STATE LAW SUMMARY
Overview of the State of Wyoming
Updated 2013

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Overview of the State of Wyoming Court System

A. Trial Courts

The Circuit Court is a limited jurisdiction court, which operates in all 23 counties. It hears all misdemeanor criminal cases and smaller civil cases.

The civil jurisdiction of the circuit courts covers cases in which the damages or recovery sought does not exceed $50,000. The criminal jurisdiction includes all misdemeanors. The circuit court may also have the jurisdiction of a municipal court over ordinance violations if a municipality requests and if the Supreme Court consents to such a consolidation of courts. Finally, the circuit court may set bail for a person accused of a crime, and it conducts preliminary hearings in felony cases.

The District Court is the trial court of general jurisdiction. A district court exists in all 23 counties organized into nine judicial districts. Felony criminal cases, large civil cases, and juvenile and probate matters are decided in the district court.

The district courts are the trial courts of general jurisdiction in the state. The district judges preside over felony and civil cases as well as the juvenile and probate matters. They also hear appeals from lower court decisions. The jurisdiction of the district courts is unlimited except for civil cases under $50,000, small claims cases and misdemeanors

Trial juries in circuit courts shall be composed of six (6) persons. Trial juries in civil cases and all other proceedings in the district courts except criminal cases shall be composed of six (6) jurors unless one (1) of the parties to the action files a written demand for twelve (12) jurors within the time a demand for jury may be filed, in which event the number of jurors shall be twelve(12). Jurors in all courts shall be allowed the same fees and mileage as jurors in district court. W.S. 1-11-119.

Wyoming does not currently mandate mediation, with the exception of domestic relations cases.

B. Appellate Courts

Wyoming's highest court is the Supreme Court of Wyoming, with five justices presiding over appeals from the state's lower courts. A justice must be a lawyer with at least nine years experience in the law, be at least 30 years old, and must also be a United States citizen who has resided in Wyoming for at least three years. Justices must retire when they reach 70 years of age. Wyoming is unusual in that it does not have an intermediate appellate court. This is largely attributable to the state's size.

Appeals from the state district courts go directly to the Wyoming Supreme Court. “A judgment rendered, or appealable order made, by a district court may be reversed, vacated, remanded, or modified by the supreme court for errors appearing on the record.” Wyoming Rules of Appellate Procedure 1:04.

Decisions of municipal and circuit courts may be appealed to the district courts and, if the Supreme Court grants a Writ of Certiorari to hear an appeal, thereafter to the Wyoming Supreme Court. W.S. §5-2-119.

In order to obtain a stay on appeal, the appellant must present to the trial court a supersedeas bond in an amount to be fixed by the trial court, with sureties approved by the court or the clerk, in an amount that will cover the judgment in full together with costs, interest and damages for delay. The trial court may, after notice, hearing and for good cause shown, fix a different amount, or order security other than the bond.

Procedural

A. Venue

Venue is controlled by statute. Statutory provisions of particular applicability to commercial transportation and its insurers, arranged in order of importance, are described below. Venue provisions concerning real estate actions, §§ 1-5-101-103, have been omitted.

§ 1-5-109. Actions for personal injuries or wrongful death

Actions for personal injuries or wrongful death may be brought in the county in which the cause of action arose or in the county in which the defendant resides or may be summoned.

§ 1-5-107. Actions against nonresidents and foreign corporations

An action…against a nonresident of this state or a foreign corporation, whether or not codefendants reside in Wyoming, may be brought in any county where the cause of action arose or where the plaintiff resides.

§1-5-105. Actions against domestic corporations

An action…against a corporation created under the laws of this state may be brought in the county in which the corporation is situate or has its principal office or place of business. If the corporation is an insurance company the action may be brought in the county wherein the cause of action or some part thereof arose.

§1-5-106. Actions against public carriers and railroad companies

An action for an injury to person or property upon a liability as a public carrier, or an action against a railroad company, may be brought in any county through or into which the carrier or railroad line passes.

§ 1-5-104. Actions to be brought where cause of action arose

Actions for the following causes shall be brought in the county where the cause or some part thereof arose:

For the recovery of a fine, forfeiture or penalty imposed by a statute. When it is imposed for an offense committed on a river or other water course or a road which is the boundary of the state or of two (2) or more counties, the action may be brought in any county bordering on the river, water course or road, and opposite to the place where the offense was committed.

§1-5-108. Actions not otherwise provided for; exception

Every action not otherwise provided for in this chapter shall be brought in the county in which a defendant resides or may be summoned, except actions against an executor, administrator, guardian or trustee, which may be brought in the county where he was appointed or resides. If the action involves two (2) or more defendants, the action may be brought against all defendants in any county in which one (1) of the defendants resides or may be summoned.

The statutes relating to small claims venue jurisdiction adopt the foregoing provisions by reference.

As is apparent, there is a substantial overlap in these venue provisions.

B. Statute of Limitations

Statutory limitation periods of particular applicability to commercial transportation and its insurers, arranged in order of importance, are described below. Limitation periods concerning real estate, trust actions, foreign claims, judgments or contracts contracted or incurred and accrued before the debtor became a resident of Wyoming, are not considered.

Civil actions must be commenced within the prescribed periods but where a different limitation is prescribed by a specific statute, that statute will govern.

W.S. 1-3-105(a) Civil actions can only be brought within the following periods after the cause of action accrues:

Within ten (10) years, an action:
- Upon…any contract, agreement or promise in writing

Within eight (8) years, an action
- Upon a contract not in writing, either express or implied
- Upon a liability created by statute other than a forfeiture or penalty

Within four (4) years, an action for:
- Trespass upon real property
- Recovery of personal property or for taking, detaining or injuring personal property (This is the provision covering property damage)
- An injury to the rights of the plaintiff (This is the provision covering personal injuries. For wrongful death, *see* this section, infra.)
- For relief on the ground of fraud

(Note: No statute of limitation makes direct reference to "bad faith," therefore, the four year fraud statute has been put forth as the applicable limitation period. Two Supreme Court decisions discuss this issue, and in both, the Court determined that the conduct of the agents were at most

negligent, not fraudulent, and therefore fell under the two year statute relating to the rendering of professional services, infra. Hulse v. BHJ, Inc., 71 P.3d 262, 2003 WY 75; Gookin v. State Farm and Cas. Ins. Co., 826 P.2d 229, (Wyo. 1992). *See* W.S. §1-3-107(a)(i), infra.

Within one (1) year, an action for:
Libel or slander
Assault or battery not including sexual assault
Upon a statute for a penalty or forfeiture.

§1-38-102(d) Every [wrongful death] action shall be commenced within two (2) years after the death of the deceased person.

§1-3-107(a)(i) "A cause of action arising from an act, error or omission in the rendering of licensed…professional…services shall be brought...within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was…[n]ot reasonably discoverable within a two (2) year period; or…[t]he claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence." (This provision covers acts, errors or omissions committed by insurance agents and adjusters.)

Ordinarily a limitations period begins to run when the injury, damage or death occurs. Wyoming is a discovery state in which the statute of limitations is triggered when the plaintiff knows or has reason to know of the existence of a cause of action. Mills v. Garlow, 768 P.2d 554, 557 (Wyo.1989). However, except in the case of the wrongful taking of personal property, it is not necessary for a claimant to know that a particular person or entity may be legally responsible for his injury or damage. Reed v. Cloninger, 131 P.3d 359, 366, 2006 WY 37. In the case of wrongful taking of personal property, the limitations period does not start to run "until the wrongdoer is discovered." W.S. §1-3-106.

Claims arising from injuries sustained by a minor (that is, a person under the age of 18) are as common in Wyoming as anywhere else. With certain exceptions, including medical malpractice and claims for wrongful death, under W.S. 1-3-114, minors, or other persons under a legal disability (such as incompetence), who are injured during the period of disability, may bring an action within three years after the disability is removed.

In the event that a claim filed within the limitations period, but is thereafter dismissed other than on the merits of the claim, the claimant has one year following the dismissal to file a new claim. §1-3-118.

C. Time for Filing An Answer

For service upon the defendant within the state – Answer due on or before 20 days after service of the summons and complaint. .

For service upon the defendant outside the state, or by publication – Answer due on or before 30 days after service or 30 days after the last day of publication.

Under Wyoming Rule of Civil Procedure 4(o), plaintiff can request that the defendant waive service of the summons. If the defendant waives service – Answer due on or before 60 days after the date upon which the request for waiver was sent, or within 90 days if the defendant was addressed outside the United States.

A party served with a pleading stating a cross-claim – Answer due on or before 20 days after service.

