Spring 2022

DEWHIRST & DOLVEN LLC Attorneys at Law

LEGAL UPDATE

Colorado • Utah • Wyoming • Texas

IN BRIEF

COLORADO

- Colorado Supreme Court finds individual insurance adjusters are not parties to the contract between the insured and the insurance company and thus cannot be sued under section 10-3-1116.

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UTAH

- The Utah Supreme Court follows federal precedent establishing that preinjury release forms must specifically and unequivocally inform of the intent to hold the released party blameless for its own negligent conduct to be enforceable.

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WYOMING

- The Supreme Court of Wyoming overrules *Hopper* declaring the liberal blue line pencil rule contrary to traditional contract law and finding it has created injustice for employees and encouraged employers to draft unreasonable noncompete agreements.

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TEXAS

- The Supreme Court of Texas determined when a physician-patient relationship is created and treatments provided, claims regarding spa treatments do fall under the Texas Medical Liability Act.

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COLORADO

THE COLORADO SUPREME COURT HOLDS INSURANCE ADJUSTERS CANNOT BE SUED UNDER CLAIMS OF UNREASONABLE DELAY OR DENIED INSURANCE BENEFITS BECAUSE INDIVIDUAL ADJUSTERS ARE NOT PARTIES TO THE CONTRACT BETWEEN THE INSURED AND THE INSURANCE COMPANY

Supreme Court of the State of Colorado: Alexis Skillett, was involved in a car accident. After settling with the "at-fault driver," Skillett filed a claim with her insurer, Allstate Fire and Casualty Insurance Company ("Allstate") for underinsured motorist benefits.

Skillett's claim was assigned to insurance adjuster, Collin Draine, who "concluded that Skillett was not entitled to underinsured motorist benefits." Allstate thus denied Skillett's claim. Skillett then filed suit against both Allstate and Draine in Denver District Court.

Skillett's "claims against Allstate included breach of contract, statutory bad faith, and common law bad faith." Against Draine "she alleged that he had personally violated section 10-3-1116, which creates a cause of action for insureds whose insurance benefits have been unreasonably delayed or denied."

Because Skillett and Draine were both Colorado residents, the federal court lacked jurisdiction because the claims were based on state law. Had Draine not been a party to the suit, the federal courts would have had diversity jurisdiction based on Allstate not

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being a Colorado resident. Claiming that "Draine had been fraudulently joined to thwart diversity jurisdiction," Allstate "removed the case to federal court." The federal court "determined that Allstate raised an important, unsettled question of Colorado law" noting "that uncertainty about the proper interpretation of the statute had been created by a conflict between" Colorado case law and federal case law interpreting section 10-3-1116's applicability to individual adjusters. The federal court then certified the question to the Supreme Court of the State of Colorado.

The Colorado Supreme Court noted section 10-3-1115(2) provided "for the purposes of an action brought pursuant to this section and section 10-3-1116, *an insurer's* delay or denial was unreasonable if *the insurer* delayed or denied authorizing payment." The Court determined this language established section 10-3-1116 applied only to an insurer and not the individual adjuster. Indeed, the Court further noted it is the insurance company, not an adjuster, who authorizes any payments to claimants.

The Court further declared that "[i]nsurers and insureds – not adjusters – are the parties to an insurance policy. They are the ones who undertake obligations under such policies, and it is the insurer – not the adjuster – who may be obligated to pay insurance benefits." The Court noted it "would seem odd to allow an insured to recover two times the covered benefit from an adjuster who . . . has not otherwise undertaken any obligation to pay the covered benefit."

The Court thus held that claims under section 10-3-1116, for unreasonably delayed or denied insurance benefits, cannot be brought against an individual adjuster. The Court then returned the case to the federal court "for further proceedings."

Skillett v. Allstate Fire & Cas. Ins. Co., 2022 CO 12.

COURT OF APPEALS FINDS INSURANCE POLICY'S MISSTATEMENT OF LAW AND CONFUSING LEVEL OF COVERAGE VIOLATED COLO. REV. STAT. §10-4-609

Colorado Court of Appeals: In 2010 Edward Mullen "completed and signed the UM/UIM Selection Form" provided by Metropolitan Casualty Insurance Company ("Metropolitan") who insured both him and his wife, Margaret Mullen. On this form, Edward selected "UM/UIM coverage in the amount of $25,000 per person and $50,000 per accident." Previously, the Mullen's policy had included $100,000/$300,000 coverage before Edward signed the Slection Form changing the limits. Edward then died on November 20, 2010. Between 2011 and 2018 "Margaret never requested an increase in her UM/UIM coverage."

