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ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

IN BRIEF

UTAH

The Utah Supreme Court upheld an insurance policy clause requiring the exhaustion of remedies from a tortfeasor prior to recovering under UIM coverage. The Court defined the provision as a condition precedent to coverage, rather than a contractual covenant, and held that the provision does not violate public policy.

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The Court of Appeals upheld direct liability claims against a general contractor asserted by the employee of a subcontractor for injuries sustained on the construction site. The Court stated that possession of the site by the subcontractor does not abrogate the general contractor's liability for harm which may result from the dangerous nature of the premises.

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COLORADO

The Colorado Supreme Court issued three concurrent decisions clarifying Colorado's application of the collateral source doctrine to medical bills write-offs. The Court held that evidence of the amount paid by a collateral source for a tort plaintiff's medical expenses is inadmissible.

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WYOMING

In an insurance coverage case, the Wyoming Supreme Court held that the giving of a vehicle via inter vivos gift overcomes the presumption of ownership established by registration and titling documents.

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NEW MEXICO

In a case involving a vehicle accident on a state highway within tribal lands between an Indian and non-Indian, the Court of Appeals held that the New Mexico state court lacked subject matter jurisdiction over the action.

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UTAH

UIM EXHAUSTION OF REMEDIES PROVISION UPHELD BY UTAH SUPREME COURT

Utah Supreme Court: Plaintiff McArthur sustained injuries when he was hit by a car while riding his motorcycle. He settled with the driver's liability carrier for $90,000 of the driver's $100,000 policy limit and demanded $100,000 in UIM coverage under his own State Farm policy to cover the balance of the $200,000 in damages he allegedly sustained. State Farm denied the claim on the ground that he had not exhausted the full $100,000 limit on the driver's liability policy, a precondition for UIM coverage under his policy.

McArthur then sued State Farm in federal court, lost on summary judgment on the ground of failure to exhaust policy limits, and appealed. The Tenth Circuit Court of Appeals certified the following issues to the Utah Supreme Court: (1) whether an exhaustion clause like State Farm's is generally unenforceable in Utah as contrary to public policy; and (2) if not, whether the enforceability of such a clause is contingent on the insurer establishing actual prejudice to its economic interest.

The Utah Supreme Court unanimously rejected McArthur's arguments that the exhaustion requirement was void as against public policy, and if not void, should be enforced only upon a showing of prejudice by his insurer. The Court examined case law and Utah insurance statutes cited by McArthur and found that nothing contained therein supported McArthur's public policy arguments. The Court further explained that the State Farm exhaustion requirement was a condition precedent, unlike contractual covenants, and is thus enforceable without regard to doctrinal limitations such as prejudice or material breach. In issuing its opinion, the Supreme Court commented on the role of the judiciary as not being one "wielding policy making authority" in the field of insurance law, but one of "interpreting and implementing policies enacted into law by the legislature. We have no power to make policy choices of our own."

McArthur v. State Farm Mutual Automobile Ins. Co., 2012 UT 22, 274 P.3d 981 (2012).

IN THIS ISSUE

Direct Liability Claims Upheld Against General Contractor in Construction Site Injury Case

Utah Court of Appeals: This case involved a workplace injury claim brought by a subcontractor's employee, Plaintiff Gonzalez, against the general contractor, Russell Sorensen Construction. Gonzalez's claims against Sorensen were for direct liability rather than vicarious liability. The issue on appeal concerned whether a general contractor may be held liable to a subcontractor's employee for injuries allegedly resulting from a job site's hazardous condition. Sorensen Construction appealed after the district court denied its motion for summary judgment, which argued that as a general contractor it could not be liable for a workplace injury suffered by a subcontractor's employee unless it had exercised direct control over the injury-causing aspect of the work.

The Court of Appeals adopted Restatement (Second) of Torts, section 384 with regard to direct liability of persons who create structures or other artificial conditions on land. Specifically, the Court affirmed the following language: "The creator of an artificial condition on land may be liable to others – both upon or outside of the land – for physical harm caused by its dangerous nature. The subsequent acceptance by the possessor of the completed condition does not abrogate this duty." Further, the Court stated that its holding does not expand a contractor's liability, and found influential the fact that Gonzalez alleged direct liability claims against Sorensen rather than vicarious liability claims. Thus, the Court of Appeals affirmed the trial court's denial of Sorensen Construction's motion for summary judgment.

