

DIGEST OF INSURANCE LAW

WYOMING

Courtesy of
Buchhammer & Kehl, P.C.
Cheyenne, Wyoming

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Justice of Peace Courts have civil jurisdiction within their respective counties of controversies not exceeding \$3,000, and of forcible entry and detainer actions. For controversies exceeding \$1,000, jurisdiction is concurrent with the District Court of the county. W.S. §5-4-106.

Circuit Courts exist in each enumerated judicial district. W.S. §5-9-102. In counties with Circuit Courts, they have exclusive original civil jurisdiction of controversies not exceeding \$7,000, actions for forcible entry or detainer, and some additional matters. W.S. §5-9-128. Claims cannot be aggregated to meet \$7,000 amount in controversy. *See Mutual of Omaha v. Losolla*, 952 P.2d 1117 (Wyo. 1998). The Circuit Court supplants and replaces Justice of Peace Courts whenever a Justice of Peace court is abolished. W.S. §5-9-104.

District Courts have general county-wide original jurisdiction of all causes both at law and equity, probate, criminal, and other proceedings not otherwise provided for. Wyo. Const., Art. 5, §10; W.S. §2-2-101. The District Court Judge can generally assign a civil case to a Circuit Court Judge restricted only by acceptance of the judge to whom it is assigned, and consent of each plaintiff and defendant where the amount in controversy is greater than \$20,000; and consent of both the prosecutor and defendant in criminal cases in which the aggregate potential sentences for charges asserted exceed five years imprisonment.

Appellate Courts

District Courts have appellate jurisdiction in cases arising in all inferior courts in their respective counties as may be prescribed by law. Wyo. Const., Art. 5, §10. Such review from a final judgment of a Circuit Court is by direct appeal to the District Court and shall be filed within 30 days of appealable order. W.S. §5-9-142, and W.R.A.P. 2.10. Post trial motions deemed denied 90 days after filing for purposes of appellate review. *Paxton Resources, LLC v. Brannaman*, 95 P.3d 796 (Wyo.

2004). Review of the District Court's Order of the appeal shall be taken to the Wyoming Supreme Court by writ of review. W.R.A.P. 13. *See Kittles v. Rocky Mountain*, 1 P.3d 1220 (Wyo. 2000). District Courts also act as Appellate Courts for action of administrative agencies. W.S. §16-3-114, W.R.A.P. 1.04, 12.01, *et seq.*

The Wyoming Supreme Court has general appellate jurisdiction in both civil and criminal causes. Wyo. Const., Art. 5, §2. The Supreme Court consists of five justices appointed for eight years and thereafter elected for retention for additional eight year terms. Review of judgments is pursuant to rules adopted by the court (W.S. §5-2-113 through W.S. §5-2-116) by direct appeal to the Supreme Court. W.R.A.P., especially Rule 1.04.

LAW

Abbreviations

- P. – Pacific Reporter.
- P.2d – Pacific Reporter (Second Series).
- P.3d – Pacific Reporter (Third Series).
- S.L. – Session Laws.
- Wyo. – Wyoming Reports. Published through volume 80 including cases through October, 1959.
- Wyo. Const. – Wyoming Constitution.
- W.R.A.P. – Wyoming Rules of Appellate Procedure.
- W.R.C.P. – Wyoming Rules of Civil Procedure.
- W.R.C.P.C.C. – Wyoming Rules of Civil Procedure for Circuit Courts.
- W.R.E. – Wyoming Rules of Evidence.
- W.S. – Wyoming Statutes, 1977 (as amended).
- ____ P.2d ____ (Wyo. [Year]) – Wyoming Reports commencing with 344 P.2d October, 1959.

ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

Contract Law. Cancellation, renewal and nonrenewal of policies are provided for by W.S. §§26-35-101 through 26-35-204.



Claims for benefits must be accepted or rejected by insurer or its agent within 45 days after receipt of proof of loss and supporting evidence. W.S. §26-15-124; *Darlow v. Farmers Ins.*, 822 P.2d 820 (Wyo. 1992). Failure to do so subjects insurer to interest and penalties, including attorney's fees.

