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UTAH
LEGAL UPDATE

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HIGHLIGHTS

DEFENSE VERDICT IN CASE OF CATASTROPHIC DAMAGES

Plaintiff sued manufacturer of wheel lock for semi-trailer after wheel assembly came loose and caused accident resulting in Plaintiff's severe burns, brain and orthopedic injuries, and 98% impairment requiring 24 hour lifetime care. The trailer was repaired twelve days before the accident. The jury returned a defense verdict finding that Plaintiff had not proved the wheel lock was properly installed after the trailer repair. *Page 2*

NO PIP SUBROGATION WHEN LIABILITY LIMITS TENDERED

The Utah Legislature amended Utah Statute 31A-22-309 to remove the right of reimbursement to a no-fault (PIP) insurer from the liability insurer when the liability insurer has tendered its policy limits. *Page 2*

EMPLOYEES' ACTIONS AGAINST EMPLOYERS

The Utah Supreme Court held an employee is not bound by the exclusive remedy of workers compensation insurance, and may pursue an action directly against the employer, when the employer or supervisor knows or expects that the assigned task will injure the particular employee that undertakes it. *Page 4*

UTAH VERDICTS

FRAUDULENT NON-DISCLOSURE

JURY AWARDS OVER $3.1 MILLION IN UNSTABLE SOILS CASE

Utah County: Plaintiff homeowners purchased a building lot from Defendant development company, and built a home on the property. Within two months of moving in, Plaintiffs could not open a back door. Eventually, no door or window opened properly. Windows broke during the night. Ceilings sagged. A gap to the outside elements developed in the basement. Plaintiffs spent more than $200,000 to remedy unstable soils, including placing piers from the home to the bedrock 35 feet below.

Plaintiffs alleged that years before they purchased the building lot, Defendant had received a soils report reflecting unstable soils in the exact location of the home, and that Defendant had failed to provide this information in disclosure statements made at the time the lot was purchased. Plaintiffs claimed that Defendant had fraudulently misrepresented and failed to disclose the known unstable soil.

The jury awarded $3,161,749 comprised of $330,057 for past economic damages, $206,692 for future economic damages, and $2,625,000 in non-economic damages.

Hess v. Canberra Development Co., LLC Case No.: 050401628.

MOTOR VEHICLE ACCIDENTS

$10,471 AWARDED IN CASE INVOLVING BLACK ICE AND PRE-EXISTING NECK FUSION

Davis County: Defendant Megan Parrish was attempting to pass Plaintiff's tractor trailer in snowy conditions when she lost control on a patch of black ice. Defendant's vehicle hit the median, and then collided with Plaintiff's truck. Plaintiff claimed injuries of neck and back pain, headaches, and sleep problems. Plaintiff had a pre-existing neck fusion.

Defense experts claimed that Plaintiff was traveling at excessive speed for the conditions and that the change in velocity of Plaintiff's tractor trailer was only 3-4 miles per hour. The jury awarded $10,471 dollars (comprised of $6,743 in medical

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expenses, $1,728 in lost wages, and $2,000 for non-economic damages) which were then reduced by 35% for Plaintiff's comparative fault.

Dalton v. Parrish, Case No.: 060700282.

Court Grants Plaintiff's Motion for Directed Verdict Where Defendant Driver Went Into Diabetic Shock

Salt Lake County: Defendant claimed he lost control of his vehicle because he went into diabetic shock. Defendant's vehicle hit a fire hydrant and street sign before it veered across the center line and collided with Plaintiff's vehicle in a near head-on collision. Plaintiff claimed soft tissue injuries to her neck and back which were treated by a chiropractor. Defendant claimed the treatment was excessive.

The Court granted Plaintiff's motion for a directed verdict on the issue of liability. The jury awarded $21,567 consisting of $8,882 in past medical expenses, $3,000 in future medical expenses, $1,185 in lost wages, and $8,500 in non-economic damages.

Crouch v. Egan, Case No.: 070911474.

