Winter 2022

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Colorado • Utah • Wyoming • Texas

IN BRIEF

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- U.S. District Court, Colorado determined ski resorts need not issue refunds to passholders, if they close the resorts in good faith that it is no longer safe to ski.

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WYOMING

- The U.S. District Court, Wyoming clarifies that a manufacturer has a duty to warn when it designs a product that requires or specifies the use of a known-to-be hazardous aftermarket replacement or additional part.

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- Liability coverage applied to claims of a truck driver deemed in use of the truck when he was injured while running after the truck in an attempt to stop it rolling down the hill.

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COLORADO

CLOSING SKI RESORTS, IN GOOD FAITH, BECAUSE OF THE SPREAD OF COVID-19 AND NOT ISSUING REFUNDS TO PASSHOLDERS WAS NEITHER A BREACH OF CONTRACT OR WARRANTY, NOR A BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

U.S. District Court, Colorado: On March 15, 2020 Vail, in an effort to keep its patrons safe from the increasing spread of the COVID-19 virus, suspended operations of its North American ski areas and, shortly thereafter, closed its ski areas for the remainder of the 2019-2020 ski season. Vail refused refunds to passholders. On April 27, 2020, Vail decided it would issue credits to passholders based on the number of days that pass had been used. These credits "could be redeemed by purchasing a 2020-2021 pass on or before September 17, 2020."

Plaintiffs brought suit "individually and on behalf of a putative nationwide class" alleging, among other claims, (1) breach of contract; (2) breach of warranty; and (3) breach of implied covenant of good faith & fair dealing. Vail then moved to have all claims dismissed for failure to state a claim, under Federal Rule of Civil Procedure 12(b)(6).

Following Colorado law, which both parties agreed governed the contract, the federal court asserted that "[t]he primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties" giving "effect to the plain and generally accepted meaning of the contractual language." The Court further noted that the court "should be wary of viewing clauses or phrases in isolation . . . instead reading them in the

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context of the entire contract."

The Court determined that the language in Vail's contract that promised "unlimited, unrestricted access" to the resort's ski areas could "neither be taken at face value or wholly ignored" stating that "[l]iteral 'unlimited and unrestricted access' would grant passholders free reign to ski after business hours or enter restricted areas like private offices and boiler rooms" which is not what the parties "reasonably" expected the contract to grant. The Court found this language "meant that there would be no holiday blackout dates . . . or any cap on the number of days a pass would grant admission."

The Court further analyzed "how long Vail promised to provide access to its ski areas" when Vail "promised access during a 'ski season.'" The Court agreed the "contract did not allow Vail unfettered discretion to open or close its resorts" and that "the contracting parties reasonably expected Vail to keep its resorts open while skiing and snowboarding *safely* were possible," finding that Vail was "obligated to exercise its discretion in good faith" before closing its resorts.

Vail also argued the contract's no-refund clause "immunize[d] it from any obligation to compensate plaintiffs." The Court declared the clause was "not license for Vail to shirk its contractual obligations" but based on *Stokes v. DISH Network, L.L.C.*, an Eighth Circuit case applying Colorado law, the Court determined that "whether a no-refund provision can be ignored when a seller fails to perform services for which it has collected payment depends in part on whether the seller's failure to perform those services was done in bad faith."

Because Vail closed its resort in good faith when it was deemed no longer safe to ski and "issued satisfactory credits" the court found Plaintiffs did "fail to state a claim for breach of contract" and the claim was dismissed.

The Court further determined, "assuming the . . . [p]asses [fell] under Colorado's warranty statute" the claim for breach of express warranty also failed because as previously found "the promise that a pass would provide 'unlimited, unrestricted access' was a promise to impose no cap or holiday black out dates" and "Vail's promise to provide access for an entire ski season was a promise to keep resorts open until it determined in good faith that skiing and snowboarding were no longer safe" and thus Vail did not breach any warranty.

Under Colorado law, the federal court also found Vail did not breach the covenant of good faith and fair dealing, reasoning that because Vail offered credits toward future purchases, "the parties could not reasonably have 'originally intended' that Vail would issue cash refunds," and "Vail's decision to shutter ski operations in response to a deadly worldwide pandemic . . . was neither dishonest nor outside accepted commercial practices." Therefore, the Court also dismissed Plaintiff's claim of breach of covenant of good faith and fair dealing.