Gonzalez v. Russell Sorensen Construction, 2012 UT App. 154 (Utah Court of Appeals, decided May 24, 2012, not yet released for publication in the permanent law reports).

Utah Legislature Passes Bill Modifying UM/UIM Coverage Rejection Requirements

On March 22, 2012, Governor Herbert signed House Bill 167 into law, which modifies the prior statutory language of U.C.A. § 31A-22-305 and 305.3 relating to a named insured's rejection of UM or UIM coverage. H.B. 167 was enacted subsequent to the Utah Supreme Court's ruling in Lopez v. United Auto Ins. Co., 2012 UT 10, which held that a UM or UIM rejection form must provide a reasonable explanation of the UM or UIM coverage that explains the benefits of coverage and when it applies. H.B. 167 states that for an insured to reject UM or UIM coverage, or for a named insured to purchase coverage in a lesser amount, the named insured must sign an acknowledgement form provided by the insurer that waives the coverage. That acknowledgement form must also reasonably explain the purpose of the UM or UIM coverage and disclose the additional premiums required to purchase the coverage. In addition, the bill established a definition of "new policy" for purposes of determining the limits of UM or UIM coverage, and provided that the definition applies retroactively to any claims arising on or after January 1, 2001 for which, as of May 1, 2012, an insured has not made a written demand for arbitration or filed a complaint in a court of competent jurisdiction.

Defense Verdict in Personal Injury Case

Plaintiff Avalos, who worked for a company that supplied granite slabs to Defendant TL Custom Countertops, had previously delivered numerous slabs to Defendant. At the time of the subject accident, Plaintiff was delivering a 1,000 pound slab with assistance of Defendant's employee, who ran over Plaintiff's foot and ankle. Plaintiff suffered crush and degloving injuries to his foot, toes, and ankle, and received a 20% disability rating. Plaintiff's claimed economic damages exceeded $690,000. Plaintiff demanded $950,000, and Defendant offered $400,000. The case was tried to a jury, which found that Defendant was not negligent.

Avalos v. TL Custom Countertops, LLC, Case No. 090403403.

Colorado

Colorado Supreme Court Issues Three Decisions Interpreting the Collateral Source Doctrine

Colorado Supreme Court: The Supreme Court recently issued three concurrent decisions clarifying the application of the collateral source doctrine to bills for medical services rendered. The following is a summary of each opinion:

In the first opinion, *Sunahara v. State Farm*, the insured, Sunhara, filed suit against the insurance company, State Farm, when State Farm denied his UIM claim. After State Farm paid Sunahara's medical bills at a discounted rate, Sunahara filed a motion in limine to exclude evidence of the amount paid. The trial court denied the motion, reasoning that the amount paid was admissible to help the jury determine the reasonable value of the medical expenses. The Court of Appeals affirmed. In addition, during discovery, Sunahara moved to compel State Farm's unredacted file, which included information as to liability assessments, fault evaluations, and other insurance information as to State Farm's reserves and settlement authority. The trial court denied this motion, and the Court of Appeals affirmed.

The Supreme Court reversed the Court of Appeal's decision, holding that evidence of the amounts paid by a collateral source for a tort plaintiff's medical expenses is inadmissible. The Court stated that the common law pre-verdict evidentiary component of the collateral source doctrine prohibits the admission. In addition, the Court affirmed the Court of Appeals'

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company's un-redacted claim file from discovery, holding that the request for the redacted information in a UIM action was not reasonably calculated to lead to the discovery of admissible evidence. *Sunahara v. State Farm Mutual Automobile Ins. Co., 2012 CO 30M, 2012 WL 1946507 (Colorado Supreme Court, en banc, not yet released for publication in the permanent law reports).*

