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# LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas

## IN BRIEF

### COLORADO

In interpreting Colorado's premises liability statute, C.R.S. § 13-21-115, the Colorado Supreme Court held: "all children – regardless of their classification as trespassers, licensees, or invitees – may bring a claim under the attractive nuisance doctrine."

..... *Page 1*

### UTAH

The district court entered a default judgment against Defendant Xpress Lube in a case involving Plaintiff Sewell having fallen into an Xpress Lube service pit. The Utah Supreme Court reversed the default judgment due to insufficient service on Xpress Lube. The Court explained that a sole proprietorship requires service on the sole proprietor rather than a business employee.

..... *Page 2*

### WYOMING

In a personal injury case, the trial court dismissed Plaintiff Reynolds' case with prejudice as a discovery sanction. Plaintiff's case had previously been dismissed, and in both cases, had failed to provide disclosures and comply with discovery orders. The Wyoming Supreme Court affirmed, holding that such dismissal did not violate constitutional guarantees of court access and also did not violate the separation of powers.

..... *Page 4*

### NEW MEXICO

Plaintiff Snow's claims were deemed barred by the statute of limitations against newly joined defendants named in an amended complaint. The amended complaint was held not to relate back to the date of the original complaint because the joined defendants did not have notice of Snow's potential lawsuit. The New Mexico Court of Appeals noted that the mere occurrence of an accident does not provide such required notice.

..... *Page 5*

### TEXAS

The Armbrusters, homeowners, filed suit against roofing contractor Ideal Roofing, for damages from an improperly installed roof. After Ideal sought to enforce an arbitration provision in the parties' contract, the Texas Court of Appeals, 5th District, held that Ideal waived the provision by substantially invoking the judicial process. The Court also ruled that enforcing the provision would prejudice the Armbrusters.

..... *Page 6*

## COLORADO

### COLORADO SUPREME COURT PERMITS ATTRACTIVE NUISANCE CLAIM BY ANY CHILD REGARDLESS OF LAND-OCCUPANT CLASSIFICATION

*Colorado Supreme Court:* S.W., a minor, attended a private party held by Defendant Towers Boat Club ("Towers"), as a guest of one of the club's member-families. While S.W. was playing on a rented, inflatable bungee run, a gust of wind hurled the inflatable run between 15 and 75 feet high into the air and 100 to 200 yards away. S.W. allegedly sustained a traumatic brain injury and other fractures from this incident.

Plaintiffs Wackers, on behalf of S.W., filed claims for premises liability, negligence, and attractive nuisance against Towers. The trial court granted Towers' motion for summary judgment as to the negligence and premises liability claims, on the basis that S.W. was a licensee and Towers thus did not breach any duty owed to S.W. However, the court denied Towers' motion on the attractive nuisance claim. Upon a motion for reconsideration, though, the district court granted Towers' motion, reasoning that "the attractive nuisance doctrine, as incorporated into C.R.S. § 13-21-115, applies only to trespassing children and to licensees." The Court of Appeals agreed.

On appeal, the Colorado Supreme Court addressed whether, under § 115, the attractive nuisance doctrine applies only to trespassing children but not to children who are licensees or invitees. Upon examining the common law precedent for the attractive nuisance doctrine, the Supreme Court found that the doctrine was never intended to apply exclusively to trespassers. Thus, the Court held: "all children – regardless of their classification as trespassers, licensees, or invitees – may bring a claim under the attractive nuisance doctrine." The Court of Appeals' decision was thus reversed.

