COLORADO SUBROGATION UPDATE

CDARA (Colorado Construction Defect Action Reform Act) - Filing 90 Days After Final Payment

Some defense attorneys have successfully argued that subrogation claims must be brought within 90 days of final "settlement" in construction cases. The attorneys based their arguments on the language of C.R.S. §13-80-104(1)(b)(II). Subrogation attorneys have argued that the legislature did not intend for the statute to be interpreted this way, and a Supreme Court decision from January of this year should assist in arguing that the statute does not require subrogation claims be made within 90 days of final payment.

C.R.S. §13-80-104 (in part):

(1)(a) Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within the time provided in section 13-80-102 after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property, except as provided in subsection (2) of this section.

(b)(I) Except as otherwise provided in subparagraph (II) of this paragraph (b), a claim for relief arises under this section at the time the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement which ultimately causes the injury.

(II) Notwithstanding the provisions of paragraph (a) of this subsection (1), all claims, including, but not limited to indemnity or contribution, by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person:

(A) Arise at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first; and

(B) Shall be brought within ninety days after the claims arise, and not thereafter.

(c) Such actions shall include any and all actions in tort, contract, indemnity, or contribution, or other actions for the recovery of damages for:

(I) Any deficiency in the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property; or

. . . .

***CLPF-Parkridge One, L.P. v. Harwell Investments, Inc.*, 105 P.3d 658 (Colo. 2005).**

Factual Background: The building owner brought a construction defect claim against the general contractor, subcontractor, and others. The subcontractor, who installed panels, asserted a cross-claim against the engineering firm that designed the panels. The engineering firm filed a motion for judgment on the pleadings, asserting the cross-claim was barred by C.R.S. §13-80-104(I)(b)(II) until the underlying lawsuit involving the owner and subcontractor was completed. The district court granted the motion for judgment and dismissed the cross-claim.

Holding: The Supreme Court held that the statutory provision did not bar cross-claims, and it allowed an indemnity claim to be brought by separate lawsuit no later than 90 days after termination of the construction defect lawsuit.

Analysis: The Court stated C.R.S. §13-80-104(1)(b)(II) is a statute of limitation tolling provision, not a ripeness provision. The legislature intended to alleviate the practice of general contractors adding a multitude of potentially responsible parties to protect themselves from an expiring statute of limitations. It tolled the otherwise applicable statue of limitations in order to allow indemnity or contribution claim to be brought in a separate lawsuit, but within ninety days after settlement of or judgment in the construction defect lawsuit. This would allow, but not require, a separate proceeding to follow on the heels of the settlement or judgment in the construction defect litigation.

Economic Loss Rule

***A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862 (Colo. 2005).**

Factual Background: HOA for a townhome complex brought an action against the developer and general contractor for breach of warranties and other claims, and brought a claim against the subcontractors for negligence. After the HOA settled the claims with the developer, general contractor, and some subcontractors, the district court granted a motion for partial summary judgment against the HOA and entered judgment for the subcontractors on the basis of the economic loss rule. The Court of Appeals, 94 P.3d 1177, reversed.

Holding: The Supreme Court held that the association's negligence action against the subcontractor was not barred by the economic loss rule because the subcontractors owed the homeowners a duty of care, independent of contractual obligations, to act without negligence in construction of the home.

Analysis:

Economic Loss Rule: A party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law. *Gynberg v. Agri Tech, Inc.*, 10 P.3d 1267, 1269.

There is a distinction between contractual and tort duty. Contract obligations arise from promises the parties have made to each other. Tort obligations arise from duties imposed by law to protect citizens from risk of physical harm or damage to their personal property. *BRW, Inc., v.*

Dufficy & Sons, Inc., 99 P.3d 66, 71 (Colo. 2004). Where there exists a duty of care independent of any contractual obligations, the economic loss rule has no application and does not bar a plaintiff's tort claim because the claim is based on a recognized independent duty of care and thus falls outside the scope of the economic loss rule. *Town of Alma v. Azco Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000).

The economic loss rule does not apply to negligent construction claims against homebuilders because homebuilders have an independent duty of care to act without negligence in the construction of homes. Subcontractors also owe homeowners a duty of care independent of any contractual obligations to act without negligence in the construction of homes.

