Fall 2013

DEWHIRST & DOLVEN LLC Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas

IN BRIEF

COLORADO

The Colorado Supreme Court held that Colorado's premises liability statute, C.R.S. § 13-21-115, is not, as a matter of law, restricted solely to activities and circumstances that are directly or inherently related to the land.

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UTAH

In an appeal of a premises liability case, the Utah Supreme Court held that preexisting conditions do not need to be symptomatic the day of the accident in order for an apportionment instruction to be proper.

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WYOMING

In a personal injury suit against a horseback riding company, a release agreement was held to bar Plaintiff's claims that fell within the scope of the agreement. The agreement was held valid despite being signed by Plaintiff's wife, and the Court ruled that it did not violate any public policy.

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NEW MEXICO

In an insurance coverage case, Plaintiff insurer sought declaratory judgment that it was not liable for a judgment of "malicious abuse of process" against its insureds, due to the policy's "malicious prosecution" exclusion. Because the elements of causes of action for "malicious prosecution" and "malicious abuse of process" were different, the New Mexico Supreme Court held that the insureds had coverage under the policy.

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TEXAS

A homebuilder sought indemnification from an insurer for settlements with homeowners for the replacement of siding on 465 houses. The Texas Supreme Court ruled that there was coverage for the settlements despite the absence of the insurer's consent, because the insurer was not prejudiced by the settlements. The Court also ruled that the entire costs were covered, despite damage beginning and ending outside of the policy period.

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COLORADO

PREMISES LIABILITY STATUTE HELD TO NOT BE RESTRICTED TO ACTIVITIES DIRECTLY OR INHERENTLY RELATED TO THE LAND

Colorado Supreme Court: On certification from the United States Court of Appeals for the Tenth Circuit, the Colorado Supreme Court addressed the following question: Whether Colorado's premises liability statute, C.R.S. § 13-21-115, applies as a matter of law only to those activities and circumstances that are directly or inherently related to the land?

The Supreme Court held that the statute is not, as a matter of law, restricted solely to activities and circumstances that are directly or inherently related to the land because such a restriction does not appear in the statutory language. The Court also declined to adopt such a restriction. Instead, it held that the premises liability statute applies to conditions, activities, and circumstances on the property that the landowner is liable for in its legal capacity as a landowner. This inquiry necessitates a fact-specific, case-by-case inquiry into whether: (1) the plaintiff's alleged injury occurred while on the landowner's real property, and (2) the alleged injury occurred by reason of the property's condition or as a result of activities conducted or circumstances existing on the property.

Larrieu v. Best Buy Stores, L.P., 2013 CO 38, 303 P.3d 558 (June 24, 2013).

PREMISES LIABILITY CASE INVOLVING CONSTRUCTION SITE INJURY REMANDED FOR NEW TRIAL

Colorado Court of Appeals: In this premises liability action under C.R.S. § 13-21-115, Defendant Berkowitz, doing business as Shimon Builders, appealed the judgment entered against him following a jury verdict in favor of Plaintiff Reid.

Plaintiff, a construction worker, had accompanied his friend, a painter, to a house that was being constructed by Defendant in Denver. Plaintiff

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sustained significant injuries when he tripped at the top of the stairs, grabbed a handrail that gave way, and fell three stories to the floor below.

Defendant contended that the trial court erred in determining that Plaintiff was a licensee at the time of the incident. The trial court found that Plaintiff was a licensee because (1) he had an ongoing business relationship with Defendant; (2) he had worked on the construction site in question; (3) it was customary for workers on the project to help each other and Defendant was aware of this custom; (4) workers had flexibility as to how and when they could perform their work; and (5) at the time of the accident, Plaintiff was on the property helping the painter while waiting for a ride. Furthermore, Defendant maintained an "open worksite," meaning that it was acceptable for workers to bring additional help to the site to complete a task without Defendant's knowledge. The Court of Appeals held that these facts were sufficient to support the trial court's findings that Plaintiff had permission or consent to be on the premises.

