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DEWHIRST & DOLVEN LLC
Attorneys at Law

ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

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COLORADO

$452,722.29 AWARD OBTAINED BY DEWHIRST & DOLVEN IN DEFENSE OF CASE WHERE PLAINTIFFS ORIGINALLY SOUGHT IN EXCESS OF $2,000,000 FOR ALLEGEDLY DEFECTIVE CONSTRUCTION

Larimer County: In a construction defect case, after trial to a jury, Dewhirst & Dolven attorneys Trevor Cofer, Sue Pray and Robin Lambourn obtained judgment on a counterclaim on behalf of their client, LT Builders, in the amount of $33,029.07. Based upon the award and a fee shifting provision in the construction contract, they filed a motion for award of fees and costs.

After a hearing on the motion, and hearing expert testimony on the issue, the Court awarded LT Builders $291,279.50 in attorney's fees and $94,034.83 in costs. The Court also amended its judgment on the counter-claim to award LT Builders $34,378.89 in prejudgment interest and interest continues to accrue at the rate of 18% per annum on the judgment from the date of entry of the judgment until it is paid.

In total, without including post-judgment interest, the Court and jury have awarded LT Builders $452,722.29 on a case in which Plaintiffs originally sought in excess of $2,000,000.00 for defective construction.

Castle v. LT Builders,
Case No.: 2004CV2483

DIRECTED DEFENSE VERDICT OBTAINED BY DEWHIRST & DOLVEN ON PLAINTIFF'S $2 MILLION DOLLAR EXCESSIVE USE OF FORCE AND NEGLIGENT HIRING AND SUPERVISION CLAIMS

Denver County: Dewhirst & Dolven's client, Boubalina, Inc., owns and operates a Denver nightclub named Vinyl. On October 27, 2007, Plaintiff was a patron of the club along with three friends. She alleged that, without provocation, the security personnel assaulted and battered her. She claimed that Bouboulina, Inc. was liable for the conduct of the security personnel and had negligently hired and supervised the security personnel.

After nine days of trial, including a full day of trial on a Sunday, lead counsel Lars Bergstrom of Dewhirst & Dolven

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was granted a directed verdict as to all of Plaintiff's claims against Bouboulina, Inc.

Plaintiff claimed she was thrown to the ground, repeatedly kicked, and was then handcuffed. After this, she was taken outside, allegedly thrown to the ground and kneeled upon until police arrived. Plaintiff also separately sued the security company and the two security guards who she claimed assaulted her. The following March, she was tried on criminal charges including disorderly intoxication and destruction of private property.

The security personnel involved in the incident stated that the Plaintiff was extremely intoxicated and belligerent. When one of the security guards, a five foot three inch female, approached Plaintiff to remove her from the club due to her obviously intoxicated state, Plaintiff and her friend assaulted the security guard. After a struggle, other security guards intervened and restrained Plaintiff and her friend.

Plaintiff claimed that the police who arrested her were as abusive as the club security personnel. After her arrest, Plaintiff was taken to the Denver County jail. While there, a sheriff's deputy assaulted Plaintiff by grabbing her hair and slamming her head repeatedly into a plexiglass window. This assault was captured on video and the sheriff's deputy was subsequently fired. Plaintiff asserted a claim against the city and received a settlement. In addition to the assault by the sheriff's deputy, the video captured Plaintiff's belligerent and non-compliant behavior.

Against Defendant Bouboulina, Plaintiff alleged claims of negligent hiring and supervision, premises liability, malicious prosecution and abuse of process, and civil conspiracy. Plaintiff also alleged that Bouboulina was vicariously liable through *respondeat superior.*

Plaintiff claimed physical and emotional damages. Her physical injury claims included continuing knee, neck and back problems. Based on pretrial motions and objections at trial, Plaintiff was precluded from introducing her medical billing records as exhibits at trial. Notably, Plaintiff was a law student at the time of the incident. She claims that her grades plummeted after the incident due to stress and psychological problems caused by the incident including post-traumatic stress disorder. She was academically dismissed from law school. Plaintiff attempted to allege as damages lost wages she would have earned as an attorney had she completed law school. Bouboulina defended against this claim arguing that such damages were extremely speculative and Plaintiff was, at best, a mediocre student prior to the incident.

