Spring 2020

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Colorado • Utah • Wyoming • Texas

COVID-19 UPDATE:

In response to the COVID-19 pandemic, Dewhirst & Dolven is OPEN for business with normal access to communications and client files. We know that our clients are going through challenging times, and we are committed to serving our clients' needs throughout this period.

IN BRIEF

COLORADO

The Tenth Circuit ruled that, under Colorado law, the plaintiff-insurer was entitled to be fully reimbursed for a settlement with a third party, due to the fraud of its insured in obtaining the insurance policy.

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UTAH

Defendant car dealership obtains judgment in its favor and an award of attorneys' fees in a case involving claims of false pretense relative to the sale of a motor vehicle.

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WYOMING

In an insurance dispute, an auto insurer was held not to have duties to defend or indemnify an insured for injury claims stemming from a well fire caused by a cigarette lighter.

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TEXAS

In a motor vehicle accident where the defendant admitted responsibility for it, the Texas Court of Appeals held that the plaintiff's motion for direct verdict as to liability should not have been granted.

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COLORADO

INSURER ENTITLED TO REIMBURSEMENT FROM ITS INSURED FOR SETTLEMENT FUNDS DUE TO THE INSURED'S FRAUD

10th Circuit: This case concerned an insurer, Plaintiff Evanston Ins. Co., filing claims against its insured, Defendant Aminokit Laboratories, for fraud. The issue in this case was whether, under the circumstances of the case, Colorado law permits an insurer to recover a settlement payment made on behalf of its insured based upon fraud.

Aminokit Laboratories fraudulently obtained an insurance policy. When Aminokit was sued by a former patient, Evanston assumed Aminokit's defense subject to a reservation of rights. Evanston settled with the former patient under pressure from Aminokit. As it said it would, Evanston then sought to recover the settlement payment from Aminokit.

Aminokit had fraudulently obtained the policy by making several material misrepresentations and omissions. For example, Aminokit had failed to disclose that it maintained overnight beds for its patients at the addiction-treatment center, and instead represented that it operated its business only during the day. Other false representations concerned its employees' treatment for alcoholism or drug addiction, and as to the circumstances under which its CEO (who provided medical care to Aminokit patients) had lost her chiropractic license.

The former patient had sued Aminokit for intentional and fraudulent conduct. Evanston thus initially denied providing a defense to Aminokit because such claims were outside of the policy's scope of coverage. At a mediation with the former patient, Aminokit, and Evanston, the former patient agreed to a settlement for $260,000. Aminokit's attorney threatened

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Evanston to fund the settlement otherwise Aminokit would bring a bad-faith action against it. Aminokit's attorney contended that Evanston was "playing a dangerous game" because the underlying lawsuit's judgment would likely exceed $700,000 if the settlement wasn't funded. Evanston agreed to fund the settlement only on the basis that it would seek reimbursement of it from Aminokit thereafter. Evanston then brought the claims for fraud against Aminokit.

"Under Colorado law, the defrauded party may recover such damages as are a natural and proximate consequence of the fraud." In the action, all parties agreed that Evanston would not have issued the policy if Aminokit had disclosed or communicated the true facts of its operation. But Aminokit argued that Evanston could not argue fraud because Evanston knew of it when it agreed to fund the settlement with the former patient. However, "where the defrauded party discovers the fraud … where it would be economically unreasonable to terminate the relationship, he may … continue the contract and then bring suit for his entire damages."

The Tenth Circuit Court of Appeals determined that it would have been "economically unreasonable" for Evanston to refuse to pay the settlement because doing so would have placed it at a risk of a bad-faith lawsuit. In addition, Colorado has a policy "to aggressively confront the problem of insurance fraud…." As such, the Court determined that Aminokit was to fully reimburse Evanston for the settlement amount.

Evanston Insurance Company v. Aminokit Laboratories, Inc., 2020 WL 1285848 (10th Circuit Court of Appeals, decided March 18, 2020, not yet released for publication in the permanent law reports).

