Winter 2020

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Colorado • Utah • Wyoming • Texas

IN BRIEF

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- Under C.R.S. § 10-3-1117, insurers must now disclose policy information to claims pre-litigation when it's requested, otherwise be subject to a daily penalty and payment of attorneys' fees.

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- In a personal injury action stemming from an indoor rock-climbing fall, a claim for gross negligence against the gym was permitted due to the gym's prior knowledge of the condition.

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- In a case concerning disclosure requirements for independent medical experts, the Wyoming Supreme Court ruled that such experts must be disclosed in accordance with Wyoming Rules of Civil Procedure 26 and 35.

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- In a case in which an insurer excluded coverage under a consent-to-settle provision, the Texas Court of Appeals held that the insurer must prove that it was prejudiced by the insured's failure to comply with the provision.

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COLORADO

MAJOR CHANGE IN COLORADO LAW: INSURERS MUST NOW DISCLOSE POLICY INFORMATION TO CLAIMANTS PRE-LITIGATION

On January 1, 2020, a new law went into effect which requires insurers to provide very specific information to claimants and their attorneys even before a lawsuit is filed. C.R.S. § 10-3-1117 in Colorado has gone into effect. C.R.S. § 10-3-1117 statutorily requires an insurance company to disclose commercial or personal automobile policy information to a claimant or the claimant's attorney just because they ask for it. Failure to deliver the information to the requesting person within thirty days after the day the request was received by the insurer's registered agent results in an automatic penalty of $100 per day for each day not received thereafter. The insurer must also pay the claimant's attorney fees and costs incurred in having to obtain the information.

The information required to be disclosed includes: (1) a complete copy of the policy with all endorsements (but not the declarations page or application for insurance even if attached to the policy); (2) the name of the insurer; (3) the name of each insured party as it appears on the declarations page; and (4) the limits of the liability coverage. The law also requires the claimant or claimant attorney to send their request to the insurer's registered agent, or to the Colorado Division of Insurance if it is the registered agent for the insurer in Colorado. The registered agent will then forward the request to the insurer. A request sent directly to the insurer and not through its registered agent does not trigger the statutory penalties.

The Division of Insurance has issued a bulletin to assist insurance companies in understanding and complying with this new law, which can be found at https://www.colorado.gov/pacific/dora/colorado-insurance-bulletins, search for Bulletin No. B-1.34 *"Guidance for Insurers Providing Automobile Liability Information Pursuant to §10-3-1117, CRS"; and by reading the new statute at C.R.S. § 10-3-1117, "Required disclosures – liability – definition."*

IN THIS ISSUE

Dewhirst & Dolven Prevails With a $6,000 Jury Verdict in a Case Where Plaintiff Demanded $9,300,000

Dewhirst & Dolven attorneys George H. Parker and Justin J. Walker obtained a jury verdict after a week-long jury trial held in the United States District Court for Denver in an admitted liability auto accident rear-end case. Plaintiff's attorney asked the jury to award Plaintiff $9.3 million in closing arguments. Dewhirst & Dolven represented the defendant. Although attorneys George Parker and Justin Walker, on behalf of their clients, admitted Defendant's negligence in causing the accident, they focused their defense on the plaintiff's pre-existing conditions. The jury agreed by reaching a verdict of only $6,000 as compared to Plaintiff's demand for $9.3 million.

Non-Economic Damages Cannot Be Recovered If the Plaintiff Passes Away During an Appeal

Colorado Court of Appeals: Colorado's survival statute, C.R.S. § 13-20-101, provides that a person's claims against another (except those for slander and libel) survive that person's death. But the damages a decedent's representative can recover may be limited to only economic damages. Damages for the decedent's pain, suffering, or disfigurement cannot be recovered if the action is one for personal injuries.

So, if a person brings a personal injury claim but dies before recovery of damages, then those non-economic damages cannot be recovered. Likewise, when a person brings personal injury suit and recovers the non-economic damages before he dies, he dies while the judgment is on appeal, and the judgment is latter affirmed on appeal, then the prior recovery stands. But, what if, during the appeal in which the person dies, the judgment is not affirmed but is instead reversed on appeal? Can the decedent's representative recover damages for pain, suffering, or disfigurement in the event of a new trial? This case presented that exact situation.