D. Dismissal Re-Filing of Suit

Generally, dismissal of a suit is controlled by Wyoming Rule of Civil Procedure 41. Any action may be dismissed by a plaintiff without an order of the court by filing a notice of dismissal at any time before an answer or motion for summary judgment is filed by an adverse party, whichever occurs first. W.R.C.P. 41(a)(1)(i). Afterwards, a suit may be dismissed by filing a stipulation for dismissal signed by all parties who have appeared in the action. W.R.C.P. 41(a)(1)(ii). Unless otherwise stated in the notice or stipulation of dismissal, the dismissal is without prejudice. Id. However, if a plaintiff has once dismissed in any court an action in which service was obtained based on or including the same claim, then a notice of dismissal operates as an adjudication upon the merits (dismissal with prejudice). Id.

In all other circumstances, dismissal may only be accomplished by order of the court and upon such terms and conditions as the court deems proper. W.R.C.P. 41(a)(2). If a counterclaim has been pleaded by a defendant prior to service of a motion to dismiss by the plaintiff, then it shall remain pending for an independent adjudication by the court. Id. Unless otherwise specified in the order, a dismissal under W.R.C.P. 41(a)(2) is without prejudice. Id.

These provisions generally apply to dismissals of counterclaims, cross-claims, or third party claims as well. W.R.C.P. 41(c). A counterclaimant, cross-claimant or third party claimant seeking dismissal must generally do so before a responsive pleading is served, or if there is none, before the introduction of evidence at the trial or hearing. Id.

The right of a plaintiff to take a "nonsuit" is essentially the right to dismiss it without prejudice. *See* Hursh v. Weliever, 72 Wyo. 379, 374, 265 P.2d 372, 386 (Wyo. 1954). The procedure for dismissing a suit without prejudice seems to be generally controlled by the provisions of Rule 41 discussed above.

Rule 41 also provides for involuntary dismissal for lack of prosecution. A defendant may move to dismiss an action for a plaintiff's failure to prosecute, to comply with the rules, or to comply with any order of the court. W.R.C.P. 41(b)(1). Unless otherwise stated by the court in its order, a dismissal made under this procedure acts as adjudication upon the merits (with prejudice). Id. However, dismissal for lack of jurisdiction, lack of venue, or failure to join a party may be without prejudice. Id.

Finally, the court may upon its own motion dismiss any action not prosecuted or brought to trial with due diligence. W.R.C.P. 41(b)(2). The dismissal is without prejudice. Id.; *see also* Uniform Rule for District Courts 203.

Liability

A. Negligence

Negligence, primary or contributory, is the failure to exercise ordinary care. Ordinary care is that degree of care which a reasonable person is expected to exercise under the same or similar circumstances. Cervelli v. Graves, 661 P.2d 1032, 1036, (Wyo. 1983); Vassos v. Roussalis, 625 P.2d 768 (Wyo.1981); Nehring v. Russell, Wyo., 582 P.2d 67 (1978); Fegler v. Brodie, 574 P.2d 751 (Wyo.1978).

B. Negligence Defenses

Wyoming has adopted modified comparative fault, W.S. §1-1-109, under which the "fault" of all actors, whether parties to the litigation or not, is compared. "Fault" includes acts or omissions, determined to be a proximate cause of death or injury to person or property, that are in any measure negligent, or that subject an actor to strict tort or strict products liability, and include breach of warranty, assumption of risk and misuse or alteration of a product. Thus, such defenses as last clear chance, the emergency doctrine and, as specifically provided in the statute, assumption of risk, are simply part of the equation in the determination of the relative percentages of fault of all actors. If the fault of the plaintiff exceeds 50% of the total fault, the plaintiff is not entitled to recover. A defendant is liable only for its or his percentage of fault as determined by the fact finder.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Conduct that the jury determines amounts to "gross" negligence or recklessness is simply part of the equation in the jury's determination of the percentages of fault. *See*, Buckley v. Bell, 703 P.2d 1089 (Wyo.,1985).

Willful and wanton conduct on the other hand, is conduct that goes to the question of whether the claimant is entitled to punitive damages. *See* "Damages," paragraph G, infra.

D. Negligent Hiring and Retention

The Wyoming Supreme Court has not yet directly addressed the issue of whether, when the defendant employer admits that it is vicariously liable for the negligence of an employee, a claim of, and evidence with respect to, alleged negligence in hiring and retention is duplicative of the vicarious claims against the employee. The United States District Court for Wyoming, however, has done so, forcefully and directly. In Cahalan v. May Trucking Co., et al., Case No. 11-CV-214F, the plaintiff asserted claims against the employer of insufficient training, failure to provide safe equipment, negligent entrustment, willful and wanton conduct in hiring, supervision, training, retaining the driver, providing incentives that promote unsafe driving and that its safety director was unqualified.

The Court (Nancy D. Freudenthal, Chief United States District Judge), held:

> Plaintiffs may not proceed against May on their independent negligence theories because May has already admitted liability under the doctrine of *respondeat superior.* Furthermore, the punitive damages exception to this general rule does not apply here since May's actions are far from willful and wanton. Looking at the evidence most favorable to Plaintiffs, no genuine issue of material fact exists to support the individual claims against May. Therefore, May is entitled to summary judgment.

The defense bar in Wyoming is hopeful that the Wyoming Supreme Court will take the same course of action as the United States District Court.

E. Negligent Entrustment

See topic D in this Liability section, supra.

F. Dram Shop

W.S. §12-8-301(a) provides that "No person who has legally provided alcoholic liquor or malt beverage to any other person is liable for damages caused by the intoxication of the other person." However, subsection (b) provides that the protection provided by (a) does not apply where alcohol was provided to a minor or "habitual drunkard." *See* W.S. §12-5-502.

G. Joint and Several Liability

With the adoption of Wyoming's Comparative Fault Act, W.S. §1-1-109, supra, statutory provisions concerning joint and several liability were repealed.

H. Wrongful Death and/or Survival Actions

Under Wyoming's wrongful death statute, W.S. §1-38-101, et seq., the qualified survivors of the deceased each have a separate claim, and it is up to each to prove his or her own damages.

The reach of the statute is very broad, and includes not only surviving spouses, but virtually every blood relative of the deceased, from children to parents and grandparents, to siblings, to aunts and uncles, nieces and nephews, to cousins.

Where a person in injured and later dies of other causes, the survivors are limited to a "survival action" under W.S. §1-4-101. Where a person is injured and then later dies of those injuries, there is a choice of remedies – wrongful death on the one hand, or a survivorship action on the other. The difference between the survival and wrongful death statutes is that the survival statute merely continues a cause of action in existence. The injured party's claim after death is an asset of the estate while the wrongful death statute creates a new cause of action for the benefit of designated persons who have suffered the loss of a loved one and provider. DeHerrera v. Herrera, 585 P.2d 479, 482 (Wyo. 1977). In a survivorship action, the damages are those that the injured person could have recovered - pain and suffering, loss of income, emotional distress, etc. - that he could have recovered had he lived. Where a person is injured and later dies of those injuries, in most cases, various factors in both law and fact lead to the decision to assert a wrongful death, and not a survivorship action.

I. Vicarious Liability

The Wyoming Supreme Court has not addressed vicarious liability arising from such theories as placard or "logo" liability, commercial trucks "under dispatch" or "presumption of agency" where ownership is not disputed. For rejection of vicarious liability in the context of negligent hiring and retention or negligent entrustment, *see* topics D and E in this section, supra.

The negligence of an employee whose negligence results in injury to another is attributable to the employer, that is, the employer is vicariously liable to the injured party. However, whether the person who caused the injury was an employee in the master-servant sense, or an independent contractor for whose negligence the employer is not liable, is a question that often arises.

In Singer v. New Tech Engineering L.P., 227 P.3d 305, 309, 2010 WY 31, the Wyoming Supreme Court succinctly summarized the independent contractor rule:

> The overriding consideration in distinguishing between master-servant relationships and employer-independent contractor relationships is the employer's right to control the means and manner of the work. *See*, e.g. Stratman v. Admiral Beverage Corp., 760 P.2d 974, 980 (Wyo. 1988); Cline v. State Dep't of Family Services, 927 P.2d 261, 263 (Wyo. 1996); Noonan v. Texaco, Inc., 713 P.2d 160, 164 (Wyo.1986).

Where the employer does control the means and manner of the work, the employer is vicariously liable for the acts or omissions of its employee. But where the relationship is employer-independent contractor, absent statutory or regulatory provisions to the contrary, the employer of the independent contractor is not liable for the acts of the independent contractor or its employees.

