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Attorneys at Law

ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

IN BRIEF

COLORADO

- Dewhirst and Dolven attorneys prevailed in defending against two motions which sought to strike general contractors' designations of non-parties at fault, and in doing so the district courts twice ruled that a general contractor does not owe a non-delegable duty to a homeowner, and is therefore not vicariously liable for the torts of subcontractors.

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UTAH

- The Utah Court of Appeals ruled that extrinsic evidence is permitted to establish that an insured signed an acknowledgment form rejecting UIM coverage. In a case where the insurer could not produce the signed acknowledgment form, the Court nevertheless ruled that Utah Rule of Evidence 1004 permits the contents of documents that have been lost or destroyed in good faith to be shown by extrinsic evidence.

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WYOMING

- In a case seeking recovery for personal injuries sustained when the Plaintiff was hit by a golf ball at a tournament, the Wyoming Supreme Court overturned the grant of summary judgment in favor of Defendants. Though the Court recognized that getting hit by a golf ball is an inherent risk of the sport, the Court ruled that genuine issues of material facts existed as to whether Defendants increased that inherent risk.

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NEW MEXICO

- The New Mexico Court of Appeals affirmed the district court's order consolidating all arbitrations between the homeowner Plaintiffs and homebuilder Defendants. The Court found that Plaintiffs' claims arose from common issues of law or fact, and thus denied Defendants' request for separate arbitrations for each household.

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COLORADO

DEWHIRST & DOLVEN PREVAILS IN OBTAINING RULINGS THAT RESIDENTIAL BUILDERS DO NOT OWE A NON-DELEGABLE DUTY TO HOMEOWNERS

Dewhirst & Dolven attorneys Kathleen Kulasza and Sue Pray prevailed in defending against two separate motions which sought to establish that a general contractor owed a non-delegable to a homeowner. The following is a summary of each case:

Arapahoe County: In the first case, *Marx and Corken v. Alpert Custom Homes, Inc. et al.*, Plaintiffs Paul Marx and Kay Corken sued Defendants Alpert Custom Homes and Scott and Sally Alpert for damages and losses to their single-family residence which Defendants constructed. Plaintiffs brought claims for breach of warranty, breach of contract, violation of the Colorado Consumer Protection Act, breaches of the implied covenant of good faith, promissory estoppel, willful breach of contract, and quantum meruit.

During litigation, Defendants filed a designation of nonparties at fault that named several parties which were at fault for the alleged construction defects at issue. The pertinent nonparties named were subcontractors of Alpert Custom Homes during the construction of the residence. Plaintiffs filed a motion for determination of law, seeking a finding that Defendants owed a non-delegable duty to Plaintiffs, and thus to strike Defendants' designation of nonparties at fault.

Plaintiffs' argument focused on Colorado authority which found that a builder owes the homeowner an independent, non-delegable tort duty of reasonable care in constructing a residence. In response, Defendants argued that a non-delegable duty, such as Plaintiffs' claimed, is a tort-based concept limited to inherently dangerous activities – of which building a home is not. Defendants also cited to a long line of cases supporting that a general contractor is not liable for the negligence of subcontractors.

Judge Michael Spear ruled in favor of Defendants and held that the designation of nonparties was valid. Specifically, in his Order, Judge Spear stated that there is no Colorado case law to support the proposition that a

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builder's duty is non-delegable. He further found that the law was clear that a person hiring an independent contractor is ordinarily not liable for negligence of the independent contractor.

Adams County: In the second case, *Ranch Creek Villas HOA, Inc. v. Ranch Creek Villas, LLC, et al.,* Plaintiff sued Defendant for alleged construction defect claims of negligence and negligence per se. Pursuant to CRS § 13-21-111.5(3)(b), Defendants designated numerous subcontractors as non-parties at fault. Plaintiff filed a motion to strike Defendants' designations of nonparties at fault, arguing that, as a matter of law, non-party designations are inapplicable in construction cases because a general contractor's tort duty is non-delegable. Both Plaintiff and Defendants argued that CRS § 13-21-111.5 supports their respective positions.