*S.W et al. v. Towers Boat Club, Inc., 2013 CO 72 (Colorado Supreme Court, decided December 23, 2013, not yet released for publication in the permanent law reports).*

## IN THIS ISSUE

## ARBITRATION PROVISION ENFORCED UNDER CRNCA IN DISPUTE BETWEEN ASSOCIATION AND DEVELOPER

*Colorado Court of Appeals:* Triple Crown at Observatory Village ("Triple Crown") is a common interest community organized under the Colorado Common Interest Ownership Act ("CCIOA"). The developer of Triple Crown, Village Homes of Colorado, Inc. ("Village"), was Triple Crown's declarant under CCIOA § 38-33.3-103(12). Village drafted and recorded Triple Crown's Declaration of Covenants, Conditions, and Restrictions ("CC&Rs"). The CC&Rs created the Triple Crown at Observatory Village Association, Inc. ("Association"). It was organized as a nonprofit corporation under the Colorado Revised Nonprofit Corporation Act ("CRNCA").

Article 14 of the CC&Rs established a dispute resolution procedure for claims arising from the design or construction of Triple Crown. It required arbitration of claims under American Arbitration Association rules if good faith negotiation and mediation efforts were unsuccessful.

In January 2012, the Association began collecting votes from its members to revoke Article 14. After 60 days, 48% of the members had cast votes in favor of revocation. After another 60 days, the Association had obtained the required 67% of votes to revoke Article 14. The Association recorded the amendment revoking Article 14. The Association then brought this action against Village and several of its principals and employees (collectively "Defendants"), alleging negligent construction, Colorado Consumer Protection Act violations, and breach of fiduciary duties.

Defendants moved to dismiss for lack of jurisdiction, citing Article 14's mandatory arbitration provision. They argued that because the Association had not amended Article 14 within the time limits in the CRNCA, they were still bound by Article 14's dispute resolution procedures. The trial court granted the motion, dismissed the case, and ordered the parties to follow Article 14.

The trial court ruled that when an association amends its declaration without a meeting under CCIOA, the association must comply with the 60 day time limit provided in CRNCA § 7-127-107. The Court of Appeals agreed. Because the Association did not comply, the amendment was thus ineffective.

The Court of Appeals also agreed that CCIOA established the power of unit owners' associations to "[i]nstitute, defend, or intervene in litigation or administrative proceedings . . . on the matters affecting the common interest community" and that "litigation" includes both judicial proceedings and arbitrations. Therefore, the mandatory arbitration provision did not infringe on the Association's statutory power to institute litigation.

The Association argued Article 14 was invalidated by CCIOA § 38-33.3-302(2), which provided that the CC&Rs "may not impose limitations on the power of the association to deal with other persons." The trial court rejected this argument. The Court of Appeals agreed with the trial court, finding that the CCIOA section forbids only restrictions unique to the declarant. Article 14 controlled disputes between all parties. The Court of Appeals thus affirmed the trial court's order.

*The Triple Crown at Observatory Village Ass'n, Inc. v. Village Homes of Colorado, Inc. et al., 2013 COA 150 (Colorado Court of Appeals, decided November 7, 2013, not yet released for publication in the permanent law reports).*

## DEFENSE VERDICT IN SUBROGRATION CASE INVOLVING DRUNK DRIVER

*Mesa County:* Caitlyn True, 17, was a front-seat passenger in a truck driven by Parker Neilsen, an intoxicated 19-year-old. Caitlyn fell out of the moving truck, struck her head on the pavement and died of blunt force trauma. Parker's BAC at the time was determined to be .220. Following the accident, Plaintiff American Family Mutual Insurance paid Caitlyn's parents $400,000 total, reflecting $100,000 each for four separate policies.

Seeking subrogation, American Family sued Parker for negligence and sued Parker's parents under the "family car doctrine." These defendants settled before trial. American Family then sued Tyler Stanford and Jonas Cooper as social hosts under the Dram Shop statute. Prior to the fatal accident, Parker had been drinking at two separate parties hosted by Tyler and Jonas. After attending these parties, Parker picked up Caitlyn, who had snuck out of her house around 3 a.m. American Family alleged that Defendants Tyler and Jonas were liable as social hosts. Though they admitted to providing alcohol to persons under 21, the Defendants denied causation for Caitlyn's death. They argued that Plaintiff failed to establish evidence that Parker was intoxicated as a result of attending the parties.

