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LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas

IN BRIEF

UTAH

- In a case involving a fatal automobile accident that occurred when employees were driving on a special errand during their return commute home from work, the Utah Supreme Court applied the "special errand exception" to the "going-and coming rule." In doing so, the employees were ruled to be within the course of their employment at the time of the accident, and workers compensation was the employees' sole source of recovery.

Page 1

COLORADO

- The Colorado Court of Appeals ruled that under C.R.S. §§ 10-4-609(1)(c) and 10-4-635(3)(b)(II) (2013), an insurer may reduce the amount of UM/UIM benefits due to its insured by the amount of medical payment benefits it has already paid the insured, when the insured's UM/UIM limits are not impaired by such setoff.

Page 2

WYOMING

- Plaintiff sued several Defendants, including its insurance company, when a 2011 claim for damage to a truck was denied. Plaintiff argued that Defendants were estopped from denying the 2011 claim because a similar 2010 incident was paid. The Wyoming Supreme Court ruled that "the coverage of an insurance policy may not be extended by waiver or estoppel."

Page 4

NEW MEXICO

- In prior New Mexico case law, the New Mexico Supreme Court held that effective rejection of an insured's statutory rights to UM/UIM coverage equal to liability limits must be made in writing and be made a part of the insurance policy that is delivered to the insured. Policies which failed to comply would be judicially reformed. In the subject case, the Court held that judicial reformation does not apply to historical issuance contracts formed before 2004.

Page 4

TEXAS

- The Texas Supreme Court stated the case's issue as follows: "whether the [economic loss] rule permits a general contractor to recover the increased costs of performing its construction contract with the owner in a tort action against the project architect for negligent misrepresentations – errors – in the plans and specifications." The Court extended the economic loss doctrine, stating that it favored the policy for economic losses to be allocated by contract.

Page 5

UTAH

UTAH SUPREME COURT APPLIES SPECIAL ERRAND EXCEPTION IN HOLDING THAT WORKERS' COMPENSATION IS EXCLUSIVE REMEDY IN FATAL AUTOMOBILE ACCIDENT CASE

Utah Supreme Court: While returning to Utah from a work project in Maryland, Kelly Colvin was killed in an automobile accident. Joseph Giguere, Colvin's co-worker, was driving the vehicle in which Colvin was a passenger when the accident occurred.

Colvin's widow and son brought a lawsuit against Giguere, arguing that Giguere's negligence caused the accident. The district court granted Giguere's motion for summary judgment, ruling that workers' compensation was the Colvins' exclusive remedy under U.C.A. § 34A-2-105 because the accident occurred in the course of Colvin and Giguere's employment.

The Utah Supreme Court found: "Although employees are generally not within the course of their employment while traveling to or from their place of work, Giguere and Colvin were not merely commuting during their return trip from Maryland, but were on a special errand for their employer." This special errand involved Colvin fixing some problems on a project in Spanish Fork, Utah prior to returning home from Maryland. Colvin had instructed Giguere that they would drive straight to Spanish Fork from Maryland.

The Court thus applied the "special errand exception" to the "going and coming rule." The "going and coming rule" provides that employees are generally not within the course of their employment while traveling to or from their place of work. However, the "special errand exception" to that rule provides that an employee driving on a "special errand" for an employer is within the course of employment. "Special errand" is defined as "an act outside the employee's regular duties which is undertaken in good faith to advance the employer's interests, whether or not the employee's own assigned work is thereby furthered." Because the fatal accident occurred while carrying out

Continued on Page 2

IN THIS ISSUE

Continued from Page 1

the special errand, the Utah Supreme Court thus ruled that workers' compensation was the Colvins' exclusive remedy and affirmed summary judgment in Giguere's favor.

Colvin v. Giguere, 2014 UT 23 (Utah Supreme Court, decided June 20, 2014, not yet released for publication in the permanent law reports).

UTAH COURT OF APPEALS DECLINES TO APPLY RELATION-BACK DOCTRINE AND AFFIRMS SUMMARY JUDGMENT UNDER THE STATUTE OF LIMITATIONS

Utah Court of Appeals: The underlying cause of action in this case involves a negligence claim stemming from a car accident that occurred on September 26, 2003. Plaintiff Wright filed suit against Defendants PK Transport and William Dunn on February 5, 2007, approximately seven months before the controlling four-year statute of limitations expired. On March 24, 2009, a year and a half after the expiration of the statute of limitations, Wright filed an amended complaint that added additional defendants.

