Spring 2010

DEWHIRST & DOLVEN LLC
Attorneys at Law

ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

IN BRIEF

UTAH

- Supreme Court Rejects Burden Shifting in Enhanced Injury Products Liability Cases ..... Page 2

WYOMING

- $250,000 Settlement Where Death Caused by Exposure When Wyoming Highway Patrol Failed to Respond to a Call ..... Page 2
- Wyoming Supreme Court Affirms Grant of Summary Judgment in Favor of Real Estate Brokers Where Plaintiff Failed to Present Evidence of Brokers' Actual Knowledge of Alleged Defects ..... Page 3

NEW MEXICO

- Waiver of Sovereign Immunity Affirmed Where Death Resulted from Failure to Enforce Traffic Laws ..... Page 3
- Jurors' Affidavits of Misunderstanding Jury Instructions Deemed Insufficient to Warrant New Trial ..... Page 4

COLORADO

- Fall in Hotel Bathtub Yields $240,417 Verdict, Including $100,000 in Punitive Damages ..... Page 5
- $100,000 Policy Limit Demand Rejected; Jury Awards over $3 Million ..... Page 5
- Colorado Supreme Court Holds Exculpatory Agreements are Void Against Claims of Strict Products Liability ..... Page 6

UTAH

$414,000 Verdict for Fall at Defendant's Motel and Resulting Knee Injury

U.S. District Court: District of Utah: In October 2006, Plaintiffs James Spahr and his wife Colleen were Michigan residents staying at Defendant's Springville, Utah Rodeway Inn. During the Spahrs' third evening of stay, James Spahr fell into a six-foot deep culvert located next to the walkway to the office.

Plaintiffs claimed the hazard was partially obscured by darkness, and that Defendant negligently failed to provide lighting and barriers. Defendant asserted barriers existed in the form of rocks and a colored concrete apron. Defendant further asserted Plaintiff's comparative fault in that the hazard was open and obvious, and previously viewed by Plaintiff during his stay.

Plaintiff James Spahr sustained a severed patellar tendon in the fall and medical expenses of $31,216. The jury awarded Plaintiff James Spahr these medical expenses, plus $375,856 in non-economic damages. Plaintiff Colleen Spahr was awarded $2,928 in economic damages and $4,000 in non-economic damages.

Spahr v. Ferber Resorts, LLC dba Rodeway Inn, Case No.: 08CV72.

Wake Surfer Awarded $100,000 in Arbitration Against Other Wake Surfing Participants Where Plaintiff Lost Her Thumb

Salt Lake County: In July 2008, Plaintiff Jessica Rassmussen was attempting to learn to wake surf at Pineview Reservoir from her sister Kristi Callister and Kristi's husband Eric. Upon falling, Plaintiff's gloved hand became entangled in the rope or handle. When she resurfaced, she found her thumb had been amputated. Though rushed to McKay Dee Hospital in Ogden, the thumb could not be reattached.

Plaintiff claimed Defendants (Plaintiff's sister and brother-in-law) were negligent in providing Plaintiff a wake boarding rope and handle, rather than a shorter, thicker rope and smaller handle used for wake surfing. Plaintiff argued use of the appropriate rope is an industry standard that would have prevented the type of entanglement Plaintiff experienced.

Following an arbitration hearing on November 11, 2009, Plaintiff was awarded $100,000 by arbitrator Paul H. Matthews.

Rasmussen v. Callister, Case No.: 080922862.

IN THIS ISSUE

Utah Supreme Court Rejects Burden Shifting in Enhanced Injury Products Liability Cases

Utah Supreme Court: In *Egbert v. Nissan Motor Co.*, the Utah Supreme Court accepted certification from the United States District Court for the District of Utah of the question of whether Utah recognizes section 16(b)-(d) of the Restatement (Third) of Torts: Products Liability, and answered the question in the negative.

The case arose from a motor vehicle accident wherein Mr. Egbert, while trying to avoid another vehicle, lost control of his 1998 Nissan Altima, and the car rolled. During the accident, the front passenger window shattered. Mrs. Egbert, eight months pregnant at the time, was ejected through the window. She suffered serious injuries and had an emergency C-section. The couple's daughter was born with a serious brain injury.

