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DEWHIRST & DOLVEN LLC
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LEGAL UPDATE

Utah • Wyoming • Colorado • New Mexico • Texas

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UTAH

UTAH SUPREME COURT REVERSES PRECEDENT TO REJECT THE "PASSIVE RETAILER" DOCTRINE

Utah Supreme Court: The issue in this case was whether Utah's Liability Reform Act ("LRA") immunizes passive retailers from product liability claims in actions where the manufacturer is a named party.

Plaintiff Melinda Bylsma purchased a reclining chair from Defendant R.C. Willey that had a foot massage attachment. The chair was a present for her husband, Plaintiff Richard Bylsma. Instead of massaging Richard, it crushed his right foot. Plaintiffs asserted claims for strict products liability, breach of warranty, and contract rescission against R.C. Willey. The district court dismissed the tort and warranty claims under the "passive retailer" doctrine. R.C. Willey then stipulated to liability on the rescission claim and tendered payment to Plaintiffs for the purchase price.

The Utah Supreme Court concluded that the LRA does not create immunity for retailers, whether "passive" or not. In doing so, the Court ruled: "[R]etailers – just as distributors, wholesalers, manufacturers, and any others in the chain of distribution – are strictly liable for breaching their duty not to sell a dangerously defective product." The Court found that its conclusion was supported by the LRA, as it interpreted the Legislature's intent in enacting the LRA to "specifically preserve our strict products liability doctrine."

The Court further stated that a retailer may still pursue an indemnification claim against the manufacturer or other entities responsible for the defect in the product. This procedure thus would leave "the ultimate burden of payment to be fought out between the retailers, wholesalers, and manufacturer."

In issuing its ruling in this case, the Utah Supreme Court rejected the passive retailer doctrine and reversed prior precedent that had upheld the doctrine. Accordingly, the Court reversed the district court's dismissal of Plaintiffs' claims for strict liability and breach of warranty.

Bylsma v. R.C. Willey, 2017 UT 85 (Utah Supreme Court, decided December 1, 2017, not yet released for publication in the permanent law reports).

IN THIS ISSUE

UTAH SUPREME COURT INTERPRETS SCOPE OF VEHICLE COVERAGE UNDER THE UNDERINSURED MOTORIST STATUTE

Utah Supreme Court: This case concerned a question certified to the Utah Supreme Court from the federal district court. The question was: whether U.C.A. § 31A-22-305.3 "requires that all vehicles covered under the liability provisions of an automobile insurance policy must also be covered under the underinsured motorist provisions of that policy, and with equal coverage limits." The Utah Supreme Court concluded "that it does, unless a named insured waives the coverage by signing an acknowledgement form meeting certain statutory requirements."

The issue arose when Derek Dircks and Michael Riley were injured in a car accident caused by another driver. Both Dircks and Riley were employees of Mid-State Consultants. They were in Riley's personal vehicle on an assignment for Mid-State at the time of the accident.

Dircks received benefits under Riley's policy, but the amounts received were insufficient to cover his medical bills. Dircks thus sought additional underinsured motorist ("UIM") benefits under Mid-State's commercial insurance policy with Travelers Indemnity Company of America. That policy provided $1 million liability coverage for persons driving in either a Mid-State fleet vehicle or a vehicle owned by a Mid-State employee when used for Mid-State business. The policy also included $1 million UIM coverage, which was sought to be limited to only persons driving a Mid-State fleet vehicle.

Travelers denied the claim on the ground that the policy did not provide UIM coverage for Riley's vehicle. Dircks thus filed suit against Travelers. The federal court then certified the question of whether Utah law requires that all vehicles for which Mid-State had purchased liability coverage be covered to the same extent under Mid-State's UIM coverage. The Utah Supreme Court determined that "any vehicle – whether owned by the policyholder or not – that is covered by a policy's liability insurance is also subject to underinsured motorist coverage under § 305.3 … unless the coverage is waived by a formal acknowledgement."

Dircks v. The Travelers Indemnity Company of America, 2017 UT 73 (Utah Supreme Court, decided October 17, 2017, not yet released for publication in the permanent law reports).

RECOVERY OF ATTORNEYS' FEES DENIED IN DEFENDING DECLARATORY JUDGMENT ACTION

Utah Supreme Court: Robert Oltmanns was named as a defendant in a personal injury case. The case stemmed from an accident that occurred when Oltmanns was towing his brother-in-law on Oltmanns' Aquatrax personal watercraft.