The new defendants moved to dismiss Wright's complaint, arguing that the claims were barred by the statute of limitations. Wright argued that his amended complaint was proper under the relation-back doctrine set forth in Rule 15 of the Utah Rules of Civil Procedure.

The district court converted the motion to dismiss into a motion for summary judgment, based upon the "extensive recitations of factual assertions made outside the pleadings." The district court then ruled that the amended complaint's new claims against the new defendants did not relate back, and entered judgment as such. Wright appealed.

The Utah Court of Appeals noted that the new claims would only relate back to the filing of the original complaint if there is an "identity of interest" between the new and original defendants. To establish an identity of interest, Wright must show two elements: (1) the amended pleading alleged only claims that arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, and (2) that the added party had received actual or constructive notice that it would have been a proper party to the original pleading such that no new prejudice would result from preventing it to use a statute of limitations defense.

On appeal, Wright only argues that the district court erred with regard to the second element of notice. Wright argues that the court only considered whether constructive notice was given, but failed to consider whether the new parties had received actual notice. Wright argued that the new defendants received actual notice because one of the original defendants (Defendant Dunn) had been an agent of the new defendants. However, the Court ruled that Wright was unable to show that Defendant Dunn was the agent at the time the statute of limitations was in effect, such that actual notice would have been given. The Court of Appeals thus affirmed the grant of summary judgment.

Wright v. PK Transport et al., 2014 UT App 93 (decided April 24, 2014).

JURY AWARDS OVER $525,000 IN TRUCKING ACCIDENT CASE

Salt Lake County: Plaintiff Shelly Eskelson sued Defendants Cardwell Distributing and Wolfgang Wilz for injuries she sustained in a trucking accident. Plaintiff was driving a commercial semi-tractor trailer on northbound SR191 to deliver ice salt to the Utah Department of Transportation. When Plaintiff slowed down and signaled to turn left into the UDOT facility, Defendant Wilz attempted to pass Plaintiff's vehicle and struck it. Plaintiff's alleged injuries were unspecified.

Defendants denied liability and the case proceeded to jury trial. The jury found Wilz 98% at fault and Plaintiff 2% at fault, and assessed Plaintiff's damages as follows: $71,649 for past medical expenses, $82,183 for future medical expenses, $71,579 for past lost earnings, and $300,000 for non-economic damages. The total award was thus $525,411.

Eskelson v. Cardwell Distributing Inc. et al., Case No. 2012-09-04844, 2014 WL 2120628.

COLORADO

TRIAL COURT'S REDUCTION OF UM/UIM AWARD FOR INSURER'S PRIOR MEDICAL PAYMENTS AFFIRMED

Colorado Court of Appeals: Plaintiff Arnold Calderon appealed the trial court's order reducing his judgment, entered on a jury verdict, by $5,000 to set off medical payments made to him by Defendant, American Family Mutual Ins. Co. The issue raised in this case is: "Under C.R.S. §§ 10-4-609(1)(c) and 10-4-635(3)(b)(II) (2013), may an insurer reduce the amount of UM/UIM benefits due to its insured by the amount of medical payment (MedPay) benefits it has already paid the insured, when the insured's UM/UIM coverage is not impaired by such setoff?"

Plaintiff Calderon sustained multiple injuries in an automobile accident with an uninsured driver, requiring him to seek medical treatment and miss work. At the time of the accident, Calderon was insured by American Family under an insurance policy providing a total of $300,000 in UM/UIM coverage and $5,000 in MedPay coverage. Following the accident, American Family paid Calderon $5,000 under the MedPay provision.

Calderon filed a claim under the UM/UIM provision, but the parties could not agree on the benefit amount due. Calderon then filed suit for breach of contract, violation of C.R.S. § 10-3-1115 (2013) (which prohibits unreasonable delay or denial of payment on insurance claims), and breach of the duty of good faith and fair dealing. A jury returned a verdict of $68,338.97 in favor of Calderon, including $34,394.65 for past medical expenses. The trial court reduced the award by $5,000 to set-off the medical payments Calderon had already received.

