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UTAH
LEGAL UPDATE

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HIGHLIGHTS

UTAH VERDICTS

ELEVATOR MALFUNCTION

PLAINTIFF AWARDED OVER $331,000 FOR FALL WHILE EXITING STUCK ELEVATOR

Weber County: Plaintiff Connie Florez, an IRS employee in her sixties, was stuck inside an elevator at her place of employment. Co-workers were able to open the elevator doors, and while trying to get out, Plaintiff fell and hit her head, sustaining injury to her inner ear and associated vertigo, nausea, dizziness and headache.

Plaintiff claimed improper maintenance of the elevator and Defendant Schindler Elevator Corporation admitted liability. Plaintiff had no lost wages and medical expenses of $17,032. Defendant offered $25,000 in settlement; Plaintiff demanded $100,000. The jury awarded Plaintiff her past medical expenses plus $93,350 in future special damages and $220,764 in general damages for a total award of $331,146.

Florez v. Schindler Elevator Corp.
Case No.: 050902302.

MEDICAL MALPRACTICE

PSYCHIATRIST WINS DEFENSE VERDICT WHERE SLEEPING PILLS WERE PRESCRIBED TO DEPRESSED ANOREXIC WHO BECAME PINNED DOWN BY A FALLEN DRESSER

Salt Lake County: Plaintiff's decedent Ann Menlove was being treated by Psychiatrist Michael Kalm for anorexia, depression and anxiety. Dr. Kalm prescribed Amitriptyline, a sleep aid. Menlove filled the prescription for 30 pills and was found dead the next day, pinned beneath a dresser that had fallen on top of her. Evidence suggested that Menlove was pulling out a dresser drawer when the dresser tipped over on top of her and she was unable to free herself. Thirteen of the pills were missing.

Plaintiff claimed Dr. Kalm knew of the recent death of Menlove's mother and Menlove's tendency to overdose on sleeping pills, and the combination of anorexia and the sleep medication made Menlove clumsy and contributed to her death. Defendant argued the death was an unfortunate accident and the autopsy revealed Menlove had not taken thirteen sleeping pills. The jury found defendant was not negligent.

Bowman v. Kalm
Case No.: 030912040.

IN THIS ISSUE

Motor Vehicle Accidents

Plaintiff Awarded $137,543 in Minor Rear End Accident

Salt Lake County: Plaintiff Gaetano Donatelli was traveling southbound on Redwood Road in Salt Lake County when he slowed suddenly for another vehicle which pulled into traffic. Defendant Troy Beaumont in a company truck rear-ended Plaintiff. Defendant estimated the speed at impact to be less than 5 mph.

Plaintiff claimed neck and back injuries including aggravation of degenerative conditions, and medical expenses of $137,543. Defendant claimed Plaintiff's condition pre-existed the subject accident, and any soft tissue injury sustained could have been treated for $1,400. The jury returned a verdict of $137,543, the amount of Plaintiff's medical expenses.

Donatelli v. Penhall Co., Case No.: 050102304.

Plaintiff Awarded $7,011 in Rear-End Accident

Utah County: In another case involving a rear end collision with minor impact, a Utah County jury also awarded Plaintiff his medical expenses only. Plaintiff Mario Arras, a corrections officer, was rear-ended in stop-and-go traffic on I-15. Plaintiff's wife described the impact as a "jolt" and Plaintiff's vehicle sustained minor damage. Plaintiff claimed lower back injuries including lumbar disc bulges. After a two-day jury trial, the Utah County jury awarded Plaintiff his medical expenses only; no award was made for general damages such as pain and suffering.

Arras v. Gull, Case No.: 060400795.

Plaintiff Awarded Less Than One-Third of Medical Expenses in Case of Excessive Treatment

Salt Lake County: Plaintiff was a passenger in a vehicle stopped behind Defendant's vehicle when Defendant backed into Plaintiff's vehicle. Defendant, who initially left the scene of the accident, claimed the impact was minimal. Plaintiff claimed soft tissue injuries to her neck and back and treated extensively including over 70 trigger point injections. Though Plaintiff's medical expenses approximated $25,000, the jury awarded $6,500 in economic damages and $2,000 in non-economic damages. The total verdict of $8,500 was reduced by $3,000 in PIP benefits.

