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DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas • Arizona

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COLORADO

DEWHIRST & DOVLEN OBTAINS FAVORABLE VERDICT IN TRUCKING CASE AGAINST PLAINTIFF SEEKING $1.4 MILLION

Denver County: Defendant Larry Welch, for Advantage Trucking, was driving a semi-tractor and trailer when he experienced mechanical difficulties. After attempts to resolve the situation, he detached the trailer and traveled toward Denver. He stopped for breakfast off of I-70. After breakfast, the semi-tractor would not initially start. However, he was able to later get it started and travelled to pick up the trailer because it had been repaired. In the dark (at about 4:00 a.m.) and misunderstanding the oral GPS instruction, he accidentally turned onto the I-70 off ramp. When he reached I-70 eastbound, Mr. Welch realized his error and attempted to execute a three point turn to head back off the ramp. Unfortunately, the tractor experienced an electrical failure, died, and could not be restarted. The tractor stalled perpendicularly to the exit, although it did not extend into the through lanes of I-70. There was an approximately 10-12 foot gap on the shoulder between the concrete jersey barriers at the edge of the road and the back of the truck. Mr. Welch testified that several cars were able to pass through this gap and exit the highway before the accident occurred.

Plaintiff claimed he intended to exit I-70 when he saw the truck. He swerved and braked suddenly. His jeep encountered the concrete barrier, completed a 360 roll, and stopped upright. There was no collision between Plaintiff's jeep and the tractor. Plaintiff claimed he did not see the tractor until too late and that there were no lights or signs illuminating the truck. Although the semi had been furnished with triangular warning cones, these had been left with the trailer. Mr. Welch asserted that the truck's lights were on, though not directly pointed at Plaintiff given the position of the tractor. Plaintiff did not seek immediate medical attention, but later returned to the ER after having called counsel. Plaintiff claimed that the accident injured his shoulders, which had been surgically repaired before the accident. After the accident, Plaintiff again underwent surgery to repair his shoulder. Further, Plaintiff claimed that he suffered a debilitating neck injury/cervical spinal injury that would require a discectomy and fusion. Plaintiff was later laid off from work, and claimed he was laid off because his injuries made him less productive. Plaintiff's counsel asked for $1.4 million at trial.

At trial, Dewhirst and Dolven attorneys George Parker and Lars Bergstrom

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argued that, although the driver of the tractor had made an understandable, but unfortunate mistake, Plaintiff bore substantial responsibility for the accident. Plaintiff was contributorily negligent for failing to see the stalled tractor and act reasonably to avoid an accident. Plaintiff had modified his jeep, lifting it up approximately six inches and installed larger tires. The defense liability expert, Dr. Kittles, testified that the modifications caused the jeep to ride up the concrete barrier and flip. Had the jeep not been raised, it would have scraped along the edge. The defense also argued that, given that the jeep rolled completely, Plaintiff could have stopped his jeep, returned to the I-70 through lane, or driven through the gap between the truck and the barrier and exited safely.

The defense argued that Plaintiff's claimed injuries were not related to the accident and the damage calculations were overly inflated. The defense conceded that the shoulder repair was related to the incident but the surgery had resolved the problem. The defense counsel argued that Plaintiff had no lost wages as he did not lose his job because of the accident; rather he was laid off. The defense was able to submit evidence that Plaintiff was a convicted felon and also brought forth evidence at trial that Plaintiff was a heavy smoker and drank a six pack of beer every day. With regard to his claimed neck injury, the defense argued that there was no evidence that this resulted from the accident. There was evidence of substantial degenerative changes to his cervical spine and his medical records show evidence of pre-existing neck pain. Further, Plaintiff's doctor testified that smoking could exacerbate and speed up the degenerative process. Plaintiff's orthopedist conceded at trial that his opinions as to causation were based in substantial part on the subjective reporting of Plaintiff. Plaintiff's cost of future surgery of $500,000.00 was likewise questionable. Plaintiff's damages expert conceded that she obtained the figure by taking medical coding information from an unknown individual at Plaintiff's orthopedists office and submitted that information to a 1-800 number to obtain a figure for the future surgery. Defense argued this information was not reliable.

