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LEGAL UPDATE

Colorado • Utah • Wyoming • Texas

IN BRIEF

COLORADO

- Plaintiffs submitted a claim to their insurer for $1.7 million in wine that was not received, which related to a Ponzi scheme. The Tenth Circuit Court of Appeals held that there was no coverage for the claim because Plaintiffs could not show evidence that the wine actually existed.
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UTAH

- In a construction defect case, the Utah Court of Appeals affirmed dismissal of the general contractor's third-party complaint against subcontractors on the basis that it was time-barred under Utah's Builder's Statute of Repose.
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- In a case stemming from a shooting at a senior living complex, the Wyoming Supreme Court held that the landlord did not have a duty to the victims because the shooting was unforeseeable.
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- The Texas Supreme Court held: "the insurer's payment of the [appraisal] award bars the insured's breach of contract claim premised on failure to pay the amount of the covered loss."
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COLORADO

TENTH CIRCUIT HOLDS THAT $1.7 MILLION IN WINE LOST DUE TO PONZI SCHEME IS NOT COVERED BY INSURANCE POLICY

U.S. Court of Appeals, 10th Cir.: Plaintiffs Malik and Seeme Hasan are fine-wine purchasers who, for fifteen years, ordered wine from Premier Cru, a wine merchant in Berkley, California. Plaintiffs placed their orders through Premier Cru's president John Fox. Premier Cru sold two types of wine: (1) wine physically present at its Berkley warehouse, and (2) wine that was not in possession but which it promised to deliver to its customers at a later date (known as pre-arrival wine).

Premier Cru, however, was not actually ordering or delivering much of the pre-arrival wine that it promised. Although Fox represented to customers that Premier Cru had already contracted with suppliers, he knew that it actually would not obtain much of what it sold. In August 2016, Fox pled guilty in federal court to wire fraud arising from this Ponzi scheme.

Plaintiffs sought to recover their losses under a Private Collections insurance policy obtained by Defendant AIG Property Casualty Company to cover their wine collection and other valuables. The policy insured against "direct physical loss or damage to valuable articles…." The term "valuable articles" is defined as "the personal property you own or possess…." The policy provided $2,000,000 in coverage for wine. Plaintiffs argue that in purchasing coverage they relied on AIG's website describing its Private Collections policies, which stated that "new acquisitions are immediately covered at the time of purchase." They also claim to have relied upon a coverage highlight sheet distributed by AIG which stated that coverage extended to "in transit items." The policy did not contain coverage for fraud.

Plaintiffs submitted a claim to AIG for $1,707,985 – the asserted market value of the 2,448 unrecovered bottles of wine. AIG denied coverage on the basis that Plaintiffs did not "own or possess" the wine as required under the policy, and thus did not suffer direct physical loss or damage to wine owned or possessed by them. AIG further explained that their claim was for a loss of money instead of wine, which was not insured under the policy.

Plaintiffs sued AIG under multiple causes of action. AIG moved for summary judgment, arguing that Plaintiffs did not own or possess the wine, and even then, Plaintiffs could not show any "direct physical loss or damage" as required

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under the policy. The district court agreed and granted AIG's motion. Plaintiffs appealed.

On appeal, Plaintiffs argued that, unlike other of Premier Cru's customers, Fox had actually used their money to purchase and allocate the specified 2,448 bottles which they purchased. They thus purchased bottles which they have not yet received. According to Plaintiffs, those bottles must have been lost or damaged, and are therefore covered by the policy. The Tenth Circuit Court of Appeals stated that the problem with Plaintiffs' argument was the absence of evidence that Fox had actually purchased the ordered bottles for Plaintiffs. This was congruent with Fox's admissions of fraud under the Ponzi scheme. As such, the Court agreed with the district court and affirmed the grant of AIG's motion for summary judgment.

Hasan v. AIG Property Casualty Co., 935 F.3d 1092 (U.S. Court of Appeals, 10th Cir., decided August 27, 2019, not yet released for publication in the permanent law reports).

