Fall 2011

DEWHIRST & DOLVEN LLC
Attorneys at Law

ROCKY MOUNTAIN LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

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COLORADO

DEFENSE VERDICT OBTAINED BY DEWHIRST & DOLVEN IN DENTAL MALPRACTICE CASE

El Paso County: The jury returned a defense verdict in a dental malpractice case tried by Dewhirst & Dolven counsel Marilyn Doig. Plaintiff, a minor, treated with the Defendant dentist for over four years. Prior to coming to Defendant, another dentist advised Plaintiff she needed jaw surgery to realign her jaw and correct her malocclusion and teeth grinding. Plaintiff and her parents elected not to have jaw surgery and did not want any teeth extracted. Plaintiff wanted her teeth straightened and a space created for an implant to be placed in a location where a natural tooth never developed.

In addition to general preventive dental care, Defendant provided orthodontia to help realign Plaintiff's malocclusion. Although Plaintiff insisted she wore her rubber bands as instructed, the jury agreed with Defendant that Plaintiff was non-compliant, causing treatment which could have been completed in 2 to 2 ½ years to extend to over 4 years.

During the time Plaintiff was in braces, the occlusal surfaces of her teeth were worn and eroded due to the malocclusion, bruxism (teeth grinding) and alleged gastric reflux from a wheat allergy. In braces, a patient cannot wear a night guard to prevent grinding and tooth destruction because the night guard inhibits movement of the teeth. Defendant treated the wear with composites and sealants. If the orthodontia had been completed within the expected 2 years, Plaintiff would have been prescribed a night guard and suffered much less wear and erosion to her teeth. Plaintiff's treating dentists and experts testified Plaintiff will need a complete reconstruction of her teeth now and at least two more times because of her young age, costing approximately $180,000.

Defendant also placed an implant in Plaintiff, which ultimately failed. Plaintiff argued the implant failed because there was not sufficient bone to support it. Defendant argued the implant was placed properly but 5 of

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NEW LOCATION:
Grand Junction, Colorado

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every 100 implants in that area of the jaw fail without anyone being negligent, and that this implant was unfortunately one of those cases. Plaintiff attempted to infer at trial that Defendant's dentist records were altered. But because of Plaintiff's total lack of evidence to support the allegation, the argument was disallowed by the Court. The jury returned a complete defense verdict. After Dewhirst & Dolven's post trial motions, the Court awarded Defendant his costs and fees.

Smith, et. al. v. Platt, DDS, Case No. 2010CV5452.

CONFLICT OF INTEREST RULES CLARIFIED IN INSURANCE COVERAGE CASE

U.S. District Court, D. Colorado: The U.S. District Court for the District of Colorado was asked to rule on a motion to disqualify counsel in an insurance coverage action arising out of an underlying suit in Colorado State Court.

The Weitz Company, LLC was a general contractor and defendant in the underlying suit for alleged construction defects. Weitz made claims against subcontractors who performed the allegedly defective work, including NPW Contracting. NPW was insured by Ohio Casualty and Mountain States, and Weitz was designated as an additional insured under NPW's policies. Weitz tendered the underlying action to both carriers for defense and indemnification.

The carriers accepted Weitz's tender of defense under a reservation of rights, but neither carrier contributed to Weitz's defense costs in the underlying action. At the conclusion of the underlying action, the parties were unable to successfully apportion attorneys fees and costs. Weitz brought a coverage action against both carriers. The carriers motioned to disqualify lawyers at the Lottner firm from representing Weitz in the action, as those lawyers with Lottner firm represented Weitz in the underlying action. The carriers sought disqualification of the Lottner firm lawyers on the basis that the Lottner firm created a conflict of interest requiring disqualification and that the Lottner firm lawyers are necessary witnesses.