J. Exclusivity of Workers' Compensation

The Wyoming Workers Compensation Act provides that the right to workers' compensation benefits is the exclusive remedy for an employee and his dependents for injuries incurred and is in lieu of all other rights and remedies against any employer or its employees, except:

- where the employer at the time of the injury has not qualified under the act, and
- where the injury was caused by an employee with intention to cause injury or harm.

In Formisano v. Gaston, 246 P.3d 286, 2011 WY 8, the Wyoming Supreme Court suggested the following instruction to define the degree of culpable conduct that would qualify as "intentional":

> 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 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; and 3) willful disregard of the need to act despite the awareness of the high probability that serious injury or death may result.

Whether conduct of an employee that meets the willful and wanton misconduct standard would be covered under the employer's commercial auto policy would depend on the language of the policy.

Damages

A. Statutory Caps on Damages

The Wyoming Constitution provides that "[n]o law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person." Wyo. Const. art. 10, § 4.

B. Compensatory Damages for Bodily Injury

Wyoming Civil Pattern Jury Instructions 4.01—Measure of Damages—Personal Injury provides:

> If you find that the Plaintiff is 50% or less at fault, you must fix the amount of money that will reasonably and fairly compensate the plaintiff for those elements of damage proved by the evidence, taking into consideration the nature, extent, and duration of the injury
>
> The claimed elements of damage include:
>
> 1. The pain, suffering, and emotional distress experienced as a result of the injuries and those reasonably probable to be experienced in the future;
>
> 2. Disability and/or disfigurement;
>
> 3. Loss of enjoyment of life and any loss of enjoyment of life reasonably probable to be experienced in the future. The award for this specific element should not duplicate the awarded given or any other element of damage;
>
> 4. Loss of Earnings and Earning Capacity. The value of time, earnings, profits, salaries lost to this date, and the present cash value of any earnings reasonably probable to be lost in the future, taking into consideration any lost earning capacity of the Plaintiff;
>
> 5. Medical Expenses. The reasonable expense of necessary medical care, treatment, and services received to date and any medical expense reasonably probable to be incurred in the future;
>
> 6. Caretaking. The reasonable expense of necessary help in the home that has been required as a result of the injury and any such help that is reasonably probable to be required in the future.
>
> Whether any of those elements have been proved is for the jury to determine.

C. Collateral Source

The collateral source rule applies in Wyoming. A claimant's receipt of collateral benefits does not serve to reduce his recovery. *See* Haderlie v. Sondgeroth, 866 P.2d 703 (Wyo. 1993).

Under this rule, if an injured person receives compensation for his injuries from a source wholly independent of the tortfeasor, the payment should not be deducted from the damages which he would otherwise collect from the tortfeasor. In other words, a

defendant tortfeasor may not benefit from the fact that the plaintiff has received money from other sources as a result of the defendant's tort, *e.g.* sickness and health insurance. Miller v. Campbell County, 901 P.2d 1107, 1112 (Wyo. 1995).

D. Pre-Judgment/Post judgment Interest

Wyoming statutes provide for interest on judgments but do not specifically address an award for prejudgment interest. Wyo. Stat. Ann. § 1–16–102. However, an award of prejudgment interest is permitted on liquidated sums in breach of contract actions when the amount due is readily computable by simple mathematical calculation. Stewart Title Guar. Co. v. Tilden, 2008 WY 46, ¶ 21, 181 P.3d 94, 101–102 (Wyo. 2008); Horseshoe Estates v. 2M Company, Inc., 713 P.2d 776, 781–82 (Wyo. 1986); Laramie Rivers Company v. Pioneer Canal Company, 565 P.2d 1241, 1245 (Wyo. 1977). Interest generally is computed from the time notice is given of the claim. Rissler & McMurry Company v. Atlantic Richfield Company, 559 P.2d 25, 34 (Wyo. 1977). A claim for unliquidated damages, however, draws interest only from the date of judgment.

The current statutory rate of interest on judgments is ten percent. Wyo. Stat. Ann. § 1-16-102(a) (Michie 1997); *Belle Fourche Pipeline Co. v. Elmore Livestock Co.*, 669 P.2d 505 (Wyo. 1983). However, If the decree or judgment is founded on a contract and all parties to the contract agreed to interest at a certain rate, the rate of interest on the decree or judgment shall correspond to the terms of the contract. W.S. §1-16-102(b).

E. Damages for Emotional Distress

Wyoming has modified the traditional rule and will allow recovery for purely emotional injury. However, like most states, Wyoming has clearly restricted the circumstances in which recovery for emotional injury without accompanying physical injury will be allowed. Blagrove v. JB Mechanical, Inc., 934 P.2d 1273, 1275 (Wyo. 1997).

Recovery for purely emotional distress has been permitted in Wyoming in certain actions. These actions are: 1) some intentional torts, Waters v. Brand, 497 P.2d 875, 877-878 (Wyo. 1972) (false imprisonment); Cates v. Eddy, 669 P.2d 912, 921 (Wyo. 1983) (malicious prosecution); 2) violation of certain constitutional rights, Town of Upton v. Whisler, 824 P.2d 545, 549 (Wyo. 1992); and 3) breach of the covenant of good faith and fair dealing, State Farm Mutual Auto. Ins. Co. v. Shrader, 882 P.2d 813, 833 (Wyo. 1994). Blagrove v. JB Mechanical, Inc., 934 P.2d at 1275-76. Wyoming has also recognized the torts of intentional and negligent infliction of emotional distress, but has done so only under limited circumstances, Id at 1275; Gates v. Richardson, 719 P.2d 193, 195, (negligent infliction of emotional distress limited by the requirements of a family relationship and observation of serious bodily harm); Leithead v. American Colloid Co., 721 P.2d 1059, 1066 (Wyo. 1986) (intentional infliction of emotional distress

limited by the requirements of extreme or outrageous conduct and severe emotional distress).

The Supreme Court has also considered the issue of purely emotional damages in a negligence action involving a car collision. In Daily v. Bone, 906 P.2d 1039 (Wyo. 1995), Bone failed to stop the snowmobile he was driving at a stop sign. Bone's failure to stop caused a collision with Daily's vehicle. Daily was not physically injured in the collision; Bone, however, was killed as a result of the impact. Witnessing Bone's impact and death caused Daily posttraumatic stress disorder, depression, and agoraphobia. The court held that recovery in tort for injuries arising out of an automobile accident should not be denied simply because the plaintiff's injuries were mental rather than physical, as long as the plaintiff could prove negligence, impact, and damages proximately flowing therefrom. Id., at 1044.

F. Wrongful Death and/or Survival Action Damages

There are no caps on wrongful death claims in Wyoming.

Wyoming's wrongful death statute, W.S. §1-38-102, as construed by the Court, provides three areas of recovery.

1. The monetary cost of funeral and related expenses, including ambulance, medical and similar costs. Usually this is a minor amount of only a few thousand dollars.

2. The amount that a survivor would reasonably be expected to have received out of the decedent's earnings during the lifetime of the decedent is recoverable. This recovery is not the amount that a decedent would have earned over his lifetime, but is, instead, limited to what a particular survivor-claimant would have received from such earnings.

3. The loss to each survivor of probable future companionship, society and comfort. From a practical standpoint, recovery for this element of damage turns on such questions as how the survivor was related to the deceased (child, parent, etc.); how intimate, close, loving, loyal, etc. the relationship was; the closeness or disparity in age; the reliance of the survivor on the deceased for such things as advice or guidance; how often the deceased and the survivor got together or talked on the phone, or in this day and age exchanged e-mail, text message or had "face-time" communications; and all other aspects of the bond between the survivor and the deceased. It is possible for a cousin or a grandparent to prove a far greater loss of companionship, society and comfort than for a more closely related relative, depending upon their personal (as contrasted to blood) relationship.

Regarding damages for loss of "probable future companionship, society and comfort," Wyoming Civil Pattern Jury Instruction 6.02 provides that the jury may be instructed as follows:

> There is no formula that the court can give you for the determination of damages for loss of probable future companionship, society, and comfort. However, this amount may not include damages for mental anguish and/or suffering. It is not necessary that any witness shall have expressed any opinion as to the dollar amount of damages. Your award, if any, should be such sum as will fairly and adequately compensate the claimants, the amount awarded, if any, resets within your sound discretion, and it is up to you to determine taking into consideration all the evidence in this case and from your knowledge, observation, and experience in life. Your award, if any, should be for what damages are reasonable and just.

There are two areas of damages not available under Wyoming's wrongful death statute that are sometimes available in other jurisdictions. In a wrongful death case in Wyoming, there is no claim for the deceased's own pain and suffering. Bush v. State, 79 P.3d 1178, 1181, (Wyo. 2003). Nor is a claim for mental anguish or emotional distress available to the survivors, Knowles v. Corkill, 51 P.3d 859, 863-864, (Wyo. 2003), although it is difficult for a jury to differentiate emotional distress from the loss of companionship.