After a car crash on October 17, 2018, Margaret "suffered serious injuries" and "Metropolitan issued Margaret a $25,000 check as payment of the maximum UM/UIM benefits under the policy." Because Margaret's damages exceeded the $25,000 payment, she brought a claim against Metropolitan asserting Metropolitan did not satisfy their statutory duties to "(1) offer the Mullens UM/UIM coverage 'before the policy is issued or renewed' and (2) notify the Mullens of the opportunity to purchase UM/UIM coverage in a manner reasonably calculated to permit them to make an informed decision."

Both parties brought Motions for Summary Judgment. The district court, following the holding in *Airth v. Zurich American Insurance Co.*, concluded "Metropolitan had a one-time duty to offer UM/UIM coverage, which it satisfied by providing the UM/UIM Selection Form [in May 2010] before the insured needed the UM/UIM coverage." The district court further concluded that "Edward had authority to make the UM/UIM election when he made it and that the election was binding on Margaret after Edward's death."

The appeals court reversed the district court's decision, agreeing with Margaret's second contention that Metropolitan failed to "notify the Mullens of the opportunity to purchase UM/UIM coverage in a manner reasonably calculated to permit them to make an informed decision," based on the holding in *Allstate Insurance Co. v. Parfrey*. In *Parfrey*, the Colorado Supreme Court determined that Colorado statute, §10-4-609(2) required that insurers not only had a "one-time duty . . . to notify an insured of the nature and purpose of UM/UIM coverage and to offer the insured the opportunity to purchase such coverage" but that the insurer must also make the offer "in a manner reasonably calculated to permit the potential purchaser to make an informed decision."

The appeals court found that the UM/UIM Selection Form provided to the Mullens in May of 2010 was not only "an inaccurate statement of the law that incorrectly suggest[ed] that UM/UIM coverage would not be available if an underinsured motorist's liability limits were the same as or greater than the insured's UM/UIM limits," but also that the information "regarding the available levels of coverage and related premiums [was] confusing." Because of the inaccurate statement of law and the confusing levels of coverage, the appeals court found Metropolitan had failed to make the offer in a manner that permitted the Mullens to make an informed decision and thus violated §10-4-609(2). The appeals court remanded "with directions to enter summary judgment in favor of Margaret," including the $100,000/$300,000 UM/UIM coverage limits as requested in her motion.

Mullen v. Metro. Cas. Ins. Co., 2021 COA 149 (Co. Ct. App.) (December 16, 2021).

ASBESTOS CONTAMINATION FROM USE OF HVAC AFTER CAR COLLIDED WITH HOME NOT A SUDDEN DIRECT LOSS AND NOT COVERED UNDER THE HOMEOWNERS INSURANCE POLICY

U.S. District Court, D. Colorado: On June 19, 2018, an intoxicated driver collided with a parked car near the insured's home, causing the parked car to then crash into the insured's home. A guest bedroom and personal property inside the guest room were damaged as a result of the collision. The collision also caused part of the exterior wall of the guest bedroom "to land directly on top of an HVAC supply vent on the floor inside the home." The insured then filed a claim with his homeowner insurance company.

A contractor inspected the damage and prepared an initial estimate. The inspection also included tests for asbestos and lead. The insured was informed the property tested "hot" for asbestos and "would require further testing to determine the extent of contamination." The property was inspected again and a report was generated finding "asbestos on a bookcase in the guest room and inside the HVAC supply duct located outside the area immediately impacted by the collision." Because of the asbestos found in the HVAC duct, it was recommended to treat "the entire property as an asbestos spill site."

Sometime after the collision, but before the asbestos test, the insured's "fiancée ran the HVAC system to warm the house on a chilly morning." After learning about the asbestos spill, the insured "immediately stopped using the HVAC system." Unfortunately, the previous use of the HVAC system spread asbestos throughout the home. Asbestos abatement was then performed on the property.

The homeowner insurance company paid the insured "for all damage to the dwelling" from the collision. The insured also requested coverage for loss to personal property, including items located in rooms other than where the collision occurred that had been contaminated with airborne asbestos. The carrier denied coverage for personal items that were damaged "as a result of the asbestos spill," and the insured then sued claiming breach of contract and bad faith. Both parties moved for summary judgment.