Oltmanns filed a claim and tendered his defense to his insurer, Fire Insurance Exchange ("FIE"), under his homeowners' insurance policy. FIE questioned whether the claim was covered under the policy's exclusion for bodily injury arising from using a jet ski. Rather than deny the claim outright, FIE brought a declaratory judgment action to determine whether the claim was covered under Oltmanns' policy. During the underlying litigation of the personal injury case, FIE asked Oltmanns' attorney to continue to represent him, indicating that it might reimburse him for fees should the accident be deemed a covered occurrence.

As reported in the Fall 2012 edition of Dewhirst & Dolven's Legal Update, the Utah Court of Appeals held that it was covered because the term "jet ski" was ambiguous. FIE then settled with the brother-in-law and paid Oltmanns' attorneys' fees for the defense of that claim. FIE did not pay Oltmanns' costs of defending the declaratory action.

Oltmanns filed a counter-claim seeking recovery of attorneys' fees for defending the declaratory judgment action. In doing so, Oltmanns argued that the action was brought in bad faith. The Court of Appeals had determined that FIE's denial of Oltmanns' claim was "fairly debatable," thus negating Oltmanns' demand for attorneys' fees.

The question before the Utah Supreme Court in this case was whether FIE's denial was fairly debatable. If it was fairly debatable, then FIE's denial was not in bad faith and Oltmanns would thus not be permitted recovery of attorneys' fees. The Utah Supreme Court held that the coverage issue, whether the Aquatrax was a jet ski under the policy, was fairly debatable. This was because the term "jet ski" could have been interpreted as a generic term instead of a specific brand. As such, Oltmanns' request for attorneys' fees in defending the declaration judgment action was denied.

Fire Insurance Exchange v. Oltmanns, 2017 UT 81 (Utah Supreme Court, decided November 21, 2017, not yet released for publication in the permanent law reports).

SUMMARY JUDGMENT AFFIRMED IN FAVOR OF CITY AND ITS CONTRACTOR IN CROSSWALK INJURY CASE

Utah Court of Appeals: After leaving a theater, Plaintiffs Rose Flygare, Marjorie Bell, and a minor child were hit by a truck and injured as they crossed a designated crosswalk in Ogden, Utah. The marked crosswalk was equipped with streetlights, but they had been inoperative for several days prior to the accident.

Plaintiffs sued Ogden City and Black & McDonald, LLC, which was the contractor responsible for maintaining the streetlights. Plaintiffs claimed that the inadequate lighting caused or contributed to the accident. Plaintiffs alleged that the driver of the truck that hit them was unable to see them in the crosswalk due to the inadequate lighting.

Defendants moved for summary judgment, arguing that that they did not have a duty to illuminate the crosswalk. The district court agreed and granted their motion. On appeal, Plaintiffs contended that the district court "erred in concluding that the defendants had no duty to light or maintain [the crosswalk] at its busiest place."

The Utah Court of Appeals ruled that "municipalities, such as Ogden City, have a non-delegable duty to maintain their streets in a reasonably safe condition for travel." It determined that Ogden City would be liable if its contractor violated that non-delegable duty. With regard to a city's duty, the Court further stated that "a city has no

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duty to light an otherwise safe street." It continued: "the duty to provide streetlights [may exist] if such lighting is necessary to warn travelers of defects, obstructions, and unsafe places in its streets." As there was no evidence of any dangerous condition at the crosswalk, the Utah Court of Appeals thus affirmed summary judgment in favor of Ogden City.

As to Black & McDonald, generally, "an independent contractor responsible for municipal light repairs owes no duty of care to the general public." Though exceptions existed to that general rule, the Court found that they did not apply in this case. As such, summary judgment was affirmed in Black & McDonald's favor.

The Estate of Rose Flygare et al. v. Ogden City et al., 405 P.3d 970, 2017 UT App. 189 (Utah Court of Appeals, decided October 13, 2017).

Colorado

COLORADO SUPREME COURT REMANDS VERDICT IN PRODUCTS LIABILITY ACTION DUE TO ERROR IN JURY INSTRUCTION

Colorado Supreme Court: This case concerned a products liability action by Forrest Walker against Ford Motor Company. Walker was in a vehicular accident whereby his vehicle was rear-ended. Upon impact, his vehicle accelerated forward and his car seat yielded rearward. He asserted head and neck injuries from the accident. His claims included suing Ford for the defective design of the seat.

