

WYOMING TORT AND INSURANCE DEFENSE NEWSLETTER

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Premises Liability. In *Berry v. Tessman*, Wyoming Supreme Court, Docket No. 07-0027 (November 2, 2007), Tessman sustained injuries from stepping into a marmot hole in a campground. While checking into the RV park, Tessman inquired of the owner where she could take her son fishing and she was directed to a river just off the property. Tessman had observed a marmot hole in a nearby field. Several days later, Tessman was walking through the field, at night, stepped in a marmot hole, and sustained injuries. The District Court found in favor of Tessman and awarded \$260,000 in damages that was reduced 25% for comparative fault.

The Supreme Court noted the general rule that a landowner owes a duty to act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the potential injury, and the burden of avoiding the risk. However, Wyoming has long recognized that landowners do not have a duty to protect from known and obvious dangers. However, this rule does not apply to man made hazards on property, but only hazards which are naturally occurring. The Court also noted that a property owner still has a duty to invitees to correct known and obvious dangers resulting from natural causes; however, a property owner has no duty to protect invitees from hazards that are naturally occurring and identical to those encountered off the premises. However, a landowner may still be liable if the conduct or action of the landowner makes the naturally occurring hazard more dangerous or hazardous than it would be in its natural state (i.e., such as enlarging a hole,

diverting flowing water to cause ice in a parking lot, etc.).

The Court went on to find that the known and obvious danger rule applied to hazards posed by holes from burrowing animals and the hole Tessman stepped in was naturally occurring and a known and obvious danger for which the landowner had no duty to protect her. The judgment of the District Court was reversed.

Eleven Hour Driving Limit. The Federal Motor Carrier Safety Administration has maintained existing limits on driver's hours rather than endorsing reduced driving time sought by consumer advocates that would have permitted a maximum of ten hours of driving. The Federal Motor Carrier Safety Administration issued an interim final rule that maintains the current eleven hour driving limit under which drivers are required to rest for ten hours.

Despite claims that such driving limits are unsafe, accident and traffic data show that an eleven hour driving rule is in fact safe.

Driving Distractions. In past issues of the newsletter, we reported a study from the United Kingdom that indicated that drivers talking on cell phones were as likely as intoxicated drivers to be involved in an accident. The increased risk of accidents comes from the distraction from using a cellular telephone.

Since that article was written, more technology has come to the market which allows drivers to not only talk on a cellular telephone, but they may also text message, take pictures, check global positioning systems, use various types of digital music players, and send and read e-mail.

These devices are also becoming a problem in commercial vehicles and include in cab communications devices such as e-mail, voice messaging, and satellite communications (i.e., QualComm).

Text messaging requires greater concentration than talking on the phone. An average driver trying to text message takes their eyes off of the road at least 14 times every 30 seconds to look at the screen or to use the keypad. Washington State House of Representatives News Release (May 11, 2007). Other studies have shown that a driver using a cell phone was four times as likely to be involved in an accident and someone text messaging while driving was six times as likely to be involved in an accident. Mello Jr., Texting: An Accident Waiting to Happen, TechNewsWorld, August 8, 2007. Other studies have shown that a driver text messaging is 23% slower to brake. Livadas, Test Messaging Not Illegal, But Data Clear on Its Peril, Rochester Democrat & Chron., July 14, 2007. The cellular telephone industry has reported that text messaging has increased 95% from 2005 through 2006. In one study, 13% of teenage drivers admitted to text messaging while driving, and the American Automobile Association has reported that number may be as high as 46%. Rich Tel, Hands on the Wheel, Not on the BlackBerry, Keys, New York Times, May 12, 2007; American Automobile Association, July 10, 2007.

In cases where such distractions may be an issue, there are numerous discovery techniques that can be used by counsel to obtain information, although a full discussion of the discovery techniques is beyond the scope this newsletter.

Complex Regional Pain Syndrome. There are times when cases involve chronic pain complaints that may be diagnosed as chronic regional pain syndrome, also known as reflex sympathetic dystrophy or causalgia. Such claims usually occur in a single area of the body such as an arm or a leg, and many times follow a minor trauma or perhaps some type of surgical intervention. This condition is categorized by a burning pain that is present without any type of stimulation or movement, typically occurring

beyond the area of a single nerve distribution, and the pain is disproportionate to the inciting event. This diagnosis remains somewhat controversial in the medical literature and among physicians. Often times a diagnosis is made based upon a treating physician simply running out of other ideas, or what is known as a diagnosis of exclusion. Such symptoms are often subjective complaints of pain and many of the associated physical signs and radiologic findings can be the result of non-use of a body part, and there are several differential diagnoses including several psychological or psychiatric disorders and malingering.

The American Medical Association's Guides the Evaluation of Permanent Impairment (5th Edition) have attempted to establish objective diagnostic criteria for such conditions. This is the treatise that is generally accepted throughout the medical community and is primarily used to rate impairments in injured individuals. According to the AMA Guides, arriving at a diagnosis of RSD should be done conservatively and based on objective findings. Also according to the AMA Guides, at least 8 findings must be present concurrently for a diagnosis of chronic regional pain syndrome. The objective criteria for the diagnosis include:

- Local clinical signs;
- Vasomotor changes:
 - skin color: mottled or cyanotic;
 - skin temperature: cool; and
 - edema
- Pseudomotor changes:
 - skin dry or overly moist
- Trophic changes:
 - skin texture: smooth, nonelastic
 - soft tissue atrophy: especially in fingertips
 - joint stiffness and decreased passive motion
 - nail changes: blemished, curved, or talonlike
 - hair growth changes: fall out, longer, or finer
- Radiographic signs:
 - radiographs: trophic bone changes, osteoporosis;
 - bone scan: findings consistent with CRPS

If a particular claimant has 8 or more of these objective findings, there is a probable diagnosis of CRPS. However, less than 8 of these objective findings, a diagnosis of CRPS should not be given.

