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LEGAL UPDATE

Utah • Wyoming • Colorado • Texas

IN BRIEF

UTAH

- In an appeal which sought abandonment of Utah's Open and Obvious Danger Rule, the Utah Supreme Court affirmed adoption of the rule. The Court upheld the rule despite Plaintiff's argument that it undermined the comparative fault scheme.
.....Page 1

COLORADO

- The Colorado Court of Appeals held that an insurance company did not have a right to intervene in the underlying action, despite the insured agreeing with the plaintiff to not present a defense at trial. The Court's ruling was based on the insurer's interest in the action being held as contingent on the outcome.
.....Page 2

WYOMING

- In a wrongful death action stemming from a criminal shooting, the Wyoming Supreme Court determined that there was an ambiguity in the term "resident" in the homeowner's policy. That ambiguity thus led to coverage for the claims.
.....Page 4

TEXAS

- An automobile PIP policy was interpreted by the Texas Court of Appeals to determine that there was no coverage for injuries sustained by the Plaintiff from the delivery of roofing materials, because the vehicle's involvement was not causally related to the injuring event.
.....Page 5

UTAH

ADOPTION OF THE OPEN AND OBVIOUS DANGER RULE IN UTAH IS AFFIRMED

Utah Supreme Court: In this case, Plaintiff Julie Coburn chose to step over orange construction netting that was strung across a public walking trail. In doing so, her foot got caught in the netting and she fell to the ground, sustaining injuries to her arm and shoulder. The district court ruled that the orange netting was an open and obvious danger. As such, Defendant Whitaker Construction, the company that strung the orange netting across the trail, did not owe Plaintiff a duty of care.

The issue in this case concerned the requested abandonment of Utah's open and obvious danger rule. That rule "defines the duty of care a possessor of land owes to invitees. Specifically, the open and obvious rule provides that a possessor of land is not liable to his invitees for physical harm caused to them by an 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." If the rule applies, then the possessor of land does not owe a duty to an invitee with respect to the open and obvious danger, and thus cannot be held liable for any injury caused by it.

On appeal, Plaintiff argued that Utah should abandon the open and obvious rule. Plaintiff argued that application of the rule is inconsistent with Utah's comparative fault scheme because it can bar some plaintiffs from recovering for their injuries. Plaintiff also argued that the inquiry as to whether a condition is open and obvious is highly fact intensive, which would be improper for judges to determine.

However, the Utah Supreme Court was not convinced that the open and obvious rule needed abandoned. The Court found that Plaintiff "simply laments the fact that the open and obvious danger rule can sometimes act as an absolute bar to recovery." As such, the Court upheld the rule and found that it applied to bar her claims. A primary factor in finding that the orange netting was open and obvious was Plaintiff's testimony that she could have walked around the netting, but instead saw it and chose to walk over it.

Coburn v. Whitaker Construction Co., 2019 UT 24 (Utah Supreme Court, decided June 18, 2019, not yet released for publication in the permanent law reports).

IN THIS ISSUE

Utah Supreme Court Affirms That Release of Liability for Minors Is Not Enforceable

Utah Supreme Court: This case stemmed from a minor, Levi Rutherford, crashing into a thick, wet machine-made patch of snow while skiing. He was injured in the accident. His parents brought claims against Defendant Talisker Canyons Finance Company for negligence and premises liability, as the landowner of the ski area.

Levi was a ten-year-old member of the Summit Ski Team, and affiliate of the United States Ski and Snowboard Association (USSA). He was an advanced skier who regularly skied on expert runs. Levi's father signed him up for the USSA team online. In the process, he signed an "Assumption of Risk and Release of Liability" on Levi's behalf. The release purported to waive Levi's right to sue USSA, the ski team, and any ski area operator for any injury due to any reason.

When Levi attended a team practice, he went for a warmup run while multiple snow-making machines were in operation at the ski area. The machines were not advised to be turned off. Levi ended up running into a mound of sticky, wet, machine-made snow that was roughly a foot high, which caused him to crash. Levi alleged sustaining a brain injury as a result of the crash.