CHOICE OF LAW ANALYSIS IN AUTOMOBILE UNDERINSURED MOTORIST INJURY CASE

U.S. District Court, D. Colorado: This case arose from an automobile accident that occurred in Grapevine, Texas. Plaintiff Crystal Loibl was a passenger in a vehicle travelling westbound when an eastbound vehicle crossed the median and struck her vehicle head-on. The driver of Loibl's vehicle was insured through Geico. The other vehicle was underinsured.

Loibl submitted a UIM claim against Geico, but not before two other involved individuals submitted demands. Geico paid out the claims in the order they were filed. After those two payments, only $2,000 remained. Geico offered Loibl that remaining amount, which she did not accept.

Loibl filed a diversity action in Federal court against Geico. Geico filed a motion to determine that Texas applies to her UIM claim, even though the action against it was filed in the Colorado Federal District Court. A dispute thus arose concerning whether Colorado or Texas law applied. The dispute was analyzed separately as to the contract and tort claims between the parties.

As to the contract claims, the court determined that Texas was the controlling law. For contract claims, the law of the state chosen will apply unless that other factors establish that another state's laws should be controlling. The insurance contract identified Texas in its choice of law provision. The insurance contract was also entered into in Texas. The policyholder was a Texas resident, and the insured vehicle was primarily driven in Texas. In addition, the accident happened in Texas. Though Plaintiff Loibl was a Colorado resident, Texas was deemed to have a substantial relationship to the parties in the case. As such, Texas law was deemed controlling for the contract claims.

As to tort claims, the court also ruled that Texas controlled due to the same factors for the contract claims. This ruling was despite Loibl's argument that Colorado had the most significant relationship to the controversy because she was a Colorado resident, her treatment took place in Colorado, she filed the case in Colorado, and the accident happened while on a business trip for a Colorado employer.

Loibl v. Geico General Insurance Company, 2020 WL 1470802 (U.S. District Court, D. Colorado, issued March 26, 2020, not released for publication in the permanent law reports).

DEFENSE VERDICT IN AUTO-PEDESTRIAN UNDERINSURED MOTORIST BENEFITS ACTION

U.S. District Court, D. Colorado: Plaintiff Sharon Shaw was injured when, as a pedestrian, she was struck by a vehicle driven by Lee Morey. The parties stipulated that Morey's vehicle had struck Shaw at approximately 9:45pm, shortly after Shaw had exited her vehicle from the driver's side door. The collision occurred on Abbey Road, a two-lane road in a section where it was dark and there were no streetlights.

Plaintiff Shaw sustained serious leg injuries. Her past medical expenses were $500,000. She sought underinsured motorist ("UIM") benefits from Defendant Shelter Ins. Co. Shelter had denied her claim for UIM benefits. In her suit against Shelter, Plaintiff Shaw alleged that Shelter did not conduct a reasonable investigation and that its refusal to pay benefits was unreasonable. Shelter denied that it owed Shaw any UIM benefits and claimed that Shaw was at least as negligent as Morey in causing the accident.

Plaintiff Shaw sought $250,000 in UIM benefits, as well as statutory double damages and attorneys' fees. The action was tried to a jury, which returned a verdict in favor of Defendant Shelter Mutual Insurance and against Plaintiff Shaw on all claims. The jury found that the underinsured motorist, Lee Morey, was not more than 50% negligent regarding the auto-pedestrian collision with Plaintiff Shaw.

Shaw v. Shelter Mutual Insurance, Case No. 17 CV 723.

PENDING COLORADO LEGISLATION

The following Colorado legislative bills are presently pending:

HB20-1290: This bill is entitled "Failure-to-cooperate Defense First-party Insurance." If passed, the bill would bar an insurer from using a failure-to-cooperate defense in an action unless multiple pre-requisites have been satisfied. Among them, the alleged failure to cooperate must materially and substantially prejudice the portion of the claim for which the defense is asserted. Any language in an insurance contract that conflicts with the bill would be considered void.