Equitable Subrogation/Antisubrogation Rule

***Continental Divide Ins. Co. v. Western Skies Mgmt., Inc.*, 107 P.3d 1145 (Colo.App. 2004).**

Factual Background: The insurer for a property owner sued the property manager for indemnity and breach of contract, arising from judgment a commercial tenant obtained against the property owner and manager in the underlying action. The district court entered summary judgment in favor of the manager.

Holding: Affirmed. The Court of Appeals held that (1) the property owner and manager did not litigate current claims as cross-claims in underlying action, and thus res judicata did not bar current claims, but (2) the insurer had no right of subrogation against the manager, which was covered under the property owner's policy, despite fact that such coverage was excess to the manager's primary insurance.

Analysis: Manager claimed insurer for owner may not bring suit against manager as owner's subrogee. Manager said it was insured under the owner's policy, so the insurer had no right of subrogation against its own insured.

Equitable subrogation: When an insurer has paid its insured for a loss caused by a third party, it may seek recovery from the third party. *Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 833 (Colo. 2004). The insurer "stands in the shoes" of its insured. *Id*. at 834.

An insurer generally has no right of subrogation against its own insured. *1700 Lincoln Ltd., v. Denver Marble & Tile Co.*, 741 P.2d 1270, 1271 (Colo.App. 1987). The antisubrogation rule provides that an insurer may not seek recovery against its insured on a claim arising from the risk of which the insured was covered. The rule served two purposes: (1) prevents the insurer from passing the loss back to its insured, wherein it would avoid the coverage that the insured had purchased; and, (2) it guards against conflicts of interest that might affect the insurer's incentive to provide a vigorous defense for its insured.

Exception: If an insurer pays on behalf of one insured for damage caused by a second insured, under a policy that does not cover the second insured for the loss, the insurer may recover from the second insured by subrogation ("no-coverage exception"). Examples are as follows: insurer may sue to recover payment made or damage caused by arson where the policy excluded intentional acts; insurer may sue to recover payment made for damage caused by a

subcontractor's negligence where the general contractor's policy covered subcontractor for property damage, but not liability.

Insurer's suit is barred by the antisubrogation rule because the insurer clearly covered manager for the conduct that gave rise to its liability, and the fact that the coverage is excess to manager's primary insurance does not amount to an exclusion.

Trial Court Decision

***Transcontinental Ins. v. Atrium Door and Window Co. of the Rockies, Inc., et al*, Denver District Court, 03-CV-8018.**

Factual Background: HOA sued general contractor. General was hired by plaintiff Transcontinental who funded a settlement with the HOA. Transcontinental sought to assert its subrogation rights and sued subcontractors who allegedly had some responsibility for the construction defects, including Denver Drywall. However, during the relevant time period, Denver Drywall was insured by one or more of Transcontinental's sister companies. Denver Drywall sought to introduce the antisubrogation rule, which prevents an insurance company from seeking subrogation from its own insured.

Holding: Denver Drywall filed a motion to dismiss all claims against it, and the trial court granted the motion.

Analysis: Transcontinental attempted to distinguish the instant case from those in which the antisubrogation rule was used by asserting that the rule only applies when subrogation is sought against one who is an insured under the same policy of insurance from which the subrogation rights arise. Since Denver Drywall, subcontractor, was insured under a different insurance policy than the general's, Transcontinental argued it may sue the subcontractor (which court refers to as Transcontinental's own insured) in subrogation.

There is no case on point. However, the court found that the policies behind the antisubrogation rule applied. To hold otherwise would lead to undesirable results. In this case, Transcontinental was suing *and* defending Denver Drywall. There were potential conflict of interests. In the end, CNA Financial (through its subsidiaries) would have funded plaintiff's suit and Denver Drywall's defense, and would be liable to pay any judgment. The only situation in which Transcontinental could have avoided being ultimately responsible for the allege damages was if Denver Drywall's policy of insurance was not enforceable or did not provide coverage for the type of liability involved in this case. Transcontinental did not asserted those arguments

Claims Against Corporate Officers

***Hoang v. Arbess*, 80 P.3d 863 (Colo.App. 2003).**

Factual Background: Home purchasers brought action against home building company and its manager. The court considered liability for corporate officers.