In the second opinion, *Wal-mart v. Crossgrove*, the Supreme Court held that evidence of the amount paid by a collateral source for a tort plaintiff's medical expenses is inadmissible. The Court held that the common law pre-verdict evidentiary component of the collateral source doctrine prohibits the admission of evidence as to the amount of medical bills paid by a tort plaintiff or the plaintiff's insurer in satisfaction of the amount owed. In doing so, the Court resolved the tension between the application of the collateral source rule and the common-law rule of admitting evidence as to the necessary and reasonable value of medical services rendered to determine the correct measure of damages. *Wal-Mart Stores, Inc. v. Crossgrove, 2012 CO 31, 276 P.3d 562 (2012) (en banc).*

In the third opinion, *Smith v. Jeppson*, the Supreme Court held that CRS § 10-1-135(10)(a) codifies the common law pre-verdict component of the collateral source rule prohibiting the admission at trial of evidence of the amount paid by a tort plaintiff's insurance company pursuant to the plaintiff's medical expense coverage. The Court thus held that the trial court correctly applied § 135(10)(a) prospectively to exclude from trial evidence of the amount paid by a collateral source. *Smith v. Jeppson, 2012 CO 32, 277 P.3d 224 (2012) (en banc).*

In sum, Colorado claimants can pursue recovery for the amounts billed for medical services, and under C.R.S. § 13-21-111.6, Colorado's "collateral source" statute, payments arising out of a contract entered into on the claimant's behalf are not admissible and may not be offset from Plaintiff's recovery. *See also Volunteers of America Colorado Branch v. Gardenswartz [Tucker]*, 242 P.3d 1080, 1083 (Colorado 2010) (en banc).

SUMMARY JUDGMENT DOES NOT TERMINATE OFFER OF SETTLEMENT

Colorado Supreme Court: Plaintiff Rost sued Defendant Atkinson for injuries her daughter sustained on Defendant's property. Defendant served Plaintiff with a statutory settlement offer. The next day, the court issued an order granting summary judgment for Defendant, resolving all issues in the case. Plaintiff accepted the settlement offer after receiving notice of the summary judgment order. Later that same day, Defendant e-mailed Plaintiff's counsel, withdrawing the settlement offer. The trial court rejected Defendant's argument that the summary judgment order terminated the settlement offer and entered an order enforcing the settlement agreement.

The Court of Appeals held that a summary judgment order resolving all issues in a case does not terminate a valid settlement offer. Only two conditions terminate a valid settlement offer under CRS § 13-17-202(1)(a): (1) the offer's withdrawal, or (2) expiration of the fourteen day period. Here, neither condition occurred before Plaintiff's acceptance. Thus, the offer was held a binding settlement agreement once Plaintiff accepted it.

Rost v. Atkinson, 2012 COA 74, No. 11CA0727 (Colorado Court of Appeals, decided April 26, 2012, not yet released for publication in the permanent law reports).

NOTICE OF CLAIM UNDER CDARA TRIGGERED A DUTY TO DEFEND

Colorado Court of Appeals: This action concerned a dispute between the Melssens and Auto-Owners as to whether Auto-Owners had a duty to defend the Melssens under a comprehensive general liability (CGL) policy. After the Melssens built the Holleys a home, the Holleys sent the Melssens a notice of claim in accordance with Colorado's Construction Defect Action Reform Act (CDARA) for construction defects in their home. The Melssens then demanded that Auto-Owners defend and indemnify them and forwarded Auto-Owners the notice of claim. Auto-Owners denied coverage, asserting that the claimed damages were sustained outside the policy period.

The Holleys agreed to arbitration and then a settlement with the Melssens, who paid an amount toward the cost of settlement. Auto-Owners did not receive advance copies of the settlement documents. The Melssens then filed suit against Auto-Owners alleging, in part, bad faith breach of contract. The Melssens' CGL policy stated that Auto-Owners would pay those sums that the insured becomes legally obligated to pay as damages because of property damage under the policy, and that Auto-Owners has the right and duty to defend "any suit" seeking those damages. "Suit" was defined as a civil proceeding seeking damages under the policy, including arbitration or any other alternative dispute resolution proceeding. At issue on appeal was whether the CDARA notice of claim process between the Melssens and the Holleys constituted a "suit" triggering Auto-Owners' duty to defend under the CGL policy.

