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ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

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COLORADO

COLORADO SUPREME COURT INTERPRETS UM/UIM COVERAGE FOR UMBRELLA POLICIES

Supreme Court of Colorado: At the time of a June 2002 accident, the insureds were both minors covered as resident relatives under an Allstate "Auto Insurance Policy" and an Allstate "Personal Umbrella Policy."

The umbrella policy provided up to $1 million in generalized excess liability coverage and did not include UM/UIM coverage; indeed, it specifically excluded coverage for "personal injury or bodily injury to an insured." The umbrella policy required the insured to maintain underlying primary auto liability insurance coverage and paid benefits when those underlying policy limits were exceeded.

The insureds brought suit against Allstate alleging that their severe and disabling injuries were caused by an at-fault, underinsured driver. The insureds sought to have the umbrella policy judicially reformed to contain UM/UIM coverage. They contended that Allstate was required to offer UM/UIM coverage for the umbrella policy under section 10-4-609(1)(a) and, because Allstate failed to do so, the coverage should be deemed incorporated into the umbrella policy as a matter of law.

The trial court rejected the claim and the court of appeals affirmed, reasoning that "[a]utomobile or motor vehicle insurance insures the owner or operator of a motor vehicle against liability arising out of the ownership and operation of designated motor vehicles." In contrast, the umbrella policy provides "general liability coverage and requires [an underlying] primary insurance policy with minimum liability limits as to those risks or activities for which specialized liability insurance is generally available and commonly purchased."

The issue before the Supreme Court was whether an umbrella policy that includes supplemental liability coverage for automobiles or motor vehicles is an "automobile liability or motor vehicle liability policy" under section 10-4-609(1)(a), thereby requiring the insurer to offer UM/UIM coverage as part of the policy.

The Supreme Court held that an

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umbrella policy which includes supplemental liability coverage for automobiles or motor vehicles is not an "automobile liability or motor vehicle liability policy" under CRS § 10-4-609(1)(a). Consequently, under § 10-4-609, an insurer issuing an umbrella policy is not required to offer uninsured/underinsured motorist (UM/UIM) coverage as part of the umbrella policy. The Court reached this result based on the plain language of the UM/UIM statute, and rejected the argument that public policy considerations of the legislative goal to maximize coverage requires broad interpretation of the UM/UIM statute. The Court therefore affirmed the court of appeals' judgment.

Apodaca et. al. v. Allstate Insurance Co, Case No. 10SC39 (Colorado Supreme Court).

Colorado Supreme Court Denies Res Ipsa Loquitur Instruction and Holds That Defendant Was Not Confronted with a Sudden or Unexpected Occurrence in Icy Roads Case

Supreme Court of Colorado: The Colorado Supreme Court reversed the court of appeals' judgment, holding that Defendant failed to present competent evidence that she was confronted with a sudden or unexpected occurrence not of her own making. Defendant's testimony demonstrated that she anticipated the roads would be slick and icy the morning she lost control of her vehicle. Consequently, she failed to present competent evidence that encountering icy road conditions was a sudden or unexpected occurrence.

The Court also held that plaintiff was not entitled to an instruction on the doctrine of *res ipsa loquitur* because she failed to introduce sufficient evidence to establish that this accident was of the kind that ordinarily does not occur in the absence of negligence.

In addition, the Court held that it is not juror misconduct for jurors to use their professional and educational background to inform their deliberations, provided that no legal content or factual information learned from outside the record is introduced during jury deliberations.

Kendrick v. Pippin, Case No. 09SC781, (Colorado Supreme Court).

Utah

Utah Supreme Court Affirms District Court's Denial of Developers' Motion for JNOV and Proposed Jury Instructions

Supreme Court of Utah: Appellees Mark and Marilyn Hess purchased an undeveloped lot of land from Appellant Canberra Development Co. located in a subdivision owned and developed by Canberra. After constructing a home on the lot and moving into it, the Hesses learned of structural problems which resulted from excessive settling of the home caused by unstable soil beneath its foundation. The Hesses learned that Canberra had failed to inform them of a soils report they had received seven years prior to selling the lot which indicated the presence of collapsible soil within the development and, specifically, within a test pit located in the Hesses' back yard.

