Summer 2020

Dewhirst & Dolven LLC Attorneys at Law

LEGAL UPDATE

Colorado • Utah • Wyoming • Texas

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COVID-19 COVERAGE & LITIGATION

As COVID-19 continues, so too have claims related to the coronavirus. Claims may include those such as an infected individual seeking to file suit against the cause of the exposure, or a business that was forced to close seeking coverage for business interruption losses. Dewhirst & Dolven attorneys are available to assist with COVID-19 coverage issues and litigation throughout Colorado, Utah, Wyoming, and Texas.

For example, in Utah, Governor Herbert signed into law S.B. 3007, which enacts new legislation that grants civil immunity to persons (including private employers, businesses, and the government) related to exposure to COVID-19. The legislation is intended to allow businesses to reopen with more certainty about COVID-19-related civil lawsuits. The bill enacts U.C.A. 78B-4-517, which provides: "a person is immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the premises owned or operated by the person, or during an activity managed by the person." However, multiple exceptions exist, such as for willful misconduct, reckless infliction of harm, or the intentional infliction of harm.

Colorado

BEING OUTSIDE OF VEHICLE IN A ROAD RAGE INCIDENT HELD TO NOT HAVE UNDERINSURED MOTORIST COVERAGE

Colorado Court of Appeals: The issue in this case was "whether a passenger in a motor vehicle involved in a road rage incident is 'using' that vehicle for purposes of underinsured motorist coverage if he is injured after getting out of the vehicle to confront the driver of the other vehicle."

Plaintiff Robert Boyle appeals the district court's summary judgment in favor of Defendant Bristol West Insurance Company. Boyle was a passenger in a Toyota vehicle insured by Bristol West. The Toyota and another vehicle, a Jeep, were involved in an incident of road rage during which both vehicles drove aggressively. When the Toyota came to a stop, Boyle got out and approached the Jeep. As the Jeep made a U-turn, it struck Boyle and dragged him some distance, causing Boyle to sustain severe injuries.

The Toyota owner's insurance policy included UIM coverage, and it insured any "person while occupying,

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maintaining or using the owner's covered auto…." Boyle sought UIM benefits under that policy and filed an action against Bristol West for those benefits. The district court granted Bristol West summary judgement on the ground that Boyle was not "using" the Toyota when he was injured.

On appeal, Boyle argued that he was using the Toyota because he was targeted for the assault as a result of his connection to the vehicle and because he had only stepped out of it briefly. However, the Colorado Court of Appeals disagreed. It ruled: "By leaving the vehicle to confront the driver of the Jeep, Boyle engaged in an independent significant act or nonuse of the vehicle. In doing so, he interrupted the 'but for' causal chain between the covered use of the vehicle for transportation and his injury." The Court thus found that Boyle was not using the vehicle at the time of injury, and thus summary judgment in Bristol West's favor was granted.

Boyle v. Bristol West Ins. Co., 2020 COA 102 (Colorado Court of Appeal, decided July 2, 2020, not yet released for publication in the permanent law reports).

TENTH CIRCUIT COURT OF APPEALS INTERPRETS RESULTING-LOSS EXCEPTION IN BUILDER'S RISK POLICY

10th Circuit: Colorado Center Development LLC ("CCD"), the owner of certain property in Colorado, hired J.E. Dunn Construction Company to construct an office building on the property. J.E. Dunn hired Plaintiff Rocky Mountain Prestress ("RMP") as a subcontractor to perform work including installing precast columns at the property. But due to concerns at another site, J.E. Dunn requested RMP to retain a third-party firm to investigate potential structural issues with RMP's work on the project. That firm concluded that the project required repairs to insufficiently grouted joints between the precast concrete column and pilaster elements at 264 locations.

CCD purchased from Defendant Liberty Mutual Fire Insurance Company a Builder's Risk insurance policy. RMP submitted a claim to Liberty seeking coverage under the policy. RMP then ended up filing suit against Liberty seeking coverage, and alleged claims for breach of contract, insurance bad faith, and a declaratory judgment on the question of insurance coverage.

The district court granted summary judgment in Liberty's favor on the basis that RMP's claim was not entitled to coverage under the policy. RMP appealed.

