

IN BRIEF

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UTAH VERDICTS

MOTOR VEHICLE ACCIDENTS

CAR VS. TRAIN COLLISION YIELDS LIABILITY VERDICT IN WRONGFUL DEATH CASE AGAINST CITY

Utah County: Decedent Shelly Elder was driving a dump truck westbound across Union Pacific Railroad tracks in Nephi, Utah. As he crossed the tracks the dump truck was hit on the driver's side by a Union Pacific train. Suit was filed against Nephi City who was allegedly responsible for maintaining trees in the area. Plaintiff presented video evidence of thirty-foot high trees in an irrigation ditch to the south that allegedly prevented Mr. Elder from seeing the oncoming train until moments before impact.

The parties agreed economic damages exceeded \$1 million dollars. After a five-day jury trial on the issue of liability, the Jury found Nephi City 70% at fault, and attributed 30% to non-parties (Juab County and the irrigation company). Nephi City agreed to payment of the governmental immunity cap on damages.

Elder v. Nephi City,
Case No.: 990600065.

\$1,008,309 AWARDED TO DAUGHTER AND COMMON-LAW WIFE IN WRONGFUL DEATH CLAIM AGAINST TRUCKING COMPANY AND DRIVER WHO RAN RED LIGHT.

Utah County: Defendant trucking company William Huff, Inc. and its driver Brett Cheney admitted liability for an accident that resulted in the

death of Quanel Teller. Mr. Cheney was operating a semi-truck in Brigham City, Utah in the course and scope of his employment with the trucking company.

Mr. Cheney ran a red light and hit decedent's pickup truck broadside. Both the occupants of the pickup (Quanel Teller and Joe Butler) died instantly. Evidence was presented of Mr. Cheney's termination from prior employment by a safety director whom Cheney claimed didn't like him.

Quanel was 23 years old at the time of his death and had one daughter. In a separate action, the child's mother Revarae Teller was deemed to be decedent's common law wife. After a three-day jury trial, the jury awarded a total of \$1,008,309 in damages comprised of \$58,412 in past economic damages, \$549,897 in future economic damages, and \$400,000 in non economic damages to decedent's widow and daughter.

Teller v. William B. Huff, Inc.
and Brett Cheney,
Case No.: 070403703.

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PREMISES LIABILITY

PARAPLEGIC AGGRAVATES BACK IN FALL FROM WHEELCHAIR WHILE CUSTOMER OF HOME BUSINESS; JURY AWARDS OVER \$380,000, REDUCED BY PLAINTIFF'S AND NON-PARTY'S COMPARATIVE NEGLIGENCE.

Salt Lake County: Plaintiff, a paraplegic as a result of a 1976 motor vehicle accident, was visiting the home of Cheryl Edvalson to receive a cosmetic facial treatment. Ms. Edvalson operated Cheryl Inc. from her home and regularly provided facials to Plaintiff.

Normally, Plaintiff was assisted to and from her vehicle by employees of Cheryl Inc. On the date in question, Cheryl asked her adult son Derek, who was visiting at the time, to help Plaintiff to her vehicle. Plaintiff claimed that as they approached her vehicle, she asked Derek to move her closer. Derek claimed he heard Plaintiff request to be lifted up. Derek lifted the wheelchair by the wheels and Plaintiff fell forward into the door of the vehicle aggravating her back condition.

Derek Edvalson (via his homeowner's insurer) reportedly settled with Plaintiff prior to the trial for \$180,000. The Court denied Cheryl Inc.'s motion for summary judgment arguing that Derek was a volunteer and it was not responsible for his conduct. The motion was renewed at trial and again denied based upon evidence of Cheryl Inc.'s liability independent from Derek's conduct.

Plaintiff underwent surgery following the incident where internal fixation was removed and new rods were replaced. The jury awarded \$325,310 in past economic damages, and \$55,625 in non-economic damages. Fault was apportioned at 42% to Cheryl Inc., 20% to Derek (a non-party), and 38% to Plaintiff resulting

in a net judgment against Cheryl Inc., including costs and interest, of \$188,813.