Premises Liability

Defense Verdict Where Employee of Home Depot Lowered Garage Door on Plaintiff's Head

Salt Lake County: As Plaintiff Jody DeJonge, a home health nurse, was exiting through the contractor's access at a Home Depot store in Centerville, Utah, a store employee lowered a garage door which struck Plaintiff in the head. Upon falling to the ground, Plaintiff hit her head again. Plaintiff alleged traumatic brain, TMJ, and cervical spine injury, in addition to over half-million dollars in past and future lost earnings. Defendant claimed Plaintiff was not paying attention and was looking at receipts as she walked. Defense experts also testified that many of Plaintiff's complaints were pre-existing or degenerative in nature, and noted plaintiff's longstanding bouts with depression and other mental health problems. After a four-day jury trial, the jury found Plaintiff to be 100% at fault for causing the accident.

DeJonge v. Home Depot, USA Inc., Case No. 050913124.

Products Liability

Defense Verdict Where Failed Wheel Assembly Caused Catastrophic Damages

Salt Lake County: After a dual wheel assembly of a northbound tractor trailer detached on Interstate 15, the wheel assembly crossed the median and caused the driver of an SUV in the southbound lanes to lose control and cross into the northbound lanes. The SUV collided head-on into Plaintiff Keith Erdel's northbound Jeep Cherokee which then caught fire.

Plaintiff was trapped inside and suffered severe burns in addition to orthopedic and brain injuries. According to Plaintiff's experts, Plaintiff is 98% impaired and requires 24 hour lifetime care.

Plaintiff alleged a "keeper" wheel lock device manufactured by Defendant Stemco, L.P. failed, and caused the wheel assembly to detach. Though the wheel lock was never located, Plaintiff's experts testified metal fragments from the lock were found in the wheel hub. Plaintiff claimed there were likely microcracks in the wheel lock caused by the stamping process during the manufacturing process.

The trailer had been worked on at Rasband Diesel twelve days before the accident. Defendant denied the wheel lock failed and alleged mechanics at Rasband Diesel failed to properly install the lock when they completed their work.

After a five-day jury trial, the jury found that Plaintiff failed to prove the lock was properly installed when the trailer left Rasband Diesel. Importantly, Plaintiff had settled with Defendants Lisa Osborne (the driver of the SUV), Rasband Diesel, and others prior to trial, and the fact of these settlements was disclosed to the jury.

Erdel v. Stemco, L.P., Case No. 050914455.

Ski Accident

Plaintiff's $38,000 Verdict Reduced by 95%

Weber County: While skiing at Snow Basin Resort, Defendant crashed into Plaintiff, after he was pushed by another unidentified skier when that skier crashed into Defendant first. The unidentified skier left the area and was never located.

Plaintiff claimed injuries of lacerations to her wrists, head and face, and knee injuries requiring two surgeries which left her impaired. Plaintiff's medical expenses were approximately $9,000.

The jury found damages of $38,000 which were reduced by the finding of 95% negligence on the part of the unidentified skier. Defendant was found to be 5% at fault.

Gilbert v. Parker, Case No.: 060902582.

Utah Legislation

No PIP Subrogation When Liability Limits Tendered

In 2008, House Bill 144 amended Utah Statute 31A-22-309 and now provides that there is no right of reimbursement to a no-fault (PIP) insurer from the liability insurer (the insurer of the person who would be held legally liable for the personal injuries sustained) if the liability insurer has tendered its policy limits.

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The Bill also provides that if the liability insurer reimburses a no-fault insurer and subsequently determines that the reimbursement is needed to settle a third party liability claim, the liability insurer shall notify the no-fault insurer that a portion of the reimbursement is needed to settle a third party liability claim and the no-fault insurer must return the needed portion of the reimbursement within 15 business days. The Bill also provides a procedure for an insurer to notify a no-fault insurer that a portion of the reimbursement is needed.

Punitive Damages Cap for Litigants Increased

In 2008, Senate Bill 155S1 amended Utah statute 78B-8-201 which now requires that a court enter a judgment for punitive damages on behalf of the State of Utah, as well as the injured party, and increases the initial amount for the injured party to $50,000 (previously the injured party retained the first $20,000). The remaining amount of the punitive damage award is still split equally with the state. The amendment also sets priorities for collection of judgments and attorney fees and costs, and specifies that the state may use all methods at its disposal to collect its judgment.

Utah Cases

Actions Against Employers

Employee May Maintain Action Against Employer Where Employer Knew of or Expected Injury

Plaintiff employee Jenna Helf was injured as a result of exposure to toxic gases in a Salt Lake City refinery. Plaintiff brought action against her employer, Chevron, under the intentional injuries exception to the Workers' Compensation Act.

