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LEGAL UPDATE

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COLORADO

CAR DEALERSHIPS HELD NOT TO HAVE A DUTY TO INQUIRE INTO A BUYER'S DRIVING HISTORY

Colorado Court of Appeals: The issue in this case was: "whether car vendors have a legal duty to inquire into a buyer's driving history before selling him a car."

Defendant Best Car Buys ("BCB") sold a car to Peter Reynoso and Erica Yancey, who were co-signatories on the sales contract. At the time of sale, Reynoso presented BCB with a Colorado identification card, and Yancey presented a valid Colorado driver's license. Eight days later, Reynoso struck Plaintiff Camell Beasley while driving the newly purchased car. Beasley suffered injuries and sued BCB for negligence and negligent entrustment. Plaintiff claimed that BCB negligently sold a car to Reynoso, who did not have a driver's license and who was alleged to not be a safe driver.

BCB moved for summary judgment, arguing that there was no evidence that it knew or had reason to know that Reynoso was likely to use the car in a risky manner. BCB also argued that it had no duty to investigate Reynoso's driving history. The district court granted BCB's motion.

The Colorado Court of Appeals noted that there is no legal authority requiring an automobile dealership to conduct a search of a buyer's driving history or to inquire as to the status of the buyer's driver's license. The Court then refused to extend any such legal duty to car dealerships. As a negligence claim cannot exist without the existence of a duty, the Court thus affirmed the dismissal of Plaintiff's lawsuit. In dismissing the lawsuit, the Court also noted that there was no evidence that BCB had reason to know of Reynoso's potential for dangerous driving.

Beasley v. Best Car Buys, LTD, 2015 COA 144 (Colorado Court of Appeals, Div. III, decided October 8, 2015, not yet released for publication in the permanent law reports).

DEFENSE SUMMARY JUDGMENT AFFIRMED DUE TO MARTIAL ARTS BEING DEEMED AN INHERENTLY DANGEROUS SPORT

Colorado Court of Appeals: This case arises from a martial arts sparring session. Defendant Juris Girtakovskis was preparing to test for his black belt. As part of a pre-test, Plaintiff Brian Laughman was a student who agreed to spar with Defendant. Plaintiff assumed the role of an attacker. He was in protective gear, however his helmet did not have a facemask. The head was off limits to target, and the pre-test was to involve light sparring.

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During the pre-test, Defendant performed an accepted technique that unintentionally struck Plaintiff's face. Plaintiff sustained serious facial and visual damage, resulting in several surgeries and permanent vision impairment. Plaintiff sued Defendant for negligence. The district court granted summary judgment in favor of Defendant, stating: "martial arts fighting is a violent activity that inherently subjects participants to an unreasonable risk of harm." It also concluded that Colorado does not recognize negligence claims in cases involving inherently dangerous sports.

The Colorado Court of Appeals held: "co-participants in a martial arts sparring activity, and inherently dangerous sport, do not owe each other a duty of ordinary care that would support a negligence claim." This is because each participant knew of the risks associated with participation, and even wore protective gear due to the risks. "Most sports acknowledge that mistakes will happen and that rules of conduct will be broken." Thus, Defendant did not owe a duty of ordinary care to Plaintiff, and the grant of summary judgment was affirmed.

Laughman v. Girtakovskis, 2015 COA 143 (Colorado Court of Appeals, decided October 8, 2015, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN SNAKEBITE PREMISES LIABILITY CASE

U.S. Dist. Ct., D. Colorado: Plaintiff Brianna Walters attended a wedding reception at Willow Ridge Manor in Morrison, Colorado. The groom (who is Ms. Walters' cousin), and bride rented the wedding venue from S & F Holdings, LLC, which leased the property from Gregory Sargowicki. At about 10:00 p.m., Plaintiff exited the reception hall and went into the paved parking lot to make a phone call. She was standing between two parked cars when a rattlesnake bit her.

