

# WYOMING TORT AND INSURANCE DEFENSE NEWSLETTER

Brought to you as a service of Buchhammer & Kehl, P.C., Attorneys at Law.  
1821 Logan Avenue, P.O. Box 568, Cheyenne, Wyoming 82003-0568.  
Telephone: (307) 634-2184; Telefax: (307) 634-2199; E-Mail: [obk@wyoming.com](mailto:obk@wyoming.com)

2009

ISSUE I

**Premises Liability.** *Hendricks v. Hurley*, Wyoming Supreme Court, 2008 WY 57, involved an eight year old boy who was electrocuted after touching an ungrounded wellhead at his grandparents home. Suit was initiated against the grandparents on a theory of premises liability. On the first appeal, 112 P.3d 610 (Wyo. 2005), the Wyoming Supreme Court upheld the District Court's summary judgment holding that the homeowner had no duty to inspect the wellhead and, as such, the grandparents were entitled to summary judgment. After remand, it was claimed that the grandparents owed a duty of reasonable care to those invited on their property and that they breached the duty by allowing a dangerous condition to exist.

The Wyoming Supreme Court reiterated its long established rule that a landowner must use ordinary care to keep the premises in a safe condition and has an affirmative duty to protect visitors against dangers which are known or those dangers that are discoverable with the exercise of reasonable care. The Court found that the grandparents did not have any actual or constructive notice of improper wiring at the wellhead and therefore summary judgment was appropriate.

It was also asserted that the grandparents had a duty to use reasonable care in supervising their grandson and the breach of that duty resulted in his death. Because there was no evidence showing the grandparents knew or had reason to know that there was a dangerous

condition on the premises, a claim of negligent supervision could not move forward.

Finally, there was a claim of negligent infliction of emotional distress. The Court found that in order to proceed on a claim of negligent infliction of emotional distress, the defendant must have been negligent in the first instance and absent that negligence, such a claim cannot stand.

**Medical Liens.** In *Winship v. Gem City Bone & Joint*, Wyoming Supreme Court, 2008 WY 68, an attorney represented an injured plaintiff. Gem City Bone & Joint provided treatment to the injured plaintiff. The attorney requested plaintiff's medical records and Gem City Bone & Joint provided a release form to the attorney that he signed along with his client. The release form granted Gem City Bone & Joint a lien for the payment of medical bills. Plaintiff's first attorney then sought the assistance of another attorney to represent plaintiff in his personal injury action. The second attorney negotiated a settlement of the plaintiff's claims. The attorney prepared a "statement of distribution of the proceeds" of the settlement that was signed by plaintiff. The statement of distribution provided that the plaintiff was solely responsible to pay all medical bills and liens. Plaintiff did not pay the amounts due and owing Gem City Bone & Joint. Gem City Bone & Joint then filed an action against the first attorney who signed the release seeking payment of plaintiff's medical bills. The District Court ruled that the attorney was required to pay

the lien as he had signed a document to that effect. The attorney appealed.

On appeal, the Wyoming Supreme Court found that plaintiff had assigned certain proceeds of the personal injury claim to Gem City Bone & Joint. According to the Court the release clearly indicated that plaintiff, who was the owner of the claim, intended to transfer proceeds to Gem City Bone & Joint for payment of his medical bills. The release effected a valid assignment of plaintiff's settlement proceeds to Gem City Bone & Joint for payment of those bills. The attorney was required to honor the assignment and it was not relevant that the attorney had not entered into a direct contract with Gem City Bone & Joint. An obligor who has notice of an assignment and fails to honor the assignment is responsible to the assignee.

**Per Occurrence/Per Person Limits.** The Supreme Court of Kansas in *American Family Mutual Insurance v. Wilkins*, Docket No. 98, 181, decided whether multiple vehicle accidents caused by a driver going the wrong way on an interstate and occurring in sequence are separate occurrences under an automobile liability policy.

The insured was driving the wrong way on a highway and two separate drivers were injured in attempting to avoid the insured's vehicle. A third driver struck the insured's vehicle. A fourth driver then swerved to avoid the wreckage of the collision and hit a wall.

The Court found that the cause of the collisions was the negligence of the insured in driving into the path of oncoming vehicles. The Court held "collisions with multiple vehicles constitute one occurrence when the collisions are nearly simultaneous or separated by a very short period of time and the insured does not maintain or regain control over his or her vehicle between collisions. When collisions between multiple vehicles are separated by a period of

time or the insured maintains or regains control of the vehicle before a subsequent collision, there are multiple occurrences."

**Cellular Telephones.** In *Foddrill v. Crane* 894 N.E. 2d 1070 (Ind. App. 208), the Indiana Court of Appeals found that circumstantial evidence suggesting a driver was on his cell phone at the time of the collision was sufficient to establish an inference of negligence.

