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Attorneys at Law

ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

IN BRIEF

COLORADO

DEWHIRST & DOLVEN WINS FEDERAL APPELLATE DECISION IN PROFESSIONAL LIABILITY CLAIM OF PSYCHOLOGIST'S ALLEGED FAILURE TO WARN

U.S. Court of Appeals, 10th Cir.: On June 21, 2010, the United States Court of Appeals for the Tenth Circuit issued a decision completely vindicating the client of attorneys Patrick Maggio and Kathleen Kulasza from claims of professional negligence.

The client had practiced psychology for 35 years and, in May 2004, was retained by the County Probation Department to perform an evaluation of a young man who had pleaded guilty to felony stalking. The young man had recently been released from an in-patient psychiatric facility after attempting to commit suicide and he was under the continuing care of a psychologist and a physician. As a condition of probation, the probationer was ordered to submit to real-time GPS monitoring and frequent sobriety checks.

Based upon intensive psychological testing and an in-person interview, the firm's client concluded that the probationer suffered from serious psychological disorders and that he needed continued treatment and monitoring. However, because the young man did not express any current intent to harm his stalking victims, the client-psychologist concluded that there was no reason to warn the Probation Officer or the victims' family of an imminent danger of physical violence.

Two weeks after the psychological examination, the probationer slipped out of the GPS monitoring system, got drunk and broke a window at the stalking victims' home. His probation was revoked and he was sentenced to a lengthy prison term. In 2006, the family brought a suit for emotional distress against every agency and professional involved with the probation and treatment of the now-incarcerated felon. The County and the monitoring firm settled with the Plaintiffs based upon allegations that they had acted recklessly in not maintaining adequate monitoring. The other defendants either settled or were voluntarily dismissed, leaving the firm's client as the lone remaining target.

The client steadfastly maintained that she had acted in accord with professional standards and was entitled to the protection of the Colorado mental health liability statute, C.R.S. § 13-21-117. That statute provides that psychologists

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and other mental health professionals are not liable for failing to predict the violent behavior of a mental health patient unless the patient communicates a "serious threat of imminent physical violence against a specific person." The Plaintiffs argued that because of the circumstances—an evaluation for purposes of probation—an exception should be made and the statute should not apply.

Attorneys Kathleen Kulasza and Patrick Maggio prevailed on motions at the trial court level and the case against the client was dismissed. The Plaintiffs appealed and after briefing and oral argument, the appellate court agreed. The result was to uphold the protection afforded to mental health professionals that had been granted by the Colorado legislature as part of tort reform more than twenty years ago.

Fredericks v. Jonsson, 609 F.3d 1096 (10th Cir., decided June 21, 2010).

Colorado Federal District Court Addresses HB 10-1394 (C.R.S. § 13-20-808) Affecting Commercial General Liability Insurance Policies Issued to Construction Professionals

We previously reported the enactment of HB 10-1394 (codified at C.R.S. § 13-20-808), a statute affecting commercial general liability (CGL) insurance policies issued to construction professionals.

The new legislation provides "in interpreting a liability insurance policy issued to a construction professional, a court shall presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured." C.R.S. § 13-20-808(3). Significantly, the statute also provides that "nothing in this subsection (3): (a) requires coverage for damage to an insured's own work unless otherwise provided in the insurance policy; or (b) creates insurance coverage that is not included in the insurance policy." C.R.S. § 13-20-808(3)(a)-(b).

On July 7, 2010, the Colorado Federal District Court issued a ruling addressing the new legislation and the *General Sec. Indem. Co.* decision referenced therein. In *Crossen v. American Family Mut. Ins. Co.,* the District Court decided Plaintiffs' motion for partial summary judgment seeking a ruling on American Family Mutual Insurance Company's duty to defend its policyholder Premier Specialty Services (Premier).

Previously, Plaintiffs had hired Premier to clean and seal tile flooring. Plaintiffs claimed Premier damaged the Plaintiffs' flooring. American Family denied Premier's claim for a defense, in part because Plaintiff's original complaint alleged no damage other than to the floor itself and thus there was no "occurrence" under the policy. Plaintiffs settled their suit against Premier and, pursuant to that settlement, Premier assigned to the Plaintiffs all of its claims against American Family. The *Crossen v. American Family* case then followed.

On Plaintiffs' motion for summary judgment on American Family's duty to defend, the Court noted the holding in *General Sec. Indem. Co. of Arizona v. Mountain States Mut. Cas. Co.,* 205 P.3d 529 (Colo. App. 2009) (holding a claim for damages for poor workmanship by itself does not allege an accident constituting a covered occurrence), as well as the holding in *Greystone Constr., Inc., v. Nat'l Fire & Marine Ins. Co.,* 649 F.Supp.2d 1213 (D. Colo. 2009) (holding poor workmanship must cause damage to something other than the work product itself to be a covered occurrence).