Plaintiff asserted premises liability and negligence claims against four defendants, including the bride and groom. Shortly before trial, Plaintiff dismissed the bride and groom, and the negligence claims were also dismissed. Plaintiff alleged that Defendants knew or should have known of a danger on the premises and failed to warn or protect her. Plaintiff asserted that Defendants were at fault due to inadequate lighting and knowledge of wildlife. Defendants argued that this was an incident involving a wild animal which was not under anyone's control.

Plaintiff's alleged injuries were swelling, discoloration, and pain resulting from the bite. She was hospitalized for four days and her medical expenses were $182,000. Her final demand before trial was $1,000,000, and she requested $350,000 at trial. Defendants' final offer before trial was $5,000. Upon a jury trial, a verdict was rendered for Defendants.

Walters v. S & F Holdings, LLC d/b/a/ Willow Ridge Manor et al., Case No. 14 CV 02006.

Utah

TREATING PHYSICIANS' TESTIMONY AS TO CAUSATION OF INJURIES SATISFIES THRESHOLD OF RELIABILITY UNDER UTAH RULES OF EVIDENCE

Utah Court of Appeals: At issue in this case is whether expert testimony provided by Plaintiffs' treating physicians was admissible under Utah Rule of Evidence (URE") 702 to show a causal connection between the crash and Plaintiffs' alleged injuries.

Plaintiffs Daniel and Patrisha Majors were involved in a motor vehicle collision. Kent Owens, an employee of Defendant Kennecott Utah Copper Corp., was driving the other vehicle involved in the crash. Plaintiffs sued Owens and Kennecott, alleging negligence claims. Plaintiffs alleged that the motor vehicle collision caused them to suffer various injuries, including neck and back pain.

Defendants filed a motion in limine to exclude testimony from Plaintiffs' treating physicians as to causation for the injuries. Defendants argued for exclusion of these opinions on the basis that they relied upon Plaintiffs' reports and unverified factual information about the accident. Defendants also argued that the treating physicians did not perform an independent analysis of Plaintiffs' medical histories. Defendants thus sought exclusion of the testimony on the basis that it did not meet the threshold requirement of reliability under URE 702.

The district court agreed. It held that the testimony was unreliable and inadmissible under URE 702, as it was based upon assumptions and not any independent analyses or evaluation. Defendants were also granted summary judgment on the basis that without the physicians' testimony, Plaintiffs were unable to establish the causation element of their negligence claim.

On appeal, the Utah Court of Appeals reversed the district court's rulings. It held that although foundation for the treating physicians' causation opinions appeared thin, the physicians' testimony met the minimal requirements of reliability under URE 702. The district court's determination addressed the testimony's lack of weight rather than its failure to meet the low threshold showing of reliability under URE 702. Under this threshold showing, the testimony must only have a basic foundational showing of reliability; it does not require the testimony to be indisputably correct. This threshold showing was met through the providers' testimony that Plaintiffs' conditions were consistent with injuries sustained from an automobile collision.

As the treating physicians' testimony was thus admissible, the district court's grant of summary judgment in Defendants' favor was also reversed.

Majors v. Owens, 2015 UT App. 306 (Utah Court of Appeals, decided December 24, 2015, not yet released for publication in the permanent law reports).

FIVE YEAR SERVICE OF PROCESS PERIOD UPHELD

Utah Supreme Court: In June 2007, Barbara and Eldon St. Jeor filed a negligence and strict products liability suit against numerous defendants, including Kerr Corporation. The lawsuit arose from Eldon's asbestos exposure. Kerr was served and filed its answer in August 2007. Eldon passed away in November 2007, and Barbara filed a Notice of Suggestion of Death the next month advising the parties of his passing. In May 2008, the parties stipulated to Kerr's dismissal without

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prejudice, and the court dismissed Kerr.

Five days later, Barbara filed a second complaint for wrongful death related to Eldon's asbestos exposure. This second complaint named several defendants, including Kerr. Within 120 days of filing the complaint, Plaintiff served several of the defendants, but not Kerr. Plaintiff later filed several amended filings with the court, each listing Kerr as a defendant. She then served Kerr with the Fifth Amended Complaint in February 2013, nearly five years after the court dismissed Kerr without prejudice.