Green v. Chojncaki, Case No.: 060910364.

Defense Verdict in Rear-End Accident

Weber County: Plaintiff, a homemaker, and Defendant were both in the right turn lane on 36th Street in Ogden, in the process of turning right onto Harrison Boulevard. Defendant rear-ended Plaintiff. Plaintiff claimed neck and back injuries as well as a concussion. At trial, Plaintiff's counsel reported he planned to call no medical experts or health care providers. Absent this foundation, the Court refused to allow evidence of all but $3,000 (paid by PIP) of Plaintiff's $11,300 in past medical expenses. After the one day trial, the jury found that Plaintiff's medical expenses did not meet the threshold. Because the jury also found that Plaintiff sustained no permanent impairment or disability, a defense verdict was rendered

Ellis v. Salimeno, Case No.: 070901674.

Utah U.S. District Court Decisions

Declaratory Judgment

U.S. District Court Enforces Insurance Policy Assault and Battery Exclusion

U.S. District Court, Judge Dale A. Kimball: Wesley Rigby was physically removed from the insured tavern by bouncers. Rigby claimed he was punched in the face several times and sustained a closed head injury. Rigby sued the tavern whose insurer Essex Insurance Company accepted the defense under a reservation of rights and pursued declaratory relief.

Essex argued there was no "occurrence" under the policy because "occurrence" was defined as an "accident" and here, the bouncer punched Rigby at least three times in the face and the resulting injury could have been anticipated. The Court disagreed, holding that it could not be said that the injuries were anticipated as a matter of law.

The Court however enforced the policy exclusion for claims arising out of assault and battery, though Rigby's Complaint was based solely on allegations of negligence. In doing so, the Court also rejected arguments that the injuries were partially related to a fall on a slippery parking lot and that Essex was required to defend the negligent infliction of emotional distress claim, as these claims arose from the assault and battery and were thus excluded by the policy.

Judge Kimball stated "regardless of why the altercation occurred or who was at fault, Mr. Rigby's claims – although styled as 'negligence' claims – necessarily arise out of an assault and battery. Under either version of the facts at issue, Mr. Rigby would not have a cause of action but for the alleged assault and battery, and therefore, his claims are excluded by the Essex policy."

Essex Insurance Co. v. Wake Up Too, Inc. and Rigby, Case No.: 07CV312.

Loss of Consortium

Claim May Not Be Included in Release for Policy Limits

U.S. District Court, Judge Tena Campbell: Mrs. Mary Crabtree sustained injuries in a motor vehicle accident with a vehicle operated by Jesse Archuleta. Shortly after the accident, and prior to litigation Mrs. Crabtree settled her personal injury claim with Archuleta's insurer American Family Insurance for the policy limits of $100,000. Mr. Andrew Crabtree subsequently pursued a claim of loss of consortium. American Family maintained the release signed by Mrs. Crabtree also released the loss of consortium claim.

Mr. Crabtree filed suit alleging the release was fraudulently obtained and thus not binding because, he claimed, American Family had agreed to honor the loss of consortium claim at a later date. Additionally, Mr. Crabtree claimed the loss of consortium claim was not resolved by the release.

Archuleta and American Family moved for summary judgment arguing that Utah Code identified loss of consortium claims as derivative and required joinder of injury and consortium claims, and thus the loss of consortium claim was extinguished by the release. Mr. Crabtree argued that Mrs. Crabtree lacked authority to release his claim and further, although the consortium claim was derivative, it was still a separate claim and joinder was not applicable where the underlying injury claim was not in litigation.

U.S. District Court Judge Campbell noted no controlling Utah authority and a split in other jurisdictions but ruled that Utah Courts would likely deem a loss of consortium claim to be separate property that cannot be released by the injured spouse. The Court also held questions of fact relative to whether Mrs. Crabtree's release was fraudulently obtained precluded summary judgment in favor of Defendant and his insurer.

Crabtree v. Archuleta, American Family Insurance, Case No.: 06CV946.