The decedent, Leland Sharon, sustained multiple ailments while staying the nursing facility of Defendant Belmont Lodge. He sued Defendant for negligence stemming from those injuries. A jury found in Mr. Sharon's favor, ruling against Defendant Belmont Lodge and two other named defendants. It awarded Mr. Sharon $300,000 in noneconomic damages and $3,000,000 in punitive damages based on his pain and suffering.

One of the defendants appealed, and during that appeal, Mr. Sharon died. His representative was substituted in as the Plaintiff. The appeal resulted in a reversal of the judgment (based upon ancillary issues of a joint venture between the defendants) and a new trial was ordered. Defendant Belmont then moved for summary judgment, arguing that noneconomic damages could no longer be pursued under C.R.S. § 13-20-101 due to Mr. Sharon's passing.

The Colorado Court of Appeals agreed with Defendant Belmont and held that noneconomic damages could no longer be pursued by Mr. Sharon's representatives in the new trial. The Court held that reversal of the judgment put the parties in the same position they were in before the entry of the original judgment (jury verdict).

Thus, the prior judgment had no continuing legal effect. The plaintiffs for the new trial were now the representatives of the injured party, instead of Mr. Sharon himself. As such, the court held that the survival statute bared an award of noneconomic damages in the new trial.

Sharon et al. v. SCC Pueblo Belmont Operating Company, LLC et al., 2019 COA 178 (Colorado Court of Appeals, not yet released for publication in the permanent law reports).

Surface Water Exclusion Held Not to Preclude Coverage in Homeowners Insurance Coverage Action

Colorado Court of Appeals: In this insurance coverage case, the Colorado Court of Appeals considered whether a "surface water" exclusion in an all-risk insurance policy precluded Plaintiffs' claims as a matter of law. Plaintiffs alleged that the interior of their home was damaged when precipitation entered the home through holes in the roof caused by hail damage.

The insurance policy was an all-risk policy designed to cover a wide range of damages to Plaintiffs' property unless coverage for a particular type of loss is expressly excluded. The policy exclusion at issue in this lawsuit was: "We do not insure for loss or damage consisting of, caused directly or indirectly by … water damage arising from, caused by or resulting from … any other source. Water damage means damage caused by or consisting of … surface water."

The Court of Appeals applied the unambiguous definition of "surface water" from a prior legal decision. That definition was: "water from melted snow, falling rain … lying or flowing naturally on the earth's surface, not gathering into or forming any more definite body of water … [it] follows no defined course."

The Court then concluded that when precipitation falls or leaks into the insured's dwelling through holes in a roof damaged by hail (or some other covered peril), rather than running off the roof and behaving as one would expect water intercepted by a roof to behave, it does not fall within the plain meaning of the term "surface water." Though the water may have originally been runoff from melted snow, it lost that character when it was diverted. Thus, the Court found that the "surface water" exclusion did not apply, and the loss was covered by the policy.

Morley v. United Services Automobile Association, 2019 COA 169M (Colorado Court of Appeals, decided Nov. 14, 2019, not yet released for publication in the permanent law reports).

Utah

Denial of Summary Judgment Affirmed in Indoor Rock Bouldering Injury Action

Utah Court of Appeals: Plaintiff Scott Howe was injured while bouldering at Defendant Momentum's indoor rock-climbing facility. The injury occurred as he dropped off the bouldering wall and onto the floor below. As he made contact with the floor, his left foot impacted the mat on top of the padded floor, causing the mat to move. This resulted in his foot contacting the concrete floor and his ankle breaking.

Plaintiff Howe sued Defendant Momentum for gross negligence, among other claims. This appeal concerned his gross negligence claim, which was predicated on Momentum having a knowing and reckless indifference and disregard for the safety of Howe, due to Momentum having concealed defects in the floor padding by placing mats over the defective area.

Momentum's concrete floor was covered by twelve inches of foam padding overlain by vinyl. Due to the vinyl having torn and separated over the years, it would be repaired by being welded with a vinyl patch. Momentum's management determined that those patches were a tripping hazard, so it placed one-inch thick mats over the bouldering area floor. Those mats were not designed to be anchored and would move when people landed on them. Momentum employees would monitor for when the mats moved to try and keep them in place. They also reconfigured bouldering routes to avoid areas where the mats would move.