If policy contains clear and unambiguous exclusion such will be enforced and doctrine of reasonable expectations does not apply. *Ahrenholtz v. Time Ins. Co.*, 968 P.2d 946 (Wyo. 1998).

Provision in insurance policy for loss by accident will not be held to be applicable only when covered insured was in perfect health when injured. *Miles v. Continental Cas. Co.*, 386 P.2d 720 (Wyo. 1963). Contract with insured permitting payments by insurer directly to provider of health services not precluded by W.S. §26-22-101.

Statements made by applicant are representations and not warranties. Misrepresentation, omissions and concealment do not prevent recovery unless they are material to the acceptance of the risk or to the hazard assumed or had the insurer known the true state of facts would not have issued the policy or excluded the risk. W.S. §26-15-109.

Disease Induced by Accident. Jury question whether assured's death caused by disease or by accident. *Equitable v. Gratiot*, 14 P.2d 438 (Wyo. 1932). Latent disease which would not be proximate cause of death after accident does not preclude recovery under health accident policy. *Miles v. Continental*, 386 P.2d 720 (Wyo. 1963). Beneficiary suing to recover under health and accident policy for death of insured not required to prove that accident was sole cause of death, but only that it was proximate cause, and if there was cause falling within some exception to policy, insurer has burden of establishing it. *Id.*

Excepted Risk. Policies must contain risk insured against. W.S. §26-15-113. Policy may contain additional provisions not inconsistent with code. W.S. §26-15-114.

Damages-Double Indemnity. If injury is active efficient cause then double indemnity available. *Bankers Life v. Nelson*, 108 P.2d 584 (Wyo. 1940).

W.S. §21-3-127 concerning student insurance policies provides that school boards "may" rather than "shall" provide insurance accident protection to school students.

W.S. §26-15-127, concerns standard accident and health policy requirements and provisions and provides that Insurance Commissioner shall prescribe uniform health insurance claim forms for use by all companies in state.

W.S. §§26-20-101 and 26-20-102, concerning newborn child coverage provides that all policies which cover family member of insured shall automatically cover newborn child of insured from birth, including necessary care and treatment of birth abnormalities and congenital defects and shall cover adoptive children from date of filing petition for adoption or entry into adoptive home, including preplacement conditions.

W.S. §26-22-102, provides that any policy providing coverage for mental illness or retardation shall provide benefits for treatment in state institutions.

W.S. §26-34-101 *et seq.* concerns HMO's.

No insurance carrier or other provider of health insurance shall refuse to accept or honor an otherwise valid claim for a covered service which is filed by either parent of a covered child or D-PASS who submit valid copies of medical bills. No insurer shall refuse to provide health insurance to a dependent child solely because the child does not live in the home of the person applying for coverage. W.S. §26-15-135.

Notice and Proof of Loss, Statute of Limitations. No action within 60 days of Proof of Loss. No action can be maintained after expiration of three (3) years after proof of loss for disability insurance policies. W.S. §26-18-115. For Wyoming statutory requirements on policy provisions relating to notice of claims, and proof of loss for disability insurance policies, see W.S. §§26-18-109 and 26-18-111, respectively.

A health plan administrator that exercises discretionary authority or control in the administration or management of the health plan may be fiduciary who owes duties to the insured and may be liable for bad faith, breach of contract, negligence, etc. *Long v. Great West*, 957 P.2d 823 (Wyo. 1998).

ERISA pre-empts bad faith claims under group health and disability policies. *Moffett v. Halliburton Energy Svcs.*, 291 F.3d 1227 (10th Cir. 2002). ERISA plan may recover amounts paid for health care from plan participant who recovers in personal injury claim. *Admn. Committee of Walmart v. Williard*, 393 F.3d 1119 (10th Cir. 2004).

Covenant of good faith and fair dealing applies in all first party insurance cases and insurer can be held liable in both tort and contract. *McCullough v. Golden Rule Ins. Co.*, 789 P.2d 855 (Wyo. 1992). First party bad faith will lie when an insurer refuses to pay claims for policy benefits if it knowingly or recklessly denies benefits without a reasonable basis or fails to advise of benefits available. *Herrig v. Herrig*, 844 P.2d 487 (Wyo. 1991).

