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ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

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UTAH

PRODUCTS LIABILITY DEFENSE VERDICT WHERE PLAINTIFF'S EMPLOYER ALLEGEDLY FAILED TO MAINTAIN PRODUCT

U.S. District Court; District of Utah: Plaintiff, an employee of Autoliv ASP was injured while working on an assembly line testing airbag systems. The end cap of a pressurized canister manufactured by Defendant Hydraulics International broke and struck other machinery injuring Plaintiff's leg and face, and causing $115,000 in stipulated medical bills, dental injuries and facial scarring.

Plaintiff claimed the end cap was negligently manufactured with a brittle steel that was susceptible to failure. Hydraulics International asserted that it merely manufactured components to specifications provided by Plaintiff's employer, and further, that Plaintiff's employer had negligently installed, inspected and maintained the product.

The jury returned a verdict in favor of the defense. A related case filed by Plaintiff's employer Autoliv to recover damages for work stoppage is pending in state court.

Forsgren v. Hydraulics International, Inc., Case No.: 06CV185.

$20.7 MILLION NET VERDICT FOR DEVELOPER AGAINST CITY FOR OBSTRUCTING HOUSING DEVELOPMENT

Tooele County: Plaintiff Tooele Associates claimed Toole City violated the terms of a 1997 development and annexation agreement related to a 7,500 unit development in Tooele County. The agreement was entered into during a housing boom in Toole City.

The developer Toole Associates claimed Toole City obstructed the development after election of the new mayor, Charlie Roberts, who ran on a platform of "responsible growth." The city allegedly imposed more stringent standards than the agreement required, delayed and refused inspections, misapplied city ordinances, and refused to allow an assignment by the developer. Plaintiff alleged that the City's conduct resulted in only 700 of the originally planned 7,500 homes being built. The City denied any wrongdoing and noted Tooele City had nearly doubled in size during the eight years that Charlie Roberts was mayor.

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The jury awarded Plaintiff developer $22.5 million in compensatory damages. The jury also awarded the City $1.8 million for public improvements required by the agreement that the developer had failed to complete, resulting in a net verdict of $20.7 million for Plaintiff developer.

Tooele Associates v. Tooele City, Case No.: 040301424.

Utah Supreme Court Recognizes Implied Warranties and Clarifies Construction Defect Law

In *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC,* Plaintiff homeowners association sued the builder and developer alleging negligence, negligence per se, and breach of express and implied warranties. Davencourt at Pilgrims Landing is a development consisting of 145 units and common areas. The Defendant developer planned to sell the 145 units to individual owners, but before doing so, it organized and established the Davencourt at Pilgrim's Landing Townhome Owners' Association, a Utah nonprofit corporation.

A few years after turnover of the association from the developer to the unit owners, the Association learned of significant problems with the Project. Water began to seep into the buildings through the foundation, floors, porches, stucco, sidewalls, exterior walls, doors, windows, window boxes, and roofs. Upon hiring a building envelope specialist, the association alleged that the water intrusion and resulting damage stemmed from faulty design, faulty workmanship, defective materials, improper construction, and/or noncompliance with building codes.

Plaintiff (the association) had no privity of contract or a direct relationship with the builder. The builder was not the seller. Rather, the developer contracted with the builder to construct the townhomes, and the developer sold them. The unit owners, not the association, purchased the townhomes from the developer.

The Supreme Court of Utah clarified Utah's economic loss rule and held that absent an independent duty (such as a contractual duty) the economic loss rule precludes a negligence claim against a builder where there is no damage to other property: "Absent physical property damage, i.e., damage to other property, or bodily injury, this doctrine prohibits recovery of economic losses. Economic losses are defined as: damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits-without any claim of personal injury or damage to other property." The Court rejected the argument that "other property" could be other components of the building and affirmed the district court's dismissal of the negligence action against the builder.

"Where the economic loss rule is at issue, the initial inquiry becomes whether a duty exists independent of any contractual obligations between the parties." The Court clarified "Utah does not recognize an independent duty to act without negligence in the construction of a home." Thus, where the association was not a purchaser from the builder and no contractual privity existed between the association and the builder, the builder did not owe the association an independent duty: "knowledge and expertise alone do not establish an independent duty; privity or a direct relationship is also required."