Although Plaintiff asked for $1.4 million during closing arguments, the jury awarded only $410,000.00 total including $21,000.00 for pain and suffering, $389,000.00 for economic damages, and $0.00 for permanent impairment. Moreover, the jury apportioned 30% contributory negligence to the Plaintiff reducing the total jury award to $287,000.00, a total not substantially different than offered to settle the case before trial.

McManis v. Wlech et al., Case No. 2014-Cv-033320.

DEALERSHIP HELD VICARIOUSLY LIABLE FOR DRIVER'S NEGLIGENCE DURING TEST DRIVE

Colorado Court of Appeals: The issue in this case was whether a car dealership is vicariously liable for a prospective purchaser's negligence during a test drive, under the joint venture doctrine.

The accident occurred when prospective purchaser Kristin Hart was testing driving a car from Defendant Go Courtesy Ford's dealership. She was test driving the car while a salesman was a passenger, who told Hart the route to drive and when to turn. While driving, Hart negligently attempted a left turn in front of oncoming traffic and collided with a car driven by Kelly Minna-Angard. Ms. Minna-Angard filed a claim with her insurer, American Family, for damages. American Family paid the claim and then sought subrogation against Go Courtesy Ford.

Go Courtesy Ford was granted summary judgment on the basis that the test drive was not a joint venture because the participants had adverse financial interests. Thus, it was not held vicariously liable for Hart's negligence.

On appeal, the Colorado Court of Appeals noted that a joint venture exists in the operation of an automobile when "two or more persons must unite in pursuit of a common purpose" and "each person must have a right to control the operation of the automobile in question." The Court found that the test drive itself constituted a common purpose. Further, the dealership's salesman had a right to control the car because the dealership owned it. Thus, Go Courtesy Ford was vicariously liable under the joint venture doctrine, and the case was remanded to the district court.

American Family Mutual Ins. Co. v. AN/CF Acquisition Corp. d/b/a Go Courtesy Ford, 2015 COA 129 (Colorado Court of Appeals, decided September 10, 2015, not yet released for publication in the permanent law reports).

EXHAUSTION CLAUSE IN UNDERINSURED MOTORIST POLICY RULED VOID AND UNENFORCEABLE

Colorado Court of Appeals: Plaintiff Steffan Tubbs was involved in a motor vehicle accident with another driver. The other driver was at fault, and had auto insurance with a $100,000 liability limit. Tubbs was insured by Farmers Insurance Exchange, and his policy included UIM coverage with a limit of $500,000. Tubbs accepted a $30,000 settlement from the other driver. He then sought to recover under his policy's UIM policy, and claimed that his total damages exceeded $100,000. Farmers refused to pay benefits, stating that Tubbs did not meet the conditions of the UIM clause, which required him to exhaust the limits of the liable party's limits before making a UIM claim.

At trial, the district court granted summary judgment in favor of Farmers based upon the exhaustion provision. On appeal, Tubbs argued that the exhaustion clause was void and unenforceable. Tubbs argued that, under Colorado law, UIM policies are required to cover the difference between the damages the insured party suffered and the limit of any liable party's legal liability coverage, regardless of whether the insured party's recovery from the liable party exhausted that limit.

The Court of Appeals held that C.R.S. § 10-4-609 required Farmers to cover Tubbs' claim for damages he sustained in excess of $100,000 (the other driver's legal liability limit), in an amount up to the UIM coverage limit of $500,000, regardless of how much he actually recovered under the other driver's legal liability coverage. As the exhaustion clause imposes a condition precedent on coverage mandated by the statute, the Court held that the clause was void and unenforceable. Thus, summary judgment was reversed.

Tubbs v. Farmers Insurance Exchange, 2015 COA 70, 353 P.3d 924 (Colorado Court of Appeals, decided May 21, 2015).

Utah

Election for Section 321 Arbitration Held Not to be Rescinded by a Motion to Amend a Complaint

Utah Supreme Court: This case concerns an election to arbitrate a personal injury action that arose from an automobile accident. The accident occurred when Defendant Charlotte Nixon crossed the center line, colliding with a vehicle driven by Plaintiff Robert Zeller. Zeller and his wife filed a complaint against Nixon alleging claims for negligence and loss of consortium.

