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ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

IN BRIEF

COLORADO

UTAH

NEW MEXICO

WYOMING

COLORADO

PUBLIC DOCUMENTS NOT REQUIRED TO BE AUTOMATICALLY DISCLOSED UNDER C.R.C.P. 26

Colorado Supreme Court: In an original proceeding, the Supreme Court held that C.R.C.P. 26(a)(1) does not require a party to automatically disclose public documents which are equally available to all parties.

The issue arose when Plaintiff Averyt sued Defendant Wal-Mart Stores after she slipped on grease while making a trucking delivery to a Wal-Mart store. Wal-Mart denied the existence of any grease spill. Plaintiff's counsel, through independent research, learned of a public record documenting the spill. Plaintiff's counsel then used the document at trial to impeach Wal-Mart's corporate representative. After a jury verdict in favor of Plaintiff awarding $15 million in damages, Wal-Mart moved for a new trial based upon surprise because the document was not produced by Plaintiff in her initial disclosures. The trial court granted Wal-Mart's motion, holding that Averyt should have disclosed the document prior to using it during questioning at trial. The Supreme Court reversed the trial court's ruling, holding that public records need not be disclosed in a party's initial or supplemental disclosures.

Averyt v. Wal-Mart Stores, Inc., 2011WL5325525 (Colorado Supreme Court, en banc, decided November 7, 2011, not yet released for publication in the permanent law reports).

NEW LOCATION:
Salt Lake City, Utah

C.R.C.P. PILOT PROGRAM ADOPTED FOR INSURANCE COVERAGE CASES

Colorado Supreme Court: Effective January 1, 2012, the Colorado Supreme Court has adopted a two year C.R.C.P. pilot program. The program is aimed at studying whether certain rule amendments regarding the control of discovery reduces the expense of civil litigation in certain actions. The program is effective for cases filed in the First, Second, Seventeenth, and Eighteenth Districts and is applicable for insurance coverage cases, among others. Personal injury negligence

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actions and construction defect cases are specifically excluded from the pilot program. The following is an overview of the amendments:

Proportionality: The extent of discovery must be proportional to the needs of the case, given the amount in controversy and the complexity of the case. PPR 1.3.

Pleadings: Parties must plead and deny matters with a higher degree of specificity and must include known monetary damages, but not punitive damages. PPR 2.

Initial Disclosures: Claimant's initial disclosures are due 21 days after service of the complaint. Defendant's initial disclosures are due 21 days after an answer or other responsive pleading is served. PPR 3.1, 3.3. Parties may not stipulate to an extension of time for these deadlines and motions for extensions shall usually be denied. In general, absent extraordinary circumstances, continuances and extensions are strongly disfavored and parties should assume that stipulated motions will be denied. PPR 1.4.

Answer: Filing of motions to dismiss shall not eliminate or delay the need to file an answer, and an answer is due 21 days after plaintiff files its PPR 3.1 initial disclosures. PPR 3.2, 4.1.

Experts: Each side may only endorse one expert in any given specialty or with respect to any given issue. PPR 10.2. Expert reports shall be produced in accordance with PPR 10.1(a) and "[t]here shall be no depositions or other discovery of experts." PPR 10.1(d).

Chief Justice Directive 11-02, effective January 1, 2012.

DEFENSE VERDICT IN CHAIN REACTION AUTO COLLISION CASE

Las Animas County: Plaintiff Clemmensen was driving a pickup truck on northbound I-25 when he saw an overturned vehicle near the highway's center median. Defendant Kernaghan was driving a truck on northbound I-25 and towing a trailer loaded with 8,000 pounds of gems and minerals. Defendant attempted to change lanes when his vehicle began sliding on black ice. His truck sideswiped the overturned, unattended vehicle and then struck the rear of Plaintiff's truck.

Plaintiff claimed a mild traumatic brain injury and his wife claimed loss of consortium. Defendant denied negligence and stated he reduced his speed from 74 mph to 40 mph because of the road conditions and overturned vehicle. The jury was not instructed on the sudden emergency doctrine.

At trial, Plaintiffs requested $566,367.63 for economic losses including impairment of earning capacity. Defendant's final offer prior to trial was a $75,000 statutory offer. The jury returned a verdict for the Defendant.

Clemmensen et. al. v. Kernaghan, Case No. 09-CV-135.