Negligent Employment. Plaintiffs frequently assert claims based on allegations of negligent hiring, training, supervision, retention or negligent entrustment ("negligent employment"). In most cases there is no real dispute whether the employee was an employee and was acting in the course and scope of his employment. In such cases consideration should be given to admitting this fact and admitting that if the employee was negligent or at fault for an accident, the employer is vicariously liable for the employee's negligence.

The majority of cases to consider the issue of mixed causes of action against an employer arising out of an accident involving a motor vehicle driven by its employee have restricted such claims. Those cases have held that when an employer admits that the employee was acting within the scope and course of his employment, and the employer is legally responsible for any negligence of its employee under respondeat superior or by vicarious liability, negligent employment claims against the employer are improper. The reasoning of the courts is that claims of negligent supervision, hiring, retention and entrustment impose no additional liability beyond that imposed under respondeat superior or vicarious liability, and therefore such claims are properly dismissed as redundant, prejudicial and unnecessary.

Wyoming has never squarely addressed this issue. In touching on this issue, the Wyoming Supreme Court did state that in the event an employee is not negligent or at fault for an accident, then claims based on negligent hiring against the employer must fail. If the employee is not negligent, the plaintiff cannot recover against his employer upon another theory. *Beavis ex rel., Beavis v. Campbell County Memorial Hospital*, 20 P.3d 508 (Wyo. 2001). There are two decisions by the Wyoming federal court that support this position but no definitive ruling has been made.

Cases from the Tenth Circuit and around the country that have adopted this rule include: *Rocky Mountain Helicopters, Inc. v. Bell Helicopters*, 805 F.2d 907 (10th Cir. 1996); *Hill v. Western Door*, 2006 W.L. 1586698 (D. Colo.); *Johnson v. Dillard's, Inc.*, 2005 WL 2372153 (W.D. Okla. 2005) *aff'd*, 186 Fed.Appx. 843 (10th Cir. 2006); *Jordan v. Cates*, 935 P.2d 289 (Okla. 1997); and *Oliphant v. Perkins Restaurants Operating Co.*, 885 F. Supp. 1486 (D. Kan. 1995). See also, *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo. 1995); *Wise v. Fiberglass Systems, Inc.*, 718 P.2d 1178 (Idaho 1986) *Hackett v. Washington Metropolitan Transit Authority*, 736 F. Supp. 8 (D. D.C. 1990); *Cole v. Alton*, 567 F. Supp. 1084 (N.D. Minn. 1983); *Crawford v. Andrew Systems, Inc.*, 119 F.3d 925 (11th Cir. 1997); *Bowman v. Norfolk Southern Railway Company*, 832 F. Supp. 1014 (D.S.C. 1993); *Hood v. Dealers Transport Co.*, 459 F. Supp. 648 (M.D. Miss. 1978); *Libersat v. J&K Trucking, Inc.*, 772 So.2d 173 (La. App. 2000); *Southern Pacific Transportation Co. v. Builders Transport Co.*, 1993 WL 185620 (E.D. La. 1993); *Elrod v. R&G Construction Co.*, 628 S.W.2d 17 (Ark. 1982); *Petrik v. New Hampshire Insurance Company*, 379 So.2d 1278 (Fla. App. 1979); *Rodgers v. McFarland*, 402 S.W.2d 208 (Tex. 1966); *Campa v. Gordon Food Services*, 2002 WL 1879262 (Ill. 2002); *Lang v. B&P Motor Express, Inc.*, 257 F. Supp. 319 (W.D. Ind. 1966); *Houlihan v. McCall*, 78 A2d 661 (Md. App. 1967). See also, Annot. 30 A.L.R. 4th 838, 839 (1984) and (Supp. 2007); 7A Am. Jur. 2d, Automobiles and Highway Traffic, §643; and Mueller & Kirkpatrick, Federal Evidence, § 7 (2nd Ed. 1994).

One exception to this rule is that in some jurisdictions negligent employment claims will not be dismissed if there are factually supported allegations of punitive damages. However, in other jurisdictions, it is irrelevant if punitive damages have been alleged and negligent employment claims must still be dismissed. See *Johnson v. Dillard's, Inc.*; *Jordan v. Cates*; *Oliphant v. Perkins Restaurants Operating Co.*; *Crawford v. Andrew Systems, Inc.*; *Hood v. Dealers Transport Co.*; *Elrod v. R&G Construction Co.*; *Petrik v. New Hampshire Insurance Company*; *Rodgers v. McFarland*;

Ledesma v. Cannonball, Inc.; and *Cole v. Alton*.

The ability to have negligent employment claims dismissed is readily apparent in a case where a driver has a history of traffic citations, accidents, poor driving, or criminal history. Likewise, if the employer has not done a particularly good job of hiring, training, or supervising the employee it can be of great benefit to have such claims dismissed. This rule can prevent the admission of potentially prejudicial, inflammatory and irrelevant evidence on the issue of negligent employment. Even if such claims are not dismissed, in many states negligent employment claims must be bifurcated and tried only after it is first determined that the employee was at fault for the accident. If the employee is not at fault for the accident, then claims of negligent employment are irrelevant and cannot proceed.

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Firm News.

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