McCauliffe v. Vail Corporation,
2021 WL 4820542
(10th Cir. D. Colorado)
(October 15, 2021,
appeal has been filed).

COMMON LAW RULE THAT ALLOWS ONLY PARENTS TO RECOVER THEIR INJURED, UNEMANCIPATED MINOR CHILD'S PRE-MAJORITY MEDICAL EXPENSES IS ABANDONED AND *PRESSEY* IS OVERRULED

Supreme Court of Colorado:

Alexander Rudnicki was born on October 5, 2005. During his delivery OB-GYN Peter Bianco, D.O. used a vacuum extractor to assist with the operative vaginal delivery. Alexander suffered "severe scalp abrasions and bruising on his skull" and was "observed to be floppy, quiet, and unresponsive, with diminished function and depressed Apgar scores." It was subsequently discovered that Alexander "suffered injuries to his brain as a result of the trauma to his scalp and skull caused by the vacuum extraction." These injuries led to intensive medical treatment at the time of birth and "ongoing physical, occupational, and speech therapy." Because of these injuries Alexander is also intellectually disabled and not likely to be capable of living independently as an adult.

In 2014, Alexander's parents, Francis and Pamela Rudnicki ("the Rudnickis"), filed a complaint against Dr. Bianco and the hospital where Alexander was delivered. The Rudnickis sued in their individual capacities and as parents, guardians, and next friends of their son. The complaint alleged professional negligence against Dr. Bianco, among other causes of action. Dr. Bianco moved to dismiss, claiming the Rudnickis did not bring their individual claims within the two-years statute of limitations, the district court agreed and dismissed the Rudnicki's individual claims, leaving only Alexander as Plaintiff. The matter went before a jury finding "that Dr. Bianco had acted negligently and awarded Alexander damages totaling $4 million, including, among other things, $325,000 for past medical expenses and $110,000 for future medical expenses until Alexander reaches the age of twenty-two."

Dr. Bianco filed a post-trial motion to reduce the verdict, arguing that Colorado common law provided that "only Alexander's parents could recover Alexander's pre-majority expenses and . . . the court was required to deduct from the verdict the medical expenses incurred prior to Alexander's eighteenth birthday." The district court agreed and vacated the entire $325,000 award for past medical expenses, as well as sixty percent of the $110,000 future medical expenses award.

Alexander appealed, "arguing that applying the common law rule in the modern health care economy violates public policy and, therefore, the rule should be abandoned in favor of allowing minor plaintiffs, as co-owners of their claim for pre-majority medical expense, to recover those expenses." The court of appeals affirmed the reduction of damages award and Alexander petitioned the Supreme Court of Colorado for certiorari review.

The Supreme Court of Colorado noted that the common law rule originated in Roman law where the head of the

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household's "relatives, dependents, and enslaved people" were treated "as chattel" and only the husband could bring claims "for any injury to the wife, minor child, or servant." The Court noted that "the trend across the United States has been to renounce (or at least substantially retreat from) the common law rule, so as to allow children to recover their pre-majority medical expenses." The Court further found the rational for the common law rule, that parents paid their children's medical expenses, no longer applied in today's world of private and public health insurance, noting that "over ninety-five percent of Colorado children have health insurance coverage" of some type.

The Court also found that "departing from the common law rule" was not against public policy finding that "more good than harm will come from . . . doing so." The Court thus overruled *Pressey* and "conclude[d] that injured children may recover their pre-majority medical expenses." The Court held further that because parents often still "shoulder . . . substantial out-of-pocket costs for a child's injuries . . . a flexible rule . . . that allows both parents and their unemancipated minor child to recover damages for pre-majority expenses as long as no double recovery is permitted – best meets the unique challenges faced" today "by families of injured children."

Rudnicki v. Bianco, 2021 WL 5875461, 2021 CO 80 (December 13, 2021, *not yet released for publication in the permanent law reports).*

THE *MCHAFFIE* RULE DOES NOT APPLY IN CASES WHERE PLAINTIFF HAS NOT ASSERTED A VICARIOUS LIABILITY CLAIM FOR AN EMPLOYEE'S NEGLIGENCE

Supreme Court of Colorado: Plaintiffs Erica and Steven Brown ("the Browns") went to the Denver Center for Birth and Wellness ("DCBW") when it came time for Erica to give birth to their child. The DCBW was a birth center for expectant mothers with low-risk pregnancies, and their newborn infants. Defendant Shari L. Long Romero, a certified nurse-midwife and employee of DCBW's, attended the delivery. "Tragically" the Brown's "child died during labor." The Brown's then brought suit against DCBW for negligence and negligent hiring and against Long Romero for wrongful death.