The Liberty policy provided protection against "direct physical loss or damage caused by a covered peril to buildings or structures while in the course of construction, erection, or fabrication." It defined "covered perils" as "risks of direct physical loss or damage unless the loss is limited or caused by a peril that is excluded." One of the policy's exclusions was for "loss or damage consisting of, caused by, or resulting from any act, defect, error, or omission (negligent or not) relating to design, specifications, construction, materials, or workmanship." On appeal, RMP conceded that its claim and work fell within the scope of that exclusion. However, it argued that coverage was restored by the following exclusion to that exclusion: "if an act, defect, error, or omission as described above results in a covered peril, Liberty does cover the loss or damage caused by that covered peril."

The Tenth Circuit Court of Appeals disagreed with RMP's position. "Several courts have concluded that the above-quoted and similar resulting-loss exceptions function to restore coverage only when an excluded peril leads to loss from an independent non-excluded peril." The Court explained: "For instance, one line of cases holds that there is coverage only if the first, excluded cause results in a separate, covered cause in an unforeseeable way, as when a water leak caused by defective construction shorts an electrical socket and causes a fire, but not when the second cause is the foreseeable result of the first, excluded cause, as when defective construction causes a water leak that in turn causes water damage."

Regardless of the interpretation, the Court ruled that "the exception cannot be allowed to swallow the exclusion. Thus, a resulting-loss exception to a defective-workmanship exclusion does not provide coverage for the costs of repairing or replacing defectively designed or constructed parts of the structure; rather, the exception only restores coverage for damage sustained when the defective workmanship becomes the cause of additional, separate damage." As such, the grant of summary judgment in Liberty's favor was affirmed.

Rocky Mountain Prestress, LLC v. Liberty Mutual Fire Insurance Co., 960 F.3d 1255 (10th Cir., decided June 2, 2020).

COLORADO SUPREME COURT ADOPTS TEST FOR APPLICATION OF THE RESCUER DOCTRINE

Colorado Supreme Court: This article is an update from an article in the Spring 2019 edition of the firm's newsletter. The Colorado Court of Appeals' decision was appealed to the Colorado Supreme Court. At issue before the Colorado Supreme Court was the question of whether an individual must exert some bodily movement of a specific degree or nature to qualify as a rescuer under the rescuer doctrine. Under Colorado's rescuer doctrine, negligent actors who put others at risk may be held liable when their negligence injures a third-party rescuer.

Plaintiff Jose Garcia sued Defendant Colorado Cab Company, after a passenger in one of Defendant's taxis assaulted him on the street. The events began late one night when taxi driver Ali Yusuf picked up Curt Glinton and Glinton's friend. The passengers were intoxicated and did not give Yusuf a destination address, instead telling him when to turn. When Glinton told Yusuf to stop, Yusuf told the passengers about the taxi fee. Glinton then grabbed and punched Yusuf from behind.

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Around the same time, Plaintiff Jose Garcia had called for a taxicab. When he saw Yusuf's taxi drive by, he thought it might be for him. Garcia heard Yusuf and Glinton arguing, so he approached the taxicab to see what was going on. When Garcia told Glinton to leave Yusuf alone, Glinton got out of the cab and attacked Garcia. Glinton then jumped behind the steering wheel of the taxi, ran Garcia over, and dragged Garcia down the street.

Garcia sued Colorado Cab, alleging that the company's negligent failure to take safety measures caused his injuries. Colorado Cab moved for summary judgment, arguing that it did not owe Garcia a duty of care. Garcia argued that he was Yusif's rescuer, and thus that there could be liability under the rescuer doctrine. The Colorado Court of Appeals found that Colorado Cab could not be liable because Garcia was not Yusif's rescuer. This was because there was no evidence that Garcia had physically sought to intervene in the argument, such as to get between the two men.

On appeal, the Colorado Supreme Court ruled that imposing a stringent physicality requirement unduly narrows the rescuer doctrine. It instead held that a three pronged test must be satisfied to qualify as a rescuer under the rescue doctrine, that the plaintiff: (1) intended to aid or rescue a person whom he, (2) reasonably believed was in imminent peril, and (3) acted in such a way that he could have reasonably succeeded or did succeed in preventing or alleviating such peril.

In examining the events of this accident, the Court determined that Garcia satisfied this test. This was because Garcia had jogged to the cab and yelled at Glinton to stop, which helped Yousif escape. Thus, Garcia was deemed Yusif's rescuer and Colorado Cab owed Garcia a duty of care under the rescuer doctrine.

Garcia v. Colorado Cab Co. LLC, 2020 CO 55 (Colorado Supreme Court, decided June 15, 2020 not yet released for publication in the permanent law reports).

