Spring 2013

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas

IN BRIEF

COLORADO

- Dewhirst & Dolven attorneys Lars Bergstrom and Kathleen Kulasza prevailed on appeal in having the district court's directed verdict against all of Plaintiff's claims affirmed. Plaintiff was a nightclub patron who alleged several causes of action after being removed from the nightclub by independently contracted security personnel and subsequently arrested by police. The Court of Appeals' decision included holding that Plaintiff failed to present evidence to support some of her claims and that Dewhirst & Dolven client Bouboulina, Inc. was not responsible for the acts of the security personnel.

..... *Page 1*

UTAH

- In a premises liability case arising when Plaintiff fell into a manhole in a grocery store parking lot, Defendant had obtained summary judgment on the basis that it was not responsible for the acts of its independent contractor in leaving the manhole uncovered. The Court of Appeals reversed, adopting the doctrine of peculiar risk that creates a duty when employers retain independent contractors to perform work that is likely to create a peculiar unreasonable risk of harm.

..... *Page 2*

WYOMING

- In a case where Plaintiff sought to recover for personal injuries stemming from a paragliding accident, Defendants' motion to dismiss was granted by the district court based upon a forum-selection clause in an agreement between Plaintiff and a paragliding association. The Wyoming Supreme Court reversed the dismissal, holding that the forum selection clause was non-binding because Defendants were not a party or third party beneficiary to the agreement.

..... *Page 3*

NEW MEXICO

- In a property damage case stemming from water seepage issues, Defendants' motion to dismiss was granted by the district court based upon the expiration of the statutes of limitations. On appeal, the Court of Appeals reversed, noting that there were questions of material fact concerning when Plaintiff discovered the damage. The Court also noted that the seepage constituted successive injuries which Defendants failed to show occurred outside the statute of limitations periods.

..... *Page 4*

TEXAS

- In a construction defect case, Defendant successfully obtained dismissal of Plaintiff's claims due to Plaintiff's failure to comply with the certificate-of-merit requirement pertaining to claims relative to professional services. The Court of Appeals reversed, finding that Plaintiff's provision of an expert affidavit satisfied the requirement.

..... *Page 5*

COLORADO

DEWHIRST & DOLVEN PREVAILS AGAINST PLAINTIFF'S APPEAL IN BARIZONTE V. BOUBOULINA, INC.

Colorado Court of Appeals: After nine days of trial in February 2011, a Denver District Court granted Dewhirst and Dolven client, Bouboulina, Inc., a directed verdict against all of Plaintiff's claims. The Co-Defendant security personnel remained in the trial. Plaintiff was a nightclub patron who alleged assault, battery, civil conspiracy, negligent supervision and hiring, and premises liability, after she was removed from the premises by independently contracted security personnel and subsequently arrested by police.

Plaintiff appealed, alleging error on a number of issues including the grant of directed verdicts; the trial court's decision to preclude evidence the Plaintiff sought to introduce; refusing to allow a third amended complaint; denying a motion to preclude allocation of fault to the City of Denver; the instruction given to the jury on intervening cause and unrelated second event; the designation of rebuttal witnesses; and supposedly inconsistent verdicts. In its unpublished opinion, the Appeals Court disagreed with all of Plaintiff's arguments and ruled in favor of Dewhirst & Dolven attorneys Lars Bergstrom and Kathleen Kulasza's defense arguments.

The Court concluded that the district court's directed verdict was proper. It held that Plaintiff presented no evidence as to the civil conspiracy or malicious prosecution claims. The trial court also ruled that Bouboulina was not responsible for the acts of the security personnel based on the independent contractor defense. Plaintiff objected to this only in a post-trial filing and the Appellate Court deemed Plaintiff to have waived the argument.

Further, the Court of Appeals agreed that the trial court did not abuse its discretion in excluding evidence of minor criminal arrests by various security personnel where the incidents were unrelated to any propensity for violence and occurred years before the incident at issue in the lawsuit. Similarly, the Court found no harm in allowing the Defense to call a non-expert rebuttal witness even though the designation occurred on the eve of trial.