The Browns alleged "that DCBW and Long Romero failed to appropriately monitor" Erica, and failed to "recognize signs and symptoms of fetal distress, provide appropriate emergency care, and initiate transfer to a hospital or higher level of care when necessary."

After acknowledging vicarious liability for Long Romero's negligence, DCBW moved for partial judgment on Brown's negligent hiring claim, asserting that claim was barred by the *McHaffie* Rule. The "*McHaffie* Rule" provides that "where an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct negligence claims against the employer are barred."

The trial court, after applying the "*McHaffie* Rule" (previously adopted by Colorado courts in *Ferrer v. Okbamicael*, 390 P.3d 836, 841-42), granted DCBW's motion and dismissed Brown's negligent hiring claim, even though the Browns "had chosen not to assert vicarious liability for Long Romero's negligence."

The trial court noted that the Browns complaint did differ from *Ferrer* and *McHaffie* matters, in that the Browns "did *not* assert vicarious liability against DCBW" but "found sufficient grounds stated in the Colorado Supreme Court's analysis in *Ferrer* to extend the express ruling" and apply it to "actions *without* a specific *respondeat superior* claim" brought by the plaintiff.

After review of the matter, the Supreme Court of Colorado, vacated "the trial court's grant of partial judgment on the pleadings" holding that "the *McHaffie* Rule does not apply" where "the plaintiff does not assert vicarious liability for an employee's negligence."

Brown v. Long Romero, 495 P.3d 955 (Colorado 2021).

Utah

SUPREME COURT PARTIALLY OVERRULES *RICCI,* AND HOLDS INADVERTENT FALL WHILE SKIING CAN ESTABLISH NEGLIGENCE

Supreme Court of the State of Utah: After a long day of skiing while on a family ski trip to Park City, Dwight Sutton took his then nine-year-old daughter for one last run on a beginners' slope. Mr. Sutton was skiing backwards in front of his daughter while she attempted to slowly make her way down the hill, until she suddenly lost control and sped past her father. Slightly further down the mountain, Plaintiff, Stephanie Donovan, had stopped to take a picture of her husband and daughter. While putting her camera away, Ms. Donovan heard Mr. Sutton's daughter cry out "look out!" but did not have enough time to move out of the way before Mr. Sutton's daughter collided into her. Ms. Donovan suffered injuries to her arm and shoulder.

Ms. Donovan then sued the nine-year-old daughter for negligence and her father for negligent supervision. Ms. Donovan claimed the daughter breached her duty of care because she "failed to pay attention to her speed, failed to maintain a proper lookout for other skiers, and skied out of control and beyond her abilities." Ms. Donovan's claims against Mr. Sutton were based on allegations he breached his "duty and obligation to properly train and supervise" his daughter "to avoid collisions with other skiers."

At the end of fact discovery, the Suttons moved for summary judgment, relying on a court of appeals case, *Ricci v. Schoultz*, where the court held that a skier owes "a duty to other skiers to ski reasonably and within control, but an inadvertent fall on a ski slope, alone, does not constitute a breach of this duty." The Suttons claimed the daughter was skiing cautiously before she inadvertently lost control and slid into

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Ms. Donovan. The Suttons also pointed out that the daughter tried to warn Ms. Donovan before the collision. The Suttons also argued Mr. Sutton's supervision was reasonable because his daughter had professional ski lessons the year before and during this ski trip, Mr. Sutton had started his daughter in the beginning areas that morning to prepare her for the slopes, his daughter gave no indication she was tired after spending the day skiing, and Mr. Sutton never left his daughter unattended while she was skiing.

The district court granted the Sutton's motion for summary judgment, finding Mr. Sutton's daughter did not fail to use reasonable care under the *Ricci* standard when she was unable to maintain control as a beginning skier and fell. The court also determined "the undisputed facts failed to establish that Mr. Sutton negligently supervised his daughter" noting she had taken "ski lessons the year before, Mr. Sutton gave her instructions about how to slow down, and that he taught her to fall . . . if she felt like she was losing control." The court of appeals affirmed.

