Winter 2011

DEWHIRST & DOLVEN LLC
Attorneys at Law

ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado

IN BRIEF

Miles M. Dewhirst Selected for Membership into the Association of Defense Trial Attorneys and the Fellows of the Colorado Bar Foundation
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COLORADO

COLORADO SUPREME COURT HOLDS CLAIMANTS CAN PURSUE THE AMOUNT BILLED FOR MEDICAL SERVICES INCURRED

Supreme Court of Colorado: In a 4-3 ruling, the Colorado Supreme Court held that under the common law collateral source rule, making the injured plaintiff whole is solely the tortfeasor's responsibility. "The rule's purpose is to prevent a tortfeasor from benefitting, in the form of reduced liability, from compensation in the form of money or services that the victim may receive from a third-party source." Any third-party benefits or gifts obtained by the injured plaintiff accrue solely to the plaintiff's benefit and are not deducted from the amount of the tortfeasor's liability. The Court held these third-party sources are "collateral" and are irrelevant in fixing the amount of the tortfeasor's liability.

The Court observed the collateral source rule allows for a "double recovery" by a successful plaintiff, but reasoned "double recovery is permitted to an injured plaintiff because the plaintiff should be made whole by the tortfeasor, not by a combination of compensation from the tortfeasor and collateral sources. The wrongdoer cannot reap the benefit of a contract for which the wrongdoer paid no compensation." In addition, Colorado's statutory collateral source rule, C.R.S. § 13-21-111.6, and its "contract clause," also do "not permit a tortfeasor to offset an injured plaintiff's benefits when they arise out of a contract entered into on the plaintiff's behalf."

Thus, the Supreme Court affirmed the ruling of the Court of Appeals and held that a claimant can pursue the amount billed for medical expenses incurred. Still, the Court did not foreclose challenges as to the reasonable value of medical expenses and noted "the trial setting is the proper forum for the parties to present evidence regarding the proper value of an injured plaintiff's damages." The tortfeasor, however, cannot receive a consideration or benefit from the write off or discount provided by a health care contract.

Volunteers of America Colorado Branch v. Gardenswartz [Tucker], 242 P.3d 1080 (Colo., decided November 15, 2010).

IN THIS ISSUE

H.B. 10-1166 Concerning the Use of Plain Language in Insurance Policies Requires Policies be Written at 10th Grade Reading Level

House Bill 10-1166 (codified at C.R.S. § 10-16-107.3) requires that automobile insurance policies, health benefit plans, limited benefit health insurance, dental plans, and long-term care plans that are issued or renewed on or after January 1, 2012, must be written at or below a 10th grade reading level. The Act does not apply to Commercial Automobile Coverage.

The Act also includes text size limitations, and where the policies are longer than 3 pages or 3,000 words, the policies must contain an index or table of contents. A violation of these requirements is an unfair or deceptive act or practice in the business of insurance.

S.B. 10-76 Identifies Certain Compensation Structures as Unreasonable Insurance Claims Settlement Practices

Senate Bill 10-76 (codified at C.R.S. § 10-3-1104), defines as an unfair compensation practice and a deceptive act or practice in the business of insurance, the practice of basing the compensation of a claims employee or contracted claims personnel on any of the following:

- The number of policies canceled;
- The number of times coverage is denied;
- The use of a quota limiting or restricting the number or volume of claims; or
- The use of an arbitrary quota or cap limiting or restricting the amount of claims payments without due consideration of the merits of the claim.

The act was approved by Governor Ritter and is effective May 17, 2010.

$4 Million Verdict in Premises Liability Case of Drowning Death of a Minor.

Denver County District Court: On June 6, 2008, 6-year-old Orion Colligan drowned after he fell into an artificial pond at The Lakes at Monico Point apartment complex. Orion's parents Vennie Mangus and Steve Colligan filed suit against the property management company and the apartment complex where Orion lived with his mother Vennie.