The Zellers submitted their claims for arbitration under U.C.A. § 31A-22-321. In doing so, they accepted statutory limits on their damages. In exchange, the arbitration system is quicker and less expensive. The arbitration statute, section 321, prescribes the terms for opting into arbitration, with which the Zellers had complied. Section 321 also provides that the election for arbitration may be rescinded if a notice of rescission is filed within 90 days after the election to arbitrate and no less than 30 days before any scheduled arbitration hearing. The Zellers did not file a notice of rescission within this period.

After the rescission period, the Zellers moved to amend their complaint to avoid arbitration by seeking to add a claim for negligent entrustment against Nixon & Nixon, Inc. The motion was based upon an allegation that the vehicle driven by Nixon was owned by the entity and had been entrusted to her despite knowing that Nixon had a history of strokes. In addition, the motion sought to undo the election for arbitration. The Zellers asserted that they had discovered this claim after the close of the statutory rescission period. In response, Nixon opposed the motion to amend, and also filed a motion to compel arbitration. The district court granted the motion to amend and denied the motion to compel arbitration.

The Utah Supreme Court found a conflict between section 321 and Utah Rule of Civil Procedure 15, which permits amendment of a pleading. The Court noted that section 321 provides a single path for rescission of a plaintiff's election for arbitration, which thus excludes any other method of rescission. It thus held that an election for arbitration cannot be undone by a subsequent filing of a motion to amend the complaint. It also found that the purpose of arbitration under section 321, to fast-track arbitration proceedings, makes it necessary to limit the rescission procedure.

Though the Court recognized the information against Nixon & Nixon came to light after the rescission period, it stated: "A claimant's election of arbitration stands after the rescission period runs – whether or not the reason for the about-face is understandable." However, the Court ruled that the election for arbitration stands only as to the named defendant in the complaint at the time the election was made. Thus, because the Zellers could file a separate action pleading its claims against Nixon & Nixon, their arbitration election was not binding as to those separate claims.

Zeller v. Nixon, 2015 UT 57, 355 P.3d 991 (Utah Supreme Court, decided July 21, 2015).

Lease Agreement Held to Require Procurement of Insurance for Negligent Acts

Utah Supreme Court: In this case, the Utah Supreme Court considered: "Whether we should strictly construe a contractual provision requiring one party to procure insurance for the benefit of another." In considering this issue, the Court noted that it has "long strictly construed provisions that call for one party to indemnify another, requiring that such provisions clearly and unequivocally manifest the intent to do so."

The case involves a lease between Greyhound Lines, Inc. (the lessee) and the Utah Transit Authority (the lessor), for a section of UTA's intermodal transportation facility. The dispute focuses on whether the insurance procurement provision of the lease agreement, which required Greyhound to purchase commercial general liability insurance covering UTA, required that this insurance cover UTA's negligent acts. Greyhound failed to purchase such insurance, and thus UTA asserted that Greyhound breached the contract.

The Utah Supreme Court held that "under Utah law, an agreement to procure insurance for the benefit of another is not subject to strict construction. Also, we conclude that under the traditional rules of contractual interpretation, Greyhound's duty to provide insurance to UTA … included the duty to provide insurance that covered UTA's negligent acts."

Utah Transit Authority v. Greyhound Lines, Inc., 2015 UT 53

$3.5 Million Jury Award for Legal Malpractice Claim Stemming from Personal Injury Case

Salt Lake County: Plaintiff Jodi Kranendonk was reportedly driving in Oregon in June 2006, when her vehicle was struck by two tractor-trailers. The tractor-trailer drivers allegedly admitted fault. Kranendonk said she sustained injuries to her lower back and knees, requiring multiple knee surgeries and a right total knee arthroplasty. She reportedly sustained past and future medical expenses, wage loss, and a loss of earning capacity.

Kranendonk retained Gregory & Swapp, P.L.L.C. and its employee, attorney Erik Highberg, to represent her in claims against the tractor-trailer drivers. Highberg was allegedly handling 90 to 100 personal injury claims at the time. Gregory & Swapp filed a claim in Oregon on behalf of Kranendonk, but failed to name the trucking companies as defendants. It also failed to prosecute the case within the time required under Oregon law and the case was dismissed. Kranendonk claimed that the firm concealed the fact that they failed to prosecute the case and that it was dismissed.