At the end of trial, Ford asked that the jury be instructed to assess the safety of the seat using the "risk-benefit" test. Walker requested the instruction be as to the "consumer-expectation" test. The trial court gave an instruction allowing the jury to apply either test.

The jury instruction stated: "A product is unreasonably dangerous because of a defect in its design if it creates a risk of harm to persons or property that would not ordinarily be expected or is not outweighed by the benefits to be achieved from such design. A product is defective in design, even if it is manufactured and performs exactly as intended, if any aspect of its design makes the product unreasonably dangerous." The Court also provided additional factors for the jury to consider, including "the user's anticipated awareness of dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions."

The jury found in Walker's favor as to his claims, and awarded him nearly $3 million. On appeal, the Colorado Supreme Court determined that the trail court erred by instructing the jury as to the consumer-expectation test. This is because Colorado has long adopted the risk-benefit test in products liability actions. The Court thus remanded the case to the trial court.

Walker v. Ford Motor Company, 406 P.3d 845, 2017 CO 102 (Colorado Supreme Court, decided November 13, 2017).

DISMISSAL OF PERSONAL INJURY ACTION AFFIRMED UNDER THE ROOKER-FELDMAN DOCTRINE

Tenth Circuit Court of Appeals: Plaintiff Kent Phan was injured in a car accident in 2012. He filed an insurance claim for bodily injury with Defendant American Family Insurance Company, but American Family rejected his claim. Phan brought a state-court action against American Family more than three years after the car accident. The state court then dismissed Phan's action with prejudice because Phan failed to bring his claim within Colorado's three-year statute of limitations. Both the Colorado Court of Appeals and Colorado Supreme Court dismissed Phan's appeal.

Phan then commenced an action in federal court, again seeking to recover for his injuries sustained in the 2012 accident. The district court dismissed Phan's action for lack of jurisdiction under the Rooker-Feldman doctrine. Phan appealed, arguing that the district court erred in dismissing his action.

The Court of Appeals explained: "The Rooker-Feldman doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by 'state-court losers' challenging state-court judgments rendered before the district court proceedings commenced…. It also precludes lower federal courts from assuming jurisdiction over claims that are inextricably intertwined with a prior state-court judgment."

The Court of Appeals affirmed dismissal of Phan's federal action. It found that Phan was essentially asking the federal court to review and reverse a final state-court judgment, which was plainly precluded by the Rooker-Feldman doctrine.

Phan v. American Family Insurance Company, 705 Fed. Appx. 766 (Tenth Circuit Court of Appeals, decided December 5, 2017, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN HOMEOWNER DISCLOSURE DISPUTE

Adams County: Plaintiff Lori Esch purchased a home from Defendant Brian Boselli and alleged that Boselli failed to disclose plumbing and sewer problems that were known to him. Two days after Esch purchased the home, the basement drain pipe backed up and the basement flooded. Esch claimed damages for replacement of the sewer line from the house to the street and for repairs to the house.

Boselli claimed that he was unaware of any flooding or plumbing problems in the home. This is why he indicated on his Seller's Disclosure form that there were no problems, past flooding, or drainage issues with the house.

Upon trial, a verdict in favor of Defendant Boselli was rendered. The Court thus awarded Boselli with $14,705.50 in attorneys' fees and costs.

Esch v. Boselli, Case No. 16 CV 31357.

Wyoming

County Hospital Ruled Not Vicariously Liabile for Independent Contractor-Physician's Conduct

Wyoming Supreme Court: Plaintiff Darrell Menapace filed a medical malpractice complaint against Defendant Memorial Hospital of Sweetwater County. Menapace alleged that the Hospital was vicariously liable for the acts and omissions of a physician, Dr. Lin Miao, who worked at the hospital as an independent contractor.

The Hospital moved for summary judgment on the ground that the physician was not a Hospital employee, and that the Hospital was thus immune from liability for his acts or omissions. In support of its motion, the Hospital cited to the Wyoming Governmental Claims Act ("WGCA"). The district court determined that the Hospital had waived its immunity by purchasing liability insurance. The WGCA provided that a governmental entity may purchase liability insurance coverage, and that purchasing it shall extend the governmental entity's liability to the policy's coverage. The Hospital's motion was thus denied.

On appeal, the Wyoming Supreme Court determined that the Hospital's liability insurance did not provide coverage for liability beyond the liability defined by the WGCA. This was based upon the policy language which the Court interpreted as limiting liability to the scope as provided under the WGCA. Thus, the purchase of insurance did not extend the Hospital's liability to include liability for its agents, including Dr. Miao. The Wyoming Supreme Court therefore reversed the decision of the district court, and held that the Hospital's motion should have been granted.