*Guss v. Cheryl, Inc.
and Derek Edvalson,
Case No.: 060903837.*

SANCTIONS FOR TRIAL CONDUCT

DEFENSE COUNSEL SANCTIONED \$10,722 FOR QUESTIONING PLAINTIFF ABOUT "NEEDLE TRACKS" ON ARM IN VIOLATION OF ORDER

Salt Lake County: The trial of an accident involving a rear-end collision and soft tissue injuries ended in mistrial after defense counsel questioned Plaintiff about "needle tracks" on his arm observed in the emergency room. The marks were noted by an emergency room physician after the subject accident.

Based upon a stipulation by the parties, the Court had ordered that evidence of Plaintiff's history of drug use was to be excluded from trial. The Court rejected defense counsel's arguments that the scope of the agreed exclusion of evidence of drug use was only for drug usage "long before the accident."

Plaintiff claimed \$8,000 in medical expenses. After the second trial, the jury awarded \$8,000 in economic damages and \$3,000 in non-economic damages, and the Court awarded Plaintiff's costs and attorney fees in the amount of \$10,722 as sanctions for defense counsel's conduct that resulted in the mistrial.

*Melis v. Murnin,
Case No.: 070912640.*

UTAH LEGISLATION

AWARDS OF ATTORNEYS FEES PER PRIVATE ATTORNEY DOCTRINE IS ABOLISHED

During the 2009 General Legislative Session, the Utah Legislature passed Senate Bill 53 which abolished the Private Attorney Doctrine. Under this common law doctrine, a court may award attorneys fees to a plaintiff who has vindicated an important right affecting the public interest.

The Bill was in response to recent cases where district courts had denied requests for attorney's fees under the Private Attorney Doctrine, but appellate courts reversed and allowed recovery of attorney fees under the doctrine.

See Utahns For Better Dental Health-Davis, Inc. v. Davis County Clerk, 175 P.3d 1036 (Utah 2007); Culbertson v. Board of County Com'rs of Salt Lake County, 177 P.3d 621 (Utah App. 2008).

S.B. 53 provides that attorney fees may only be awarded if there is statutory authority to do so. Under S.B. 53, courts cannot award attorneys fees pursuant to the Private Attorney Doctrine in actions filed after May 12, 2009.



UTAH CASES

DECLARATORY RELIEF

SUMMARY JUDGMENT AGAINST CARRIER AFFIRMED WHERE CARRIER FAILED TO ESTABLISH REQUISITE ELEMENTS OF NON-COOPERATION DEFENSE FOR ABSENTEE INSURED, AND RESCISSION NOT AVAILABLE.

In *The Doctor's Company v. Dr. Gregory Drezga*, the insurer, The Doctor's Company (TDC), argued that the district court erred in holding that its malpractice insurance policy could not be invalidated based on the misrepresentations and noncooperation of the insured doctor.

There, Dr. Gregory Drezga, an obstetrician-gynecologist, applied to TDC for a medical malpractice insurance policy in 1996. In his application, Drezga warranted that he had not been the subject of any malpractice claims over the preceding ten years. This was later revealed to be a misrepresentation, as Drezga had in fact been the subject of three such malpractice claims.

The subject claim arose from Drezga's use of forceps during a birth which resulted in severe brain damage to Athan Montgomery. Sometime thereafter, but before any legal proceedings began, Drezga disappeared.

Athan's mother, Helen Judd, filed a medical malpractice suit against Drezga. TDC hired counsel on Drezga's behalf to defend against the claim. While the malpractice litigation was ongoing, TDC filed a separate action against the still-absent Drezga. The action, which named Helen and Athan as co-defendants, sought a declaration that the insurance contract was invalid and that TDC should therefore be excused from

defending Drezga or paying any judgment on his behalf.