Kerr moved to be dismissed, asserting that Plaintiff's claims were barred by the statute of limitations, laches, and was also untimely served. The district court denied the motion to dismiss, and Kerr appealed.

In its appeal, Kerr noted that Utah Rule of Civil Procedure 4(b) provides: "where one defendant in a case is served, other defendants may be served at any time prior to trial." The Utah Supreme Court stated: "This statement of the rule begins and ends our analysis of the present matter." The Court noted that Rule 4(b) was complied with in that circumstance. Kerr argued that "principles of fairness" require the Court to introduce limitations in the Rule. However, the Court declined to do so, noting that Rule 4(b) was clear and unambiguous.

St. Jeor v. Kerr Corp., 2015 UT 49, 353 P.3d 137 (Utah Supreme Court, decided May 22, 2015).

DEFENSE VERDICT IN MOTORCYCLE ACCIDENT CASE

U.S. Dist. Ct., D. Utah: Plaintiff Jonathan Dickson was involved in a motor vehicle accident with Defendant Tim Gleason, which occurred when Mr. Gleason reportedly changed lanes and collided with Plaintiff's motorcycle. Plaintiff reportedly suffered a shoulder injury that required surgery.

Plaintiff sued Defendant alleging several failures, including that Defendant negligently drove inattentively, failed to maintain a proper lookout, failed to exercise due care and caution in the operation and maintenance of his vehicle, violated state traffic laws, and failed to follow and obey traffic controls. Defendant admitted a collision occurred but denied liability. Defendant contended that he was moving into the right curb lane into a parking spot at the time of the collision. He asserted, among other things, that Plaintiff failed to keep a proper lookout and improperly passed on the right. He further claimed that the curb lane was blocked and not suitable for travel because of vehicles parked along the roadway. Upon jury trial, a defense verdict was rendered.

Dickson v. Gleason, Case No. 2:12CV01187.

Wyoming

COVERAGE FOR TRUCKING ACCIDENT HELD TO EXIST UNDER POLICY'S OMNIBUS CLAUSE

Wyoming Supreme Court: Keizer Trailer Sales, Inc. ("Keizer") was insured by Plaintiff Continental Western Insurance Company ("CWIC"). Keizer sold three trailers to Defendant James Black. Mr. Black took immediate possession of the trailers, but the installment purchase agreement pursuant to which he bought the trailers specified that Keizer would remain the owner of the trailers until the purchase price was paid in full. Mr. Black was subsequently in an accident with one of the trailers while traveling on I-80 in Wyoming. The accident resulted in multiple injuries and one fatality. Following the accident, wrongful death and personal injury actions were filed against him and his business. CWIS was notified of potential claims against the commercial and umbrella polices it issued to Keizer on the trailer involved in the accident.

CWIC thereafter filed a complaint for declaratory judgment, seeking a declaration that the policies issued to Keizer did not provide coverage for the claims arising from Mr. Black's accident. The district court ruled against CWIC and found that Mr. Black was insured under the policies' omnibus clauses because he was driving a vehicle owned by Keizer with Keizer's permission. An omnibus clause "is a provision in an insurance policy that extends liability coverage to persons who use the named insured's vehicle with his or her permission."

On appeal, the Wyoming Supreme Court found that the transaction between Keizer and Mr. Black was neither a completed sale nor a conditional sale. Therefore, Keizer retained ownership of the trailers and Mr. Black's use of the trailers was with Keizer's permission. Coverage was thus available under the omnibus clauses of CWIS's policies, and the district court's ruling was affirmed.

Cont'l Western Ins. Co. v. Black, 2015 WY 145, 361 P.3d 841 (Wyoming Supreme Court, decided Nov. 16, 2015).