In addition, the *Davencourt* Court held that Utah does not recognize an independent duty to conform to the building code, and thus affirmed the District Court's dismissal of a negligence *per se* claim. The Court also overruled its own precedent and recognized a breach of implied warranty of workmanship and habitability with the following elements: "to establish a breach of the implied warranty of workmanlike manner or habitability under Utah law a plaintiff must show (1) the purchase of a new residence from a defendant builder-vendor/developer-vendor; (2) the residence contained a latent defect; (3) the defect manifested itself after purchase; (4) the defect was caused by improper design, material, or workmanship; and (5) the defect created a question of safety or made the house unfit for human habitation." Thus, the newly recognized implied warranty of workmanship and habitability would not apply to those who are not also vendors of the new residence.

Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC, Utah Supreme Court, Decided October 2, 2009 (not yet released for publication in the permanent law reports).

WYOMING

Defense Verdict in Rear End Motor Vehicle Accident

Natrona County: Plaintiff had stopped at an intersection and was planning to turn right when he was rear-ended by Defendant. Plaintiff, a male in his 40's, claimed the impact was significant, resulting in a cervical disc bulge and over $13,000 in medical expenses.

Defendant alleged the low speed impact was minor. Defendant emphasized the accident caused only $350 in property damage to Plaintiff's vehicle and argued the impact could not have caused the injuries alleged. The jury returned a verdict for the defense.

Kraft v. Caperton, Case No.: CV87572.

$18 Million Verdict Upheld in Car v. Semi-truck Accident Causing Severe Brain Damage

A Larimer County jury awarded Peter and Kate Brophy damages in the amount of $18,069,257 for injuries they sustained as a result of a collision between Mr. Brophy's vehicle and a semi-truck owned by Werner Enterprises, Inc. and being driven by Werner employee, Cheryl R. Neal. Defendants appealed, asserting the district court erred, among other things, in refusing to instruct the jury concerning the statutory presumption they claimed was created by Wyoming Statute § 31-5-222(c), and in entering judgment on the verdict that they claimed was excessive and influenced by passion and prejudice.

The accident occurred at the I-25 interchange with I-80 in Cheyenne, Wyoming. At the point where Werner's semi-truck and Mr. Brophy's vehicle came into contact, there were three southbound lanes on I-25-a passing lane on the left, a through lane in the middle, and an acceleration/deceleration lane on the right for vehicles entering I-25 from I-80 or exiting I-25 onto I-80. At the time of the accident, there were two yield signs on the ramp for vehicles coming from I-80 onto southbound I-25.

On July 25, 2006, Ms. Neal was driving Werner's semi-truck southbound in the through lane on I-25 approaching the I-25 interchange with I-80. At the same time Mr. Brophy was traveling westbound in a BMW on I-80. Mr. Brophy exited I-80 and proceeded around the ramp of the cloverleaf toward southbound I-25 and into the acceleration/deceleration lane to the right of the through lane in which Ms. Neal was traveling. The right front wheel of the semi-truck hit the left rear side of the BMW, causing the BMW to spin, skid backwards across the highway to the east and hit the guardrail before being broad-sided by another semi-truck traveling in the left passing lane.

Mr. Brophy suffered catastrophic injuries in the accident. He underwent an immediate craniotomy, in addition to a cervical spinal fusion, and incurred $992,557 in past medical expenses. Mr. Brophy suffered right sided paralysis and is unable to speak or communicate. He is totally disabled. Plaintiff's life care planning expert testified to damages of $10.9 to $11.9 million. The jury returned a verdict finding Defendants 100% at fault and awarding Mr. Brophy $15,782,257 in compensatory damages, and Mrs. Brophy $2,284,000 for loss of consortium and support.