Moreover, Bouboulina argued that the actions of the sheriff's deputies in jail and the police on the scene constituted an unrelated, subsequent act and that Plaintiff could not prove her claimed damages arose as a result of the conduct of the police as opposed to anything that might have occurred in the jail.

The Court found that Plaintiff did not provide any evidence of negligent hiring or supervision. Further, the Court found that, within the meaning of Colorado's premises liability statute, there was no danger to Plaintiff that the club knew about or should have known about. The Court found that Plaintiff introduced no evidence of malicious prosecution or abuse of process. In fact, Plaintiff did not produce any evidence that Bouboulina was in any manner involved in the prosecution of Plaintiff.

With respect to the vicarious liability claims, Bouboulina successfully argued that the security personnel were independent contractors, not employees. Under Colorado law, there is generally no vicarious liability for the acts of independent contractors unless the contractor is engaged in an inherently dangerous activity. The Court ruled that providing security at a nightclub was not inherently dangerous to the patrons of the nightclub. Based upon Bouboulina's successful pretrial motions, Plaintiff's liability experts were precluded from testifying. Moreover, Plaintiff only alleged intentional torts against the security personnel. In rendering its verdict, the Court also accepted Bouboulina's argument that there is no vicarious liability for the deliberate acts of employees or independent contractors unless the employer ratifies the conduct.

Barizonte v. Bouboulina, Case No. 2008CV9204

Colorado Supreme Court Holds Vehicle Owner and Driver's Insurance Policies are Co-Primary

Supreme Court of Colorado: This appeal arose when two automobile insurers disagreed as to responsibility for losses arising from an automobile accident. At issue was how two liability policies (a Shelter policy insuring the vehicle and a Mid-Century policy insuring the driver) applied to the loss.

Shelter's policy included a "step down" clause that reduced liability coverage for permissive drivers. The Supreme Court held that this provision was unenforceable in this case for lack of adequate notice to its insured. The Court did not rule on whether such provisions are void as a matter of public policy.

The Court also found no "primary-insurer" structure exists in Colorado statute. As such, there is not a statutory requirement that a vehicle owner's insurer to be the primary insurer where there is more than one applicable insurance policy. The Court held that an excess clause contained in a vehicle owner's insurance policy is valid under Colorado law. Here, however, both insurers' policies contained valid excess clauses, and thus were both mutually void. Therefore, in this case, both insurers were ruled as co-primary who must share losses equally until the policy limits of one insurer has been exhausted.

Shelter Mutual Ins. Co.v. Mid-Century Ins. Co., 246 P.3d 651 (Colorado Supreme Court, decided Jan. 18, 2011).

UTAH

UTAH SUPREME COURT HOLDS TREATING PHYSICIANS NOT REQUIRED TO PRODUCE A WRITTEN EXPERT REPORT TO TESTIFY AS EXPERT

Supreme Court of Utah: Richard Drew filed a complaint against Tonia Lee for damages related to an automobile collision. As part of the discovery process, Mr. Drew identified his treating medical providers ("treating physicians"), per Utah Rule of Civil Procedure 26(a)(3)(A), as expert witnesses who may be called to testify at trial. Although Mr. Drew identified his experts, he did not produce any written expert reports as required by Rule 26(a)(3)(B).

In response, Ms. Lee filed a motion in limine to exclude the expert testimony. Ms. Lee's objection was based upon Mr. Drew's treating physicians plan to opine on causation and prognosis issues which Ms. Lee considered to be beyond the scope of care and treatment. Ms. Lee argued that if Mr. Drew wanted to move forward with this testimony, he was required to produce and provide written expert reports as required by Rule 26(a)(3)(B).

The district court granted Ms. Lee's motion in limine and required Mr. Drew to provide expert reports under Rule 26(a)(3)(B). Relying on *Pete v. Youngblood*, the district court reasoned that if a treating physician's testimony goes beyond the scope of mere diagnosis and treatment of the patient, then the physician becomes a "retained expert" and the party must comply with both subsections (a)(3)(A) and (a)(3)(B) by filing an expert report.

The Supreme Court reversed the district court's decision and held that Rule 26(a)(3)(B) requires parties to produce a written report only from experts who are "retained or specially employed" to testify and that treating physicians do not fall into this category.