Defendant also argued that the trial court erred in refusing to instruct the jury that it could apportion liability and fault to the two coworkers who had installed the handrail. Because the two coworkers owed Plaintiff a duty of care, Defendant was entitled to a jury instruction directing the jury to measure the fault of the two coworkers in addition to the fault of Defendant. Thus, the Court of Appeals found that the trial court erred in rejecting Defendant's tendered instruction. However, any error was determined harmless because Defendant had a non-delegable duty as a landowner to maintain the premises in a safe condition. Under the non-delegability doctrine, any fault of the coworkers would thus be imputed to Defendant.

Defendant further asserted that the trial court erred in refusing to instruct the jury on Plaintiff's comparative negligence. The Court of Appeals ruled that there was sufficient evidence to support an instruction on Plaintiff's comparative fault, including based upon Plaintiff's failure to see the cords which he tripped on. The part of the judgment rejecting a comparative negligence instruction was reversed, and the case was remanded for a new trial on liability only.

Reid v. Berkowitz, d/b/a Shimon Builders, 2013 COA 110 (Colorado Court of Appeals, decided July 18, 2013, not yet released for publication in the permanent law reports).

$50,000 VERDICT IN VICARIOUS LIABILITY CASE WHERE PLAINTIFF SOUGHT $2 MILLION

Jefferson County: In this personal injury action, the jury was to determine whether Defendant Duffy was within the course and scope of his employment when he rear-ended Plaintiff Durant's vehicle. Plaintiff alleged that Defendant was entering a text message into his cell phone when the collision occurred and claimed that Duffy was a distracted driver. Plaintiff also alleged that Duffy had consumed two beers prior to the accident. Plaintiff thus sought punitive damages.

Defendant Duffy admitted liability for the rear-end collision, but disputed causation, damages, and Plaintiff's claim for punitive damages. At the conclusion of Plaintiff's case, the court directed a verdict in favor of Defendant Duffy on the issue of punitive damages.

When the collision occurred, Duffy was employed by Atmel Corporation; however, Atmel denied that Duffy was within the course and scope of his employment. Duffy said that he had left work for the day, met a friend and had two beers, was called back to work, returned to work and completed additional work assignments, and then started to drive home. He had been talking with his employer on his cell phone, via Bluetooth, while driving home. He also testified that he had started to send a text to his employer and had entered two letters ("FU") but had not sent the text when the collision occurred. Duffy passed a roadside sobriety test administered by a police officer.

Plaintiff alleged a mild traumatic brain injury with cognitive deficits and soft tissue injuries to the neck and back. Plaintiff's past medical expenses were $60,000. He claimed a future loss of earning capacity as well as a permanent impairment. Plaintiff sought $2 million in closing argument. Plaintiff's final demand before trial was $100,000 to Duffy and $175,000 to Atmel. Duffy's final offer before trial was $100,000 contingent upon a release of all claims; Atmel's final offer was $75,000.

The jury returned a $50,000 total verdict against Duffy and a verdict in favor of Atmel. The jury determined that Duffy was not in the course and scope of his employment with Atmel when the collision occurred.

Durant v. Duffy et al., Case No. 10-CV-3892, Jefferson County District Court, Colorado.

LIMITATIONS ON JUDGMENTS UNDER THE COLORADO GOVERNMENTAL IMMUNITY ACT ARE AMENDED

Senate Bill 13-023, discussed in the Summer 2013 edition of this newsletter, was enacted into law as C.R.S. § 24-10-114, effective July 1, 2013, which provides:

(1) The maximum amount that may be recovered under this article in any single occurrence, whether from one or more public entities and public employees, shall be:

(a) For any injury to one person in any single occurrence, the sum of three hundred fifty thousand dollars;

(b) For an injury to two or more persons in any single occurrence, the sum of nine hundred ninety thousand dollars; except that, in such instance, no person may recover in excess of three hundred fifty thousand dollars.

(c) The amounts specified in subsections (a) and (b) of this subsection (1) shall be adjusted by an amount reflecting the percentage change over a four-year period in the United States department of labor, bureau of labor statistics, consumer price index for Denver-Boulder-Greeley, all items, all urban consumers, or its successor index. On or before January 1, 2018, and by January 1 every fourth year thereafter, the secretary of state shall calculate the adjusted dollar amount for the immediately preceding four-year period as of the date of the calculation.

C.R.S. § 24-10-114.