DEFENSE VERDICT IN GROSS NEGLIGENCE CASE STEMMING FROM HIKING ACCIDENT

U.S. Dist. Ct., D. Wyo.: Thomas Plotkin enrolled in National Outdoor Leadership School ("NOLS") and went on a backpacking trip to India with a group of hikers. Mr. Plotkin slipped on a wet rock while carrying a heavy pack and fell down a 300-foot ravine into a raging river. His body was never found. His mother, Plaintiff Elizabeth Brenner, contended that her son was among a group of hikers who were walking far ahead of their NOLS program leaders in rainy, dark conditions when the accident occurred.

Plaintiff brought an action against Defendant NOLS, claiming that Defendant's gross negligence led to her son's death. Plaintiff alleged that the Indian government conducted an independent investigation of the accident and concluded that NOLS group leaders should have alerted police and villagers immediately to search for Mr. Plotkin. The report also concluded that it appeared improper for the group to be hiking through rough terrain during the evening under a light drizzle. Defendant contended

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that it was not liable because Mr. Plotkin had signed an agreement acknowledging that their NOLS program involved inherently dangerous activities, and released NOLS from liability.

The judge found that the facts surrounding Mr. Plotkin's death did not support claims for gross negligence or willful or wanton misconduct. He thus rendered a verdict in favor of Defendant.

Elizabeth Brenner, as Trustee for the Heirs and Next-of-Kin of Thomas Levi Plotkin v. National Outdoor Leadership School, Case No. 1:14-cv-00130-ABJ (United States District Court, D. Wyoming, decided October 9, 2015).

Arizona

EXPERT MEDICAL TESTIMONY REQUIRED TO PROVE CAUSATION OF ALLEGED INJURY IN GYM ACCIDENT CASE

Arizona Court of Appeals, Div. 1: Plaintiff Todd Clemens was working out at Defendant DMB Sports Club's gym when he was suddenly forced back into the machine. A gym trainer passed by and asked how he was doing. Clemens told the trainer what happened, and the trainer suggested he get an ice treatment at the spa. Clemens went to the spa area and asked for an ice treatment. In response, the receptionist asked Clemens if he would like to see the chiropractor, Dr. Koop. Clemens did so. Dr. Koop provided chiropractic treatment to Clemons and sent him home to rest.

Four days later, Clemens went to a hospital emergency department. At the hospital, testing showed Clemens had a brain hemorrhage. Clemens filed suit against Dr. Koop and DMB for his injuries, including an alleged traumatic brain injury. He claimed that Dr. Koop and DMB failed to recognize the injuries, and Dr. Koop exacerbated them by failing to refer him for appropriate medical treatment.

During the lawsuit, Clemens disclosed twenty-three expert witnesses in support of his claims, but none of them were causation experts. At deposition, Clemens' standard of care expert, Mark Sutton, D.C. testified that Dr. Koop failed to meet the standard of care. This failure "likely resulted in physical harm," which Dr. Sutton described as "the subsequent injuries that Mr. Clemens apparently suffered as a result of the head trauma." Dr. Sutton then admitted both that Clemens' attorney told him Clemens hit his head causing a brain hemorrhage, and that he had not reviewed any medical records except for those generated by Dr. Koop. Dr. Sutton ultimately testified he did not know what happened to Clemens and could not give an opinion whether "physical harm was caused" to Clemens.

Defendants moved for summary judgment on the basis that there was no evidence as to the gym accident causing any injuries. The Court granted the motions for summary judgment, finding that there was no medical opinion to support the theory that Plaintiff's alleged head injury was caused by the incident or that delay of treatment increased the risk of harm.

The Court of Appeals affirmed the lower court's ruling. The Court agreed with Plaintiff's argument that a lay person can understand that a delay in treatment for a brain hemorrhage could cause increased risk for injury. However, the Court found that, in this case, it was not readily apparent to a lay person that any act or omission by Dr. Koop caused Clemens' alleged injuries. "Expert medical testimony is required to prove this causal connection."