A verdict was rendered for Defendants Tyler Stanford and Jonas Cooper and against American Family. The Court then granted Defendants' motions for costs.

*American Family Mut. Ins. v. Stanford et al., Case No. 11-CV-4648.*

# Utah

## UTAH SUPREME COURT REVERSES A DEFAULT JUDGMENT ENTERED AGAINST A SOLE PROPRIETORSHIP

*Utah Supreme Court:* This case concerns the sufficiency of service upon a sole proprietorship. Plaintiff Larry Sewell alleged injuries resulting from a fall into a service pit at Xpress Lube, which is a sole proprietorship of Bruce Anderson.

Plaintiff secured a default judgment against Xpress Lube approximately one month after it served the complaint and summons on an employee of the business. The district court denied Xpress Lube's motion to set aside the default judgment, despite an answer with meritorious defenses having been filed with the motion. The district court then granted Plaintiff the full $600,000 he requested for medical bills, lost wages, and pain and suffering, without holding an evidentiary hearing.

The Utah Supreme Court vacated the default judgment on three separate grounds. First, service was improper on Xpress Lube because a sole proprietorship requires service upon the sole proprietor, rather than an employee of the business.

*More on Page 3*

*Continued from Page 2*

The district court thus lacked jurisdiction to enter the default judgment.

Second, the motion to set aside default was timely filed, and the default was the result of mistake, inadvertence, or excusable neglect due to Xpress Lube's insurance company never having received the complaint because of an incorrectly-sent fax. In addition, Xpress Lube presented a meritorious defense to the underlying claims. Lastly, the district court erred in entering the default judgment for the full amount of damages alleged by Plaintiff, without holding an evidentiary hearing as required under Utah R. Civ. P. 55.

*Utah Supreme Court: Sewell v. Xpress Lube, 2013 UT 61 (Utah Supreme Court, decided October 18, 2013, not yet released for publication in the permanent law reports).*

## CGL POLICY EXCLUSION ENFORCED TO DENY COVERAGE IN CONSTRUCTION DEFECT CASE

*Utah Court of Appeals:* America First Credit Union ("AFCU") and Kier Construction ("Kier") entered into a contract for Kier to act as the general contractor in the construction of an AFCU branch. Kier subcontracted with Broberg Masonry ("Broberg") to supply and install manufactured stone veneer for the building. Per the contract with Kier, Broberg was required to obtain a commercial general liability insurance policy ("CGL policy"). Broberg did so and listed Kier as an "additional insured" in an endorsement.

The CGL policy provided that Owners Insurance Company ("Owners") will defend the insured in any suit against the insured seeking damages that are payable under the terms of the policy.

After AFCU filed a breach of contract action against Kier alleging defective construction due to cracking and failing of exterior masonry work on the building, Kier filed a third party complaint against Broberg and Owners. Owners filed a motion for summary judgment, arguing that the CGL policy did not provide coverage to Kier for AFCU's claims under the circumstances. The district court ruled that the CGL policy did provide coverage to Kier and denied Owners' motion. Specifically, the district court determined: (1) that a covered "occurrence" had taken place under the policy because Kier, as general contractor, did not expect to be liable for any damages arising from a subcontractor's faulty work; (2) that the damage to the building's exterior was "property damage;" and (3) that none of the CGL policy's exclusions applied to limit Owners' duty to defend and indemnify Kier.

On appeal, Owners challenged the district court's determinations that the veneer failure constituted an "occurrence" involving "property damage" sufficient to trigger coverage under the policy. However, the Court did not address those issues. Instead, the Court found that even if there was an "occurrence" and "property damage" within the meaning of the policy, exclusions in the policy excluded coverage for property damage to work performed or products furnished by Broberg. In doing so, the Court of Appeals interpreted the terms "you" and "your work" in the "property damage to your work" exclusion to refer to Broberg and Broberg's work, rather than Kier and Kier's work at the property. In finding this, the Court of Appeals interpreted such terms based upon definitions provided for these terms under the policy.