Plaintiffs alleged Defendants failed to take reasonable care and the pond was a dangerous condition due to lack of fence or warning signs, and the presence of algae around the pond made the shore surface slippery. Defendants denied the pond was a dangerous condition, and denied knowledge of a dangerous condition on the premises. In addition, Defendants claimed the tenants were responsible for watching their children on the premises, and that Orion's mother Vennie was comparatively responsible.

The jury rendered a verdict for Plaintiffs, charging 100% negligence to Defendants and awarding Vennie Mangus $2,000,000 and Steve Colligan $2,000,000.

Mangus and Colligan v. Apartment Management Consultants and The Lakes at Monaco Colorado, LC, Case No. 09CV3388.

Utah

Medical Malpractice Statute of Limitation Held to Began Running When Plaintiff Received a Copy of His Medical Records

Utah Court of Appeals: Plaintiff Larry Roth brought a medical malpractice action against a hospital and a physician who performed a colonoscopy, alleging that the physician negligently failed to clearly identify for the surgeon a spot in his colon that needed to be resected. The Third District Court, Salt Lake Department, entered summary judgment in favor of Defendants on statute of limitations grounds, and Mr. Roth appealed.

The Court of Appeals held the claim accrued for limitation purposes when Mr. Roth received a copy of his medical records containing the surgeon's note indicating that he was unable to definitively identify the section of colon to be resected. Although Mr. Roth claimed that the defendant physician had fraudulently concealed information, the Court held that a patient who was not prevented from discovering his legal injury was not entitled to a tolling of the limitations period on grounds of fraudulent concealment.

Roth v. Joseph and Northern Utah Healthcare Corp., 2010 WL 4870967 (Utah App., decided November 26, 2010, not yet released for publication in the permanent law reports).

Claims of Employee Waterboarding Allowed to Proceed in District Court

Supreme Court of Utah: This appeal arose from the District Court's dismissal of claims made by Chad Hudgens against Prosper, Inc., and Joshua Christopherson for injuries related to the alleged waterboarding of Mr. Hudgens by Mr. Christopherson.

Plaintiff Mr. Hudgens was an employee of Prosper, Inc. under the direct supervision of Mr. Christopherson. During the ten months that Mr. Hudgens worked for Prosper, Mr. Christopherson had engaged in numerous questionable management practices. Specifically, when an employee did not meet performance goals, Mr. Christopherson would draw a mustache on the employee using permanent marker or he would remove the employee's chair. Additionally, he would patrol the employees' work area with a wooden paddle, which he would use to strike desks and tabletops. Prosper was aware of Mr. Christopherson's actions and encouraged his behavior because it led to increased revenue.

On May 29, 2007, Mr. Christopherson asked for volunteers for a new motivational exercise. He offered no explanation to his team members regarding the nature of the exercise. In his search for volunteers, Mr. Christopherson challenged the loyalty and determination of his team members. Mr. Hudgens volunteered to be a part of the exercise to prove his loyalty and

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determination. Mr. Christopherson then led his team members to the top of a hill near Prosper's office. Once on the hill, Mr. Christopherson ordered Mr. Hudgens to lie down, facing up, with his head pointed downhill. Mr. Christopherson ordered other team members to hold Mr. Hudgens down by his arms and legs. Mr. Christopherson then slowly poured water from a gallon jug over Mr. Hudgens's mouth and nose so that he could not breathe. Mr. Hudgens struggled and tried to escape but, at Mr. Christopherson's direction, the other team members held him down. After concluding the exercise, Mr. Christopherson instructed his team members that they should work as hard at making sales as Mr. Hudgens had worked at trying to breathe.

Mr. Hudgens quit working for Prosper, he claimed, because the waterboarding incident caused him to suffer sleeplessness, anxiety, depression, and to feel sick to his stomach at work. Mr. Hudges alleged that because of the distress caused by the incident, he has undergone psychological counseling and has suffered physical and emotional harm.

Approximately seven months after the incident, Mr. Hudgens filed a complaint against Prosper and Mr. Christopherson asserting four causes of action. Prosper filed a motion to dismiss the complaint and argued that Mr. Hudgens had failed to allege sufficient facts to demonstrate any claim for relief. The District Court granted Prosper's motion to dismiss Mr. Hudgens's complaint. Before the order dismissing Mr. Hudgens's claims was entered, however, Mr. Hudgens filed a motion for leave to amend his complaint. The district court denied Mr. Hudgens leave to amend and dismissed his claims with prejudice.