On appeal, Calderon argued that he was entitled to the full amount awarded by the jury's verdict because C.R.S. §§ 10-4-609(1)(c) and 10-4-635(3)(b)(II) prohibited the trial court from setting off his UM/UIM benefits by the amount of MedPay benefits he received. The Court of Appeals disagreed.

More on Page 3

Continued from Page 2

The Court noted that setoff is not allowed where the benefits are impaired, but it is allowed to prevent double recovery. Calderon argued that the statutory sections expressed a legislative intent to prevent insurance companies from using a MedPay setoff to reduce UM/UIM benefits. However, the Court found that Calerdon was incorrectly equating the term "coverage" with the term "benefit." The section prohibited a reduction in coverage by a setoff from another coverage, but not a setoff of another benefit. "Coverage" refers to the upper limit for which an insurer may be liable, while "benefit" refers to the actual payments made under the policy. Here, Calderon's UM/UIM coverage was not reduced, but the amount he was awarded was properly reduced by the $5,000 he had already received.

The Court also found that the setoff provision was not void against public policy, as it did not dilute, condition, or limit Calderon's statutorily mandated coverage. The Court of Appeals thus affirmed the trial court's judgment.

Calderon v. American Family Mutual Ins. Co., 2014 COA 70 (Colorado Court of Appeals, decided May 22, 2014, not yet released for publication in the permanent law reports).

COLORADO SUPREME COURT ISSUES THREE OPINIONS INTERPRETING THE COLORADO GOVERNMENTAL IMMUNITY ACT'S RECREATION AREA WAIVER

Colorado Supreme Court: The Supreme Court recently issued three concurrent decisions addressing the Colorado Governmental Immunity Act's ("CGIA") "recreation area waiver" under C.R.S. § 24-10-106(1)(e). This waiver subjects public entities to potential liability for injuries resulting from a "dangerous condition on any … public facility located in any … recreation area maintained by a public entity." The following is a summary of each decision:

In the first opinion, *Young v. Brighton School District 27J*, a student brought a premises liability action against a public school district when he slipped and fell on a puddle of water that had accumulated on a concrete walkway at his public elementary school.

The Court held that the walkway, which was adjacent to a public school's playground, did not qualify as a "public facility" under the waiver. The Court ruled as such after finding no evidence that the legislature intended to define a public facility as a walkway. Thus, the walkway did not trigger the application of the recreation area waiver. The Court therefore affirmed the Court of Appeal's holding that the public school district did not waive its governmental immunity.

The Supreme Court also held that the CGIA's waiver provisions under C.R.S. § 24-10-106(1)(a)-(h), which strip public entities of their immunity from tort liability when applied, are not mutually exclusive. Rather, each waiver provides an alternate avenue for exposing a public entity to possible tort liability. *Young et al. v. Bright School District 27J, 2014 CO 32, 325 P.3d 571 (decided May 19, 2014).*

In the second opinion, *St. Vrain Valley School District RE-1J v. A.R.L.*, the Supreme Court also interpreted the CGIA's recreation area waiver. This lawsuit involved claims by a student and her parents against a school district and district employee, for personal injuries which the student sustained after falling from a zip line apparatus on a public school playground.

The Court held that the term "facility" under the recreation area waiver can be interpreted to include both a prototypical brick-and-mortar structure as well as a collection of items that serve a greater purpose. For a facility to be "public" under the waiver, it must be accessible to the public and maintained by a public entity to serve a beneficial public purpose.

The Court thus held that a collection of playground equipment considered as a whole qualifies as a "public facility" under the waiver because the playground equipment is: (1) relatively permanent or otherwise fixed to the land; (2) a man-made structure; (3) accessible to the public; and (4) maintained by a public entity to serve a beneficial, common public purpose. The student's injury occurred on a "facility" because the zip line was a component of the playground that constitutes a facility. The Court remanded the case for the trial court to conduct further fact finding to determine whether the remaining requirements of the recreation area waiver could be satisfied. *St. Vrain Valley School District RE-1J v. A.R.L. by and through Loveland, 2014 CO 33, 325 P.3d 1014 (decided May 19, 2014).*

In the third opinion, *Daniel v. City of Colorado Springs*, a pedestrian brought a negligence action against the City of Colorado Springs for injuries sustained when she stepped into a hole in a public golf course's parking lot. The golf course was owned and maintained by the City.

