Winter 2017

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • Colorado • New Mexico • Texas

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- The Utah Supreme Court held that a plaintiff was permitted to sue herself for wrongful death, since she was suing herself in the capacities of being the decedent's personal representative and heir.

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- The Colorado Supreme Court interpreted the issue of set-off from a jury award, for the amount of medical payments paid under a policy. The Court ruled that the UM/UIM statute barred the set-off.

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- In a construction breach of contract case brought by a plaintiff that was an expired corporation, the Wyoming Supreme Court held that the estate of the corporation's sole owner was permitted to be substituted as the party in interest.

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- The New Mexico Supreme Court held that the statute of limitation applicable to a wrongful death cause of action can be equitably tolled based upon a defendant's fraudulent concealment of a cause of action.

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- The Texas Supreme Court reversed a judgment entered upon a jury verdict against a premises owner, finding that there was no evidence in the record to support a finding of negligent entrustment and premises liability.

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UTAH

DEWHIRST & DOLVEN OBTAINS DEFENSE VERDICT IN A TRIAL DE NOVO MOTOR VEHICLE ACCIDENT CASE

Utah County: Dewhirst & Dolven attorney Kyle Shoop obtained a defense verdict upon a trial de novo to the bench. The matter involved alleged property damage to a passenger vehicle stemming from a motor vehicle accident in an intersection. The accident occurred when Ann Weight stopped her vehicle at a green light at an intersection in Provo, Utah. Prior to stopping at the green light, Ms. Weight had changed lanes just before the intersection. Behind Ms. Weight's vehicle was a pick-up truck that was able to come to a stop. Ms. Weight's insurer sued Defendants Roger Groom and Universal Towing, due to Mr. Groom's tow truck not being able to stop to avoid impacting the pick-up truck. The impact from Mr. Groom's tow truck sent the pick-up truck into the rear of Ms. Weight's car.

After the accident, Ms. Weight provided a written statement to the police and a recorded statement to an adjuster wherein she stated that she stopped at a red light. She stated that she was stopped in a turn lane, and that her car was rear ended when the light turned green. However, Mr. Groom's tow truck was affixed with a dashboard video-camera that recorded the events. At the trial de novo, the video was shown to the court. The video showed that Ms. Weight changed lanes just prior to stopping at the intersection's green light. Ms. Weight had stopped in a thru lane and was not in a turn lane, as she had believed.

Despite the video, Plaintiff's attorney argued that Defendants were at fault due to allegedly following too closely and driving too fast. The attorney also argued that Defendants were at fault because the pick-up truck was able to stop in time to avoid a collision. However, the Court was not convinced of Plaintiff's arguments. Rather, the Court found that there was nothing that Mr. Groom could have done to avoid the impact, as the evidence showed that he braked in an effort to avoid the sudden condition caused by Ms. Weight. As such, the Court found that Ms. Weight's negligence was the sole cause of the accidents.

Allstate Fire and Casualty Ins. Co. a/s/o Ann Weight v. Groom et al., Case No. 168400003, Utah County, Utah.

NEW UTAH OFFICE LOCATION

IN THIS ISSUE

Utah Supreme Court Affirms Decision Allowing a Decedent's Heir to Sue Herself in a Wrongful Death Action

Utah Supreme Court: This decision from the Utah Supreme Court affirms a decision that was reported in the Spring 2015 edition of the Dewhirst & Dolven Legal Update. As was reported in that article, Barbara Bagley had appealed the district court's ruling that she is barred from maintaining two causes of action arising out of an automobile accident that claimed her husband's life. Bagley found herself on both sides of the dispute because not only was she her husband's heir and estate personal representative (plaintiff), but she was also the driver whose negligence caused the accident (defendant).

Before the Utah Court of Appeals was the issue of "whether the plain language of the wrongful death and survival action statutes bars a tortfeasor from bringing an action against herself for damages if she asserts those causes of action in her capacity as an heir or as the personal representative of the decedent's estate." The Court of Appeals held that the wrongful death and survival action statutes do not bar an heir or personal representative from pursuing those causes of action, even when the heir or personal representative is the defendant-tortfeasor.

On appeal, the Utah Supreme Court considered the same issue that was before the Court of Appeals. In affirming the Court of Appeals' decision, the Supreme Court found that the plain language of Utah's wrongful death and survival statutes permits a lawsuit as asserted by Ms. Bagley against herself. In addition, the Court found that such an interpretation of the statutes did not lead to absurd results. This is because such an interpretation still allows a person acting as an heir or personal representative to sue herself for the benefit of other heirs or creditors of the estate.