HB20-1348: This bill is entitled "Additional Liability Under Respondeat Superior." A recent Colorado Supreme Court case - Ferrer v. Okbamicael, 390 P.3d 836 (Colo. 2017) – held that a plaintiff cannot assert additional claims against the employer arising out of an incident when the employer admits to liability for the tortious actions of its employee. If passed, this bill would allow a plaintiff to bring such claims against an employer.

SB20-138: This bill is entitled "Consumer Protection Construction Defect Time Period." If passed, this bill would increase the statutory limitation period for actions based on construction defects from 6 years to 10 years; allow tolling of the limitation period on any statutory and equitable basis; and require tolling of the limitation period until the claimant discovers some physical manifestation of a construction defect and its cause.

Utah

DEWHIRST & DOLVEN WINS BENCH TRIAL AND IS AWARDED ATTORNEYS' FEES IN DEALERSHIP VEHICLE SALES DISPUTE

Salt Lake County: In a case concerning allegations of false pretenses relative to a car sale, Dewhirst & Dolven partner Rick Haderlie was retained to represent a car dealership-defendant. That car dealership had sold Plaintiff a "certified" used vehicle that was allegedly involved in a prior accident, which Plaintiff alleged Defendant failed to disclose.

After the sale, Plaintiff was in a subsequent minor accident and obtained an ISO Claims Index that reflected an accident prior to the sale for the vehicle. The prior accident was not on the CarFax report which was shown to Plaintiff at the time of her sale.

At trial, Plaintiff sought the diminished value of the vehicle, and Defendant noted the "merger" clause in the contract, which stated that all terms of the agreement were included in the contract and that there was no contractual representation relative to the absence of prior accidents. In addition, the contract provided for the dealership to recover fees should any portion of the contract have to be enforced (such as the merger clause).

After a bench trial, the court ruled in favor of Dewhirst & Dolven's client by issuing a "no cause" order and granting the dealership an award of its attorneys' fees incurred in defending against Plaintiff's action.

Civil No. 208400048.

UTAH SUPREME COURT REVERSES GRANT OF SUMMARY JUDGMENT IN PREMISES LIABILITY TRIP AND FALL CASE

Utah Supreme Court: Plaintiff Candice Cochegrus tripped and fell while walking across a park strip in Herriman City, Utah. She asserted that she tripped over a metal rod protruding out of a hole in the ground. She sued Herriman City, Rosecrest Village Homeowners Association, and its maintenance company FCS for negligence.

The district court granted summary judgment to all three defendants. It treated the rod as a temporary condition and, as such, ruled that Cochegrus did not produce enough evidence to create a disputed fact as to when the unsafe condition arose. The court concluded that, without this, she could not meet her burden to show that the defendants had constructive notice of the metal rod and an opportunity to remedy the condition.

Cochegrus appealed, arguing that the rod should have been treated as a permanent unsafe condition rather than a temporary condition. Treating the rod as a permanent condition would have eliminated the requirement for her to prove Defendants' knowledge of the condition. She also argued that she had presented sufficient evidence of the Defendants' knowledge of the condition, due to the rod showing signs of being impacted during lawnmowing and based upon its aged condition.

As to the argument that the rod should have been considered a permanent condition, the Utah Supreme Court held that Plaintiff did not procedurally preserve this argument because she had previously conceded that it was a temporary condition. As a temporary condition, she was thus to show that Defendants had knowledge of the condition, by showing that an unsafe condition existed long enough that Defendants should have discovered it.

The Utah Supreme Court agreed with Plaintiff Cochegrus' argument that she had set forth sufficient evidence to establish that the rod existed long enough for Defendants to have discovered it. The evidence suggested that the rod was in a prominent condition in a residential, regularly-maintained park strip. The rod protruded about five inches above the grass. Further, the rod looked rusted and had nicks which looked like they came from the surrounding lawn being mowed.

