Spring 2012

DEWHIRST & DOLVEN LLC
Attorneys at Law

ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

IN BRIEF

COLORADO

DEWHIRST & DOLVEN PREVAILS WITH DISMISSAL OF PLAINTIFF'S CLAIMS ON $4 MILLION DIMINUTION IN VALUE CONSTRUCTION DEFECT CASE

Larimer County: Dewhirst & Dolven Attorney Aldo DelPiccolo prevailed on a motion to dismiss in a developer versus general contractor/engineer construction defect lawsuit involving a combination of seven "ready to build" exclusive estate lots and a 64-unit luxury condominium project in Estes Park, Colorado. The trial was to the Court before the Honorable Judge David Williams.

Plaintiff Fall River Village Communities ("FRVC") claimed that Defendants Cornerstone Engineering Services ("CES") and Cornerstone Construction Concepts breached their contractual obligations to properly construct the project and failed to identify allegedly detrimental soil conditions underlying the project. The suit involved contracts providing for the civil engineering, infrastructure installation, site work and vertical construction of two 8-plex condominium buildings and a pool house. Defendant CES terminated the contracts due to non-payment and proceeded to arbitration in 2007 to recover under the contracts. It prevailed in arbitration recovering fully on its claim. Plaintiff then filed this suit.

Plaintiff's case rested entirely on a single theory of damages based upon diminution in value. Plaintiff asserted that the difference between the project's anticipated worth upon completion of Defendants' construction and the amount for which Plaintiff transferred title to the project to a wholly related entity, FRVC II, reflected the diminution in value. Mr. DelPiccolo argued that Plaintiff failed to present any competent evidence of a diminution in the value of the project and that the transfer price was not fair market value, but was rather a transfer of convenience and done so at the lowest amount necessary to retire existing construction loans. Plaintiff's own appraiser, Alex Kovacs, testified that no diminution of value had occurred between the time he first appraised the value of the property for purposes of construction financing and any time thereafter. Notably, Mr. Kovac confirmed the appraisal in an affidavit in October 2007, over a year after CES left the site.

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At the conclusion of Plaintiff's case, Defendants presented their motion to dismiss. In his findings regarding the motion to dismiss, Judge Williams held that Plaintiff's own evidence failed to show any difference between the anticipated value of the project as appraised immediately prior to commencement of CES's work and the appraised value almost six months after the contracts were terminated. No other evidence relevant to the diminution of value claim was brought forward, nor did Plaintiff present any evidence of any measure of damages by any other theory. The Court declined to make any findings of fact regarding other issues in the case because the dismissal was based solely upon a failure to prove any damages.

Dewhirst & Dolven is currently pursuing an award for the costs of litigation, as statutorily permitted for a prevailing party.

Fall River Village, LLC v. Cornerstone Engineering Services et al., Case No. 2007CV525.

DUTY TO DEFEND UNDER COMMERCIAL GENERAL LIABILITY POLICY FOR POOR WORKMANSHIP CONSTRUCTION CLAIMS

Tenth Circuit Court of Appeals: The issue before the U.S. Court of Appeals for the Tenth Circuit was whether property damage caused by a subcontractor's faulty workmanship is an "occurrence" for purposes of a commercial general liability ("CGL") insurance policy.

This issue arose when the Hull and Giorgetta families sued Greystone Construction for defective construction when their homes (which they purchased from Greystone) were damaged due to soil expansion. Greystone was insured under CGL policies provided by two insurers: American Family Mutual Insurance Co. and National Fire & Marine Insurance Co. American defended Greystone under the CGL policy. National denied that it owed Greystone a duty to defend under the CGL policy because the property damage did not arise from a covered "occurrence."

In federal district court, the builders, Greystone and The Branan Co., and American Family sought to recover a portion of their defense costs from National. However, the district court granted summary judgment in favor of National, holding that National did not owe Greystone and Branan a duty to defend under the CGL policy because the complaints brought against National did not allege covered "occurrences." According to the district court, the complaints alleged injuries arising from faulty workmanship, which are not covered "injuries" under the CGL policy.

On appeal, Plaintiffs asserted that the complaints allege covered "occurrences" under the standard terms of the policies. In response, National argued that construction defects are not "occurrences" but rather the foreseeable result of poor workmanship, which was not covered by the CGL policy.

As a threshold matter, the Court of Appeals held that C.R.S. § 13-20-808 governing insurance policies issued to construction professionals, and establishing a definition of "accident," did not have retroactive effect, since the statute's "currently in existence" language indicated that it applied only to those whose policy periods that had not yet expired.