The Hesses filed suit against Canberra and its CEO, David Allen, (the "Developers") seeking compensatory and punitive damages for fraudulent nondisclosure and fraudulent misrepresentation. At the conclusion of a jury trial, the Developers were found liable on both claims, and the Hesses were awarded $536,750.50 in economic damages and $2,625,000 for pain and suffering. No punitive damages were awarded. After the trial, the Developers filed several post-verdict motions, including a motion for judgment notwithstanding the verdict (JNOV) on the fraudulent nondisclosure claim and a motion for a new trial or remittitur on the amount of damages awarded by the jury. The district court denied these motions.

On appeal, the Supreme Court addressed three issues: first, whether the district court erred when it denied the Developers' motion for JNOV on the fraudulent nondisclosure claim; second, whether the district court erred when it declined to give the jury an instruction that the Developers proposed concerning intervening and superseding causes; and third, whether the district court erred when it denied the Developer's motion for remittitur or a new trial based upon the amount of economic damages awarded by the jury.

In affirming the district court's denial of the Developers' motion for JNOV, the Court held that the jury had sufficient evidence to find the Developers liable to the Hesses for fraudulent nondisclosure. The Court noted that the jury was presented with the following evidence in support of the Developers' liability: an AGEC Report concluding that the subject pit had collapsible soil, testimony by Mr. Allen that he read through the AGEC Report and paid particular attention to the conclusions section, and testimony and exhibits demonstrating the subject pit on the Hesses' property contained collapsible soil.

Second, Developers argued that the district court should have given the jury their proposed instruction regarding the effect of intervening and superseding causes on the Developers' potential liability to his purchasers. The Court discussed the fact that intervening and superseding causes are not a defense to intentional tort claims, such as the Hesses' claim of intentional fraud. Thus, the Court held the district court did not err when it declined to give the Developers' proposed jury instruction regarding intervening and superseding causes.

Lastly, the Court held that the district court erred when it denied the Developers' motion for a new trial or remittitur on the amount of economic damages because the damages awarded by the jury exceeded the amount of damages proven by the Hesses at trial. Thus, the Court

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reduced the amount of economic damages awarded by the jury from $536,750.50 to $330,057.30, to accurately reflect the evidence presented by the Hesses.

Hess v. Canberra Development Co., LC et. al., 2011 UT 22, 2011 WL 1549211 (Utah Supreme Court, decided April 26, 2011, not yet released for publication in the permanent law reports)

SUMMARY JUDGMENT AFFIRMED IN FAVOR OF DEFENDANT BASED UPON UNTIMELY DESIGNATION OF EXPERT WITNESSES IN PERSONAL INJURY CASE

Utah Court of Appeals: Heather Brussow filed a complaint against William Webster for injuries related to an automobile accident. The trial court granted Webster's motion to strike Ms. Brussow's untimely designated fact and exert witnesses. It later granted Webster's motion for summary judgment based upon Ms. Brussow's inability to prove a prima facie case without expert testimony.

The trial court determined that Ms. Brussow failed to show good cause for failure to disclose under Utah Rule of Civil Procedure 37(f) and that Mr. Webster suffered prejudice because of it. The trial court specifically found that Ms. Brussow's untimely disclosure impaired Mr. Webster's ability to defend against Ms. Brussow's claims because Mr. Webster did not have an opportunity to depose Ms. Brussow's untimely designated expert witness.

On appeal, Ms. Brussow did not dispute that her witnesses were untimely designated, but argued that the trial court erred by excluding them based upon the trial court's broad discretion in discovery matters. Ms. Brussow argued that her untimely witness designations were harmless because any prejudice to Mr. Webster was ameliorated by the fact that Mr. Webster had received a list of post-accident treating physicians and her medical records via Ms. Brussow's responses to written discovery. However, the Court found Ms. Brussow's responses to discovery did not provide the information required under Rule 26 regarding expert disclosures, nor did such responses excuse Ms. Brussow from complying with Rule 26. The Supreme Court further stated: "Formal disclosure of experts is not pointless. Knowing the identity of the opponent's expert witnesses allows a party to properly prepare for trial." The Court pointed to the fact that Ms. Brussow did not provide expert designations until four years after the complaint was filed, one month after all discovery deadlines had passed under the third scheduling order, one month after Mr. Webster had filed a motion for summary judgment based upon her failure to designate witnesses, and over two years after Mr. Webster's expert designations.