Upon analyzing the plain language of the statute, the Court emphasized that the legislature's intent in enacting § 13-21-111.5 was "to prevent any party to a construction agreement from transferring responsibility for its own negligence to another party." Specifically, it found that the statute permits a subcontractor to indemnify a general contractor for the subcontractor's own negligence, in amounts represented by the degree or percentage of negligence or fault attributable to the subcontractor.

The Court found influential the fact that Plaintiff's suit did not involve any contractual liability claims and that by designating non-parties at fault, Defendants were not seeking to avoid responsibility for their own negligence. Rather, by the designations, Defendants sought to limit their own liability to the extent of their own negligence. The Court found that this was permitted under § 13-21-111.5 and thus denied Plaintiff's motion to strike.

DECLARATORY JUDGMENT AFFIRMED IN INSURANCE POLICY COVERAGE DISPUTE

Colorado Court of Appeals: Defendant Moore was involved in a car accident. When he sought insurance benefits from his insurance company, Progressive Casualty Ins. Co., he was told that his automobile insurance policy had expired months earlier.

Progressive filed an action seeking a declaration of the parties' rights and obligations under Moore's policy, asking the Court to declare that Moore's policy had expired prior to the accident for failure to pay the premium and that Moore was not entitled to any benefits under the policy. Moore responded by arguing that, despite his nonpayment, the policy was still in effect. Relying on C.R.S. § 10-4-110.5, he argued that the policy had renewed automatically because progressive had failed to comply with the statutory notice requirements.

The Court of Appeals disagreed with Moore, finding that § 10-4-110.5 applies only to commercial automobile insurance policies. Because Moore did not have a commercial automobile policy, the Court affirmed the district court's declaratory judgment.

Progressive Casualty Ins. Co. v. Moore, 2012 COA 145 (Colorado Court of Appeals, decided August 30, 2012, not yet released for publication in the permanent law reports).

EXPERT OPINION AS TO SEATBELT DEFECT RULED INADMISSIBLE IN ROLLOVER CASE

Tenth Circuit U.S. Court of Appeals: Plaintiff Erica Hoffman was rendered a quadriplegic from injuries she sustained as a front seat passenger in a rollover of a Ford vehicle while traveling on a dirt road in Weld County, Colorado. She sued Ford claiming that she was wearing her seatbelt at the time of the incident but, due to a defect in its buckle, it released during the rollover, causing her to be ejected from the vehicle.

To support Hoffman's defect theory, expert mechanical engineer Dr. Good opined that Hoffman's seatbelt buckle "most probably" inertially unlatched during the accident due to a defect in its design. To reach this conclusion, Good ran a series of tests on buckles similar in design to Hoffman's to determine their lowest inertial unlatch threshold, i.e. the lowest level of acceleration needed to unlatch the buckle. But rather than comparing the results to data from rollover crash tests to determine if the scenarios measured in the laboratory could occur in the real world, he compared the results to data from planar crash tests (ones conducted on only the horizontal plane, as opposed to the more dynamic and elusive forces present in a rollover). Good then determined that his results could occur in the real world.

Ford moved to exclude Good's testimony as unreliable and irrelevant because he failed to demonstrate that the levels of acceleration he found necessary to cause inertial unlatch in the laboratory actually occurred or could have occurred on Hoffman's buckle in the rollover. The district court denied Ford's motion, concluding that Ford failed to show how the differences between Good's test results and real-life rollover accidents were significant. Moreover, the district court decided that deficiencies in Good's tests went to the weight, not admissibility, of his opinions. The jury found Ford liable, and Ford appealed.

The Court of Appeals stated that in permitting Good's testimony, "the district court was not a sufficiently exacting gatekeeper." Specifically, Good's opinion should not have been admitted at trial because he had failed to present a scientific connection between the accelerations he found necessary to inertially unlatch buckles tested in the laboratory and accelerations that occurred or could have occurred on Hoffman's buckle during the rollover. The Court found that absent Good's testimony, Hoffman's evidence was insufficient to support

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the jury verdict. Because Hoffman had a full and fair opportunity to present her case, the Court therefore reversed the district court's order and remanded to the district court to enter judgment in favor of Ford.