The malpractice suit went to trial and resulted in a judgment against Drezga worth nearly \$2.3 million. The judgment was later reduced to \$1.3 million in compliance with a statutory cap on damages (the decision was affirmed in *Judd v. Drezga*, 103 P.3d 135 (Utah 2004)).

TDC advanced two arguments in the declaratory relief action. First, TDC claimed that the misrepresentations made by Drezga on the insurance application gave TDC the right to rescind the contract. Second, TDC argued that Drezga's disappearance constituted a failure to cooperate with TDC in defending the malpractice suit.

TDC moved for summary judgment on the noncooperation claim. The district court denied the motion, holding that TDC failed to submit undisputed evidence that Drezga had "willfully and intentionally" breached the cooperation requirement in the policy. Judd also moved for summary judgment which was granted. The district court held that the insurance contract gave TDC the option of cancellation or rescission of Drezga's policy. Because TDC's pleadings indicated that TDC chose cancellation, the district court held that TDC could not later rescind the same policy. Since cancellation has only a prospective effect, and did not occur until after Athan's birth, the district court held that TDC could not avoid responsibility for the malpractice judgment.

The Utah Supreme Court agreed, concluding TDC was barred from rescinding Drezga's insurance policy for two reasons. First, the Supreme Court observed the contract uses clearly disjunctive language, indicating that TDC can either rescind or cancel the policy, but cannot do both. Because TDC's own pleadings indicate that it first cancelled the policy, the Court held it waived whatever right of rescission it may

have possessed. Second, the Court held that even when viewed in the light most favorable to TDC, the contract language regarding the consequences of misrepresentation is ambiguous. Pursuant to longstanding Utah authority, any such ambiguity is resolved in favor of the insured.

Regarding TDC's contention that Drezga's disappearance released it from the duty of paying the malpractice claim, the Supreme Court held this argument fails for two reasons. First, the Court held TDC did not meet its burden to relieve itself of responsibility for the malpractice judgment on grounds of noncooperation. Second, even if TDC had satisfied this burden, the contract did not allow TDC to retroactively deny coverage due to a failure to cooperate.

The district court, citing a federal case, held that proof of noncooperation required TDC to show Drezga "willfully and intentionally breached the cooperation clause." Because the only available evidence suggested that Drezga's disappearance was motivated by family and financial difficulties rather than a desire to avoid cooperation with TDC, the district court held that this standard was not satisfied.

Pursuant to Utah law, however, an insurer seeking to avoid coverage of a claim for reasons of noncooperation must establish two things: (1) that it used "reasonable diligence" to secure the insured's cooperation; and (2) that the noncooperation "substantially prejudiced" its ability to defend against the claim in question. *Montgomery v. Preferred Risk Mut. Ins. Co.*, 411 P.2d 488, 490 (Utah 1966). The burden for demonstrating reasonable diligence and substantial prejudice rests on the insurance company. *Peterson v. W. Cas. & Sur. Co.*, 425 P.2d 769, 770 (Utah 1967).

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The Utah Supreme Court held that TDC did not satisfy either the reasonable diligence or substantial prejudice requirements and therefore could not invalidate its insurance policy. TDC's own brief reflected that its attempts to find Drezga consisted solely of phone calls and efforts to mail correspondence to addresses it knew were outdated. Further, TDC knew from the insurance application that Drezga attended medical school in Zagreb, Croatia, and learned from the affidavit of a process server that Drezga's relatives believed him to be in Europe. Yet at no point did TDC claim to have acted on these tips in an attempt to locate Drezga abroad.

Regarding the showing of "substantial prejudice" required to invalidate coverage for noncooperation, Utah law requires that TDC show the noncooperation put it at a material disadvantage in defending against the malpractice claim. Again, the Court observed that TDC's brief did not suggest any reason why the malpractice suit would have ended differently had Drezga been present. TDC's only support was an affidavit filed by the attorney who represented Drezga at the malpractice trial. The affidavit, which was filed several months before the trial began, simply asserts that it "would be extremely difficult and prejudicial to go to trial with an absentee defendant/physician." The Court found the affidavit unpersuasive as proof of substantial prejudice.