Continued on Page 2

IN THIS ISSUE

Continued from Page 1

Plaintiff, a first year law student, claimed that she was academically dismissed due to post-traumatic stress disorder resulting from the incident. After the incident at the nightclub, Plaintiff was arrested. While in jail, Plaintiff was not cooperative and a Sheriff's deputy grabbed Plaintiff by the hair and slammed her head several times into a plexiglas window. At trial, Defendants claimed this subsequent event was an intervening and superseding cause. Plaintiff attempted to argue that Defendants could not assert this defense without designating the Sheriff's deputy as a non-party at fault. The Court of Appeals agreed that since the Defendants were not seeking a percentage apportionment of any potential verdict, there was no need to make a non-party designation to assert the affirmative defense of an unrelated second event.

The jury awarded Plaintiff a small verdict on her assault and battery claims against security guard Malia Calip. At the same time, Ms. Calip was also awarded a verdict on her assault and battery counterclaims against Plaintiff. Plaintiff claimed these verdicts were inconsistent. The Appeals Court instead found that these merely reflected a mutual fight.

Barizonte et al. v. Bouboulina, Inc. et al., No. 11CA1162.

COLORADO SUPREME COURT ABOLISHES THE SUDDEN EMERGENCY DOCTRINE

Colorado Supreme Court: Plaintiff Bedor's vehicle was hit by Defendant Johnson's vehicle after Defendant lost control of his vehicle in winter driving conditions. There was conflicting evidence regarding whether Defendant was intoxicated, speeding, or both when he lost control of his vehicle. Among the jury instructions was an instruction on the sudden emergency doctrine. The jury returned a verdict in favor of Defendant, holding that Defendant was not negligent. Plaintiff appealed, arguing that the court erred in instructing the jury on the sudden emergency doctrine.

The Supreme Court held that the district court erred in its instruction because competent evidence did not support giving it in this case. The Court stated that the instruction was only proper in cases where the defendant deliberately acted in response to a sudden emergency, not where a defendant lost control of a vehicle. Furthermore, the Court held that Colorado negligence law no longer requires the sudden emergency instruction and that the instruction's potential to mislead the jury outweighs its minimal utility. Thus, the Court abolished the sudden emergency doctrine.

Bedor v. Johnson, 2013 CO 4, 292 P.3d 924 (January 22, 2013).

DEFENSE VERDICT IN CONSTRUCTION COVERAGE CASE

U.S. District Court, D. Colorado: In 2009, road work was being performed near Plaintiff High Street Lofts Condominiums Association's property. Defendant American Family Mutual Ins. Co. issued Plaintiff an insurance policy. Plaintiff alleged that vibrations from the road work damaged its building. Plaintiff filed a claim with American Family and alleged that American Family owed benefits under the policy. American Family denied the claim and cited several policy exclusions, including an earthwork movement exclusion. It also argued that Plaintiff's building had pre-existing damage and that the damage was not caused by the road work.

At trial, the Court directed a verdict in favor of Defendant American Family on Plaintiff's claim of unreasonable denial of benefits. Plaintiff alleged approximately $560,000 to repair the building and sought $800,000 in damages. The jury returned a verdict in favor of Defendant, finding that Plaintiff did not prove that it suffered a type of injury or damage that falls within the grant of coverage in the policy.

High Street Lofts Condominium Assoc., Inc. v. American Family Mut. Ins. Co., Case No. 10-CV-2484.

Utah

COURT OF APPEALS ADOPTS THE DOCTRINE OF PECULIAR RISK FOR INDEPENDENT CONTRACTORS

Utah Court of Appeals: Plaintiff Berrett was injured when she fell twenty feet into an open manhole while walking to her car in an Albertsons parking lot. Albertsons had contracted with A-1 to service a grease trap located below the parking lot. A-1 opened the manhole cover and inserted a hose that was attached to A-1's truck to clean the grease trap. When Plaintiff fell into the manhole, video showed the hose no longer being inside of it. A-1's worker was away from the manhole and there were no barricades placed around it.