In addressing the conflict of interest claim, the Court held that that no conflict of interest exists and permitted the Lottner firm to represent Weitz in both the underlying action and the coverage action. The carriers cited Rule 1.7 of the Colorado Rules of Professional Conduct in arguing that representation of one client by the Lottner would be directly adverse to the another client. However, the Court cited Colorado Ethics Opinion 91 in finding that a lawyer retained by an insurance carrier to defend a claim against the carrier's insured does not have an attorney-client relationship with the carrier. Rather, the insured is the client to whom the lawyer's duty of loyalty is owed.

The carriers also argued that the Lottner firm is disqualified under Ethics Opinion 91 because the firm is acting both as coverage counsel and defense counsel in the underlying action. However, the Court found that this case differed from the situation described in Opinion 91 because the firm was first retained by Weitz to defend the underlying action then asked to represent Weitz in the coverage action. The Court determined that there is no suggestion the Lottner firm is defending the underlying action in a manner that exploits the attorney-client relationship in order to build a case of non-coverage.

The Court also denied the carrier's argument that a conflict of interest exists because the lawyers are necessary witnesses. The Court found that the lawyers were not necessary witnesses, as other fact witnesses exist who can testify about the same matters. Thus, the Court denied the carriers' motion to disqualify.

Weitz Co., LLC v. Ohio Casualty Ins. Co et al., 2011WL2535040 (U.S. District Court, D. Colorado, decided June 27, 2011).

DEFENSE VERDICT IN REAR-END AUTO COLLISION CASE

Jefferson County: Plaintiff Ann Marie Noto alleged that she sustained injuries to her neck and upper, mid, and lower back as the result of a rear-end auto collision. The only issue before the jury was to determine the amount of damages, if any, incurred by Plaintiff. Plaintiff also sought punitive damages, claiming that Defendant was using a cell phone while driving. Plaintiff claimed medical expenses of $50,945. The Court entered a judgment in favor of Defendant on the punitive issues claim. The jury returned a verdict for Defendant and did not award any damages.

Noto v. Shotwell, Case No. 09CV2124.

UTAH

DEWHIRST & DOLVEN WINS SUMMARY JUDGMENT IN FAVOR OF DEFENSE IN COMPLEX MOTOR VEHICLE ACCIDENT CASE

Salt Lake County: In a personal injury case stemming from a complex twelve vehicle pile-up, the Court granted Dewhirst & Dolven attorney Kyle Shoop's motion for complete summary judgment in favor of Defendant Eugene Cavoli and his employer.

After a series of accidents on snowy I-80, including Mr. Cavoli's accident wherein he rear-ended the vehicle in front of him, Plaintiff Chaz Denbow was found under the rear of Mr. Cavoli's van. Mr. Denbow sued Mr. Cavoli for negligence, claiming that Mr. Cavoli's van either hit Mr. Denbow or pushed another vehicle into Mr. Denbow. Upon Dewhirst & Dolven's Motion for Summary Judgment, and after hearing oral arguments from counsel for both parties, the Court ruled that no evidence existed to support Plaintiff Denbow's claims and granted summary judgment in favor of Defendant Cavoli.

Denbow v. Cavoli, dba Quality TTSLS Transportation, Case No. 090417797.

Enacted Amendments to Utah Rules of Civil Procedure Aim to Reduce Discovery Costs

Utah Supreme Court: Proposed amendments to the URCP, taking effect November 1, 2011, are aimed at achieving "the just, speedy and inexpensive determination of every action." The amendments seek to serve this purpose by enacting a "tiered" discovery system, curbing excessive expert discovery, and requiring the early disclosure of documents, witnesses, and evidence that a party intends to use in its case-in-chief. The following provides an overview of the proposed amendments:

Pleadings: A complaint, counter-claim, crossclaim, or third party claim must contain the facts showing that a party is entitled to relief, a statement of the legal theory on which the claim rests, and the specified relief prayed for. An answer is to contain a statement of facts supporting any affirmative defenses which are pled. Though all pleadings are to provide more and earlier notice of the facts alleged, the amendments are not intended to raise the level of pleadings to a code pleading standard.