Before Plaintiff Howe was injured, five incidents were reported before Momentum began using the mats, and another eight injuries occurred after the mats were began being used. Each of the injuries involved a climber dropping from the wall, having a foot push through the mat to the concrete floor, and the injuring an ankle.

Defendant Momentum filed a motion for summary judgment on the basis that their conduct did not raise to the level of gross negligence. This was because gross negligence "is the failure to observe even slight care…" Momentum argued that it used more than slight care due to the modifications they had made to try and avoid injuries, such as rerouting the wall, watching for mat movement, and using the additional mat. The district court denied the motion, and Momentum appealed.

Plaintiff argued that Momentum's prior steps were inadequate, and that Momentum's use of the mat actually concealed the risk to climbers. This left climbers defenseless. The Utah Court of Appeals affirmed denial of the motion, holding that issues of fact existed to deny summary judgment. The Court noted that eight accidents occurred even after implementation of Momentum's injury-avoidance strategy. The basis that Momentum did not take any action in response to the injuries supported Plaintiff being able to pursue the claim for gross negligence.

Howe v. Momentum, LLC, 2020 UT App. 5 (Utah Court of Appeals, decided January 3, 2020, not yet released for publication in the permanent law reports).

Defense Summary Judgment Affirmed Due to Prior Incident Being Unrelated to Injury-Causing Accident

Utah Court of Appeals: A truck driven by Defendant UPS backed up and collided with a loading dock at a warehouse managed and operated by KNS International. This collision damaged the loading dock and an overhead vinyl curtain system KNS purchased and installed to regulate the warehouse temperature. After the collision, one of KNS's managers noticed that a cinderblock to which the curtain system was attached had cracked. The manager thought the system was secure.

At a later date, Plaintiff Stuart Wood, a driver for a delivery company used by KNS, was present at the loading dock. The curtain system dislodged and fell on Wood's head. The system weighed about forty-five pounds. Wood filed negligence claims against UPS and KNS for his injuries. He argued that UPS was liable due to it being the party that caused the condition.

UPS moved for summary judgment on the basis that it did not owe Wood a duty because it did not possess or control the land. UPS also argued that its actions were not the proximate cause of the injury. The district court granted UPS's motion on both bases.

On appeal, the Utah Court of Appeals stated: "To determine which party is best positioned to bear the loss, we look to who is in a superior position of knowledge or control to avoid the loss in question." The Court thus looked at whether UPS had an ongoing duty after its truck impacted the loading dock. The Court determined that UPS did not have a continuing duty toward Plaintiff because Plaintiff's accident did not occur contemporaneously with UPS's accident. As such, the Court affirmed summary judgment in UPS's favor on the basis that UPS did not have a legal duty toward Plaintiff.

Wood v. United Parcel Service, Inc., 2019 UT App 168 (Utah Court of Appeals, decided October 18, 2019, not yet released for publication in the permanent law reports).

$235,286 Award of Attorneys' Fees for Discovery Violation in Construction Company Lawsuit

Utah Court of Appeals: Plaintiff Raass Brothers Inc. (RBI) was a construction company owned by two brothers, Stan and John Raass. After Stan and his wife Summer divorced, Stan confessed to John that he and Summer had been embezzling RBI's corporate funds for personal use. Thereafter, Stan entered into an agreement with John and RBI whereunder Stan agreed to surrender his ownership in the company and RBI agreed not to sue Stan. RBI then sued Summer for theft and conversion of the embezzled funds.

After responding to RBI's lawsuit, Summer served RBI with multiple written discovery requests. Among them, Summer asked RBI to produce multiple financial records and

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contracts. Summer was dissatisfied with RBI's responses. Her counsel met and conferred with RBI's counsel five times without Summer obtaining the documents she had requested. The district court ended up ordering RBI to comply with the requests. Summer ended up filing a motion for sanctions due to RBI not complying with that order.

The court found that RBI had not complied with the discovery requests and granted Summer's request for attorneys' fees. She submitted invoices totaling $343,590.12 in attorneys' fees. The court granted her an award of fees in the lower amount of $235,286.73. RBI appealed, contesting that any sanctions should have been entered against it, as well as disputing the amount of the attorneys' fees.

On appeal, the Utah Court of Appeals noted that a district court has wide discretion in determining discovery disputes and sanctions. It found that sufficient evidence existed to support

RBI not complying with the discovery requests. Regarding the award of attorneys' fees, the Court ruled that they were appropriately awarded by RBI had engaged in persistent dilatory tactics tending to frustrate the judicial process. Thus, the award of fees was affirmed against RBI.