Albertsons maintains grease traps at most of its stores, which require being serviced about every six weeks. At the subject store, the grease trap is located in front of the store in its main parking lot. A-1 had previously cleaned the grease trap several times and was following usual procedure. Albertsons was aware that this procedure involved leaving the manhole uncovered during servicing.

Plaintiff sued Albertsons and A-1 for damages. Albertsons moved for summary judgment on the ground that it did not owe Plaintiff a duty. The district court granted this motion and Plaintiff appealed.

On appeal, Plaintiff argued that Albertsons had actual or constructive notice of a hazardous condition, and thus owed a duty to Plaintiff as a business invitee. Plaintiff also argued for the adoption of the doctrine of peculiar risk in Restatement (Second) of Torts, § 413. The doctrine of peculiar risk describes a duty on the part of an employer when the employer entrusts to an independent contractor work that is likely to create a peculiar unreasonable risk of harm. Situations where the duty arises include when the employer fails to provide in the contract that the contractor is to take certain precautions. Albertsons argued that Utah law provides that an employer is not

More on Page 3

Continued from page 2

vicariously liable for the acts oromissions of independent contractors, and thus it held no duty toward Plaintiff for A-1's acts. Albertsons also argued that adopting the doctrine of peculiar risk would burden employers in obtaining specialized knowledge in foreign areas.

The Court first held that the facts, when inferred in favor of Plaintiff, provide some evidence suggesting that Albertsons had notice of the hazard, and thus owed Plaintiff a duty of care as a business owner. Second, the Court adopted the doctrine of peculiar risk as provided for in § 413 and remanded the case to the district court for further proceedings.

In addition, during litigation of the case, Plaintiff passed away, raising an issue as to which version of the Utah survival statute applied. Plaintiff argued that the version in effect at the time of Plaintiff's death applied, whereas Albertsons argued that the version in effect at the time of Plaintiff's underlying injury controls. The Court held that the version of the Utah survival statute in effect at the time of the injury to the party controls.

Berrett v. Albertsons Inc., 2012 UT App. 371, 293 P.3d 1108 (December 28, 2012).

INSURER'S DUTY OF INVESTIGATION RULED AS BEING OUTSIDE THE SCOPE OF GENERAL LIABILITY POLICY IN PROPERTY DAMAGE CASE

Utah Court of Appeals: In October 2005, Human Ensemble ("Ensemble") purchased two insurance policies: a general liability policy from Scottsdale Ins. Co. and a property damage policy from Colony Ins. Co. In December 2005, a toilet overflowed in a building owned by Ensemble, resulting in several inches of standing water. The tenants sued Ensemble for damages. Ensemble filed a claim for property cleanup in January 2006 with its liability carrier, Scottsdale. Scottsdale also agreed to defend Ensemble against the liability claims. Six weeks later, Scottsdale informed Ensemble that it would not cover the property damage claim because it was only the general liability insurer and there was no property damage policy issued.

In June 2006, Colony sought a declaratory judgment that it was not obligated to pay for any water leak damages. Scottsdale then intervened to have its own obligations to Ensemble determined. Ensemble counterclaimed against Scottsdale for bad faith, breach of contract, and negligence, alleging that Scottsdale breached its duty of investigation. When Scottsdale filed a motion for summary judgment, Ensemble opposed it by arguing that Scottsdale breached its duty when the adjuster failed to notify Ensemble for the six week period that its policy did not cover the property damage claim. The district court denied Scottsdale's motion.

Scottsdale filed a renewed motion for summary judgment, arguing that the bad faith claim was not yet ripe because Scottsdale had not yet withheld any benefits due under the insurance policy, that it had no actionable duty to inform Ensemble of coverage terms in a policy which Ensemble sought out and purchased, and that Ensemble was on notice of the coverage terms. The district court granted Scottsdale's renewed motion.

