Summer 2018

DEWHIRST & DOLVEN LLC Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • Colorado • Texas

IN BRIEF

COLORADO

- Dewhirst & Dolven attorneys recently obtained favorable verdicts in two separate jury trials. In the first trial, they prevailed as to defending against all claims in a homeowners' association lawsuit. In the second trial, they obtained a favorable verdict of about 10% of Plaintiff's demand, in a slip and fall case alleging permanent injuries.

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UTAH

- In a slip and fall case at a grocery store, the Utah Supreme Court held that the premises owner, under the non-delegable duty doctrine, "is liable for an independent contractor's negligence as if it were her own."

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WYOMING

- In a wrongful death action stemming from a truck accident where the truck was parked on the side of a highway, the Wyoming Supreme Court reversed the grant of summary judgment in the defendants' favor. The Court held that whether the parked truck was the cause of the accident was an issue for the jury.

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TEXAS

- An insured sought uninsured motorist coverage as to claims against a governmental entity that were barred due to immunity. The Texas Court of Appeals held that the UM claims were also precluded under the express terms of the policy.

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COLORADO

DEWHIRST & DOLVEN OBTAINS DEFENSE VERDICT IN HOMEOWNERS ASSOCIATION LAWSUIT

Denver County: A commercial general liability carrier retained Dewhirst & Dolven, LLC to defend counterclaims and third-party claims. The dispute involved a condominium owners association, two association board members, two property management companies, a property management company employee, and a condominium unit owner.

At trial, Dewhirst & Dolven attorney Steven Helling successfully defended the condominium owners association and the five third-party defendants, all of whom had been sued by a condominium unit owner.

It was generally alleged that the unit owner had failed to obtain the necessary approval from the association before remodeling her unit, which included the alteration of structural supports. In response to being sued, the condominium unit owner counterclaimed against the association, asserting it was the association that breached its own covenants, while also breaching its duties to her of good faith and fair dealing. The unit owner asserted similar claims against the third-party defendants.

The third-party defendants were dismissed from the action upon summary judgment prior to trial. The court found that the two third-party defendant board members were not personally liable for the association's actions and owed no independent duty to the unit owner. The court also found that the other third-party defendants, consisting of the two property management companies and its employee, were not bound by the association's governing documents or the laws governing homeowner's associations. Thus, they did not owe a fiduciary duty to the unit owner that had sued them.

The remaining claims by the association against the unit owner, and the counterclaims against the association, were presented to a jury. The jury returned its verdict, finding that neither party had proven any recoverable damages. As a result of neither party being awarded any damages, the court declared that there was no prevailing party. Dewhirst & Dolven thus successfully defeated both the counterclaims and the third-party claims.

Westchester South Association of Condominium Owners, Inc. v. Lemay et al., Case No. 2017CV33266 (Jury verdict rendered June 1, 2018).

IN THIS ISSUE

FAVORABLE JURY VERDICT OBTAINED BY DEWHIRST & DOLVEN IN SLIP AND FALL CASE ALLEGING PERMANENT INJURIES

Jefferson County: Dewhirst & Dolven attorneys George Parker and Christopher Unger obtained a favorable jury verdict on behalf of the defendant in a slip and fall case alleging permanent injuries. The case arose when Plaintiff Larry Holmes went to The Mirage Sports Bar to play in a poker tournament. Due to it snowing outside, snow got tracked onto the tile floor each time customers entered the bar. Employees of the bar would periodically dry-mop the tile near the entryway, but the floor continued to get wet during the evening. The bar had a large mat inside the front door but did not have any signs or warnings to alert patrons about a wet floor.

Holmes went outside to smoke during one the tournament breaks. Upon reentering, he slipped and fell on the wet tile, severely tearing the tendons in his shoulder. The incident report prepared by the bar manager that night admitted that they knew about the tile getting wet from persons tracking in snow, and that Holmes had fallen on that wet tile.

Over the next several months, Holmes underwent two separate surgeries to repair his rotator cuff tear. His related medical bills were $91,066.67. He also claimed damages for pain and suffering, as well as permanent impairment to his shoulder for the remainder of his life.

At trial, Dewhirst & Dolven attorneys argued that the bar employees tried to keep the tile floor dry during the evening. In addition, Holmes was contributorily negligent by failing to wipe his feet on the available mat. Defendant thus argued that any damages award should be reduced by the percentage of Plaintiff Holmes' own negligence.