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Gregory & Swapp filed a second complaint and again failed to name the trucking companies as defendants. The firm also failed to timely serve the truck drivers and the second complaint was then dismissed. Kranendonk alleged that she was not informed of these issues. The firm then filed an appeal without informing Kranendonk or obtaining her permission.

Highberg later filed a third complaint in Washington State, which was reportedly dismissed. A fourth case was filed in Oregon, which was dismissed under the statute of limitations. Kranendonk brought a legal malpractice action against Gregory & Swapp and Highberg, and sought monetary damages as well as punitive damages. The case eventually proceeded to a jury trial. Kranendonk was awarded $80,000 for economic damages and $670,000 for noneconomic damages for damages related to the underlying personal injury suit. They also found that Defendants were liable for malpractice, breach of contract and fiduciary duty, and negligent hiring, training, and supervision. They awarded Plaintiff $2.7 million for those damages, for a total award of about $3.5 million.

Kranendonk v. Gregory & Swapp, P.L.L.C. et al., 2015 WL 4719610.

Wyoming

Wyoming Supreme Court Affirms Grant of Defense Summary Judgment for Injuries From Science Class Demonstration

Wyoming Supreme Court: Plaintiff Jacob Fugle sued Defendant Sublette County School District No. 9 and his teacher, Stephen Nelson, for injuries he sustained during a science demonstration conducted in the school gymnasium. The demonstration was of the affect of centripetal force and involved use of a wheeled cart and a 20-foot rope. Mr. Nelson stood in the center of the gym and held onto one end of the rope while a student, sitting in the cart, held onto the other end. The students took turns sitting in the cart and pushing on it to initiate motion. During Plaintiff's turn, he was unable to hang onto the rope due to the forces acting upon him. When he let go of it, the cart travelled across the room and into the door frame. Plaintiff sustained extensive injuries.

Defendants were granted summary judgment under the Wyoming Governmental Claims Act. The district court had concluded that Plaintiff's injury did not fall within the exceptions to governmental immunity for negligence in the "operation and maintenance" of any building, or in the "operation and maintenance" of any recreation area. Plaintiff appealed, contending that immunity was waived because Defendants' negligence fell within those exceptions.

With regard to the exception for "operation and maintenance of a building," the Supreme Court noted that this exception applies only to negligence in making a building functional and, accordingly, "applies only to unsafe conditions due to physical defects in the building itself." Neither of the expert reports submitted by Plaintiff mentioned any defect inherent in the school building or gymnasium. Thus, his claims did not fall within that exception.

As to the exception for "operation or maintenance of a recreation area," the Court ruled that conducting and supervising a science demonstration does not constitute "operation or maintenance of a recreation area." Merely having an activity take place in the school gymnasium does not satisfy this requirement because "the alleged negligence does not relate to any defect in the design or construction of a physical structure or facility." It ruled that the exception does not extend to activities which occur within a recreational area. Thus the grant of summary judgment in favor of Defendants was affirmed.

Fugle v. Sublette County School District #9 et al., 2015 WY 98, 353 P.3d 732 (Wyoming Supreme Court, decided July 31, 2015).

Defense Verdict in Trucking Personal Injury Case

U.S. Dist. Ct., D. Wyo.: Plaintiff George Clark reportedly suffered chemical encephalopathy and paralysis of both lower extremities when he climbed onto a tanker trailer leased and/or supplied by Defendant Keller Transport Inc. He was to monitor the filling of the tank with crude oil because the tank's volume gauge was not working. While he was on top of the tank, he was allegedly exposed to hydrogen disulfide gas present in the crude oil, and fell off the tanker truck.

Plaintiff filed suit against Defendant alleging several failures, including that Defendant failed to provide a safe workplace, failed to provide him with safety training, and failed to provide safety equipment. Defendant denied that Plaintiff was exposed to hydrogen disulfide gas at a level of exposure sufficient to cause his injuries. Upon jury trial, Defendant was found negligent; however, its negligence was not a cause of Plaintiff's injuries and damages. Thus, a defense verdict was rendered.