The Court of Appeals first ruled that the district court did not abuse its discretion by reconsidering the previous denial of summary judgment. The Court stated that the district court had discretion to do so because the case was not yet fully resolved, and that the presentation of new legal theories permitted reconsideration.

The Court also affirmed the district court's grant of summary judgment on the bad faith claim, on the basis that the duty of investigation which Ensemble sought to impose upon Scottsdale was outside the scope of the insurance contract. Ensemble was held to have been responsible for keeping track of which insurance company provided which type of coverage, rather than Scottsdale being responsible to advise Ensemble of the general type of policy which Ensemble purchased. Thus, summary judgment in favor of Scottsdale was affirmed.

Colony v. The Human Ensemble, LLC et al., 2013 UT App. 68 (Utah Court of Appeals, decided March 14, 2013, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN WATER METER PREMESIS LIABILITY CASE

Utah County: Plaintiff Shephard was walking back to her home after talking with a visitor in her front yard. Plaintiff knowingly stepped on a water meter cover. She alleged that the cover gave way, causing her right leg to plunge into the water meter hole to about thigh height. Plaintiff claimed that her brother then hand-tightened the lid. Defendant, the City of Orem, alleged no notice of any defect or problem, and noted it has responsibility to maintain thousands of city residential water meters. The City also questioned whether the lid came loose, as a City worker found the lid locked down tight after the incident. The worker said he could not open the lid without a wrench, thus questioning whether the lid could have been "hand-tightened."

Plaintiff suffered a right knee injury. She claimed she would need future surgery and alleged up to $50,000 in future medical expenses. The jury returned a verdict finding that the City was not negligent.

Shephard v. City of Orem, Case No. 090402478.

Wyoming

FORUM SELECTION CLAUSE RULED NON-BINDING IN PARAGLIDING CASE

Wyoming Supreme Court: Plaintiff Venard filed suit against Defendants to recover damages for personal injuries sustained during a paragliding lesson when he fell thirty-five feet to the ground. Defendants included Jackson Hole Paragliding and its employees, owners, and agents. Defendants filed a motion to dismiss, seeking to enforce a forum selection clause contained in a "Release, Waiver, and Assumption of Risk Agreement" signed by Plaintiff as a condition of membership with the United States Hang Gliding and Paragliding Association ("USHPA").

More on page 4

Continued from Page 3

Several Defendants had signed similar agreements with USHPA, but none were parties to the agreement between Plaintiff and USHPA. Based upon the forum selection clause, Defendants contended that Wyoming was not the correct forum for the dispute, arguing that they were third party beneficiaries of the agreement. The district court agreed and granted the motion to dismiss.

The Wyoming Supreme Court stated that Defendants' reliance on their status as a third party beneficiary to the agreement was "misplaced." The Court noted that previous Wyoming authority supports forum selection clauses being prima facie valid, however that authority demonstrates Defendants not being third-party beneficiaries. Defendants were not "closely related" to USHPA and it was not reasonably foreseeable that Defendants would be bound by the agreement. Thus, because Defendants were not parties to the agreement between Plaintiff and USHPA, Plaintiff was not bound to the forum selection clause. The Court thus reversed the trial court's grant of Defendants' motion to dismiss.

Venard v. Jackson Hole Paragliding, LLC et al., 2013 WY 8, 292 P.3d 165 (January 17, 2013).

$400,000 AWARD IN AIRCRAFT CRASH CASE INVOLVING STUDENT PILOT

U.S. District Court, D. Wyoming: Plaintiff Fox, a student pilot, claimed he suffered a femoral condyle fracture and a tibiofibular fracture, in addition to contusions, abrasions, and lacerations, when the aircraft he was flying struck a mountainside during a night flight. Plaintiff alleged that Defendant D.R.A. Services LLC operated and managed the airport from which he took off. He also alleged that D.R.A. knew the red instrument panel light in the aircraft was not functioning and that the flight instructor intended to use the white cockpit light, which would impair Plaintiff and the instructor's night vision.