Prior to trial, Holmes demanded $650,000 to settle the lawsuit. Due to this unreasonable demand, the bar's insurer elected to let a jury decide the damages amount for Holmes' claims. After a two-day jury trial, the jury found that Holmes' medical bills were inflated. It thus reduced his bills from $91,066.67 to $77,509.52. The jury also awarded Holmes $2,500.00 for his pain and suffering, and $0 for permanent impairment or disfigurement. While the jury found that the bar was liable, it also found that Holmes was 15% negligent. The final jury award was thus $68,008.09 total, which was about 10% of Holmes' settlement demand.

Holmes v. The Mirage Sports Bar and Grill, Case No. 2017-CV-30953 (Jury verdict rendered May 16, 2018).

INSURERS HELD TO HAVE DUTY TO NOT UNREASONABLY DELAY PAYMENTS FOR COVERED BENEFITS EVEN IF OTHER PARTS OF CLAIM ARE DISPUTED

Colorado Supreme Court: An underinsured motorist struck a car driven by Dale Fisher, causing Fisher to sustain injuries requiring over $60,000 in medical bills. Fisher was not at fault, and he was covered under multiple State Farm underinsured motorist ("UIM") insurance policies. State Farm agreed that Fisher's medical bills were covered under the UIM policies, but it disputed other amounts Fisher sought under the policies such as lost wages. State Farm then refused to pay Fisher's medical bills without first resolving his entire claim.

Fisher sued, alleging that State Farm had unreasonably delayed paying his medical bills. In response, State Farm argued that it had no duty to make piecemeal payments when it disputed the rest of his UIM claim.

The issue on appeal was whether "auto insurers have a duty to pay undisputed portions of a UIM claim – like the medical expenses at issue here - even though other portions of the claim remain undisputed." The Colorado Supreme Court looked at the plain language of C.R.S. § 10-3-1115, which provides: "A person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant … An insurer's delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action."

Based upon § 1115, the Court ruled: "insurers have a duty not to unreasonably delay or deny payments of covered benefits, even though other components of an insured's claim may still be reasonably in dispute."

Fisher v. State Farm Mutual Automobile Ins. Co., 418 P.3d 501, 2018 CO 39 (Colorado Supreme Court, decided May 21, 2018).

CLAIMS FOR CATASTOPHIC INJURIES DUE TO POOR ROAD CONDITIONS PRECLUDED UNDER THE COLORADO GOVERNMENTAL IMMUNITY ACT

Colorado Supreme Court: Doreen Heyboer was a passenger on a motorcycle and was injured when the motorcycle was in an accident with an automobile. She sustained catastrophic injuries. A lawsuit was asserted on her behalf against the City and County of Denver, alleging that the street's deteriorated condition contributed to the accident.

Denver responded by asserting its immunity under the Colorado Government Immunity Act ("CGIA"). Heyboer argued in response that Denver waived its immunity because the road was a dangerous condition that physically interfered with the movement of traffic, which was an exception to governmental immunity under the CGIA.

The CGIA waives immunity when "a dangerous condition of a … road or street … physically interferes with the movement of traffic." Heyboer thus had the burden to establish that the road was "a dangerous condition." The accident occurred at an intersection when a westbound driver suddenly turned left, cutting off the motorcycle that Heyboer was a passenger on. The two vehicles collided, sending Heyboer flying from the motorcycle and landing on the pavement.

At a hearing Denver's pavement engineer testified that the intersection was in very poor condition, though it did not require immediate repair. He also testified that the intersection was "dangerous," but "not dangerous enough" to warrant immediate repairs. The parties' experts disagreed about whether the road condition caused the accident. The driver of the other vehicle testified that the road may have played some role in his inability to avoid the accident. An investigating police officer testified that the road did not play a role in causing the accident.

The Colorado Supreme Court found that, while driving on the road may carry some risk of an accident, it did not present an unreasonable risk. For Denver to waive its immunity, the road must have degraded to such an extent that it was unreasonably risky. Only at that point would Denver have the duty to fix the road. The Court made this

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determination from testimony, which indicated that the road condition did not necessitate taking emergency maneuvering actions. Thus, the Court held that Heyboer's claims were precluded under the CGIA.

Heyboer v. City and County of Denver, 418 P.3d 489, 2018 CO 37 (Colorado Supreme Court, decided May 21, 2018).