G. Punitive Damages

Wyoming law permits an award of punitive damages, in a proper case, to punish the defendant and to deter the defendant and others similarly situated from engaging in similar conduct.

Consideration of punitive damages is a two stage process. In order to find that a defendant is liable for punitive damages, the jury must first determine that the defendant was guilty of willful and wanton misconduct.

The Wyoming Supreme Court recently opined:

> We have explained that punitive damages are to be awarded only for conduct involving some element of outrage, similar to that usually found in crime. …We have approved punitive damages in circumstances involving outrageous conduct, such as intentional torts, torts involving malice and torts involving willful and wanton misconduct. Willful and wanton misconduct is the intentional doing, or failing to do, an act in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know that such conduct would, in a high degree of probability, result in harm to another. The aggravating factor which distinguishes willful misconduct from ordinary negligence is the actor's state of mind. In order to prove that an actor has engaged in willful misconduct, one must demonstrate that he acted with a state of mind

that approaches intent to do harm. Cramer v. Powder River Coal, LLC,, 204 P.3d 974, 2009 WY 45.

Once having determined that a defendant's conduct was willful and wanton as described, the jury is then permitted to consider what damages would be appropriate to accomplish the goals of punishment and deterrence.

Wyoming Civil Pattern Jury Instruction 4.06A provides:

Having determined punitive damages should be imposed for the purposes of punishment and deterrence; you must now determine the amount of the punitive damages award. The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to your sound discretion to be exercised without passion or prejudice. In determining the punitive damage award, you should consider the following factors:

1. Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater;

2. The degree of reprehensibility of a Defendant's conduct should be considered. The duration of this conduct, the degree of the Defendant's awareness of any hazard that he has caused or is likely to cause, and any concealment or "cover up" of that hazard, and the existence and frequency of similar past conduct are all relevant in determining this degree of reprehensibility;

3. If wrongful conduct was profitable to the Defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the Defendant recognizes a loss;

4. The financial position of the Defendant;

5. All of the costs of litigation should be included, so as to encourage Plaintiffs to bring wrongdoers to trial;

6. If criminal sanctions have been imposed on the Defendant for its conduct, this should be taken into account in mitigation of the punitive damages award;

7. If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive award.

An employer can be found liable for punitive damages for the conduct of an employee, but only where at least one of the following elements has been proven:

1. The Defendant-employer authorized the doing and the manner of the act of the employee, or

2. The employee was unfit and the Defendant-employer was reckless in employing or retaining the employee, or

3. The employee was employed in a managerial capacity and was acting in the scope of employment, or

4. The Defendant-employer ratified or approved the act(s) of the employee.

Wyoming Civil Pattern Jury Instruction 4.06B

With regard to the question of whether punitive damages are covered by insurance, the Wyoming Supreme Court stated:

> We hold that it is not against the public policy of the State of Wyoming to insure against either liability for punitive damages imposed vicariously based on willful and wanton misconduct or personal liability for punitive damages imposed on the basis of willful and wanton misconduct. Sinclair Oil Corp. v. Columbia Cas. Co., 682 P.2d 975, 981 (Wyo. 1984).

In other words, the terms of the insurance policy will control.

H. Diminution in Value of Damaged Vehicle

Reported law on the subject is scarce in Wyoming. Generally, the ordinary measure of damages for destruction or loss of personal property is the recognized market value of the property. Reposa v. Buhler, 770 P.2d 235, 238 (Wyo. 1989). Damages must be proven with a reasonable degree of certainty. Id. While exact certainty is not required, remote, conjectural or speculative damages will generally be insufficient. Id.

In Meredith GMC, Inc. v. Garner, 78 Wyo. 396, 328 P.2d 371 (Wyo. 1958) the Wyoming Supreme Court cited with approval Restatement of Torts § 928 (1939). It provides:

> Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for
>
> (a) the difference between the value of the chattel before the harm and the value after the harm or, at the plaintiff's election, the reasonable cost of repair or restoration where feasible, with due allowance for any

difference between the original value and the value after repairs, and

(b) the loss of use.

The Wyoming Supreme Court has explained that there are essentially two options for calculating damages, either the "cost-of-repairs method" or the "decrease-market value method." Aetna Casualty & Sur. Co. v. Langdon, 624 P.2d 240, 242 (Wyo. 1981). The appropriate method varies depending on the circumstances, and there is no absolute rule defining when each method should be applied. Bush v. State, 2003 WY 155, ¶ 25, 79 P.3d 1178, 1187 (Wyo. 2003) (Lehman J. dissenting). As the language of § 928(a) suggests, a plaintiff in Wyoming might be able to seek from a tortfeasor the reasonable costs of repairing a damaged vehicle plus the difference between the original value and the value after repairs.

I. Loss of Use of Motor Vehicle

The Wyoming Supreme Court has suggested that "loss of use" or "down time" may be an appropriate element of damages. *See* Colorado Kenworth, Inc. v. Archie Meek Transp. Co., 495 P.2d 1183 (Wyo. 1972); *see also* Wheatland Irrigation Dist. v. McGuire, 562 P.2d 287, 299 (Wyo. 1977). The usual method for proving the amount of damages for loss of use is the cost of hiring or renting another vehicle. Colorado Kenworth Inc., 495 P.2d at 1186. Another method may be proof of the rental or useable value of the vehicle lost. Id. As with all matters of damages, the fact finder must have sufficient evidence in which it can reasonable determine the amount of the loss with some degree of certainty. Id.

Evidentiary Issues

A. Preventability Determination

There are no reported cases in Wyoming which address whether a company's internal investigation whether an accident was preventable is either discoverable or admissible. However, it is likely that Wyoming courts will follow the decisions of federal district courts in the10th Circuit, which have found such investigations to both be discoverable and admissible.

In the case of Smith v. Marten Transp., Ltd., 2010 WL 5313537 (D.Colo.), the Federal District Magistrate found that "[i]f the investigation of the accident would normally be undertaken, an investigative report developed in the ordinary course of business will not be protected as work product" and thus discoverable. Only if the accident report was specifically prepared in anticipation litigation, would a work product prevent disclosure.

In the case of Ferguson v. Martin Brower, L.L.C., 2006 WL 964796 (N.D.Okla.), the Federal District Court found the Defendants admitted it investigates all of its

accidents involving its vehicles to determine if they were preventable. “Such information is clearly relevant to the claims at issue here. To the extent that these investigations are conducted and recorded as part of Martin Brower's regular business practice, information contained therein is also admissible.”

B. Traffic Citation from Accident

The Wyoming State Legislature made evidence of traffic citations inadmissible in any civil action. The Legislature enacted Wyo. Stat. § 31-5-1208, which states that “no evidence of the conviction of any person for any violation of this act is admissible in any court in any civil action.”

However, the Wyoming Supreme Court has made a specific exception to this statute, and will allow such evidence if the party to whom the citation is issued pleads guilty. Specifically, in the case of Haley v. Dreesen, 532 P.2d 399 (Wyo. 1975), the Court found that the driver's plea of guilty to the charge of driving too fast for conditions was admissible as an admission against interest in the passenger's action for personal injuries. If a defendant in civil case wishes to avoid both the effect of an admission against interest and the burden of defending a traffic violation, a plea of nolo contendere should be entered. Id.

C. Failure to Wear a Seat Belt

The Wyoming State Legislature made evidence of seat belt use inadmissible in any civil action. The Legislature enacted Wyo. Stat. § 31-5-1402(f), which states that “Evidence of a person’s failure to wear a safety belt as required by this act shall not be admissible in any civil action.”

Noncompliance with seat belt statute cannot be used to establish comparative fault. Huff v. Shumate, 360 F.Supp.2d 1197 (D. Wyo. 2004). Prior to the enactment of this statute, evidence of seatbelt use was admissible in Wyoming. Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992) (even though there was no statute in place at time of accident to require seat belt use, mother had a duty based on common-law standard of ordinary care to use available seat belts for minor passengers, independent of any statutory mandate.) Since the enactment of the Statute, the Wyoming Supreme Court has not issued any rulings interpreting the statute. However, the Federal District Court of Wyoming has had the opportunity to hear a broad-based constitutional challenge to the law, and upheld the statute. Specifically, the Wyoming Federal District Court found that the authority to enact the statute was inherently within power delegated to state legislature by state constitution, the statute did not violate state separation of powers doctrine, equal protection doctrine, nor violate substantive due process requirements of the United States and Wyoming Constitutions. Huff v. Shumate, 360 F.Supp.2d 1197 (D. Wyo. 2004).