Finally, the Court observed that even if TDC met the noncooperation requirements, its contract language did not allow it to retroactively avoid coverage of the malpractice claim. The provision states, "Failure to cooperate with the Exchange in the defense of any claim is a breach of this policy and will result in loss of coverage." The district court's grant of summary judgment was affirmed.

*The Doctor's Company v. Drezga,
Utah Supreme Court
Decided September 15, 2009
(not yet released for publication in the
permanent law reports).*

DUTY TO DEFEND

DEPENDING ON THE POLICY LANGUAGE, COURTS MAY LOOK OUTSIDE THE COMPLAINT AND THE POLICY IN DETERMINING THE DUTY TO DEFEND

The insured, Equine Assisted Growth and Learning Association (EAGALA), appealed from the district court's dismissal of its action against Carolina Casualty Insurance Company (Carolina Casualty), the issuer of EAGALA's non-profit organization liability insurance policy. The district court was reversed.

The Complaint against the insured EAGALA was filed by Greg Kersten, a former employee of the insured, who sued individual members of EAGALA's board of trustees, seeking monetary and injunctive relief. Although the Complaint was captioned as if the plaintiff was EAGALA itself and was verified by Kersten as "President and CEO" of EAGALA, Kersten in fact had no authority to sue on EAGALA's behalf at the time the complaint was filed.

EAGALA notified Carolina Casualty of the Complaint and requested coverage for the costs of its defense. Carolina Casualty denied coverage citing a policy exclusion for claims brought "by, on behalf of, or in the right of [EAGALA]" (the insured versus insured clause). Carolina Casualty maintained its denial of coverage after EAGALA informed it that Kersten had no relationship with EAGALA at the time of the suit. EAGALA then brought the subject suit against Carolina Casualty to establish coverage for the costs of defending against Kersten's suit.

Carolina Casualty sought judgment on the pleadings, arguing that on the face of its initiating Complaint, Kersten's suit fell within the terms of the insured versus insured clause. EAGALA sought to introduce extrinsic evidence to demonstrate that Kersten had no authority to sue in EAGALA's name and that Kersten's suit was therefore not "by, on behalf of, or in the right of" EAGALA. The district court concluded that such evidence could not be considered and granted Carolina Casualty judgment on the pleadings.

The insured EAGALA argued that the district court erred by refusing to consider extrinsic evidence. The Utah Appellate Court observed prior precedence in noting that the language of the policy controls whether extrinsic evidence is admissible to determine if an insurer has a duty to defend an insured. If the parties make the duty to defend dependent on the allegations against the insured, extrinsic evidence is irrelevant to a determination of whether a duty to defend exists. However, if, for example, the parties make the duty to defend dependent on whether there is actually a "covered claim or suit," extrinsic evidence would be relevant to a determination of whether a duty to defend exists.

The insured versus insured clause of the Carolina Casualty policy stated that Carolina Casualty will not be liable for either indemnification or defense of claims made "by, on behalf of, or in the right of [EAGALA]." The court reasoned that the listed circumstances triggering the clause constituted objective facts, the truth or falsity of which were not determined solely by the allegations or the captioning of the suit.

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Thus, the Court held that extrinsic evidence should have been considered and the district court's grant of judgment on the pleadings was reversed.

Equine Assisted Growth and Learning Ass'n v. Carolina Cas. Ins. Co., Utah Court of Appeals, Decided July 23, 2009 (not yet released for publication in the permanent law reports).

LIABILITY FOR INDEPENDENT CONTRACTORS

SUMMARY JUDGMENT IN FAVOR OF GENERAL CONTRACTOR REVERSED WHERE GENERAL CONTRACTOR MAY BE DIRECTLY RESPONSIBLE FOR SUBCONTRACTOR'S EMPLOYEE'S INJURY

An employee of a subcontractor was injured at a construction site when a load of trusses slipped from its rigging during the off-loading process and fell on him, causing spinal injuries. The employee brought a negligence action against the general contractor and crane rental company, asserting, in part, that the general contractor's superintendent negligently rigged the bundle of trusses that fell on him.