Utah

Utah Supreme Court Reverses Pre-Existing Conditions Decision

Utah Supreme Court : In an appeal of a Court of Appeals' decision summarized in the Winter 2012 edition of this newsletter, the Utah Supreme Court re-iterated "a core principle of tort law: defendants are only liable for those injuries proximately caused by their negligence."

In this case, Plaintiff Harris was injured when she sat on a display office chair at Shopko and the chair collapsed. She sued Shopko for negligence. At trial, evidence was introduced that she suffered from preexisting conditions that may have contributed to her injury. The trial court instructed the jury that, if it could, it should apportion damages between those attributable to her preexisting conditions. The jury found Shopko negligent but awarded Plaintiff substantially less than she requested in damages. Plaintiff appealed.

The Court of Appeals reversed the jury's award and remanded for a new trial. It did so on the ground that the trial court erred in giving an apportionment jury instruction. The Court of Appeals held that because Plaintiff's preexisting conditions were asymptomatic on the date of the accident, Defendant Shopko was not entitled to a jury instruction permitting the jury to allocate some portion of the damages to Plaintiff's preexisting conditions.

The Utah Supreme Court declined to adopt the Court of Appeals' approach of requiring preexisting conditions to be symptomatic on the day of the accident in order for an apportionment instruction to be proper. The Supreme Court noted that the Court of Appeals' decision would put a victim with latent, dormant, or otherwise asymptomatic preexisting conditions on equal footing with a victim with no preexisting conditions. Because the Court of Appeals' approach risks holding a defendant liable for more than they proximately caused in damages, the Supreme Court reversed the decision. The Court further recognized the eggshell plaintiff doctrine and ruled that it does not alter the Court's decision, as conclusions drawn from the evidence are typically within the province of the jury.

Harris v. Shopko, 2013 UT 34 (Utah Supreme Court, decided June 14, 2013, not yet released for publication in the permanent law reports).

Economic and Vocational Expert Testimony Ruled Admissible in Motor Vehicle Accident Case

Utah Court of Appeals: Defendant Montoya was driving on Interstate-15 when she entered a lane that was already occupied by a tractor-trailer being driven by Plaintiff Johnson. Plaintiff was injured when the two vehicles collided. Plaintiff sued for damages and the matter went to trial.

Plaintiff's vocational expert testified that Plaintiff's injuries shortened her work life and decreased her future earning capacity in a range of 50% - 69%. Defendant's counsel challenged the foundation of the expert's testimony and was given the opportunity to conduct voir dire of the expert outside of the jury's presence. The court then overruled Defendant's objection.

Plaintiff also called an economic expert, who opined that Plaintiff's injuries caused her a loss of at least $619,955 in earnings. Defendant objected to the economic expert's testimony, but the objection was overruled.

The jury found Defendant negligent and awarded Plaintiff $475,725.16 in damages. Defendant made motions for judgment notwithstanding the verdict, and for a new trial. Both motions were denied and Defendant then appealed on two bases: (1) that the trial court abused its discretion in permitting both experts to testify over objections; and (2) that the court improperly denied the motion for new trial.

As to Plaintiff's vocational expert, Defendant argued that the expert's methodology lacked the foundational requirements to ensure that the opinions had a reasonable degree of certainty because the expert never testified that her methodology was subject to peer review or subject to a rate of error. The Court noted, however, that the standard for admissibility of expert opinion under the Utah Rules of Evidence does not require a "reasonable degree of certainty" but instead a "threshold showing of reliability." The Court thus ruled that the expert testimony met the threshold and affirmed the trial court's ruling.

Because the motion for a new trial rested upon Defendant's expert testimony argument, the Court also affirmed the trial court's denial of the motion for a new trial.

Johnson v. Montoya, 2013 UT App 199 (Utah Court of Appeals, decided August 8, 2013, not yet released for publication in the permanent law reports).

Despite Plaintiff's Expert Report Being Held Inadmissible, Defense Summary Judgment is Reversed

Utah Court of Appeals: Plaintiff sued the Utah Department of Transportation (UDOT) following a car crash which injured one Plaintiff and killed both Plaintiffs' daughter. The crash occurred when a westbound car crossed over the median on I-80, came into eastbound traffic, and collided with Plaintiffs' vehicle. In suing UDOT, Plaintiffs claimed negligent design and construction by UDOT in failing to separate the lanes with a median barrier.