Raass Brother Inc. v. Raass et al., 2019 UT App. 183, 454 P.3d 83 (Utah Court of Appeals, decided Nov. 15, 2019).

DEFENSE VERDICT IN TRAFFIC LIGHT ACCIDENT CASE

Davis County, Utah: Plaintiff Megan Curtis filed a lawsuit against Defendant Leanne Hodges relative to a motor vehicle accident involving their two vehicles. Plaintiff alleged that Defendant negligently failed to stop at a red light. Plaintiff alleged that Defendant collided with her vehicle while she was turning left through the intersection. Plaintiff alleged sustaining migraine headaches and neck and back strains as a result of the accident.

Defendant denied liability and denied that Plaintiff had the right-of-way at the intersection. Defendant claimed that she had the right-of-way at the intersection because her traffic light was yellow.

The Court found that it was more likely than not that Defendant had a yellow light at the time of the collision. The Court thus returned a judgment in favor of Defendant.

Curtis v. Hodges, Case No. 2018-07-00194.

Wyoming

WYOMING SUPREME COURT ADDRESSES DISCLOSURE REQUIREMENTS FOR INDEPENDENT MEDICAL EXPERTS

Wyoming Supreme Court: Plaintiff Aubri Vahai was rear-ended twice in the span of fifteen months, first by Defendant Ryan Gertsch and then by James Frew. Vahai sued both Gertsch and Frew, claiming their negligence cause permanent injuries to her spine which would require future surgery. Eventually, the case went to a jury trial. The only issue at trial was whether each of the negligence caused damage to Vahai, and if so, the amount.

The jury award Vahai a total of $10,000 in damages. On appeal, Vahai contends that the district court erred by allowing Gertsch's Rule 35 examining medical doctor to testify at trial because Gertsch did not comply with expert disclosure requirements under Wyoming Rule of Civil Procedure 26.

The court's scheduling order established one deadline for Rule 26 expert designations and then a separate deadline for Rule 35 medical examinations and reports. Gertsch's Rule 26 disclosers disclosed one expert and reserved the right to have Vahai examined by Dr. Tashof under Rule 35. Vahai agreed to be examined by a different professional, Dr. Bernton. Gertsch disclosed Bernton's report and designated him as a testifying expert. Vahai then filed motion to prohibit Dr. Bernton from testifying at trial because Gertsch had not previously disclosed him under Rule 26. On appeal, Vahai maintained that same argument in seeking to exclude Dr. Bernton's testimony.

The Wyoming Supreme Court's opinion stated: "We have yet to address whether a Rule 35 examiner who provides expert testimony at trial is required to comply with the disclosure requirements of Rule 26(a)(2)(B)." Nevertheless, the Court concluded: "if a party seeks to offer his retained Rule 35 examiner as an expert at trial, Rule 26(a)(2)(B) is triggered and the party must comply with that rule's disclosure requirements in addition to the report under Rule 35(b). A single report can satisfy [both rules] as long as it has the information required by both rules."

Because Gertsch offered Dr. Bernton as an expert at trial, he was thus required to comply with Rule 35 and Rule 26 disclosure requirements, such as disclosing the expert's testimony history. However, because Dr. Bernton's testimony was a small part of the trial, and there existed other testimony to support the jury verdict, Gertsch's failure to make the expert disclosure for Dr. Bernton was deemed harmless. The verdict was thus affirmed.

Vahai v. Gertsch, 2020 WY 7 (Wyoming Supreme Court, decided January 15, 2020, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN BEDBUG HOTEL INJURY LAWSUIT

United State District Court, D. Wyoming: Plaintiff Daniel Sandoval, an adult male, allegedly suffered bedbug bites over his entire body, as well as emotional stress, during a two-week stay at a Motel 6 that was owned and operated by Defendant G6 Hospitality L.L.C. Plaintiff Sandoval sued G6 Hospitality for his physical and emotional injuries. He alleged claims based upon negligence,

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premises liability, and intentional infliction of emotional distress. He alleged that G6 Hospitality both caused and allowed the bedbugs to be present in two rooms which he occupied, and that it ignored his complaints.

