

WYOMING TORT AND INSURANCE DEFENSE NEWSLETTER

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Workers' Compensation and Co-Employee Liability. Under the Wyoming Workers' Compensation Act, if an employee is covered by worker's compensation, he may not sue either his employer or a co-employee and his sole remedy is workers' compensation benefits. However, if a co-employee engages in "willful and wanton misconduct" that results in the employee's injury, he may sue the co-employee. In *Formisano v. Gaston*, Wyo. Sup. Ct., Docket S-10-0138 (January 20, 2011), this issue was again presented to the Wyoming Supreme Court.

Formisano and Gaston were co-workers and there was some indication that Gaston was Formisano's supervisor. Gaston had worked several long days in a row. On the day of the accident Gaston and Formisano had worked numerous hours. While returning from a job site back to town, it was obvious that Gaston was tired and he was nodding off. Ultimately, Gaston fell asleep, the vehicle left the road and rolled, and Formisano sustained injuries. Formisano sued Gaston for his injuries alleging that Gaston's conduct in driving while excessively tired amounted to willful and wanton misconduct. Evidence was that if Gaston was too tired to drive, a replacement crew could have been called to the job site earlier, a driver would have been sent to drive Gaston and Formisano back to town, or they could have obtained permission to stay in a nearby hotel.

The Wyoming Supreme Court reiterated that in the workers' compensation arena, a co-employee is only liable if they engage in willful and wanton misconduct. The Court cited several cases where conduct amounted only to negligence, as opposed to willful and wanton misconduct, including (1) an employee's violation of company safety policies and OSHA regulations; and (2) a supervisor's knowledge of a hazardous condition coupled with a failure to correct a hazardous condition. The Court noted that "willful misconduct does not arise merely from 'a thoughtless, heedless, or inadvertent act, or an error in judgement' it is 'more than mere mistake resulting from inexperience, excitement, or confusion...or simple inattention' but is 'an extreme departure from ordinary care, in a situation where a high degree of danger is apparent.'"

Applying the law to Formisano's claim, a co-employee being tired but feeling okay and driving after a long day's work to a destination less than two hours away did not constitute willful and wanton misconduct. The Court also noted that even assuming that the very long hours worked by Gaston could have been avoided, that was not sufficient for co-employee liability under the Workers' Compensation Act. The evidence did not support that Gaston intentionally acted to cause harm to Formisano or that the circumstances were such that a reasonable person would know, or should know, that such conduct would, in a high degree of probability, result in harm to another.

Fireplace Hazards. In the February 2011 Edition of Best's Review, it was noted that wood burning fireplaces and wood stoves present some of the highest risks when it comes to winter house fires. According to the article, nearly 14,000 house fires start each year in fireplaces. In the 2008 and 2009 time period, 11% of Chub Insurance Company fire losses were related to fireplaces.

Motor Vehicle Insurance. In the 2010 Wyoming Legislative Session, the Legislature passed new insurance requirements for newly purchased vehicles. Under prior law, it was unclear whether mandatory insurance applied to vehicles that were newly purchased but were not yet registered. The new law resolves the ambiguity requiring liability insurance on every vehicle.

Texting While Driving. In the 2010 Wyoming Legislative Session, a new law was passed and signed by the Governor prohibiting texting or reading text-based communications while operating a motor vehicle on a public street or highway. Excepted are vehicles that are lawfully parked, contacting emergency response vehicles, and individuals operating emergency response vehicles in the performance of their official duties. However, it is not prohibited for a person to enter a number or word to make or receive a telephone call. Using hands free technology is not a violation of the law. Of note, many cities and municipalities in the state of Wyoming have now banned not only texting while driving, but using a cell phone while driving, although such laws typically exempt hands free communication.