Utah

Premises Owner Has a Non-Delegable Duty for Negligence of Independent Contractor's Worker

Utah Supreme Court: Plaintiff Gloria Rodriguez slipped on a puddle of water in a grocery store shortly after it opened. Due to her injuries, she sued Defendants Kroger Company and Smith's Food & Drugs ("Smith's"). She also sued the janitorial company (J&I Maintenance) that Smith's contracted with to clean the floors, and the independent contractor (Benigno Galeno) hired by J&I to do the work.

Plaintiff settled with Galeno before trial. At trial, the jury apportioned 5% fault to Smith's, no fault to J&I, 75% fault to Galeno, and 20% fault to Plaintiff. After trial, Plaintiff argued that Smith's and J&I were liable for Galeno's share of the damages. The district court disagreed, and Plaintiff appealed. On appeal, Plaintiff argued that Smith's and J&I should pay Galeno's damages because they were charged with a non-delegable duty to keep its premises safe.

Under the non-delegable duty doctrine, "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." This rule recognizes that one "who hires an independent contractor and does not participate in or control the manner in which the contractor's work is performed owes no duty of care concerning the safety of the manner or method of performance implemented." However, an exception to the rule is that an "owner of a premises has a non-delegable duty to keep her premises reasonably safe for business invitees." Thus, a premises owner "is liable for an independent contractor's negligence as if it were her own."

On appeal, Smith's and J&I cited to U.C.A. § 78B-5-818(3), which states that "no defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant…." They argued that § 818(3) "assures that one party is not liable for the breach of another party's duty."

However, the Utah Supreme Court ruled that an inquiry as to a non-delegable duty is parallel to vicarious liability. It further found that apportionment of fault is a separate inquiry from the vicarious liability of one defendant for the conduct of another. Plaintiff's issue did not concern the reallocation of fault assigned to an immune employer, but rather that Smith's had a duty to keep its store safe and it was not permitted to delegate that duty away.

Thus, the Utah Supreme Court held that Smith's is liable under the non-delegable duty doctrine for the damages Galeno caused. However, as to J&I, it found that there was no evidence that J&I assumed Smith's non-delegable duty. J&I had to assume Smith's non-delegable duty because J&I was not the owner of the premises. Since this did not occur, J&I was not responsible for Galeno's amount of damages.

Rodriguez v. The Kroger Company et al., 2018 UT 25 (Utah Supreme Court, decided June 12, 2018, not yet released for publication in the permanent law reports).

Lawsuit Tier Designation Cannot Be Amended Post-Trial to Increase Damages Limit

Utah Court of Appeals: In an effort to promote proportional discovery practices, Utah adopted tier designations in 2011 whereby parties must plead an amount of damages that correlates to one of three specified tiers. These tier designations impose limits on the amount of damages a plaintiff can ultimately recover. This case concerned Plaintiff Robert Pilot seeking to circumvent the tier designation effects by requesting to amend his "Tier 2" lawsuit to be a "Tier 3" designation after the jury returned a verdict higher than his Tier 2 designation. Doing so would permit Plaintiff to increase the amount of damages that he may recover.

Plaintiff's vehicle was rear-ended by Defendant Earl Hill's vehicle, causing Plaintiff to sustain injuries. When Plaintiff filed his lawsuit, he designated it as a Tier 2 action, which had a maximum potential recovery of up to $300,000. At trial, the jury returned a verdict of $640,979 in damages. Plaintiff then filed a post-trial motion to amend his lawsuit to designate it as Tier 3.

The Utah Court of Appeals held that the tier designation of a lawsuit is a "pleaded issue." Amendments to pleadings are made pursuant to Utah R. Civ. P. 15, which only allow amendments for unpleaded issues. As such, Plaintiff could not seek post-trial to amend his lawsuit to increase his tier designation.

Pilot v. Hill, 2018 UT App. 105 (Utah Court of Appeals, decided June 7, 2018, not yet released for publication in the permanent law reports).

Dismissal of Claims Against Hospital for Hospital Liens Related to Motor Vehicle Accident Is Affirmed

Utah Supreme Court: A child was struck by a car and seriously injured. The hospital at which the child received medical care (Defendant IHC Health Services) sought to secure payment for that care by asserting liens against the child's interest in the tort claim against the driver of that car.