The Egberts brought products liability claims against Nissan asserting the passenger window was defectively designed because it was made with tempered glass, which shatters on impact, and not laminated glass which remains intact and acts as a secondary restraint mechanism. The Egberts argued that had the Altima's window been made of laminated glass, Mrs. Egbert would have remained in the car, her injuries would have been less severe, and their daughter would not have suffered a brain injury.

In a related case, the Utah Supreme Court had previously recognized the "enhanced injury" theory of liability as outlined in section 16(a) of the Restatement (Third) of Torts. Section 16 of the Restatement (Third) of Torts addresses an enhanced injury claim-sometimes known as a crashworthiness or second collision claim—in the products liability context. An enhanced injury occurs when an injury caused by some other event is increased or enhanced due to a defective product. Previously, the Court held that Utah recognizes the theory of liability for an enhanced injury as outlined in subsection 16(a) of the Restatement. The Court, however, did not address the remaining subsections 16(b) to (d) of the Restatement which address the burden of proof in an enhanced-injury case.

In part, these subsections read: "(b) If proof supports a determination of the harm that would have resulted from other causes in the absence of the product defect, the product seller's liability is limited to the increased harm attributable solely to the product defect. (c) If proof does not support a determination under Subsection (b) of the harm that would have resulted in the absence of the product defect, the product seller is liable for all of the plaintiff's harm attributable to the defect and other causes." Restatement (Third) of Torts: Products Liability § 16(b)-(c) (1998).

The difficulty in the Restatement arises in subsection (c) for injuries thought to be indivisible or single, and in defining which party should bear the burden to prove apportionment of an enhanced, indivisible injury. The Egberts urged the Court to adopt an approach where, if an indivisible injury exists in an enhanced-injury case, a plaintiff need only show that the product defect was a substantial factor in increasing the plaintiff's harm beyond that which would have resulted from other causes. Under such a rule, if the defect is found to be a substantial factor and the fact-finder cannot apportion liability for the indivisible injury, then the product seller would be jointly and severally liable with the other tortfeasors who caused the injury.

The Court rejected this approach and looked instead to a rule based on party apportionment, the predicate for Utah's liability scheme. Utah statute has abolished joint and several liability. Section 78B-5-818(3) of the Utah Code provides, "No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant." Fault is defined broadly. U.C.A. § 78B-5-817.

Utah's statute contains an explicit legislative intent and declaration that fault, in all its broadly defined forms, is always apportionable. Thus, even when a plaintiff suffers what is generally thought to be an indivisible injury, Utah statute calls for apportionment. The Court recognized this apportionment may not be precise, but the law in Utah not only favors apportionment, it demands it. Because all injuries, as a matter of Utah law, can and must be apportioned, there is no shifting of burden—informal or formal—to a defendant product seller to prove apportionment. The plaintiff therefore bears the burden of proof in an enhanced-injury case and Utah does not follow section 16(b)-(d) of the Restatement (Third) of Torts: Products Liability.

Egbert v. Nissan Motor Co., Ltd., Utah Supreme Court, decided February 19, 2010 (not yet released for publication in the permanent law reports).

WYOMING

$250,000 Settlement Where Wyoming Highway Patrol Failed to Respond to Call and Death Caused by Exposure

At about 2:30 a.m. on December 26, 2006, Michael Ruiz lost control of a pickup in which Steven Sabula was riding as a passenger. Ruiz was killed in the rollover accident but Sabula survived. A passing trucker saw Sabula waiving for help and called the Wyoming Highway Patrol dispatch at 2:42 a.m. and reported a man signaling for help.

At 2:44 a.m. Trooper Forest Johnson was told "there's a man standing by the road trying to waive down help, or a ride." Trooper Johnson was scheduled to end his shift at 3:00 a.m. and reportedly responded "Let's wait for second call."