Defendants asserted the district court erred when it gave a jury instruction which omitted the last part of Wyoming Statute § 31-5-222(c) providing *"If the driver is involved in a collision with ... a vehicle in the intersection or junction of roadways, after driving past a yield sign without stopping, the collision shall be deemed prima facie evidence of his failure to yield the right-of-way."* Defendants contend this section created a statutory presumption that Mr. Brophy failed to yield the right of way which shifted the burden to the Brophys to prove that he did not fail to yield. The consequence of the district court's failure to give the instruction, Defendants asserted, was that the jury was incorrectly instructed on the law and the burden of proof. The Brophys argued that defense counsel failed to object to the district court's ruling on the proposed instructions as required by W.R.C.P 51(b).

W.R.C.P. 51(b) provides that *"No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."* Here, although defense counsel had objected to the omission of the last part of Wyoming Statute § 31-5-222(c) and offered his own instruction, defense counsel did not fully explain the grounds for the objection or offer alternative instructions addressing the statutory presumption and burden of proof. The Supreme Court noted that as a result, the district court was not fully informed of the nature and specific grounds of the asserted error and did not have the opportunity to reconsider and, if necessary, modify the instructions in order to avoid error. Thus, the Supreme Court held defense counsel's objection was not sufficient to preserve the argument for appeal, and further that it was not plain error for the district court to decline to give the instruction in light of the conflicting evidence regarding the facts of the accident.

Defendants also claimed that the verdict was excessive and the result of passion and prejudice. Defendants asserted the evidence showed only that the Brophys incurred nearly $1,000,000 in medical bills and there was no evidence to prove that future medical care would be necessary or was causally connected to the accident. Therefore, Defendants argued, the verdict must have been based upon improper evidence, passion or prejudice against Defendants, stirred by the prejudicial statements of the Brophys' counsel.

The jury awarded Mr. Brophy total damages of $15,785,257. It was undisputed that his medical bills totaled nearly $1,000,000. Mr. Brophy was thirty-two years old at the time of the collision. Plaintiff's life care planner estimated that it would cost nearly $8,000,000 to care for Mr. Brophy over his lifetime. The Brophys' economist testified that the Brophys had between $1,417,400 and $2,047,400 in lost income as a result of Mr. Brophy's inability to work due to his injuries. Totaling the Brophys' medical bills, costs of future care and lost income, the evidence supported a verdict of between

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$10,852,757 and $11,482,757. In addition to these damages, Mr. Brophy sought damages for pain and suffering, loss of enjoyment of life and disability.

The evidence was undisputed that, among other injuries, Mr. Brophy sustained a devastating brain injury as a result of the collision. Two years later, he still was unable to walk without assistance, could speak only a few words, and could not perform even the most basic tasks of personal care. The Supreme Court observed that from the medical procedures, rehabilitation and other treatment Mr. Brophy endured in the two years before trial, the jury was capable of inferring that he experienced considerable pain and suffering, loss of enjoyment of life and disability. Thus the Supreme Court could not say the award was so excessive and unreasonable as to indicate passion or prejudice on the part of the jury, and affirmed the district court on all counts.

Werner Enterprises, Inc. v. Brophy, 218 P.3d 948 (Wyoming Supreme Court, decided November 3, 2009).

New Mexico

$53.2 Million Verdict Overturned for Trial Court's Improper Finding of Fact

Defendant ManorCare, Inc., appealed a $53.2 million jury verdict entered against it in a wrongful death action brought by Plaintiff Lori Keith as the personal representative of the estate of Barbara Barber, the decedent. Ms. Barber was a resident at the ManorCare Camino Vista nursing home and died at the home in December 2004. Plaintiff alleged that Ms. Barber died of gastrointestinal bleeding that was negligently left untreated by the nursing staff at the Camino Vista facility. Plaintiff sought compensatory damages for Defendant's alleged negligence as well as punitive damages for Defendant's alleged wanton, willful, and reckless conduct.

On appeal, Defendant argued, among other things, that the district court erred by entering a finding that Defendant was the employer of the staff of the nursing home where Ms. Barber resided. The Supreme Court concluded that the district court erred in determining prior to trial and on the basis of disputed facts that Defendant was the employer of the staff at the facility where Ms. Barber resided, and ordered a new trial. Because this issue was dispositive, the New Mexico Court of Appeals did not address Defendant's remaining contentions of error.