Ms. Brussow also argued on appeal that the trial court erred in granting summary judgment in favor of Mr. Webster because she could establish a prima facie case of negligence even without expert testimony. Ms. Brussow argued that she could present a prima facie case at trial based upon her own testimony as a licensed emergency medical technician and through the testimony of Mr. Webster's designated expert. However, the Court found these arguments inadequately briefed and unsupported by authority or portions of the record. The Court also pointed to Ms. Brussow's argument as being based upon the assumption that she could subpoena and call Mr. Webster's expert in her case in chief. The Court of Appeals thus declined to address the merits of the issues and affirmed the trial court's decisions.

Brussow v. Webster, 2011 UT App 193, 2011 WL 2409466 (Utah Court of Appeals, decided June 16, 2011, not yet released for publication in the permanent law reports).

DISTRICT COURT'S APPORTIONMENT OF FAULT AND EXLCUSION OF PLAINIFF'S WITNESS TESTIMONY AFFIRMED BY UTAH COURT OF APPEALS IN PERSONAL INJURY CASE

Utah Court of Appeals: In a personal injury case following an automobile accident, the Court of Appeals affirmed the district court's exclusion of testimony. The district court excluded testimony of the Plaintiff's witnesses due to her failure to disclose the witnesses by the deadline for disclosure of fact or expert witnesses.

Plaintiff Seini Moa argued on appeal that the district court erred when it excluded testimony of certain witnesses who would have testified as either treating medical providers or expert witnesses. Although she acknowledges that she disclosed the witnesses after the deadlines had passed to disclose both fact and expert witnesses, Ms. Moa argued the trial court was in error because it did not find her late designation constituted willfulness or bad faith.

The Court of Appeals stated that Ms. Moa failed to argue the issue of willfulness and bad faith at the trial court, and thus failed to preserve the issue for appeal. The Court pointed to the fact that Ms. Moa failed to object to the alleged inadequacy of the district court's order. Thus, Ms. Moa did not give the district court the opportunity to correct any inadequacy and waived the argument on appeal.

The Court stated that even if the district court was required to make a finding of willfulness, the facts of the case clearly support such a finding. Ms. Moa waited until three months before trial to attempt to designate the witnesses, despite having numerous prior opportunities to do so. She had visited with one of the witnesses a week before the expert witnesses' disclosures were due and a month before the discovery deadline, yet did not notify opposing counsel of her visit or request that the discovery cut-off be extended to accommodate this additional course of treatment. By the time the Court held the scheduling conference to set the trial date, Ms. Moa had failed to advise the Court or opposing counsel of the new witnesses or to seek a continuance of the pretrial hearing, even though she had already seen all of her medical care providers. As such, the Court found that the district court did not

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abuse its discretion because clear evidence existed to support the willfulness determination.

Ms. Moa also challenged the jury's apportionment of fault that her husband, the driver of the car at the time of the accident, was eighty percent liable for the accident. The Court noted that a jury verdict will not be disturbed if it is supported by evidence and held that the jury could have reasonably determined, based upon the evidence presented at trial, that Ms. Moa's husband was at least partially responsible for the accident when he sped up and entered the intersection when the light was yellow. In addition, the fact that the vehicle driving next to Ms. Moa's vehicle stopped at the intersection rather than proceeding forward supports a determination that a reasonable driver would have stopped. Thus, the Court affirmed the jury's apportionment of fault.

Moa v. Edwards, 2011 UT App 140, 2011 WL 1706486 (Utah Court of Appeals, decided May 5, 2011, not yet released for publication in the permanent law reports).