Statute of Limitations. In *Adelizzi v. Stratton, et al.*, Wyo. Sup. Ct. Docket S-09-0257 (November 17, 2010), the Wyoming Supreme Court addressed the issue of statute of limitations in the context of a real estate broker which also applies to the statute of limitations to

all professional liability claims. Adelizzi purchased a home through the use of a real estate broker. The Adelizzis closed on June 1, 2006. Prior to the sale of the house, the house had suffered basement flooding for various reasons on several occasions. Shortly after the Adelizzis bought the home, water was coming into the basement from a floor drain and the Adelizzis contacted their real estate broker who instructed them to contact a plumber who repaired the problem. Thereafter, in April of 2007, and August of 2007, the Adelizzis basement again suffered water damage due to a flood and water seeping into the basement through the foundation.

On September 24, 2007, the Adelizzis filed a complaint against individuals other than the real estate broker and thereafter an amended complaint was filed on January 12, 2009, naming the buyers' real estate broker as a defendant.

The applicable statute of limitations in Wyoming is W.S. §1-3-107(a), which generally provides that a cause of action arising from an act, error, or omission in the rendering of licensed or certified professional services shall be brought within two years of the date of the alleged act, error, or omission if discoverable. The Wyoming Supreme Court held that the statute of limitations began to run on June 1, 2006, which was the last day that the broker performed services on behalf of the Adelizzis under the agreement. The Court then addressed the issue as to whether an exception to the statute of limitations should apply in that the Adelizzis did not discover the act, error, or omission until a later date, thus tolling the statute of limitations. The Court found that the Adelizzis closed on the home on June 1, 2006, and less than a month later the Adelizzis suffered the first of several flooding incidents that occurred during the statutory two year limitation. As such the statute of limitations had run against the broker in that the Adelizzis knew of the water problem within weeks of moving into the house. The suit was not filed against the

broker until two years after they knew or should have known of the problem, and therefore the statute of limitations ran on the claim against the broker.

Misrepresentation and Insurance Policies. In *Harper v. Fidelity Life Insurance Company*, Wyo. Sup. Ct., docket S-09-0119 (June 25, 2010), Harper procured a life insurance policy from Fidelity. At the time Harper acquired the policy, he made numerous representations regarding his health in a health history questionnaire. At the time the policy was issued, Fidelity was aware that he had applied for another type of insurance although it was unclear what that was. Fidelity was also made aware of certain discrepancies, none of which were deemed material. On March 1, 2006, Fidelity issued the life insurance policy, and on April 20, 2006, Harper died from a sudden cardiac arrest, and cardio-vascular disease.

Fidelity conducted an investigation within the policy's two year contestability period and reviewed medical records. Fidelity identified various medical conditions that had not been disclosed and which were felt to be material. Those included Harper's treatment for a probable transient ischemic attack in 2000, which Harper had specifically denied. There was also a history of alcohol abuse including recommendations from a doctor to quit drinking because of abnormal liver tests, again which Harper denied on his application. Harper was also hospitalized in 2000 for "heart fluttering and chest pains," which were not disclosed on the application. A weight discrepancy was also noted in the application Harper stated he weighed 275 pounds and his death certificate noted he was morbidly obese at 350 pounds. Based on these facts, Fidelity denied payment on the policy. Harper's survivors filed suit asserting numerous claims for relief.

In addressing the issue, the Wyoming Supreme Court began with a discussion on W.S. §26-15-

109, which sets forth when a misrepresentation, omission, or concealment of facts will prevent recovery under an insurance policy. This statute states in relevant part that misrepresentations, omissions, or concealment of facts do not prevent recovery under an insurance policy unless: (1) fraudulent; (2) material to either the acceptance or the risk or to the hazard the insurer assumes; or (3) the insurer, in good faith, if it knew the true state of facts would not have issued the policy or would not have issued it at the same premium rate. The Wyoming Supreme Court defined materiality in reference to insurance policies as being "determined by asking whether reasonably, careful, and intelligent persons would have regarded the omitted facts as substantially increasing the chances of the events insured against so as to cause a rejection of the application or different conditions, such as higher premiums...the materiality of a misrepresentation may be established by the underwriter's testimony or testimony of the insurer's employees... furthermore, a good faith mistake does not excuse a material misrepresentation...the fact that a potential insured does not die from the withheld ailment, does not affect the materiality of the misrepresentation..."