In determining in a first party case whether insurer committed bad faith, the issue is whether claim is fairly debatable. *Gainsco Ins. v. Amoco*, 53 P.3d 1051 (Wyo. 2002). No third party bad faith claim for failure to settle arises until there is an entry of judgment against insured in excess of policy limits. *Id.*

In cases involving delay of payment, it must be shown that insurer not only acted without justification, but acted intentionally and used deceit, non-disclosure or violated industry custom. *Farmers Ins. v. Shirley*, 958 P.2d 1040 (Wyo. 1998). Insured need not prevail on contract claim to pursue claim for bad faith. *Ahrenholtz v. Time Ins. Co.*, 968 P.2d 946 (Wyo. 1998).

ACCIDENTAL MEANS

Where cause of death was bodily infirmity which was not induced by accident, no recovery can be had under policy. *Miles v. Continental Cas. Co.*, 386 P.2d 720 (Wyo. 1963). No case has arisen of death under anesthesia.

For purposes of accidental death claim under Wyoming Law, "accidental" nature of death is to be determined from perspective of insured rather than of one who killed him. *Smith v. Equitable Life Assur. Soc'y*, 614 F.2d 720 (1982). Beneficiary suing to recover under health and accident policy for death of insured not required to prove that accident was sole cause of death, but only that it was proximate cause, and if there was cause falling within such exception to policy, insurer has burden of establishing it. *Miles v. Continental*, 386 P.2d 720 (Wyo. 1963).

Arson is not accidental. *Hatch v. State Farm*, 930 P.2d 382 (Wyo. 1997).

Words "sudden" and "accidental" are not ambiguous. Occurrence of event must happen quickly, abruptly and without significant notice. Gradual and unintentional discharge of pollutants is not sudden. *Sinclair Oil v. Republic Ins. Co.*, 929 P.2d 535 (Wyo. 1996).

Intentional act is not accidental nor is such an occurrence under a policy. *Hedart Mt. Irrigation Dist. v. Argonaut Ins. Co.*, 08-8018 (10th Cir. 2008)

ADJUSTERS

Definition. Adjuster investigates and negotiates settlement of claims under insurance contract. W.S. §26-1-102. Are under supervision and control of Insurance Commissioner, his deputy or examiner W.S. §26-2-117.

License required. W.S. §26-9-102. Qualifications for adjusters license, see W.S. §26-9-135. Grounds for suspension, revocation, or refusal of adjusters license. W.S. §26-9-136.

Duty of Adjuster. For duty of adjuster toward claimant and as agent of carrier see *Western Cas. & Sur. Co. v. Klair Fowler*, 390 P.2d 602, (Wyo. 1964). Knowledge of adjuster can be imputed to insurer. *Wyatt v. State Farm*, 322 P.2d 137 (Wyo. 1958).

Insurance carrier can be held liable for tort of bad faith for oppressive or unreasonable claims practices and adjuster conduct even if insurer complies with all terms of the policy. *Hatch v. State Farm*, 842 P.2d 1089 (Wyo. 1992). This standard does not apply to litigation related to conduct by insurer against its insured. *Sinclair Oil v. Republic Ins.*, 967 F. Supp. 462 (D. Wyo. 1997). First party bad faith will lie when an insurer refuses to pay claims for policy benefits if it knowingly or recklessly denies benefits without a reasonable basis or fails to advise of benefits available. *Herrig v. Herrig*, 844 P.2d 487 (Wyo. 1992). Denial of a first party claim must be fairly debatable to preclude bad faith liability. *McCollough v. Golden Rule*, 789 P.2d 865 (Wyo. 1990).

No cause of action for negligent failure to pay or infliction of emotional distress independent of bad faith cause of action against insurer. *Kirkwood v. CUNA, Inc.*, 937 P.2d 206 (Wyo. 1997).

AGE

See "AUTOMOBILES"; "NEGLIGENCE"; "LIMITATION OF TIME FOR COMMENCEMENT OF ACTION."