The Supreme Court of the State of Utah found that it had "not previously articulated the standard of care for skiers" and determined that "the applicable standard of care is a somewhat streamlined version of the one . . . in *Ricci*" holding "that a person has a duty to exercise reasonable care while skiing." The Court overruled *Ricci* to the extent that it "establish[ed] a categorical rule that an inadvertent fall, by itself, can never establish negligence." The Court also noted that "[w]hen a child is accused of negligence, the standard of care is measured by that degree of care which ordinarily would be observed by children of the same age, intelligence and experience under similar circumstances."

Notwithstanding it's clarification of Utah Law, the Supreme Court affirmed the grant of summary judgment for the Suttons. The Supreme Court affirmed the Court of Appeal's decision regarding the alleged negligence of both Mr. Sutton and his daughter, finding the facts did not establish that either breached their duties.

Donovan v. Sutton,
498 P.3d 382 (Utah 2021).

OPEN AND OBVIOUS DOCTRINE CANNOT SHIELD A LAND POSSESSOR WHEN THE POSSESSOR SHOULD HAVE ANTCIPATED INVITEE WOULD STILL ENCOUNTER THE DANGER

Court of Appeals of Utah: Plaintiff Tara Downham rented a home from Defendant Alan Arbuckle. The home had two doors leading to the backyard. The first door was a wooden swinging door; the second was a sliding glass door. A wooden step had been placed outside the sliding glass door to "bridge the gap between the home and the backyard." On a day in June 2015, after 18 months of use, the wooden step broke as Ms. Downham used it to enter the backyard, injuring Ms. Downham as a result. Before the step had broken, Ms. Downham had complained to Mr. Arbuckle that the step was "very wobbly, unsafe, and that it was moving" but she kept it there because "there was a drop-off from the door to the ground" and believed it "was safer than not having a step."

Ms. Downham subsequently sued Mr. Arbuckle for negligence based on principles of premises liability. Mr. Arbuckle moved for summary judgment, claiming that the "open and obvious danger rule" barred any recovery for Ms. Downham. The district court granted Defendant's motion holding that the "open and obvious" danger did apply and Mr. Arbuckle owed no duty to Ms. Downham. Ms. Downham then appealed the court's grant of summary judgment.

The Court of Appeals noted that the open and obvious rule "does not always shield a land possessor from liability where the danger is . . . determined to have been open and obvious" declaring that "the possessor is not relieved of the duty of reasonable care . . . if the possessor had reason to expect that the invitee would nevertheless suffer physical harm from the open and obvious danger."

The appeals court held that it agreed that, as a matter of law, the danger of the wooden step was open and obvious. However the Court concluded, based partially on Mr. Arbuckle's own deposition, that "a jury could reasonably determine that Arbuckle should have anticipated that Downham would encounter this danger despite the risk" and "reversed the district court's grant of summary judgment."

Downham v. Arbuckle,
2021 WL 5267864, 2021 UT App 121
(November 12, 2021,
not yet released for publication in the permanent law reports).

Wyoming

A MANUFACTURER HAS A DUTY TO WARN WHEN IT DESIGNS A PRODUCT THAT REQUIRES OR SPECIFIES THE USE OF A KNOWN-TO-BE HAZARDOUS AFTERMARKET REPLACEMENT PART OR ADDITIONAL PART

U.S. District Court, Wyoming: During September of 2015, while driving a 1999 truck-mounted Manitowoc model 777T crane near Sundance, Wyoming, for his employer, Kuhr Trucking, LLC ("Kuhr"), Christian Shields "noticed that an outer wheel on the crane's middle rear drive axle was wobbling." Mr. Shields pulled off the interstate and called Kuhr, who in turn called Herb Robinson, "the owner of a local repair shop and towing company."

On September 29 and 30, 2015, Herb and his brother Clay, were attempting to fix the outer wheel on the crane. When the crane was originally sold it came "with a detailed set of warnings, a warning plate, warning decals and manuals concerning its service and operation." Herb and Clay were not "properly trained" to service the type of axle assembly of the crane and neither brother was "provided with or asked to see any operation or service manuals for the crane."

After multiple failed attempts to stop the tire from wobbling, Herb decided to try "switching the inner and outer tires on the middle axle." While attempting to switch the tires, "the outer rim assembly failed causing the outer tire to strike" Herb and explode, releasing "a huge gush of air that

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propelled the rim base and tire into" Herb, killing him. Plaintiff Cora Robinson, Herb's wife, was also present at the time of the incident.