Clemens v. DMB Sports Clubs Ltd. P'ship, No. 1 CA-CV 14-0645, (Arizona Court of Appeals, Div. 1, decided December 8, 2015, not yet released for publication in the permanent law reports).

SUMMARY JUDGMENT AND AWARD OF FEES UPHELD AGAINST INSURED-PLAINTIFF IN BAD FAITH CASE

Arizona Court of Appeals, Div. 1: Plaintiff James Indihar was in a covered motor vehicle collision. He submitted a claim to his insurer, State Farm Mutual Auto. Ins. Co. ("State Farm"). Indihar's 2008 Ford Mustang was deemed a total loss by both State Farm and a body shop of his choice. At the time of the accident, Indihar was making payments to Ford Motor Company ("FMC"). FMC had a lien on the vehicle.

State Farm valued the total loss of the Mustang at an actual cash value ("ACV") of $30,037.70 with a proposed payout of $28,917.34 after accounting for tax, title, deductible, and salvage value. State Farm provided Indihar with a general explanation of the appraisal process and advised him that State Farm was ready to tender $28,917.34 in advance of any appraisal if Indihar did not agree to their proposed ACV. He did not ask for an appraisal.

Indihar told State Farm that it could pay off the FMC lien and send him the balance, or it could send him the payout and he would pay off FMC. State Farm advised Indihar that it could not proceed with the payout until either Indihar got a salvage title for the Mustang or he gave State Farm possession of the Mustang. Indihar then filed suit against State Farm seeking a declaratory judgment and alleging State Farm's prerequisites constituted a breach of the duty of good faith and fair dealing, and a breach of contract. No specifics were given in the complaint for the contract claim.

Several months later, State Farm paid off FMC and provided Indihar with the balance of $9,342.30. Indihar kept the vehicle and sold the Mustang to a scrap dealer for $60.90.

State Farm filed a motion for summary judgment, which the trial court granted. Plaintiff filed an amended complaint to provide additional support for his breach of contract claim. However, the district court also dismissed the amended complaint, and instead granted State Farm $23,632.25 in costs and fees.

On appeal, State Farm argued that it was complying with Arizona statutes that require an insured to obtain a salvage title for a vehicle which the

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insured elects to keep in a total loss claim. State Farm argued that it could not be held liable for breach of contract or acting in bad faith for simply making requests which were mandated by Arizona law. The Arizona Court of Appeals agreed and found no bad faith or breach of contract on the part of State Farm. Further, the Court affirmed the grant of attorney fees to State Farm, on the basis that it was the successful party.

Arizona Court of Appeals, Div. 1: Indihar v. State Farm Mut. Auto. Ins. Co., No. 1 CA-CV 14-0621, (Arizona Court of Appeals, Div. 1, decided December 15, 2015, not yet released for publication in the permanent law reports).

Texas

ARBITRATION AGREEMENT ENFORCED AGAINST COUNTY FOR CONSTRUCTION DEFECT CLAIMS

Texas Court of Appeals: In this case, Defendants had contracted to construct three buildings for Willacy County. For each building, Defendants had contracted with different entities of the county government. Several years after completion, the County brought suit against Defendants for numerous alleged defects in the construction material and workmanship used on the buildings. Defendants filed a motion to enforce arbitration agreements in the contracts. The trial court denied the motion on several bases, including: that the County was not a signatory to the agreements and as such, had not consented to arbitration; Defendants did not prove an arbitration agreement; and the agreements were unconscionable when made.

On appeal, the Texas Court of Appeals noted that in general, federal and state policies strongly favor arbitration. For a court to compel arbitration, the moving party must establish the existence of a valid agreement to arbitrate, and that the claims fall within the scope of that agreement. The County admitted that all the contracts had arbitration clauses and the Court found that there was abundant evidence of a valid agreement. The Court noted that although only parties to an arbitration agreement can normally be compelled to arbitrate, it explained that being a third-party beneficiary may bind non-signatories to arbitration agreements.

