

WYOMING TORT AND INSURANCE DEFENSE NEWSLETTER

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Proper Summons in a Civil Action. In *Hoke v. Motel 6 Jackson*, Wyoming Supreme Court, Docket 05-132 (March 27, 2006), the plaintiff, Paula Hoke, suffered injuries at the Motel 6 in Jackson, Wyoming, on March 6, 2000. On March 4, 2004, two days before the statute of limitations ran on her negligence claim she filed her complaint. On March 29, 2004, the summons was served on an employee of Motel 6. Rule 4 of the Wyoming Rules of Civil Procedure requires that a summons meet certain requirements including being signed by the clerk of court, being under seal of court, contain the name of the court and the names of the parties, state the name and address of the plaintiff's attorney, state the time in which the defendant must answer, and notifying the defendant that if an answer is not timely a default may be entered.

In this case, the summons was defective in that it was not signed by the clerk of court nor was the complaint attached. A default was ultimately entered against Motel 6. On May 3, 2004, the plaintiff sought to have the court enlarge the time for service on a co-defendant and the co-defendant was served on July 1, 2004. Both defendants filed motions to dismiss which were granted by the court.

On appeal, the Wyoming Supreme Court affirmed the dismissal. The court held that the defective summons served on Motel 6 rendered the trial court without jurisdiction because the summons did not comply with the requirements of Rule 4. Any omission of the required elements for

a summons under the Rules of Civil Procedure is fatal and such an omission prevents the trial court from obtaining jurisdiction. Since Motel 6 was not properly served the statute of limitations ran because the complaint had not been served within 60 days of filing the complaint as required under the Rules of Civil Procedure.

The second issue was whether the statute of limitations could be enlarged by the trial court extending the time within which service could be made. The court held that Rule 6 of the Wyoming Rules of Civil Procedure cannot extend the time period found in Rule 3 of the Rules of Civil Procedure. Since the co-defendant had not been served within 60 days of filing the complaint, the complaint against the co-defendant was also dismissed. Because the statute of limitations as to both defendants had run, the plaintiff was precluded from bringing suit.

Statute of Limitations. *Reed v. Cloninger, et al.*, Wyoming Supreme Court, Docket 05-74 (March 24, 2006). The Reeds brought a lawsuit on March 31, 2004, asserting claims of negligence, nuisance, and trespass. They claimed the defendants, who were adjoining landowners, were damaging their home with uncontrolled irrigation water. The trial court granted summary judgment in favor of the defendants on the basis that the four year statute of limitations had run. The Supreme Court reversed.

The Reeds' home was built in the

late 1930's and the home had a history of water seepage problems that had never been resolved. A former owner believed that the seepage was caused by a rise in the water table. The home is in the middle of a farming area and when adjoining neighbors would irrigate, water would seep into the basement of the house. The plaintiffs claim they first noticed water in the basement in the summer of 2000 and each year thereafter. The trial court believed the plaintiffs should have known in 1999 about the water issue and thus the four year statute of limitations expired.

The Supreme Court concluded there were genuine issues of material fact as to where the water was coming from since the plaintiffs could not identify who was at fault. The court also believed there were genuine issues of material fact that a new trespass occurred each year during the irrigation season starting a new statute of limitations every year. The court also questioned whether the concept of a "continuing tort" could apply to the plaintiff's claims.

Respondent Superior. *Killian, et al. v. Caza Drilling, Inc.*, Wyoming Supreme Court, Docket 05-37 (April 7, 2006), involved a wrongful death claim. The Plaintiff, Killian, was the personal representative of the decedent, Poole. Poole was killed when he was struck by a vehicle driven by an employee of Caza. Suit was brought against Caza as well as the supervisor of the employees that struck Poole. The supervisor allegedly allowed employees of Caza to drink alcohol on the job site. Summary judgment was granted to Caza and the Wyoming Supreme Court affirmed.

Caza had a drilling site and also had a man camp in the same area where its employees stayed. There was a policy at the camp that employees could not possess or consume alcohol; however, the policy was not enforced. Two employees of Caza started drinking at the camp and

they left the camp in a personal motor vehicle. The trip ultimately resulted in the accident which killed Poole.

The Wyoming Supreme Court noted the general rule is that an employer under the doctrine respondeat superior is only responsible for the negligence of its employee acting within the scope and course of employment. Here the employees who had been drinking were not acting within the scope and course of their employment when the accident occurred. Plaintiff argued that when an employer adopts a safety policy that is intended to protect the public, the employer should owe a duty of care to the public. The Wyoming Supreme Court refused to recognize such a broad duty noting that the mere creation of an internal company policy regarding the consumption of alcohol on the premises does not create a duty of care to third persons who are injured by a violation of the policy.