Thus, the Utah Supreme Court reversed the grant of summary judgment, ruling that there was sufficient evidence for a jury to infer longevity of the rod.

Cochegrus v. Herriman City et al., 2020 UT 14 (Utah Supreme Court, decided March 26, 2020, not yet released for publication in the permanent law reports).

"NO CAUSE" DEFENSE VERDICT AFFIRMED ON APPEAL DESPITE ARGUMENTS AS TO INSURANCE AND AFFIRMATIVE DEFENSES

Utah Court of Appeals: Plaintiff Janet Kubiak sued Defendant Melinda Pinson for injuries Kubiak sustained as a result of an automobile accident. Kubiak elected to pursue her claims via arbitration. Unsatisfied with the arbitration result, she then sought a trial de novo before a jury in the district court.

The jury found Pinson negligent in causing the accident and some of Kubiak's claimed injuries. But the jury also found that the medical expenses resulting from the accident were less than $3,000. Based on this finding, the district court entered a judgment of "no cause of action" in Pinson's favor. The basis for this was that Kubiak's medical expenses did not reach the $3,000 threshold amount required under U.C.A. § 31-22-309 to assert an action for personal injuries stemming from an automobile accident.

On appeal, Kubiak argued that Pinson's affirmative defenses established her admission as to liability. She also argued that evidence of Pinson being insured should have been admissible.

As to the first issue, Kubiak argued that Pinson set forth inconsistent positions in her affirmative defenses, by denying liability while also alleging that set-off should occur for any amounts which had been paid by Kubiak's PIP coverage. Kubiak had been paid an amount in excess of the $3,000 damages threshold under U.C.A. § 31-22-309. Kubiak alleged that Pinson's two affirmative were inconsistent, and thus should have resulted in an admission of liability in the amount of that set-off PIP amount. However, the Utah Court of Appeals disagreed, holding that Utah law "unequivocally allows a party to assert defenses in the alternative and a pleading is not made insufficient by the insufficiency of an alternative statement."

The Utah Court of Appeals also denied Kubiak's argument that evidence of Pinson's insurance should have been admitted. Kubiak sought to admit that evidence, despite U.R.E. 411, to rebut Pinson's argument that she'd filed the lawsuit in pursuit of monetary gain. Kubiak argued that the evidence should have been admissible to inform the jury that she would not collect any proceeds from Pinson personally. The Court rejected that argument and found that such an argument sought to circumvent the inadmissibility of insurance evidence under Rule 411. The Court ruled that Kubiak "sought to use the insurance evidence for irrelevant and expressly prohibited purposes." The district court's ruling was thus affirmed.

Kubiak v. Pinson, 2020 UT App 40 (Utah Court of Appeals, decided March 19, 2020, not yet released for publication in the permanent law reports).

RECENTLY-ENACTED UTAH LEGISLATION

H.B. 361: On March 24, 2020, Governor Herbert signed into law H.B. 361, which modifies U.C.A. § 31A-22-309 as to the pre-requisites for when a personal injury action stemming from an automobile action may be brought. Under the amendment, a bone fracture now provides a basis for when such a personal injury action may now be asserted, regardless of the amount of medical expenses incurred.

H.B. 143: On March 24, 2020, Governor Herbert signed into law H.B. 143, which modifies U.C.A. § 31A-22-305 and 305.3. The code has been amended to include the following: "A covered person injured as a pedestrian by an underinsured motor vehicle may recover underinsured motorist benefits under any one other policy in which they are described as a covered person."

H.B. 223: On March 24, 2020, Governor Herbert signed into law H.B. 223, which modifies U.C.A. § 78B-2-225. That statute provides the limitations periods for actions related to improvements in real property. The bill modifies the statute's definition of an action and a provider and clarifies certain time limitations for actions. It also provides a two-year statute of limitations for certain contract or warranty actions involving improvements on real property that occur beyond the six-year statute of repose for contract and warranty actions.

