



HALL & EVANS ROCKY MOUNTAIN LITIGATION REPORTER

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The Hall & Evans Rocky Mountain Litigation Reporter is a periodic online newsletter directed to a select group of individuals and organizations. In this issue, we review a very significant recent decision from the Colorado Supreme Court concerning premises liability.

AFFIRMATIVE DEFENSES OF COMPARATIVE FAULT AND NON-PARTY LIABILITY RESTORED TO PREMISES LIABILITY CASES.

Justice Back on Track After Being Derailed for Two Years.

The Colorado Supreme Court recently entered a judgment reaffirming the use of comparative negligence as an affirmative defense in premises liability cases. Union Pacific v. Martin stemmed from an unfortunate incident in 2002 in which a Castle Rock teen's car had stalled on the railroad tracks as a train approached. The warning gates came down on her car, and her boyfriend, in a truck behind her, attempted to push her car out of the way. He was not successful, however, and the train struck her vehicle.

At issue in this case was whether Union Pacific could raise the affirmative defenses of comparative negligence and pro rata liability of a nonparty, alleging that the boyfriend had actually made the situation worse and contributed to the damages by pushing the plaintiff's car into the path of the train. The district court and the court of appeals both held that Union Pacific could not raise that defense. The district court concluded that Vigil v. Franklin, 103 P.3d 322 (Colo. 2004) rendered those defenses inapplicable to premises liability claims. In Vigil, the Colorado Supreme Court found the premises liability statute was the "sole codification of landowner duties in tort," abrogating all common law doctrines. The district court took this to mean that any common law doctrines not expressly written into the statute no longer applied. The jury awarded the plaintiffs almost \$8 million in economic damages and a full \$4 million in punitive damages.

The Court of Appeals disagreed with the district court that Vigil applied to this case. The holding in Vigil was limited to the abrogation of common law doctrines relating to landowner duties specifically and did not have a bearing on statutory defenses. Nonetheless, the Court of Appeals found for the plaintiffs. The General Assembly had modified the premises liability statute after the district court's decision to expressly allow for these defenses. The Court of Appeals was then asked to determine, as an issue of statutory construction, whether this amendment was intended to clarify the existing statute or to effect a substantive change. The Court of Appeals found it to be a substantive change that could not be applied retroactively and thus did not allow the affirmative defenses.

The Colorado Supreme Court granted certiorari and reversed the decision of the Court of Appeals. The Supreme Court agreed that Vigil did not apply here, and held that the premises liability statute as it existed before the amendments did allow for the affirmative defenses of comparative negligence and pro rata liability of a nonparty. Looking at other Colorado statutes that allow comparative negligence, the Supreme Court found that the intent of the General Assembly was to apportion damages according to fault, and that this “reflects a broad policy choice, not only to reject complete exoneration whenever another is partially at fault, but also to reject the imposition of full liability on one who bears only partial responsibility.” Thus, the Supreme Court held that, in this context, the premises liability statute did not displace the affirmative defenses of comparative negligence and pro rata liability of a nonparty. The decision of the Court of Appeals was reversed, and the case was remanded to the district court for a new trial, with instructions to allow the affirmative defenses.

This decision of the Supreme Court is particularly significant because the Court of Appeals’ decision had effectively erased the affirmative defenses of comparative negligence and pro rata liability in all premises liability cases. Many district courts followed the Court of Appeals’ decision out of judicial deference. Other courts, however, questioning the logic of the Court of Appeals’ decision, refused to follow it, creating a certain degree of tension in the lower courts. Two divisions of the Court of Appeals also refused to follow the Martin decision, offering various justifications for their action. Although the decision of the Supreme Court settled the controversy in the lower courts, its practical application is limited to the period before the General Assembly amended the statute. Union Pacific v. Martin, ___ P.3d ___ (Colo. 2009).

Alan Epstein, head of the Appellate Department at Hall & Evans, was on the lead appellate counsel team that directed the successful effort to overturn the Court of Appeals’ decision. For further information about this case or related matters, please contact Mr. Epstein at 303-628-3354 or by email to epsteina@hallevans.com.

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INQUIRIES OR COMMENTS

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