Though multiple issues were raised by the action, a primary issue was whether the parents' release of liability applied to their minor-son's injuries. Talisker asked the court to hold that the parents' signing of a release of liability barred the claims brought on behalf of their minor son.

The Utah Supreme Court readdressed prior authority wherein it previously and "unambiguously declared that it would violate public policy to allow a parent to release a minor's prospective claim for negligence." In revisiting that prior law, the Utah Supreme Court decided to uphold it, finding that the parents' release of liability for the minor child was not enforceable. "[A] parent cannot release his or her minor child's prospective claims for negligence."

Rutherford v. Talisker Canyons Finance Co. et al., 2019 UT 27 (Utah Supreme Court, decided June 27, 2019, not yet released for publication in the permanent law reports).

Utah Supreme Court Defines Scope of "Contact Sports Exception" for Tort Liability

Utah Supreme Court: Plaintiff Judd Nixon was injured while playing basketball during a recreational church game. The game was being played at the church meetinghouse. Judd sought to recover from the opposing player he saw as responsible for his injuries, Defendant Edward Clay. The issue on appeal to the Utah Supreme Court was whether the district court erred in adopting a "contact sports exception" in the law of torts.

The district court held that "in bodily contact games … participants are liable for injuries in a tort action only if their conduct is such that it is either willful or with a reckless disregard for the safety of the other player." Applying this "contact sports exception" to the facts of the case resulted in the determination that Nixon's injury arose out of conduct that was not willful or reckless, but was inherent in the game of basketball. The district court thus held that Clay did not owe a duty to Nixon, and it granted Clay's motion for summary judgment.

On appeal to the Utah Supreme Court, it agreed with the district court's adoption of the "contact sports exception" to liability arising out of sports injuries. However, it slightly modified the exception: "We do not think the exception should turn on the defendant's state of mind, or be limited just to contact sports. We instead hold that participants in any sport are not liable for injuries caused by their conduct if their conduct was inherent in the sport."

Applying this standard to the basketball game involving Nixon and Clay, the Court determined that Clay's conduct was inherent in the sport. The injury occurred when Clay went to contest a shot by Nixon, and Nixon fell on his knee, incurring a serious knee injury. In light of the Court's ruling, the grant of summary judgment in favor of Defendant Clay was affirmed.

Nixon v. Clay, 2019 UT 32 (Utah Supreme Court, decided July 11, 2019, not yet released for publication in the permanent law reports).

Defense Verdict in Multi-Vehicle Rear-End Accident Case

Salt Lake County: Plaintiff Janet Beasley was a passenger in a vehicle traveling westbound on 400 South in Salt Lake County. Defendant Richard Brown also was driving westbound on 400 South. Traffic reportedly stopped and Defendant rear-ended the vehicle in front of him. Plaintiff's vehicle then rear-ended Defendant's vehicle.

Plaintiff reportedly sustained injuries to her wrist and shoulder. Plaintiff Janet Beasley's claims also sought recovery for past and future pain, medical expenses, past lost income, and future lost earning capacity. Her spouse, Plaintiff Keith Beasley, also brought loss of consortium claims against Defendant Brown.

Defendant Brown filed a cross-claim against the driver of the vehicle in which Plaintiff was a passenger, because that driver had rear-ended his vehicle. The case proceeded to trial only on Plaintiffs Janet and Keith Beasley's claims against Defendant Brown.

The jury found that Defendant and the driver who rear-ended Defendant's vehicle were both negligent. They also found that the driver of the vehicle that rear-ended Defendant's vehicle was the cause of Plaintiffs' injuries, and that Defendant Brown was not the cause. As such, a verdict was rendered in Defendant's favor.

Beasley v. Brown, Case No. 2019-09-06622.