The investigation uncovered that the "rim and wheel assembly on the crane had mismatched parts and was not in proper repair" at the time Herb attempted the repair and it "wobbled because there was inadequate material left to hold it together."

Herb's wife Cora, then sued multiple defendants for negligent infliction of emotional distress. After various settlements and dismissals, Grove US, LLC ("Grove") was the only remaining defendant. Grove had evaluated and selected the "multi-piece rim systems used on the truck crane" and "placed the truck crane into the stream of commerce." After Herb's death, it was discovered and undisputed "that the failed assembly was a replacement part that Grove neither manufactured nor provided."

Sometime in 2016, Kuhr "disposed of and destroyed the used and worn rim and wheel parts" despite an October 13, 2015 preservation letter "requesting the preservation of the subject rim and maintenance records."

Grove argued it could not be held liable for Herb's death under the "bare metal" defense, asserting "a manufacturer or product designer is not liable for replacement parts they did not make or provide." Cora argued the court should follow "the more plaintiff-friendly approach, which merely requires foreseeability" stating "a manufacturer may be liable when it was foreseeable that the manufacturer's product would be used with another product or part, even if the manufacturer's product did not require use or incorporation of that other product or part."

The court noted a third "middle approach" that finds "a manufacturer does have a duty to warn when its product requires incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses." This middle approach holds that a "manufacturer may be liable even when the manufacturer [did] not itself incorporate the required part into the product."

Because the Wyoming Supreme Court had "not yet decided this question . . . and the issue [was] one of state law" the federal court relied "on decisions from other state and federal courts, as well as on the general weight and trend authority" to "predict[] how the Wyoming Supreme court would rule."

The Court, found *Robinson v. Flowserve*, Case No. 14-CV-161-ABJ, 2015 WL 11622965 (D. Wyo. Oct. 9, 2015) persuasive in the matter. *Flowserve* was an asbestos case with a similar issue based on Wyoming state law. The federal judge in *Flowserve*, also predicting how the Wyoming Supreme Court would rule, held that the Wyoming court "would adopt the bare-metal doctrine for purposes of strict liability . . . [b]ut as to negligence . . . the state supreme court would . . . instead adopt a middle approach." Thus the federal court held the Wyoming Supreme Court would also take the middle-approach in this matter and "find a manufacturer has a duty [to warn] when it design[s] a product that require[s] or specifie[s] the use of a known-to-be hazardous aftermarket replacement part or additional part" and therefore Grove had such a duty.

Robinson v. Grove US, LLC,
2021 WL 5235548
(D. Wyoming, November 10, 2021)

INDIVIDUAL BOARD MEMBERS DEEMED VOLUNTEER WORKERS, THUS PRECLUDING LIABILITY COVERAGE

U.S. District Court, Wyoming: This coverage case arises from an accident on July 25, 2015, when a wagon at a Red Desert Roundup Rodeo event, "overturned and injured several passengers" including several board members of the Red Desert Roundup Rodeo, Inc. ("Red Desert"). Four of the board members filed lawsuits in a separate case against Patrick Sheehan ("Sheehan") and Hog-Eye Ranch, LLC ("Hog-Eye").

At the time of the incident Sheehan and Hog-Eye were covered by an excess policy issued by Mountain West Farm Bureau Mutual Insurance Company ("MWFB"). Red Desert had liability coverage under a T.H.E. Insurance Company ("T.H.E.") policy. Sheehan and Hog-Eye submitted a claim for their defense to T.H.E. believing they were covered by T.H.E.'s policy for volunteer workers and other provisions, but T.H.E. denied coverage. MWFB then provided a defense to Sheehan and Hog-Eye, and with Sheehan and Hog-Eye as Plaintiffs, subsequently filed a complaint "seeking to recoup defense costs" and "claiming T.H.E. had a duty to defend Sheehan and Hog-Eye."

Plaintiffs in the coverage case argued Sheehan and Hog-Eye did fall under the volunteer workers and Special Events Endorsement provisions and therefore T.H.E. had a duty to defend. T.H.E. argued "the duty to defend standard only applies when determining if coverage exists for a clearly identified insured, not when determining if someone qualifies as an insured." T.H.E. further claimed Sheehan and Hog-Eye did not fall under the volunteer provision "because (1) the injured parties were also volunteer workers and (2) Sheehan and Hog-Eye received compensation." T.H.E. further argued Sheehan and Hog-Eye "did not qualify under the Special Events Endorsement because the incident did not arise out of Red Desert's negligence."