The Court held that even though the County was not a signatory to any of the contracts, it was named as a third-party beneficiary. Moreover, the contracts included a provision that stated the County was bound by the dispute resolution procedures of the contracts. In addition, all parties to the contracts knew that any benefit given to them would ultimately be bestowed upon the County, as the governmental entities were created for the direct benefit of the County. The Court found that this indicated the clear intention of the parties to secure a benefit for the County as a third-party beneficiary. The Court also held that the claims fell within the scope of the arbitration agreements because the language of the contracts was broad.

Lastly, the Court found that the County did not substantiate its claims that the contracts were unconscionable. The County made no attempt to prove that the fees were too high, what the cost differential would be between arbitration and litigation, or the reasons why arbitration would be burdensome on the County. The Court thus reversed the trial court's order refusing to compel arbitration.

Hale-Mills Constr. Ltd. v. Willacy Cty., No. 13-15-00174-CV (Texas Court of Appeals, Corpus Christi-Edinburg, decided January 14, 2016, not yet released for publication in the permanent law reports).

New Mexico

DUTY TO DEFEND EXISTS UNDER CGL POLICY, AS TO CLAIMS BROUGHT BY HOMEOWNERS FOR ALLEGED CONSTRUCTION DEFECTS

New Mexico Court of Appeals: Third-Party Plaintiff Pulte Homes of New Mexico, Inc. built 107 homes in a subdivision in Albuquerque, New Mexico. Pulte contracted with Western Building Supply ("WBS") to provide the windows for the homes, but a contractor other than WBS installed the windows. Pulte also contracted with WBS to provide and install the homes' sliding glass doors. A group of homeowners in the subdivision sued Pulte, alleging numerous construction defects in their homes, including that Pulte used "substandard and inadequate windows that leak."

Pulte tendered its demand for a defense to ILM - the insurance company that had issued a commercial general liability policy to WBS naming Pulte as an additional insured. ILM denied coverage to Pulte. Pulte then filed a third-party

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complaint against ILM, claiming that ILM improperly refused to indemnify and defend Pulte under the insurance policies ILM had issued to WBS.

Plaintiffs subsequently amended their complaint to add additional plaintiffs and further allegations about the windows. Pulte then tendered its second demand for a defense to ILM. ILM continued to deny that it had any duty to defend Pulte in the lawsuit. ILM moved for summary judgment, asking the district court to rule that it had no duty to defend Pulte. The district court granted summary judgment in favor of ILM, concluding that Pulte "is not afforded coverage under the ILM policy with WBS regarding the window and sliding doors provided to Pulte by WBS."

Pulte appealed, asserting that its defense tenders triggered ILM's duty to defend. Specifically, Pulte first contended that ILM had a duty to defend Pulte because at the time it tendered its defenses to ILM, "potential claims existed in the underlying action that the windows caused damage to other property in the underlying plaintiffs' homes or caused the underlying plaintiffs' loss of use of their property." Second, Pulte contended that ILM had a duty to defend Pulte because Pulte stood in WBS's shoes for coverage due to WBS's agreement to defend and indemnify Pulte pursuant to the insured contract.

On Appeal, the New Mexico Court of Appeals stated: "In New Mexico, an insurer's duty to defend is triggered when it has received actual notice of a claim against the insured, unless the insured affirmatively declines a defense." A duty to defend is determined from "the allegations on the face of the complaint or from the known but unpleaded factual basis of the claim that brings it arguably within the scope of coverage."

The New Mexico Court of Appeals then reversed the district court's grant of summary judgment in favor of ILM and held that claims in the second tender were sufficient to allege a claim covered by the policy. Thus, ILM's duty to defend Pulte was triggered as of the date of that tender. The duty to defend was not triggered by the first tender due to the scope of Plaintiffs' claims at that time falling within an exception to coverage. That exception was not applicable to the second tender because the scope of Plaintiffs' claims had expanded beyond the scope of the exception.

Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co., Docket No. 33,283 (New Mexico Court of Appeals, slip opinion, decided December 17, 2015, not yet released for publication in the permanent law reports).