In its answer to Plaintiff's complaint, Defendant noted that its subsidiary, Four Seasons Nursing Centers, Inc. (Four Seasons), was the owner and operator of the Camino Vista facility, not Defendant. The issue of whether Defendant was the employer of the Camino Vista nursing staff arose again in Defendant's motion for summary judgment on Plaintiff's punitive damages claim. In that motion, Defendant noted that Plaintiff had made a direct punitive damages claim against it as well as a vicarious liability claim based upon the actions of the nurses at Camino Vista and argued that there was no evidence that either Defendant or the nurses had any malicious intent. Thus, Defendant argued, Plaintiff could neither establish vicarious liability for punitive damages based on the actions of the nursing staff nor show that Defendant directly engaged in the type of conduct needed to prove a punitive damages claim. In response, Plaintiff argued that a corporation may be liable for punitive damages for the wrongful acts of employees who are acting within the scope of employment and who are employed in a managerial capacity when the corporation ratifies an employee's conduct, and when the actions of the employees in the aggregate demonstrate a cumulative effect that proves the requisite culpable intent.

To address these arguments, Defendant argued in its reply that the cumulative conduct of the Camino Vista staff could not be used against it because none of the staff members were its employees. In support of this argument, Defendant submitted a number of documents showing that the employees whose conduct Plaintiff sought to cumulate were actually employees of Heartland Employment Services, Inc., who were working for Four Seasons at the Camino Vista facility, not for Defendant ManorCare, Inc.

The court advised the parties that it would not "consider any issues that were raised in the reply brief that were not raised in the original motion, but that insofar as that may become an issue down the road, it was going to find that all of these folks were employees of ManorCare." In making this finding, the court did not consider the evidence Defendant had submitted with its motion and relied solely on Plaintiff's evidence and the one exhibit Defendant had been allowed to introduce at the hearing that showed Defendant's corporate structure. The court then proceeded to deny Defendant's motion for summary judgment because factual issues existed regarding the elements of Plaintiff's claims for punitive damages.

Plaintiff then asked the district court for a written order memorializing the court's finding. The court agreed that a written order was necessary, noting that the employment issue was "not going to be an issue that gets litigated at trial starting next week." Plaintiff then submitted a proposed order. Over Defendant's objections, the district court entered the order, finding that "the staff at Camino Vista were employees of Defendant." In entering the order, the court stated that it was doing so "as a finding of the court, not as a motion for summary judgment."

Subsequently, and over objection, the district court instructed the jury that "the Camino Vista staff were employees of Defendant at the time of these events. Therefore, Defendant is liable for any negligent act or omission of the Camino Vista staff that caused harm to Ms. Barber."

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The New Mexico Court of Appeals agreed with Defendant that the district court's order effectively granted summary judgment to Plaintiff on the issue of whether Defendant employed the staff of the Camino Vista facility and that the district court erred in doing so. Defendant's answer put Plaintiff on notice that in order to hold Defendant liable for the acts of the Camino Vista staff, she would have to prove that Defendant actually employed the staff. Because resolution of the employment status of the Camino Vista staff was a fact question, the district court could properly make a pre-trial determination that an employment relationship existed only if Plaintiff properly moved for summary judgment and established that there were no disputed issues of material fact. Thus, despite the court's indication that it was not entering summary judgment, the court's order was the equivalent of summary judgment because it resolved a question of fact that ordinarily would be submitted to the jury.

The Appellate Court held the means employed by the district court was contrary to the proper procedure for resolving an issue of fact before trial, which is via summary judgment. The evidence that Plaintiff submitted was contradicted by evidence Defendant submitted indicating that the Camino Vista facility was owned and operated by a subsidiary and that the staff was therefore employed by the subsidiary, not by Defendant. The Court of Appeals found that in light of this evidence, the district court could not properly conclude as a matter of law that Defendant employed the Camino Vista staff, and reversed the judgment against Defendant and ordered a new trial.

Keith v. ManorCare, Inc.,
218 P.3d 1257
(New Mexico Court of Appeals,
decided August 14, 2009).