The *Crossen* Court observed that C.R.S. § 13-20-808(3) addressed "some of the issues raised in *General Security* and provides, *inter alia*, that when considering commercial liability policies issued to construction professionals 'a court shall presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured.'" Rather than directly address this portion of the new legislation, the Court found that the damage allegedly caused by Premier was not only damage to Premier's work that may have required the floors to be recleaned and resealed, but also included damage to the floors. Thus, the Court concluded that Plaintiffs' claims alleged an "occurrence" under the policy, and the Court "need not address the effect of the new legislation" in this regard.

Next, the *Crossen* Court addressed a "faulty workmanship" provision that limited coverage for the insured's work. "In general, CGL policies exclude coverage for faulty workmanship on the grounds that it is considered a business risk to be borne by the insured. A CGL policy is 'not intended to serve as a performance bond or a guaranty of goods or services.'" *Crossen v. American Family,* 2010 WL 2682103 at 6 (quoting *Hartford Acc. & Indem. Co. v. Pacific Mut. Life Ins. Co.,* 861 F.2d 250, 253 (10th Cir.1988)). The *Crossen* Court concluded the alleged damage was barred by the faulty workmanship provision of American Family's policy, which excluded property damage that directly or consequentially occurs from faulty workmanship of the insured while the work is ongoing.

The *Crossen* Court was careful to note "House Bill 10-1394 does not alter my conclusion in this regard, as it expressly does not create or require coverage for damage not otherwise provided in the policy. House Bill 10-1394 at p. 3 (enacting C.R.S. § 13-20-808(3)(a) and (b))."

Thus, the Court held that because coverage was precluded by exclusion, American Family did not have a duty to defend, and this issue was dispositive of all of Plaintiffs' claims. *Crossen* provides an example of how one court addressed C.R.S. § 13-20-808(3), but refused to apply the statute to expand coverage.

Crossen v. American Family Mut. Ins. Co., 2010 WL 2682103 (D. Colo., decided July 7, 2010).

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UTAH

$294,068 Arbitration Award for Facial Fractures Caused in Skiing Accident.

Weber County: Plaintiff, a 59 year old female graphic designer, was skiing "Dan's Saddle" at Snowbasin Ski resort on January 26, 2007. Defendant Sandy Cunningham entered the same area and the two collided. Both skiers were estimated to be travelling at 15 miles per hour at the time of impact. Liability was disputed.

Plaintiff's face collided with Defendant's head. Plaintiff sustained a fractured maxilla, dislocated jaw, impaired vision, headaches, and multiple facial fractures. Plaintiff's medical expenses totaled $58,350. She claimed no lost wages.

After arbitration before Paul Matthews, Plaintiff was found to be 10% at fault for causing the accident. Plaintiff's award of $326,742.31 was reduced by Plaintiff's comparative negligence to $294,068.07.

Cunningham v. Toner, Case No. 070907253.

Family Medical Leave Act (FMLA) Wrongful Termination Claim Yields $4,000 Verdict, Plus $142,195 Award of Attorneys Fees

U.S. District Court, District of Utah: Plaintiff was employed as regional manager for Defendant Horizon Investment & Management Corporation, an apartment management company with 190 employees. Plaintiff claimed she was fired the day after she told Defendant's president that she would not be able to return early from the family medical leave she took to recover from a hysterectomy.

Plaintiff obtained a new job with a competing management company within a few weeks, and then proceeded with a Title VII discrimination claim. Defendant asserted Plaintiff was terminated for just cause and won summary judgment. On Plaintiff's appeal, the case was remanded for trial on the FMLA claim.

At trial, Defendant's president testified he had not heard of the FMLA until Plaintiff's claim. The jury awarded Plaintiff $2,000 in lost wages and the Court (Judge Kimball) added $2,000 in liquidated damages. In addition, the Court held that Plaintiff was entitled to an award of attorneys fees in the amount of $142,195.

deFreitas v. Horizon Investment and Management Corp., et al., Case No. 06CV296.

WYOMING

Injuries to Subcontractor's Employees in Construction Site Yield Verdicts of $275,000 Against General Contractor

U.S. District Court: District of Wyoming: Plaintiff Randy Asberry, a 45 year old electrician was employed with Ardent Services, a subcontractor of Defendant WHC, Inc. Plaintiff Terry Cater, a 50 year old male, was employed as Randy Asberry's assistant. Plaintiffs performed electrical construction in a compressor station for a pipeline near Wamsutter, Wyoming.