The Court went on to note that although normally the question of whether a misrepresentation is material is a question of fact for the jury, summary judgment can be appropriate where the misrepresentation "is of such a nature that there can be no dispute as to its materiality." Under the facts, the Court found that the misrepresentations were so material that Fidelity was entitled to summary judgment.

The Court also addressed whether Fidelity had a duty to investigate the representations in the insured's application. In addressing this issue, the Court held that "an insurer is under no duty to, investigate the truthfulness of an applicant's responses unless it has notice that those responses might not be truthful or accurate...a

majority of cases interpreting statutes similar to Wyoming's statute have held that an insurer does not have a duty to investigate, and is entitled to rely on the representations made by the applicant on his application."

The Court also addressed the claim that Fidelity violated the duty of good faith and fair dealing. The Wyoming Supreme Court held that in order to recover on a claim such as presented in this case, the plaintiff must show the absence of a reasonable basis for denying benefits under the policy and the insurer's knowledge or reckless disregard of a reasonable basis for denying the claim. In Wyoming an objective standard is used to determine whether an insurer has committed bad faith and the issue is whether the validity of the denied claim is fairly debatable. A claim is fairly debatable, if a reasonable insurer would have denied or delayed payment of benefits under the facts and circumstances. To establish a claim for first-party bad faith, a plaintiff must establish first, the absence of any reasonable basis for denying the claim and second, the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. The Court found that under the facts presented, there was a reasonable basis to deny the claim. Under Wyoming law, a breach of the implied covenant of good faith and fair dealing cannot exist where a party is simply exercising those rights that they are contractually entitled to exercise under the policy.

Finally, the Court addressed the argument made under the doctrine of "reasonable expectations." The Court wrote that in order to state a claim under the doctrine of reasonable expectations, it must be shown that the contract is ambiguous as to the provision in dispute. The doctrine will not be applied when the contract is clear and unambiguous. The Court noted that Harper was advised in the application that the information he supplied would be relied on in issuing the policy, the policy contained a contestability clause, and by his signature, Harper verified the answers

contained in the application were true and correct. The unambiguous language showed Fidelity was relying on Harper's answers.

MCS-90 Endorsements. Federal Motor Carrier Regulations require interstate trucking companies to maintain minimum levels of liability coverage in order to compensate those injured as a result of accidents due to the fault of the motor carrier or driver. The MCS-90 Endorsement was enacted to eliminate a denial of coverage for the accident, the vehicle involved in the accident was not listed in the underlying policy, or the policy or policies provide coverage below the mandated minimum standards.

The 10th Circuit Court of Appeals in *Carolina Casualty Insurance Company v. Yeates*, 584 F.3d 868 (10th Cir. 2009), addressed the MCS-90 Endorsement stating that it is "a safety net in the event other insurance is lacking." The MCS-90 Endorsement is triggered only when "(1) the underlying insurance policy to which the endorsement is attached does not otherwise provide coverage, and (2) either no other insurance is available to satisfy the judgment against the motor carrier, or the motor carrier's insurance coverage is insufficient to satisfy the federally-prescribed minimum levels of financial responsibility." Once the federally mandated minimums have been satisfied, the endorsement does not apply. The purpose behind the MCS-90 Endorsement is to make sure that those injured by the negligence of motor carriers and their drivers have access to minimum levels of insurance coverage where the level of coverage can vary depending on the type of cargo involved in the accident. The MCS-90 Endorsement was never intended to serve as an excess policy or a primary policy, but serves only as a surety policy in the event of no other collectible coverage or insufficient collectible insurance. As a surety, the endorsement does not extinguish the debt of the insured and the MCS-90 insurer can seek reimbursement from the motor carrier.

Firm News.

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- Association for Defense Trial Attorneys (ADTA)
- Association for Transportation Law, Logistics and Policy
- Transportation Lawyers Association (TLA)
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