The District Court granted the general contractor's motion for summary judgment, dismissing the negligence claim on the grounds that even if the superintendent directly participated in rigging the trusses, he did not actively participate in the process in such a way as to retain sufficient control to expose the general contractor to liability for the negligent rigging. The Court of Appeals affirmed. The Utah Supreme Court reversed holding the lower courts failed to consider the employee's direct negligence argument outside of the context of the retained control doctrine.

Utah adheres to the general common law rule that the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the independent contractor or his servants. This general 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. By the rule's plain language, the scope of the rule is limited to circumstances in which the direct act or omission of the independent contractor, not the employer, causes an injury.

Despite the general non-liability rule, the employer of a contractor remains liable for the contractor's actions when the employer participates in or controls the manner in which the contractor's work is performed, and therefore owes a duty of care concerning the safety of the manner or method of performance implemented. This exception to the general non-liability rule is called the retained control doctrine, and it is applied narrowly in unique circumstances where an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care.

In determining whether an employer exercised sufficient control to create liability under the retained control doctrine, Utah courts apply the active participation standard. Under that standard, an employer has a duty to ensure the safety of its contractor's work where the employer "actively participates" in the contractor's work. An employer actively participates if the employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. In contrast, an employer does not actively participate in an activity when the employer merely exercises a general right to order the work

stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.

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ABOUT OUR FIRM

Dewhirst & Dolven LLC has been published in A.M. Best's Directory of Recommended Insurance Attorneys and is rated an "AV" law firm by Martindale Hubbell. The founding partners, Miles Dewhirst and Tom Dolven, practiced as equity partners with a large Colorado law firm before establishing Dewhirst & Dolven, LLC.

Our attorneys have combined experience of over 100 years and are committed to providing clients throughout Utah and Colorado with superior legal representation while remaining sensitive to the economic interests of each case.

We strive to understand our clients' business interests to assist them in obtaining business solutions through the legal process. Our priority is to establish a reputation in the legal and business community of being exceptional attorneys while maintaining a high level of ethics and integrity. We are committed to building professional relationships with open communication, which creates an environment of teamwork directed at achieving successful results for our clients.

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Accordingly, the retained control doctrine and the accompanying active participation standard establish a two-step analysis. The first step is to determine whether the employer actively participated in the contractor's work and, therefore, had a limited duty of care to ensure that the work was conducted safely. When an employer actively participates, the next step is to determine whether the employer breached that duty of care.

The retained control doctrine is separate and distinct from a direct negligence theory. Specifically, the retained control doctrine does not apply when a plaintiff alleges that an employer's own actions were negligent. Rather, the doctrine is limited to circumstances where the plaintiff alleges that the employer of a contractor is liable for the contractor's negligence because the employer retained sufficient control over the contractor's actions to owe the plaintiff a

duty of care regarding the contractor's actions. Likewise, the common law general non-liability rule only recognizes that employers are not liable for the actions of their contractors. The rule does not speak to an employer's liability for its own actions.

Once an employer goes beyond mere direction or control of the contractor's work and directly acts in such a way that causes an injury, the employer may be liable for its own direct negligence. It is not a defense that the employer was conducting the work of the independent contractor when the employer caused the injury.

Thus, the Utah Supreme Court held an employer remains liable for its own direct actions, even if the employer is assisting its contractor and acting according to the means and methods that the contractor has prescribed. Because there remained a question of fact relative to whether the general contractor assisted in the rigging of the load of trusses that slipped and fell on the subcontractor's

employee, the grant of summary judgment was reversed and the case was remanded to the district court.

*Magana v. Dave Roth Const.,
Utah Supreme Court,
Decided July 21, 2009
(not yet released for publication
in the permanent law reports).*