DECISION ISSUED ADDRESSING CONTRIBUTION AMONG JOINT TORTFEASORS IN CONSTRUCTION DEFECT ACTION

Colorado Court of Appeals: A group of homeowners sued Defendants LB Rose Ranch and Hansen Construction for damages caused by defects in the design, construction, and repair of twenty single-family homes. Hansen compelled arbitration, but Rose did not. Thus, Rose did not participate in the arbitration. The arbitrator awarded damages to the homeowners and found that Hansen, Rose, and other defendants jointly caused them. The arbitrator found Rose 20% at fault and Hansen 18% at fault.

Rose and the homeowners went to a jury trial, and Hansen did not participate in that trial. The jury found Rose, Hansen, and other defendants jointly and severally liable for sizeable damages. The jury found Rose 30% at fault and Hansen 15% at fault. Both the jury and arbitrator awarded damages on a lot-by-lot basis rather than a single aggregate award.

When entering judgment, the court found that Rose was bound only by the jury's findings, and Hansen was bound only by the arbitrator's rulings. Hansen had already paid the arbitrator's judgment in the amount of over $9 million. The court ruled that the homeowners could not receive a double recovery for damages already paid by Hansen. The court thus ended up entering judgment against Rose for over $6.6 million and ruled that most of it – all but $698,548.93 – had been satisfied by Hansen. Rose then settled with the homeowners for about $1 million.

Hansen then sought contribution from Rose for the amount of common liability to the homeowners that Hansen had satisfied. Applying the jury's finding as to Rose's percentage of fault, the court concluded that Rose must pay Hansen 30% of the joint liability, or $1,774,369.91. In so doing, the court rejected Rose's argument that its settlement agreement discharged Rose from any contribution liability to Hansen. It found this because, at the time of the settlement, Rose was only liable to pay the homeowners the jury judgment of $698,548.93.

Rose appealed. The Colorado Court of Appeals affirmed the district court's rulings. Colorado adopted the Uniform Contribution Among Tortfeasors Act, which was adopted to "permit the equitable apportionment of damages among the tortfeasors responsible for those damages." The act codifies a tortfeasor's right of contribution from another tortfeasor when both become jointly and severally liable in tort for the same injury. The Court of Appeals agreed with the district court's determination that Rose's settlement with the homeowners did not extinguish its contribution liability to Hansen under the Act.

LB Rose Ranch, LLC v. Hansen Construction, Inc., 2019 COA 141 (Colorado Court of Appeals, decided September 5, 2019, not yet released for publication in the permanent law reports).

RAILROAD COMPANY HELD TO HAVE A DUTY UNDER THE DOCTRINE OF MISFEASANCE TOWARD AN INJURED WORKER

Colorado Court of Appeals: In this personal injury action, Plaintiff Richard Blakesley alleged that Defendant BNSF Railway Company is liable to him for the damages he sustained on a construction site when an excavator ran over his foot. The incident resulted in his leg being amputated below the knee.

Blakesley was a welder employed by Mountain Man Welding. He was injured while working on the Gold Line light rail project when the excavator crushed his foot. The Regional Transportation District (RTD) had employed BT Construction (BTC) to install utilities along the light rail line. BTC subcontracted with Mountain Man Welding to provide the welder. Part of the light rail line ran through BNSF's rail yard, including BTC's construction site where the injury occurred.

BNSF employed a flagger to protect BNSF property during the construction and to ensure that its trains ran smoothly in the rail yard. The flagger was also responsible for conducting safety meetings with anyone before they entered the jobsite, to explain BNSF's safety policies. These safety policies included a requirement that anyone near the railroad tracks is to wear a high visibility safety vest. The flagger informed Blakesley of the vest requirement, but Blakesley asked to take it off because it was flammable. BNSF's flagger agreed. Blakesley's foot was then run over when by an excavator when he was not wearing the high visibility safety vest.

Blakesley sued BNSF alleging negligence. The district court held that BNSF did not owe a duty of care to Blakesely outside of its contract, as the conversation between Blakesley and the flagger did not create a duty. As such, BNSF was granted summary judgment. Blakesley appealed.

On appeal, the Colorado Court of Appeals disagreed with the district court. It held that BNSF, through its flagger, held a duty toward Blakesley under the doctrine of misfeasance, which is the failure to act. Under a theory of misfeasance, a "defendant has created a new risk of harm to the plaintiff." In this case, misfeasance applied when the flagger told Blakesley, contrary to BNSF's jobsite rule, that he did not need to wear the high visibility safety vest. In so doing, the flagger created a new risk of harm.