Plaintiff alleged that her supervisors directed her to initiate a chemical process that they knew would result in dangerous conditions that would injure whoever initiated the chemical reaction. Defendant Chevron filed a motion to dismiss arguing that the exclusive remedy provision of the Workers' Compensation Act barred Plaintiff's claim. The motion was granted by the trial court.

With limited exception, Utah's Workers Compensation Act provides the exclusive remedy for injured employees. One such exception, previously recognized by the Utah Supreme Court, allows an employee to maintain an action for damages caused by an intentional tort.

The Utah Supreme Court joined the majority of states in adopting the "intent to injure" standard in order to distinguish between intentional injuries that fall within the intentional injury exception and negligent or accidental injuries, which are covered by the exclusive remedy provision of the Workers Compensation Act. The "intent to injure" analysis focuses on whether the actor knew or expected that injury would occur as a consequence of his actions, as opposed to intending to do the act itself, or having any motive to injure.

The Court cautioned trial courts to maintain the distinction between motive and probability, and the legal concept of intent. The Court held that the "intent to injure" standard requires a specific mental state in which the actor knew or expected that injury would be the consequence of his action. "For a workplace injury to qualify as an intentional injury under the Act, the employer or supervisor must know or expect that the assigned task will injure the particular employee that undertakes it. In other words, the employer must know or expect that a specific employee will be injured doing a specific task. In these situations, the knowledge and expectation that injury will occur robs an injury of its accidental character, moving it out of the realm of negligence and into the realm of intent."

In reversing the trial court, the Utah Supreme Court held that Plaintiff's Complaint satisfied the "intent to injure" standard because it alleges that Plaintiff's supervisors knew or expected that whoever initiated the chemical process would be injured by exposure to the toxic gases released by the process.

Helf v. Chevron U.S.A., Inc., decided February 13, 2009 (This opinion has not yet been released for publication in the permanent law reports).

Asbestos Discovery

Plaintiffs Risk Dismissal by Cremating or Burying Body Before Autopsy, in Violation of Case Management Order.

In 2001, anticipating a substantial increase in asbestos litigation, the Third District Court created a "Master Case File" for asbestos litigation and developed a Case Management Order (CMO), applicable to all asbestos cases, to efficiently manage these cases. One of the discovery provisions in the CMO required an autopsy upon the death of a plaintiff.

Upon the death of two Plaintiffs, one was cremated and the other buried before any autopsy was performed. The trial court dismissed the actions for violation of the CMO requiring an autopsy upon the death of a plaintiff. However, the trial court failed to make specific finding as to whether plaintiffs' failures to procure autopsies were the result of willfulness, bad faith, fault or persistent dilatory tactics on the part of Plaintiffs or their heirs. The Supreme Court held that unintentional non-compliance with the CMO was insufficient to justify dismissal.

A failure to make factual findings regarding willfulness is not always grounds for reversal if a full understanding of the issues on appeal can nevertheless be determined by the appellate court. Here, the Supreme Court noted the record failed to

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provide such an understanding and reversed, holding the trial court erred in dismissing plaintiffs' claims as a sanction for their failures to obtain autopsies, absent a factual determination that the failures were due to willful, rather than unintentional, noncompliance with the CMO.

Kilpatrick v. Bullough Abatement, Inc., Decided December 12, 2008.

Pharmacist Liability

"Learned Intermediary" Rule Does Not Shield Pharmacist Where Drug Not FDA Approved and Withdrawn by Manufacturer

In early 1996, Plaintiff's physician began prescribing fen-phen, an appetite suppressant medication, for Plaintiff Steven Downing. From February 1996 until September 2000, Defendant Hyland Pharmacy filled Plaintiff Downing's prescriptions for fen-phen.

In 2004, Plaintiff brought negligence claims against Defendant pharmacy for continuing to fill prescriptions for fenfluramine, brand name Pondimin, after it was withdrawn from the market by the FDA and the manufacturer. Defendant subsequently filed a summary judgment motion arguing that it was entitled to judgment as a matter of law because it acted as a reasonable prudent pharmacy in filling Plaintiff's prescription and thus did not breach any duty owed to him. The trial court granted Defendant's summary judgment motion, holding that the "learned intermediary" rule protects pharmacists from liability if they fill a prescription as directed by the manufacturer or physician.