Colorado

Insurer Who Issued Reservation of Rights Held Not to Have Right to Intervene in Construction Defect Action

Colorado Court of Appeals: This insurance dispute arose from a construction defect case in which Plaintiff Bolt Factory Lofts Owners Association sued six contractors for alleged defects in the construction of one of its condominiums. Two of those contractors then asserted negligence and breach of contract claims against several subcontractors, including Sierra Glass. Following several settlement

More on Page 3

Continued from Page 2

agreements, the only remaining claims were by the Association (as assignee of the two contractors) against Sierra Glass.

Auto Owners Insurance Company issued insurance policies to Sierra Glass. Auto Owners defended Sierra Glass from the Association's claims under a reservation of rights. Auto Owners refused to pay a $1.9 million settlement demand presented to Sierra Glass. As a result, Sierra Glass entered into an agreement with the Association under which Sierra Glass would refrain from offering a defense at trial. In exchange, the Association agreed to not pursue recovery against Sierra Glass. Auto Owners learned about this agreement the day before trial began.

Auto Owners filed a motion to intervene in the action, to continue the trial, and contesting the settlement agreement. The trial court determined that the settlement agreement was valid. It thus denied Auto Owners' motion to intervene, concluding that Auto Owners' claims were contingent on the outcome of trial. In addition, Auto Owners could pursue a separate declaratory judgment action to determine its coverage obligations.

During the trial, Sierra Glass did not present a defense. The trial court found in favor of the Association and entered judgment for $2,489,021.91. Auto Owners appealed the trial court's denial of its motion to intervene.

On appeal, the Colorado Court of Appeals addressed whether Auto Owners had an interest in the action such that it merited intervention. It stated that "intervention [may occur] as a matter of right where: (1) the applicant claims an interest in the subject matter of the litigation; (2) disposition of the action may impair or impede the applicant's ability to protect that interest; and (3) the applicant's interest is not adequately represented by existing parties."

The Court stated that "if the interest is contingent, it may be insufficient to warrant intervention." It also held that "where an insurer reserves the right to deny coverage, the insurer's interest in the liability phase of the proceeding is contingent on the resolution of the coverage issue." The reservation is typically considered contingent because an insurer who reserves the right to deny coverage cannot control the defense of a lawsuit against its insured by an injured party.

Because Auto Owners reserved the right to deny coverage, its interest in the litigation was contingent on the liability phase of the proceedings. Thus, the Colorado Court of Appeals held that the trial court correctly denied Auto Owners' motion to intervene. The Court also noted that the agreement entered into between the Association and Sierra Glass was permissible under prior Colorado authority.

Bolt Factory Lofts Owners Association Inc. v. Auto-Owners Insurance Company, 2019 COA 121 (Colorado Court of Appeals, decided August 1, 2019, not yet released for publication in the permanent law reports).

ARBITRATION PROVISION IN AN AGREEMENT IS HELD NOT TO APPLY TO A NONSIGNATORY

Colorado Supreme Court: The issue in this case was "whether a nonsignatory to an arbitration agreement can be required to arbitrate under that agreement by virtue of the fact that it is a purported agent of a signatory to the agreement."

In this case, the district court ordered Defendant Rugby International Marketing ("RIM") to arbitrate, despite it not being a signatory to the Professional Rugby Sanction Agreement. RIM was order to arbitrate based upon the arbitration provision of that agreement, which covered the parties and their agents. The district court found that because RIM was an agent for United States of America Rugby Football Union, which was a signatory to the agreement, RIM was also within the broad language of the arbitration provision.

The Colorado Supreme Court considered the issue of first impression and ruled: "Subject to a number of recognized exceptions, only parties to an agreement containing an arbitration provision can compel or be subject to arbitration." Because RIM was not a party to the agreement, and because Plaintiffs did not establish that any recognized exception did not apply, RIM was deemed not subject to the arbitration provision.

Exceptions to the general rule include: the nonsignatory being a third-party beneficiary of the agreement; traditional agency principles binding the nonsignatory to an agreement; and the nonsignatory being equitably estopped from denying the applicability of the arbitration provision due to it seeking to enforce the rights or benefits of the agreement that contains the arbitration provision. However, Plaintiffs did not establish any of those exceptions as applying this case. Thus, the district court's order was reversed.