D.R.A. denied liability and contended it was not aware of any foreseeable risks, did not have an ownership interest in the aircraft, and did not perform maintenance on the aircraft. The jury awarded Plaintiff $400,000 and determined that D.R.A was 20 percent liable. Accordingly, the court reduced the award to $80,000.

Fox v. D.R.A. Services LLC, Case No. 11CV00248.

New Mexico

STATUTE OF LIMITATIONS SUMMARY JUDGMENT REVERSED BY NEW MEXICO COURT OF APPEALS IN WATER SEEPAGE CASE

New Mexico Court of Appeals: Plaintiff Yurcic owned property located next to the Gallup airport. In 1998, a retention pond was dug at the airport next to Plaintiff's property to address flooding and drainage issues. After construction, the pond often filled and overflowed during rainstorms. No efforts were made to pump or drain the pond, allowing water to seep into the ground.

In the years following the pond's construction, Plaintiff's building began exhibiting signs of damage to the foundation, walls, roof, and floors. In May 2008, Plaintiff filed suit against the City of Gallup, Gallup Flying Service, and Molzen-Corbin and Associates (the pond designer). In 2010, these Defendants jointly moved for summary judgment based upon the expiration of the statutes of limitation, arguing that Plaintiff obtained notice between 1998 and 2003 that the pond was damaging the property. Defendants argued that the two year statute of limitations applicable to the City and the four year statute of limitations applicable to the other Defendants barred Plaintiff's claims. The district court granted Defendants' motion.

On appeal, Plaintiff argued that disputed material facts exist as to whether the statute of limitations expired prior to her filing of the complaint. The Court of Appeals held that the discovery rule determined when Plaintiff's claims arose: "Under the discovery rule, the statute of limitations begins when the plaintiff acquires knowledge of facts, conditions, or circumstances which would cause a reasonable person to make an inquiry leading to the discovery of the concealed cause of action." The Court ruled that material facts were in dispute as to the timing of when Plaintiff discovered the property damage. The Court also noted that Defendants failed to offer any proof that the property damage would lead a reasonable person to inquire as to the pond's deteriorative effect on Plaintiff's building. Notwithstanding, the Court held Plaintiff's claims against the City time-barred on the basis that Plaintiff was put on inquiry notice concerning the damage within the applicable two year period for claims against the City.

Also on appeal, Plaintiff argued that summary judgment was improper because successive injuries occurred due to the pattern of ongoing seepage. Thus, under Valdez v. Mountain Bell Telephone Co., 107 N.M. 236 (Ct. App. 1988), separate causes of action accrued with each new injury to the property. The Court ruled that the evidence supported the seepage creating successive injuries under Valdez. Because a statute of limitations argument is an affirmative defense, the Court reversed the grant of summary judgment on the basis that Defendants failed to meet their burden to show that the successive injuries occurred outside of the applicable statute of limitations periods.

Yurcic v. City of Gallup et al., 2013-NMCA-039, Docket No. 30,786.

COURT OF APPEALS INTERPRETS UCC CLAIM AS TORT CLAIM SUBJECT TO TORT STATUTE OF LIMITATION

New Mexico Court of Appeals: This case addressed whether a complaint based solely upon the Uniform Commercial Code (UCC) provisions for breach of warranty, but seeking personal injury damages, is a claim under the UCC or a tort claim.

Plaintiff Badilla worked as a tree trimmer. He bought a pair of work boots at Wal-Mart in October 2003 which were labeled "Iron Tough, rugged leather boots" and stated that they met or exceeded specifications for performance requirements for foot protection. During the next nine months, Plaintiff wore the boots for between 1871 and 2805 hours. Plaintiff stated that as "the boots wear

More on Page 5

Continued from Page 4

down, the yellow rubber piece tends to unglue itself and roll up as you are walking, making it very dangerous when working." Plaintiff did not attempt to return the boots or obtain any refund.