Hoffman v. Ford Motor Co., No. 10-1137, 2012WL2518997 (U.S. Court of Appeals, Tenth Circuit, decided August 16, 2012, not yet released for publication in the permanent law reports).

DEFENSE JURY VERDICT IN PEDESTRIAN/MOTORCYCLE COLLISION CASE

Larimer County: Defendant Dever was on his motorcycle at nighttime and was traveling about 35 mph when his motorcycle struck Plaintiff Deese as Plaintiff was crossing the road. Plaintiff alleged that Defendant was negligent for not seeing him and for failing to stop in time to avoid the collision. Defendant argued that Plaintiff was crossing the street mid-block on a dark night. Defendant said that by the time he saw Plaintiff in the headlights of his motorcycle, he was unable to stop in time to avoid the collision. Defendant said he swerved and attempted to avoid striking Plaintiff, however Plaintiff stepped back at the same time so that they both moved in the same direction. Defendant thus argued that Plaintiff was comparatively negligent for failing to see his approaching motorcycle and claimed that Plaintiff had a better opportunity to avoid the collision than he did.

Plaintiff claimed traumatic brain injury and headaches. He had one surgery to relieve swelling in the brain and a second surgery to secure a flap in his brain. Plaintiff developed a seizure disorder after the second surgery was performed. He claimed to be permanently disabled, unable to work, and unable to live independently. He claimed $450,000 in past medical expenses, $66,000 in past lost income, $235,000 in future lost income, and between $3.6 million to $6.8 million for the future cost of care. At trial, he requested damages of $5 million to $7 million, including expenses for assisted living. Defendant's final offer before trial was $50,000 (Defendant's policy limits). The jury returned a verdict for Defendant.

Deese v. Dever, Case No. 09-CV-875.

UTAH

EXTRINSIC EVIDENCE PERMITTED TO ESTABLISH THAT UIM ACKNOWLEDGEMENT FORM WAS SIGNED BY AN INSURED

Utah Court of Appeals: Rex Randall was struck from behind by another vehicle and allegedly sustained resulting neck and back injuries. After settling with the at-fault driver's insurance company for policy limits, Randall notified his insurer, Progressive Classic Ins. Co., that he intended to pursue a claim for UIM benefits under his policy. Progressive denied the claim on the basis that Randall had rejected UIM coverage at the time he obtained his policy.

Randall then sought declaratory relief, asking the district court to determine that he was entitled to UIM coverage in the same amount as the automobile liability coverage that he had carried under his Progressive policy. He alleged that Progressive would be unable to produce a signed acknowledgement form showing that he had rejected UIM coverage. Randall's position was thus that he was statutorily entitled to the claimed UIM coverage unless Progressive could actually produce his signed acknowledgement form. Both parties sought summary judgment.

Progressive conceded that it could not produce a signed acknowledgement form, but argued that Randall had in fact signed one. Progressive provided insurance declaration sheets and other documents reflecting Randall never was charged for UIM coverage, as would have been the case if Randall declined coverage. In addition, the insurance agent who worked with Randall signed an affidavit stating that the forms were entered in electronically with Randall's selections on coverage, then printed out for Randall to sign. The district court granted Progressive's motion for summary judgment, and Randall appealed.

On appeal, Randall argued for the adoption of a bright line rule that an insurance company must either produce the acknowledgement form signed by the insured or provide UIM coverage under U.C.A. § 31A-22-305.3(3)(a). Randall therefore argued that the district court erred in permitting Progressive to use extrinsic evidence to establish that he had signed the form.

The Court of Appeals, however, declined to adopt Randall's proposed bright line rule. Instead, the Court stated that Utah Rule of Evidence 1004 permits the contents of documents that have been lost or destroyed in good faith to be shown by extrinsic evidence. The Court found that Progressive had properly established the contents of Randall's acknowledgement form by extrinsic evidence under URE 1004, and thus affirmed the grant of summary judgment.

Randall v. Progressive Classic Ins. Co., 2012 UT App. 250 (Utah Court of Appeals, decided September 7, 2012, not yet released for publication in the permanent law reports).