N.A. Rugby Union LLC et al. v. United States of America Rugby Football Union et al., 2019 CO 56, 442 P.3d 859 (Colorado Supreme Court, decided June 17, 2019).

COLORADO SUPREME COURT INTERPRETS APPRAISAL PROVISION IN CONDOMINIUM ASSOCIATION'S POLICY

Colorado Supreme Court: A condominium association (Dakota) filed two claims with its insurer (Owners Insurance Company) for weather damage. The parties couldn't agree on the money owed, so Dakota invoked the appraisal provision of its insurance policy.

The appraisal provision requires each party to "select a competent and impartial appraiser." An umpire would be selected by the parties or appointed by the court. The appraisers would assess the value of the property and amount of loss. Any disagreement would be submitted to the umpire. Any agreement as to the values reached by at least two of the three of them would bind them all.

The parties each selected an appraiser, putting the rest of the provision's terms into motion. Ultimately, the appraisers submitted conflicting value estimates to the umpire, and the umpire issued a final award, accepting some estimates from each appraiser. Dakota's appraiser signed onto the award, and Owners paid Dakota.

Later, Owners called foul. It moved to vacate the award, arguing that Dakota's appraiser was not "impartial" as required by the appraisal provision. Owner argued that Dakota failed to disclose all material facts. Owners

More on page 4

Continued from Page 3

alleged that Dakota's appraiser acted improperly by entering into a contract with the public adjuster that capped her fees at five percent of the insurance award. Thus, Dakota's appraiser had a financial interest in the outcome. At an evidentiary hearing, Dakota's appraisal said it was "natural" to be an advocate for an insured when she's acting as an appraiser.

The district court denied Owners' motion. It found that Dakota's appraiser didn't act improperly.

On appeal to the Colorado Supreme Court, the Court first ruled as to the appraiser's fee cap provision. The Court found that there was "no basis for concluding that the appraiser's impartiality was compromised by this five percent fee cap." However, as to the appraiser's testimony about advocating for the insured, the Court rule: "We conclude that the appraiser's conduct must be evaluated using the plain meaning of the word impartial. Thus, the policy requires the appraiser to be unbiased, disinterested, without prejudice, and unswayed by personal interest. She must not favor one side more than another." The Court thus reversed the lower court's decision with respect to the provision's impartiality requirement.

Owners Insurance Company v. Dakota Station II Condominium Association, Inc., 2019 CO 65, 443 P.3d 47 (Colorado Supreme Court, decided June 24, 2019).

DEFENSE-FAVORABLE AWARD IN TRAUMATIC BRAIN INJURY MOTOR VEHICLE CASE

Pitkin County: Plaintiff Kirk Reichel was driving south on Original Street in Aspen, Colorado. Defendant Edward Norwood made a U-turn from northbound to southbound Original Street, and then his vehicle collided with the passenger side of Plaintiff's Porsche vehicle. Plaintiff alleged that Defendant was negligent and caused the collision.

Plaintiff Kirk claimed that he was injured as a result of the collision. He allegedly sustained a mild traumatic brain injury and soft tissue injuries to the neck and back. His past medical expenses were $48,000. Plaintiff Kirk was 59 years old when the collision occurred. He claimed that, because of his brain injury, he was forced to sell his business at a diminished price and retire 10 years earlier than he planned. His wife, Plaintiff Barbara Springer, also pursued claims for her loss of consortium.

Plaintiffs' final demand before trial was $3.3 million, which was Defendant's policy limits. Defendant's final offer before trial was a statutory offer of $75,000 total, allotted $72,500 to Kirk and $2,500 to Barbara. Defendant admitted that he was at fault for the collision, but denied the nature and extent of Plaintiffs' injuries and damages.

Upon trial to a jury, a verdict was rendered in Plaintiff Kirk's favor of $5,000 total for non-economic losses, with there not being any award for his economic losses. The jury also returned a verdict of no award against Plaintiff Barbara.

Reichel et al. v. Norwood, Case No. 17CV30058.