Following Colorado case law to interpret the policy's meaning, the federal court determined the clear language of the policy did not cover the asbestos contamination because the contamination was not a "direct, physical loss" caused by the collision. The court further determined the asbestos contamination was not a "sudden and accidental, direct physical loss" because the damage to "rooms otherwise unaffected by the collision did not occur suddenly" and the policy did not include damage to personal property that occurred "gradually." The court granted summary judgment to the insurance company on the breach of contract claim and declined to opine on the bad faith claims since it had already found "denial of coverage was proper as a matter of law."

Walkinshaw v. USAA Cas. Ins. Co., 2022 U.S. Dist. LEXIS 21505 (10th Cir. D. Colorado) (February 7, 2022).

Utah

UTAH SUPREME COURT FOLLOWS FEDERAL PRECEDENT APPLYING UTAH STATE LAW TO FIND PREINJURY RELEASES MUST CLEARLY AND UNMISTAKABLY INFORM THE RELEASOR TO BE ENFORCEABLE

Supreme Court of the State of Utah: Layton City firefighter, Brian Cunningham, attended a Special Weapons and Tactics (SWAT) training conducted by Weber County. During the training Cunningham suffered "significant injuries to his face and neck" when an explosive detonated on a door latch and Cunningham's instructors "had Cunningham stand a few feet away."

Cunningham and his wife filed suit against Weber County alleging negligence for failure to follow its safety procedures, gross negligence "by failing to observe even the slightest care and by showing an indifference to the consequences that could result," and loss of consortium. The County moved for summary judgment arguing "Cunningham had released his negligence cause of action against the County" when he signed a release before beginning the training. The County furthered argued immunity for the gross negligence and loss of consortium causes of action under the Governmental Immunity Act of Utah (GIA).

The district court granted the County's motion, holding the signed release "was enforceable and precluded the negligence claim" and that the GIA granted immunity to the County against the gross negligence and loss of consortium claims. The Cunninghams appealed.

Following the reasoning found in several federal cases applying Utah State law, the Utah Supreme Court

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held "a preinjury release must clearly and unmistakably inform a reasonable person who and what she is releasing to be enforceable." The release Cunningham signed provided that he would "unconditionally and irrevocably release and discharge the Ogden Metro SWATT [sic] Team and all related organizations and entities from any and all claims, demands, damages, actions and causes of action arising, whether directly or indirectly, from or in connection with attending or participating in the described SWAT training." The Court found the language of the release too "broad" and "general" to be enforceable because it did "not specifically nor unequivocally evince an intent to hold the released party blameless for its own negligent conduct."

The Court further determined "the district court also erred when it read the GIA to not waive the government's immunity for gross negligence and certain loss of consortium claims." The Court reversed the grant of summary judgement and remanded.

Cunningham v. Weber Cnty.,
2022 UT 8 (February 17, 2022).

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

Court of Appeals of Utah: In October 2015, Utah company, MX, "began internal discussions about hosting a major corporate conference" with plans to invite both current and prospective clients. The next month, MX's Events Manager (a twenty-four year old who had only been hired a few months prior) and the Event Coordinator "were tasked with the assignment of negotiating a prospective contract with Stein" and "participated in a site visit" to tour Stein's facilities as a potential site for the event.

After more correspondence with Stein, the Events Coordinator expressed interest in the venue but informed Stein she needed to get approval from MX's new CMO "before moving forward." Stein then informed the Events Coordinator other groups had also indicated interest for the venue on the same days, and they would need "commitment from MX in order to hold the rooms open."

On New Year's Eve, Stein contacted the Events Manager "alerting her that another group had submitted a proposal that conflicted with MX's proposed dates and asking to 'confirm everything and finalize the contract.'" In an effort not to lose the dates, the Events Manager signed the contracts that same day, without alerting upper management.

The contract required two $2,500 deposits and an additional $75,000 deposit due at a later time. The Events Manager paid the $2,500 deposit on January 5, 2016 using a company credit card. None of upper management knew the Events Manager had entered in the contract and believed the $2,500 deposit was to hold the dates.

Eventually the CFO and CMO learned of the contract and "attempted to negotiate a resolution with Stein, explaining in an email that, in his view the contracts had not been approved per corporate policy" and that the Events Manager was "not authorized to sign on behalf of or legally bind MX." Stein refused to negotiate and filed suit against MX for "breach of contract, seeking $350,660 in liquidated damages."