Thus, because exclusions barred coverage for AFCU's alleged damages, Owners was held not liable to cover them under the CGL policy. Accordingly, the Court of Appeals reversed the district court's denial of Owners' motion for summary judgment.

*American First Credit Union v. Kier Construction Corp., 2013 UT App. 256 (Utah Court of Appeals, decided October 24, 2013, not yet released for publication in the permanent law reports).*

## DEFENSE SUMMARY JUDGMENT UNDER THE OPEN AND OBVIOUS DOCTRINE REVERSED

*Utah Court of Appeals:* In this slip and fall case, Plaintiff Candelaria sought recovery from Defendants CB Richard Ellis ("CBRE") and Concept Maintenance Specialties ("CMS") for injuries sustained when she slipped on a layer of ice that was concealed beneath some snow. This occurred on a property managed by CBRE. CMS had contracted with another entity for removal of snow and ice from the property.

CBRE and CMS moved for summary judgment on Candelaria's negligence claim, asserting they owed no duty to Candelaria because the hazardous conditions were open and obvious. The district court granted the motion.

The Court of Appeals cited the following open and obvious danger rule: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."

Recognizing that Candelaria slipped and fell on some snow and ice, Defendants' position relied on the argument that the presence of snow and winter conditions would have been obvious to any person who lives in Utah. However, viewing the evidence in the light most favorable to Candelaria (because she was the nonmoving party), the Court of Appeals concluded that a disputed issue of material fact remained regarding whether the ice was an open and obvious danger. Candelaria's deposition testimony established that she slipped on ice that was concealed beneath the snow, and as such, she could not see the ice. Prior to the fall, she did not know there was ice accumulated in that area. Thus, her testimony was sufficient to place into dispute whether the ice was open and obvious.

*More on page 4*

*Continued from Page 3*

The Court of Appeals thus reversed the district court's grant of summary judgment in favor of CBRE and CMS.

*Candelaria v. CB Richard Ellis et al., 2014 UT App. 1, (Utah Court of Appeals, decided January 3, 2014, not yet released for publication in the permanent law reports).*

## DEFENSE VERDICT ENTERED DUE TO COMPARATIVE FAULT STATUTE

*Utah County:* Plaintiff Thompson was riding a bicycle westbound on the same road that Defendant Hayward was also travelling westbound on in a car. Defendant turned right into a driveway, and Plaintiff collided into the rear passenger door of Defendants' vehicle. Plaintiff alleged that Defendant failed to yield. Defendant disputed liability.

Plaintiff sustained several severe lacerations to his arm which required extensive stitching. Plaintiff claimed to have incurred $21,454 in medical bills. Upon a jury trial, the jury found that Plaintiff was 60% at fault. As such, under Utah law pertaining to a plaintiff's comparative fault, a verdict was thus entered for Defendant.

*Thompson v. Hayward, Case No. 100404044.*

# WYOMING

## DISMISSAL WITH PREJUDICE AFFIRED BY WYOMING SUPREME COURT AS A DISCOVERY SANCTION

*Wyoming Supreme Court:* In 2011, Plaintiff Reynolds sued Defendant Bonar, seeking recovery of personal injuries arising from a motor vehicle accident. That complaint was dismissed without prejudice for failure to comply with a discovery order compelling Reynolds to provide his initial disclosers and respond to Defendant's written discovery requests.

In 2012, Reynolds re-filed his complaint against Bonar. Afterwards, Bonar filed a motion to compel Reynolds to provide initial disclosers, as well as complete responses to Bonar's written discovery requests. After Reynolds' attorney failed to attend the hearing on the motion, the trial court again dismissed Reynolds' complaint. However, the second time, the complaint was dismissed with prejudice.