Summary Judgment in Favor of UM/UIM Insurer Reversed.

Arias v. Phoenix Indemnity addressed what constitutes a valid rejection of uninsured/underinsured motorist (UM/UIM) coverage under New Mexico's Uninsured Motorist Act, New Mexico Statutes §§ 66-5-301 to 303.

As part of her application, the insured Plaintiff indicated that she wanted to reject UM/UIM coverage and signed an agreement to delete such coverage. Plaintiff also signed an applicant's statement providing that "I have read this application and declare that all statements are true to the best of my knowledge and belief." She was then provided with a copy of her application at the conclusion of the application process. The application, and its signed agreement to delete UM/UIM coverage, was not physically attached to the insurance policy. Nor did the policy declarations page provided to Plaintiff contain any specific reference to her rejection of UM/UIM coverage.

In New Mexico, it is statutorily mandated that insurance companies include in automobile policies UM/UIM coverage ranging from the minimum statutory limits up to the limits of liability coverage contained in a policy. This requirement embodies "a strong public policy to expand insurance coverage and to protect individual members of the public against the hazard of culpable uninsured and underinsured motorists."

An insured, however, may elect to reject UM/UIM coverage. But to be effective, such rejection must satisfy the regulations promulgated by the superintendent of insurance. The applicable regulation, 13.12.3.9 NMAC, provides *"The rejection of the provisions covering damage caused by an uninsured or unknown motor vehicle as required in writing by the provisions of Section 66-5-301 ... must be endorsed, attached, stamped or otherwise made a part of the policy of bodily injury and property damage insurance."*

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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, 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 New Mexico Supreme Court has directed that a rejection of UM/UIM coverage is ineffective, regardless of the parties' intent, if it is not endorsed, attached, stamped or otherwise made a part of the policy. Thus, the Court of Appeals found that Phoenix Indemnity's reliance on Plaintiff's knowledge that she rejected coverage in the application process was unavailing, and reversed the district court ruling that Plaintiff's rejection of UM/UIM coverage was effective.

Arias v. Phoenix Indem. Ins. Co.
216 P.3d 264
(New Mexico Court of Appeals, decided July 9, 2009).

COLORADO

WAL-MART STORES, INC. RECEIVES TWO PREMISES LIABILITY VERDICTS

Denver County: Mary Williamson, 71, alleged she was injured when she fell from a toilet in the women's restroom that was not bolted to the floor. Plaintiff Williamson sustained a broken wrist and was placed in a cast for six weeks, followed by a removable splint. Plaintiff incurred $3,988 in medical expenses, but claimed no lost wages as she was retired.

Defendant Wal-Mart admitted liability but disputed the nature and extent of Plaintiff's damages. Plaintiff made a $23,000 statutory demand of settlement; Wal-Mart made a $12,000 statutory offer of settlement. The jury returned a verdict of $4,188 in economic damages, $60,000 for non-economic damages, and $10,000 for permanent impairment, totaling $74,188 plus statutory interest. *Mary Williamson v. Wal-Mart Stores, Inc., Case No.: 08CV3090.*

El Paso County: In a separate case against Wal-Mart, Plaintiff Deborah Williams alleged she tripped on a mat at the entrance to the store and fell, injuring her shoulder and hand. Plaintiff alleged part of the mat was raised, causing her to trip and fall. Defendant Wal-Mart asserted Plaintiff's comparative negligence and failure to watch where she was walking. Wal-Mart also disputed causation for some of Plaintiff's injuries and claimed that Plaintiff exaggerated her damages.

Plaintiff claimed she sustained a ruptured collateral ligament in her right dominant hand requiring surgery, as well as a left shoulder rotator cuff tear also requiring surgery. Plaintiff presented past medical expenses of $56,000, and $280,000 for lost earnings as a dental hygienist and costs associated with vocational retraining.

The jury found Wal-Mart 90% negligent and Plaintiff 10% negligent and awarded a gross verdict of $95,000. The district court entered an $85,500 judgment for the Plaintiff, plus $15,556.16 in interest from the date of the accident, for a total award of $101,056.16.