Bagley ex rel. Vom Baur v. Bagley, 2016 UT 48 (Utah Supreme Court, filed October 27, 2016, not yet released for publication in the permanent law reports).

Utah Court of Appeals Emphasizes That Allocation of Fault Is for the Province of the Jury

Utah Court of Appeals: Plaintiff Kachina Choate slipped and fell on a sidewalk outside of a convenience store owned by Defendant ARS-Fresno LLC. The incident occurred when Choate stepped up onto a concrete walkway at the front of the store to avoid a car. Choate testified that although the sidewalk appeared wet, she did not see any ice. She nevertheless slipped on what she called a patch of black ice and fell. When Choate discussed the incident with a store clerk, that clerk identified having previously observed a water drip from the building's overhang in that location.

In Choate's negligence lawsuit against ARS, a jury found that ARS and Choate were each the proximate cause of Choate's fall. However, the jury apportioned Choate with 60% of the fault, and apportioned ARS with 40% fault. As Choate was more at fault than ARS, Choate's recovery was barred under Utah Code § 78B-5-818(2). The jury thus did not reach the question of damages. Choate filed a motion for a new trial. The Court denied the motion, finding that the evidence was sufficient for a jury to have decided in favor of either party. Choate then appealed the denial of that motion.

On appeal, Choate argued that her motion for a new trial should have been granted because the "jury lacked sufficient evidence to determine that Choate was 60% at fault where ARS knew of the defect and failed to make its premise safe." However, on appeal, Choate conceded that the evidence was sufficient to support the jury's finding that she was at fault. In effect, Choate argued that while the jury could have found her negligent, it was wrong in finding her as negligent as it did. The Utah Court of Appeals noted that allocation of fault is "quintessentially a jury question." It further stated: "This allocation of responsibility is a determination for the jury, one that an appellate court is loath to disturb absent compelling analysis." The jury's verdict was therefore affirmed.

Choate v. ARS-Fresno LLC, 2016 UT App 249 (Utah Court of Appeal filed December 30, 2016, not yet released for publication in the permanent law reports).

Dismissal of a Medical Malpractice Case by a Pro Se Plaintiff Is Affirmed

Utah Court of Appeals: Plaintiff Zachary Rusk filed a complaint against Defendant University of Utah Healthcare. His complaint's factual statements included statements regarding what one must do to "win a malpractice case." The complaint did not allege any specific facts regarding how the doctor or University of Utah Healthcare may have committed malpractice. Similarly, the complaint's request for relief contained only conclusory statements about the doctor's "duty to act properly" and the doctor's breach of that duty "through negligence by making a very big mistake and not doing what she agreed to do."

In a memorandum accompanying the complaint, Plaintiff referred to a tortious interference claim, but he did not allege material facts to support that claim. Instead, he made statements concerning how the doctor required him to attend an appointment and take medication prior to having Family and Medical Leave Act forms completed. He stated that his former employer, FBS, terminated his employment four days before his scheduled appointment with the doctor. Finally, Plaintiff requested that the University pay him damages to the extent that he is unable to obtain relief in another lawsuit he filed against FBS.

When the University filed a motion to dismiss the complaint for failure to state a claim upon relief, Plaintiff did not file any opposition to the motion. Instead, he submitted the motion for decision. When that motion was granted, Plaintiff appealed.

On appeal, the Utah Court of Appeals filed a sua sponte motion to dismiss the appeal. In opposing that motion, Plaintiff argued that he was denied a right to have counsel appointed to assist him with pursing his medical malpractice and tort claims against the University. However, in denying that request for appointed counsel, the Court noted that he was not entitled to such counsel because he was not a criminal defendant. The Court also affirmed the

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district court's dismissal of Plaintiff's complaint, on the grounds that it only contained conclusory statements and therefore failed to state a claim upon which relief can be granted.

Healthcare Risk Management, 2016 UT App 243 (Utah Court of Appeal, filed December 22, 2016, not yet released for publication in the permanent law reports).