Utah Cases

Discovery Sanctions

Pro Se Party's Answer Stricken for Failure to Respond to Discovery

Defendant Linda Hensley appealed the district court's denial of her motion to set aside default judgment entered against her after her Answer was stricken as a sanction for failing to obey discovery orders.

The Utah Court of Appeals noted that the "district court judge is vested with considerable discretion under Rule 60(b) in granting or denying a motion to set aside a judgment." Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986). In this case, there was ample support for the district court's denial of Defendant's motion. Defendant did not provide a reasonable justification for her failure to respond to discovery. Defendant argued that the failure to provide discovery was the consequence of prior counsel's failure to act; however, the record supported the opposite conclusion.

At a hearing regarding Defendant's first failure to comply with an order compelling discovery, in the presence of Defendant and with no objection from Defendant, Defendant's prior counsel stated that Defendant had instructed him to not file responses to discovery requests. At this same hearing, the district court awarded sanctions, allowed Defendant's prior counsel to withdraw, and ordered Defendant to provide the outstanding discovery requests within fifteen days or she would be subject to sanctions "up to and including having the answer stricken." Then, with prior counsel out of the picture and the decision regarding responding purely her own, seven months passed without discovery responses from Defendant.

Defendant's temporary status as a pro se litigant apparently had no impact on the Court's analysis. The Court noted that although it is generally lenient with pro se litigants because of their lack of technical knowledge of law and procedure, Defendant's repeated failures to respond to discovery were not missteps due to lack of technical legal knowledge. The district court ordered Defendant to respond to the discovery requests on two occasions, the latter time also warning her of the dire consequences that could result if she chose not to comply. Thus, the Court found that Defendant could not have reasonably been under the impression that failure to respond to discovery was appropriate. The denial of Defendant's motion to set aside the default judgment was affirmed and Plaintiff was awarded her attorney fees reasonably incurred on appeal.

Fratto v. Hensley, Memorandum Decision – Not for Official Publication, Court of Appeals, Decided April 23, 2009.

Enforcement of Settlements

Trial Court's Order Compelling Settlement Affirmed

Defendants Richard Ferguson and Hollywood Body Salon, LLC, appealed from the trial court's grant of Plaintiff's motion to compel settlement, arguing that the trial court abused its discretion because the evidence in the record did not show a meeting of the minds. Generally, a trial court's summary enforcement of a settlement agreement will not be reversed on appeal unless it is shown that there was an abuse of discretion. *John Deere Co. v. A & H Equip., Inc.*, 876 P.2d 880, 883 (Utah App. 1994).

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The Court of Appeals has generally affirmed the granting of a motion to compel settlement if the record establishes a binding agreement and the excuse for nonperformance is comparatively unsubstantial. *John Deere Co. v. A & H Equip., Inc.*, 876 P.2d 880, 883-84 (Utah App. 1994). Utah law permits enforcement of oral settlement agreements. *Goodmansen v. Liberty Vending Sys., Inc.*, 866 P .2d 581, 584 (Utah App. 1993) (holding "It is of no legal consequence that the parties have not signed a settlement agreement."). If a written agreement is intended to memorialize an oral contract, a subsequent failure to execute the written document does not nullify the oral contract. *Goodmansen v. Liberty Vending Sys., Inc.*, 866 P .2d 581, 585 (Utah App. 1993) (quoting *Lawrence Constr. Co. v. Holmquist*, 642 P.2d 382, 384 (Utah 1982)).

Defendants conceded that a settlement agreement was created but disputed whether Richard Ferguson was bound by it in his individual capacity. The trial court found, however, that the Parties reached a meeting of the minds on the essential terms of a settlement, but that Defendants (and particularly their counsel) suddenly abandoned communications regarding the finalization of the agreement. The trial court further found that there was nothing before the court to suggest a lack of clarity as to who the Parties to the settlement would be.

These factual findings were supported by a series of emails and letters sent by Plaintiff's counsel to Defendants' counsel as well as one response by Defendants' counsel. In these emails, Defendants' counsel's client is referred to as "he" rather than "it." Throughout this correspondence, as well as the proposed written settlement agreement sent to Defendants' counsel, it is apparent that the settlement was in lieu of going forward with the litigation. At this point, the litigation involved only Plaintiff's claims against Richard Ferguson because Plaintiff's claims against Hollywood Body Salon had already been compelled into arbitration.