Initial Disclosures: A party is to identify each fact witness it may call in its case-in-chief, and a summary of the expected testimony. A party is to provide a copy of all documents and other tangible things in its possession, not just a description and/or location of the evidence. Disclosures are to be made by Plaintiff within 14 days of service of the answer and by Defendant within 28 days of the later of Plaintiff's initial disclosures or Defendant's appearance.

Expert Disclosures: Without waiting for a discovery request, a party shall provide certain information for all expert witnesses. Further discovery of experts is permitted by deposition (limited to 4 hours) or an expert report signed by the expert. Expert disclosures are to be served within 7 days after the close of fact discovery, and the opposing party has 7 days to elect for either the expert's deposition or report, but not both. If no election is made, than no additional discovery of the expert is permitted. For non-retained experts, the party must provide a written summary of the facts and opinions of the expert. The proposed amendments also provide protections for communications between a party's attorney and its expert witness, as well as for drafts of the expert report.

Discovery: The amount of discovery permitted for a case depends upon the amount of damages claimed. The amendments adopt a tiered discovery system, whereby cases are split into three tiers: (1) $50,000 or less, (2) more than $50,000 and less than $300,000, including cases for non-monetary relief, and (3) $300,000 or more. The amount of fact deposition hours, interrogatories, requests for production, requests for admission, and days to complete fact discovery are proportional based upon which tier the case falls within. By focusing on proportionality, the costs of discovery are aimed to be proportional to what is "at stake" in the litigation. To obtain additional discovery, a party shall file a stipulation (requiring court approval) or motion the court for extraordinary discovery, demonstrating the proportionality of the additionally sought discovery. Responses to written discovery requests are now due 28 days rather than the prior 30 days after service.

Medical Examinations: Recording of the examination will be the default for Rule 35 medical examinations. The amendments also remove the requirement for automatic production of prior reports. The Utah Supreme Court was concerned with the rise in so-called "professional witnesses," and thus urges courts to refrain from the use of the term "independent medical examiner." Instead, the neutral terms "medical examiner" and "Rule 35 examiner" should be used.

Utah Supreme Court Interprets UIM Coverage Question

Supreme Court of Utah: The Utah Supreme Court accepted certification of the following question from the U.S. District Court for the District of Utah: Whether provision of lower limits for underinsured motorist coverage than for liability coverage complies with Utah Code.

The personal representatives of deceased insureds brought an action against State Farm, alleging that State Farm did not comply with notification requirements of the Utah UIM statute when the amount of UIM coverage that the insured's policy provided was less than the amount required under Utah law. The personal representative argued that State Farm was required to obtain a written waiver under Utah UIM laws before it could provide UIM coverage in an amount less than the liability policy limits, because changes in the insureds' policy made it a "new policy" under the UIM statute. State Farm argued that no waiver was necessary because it never issued the insureds a new policy.

The Supreme Court held that "new policy" within the meaning of the UIM statute includes not only new contractual relationships, but also material changes to an existing policy that alter the risk between the insurer and insured. To determine whether a change to an existing policy is so material that it creates a new policy under the UIM statute, the totality of the circumstances must be considered. Relevant considerations include whether the change to the policy was requested by the insured, whether the character of the changes would lead the average insured to believe a new policy was being provided, and whether the average insured would want to reevaluate the amount of risk being incurred under the policy.

For new policies, the Court stated that the statute requires the insurer to either obtain a written waiver from the insured or provide UIM coverage in an amount equal to the lesser of the limits of the insured's motor vehicle liability coverage or the maximum UIM coverage limits available by the insurer under the insured's policy.

Iverson v. State Farm Mutual Ins. Co., 256 P.3d 222 (Utah Supreme Court, decided July 1, 2011).

New Mexico

RESTITUTION PERMITTED FOR BREACHING PARTY IN CONSTRUCTION CASE

New Mexico Court of Appeals: Eker Brothers, Inc. sued General Contractor, Inc., seeking payment for work which Eker performed as a subcontractor on an elementary school. The district court found that Eker was owed $74,964.05 and that General had incurred $42,448.20 in damages, but that Eker's claims were barred by its willful, material, and anticipatory breach of the parties' contract. The court awarded General $42,448.20. The Court of Appeals reversed the district court's award, concluding that the district court erred by not offsetting General's damages against the benefit General received from Eker's unpaid work. In doing so, the Court of Appeals ruled that a breaching party can obtain restitution for the value of benefits conferred in excess of damages.