Menapace v. Memorial Hospital of Sweetwater County, 404 P.3d 1179, 2017 WY 131 (Wyoming Supreme Court, decided November 9, 2017).

Defense Summary Judgment Reversed in Slip and Fall Case

Wyoming Supreme Court: Plaintiff Cindy Williams was injured when she slipped and fell outside a store operated by Defendant Plains Tire & Battery. She slipped as she stepped from an asphalt area into gravel and fractured her ankle. She filed a complaint alleging that Plains was negligent in failing to maintain the area in a reasonably safe condition. She specifically alleged that Plains had allowed an unnatural accumulation of gravel to develop that created a slippery condition.

Plains filed a motion for summary judgment on the basis that Plaintiff failed to establish that it breached any duty. In support of the motion, Plains cited to Plaintiff's deposition testimony that she could not remember where, how, or why she fell. Absent evidence of how Plaintiff fell, Plains argued that Plaintiff could not establish that a duty was owed or how it was breached. In opposition to the motion, Plaintiff cited to evidence supporting what Plaintiff's travel path was, the sloping of the gravel area, and the layout of the premises. In addition, Plaintiff cited to an accident report by the store manager that made recommendations to changes for the premises that would prevent a similar accident. The district court granted Plains' motion.

On appeal, the Wyoming Supreme Court examined the evidence proffered by Plaintiff in support of her allegations. The Court noted that "it is a close question," but that the evidence must be viewed in the light most favorable to Plaintiff as the non-moving party. In addition, Plaintiff is to be given "the benefit of all reasonable inferences that may be fairly drawn from [the evidence]." In light of such inference, the Court found that a material issue of fact existed as to the reasonableness of Plains' conduct in allowing the gravel slope to be where customers would walk. Thus, the Court reversed the grant of summary judgment.

Williams v. Plains Tire & Battery Co., 405 P.3d 228, 2017 WY 136 (Wyoming Supreme Court, decided November 17, 2017).

New Mexico

Punitive Damages Award Under UM/UIM Policy is Reversed Where Coverage Limit was Already Exhausted

New Mexico Court of Appeals: The issue in this case is whether New Mexico's uninsured/underinsured ("UM/UIM") motorist statute, NMSA § 66-5-301 (1983), requires an insurance company to pay punitive damages from the UM/UIM bodily injury coverage limits of its insured's automobile policy. The issue arose where: (1) the insured motorist sustained only property damage caused by an uninsured motorist; (2) the insurer paid the full amount of the UM/UIM property damage coverage limits of the policy; and (3) the punitive damages claim arose only from the uninsured motorist's conduct in causing that property damage.

Thomas Swiech was asleep in his apartment when an uninsured motorist, fleeing from police, struck Swiech's vehicle. No one was in the vehicle at the time of the accident, and no one sustained any bodily injuries. Swiech incurred $3,566.24 in property damage to his vehicle. He sought UM/UIM property damage coverage from his insurer, Fred Loya Insurance Company. The declarations page of his insurance policy provided a $10,000 coverage limit for property damage, and a separate limit for bodily injury.

Loya paid Swiech the policy's UM/UIM $10,000 limit for his property damage. Swiech then demanded that punitive damages arising from the property damage be paid from his UM/UIM bodily injury coverage. Loya denied the punitive damages claim, and filed an action against Swiech to determine that Swiech was not entitled to any UM/UIM proceeds beyond the property damage amount already paid. Swiech counter-claimed, alleging Loya breached the insurance contract by denying his claim, and that he was entitled to punitive damages and "to recover the entire UM/UIM policy limits." This was despite the fact that he did not sustain any bodily injury.

The district court held that Swiech could recover punitive damages under the policy if a trial determined that punitive damages were awarded based

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upon the facts of the accident. The district court later awarded Swiech with $20,000 in punitive damages, above and beyond the prior $10,000 amount paid.

On appeal, the New Mexico Court of Appeals recognized that the New Mexico Supreme Court previously found that the UM/UIM Act includes coverage for punitive damages. However, an award of punitive damages was predicated on the actual damages sustained. In addition, the total amount of damages should not exceed the policy limits of the coverage provided for the actual damages. Because Swiech did not sustain any bodily injury, any punitive damages award was thus limited to the property damage coverage. As that coverage limit was already exhausted, Swiech thus could not recover any further punitive damages. The Court therefore reversed the district court's ruling.