As such, the Colorado Court of Appeals held that BNSF did hold a duty toward

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Blakesley. Summary judgment was thus reversed, and the case was remanded.

Blakesley v. BNSF Railway Co., 2019 COA 119 (Colorado Court of Appeals, decided August 1, 2019, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN DRAMSHOP ACTION SEEKING IN EXCESS OF $20 MILLION

Boulder County: Plaintiffs Ronald and Mary Lynn's vehicle was impacted by an intoxicated driver who crossed the center line of a highway and collided head-on with Plaintiffs' vehicle. The intoxicated driver's BAC level was .208 approximately three hours after the accident.

Plaintiffs both sustained injuries. Ronald sustained multiple fractures to his tibia, fibula, ribs, and patella. His medical expenses were $378,303.31. Mary sustained an L4 compression fracture, multiple rib fractures, respiratory distress, and injuries to both knees. Her medical expenses were $269,987.31.

Plaintiffs filed suit against Defendant Ameristar Casino. Plaintiffs alleged that Ameristar violated the Colorado Dram Shop Act by serving alcohol to a visibly intoxicated patron who subsequently caused a car crash.

Plaintiffs' final demand before trial was $561,620. At trial, Plaintiffs asked for their medical expenses and Plaintiffs' counsel suggested a non-economic damages award of $10 million per Plaintiff. Defendant's final offer before trial was $5,000 to each Plaintiff. Upon trial to the jury, a verdict in favor of Defendant was rendered.

Lynn v. Ameristar Casino Black Hawk, LLC, Case No. 17-CV-31035.

Utah

THIRD-PARTY COMPLAINT IN CONSTRUCTION DEFECT ACTION TIME-BARRED UNDER UTAH'S BUILDER'S STATUTE OF REPOSE

Utah Court of Appeals: This construction defect action concerns Third-Party Plaintiffs "seeking to avoid a statute of repose but fail in that effort." Plaintiff filed suit against its general contractor, Blueridge Homes Inc., in December 2014, alleging construction defects in a condo development project. Blueridge filed a third-party complaint against its subcontractors, alleging that if Blueridge was liable to Plaintiff, then the subcontractors were liable to Blueridge.

Although Plaintiff's claims against Blueridge survived a motion to dismiss, the district court dismissed Blueridge's third-party claims as time-barred under U.C.A. § 78B-2-225, Utah's builder's statute of repose.

The condo project consisted of nine buildings. Upon substantial completion of each building, certificates of occupancy were issued between May 2, 2007 and June 9, 2009. In dismissing the third-party complaint, the district court held that the builder's statute of repose ran on June 9, 2015, six years after the last certificate of occupancy was issued. The third-party complaint was not filed until July 2015. The district court held that the third-party complaint did not relate back to Plaintiff's complaint because the subcontractors were not named as parties in Plaintiff's complaint.

Blueridge appealed, arguing that the district court erred by dismissing the third-party claim because it should have related back to Plaintiff's December 2014 filing.

Blueridge conceded that its third-party complaint was filed after the builder's statute of repose period. But it argued that Utah Rule of Civil Procedure 14 allows for a third-party complaint "at any time after the commencement of the action." However, the Utah Court of Appeals held that Rule 14 only identified when the third-party complaint may be filed. Rule 14 does not "bar third-party defendants from raising a statute of limitations or repose as an affirmative defense…. In other words, the language Blueridge relies on merely dictates when a third-party complaint can be filed – not what the substantive effect of the third-party complaint is or what defenses may be raised against the claims stated in a third-party complaint."

The Court also determined that the third-party complaint did not relate back to the filing date of Plaintiffs' complaint because it added new parties. Thus, the Utah Court of Appeals affirmed dismissal of the third-party complaint as untimely under the Utah builder's statute of repose.

Blueridge Homes, Inc. v. Method Air Heating and Air Conditioning et al., 2019 UT App. 149 (Utah Court of Appeals, decided September 6, 2019, not yet released for publication in the permanent law reports).

UTAH SUPREME COURT ISSUES DECISION CONCERNING WHETHER AN ESTATE MAY BRING A WRONGFUL DEATH ACTION

Utah Supreme Court: Helen Faucheaux died of a drug overdose in 2009, in an incident in which Defendant Provo City police officers were dispatched to her home. Officers had determined that she was intoxicated and did not need additional help, despite her husband stating that he feared his wife overdosed. Her heirs sought damages through a wrongful death suit. That suit was captioned "Estate of Helen Faucheaux v. City of Provo."