Holding: The evidence was sufficient to show the defendant approved of, directed, actively participated in, or cooperated in the negligent conduct.

Analysis: To be found personally liable for a tort, the officer of a corporation must have participated in the tort. *See Snowden v. Taggart*, 91 Colo. 525, 531, 17 P.2d 305, 307 (1932). The Court stated that at a minimum, personal liability attached to a defendant who was directly involved in the conduct through conception or authorization. Other direct involvement, such as active participation or cooperation, specific direction, or sanction of the conduct, also may be sufficient. Whether defendant approved of, directed, actively participated in, or cooperated in the negligent conduct is a question of fact for the jury.

In this case, plaintiffs presented evidence that the defendant was personally involved in each step of the construction, chose the individual home sites, oversaw the subcontractors, set policies and procedures for the subcontractors to follow, and visited the construction sites at least once a week. Furthermore, there was evidence that defendant knew or should have known the construction techniques implemented did not meet the recommendations by the soils engineer. There was sufficient evidence that the defendant knew or should have known that the homes and their landscaping were constructed improperly. The issue of defendant's negligence should not have been taken from the jury by directed verdict.

***Hoang v. Monterra Homes, et al*, 2005 WL 427936 (Colo.App.).** Garnishment action. Decision includes analysis of insurance coverage and attorney fees.

Negligent Hiring

***Raleigh v. Performance Plumbing and Heating, Inc.*, 2004 WL 963817 (Colo. App.), *cert. granted* 2005.**

Factual Background: Plaintiffs were injured in car accident with employee and sued employer, asserting claims for negligent hiring and vicarious liability.

Holding: Court of Appeals held that employer was entitled to JNOV (judgment notwithstanding verdict) on plaintiffs' negligent hiring claim. Employer breached its duty to use reasonable care in hiring employee, but the breach was not the cause of plaintiffs' injuries. In addition, plaintiffs were not entitled to JNOV on their vicarious liability claim because there was a reasonable basis for the jury to conclude that the act did not occur in the course and scope of defendant's employment.

Analysis: The entry of JNOV is appropriate only where the evidence, when viewed in a light most favorable to the non-moving party, is such that no reasonable person could reach the same conclusion as the jury.

Liability for negligent hiring is predicated on the employer's hiring of a person under circumstances antecedently giving the employer reason to believe that the person by reason of some attribute, character or prior conduct, would create an undue risk of harm to others in carrying out his or her employment responsibilities.

An employer may be held liable for negligently hiring an employee even if the employee's conduct was intentional and, for that reason, outside the scope of employment. The negligent hiring claim appears designed to address that very situation, where a vicarious liability claim would not be viable because the conduct was outside the scope of employment.

To impose respondeat superior liability on an employer for an employee's acts, the plaintiff must show that an employer employee relationship existed and that the acts occurred in the course and scope of the employee's employment.

Fire – Jury Instructions

***Minto v. Sprague*, 2005 WL 1404917 (Colo.App.).** This opinion has not been released for publication in the permanent law reports.

Factual Background: Plaintiff's land was damaged by a fire that started on defendant's adjoining parcel. Defendant testified that while he was operating a bulldozer on this land, the machine scraped a rock and caused a fire. The trial court rejected plaintiff's jury instruction on strict liability and res ipsa loquitur.

Holding: Court of Appeals concluded that the trial court properly declined to give the strict liability and res ipsa loquitur instructions.

Analysis:

Strict Liability: Plaintiff wanted an instruction on the doctrine of strict liability under C.R.S. §13-21-105 which provides as follows: "[I]f any person sets fire to any woods or prairie so as to damage any other person, such person shall make satisfaction for the damage to the party injured, to be recovered in an action before any court of competent jurisdiction. The Court stated that interpreting "sets fire to" as imposing liability for accidental fires would be contrary to the general principles of common law strict liability. The plain and ordinary meaning of the phrase "sets fire to" does not apply to driving a bulldozer and unintentionally igniting a fire.