$23,500 JURY VERDICT FOR REAR-END ACCIDENT CASE WHERE PLAINTIFF REQUESTED $700,000

El Paso County: Plaintiff Gina Nichols alleged that she was injured when she was rear-ended by a vehicle driven by Defendant Kyle Knechle, who was 18 years old. Defendant said he was driving at the speed limit of 50 mph and did not realize that traffic had come to a stop because of a traffic light. He slammed on his brakes but struck Plaintiff's vehicle at 35-40 mph. Both vehicles were totaled.

Plaintiff alleged the following injuries from the accident: mild traumatic brain injury resulting in cognitive issues, headaches, and neck and back pain.

At trial, Defendant argued that Plaintiff had been a lifetime chiropractic patient who had been seen twice a month in the two years prior to the accident. Defendant conceded that Plaintiff had sustained neck and back strains as a result of the accident. Defendant argued that Plaintiff's diagnosis of a traumatic brain injury was two-and-a-half years after the accident. Defendant also argued that Plaintiff had continued to work more than 40 hours per week and completed a half marathon after the accident, thus showing her lack of injury.

At trial, Plaintiff asked for $700,000 in damages, including for past and future medical expenses, non-economic losses, and damages for permanent impairment. She was 51 years old at the time of the accident. Upon trial to the jury, Plaintiff was awarded $23,500 total, with $8,000 being for economic damages and $15,000 for non-economic damages. She was not awarded anything for her argument of permanent impairment.

Utah

UTAH'S PROFESSIONAL RESCUER RULE DOES NOT APPLY TO CLAIMS OF GROSS NEGLIGENCE AND INTENTIONAL TORTS

Utah Supreme Court: This case addresses the applicability of the "professional rescuer rule" of tort law. That rule provides that "a person does not owe a duty of care to a professional rescuer for injury that was sustained by the very negligence that occasioned the rescuer's presence and that was within the scope of hazards inherent in the rescuer's duties." The question in this action concerns whether that rule applies to claims of gross negligence or an intentional tort which caused the rescuer's presence.

A mulch fire occurred on the property of Defendant Diamond Tree Experts, Inc. In the week before the fire, there had been at least two other fires on the property. About ten days before the mulch fire, a representative of the Salt Lake County Health Department told Diamond Tree that the mulch on its property was piled too high and that Diamond Tree needed to reduce it. Diamond Tree did not comply, meaning that at the time of the fire, it was in knowing violation of several ordinances, including fire codes and industry standards regarding the safe storage of mulch.

Plaintiff David Ipsen was one of the firefighters who responded to the much fire. While working by the fire engine, and away from the fire, a thick cloud of smoke and embers engulfed him, leaving him unable to breathe. Ipsen sustained permanent injuries which prevented him from returning to his job as a firefighter.

Ipsen sued Diamond Tree for gross negligence, intentional harm, and negligent infliction of emotional distress. Diamond Tree moved for summary judgment, arguing that it did not owe Ipsen a duty under the professional rescuer rule. The district court ruled in Diamond Tree's favor, holding that the professional rescuer rule barred Ipsen's claims on the basis that Diamond Tree did not owe Ipsen a duty.

On appeal, the Utah Supreme Court reversed that ruling. It held that, "based on public policy … the professional rescuer rule does not apply in cases of gross negligence and intentional torts. A person thus does owe a duty of care to a professional rescuer for injuries sustained by gross negligence or an intentional tort causing the rescuer's presence."

Ipsen v. Diamond Tree Experts, Inc., 2020 UT 30 (Utah Supreme Court, decided May 2020, not yet released for publication in the permanent law reports).

CLAIM PRECLUSION HELD NOT TO BAR SECOND LAWSUIT IN COMMERCIAL LAWSUIT

Utah Court of Appeals: Pursuant to a rental agreement, Daz Management, LLC rented a grading machine from Honnen Equipment Company. During the rental period, Daz damaged the machine, and Honnen filed suit for breach of contract and negligence against the owner and manager of Daz, in his personal capacity. After a bench trial, the district court found the owner was not liable under the contract and that he was not negligent. The court ruled that the owner was not a party to the rental agreement, which named Daz as the lessee and had been signed by the owner.

Honnen then filed another suit, this time against Daz, asserting the same causes of action. The district court dismissed the second suit as barred under the doctrine of claim preclusion. Honnen appealed, arguing that its second suit against Daz should not have been dismissed.

To establish an action is barred by claim preclusion, the movant must establish three elements: (1) both cases must involve the same parties or their privies; (2) the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action; and (3) the first suit must have resulted in a final judgment on the merits.