Colorado

COLORADO SUPREME COURT INTERPRETS THE UM/UIM STATUTE PROHIBITING SET-OFF

Colorado Supreme Court: Plaintiff Arnold Calderon sustained injuries in a motor vehicle accident with an uninsured motorist. At the time of the accident, Calderon was insured under policies issued by Defendant American Family Mutual Insurance Company, providing a total of $300,000 in uninsured/underinsured motorist ("UM/UIM") coverage and $5,000 in medical payments ("medpay") coverage. American Family paid the $5,000 medpay policy limits directly to Calderon's medical providers. Calderon also made a claim for UM/UIM benefits, but American Family disputed the extent of his damages. Calderon sued for breach of contract, and the jury returned an award of $68,338.97 in his favor. However, the trial court reduced the jury award by $5,000 to set off the medpay benefits Calderon had already received.

Calderon appealed the order reducing his judgment, and the Colorado Court of Appeals affirmed the reduction. It held that the set off of medpay coverage was not barred by the UM/UIM set off prohibition, which provides: "The amount of UM/UIM coverage available pursuant to this section shall not be reduced by a set off from any other coverage, including but not limited to medpay coverage…." C.R.S. § 10-4-609(1)(c). In allowing reduction of the judgment for the medpay coverage, the Court of Appeals interpreted the statute's language of "the amount of the UM/UIM coverage available" as referring to the "amount available under the policy in the abstract – that is, the UM/UIM coverage limit." Under the Court of Appeals' interpretation, an insurer may reduce the payment due under the insured's UM/UIM coverage by amounts paid pursuant to the insured's medpay coverage, so long as the UM/UIM coverage limit (here, $300,000) is not reduced.

On appeal, the Colorado Supreme Court disagreed. It held that statute's language of "the amount of UM/UIM coverage available pursuant to this section" refers not to the coverage limit but rather to the amount of UM/UIM coverage available on a particular claim (here, $68,338.97). Accordingly, the Supreme Court held that § 609(1)(c) barred the set off of medpay payments from Calderon's UM/UIM claim.

Calderon v. American Family Mutual Insurance Company, 2016 CO 72, 383 P.3d 676 (Colorado Supreme Court, filed November 7, 2016).

EVIDENCE OF TWENTY YEAR-OLD FRAUD CONVICTION RENDERED ADMISSIBLE IN AIRPORT TORT CASE

Colorado Court of Appeals: Plaintiff Trina McGill filed a negligence action against the Denver International Airport ("DIA") based on her allegations that a side-view mirror of a DIA shuttle bus struck her in the head. This case concerns Plaintiff McGill appealing the trial court's admission of evidence of her character for truthfulness.

Before trial, Plaintiff moved to exclude evidence of her conviction of check fraud and the underlying conduct that occurred approximately 20 years earlier. The trial court denied her motion and ruled that the conduct was admissible under Colorado Rule of Evidence ("CRE") 608(b), as evidence concerning the character for truthfulness or untruthfulness of a witness.

At trial, anticipating that the evidence would be elicited by DIA's counsel on cross-examination, Plaintiff's counsel questioned her about the conduct underlying her conviction. DIA then also questioned her about it on cross-examination. The jury returned a verdict in favor of DIA.

On appeal, Plaintiff argues that the trial court erred in admitting the evidence of her prior check fraud. DIA argued that she invited the error by first introducing the evidence, thereby waiving objection to the evidence. However, the Colorado Supreme Court found that the trial strategy of Plaintiff first discussing the evidence was not acquiescence with the trial court's ruling to admit the evidence. Nevertheless, the Court of Appeals ruled that there was no error in admitting evidence of the check fraud conviction under CRE 608(b), as acts involving fraud are probative of a witness's character for truthfulness. Though the check fraud conviction occurred several years prior, it still was probative of Plaintiff's character for truthfulness. Facts that may lessen the degree to which the conduct is probative go to the weight of the evidence and not the admissibility of it.

McGill v. DIA Airport Parking, LLC, 216 COA 165 (Colorado Court of Appeals, filed November 17, 2016, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN CASE INVOLVING FALL FROM A BROKEN TOILET SEAT AT WENDY'S

Denver County: Plaintiff Nadine Patik claimed that she injured her knee when she fell from a broken toilet seat in a bathroom at a Wendy's in Littleton, Colorado. She alleged that Defendants Wendy's of Denver, LLC and Wendy's International, LLC knew or should have known about the dangerous condition on their premises. Defendants stated that there was not a defective toilet seat, and they disputed Plaintiff's alleged injuries and damages.