Wyoming

AUTO INSURER HELD NOT TO HAVE DUTY TO DEFEND OR INDEMNIFY AS TO WELL FIRE FROM CIGARETTE LIGHTER

10th Circuit: The issue in this case concerned which of two insurers, Carolina Casualty or Burlington Insurance, covered bodily injuries sustained in a well-site fire ignited by use of a cigarette lighter. Both insurers issued policies to RW Trucking, and each policy intentionally dovetailedeach other's scope of coverage. Each insurer asserted that the other is solely liable to indemnify RW Trucking and its driver Jason Metz for damages arising from David Garza's bodily injuries sustained in the fire. Carolina issued a commercial-automobile policy, and Burlington issued a commercial-general-liability policy.

After the insurers jointly settled Garza's claims, Carolina filed an action alleging that it did not have a duty to defend or indemnify RW Trucking or Metz. Carolina also sought reimbursement from Burlington for its portion of the settlement.

On appeal to the Tenth Circuit Court of Appeals, the Court first analyzed the insurers' duty to defend under Wyoming law. The Court ruled that Carolina's policy covered accidental injury or loss resulting from the ownership, maintenance or use of an RW Trucking auto. While the Garza complaint mentioned use of an auto on the day of the accident, it did not

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identify a causal relationship between the vehicle use and the fire. Rather, the fire happened after Metz lit a cigarette. Thus, Carolina was held not to have a duty to defend.

As to a duty to indemnify RW Trucking and Metz for the settlement, the Court ruled that Carolina did not have a duty to indemnify because it did not have a duty to defend. "The duty to defend is broader than a duty to indemnify." Despite Burlington's argument, the Court held that Carolina did not voluntarily pay the settlement amount, due to Carolina entering a reservation-of-rights agreement with Burlington before paying the settlement amount.

The Court thus held that Carolina was entitled to reimbursement by Burlington of its $375,000 settlement contribution as to Garza's lawsuit.

Carolina Casualty Ins. Co. v. Burlington Ins. Co., 951 F.3d 1199 (10th Cir. Court of Appeals, decided February 27, 2020).

DEFENSE VERDICT IN CO-EMPLOYEE TRUCKING INJURY CASE

U.S. District Court, D. Wyoming: Plaintiff Wesley Vincent filed suit against Defendant Ava Nelson for injuries he allegedly sustained stemming from a truck accident. The accident happened when his truck collided with another truck in the mine where he worked.

Plaintiff Vincent said he was driving a Komatsu 830E haul truck down an access ramp into the mine pit and met Nelson, who was driving the same truck up the ramp. Vincent claimed that Nelson's truck sideswiped him when the two trucks met on the narrow ramp. He claimed that Nelson was driving at an unsafe speed on a hazardous and narrow ramp, ramming his truck and refusing to stop either before or after sideswiping him.

Defendant Nelson denied both the liability and damages claims. She alleged that she had safely passed other haul trucks at the same location during that shift and had no reason to believe that proceeding would cause an accident. She also argued that she was immune from liability under W.S.A. § 27-14-104, which provides that worker's compensation is the exclusive remedy for actions against a co-employee, unless that co-employee's acts were intentional.

Vincent sought damages for his personal injuries, as well as punitive damages. Vincent's alleged injuries were an umbilical hernia treated with hernia repair surgery, an appendix injury treated with an appendectomy, post-traumatic stress disorder, herniated lumbar discs treated with spinal injections, a three-level lumbar spinal fusion, and a complete loss of sexual functioning. The case was tried to a jury, which returned a verdict in favor of Defendant Nelson.