Upon applying Colorado case law, and assessing authority from other jurisdications, the Court of Appeals held that because damage to a property caused by poor workmanship is generally neither expected nor intended, it may qualify under Colorado law as an occurrence. Thus, liability coverage may potentially apply under the CGL policy. However, because the district court did not address potentially applicable exclusions, the judgment was vacated and the case was remanded to the lower court for reconsideration.

Greystone Construction, Inc. et al. v. National Fire & Marine Insurance Co., 661 F.3d 1272 (U.S. Court of Appeals, 10th Cir., decided Nov. 1, 2011).

COLORADO COURT OF APPEALS INTERPRETS CONSTRUCTION DEFECT TOLLING AND STATUTE OF REPOSE ISSUES

Colorado Court of Appeals: Plaintiff Roslyn Court at Stapleton Homeowners Association, not a party to the appeal, alleged construction defects in the Roslyn Court condominium complex, for which Defendant Shaw Construction had been the general contractor. Shaw hired Third Party Defendants United Builder Services and MB Roofing (collectively, "subcontractors") to hang drywall and install roofs, gutters, and downspouts. The City and County of Denver issued certificates of occupancy ("CO") for each residential building, the last being issued on March 10, 2004. The project's architect did not certify completion of all architectural items until June 8, 2004.

On May 15, 2007, Shaw received a notice of claim letter from the HOA under the Construction Defect Action Reform Act ("CDARA"). On January 21, 2009, the HOA filed an action against the developers of the property but did not add Shaw as a defendant until January 28, 2010. On March 29, 2010, Shaw filed its answer and third-party complaint, naming subcontractors, among others, as third-party defendants. Shaw sent its only notice of claim to subcontractors the following day.

Subcontractors moved for summary judgment on the basis that the six-year statute of repose had run. They argued that substantial completion had occurred not later than the date the final CO was issued, March 10, 2004. Shaw argued that substantial completion occurred on June 8, 2004, when the architect certified completion. Shaw did not include any evidence that subcontractors' work continued after the date of the CO on the last building. Alternatively, Shaw argued that under § 13-20-805, C.R.S. 2011, the HOA's notice of claim had tolled all claims associated with the project, including those against subcontractors, even though they had not received actual notice of the claim.

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The trial court granted subcontractors' motions, finding that the last CO indicated substantial completion. The trial court also held that the plain language of § 805 required actual notice to a party to toll a claim as to that party.

On interlocutory appeal, the Court of Appeals decided two questions of first impression under the CDARA. First, the Court determined that § 805 tolls construction defect claims against only parties who receive actual notice of a claim. Second, in applying the statute of repose (§ 13-80-104, C.R.S. 2011) to a multi-phase construction project, an improvement may be a discrete component of the larger project, which can be completed before the entire project is finished. Accordingly, the trial court's grant of summary judgments was affirmed.

Shaw Construction, LLC v. United Builder Services, Inc. et al., 2012 COA 24, No. 11CA2351 (Colorado Court of Appeals, decided February 2, 2012, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN MEDICAL MALPRACTICE WRONGFUL DEATH CASE

Mesa County: Plaintiff, the surviving spouse of Douglas Bennett, alleged that Defendant Narrod, M.D. was negligent in ordering a fentanyl transdermal patch when it was contraindicated and when Mr. Bennett was discharged from the hospital six hours after the patch was applied. Dr. Narrod ordered the patch to control post-operative pain in a hospital setting. Mr. Bennett died 18 hours after discharge.

A county medical examiner's autopsy concluded the cause of death was fentanyl intoxication. Plaintiff alleged that the use of the patch was negligent and inappropriate for post-operative pain. Plaintiff's experts relied upon "black box" warnings by the FDA. Defendant testified that the patch was used "off-label" until an appropriate plan to control the pain was established. Defendant's expert testified that Mr. Bennett's post-operative course was not typical and was complicated by his withdrawal from alcohol. Defendant presented evidence from a toxicologist that the post-mortem blood level of fentanyl was unreliable because of "post-mortem redistribution."

Plaintiff claimed $500,000 in economic damages and $300,000 in non-economic damages. The jury returned a verdict for Defendant.

Bennett v. Narrod, M.D., Case No. 09-CV-4302.

UTAH

UIM WAIVER RULED INVALID FOR FAILURE TO PROVIDE A REASONABLE EXPLANATION OF COVERAGE

Utah Supreme Court: In this underinsured motorist (UIM) coverage case, the Utah Supreme Court was asked to determine what constitutes a "reasonable explanation" of UIM coverage under U.C.A. § 31A-22-305.3. The UIM statute provides that an insured "may reject UIM coverage by an express writing to the insurer … on a form provided by the insurer that includes a reasonable explanation of the purpose of UIM coverage . . . ."