The Supreme Court held that the golf course's parking lot is a "public facility" under the recreation area waiver. The basis for the Court's ruling was that the parking lot serves the public golf course and is accessible and operated for the benefit of the general public.

The Court further held that a three-step analysis should be employed to determine whether a public facility is "located in" a "recreation area" for purposes of the waiver. First, a court examines the underlying piece of contiguous public property to identify the "putative recreation area." Second, a court should determine whether the public entity's primary purpose in building or maintaining that area was the promotion of recreation. Third, a court should determine whether the public facility at issue was located within the boundaries of that area. Applying this three-step analysis, the Court held that the golf course grounds, which include the parking lot, is a "recreation area" and that the parking lot is "located in" that area.

More on page 4

Continued from Page 3

The Court reversed the Court of Appeals' judgment that the recreation area waiver did not apply to the golf course's parking lot. *Daniel v. City of Colorado Springs, 2014 CO 34 (Colorado Supreme Court, decided May 19, 2014, not yet released for publication in the permanent law reports).*

WYOMING

WYOMING SUPREME COURT HOLDS INSURANCE COVERAGE MAY NOT BE EXTENDED UNDER THE DOCTRINES OF ESTOPPEL OR WAIVER

Supreme Court of Wyoming: In this insurance coverage dispute, the district court granted summary judgment in favor of Defendants Lexington Ins. Co., NTA, Inc., and Forsberg Engerman Co., and against Plaintiff Lewis Holding Company.

Plaintiff is a Wyoming trucking business. Defendants are Plaintiff's insurance company (Lexington), an insurance adjusting firm (NTA), and Plaintiff's insurance agency (Forsberg). In 2010, one of Plaintiff's side-dump trailers was damaged while unloading, resulting in the trailer partially turning over and its back wheels lifting off the ground. Plaintiff filed an insurance claim which Lexington paid.

In 2011, another of Plaintiff's side-dump trailers was damaged. However, this time the trailer did not turn over and its wheels never left the ground. Plaintiff filed a claim. NTA examined the trailer and issued a reservation of rights letter on Lexington's behalf, stating that the damage may not be covered because it was due to mechanical failure or wear and tear. After inspecting the trailer a second time, Lexington denied the claim because the damages were not the result of an upset or collision, but rather the result of improper welding from previous repairs.

Plaintiff sued Defendants, seeking coverage and claiming that Defendants breached the covenants of good faith and fair dealing by failing to pay the claim. Lexington and NTA moved for summary judgment, pointing out that the policy covered damage caused by "upset," but excluded coverage for damage resulting from wear and tear or mechanical failure. The 2010 claim was paid because the raised wheels constituted an upset. The 2011 claim was properly denied because the damage was due to wear and tear and mechanical breakdown. Forsberg also moved for summary judgment on the basis that it was not a party to the insurance contract and could not be liable for the claim because it was only an agent, not the insurer.

On appeal, Plaintiff argued that Defendants are estopped from denying the 2011 claim because the 2010 incident was similar to the 2011 incident and the 2010 claim was paid. However, the Wyoming Supreme Court ruled that "the coverage of an insurance policy may not be extended by waiver or estoppel." Thus, the Court affirmed the grant of summary judgment in Lexington and NTA's favor.

The Court also affirmed summary judgment in Forsberg's favor on the basis that Forsberg was not a party to the insurance policy.

Lewis Holding Co., Inc. v. Forsberg Engerman Co., 2014 WY 26 (decided February 21, 2014).

DEFENSE VERDICT IN SKI CHAIRLIFT FALL CASE INVOLVING MINOR

U.S. District Court, D. Wyoming: A seven-year old male ("B.O.") fell approximately 50 feet off of a ski chairlift onto hard-packed snow at a Snow King Mountain Resort, which was owned by Defendant Snow King Resort Inc. B.O. sustained a traumatic brain injury, bilateral pneumothorax with pulmonary contusions due to a rib fracture, a right distal femur fracture, and abdominal trauma from the fall.

The Plaintiff contended that Defendant, under a theory of respondeat superior and by and through the non-party chair lift operator-employee, failed to pay attention, properly and safely load B.O. onto the chair lift, stop the lift safely in the loading zone, and violated resort and industry standards. Plaintiff also alleged that B.O. was not seated and that Defendant failed to respond to numerous communications and pleas to stop the lift by co-workers, ski coaches and riders. Plaintiff also alleged that Defendant failed to equip the lift with safety bars.