$1 MILLION AWARD IN MEDICAL MALPRACTICE CASE

Denver County: Plaintiff Whitehair had a prosthetic eye since he was nine years old and consulted with Defendant Popham, M.D. when it had sunk back into its socket. With Dr. Popham's supervision, Dr. Popham's fellow, Michelle White, M.D., performed occoplastic surgery on Plaintiff. The surgery was to move the prosthetic eye forward in the socket so as to match the location of Plaintiff's natural eye. During the surgery, a bone cement called Norian was injected into a pocket to lift the prosthetic eye and push it forward. However, the Norian quickly hardened and occluded into Plaintiff's internal carotid artery. As a result, Plaintiff suffered a stroke and sustained permanent brain damage.

Plaintiffs claimed negligence and loss of consortium against Dr. Popham. Plaintiffs alleged that Dr. Popham was negligent in using Norian for the surgery, that he failed to obtain Plaintiff Whitehair's informed consent for surgery, and that he failed to advise Plaintiff of substantial risks involved with the procedure. Dr. Popham claimed that Norian was commonly used in the procedure, that the consent form warned of the risk of stroke, that he advised Plaintiff of alternatives to receiving surgery, and that Plaintiff's unusual anatomy resulted in an unforeseeable outcome.

Plaintiff's final pre-trial demand was for $585,000. Defendant's final pre-trial offer was $500,000. A verdict was returned in favor of Plaintiffs for $1,000,000 plus statutory interest and costs.

Whitehair et. al. v. Popham, M.D., Case No. 10-CV-2013.

Utah

TESTIMONY OF DREAM HELD INADMISSIBLE EVIDENCE

Utah Court of Appeals: In a case involving three automobile accidents, Plaintiff Ladd appealed the trial court's grant of summary judgment in favor of Defendant. Ladd claimed that his deposition testimony describing the details of his dream where he relived the accident was admissible evidence which created a question of fact as to the causation of the accidents. Ladd testified that his account of the accidents is actually him reliving his dream, as he otherwise had absolutely no recollection of the accidents due to memory loss.

Ladd argued that his dream was admissible evidence as a "recovered memory" under Rule 602 of the Utah Rules of Evidence because he had the opportunity and capacity to perceive the events in question. The Court of Appeals ruled that the dream testimony was inadmissible under 602 because Ladd's memory was of the dream itself rather than of the accident. The Court stated that Ladd was "not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture," and held that no material facts were therefore disputed by Ladd.

The Court also affirmed the trial court's grant of summary judgment for Defendant on the basis that expert

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witness testimony was required for Ladd to establish the causation element of his negligence claim. In doing so, the Court stated that expert testimony is usually required to prove causation in all but the most obvious tort cases. The Court found that causation as to Ladd's injuries was not obvious and that he failed to designate any expert witnesses to prove causation.

Ladd v. Bowers Trucking, Inc., 2011 UT App. 355 (Utah Court of Appeals, decided October 20, 2011, not yet released for publication in the permanent law reports).

ACTUAL KNOWLEDGE OF UNDISCLOSED INFORMATION REQUIRED IN CONSTRUCTION DEFECT CASE ALLEGING FRAUDULENT NONDISCLOSURE

Utah Supreme Court: In this construction defect case, the Andersons brought a fraudulent nondisclosure claim against Defendant when several structural problems with their home were discovered as resulting from excessive settling caused by unstable soil beneath their home's foundation. Plaintiffs alleged that Defendant had actual knowledge of the unstable soils due to a report indicating that some areas contained "slightly collapsible soils." Despite the existence of the report, Defendant provided an affidavit stating that at the time of the sale he did not know of any soils testing that addressed the lot's suitability for housing construction. Plaintiff failed to present evidence that Defendant actually knew of the report or its contents.

The Supreme Court held that a plaintiff must demonstrate that a defendant had actual knowledge of undisclosed information in order to satisfy the elements of a fraudulent nondisclosure claim. The Court stated that mere constructive knowledge was insufficient to support a claim of fraudulent nondisclosure, and affirmed the grant of summary judgment in favor of Defendant.

Anderson v. Kriser, 2011 UT 66 (Utah Court of Appeals, decided October 25, 2011, not yet released for publication in the permanent law reports).

PRE-EXISTING CONDITIONS JURY INSTRUCTION HELD IMPROPER AS UNSUPPORTED BY EVIDENCE

Utah Court of Appeals: Plaintiff Harris sued Defendant Shopko Stores for personal injuries sustained when she fell after sitting in a sample office chair that fell apart. At trial, the court gave two jury instructions pertaining to pre-existing conditions. The first instruction involved the aggravation of symptomatic pre-existing conditions and apportioning damages between any pre-existing condition and any injury caused by the accident. The second instruction involved aggravation of dormant pre-existing conditions and instructed that all such damages caused by the accident are recoverable. The jury awarded Plaintiff approximately one third of her claimed economic damages and $1,000 in noneconomic damages.