Six years after the case was filed, Provo City moved to dismiss the case on the ground that an estate lacks legal capacity to assert a claim sounding in wrongful death. The district court granted the motion, and the heirs appealed. The Utah Court of Appeals reversed, concluding that lack of capacity is an affirmative defense and held that Provo City forfeited the defense by waiting to raise it until a motion filed six years into the litigation.

On appeal to the Utah Supreme Court, the Court affirmed the Court of Appeals' ruling, but on two alternative grounds.

The Court first ruled that "it is therefore clear … that an estate cannot initiate a wrongful death action. Such a claim should be filed by the heirs of the decedent or by a personal representative of an estate on the heir's behalf." Despite this, there was no lack of capacity in this case because the body of the complaint shows that the suit was brought by Kevin Faucheaux on behalf of Helen Faucheaux's heirs. Mr. Faucheaux is the personal representative of the estate; thus, he is a proper party.

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The caption of the case was not determinative in identifying the parties to the action, and the body of the complaint clarified the parties.

In addition, the Utah Supreme Court vacated the court of appeals' decision as to waiver of the defense by the City. The Court explained: "The conclusion may be correct as a matter of our law of civil procedure. But we decline to endorse it because it implicates a difficult question in the law of standing, which may raise a jurisdictional question that would not be subject to waiver. In light of this concern, we vacate the court of appeals' holding on waiver and reserve this question for a future case."

Estate of Faucheaux v. City of Provo, 2019 UT 41 (Utah Supreme Court, decided August 6, 2019, not yet released for publication in the permanent law reports).

DISMISSAL AFFIRMED OF NEGLIGENCE ACTION AGAINST NINE-YEAR-OLD RELATED TO SKIING ACCIDENT

Utah Court of Appeals: This case concerned nine-year-old Defendant S.S. and his parents being sued by Plaintiff Stephanie Donovan for a skiing accident. S.S. was learning to ski on a beginner course, and was still a novice. His parents skied near S.S down the run.

Meanwhile, Donovan, an experienced skier, stopped on the same slope to take a picture. As she faced downhill she heard "Look out!" Donovan did not have time to move, and S.S. hit her from behind. She alleged injuries as a result of the accident. S.S. had been skiing in a wedge about five miles per hour, but began to lose control about ten feet away from Donovan. S.S. fell and landed on Donovan.

Donovan asserted claims against S.S. for negligence, and against the parents for negligent supervision. Defendants moved for summary judgment. As to the negligence claim, they argued that S.S. could not have taken any other action to ski more cautiously, and an inadvertent fall on a ski slope by a beginning skier is not a breach of duty. They also argued for dismissal of the negligent supervision claim on the basis that the facts showed the parents were not negligent in their supervision. The district court agreed and granted summary judgment.

Plaintiff appealed. On appeal, Plaintiff argued that S.S. breached her duty by being "out of control" and by "ignoring instructions given by her father as to how to stop or slow down on the ski hill." She also argued that S.S. failed to yield the right of way to downhill skiers in contravention of a local ordinance. Thus, Plaintiff argued that the question of Defendants' conduct was a jury question.

The Utah Court of Appeals ruled that the duty skiers have to other skiers is "to ski reasonably and within control." It also stated that "some collisions between skiers are an inherent risk of skiing and may occur absent negligence," and "an inadvertent fall on a ski slope, alone, does not constitute a breach of duty." As such, the Court ruled that there was no evidence, apart from the collision itself, which showed S.S. skied negligently. The Court also found that there was no evidence to support the claim against the parents for negligent supervision. As such, the district court's ruling was affirmed.

Donovan v. Sutton et al., 2019 UT App. 161 (Utah Court of Appeals, decided October 3, 2019, not yet released for decision in the permanent law reports).

UTAH SUPREME COURT HOLDS THAT CERTIFICATE OF COMPLIANCE REQUIREMENT UNDER MEDICAL MALPRACTICE ACT IS UNCONSTITUTIONAL

Utah Supreme Court: This case involved a challenge as to the constitutionality of Utah's Health Care Malpractice Act.