Plaintiffs seeking liability coverage argued the "injured board members could not be volunteer workers" because, as board members, they did "not perform their work at the direction of Red Desert" and instead were "the ones, who give directions to others." Plaintiffs cited to Wyoming Statute ¶ 17-19-801(b) (2021) which states; "except as provided in subsection (c) of this section, all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board."

While the federal court found the argument "creative" they concluded "the reality is that board members can both direct Red Desert and subsequently act at the direction of it." The court noted ¶ 17-19-801(b) "does not say an entity such as Red Desert shall be directed by a single member of the board, it states it shall be directed by the board." The court interpreted this to mean "Red Desert may be directed by members of the board together, when they comprise the board directors, however, individual members of the board may subsequently

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act at the direction of Red Desert." The court further found the board members "were acting at the direction of Red Desert" when they were "riding out into the arena" and concluded this made the board members "volunteers as defined by the policy" and T.H.E. did not owe a duty to defend Sheehan and Hog-Eye for damages caused to" them.

Sheehan v. T.H.E. Insurance Company, 2021 WL 5918005 (D. Wyo. November 18, 2021).

Texas

UNDER THE COMING-AND-GOING RULE, MOTORIST WAS NOT IN THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF COLLISION EVEN THOUGH MOTORIST WAS IN USE OF AN EMPLOYER OWNED VEHICLE

Court of Appeals of Texas, Fort Worth: On September 29, 2015, Anthony Nelson, was involved in a motor vehicle accident with Guillermo Arce while driving home from his branch office in a car owned by Nelson's employer, Enterprise Rent-A-Car ("Enterprise"). Arce subsequently sued Enterprise "alleging negligent entrustment, joint enterprise, and vicarious liability." After the trial court granted summary judgment in favor of Enterprise on Arce's claims for negligent entrustment and joint enterprise, the remaining claims, including Arce's claims of vicarious liability, proceeded to trial.

The jury found that Nelson was in the course and scope of his employment with Enterprise at the time of the collision and "found Nelson 100% causally negligent and awarded Arce substantial damages." After the trial court denied Enterprise's motion for judgment notwithstanding the verdict, wherein Enterprise asserted there was legally and factually insufficient evidence to support the jury's answer regarding course and scope of employment, Enterprise appealed.

When Nelson became a branch manager for Enterprise, Nelson qualified for Enterprises corporate personal use program, which allowed him to use Enterprise vehicles for personal use. This program allowed Nelson to "choose any vehicle on the lot" and drive it "from the Enterprise lot where he worked to his home and back . . . he could also drive a vehicle on weekends or on his off-duty days for personal use." The "program also offered liability protection for Nelson in the event of a covered claim." Nelson paid $200 a month to be part of the personal use program.

At the time of the subject accident Nelson "was driving home in an EAN personal-use vehicle after work . . . [h]e was not conducting any [Enterprise] business at the time" and he planned to pick up dinner for himself on the way home. Nelson "had no plans to conduct any [Enterprise] business when he arrived home for the evening," and Enterprise had no expectation that he would work from home.

The Appeals Court noted Texas has long held to the "coming-and-going rule" which provides "in the third-party context, the criteria for course and scope of employment are generally not met when an employee is traveling to or from work." However, the court provided "in vicarious liability law" there "is a rebuttable presumption that an employee driving a company-owned vehicle is presumed to be in the course and scope of his employment while driving the vehicle." This presumption can be "overcome when positive evidence to the contrary is introduced."

Enterprise argued "Nelson was not in the course and scope of his employment at the time of the accident" because he "was on his way home from work with an intermediate stop to pick up dinner for himself . . . when the accident occurred" and therefore his actions fell "within the ambit of the coming-and-going rule."

Arce argued that because the "Enterprise branch office was open until 6:00 p.m." and Nelson regularly worked until 6:00 p.m. or later, coupled with "evidence that the collision occurred at 5:25 p.m." there was evidence that Nelson was still working at the time of the collision. Arce further contended that Nelson's "episodic conduct of transacting business from his home" established he was in the course and scope of his employment at the time of the subject accident.