On appeal, Reynolds argued that the district court did not have authority to dismiss his complaint with prejudice because such ruling violates the Wyoming Constitution's guarantees of access to courts. On this issue, the Wyoming Supreme Court held that Reynolds had access to the courts and that his action was properly dismissed solely because of his own failure to comply with court orders.

Reynolds also argued that the district court's ruling precluding him from filing a new action intruded upon the legislature's authority to dictate when an action may be commenced. He thus argued that it violated the separation of powers provision of the Wyoming Constitution. The Supreme Court, however, found that the Wyoming Constitution grants the court, not the legislature, the power to control the course of litigation. Thus, the district court's ruling was affirmed. Indeed, the Supreme Court found that Reynolds' appeal was meritless because it was contrary to clear precedent, and thus awarded Bonar with attorneys' fees and costs incurred in the appeal.

*Reynolds v. Bonar, 2013 WY 144, 313 P.3d 501 (November 21, 2013).*

## WYOMING SUPREME COURT INTERPRETS GOVERNMENTAL CLAIMS ACT

*Wyoming Supreme Court:* Plaintiff DiFelici was injured when she fell after stepping into a drainage hole drilled in the gutter of a street in the City of Lander, Wyoming. The hole was drilled by City employees. She sued the City claiming it was negligent in the operation of a public utility or service, and also that she was entitled to recover under Wyo, Stat. Ann. § 15-4-307, rendering cities liable for injuries resulting from excavations that make streets unsafe.

The district court granted the City's motion for summary judgment based upon governmental immunity. DiFelici appealed, arguing: (1) that the City's failure to replace a grate over the drainage hole fell within the waiver of immunity for negligence of public employees in the operation of public utilities and services under Wyo. Stat. Ann. § 1-39-108(a); and (2) that Wyo. Stat. Ann. § 15-4-307 provides a statutory basis for DiFelici to recover from the City due to the City excavating the drainage hole.

The Wyoming Supreme Court first ruled that § 108(a) does not provide DiFelici with an exception to the City's governmental immunity under Wyoming's Governmental Claims Act. In so ruling, the Supreme Court interpreted specific terms of § 108, including that the term "liquid waste" in the exception does not include runoff or storm water as was drained into the subject gutter. In addition, the Supreme Court commented that the Governmental Claims Act "has been described as a 'close ended' tort claims act because it generally grants immunity to governmental entities and public employees, waiving that immunity only through specific statutory exceptions." Because no exceptions applied in this case, DiFelici's claim was thus barred.

Regarding the application of Wyo. Stat. Ann. § 15-4-307, the Supreme Court held that it does not apply to the negligence of public employees of cities. Rather, it applies when a non-governmental person or entity creates an excavation. Because the hole was drilled by City employees, DiFelici was not entitled to recover under § 307. The Wyoming Supreme Court thus affirmed the district court's grant of summary judgment in favor of the City.

*Difelici v. City of Lander, 2013 WY 141, 312 P.3d 816 (November 12, 2013).*

## New Mexico

### STATUTE OF LIMITATIONS HELD TO BAR CLAIMS IN AMENDED COMPLAINT

*New Mexico Court of Appeals:* Plaintiff Snow was injured when a hose assembly came loose from a water pump and struck him in the leg while he was working at the Navajo Refinery (a crude oil refinery). Snow filed his initial complaint naming several defendants. On January 20, 2012, Snow filed a motion for leave to file an amended complaint, seeking to add Warren CAT and Brininstool Equipment Sales as defendants. It is undisputed that this motion for leave was filed on the final day before the relevant statute of limitations would expire.

The district court granted Snow's motion for leave on January 27, 2012, and Snow filed the amended complaint on January 30, 2012. Warren and Brininstool were served on February 2 and 6, 2012, respectively. Warren and Brininstool both moved for summary judgment, asserting that the statute of limitations had expired prior to the filing of the amended complaint. The district court agreed and granted both motions.