For unknown reasons, Gustavo Vega, an otherwise healthy forty-four year old male, went in for a routine gallbladder operation and came out in a coma. He died a week later. His wife, Plaintiff Yolanda Vega, brought a medical malpractice action against Defendant Jordan Valley Medical Center and all related medical providers who were involved in Mr. Vega's care.

The district court dismissed the medical malpractice action under U.C.A. § 78B-3-423, Utah's Health Care Malpractice Act, on the basis that Plaintiff failed to obtain a certificate of compliance from the Division of Occupational and Professional Licensing. The Act requires plaintiffs to obtain a certificate of compliance before filing their case in district court.

To obtain a certificate of compliance, a claimant needs to have their claim screened by a panel prior to filing the lawsuit. If the panel finds that the claim does not have merit, then it will not issue a certificate. However, a certificate can still be obtained via an affidavit of merit from a health care provider. That affidavit must state that there are reasonable grounds to believe the standard of care was breached, that such breach was the proximate cause of the injury, and the reasons for the opinion.

For Plaintiff's claim, the panel determined there was no merit. Plaintiff obtained an affidavit from a medical provider, but that provider did not provided his detailed reasoning for his opinion because of the inadequacy of medical records. As a result, Plaintiff did not obtain the certificate prior to filing her lawsuit.

On appeal, Plaintiff challenged the constitutionality of the Malpractice Act under the provisions of the Utah Constitution relating to the separation of powers and the judicial powers. Thereunder, the judiciary has the power to hear and determine controversies between adverse parties and questions in litigation. It is thus unconstitutional for anyone but judges to adjudicate cases.

As such, the Utah Supreme Court agreed with Plaintiff that the requirement to obtain a certificate of compliance to initiate an action is unconstitutional. The basis was that it violated the constitutionally enacted judicial power for medical malpractice claims to be disposed of on a final non-appealable basis without the judiciary.

Vega v. Jordan Valley Medical Center, LP, 2019 UT 35 (Utah Supreme Court, decided July 19, 2019, not yet released for publication in the permanent law reports).

Wyoming

WYOMING SUPREME COURT HOLDS THAT A SENIOR LIVING COMPLEX DID NOT HAVE A DUTY TO PREVENT RESIDENTS FROM BEING SHOT.

Wyoming Supreme Court: Plaintiffs Larry Warwick and Gregory Gilbert lived in a senior living apartment complex owned and operated by

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Defendant Accessible Space, Inc. ("ASI"). Another tenant, Larry Rosenberg, shot them. Plaintiffs sued ASI claiming it was negligent for failing to protect them from Rosenberg.

The complex is an independent living facility for low-income seniors and does not provide personal assistance to tenants. To live there, residents must pass a background check, which Rosenberg passed. Rosenberg had disagreements with Plaintiffs over several matters, such as Plaintiffs' smoking and hosting poker games. Rosenberg also had disagreements with the complex's site liaison, Matt Wilson.

As Wilson and Gilbert were sitting outside of the complex, Rosenberg walked up and shot them with a .22 caliber rifle. He then went inside and knocked on Warwick's door. When it opened, Rosenberg shot Warwick with a .22 pistol. Rosenberg then went outside and shot Gilbert again when he saw he wasn't dead. Miraculously, both Plaintiffs survived.

Plaintiffs filed suit against ASI alleging negligence. They assert ASI, as a landlord, had a duty to exercise reasonable care to protect them from Rosenberg's criminal action. They also asserted that their leases required ASI to take action to protect them, as the carrying a firearm was a violation of the lease.

ASI moved for summary judgment, arguing it did not owe Plaintiffs any duty from Rosenberg's unforeseeable criminal action and, in any event, its alleged negligence was not the proximate cause of Plaintiffs' injuries. The district court agreed, granting the motion on the basis that ASI did not have a duty to protect Plaintiffs from the criminal action.

On appeal, the Wyoming Supreme Court agreed. It held that it was not foreseeable to a landlord that a shooter would shoot and attempt to kill tenants. Thus, ASI did not have a common law duty to protect Plaintiffs from the criminal action. In addition, assuming ASI had a duty under the terms of the lease, any breach of the lease was not a proximate cause of Plaintiffs' injuries. The district court's ruling was thus affirmed.