Plaintiff asserted that her knee injuries included a patella fracture. She had two surgeries: a knee cap removal and a total knee replacement. Plaintiff also

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alleged that she had an osteoarthritic condition that was asymptomatic before she fell. Her medical expenses were about $268,000 and she claimed $160,000 for loss of home services and wage loss related to the incident. Her final demand before trial was reportedly $721,000. Defendants' final offer prior to trial was reportedly $20,000. Upon a jury trial, the jury rendered a verdict for Defendants and against Plaintiff.

Palik v. Wendy's of Denver, LLC et al., Case No. 15CV33599.

Wyoming

WYOMING SUPREME COURT PERMITS SUBSTITUTION OF PARTY IN CONSTRUCTION CASE INVOLVING EXPIRED CORPORATION

Wyoming Supreme Court: Prior to his death, Timothy Trefren owned Trefren Construction and operated it as a sole proprietorship. It was managed by his son. Defendant Cocca Development owned real property in Wyoming, on which it desired to build a Shopko retail establishment. Cocca entered into a contract with Defendant V&R Construction whereby V&R was to be the general contractor in constructing the Shopko building. V&R entered into a contract with Trefren Construction, whereby it agreed to pay Trefren Construction a total of $603,850 to excavate and build the approximately 36,000 foot building.

Trefren Construction billed V&R for amounts owed during construction of the building, which at that time totaled approximately $115,560.53. When Trefren did not receive payment, it sued V&R and Cocca. In response to the lawsuit, Defendants V&R and Cocca filed a motion to dismiss. It argued that, contrary to statements in the complaint, Trefren Construction was not a Wyoming corporation, as it became inactive in 2003 in Wyoming. Defendants thus argued that any contracts with Trefren Construction were not valid.

In response to Defendants' motion to dismiss, Plaintiff Trefren Construction filed a motion to substitute the Estate of Timothy Trefren as the plaintiff. This was due to Mr. Trefren having passed away after it filed the lawsuit. Plaintiff argued that Mr. Trefren's estate was the real party in interest because the business was owned by him. Defendants opposed the motion for substitution, arguing that no party to the lawsuit had passed away. The district court agreed with Defendants and dismissed the lawsuit. Plaintiff appealed.

On appeal, the Wyoming Supreme Court ruled that the district court erred in dismissing the complaint. It held that the district court should have allowed the Estate to be substituted as the plaintiff. The Supreme Court found that the alleged prejudice to Defendants which would be caused by substitution of the parties was not sufficient to deny the motion to substitute. This is because much of the case remains the same even with the estate as the plaintiff. It also held that the district court erred in determining that the contracts were voidable, as Defendants had recognized that the case was being asserted by a sole proprietorship.

Trefren Construction Co. v. V&R Construction, LLC et al., 2016 WY 121 (Wyoming Supreme Court, decided December 20, 2016, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN ASBESTOS WRONGFUL DEATH CASE

U.S. Dist. Ct., D. Wyoming: A wrongful death action was brought for the death of 76-year-old retired maintenance mechanic William Robinson. Mr. Robinson died from malignant mesothelioma allegedly caused by his occupational exposure to asbestos-containing products designed, marketed, manufactured, distributed, supplied, and sold by Defendant Flowserve and its successor Durco Pumps. The asbestos-containing products had been used in the soda ash plant where Mr. Robinson worked for thirty years.

Mr. Robinson's estate claimed that Defendant was negligent for including asbestos in its products when it knew or should have known that the asbestos would have a toxic and poisonous effect on the health of persons exposed to it. The estate also claimed that Defendant was negligent for failing to provide adequate warnings or instructions for persons exposed to it, and for including asbestos in its products when adequate substitutes were available. In addition, the state contended that Defendant was liable under a strict product liability theory for placing its products on the market in a dangerous condition, and for failing to provide warnings of the asbestos.

Defendant denied that the replacement flange valves it sold to Mr. Robinson's employer contained asbestos. Defendant also claimed that Mr. Robinson's mesothelioma was caused by his nearly 30 year history of smoking cigarettes. Upon a jury trial, the jury found Defendant not negligent and that the parts it manufactured were not defective.

Robinson v. Flowserve et al., 2015 WL 9906817 (United States District Court, District of Wyoming).

New Mexico

NEW MEXICO'S STATUTE OF LIMITATION FOR A WRONGFUL DEATH ACTION MAY BE TOLLED DUE TO A DEFENDANT'S FRAUDULENT CONCEALMENT

New Mexico Supreme Court: The issue in this case is whether the doctrine of fraudulent concealment applies to toll actions under New Mexico's Wrongful Death Act ("WDA"), N.M.S.A. § 41-2-1.