D. Failure of Motorcyclist to Wear a Helmet

Wyoming has no statute or case law which would exclude evidence of a motorcyclist's failure to wear a helmet, on either issue of comparative fault or damages. Wyoming's does not have a mandatory helmet law for operators of motorcycles, other than for minors. Specifically, Wyo. Stat. § 31-5-115(o) provides "No minor shall operate or ride nor shall the operator permit a minor to ride upon a motorcycle unless he is wearing protective headgear securely fastened on his head."

While there is no reported case directly on point, the case of Hermreck v. State, 956 P.2d 335 (1998) strongly suggests that if a party wishes to introduce evidence of failure to use a helmet, that it must be supported by competent expert testimony. Specifically, in Hermreck, a defendant attempted to defend charges of aggravated assault and battery, when she hit a child riding a bike without a helmet, with an automobile. Hermreck argued that a lesser charge should have been included, because the victim's injuries would have been less serious had he been wearing a helmet. Hermreck's counsel offered to call a professional engineer to provide evidence concerning the helmet. The court excluded the evidence, because the defendant did not have an expert medical doctor to testify whether or not a helmet would have made a difference in the injuries the victim suffered. Absent such testimony, it would have improperly invited the jury to speculate about the effect of the victim's failure to wear a helmet.

E. Evidence of Alcohol or Drug Intoxication

The admissibility of evidence of intoxication is controlled by the Wyoming Rules of Evidence, Rules 401, 402, and 403. Rule 401 establishes that relevant evidence is any evidence having a tendency to make the existence of a fact that is being determined more or less probable. Rule 402 allows the admission of all relevant evidence, and excludes irrelevant evidence. Rule 403 allows for the exclusion of relevant evidence when its probative value is substantially outweighed by its prejudicial effect, would confuse the jury, cause needless delay or amount in the presentation of cumulative evidence. Therefore, assuming the evidence of alcohol or drug intoxication is foundationally supported and relevant to the issue, it is admissible.

Where evidence of intoxication is not relevant, it is inadmissible, even if the intoxication may have contributed to cause the incident and liability. In Parker v. Artery, 889 P.2d 520, 523-24 (Wyo. 1985), the defendant in a personal injury action (estate of the defendant) admitted liability for the plaintiff's damages resulting from a motor vehicle accident. The now deceased defendant was intoxicated and driving his car under the influence of alcohol, when he failed to yield to the plaintiff, causing the accident. The decedent's estate admitted liability and the trial progressed on the issue of damages. The District court excluded evidence of the deceased defendant's intoxication at the time of the accident, ruling it was not relevant to the issues of damages. The court's exclusion of this evidence was affirmed by the Wyoming Supreme Court on appeal. The Court found that admission of intoxication is appropriate where the jury is determining compensatory damages only, and not liability, even if relevant because if was more prejudicial than probative, and therefore inadmissible. By contrast,

admissibility of a defendant's drug use prior to an accident was allowed when the issue of liability was being tried. Furman v. Rural Elec. Co., 869 P.2d 136, 140 (Wyo.1994).

Also by contrast, in Worker's Compensation claims, evidence of intoxication is a statutorily prescribed affirmative defense to claims. Evidence of intoxication as the cause of the claim acts to bar any recovery of benefits. It is the burden of the State (or employer when objecting to claims) to prove that the employee's injury was caused by intoxication. Once this burden is met, producing evidence to the contrary becomes the burden of the injured employee. Johnson v. State ex rel. Wyoming Workers' Compensation Div., 911 P.2d 1054 (Wyo. 1996).

F. Testimony of Investigating Police Officer

There appears to be no on-point case law that discusses the issue of qualifying a law enforcement officer as an expert in a civil trial, or a discussion of the admissibility of that testimony. In criminal cases, officers have been able to provide expert opinions about the issues within the case, assuming the foundational hurdles of qualifying an officer as an expert witness can be met. There is heightened constitutional scrutiny in criminal cases. Assuming a law enforcement officer can be qualified under W.R.E. 702, it is likely they would be able to provide expert testimony with respect to issues outside their personal knowledge.

G. Expert Testimony

Expert testimony is generally admissible if it meets the requirements of W.R.E. 702, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

Rule 702 serves a "gatekeeping" function in which trial courts test the reliability of preferred expert testimony. Reichert v. Phipps, 2004 WY 7, ¶ 7 , 84 P.3d 353, 356 (Wyo. 2005)(citing Kumho Tire Co. Ltd. V. Carmichael, 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-93, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). The primary goal is to "ensure the reliability and relevancy of expert testimony," and that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Id. (*quoting* Bunting v. Jamieson, 984 P.2d 467, 471 (Wyo. 1999)). As with all evidentiary rulings, a trial court has discretion in ruling on the admissibility of expert testimony. Id. at ¶ 5, 355-56.

Wyoming Courts follow a two-part test adopted by the U.S. Supreme Court in Daubert, supra. Id. at ¶ 8 (citing Bunting, 984 P.2d at 471). First, the trial court must

determine whether the methodology or technique used by the expert is reliable, and second, whether the testimony "fits" the particular case. Id. Seven non-exclusive factors have been identified that may aid in making the first determination of reliability.

> 1) whether the theory or technique in question can be and has been tested; 2) whether it has been subjected to peer review and publication; 3) its known or potential rate of error along with the existence and maintenance of standards controlling the technique's operation; ... 4) the degree of acceptance within the relevant scientific community[;] ... [5)] the extensive experience and specialized expertise of the expert[;] ... [6)] whether the expert is proposing to testify about matters growing naturally and directly out of research [he has] conducted independent of the litigation; and [7)] the non-judicial uses to which the method has been put[.]

Id. Importantly, while the trial court may utilize these factors, they may not always be helpful in every case. Id. at ¶ 9. As a result, the test is flexible and gives trial courts' "broad latitude in determining reliability." Id.

The second determination of whether the testimony "fits" the particular case is a question of relevance and incorporates the concept of "helpfulness" found in W.R.E. 702. It requires that expert opinions relate to an issue that is actually in dispute, and that they provide "a valid scientific connection to the pertinent inquiry." Id.

Finally, the distinction between the opinion and the methodology used to reach that opinion is vital. A trial judge should not consider the scientific validity of a conclusion reached by an expert witness, but rather must consider "the soundness of the general scientific principles or reasoning on which the expert relies and the propriety of the methodology applying those principles to the specific facts of the case." Hoy v. DRM, Inc., 2005 WY 76, ¶ 18, 114 P.3d 1268, 1278 (Wyo. 2005)(*quoting* Bunting, 984 P.2d at 472-73; Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6233 (1997)). Expert testimony must be based upon a reliable methodology, although it need not meet the proponent's burden of proof, and "shaky" evidence may be attacked through other traditional means such as cross-examination. Riechert, 2004 WY 7 at ¶ 9, 84 P.3d at 356-57. Consideration of only the soundness of the scientific principles and the propriety of the methodology underlying an expert's testimony avoids usurping the jury's role in evaluating witness credibility and assigning evidentiary weight. Id.

An expert witness is required to explain the foundation of his opinion, and how that opinion is reliably derived when the opinion is being offered based on the proposed expert's experience, and application of that experience to the facts. Hoy, supra at 1283. The reliability of an expert's opinion based on experience can be established based on the expert's experience in similar situations. To be properly admissible, and expert must explain how their knowledge and experience support the opinion, and

thereby, what the nature and extent of that experience was. "An expert cannot rely just upon their status as an expert to bootstrap the admission of their opinion testimony. There must be some indicia of reliability." Id.

It is also well established an expert exposes himself to a vast and wide form of cross examination. Chrysler Corp. v. Todorovich, 580 P. 2d 1123 (Wyo. 1978). This allows a party to test the qualifications, knowledge and experience of the proffered expert to determine the relevance and admissibility of his testimony. Examination of an expert's opinion and foundation of experience is therefore proper, and necessary to determine the reliability of the opinion.

H. Collateral Source

Wyoming generally recognizes the Collateral Source Rule. In tort cases, this rule prevents the admission of evidence of payments made to or on behalf of and injured party stemming from the incident. It also precludes this evidence in the instance of benefits being received by the injured party. This is true even if the medical services are rendered gratuitously.

Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable. Restatement (Second), Torts 2d, § 920(A)(2) (1982). This is true even where the injured party is allowed to recover the benefits or payments made on their behalf. Banks v. Crowner, 694 P.2d 101 (Wyo. 1985). However, in cases not involving tortious conduct, the rule is inapplicable, at least with regard to inverse condemnation actions. Miller v. Campbell County, 901 P.2d 1107 (Wyo. 1995).