"FAIRLY DEBATABLE" INSURANCE DEFENSE DOES NOT REQUIRE RESOLUTION THROUGH SUMMARY JUDGMENT

Utah Supreme Court: Chad Jones filed a UIM claim with his insurance company, Farmers, after sustaining injuries in an automobile accident and accepting the at-fault driver's policy limits. The only disputed aspect of Jones' UIM claim was a dental bill for cracked teeth. Jones visited Richard Hughes, D.M.D. about four years after the accident. Hughes submitted a report to Farmers detailing the extensive restorative work that Jones required. Hughes' report also stated that the cracked teeth could have been caused by traumatic force, and discussed Jones' reporting of the prior

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accident and Jones' statement that he injured his mouth in the accident.

Farmers noted that Jones' claim was "fairly debatable" because he did not complain of any teeth injuries until he visited Hughes four years after the accident. After Jones rejected a reduced offer from Farmers, he filed suit against Farmers for breach of contract, bad faith breach of contract, and intentional infliction of emotional distress. Jones then sought partial summary judgment on the basis that his claim was not fairly debatable and that Farmers had no good faith basis for denying his claim. Farmers then moved for summary judgment arguing that "if an insured cannot establish that it is entitled to summary judgment on the merits of his claim, that means the claim is fairly debatable."

In response to Farmers' "fairly debatable" argument, the Supreme Court clarified: "[A] bad faith claim need not be resolved on summary judgment whenever an insurance company argues that the claim was fairly debatable." When an insurer raises the fairly debatable defense, the case may present questions of fact for the jury. Thus, the Court denied Farmers' argument that a claim involving the fairly debatable defense will always be resolved through summary judgment.

The Court ruled that reasonable minds could differ as to the weight and reasonableness of both parties' arguments, and therefore it presented issues of fact which should be heard by a jury.

Jones v. Farmers Ins. Exchange dba Farmers Ins. Co., 2012 UT 52 (Utah Supreme Court, decided August 28, 2012, not yet released for publication in the permanent law reports).

INSURANCE POLICY TERM "JET SKI" RULED AMBIGUOUS IN COVERAGE CASE

Utah Court of Appeals: Robert Oltmanns (the insured) and Brady Blackner were operating a Honda F-12 AquaTrax personal watercraft on a lake in southern Utah. This kind of watercraft is designed for use by a seated driver and up to two additional seated passengers. A lawsuit resulted from injuries sustained in an accident that occurred during this use, and Oltmanns tendered the defense to Fire Insurance Exchange ("FIE"), whom he was insured with under a homeowner's policy.

FIE then brought a declaratory judgment action against Oltmanns and Blackner, arguing that it had no duty to defend, indemnify, or compensate them based upon exclusions of coverage in Oltmanns' policy for jet skis, jet sleds, and certain watercraft. The trial court granted FIE's motion for summary judgment on the grounds that Oltmanns was operating a jet ski, which is merely a synonym for personal water craft, and that the policy unambiguously excluded coverage for use of all such watercraft.

On appeal, Oltmanns and Blackner argued that the exclusion did not apply because the term "jet ski" is a registered trademark for a particular model of Kawasaki personal watercraft, which was not involved in the accident. FIE argued that "jet ski" was intended to refer to any and all personal watercraft, as it is a common vernacular for such and is not ambiguous.

The Court of Appeals, after examining the Wikipedia definition of "jet ski," found the term ambiguous because it failed to clearly communicate to the insured the specific circumstances under which the expected coverage would not be provided. Thus, because the term was ambiguous, the Court interpreted it against the drafter, and reversed the grant of summary judgment.

Fire Insurance Exchange v. Oltmanns et al., 2012 UT App. 230 (Utah Court of Appeals, decided August 16, 2012, not yet released for publication in the permanent law reports).