The child, who was Medicaid eligible, and his mother brought a number of claims against IHC Health Services and the hospital's payments vendor. On appeal, the causes of action which were at issue were: intentional infliction of emotional distress, tortious interference with economic relations, and the breach of implied covenant of good faith and fair dealing. The district court had dismissed these three causes of action based upon its interpretation of Medicaid law.

The Utah Supreme Court refused to address the "nest of statutes" comprising Medicaid law. Rather, it affirmed

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dismissal of the claims on separate grounds. As to the claim for intentional infliction of emotion distress, the Court stated: "Asserting statutorily authorized liens instead of billing Medicaid, without more, cannot constitute outrageous and intolerable conduct [to merit such a claim]. If it did, then every breach of contract or statutory violation would automatically give rise to an intentional infliction of emotional distress claim and tort damages, including punitive damages."

As to the tortious interference claim, the Court found that Plaintiffs abandoned this claim "by offering naught in response to defendants' argument that filing a lawsuit against another person is not a potential economic relationship." As to the last claim for breach of the implied covenant of good faith and fair dealing, the Court emphasized that damages are an essential element to that contract claim. Plaintiffs had not established any damages that resulted from the hospital's assertion of liens, especially since those liens were later removed.

S.S. by and through Shaffer v. IHC Health Services, Inc. et al., 417 P.3d 603, 2018 UT 13 (Utah Supreme Court, decided April 10, 2018).

PUBLIC DUTY DOCTRINE UPHELD TO BAR WRONGFUL DEATH CLAIMS

Utah Court of Appeals: This case arises from a motor vehicle accident that resulted in the death of decedent Brady Simons. The accident occurred when another motorist hit and killed a deer on a highway. That motorist called the Sanpete County dispatch center at 6:21 a.m. to report the incident and notify authorities that the deer was lying in the middle of the road. However, the Utah Highway Patrol, which was the agency responsible for responding to such calls, never received notification of the dangerous road condition.

At about 6:50 a.m., a second motorist hit the deer carcass, causing her vehicle to cross the center line and collide head-on with the decedent's vehicle. Both drivers died as a result. A wrongful death action was brought on decedent Brady Simons' behalf against Sanpete County. The lawsuit alleged that the accident would not have occurred but for Sanpete County's negligence.

Sanpete filed a motion for summary judgment, arguing that the public duty doctrine bars the Simons' claims. The district court agreed, holding that the public duty doctrine applied because Sanpete's obligation to maintain its highways extends to anyone who may travel on them. Sanpete's failure to remove the deer carcass was an omission that did not contribute to the danger that otherwise existed. Thus, the district court ruled that Sanpete did not have a duty toward Simons. Simons appealed this ruling.

Under the public duty doctrine, where a plaintiff's claim is based on a government actor's failure to adequately discharge a public duty, "a presumption arises that this duty may not be a basis for liability in a lawsuit." A plaintiff may rebut this presumption by establishing that a special relationship exists between the government agency and the individual.

The Utah Supreme Court held that Sanpete's omission of not relaying the condition to the Utah Highway Patrol neither created nor increased the danger that existed on the roadway. This is an omission that falls within the public duty doctrine. In addition, there was no special relationship between Sanpete and Simons, as there was no specific action undergone to assume one, nor did Sanpete induce Simons' reliance. Thus, summary judgment in Sanpete's favor was affirmed.

Simons v. Sanpete County, 2018 UT App. 106 (Utah Court of Appeals, decided June 7, 2018, not yet released for publication in the permanent law reports).

Wyoming

WYOMING SUPREME COURT REVERSES DEFENSES SUMMARY JUDGMENT IN WRONGFUL DEATH ACTION

Wyoming Supreme Court: At around midnight, Jared Chavez and Luis Fontanez-Bermudez, who were drivers of a CRST semi tractor-trailer, left Salt Lake City driving eastbound on I-80. About one mile away from Rawlins, Chavez parked the tractor-trailer in the emergency lane of I-80 and turned on the vehicle's emergency lights. He pulled over so that the two men could change who was driving. The vehicle was parked such that portions of the rig were within ten inches of the eastbound lanes. Multiple signs leading up to the location of the parked vehicle indicated that parking was not allowed except for "emergency purposes."

Within minutes of Chavez parking the vehicle, it was rear-ended by a car driven by decedent David Crashley, whose vehicle was driving at or near the speed limit of 75mph. It was undisputed that the tractor-trailer was parked completely within the emergency lane at the time of the impact. There were no signs that the decedent braked or attempted to avoid the collision. It was unknown why the decedent failed to maintain his proper lane of travel. The decedent sustained immediate fatal injuries. Chavez was cited for illegally parking in that location.