I. Recorded Statements

There appears to be no decisions from the Wyoming Supreme Court analyzing this issue in civil cases. Assuming foundational requirements can be met, or for other purposes such as refreshing recollection or impeachment, they may be admissible. Likewise, the person who took the recorded statement could testify to admissions of the opposing party.

J. Prior Convictions

There appears to be no decision from the Wyoming Supreme Court analyzing this issue in civil cases. Admission of prior convictions would be governed under WRE Rules 401, 402, and 403. It is likely that they would be inadmissible in almost all cases because of their prejudicial effect.

However, in cases involving claims of "vicarious liability" of an employer, such as negligent hiring, retention, supervision, it is likely that prior convictions would be admissible if they go to an issue in the case. For example, a prior conviction of driving

while intoxicated, either known or should have been known to an employer, prior to the incident, would likely be admissible to demonstrate an element of a claim of negligent hiring/retention if the claim dealt with an accident caused by the intoxicated employee.

K. Driving History

As a general rule, evidence of a driver's prior driving history, including prior accidents, is irrelevant and therefore inadmissible to determine whether she was negligent in causing an accident in dispute. *See* Banks v. Crowner, 694 P.2d 101, 103 (Wyo. 1985)(finding that a driver's alleged history of alcoholism was not relevant as it would not help the trier of fact determine the [defendant's] negligence at the time of the accident); *see also,* Werner v. Enterprises, Inc. v. Brophy, 2009 WY 132, ¶¶ 50-53, 218 P.3d 948, 932 (Wyo. 2009)(finding that an improper question regarding driving history was harmless error). However, driving history may be admissible for other purposes. For instance, Wyoming recognizes a cause of action for negligent hiring and/or supervision, and a driver's past history may be relevant to prove that he was an improper person to employ in work involving the risk of harm to others. Similar evidence may be admissible to prove wanton or reckless actions necessary to recover punitive damages under a negligent hiring or supervision cause of action as well. Finally, evidence that a plaintiff was involved in a prior accident(s) may be relevant to determine whether she had preexisting injuries not proximately caused by a subsequent accident. *See, e.g.,* Shaub v. Wilson, 969 P.2d 552 (Wyo. 1998).

L. Fatigue

There are no reported cases in Wyoming in which the Court has considered the admissibility of Hours of Service (HOS) violations. However, it is common for plaintiffs to rely on alleged violations of the Federal Motor Carrier Safety Administration Regulations to attempt to show negligence. It is unlikely that the Wyoming Supreme Court would allow adoption of such regulations as the standard of care. *See* Cervelli v. Graves, 661 P.2d 1032, 1038-39 (Wyo. 1983) and State Dept. of Transp. v. Robbins, 2011 WY 23, ¶ 17, 246 P.3d 864, 867 (Wyo. 2011)(both holding that professional drivers are not held to a higher standard of care under Wyoming tort law). However, the Court may allow evidence of a regulatory violation as proof of a breach of duty (i.e. evidence of negligence).

The Wyoming Supreme Court has held that an employer must be the proximate cause of its employee's fatigue in order to be held liable for injuries caused by that fatigue. Black v. William Insulation Co., Inc., 2006 WY 106, 141 P.3d 123 (Wyo. 2006). The ultimate test of proximate causation is foreseeability of the injury, and the conduct must be a substantial factor in bringing about the plaintiff's injuries. Id. at ¶ 11, 128. "This means that for an "employer to be liable for the actions of a fatigued employee on a theory of negligence, the fatigue must arise out of and in the course of employment…[because]…[t]o hold otherwise would charge an employer with knowledge of circumstances beyond his control." Id. at ¶ 12, 129. In Black, the Court

held that an employer was not liable where its employee fell asleep and caused a motor vehicle accident while commuting to work.

Finally, there is no rule that requires expert testimony to establish that a driver was fatigued or that the fatigue proximately caused an accident. However, in many cases practical considerations may require retaining an expert witness.

M. Spoliation

The Wyoming Supreme Court has not addressed whether spoliation should be adopted as a separate tortuous cause of action, and it is unknown whether it would if confronted with the issue. *See* Coletti v. Cudd Pressure Control, 165 F.3d 767, 775 (10th Cir. 1999)(the 10th Circuit Court of Appeals noting that Wyoming does not recognize spoliation of evidence as an independent tort claim). For the time being, the issue is primarily evidentiary.

If a party withholds, destroys, or alters evidence in bad faith that is relevant to proof of an issue at trial, then a presumption or inference that the evidence would have been unfavorable to the party responsible for its nonproduction, destruction or alteration arises. Abraham v. Great Western Energy, LLC, 2004 WY 145, ¶ 20, 101 P.3d 446, 455 (Wyo. 2004). "In essence, the inference is akin to an admission by conduct of the weakness of one's own case." Id. If the loss or destruction of evidence was not intentional or reckless, then the trial court has discretion to admit or exclude testimony relating to the missing evidence, and to give an appropriate jury instruction. Id.

In considering spoliation, courts will consider: (1) whether the innocent party was prejudiced by loss of the evidence; (2) whether this prejudice can be cured; (3) the practical importance of the lost evidence; (4) the fault of the spoliator; and (5) what is the least onerous sanction that will effectively deter the offending conduct. Id. at ¶ 21, 456. In cases where a sanction is warranted, the court may instruct the jury on the spoliation inference, i.e. that the lost evidence is presumed to be unfavorable to the spoliating party. Id. In addition, the Court may choose to preclude the spoliating party from introducing expert testimony concerning the evidence, dismiss the plaintiff's claim or the defendant's defense, or grant summary judgment to the innocent party. Id.

Settlement

A. Offer of Judgment

Offers of "Judgment" in Wyoming are permitted under Rule 68 of the Wyoming Rules of Civil Procedure, and are entitled "Offers of 'Settlement'". The Rule provides that "any party" may serve upon an adverse party an offer "to settle a claim for the money or property or to the effect specified in the offer." An offer not accepted within 10 days is deemed withdrawn. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The term "costs" does not include attorney's fees.

The making of an offer that is not accepted does not preclude a subsequent offer.

When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of that liability remains to be determined by further proceedings, the party found to be liable may make an offer of settlement under this rule if it is served not less than 10 days prior to the commencement of proceeding to determine the amount or extent of that liability.

B. Liens

The most common liens that arise in the course of personal injury or wrongful death litigation in Wyoming are workers' compensation liens, Medicaid liens, and Medicare liens.

1. Workers' Compensation

When a claim is made against a third-party for injuries that occurred while the claimant was in the course and scope of his employment, then it is likely that workers compensation benefits were awarded and must be considered. Wyoming is one of a limited number of states in which workers' compensation is entirely state administered for extra hazardous employment. As a result, if the state paid workers compensation benefits, then it is entitled to be reimbursed out of all payments made by a third-party or co-employee, not to exceed one-third (1/3) of the total proceeds of the recovery without regard to the type of damages alleged in the third-party action. Wyo. Stat. Ann. § 27-14-105(a) (LexisNexis 2011). If a lawsuit is filed, the complaint must be served on the director or the Wyoming attorney general. Wyo. Stat. Ann. § 27-14-105(b) (LexisNexis 2011). The director or attorney general must be notified of any judgment, compromise, settlement or release. Id. Before offering a settlement to an employee, a third-party or its insurer must notify the state of the proposed settlement and give fifteen (15) days after receipt in which to object. Id. If notice is not given, then the state may institute an independent action against the third-party or its insurer. Id. For all offers to settle, compromise, or release in claims against a person other than the employer, the attorney general must be made a party in all negotiations. Id. A lien will remain in effect until the state is paid the proper amount, and any person paying the settlement remains liable to the state until the attorney general signs a release prior to payment of an agreed upon settlement. Id. These requirements apply to a personal representative seeking claims on behalf of a deceased worker when the injuries caused death. Wyo. Stat. Ann. § 27-14-105(c).

2. Medicaid

Wyoming jointly administers the Medicaid program with the federal government to pay for medical care for some low income individuals and families. *See* Wyo. Stat. Ann. § 42-4-101 *et seq*. (LexisNexis 2011). If a Medicaid applicant or recipient recovers from a third-party in any manner, including judgment, compromise, settlement or release, the state is entitled to reimbursement for all payments made, or to be made, on behalf of the applicant or recipient. Wyo. Stat. Ann. § 42-4-201(a) (LexisNexis 2011). If the Wyoming Department of Health pays or becomes liable for medical care, it has a lien upon any and all causes of actions which accrue to the recipient as a result of the injuries which necessitated the medical care. Wyo. Stat. Ann. § 42-4-202 (LexisNexis 2011).