DEFENSE SUMMARY JUDGMENT AFFIRMED IN PROXIMATE CAUSE VEHICULAR ACCIDENT CASE

Utah Court of Appeals: Defendant Ricky Johnson was driving his car on I-84 when the roads became slick with snow and ice. When he lost control, his car slid into the median. A tow truck arrived and pulled Johnson's car onto the highway. While doing so, the tow truck partially blocked the left lane. Other vehicles began to lose control, and Plaintiff Dee's vehicle hit the tow truck. Dee sustained injuries as a result.

Johnson filed a motion for summary judgment arguing that his negligence was not a proximate cause of Dee's injuries. The trial court agreed and granted summary judgment in Johnson's favor.

The Court of Appeals emphasized that Johnson's negligent act came to a conclusion when his vehicle came to a rest safely in the median. The Court found that the risk of injury to Dee from a negligent tow truck driver was not foreseeable to Johnson as he navigated his car over the snow and ice. Thus, the Court affirmed the grant of summary judgment in favor of Defendant Johnson.

Dee v. Johnson, 2012 UT App. 237 (Utah Court of Appeals, decided August 23, 2012, not yet released for publication in the permanent law reports).

WYOMING

SUMMARY JUDGMENT OVERTURNED IN GOLF BALL PERSONAL INJURY CASE

Wyoming Supreme Court: James and Brenda Creel attended the 2006 Wyoming Open Golf Tournament as spectators. During the tournament, James was struck by a gold ball and suffered a head injury. Prior to being hit, an agent of L&L Inc. (who operated the golf course and tournament) instructed a player to tee off when golfers and spectators were on and around the green. The player expressed concern to the L&L agent that he could hit the group ahead of him. The player then teed off after the agent persisted, wherein James was then hit.

The Creels filed a lawsuit against the golfer who hit the golf ball, the L&L agent, and L&L. The district court granted summary judgment in favor of all defendants except the golfer, concluding that getting hit by a golf ball was an inherent risk of golf and that the Wyoming Recreation Safety

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Act ("WRSA") thus barred the Creels' action. The Creels appealed the summary judgment entered in favor of L&L.

On appeal, the Creels contested the district court's conclusion that being hit in the head was an inherent risk of golf under the WRSA. Specifically, the Creels argued that L&L increased the risk of getting hit beyond the normal inherent risk when its agent directed the player to hit the ball into spectators.

The Court found that genuine issues of material fact existed regarding the extent to which L&L's agent had the ability and authority to influence the golfer's decision to tee off, whether spectators were viewable from the tee, and whether L&L's agent knew or should have known that spectators were on the green. Thus, the Court ruled that questions of fact existed as to whether L&L's agent increased the risk of James being hit by a golf ball. The Court therefore reversed the grant of summary judgment and found that a jury must determine whether L&L's agent increased the risk of being hit.

Creel v. L&L Inc. et al., 2012 WY 124 (Wyoming Supreme Court, decided September 14, 2012, not yet released for publication in the permanent law reports).

$9 MILLION MEDICAL MALPRACTICE VERDICT REDUCED BY $1.5 MILLION

U.S. District Court, D. Wyoming: Plaintiff Louis Prager suffered neck injuries when the pickup he was driving left the road in icy conditions and rolled 3½ times. He alleged that Defendant Cullison, the emergency doctor who treated him at Campbell County Memorial Hospital, failed to order scans of his neck even though he complained of neck and shoulder pain.

Plaintiff alleged he later developed permanent and severe neurological damage as a result of an undiagnosed comminuted fracture of the C5 vertebrae. He alleged more than $1.7 million total in medical bills, wage losses, and other special damages. The case was tried to jury, which found for Plaintiff and his wife, who had alleged loss of consortium. Plaintiff was awarded $7 million and his wife was awarded $2 million.

The defense filed a motion for remittitur, alleging the damages awarded were excessive. Noting that Plaintiff Louis' attorneys asked for an award of $12 million, the U.S. District Court stated: "Based on his injuries, the necessary medical procedures, his probable need for future medical attention, the limitations on his activities, and the continuous pain he experiences, the Court is unable to conclude that the jury's verdict was against the weight of evidence." Thus, the Court denied Defendants' motion in regards to Louis' award.