AGENTS AND BROKERS

Definition. Agent is appointed by insurer to solicit applications for insurance. Broker is independent contractor on behalf of insured who solicits insurance. W.S. §26-1-102.

For Whom. Agent acts on behalf of insurer. Broker acts on behalf of the insured. W.S. §26-1-102. Before contract of insurance is created the application must be accepted by the insurer or its agent. *Raymond v. National Life*, 273 P. 667 (Wyo. 1929).

Fraud. Fraud of agent and his fraudulent knowledge is fraud of company. *Mutual Life v. Summers*, 19 Wyo. 441, 120 P. 185.

Knowledge of Agent. Knowledge of agent is imputed to insurer. *Mutual Life v. Summers*, 19 Wyo. 441, Pac.185. Agent's knowledge of matters relating to contract is deemed to be knowledge of principal that is insuring company. *Kahn v. Traders Ins. Co.*, 4 Wyo. 419.

Broker or agent who, with view to compensation for his services, undertakes to procure insurance for another and through fault or neglect fails to do so will be held liable for damage resulting. *Hursh Agency Ins. v.*

Wigwam Homes Inc., 664 P.2d 27 (Wyo. 1978); *Arrow Constr. Co. v. Camp*, 827 P.2d 378 (Wyo. 1992). There are circumstances where insured may rely upon agents' representations even as against contrary provision in policy, based on principles of agency and considerations of equitable estoppel. *Hunter v. Farmers Ins. Group*, 554 P.2d 1239 (Wyo. 1974). Generally agent has no duty to give advice regarding what type of policy a client should purchase, even if client requests full coverage. If agent undertakes to provide a specific type of coverage, owes duty to procure such coverage. *Small v. King*, 915 P.2d 1192 (Wyo. 1996). Insured's knowledge that policy did not provide coverage requested precludes claim based on misrepresentation. *Id.*

Title insurance company owed no duty to search for and disclose defects in title. *Hulse v. First American Title*, 33 P.3d 122 (Wyo. 2001).

License and Regulation. For provisions relative to grounds for supervision, revocation or refusal of license, see W.S. §26-9-136. Insurance Commissioner can not revoke license of agents arbitrarily or unreasonably or without notice and hearing of charges against such agents. *State ex rel v. Loucks*, 30 Wyo. 485, 222 P. 37; 32 Wyo. 26, 228 P. 632.

For provisions relative to examination of applicants for agent's or broker's license see W.S. §26-9-108. See also, *Bell v. Gray et al.*, 337 P.2d 924. For general provisions as to Insurance Agents and Brokers see W.S. §§26-9-101 through 26-9-139.

Process Agent. Insurance commissioner is attorney in fact of every qualified foreign and alien insurance company and of every domestic reciprocal insurer for service of process W.S. §26-3-112, 121 and also agent for service of process for non-resident agent, broker or solicitor W.S. §26-9-134.

ARBITRATION

Uniform Arbitration Act is set forth in W.S. §1-36-101 *et seq.* A written agreement to submit an existing or future controversy to arbitration is valid, enforceable and irrevocable. W.S. §1-36-103. See *Welty v. Brady*, 123 P.3d 920 (Wyo. 2005).

Insurer must plead defense based on failure to comply with arbitration clause or such cannot be submitted to the jury. *Kahn v. Traders Ins.*, 4 Wyo. 419, 34 P. 1059 (1893). Confirmation by Court is proper where a party fails to present clear and convincing evidence that arbitrator's decision was based on manifest mistake of fact or for other improper reason. *Wild West Trading v. Architects*, 881 P.2d 1070 (Wyo. 1994).

Arbitration provision in uninsured motorist policy is not enforceable under Wyoming Insurance Regulations.

Voluntary binding or nonbinding arbitration in the Federal Court is available 28 U.S.C. §51. Mediation is available in Wyoming. Mediation discussions and resolutions are confidential and not admissible. Further, the mediation is non-binding. W.S. §1-43-101 *et seq.*

ASSIGNMENT

See "FIRE INSURANCE" and "SUBROGATION."