Both parties then filed motions for summary judgment, with Stein asserting the Events Manager "either had authority to sign the contracts or, alternatively, that MX ratified the contracts after execution." The district court granted Stein's motion after determining the Events Manager "had authority to sign the contracts and that, even if she did not, her actions were ratified by MX upper management."

The appeals court found that because MX's company policy required "any payment over $20,000 had to be run through company software and approved by CFO" and "CFO unequivocally testified that Events Manager did not have authority to sign," it is disputed whether the Events Manager did have express authority to bind MX to the contract. The appeals court further determined, that despite the fact the Events Manager had entered into a similar contract for MX previously, it was "not enough to establish the reasonableness of Events Manager's belief as a matter of law" that she had implied actual authority, noting they did not know enough about the previous contract and that "she was aware of the prevailing company policy" that she needed approval to enter into the contract. The case was remanded back to the district court for further proceedings.

Stein Eriksen Lodge Owners Ass'n v. Mx Techs.,
2022 UT App 30
(March 10, 2022).

Wyoming

WYOMING SUPREME COURT OVERRULES HOPPER AND DETERMINES WYOMING WILL NO LONGER FOLLOW THE BLUE PENCIL RULE ON NONCOMPETE AGREEMENTS

Supreme Court of Wyoming: Charlene Hassler worked for Circle C Resources providing residential habilitation services in her home to

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Circle C clients. Hassler quit Circle C's employment after a client decided to find another provider. Hassler found employment with the other provider and continued to care for the client in the Hassler's home. Hassler also worked on becoming a Medicaid provider herself. Circle C then filed suit against Hassler, based on a noncompete agreement she had signed when she began working for Circle C. Hassler answered Circle C's complaint, asserting the noncompete "was unenforceable and void as against public policy."

The district court found the noncompete would be enforceable if the geographical and duration restrictions were narrowed. Following *Hopper v. All Pet Animal Clinic, Inc*., the district court used the liberal blue pencil rule to "reform the duration and geographical terms of Circle C's noncompete agreement . . . to make the agreement reasonable" and granted summary judgment to Circle C.

The Supreme Court of Wyoming, found the district court "logically followed *Hopper*" precedent, but determined the blue pencil rule was "contrary to traditional contract law, has worked an injustice on employees, and has contributed to uncertainty in business relationships by encouraging employers to draft overly broad, unreasonable restraints on trade." The Court therefore overruled *Hopper's* adoption of the blue pencil rule and found Circle C's noncompete agreement "unreasonable on its face and, therefore, void in violation of public policy." The Court then reversed and remanded the matter back to the district court.

Hassler v. Circle C Res.,
2022 WY 28
(February 25, 2022).

Texas

Supreme Court of Texas Holds Claims Alleging Negligent Skin Treatments at Spa Fall Under the Texas Medical Liability Act

Supreme Court of Texas: In her suit against Lake Jackson Medical Spa, Ltd., Erika Gaytan alleged the Spa "negligently performed various skin treatments that caused scarring and discoloration." In their answer, the Spa "moved to limit discovery because Gaytan had not yet served them with an expert report as the Texas Medical Liability Act Requires." Gaytan argued that her complaint did not fall under the Act because her claims were only about "cosmetic skin treatments" that she received for "purely aesthetic reasons." Her response included an affidavit stating she was not referred by a medical doctor, she received cosmetic treatment for acne (not for any type of "disease, disorder or injury"), she did not "recall completing any medical-history or patient-consent forms," and she did not consult with Dr. Yarish, the owner of the Spa.

Gaytan also filed a second-amended complaint "the day before the hearing on defendant's dismissal motion, in which she omitted all references to the Act and to 'medical' treatments or negligence." The trial court denied defendants' dismissal motion and the court of appeals affirmed.

The Supreme Court of Texas found that because the treatments Gaytan received were "pursuant to a physician-patient relationship" and the treatments were provided "during Gaytan's medical care, treatment, or confinement," and because Gaytan's claims asserted "departures from accepted standards of health care," they did fall under the Texas Medical Liability Act. Finding Gaytan's claims

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is published quarterly by
Rick N. Haderlie, Esq. and
N. Michelle Phleps, Esq.
of
Dewhirst & Dolven, LLC

For more information regarding legal developments, assistance with any Utah, Wyoming, Colorado or Texas matter, contact Rick Haderlie at
rhaderlie@dewhirstdolven.com
222 S. Main Street
5th Floor
Salt Lake City, UT 84101
(801) 274-2717
www.DewhirstDolven.com

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were "subject to the Act's expert-report requirements" and "Gaytan failed to serve an expert report before the Act's 120-day headline," the Court dismissed her claims and remanded.