Though the Court of Appeals held that the issue should not have been presented to the jury for decision, the error was harmless because the CDARA notice of claim was a form of alternative dispute resolution which fell within the policy definition of suit. In addition, the Court examined whether Auto-Owners had consented to arbitration, either impliedly or by waiver. Here, the arbitration occurred after Auto-Owners denied coverage under the policy, thus excusing the Melssens from obtaining consent. The Court noted that an insurer waives its right to argue that its insured failed to give the required notice under a policy if the insurer denied liability on the basis of lack of coverage and did not assert the noncompliance defense until after a judgment was entered against it.

Melssen, d/b/a Melssen Construction v. Auto-Owners Ins. Co., 2012 COA 102, 2012 WL 2353802 (Colorado Court of Appeals, decided June 21, 2012, not yet released for publication in the permanent law reports).

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DEFENSE VERDICT IN REAR-END HIT-AND-RUN COLLISION

Denver District Court: Plaintiff Fabela claimed she was injured when Defendant Coyle rear-ended her vehicle in a hit-and-run accident. Defendant denied that he even knew there was a collision because the impact was so minor. He subsequently admitted liability for the rear-end collision. There was $906 in damage to Plaintiff's car and no damage to Defendant's car.

Plaintiff alleged soft tissue neck and back injuries resulting in pain, and received chiropractic treatment and massage therapy. Plaintiff's medical expenses were $9,720. Defendant disputed the nature and extent of Plaintiff's injuries, as she had received chiropractic care for injuries sustained in two prior auto accidents. Plaintiff's final demand before trial was $20,000, and Defendant's final offer was $5,000. A verdict returned in favor of Defendant.

Fabela v. Coyle,
Case No. 11-CV-284.

$4.5 MILLION VERDICT IN FOUR CAR PILE-UP ACCIDENT

Jefferson County District Court: A pile-up began when Defendant Young was driving southbound on I-25. When traffic stopped for construction, Young rear-ended a vehicle that struck the vehicle in front of it, and that car struck a fourth vehicle. Young's vehicle became disabled and stopped diagonally across the left through lane of I-25 and partially into the right lane. Plaintiff Reyes was driving southbound when he saw the four car pile-up. He parked his vehicle on the side of the highway and got out to assist those in the collision. While crouched down next to Young's vehicle, Timothy Reed struck Young's vehicle. The force pushed Young's vehicle into Reyes, who was thrown ten feet into the air and landed on his back and head. He sustained a skull fracture and severe permanent brain injury.

Reyes claimed economic losses of more than $7.5 million, and alleged that he had a traumatic brain injury, among other injuries. He claimed to be permanently disabled and requiring lifetime care. At the time of the accident, Reyes had been unemployed but previously worked as a facilities manager. Defendants disputed the extent of Plaintiff's claimed economic damages. Timothy Reed settled with Plaintiff.

Plaintiff's final demand of Defendant Young before trial was a policy limits demand of $2.25 million. Young's final offer before trial was $205,000. The jury returned a verdict of $4.5 million total, and allocated fault as follows: 54% to Defendant Young, 27% to Timothy Reed, 18% to Plaintiff Reyes, and 1% to non-party construction companies.

Reyes v. Young et al.,
Case No. 10-CV-3594.

WYOMING

WYOMING SUPREME COURT HOLDS INTER VIVOS (BETWEEN THE LIVING) GIFT OVERCOMES PRESUMPTION OF VEHICLE OWNERSHIP

Wyoming Supreme Court: Appellant Mendenhall was injured when she was involved in a motor vehicle accident. The other vehicle in the accident, a Ford truck, was listed on two different insurance policies: an Allstate policy issued to Jeremy Lucas and a Mountain West policy issued to Wyoming Electric Company. The Appellee, Mountain West, filed a complaint for declaratory judgment, requesting that the trial court find that it did not have to provide coverage for the truck because the person driving it could not be considered an "insured."