UDOT filed a motion for summary judgment, arguing that it had not breached the applicable standard of care and that Plaintiffs' proposed expert testimony was inadmissible. UDOT supported its motion with a report from its expert, who opined that a barrier was "not required." Thus, UDOT's decision not to construct a barrier at the site complied with the applicable standard of care.

In opposition to the motion, Plaintiffs offered an affidavit of its expert, Edward Ruzak, who concluded that a

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barrier should have been constructed. However, Ruzak never visited the site, never took measurements, and incorrectly reported the median width and road grade in his report.

The trial court excluded Ruzak's affidavit, finding that it failed to make the threshold showing that the opinions were reliable. The court emphasized Ruzak's reliance on vague or inadmissible data and that Ruzak's opinions were not supported with any published and accepted standard. As Plaintiffs' expert opinion was excluded, the trial court thus granted UDOT's motion because Plaintiffs lacked evidence that UDOT breached the standard of care. On appeal, Plaintiffs argued that the court erred in excluding Ruzack's expert opinion and sought reversal of the grant of summary judgment in favor of UDOT.

The Court of Appeals affirmed the trial court's exclusion of Ruzack's expert opinion. In doing so, the Court noted the same deficiencies highlighted by the trial court and stated that Ruzack's "methodology appears almost completely devoid of any such indicia of reliability." However, the Court did not affirm the grant of summary judgment.

Despite UDOT's argument that exclusion of Ruzack's opinions meant that Plaintiffs' claims failed as a matter of law, the Court held that UDOT, as the moving party, must demonstrate that it was entitled to of law. The Court noted that neither UDOT nor UDOT's expert had explained why UDOT's decision not to install a barrier was reasonable as a matter of law. As such, summary judgment was reversed and the case remanded to the trial court.

Paget v. UDOT, 2013 UT App 161 (Utah Court of Appeals, decided June 27, 2013, not yet released for publication in the permanent law reports).

'NO CAUSE' VERDICT IN MOTOR VEHICLE ACCIDENT CASE WHICH SOUGHT $4.2 MILLION

Utah County: Plaintiff Raquel Halladay alleged injury from a side-impact automobile accident caused by Defendant Blakely. Defendant admitted fault, but claimed the accident caused only a minimal change in velocity of Plaintiff's vehicle, caused almost no property damage, and alleged the impact was insufficient to cause the claimed injuries.

Plaintiff alleged to have sustained post-traumatic stress, a nasal fracture, a right shoulder injury, back and neck strains, and a traumatic brain injury with several resulting symptoms. Defendant claimed that most or all of the symptoms alleged by Plaintiff were related to a prior car accident. Plaintiff's expert claimed that Plaintiff hit her head against the side window with 800 pounds of force.

Plaintiff claimed past medical bills in the amount of $38,858 and future medical care having a value of $3,910,479. At the time of the accident, Plaintiff worked as a property manager, but stopped working after the accident. She claimed past wage losses in the amount of $48,837 and lost earning capacity in the amount of $289,912. Thus, Plaintiff sought over $4.2 million total.

Upon being tried to a jury, the jury awarded a "No Cause" verdict in favor of Defendant. The jury found that Plaintiff did not incur medical bills in excess of the statutory threshold amount of $3,000, and also did not sustain any permanent injury or impairment. The jury awarded "0" for past medical expenses. Prior to the trial, Plaintiff had demanded $1.25 million.

Halladay v. Blakely, Case No. 090402595.

WYOMING

RELEASE AGREEMENT UPHELD IN HORSEBACK RIDING CASE

U.S. District Court, D. Wyoming: While passing through Jackson, Plaintiff Kennedy and his family participated in a half-day horseback trail ride offered by Defendants. Plaintiff fell off his horse about an hour into the ride, possibly due to a broken cinch on the belt holding the saddle. Plaintiff sued for negligence, and Defendants moved for summary judgment in reliance on a release agreement that had been signed prior to commencement of the ride.