As to Mrs. Prager, however, the Court found the $2 million award for loss of consortium was excessive, finding the evidence to support the verdict "meager" and "rather limited." The Court noted that the couple had been married 30 years and their relationship remained "solid," though "less engaged" than prior to the accident. The Court also noted that Mrs. Prager testified that she did not go to Gillette to be with her husband after the accident, nor did she travel to Gillette when she found out that he would need surgery because "I guess I just didn't want to go face it." The Court ruled that the $2 million verdict was "excessive, shocks the judicial conscience [and] is not supported by substantial evidence." The Court thus reduced the verdict to $500,000, the amount requested by counsel in closing arguments.

Prager v. Campbell County Medical Hospital et al., Case No. 10 CV 202 (U.S. District Court, District of Wyoming, not released for publication in the permanent law reports).

NEW MEXICO

CONSOLIDATION OF ARBITRATIONS ORDERED IN CONSTRUCTION DEFECTS LAWSUIT

New Mexico Court of Appeals: In this case, the district court ordered the consolidation of all arbitrations between Defendants D.R. Horton and DRH Southwest Construction ("Horton"), and Plaintiffs, who are

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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 250 years and are committed to providing clients throughout Utah, Wyoming, New Mexico 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 profecssional relationships with open communication, which creates an environment of teamwork directed at achieving successful results for our clients.

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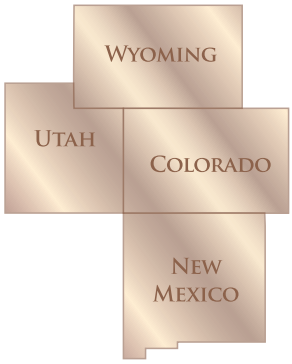

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owners of homes built and sold by Horton.

Plaintiffs sued Horton for various deficiencies in their Horton-built homes, many of which were caused by the settlement of subsurface soils. Plaintiffs also alleged that their purchase agreements with Horton contained arbitration agreements, and they asked the district court to compel Horton to litigate their claims in a consolidated arbitration in accordance with New Mexico's Uniform Arbitration Act ("UAA") § 44-7A-11.

Horton opposed consolidation of all of the claims and instead proposed a separate arbitration for each household. Horton argued that Plaintiffs' claims were not related transactions because they were not part of the same series of contractual negotiations. Horton also argued that consolidating the arbitrations would result in undue delay due to the widely varying claims of each Plaintiff. Upon the Court ordering consolidation, Horton appealed.

The Court of Appeals ruled that Plaintiffs' claims arose from a common issue of law or fact. The Court focused on the fact that Plaintiffs' claims share common issues involving the settlement of their respective homes and similar resulting damage, including cracks and separation. Specifically, the Court clarified that consolidation under the UAA requires "only common issues of law or fact, not common established facts."

The Court also clarified that ordering consolidation differed from ordering a "class arbitration" under federal law because New Mexico state law permitted the consolidation. The Court therefore affirmed the district court's order consolidating the arbitrations between Plaintiffs and Horton.

Lyndoe et al. v. D.R. Horton, Inc. et al., Docket No. 30,663 (New Mexico Court of Appeals, slip opinion, decided July 24, 2012, not yet released for publication in the permanent law reports).

"SUDDEN" TERM RULED AMBIGUOUS IN INSURANCE POLICIES

New Mexico Supreme Court: This appeal turned on the Supreme Court's construction of a single word, "sudden." The term appeared within a pollution exclusion clause in a series of liability insurance policies barring coverage for certain damages unless the events causing those damages were "sudden and accidental."

Because the term was undefined in the policies, the Court evaluated the dictionary definitions and findings of courts in other jurisdictions. However, due to the diverging definitions and lack of any consensus among the courts nationwide, the Court found the term ambiguous and resolved the ambiguity in favor of the insured, United Nuclear Corporation. The Court therefore reversed the Court of Appeals' grant of summary judgment in favor of the insurer, Allstate, and remanded the case for further proceedings.

United Nuclear Corp. v. Allstate Ins. Co., Docket No. 32,939 (New Mexico Supreme Court, decided August 23, 2012, not yet released for publication in the permanent law reports).