Drew v. Lee, 2011WL917257, (Utah Supreme Court, decided March 15, 2011, not yet released for publication in the permanent law reports).

UTAH VERDICTS

DEFENSE VERDICT IN BAR PATRON CASE

Salt Lake County: Plaintiff Martin Briceno claimed he was assaulted by bouncers at Defendant Lumpy's Downtown bar when he was denied entry because of the way he was dressed. Defendant did not deny the Plaintiff was assaulted, but claimed it was done by third parties unrelated to Defendant's establishment as Plaintiff was walking somewhere near the bar. Plaintiff complained of cuts and bruising to his head which were treated at a local emergency room. The case was tried before a jury, which returned a verdict for the Defendant.

Briceno v. Dinisimo, Case No. 080918963.

JURY REDUCES $12,000 ARBITRATION AWARD TO $5,087

Salt Lake County: Vehicles operated by Plaintiff Maurice Charleston and Defendant Audrey Miller collided on a residential street at a "Y" intersection where Defendant, an elderly woman, was trying to cross the intersection to enter her driveway. Defendant failed to notice Plaintiff's vehicle as she was not feeling well and had just returned from a doctor's appointment. The impact was minor and police were not called to investigate the accident.

Plaintiff experienced low back symptoms a few days following the accident, visited Defendant's home, and reported the accident to the police. Plaintiff received treatment at an emergency room, then followed up with chiropractic care and physical therapy. An MRI ordered by an orthopedic doctor revealed a lumbar disc bulge and annular tear. Medical bills totaled approximately $11,000. Defendant disputed the extent to which Plaintiff's symptoms were accident related.

The case was arbitrated and Plaintiff was awarded $12,000 plus costs. Defendant appealed. Upon jury trial, the jury found Defendant 70% at fault and Plaintiff 30% at fault. The jury awarded medical bills of $3,087 and general damages of $2,000. After reductions for PIP and comparative fault, Plaintiff's net verdict came to $1,479.51, plus costs of $234.

Charleston v. Miller, Case No. 090903208.

UTAH LEGISTLATION

NEW LEGISLATION CLARIFIES ARBITRATION AWARD AND AWARD OF FEES CAPS FOR UM/UIM MOTORIST CLAIMS

Senate Bill 174 was signed by Governor Gary Herbert on March 30, 2011 and applies to motor vehicle accidents that occur on or after that date. The bill clarifies UM statute 31A-22-305 and UIM statute 31A-22-305.3. Specifically, the amendments clarify that caps on the amount of arbitration awards for certain uninsured and underinsured motorist claims apply only in certain circumstances.

Within 30 days after a claimant elects to submit a claim to arbitration or files litigation, the Claimant shall provide to the carrier a written demand setting forth the specific monetary amount claimed, along with the factual and legal bases, any supporting documentation for the demand, identity of treating providers and relevant insurers, authorization to allow collection of records from the same, statutory lienholders, and other information.

Upon receiving the items specified in the statute, along with the election for arbitration or notice of filing litigation, the carrier shall have up to sixty days to provide a written response to the demand for payment and "tender the amount, if any, of the uninsured motorist carrier's determination of the amount owed to the covered person." U.C.A. § 31A-22-305(9)(c).

A covered person who receives a written response from the uninsured

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motorist carrier may then elect to accept the amount tendered as full payment of the claim or to accept the amount tendered as partial payment of the claim and litigate or arbitrate the remaining claim. If the amount tendered is the policy limits, "the tendered amount shall be accepted by the covered person." U.C.A. § 31A-22-305(9)(c)(ii).

The amount of an arbitration award may not exceed the policy limits, including applicable uninsured motorist umbrella policies, unless the final award is greater than the average of the above referenced initial demand and response. In this circumstance, the carrier shall pay the final award, and if the final award exceeds the policy limits by more than $15,000, "the amount shall be reduced to an amount equal to the policy limit plus $15,000," along with costs and arbitrator(s)' fees. U.C.A. § 31A-22-305(9)(g). The award of costs by arbitrator(s) may not exceed $5,000. Enacted amendments to the underinsured motorist coverage in U.C.A. § 31A-22-305.3 provide the same award caps as provided in the uninsured motorist statute. U.C.A. § 31A-22-305.