**Insurance Coverage.** In *Heart Mountain Irrigation District v. Argonaut Insurance Co.*, 10<sup>th</sup> Circuit Court of Appeals, Docket No. 08-8018, the Irrigation District brought a declaratory judgment action as to whether there was a duty to defend an irrigation district employee for an assault allegedly committed on the job. The trial court granted the insurer's motion to dismiss for failure to state a claim and the 10<sup>th</sup> Circuit affirmed.

The Irrigation District's employee was sued in state court for allegedly attacking a person with a shovel while in the course and scope of his employment. The Irrigation District submitted the claim to its insurer. The insurer refused to defend on the basis that the occurrence was not an "accident" but was intentional and the policy only applied to accidental conduct. The policy further excluded intentional acts from the definition of bodily injury. The 10<sup>th</sup> Circuit agreed with the insurer that under Wyoming law, intentional conduct does not amount to an occurrence.

**Motor Carriers.** In *Beardsley v. Farmland Co-op*, 530 F.3d 1309, (10<sup>th</sup> Cir. 2008) plaintiff was a passenger in a tanker truck driven by her husband. There was an accident and she was injured. Plaintiff brought a personal injury action against the truck driver's employer alleging that under Wyoming law, the employer was vicariously liable for the alleged negligence of the driver. The Court found that the driver of the tanker truck did not obtain or receive permission

from his employer to take his wife in the truck with him while performing company business. Therefore, under Wyoming law, the driver did not have express authority from the employer to have family members travel with him on business trips, which is a necessary predicate for the employer to be held vicariously liable in a passenger's personal injury action against the employer. Further, the employee truck driver could not create his own authority to act under Wyoming law. He must reasonably believe that he has the authority based on the employer's conduct, customs or course of dealing. Therefore, the driver of the tanker truck did not have the implied authority from his employer to have his wife with him as a passenger on a business trip, which was necessary for the wife to hold the driver's employer vicariously liable for her injuries.

**Suits Against Corporations.** In *Catamount Construction v. Timmis Enterprises*, Wyoming Supreme Court, 2008 WY 122, Catamount filed suit against several of its sub-contractors alleging defective work on a home. The subcontractors filed motions to dismiss asserting that Catamount had no standing to maintain the suit because it was defunct as a result of filing bankruptcy. The Wyoming Supreme Court held that corporate existence is a matter of state law and under Wyoming law a dissolved corporation may sue and be sued. Therefore, Catamount had standing to maintain the action.

**Co-employee Liability.** In *Hannifan and Hampleman v. American National Bank of Cheyenne*, Wyoming Supreme Court, 2008 WY 65, the Wyoming Supreme Court addressed the issue of co-employee liability. An employee of a mine was severely injured and rendered paraplegic when a large boulder landed on a piece of mining equipment that he was operating at a coal mine. The defendants were the safety manager and mine manager. Normally under Wyoming law, such employees are covered by worker's compensation. Normally, an employee

covered under worker's compensation may not bring suit against a co-employee except under very limited circumstances.

The injured employee brought suit on a theory of co-employee liability asserting that they acted intentionally by failing to safeguard him. The jury returned a verdict of \$20,000,000 excluding any reduction for comparative fault.

The Wyoming Supreme Court stated the following with regard to co-employee liability:

"A co-employee is liable to another co-employee if the employee acts intentionally to cause physical harm or injury. To act intentionally to cause physical harm or injury is to act with willful and wanton misconduct. Willful and wanton misconduct is the intentional doing of an act or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, in a high degree of probability, result in harm to another. In the context of co-employee liability, willful and wanton misconduct requires the co-employee to have 1) actual knowledge of the hazard or serious nature of the risk involved; 2) direct responsibility for the injured employee's safety and work conditions; 3) willful disregard of the need to act despite the awareness of the high probability that serious injury or death may result."

**Punitive Damages.** In *Cramer v. Powder River Coal*, Wyoming Supreme Court, 2009 WY 45, a plaintiff was injured while performing ultrasonic testing on a large coal shovel at a mine. The District Court refused to allow discovery of financial status for purposes of a punitive damage award. On appeal, the Wyoming Supreme Court found that certain allegations even if proven, would only constitute negligence and would not arise to the level of willful and wanton misconduct. Those

allegations include 1) violations of federal regulations by failing to designate a representative to inspect for hazardous conditions; 2) violation of regulations by operating equipment in the presence of a person exposed to a hazard from its operation; 3) providing inadequate safety training to its employees; 4) the fact that employees did not have an immediate supervisor the day of the incident; 5) employees had done work that allowed a hazardous condition to exist on the equipment; 6) employees directing plaintiff to climb a ladder on the equipment; 7) oil spilling on the plaintiff while he was on the equipment; and 8) the plaintiff slipped or fell off the ladder and was injured as a result.

The Court noted that even if proven the facts could be sufficient to support a claim of ordinary negligence but did not demonstrate outrageous conduct, willful and wanton misconduct, or a state of mind approaching an intent to do harm.

#### **Firm News.**

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

Buchhammer & Kehl, P.C. are members of:

- 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)
- Wyoming State Bar

- American Bar Association

Our firm website, [www.bklawfirm.com](http://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.