An attorney representing a Medicaid recipient or applicant in a claim upon which the department may have a reimbursement right must notify the department before filing a claim, commencing an action, or negotiating a settlement. Wyo. Stat. Ann. § 42-4-202(d)(iii) (LexisNexis 2011). An attorney for a plaintiff also has a duty to serve the department with a copy of the complaint if one is filed. W.S. § 42-4-201(b); Wyoming Department of Health Medicaid Rules, Chapter 35, Section 9(a)(ii). Both the Medicaid recipient and a potentially liable third-party have a duty to make the attorney general a party in all negotiations for settlement, compromise or release. W.S § 42-4-201(b); Wyoming Medicaid Rules, Chapter 35, Section 5(f)(i). Both the Medicaid recipient and the third-party will remain liable to the State's reimbursement right until a signed release is obtained from the attorney general prior to a settlement being paid. *See* Wyo. Stat. Ann. §§ 42-4-201(b) and 42-4-203; Wyoming Medicaid Rules, Chapter 35, Section 5(f)(ii). Insurers may not disburse any settlement payment for a personal injury claim to a Medicaid recipient without providing seven (7) days advanced written notice. W.S. § 42-4-202(d)(iv). The State has the right to seek recovery directly from a Medicaid recipient, a responsible third-party, a service provider, or from a Medicaid recipient's attorney who fails to properly notify the department of a settlement. Wyoming Medicaid Rules, Chapter 35, Section 10a(g)(i). This authority includes the ability to initiate a civil lawsuit against the liable third-party, a recipient, a recipient's attorney, or a provider. Wyoming Medicaid Rules, Chapter 35, Section 10(h). An attorney who fails to notify the department of a settlement to ensure the State's reimbursement right will be reported to the Board of Professional Responsibility. Wyoming Medicaid Rules, Chapter 35, Section 10 (i)(iii).

3. Medicare

Pursuant to the federal Medicare Secondary Payer Act, Medicare has the right to recover pre-settlement health care costs related to third-party injury claims out of any settlement or judgment. *See* 42 U.S.C. § 1395y and 42 C.F.R. § 411.52. Medicare requires that its interests be taken into account, including compensation for future health care costs. Generally this is done through proper communication with the Centers for Medicare & Medicaid Services. The exact

requirements expected by Medicare can be murky when it comes to third-party liability cases. As a result, if a claimant is or will become a Medicare recipient in the relevant future, competent legal counsel should be consulted in order to avoid additional liability to Medicare.

C. Minor Settlement

The age of majority in Wyoming is 18. Wyo. Stat. Ann. § 14-1-101 (LexisNexis 2011). Generally, appointment of a conservator pursuant to Wyoming Statute Sections 3-3-101 *et seq.* is necessary to effectuate a settlement with a minor. A properly appointed conservator has authority to enforce, defend against or prosecute any claim by or against the ward (minor) without an order of the court. Wyo. Stat. Ann. § 3-3-606(a)(ii) (LexisNexis 2011). Similarly, a properly appointed conservator has the right to sue on or defend claims in favor of or against the ward (minor). Wyo. Stat. Ann. § 3-3-606(a)(iii) (LexisNexis 2011). However, a conservator must gain court approval prior to compromising or settling any claim of the minor. Wyo. Stat. Ann. § 3-3-607(a)(ii) (LexisNexis 2011). Prior to authorizing a settlement on account of personal injuries to the minor, the court may at its discretion appoint an independent attorney to conduct an investigation. Wyo. Stat. Ann. § 3-3-608 (LexisNexis 2011). The costs of the independent investigation, including reasonable attorney fees, are taxed as part of the cost of the conservatorship. Id. Although not discussed in any reported cases in Wyoming, it could be argued that because Wyoming statutes provide a conservator with authority to settle claims on behalf of a minor, a properly executed settlement agreement and release done with court approval is binding after the minor reaches the age of majority.

D. Negotiating Directly With Attorneys

With the admonitions that follow, there are no Wyoming statutes or regulations that would preclude a properly licensed claims adjuster from negotiating directly with an attorney who represents a claimant.

Care must be taken, however, to assure, if required by the policy, that the adjuster has the consent of the insured to negotiate and settle. Even if not required by the policy, where the insured is separately represented by counsel, the adjuster should assure that the insured's counsel is aware that the adjuster will conduct negotiations and effect a settlement directly with the claimant's attorney.

Where suit has been filed, often the insurer will have retained counsel to protect the answer date, as well as directing its in house or an independent adjuster to negotiate with the claimant's attorney. At times, the insurer fails to tell its retained counsel that negotiations with the claimant's attorney will be conducted by the adjuster. The claims adjuster, whether in-house or independent, needs to assure that retained counsel is aware that the adjuster has been instructed to conduct at least initial negotiations, and the better practice would be to have the claims adjuster and the

retained attorney coordinate their activities so as to avoid misunderstandings, miscommunications and conflicts.

E. Confidentiality Agreements

Confidentiality provisions are commonly included in settlement agreements. There is no Wyoming case law with respect to validity or enforceability of confidentiality provisions in settlement agreements. A confidentiality agreement, like any other contract, is governed by general contract law.

F. Releases

There is little statutory or case law that relates to types of releases, to content, or to form or format. Notarization is not a requirement, although having a release notarized is the better practice. There is no statutory requirement that a release be translated into the language of the person released, although, again, to do so would be the better practice. A release of liability, like any other contract, is governed by general contract law.

W.S. §1-1-119 provides:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one (1) of two (2) or more persons liable in tort for the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide.

G. Voidable Releases

There are no reported Wyoming cases which consider when a release entered into by an unrepresented party is voidable. However, Wyoming Rule of Professional Conduct 4.3 requires lawyers to carefully approach interactions with unrepresented persons, and certain actions must be taken to ensure that his or her role is understood by the *pro se* individual(s). A lawyer dealing on behalf of a client with an unrepresented person cannot render legal advice to the unrepresented party, other than to secure counsel. Id. A well respected legal commentator in Wyoming has suggested that failure to abide by Rule 4.3 may lead to a good argument to set aside the agreement. John M. Burman, *Ethically Speaking: Dealing with an Opposing Party Who is Proceeding Pro Se*, 31 JUN Wyo. Law. 40 (Wyoming Lawyer, Vol. 31, No. 3, June 2008).

Transportation Law

A. State DOT Regulatory Requirements

Wyoming Statutes addressing commercial vehicles are located in Title 31, Chapter 18 of the Wyoming Statutes, §31-18-101 to 903. The Wyoming Department of Transportation rules and regulations are found on the Secretary of State's website, http://soswy.state.wy.us/ under "Agency Rules."

Wyoming has adopted most of the United States Federal Motor Carrier Safety Regulations concerning hazardous materials and safety regulations. As to hazardous materials, the Wyoming Department of Transportation requires all carriers in interstate commerce to comply with the following hazardous materials regulations of the United States DOT: 49 C.F.R. Parts 107, 130, 171 through 173, and 177 through 180.

The Wyoming DOT further requires all carriers in interstate commerce to comply with the following Federal Motor Carrier Safety Regulations: 49 C.F.R. Parts 40, 373, 382, 383, 385, 390, 391, 392, 393, 395, 396 and 397, subject to certain amendments to Parts 390, 391 and 395. The amendments can be found in the Wyoming Department of Transportation Rules and Regulations located on the Wyoming Secretary of State website referenced above.

The amendments to Section 390.3 concern, among other things, farm and ranch vehicles, school buses, mail vehicles and wrecker/towing vehicles. The amendment to 390.3(g) concerns wrecker-towing vehicles. Other amendments of note include: Section 391.11 is amended to lower the age of qualification to drive a commercial motor vehicle from 21 to 18 and Section 395.1(3) is amended to exempt from the record of duty status requirements drivers operating within 150 air miles of their normal work reporting station (increased from the federal exemption of 100 miles).

B. State Speed Limits

Wyoming speed limits are established by Wyoming Statute § 31-5-301. The speed limits are as follows: Interstate highways - 75 mph; paved highways (non-interstate) – 65 mph; unpaved roadways – 55 mph; urban and residential areas – 30 mph; school zones – 20 mph. The speed limit on an approximately forty-mile mountainous stretch of Interstate 80 between Rawlins and Laramie, Wyoming is reduced to 65 mph during winter months, subject to further reductions announced by overhead electronic signs in that area. Wyoming has no minimum speed limits.