A Utah appellate court reviews a district court's denial of leave to amend for an abuse of discretion. Under the Utah Rules of Civil Procedure, leave to amend should be granted liberally. But this liberality is limited, for example, when it would result in prejudice to the opposing party, when leave to amend is sought during or after trial instead of before trial, or if the amendments would be futile.

The Supreme Court concluded that the District Court abused its discretion when it denied Mr. Hudgens's motion for leave to amend because the District Court's order denying leave to amend failed to provide adequate reasons for the denial. The District Court was instructed to permit the proposed amended complaint, and the case was remanded for further proceedings.

Hudgens v. Prosper, Inc., 2010 WL 4840470 (Utah Supreme Court, decided November 23, 2010, not yet released for publication in the permanent law reports).

$331,147 Verdict for Benign Positional Paroxysmal Vertigo (BPPV) Affirmed

Utah Court of Appeals: Elevator passenger Connie Florez brought a negligence action against Schindler Elevator Corp., an elevator maintenance company, alleging that she suffered BPPV as a result of fainting and hitting her head after being trapped in an elevator for 45 minutes. Schindler stipulated that its negligence caused the elevator stoppage and Plaintiff's confinement, but denied that its conduct caused Plaintiff's alleged damages.

Following denial of Schindler's motion for summary judgment on the causation issue, the case proceeded to trial in the Second Judicial District, Ogden Department. The jury awarded past and future special damages and general damages totaling $331,147 (both parties presented a summary of bills totaling slightly in excess of $20,000; the jury ultimately awarded $17,032.31 in past medical expenses).

Schindler appealed denial of its motion for summary Judgment. The Court of Appeals held that the report of Plaintiff's expert stated an opinion that Plaintiff's injuries were caused by the elevator accident, so as to create an issue of fact precluding summary judgment. In addition, the Court held that Plaintiff's own affidavit as to the cause of her condition did not improperly state a lay opinion on medical causation and was admissible in opposition to the motion for summary judgment.

Schindler also argued there was insufficient evidence of damages awarded. The Court held the award of past medical expenses was supported by summaries of past medical bills that the parties stipulated would be provided to jury. Additionally, Plaintiff's failure to present evidence of life expectancy did not preclude an award of future medical costs as damages.

Finally, Schindler argued that it was entitled to a new trial because the District Court instructed the jury that Plaintiff Ms. Florez could recover damages if the elevator incident aggravated Ms. Florez's preexisting conditions rather than causing them outright. Schindler argued that the instruction was error because Plaintiff did not plead an aggravation theory in her complaint, nor did she move to amend the pleadings to conform to the evidence. The Court held the issue of whether the elevator accident aggravated Plaintiff's preexisting conditions was tried by implied consent of the parties, such that no amendment of either party's pleadings was required, and Plaintiff could recover damages if the accident aggravated preexisting conditions. The District Court was affirmed in all respects.

Florez v. Schindler Elevator Corp., 240 P.3d 107(Utah App., decided September 16, 2010).

Wyoming

Defendant Awarded $38,618 in Claim of Property Damage Against Subrogating Insurer Resulting From Collision of Trucks on Highway

U.S. District Court: District of Wyoming: Plaintiff Markel Insurance Company sued Brian Thiessen in Federal District Court, for property damage Markel paid for damage to its insured's vehicle.

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Defendant Thiessen was driving a tractor northbound on Wyoming Highway 59 in Converse County when he came upon a derrick truck owned by Markel's insured, R&S Well Service. Defendant claimed the R&S vehicle was to the right, outside the lane of travel, and that the R&S driver waved his arm out the window signaling Defendant to pass. The R&S driver claimed he was not signaling for Thiessen to pass but was instead signaling his own left turn. The trucks collided when Thiessen went to pass on the left while the R&S driver initiated a left turn.