In light of the evidentiary record before it, the Court of Appeals held the trial court did not err in concluding that a binding contract had been made and in finding that the settlement agreement included Richard Ferguson as a party. The trial court therefore did not abuse its discretion in granting Plaintiff's motion to compel settlement and its ruling was affirmed.

Ellis v. Ferguson, Memorandum Decision – Not for Official Publication, Court of Appeals, Decided March 12, 2009.

Interest on Settlements

Prejudgment Interest is Not Available on Settlement Agreements Absent an Admission of Liability for Damages

The Utah Supreme Court reversed the court of appeals decision affirming an award of $12,835.48 in prejudgment interest subsequent to the Parties' settlement of all claims during trial.

In early 2000, Defendants Alan and Vicki Gurney hired Plaintiff Iron Head Construction, Inc. (Iron Head) to expand and remodel part of their home. The Parties signed a contract that indicated Iron Head would be paid for the work. Once construction began, the Gurneys made several changes to the scope of the project. According to Iron Head, these changes included expanding the work originally contracted for as well as a complete remodel of both floors of the Gurneys' home.

Iron Head attempted to collect an additional $82,463.33 from the Gurneys above and beyond the contract price. The Gurneys refused to pay. As a result, Iron Head filed both a mechanic's lien against the Gurneys' home and a suit alleging breach of contract, unjust enrichment, and quantum meruit, and requesting foreclosure of the mechanic's lien.

Following three days of a bench trial, and in the middle of Iron Head's case in chief, the Parties agreed that the Gurneys would pay Iron Head $43,500 to settle the case. The agreement settled all claims between the Parties but reserved for determination by the trial court the question of whether Iron Head was entitled to prejudgment interest on the settlement amount. The agreement between the Parties was not reduced to writing and was instead announced to the court during the trial. It contained no admissions of liability or identification of the basis for the settlement amount.

Following briefing by both Parties, the district court determined that damages became complete and awarded $12,835.48 in prejudgment interest to Iron Head. The Utah Supreme Court held the court of appeals erred in affirming the district court's award of prejudgment interest on the settlement amount.

The Utah Supreme Court vacated the award of prejudgment interest because (1) the settlement involved no underlying finding of damages or liability against either party; (2) the amount stipulated to by the parties was not related to an amount that could be calculated to a mathematical certainty; and, (3) allowing an award of prejudgment interest based solely on a stipulated amount between the Parties undermines the public policy of encouraging settlements.

The Court reasoned that the Parties' settlement was agreed upon in order to prevent the further expenditure of their assets on protracted litigation. The agreement did not include an admission or finding of liability, and no judgment was entered against either Party. Additionally, the agreement did not specify what values and conditions made up the stipulated amount. These facts precluded the

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settlement amount from being characterized as damages and from falling within the standard of an amount of loss that can be calculated to a mathematical certainty.

Iron Head Const. Inc. v. Gurney, Utah Supreme Court, Decided April 24, 2009.

Road Construction

Where Plaintiff Injured in Road Construction Zone, Summary Judgment Granted When Uncontroverted Expert Testimony Showed Compliance with Manual on Uniform Traffic Control Devices

Plaintiff Flora Macintosh appealed the trial court's grant of summary judgment on her negligence claim in favor of Defendant Staker Paving and Construction Company (Staker).

At issue was the scope of the legal duty owed by Staker. Defendant Staker asserted that it met its requisite standard of care because it complied with safety standards outlined in the Manual on Uniform Traffic Control Devices (the MUTCD). Utah Administrative Code adopted by reference the MUTCD which "was approved by the Federal Highway Administrator as the National standard for all highways open to public travel."

Fred Lupo, the Staker employee who inspected the intersection shortly before the accident, was trained and certified in traffic control. Lupo concluded that the intersection complied with the MUTCD. Plaintiff Macintosh failed to controvert this fact. Aside from her deposition testimony that the intersection was unmarked, Macintosh failed to provide any evidence regarding the scope of Staker's duty.