Alice Brice died in an automobile accident on September 13, 2006 when her vehicle suddenly accelerated into a highway intersection, collided with a tractor-trailer, and burst into flames. The Estate of Alice Brice (Plaintiff) filed a wrongful death action on August 31, 2010, asserting products liability and various other claims against the car manufacturer, the dealer, and others (Defendants).

Because the lawsuit was filed over three years after the date of Ms. Brice's death, Defendants moved for entry of judgment in their favor. New Mexico has a three year statute of limitations under the WDA for wrongful death actions. In opposing the motion, Plaintiff argued that the three year limitations period was tolled due to Defendants' fraudulent concealment. Plaintiff argued that Defendants fraudulently concealed the vehicle's sudden acceleration problem until February 2010 when the problem

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drew public attention and led to congressional hearings. Plaintiff contended that it had no way to discover its wrongful death cause of action prior to February 2010, and that it promptly filed the lawsuit once it discovered the cause of action.

After the district court granted Defendants' motion, Plaintiff appealed, arguing that the WDA should be equitably tolled due to Defendants' fraudulent concealment. The Wyoming Supreme Court held: "the doctrine of fraudulent concealment may apply to toll the statutory limitations period for a wrongful death claim if a defendant has fraudulently concealed a cause of action, thereby preventing that defendant from claiming the statute of limitations as a defense until the plaintiff learned or, through reasonable diligence, could have learned of the cause of action." Thus, the Supreme Court held that the WDA could be equitably tolled under the doctrine of fraudulent concealment by a defendant.

Estate of Brice v. Toyota Motor Corp. et al., 2016-NMSC-18, 373 P.3d 977 (Wyoming Supreme Court, filed May 19, 2016).

GOVERNMENTAL IMMUNITY HELD NOT TO BE WAIVED IN VEHICLE-PEDESTRIAN ACCIDENT

New Mexico Court of Appeals: This case concerned Plaintiff Sherry Milliron appealing the district court's dismissal of her negligence claim against Defendants San Juan County, San Juan County Sherriff's Department, and San Juan County Sherriff's Department Deputy Richard Stevens. The district court ruled that, under any legal theory, the facts alleged by Plaintiff were insufficient to establish a waiver of the governmental immunity granted under New Mexico's Tort Claims Act ("TCA"), N.M.S.A. § 41-4-1.

Plaintiff was travelling on Highway 550 when her vehicle struck a pedestrian. Plaintiff then sued Defendants for negligence, seeking to recover for personal injuries and property damage. The allegation of negligence was predicated upon Deputy Stevens' conduct with regard to the pedestrian that Plaintiff hit, Jasper Lopez. Deputy Stevens had decided to leave Lopez unsupervised near Highway 550.

Plaintiff's complaint alleged the following facts: (1) a motorist called 911 to report a potentially intoxicated pedestrian "wandering on" Highway 550; (2) the caller expressed concern that the pedestrian would be struck by passing traffic; (3) Deputy Stevens responded and contacted the pedestrian (Lopez); (4) Deputy Stevens took Lopez into his "custody and control" for the purpose of transporting Lopez home; (5) Deputy Stevens received an emergency call related to a traffic accident; (6) Deputy Stevens told Lopez to exit the vehicle near a gas station along Highway 550; (7) Lopez did not enter the gas station, but instead reentered Highway 550, whereupon he was struck by Plaintiff's vehicle; and (8) Plaintiff suffered damages as a result of the collision.

Despite these facts being alleged, Plaintiff's complaint did not state that Deputy Stevens had placed Lopez under custodial arrest for any crime, or that Lopez had been transported under the authority of

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So as to better serve our clients in the mountain region, Dewhirst & Dolven is pleased to announce a new office address in Utah. The firm's Salt Lake City, Utah office has recently changed locations to now be at:

4179 Riverboat Road, Suite 206 • Salt Lake City, Utah 84123.

The office's phone number (801-274-2717) and fax number (801-274-0170) remain unchanged.

Dewhirst & Dolven is pleased to announce that Matthew Jones and Robert Harper have joined the firm as associates.