Thiessen countersued for damage caused to his tractor. After jury trial, the jury found in favor of Defendant Theissen and against Plaintiff Markel, and awarded Thiessen $38,618.42 in property damage.

R&S Well Service and Markel Insurance Company v. Thiessen, Case No. 09CV72.

Defendants Awarded Summary Judgment Where Railway Worker Run Over by Rail Cars and Sustained Severe Injury to Legs

U.S. District Court, District of Wyoming: Plaintiff Clinton Kelly was employed by Kelly Transport Services and severely injured while unloading sand from belly-dump cars. To move cars that were not aligned with an unloading conveyor, Mr. Kelly released a handbrake while standing between two cars. When trying to move out from between the cars Mr. Kelly slipped on the loose sand he was unloading. His right foot and lower left leg were run over by the rolling cars.

Plaintiff claimed Union Pacific Railroad Company was responsible because Union Pacific employees had spotted the cars with the belly-dump beyond the unloading conveyor. The Court held that the Railroad had no duty to properly spot the cars. "Although some harm was foreseeable, it is speculative at the time the cars are spotted, and depends greatly on intervening events and the conduct of others."

In addition, the Court addressed claims against BJ Services, which had contracted with Kelly Transport Services for unloading of cars. Plaintiff averred two theories of liability against BJ Services: first, that BJ controlled the work of Kelly Transport, and second, that BJ had assumed safety duties. The Court found "the record is devoid of any fact suggesting that BJS or its employees exercised control over KTS, other than to tell KTS that another load of sand was ready to be unloaded."

Regarding the second allegation, while BJ Services had participated in some aspect of Kelly Transport safety in that the BJ Services supervisor had trained Plaintiff Clinton Kelly how to unload the rail cars, Plaintiff did not dispute that he was trained to only release the handbrake when he was standing on the brake platform of the rail car. Had this instruction been followed the accident would not have occurred. Thus, summary judgment was granted in favor of both Defendants.

Kelly v. Union Pacific Railroad Company and BJ Services Co., Case No. 08CV88.

New Mexico

New Mexico Supreme Court Affirms Rules Regarding UM/UIM Offerings

New Mexico Supreme Court: In *Jordan v. Allstate Ins. Co.,* automobile insurers appealed decisions of the Court of Appeals finding that the insurers failed to obtain valid rejections of uninsured/underinsured motorist (UM/UIM) coverage and that the proper remedy in each case was reformation of the insureds' automobile liability policies to provide UM/UIM coverage equal to the liability limits.

The Supreme Court of New Mexico held that rejection by insureds of UM/UIM coverage equal to the liability limits must be made in writing, and must be meaningfully incorporated into the policy delivered to the insured. In addition, the Supreme Court held insurers are required to provide the insured with the premium charges corresponding to each available UM/UIM coverage option. Further, if an insurer does not obtain a valid rejection of UM/UIM Coverage, the policy will be reformed to provide UM/UIM coverage equal to the liability limits.

Because the insurers failed to obtain valid rejections of UM/UIM coverages equal to liability limits, the Court held the proper remedy in each case was reformation of the insureds' automobile liability policies to provide UM/UIM coverage equal to liability limits.

Jordan, et al. v. Allstate Ins. Co. et al., 2010 WL 5116920 (N.M. Supreme Court, decided October 18, 2010).

New Mexico Rejects "Baseball Rule" and Holds Owner/Operators of Commercial Baseball Stadiums Must Exercise Ordinary Care Not to Increase Inherent Risk

New Mexico Supreme Court: Parents of a child struck by a baseball while he was sitting in a commercial baseball stadium's picnic area, located beyond the outfield wall in fair ball territory, brought an action against the city, both the home and visiting baseball clubs, and the batter.

The District Court, Bernalillo County, granted summary judgment to all defendants, and the Parents appealed. The Court of Appeals affirmed summary judgment for the visiting baseball club and the batter, but reversed summary judgment for the city and home baseball club, and remanded the case to the trial court. The city and home baseball club sought appeal to the New Mexico Supreme Court.