Defendant G6 Hospitality generally denied the allegations and contended it was fully, or at least partially, immune per the affirmative defenses of assumption of the risk, contributory negligence, and failure to mitigate. The case was tried to a jury, which returned a verdict in favor of Defendant G6 Hospitality.

Sandoval v. G6 Hospitality L.L.C., Case No. 1:18CV00116.

Texas

INSURER MUST PROVE PREJUDICE TO ASSERT BREACH OF CONSENT-TO-SETTLE POLICY PROVISION

Texas Court of Appeals, Dallas: Plaintiff Curtis Davis sued his insurance carrier, Defendant State Farm Lloyd's, for underinsured motorist (UIM) benefits. His policy excluded UIM coverage if he settled his claim against an underinsured driver without State Farm's written consent. State Farm was granted summary judgment based on evidence that Plaintiff did just that. The questions on appeal to the Texas Court of Appeals were: (1) was State Farm required to prove it was prejudiced by Davis's settlement, and (2) if so, did State Farm conclusively prove prejudice?

The subject accident occurred between Davis's vehicle and a vehicle driven by Jose Manuel Vicencio-Hernandez. Because Vicencio-Hernandez was underinsured, Davis informed State Farm of his intent to pursue a UIM claim. Notices from State Farm informed Davis that failure to obtain

State Farm's consent to settle might forfeit Davis's UIM coverage. Subsequently, Davis settled his claim with Vicencio-Hernandez. After State Farm denied UIM benefits to Davis, he sued State Farm for breach of contract and other causes of action.

In response to the lawsuit, State Farm moved for summary judgment on the basis that Davis's settlement without State Farm's consent triggered the policy exclusion. Davis argued that State Farm had not proved that it was prejudiced by Davis's action. The district court granted the motion in State Farm's favor.

On appeal, the Texas Court of Appeals ruled that State Farm was required to prove that Davis's settlement prejudiced it. "An insured's breach of the consent-to-settle clause is material

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Dewhirst & Dolven New Firm Partners Announced:

Jeffery D. Bursell, Esq.

Mr. Bursell has been with the firm since 2010. Mr. Bursell is located in the firm's Denver, Colorado office and is licensed in both Colorado and Utah.

Mr. Bursell provides a full range of representation in the areas of construction defects, bodily injury, general tort law, insurance defense, first and third-party insurance bad faith, premises liability, insurance coverage, products liability, cyber liability, and toxic torts.

Kyle L. Shoop, Esq.

Mr. Shoop has been with the firm since 2011. He is located in the firm's Salt Lake City, Utah office and is licensed in both Utah and Wyoming. Mr. Shoop is the selected Prime Member for the Association of Defense Trial Attorneys (only one defense trial attorney is selected to be a prime member per one million in area population).

Mr. Shoop's practice involves defense of personal injury, motor vehicle (commercial and passenger), premises liability, first and third-party insurance bad faith, insurance coverage, and construction defect litigation cases.

About Our Firm

Dewhirst & Dolven, LLC is pleased to serve our clients throughout the intermountain west and Texas from the following offices:

- Salt Lake City, Utah
- Denver, Colorado
- Colorado Springs, Colorado
- Grand Junction, Colorado
- Casper, Wyoming
- Dallas, Texas
- South Padre Island, Texas

Please see our website at DewhirstDolven.com for specific contact information.

Dewhirst & Dolven, LLC has been published in the A.M. Best's Directory of Recommended Insurance Attorneys and is rated an "AV" law firm by Martindale Hubbell. Our attorneys have extensive experience and are committed to providing clients throughout Utah, Wyoming, Colorado and Texas with superior legal representation while remaining sensitive to the economic interests of each case.

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.

Dewhirst & Dolven's Legal Update
is published quarterly by
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CLM

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if it extinguishes a valuable subrogation right," unless that subrogation right has no value.

The Texas Court of Appeals held that State Farm did not conclusively prove that it had been prejudiced by Davis's breach of the consent-to-settle provision. State Farm did not adduce any evidence that its subrogation right had any value, or that it otherwise was prejudiced by Davis's action. As such, the grant of summary judgment was reversed, and the case was remanded to the district court.

Davis v. State Farm Lloyd's, Inc., 2019 WL 5884405 (Texas Court of Appeals, Dallas, decided November 12, 2019, not yet released for publication in the permanent law reports).