Under the "learned intermediary rule," manufacturers of prescription drugs have a duty to warn only the physician prescribing the drug, not the end user or patient. The physician, after having received complete and appropriate warnings from the drug manufacturer, acts as a learned intermediary between the drug manufacturer and the patient when preparing the drug prescription.

The Utah Supreme Court noted the majority of recent decisions discussing the rule have recognized limits or exceptions to its scope in the negligence context, concluding that its protections extend only to warnings about general side effects of the drugs in question, but not to specific problems known to the pharmacist such as prescriptions for excessively dangerous amounts of the drug or for drugs contraindicated by information about a patient. These holdings attempt to account for the nature of modern pharmacy practice and to apply traditional common law negligence rules to that practice.

Thus, the Utah Supreme Court held the learned intermediary rule did not preclude as a matter of law a negligence claim against a pharmacist for dispensing a prescribed drug that has allegedly been withdrawn from the market, and that pharmacists under such circumstances owe their customers a duty of reasonable care. The grant of summary judgment was reversed and the case remanded to the trial court.

Downing v. Hyland Pharmacy, Decided September 16, 2008.

Premises Liability

While a Slippery-When-Wet Floor Surface Does Not of Itself Constitute Negligence, Hazards Created By the Owner May.

Plaintiff entered a store shortly after it opened and slipped and fell on a puddle of water located on a hardwood floor towards the rear of the store. Defendant store routinely placed walking mats from the store entrance to the cash register, but no mats were placed from the cash register towards the rear of the store.

Noone was aware of the puddle before Plaintiff fell, but Defendant's representative testified the liquid likely came from either his shoes or Plaintiff's shoes. Defendant testified the floor was not maintained during the day; instead Defendant cleaned its floors once at the end of the day after the store was closed.

Plaintiff sued for injuries sustained in the fall, alleging that Defendant's mode of operation created a permanent unsafe condition, or that Defendant was liable under a temporary unsafe condition theory because Defendant had knowledge of the unsafe condition, and after obtaining such knowledge, Defendant had adequate time to remedy it but failed to do so. The trial court granted summary judgment in Defendant store's favor.

Plaintiff argued that by installing a wood floor that becomes slippery when wet, Defendant created a foreseeable and inherently dangerous condition for its customers. However, Plaintiff offered no evidence that Defendant did anything more than install a standard wood floor. Plaintiff offered no evidence, for example, that Defendant installed an unusually slippery wood floor or that it installed its wood floor negligently. While Plaintiff argued that merely installing a floor that can become slippery when wet satisfies the elements of foreseeability and inherent dangerousness, the Supreme Court specifically held that the construction and maintenance of a slippery-when-wet floor surface does not of itself constitute negligence in premises liability cases. Thus the trial court's grant of summary judgment on Plaintiff's permanent unsafe condition theory was affirmed.

However, summary judgment in Defendant's favor was reversed on Plaintiff's temporary unsafe condition claim. To recover under a temporary unsafe condition theory, a plaintiff must show that (1) the defendant had knowledge of the condition, that is, either actual knowledge or constructive knowledge because the condition had existed long

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enough that he should have discovered it; and (2) after obtaining such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it. Notwithstanding, if the unsafe condition or defect was created by the defendant himself or his agents or employees, the notice requirement does not apply. Thus, the Court noted, it is important to distinguish between the situation where the condition causing the injury was created by a store employee, or was created by some third person.

Plaintiff argued that Defendant had constructive notice because the water had been on the floor long enough that the owner or employees should have discovered it. However, Plaintiff presented inadequate evidence that the puddle of water was on Defendant's floor for an appreciable length of time. Because conjecture and speculation was the only way to determine the length of time the puddle was on the floor, the Court held it would be improper to impute constructive notice to Defendant.

Thus, the Utah Supreme Court held that Plaintiff could not recover under a temporary unsafe condition theory if the condition was created by a third party because Defendant did not have notice of the puddle. Plaintiff however could recover under a temporary unsafe condition theory if the puddle was created by Defendant because the notice requirement does not apply to owner-created temporary unsafe conditions. Because there was a genuine issue of material fact regarding who created the puddle, the case was remanded to the district court for a jury to determine whether Defendant created it and might therefore be liable for Plaintiff's injuries.