Macintosh contended that expert testimony regarding the scope of Staker's duty was unnecessary because a jury is capable of determining whether failure to properly mark a road constitutes negligence. The Utah Court of Appeals disagreed noting the matter at issue required special knowledge not held by the trier of fact and that the standard of care in a trade or profession generally must be determined by testimony of witnesses in the same trade or profession.

The Court noted the standard of care for temporary traffic control during major road construction is technical and involves complexities not within the common knowledge of jurors. The MUTCD, to which traffic controllers are required to adhere, is several hundred pages long and contains numerous arcane subparts. In this case, the road construction project involved completely closing one side of the highway and diverting traffic traveling in both directions into the side that remained open.

Thus, the Court held the scope of Staker's legal duty could not be established merely through Plaintiff Macintosh's testimony. Without any evidence establishing the scope of Staker's legal duty, Macintosh could not demonstrate whether Staker breached that duty. Accordingly, Macintosh did not meet her burden of proof on her claim of negligence, and summary judgment was granted in favor of Defendant Staker.

Macintosh v. Staker Paving and Const. Co., Memorandum Decision – Not for Official Publication, Court of Appeals, Decided April 9, 2009.

Premises Liability

Summary Judgment Granted in Trip and Fall in Parking Lot

Plaintiff Nelda Johnson appealed the trial court's order granting Defendant Gold's Gym's motion for summary judgment. Johnson joined Gold's Gym, a membership-required exercise facility, in Provo, Utah, in 2004. Later, when Johnson was leaving the Gold's Gym facility at 9:30 p.m. she tripped and fell on broken asphalt in the parking lot, injuring her right knee. Johnson filed suit alleging that Gold's Gym was negligent in maintaining the parking lot. Gold's Gym moved for summary judgment.

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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 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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Premises Liability, cont'd

The Court of Appeals affirmed the trial court noting it is well established in Utah that property owners are not insurers of the safety of those who come upon their property, even though they are business invitees. Rather, whether and when liability attaches depends upon the nature of the unsafe condition that caused the injury.

Under Utah law, there are two classes of unsafe conditions that may result in liability. The first involves some unsafe condition of a temporary nature, where the origin of the condition is generally unknown. To hold a landowner liable for a temporary condition, a plaintiff must show (1) that the landowner had knowledge of the condition, that is, either actual knowledge, or constructive knowledge because the condition had existed long enough that he should have discovered it; and (2) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it.

The second class of unsafe conditions involves a permanent condition, meaning that the unsafe condition is in the structure of a building, or in equipment or machinery, or its manner of use, which was created or chosen by the defendant. When an unsafe condition is permanent, the landowner is deemed to have knowledge of the condition and a plaintiff need not independently establish notice before liability can be imposed.

In this case, Plaintiff Johnson argued that the broken asphalt was a permanent condition because Gold's Gym had a permanent duty to maintain the parking lot. The Court of Appeals agreed with the trial court that the broken asphalt was a temporary condition. Gold's Gym did not create the crack in the asphalt. Rather, Gold's Gym was responsible only for the lot's maintenance. Accordingly, to recover, Johnson must have shown that Gold's Gym had actual or constructive knowledge and a reasonable time to remedy the condition.

The Manager of Gold's Gym testified that it was her duty to check the condition of the parking lot daily and to request maintenance through an online reporting system if a problem is identified. Despite these daily inspections, the Manager did not discover the unsafe condition that caused Johnson's injury. Johnson produced no evidence to dispute the Manager's testimony.

Johnson contended that none of Gold's Gym's employees, including the Manager, had training on asphalt maintenance, thereby creating an issue about whether they adequately inspected the parking lot. The Court rejected this argument because in determining what constitutes reasonable care in the discovery of defects, the proper standard is whether the defect would be apparent to ordinary prudent persons with like experience, not to persons with specialized knowledge in the field of construction or real estate. The Court affirmed the grant of summary judgment because Johnson presented no genuine dispute of material fact on the existence of a duty breached by Gold's Gym.

Johnson v. Gold's Gym, Utah Court of Appeals, Decided March 19, 2009.