Eker Brothers, Inc. v. Rehders, Docket No. 29,839 (New Mexico Court of Appeals, slip opinion, decided August 2, 2011).

WORKERS COMPENSATION ACT INTERPRETED BY NEW MEXICO SUPREME COURT

Supreme Court of New Mexico: Plaintiffs were members of an oil well drilling crew who worked for Defendant Periman Drilling and were involved in an automobile accident while traveling to their work site. Plaintiffs filed workers compensation claims under the Workers Compensation Act, arguing that they were traveling employees injured in the course of their employment. The Workers Compensation Judge ruled that Plaintiffs were commuters, that mileage payments did not make Plaintiffs travelling employees, and that the travel to the rig was not an integral part of their employment. As a result, the claims were dismissed.

The New Mexico Court of Appeals recognized that an employee may receive compensation for an injury under the Act if the injury arises out of and in the course of employment. The Act excludes injuries incurred by an employee while on the way to assume the duties of employment of after leaving such duties. This exclusion is commonly referred to as the "going and coming" rule. However, the Court recognized that the traveling employee exception to the going and coming rule applied to Plaintiffs' case.

The Court distinguished between "mere commuters" and "traveling employees." In finding that Plaintiffs were traveling employees whose claims were covered under the Act, the Court applied three factors: (1) that but for the employment, Plaintiffs would not have been at the location where the injury occurred; (2) that the risk is distinctive in nature or quantitatively greater than risks common to the public; and (3) that the travel provided some benefit to the employer.

Rodriguez et. al. v. Permian Drilling Corp., 258 P.3d 443 (New Mexico Supreme Court, decided July 19, 2011).

Wyoming

WYOMING SUPREME COURT HOLDS W.R.C.P. 68 OFFER OF SETTLEMENT NOT ACCEPTED IN A PERSONAL INJURY CASE

Supreme Court of Wyoming: Following an automobile wreck, Kara Dunham filed suit against Robert Fullerton for recovery of her injuries. Mr. Fullerton filed his answer in July 2009 and passed away in November 2009. Despite Mr. Fullerton's death, the parties continued to negotiate settlement.

In June 2010, Fullerton's counsel made a Rule 68 offer of settlement to Dunham. In July 2010, Fullerton then filed a motion to dismiss Dunham's complaint, alleging a failure to substitute a party pursuant to Rule 25. Ms. Dunham responded by filing a new suit against Fullerton's estate based upon the same accident. Ms. Dunham also responded by filing her Notice of Acceptance to the Rule 68 offer. In accepting the Rule 68 offer, Ms. Dunham reserved her right to litigate the "estate case." The district court granted the motion to dismiss and Dunham appealed the order, arguing that she had accepted the offer of settlement.

On appeal, the Wyoming Supreme Court found that Ms. Dunham's reservation of right modified the original offer by Fullerton's counsel. The Court stated that, unlike traditional settlement negotiations where counter-offers may be made, a plaintiff faced with a Rule 68 offer may only accept or reject it. Finding that Ms. Dunham's acceptance did not mirror the Rule 68 offer, the Court held that she did not validly accept the offer of settlement.

Dunham v. Fullerton, 258 P.3d 701 (Wyoming Supreme Court, decided July 6, 2011).

HEALTH INSURANCE POLICY INTERPRETED IN FAVOR OF COVERAGE BY WYOMING SUPREME COURT FOR REDUCTION MAMMOPLASTY SURGERY

Supreme Court of Wyoming: Kimberly Shaffer filed suit against her health insurance carrier, WIN, alleging breach of contract when WIN denied coverage for treatment she received for an MRSA infection. In 2005, Ms. Shaffer received a medically necessary bilateral breast reduction mammoplasty. Her insurance carrier at the time of the mammoplasty, Great West, authorized the surgery, finding that the mammoplasty was medically necessary.