Warwick et al. v. Accessible Space, Inc., 449 P.3d 206, 2019 WY 89 (Wyoming Supreme Court, decided September 3, 2019).

DISMISSAL OF MOTOR VEHICLE WRONGFUL DEATH ACTION REVERSED

U.S. Court of Appeals, 10th Cir.: Plaintiff Keisha Porter's husband, Dennis Richardson, was killed in an auto accident on November 25, 2014. Within two years, Vance Countryman filed a "Petition/Action for the Appointment of Wrongful Death Representative" in Wyoming district court. Countryman requested appointment as the wrongful death representative.

Due to potential ethical problems with Countryman being the representative and the attorney in a wrongful death suit, Porter asked the Court to appoint her as the representative. Porter made the request in a court filing on April 27, 2017. That filing was filed in Countryman's existing action, though the filing stated that "this petition is made in a separate action brought solely for appointing the wrongful death representative." Porter was appointed as the wrongful death representative on July 10, 2017.

Porter then filed a wrongful death action against Ford Motor Company on August 7, 2017, as her husband's representative. Ford moved to dismiss, arguing that Porter's claims were barred by Wyoming's two-year statute of limitations for wrongful death actions. The district court agreed and dismissed the action. Porter appealed.

Wyoming law provides that "An action for wrongful death shall be commenced within two years after the death of the decedent." W.S.A. § 1-38-102. However, "if an action to appoint the wrongful death representative is properly filed, the limitation period under § 102 … shall be tolled from the time of the action is filed until thirty days after an order appointing the representative is entered." W.S.A. § 1-38-103.

On appeal to the Wyoming Supreme Court, the issue was whether Porter's filing related back to the date of Countryman's Petition. The Court determined that relation back was unnecessary. Rather, the statutory thirty-day tolling deadline was satisfied when Countryman's Petition was filed within two years of Richardson's death. The statute did not require the individual who is ultimately appointed as the representative to initiate the action.

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Congratulations to Dewhirst & Dolven attorney Steve Helling for his reappointment to the Colorado Springs Independent Ethics Commission. This is a highly sought-after position which is appointed by the Colorado Springs City Council.

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There was no dispute that Porter filed the wrongful death action within thirty days of being appointed as the representative. The district court's ruling was thus reversed.

Porter v. Ford Motor Company, 917 F.3d 1246 (United States Court of Appeals, 10th Circuit, decided March 12, 2019).

TEXAS

TEXAS SUPREME COURT ADDRESSES WHETHER INSURER'S PAYMENT OF AN APPRAISAL AWARD FORECLOSES FIRST PARTY CLAIMS

Texas Supreme Court: In this case, the Texas Supreme was asked to consider: "the effect of an insurer's payment of an appraisal award on an insured's breach of contract, bad faith insurances practices, and violations of the Texas Prompt Payment of Claims Act."

Plaintiff Oscar Ortiz had a homeowner's insurance policy with Defendant State Farm Lloyd's and submitted a claim for wind and hail damage to his home. State Farm's adjuster determined the damage caused by wind or hail to be $732.53, which was below the policy's $1,000 deductible. The adjuster observed additional damage which he concluded was not caused by the hail. Ortiz provided State Farm with a separate adjuster report valuing the loss at $23,525.99. State Farm conducted a second inspection with that separate adjuster present and revised the damage to $973.94.

Ortiz sued State Farm for multiple claims. State Farm answered and demanded an appraisal under the policy. That appraisal award set the replacement cost at $9,447.52 and the actual cash value at $5,243.93. State Farm paid that award, minus the deductible. It then moved for summary judgment, arguing that its payment of the appraisal award resolved the claims. The district court granted the motion, and Ortiz appealed.

The Texas Supreme Court held: "the insurer's payment of the [appraisal] award bars the insured's breach of contract claim premised on failure to pay the amount of the covered loss. We further hold that the payment bars the insured's common law and statutory bad faith claims to the extent the only actual damages sought are lost policy benefits." The Court also held that the insured may proceed on his claim under the Prompt Payment Act based upon Texas authority which permits such claims despite payment of the appraisal award.

Ortiz v. State Farm Lloyd's, 62 Tex. Sup. Ct. J. 1484 (Texas Supreme Court, decided June 28, 2019, not yet released for publication in the permanent law reports).