C. Overview of State CDL Requirements

Pursuant to Wyoming Statute § 31-7-114(e), the requirement for a commercial driver's license in Wyoming include the following:

1. Must be a resident of the State of Wyoming;

2. Must pass a knowledge and skills test for driving a commercial vehicle as prescribed by the rules and regulations of the Wyoming DOT, which at a

minimum will include the standards established by the United States Department of Transportation;

3. The test, with some exceptions, must be conducted by the Wyoming Department of Transportation; and

4. A separate written test must be passed for a hazardous material endorsement.

The skills test may be waived by the Wyoming Department of Transportation if the applicant meets the requirements designated by the United States Department of Transportation. *See* Wyoming Statute §31-7-114(g). Wyoming does not have a separate age limitation for a CDL from that for a standard driver's license, which is age 17, or age 16 after having held an intermediate (instructional) permit for six months and completed of a driver's training course. *See* Wyoming Statute §31-7-108(a). As noted above, however, a person must be 18 years old to operate a commercial motor vehicle in Wyoming.

Wyoming commercial driver's licenses may be issued in three classifications. Class "A" allows the holder to drive any combination of vehicles with a gross combination weight rating of 26,001 pounds or more, provided the gross vehicle weight rating of the vehicle or vehicles being towed is in excess of 10,000 pounds. Class "B" allows the holder to drive any single vehicle with a gross vehicle weight of 26,001 pounds or more or any such vehicle towing a vehicle which is not in excess of 10,000 pounds. Class "C" allows the holder to operate any single vehicle or combination of vehicles that does not meet the definition of a Class A or Class B vehicle, but is either designed to transport 16 or more passengers including the driver or is placarded for the transportation of hazardous waste.

Insurance Issues

A. Minimum Limits – Intrastate Motor Carriers

The Wyoming Department of Transportation regulations provide that "contract" motor carriers, defined as "Intrastate" carriers, must possess liability insurance with a combined single limit of $500,000 and cargo insurance in the amount of $10,000. *See* Wyoming Department of Transportation, Rules and Regulations, Chapter 3, Sections 2 and 3.

B. State Minimum Limits of Financial Responsibility

Wyo. Stat. Ann. § 31-9-102(xi): "Proof of financial responsibility" means evidence of ability to respond in damages for liability, resulting from accidents occurring subsequent to the effective date of the proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of twenty-five thousand dollars ($25,000.00) because of bodily injury to or death of one (1) person in any one (1) accident, and

subject to the limit for one (1) person, in the amount of fifty thousand dollars ($50,000.00) because of bodily injury to or death of two (2) or more persons in any one (1) accident, and in the amount of twenty thousand dollars ($20,000.00) because of injury to or destruction of property of others in any one (1) accident.

C. Uninsured Motorist Coverage

Wyoming requires that all motor vehicle liability policies issued in Wyoming provide uninsured motorist coverage in the minimum limits of $25,000 per person, $50,000 for injury or death to two or more persons and $20,000 due to property damage. The coverage may be rejected by the named insured. Uninsured motorist coverage is available to commercial drivers injured by uninsured tortfeasors. "Stacking" of uninsured motorist coverage is permitted and in fact is required by regulation where the insured holds more than one policy of uninsured motorist insurance for which separate premiums have been paid, up to the combined limits of all such policies. The regulation further provides, however, that the insured's recovery will not exceed the minimum coverage requirements of 25/50/20 for any policy except the primary policy. *See* Wyoming Insurance Regulations, Chapter 23, Section 4.

D. No Fault Insurance

Wyoming is not a no fault insurance state.

E. Disclosure of Limits and Layers of Coverage

There is no Wyoming statute that would require an insurer to disclose the limits and/or layers of coverage to a claimant and/or plaintiff making a claim against its insured. However, Wyoming has adopted the equivalent of the federal rules of civil procedure. Rule 26(a)(1)(D) of the Wyoming Rules of Civil Procedure requires that a party in its initial disclosures produce "for inspection and copying . . . <u>any</u> insurance agreement [that] may be liable to satisfy part or all of a judgment which may be entered in the action . . ." Such production would, of course, disclose any policy limits and would include any layers of coverage.

F. Unfair Claims Practices

Wyoming has adopted an unfair claims settlement practices statute. It is set forth at *Wyo. Stat. Ann.* § 26-13-124. The unfair claims practices enumerated are as follows:

(i) Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

(ii) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

(iii) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

(iv) Refusing to pay claims without conducting a reasonable investigation based upon all available information;

(v) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

(vi) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

(vii) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

(viii) Attempting to settle a claim for less than the amount to which a reasonable person would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

(ix) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured;

(x) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made;

(xi) Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

(xii) Delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

(xiii) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

(xiv) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement;

(xv) Denying or failing to timely pay disability insurance claims for medically necessary services, procedures or supplies as required by W.S. 26-40-201;

(xvi) Failing to comply with the external review procedures required by W.S. 26-40-201; or

(xvii) Failing to pay a claim after an external review organization has declared such claim to be a benefit covered under the terms of the insurance policy.

The unfair claims settlement practices statute does not create a private cause of action available to an insured and suit may not be based on the statute. Herrig v. Herrig, 844 P.2d 487 (Wyo. 1992); Julian v. New Hampshire Ins. Co., 694 F. Supp. 1530 (T. Wyo. 1988).

G. Bad Faith Claims

Wyoming recognizes both first-party bad faith claims and third-party bad faith claims.

A cause of action for third-party bad faith can be asserted when a liability insurer fails, in bad faith, to settle a third-party claim within policy limits against its insured. Bad faith in this context would occur if an excess judgment were obtained under circumstances when the insurer failed to exercise intelligence, good faith and honest and conscientious fidelity to the common interest of the insured as well as the insurer and to give at least equal consideration to the interest of the insured. However, no third-party bad faith cause of action for failure to settle accrues against an insurer until entry of a judgment against the insured in excess of policy limits and the failure of the insurance company to pay the full amount of the judgment. A stipulated judgment entered into by an insured where notice has been provided to the insurance company can be the basis of a third-party bad faith cause of action against the insurance company if it does not pay the stipulated settlement. *See* Western Casualty and Surety Co. v. Fowler, 390 P.2d 602 (Wyo. 1964); Herrig v. Herrig, 844 P.2d 487 (Wyo. 1992); Jarvis v. Farmers Insurance Exchange, 948 P.2d 898 (Wyo. 1997); Gainsco Ins. Co. v. Amoco Production Co., 53 P.3d 1051 (Wyo. 2002).

In order to establish a first-party bad faith claim, a plaintiff must establish; (1) the absence of any reasonable basis for denying the claim; and (2) the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. Ahren Holtz v. Time Ins. Co., 968 P.2d 946 (Wyo. 1998); State Farm Mutual Automobile Ins. Co. v. Shrader, 882 P.2d 813 (Wyo. 1994); Cathcart v. State Farm Mutual Automobile Ins. Co., 123 P.3d 579 (Wyo. 2005); Gainsco Ins. Co. v. Amoco Production Co., 53 P.3d 1051 (Wyo. 2002).

The appropriate test to determine "bad faith" is the objective standard of whether the validity of the claim which the insurance company denied or delayed payment on, was not fairly debatable. Whether a claim is fairly debatable requires the determination of whether the facts necessary to evaluate the claim were properly investigated and developed or recklessly ignored and disregarded. Even if a claim is fairly debatable, the insurer may breach the duty of good faith and fair dealing by the manner in which it

investigates, handles or denies a claim. McCullough v. Golden Rule Ins. Co., 789 P.2d 855 (Wyo. 1990); Hatch v. State Farm Fire and Casualty Co., 842 P.2d 1089 (Wyo. 1992); State Farm Mutual Automobile Ins. Co. v. Schrader, 882 P.2d 813 (Wyo. 1994); Hulse v. First American Title Co., 33 P.3d 122 (Wyo. 2001); Gainsco Ins. Co. Amoco Production Co., 53 P.3d 1051 (Wyo. 2002).

H. Coverage – Duty of Insured

Under Wyoming law, there is no common law or statutory standard for a duty to cooperate by an insured. The duty to cooperate arises under the terms of the insurance contract. An insured breaches the duty to cooperate and a duty not to enter into any agreement assuming liability where the insured is being defended under an insurance policy with no reservation of rights and provides the insurance company with no notice of a settlement of a claim with a third-party. State Farm Fire & Casualty Co. v. Windsor, 5 F. Supp. 2d 1258 (D. Wyo. 1998).

I. Fellow Employee Exclusions

Fellow employee exclusion clauses are enforceable in Wyoming. A fellow employee exclusionary clause, however, may be modified by other terms of an insurance contract such that coverage is not excluded. (Severability-of-Interest Clause may operate to provide coverage even with fellow employee exclusionary clause). Barnette v. Hartford Ins. Group, 653 P.2d 1375 (Wyo. 1982); State Farm Mutual Automobile Ins. Co. v. Dyer, 19 F.3d 514 (10th Cir. 1994).