Both parties filed cross-motions for summary judgment. The trial court granted Mountain West's motion, finding that the owner of Wyoming Electric had given the truck to Lucas and, therefore, was no longer covered under the company's policy. Mendenhall appealed, arguing that Mountain West should be required to pay under the policy because the truck was titled and registered under Wyoming Electric's name, and was still listed as a specific vehicle on the Mountain West policy. Thus, the issue on appeal was whether ownership of the truck passed by an *inter vivos* (between the living) gift from Wyoming Electric to Lucs prior to the date of the accident.

The Court found the applicable facts as follows: When Lucas told David Nelson, the owner of Wyoming Electric, that he was looking to acquire a truck, Nelson gave Lucas one of the old company trucks. Lucas took the keys from the company's office, took possession of the truck, and retained possession. Lucas was responsible for all the expenses and added the truck to his Allstate policy, though Lucas did not apply for a new certificate of title until after the accident.

The Court determined that W.S.A. § 31-2-103(d) provides that a certificate of title is only prima facie proof of a vehicle's ownership, and that an *inter vivos* gift can overcome this presumption of ownership. Thus, as the truck was properly transferred via inter vivos gift under Wyoming law, Wyoming Electric was no longer the owner of it, and it was no longer covered under the Mountain West policy.

Mendenhall v. Mountain West Farm Bureau Mutual Ins. Co.,
2012 WY 46, 274 P.3d 407 (2012).

DISMISSAL OF WRONGFUL DEATH ACTION REVERSED

Wyoming Supreme Court: Appellant Nodine's husband was killed by an avalanche on a ski run at Jackson Hole Mountain Resort (JHMR). On July 16, 2009, a Texas probate court appointed her as the Independent Administrator of her deceased husband's estate. On September 17, 2009, she filed a wrongful death action against JHMR in federal court.

On May 18, 2010, while Nodine's action was pending in federal court, the Wyoming State Supreme Court issued a decision holding that the personal representative for purposes of bringing a Wyoming wrongful death action must be appointed within the wrongful death action by the court with jurisdiction over the action. Nodine then filed an amended complaint, alleging that she was the duly qualified and appointed personal representative of her husband's estate and that she was therefore a proper plaintiff under the Wyoming Wrongful Death Act. JHMR filed its answer, admitting those allegations.

The federal court granted JHMR's

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motion for summary judgment and dismissed Nodine's claim without prejudice, finding that a forum selection clause required the case be filed in state court. On December 22, 2010, Nodine filed her suit in state district court. JHMR filed a motion for summary judgment seeking judgment both on the merits and on the ground that Nodine was not properly appointed as the personal representative under the Act. After Nodine requested that she be appointed personal representative, the district court granted JHMR's motion, dismissing the claim on the ground that Nodine was not a proper plaintiff.

On appeal, the Wyoming Supreme Court clarified that its prior decision did not require the appointment of the personal representative as a prerequisite or condition precedent to maintaining a wrongful death claim. The Court also ruled that the prior decision was not retroactive, and that Nodine previously filed her initial wrongful death action over seven months before the decision. In reversing the district court's dismissal, the Supreme Court discussed its concern with the inequities of dismissing Nodine's case, as Nodine had complied with Wyoming law at the time of her initial action and JHMR had initially failed to object to Nodine's capacity to bring the wrongful death action.

Nodine v. Jackson Hole Mountain Resort, 2012 WY 72, 277 P.3d 112 (2012).

DEFENSE VERDICT IN BLOOD DONATION MEDICAL MALPRACTICE CASE

Converse County: Plaintiff Durbin participated in a blood drive at work. After donating blood, he felt his arm become sore. When the soreness grew over several months, Plaintiff underwent nerve decompression surgery. Plaintiff alleged that his nerve problems were caused by the phlebotomist when the needle was inserted during the blood draw. Defendant Blood Systems, Inc. denied negligence. Plaintiff's economic damages exceeded $18,600. The case was tried to a jury, who returned a verdict finding that Defendant was not negligent.