Senate Bill Modifies Named Driver Exclusions in the Utah Insurance Code

Senate Bill 99 was signed by Governor Gary Herbert on March 30, 2011. The bill modifies provisions of the Utah Insurance Code relating to named driver exclusions for motor vehicle insurance coverage.

As enacted, S.B. 99 amends U.C.A. § 31A-22-302.5 to proportionately reduce any benefits to any named insured for benefits payable under uninsured motorist coverage, underinsured motorist coverage, personal injury protection coverage, and first party medical coverage to the extent the person excluded from coverage was comparatively at fault.

If the driver's license of a person excluded from coverage has been denied, suspended, revoked, or disqualified and the person excluded from coverage subsequently operates a motor vehicle, benefits shall be proportionately reduced to any named insured for benefits payable under uninsured motorist coverage, underinsured motorist coverage, personal injury protection ("PIP") coverage, and first party medical coverage to the extent the person excluded from coverage was comparatively at fault.

If the excluded person is 50% or more at fault in causing the accident, both the excluded person and any named insured are barred from recovering any benefits from UM/UIM or PIP coverage.

WYOMING

Wyoming Supreme Court Refuses to Interpret Medical Malpractice Statute of Limitations Literally

Supreme Court of Wyoming: Plaintiff Rex Adams brought a medical malpractice claim against Dr. Betty Walton after allegedly receiving negligent medical treatment. While Plaintiff was being treated by Dr. Walton, he suffered a cardiac arrest in the emergency room.

Plaintiff's attorney reviewed the medical records of Dr. Walton, as well as other treating doctors who had previously operated on Plaintiff. Plaintiff's attorney felt there was no evidence of negligent medical treatment on the part of Dr. Walton and filed a claim against the prior treating doctors. During the trial, expert witnesses placed the fault on Dr. Walton. Plaintiff then filed a claim against Defendant Walton, despite Plaintiff's attorney continuing to disagree with the expert opinion.

After filing the claim, Dr. Walton was discovered to be out of state, though her whereabouts were "relatively easy to determine." By the time Plaintiff filed the claim, the two year statute of limitations period for medical malpractice claims had run. Plaintiff alleged the statute of limitations period had tolled because Defendant was out of state and he was unable to effectuate service of process. The district court disagreed and granted summary judgment for Defendant.

Plaintiff argued for a strictly literal translation of the statute of limitations and argued that the two year period of time should be overridden if a potential defendant is serendipitously absent from the state. The Supreme Court refused to interpret the statute of limitations period with a strictly literal reading and affirmed the trial court's grant of summary judgment for Defendant.

Adams v. Walton, 248 P.3d 1167 (Supreme Court of Wyoming, decided March 31, 2011).

Breach of Contract Award of $500,000 in a Third Party Indemnification Claim Affirmed by Wyoming Supreme Court

Supreme Court of Wyoming: In an appeal and cross appeal between True Oil Company and Pennant Services Company, the Supreme Court affirmed the trial court's $500,000 award for True Oil based upon Pennant's breach of contract.

Both companies were originally involved in a negligence action brought by Christopher Van Norman after he was injured in an oil well accident. True Oil settled out of court with Van Norman for $500,000. The original suit was resolved in 2005, leaving only a third-party suit that alleged breach of contract and indemnification between True Oil and Pennant. After a bench trial on those issues, the trial court found in favor of True Oil. Pennant was found to have breached the contract, and the court awarded True Oil $500,000 in damages. The appeal followed.

In its answer to True Oil's third-part complaint, Pennant admitted that it agreed to indemnify True Oil for the amount of any judgment or settlement that might be entered against True Oil which is attributable to the negligence of Pennant and its employees. Settlement discussions ensued between True Oil and Van Norman, whereby the claim was settled for $500,000. Neither Pennant nor its insurer,

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Mid-Continent, participated in the settlement discussions, despite invitations to do so. Pennant signed a stipulation agreeing the reasonableness of the settlement.