ATTORNEYS

Conduct governed by Wyoming Rules of Professional Conduct. Unauthorized practice of law prohibited. W.S. §33-5-116 *et seq.*

Attorney Client Relationship. Payment is not essential to the existence of attorney/client relationship. *Carlson v. Langdon*, 751 P.2d 344 (Wyo. 1988). Existence of attorney client relationship is one of fact. *Meyer v. Mulligan*, 889 P.2d 509 (Wyo. 1995).

Conflict of Interest. See *Carlson v. Langdon, supra.* and *Suchta v. Robinett*, 596 P.2d 1380 (Wyo. 1979) regarding insurance counsel's duty to insured. Waiver of Conflict - *Carlson v. Langdon, supra.* Attorney may represent multiple defendants if interests of defendants are not so adverse that representation of either is compromised. *Shisler v. Town of Jackson*, 890 P.2d 555 (Wyo. 1995).

An attorney is an agent of his client and it is immaterial whether he is employed for a single transaction or series of transactions. *Stricker v. Fravendienst*, 669 P.2d 520 (1983). Attorney generally only owes a duty to his client and not third parties. *Brooks v. Zebre*, 792 P.2d 196 (Wyo. 1990). It is an abuse of discretion for a trial court to permit withdrawal of counsel absent strict adherence to rule 102(c) of the Wyoming Uniform Rules for District Court. *Sims v. Day*, 99 P.3d 964 (Wyo. 2004).

Duty. Attorney employed by corporation represents corporation and not its shareholders. *Bowen v. Smith*, 838 P.2d 186 (Wyo. 1992). In representing a client an attorney has the duty to use the degree of learning and skill ordinarily possessed by reputable lawyers licensed to practice in the state of Wyoming and under similar circumstances. Further, an attorney must use reasonable diligence and his best judgment in representing a client. W.C.P.J.I., 14.12, *Banner v. Town of Dayton*, 474 P.2d 300 (1979). Wyoming recognizes the professional judgement rule. *Burk v. Burzynski*, 672 P.2d 419 (Wyo.



1983). Legal malpractice is a contract action and the client's comparative negligence does not preclude or reduce his recovery. *Jackson State Bank v. King*, 844 P.2d 1093 (Wyo. 1993). Normally to prove legal malpractice requires expert testimony as to the standard of care and violation of the standard of care. *Moore v. Lubnau*, 855 P.2d 1245 (Wyo. 1993). To prove a legal malpractice claim the plaintiff must show 1) duty; 2) breach of duty; 3) causation; and 4) damages. *Id.* Breach of standard of care must be both the cause in fact and proximate cause of the injury. *Meyer v. Mulligan, supra*. Counsel should reject employment when circumstances do not allow timely representation. *Elliot v. State*, 626 P.2d 1044 (Wyo. 1981). No malpractice arises from attorney's failure to pursue asserted cause of action not supported by facts or law at trial. *Gayhart v. Good*, 98 P.3d 164 (Wyo. 2004).

Whether an attorney owes a limited duty to a non-client who is suing attorney for malpractice, the inquiry is whether the non-client was the intended beneficiary of the transaction. *In re Estate of Drwenski*, 83 P.3d 457 (Wyo. 2004). If such intent is found the court will apply a balancing test. *Id.*

Damages for emotional distress or emotional suffering are not recoverable in legal malpractice case based on negligence. Such damages may be recoverable if attorney engaged in willful, wanton or malicious conduct. *Long-Russell v. Hampe*, 39 P.3d 1015 (Wyo. 2002). Negligent attorney is entitled to an offset of his contingent fee from a malpractice award. *Horn v. Wooster*, 165 P.3d 69 (Wyo. 2007).

There is a two-year statute of limitations. Statute of limitations begins to run when client knows or should know of the malpractice. *Hiltz v. Horn*, 910 P.2d 566 (Wyo. 1996). Knowledge of attorney as client's agent of malpractice is imputed to client. *Murphy v. Housel*, 955 P.2d 880 (Wyo. 1998).

Wyoming does not adopt the doctrine of "continuous representation" in the context of legal malpractice actions. *Id.*

Attorney acting as guardian ad litem is subject to special standards. *Clark v. Alexander*, 953 P.2d 145 (Wyo. 1998).