The court of appeals held Arce did not provide evidence that Nelson was working in course and scope of his employment and "employer's personal-use program and rules did not create right of contractual control sufficient to impose vicarious liability" on Enterprise. The court thus reversed the jury's verdict and remanded.

EAN Holdings, LLC v. Arce, 2021 WL 4783156 (October 14, 2021).

LIABILITY COVERAGE APPLIED TO CLAIMS OF TRUCK DRIVER WHO WAS DEEMED IN USE OF THE VEHICLE WHEN HE WAS INJURED WHILE RUNNING AFTER THE TRUCK IN AN ATTEMPT TO STOP IT ROLLING DOWN THE HILL

U.S. District Court, N.D. Texas, Fort Worth Division: While making a delivery in Wise County Texas on February 28, 2019, truck driver Larry Duane Haley was injured after the company truck he had parked on top of a hill with the park brake set began to roll down a hill. Haley ran after the truck in an attempt to stop the rolling vehicle but fell and shattered his right knee. The truck continued until it hit an electrical pole.

The truck's owner, Jose Dominguez, had purchased a business auto insurance policy on the truck from Acuity. The policy provided Acuity would "pay all sums an insured legally must pay as damages because of bodily injury . . . to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto." The policy further provided Acuity owed "no duty to defend any insured against a suit seeking damages for bodily injury . . . to which this insurance does not apply."

Haley subsequently sued Dominguez in state court "alleging that Dominguez failed to properly maintain the vehicle." Subject to a reservation of rights, Acuity agreed to defend Dominguez. Acuity

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then filed a declaratory relief action and moved for summary judgment arguing that it had no duty to defend or indemnify Dominguez in the underlying lawsuit asserted by Haley because "Haley's accident – falling while outside the truck – did not result from the ownership, maintenance or use of a covered auto" and thus "does not trigger coverage under the policy."

Dominguez and Haley responded and filed their own cross-motions for summary judgment contending Acuity has a duty to defend and indemnify because Haley's injury "resulted from the maintenance or use of a covered auto."

The federal court, noted "Texas courts apply the eight-corners rule" which requires the court to look "at the four corners of the insurance policy, plus the four corners of the complaint" to determine whether the claim "fall[s] within the scope of the policy." The federal court further relied on Texas courts' adherence to the *Lindsey* factors which provide three instances where an injury may apply to the "use" provision of an automobile policy:

> (1) the accident must have arisen out of the inherent nature of the automobile, as such, (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated, (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury.

Applying the eight-corners rule and *Lindsey* factors, and acknowledging that "Texas courts define 'use' broadly," the court determined that because the truck "itself produce[d] the danger" and "Haley's running was a direct response to the truck rolling down the hill, and his fall was a natural consequence of the situation's urgency . . . the truck was a but-for-cause of the accident" and under Texas' broad construction of "use" "Haley's injury resulted from the use of the truck." The court then held that "Haley's complaint triggers coverage under Acuity's policy" and granted both Dominquez's and Haley's cross motions for summary judgment "on Acuity's duty to defend Dominguez in the underlying lawsuit."

Acuity, A Mutual Insurance Co. v. Dominguez, 2021 WL 4748584 (October 12, 2021).

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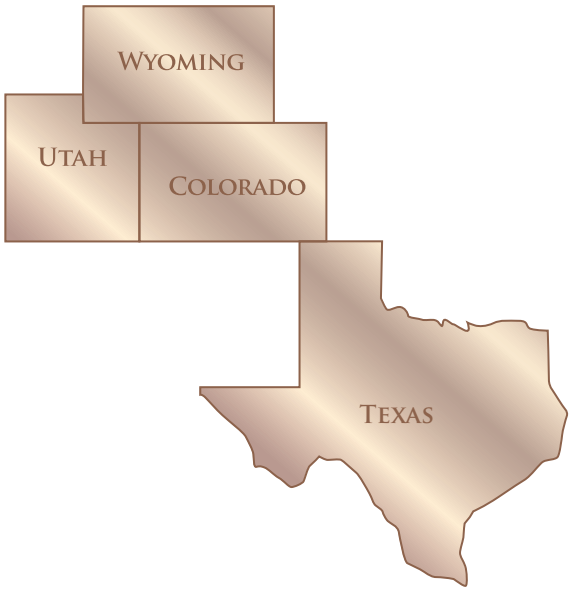

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