A wrongful death action was brought on behalf of the estate of the decedent against CRST and its two drivers. The lawsuit alleged that the drivers illegally and negligently parked the semi tractor-trailer in an I-80 emergency lane and caused the decedent's death. The district court ruled that, based upon the undisputed facts, parking the tractor-trailer in the emergency lane was not a proximate cause of the accident. Summary judgment was thus entered in Defendants' favor, and Plaintiff appealed.

On appeal, Defendants argued that the vehicle was parked solely in the emergency lane. Thus, their acts cannot be the proximate cause of the accident because it was not foreseeable that decedent's vehicle would leave its lane due to the tractor-trailer being parked in the emergency lane.

The Wyoming Supreme Court ruled: "[Plaintiff] was not required to establish that the conduct of Mr. Chavez caused the decedent to leave his lane of travel. Rather, [Plaintiff] was required to show that the act of parking on the shoulder of an interstate highway created a reasonably foreseeable increased risk of injury to the decedent." The Court then determined that reasonable minds could differ on this question. Thus, the issue should be left to a jury, and the Court reversed entry of summary judgment in Defendants' favor.

Wood v. CRST Expedited, Inc. et al., 2018 WY 62 (Wyoming Supreme Court, decided June 8, 2018, not yet released for publication in the permanent law reports).

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WYOMING GOVERNMENTAL CLAIMS ACT UPHELD TO BAR LAWSUIT AGAINST SCHOOL DISTRICT AND ITS EMPLOYEES

Wyoming Supreme Court: A minor student and his parents brought a lawsuit against a county school district and school district employees. The lawsuit alleged that employees had committed various torts, including negligence, battery, child endangerment, civil trespass, assault, false reporting, and intentional infliction of emotional distress. The lawsuit alleged that the school district was liable for the employees' actions under the doctrine of respondeat superior. In addition, Plaintiffs alleged that the school district committed direct acts of negligence. All claims stemmed from allegations as to the six-year old minor's treatment at school.

Defendants filed a motion to dismiss the action, claiming they were immune from suit pursuant to the Wyoming Governmental Claims Act ("WGCA"). Plaintiffs opposed the motion, arguing that an exception for "public utilities" applied to school districts. Plaintiffs also argued that the school employees were not immune under the WGCA because they were acting outside of the scope of their duties by violating school policies. The district court granted Defendants' motion to dismiss, finding that Plaintiffs' claims were barred under the WGCA.

The WGCA provides: "A governmental entity and its public employees while acting within the scope of duties are granted immunity from liability for any tort except [as provided in other sections of the WGCA]." The definition of a governmental entity includes school districts, as well as school district employees acting within the scope of their duties.

The Wyoming Supreme Court noted that Plaintiffs' complaint did not allege that the school district employees were acting outside the scope of their duties. Rather, it identified that the employees were acting within their scope of duties. Thus the WGCA applied to the acts of the employees. As to Plaintiffs' claims that the "public utilities" exception to the WGCA applied, the Court found that this position was directly contradicted by the WGCA. This included school districts being within the definition of a governmental entity. The Court declined to expand the exceptions to the WGCA, and affirmed dismissal of Plaintiffs' lawsuit.

Whitham v. Feller et al., 415 P.3d 1264, 2018 WY 43 (Wyoming Supreme Court, decided April 30, 2018).

DEFENSE VERDICT IN HEAD-ON MOTOR VEHICLE COLLISION INVOLVING MULTIPLE ALLEGED INJURIES

U.S. District Court, D. Wyoming: Plaintiff Michael Caruso, 62 years old, allegedly sustained multiple injuries from a head-on motor vehicle accident. Caruso was driving a pickup truck eastbound on a two-lane highway. A westbound pickup truck operated by Defendant Robert Stobart allegedly slowed down, intending to turn right. As Stobart slowed, a westbound recreational vehicle travelling behind him was not able to stop in time, swerved into the oncoming lane, and collided head-on with Plaintiff's vehicle.