Fred Loya Ins. Co. v. Swiech, 2017 WL 6018070 (New Mexico Court of Appeals, slip opinion, decided December 4, 2017, not yet released for publication in the permanent law reports).

MEDICAL MALPRACTICE CLAIM BARRED AS UNTIMELY DESPITE TOLLING UNDER THE DUE PROCESS CLAUSE

New Mexico Supreme Court: New Mexico's Medical Malpractice Act, NMSA § 41-5-1 et seq., forecloses any cause of action that does not accrue within three years of the act of malpractice. In this case, the New Mexico Supreme Court clarified "the contours of the due process exception to this limitation." In doing so, it held that plaintiffs with late-accruing medical malpractice claims shall have twelve months from the time of accrual to commence the suit. The Court ruled that late accruing medical malpractice claims are those that accrue in the last twelve months of the three-year repose period.

The New Mexico Supreme Court discussed that the Due Process Clause in the United States Constitution provides an exception to the medical malpractice three-year statute of repose. However, it held that "twelve months is a constitutionally reasonable period of time within which to file an accrued claim regardless of whether the claim accrues twelve months or one day before the expiration of the three-year repose period." It clarified that, for example, if a claim accrues six months prior to when the repose period expired, then a claimant would have the remaining six months of the repose period plus an additional six months after the repose expiration to file suit.

In this case, Plaintiff Cahn filed a complaint against John Berryman, MD, for alleged medical malpractice stemming from a failure to diagnose ovarian cancer. At the time when her claim accrued against Dr. Berryman, ten and a half months remained before the expiration of the three-year repose period. More than twenty-one months elapsed between the date the Cahn's claims against Dr. Berryman accrued and the date that she filed her complaint against him. Thus, Cahn filed suit against Dr. Berryman more than twelve months after her claim against Dr. Berryman accrued. As such, her claims were barred by the Medical Malpractice Act, despite tolling of the statute of repose under the Due Process Clause.

Thompson v. City of Albuquerque et al., 397 P.3d 1279, 2017 NMSC 21 (New Mexico Supreme Court, decided June 19, 2017).

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Texas

UNDERINSURED MOTORIST POLICY'S "OTHER INSURANCE" PROVISION IS UPHELD

Texas Court of Appeals: This case concerned the enforcement of the "other insurance" provision in the uninsured/underinsured motorist coverage of two automobile insurance policies.

Alfred Elwess was employed by Glendell Gibson. Elwess was driving a truck owned by Gibson in the course and scope of his employment when he was hit by a vehicle driven by Carlos Molina. Elwess sustained a torn rotator cuff from the accident. Molina did not personally have an automobile insurance policy. However, the vehicle that he was driving was owned by Khoun Rattana, who had a policy with Affirmative Insurance Company ("AIC"). Elwess settled with AIC for the liability policy limit of $25,000. The truck that Elwess was driving was insured by Northland Insurance Company, with whom Elwess settled for $70,000 under the underinsured motorist coverage.

Elwess also had two insurance policies with Texas Farm Bureau Mutual Insurance Company ("TFB"), each of which provided uninsured/underinsured motorist ("UM/UIM") coverage with $50,000 limits per person for bodily injury. TFB asserted that Elwess was not entitled to collect any amounts under its policies under the "other insurance" provision of the policies, based upon Elwess' recoveries from AIC and Northland. The issue on appeal is whether Elwess could recover under the TFB policies based upon his recoveries from AIC and Northland.

The "other insurance" provision of the policies stated: "If there is other applicable similar insurance we [TFB] will pay only our share of the loss. Our share is the proportion that our limit of liability bears of the total of all applicable limits. However, any insurance we provide with a respect to a vehicle you do not own shall be excess over any other collectible insurance."

Elwess argued that this provision was invalid under Texas authority. However, the Texas Court of Appeals ruled that the "other insurance" provision is only invalid if the provision prevents the claimant from recovering the actual damages caused by an uninsured/underinsured motorist. This was not the case as to Elwess because Elwess had already recovered amounts from TFB and Northland. The Court stated that the purpose of UIM coverage is to compensate the insured for actual damages, and Elwess had already been compensated that amount by his TFB and Northland recoveries.

Elwess v. Texas Farm Bureau Mutual Insurance Company, 2017 WL 6559654 (Texas Court of Appeals, Eastland, decided December 21, 2017, not yet released for publication in the permanent law reports).