Lake Jackson Med. Spa, Ltd. v. Gaytan,
2022 Tex. LEXIS 197
(Feb 25, 2022).

SUPREME COURT FINDS AUTOMOBILE INSURANCE COMPANY HAD NO DUTY TO DEFEND OR INDEMNIFY FOR INJURIES THAT OCCURRED IN GOLF CART INCIDENT AS GOLF CARTS DID NOT FALL WITHIN THE POLICY TERMS

Supreme Court of Texas: While riding in a golf cart with Cristoval DeLaGarza, Jr., who worked at Pharr-San Juan-Alamo Independent School District as a certified athletic trainer, Lorena Flores's minor daughter Alexis, was injured when she fell from the cart. Flores then sued the School District claiming DeLaGarza "suddenly, and without warning, turned the golf cart abruptly, thereby throwing Alexis" from the golf cart while "acting within the course and scope of his employment with the School District."

The School District requested their automobile insurance provider, the Texas Political Subdivisions Property/Casualty Joint Self Insurance Fund "provide a defense against Flores's claims and indemnify the School District against any resulting liability." The Insurance Fund refused asserting that because a golf cart "is not designed to travel on public roads" it did not fall under the term "auto" as defined in the policy and was thus not a covered vehicle. After being unable to resolve the matter, the Insurance Fund sought declaratory judgment that it had no duty to defend and the School District filed a counter-claim arguing "the policy required the Insurance Fund to defend and indemnify the School District."

While the declaratory judgment action was pending, a bench trial in the Flores's suit was conducted. The court found in favor of Flores and "entered a final judgment ordering the School District to pay Flores $100,000." Meanwhile, the Insurance Fund and the School District both filed summary-judgment motions in the declaratory action "addressing both the duty to defend and the duty to indemnify."

The trial court found in favor the School District, determining that as a matter of law the policy required the Insurance Fund to defend and indemnify the School District. On the Insurance Fund's appeal, the appeals court "reversed holding that neither party was entitled to summary judgment on either the duty to defend or the duty to indemnify" and remanded the case back to the trial court. The School District then petitioned the Supreme Court of Texas for review.

Using the eight-corners rule, the Court determined "the Insurance Fund had no duty to defend the school district because Flores's petition did not allege a claim that could fall within the policy's coverage for liabilities resulting from the use of a vehicle designed for travel on public roads." The eight-corners rule considers only the allegations made in "the underlying lawsuit" and "the terms of the insurance policy." The Court does not consider "the truth or falsity of such allegations" or "what the parties know or believe the true facts to be."

The Court also held "that the trial court erred by granting summary judgment for the School District because the summary-judgment evidence did not conclusively establish that the" golf cart was a "covered auto" under the policy." The Court further declared that under its "reasoning, the Insurance Fund would be entitled to summary judgment on both the duty to defend and the duty to indemnify."

Pharr-San Juan-Alamo Indep. Sch. Dist. v. Tex. Pol. Subdivisions Property/ Casualty Joint Self Ins Fund,
2022 Tex. LEXIS 149
(February 11, 2022)

DEWHIRST & DOLVEN
Attorneys at Law
www.DewhirstDolven.com

SALT LAKE CITY
222 S. Main Street,
5th Floor
Salt Lake City, UT 84101
(801) 274-2717

DENVER
650 S. Cherry St.,
Ste 600
Denver, CO 80246
(303) 757-0003

COLORADO SPRINGS
405 S. Cascade Ave., Ste 301
Colorado Springs, CO 80903
(719) 520-1421

FORT COLLINS
2580 East Harmony Rd.,
Ste 201
Fort Collins, CO 80528
(970) 214-9698

GRAND JUNCTION
2695 Patterson Road,
Ste 2, #288
Grand Junction, CO 81506
(970) 241-1855

SAN ANTONIO
One Riverwalk Place,
700 N. St. Mary's St.,
Ste 1400-5767
San Antonio, TX 78205
(210) 817-4001

SOUTH PADRE ISLAND
2216 Padre Boulevard, Ste B605
South Padre Island, TX 78597
(956) 433-7166

CASPER
5830 East 2nd Street
Casper, WY 82609
(307) 439-6100

CLM