The release provided: "[the] undersigned hereby assumes the risk of injury … inherent in horseback trail riding and does hereby release and discharge [Defendant] Teton Village Trail Rides from any and all claims, including negligence involving or relating to any bodily injury which may arise or result from participation by the undersigned."

Plaintiff argued that he was not bound by the terms of the release because his wife had signed for him. However, the Court noted that it was undisputed that Plaintiff had read or "skimmed" the release and told his wife to sign it for him. Thus, he was bound by the agreement because his wife was his authorized agent.

Plaintiff also argued that the release was invalid as against public policy. However, the Court found that no public policy was violated. In so ruling, the Court found that horseback riding is not an essential public service which would convey on Defendant a "decisive bargaining advantage." The Court also found that Plaintiff and his wife were not pressured to sign the release, nor dissuaded from seeking to amend its language. As such, because the release was clear, unambiguous, and included a release for Plaintiff's claims, summary judgment was therefore granted in favor of Defendants.

Kennedy v. Teton Village Trail Rides, et al., Case No. 12 CV 155

NEW MEXICO

MALICIOUS PROSECTION POLICY EXCLUSION RULED NOT TO INCLUDE MALICIOUS ABUSE OF PROCESS TORT

U.S. Court of Appeals, 10th Circuit: The New Mexico Supreme Court had previously recognized a new tort for "malicious abuse of process," which subsumed the traditional causes of action for malicious prosecution and

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abuse of process. Defendant Nanodetex and two of its principals (the insureds) were successfully sued for malicious abuse of process, resulting in a judgment of $1 million in compensatory damages and $1 million in punitive damages. They then sought indemnification from Plaintiff, which covered the insureds under a management liability policy (the Carolina Policy).

Plaintiff insurer denied the claim, relying on an exclusion in the policy for losses arising from claims for "malicious prosecution." It then sought a declaratory judgment that it was not liable for the damages arising from the malicious abuse of process judgment.

The parties both moved for partial summary judgment on whether the Carolina Policy covered the compensatory damages award. The district court ruled that the term "malicious prosecution" in the policy was ambiguous, but that the most reasonable interpretation was for it to include claims brought for malicious abuse of process. Alternatively, the court ruled that the evidence in the prior lawsuit could have satisfied the traditional elements of malicious prosecution. Thus, Plaintiff's motion for summary judgment was granted. The insureds appealed, arguing that the district court erred in ruling that the Carolina Policy did not cover the damages award for malicious abuse of process.

The Court of Appeals first noted that clauses excluding coverage must be narrowly construed under New Mexico law. The elements of the two causes of action were determined to not be the same; indeed, the malicious prosecution claim requires an additional element. As such, the district court's grant of partial summary judgment in Plaintiff's favor was reversed, and the Court ruled that partial summary judgment should have been awarded in the insureds' favor.

Carolina Cas. Ins. Co. v. Nanodetex Corp., 2013 WL 440572 (United States Court of Appeals, 10th Circuit, decided August 19, 2013, not yet released for publication in the permanent law reports).

$58.5 MILLION JURY VERDICT IN WRONGFUL DEATH TRUCKING ACTION

Santa Fe County: This wrongful death action was brought when 46-year-old Kevin Udy was traveling westbound in a pickup truck and an eastbound tractor-trailer driven by Defendant Lyons made a sudden and unexpected left turn across Udy's lane of travel. Lyon's tractor-trailer was owned by Defendant Zia Transport and operated by Defendant Standard E&S LLC. Udy allegedly slammed into the back of the tractor-trailer. Udy suffered severe injuries in the crash, including a severed leg. He then died en route to the hospital.

The Plaintiff estate contended that Defendant Lyons was negligent and negligent per se for failing to yield the right-of-way, failing to keep a proper lookout, failing to keep his vehicle under proper control, becoming distracted while driving, driving while overly fatigued, and violating both Federal Motor Carrier regulations and New Mexico statutes. Plaintiff claimed Defendants Standard E&S and Zia Transport were negligent for failing to properly train, monitor, and supervise Lyons, failing to properly inspect, repair, and maintain the truck, and violating State and Federal rules and regulations. Plaintiff also asserted that Defendant Bergstein Enterprises operated Defendants Standard E&S and Zia Transport, and was thus liable under the doctrines of respondeat superior and agency.