Wyoming

AMBIGUITY IN HOMEOWNER'S INSURANCE POLICY LEADS TO COVERAGE FOR SHOOTING WRONGFUL DEATH ACTION

U.S. Court of Appeals, 10th Cir.: This is a coverage case stemming from sixteen-year-old Phillip Sam shooting and killing Tyler Burns. The Burnses brought a wrongful death claim against Phillip's mother, Dora Sam, alleging that she had negligently stored the handgun used in the shooting.

Dora was a named policyholder of an American National homeowner's policy effective at the time of the shooting. Dora thus demanded that American National indemnify and defend her in the wrongful death action. American National filed an action seeking declaration that there was not coverage under the policy for the action.

The district court granted summary judgment in favor of American National. It concluded that Phillip was a "resident" under the policy at the time of the shooting. The policy defined "insureds" to include relatives who were "residents" of a named insured's home. The policy also included an exception for coverage for intentional and criminal actions by "any insured." Thus, the district court deemed that there was no coverage under that exception for the shooting.

The Burnses appealed that decision, as they sought coverage for any judgment under Dora Sam's insurance policy. The Burnses argued that Phillip was not a resident of Dora's household at the time of the shooting. This was because he had been staying with his father, Nathan Sam, and expressed an intent to continue living with Nathan. Dora and Nathan had divorced, and their divorce decree gave them joint legal custody of Phillip. Dora was listed as the primary residential custodian. When being booked into jail, Phillip provided Nathan's address as his home address.

In considering the appeal, the United States Court of Appeals determined that the term "resident" was ambiguous under the policy. This was because the term was subject to more than one reasonable interpretation. The Court then examined Phillip's behavior both immediately before and after the shooting, and found that it manifested his intent to be a resident of his father's house. Due to the term "resident" being ambiguous and contrary to Phillip's manifested intent as to his residency, the Court reversed the district court's finding. It was thus deemed that coverage existed under the homeowner's policy as to the wrongful death action.

American National Property and Casualty Company v.. Burns et al., 771 Fed.Appx. 854 (United States District Court, 10th Circuit, decided April 23, 2019, not yet released for publication in the permanent law reports).

MARRIED COUPLE DEEMED NOT TO HAVE PARTNERSHIP IN HOME REMODEL CONTRACT DISPUTE

Wyoming Supreme Court: Plaintiffs David and Lisa Norris hired Defendant Leonard Besel d/b/a Leonard's Home Improvement to remodel their home. Besel terminated their contract prior to completing the project, so Plaintiffs filed suit. Plaintiffs also filed suit against Mr. Besel's wife, Shelly Besel, alleging that she was a partner in her husband's contracting business. Mrs. Besel denied any ownership interest and moved for summary judgment. The district court granted the motion and dismissed Mrs. Besel. Plaintiffs appealed that ruling.

Mrs. Besel had responded to an inquiry on social media, posted by Plaintiffs, which sought a contractor for their

More on Page 5

Continued from Page 4

renovation. Mrs. Besel informed Plaintiffs of her husband's business and put them in contact with each other. Plaintiffs executed a contract with Leonard's Home Improvement. However, Mrs. Norris continued to contact Mr. Besel through his wife.

In determining whether a partnership existed between Mr. and Mrs. Besel, the Wyoming Supreme Court stated: "Whether a partnership exists between spouses depends on the particular facts of each case and there is no single conclusive test for a partnership that will suffice in every situation."

In support of her motion, Mrs. Besel argued that she was not a partner or co-owner in her husband's business. Instead, evidence only established that she would assist her husband with certain tasks as his wife, and that she did not have any control in the management of her husband's business.

In opposition to the motion, the Norrises argued that the business was a two-person operation wherein Mrs. Besel handled administrative tasks and Mr. Besel did the labor. They presented evidence of Mrs. Besel doing the following: creating, running, and owning a facebook page for the business; providing the Norrises with inquiries; and sometimes typing up bids due to Mr. Besel having limited computer skills.