On appeal, Plaintiff argued that the trial court erred in instructing the jury as to the first instruction regarding apportioning damages between pre-existing conditions and those caused by the Shopko incident. The Court of Appeals found that Shopko failed to present any evidence at trial that Plaintiff's pre-existing injuries were anything other than dormant at the time of the accident. Thus, the Court found the trial court's instruction on apportionment of damages erroneous because it was unsupported by evidence. The trial court's ruling was reversed and the case was remanded for a new trial.

Harris v. Shopko, 2011 UT App. 329, 263 P.3d 1184 (Utah Court of Appeals, decided September 29, 2011).

DEFENSE VERDICT IN CAR AND MOTORCYCLE INTERSECTION ACCIDENT

Cache County: Plaintiff was riding a motorcycle through an intersection with the right of way when Defendant pulled out into the intersection in a car. Defendant's lane was controlled by a stop sign. Defendant had stopped for the sign but admitted his field of vision was obstructed. Defendant's reconstruction expert claimed Plaintiff was traveling 35 mph in a 25 mph zone, and that the accident could have been avoided if Plaintiff wasn't speeding. Plaintiff's reconstruction expert testified that Plaintiff's speed was closer to 30 mph.

Plaintiff suffered soft tissue injuries mainly to his back, but both sides agreed Plaintiff sustained mild but permanent back pain. A jury found Plaintiff 56% at fault. Because Utah law bars recovery for plaintiffs who are 50% or more at fault, the Court entered judgment for Defendant.

Nilson v. Hansen, Case No. 070102670.

NEW MEXICO

INDEMNIFICATION INSURANCE PROVISION HELD TO PROVIDE A DUTY TO DEFEND

New Mexico Court of Appeals: When the City of Taos hired Defendant L.C.I.2 to construct a structure at a recreation facility, L.C.I.2 subcontracted with Plaintiff Bobby Windham's employer, Newt & Butch, for the installation of the structure's roof. Under the subcontract, Newt & Butch agreed to indemnify L.C.I.2 from any claim, suit or liability for injuries to persons on account of Newt & Butsch. L.C.I.2 was then named as an additional insured to Newt & Butch's liability policy issued by Defendant Nationwide.

After Plaintiff sustained injuries from falling through a skylight cutout, Plaintiff sued L.C.I.2 for negligence. L.C.I.2 asserted that Plaintiff's injuries arose from work completed by Newt & Butch. L.C.I.2 demanded a defense and indemnification from Nationwide as an additional insured. Nationwide accepted the defense under a reservation of rights in the event it was determined that Plaintiff's injuries arose from the individual negligence of L.C.I.2. After Nationwide intervened and sought a declaratory judgment

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against L.C.I.2, the trial court granted L.C.I.2's motion for summary judgment and held that L.C.I.2 was an additional insured entitled to a defense and indemnification under the terms of the policy.

On appeal, Nationwide argued that New Mexico Code Section 56-7-1 is a general prohibition against agreements that allows an indemnitor to indemnify an indemnitee for the indemnitee's negligence. However, the New Mexico Court of Appeals interpreted Section 56-7-1 as not voiding Nationwide's obligation to provide L.C.I.2 a defense. In doing so, the Court distinguished the duty to defend from the duty to indemnify and interpreted the Nationwide policy as providing a duty to defend L.C.I.2 regardless of L.C.I.2's ultimate liability to Plaintiff.

Windham et. al. v. L.C.I.2, Inc., Docket No. 29,609 (New Mexico Court of Appeals, slip opinion, decided November 8, 2011).

COURT IN CLASS ACTION SUIT HOLDS MONTHLY INSURANCE SERVICE FEES PERMITTED

New Mexico Court of Appeals: In a class action case, Plaintiffs challenged the manner in which Defendant Farmers Insurance Company of Arizona documented and collected charges imposed when insureds opt to pay their premiums in monthly installments rather than a bi-annual lump sum. Those Farmers customers which sought to sign up for monthly insurance installment payments were required to sign up for an account with Prematic, a separate entity that handled the monthly service processing. Though Prematic charged a separate monthly service charge, this monthly fee was collected by Farmers.

Plaintiffs argued that this service charge was an additional premium not permitted under the Farmers insurance policies terms because the policies do not specify any service charge to be paid by a policyholder. Plaintiffs also argued that Farmers' collection of Prematic installment charges was contrary to the Insurance Code, alleging that the definition of "premium" covers installment fees. Farmers argued that the services charges were not premiums either under the provisions of the policies or under New Mexico's statutory definition.