On appeal to the Utah Court of Appeals, the Court held that the second suit was not barred by claim preclusion. This was because the first suit was not decided on the merits. "Rather, the court's decision merely established that, by not suing Daz – the real party to the contract – Honnen failed to overcome an initial bar to the court's authority, because the wrong parties were before the court." Thus, all three of the elements for claim preclusion were not satisfied.

Honnen Equipment Co. v. Daz Management LLC, 2020 UT App. 89 (Utah Court of Appeals decided June 11, 2020 not yet released for publication in the permanent law reports).

UTAH COURT OF APPEALS RULES IT PREMATURE TO DETERMINE APPLICABILITY OF THE GOVERNMENTAL IMMUNITY ACT IN HIGH SCHOOL STUDENT INJURY CASE

Utah Court of Appeals: Plaintiff Juel Eickson was a student at a high school within the boundaries of Defendant Canyons School District. At an assembly, a supervisor had confiscated a home-made flag, fastened to a pole, from junior class officers and placed it on the east side of the gym. A student retrieved the flagpole, resulting in the supervisor instructing another student to confiscate it. That student placed the flagpole under the gym bleachers, from where yet another student retrieved it. That student then climbed to the top of the bleachers and threw the flogpole into the crowd of students below, striking Erickson in the head and knocking her unconscious. No high school employee called an ambulance or provided Erickson with any medical care.

Erickson filed a complaint against the school district and high school. The complaint alleged gross negligence, negligence, and vicarious liability against the defendants for "failing to secure the flag pole and keep other students from reaching it, failing to adequately supervise their students, and failing to provide medical assistance upon injury."

The school district moved to dismiss the lawsuit against it under the Governmental Immunity Act of Utah, arguing that governmental entities such as the school district are immunized against claims arising from battery. In opposition, Erickson argued that it remained a question of fact as to whether a battery occurred, because battery requires an actor to intend the harmful consequences and it was not yet established what the student's intent was when throwing the flagpole. The court declined dismissing the suit against the school district, holding it was too premature due to the unknown facts as to whether a battery occurred. On appeal, the Utah Court of Appeals agreed with the district court's ruling.

"The Governmental Immunity Act of Utah waives governmental immunity as to any injury proximately caused by a negligent act or omission of any employee committed within the scope of employment, but exempts from this waiver injuries that arise out of or in connection with, or result from, among other things, battery." The Court agreed that it was too early in the litigation to determine whether or not a battery had occurred, as it was still possible for Erickson to prove a set of facts where the student did not engage in battery.

Erickson v. Canyons School District, 2020 UT App. 91 (Utah Court of Appeals, decided June 11, 2020, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN APARTMENT SLIP AND FALL CASE

Summit County: Plaintiff Peggy Zazetti reportedly resided in an apartment building in Heber City, Utah, operated by Defendant Prestige Senior Living Center LLC. Defendant Action Snow Plow and Lawncare Inc. was allegedly responsible for snow removal and lawn care on the property. Zazetti slipped and fell on ice on the sidewalk leading from the building out to the parking lot. She twisted her knee, resulting in injuries.

Zazetti brought claims against Prestige and Action. She alleged that they failed to inspect the premises, failed to warn of the danger, failed to maintain the walkway free of snow and ice, and failed to adequately illuminate the walkway. She sought damages for past and future mental and physical pain and suffering, as well as medical expenses.

Action was dismissed from the lawsuit on summary judgment, on the basis that evidence showed it fulfilled its contractual obligations with Prestige. In addition, Action did not have a contract with Zazetti.

The case proceeded to trial against Prestige. The jury returned a defense verdict in Prestige's favor.

Case No. 2017-05-00337.

WYOMING

ADOPTIVE SIBLING HELD TO HAVE STANDING AS A BENEFICIARY TO ASSERT A WRONGFUL DEATH ACTION

Wyoming Supreme Court: Robert Anderson died while in the custody of the Wyoming State Hospital. Prior to his death, Mr. Anderson had been adopted by his since-deceased paternal grandmother. Plaintiffs Robert and Sabrina Craft filed suit against the hospital and staff for various claims, including wrongful death. Mr. Craft is both Mr. Anderson's biological father and his adoptive brother. Ms. Craft is Mr. Anderson's appointed personal representative.

The district court dismissed the complaint, in part because it concluded the Crafts lacked standing to pursue the claims. It reasoned that the Crafts were not qualified wrongful death beneficiaries because of Mr. Anderson's adoption. The district court held that Anderson's adoption severed Mr. Craft's right to bring claims. The Crafts appealed, arguing that they had standing to bring the wrongful death claims.