Pennant argued that True Oil failed to prove its damages for indemnification were reasonably foreseeable as a result of the breach of contract by Pennant. The Court stated that the issue before it on appeal was whether Pennant would be in breach of contract if it were not required to indemnify True Oil for True Oil's good-faith settlement with Van Norman. In answering yes, the Court wrote: "If, before settlement is concluded, the indemnitor is offered a choice between approving the settlement or taking over the defense of the claim, and refuses to do either, the indemnitee can recover by showing *potential* liability to the original plaintiffs and need not prove *actual* liability." The court found that reasonable apprehension of liability existed in the case and affirmed the trial court's award of indemnification for True Oil.

Pennant Service Co., Inc. v. True Oil Co., LLC, 2011WL782488 (Supreme Court of Wyoming, Decided March 8, 2011).

New Mexico

New Mexico Supreme Court Interprets UM/UIM Coverage Rejection by Insureds

Supreme Court of New Mexico: In this case, the Court considered the duty imposed on insurers to offer UM/UIM coverage under N.M.S.A. § 66-5-301. The United States Court of Appeals certified to the New Mexico Supreme Court the question of whether the election by an insured to purchase UM/UIM coverage in an amount less than the policy liability limits constitutes a rejection of the maximum amount of UM/UIM coverage permitted under Section 66-5-301.

In answering "yes," the Supreme Court held that the offer of UM/UIM coverage must include the maximum amount statutorily available in order to effectuate the legislature's policy of encouraging insureds to purchase such coverage. "As section 66-5-301 requires insurers to offer UM/UIM coverage up to the liability limits of the policy, it follows that the choice by the insured to purchase any lower amount is a rejection. … [W]e hold that the insurer may not exclude the maximum possible level of UM/UIM coverage in an auto liability policy unless it has offered it to the insured and the insured has exercised the right to reject the coverage through some positive act."

Progressive Northwestern Ins. Co. v. Weed Warrior Svcs., 245 P.3d 1209 (Supreme Court of New Mexico, 2010).

New Mexico Supreme Court Reverses Motion to Dismiss in Social Host Liability Claim by Providing Social Host Liability in a Private Settings

Supreme Court of New Mexico: Plaintiff Gina Delfino filed a claim on behalf of herself and as a representative for her children against several defendants for injuries sustained in a tragic automobile accident. Ms. Delfino was struck by a vehicle driven by Alicia Gonzales, who had been speeding and had a blood alcohol content of more than twice the legal limit.

Ms. Gonzales had spent several hours prior to the accident consuming multiple alcoholic beverages provided by individual pharmaceutical representatives during the course and scope of business meetings. Plaintiff filed a wrongful death suit against the pharmaceutical defendants and the owners and operators of the various bars and restaurants where Ms. Gonzales had consumed alcohol that evening. The district court granted the pharmaceutical defendants' motion to dismiss and concluded that they were not social hosts under the Liquor Liability Act.

In reviewing the district court's ruling, the Supreme Court interpreted the Liquor Liability Act to determine whether the pharmaceutical defendants had a legal duty to Plaintiff. The Liquor Liability Act provides for tort liability of liquor licensees and social

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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 professional relationships with open communication, which creates an environment of teamwork directed at achieving successful results for our clients.

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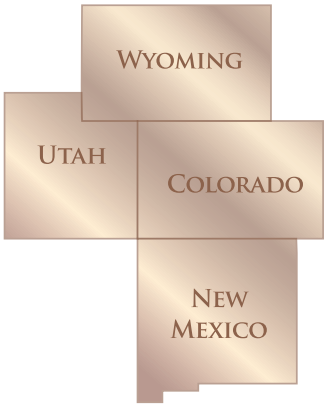

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hosts who sell, serve, or provide alcohol. The court interpreted this statute to include social host liability for private settings and ruled that the statute permits a cause of action against a social host who "recklessly provides alcohol to a guest when the alcohol is consumed in a licensed establishment."

The court identified several factors for determining whether one is a social host, including whether the person exercised control over the alcohol consumed, whether the person convened the gathering for a specific purpose or benefit to the alleged social host, and whether the person intended to act as a "host" of the event.

In applying these factors, the Supreme Court ruled that the pharmaceutical defendants were social hosts under the Liquor Liability Act, reversed the district court's grant of the motion to dismiss, and remanded the case to the district court.

Delfino et. at. v. Griffo et. al., Slip Opinion, Docket No. 32,372 (Supreme Court of New Mexico, decided April 8, 2011).