The Supreme Court held that the "baseball rule" would be rejected in New Mexico. The "baseball rule" holds that where a proprietor of a ballpark furnishes screening for the area of the field behind home plate where the danger of being struck by a

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ball is the greatest, and that screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, then the proprietor fulfills the duty of care imposed by law and, therefore, cannot be liable in negligence.

Instead, the Supreme Court held an owner/occupant of a commercial baseball stadium owes a duty of care that is symmetrical to the duty of the spectator. Spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play; the owner/occupant must also exercise ordinary care not to increase that inherent risk.

Thus, the Supreme Court remanded the case to the District Court for further proceedings consistent with the standard of care announced.

Edward C. v. City of Albuquerque, 241 P.3d 1086 (N.M. Supreme Court, decided September 3, 2010).

$4.2 Million Products Liability Verdict Affirmed

Marcos Baca was killed in a rollover accident involving a Hyundai automobile. Mr. Baca's estate, parents, and brother (Plaintiffs) brought suit against Hyundai Motor Company, Hyundai Motor America, and Borman Motor Company (Defendants) in negligence, implied warranty, and strict products liability asserting that the roof structure of the car was defectively designed. The jury found in favor of Plaintiffs on all claims and awarded $4.2 million.

Defendants appealed arguing that (1) the district court abused its discretion in admitting expert testimony as to the design defect and enhanced injury, (2) Plaintiffs failed to prove that a design defect existed, (3) Plaintiffs failed to prove the degree of injury enhancement resulting from the alleged design defect, and (4) the district court erred

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About Our Firm

Congratulations to Miles Dewhirst for his selection for prime membership in the Association of Defense Trial Attorneys (ADTA). ADTA invites only one defense trial attorney to be its prime member per one million in population for each city, town, or municipality across the United States, Canada, and Puerto Rico. An ADTA prime membership is, in essence, a statement of the high regard in which that defense trial attorney is held by his or her peers in the defense trial bar. A member of the ADTA is a proven and recognized successful professional possessing the highest skill level of a defense trial attorney in civil cases. Its members are proud of their reputations and their success and they carefully select those they invite to be a member of the Association of Defense Trial Attorneys. For more information on the ADTA, see www.adtalaw.com.

In addition, Miles Dewhirst was also nominated to the Fellows of the Colorado Bar Foundation. The Fellows is the charitable arm of the Colorado Bar Association, promoting the advancement of jurisprudence, administration of justice and dissemination of educational information to practicing attorneys and the public through grants and contributions. Total membership of the Fellows is limited to no more than 5% of the lawyers in Colorado. For more information, go to www.cobar.org/cbf.

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 250 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
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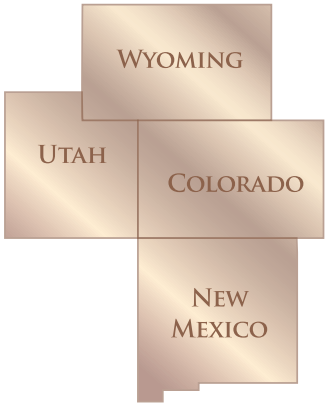

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as a matter of law by failing to specifically instruct the jury that Plaintiffs were required to prove the feasibility of a reasonable alternative design which could have eliminated the alleged defect.

In affirming the District Court on all issues, the New Mexico Court of Appeals held any error by the trial court in applying an allegedly incorrect expert witness standard was harmless, and the Plaintiffs' expert witness' testimony was sufficiently anchored in the specific facts of the rollover accident at issue so as to be reliable and admissible. The Court further held that Plaintiffs' expert testimony was sufficient to support a jury finding that the vehicle's roof was defective in design and that the design defect caused the victim's enhanced injury.

Although a reasonable alternative design is a relevant consideration by a jury when determining whether a product created an unreasonable risk of injury, a specific finding on the issue is not required. The case is currently on appeal to the Supreme Court of New Mexico.

Bustos v. Hyundai Motor Co., 243 P.3d 440 (N.M. App., decided June 17, 2010).