New Mexico

NEW MEXICO COURT OF APPEALS INTERPRETS UIM STATUTE IN PUNITIVE DAMAGES SETOFF CASE

New Mexico Court of Appeals: Defendants Christine Sandoval and Melissa Carter were involved in an automobile accident with Shawna Chavez. Defendants sought compensatory and punitive damages from Mid-Century Insurance Co., which insured Chavez's vehicle for liability coverage in the amount of $25,000 per person and $50,000 per accident. However, the Mid-Century policy explicitly excluded punitive damages from liability coverage. The Court anticipated that each Defendant will settle her claims against Mid-Century for an amount less than policy limits.

Defendants filed a UIM claim against Farmers Insurance Co. of Arizona, which insured Ms. Carter's vehicle for $30,000 per person and $60,000 per accident. Defendants each sought $30,000 in punitive damages, alleging the Ms. Chavez was underinsured with respect to punitive damages. Farmers determined that each Defendant was entitled to $5,000 in UIM benefits, which it calculated by offsetting the policy limits of Defendants' UIM coverage ($30,000) by the policy limits of the Mid-Century policy ($25,000). Defendants claimed that the offset must be based upon the amount of money actually received by Defendants in settlement of their claims, rather than the liability limits of the Mid-Century policy.

Farmers filed a declaratory judgment action in district court to determine the amount of its offset under Section 66-5-301 and the UIM policy. Farmers' motion for summary judgment was granted and Defendants appealed. The issue on appeal was whether an insurer is entitled to offset an injured insured's award of UIM benefits by a tortfeasor's liability policy limits when the insured receives an amount less than policy limits due to a contractual exclusion for punitive damages.

Farmers argued that UIM payments must be offset by the full liability limits of the tortfeasor's policy because the UIM statute creates and defines UIM insurance in terms of the tortfeasor's full liability coverage only. Defendants responded that limiting the amount of liability proceeds to the amount actually received by the insured furthers the remedial purpose of the UIM statute. The Court of Appeals determined that the UIM statute was ambiguous in discussing the issue and turned to the purpose of the statute in order to discern the Legislature's intent. The Court determined that the purpose the UIM statute was enacted was to ensure that an insured motorist entitled to compensation will receive at least the sum certain in UIM coverage purchased for his or her benefit. In the present case, $30,000 in UIM coverage was purchased for each Defendant's benefit. To ensure that Defendants received at the least this sum in coverage, the Court held that Farmers' offset was limited to the amount of liability proceeds actually received by Defendants from Mid-Century.

Farmers next argued that it is entitled to a contractual offset in the amount of the tortfeasor's liability limits under the plain language of the UIM policy, which provides that the amount of UM coverage they will pay is reduced by the amount of any other bodily injury coverage available to any party held to be liable for the accident. Farmers argued that $25,000 in liability coverage was available under the Mid-Century policy, and, therefore, Defendants' UIM benefits may be reduced by this amount.

Defendants responded that coverage for punitive damages was not available under Mid-Century's policy, only coverage for compensatory damages. Defendants also argued that the contractual offset was void because it violated the remedial legislative policy underlying the UIM statute.

The Court of Appeals held that Farmers' contractual offset was void to the extent that it purported to limit Defendants' recovery of UIM benefits to an amount less than the limits of their UIM coverage ($30,000 each), minus an offset in the amount of the liability proceeds actually received by Defendants under the Mid-Century policy.

Farmers Insurance Co. of Arizona v. Sandoval et. at., Opinion No. 2011-NMCA-051, 2011 WL 2207590 (New Mexico Court of Appeals, decided April 4, 2011).

Wyoming

WYOMING SUPREME COURT RULES CONTRACTOR BREACHED CONTRACT DESPITE SUBCONTRACTOR'S NEGLIGENCE

Supreme Court of Wyoming: The City of Torrington entered into an agreement with Strong Construction, Inc.

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whereby Strong would provide general contracting services on the second phase of a municipal water project.

As part of the project, Strong hired subcontractors Kelly-Dines Irrigation to supply and install three submersible water pumps and motors in three separate wells in a well field. Prior to commencement of the work, Strong was required to submit plans and specifications relating to the motors to the City's engineer, Baker & Associates, for approval.

The City's agreement with Strong specified that the motors would need to operate at a frequency of 60 hertz and that they would need to be compatible with a variable frequency drive (VFD), which would allow the motors to operate within a range of frequencies.