At 2:45 a.m. a dispatcher at the Buffalo City Police Department called the Highway Patrol dispatch and, indicating Campbell County had reported an accident at the same location, offered to send an ambulance. The Highway Patrol dispatcher declined the offer noting that Trooper

More on Page 3

Continued from page 2

Johnson had said to wait for a second call.

Another Trooper went to the scene at 5:00 a.m. after a motorist reported a man on the ground, holding a sign asking for help. Sabala was found and transported to Wyoming Medical Center by life-flight, where he died at 10:50 a.m. The coroner indicated the cause of death as "hypothermia due to spending time in cold weather following an auto crash."

Wyoming authorities acknowledged that the Highway Patrol's policy requires troopers to respond to requests for assistance, and agreed to pay $250,000 to settle the case. Trooper Johnson was terminated.

Wyoming Supreme Court Affirms Grant of Summary Judgment in Favor of Real Estate Brokers Where Plaintiff Failed to Present Evidence of Brokers' Actual Knowledge of Alleged Defects

Wyoming Supreme Court: In *Throckmartin v. Century 21 Top Realty*, the Wyoming Supreme Court affirmed the district court's grant of summary judgment in a case of alleged real estate broker malpractice.

The case arose out of Bryon and Vanessa Throckmartin's purchase of a house in Gillette, Wyoming, in November, 2005. In August of 2006, the Throckmartins discovered that the basement of the house leaked very badly during significant rainfall, that the foundation had crumbled, and that the house was becoming uninhabitable. Eventually it was condemned by the City of Gillette in mid-2007—a total loss for the Throckmartins. They filed suit naming two real estate firms (and their respective agents) as defendants, as well as the sellers of the home and the home inspection experts who inspected the home for the Throckmartins prior to closing. The district court granted summary judgment in favor of the real estate firms and their agents. The case is still pending against other defendants.

Defendant Century 21 TOP Realty was a real estate brokerage firm and Defendant Kathie Hove was a sales representative and associate broker who worked for that firm and provided services to the Throckmartins in their endeavor to buy their first home. Defendants Vicki Nelson and Real Estate Professionals, Inc., (ReMax) had listed the home for sale. The Throckmartins claimed, among other things, that Defendants engaged in professional negligence, breached their contract, and breached the duty of good faith and fair dealing implied in their contract and articulated in applicable statutes.

Real estate brokers and salesmen are licensed by the State of Wyoming and required to meet standards of honesty, integrity, trustworthiness and competency. Wyo. Stat. Ann. § 33-28-302 describes the relationships between brokers and salesmen ("licensees") and the public and imposes a duty of good faith and fair dealing in the performance of all contracts governed by the statute. Pursuant to Wyoming statute, a licensee acting as a seller's agent, a buyer's agent, or an intermediary, is required to disclose to any prospective buyer all adverse material facts actually known by the licensee. However, such licensees owe no duty to conduct an independent inspection of the property for the benefit of the buyer, and owe no duty to independently verify the accuracy and completeness of any statement made by the seller or any independent inspector.

The Wyoming Supreme Court observed the negligence claims asserted by the Throckmartins essentially assert a breach of the duty of care owed by real estate professionals. Because the Throckmartins were unable to present any evidence that suggested that the adverse material facts were "actually known" to the real estate firms and their agents, the district court's grant of summary judgment was affirmed.

Throckmartin v. Century 21 Top Realty, et al., Wyoming Supreme Court, decided March 3, 2010.

New Mexico

Waiver of Sovereign Immunity Affirmed Where Death Resulted from Failure to Enforce Traffic Laws

New Mexico Court of Appeals: The Bernalillo County Sheriff's Department (BCSD) appealed the judgment of the district court holding it thirty percent liable for the wrongful death of Jason Wachocki. The district court set the total compensatory damages for Jason's death at $3,707,563.82. BCSD's comparative fault portion amounted to $1,112,269.15, but the judgment was capped at $400,000 pursuant to NMSA Section 41-4-19(A)(3) which sets forth maximum governmental liability under the Tort Claims Act.