In 2006, Ms. Shaffer was hospitalized for an MRSA infection and was treated aggressively because of the life-threatening nature of the infection. Her claims to her new insurance carrier, WIN, were denied on the basis that her infection arose from treatment to improve appearance. WIN's policy provided the following exclusion: "The following services are not covered or are subject to limitations

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… reduction mammoplasty."

It was undisputed that Ms. Shaffer's reduction mammoplasty was medically necessary, and that the infection resulted from a complication of the surgery. In giving effect to each word in the insurance policy, the Court focused on the language "or are subject to limitations," and found that the mammoplasty may be subject to limitations, rather than excluded altogether. The Court stated that even if it were to find the policy ambiguous, Wyoming precedent would require ruling in favor of Ms. Shaffer for an ambiguous insurance contract. Thus, the Court ruled in favor of Ms. Shaffer in finding the insurance claims were covered under the terms of the policy.

Shaffer v. WINhealth Partners, 2011WL4357728 (Wyoming Supreme Court, decided Sept. 20, 2011).

$500,000 JURY AWARD IN SEMI-TRUCK ACCIDENT CASE PLEADING EMOTIONAL DISTRESS

U.S. District Court, D. Wyoming: Plaintiff Caitlin King was a passenger in a car driven by Peter Brophy that spun out of control at the interchange of I-25 and I-80, after being rear-ended by a Werner Enterprises semi-truck operated by Defendant Cheryl Neal.

Mr. Brophy's car was traveling in the acceleration/deceleration lane of I-25, and Ms. Neal entered the same lane coming from I-80. Plaintiff alleged that Ms. Neal failed to signal her intent to change lanes and failed to look to be sure she could safely change lanes. A collision ensued between the two vehicles, causing Mr. Brophy's vehicle to spin out of control, cross several lanes of traffic, collide with a guardrail, and then rebound in front of another semi-truck, which then broadsided Mr. Brophy's vehicle on the driver's side.

Plaintiff suffered relatively minor physical injuries, including a cervical strain, abrasions, and an abdominal wall contusion. Plaintiff alleged emotional distress in the form of post-traumatic stress disorder, which occurred from witnessing Mr. Brophy sustain severe injuries. Defendant argued that Plaintiff could not recover emotional distress damages since Plaintiff and Mr. Brophy were not related. Defendant also alleged that Plaintiff's psychological problems were misdiagnosed and were instead caused by alcohol abuse. Plaintiff's claimed medical expenses were $22,500. Lost wages were alleged between $245,000 and $631,000. A jury awarded Plaintiff $500,000.

King v. Werner Enterprises et. al., Case No. 10CV172.

ABOUT OUR FIRM

DEWHIRST & DOLVEN OPENS OFFICE IN GRAND JUNCTION, COLORADO

To better serve our clients in Western Wyoming and the Western Slope of Colorado, Dewhirst & Dolven has opened a Grand Junction, Colorado office at:

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Dewhirst & Dolven is pleased to announce the publication of Clergy Sexual Misconduct: A Systems Approach to Prevention, Intervention and Oversight. Attorneys Miles Dewhirst and Crystal Littrell provided their legal insight in co-authoring the chapter entitled "Legal Liability for Clergy Sexual Misconduct."

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 100 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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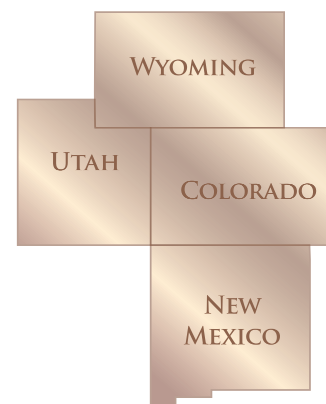

The information in this newsletter is not a substitute for attorney consultation. Specific circumstances require consultation with appropriate legal professionals.

Dewhirst & Dolven Opens Office in Grand Junction, Colorado

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Western Wyoming and the Western Slope of Colorado,
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