Jex v. JRA, Inc., Decided September 16, 2008.

Products Liability

Test to Identify "Product" for Purpose of Statute of Limitations in Product Liability Cases

In *Utah Local Government Trust v. Wheeler Machinery Company* the Utah Supreme Court was asked to determine whether the court of appeals erred in holding that the Utah Product Liability Act's two-year statute of limitations did not apply to Plaintiff's claim against Defendant manufacturer. The Supreme Court held the court of appeals did not apply the correct test for determining whether Plaintiff's claim was a product liability claim and reversed for application of the newly developed test.

Defendant Wheeler Machinery Company contracted with Plaintiff for the purchase of two diesel generators that were installed in a generator building. Exhaust pipes with rain caps were also installed by a local independent welding contractor. About seven months after the generators were installed, a fire in the generator building occurred, causing extensive damage to the building and equipment. The modified rain caps for the exhaust pipes were identified as the cause of the fire.

Plaintiff sued Defendant manufacturer alleging that one of the generators sold, supplied, assembled, and installed by Wheeler Machinery Co. caused the fire that damaged the property. Wheeler moved to dismiss the lawsuit arguing that Plaintiff's Complaint alleged a product liability cause of action and that the complaint had not been filed within the two-year product liability statute of limitations. The court of appeals held that Plaintiff's claim was not a product liability claim because the installation of the rain caps occurred after the product was placed in the stream of commerce.

The Utah Supreme Court reversed and remanded for application of the following test to determine whether a claim sounded in product liability: (1) whether the transaction primarily concerned a product and (2) whether the product was defective when it was sold. The Court further held that standards of the Uniform Commercial Code could be used to inform whether a transaction concerned a product, and when a sale occurs.

Utah Local Government Trust v. Wheeler Machinery Co., Decided December 12, 2008.

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 100 years and are committed to providing clients throughout Utah 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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Vicarious Liability

Questions of Fact Under "Going and Coming" Rule Preclude Summary Judgment

In 2004, Bradley Sundquist was working as an installer for his employer White Water Whirlpool (White Water), a company that manufactures and installs a variety of marble products. As part of his employment, employee Sundquist was required to travel from his home in Salt Lake County to White Water's offices in Utah County each day where he would pick up materials and supplies.

The employee's job responsibilities also included transporting White Water's products to the job sites, as well as returning any unused materials to White Water's warehouse. Often, the employee would return home with the unused materials after work and take them with him the next morning when he reported for work.

While on his way to work in a truck and trailer he personally owned, the employee collided with Plaintiff Kenneth Newman on Interstate 15. Both Newman and his passenger were thrown from the car.

Plaintiff Newman subsequently filed suit, alleging that the employee was in the course and scope of his employment at the time of the accident and that White Water should be vicariously liable for his injuries.

Under the doctrine of respondeat superior, an employer may be held vicariously liable for the acts of its employee if the employee is in the course and scope of his employment at the time of the act giving rise to the injury; however, as an exception to the general rule, an employee is not acting within the course and scope of his employment when he is traveling in his own automobile to and from work. This exception is known as the "coming and going rule."

To determine whether an employee is in the course and scope of his employment for vicarious liability purposes, courts apply a three-part test: (1) an employee's conduct must be of the general kind the employee is employed to perform; (2) the employee's conduct must occur within the hours of the employee's work and the ordinary spatial boundaries of the employment; and (3) the employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest.

The parties filed cross-motions for summary judgment. The trial court ultimately determined that, as a matter of law, the employee fell squarely within the ambit of the "coming and going" rule and thus was not acting within the course and scope of his employment at the time of the accident. The Utah Supreme Court disagreed, noting that the question of whether an employee is in the course and scope of his employment inherently presents a question of fact for the fact-finder. Because the employee's regular job responsibilities included hauling and installing materials, and then returning the remainder of the materials to the employer's warehouse, reasonable minds could differ as to whether the employee was actually returning materials to the employer – an act that would bring him within the course of his employment – or whether he was simply commuting to work, or perhaps both. Accordingly, an issue of material fact remained to be submitted to a jury.

Newman v. White Water Whirlpool, Decided November 14, 2008.