Res Ipsa Loquitur: Plaintiff wanted an instruction on res ipsa loquitur. The doctrine gives rise to a rebuttable presumption of defendant's negligence. *Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991). When the plaintiff introduces sufficient evidence to establish a presumption of negligence, the trial court must instruct the jury on the doctrine. *Ravin v. Gambrell*, 788 P.2d 817 (Colo. 1990). The plaintiff must introduce evidence which establishes that it is more probable than not that: (1) the event is of the kind that ordinarily does not occur in

the absence of negligence; (2) responsible causes other than the defendant's negligence are sufficiently eliminated; and, (3) the presumed negligence is within the scope of the defendant's duty to the plaintiff. *Williams v. Boyle*, 72 P.3d 392 (Colo.App. 2003).

In this case, plaintiffs were required to present sufficient evidence upon which the trial court could have concluded the defendant's negligence was the more probable explanation for the fire, but they were not required to conclusively exclude all possible explanations of the accident. *See Montgomery Elevator Co. v. Gordon*, 619 P.2d 66 (Colo. 1980). However, when the facts and circumstances of the occurrence create conflicting inferences, one of due care and one of negligence, the doctrine does not apply. *Zimmerman v. Frazen*, 121 Colo. 574, 220 P.2d 334 (1950). The doctrine also does not apply when the court does not find that it is more likely than not that the defendant's negligence was the cause of the plaintiff's injury. *Holmes v. Gamble*, 655 P.2d 405 (Colo. 1980). In this case, plaintiffs did not introduce sufficient evidence to make it more probable than not that an unknown negligent act by defendant caused the fire. They failed to present prima facie support for their theory of res ipsa loquitur.

Diminution in Home Value

Vista Resorts, Inc. v. Goodyear Tire & Rubber Co., 117 P.3d 60 (Colo.App. 2004), cert. denied (2005).

Homeowner's testimony regarding the post-repair diminution in value of his or her home was admissible in product liability action against manufacturer of rubber hoses used in home heating systems; allowing homeowners to opine on post-repair stigma was consistent with their presumed extensive knowledge and heightened awareness of the value of their homes.

See also for analysis of jury instructions pertaining to component part manufacturer and CCPA treble damages.

Workers' Compensation

***CCIA and Satterfield v. Jones*, 2005 WL 1189843 (Colo.App.).**

Factual Background: Satterfield was driving his employer's truck when he approached a herd of cattle. Jones was herding the cattle, and Hagan was assisting him. Satterfield slowed but did not stop as he passed the herd. This made Hagan mad. Hagan went home, obtained a gun, found Satterfield (who was unloading his truck) and shot him. Satterfield was paralyzed. Satterfield received workers' compensation benefits because he sustained the injury in the course of his employment. Satterfield brought a personal injury action against the Hagans and Jones, and the insurer was permitted to intervene in the action to assert subrogation rights under C.R.S. §8-41-203, to the extent of the workers compensation benefits it was obligated to provide to Satterfield.

Satterfield and insurer agreed to settle the personal injury action against the Hagans for policy limits. They had a hearing to determine allocation of the proceeds. The court ruled that the insurer had no subrogation rights to any part of the settlement because the entire settlement would not fully compensate Satterfield for all his noneconomic damages.

Holding: Court of Appeals found the trial court erred in allocating all of the settlement to noneconomic damages and in distributing the full amount to Satterfield.

Analysis: The payment of workers' compensation benefits to an injured employee operates as an assignment to the workers' compensation insurer of the employee's cause of action against a third party tortfeasor responsible for the employee's injuries to the extent of the benefits for which the insurer is liable, including past and future benefits. C.R.S. §8-41-203(1)(b); *Colo. Comp. Ins. Auth. v. Jorgensen*, 992 P.2d 1156 (Colo. 2000). The subrogation right extends only to the employee's right to recover economic damages. Before enactment of the statute, the General Assembly did not intend to include physical impairment or disfigurement damages recovered by an employee within the general category of economic damages. Colorado law does not require that an employee be fully compensated for his or her noneconomic damages before the insurer's subrogation rights may be exercised. However, the trial court, on remand, must determine Satterfield's past and future economic damage and reallocate the settlement proceeds among economic, noneconomic, physical impairment and disfigurement damages.

The case was decided before enactment of C.R.S. §8-41-203(1)(d)(I)(B), which provides that for injuries occurring on or after the effective date of the statute, a workers' compensation insurer's subrogation rights extend to an employee's physical impairment and disfigurement damages.