Matthew Jones joins the firm's Salt Lake City, Utah office. He concentrates his practice on defense litigation of personal injury, motor vehicle, and construction defect cases. In addition, he had litigated matters involving workers' compensation, medical malpractice, products liability, commercial litigation, bankruptcy, employment law, and civil rights violations. Matthew received his Juris Doctor and Masters in Science degrees from the University of New Mexico, and received a Bachelor of Arts degree from Brigham Young University. He is licensed to practice law in Utah and New Mexico state and federal courts.

Robert Harper joins the firm's Denver, Colorado office. His practice is focused on the defense of cases involving toxic torts, environmental law, product liability, oil and gas as well as the Clean Water Act. He also maintains a practice involving premises liability, automobile accidents, insurance coverage and commercial vehicle accidents. Robert received his Juris Doctor degree from Vermont Law School. He also received a Masters degree in Environmental Law, with a minor in Energy and Gas Law. Robert obtained a Bachelor of Arts degree from Albright College. He is admitted to practice law in Colorado state and federal courts.

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, New Mexico and Texas with superior legal representation while remaining sensitive to the economic interests of each case.

About Our Firm

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New Mexico's Detoxification Reform Act. The complaint also did not state that Lopez intentionally collided with Plaintiff's vehicle. If those facts had been pled, then there may have been sufficient facts indicating a waiver of Defendants' immunity under the TCA. However, the New Mexico Court of Appeals held the alleged facts were insufficient to establish a waiver of the governmental immunity granted under the TCA. Plaintiff's alleged facts may be sufficient to support a claim of negligence against Defendants, but immunity was not first waived. Thus, it held that Defendants are immune from suit, thereby affirming the dismissal of Plaintiff's claims. *2016 WL 3568055*

Milliron v. County of San Juan et al., 2016-NMCA-096, 384 P.3d 1089 (New Mexico Court of Appeals, filed August 4, 2016).

Texas

TEXAS SUPREME COURT REVERSES JUDGMENT AGAINST PREMISES OWNER IN ACCIDENT INVOLVING SUBCONTRACTOR

Texas Supreme Court: Plaintiff Carlos Rosales was a subcontractor who brought an action for personal injuries he suffered while working with a contractor (Francisco Reyes) on the premises owned by 4Front Engineered Solutions, Inc. Reyes was a licensed electrician who contracted with 4Front to repair a lighted sign that hung over the exterior wall about twenty feet above the warehouse's entrance. Reyes subcontracted with Plaintiff Rosales, another electrician, to assist him.

Reyes and Rosales worked without incident for about four hours the first day, and returned two days later to complete the job. On both days, Reyes operated a forklift on a sidewalk under the sign, while Rosales stood in a "man basket" attached to the forklift to reach the sign. On the second day, Reyes drove the lift off the sidewalk's edge, causing the lift to topple over. Rosales fell and suffered severe injuries. Rosales sued Reyes and 4Front for negligence, negligence per se, gross negligence, and premises liability.

A jury found that 4Front negligently entrusted the forklift to Reyes and negligently failed to warn or make safe a dangerous condition on its premises. The jury also found that Reyes and Rosales were negligent. The jury assigned 75% of fault to 4Front, 15% to Reyes, and 10% to Rosales. It awarded $8 million in actual damages, and another $5 million as exemplary damages.

On appeal, the Texas Supreme Court found that, even if 4Front owed a negligent entrustment duty to Rosales, no evidence supported the jury's finding of negligent entrustment or premises liability. As to the negligent entrustment claim, Plaintiff had to establish that Reyes was an incompetent or reckless forklift operator. In finding that this element of the claim was not satisfied, the Court distinguished between an "incompetent or reckless" operator and one who is merely "negligent," such as Reyes. There was no evidence of Reyes having ever previously caused any forklift accidents, or that he had ever previously negligently operated one. Moreover, a lack of formal training and certification for forklift operation did not establish incompetence or recklessness.

As to the jury's finding of premises liability, the claim required Plaintiff to prove that a "condition of the premises posed an unreasonable risk of harm" and that 4Front had "actual knowledge of the danger." These issues focus on the "state of being of the property itself." The Court found that there was no evidence in the record to support a finding of liability based on the "condition of the premises." The only possible premises condition would have been the conditions of the sign and the sidewalk. As there was no evidence that either of those conditions contributed to the accident, the Texas Supreme Court reversed judgment against 4Front.

Rosales v. 4Front Engineered Solutions, Inc., 2016 WL 7437658 (Texas Supreme Court, filed December 23, 2016, not yet released for publication in the permanent law reports).