Attorney Fees. Absent contract or statutory provision each party pays their own attorney's fees. *Werner v. American Sur. Co.*, 423 P.2d 86 (1967). Contract providing for attorneys' fees not enforceable if party has accepted settlement or offer of judgment that indicated such settlement or judgment was full and final satisfaction of all claims. *The Real Estate Pros, P.C. v. Byars*, 90 P.3d 110 (Wyo. 2004). Attorney's fees are generally a matter of contract between attorney and client. *Morfeld*

v. Andrews, 579 P.2d 426 (1978). Absence of express or implied contract attorney may recover fees based on quantum meruit. *Condict v. Whitehead, et al*, 743 P.2d 880 (1987). Attorney fees must be reasonable and must include the various considerations set forth in Rule 1.5 Wyo. Rules of Professional Conduct. Requirements for Contingent Fee Agreements are set forth in Rule 6, Wyoming Rules Governing Contingent Fees. Attorneys Lien W.S. §29-1-102. Paralegal fees included in attorney fee award when appropriate. *See Cline v. Rocky Mountain*, 998 P.2d 942 (Wyo. 2000). A party who brings an action in bad faith and without a factual basis may be required to pay opposing party's fees and costs. *Mueller v. Zimmer*, 173 P.3d 361 (Wyo. 2007).

Attorney whose client provides a lien to medical care provider is liable to pay that lien from the proceeds of a settlement or judgment. *Winship v. Gem City Bone & Joint*, 185 P.3d 1252 (Wyo. 2008).

AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE" and "FINANCIAL RESPONSIBILITY."

Age. Automobile operation. Statutory age for operators of motor vehicles is sixteen years W.S. §31-7-108. Over fifteen and below sixteen years may have instruction permit to operate vehicle with licensed driver, W.S. §31-7-110.

Agency. Employer not liable for negligence of employee in operation of employer's car where employer did not control movements of employee unless within the scope and course of employment. *Stockwell v. Morris*, 46 Wyo. 1; *See also Blessing v. Pittman*, 70 Wyo. 416, 251 P.2d 243; *Sun Land & Cattle Co. v. Lara Brown*, 394 P.2d 387. It is for jury to determine from evidence before it how much "right to control" employer had. *Holly Sugar Corp. v. Perez*, 508 P.2d 595 (1973). Employee was not acting within scope of employment at time of collision where employee's conduct was not actuated in any part by purpose to serve employer and trip was not performed as part of, nor incident to, service on account of employment. *Miller v. Reimam-Wuerth Co.*, 598 P.2d 20 (Wyo. 1979); *Gill v. Schaap*, 601 P.2d 545 (Wyo. 1979); nor where operation of vehicle did not work to benefit of employer. *Beard v. Brown*, 616 P.2d 726 (Wyo. 1980). Theory of joint venture held not to apply to passenger where driver of vehicle was in physical and actual possession of automobile directing it as he desired without instruction or suggestion from passenger. *Hume v. Mankus*, 401 P.2d 703 (Wyo. 1965). Negligence of driver, except under certain circumstances, is not imputable to passenger in automobile so as to bar

recovery against third party. *Chandler v. Dugan*, 251 P.2d 580, 70 Wyo. 439 (Wyo. 1952).

An automobile is not a dangerous instrumentality and unless owner is negligent, he is not liable for negligent acts of people he allows to drive his vehicle. *Jack v. Enterprise*, 899 P.2d 891 (Wyo. 1995). Employee and employer are still liable by doctrine of duty of reasonable care for damages from accident when employee had been obeying all traffic laws and pedestrian suddenly appeared in street, leaving employee no time to avoid accident. *Downtown Auto Parts v. Toner*, 91 P.3d 917 (Wyo. 2004). Negligent Entrustment - owner must know or should know of user's incompetence. *Moore v. Kiljander*, 604 P.2d 204 (Wyo. 1979).

Family Purpose Doctrine. Not recognized. *Sare v. Stetz*, 67 Wyo. 55, 214 P.2d 486 (Wyo. 1950); *Wyoming Dept. of Revenue v. Wilson*, 400 P.2d 144 (Wyo. 1965).