Plaintiff Lopez sustained injuries in an automobile accident while being a passenger in Miriam Salazar's vehicle. A few days prior to the accident, Ms. Salazar purchased an insurance policy from United Auto Insurance, wherein she rejected UIM coverage by signing United's waiver. Ms. Lopez sued Defendant United, alleging that United must provide her with UIM coverage because its waiver did not provide the reasonable explanation of UIM coverage required by the UIM statute. Ms. Lopez argued that United's waiver was invalid under the UIM statute because it failed to define UIM coverage or explain its purposes or benefits.

The Supreme Court held that the "reasonable explanation" clause of the UIM statute requires insurers to provide information sufficient to allow a consumer to make an informed decision regarding the selection of coverage. The Court held that United's waiver was invalid because it did not define "underinsured," failed to distinguish between UM and UIM coverage, and failed to explain the benefits of coverage.

Lopez v. United Auto Ins. Co. et al., 2012 UT 10 (Utah Supreme Court, decided February 24, 2012).

INSURER'S RIGHT TO REIMBURSEMENT FROM INSURED DENIED UNLESS INCLUDED IN CONTRACT

Utah Supreme Court: The U.S. District Court for the District of Utah certified the following question to the Utah Supreme Court: Does an insurer have a right to reimbursement or restitution against an insured?

The issue arose when a minor's parents sued the U.S. Sports Specialty Association ("USSSA") for injuries the minor received at a softball game sponsored by the USSSA. USSSA was insured with U.S. Fidelity and Guarantee Co. ("USF&G") with a $2 million policy limit. USF&G assumed the defense of USSSA, and a jury returned a $6.1 million verdict against USSSA. USSSA demanded that USF&G satisfy the entire judgment and asserted that USF&G conducted its defense in bad faith.

USF&G posted the full bond and filed an action in federal court, seeking a declaration that it could not be compelled to pay more than policy limits. USF&G then attended mediation with the minor's parents and entered into a settlement where USSSA was to pay $2.8 million. USSSA refused to sign the settlement and USF&G paid the settlement amount. USF&G requested restitution against USSSA for the amounts paid in excess of policy limits. USSSA asserted that USF&G voluntarily paid the settlement, denying that USF&G was entitled to restitution.

The Supreme Court stated: "An insurer's right to reimbursement from an insured affects the parties' risk relationship and therefore may only arise under the express terms of their insurance contract." Thus, the

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Court held that an insurer is entitled to restitution from its insured only where there is an express contract, such as an insurance agreement, permitting restitution.

U.S. Fidelity & Guarantee Co. v. U.S. Sports Specialty Assoc., 2012 UT 3 (Utah Supreme Court, decided January 24, 2012).

DEFENSE COSTS BETWEEN INSURERS ALLOCATED BASED UPON TIME-ON-RISK

Utah Supreme Court: The Tenth Circuit Court of Appeals certified the following issue to the Utah Supreme Court: Should defense costs in the underlying case be allocated between the two insurance coverage carriers under an "equal shares" method or, because the policies were issued for successive periods, allocated based upon a time-on-risk method?

Ohio Casualty Insurance Co. and Unigard Insurance Co. both insured Cloud Nine for successive periods. Both policies contained "other insurance" clauses which apportioned defense costs in equal shares with other primary insurance coverage. On appeal of the federal district court's ruling regarding allocation of defense costs, Ohio Casualty argued that the "other insurance" clause does not constitute "express language that decrees the method of apportionment." Rather, it urged the time-on-risk method as the most equitable means of apportionment.

The Supreme Court held that the "other insurance" clauses do not apply to successive insurers because neither insurer provided collectible insurance for a loss covered by the other insurer, as required by the language of the clause. The Court therefore held that defense costs should be apportioned using a method that divides responsibilities for defenses costs between the two insurers in proportion to their time on the risk.

Ohio Casualty Ins. Co. v. Unigard Ins. Co. et al., 2012 UT 1 (decided January 6, 2012).

NO-CAUSE VERDICT FOR DEFENSE IN MOTOR VEHICLE ACCIDENT

Utah County: Plaintiff Smith was exiting I-15 when his vehicle was rear-ended by Defendant Gray. Plaintiff claimed Defendant left about 15 feet of skid marks and pushed his vehicle about 30 feet. Defendant claimed the accident left virtually no damage to Plaintiff's vehicle.