Durbin v. Blood Systems, Inc., Case No. 15959.

NEW MEXICO

STATE COURT LACKS SUBJECT MATTER JURISDICTION IN VEHICULAR ACCIDENT ON TRIBAL LANDS

New Mexico Court of Appeals: The issue on appeal is whether New Mexico state courts have subject matter jurisdiction over tort claims filed against Indian defendants for conduct occurring on state highways within Indian Country. The issue arose after Plaintiff Hinkle, a non-Indian, and Defendant Abeita, an enrolled member of Isleta Pueblo, were involved in a motor vehicle accident on a state highway within Indian Country. Hinkle filed suit in Bernalillo County District Court for injuries sustained in the accident. The court granted Abeita's motion for summary judgment on the basis that the court lacked subject matter jurisdiction, and Hinkle appealed.

Hinkle conceded that the same issue was resolved over thirty years prior in the Hartley decision, wherein the court had found that no subject matter jurisdiction existed. In that case, the Court stated that the issue of whether states have subject matter jurisdiction, absent Congressional action, has always been about whether the state action infringed on right of the reservation Indians to make their own laws and be ruled by them. However, Hinkle argued that this infringement test has since been altered by federal precedent which applied stricter limitations on the reach of tribal jurisdiction.

The Court distinguished the federal precedent as dealing with the question of tribal court jurisdiction instead of the issue of state court jurisdiction. In doing so, the Court clarified that state jurisdiction is not necessarily assumed in instances where tribal court

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

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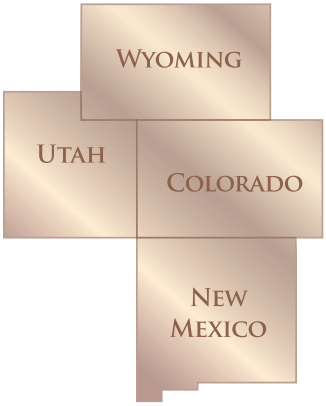

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jurisdiction has been denounced. The Court therefore affirmed its adoption of the infringement test in the Hartley decision, and affirmed the district court's grant of summary judgment in favor of Abeita on the ground that the district court was without subject matter jurisdiction.

Hinkle v. Abeita, Docket No. 30,577 (New Mexico Court of Appeals, slip opinion, decided May 10, 2012, not yet released for publication in the permanent law reports).

STATE PERSONAL INJURY SUIT NOT BARRED BY STATUTE OF LIMITATIONS AFTER FEDERAL DISMISSAL

New Mexico Court of Appeals: Plaintiff Foster filed suit against Defendants Sun Healthcare, Peak Medical Corporation, and Peak Medical NM Management Services in state district court for personal injuries suffered while he was a resident at a rehabilitation clinic. Foster had previously filed the suit in federal court, but it was dismissed for lack of subject matter jurisdiction due to there not being complete diversity of citizenship. New Mexico State has a savings statute that provides that once a suit has been commenced, if it fails for any cause, except negligence in its prosecution, a second suit can be brought within six months and the second suit will be considered a continuation of the first suit. NMSA 1978, § 37-1-14 (1880).

After Foster field his suit in New Mexico state court, Defendants filed a motion for summary judgment arguing that the suit was barred by the statute of limitations and could not be considered a continuation of the federal suit under § 37-1-14 because the federal suit failed due to negligence in prosecution based upon the lack of complete diversity. The district court agreed and granted Defendants' motion for summary judgment, on the basis that diversity was lacking in the federal suit.

On appeal, the Court of Appeals found that the evidence did not establish that Foster knew Defendants' citizenship when he filed his federal court complaint. Thus, nothing in Foster's federal complaint established that Foster knew or reasonably should have known that there was not complete diversity to support subject matter jurisdiction for his federal suit. As such, the court held that Foster was not negligent in the filing of his federal suit, and thus reversed the district court's grant of summary judgment in favor of Defendants. Foster v. Sun Healthcare Group, Inc. et al., Docket No. 31,389

(New Mexico Court of Appeals, slip opinion, decided May 2, 2012, not yet released for publication in the permanent law reports).