Guest Cases. Guest passengers have right of recovery premised upon ordinary negligence of host drivers. *Nehring v. Russell*, 582 P.2d 67 (Wyo. 1978).

Gross negligence was judicially determined by Supreme Court of Wyoming in *Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979) as not being sufficient to establish basis for punitive damages.

A front seat passenger is not an indispensable party in lawsuit. *Grove v. Pfister*, 110 P.3d 275 (Wyo. 2005).

Financial Responsibility. W.S. §§31-9-401 to 31-9-414. Required amounts \$25,000/\$50,000/\$20,000. W.S. §31-9-405. Uninsured and underinsured motor vehicle coverage W.S. §§31-10-101 to 31-10-104 provides such coverage must be made available to the insured but is not required. Unless the insured requests coverage in writing, coverage need not be provided in, or supplemental to, a renewal policy where the insured has previously rejected coverage. W.S. §31-10-101. Wyoming does not have No-Fault or P.I.P.

Separate uninsured motorist policies can be stacked. *Ramsour v. Grange Ins.*, 541 P.2d 35 (Wyo. 1975). However, multiple cars insured under a single policy does not permit stacking of uninsured coverage. *Commercial Union Ins. Co. v. Stamper*, 732 P.2d 534 (Wyo. 1987). In *Arron v. State Farm*, 34 P.3d 929 (Wyo. 2001) the court ruled that stacking of separate underinsured coverage from different policies was required since the policies did not contain anti-stacking language. This case discusses how various policies should be paid. See *Mena v. Safeco Ins. Co.*, 412 F.3d 1159 (10th Cir. 2005). Where injuries exceed policy limits, the insurer may not offset medical payments. Ch. 23 §5. No physical contact is required to trigger uninsured coverage inflicted by a hit-and-run motorist. Ch. 23 §6. Stacking of

medical benefits not required absent specific policy language. *Farmers v. Williams*, 823 F. Supp. 927 (D. Wyo. 1994). Fault of uninsured motorist suffered by insured may be determined in direct action against insurer. *State Farm v. Shrader*, 882 P.2d 813 (Wyo. 1994). Insurer has no absolute right to intervene in its insured's suit against uninsured driver. *American Family v. Bowen*, 959 P.2d 1199 (Wyo. 1998). Insured legally entitled to coverage when he establishes injuries/damages caused by negligence of uninsured motorist. *State Farm v. Shrader*, 882 P.2d 813 (Wyo. 1994). But insurer of uninsured/underinsured benefits not bound by insured's settlement or consent judgment triggering benefits for uninsured/underinsured policy where insurer party to action but not included in settlement. *Ecklund v. Farmers Ins. Exchange*, 86 P.3d 259 (Wyo. 2004). Insurer that is a party to action remains entitled to trial on damages after settlement and consent judgment between insured and tortfeasor. *Id.* In wrongful death action, when policy is unambiguous, the personal representative is only entitled to collect "each person" limit rather than "each occurrence" limit of uninsured motorist coverage. *Farmers Ins. v. Dahlheimer*, 3 P.3d 820 (Wyo. 2000). See "LIABILITY INSURANCE," *infra*. No Statute requires insurer to provide medical benefits in automobile policy. *Farmer's Ins. v. Williams*, 823 F. Supp. 927 (D. Wyo. 1992).

Alcohol/DWI. Blood alcohol content of .08 percent or more an individual is presumed intoxicated and shall not drive or if an individual consumes alcohol and/or controlled substances to a degree which renders him incapable of safely driving. Blood alcohol content of between .05 percent to .08 percent there is no presumption but may be considered by the jury. Blood alcohol content of less than .05 percent it is presumed the person is not under the influence. W.S. §31-5-233. Police officers failure to conduct field sobriety tests or arrest motorist for DWUI is not proximate cause of subsequent accident with a third party. *Brown v. Avery*, 850 P.2d 612 (Wyo. 1993). Where defendant admits fault, no error in excluding evidence of his intoxication. *Parker v. Artery*, 889 P.2d 520 (Wyo. 1995).

