

WYOMING TORT AND INSURANCE DEFENSE NEWSLETTER

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Motor Carrier Accidents. According to a March 15, 2007 article in the Insurance Journal™, Wyoming and Arkansas are the deadliest states for truck accidents. The safest states for truck accidents were Rhode Island and Massachusetts. The statistics compiled were based on the number of fatalities per 100,000 residents during calendar year 2005. According to the article, in 2005 Wyoming had 6.09 deaths in semi tractor-trailer accidents per 100,000 residents followed by Arkansas with 4.17 deaths per 100,000 residents.

9.5 Million Dollar Verdict. A Campbell County Wyoming jury awarded a coal miner 9.5 million dollars. The miner suffered a severe spinal cord injury when a large rock fell onto the vehicle he was operating. The seven member jury determined that the miner was entitled to 18 million dollars and each of his sons were entitled to two million dollars. However, the jury found his employer responsible for 57% of the accident and the employer was immune under the Wyoming Workers' Compensation Act. The jury assigned the remaining liability to two different co-employees, one receiving 18% of the fault and the other receiving 25% of the fault, for a total verdict of 9.46 million.

Governmental Immunity. In *City of Torrington v. Cottier*, Wyoming Supreme Court Docket 05-267 (2006), the Cottiers sued the city of Torrington because raw sewage backed up into rental property causing damage. The City sought

immunity under the Wyoming Governmental Claims Act. The Wyoming Supreme Court affirmed the trial court's ruling that the Governmental Claims Act did not protect the city of Torrington.

The cause of the sewer backup was tree roots in the main sewer line and it was the City's responsibility to maintain the lines. The Court found that maintenance of a sewer system is part of the operation of the system and, therefore, there was no immunity.

Becker v. Mason. *Becker v. Mason*, Wyoming Supreme Court Docket 05-219 (2006). In 2003, Glenn Towner and Mary Brandes were at a horse stable. Towner was intoxicated and had been drinking all day. Brandes was injured while riding horses and medical personnel responded to the scene along with the Sheriff's Department. Towner told the Sheriff that he had been drinking, but that he wanted to go to the hospital to check on Brandes. Towner got into a vehicle to drive to the hospital and, predictably, hit another vehicle and killed a passenger in that car.

The issue was whether law enforcement authorities owed a duty of care to other motorists to have arrested Towner for driving while under the influence. The trial court dismissed the case early on relying on an older Wyoming case and the Wyoming Supreme Court reversed the dismissal holding that the law in Wyoming is that circumstances may create a duty on

the part of a law enforcement officer to investigate someone for driving under the influence. No facts were developed and the case was remanded to the trial court. It is anticipated the Sheriff's Department will file a motion for summary judgment.

The Court did note that when law enforcement arrived at the stable and determined that Towner was intoxicated, there was a duty to do what an ordinarily prudent law enforcement officer would have done under like circumstances.

Premises Liability. *Rader v. Sugarland Enterprises, Inc.*, Wyoming Supreme Court Docket 06-20 (2006). Rader was asked to leave a bar at a hotel complex in Sheridan and was attacked in the parking lot by two men. Rader sued the bar contending that it had a duty to protect him in light of the fact that events earlier in the night at the bar created a situation where the attack would occur. The trial court found there was no duty and the Wyoming Supreme Court affirmed.

On appeal, the issue was whether the bar owed Rader a duty of care. In order to establish a duty of care, the Plaintiff must show four elements: (1) a disturbance which did attract or should have attracted the tavern keeper's attention; (2) a period of time from the original disturbance until the attack; (3) that a subsequent tortious act occurred to allow the tavern owner to respond; and (4) a relationship between the attracting disturbance and the subsequent tortious act.

The Court noted that this requires more than a "battle of words." Here, the initial disturbance did not involve Rader, but rather his wife. There was no confrontation inside the tavern with Rader and the individuals who eventually assaulted him. Therefore, Rader did not establish a claim for relief.

Motor Carriers. Federal preemption of vicarious liability. Frequently in lawsuits against truck companies arising out of a tractor-trailer accident, the truck lessor is named as a party defendant. Effective August 10, 2005, the Graves Amendment, 49 USC §30106, overrides and preempts any state law that would subject lessors to vicarious liability merely based on the act of the rental or lease of a motor vehicle.

Collateral Source Rule. In the recent case of *Robinson v. Bates*, Docket No. 2005-0998 (2006), the Ohio Supreme Court found that the Collateral Source Rule does not bar evidence of both the actual bill for medical services and the amount actually paid by the insurer. Here, the plaintiffs sued the defendant for a slip-and-fall injury. Actual bills exceeded those paid by her insurer and the trial court refused to admit the original bills and limited the Plaintiff to the amount that was actually paid by her insurer.

The Ohio Supreme Court found that both the original bill and the amount paid by the insurer are admissible to prove the "reasonable value" of the medical treatment. It was felt this more accurately reflects the current system of health insurance with a variety of different insuring organizations ultimately paying bills, often at discounted rates.