Clark v. Keller Transport Inc., Case No. 1:13CV00279.

Arizona

Commercial Vehicle Held Not Covered by Underinsured Motorist Policy for Personal Vehicle

Arizona Court of Appeals, Div. 2: Plaintiff Frank Gambrell was driving a semi-tractor tanker, transporting milk for his employer, when another driver lost control of his vehicle and crashed into the tanker. Gambrell sustained serious injuries. He received $15,000 from the other driver's insurance, and received $100,000 in underinsured motorist ("UIM") coverage from his employer's policy. He then sought an additional $100,000 from the UIM coverage of his personal automobile liability insurance policy provided by Defendant IDS Property Casualty Insurance Company ("IDS"). IDS denied the claim, concluding that the UIM coverage did not apply to

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Gambrell while he was driving the milk truck.

Upon filing suit against IDS, the district court concluded that A.R.S. § 20-259.01(C) permits insurers to exclude UIM coverage when the insured is driving a large truck used in a business for transporting property. The district court thus concluded that the UIM policy lacked coverage for the milk tanker. Gambrell argued that § 259.01(C) only creates a limited exception to UIM coverage that is applicable when a commercial vehicle owner or operator specifically seeks to insure the vehicle.

The Arizona Court of Appeals noted that nothing in the statute indicates that § 259.01(C) applies only when an insured seeks to specifically insure the commercial vehicle. It found that UIM coverage for ownership or operation of a commercial vehicle was not required to be included in his personal vehicle policy, and it is not included. Therefore, the Court of Appeals affirmed the district court's ruling.

Gambrell v. IDS Property Casualty Ins. Co., Docket No. 2 CA-CV 2014-0147 (Arizona Court of Appeals, Division 2, decided September 9, 2015, not yet released for publication in the permanent law reports).

COMPLIANCE WITH STATUTORY WAIVER REQUIREMENT FOR UM/UIM COVERAGE DOES NOT PRECLUDE MALPRACTICE CLAIM AGAINST INSURANCE AGENT

Arizona Supreme Court: Under A.R.S. § 20-259.01, an insurer is required to offer uninsured motorist ("UM") and underinsured motorist ("UIM") coverage to their insureds. Insurers may prove compliance with the statute by having their insureds sign a Department of Insurance approved form selecting or rejecting such coverage. The issue in this case is whether compliance with § 20-259.01 bars a negligence claim alleging that the insurance agent failed to procure the UIM coverage requested by the insured.

For two years, Plaintiff Lesley Wilks had car insurance from State Farm, which she obtained through John Manobianco at his insurance agency. Her policy included liability and both UM and UIM coverage. Wilks later replaced the State Farm policy with a policy from another insurance company. A year later, she decided to switch back to State Farm. When doing so, Wilks asked Manobianco to obtain "the exact same coverage that [she] had previously, full coverage." Manobianco did not look up Wilks' prior coverage and procured insurance that did not include UIM coverage. In the course of signing several forms, Wilks signed the DOI-approved form, which had been filled out by Manobianco to reject UIM coverage.

Several years later, Wilks was in a car accident and ended up filing a UIM claim with State Farm. State Farm denied the UIM claim, due to there not being such coverage. Wilks sued Manobianco for malpractice for failing to procure the coverage she had requested. Manobianco moved for summary judgment, arguing it satisfied the duty of care by complying with § 259.01.

The Arizona Supreme Court held that compliance with § 259.01 does not bar a negligence claim for failure to procure the coverage. This is because the plain language of the statute applies only to insurers and not insurance agents. Thus, Wilks' negligence claim is based upon a duty distinct from that imposed by § 259.01. However, the Court ruled that the jury may consider the agent's compliance with § 259.01, and whether the insured read the DOI-approved form.

Wilks v. Manobianco et al., 235 Ariz. 246, 330 P.3d 1003 (Arizona Supreme Court, decided July 9, 2015).