Plaintiff was taken to the emergency room and the doctor told him that he had suffered "a stinger like athletes get." Plaintiff claimed continuing neck and shoulder problems. Defendant argued the medical records showed Plaintiff receiving treatment for neck and shoulder problems less than a year prior to the accident. Plaintiff claimed $50,514 in medical expenses, $27,609 of which were for future medical expenses. A jury found Defendant 90% at fault, but found that Plaintiff was not injured and returned a no-cause verdict for the defense.

Smith v. Gray, Case No. 090403582.

LOCAL RULES ADOPTED FOR THE RAPID AND INEXPENSIVE RESOLUTION OF DISCOVERY DISPUTES

The Third and Fourth District Courts have adopted a local supplemental rule, Rule 10-1-306, to provide for a rapid and inexpensive means of resolving discovery disputes short of a formal motion.

Rule 10-1-306 provides that prior to filing a discovery motion, such as a motion to compel or a motion for protective order, the parties must meet and confer regarding the issues and attempt in good faith to resolve the issues absent court involvement. The motioning party must then serve on all parties a "Statement of Discovery Issues," which must not exceed four pages or include any exhibits. Within five days after service of the Statement, any objecting party may file and serve a "Statement in Opposition," not to exceed four pages or include any exhibits. The Court will then set a telephone conference, if needed, to discuss the matter and will resolve most if not all of the discovery issues during the telephone conference.

Local Rule 10-1-306, Expedited Procedures for Resolving Discovery Issues.

New Mexico

SINGLE EMPLOYEE CONSTRUCTION CONTRACTOR REQUIRED TO PROCURE WORKERS COMPENSATION INSURANCE

New Mexico Court of Appeals: Paul Jackson was the sole owner of Jackson Construction, Inc. ("JCI"), a general contractor licensed in New Mexico. JCI did not employ any workers or executives other than Mr. Jackson, who served as JCI's president and sole board member. In 2008, Mr. Jackson affirmatively elected to exempt himself from coverage by the Workers' Compensation Act. The issue before the Court of Appeals was whether JCI remained subject to the Act and must nevertheless procure workers' compensation insurance.

The Court held that JCI was required to provide workers' compensation insurance under a plain reading of NMSA 1978, § 51-1-6(A) (1990), which states that the Act "shall apply to all employers engaged in activities require[ing a construction license] … regardless of the number of employees." The Court held that Mr. Jackson, as an executive, was an employee of JCI, and that Mr. Jackson's individual election to opt out of coverage did not opt JCI from coverage under the Act. Section 51-1-6(A) was therefore interpreted by the Court to require all incorporated construction employers to abide by the Act, even those who employ only executive employees that have individually opted out of coverage.

Jackson Construction, Inc. et al. v. Smith, Docket No. 30,454 (New Mexico Court of Appeals, slip opinion, decided February 15, 2012).

DRAM SHOP ACT APPEAL REVERSED IN DUI RELATED ACCIDENT

New Mexico Supreme Court: Defendant Durand crashed his Ford Bronco into a motorcycle driven by Daniel Gutierrez, ultimately resulting in Mr. Gutierrez's death. Durand admitted that earlier in the afternoon, while at the business establishment of Defendant Meteor Monument, he consumed seven twelve-ounce cans of

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beer and a twenty-four-ounce can of malt liquor, which has a higher alcohol content. He also testified that he consumed three ounces of malt liquor and ingested heroin and crack cocaine shortly before the accident. Gutierrez's estate successfully sued both Durand and Meteor for Gutierrez's wrongful death.

On appeal of the verdict against Meteor, Meteor contended that the evidence was insufficient to support a verdict under the New Mexico Dram Shop Liability Act because there was no evidence that identified which Meteor employee served Durand, nor was there evidence from which the jury could find that Durand's intoxication was reasonably apparent to the server. The Court of Appeals agreed.

However, in interpreting the Dram Shop Act, the New Mexico Supreme Court held that identification of the server was not essential. Further, the Court held that circumstantial evidence in the case, including testimony that Durand's alcoholism was well known and that Durand was usually visibly intoxicated by late afternoon, was sufficient for a jury to find it was reasonably apparent to Meteor that Durand was intoxicated at the time he was last served alcohol that evening. Thus, the Supreme Court reversed the Court of Appeals' decision.

Estate of Gutierrez v. Meteor Monument, L.L.C., Docket No. 32,436 (New Mexico Supreme Court, slip opinion, decided February 22, 2012).