The Wyoming Supreme Court held that "persons for whose benefit a wrongful death action is brought are all of those persons identified in the intestate succession statute, W.S.A. § 2-4-101." Included within that statutory framework for intestate succession are the "brothers and sisters." It held that Anderson's adoption did sever the parent-child relationship, but a new family was created by the adoption. In this case, the adoption resulted in the Crafts having one parent in common, thereby fitting the definition of "brothers." The Court held that the intestate laws do not exclude adoptive siblings. Thus, the Crafts were beneficiaries under the intestacy laws, with the right to bring a wrongful death action.

Craft v. State ex rel. Wyoming Department of Health, 2020 WY 70 (Wyoming Supreme Court, decided June 10, 2020, not yet released for publication in the permanent law reports).

IN AN INSURANCE COVERAGE DISPUTE, A POLICY'S LIBERALIZATION PROVISION HELD NOT TO CREATE BACKDATED COVERAGE

Tenth Circuit: This case involves a dispute over insurance coverage. Plaintiffs Sara Hurst and her law office entity sued Defendants Nationwide Mutual Insurance Company and Allied Insurance Company of America (collectively referred to as Nationwide) under various theories after Nationwide declined uninsured motorist (UM) coverage for injuries Ms. Hurst sustained in a collision.

About a month before the accident, Nationwide issued a commercial auto policy covering a 2007 Lexus owned by Ms. Hurst's law office. The policy did not list Ms. Hurst as a named insured. Ms. Hurst asserted that the policy provided her, as an individual, with UM coverage. Nationwide denied the claim both because she was not in the Lexus at the time of the accident and because she was not individually named as an insured.

After the accident, Ms. Hurst convinced Nationwide to name her individually as an insured, despite Nationwide's normal practice of not naming individuals on commercial policies. Ms. Hurst then sued Nationwide for denying her claim, arguing that Nationwide had created backdated coverage by adding her to the policy in the same year as the accident. She argued it created coverage under the policy's "liberalization" provision.

The district court granted summary judgment in favor of Nationwide, finding that the policy language did not retroactively create coverage for her when she was subsequently added as an insured. On appeal, the Tenth Circuit Court of Appeals also held that the policy language did not create coverage for her because she was unambiguously not named as an insured on the policy as it existed on the date of the accident. In addition, the plain language of the liberalization provision did not have a backdated

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effect. Because Ms. Hurst did not present any evidence showing a "mutual understanding between the parties" to the contrary, summary judgment in Nationwide's favor was affirmed.

Hurst v.
Nationwide Mutual Ins. Co. et al.,
2020 WL 2988688
(Tenth Circuity Court of Appeals,
not yet released for publication
in the permanent law reports).

TEXAS

INSURER'S PAYMENT OF APPRAISAL AWARD DOES NOT BAR EXTRA-CONTRACTUAL CLAIMS AGAINST THE INSURER

Texas Supreme Court: At issue in this insurance dispute is whether an insurer's payment of an appraisal award bars an insured's claims under the Texas Prompt Payment of Claims Act (TPPCA).

Plaintiff Della Perry's residential property sustained damage from a storm. After its inspection, Perry's insurance provider, Defendant United Services Automobile Association (USAA), paid her the cash-value of her claim in the amount of $5,153.00. Believing the property damage was undervalued, Perry sued USAA, asserting contractual and extra-contractual theories and invoking the insurance policy's appraisal clause.

The appraisers valued the damage at almost $15,000. USAA paid the balance of the award and then moved for summary judgment on all of her claims. USAA argued that Perry did not lack any benefits to which she was entitled under her policy because it had paid the appraisal award. Thus, her breach of contract claims failed. USAA also argued that, because her breach of contract claims failed, her extra-contractual also failed because she received all of her policy benefits. The district court agreed and granted USAA summary judgment as to all claims.

On appeal to the Texas Supreme Court, the Court held that "an insurer's payment of an appraisal award does not as a matter of law bar an insured's claims under the TPPCA." It held this due its prior finding that "payment in accordance with an appraisal is neither an acknowledgement of liability nor a determination of liability under the policy for purposes of the TPPCA." The Texas Supreme Court thus held that the prior grant of summary judgment in USAA's favor was in error, and remanded the case to the trial court for further determinations

Perry v.
United Services Automobile Association,
63 Tex. Sup. Ct. J. 1432
(Texas Supreme Court,
decided June 19, 2020,
not yet released for publication
in the permanent law reports).