On December 5, 2007, Randy was running conduit on the floor of a pit beneath a metal grating walkway. Terry was standing on the metal grating, providing tools and materials to Randy, when the grating collapsed.

Randy was knocked unconscious and pinned beneath the grating. He claimed concussion and ongoing headaches, shoulder injury, and injury to his right eye. After cataract surgery restored his vision in his right eye, Randy continued to complain of floaters.

Terry was handing a tool to Randy when the grating on which Terry was standing collapsed. Terry's foot became caught in the conduit and he hung upside down. Terry claimed injury to his left knee and back. He was diagnosed with L4 radiculopathy and sacroiliac pain. Treatments included steroid injections, and arthritis and anti-inflammatory medications.

Plaintiffs claimed that WHC, Inc. failed to install clips to keep the grating in place, and failed to warn of the dangerous condition. Defendant WHC claimed Randy and Terry were not supposed to be in the area and were not to be walking on the grating.

Plaintiff's special damages were initially covered by workers compensation. The jury awarded Terry Cater $100,000, and Randy Asberry was awarded $175,000.

Assberry and Cater v. WHC, Inc., Case no.: 08CV173.

Wyoming Supreme Court Refuses to Recognize Cause of Action for Failing to Maintain Automobile Liability Insurance

Wyoming Supreme Court: State Farm filed a complaint against Vanessa Sorensen, the owner of a vehicle that was involved in a collision with a State Farm insured. Ms. Sorenson was not driving her vehicle at the time. State Farm's insured sustained $36,521.61 in property damage as a result of the collision. Under the terms of the uninsured motorist property damage provision of its policy, State Farm was obligated to pay its insured that amount.

State Farm alleged that Ms. Sorenson violated Wyoming law by failing to maintain insurance on her vehicle, State Farm's insured sustained damages as a result, and that State Farm was subrogated to its insured's right to recover the damages from Ms. Sorensen.

Ms. Sorensen moved to dismiss the complaint on the ground that there is no common law duty to insure a vehicle and Wyo. Stat. Ann. § 31-4-103 (the criminal statute requiring motor vehicle owners to maintain liability insurance) does not create a cause of action for negligent failure to maintain insurance. The district court

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denied Ms. Sorenson's motion to dismiss, concluding § 31-4-103 establishes the minimum standard of care and imposed a duty on Ms. Sorensen to maintain proper insurance. Ms. Sorensen filed a petition seeking the Wyoming Supreme Court's review of the district court's order denying the motion.

The Wyoming Supreme Court disagreed with the district court and reversed. The issue before the Supreme Court was whether a cause of action exists in Wyoming for negligent failure to maintain liability insurance, or more specifically, whether a party who alleges that he sustained damages in a collision caused by the driver of an uninsured vehicle has, in addition to his cause of action against the negligent driver, a cause of action in tort against the vehicle's owner for negligently failing to maintain liability insurance.

The Court reiterated the elements necessary to maintain a negligence claim in Wyoming. A plaintiff must prove: 1) the defendant was under a duty of care to protect the plaintiff from injury or loss; 2) the defendant breached the duty owed to the plaintiff; 3) the plaintiff suffered actual injury or loss; and 4) the defendant's breach of the duty proximately caused the plaintiff's injury or loss.

In State Farm's case against Ms. Sorenson, there was no contract between Ms. Sorensen and State Farm or State Farm's insured giving rise to a duty. In addition, there is no recognized common law duty to maintain insurance. Thus, the Court analyzed whether the duty State Farm asserted arises by statute or whether the common law should recognize such a duty.

In deciding this issue, the Wyoming Supreme Court was careful to note that Wyoming does not have an "owner liability" statute as some states do establishing liability on the part of a vehicle owner for the negligence of anyone operating it with the owner's express or implied permission. Additionally, the Wyoming Supreme Court has previously said the owner of a vehicle who permits another to use it for his own purposes is not liable for the borrower's negligence in operating it.

The Court focused on whether Wyo. Stat. Ann. § 31-4-103 imposed a tort duty upon owners to maintain liability insurance. Giving the words in the statute their plain and ordinary meaning, § 31-4-103 requires vehicle owners to maintain liability insurance on their vehicles. Nothing in the plain language of the statute, however, suggests that in enacting the provision the legislature intended to impose a new tort duty owed by vehicle owners to the general public to maintain insurance. The plain language of the statute also does not suggest the legislature intended to provide a remedy for money damages for violations of the statute. The Court concluded the statute did not impose a tort duty upon Ms. Sorensen to maintain liability insurance.