Plaintiff tripped while working in July 2004 and could not get out of bed the next day. After being told he had two ruptured or bulging discs, he underwent surgery. Plaintiff obtained a stipulated workers compensation order then filed suit against Wal-Mart in September 2007 for breach of express and implied warranties of the boots. Wal-Mart moved for summary judgment on the basis that Plaintiff's claims were barred by the statute of limitation for personal injury claims. The district court granted Wal-Mart's motion, despite Plaintiff's argument that his claims should be governed by the four-year statute of limitation under the UCC's warranty provisions. Plaintiff then appealed.

The Court of Appeals noted that Plaintiff's claims were personal, rather than attributed to any failure of the purchase of the boots. Plaintiff stated that his objective was not to recoup the cost of the boots but to recover damages. The Court noted the split between jurisdictions in whether to apply the UCC or tort statute of limitation period for claims for personal injury under breach of warranty theories. The Court stated that New Mexico's practice was to look to the nature of the right sued upon rather than the form of the action of relief demanded. Because Plaintiff stated his claim was for personal injuries instead of a breach of a contract for the sale of goods, the Court ruled that Plaintiff's claims were tort claims subject to the three year tort statute of limitation. Thus, Plaintiff's claim was barred by the tort statute of limitation.

Badilla v. Wal-Mart Stores East, Inc. d/b/a Wal-Mart #850 et al., Docket No. 31,162 (New Mexico Court of Appeals, slip opinion, decided February 7, 2013, not yet released for publication in the permanent law reports).

Texas

CERTIFICATE-OF-MERIT REQUIREMENT IN CONSTRUCTION DEFECT CASE RULED SATISFIED BY EXPERT AFFIDAVIT

Texas Court of Appeals, 1st Dist: Plaintiff Tellepsen Builders sued Defendant CBM Engineers for damages related to the design and construction of a conference center. CBM filed a motion to dismiss alleging that Tellepsen failed to comply with the certificate-of-merit requirement of the applicable version of Civil Practice and Remedies Code § 150.002. The trial court granted CBM's motion as to Tellepsen's negligence claim, but denied it as to the breach of contract and warranty claims. Both CBM and Tellepsen appealed.

On appeal, CBM argued that the breach of contract and warranty claims should have been dismissed because they are subject to § 150. Tellepsen argued that the negligence claim should not have been dismissed because its expert affidavit was sufficient to satisfy the certificate-of-merit requirement.

The applicable version of § 150 required a certificate-of-merit in any action for damages arising out of the provision of professional services by a licensed or registered professional, which includes a licensed professional engineer. The Court of Appeals analyzed the definition of "practice of

More on Back Page

About Our Firm

Dewhirst & Dolven is proud to participate in the development of the online Claims Handling Manual by the Claims & Litigation Management Alliance. Attorneys Rick Haderlie and Kyle Shoop contributed to the claims handling resources guide for the state of Utah.

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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Continued from Page 5

engineering" in the Texas Occupations Code in holding that Tellepsen's claims against CBM arose out of CBM's provision of professional services by a licensed registered professional. As such, Tellepsen was required to file a certificate-of-merit under § 150.

Under § 150, a certificate-of-merit must set forth at least one negligent act, error, or omission claimed to exist and the factual basis for each claim. The purpose of § 150 was to provide a factual basis for claims concerning allegations of professional errors or omissions, so as to allow the trial court to conclude the claims are not frivolous. CBM argued that Plaintiff's expert affidavit was insufficient. However, the Court disagreed, noting that CBM's argument required a certificate-of-merit to require more detail than required under § 150. Because the expert affidavit was from a licensed professional in the same area of expertise as CBM and it contained the factual basis for the expert's opinion, the affidavit satisfied § 150. Thus, Tellepsen's claims against CBM were remanded to the trial court.

CBM Engineers, Inc. v. Tellepsen Builders, L.P. et al., No. 01-11-01033-CV (Texas Court of Appeals, 1st Dist., decided January 10, 2013, not yet released for publication in the permanent law reports).