Some states have held the actual medical bills as opposed to the amount paid is the only proper evidence and the defendant should not benefit by the fact that the plaintiff has insurance. Other states have followed the Ohio approach. To date, the Wyoming Supreme Court has never directly ruled on this issue.

Insurance Companies Facing More Lawsuits. In the January 2007 of Best's Review, an article reported that the average U.S. insurance company faces nearly 1,700 lawsuits in the United States.

This number is five times the average over the next highest company sector of energy, with 364 pending suits, retail, with 333 pending suits, and financial services, with 300 pending suits. The article noted that the average insurer spent \$36,000,000 in litigation costs in 2005. The article went on to report that it was unknown whether these numbers were increasing for insurance carriers over time or whether they are moving in proportion to other factors such as claim frequency, severity, or catastrophic losses.

Recreational Use Statute. In *Jackson Hole Mountain Resort v. Rohrman*, Wyoming Supreme Court, Docket #05-290 (2006). The Wyoming Supreme Court answered a certified question from the United States District Court pertaining to the Recreational Use Statute. Generally, the Recreational Use Statute provides that those providing recreational services are immune from suit for injuries arising out of "inherent risks." A provider of recreational services may be liable for "non-inherent" risks and may have a duty to eliminate, alter, or control such risks.

The question certified was: when faced with competing motions for summary judgment, how should the court differentiate between "inherent risks" and "non-inherent risks." The Supreme Court responded to the question that the court must scrutinize the facts and if the court can say that based on given evidence that something is an "inherent risk" and reasonable minds cannot differ, then summary judgment is appropriate. If the risk is inherent, the provider has no duty to eliminate alter or control the risk. However, if reasonable minds could differ as to whether a given risk was inherent or not inherent, then summary judgment is not appropriate and a jury must make the ultimate determination.

The Court noted that in such cases

summary judgment is a "lofty bar" and normally the jury should ultimately decide the issue. The Supreme Court did state that the trial courts could be assisted by looking at the recreational safety acts in states such as Colorado, New Mexico, and Utah in order to determine what is an inherent risk and what is not an inherent risk.

Violation of Building Codes. In *Frost v. Allred*, Wyoming Supreme Court, Docket #06-24 (2006). The Wyoming Supreme Court was faced with the issue of whether the violation of a building code was negligence per se or was only evidence of negligence. The Court ultimately found that violation of a building code would be evidence of negligence as opposed to negligence per se.

Wyoming courts have been reluctant to adopt claims based on negligence per se based on the violation of a statute, ordinance, or regulation. A representative sampling of cases include: *Hincks v. Walton Ranch*, 150 P.3rd 669 (Wyo. 2007), when the court found no negligence per se based on the violation of livestock laws; *Pinnacle Bank v. Villa*, 100 P.3rd 1287 (Wyo. 2004), which found violation of a snow and ice removal ordinance was not negligence per se; *Greenwalt v. Ram Restaurant Corporation*, 71 P.3rd 717 (Wyo. 2003), which found in violation of liquor statutes was not negligence per se; *Anderson v. Two Dot Ranch*, 49 P.3rd 1011 (Wyo. 2002), that held violation of fencing and open range laws does not constitute negligence per se; and, *Distad v. Cuban*, 633 P.2nd 167 (Wyo. 1981), which found a violation of federal regulations was not negligence per se.

Additionally, in *Short v. Spring Creek Ranch*, 731 P.2nd 1195 (Wyo. 1987), the Wyoming Supreme Court found that the violation of motor vehicle statutes generally would not be negligence per se,

but would only be evidence of negligence.

Although the question has never been answered in Wyoming, several courts have found that violations of the Federal Motor Carrier Safety Regulations were not negligence per se but only evidence of negligence. *Thurston v. Ballou*, 505 NE.2d 88 (Mass. 1987), *Tartaglione v. Shaw's Express, Inc.* 790 F.Supp 438 (SDNY 1992), and *Long v. Burgart*, 914 F.2nd 257 (6 Cir. 1990)

Firm News.

We are pleased to announce that James Learned has joined the firm as an associate. Firm members include Curtis B. Buchhammer and Larry B. Kehl. Associates are Lisa M. Barrett and James Learned.

The firm of Buchhammer & Kehl, P.C., is A-V rated by **Martindale-Hubbell** and we are the Wyoming Law Digest Revisor for **Best's Directory of Recommended Insurance Attorneys.**

Firm memberships include: the Defense Research Institute (DRI); Trucking Industry Defense Association (TIDA); Association for Defense Trial Attorneys (ADTA); Association for Transportation Law, Logistics and Policy; Transportation Lawyers Association (TLA); and several trial practice associations.

Our firm website, www.bklawfirm.com, includes information about the firm and our practice, the current Wyoming Tort and Insurance Defense Newsletter, past issues of the Newsletter, and links to many insurance, legal, and litigation resources.