Strong submitted specifications relating to a Hitachi motor, and Kelly-Deines ultimately supplied and installed the motors. Strong submitted to Baker & Associates a set of seven pages describing specifications relating to the Hitachi motor. However, those seven pages included a document setting forth guidelines relating to a Centripro motor which would operate within a range of 42 to 60 hertz and would function well with a VFD. The submittals were approved by Baker & Associates.

Approximately four weeks before the motors were shipped, the supplier sent revised operational guidelines for the Hitachi motor to Kelly-Deines indicating that the motors could only operate in the range of 55 to 60 hertz. Kelley-Deines did not provide this information to Strong, to the City, or to Baker & Associates.

The pumps were installed but not used until the completion of the third phase of the water project, nearly two years after. After initial electrical problems with one of the motors, the manufacturer determined the type of damage to the motor was consistent with damage which typically occurs when the motor is operated for extended periods at frequencies between 51 and 55 hertz with a VFD. The city subsequently replaced all three Hitachi motors with a model conforming to the requested specifications.

The City filed suit against Strong alleging breach of contract based upon Strong's failure to supply and install water pump motors that conformed to contract specifications. After a bench trial, the district court held that Strong, through its subcontractors, breached the contract by providing motors that did not have the performance and construction data as represented in the submittal and entered judgment in favor of the City.

On appeal, Strong argued that its agreement with the City only required the motor to operate at a frequency of 60 hertz and to be compatible with a VFD. Strong contended that it fulfilled its obligations under the agreement by providing a motor which met those criteria.

The Supreme Court ruled that the submitted guidelines were incorporated into the agreement once approved by Baker & Associates. Thus, Strong breached the agreement with the City by failing to provide motors that conformed to the specifications in those guidelines, as they were part of the agreement. The Court also ruled that the one year warranty provision in the parties' agreement, which had expired by the time the claim was brought, did not preclude the City's breach of contract claim.

Lastly, Strong argued that the damages awarded by the district court should be apportioned according to the respective degrees of fault of the parties under a negligence theory of liability. The district court had concluded that Kelley-Deines was 60 percent at fault (for which Strong would be vicariously liable), Baker & Associates was 30 percent at fault, and the project electrician was 10 percent at fault. The court, however, did not apportion the damages. The Supreme Court refused to extend the tort theory of fault to a breach of contract action and affirmed the district court's decision.

Strong Construction Inc. v. City of Torrington, 2011 WY 82 (Supreme Court of Wyoming, decided May 23, 2011).

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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$425,000 AND $100,000 SETTLEMENTS IN FOURTH OF JULY AUTOMOBILIE ACCIDENTS

U.S. District Court: Plaintiff Jennifer Boekenoogen was a backseat passenger in a car driven by Defendant David Levinson. Mr. Levinson was traveling southbound in Yellowstone National Park near the south entrance to the park on July 4, 2008. Mr. Levinson crossed the center line and collided with a north-bound vehicle driven by Plaintiff Merilie Reynolds. The accident involved three vehicles (Mr. Levinson, Ms. Reynolds, and a third driven by Roger Miller, who was behind Mr. Levinson and skidded into the first two vehicles) with a total of eleven occupants.

Plaintiff Boekenoogen suffered a broken neck and multiple lesser injuries. She required surgery and extensive medical care and rehabilitation. Her medical bills totaled $148,084. This case was settled with Mr. Levinson's insurer for $425,000.

Plaintiff Reynolds was trapped inside her vehicle for two hours while emergency responders worked to release her. She was then life-flighted to a hospital. Ms. Reynolds suffered a fractured tibia and required surgery, with unspecified complications that developed following surgery. Her medical bills totaled approximately $26,000 and lost wages were approximately $6,000. This case settled for a total of $100,000, including $75,000 from Defendant Levinson's insurer and $25,000 from an umbrella policy.

Boekenoogen v. Levinson,
Case No. 09 CV 114;
Reynolds v. Levinson,
Case No. 09 CV 114.

The Wyoming State Bar does not certify any lawyer as a specialist or expert. Anyone considering a lawyer should independently investigate the lawyer's credentials and ability, and not rely upon advertisements or self-proclaimed expertise.