Under the Wyoming Uniform Partnership Act, "the association of two or more persons to carry on as co-owners of a business for profit creates a partnership whether or not the persons intend to create a partnership." W.S.A. § 17-21-202. The Wyoming Supreme Court also noted that "the basic elements of a partnership … are that the parties agree to share in some way the profits and losses of the business venture." In this case, Mr. Besel maintained a separate business account. They also filed joint tax returns which identified the business as Mr. Besel's joint sole proprietorship.

As such, the Wyoming Supreme Court ruled: "Wholly lacking in this case is any competent evidence to establish a genuine issue of material fact whether the Besels agreed to share in the profits of [the business] or in the management or control." The Court also stated that "a business partnership does not exist simply because the parties are married." Thus, dismissal of claims against Mrs. Besel was affirmed.

Norris v. Besel, 2019 WY 28, 442 P.3d 60 (Wyoming Supreme Court, decided May 30, 2019).

Texas

Auto PIP Policy Interpreted to Exclude Coverage in Roofing Delivery Injury Case

Texas Court of Appeals: Plaintiff Alan Kiely sued Defendant Texas Farm Bureau Casualty Insurance Company to recover personal injury protection (PIP) benefits for injuries he sustained when a lumber company employee was unloading metal roofing sheets at his home. Arguing that Kiely's injuries did not result from a motor vehicle accident and that he was not a "covered person" under the insurance policy, Farm Bureau filed a motion for summary judgment. The trial court granted that motion.

The events leading to Kiely's injuries began when his residence sustained windstorm damage. He ordered metal roofing sheets from Cragg's Do It Best Lumbar to repair the roof. Cragg's delivered the metal sheets in a flatbed delivery truck driven by its employee Brian Reeves. As Reeves was unloading the metal sheets, he misaligned the truck with pallets on which they were to be laid. As Reeves began moving the first bundle of metal sheets by hand, it slid off the truck bed and pinned Reeves between the ground and the metal sheets.

Reeves screamed for Kiely's help. Kiely had a difficult time helping because of a leg injury requiring his use of a cane. But he wedged his cane under the metal sheets to get some leverage. When that was unsuccessful, Kiely bent over, grabbed a corner of the bundle, and tried to lift it. As he did so, Kiely heard a "pop" in his back and felt sharp pain. Kiely eventually freed Reeves by then using a plank to lift the sheet off of him. As a result of the actions, he fractured two vertebrae in his back and had multiple surgeries.

Kiely argued that his injuries stemmed from a motor vehicle accident, and that he was a "covered person" as defined by the insurance policy. For Kiely to be entitled to PIP benefits under his policy, he was required to show that he was injured in a motor vehicle accident, either while occupying the vehicle or when he was struck by a vehicle. Kiely contended that his injuries were caused from the use of a motor vehicle.

More on Back Page

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CLM

Continued from Page 5

On appeal, the Texas Court of Appeals found that the phrase "auto accident" in an insurance policy was not ambiguous: "While a collision or near collision is not required, the vehicle must be more than the mere situs of the accident or injury-producing event." This meant that a motor vehicle accident occurred when: (1) one or more vehicles are involved with another vehicle, an object, or a person; (2) the vehicle is being used as a motor vehicle; and (3) a causal connection exists between the vehicle's use and the injury-producing event.

In this case, other than the truck being used to transport metal sheets, it was not directly involved in the circumstances leading to Kiely's injuries. Kiely was not exiting or entering the vehicle, and he was not injured while removing the metal sheets from the bed of the truck. Instead, the injury-producing event occurred as a direct cause of Kiely's intentional act of lifting the metal sheets up. Thus, the Court found that he was not injured in a motor vehicle accident. The Court also determined that Kiely was not a "covered person" under the policy because he was not using the truck, nor otherwise exiting, entering, or occupying it, at the time of his injuries. The trial court's ruling was thus affirmed.

Kiely v. Texas Farm Bureau Casualty Insurance Company, 2019 WL 3269326 (Texas Court of Appeals, Texarkana, decided July 22, 2019, not yet released for publication in the permanent law reports).