BCSD argued that several of the district court's factual findings were not supported by substantial evidence and that the court improperly determined that Plaintiffs' claim fell within the waiver of sovereign immunity for law enforcement officers under New Mexico Statute § 41-4-12.

The Court of Appeals declined to address BCSD's challenge of the district court's substantive findings of fact because its brief did not conform to the New Mexico Rules of Appellate Procedure. The Court of Appeals wrote that BCSD's appellate brief rendered it virtually impossible for the Court to review BCDS's assertions because it failed to cite the record and failed to present the evidence as a whole. The district court's decision that the Tort Claims Act does not provide immunity was affirmed.

The fatal collision occurred at the intersection of Shelly Road and Speedway Boulevard west of Albuquerque. Shelly Road is a two-lane road running north and south, providing access to the county jail, Sandia Motor Speedway (the race track), and the Albuquerque Solid Waste Management Department (SWMD). Speedway Boulevard makes a T-intersection

More on page 4

Continued from Page 3

with Shelly Road, and leads to the race track to the west. BCSD had the responsibility for patrolling these roadways.

Jason Wachoki was traveling east along Speedway Boulevard, coming to a complete stop at the three-way intersection with Shelly Road at about 10:58 p.m. At the same time, Willie Hiley was driving south along Shelly Road on his way to work the graveyard shift at the jail. As Mr. Hiley approached the intersection of Speedway Boulevard, he turned off his vehicle's headlights in an apparent attempt to determine whether there were any other vehicles in the area based on signs of illumination from their headlights. As Mr. Wachoki proceeded through the intersection, Mr. Hiley's vehicle came out of the darkness with its headlights off, ran the stop sign driving in excess of 75 miles per hour (almost twice the posted speed limit) and struck Mr. Wachoki's vehicle killing him instantly.

The jail opened in 2003 and traffic increased significantly on Shelly Road. In the fourteen months between the opening of the jail and Mr. Wachoki's death, BCSD received numerous complaints about corrections officers and others violating traffic laws on Shelly Road. It also received requests to enforce the traffic laws on the roadways leading to the jail. The district court found that BCSD failed to respond to requests to enforce traffic laws on the roads leading to the jail and that it did not enforce traffic laws against law enforcement officers and most corrections officers. The district court also found that BCSD knew that its failure to patrol traffic on Shelly Road could lead to a serious accident and concluded that the BCSD, through its deputies and employees, was negligent in violating and not enforcing the traffic laws on Shelly Road, and that its negligence was a contributing cause of the wrongful death of Jason Wachocki.

Generally, the New Mexico Tort Claims Act provides governmental entities and public employees acting in their official capacities with immunity from tort suits unless the Act sets out a specific waiver of that immunity. Section 41-4-12 of the Act sets out the applicable waiver of immunity for the acts or omissions of law enforcement officers, listing several specific torts for which liability is waived. Section 41-4-12 waives immunity from liability for wrongful death resulting from deprivation of any rights secured by the laws of New Mexico when caused by law enforcement officers while acting within the scope of their duties.

New Mexico Statutes state in relevant part that "it is the duty of every county sheriff, deputy sheriff, constable and other county law enforcement officer to enforce the provisions of all county ordinances," and "it is hereby declared to be the duty of every sheriff, deputy sheriff, constable and every other peace officer to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware." NMSA §§4-37-4 and 29-1-1. The Court of Appeals held that both sections secure private rights that may be enforced under the Tort Claims Act because the duties they establish are designed to protect individual citizens from harm. The district court's decision refusing to apply immunity was affirmed.

Wachocki v. Bernalillo County Sheriff's Dept., decided November 24, 2009.

Jurors' Affidavits of Misunderstanding Jury Instructions Deemed Insufficient to Warrant New Trial

New Mexico Court of Appeals: Cities of Gold Casino, Pojoaque Gaming, Inc., and Pueblo of Pojoaque (Defendants) appealed a district court order granting Donna Shadoan (Plaintiff) a new trial based upon jurors' affidavits of misunderstanding jury instructions or process in reaching a verdict. The Court of Appeals reversed the district court and remanded the case for entry of judgment.