New Mexico

EQUITABLE TOLLING OF STATUTE OF LIMITATIONS PERMITTED WHILE MOTION FOR LEAVE TO AMEND COMPLAINT IS PENDING

New Mexico Supreme Court: Plaintiff Ken Snow sustained injuries on January 20, 2009 while working as an operator for the Navajo Refinery. On August 15, 2011, he filed suit against several Defendants for the accident stemming from that accident. During litigation, he learned that Warren CAT ("Warren") and Brininstool Equipment Sales ("Brinninstool") had provided the equipment which harmed him. Plaintiff thus sought to amend his complaint to add Warren and Brinninstool as Defendants.

Under New Mexico law, the statute of limitations for Plaintiff's case expired on January 20, 2012. Under the New Mexico Rules of Civil Procedure, Plaintiff had to first obtain leave of court before amending his complaint. On January 20, 2012, Plaintiff filed an unopposed motion for leave of court to amend his complaint to add Warren and Brinninstool. The motion attached a copy of the proposed amended complaint.

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One week after the motion was filed, the district court issued its order granting the motion. The following day, Plaintiff filed the amended complaint. Defendants Warren and Brinninstool argued for dismissal under the statute of limitations, on the basis that it had expired before the amended complaint was filed. Plaintiff argued that the amended complaint should be deemed filed at the time that the motion for leave was filed because the amended complaint was attached to that motion. Alternatively, Plaintiff argued that the amended complaint should relate back to the filing date of the original complaint. The district court granted Defendants' motions for summary judgment and dismissed Warren and Brinninstool from the case.

Plaintiff appealed, and the New Mexico Court of Appeals affirmed the decision. Though Plaintiff appealed to the New Mexico Supreme Court, the parties subsequently settled. The Supreme Court refused to accept the parties' notice of withdrawal, and considered amicus briefs on the issue.

The Supreme Court reversed the prior rulings. In doing so, it found the response time by the district court to Plaintiff's unopposed motion for leave to be a circumstance outside of Plaintiff's control. "It would be an absurd policy for us to interpret our statutes and rules in a way that requires a plaintiff to anticipate the turnaround of a court and thereby risk truncating the limitations period set by the Legislature." It held that equitable tolling of the statute of limitations is permitted as long as the amended complaint is attached to the motion requesting leave to file it.

Snow v. Warren Power & Machinery, Inc., d/b/a Warren CAT et al., 2015 NMSC 026, 354 P.3d 1285. (New Mexico Supreme Court, decided August 10, 2015).

Texas

TEXAS SUPREME COURT HOLDS THAT EXEMPLARY DAMAGES CAP IS NOT AN AFFIRMATIVE DEFENSE AND THUS DOES NOT NEED PLEADED

Texas Supreme Court: In this residential construction dispute, the primary issue was: "whether the statutory cap on exemplary damages is waived if not pleaded as an affirmative defense or avoidance." Texas Rules of Civil Procedure 94 requires pleading and proof of affirmative defenses and avoidances. In addition, Texas law limits exemplary damages to the greater of $200,000 or two times the amount of economic damages plus noneconomic damages not exceeding $750,000.

In this case, Aypco Construction and its owner, Jose Luis Munoz, sued Mirta Zorilla after Zorilla refused to pay several invoices for construction work at two residential properties. At trial, Zorilla did not dispute having engaged Munoz for construction services, but she disclaimed an agreement to pay for work billed as reflected in the subject invoices. She claimed that the work was either unauthorized or had previously been invoiced. She claimed that her signature on a written agreement had been forged.

Upon jury trial, a verdict was rendered in favor of Plaintiffs in the following amounts: $56,654.15 in economic damages, $250,000 in exemplary damages, and $150,000 in attorneys' fees. On appeal, the Court of Appeals held that the statutory cap on exemplary damages did not apply because Zorilla failed to expressly plead the cap as an affirmative defense.

The Texas Supreme Court disagreed, holding that the exemplary damages cap is not a "matter constituting an avoidance or affirmative defense." It therefore does not need to be affirmatively pleaded because it applies automatically when invoked and does not require proof of additional facts.

Zorilla v. Aypco Construction II, LLC et al., 58 Tex. Sup. Ct. J. 1140 (Texas Supreme Court, decided June 12, 2015, not yet released for publication in the permanent law reports).