Next the Court assessed whether it should recognize a new common law duty, as it had in several other cases, and applied precedential factors to be considered by Wyoming courts in so expanding the common law. The Court concluded it was not necessarily foreseeable that Ms. Sorensen's failure to maintain liability insurance would result in State Farm's insureds being struck by a negligent driver and being unable to obtain compensation for their damages from him. Further, while the damage State Farm alleged in its complaint was closely connected with the driver's failure to exercise reasonable care in operating Ms. Sorensen's vehicle and his failure to maintain his own liability insurance or otherwise pay for the damages he caused, the damages were not connected to Ms. Sorensen's failure to maintain insurance.

The Court further reasoned that although imposing a tort duty to maintain liability insurance might prevent some vehicle owners from failing to maintain insurance, criminal sanctions are likely more effective in encouraging owners to obtain the required insurance and the legislature has already imposed a penalty for the wrong Ms. Sorensen was alleged to have committed. Additionally, the Court observed the availability of insurance to cover the damages caused by such collisions with uninsured motorist.

Thus the Wyoming Supreme Court declined to recognize a new tort duty on vehicle owners to maintain liability insurance. The District Court was reversed and the case was remanded with instructions to dismiss the complaint for failure to state a claim.

Sorensen v. State Farm Automobile Ins. Co., 234 P.3d 1233 (Wyo., decided July 20, 2010).

New Mexico

New Mexico Supreme Court Clarifies Rules Regarding Extraneous Juror Communications

New Mexico Supreme Court: Kilgore v. Fuji Heavy Industries Ltd., involved a single-vehicle accident that occurred on May 19, 2000, when Mr. Kilgore, while driving a 1998 Subaru Legacy Outback on Highway 84 near Tierra Amarilla, New Mexico, lost control of the vehicle which rolled down an embankment and landed on its roof.

Prior to the accident, his seven-year-old granddaughter, Emily Walters, was seated beside him in the passenger seat, and his wife, Mrs. Kilgore, was seated behind him in the backseat. Both Mr. Kilgore and Emily Walters ended up hanging upside down suspended by their seat belts, but Mrs. Kilgore was found lying on the interior roof of the car, unrestrained. Mrs. Kilgore's injuries rendered her a ventilator-dependent quadriplegic.

Plaintiffs sued the designer and manufacturer of the vehicle and the vehicle's seat belt buckle system. Essentially, Plaintiffs claimed that the vehicle's seat belt buckle system had been designed and manufactured improperly, resulting in the risk of unintentional unbuckling during a crash or rollover. The jury entered a special verdict in favor of Defendants.

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Plaintiffs filed a motion for a new trial, claiming in part that they were presumptively prejudiced during trial by juror misconduct, in that a member of the impaneled jury not only failed to disclose during voir dire that her brother is employed as a Subaru mechanic, but further personally obtained the advice of the owner of the Subaru repair garage as to whether seatbelts were prone to inadvertent unbuckling.

In support of their motion, Plaintiffs submitted affidavits, including an affidavit from the owner of the Subaru repair garage where the juror's brother was employed, stating that he had a conversation with the juror wherein "[s]he told me that she was a juror on the Subaru trial. I told her that I had never heard of any incident where a Subaru seat belt buckle had come open accidentally. I told her that I had never heard of that happening. During the conversation, she said to me, at least twice, that she was not supposed to be talking to me about the case."

Plaintiffs argued that it was established that the juror received extraneous information and that, under New Mexico law, the Court must therefore presume prejudice and grant Plaintiffs' motion for a new trial. The trial court denied Plaintiffs' motion for a new trial without conducting an evidentiary hearing. The Court of Appeals affirmed, holding the affidavits submitted by Plaintiffs were insufficient to raise a presumption of prejudice under New Mexico law.

After reviewing New Mexico case law in light of United States Supreme Court precedent, the New Mexico Supreme Court clarified New Mexico law and held the party moving for a new trial based on extraneous juror communications bears the burden to prove that (1) material extraneous to the trial actually reached the jury, (2) the extraneous material relates to the case being tried, and (3) it is reasonably probable that the extraneous material affected the jury's verdict or a typical juror.

The New Mexico Supreme Court further concluded that a remand for an evidentiary hearing, rather than a new trial, typically is the appropriate remedy in these cases. Because the affidavits submitted by Plaintiffs were sufficient to establish that extraneous material related to the case actually reached one of the jurors in the case, the case was remanded to the trial court for an evidentiary hearing where Plaintiffs would have an opportunity to prove a reasonable probability of prejudice.

Kilgore v. Fuji Heavy Industries Ltd., 2010 WL 3448857 (N.M., decided August 3, 2010).