The case arose from an incident where Plaintiff was robbed and injured in the parking lot of the Cities of Gold Casino as she was getting out of her car. Plaintiff filed suit against Defendants alleging a lack of security in the casino parking lot. During closing arguments, Plaintiff urged the jury that she was entitled to $448,500 in compensatory damages arising from the assault for lost income and pain and suffering, as well as medical expenses totaling $9,568. After deliberation, the jury returned a verdict for Plaintiff in the amount of $4,784 and found that Defendants were 20% responsible for Plaintiff's injuries.

Following the proceedings, the district judge met with the jury in the jury room for a debriefing. While there is no record of the post-trial debriefing, the jury apparently told the judge that they had intended to give Plaintiff half of her medical expenses and 20% of the $448,500 that Plaintiff had asked for in closing arguments. The judge responded by stating that the jury had to speak to the attorneys for the parties. Following the debriefing, one of the jurors approached both parties, who were apparently still in the building at the end of the trial and told the parties about the confusion surrounding the verdict form.

Plaintiff subsequently filed a motion for additur or, in the alternative, new trial, and attached three essentially identical affidavits from three jurors. The affidavits stated, in pertinent part, that the jurors intended that Plaintiff should receive 20% of the $448,500 requested by Plaintiff's counsel.

Defendants argued that Rule 11-606(B) prohibits juror testimony or affidavits that seek to impeach the verdict of the jury, and it was error for the district judge to consider the affidavits in his decision to grant a new trial. Rule 11-606(B) states, "*a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations . . . or concerning the juror's mental processes in connection therewith.*" A

More on Page 5

Continued from Page 4

juror may however, testify about "*whether there was a mistake in entering the verdict onto the verdict form.*"

The Court of Appeals observed the affidavits explain what the intentions of the jury were, but they did not state that what was written on the verdict form was not what the jury agreed upon. Thus, the mistake was not clerical and the district court erred in considering the post-verdict jurors' affidavits. The case was remanded to the district court with instructions to reinstate the original verdict and to enter judgment for Plaintiff in the amount of 20% of $4,784.

Shadoan v. Cities of Gold Casino, decided November 12, 2009.

COLORADO

FALL IN HOTEL BATHTUB YIELDS $240,417 VERDICT, INCLUDING $100,000 IN PUNITIVE DAMAGES

Denver County: Carol Wilson was a guest at the Sheraton Hotel in downtown Denver on October 9, 2008. She took a shower in the bathtub and upon attempting to turn off the water, slipped on the bare surface of the bathtub and fell, striking her back on the outside edge of the tub.

Plaintiff Ms. Wilson claimed the tub was not equipped with a non-skid surface or non-slip mat as required by the Colorado Department of Public Health. Additionally, Plaintiff claimed Defendant hotel knew its tubs were inadequately equipped and that as many as 14 other guests had been injured in slip and falls in the hotel's tubs. Plaintiff asserted Defendant's failure to protect against a known dangerous condition was willful and wanton, and the Court allowed Plaintiff's claim for punitive damages.

Defendant admitted its tubs were not equipped with non-skid surfaces or non-slip mats and admitted its knowledge of eight other slip and falls in the hotel's tubs that caused injury. Though Defendant also admitted it did not warn of the absence of non-slip surfaces, it claimed Plaintiff was comparatively negligent in failing to request a non-slip mat which was available. Defendant also denied causation for Plaintiff's injuries and damages.

Plaintiff claimed injuries of a T12 compression fracture and resulting laparoscopic surgery and rehabilitation. The Denver jury awarded $51,288 in past medical expenses, $4,129 in past wage loss, $35,000 in non-economic damages, $50,000 for physical impairment, and $100,000 in punitive damages, for a total award of $240,417.

Wilson v. Sheraton License Operating Company, Case No.: 09CV2096.