Governmental Claims. *Sponsel v. Park County*, Wyoming Supreme Court, Docket 05-109 (January 11, 2006). Two individuals died in a one car accident on the Clark's Fort Canyon Road in Park County. The driver of the vehicle had been drinking, drove down the Clark's Fort Canyon Road, and crashed through a fence ending up in a field resulting in the death of a passenger. A lawsuit was filed against Park County claiming that it did not provide proper road signage on the road. The County moved for summary judgment under the Wyoming Governmental Claims Act ("Governmental Claims Act") and the motion was granted. In affirming the summary judgment, the Supreme Court agreed that the signage on the road was inadequate and misleading; however, there is no exception under the Governmental Claims Act waiving immunity from suit regarding improper or misleading traffic control devices.

Insurance Bad Faith. *Elworthy, et al. v. Hawkeye Insurance Company*, United States Court of Appeals for the 10th Circuit, Docket No. 05-8009 (2006). The Elworthy's owned a home in Sheridan, Wyoming. The Elworthy's had hired Cosner Construction Company ("Cosner") to perform remodeling at their home. The Elworthy's failed to pay Cosner approximately \$100,000 for remodeling services and were sued. The Elworthy's sought defense from their insurance carrier, CGU Insurance Company ("CGU"). The Elworthy's were also insured by Hawkeye Security Insurance Company and One Beacon Insurance Group. CGU defended under a reservation of rights. The Elworthy's then filed a counterclaim against Cosner alleging construction defects, breach of contract, breach of warranty, etc. At one point the parties had agreed to a settlement where both Elworthy's and Cosner would receive \$100,000; however, the settlement was never concluded. CGU then approached Cosner to settle Cosner's claims for \$120,000 with \$100,000 toward the bill that was owed it and an additional \$20,000 to be used to defend the counterclaims filed by the Elworthy's. Cosner agreed and dismissed its suit.

The Elworthy's filed a suit in federal court for breach of contract and bad faith related to CGU's settlement with Cosner as well as failure to pay other sums due in its first party suit. It was argued that the insurance company settling with Cosner prevented the Elworthy's from succeeding on their counterclaims thus breaching the covenant of good faith and fair dealing. The court held there was no breach of contract or breach of the duty of good faith and fair dealing because the insurance policy specifically provided that CGU could settle any claim it deemed appropriate. CGU had the right to settle with Cosner.

Motor Carrier Liability. *Booth v. Quality Carriers, Inc.*, 2005 Ga. (LEXIS 1268).

Quality Carriers, Inc., brought a load of cylinder containers from Georgia to North Carolina. The motor carrier did not note or correct any container defects. Before leaving with the load the driver had performed a pre-trip inspection. After the freight had been off loaded at the consignee's facility, an employee was injured when a valve exploded on a container. The injured worker sued Quality Carriers claiming that it should have determined and corrected the problem with the valve as part of its inspection. The court dismissed the claims stating the motor carrier owed no duty to the consignee or its employees. The consignee was not the freight's owner until after delivery. Thus any negligence of the motor carrier did not give rise to liability to the injured worker.

Fireman's Rule. In *Fordham v. Oldroyd*, Utah Court of Appeals, Docket No. 2005-0325 (February 16, 2006), the Utah Court of Appeals held that a policeman who reported to the scene of an auto accident and was then struck by another vehicle was prohibited from suing the first driver under the "Fireman's Rule." The Fireman's Rule precludes a professional rescuer from recovering damages for injuries sustained while responding to an emergency from the person who caused the crisis. The Utah Court of Appeals noted the rule is a matter of public policy. Utah should join the majority of states that have adopted the Fireman's Rule. Police officers are employed for the very purpose of responding to emergency situations and it would be contrary to public policy to impose a duty on citizens not to need such services.

MCS-90 Endorsements. In response to an MCS-90 case captioned *John Deere Insurance Company v. Nueva*, 299 F.3d 853 (9th Cir. 2000), the Federal Motor Carrier Safety Administration issued an interpretive note effective October 5,

2005, to be appended to Sections 387.15 and 389.39 pertaining to MCS-90 endorsements and MCS-82 surety bonds. According to the Federal Motor Carrier Safety Administration, under 49 C.F.R. 387.5, "insured and 'principal' is defined as the motor carrier named in the policy of insurance, surety bond, endorsement, or notice of cancellation, and also the fiduciary of such motor carrier." Forms MCS-90 and MCS-82 are not intended, and do not purport, to require a motor carrier's insurer to satisfy a judgment against any party other than the carrier named in the endorsement or surety bond or its fiduciary.

The effect of this interpretation should be to preclude claims that an MCS-90 endorsement provides coverage to someone other than a motor carrier.

Auto-Deer Collisions. The January 2006 edition of Best's Review© reported that an estimated 1.5 million vehicle/deer collisions take place across the United States each year killing more than 150 motorists and resulting in more than \$1.1 billion in vehicle damage. Recent studies by the National Highway Traffic Safety Administration reported that vehicle/animal collisions rose by 24% in the 2000-2001 time period when compared to 1992-1993.

Use of Turn Signals. The June 2006 issue of Best's Review© reported that 57% of American drivers do not use their turn signals when changing lanes. Reasons given by drivers varied, but included not having enough time, laziness, forgetting to turn their turn signal off, they changed lanes too frequently to bother using a turn signal, it was not considered important, and because other drivers do not use turn signals.

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