Vincent v. Nelson, Case No. 16CV002700

Texas

LIABILITY DIRECTED VERDICT IN PLAINTIFF'S FAVOR REVERSED ON APPEAL IN A MOTOR VEHICLE ACCIDENT

Texas Court of Appeals: Defendant Lissa Douglas appealed the judgment in this automobile case, where the district court granted Plaintiff Maria Aguilar's motion for directed verdict on the issue of liability.

Douglas was driving on the highway when she tried to change lanes. She checked her rearview mirror and both side mirrors, activated her turn signal, and began to move lanes. She did not see Aguilar's vehicle and hit it when moving lanes. Douglas talked to Aguilar and apologized for the accident. Later, Aguilar began receiving treatment for some pain that she felt, which she attributed to the accident. She then filed suit against Douglas for her injuries.

At trial, Douglas testified that she "absolutely" took responsibility for the accident. She testified that Aguilar's vehicle must have moved up fast next to her vehicle. Plaintiff Aguilar thus moved for a directed verdict. The district court granted the motion and charged that "yes" be answered as to the questions of whether Douglas's negligence was the proximate cause of the accident. On appeal, Douglas challenged that finding by the district court.

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About Our Firm

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

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- 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.

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The Texas Court of Appeals held that the motion for directed verdict should not have been granted. It ruled that "negligence means the failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances…." In addition, "the occurrence of an accident or a collision is not of itself evidence of negligence." The Court thus ruled: "The jury could have reasonably believed that despite Douglas's acceptance of responsibility she drove in a reasonable manner and did not act negligently." As such, the Court reversed the grant of the direct verdict and remanded the case to the trial court.

Aguilar v. Douglas,
2020 WL 1616970
(Texas Court of Appeals, Houston, decided
April 2, 2020
not yet release for publication
in the permanent law reports).

TEXAS SUPREME COURT UPHOLDS THE EIGHT CORNERS RULE IN INTERPRETING DEFENSE OBLIGATION FOR WRONGFUL DEATH ATV CLAIMS

Texas Supreme Court: This action concerned whether Plaintiff State Farm Lloyds must defend its insureds, Janet and Melvin Richards, against personal injury claims brought by Amanda Meals. Amanda brought a claim against the Richards for the death of her ten-year-old son Jayden from an ATV accident. The Richards were Jayden's grandparents, who were supervising him. Amanda brought claims against the Richards for negligent supervision and instruction and alleged that the accident occurred "on or near" the Richards' residence.

The Richards had a homeowner's insurance policy with State Farm Lloyds. The Richards asked State Farm to provide a defense and to indemnify them against any damages for which they are liable. State Farm agreed under a reservation of rights. It then sued the Richards, seeking a declaration that it did not have a duty to defend or indemnify them.

State Farm argued that the Meals' claims did not fall within the scope of coverage. It argued that the claims were excluded because the ATV accident occurred on a public recreational trail and not on the grandparents' property. To prove the accident's location, State Farm submitted the police vehicle crash report which stated the location of the accident.

In response, the Richards argued that the "eight corners rule" applied to give rise to State Farm's obligations because the claims made within the Meals' complaint fell within the scope of coverage of the policy. The Richards argued that this rule prohibited the court from considering any evidence outside of the eight corners of the complaint and policy.

On appeal, the Texas Supreme Court stated: "the goal in interpreting the contractual duty to defend … is to ascertain the true intentions of the parties as expressed in the writing itself." The Court ruled that State Farm's policy agreed to defend the policyholders if "a claim is made or suit is brought against an insured for damages because of bodily injury … to which the coverage applies." Texas courts have long used the eight corners rule to determine the scope of an insurer's obligation. The Texas Supreme Court found that State Farm could have contracted around the eight corners rule, but that it chose to not do so. The Court thus reversed the grant of summary judgment in favor of State Farm.

Richards v. State Farm Lloyds,
63 Tex. Sup. Ct. J. 614
(Texas Supreme Court,
decided March 20, 2020,
not yet released for publication
in the permanent law reports).