On appeal, Snow had two arguments: (1) that the amended complaint should relate back to the date of initial complaint, under Rule 1-015(C), because Warren and Brininstool both knew of the accident before the limitations period expired; and (2) that the filing of the motion for leave tolled, under a theory of equitable tolling, the statute of limitations until the amended complaint was actually filed.

The Court of Appeals determined that the amended complaint would only relate back under Rule 1-015(C) if Warren and Brininstool had adequate notice of the institution of the action, and if they knew or should have known that but for inadvertence that arose due to mistaken identity, the action would have been brought against them. The Court disagreed with Snow's argument that Warren and Brininstool both received notice of the institution of the lawsuit when they became aware of the accident and resulting injury. The Court reiterated that a plaintiff cannot establish the notice requirement under Rule 1-015 by showing that a defendant was merely aware of the possibility that an action might be brought. The Court also found that Snow failed to present evidence that he exercised due diligence in investigating and identifying the entities as additional defendants prior to the expiration of the statute of repose.

Regarding Snow's equitable tolling argument, the court found that equitable tolling would have only tolled the filing date to the date which the motion was granted. Because the amended complaint was filed the next business day, it was therefore filed beyond any date permitted under a theory of equitable tolling. The Court of Appeals thus affirmed the grant of summary judgment in favor of Warren and Brininstool.

*Snow v. Warren Power & Machinery, Inc. d/b/a/ Warren CAT et al., Docket No. 32,335 (New Mexico Court of Appeals, slip opinion, decided December 17, 2013, not yet released for publication in the permanent law reports).*

## About Our Firm

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# TEXAS

## ARBITRATION PROVISION RULED WAIVED DUE TO CONTRACTOR HAVING SUBSTANTIALLY INVOKED THE JUDICIAL PROCESS

*Texas Court of Appeals, 5th Dist:* Homeowners Mike and Nery Armbruster filed suit against roofing contractor Ideal Roofing, Inc. ("Ideal") seeking recovery of damages allegedly arising from an improperly installed roof. The Armbrusters had entered into a contract directly with Ideal, which provided an arbitration provision that mandated for disputes between the parties to be resolved through binding arbitration. The Armbrusters filed suit after it was concluded that the roof was improperly installed, resulting in water damage. The county court denied Ideal's motion to compel arbitration.

At the time Ideal filed a motion to compel arbitration, the case had been pending for nineteen and a half months and had been set for trial three times. Indeed, disclosed correspondence showed that Ideal was aware of the arbitration agreement at least within four months after answering the lawsuit. However, the Court of Appeals recognized that delay alone generally does not establish a waiver of a contractual right to arbitration.

The Court of Appeals also noted that written discovery was served by Ideal on the Armbrusters. This discovery consisted of requests for disclosure, interrogatories, and requests for production not pertinent to the arbitrability of the case. Ideal also responded to written discovery requests. Two motions to compel had been filed by the Armbrusters. The depositions of Nery Armbruster and the Armbrusters' expert witness had also been taken by Ideal. An inspection of the roof had been completed by Ideal as well. The Court of Appeals thus held that arbitration had been waived by Ideal due to having substantially invoked the judicial process.

In addition, the Court of Appeals stated that the Armbrusters had the burden to establish they would be prejudiced by enforcement of the arbitration provision. The Armbrusters argued that they would be economically prejudiced due to the arbitration provision requiring that the arbitration be located in Houston, rather than Dallas where the residence was located. These expenses would be in addition to expenses already incurred by the Armbrusters throughout the prior months of litigation. The Court of Appeals found that prejudice was established and affirmed the denial of Ideal's motion to compel arbitration.

*Ideal Roofing, Inc. v. Armbruster, Case No. 05-13-00446-CV, 2013 WL 6063724 (Texas Court of Appeals, 5th District, decided November 18, 2013, not yet released for publication in the permanent law reports).*