Defendant alleged that B.O.'s injuries were due to his own misconduct, thereby denying any liability. Also among its defenses were assertions of B.O.'s assumption of the risk and a signed release and indemnification agreement. The jury returned a verdict in favor of Defendant.

B.O., Pro Ami, Oswald v. Snow King Resort Inc., Case No. 2:11CV00382, 2014 WL 2803777.

New Mexico

NEW MEXICO SUPREME COURT DECLINES TO REFORM AUTOMOBILE POLICY IN UM/UIM COVERAGE CASE

New Mexico Supreme Court: In a prior decision, *Montano v. Allstate Indemnity Co.*, the New Mexico Supreme Court held that insurance carriers must obtain explicit written rejection by an insured of stacking of UM/UIM policies in order to limit an insurer's statutory obligations. Following *Montano*, the Court held in *Jordan v. Allstate Ins. Co.* that effective rejection of an insured's statutory rights to UM/UIM coverage equal to liability limits must be made in writing and be made a part of the insurance policy that is delivered to the insured. The Court further held that policies which failed to comply with *Jordan's* rejection requirements would be judicially reformed to provide full statutory coverage.

Following *Jordan*, Plaintiff Whelan made a demand on his insurer, Defendant State Farm Mutual

More on Page 5

Continued from Page 4

Automobile Ins. Co., for reformation of a policy in effect at the time of a 2002 accident that resulted in the death of Plaintiff's father in 2004. Relying on a clause in the policy that purported to bar UM/UIM claims made more than six years after the date of the underlying accident, State Farm rejected the claim. Plaintiff then filed a declaratory action against State Farm, seeking reformation of the policy.

The New Mexico Supreme Court held that judicial reformation under *Jordan* does not apply to historical issuance contracts formed before the *Montano* decision was issued in 2004. The policy was thus not subject to retroactive reformation of its facial lack of UM/UIM coverage.

Whelan v. State Farm Mutual Automobile Ins. Co., Docket No. 34,280 (New Mexico Supreme Court, slip opinion, decided June 16, 2014, not yet released for publication in the permanent law reports).

Texas

TEXAS SUPREME COURT HOLDS THAT THE ECONOMIC LOSS RULE APPLIES IN CONSTRUCTION TORT CASE

Texas Supreme Court: As stated by the Texas Supreme Court: "The issue in this case is whether the [economic loss] rule permits a general contractor to recover the increased costs of performing its construction contract with the owner in a tort action against the project architect for negligent misrepresentations – errors – in the plans and specifications."

The Court defined the economic loss rule as follows: "In actions for unintentional tort, the common law has long restricted recovery of purely economic damages unaccompanied by injury to the plaintiff or his property…. The rule serves to provide a more definite limitation on liability than foreseeability can and reflects a preference for allocating some economic risks by contract rather than by law."

The Dallas Area Rapid Transportation Authority ("DART") contracted with LAN/STV to prepare plans, drawings, and specifications for the construction of a light rail system. LAN/STV agreed to be liable to DART for LAN/STV's negligent performance. Martin K. Eby Construction Co. ("Eby") submitted the low bid on the project of just under $25 million, and was awarded the contract.

After beginning construction, Eby discovered that LAN/STV's plans were full of errors and that 80% of the plans had to be changed. Due to scheduling disruptions, Eby lost nearly $14 million. Eby filed a tort lawsuit against LAN/STV, asserting that LAN/STV negligently misrepresented the work to be done in its error-ridden plans. Following a jury award, the trial court rendered judgment for Eby for $2.25 million.

On appeal, LAN/STV argued that Eby's recovery for negligent misrepresentation is barred by the economic loss rule. The Court recognized that Eby and LAN/STV were "contractual strangers." It found "beyond argument that one participant on a construction project cannot recover from another … for economic loss caused by negligence." Allowing such recovery would magnify the risk of liability to everyone on the project to an indeterminate degree. Favoring the policy that economic losses are to be allocated by contract, the Court ruled that the economic loss rule barred Eby's claim for economic damages.

LAN/STV et al. v. Martin K. Eby Const. Co., Inc., Case No. 11-0810, 2014 WL 2789097 (Texas Supreme Court, decided June 20, 2014, not yet released for publication in the permanent law reports).

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