Federal District Court Grants Insurer's Motion for Summary Judgment on Extra-Contractual Claims

U.S. District Court: District of New Mexico: In *Hauff v. Petterson and Safeco Insurance*, Plaintiff David Hauff sought payment from Safeco under an Uninsured Motorist insurance policy. After the parties did not settle, Mr. Hauff brought various extra-contractual claims against Safeco and its adjuster, Ms. Petterson.

Safeco moved for summary judgment on whether it violated its common-law duty of good faith, the New Mexico Insurance Code, or the New Mexico Unfair Practices Act when it (1) negotiated to settle Mr. Hauff's claim, (2) offered to pay after-tax wages, and (3) valued Mr. Hauff's general damages.

In reviewing Defendants' motions for summary judgment, the District Court noted that under New Mexico law, the obligation to deal fairly and honestly rests equally upon the insurer and the insured. To survive summary judgment on a bad faith claim against an insurer raised under New Mexico law, the insured must cite evidence tending to show that insurer's actions were based on a dishonest judgment and that it failed to honestly and fairly balance its own interests with its insured's. An insurer acts in "bad faith" under New Mexico law when its reasons for denying or delaying payment of the claim are frivolous or unfounded.

A "frivolous or unfounded refusal to pay," as required to support a bad faith

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About Our Firm

Dewhirst & Dolven LLC has been published in A.M. Best's Directory of Recommended Insurance Attorneys and is rated an "AV" law firm by Martindale Hubbell. The founding partners, Miles Dewhirst and Tom Dolven, practiced as equity partners with a large Colorado law firm before establishing Dewhirst & Dolven, LLC.

Our attorneys have combined experience of over 250 years and are committed to providing clients throughout Utah, Wyoming, New Mexico and Colorado with superior legal representation while remaining sensitive to the economic interests of each case.

We strive to understand our clients' business interests to assist them in obtaining business solutions through the legal process. Our priority is to establish a reputation in the legal and business community of being exceptional attorneys while maintaining a high level of ethics and integrity. We are committed to building professional relationships with open communication, which creates an environment of teamwork directed at achieving successful results for our clients.

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claim against an insurer under New Mexico law, is an arbitrary or baseless refusal, recklessly lacking any arguable support in the insurance policy or facts of the case. Thus, liability on a bad faith claim against an insurer under New Mexico law cannot rest on a merely erroneous or incorrect refusal. Where the insurer had a legitimate reason to question the amount of damages claimed by the insured, a finding of bad faith is improper under New Mexico law.

Plaintiff claimed that Safeco's offer to pay Plaintiff his net lost earnings (as opposed to his gross pre-tax earnings) was in bad faith as lost wages recovered due to personal, physical injuries are not taxable. The Court held that Safeco could reasonably have concluded that it had no obligation under New Mexico law to pay the insured gross wages lost. No New Mexico statute, case, or rule stated that an insurer was obliged to pay pre-tax wages to settle an insured's claim. Thus, the Court held Safeco's offers to settle Plaintiff's lost wages claim by deducting 20 percent for taxes were not made in bad faith.

Plaintiff also claimed that Safeco's allegedly low offers to settle Plaintiff's general (non-economic) damages was in bad faith. Plaintiff's medical bills were $12,829.72. Both the adjuster and the insured's counsel agreed and negotiated based on the fact that Plaintiff had essentially made a full recovery three months after the accident. Before filing suit, Plaintiff demanded $40,294.69 to settle his claim for general damages; Safeco offered $9,375.81, for a difference of $30,918.88. Although Safeco's adjuster did not break down her offer by specific injury, evidence reflected Plaintiff's essentially resolved condition and the adjuster's review and re-review of the entire package of medical records, as well as her "round-table" with other adjusters to value the claim. Thus, the Court held the amount of general damages Safeco offered was not a product of bad faith, as would have violated New Mexico law.

Plaintiff also argued that Safeco violated its duty of good faith and the "equal consideration doctrine" when it failed to make a timely settlement offer. The Court noted that Safeco was in contact with Plaintiff's counsel before and after receiving the initial settlement demand. The adjuster made an initial settlement offer fifteen days after resolving the total of Mr. Hauff's medical bills. Later, the longest period between offers was eighteen days, which resulted from the adjuster's decision to re-review Plaintiff's records with other adjusters. The Court found that Safeco's offers were reasonably timely.

Thus, the New Mexico Federal District Court granted Defendant's motions for summary judgment on Plaintiff's extra-contractual claims.

Hauff v. Petterson, et al.,
2010 WL 2978060
(D.N.M., decided July 22, 2010).