The Court found influential the prior holding in *Nakashima v. State Farm* and found the two cases factually similar. The Court held that installment fees should not be deemed "administration fees" and therefore need not be specified in the applicable insurance policy. The Court was influenced by the fact that Plaintiffs entered into a separate, enforceable agreement for payment of monthly premiums and that, as Plaintiffs agreed, the service charges were designed to cover the additional costs of monthly billing and payment.

Nellis v. Farmers Ins. Co. of Arizona, Docket No. 29,295 (New Mexico Court of Appeals, slip opinion, decided September 20, 2011).

Wyoming

SET-OFF FOR WORKERS COMPENSATION PAYMENTS TO INSURED NOT PERMITTED TO REDUCE UNISURED MOTORIST BENEFITS

U.S. District Court, D. Wyoming: Plaintiff Michael Garcia was injured in a motor vehicle collision with an uninsured motorist that rendered him unable to work for a period of time. Because he was acting within the scope of his employment, Garcia received a total of $39,699.01 from the Wyoming Workers Compensation Division.

Garcia also had Uninsured Motorist coverage through Defendant Nationwide under a policy which provided that Nationwide would pay compensatory damages "which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury." The policy further provided that Nationwide would not make a duplicate payment for any "loss for which payment has been made by or on behalf of persons or organizations who may be legally responsible."

Additionally, the Wyoming Insurance Department promulgated two potentially applicable regulations. The first ("Section 5(b)") states: "In no instance shall the benefits payable under uninsured motorists coverage be reduced by amounts paid under Worker's Compensation legislation." The second regulation ("Section 10") states: "Notwithstanding any other section of this regulation, no payments will be required under [UM] coverage which would result in duplicate payment" for the same loss or payments in excess of damages sustained.

The sole issue before the Court was whether, under Wyoming state law, Nationwide was entitled to a set-off of $39,699.01 in worker's compensation payments made to Garcia from the amount of uninsured motorist benefits Nationwide owed Garcia under his UM policy. Nationwide argued that Section 10 trumps the language of Section 5(b). However, the Court held that the more specific language of Section 5(b) governed, as a contrary interpretation of the two regulations would render Section 5(b) completely inoperative. Thus, the Court held that Nationwide was not entitled to a set-off in the amount of the worker's compensation benefits received by Garcia.

Garcia v. Nationwide Mutual Ins. Co., 2011WL5154733 (U.S. District Court, D. Wyoming, decided August 29, 2011).

TAVERN'S DEFENSE SUMMARY JUDGMENT AFFIRMED IN DUI RELATED ACCIDENT

Wyoming Supreme Court: The estates of a husband and wife who were killed in a motor vehicle accident caused by another motorist filed a complaint alleging wrongful death and negligence against owners of a bar in which the motorist became intoxicated prior to the accident. Defendant challenged the complaint under Wyoming Code Section 12-8-301,

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which provides: "No person who has legally provided alcoholic liquor or malt beverage to any other person is liable for damages caused by the intoxication of the other person."

Plaintiffs alleged that Defendant was highly intoxicated and noticeably so, as employees of the establishment continued to provide alcoholic beverages to him. Plaintiffs argued that the alcohol was therefore not legally provided under the statute because it was provided in violation of a local municipal statute.

The Wyoming Supreme Court upheld the lower court's grant of summary judgment in favor of Defendant. The Court held that while municipalities "may to some extent" regulate the consumption of alcoholic beverages, they are without authority to establish a negligence standard of care different from that chosen by the legislature.

Plaintiffs also sought a declaratory judgment on the constitutionality of the Wyoming statute under the Wyoming Constitution, arguing it violates equal protection standards and that it violates special laws provisions. The Court ruled that that statute does not violate Wyoming constitutional equal protection standards as it is the legislature's prerogative to determine public policy regarding the risk of injury to third persons as a result of someone's alcohol consumption. Finally, the Court ruled that the statute was not a special law in violation of the constitution because the "statute has general application across the state [and] applies to all liquor vendors … in the exact same fashion."

Baessler et. al. v. Freier et. al., 2011 WY 125, 258 P.3d 720 (Wyoming Supreme Court, decided August 26, 2011).

About Our Firm

Dewhirst & Dolven Opens Office in Salt Lake City, UT

To better serve our clients in Utah, Dewhirst & Dolven is pleased to announce the move of its Provo, Utah office to Salt Lake City. Please contact us in Utah at:

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Dewhirst & Dolven is also pleased to announce that Miles Dewhirst and Marilyn Doig have become members of the Professional Liability Defense Federation. The PLDF is a non-profit organization designed to bring together attorneys, claims professionals, and risk management specialists to share expertise and information helpful to the successful defense of professional liability claims.

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DEWHIRST & DOLVEN OPENS OFFICE IN SALT LAKE CITY, UTAH

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