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LAMBDIN & CHANEY, LLP CLAIMS GAZETTE

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EXTRA, EXTRA:

Beware of the increasing use of Colorado home-rule cities (to date—Arvada, Aurora, Castle Rock, Centennial, Colorado Springs, Commerce City, Denver, Durango, Ft. Collins, Lakewood, Littleton, Lone Tree, Loveland, Parker and Wheat Ridge) adopting ordinances governing construction defect claims, which may include "right-of-repair" and "consent-to-sue" procedures and arbitration provisions.

June 2, 2017 Event—Applied for Wyoming, Colorado & Texas Credits

The seminar will be on Friday June 2nd from 1:00 p.m. to 5:00 p.m., at the Marriott in the Tech Center, 4900 S. Syracuse Street.

4 credit hours (including 1 ethics credit) have been applied for with the Wyoming, Colorado and Texas Divisions of Insurance.

Because appetizers and drinks will be served **DURING** the presentations, it is important to get an accurate head count.

***SO PLEASE* register by either emailing my legal assistant Jamie Cook at jcook@lclaw.net or call her at 303-799-8889.**

The seminar is free and desk reference claim handling materials will be handed out to all attendees.

In addition to food, drinks, credits, great speakers and reference materials, there will also be door prizes.

As anyone who attended last year can attest to, you do not want to miss this!

AGENDA

1:00-3:00 **Legal Update with Best Practices Claims Handling**– *Kathy Chaney, Lambdin & Chaney, LLP*

3:00-4:00 **Liability Issues with Workplace Injury Claims—Who Can Be Sued and for What?** - *Jennifer Gifford, Gifford Stevens, LLC, 303-495-5988, jjg@giffordstevens.com*

4:00-5:00 **When Water is to Blame—Whose fault is it?**— *Dave Lipson, PhD, Hydro Science + Engineering, LLC*

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Colorado Supreme Court Bars Direct Negligence Against Employer

On March 27, 2017, in ***In Re Ferrer***, the Colorado Supreme Court reviewed trial court orders dismissing plaintiff's direct negligence claims against an employer where the employer acknowledged vicarious liability for its employee's negligence, and denying the plaintiff's motion for leave to amend her complaint to add punitive damages against the employer and employee.

The supreme court adopted the rule stated in McHaffie v. Bunch, 891 S.W.2d 822 (Mo. 1995), which holds that an employer's admission of vicarious liability for an employee's negligence bars a plaintiff's direct negligence claims against the employer.

The supreme court declined to adopt an exception to this rule where the plaintiff seeks punitive damages against the employer.

Plaintiff Ferrer was injured when a taxicab driven by Tesfamariam Okbamicael struck her as she crossed a street in Denver. Ferrer sued Okbamicael and Yellow Cab, alleging Okbamicael was negligent and that Yellow Cab was liable under the doctrine of respondeat superior. Ferrer also alleged that Yellow Cab was directly negligent based on negligent entrustment, hiring, supervision and training.

Yellow Cab admitted that Okbamicael was an employee acting in the course and scope of his employment.

Yellow Cab then moved to dismiss Ferrer's direct negligent claims, which the trial court granted. The trial court also denied Ferrer's motion to add punitive damages, finding no evidence of willful and wanton conduct by either defendant.

The court ruled that because Yellow Cab will be strictly liable for 100% of Okbamicael's alleged negligence based on its admission of vicarious liability, the direct negligence claims—negligent entrustment, hiring, supervision and training—were duplicative and unnecessary.

Privity of Contract Required for Implied Warranty Claim

On April 17, 2017, in ***Forest City v. Rogers***, the Colorado Supreme Court considered whether privity of contract was necessary for a home buyer to assert a claim for breach of the implied warranty of suitability against a developer. The supreme court concluded that because breach of the implied warranty of suitability is a contract claim, privity of contract is required in such a case. In ***Forest City***, the home buyer was not in privity of contract with the developer and thus could not pursue a claim against the developer for breach of the implied warranty of suitability.

Notably, however, the court made a point of saying that the home owner did not assert a third-party beneficiary claim.

Other Notable Recent Colorado Decisions and Activity

- The issue of whether first party statutory penalty claims under C.R.S. 10-3-1115, –1116 are subject to a one-year statute of limitations is currently on appeal with the Colorado Supreme Court. Stay tuned….
- In January 2017, in ***Smith v. State Farm***, the Colorado Court of Appeals found that a farm tractor was a covered motor vehicle for UIM benefits. A farm tractor with hay spears pierced the vehicle Smith was in, leaving him severely injured. State Farm argued that because Smith was not injured by an underinsured "motor vehicle", i.e., a tractor does not qualify, he was not entitled to UIM benefits. The court disagreed, noting that the tractor had wheels, its own motor, was not operated on rails and was designed for use on streets and highways.
- In two separate federal court opinions, Vail Resorts obtained summary judgments, enforcing lift ticket and ski school waivers. The court found that businesses engaged in recreational activities like Vail have been held not to owe special duties to the public or to perform essential public services. The court also found that the "contract," i.e., lift ticket, was entered into fairly as riding a chairlift is not an essential activity but is recreational in nature. Plaintiff was free to walk away if she did not wish to assume the risks involved in connection with the chairlift. ***Raup v. Vail Summit Resorts, Inc.***, 15-cv-00641-WYD-NYW, January 23, 2017; ***Brigance v. Vail Summit Resorts, Inc.***, 15-cv-1394-WJM-NYW, January 13, 2017.
- In several venues, trial courts have denied plaintiffs' motions to add punitive damages based on using a cell phone at the time of the accident. Pursuant to C.R.S. § 13-21-102(1)(a), a court should only allow punitive damages if there is a showing of fraud, malice or willful and wanton conduct. Willful and wanton conduct is a dangerous course of action that is consciously chosen with knowledge of the facts, which to a reasonable mind creates a strong probability that injury to others will result. While C.R.S. § 42-4-239 prohibits drivers under the age of 18 from using a cell phone while driving, the statute does not impose punishment on drivers over the age of 18 for the same conduct. The courts are rejecting the argument that driving while on a cell phone, without more, is equivalent to drunk driving. Instead, driving while on the phone is more analogous to simple negligence, such as trying to locate a radio program or changing a CD while driving.

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