WYOMING

SUPREME COURT DECLINES TO INTERPRET INSURANCE POLICY TO PROVIDE UIM COVERAGE

Wyoming Supreme Court: Plaintiff Broderick was injured as a result of an accident with an underinsured motorist. Prior to the accident, Plaintiff had purchased automobile insurance coverage from Defendant Dairyland Insurance Co. Although Plaintiff had requested "full coverage," the policy did not include UIM coverage. Plaintiff sued Dairyland, alleging that he should be granted recovery under the Dairyland policy.

The Wyoming Supreme Court first interpreted W.S.A. § 31-10-101 to hold that it does not require an insurance policy to provide UIM coverage (only UM coverage is required unless rejected by the named insured). Next, the Court interpreted the Dairyland-policy and ruled that it was unambiguous in not providing UIM coverage. The Court refused to reform the Dairlyland policy to include UIM coverage, based upon the absence of a mutual mistake between the parties. Lastly, the Court held that the Dairyland agent did not have actual authority to bind Dairyland to provide UIM coverage.

Broderick v. Dairyland Ins. Co. et al., 2012 WY 22 (Wyoming Supreme Court, decided February 16, 2012).

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ABOUT OUR FIRM

Dewhirst & Dolven is pleased to announce that Marilyn Doig has accepted membership with the firm. Ms. Doig's practice includes the defense of claims in the following areas: first and third party insurance, construction litigation, dental malpractice, medical malpractice, professional liability, general liability, insurance bad faith, and products liability defense. Ms. Doig received a Bachelors of Arts degree from Bradley University, a Master of Education degree from Northern Illinois University, and a Juris Doctor degree with honors from DePaul University College of Law. Ms. Doig has served as a member of the DePaul University Law Review, Juvenile Diabetes Research Foundation, Colorado Springs Branch Board of Directors, and LEAD Foundation Board of Directors. She is currently a member of the Colorado Bar Association, El Paso County Bar Association, Colorado Defense Lawyer's Association, Professional Liability Defense Association, and Defense Research Institute. Ms. Doig is licensed to practice law in the State of Illinois, State of Colorado, U.S. District Court, District of Colorado, and U.S. Court of Appeals, Tenth Circuit.

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MEDICAL PAYMENTS COVERAGE DENIED FOR INJURIES SUSTAINED WHILE ATV DRIVEN OFF-ROAD

Tenth Circuit Court of Appeals: Plaintiff Hale was severely injured in an ATV accident when the ATV flipped and landed on top of him while ascending an embankment on federal land. The ATV was not registered with any state and was not covered by a liability policy. Plaintiff Hale had a motor vehicle insurance policy from Nationwide for his four automobiles.

The Nationwide policy included medical payments coverage. However, the medical payments coverage excluded coverage for injuries sustained in accidents involving "any vehicle or equipment . . . designed mainly for use off public roads while not upon public roads." The policy did not include a definition for "road." Based upon the policy language, Nationwide denied Hale's claim.

On appeal, Hale argued the accident occurred on a public road. In interpreting the Nationwide policy, the Court noted that although the policy did not define "public road," it nevertheless distinguished between public roads and terrain suitable only for specially designed vehicles. Because evidence indicated the subject trail was "steep, slick, and dangerous – barely passable," the Court ruled that the Nationwide policy did not provide coverage for Hale's injuries.

Hale v. Allied Ins. et al., 2012WL287168 (U.S. Court of Appeals, 10th Cir., slip opinion, decided February 1, 2012).

$1.4 MILLION VERDICT IN CONSTRUCTION BREACH OF CONTRACT CASE

U.S. District Court, D. Wyoming: Plaintiff Tetra Tech was hired as the general contractor to construct three wind farms. Tetra hired Defendant Jerry Herling Construction ("JHC") as a subcontractor to perform dirt works on the project. Five months after JHC began its work, JHC informed Tetra that its fuel contractor was owed $3,000 and had threatened to stop fuel deliveries if it was not paid. Tetra investigated and learned that JHC's vendors were owed more than $7 million total. Tetra paid numerous vendors to avoid work stoppage and lien fees, and worked with JHC on a "recovery plan." JHC, however, later complained that Tetra caused the problems and sent an email to Tetra demanding payment of over $9 million. Tetra terminated the contracts with JHC and filed suit. JHC counterclaimed for payment for work it had performed.

The case was tried to jury. The jury awarded Tetra $1,580,539 for breach of contract and negligent misrepresentation damages. The jury also awarded JHC $153,226 on its unjust enrichment claim for unpaid completed work on the project. The Court confirmed the verdict and awarded Tetra a net judgment of $1,427,313.

Tetra Tech v. Jerry Herling Construction, Inc., Case No. 08CV210.