$100,000 POLICY LIMIT DEMAND REJECTED; JURY AWARDS $3,087,500 IN REAR-END ACCIDENT CAUSING TBI

Jefferson County: Plaintiff Scott Martin was rear-ended on August 24, 2008, by a vehicle driven by Sherri Lauk. Plaintiff claimed injuries including moderate traumatic brain injury (TBI) and resulting cognitive deficits.

Plaintiff claimed permanent impairment and loss of earning capacity including economic damages between $2 and $4 million dollars. Plaintiff had been self-employed, working from home in a trucking logistics business, and claimed he was unable to continue working.

Plaintiff demanded the policy limits of $100,000 in September 2008. Defendant rejected the demand. Six months later, Defendant's offer of the $100,000 policy limits was rejected by Plaintiffs.

The jury awarded Plaintiff Scott Martin $3 million dollars in economic damages, $50,000 for non-economic damages, and $25,000 for physical impairment. $12,500 was awarded for the loss of consortium claim of Plaintiff's wife Elizabeth, for a total award of $3,097,500.

Martin v. Lauk, Case No.: 08CV4546.

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, 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.

ROCKY MOUNTAIN LEGAL UPDATE
is published quarterly by
Rick N. Haderlie, Esq of
DEWHIRST & DOLVEN, LLC

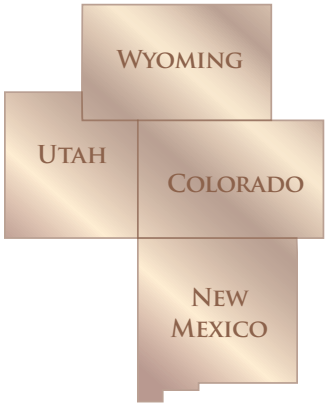
For more information regarding Rocky Mountain legal developments, or assistance with any Utah, Wyoming, New Mexico or Colorado matter, contact Rick Haderlie at
rhaderlie@dewhirstdolven.com
17 East 200 North, Ste 203
Provo, UT 84606
(801)225-7955
www.DewhirstDolven.com

DEWHIRST & DOLVEN
Attorneys at Law
www.DewhirstDolven.com

PROVO
17 East 200 North, Ste 203
Provo, UT 84606
(801) 225-7955

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

COLORADO SPRINGS
102 So. Tejon, Ste 500
Colorado Springs, CO 80903
(719) 520-1421



Colorado Supreme Court Holds Exculpatory Agreements are Void Against Claims of Strict Products Liability

Colorado Supreme Court: Savannah Boles brought suit against Sun Ergoline, Inc., asserting a strict products liability claim for personal injuries she sustained in a tanning booth when several of her fingers came in contact with an exhaust fan located at the top of the booth, partially amputating them.

Sun Ergoline moved for summary judgment, countering that Boles's claim was barred by a release she signed prior to using its product which contained the following exculpatory agreement: "I have read the instructions for proper use of the tanning facilities and do so at my own risk and hereby release the owners, operators, franchiser, or manufacturers, from any damage or harm that I might incur due to use of the facilities." The trial court granted Sun Ergoline's motion; the Court of Appeals affirmed.

In general, although an exculpatory agreement attempting to insulate a party from liability for its own simple negligence may be disfavored, it is not necessarily void. Colorado law has delineated four factors to be considered in determining whether such a release agreement should be enforced to bar a claim for damages premised on simple negligence: (1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.

However, claims of strict products liability, rather than resting on negligence principles, are premised on the concept of enterprise liability for casting a defective product into the stream of commerce. In strict products liability, the focus is on the nature of the product rather than the conduct of either the manufacturer or the person injured. The Court observed that a claim for strict products liability would be flatly thwarted by legitimizing such disclaimers or exculpatory agreements.

The Court further noted that the Second Restatement of Torts clearly indicates that exculpatory agreements between a manufacturer and an end-user can have no effect, and that other jurisdictions considering the question are in accord. The Supreme Court of Colorado held that an agreement releasing a manufacturer from strict products liability for personal injury, in exchange for nothing more than an individual consumer's right to have or use the product, necessarily violates the public policy of Colorado and is void.

Boles v. Sun Ergoline, Inc., decided February 8, 2010.