Plaintiff claimed that Defendant's right turn signal and taillight were not functioning. As Defendant approached the spot where he intended to turn right, he reportedly let his vehicle coast and did not apply his brakes. Plaintiff thus alleged that the following recreational vehicle was unaware that Defendant was slowing down and intending to turn. Plaintiff claimed that Defendant was negligent for: making a right turn with faulty brake lights and turn signals; failing to use his turn signal; careless driving; and failing to maintain a proper lookout. Defendant denied liability, claiming that the recreational vehicle's negligence caused the accident. Defendant also argued that Plaintiff failed to mitigate his damages.

Plaintiff's injuries allegedly sustained from the accident included three open ulnar fractures treated with open reduction and internal fixation, a left acetabular dislocation and fracture, a left shoulder dislocation, and a knee injury. Upon a jury trial, the jury returned a verdict in favor of Defendant.

Caruso v. Stobart, 2018 WL 2463743 (U.D. District Court, D. Wyoming, verdict rendered April 12, 2018).

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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CLM

Texas

UNINSURED MOTORIST COVERAGE PRECLUDED BY UNDERLYING GOVERNMENTAL IMMUNITY

Texas Court of Appeals: Plaintiffs Brian and Sue Loncar sued Defendant Progressive County Mutual Insurance Company for uninsured motorist ("UM") benefits. The lawsuit followed Brian Loncar being injured in a traffic accident with a City of Dallas fire truck.

The UM provision at issue covers "damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle." It was established as a matter of law that the fire truck operator's governmental immunity bared the Loncars from recovering against the operator or the City of Dallas. The question on appeal was whether that immunity results in UM coverage being defeated under that policy language.

The Texas Court of Appeals held that UM coverage was precluded "because the policy's unambiguous terms do not provide coverage when the insured is injured in an accident and the other driver is legally protected by immunity." Summary judgment in Defendant Progressive's favor was thus affirmed.

Loncar v. Progressive County Mutual Ins. Co.,2018 WL 2355205 (Texas Court of Appeals, Dallas Div., decided May 24, 2018, not yet released for publication in the permanent law reports).

SUMMARY JUDGMENT AFFIRMED IN INSURER'S FAVOR AS TO EXTENSIVE HAIL DAMAGE AT COMMERCIAL PROPERTY

U.S. Court of Appeals, 5th Circuit: Plaintiff Certain Underwriters of Lloyd's London brought suit against Lowen Valley View, LLC, seeking a declaratory judgment that it did not owe any coverage under a commercial property insurance policy. Lowen Valley View counterclaimed against Lloyd's for declaratory judgment, breach of insurance contract, and violations of the Texas Insurance Code.

Lowen Valley owns and operates a Hilton Garden Inn in Irving, Texas. Lloyd's issued Lowen Valley a commercial property insurance policy for the period of June 2, 2012 to June 2, 2013. In November 2014, a Lowen Valley employee "noticed that the shingles on the top of the hotel looked bad" and called a roofing contractor to investigate. The contractor found evidence of significant hail damage. Estimated total repair costs were $429,225.41. Lloyd's sent Lowen Valley a reservation of rights letter stating that "potential coverage issues may exist."

An investigation for the subject damage was undergone, and a following report stated that the "most recent hailstorm with hailstones large enough to cause the damage … was on June 13, 2012." At Lloyd's request, the investigator issued a subsequent report, this time stating that the observed damage "most likely occurred on June 12, 2012." Two additional reports were then done by the investigator. Those reports identified other potential dates of weather conditions that could lead to the damages, which were outside the coverage period. They also clarified that the prior reports never intended to identify June 12, 2012 as the known or only date that damage occurred at the property.

Lloyd's then denied Lowen Valley's claim and filed a declaratory action seeking a determination that it did not owe coverage for the claim. Lloyd's moved for summary judgment on its claims, which the district court granted. Lowen Valley then appealed.

On appeal, the Fifth Circuit Court of Appeals held that Lowen Valley failed to meet its burden to show what, if any, portion of the claimed damage occurred during the coverage period. Lowen Valley's reliance on the "most likely" language from the report was insufficient to meet its burden. In addition, there was "undisputed evidence of severe hail events outside the coverage period." As such, there was no evidence providing a reasonable basis for the jury to allocate the damage. The Court thus affirmed summary judgment in Lloyd's favor.

Lowen Valley View, LLC v. Certain Underwriters at Lloyd's of London, 2018 WL 2727323 (U.S. District Court, Fifth Circuit, decided June 6, 2018, not yet released for publication in the permanent law reports).