UIM coverage equal to the liability limits.

Safeway's documents included a UM/UIM Coverage Selection/Rejection form that identified policy limits and informed insureds about the ability to reject the coverage entirely. Plaintiff marked the appropriate rejection boxes and appropriately signed the form and other included forms which advised her of her rights and available options.

After examining State Farm's forms in-depth, the New Mexico Court of Appeals held that Safeway obtained valid rejections to its UM/UIM coverage benefits in compliance with New Mexico law. The above requirements were expressly satisfied in State Farm's rejection forms.

Ullman v. Safeway Ins. Co., 2017 WL 2813993 (New Mexico Court of Appeals, slip opinion, decided June 28, 2017, not yet released for publication in the permanent law reports).

Insurer Had Duty to Defend a Renting Tennant as a Potential "Real Estate Manager" Under the Policy

New Mexico Court of Appeals: David Tapia was reading an electrical meter at a residence when he was injured by a dog owned by Jenny Dove. Dove was renting one of two units at the residence from Betsy Joyce. Joyce lived in California and only visited the property twice per year. Joyce asked Dove to water a tree and some flowers in the common yard area of the property. Dove did not receive any lowering of rent or other benefit from Joyce for performing this service. Dove rarely entered the common yard area prior to this request and was watering the flowers when her dog attacked Tapia.

Tapia sued Joyce and Dove, alleging negligence, negligence per se, and premises liability. Joyce had a rental dwelling insurance policy with State Farm Fire and Casualty Company that covered the property. Dove tendered her defense to State Farm. State Farm denied the tender because Dove was not a named insured and allegedly did not qualify under the policy. Dove and Tapia eventually reached a settlement wherein Dove assigned all rights and claims against State Farm in the primary action to Tapia.

On appeal is the issue of whether State Farm breached its duty to defend Dove as to Tapia's claims. The New Mexico Courts of Appeals ruled that State Farm breached its duty to defend. In doing so, it found that an insurer carries the burden of proving that all claims arose out of an uncovered act and has a duty to defend until it meets that burden. If there is any doubt whether a claim is covered, an insurer who has refused to defend has breached its duty. State Farm unilaterally determined that Dove was not covered and gave no further explanation for this conclusion. However, the facts show that Dove was arguably covered under the policy as a "real estate manager," thus triggering the duty to defend Dove despite Dove not having a formal responsibility to maintain the yard.

Dove et al. v. State Farm Fire and Cas. Co., Docket No. 34,932, 2017 WL 1210174. (New Mexico Court of Appeals, slip opinion, decided March 28, 2017, not yet released for publication in the permanent law reports).

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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, Texas or New Mexico matter, or to receive this publication via email, contact Rick Haderlie at
rhaderlie@dewhirstdolven.com
4179 Riverboat Road
Suite 206
Salt Lake City, UT 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

TEXAS

UIM INSURER ENTITLED TO FULL OFFSET OF UNDERLYING SETTLEMENT AMOUNT, BASED ON POLICY TERMS

Texas Court of Appeals, Houston: This case concerned a lawsuit between an insured (Steven Okelberry) and his insurance company (Farmers) over the amount due to the insured under the underinsured motorist (UIM) policy following a settlement in an underlying personal injury lawsuit. Farmers contends that the trial court erred in failing to offset the full amount of the settlement against the UIM policy limit.

Steven Okelberry had an auto policy issued by Farmers Texas County Mutual Insurance Co. which provided $500,000 in UIM coverage. Steven and his two sons were in a vehicle collision with a truck insured by Home State Mutual Insurance. Home State's policy limits were $750,000. Steven suffered injuries and Home State settled the property damage claim for $20,066.12. Steven then sued for personal injury damages. Farmers gave Steven consent to settle the claim for the remainder of Home States' policy limits. Three checks were then made as part of the settlement: one payable to Steven's counsel, one payable to Steven and his wife (who was not a party), and one payable to a subrogation service on Steven's behalf. The three checks totaled $639,988.77.

Steven then filed suit against Farmers for UIM benefits. A jury awarded Steven $825,674.84 for his injuries, which exceeded Farmers' policy limits of $500,000. Farmers subsequently filed a motion to apply credits and to offset the award by the amount received by Steven in the Home State settlement. Under the policy, Farmers was obligated to pay the lesser of (1) the difference between the amount of Steven's damages and the amount paid to Steven for his damages; or (2) the full amount of the $500,000 policy limit.

Farmers argued for credit of the $639,988.77 amount. Steven argued that the amount paid to his wife should not be credited against the Farmers award. Steven argued that the amount made payable to Steven and his wife was community property, and thus at most only one-half of that check amount should be credited to the Farmers' award. Farmers responded by stating that the wife was not a party to the lawsuit, did not have any claims in it, and did not sustain any injuries in the accident. As such, Farmers argued that the full amount of that check should be credited from the award against it.

The Texas Court of Appeals found that the money paid to both Steven and Patricia was not considered community property because only one spouse suffered the personal injury. In addition, Patricia did not make a claim for loss of consortium or other damages in the lawsuit. The court thus found that Farmers was entitled to an offset of the entire $639,988.77 paid to Steven for his damages.

Farmers Texas County Mutual Ins. Co. v. Okelberry,
Case No. 14-15-01081-CV,
2017 WL 2292536
(Texas Court of Appeals,
decided May 25, 2017,
not yet released for publication
in the permanent law reports).