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About Our Firm

Dewhirst & Dolven is pleased to announce the online publication of the Claims Handling Manual by the Claims & Litigation Management Alliance. Attorneys Rick Haderlie and Kyle Shoop contributed to the claims handling resources guide for Utah and Wyoming.

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 • Fort Collins, Colorado • and Port Isabel, Texas. Please see our website at DewhirstDolven.com for specific contact information.

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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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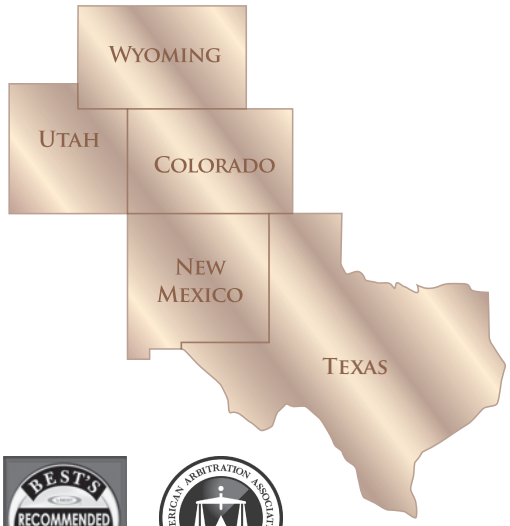

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Defendant denied liability, claimed the decedent was comparatively and contributorily negligent, and asserted that the decedent's accident and injuries were the fault of others.

The jury found that each Defendant was negligent and allocated fault as follows: 1% to Lyons, 20% to Standard E&S, 9% to Zia Transport, and 70% to Bergstein. The jury awarded $8,000,000 in damages on behalf of the decedent's surviving beneficiaries, $2,000,000 to the surviving spouse, and $500,000 each to decedent's three children. The jury also awarded the Plaintiff estate punitive damages of $28,000,000 from Standard E&S, $5,000,000 from Zia Transport, and 14,000,000 from Bergstein. The total award was thus $58,500,000.

Udy, Estate of v. Standard E&S LLC et al., Case No. D-101-CV-2011-00751.

Texas

JUDGMENT OBLIGATING INSURER TO INDEMNIFY HOMEBUILDER FOR REMEDIATION COSTS AFFIRMED

Texas Supreme Court: Having determined that homes built with an exterior insulation and finish system suffer serious water damage that worsens over time, a homebuilder (Defendant Lennar Corp.) undertook to remove the product from all homes it had built and replace it with conventional stucco. Lennar's insurer, Plaintiff Markel American Insurance, denied coverage of the costs, preferring instead to wait until homeowners sued.

Litigation ensued, and on appeal two issues were presented: (1) not having consented to the homebuilder's remediation program, is the insurer nevertheless responsible for the costs if it suffered no prejudice as a result; and (2) is the insurer responsible for i) costs incurred to determine property damage as well as to repair it, and (ii) costs to remediate damage that began before and continued after the policy period?

The insurance policy forbade Lennar from voluntarily making any payment, assuming any obligation, or incurring any expense without obtaining Plaintiff Markel's consent. Though Markel did not consent to Lennar's settlements with homeowners, the provision was held not to excuse its liability under the policy unless it was prejudiced by the settlements.

Markel had argued at trial that it was prejudiced from the settlements because Lennar offered remediation to homeowners with damaged houses who would never have sought redress if not offered by Lennar. However, the jury failed to find any prejudice, leaving the Supreme Court to one conclusion: "that Lennar's loss as shown by the settlements is the amount Markel is obligated to pay under the policy."

The Court also ruled that Markel's policy covered Lennar's entire remediation costs for the damaged homes. The Court noted that although damage began and continued outside of the policy period, all of the 465 houses suffered damage during the policy period. For damage that occurred during the policy period, the policy provided coverage to the "total amount" of loss suffered as a result, not just the loss incurred during the policy period. As such, the trial court's judgment in favor of Lennar was affirmed by the Texas Supreme Court.

Texas Supreme Court: Lennar Corp. v. Markel American Ins. Co., 56 Tex. Sup. Ct. J. 893, 2013 WL 4492800 (Texas Supreme Court, decided August 23, 2013, not yet released for publication in the permanent law reports).