Pedestrians. Pedestrians must obey traffic control devices and signals at uncontrolled intersections and on streets with crosswalks the pedestrian has the right-of-way. At uncontrolled intersections and streets with no crosswalks, pedestrian must yield the right-of-way to motor vehicles. While walking, a pedestrian must use a sidewalk if available, otherwise the pedestrian shall walk on the left side of the roadway facing traffic. Drivers of motor vehicles must always use care to avoid colliding with pedestrians. W.S. §§31-5-601 to 31-5-613.

Seat Belts. All drivers and front seat passengers are required to wear seat belts. Failure to wear a seat belt is not admissible in a civil case as to either liability or damages. W.S. §31-5-1402. Children must be restrained. W.S. §31-5-1301 *et seq.* Parent may be liable to minor child if parent fails to have child restrained and lack of restraint is proximate cause of injury. *Dellapenta v. Dellapenta*, 838 P.2d 1153 (Wyo. 1992).

Size and Weight Limits. W.S. §§31-8-802 to 31-8-804.

The Uniform Act Regulating Traffic on Highways, W.S. §31-5-201, *et seq.* applies to motor vehicles on public roads and snowmobiles on groomed trails. *Roberts v. Estate of Randall*, 51 P.3d 204 (Wyo. 2002).

Speed Limits. Unless posted otherwise 20 mph in school zones and business districts, 30 mph in urban areas, 75 mph on interstates and 65 mph on 2-lane highways. W.S. §31-5-301

Service of Process Upon Non-Resident Motorists. W.S. §1-6-301 provides that use and operation of motor vehicle within Wyoming by person upon whom service cannot be made personally or on a duly appointed resident agent is deemed appointment of Secretary of State of Wyoming as operator's lawful attorney upon whom legal process may be served. Statute of limitations will not be tolled in resident motorist's absence from state. *Ryel v. Anderies*, 4 P.3d 193 (Wyo. 2000).

Direct Actions. No statutory provisions permitting action by injured person against insurer.

Repairs. Insurer must obtain consent of insured to use non-original manufacturer's parts. *State Farm v. Wyoming Ins. Dept.*, 792 P.2d 1008 (Wyo. 1990).

Accident Reconstruction. An accident reconstructionist can use law enforcement accident report for foundation. *McGuire v. Solis*, 120 P.3d 1020 (Wyo. 2005).

AVIATION

In general W.S. §10-1-101 *et seq.* (Uniform State Law of Aeronautics)

Plaintiff must show by substantial evidence what caused plane to crash. *Continental Motors v. Jolly*, 483 P.2d 244 (Wyo. 1971).

Airline carriers have same duty as other common carriers. *Urban v. Frontier*, 139 F. Supp. 288 (D. Wyo. 1956). Pilot charged with knowledge of safety rules and regulations. *Huske v. Shipley*, 445 P.2d 9 (Wyo. 1968). Passenger is not comparatively negligent for flying on commercial carrier, *Urban, supra*.

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Generally W.S. §26-1-101 *et seq.*

CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

Generally W.S. §§26-35-101 to 26-35-204.

Notice must be provided by mail or personally to both the insured and agent, W.S. §26-35-101. Prior to cancellation a refund of unearned premium must be paid to the insured, W.S. §26-35-102. Midterm cancellation of an entire block, line or class of business is presumed to be an unfair, inequitable and deceptive practice and is unlawful. W.S. §26-35-103. An insurer who violates this act is subject to monetary penalties or license suspension or revocation. W.S. §26-35-104.

An insurance policy or renewal shall not be canceled by an insurer except for failure to pay premiums when due, material misrepresentation of fact which if known would have caused the company not to issue the policy, substantive change in risk assumed if not foreseeable, substantial breaches of contract duties, conditions or warranties. W.S. §26-35-202. Notice of cancellation must be provided and time limits set before cancellation is effective.

A policy may be nonrenewed by an insurer if on its expiration date notice is provided and such notice is not less than 45 days prior to expiration. W.S. §26-35-203.

If an insurer intends to renew a policy but on less favorable terms, the insurer shall furnish to the insured and agent the renewal terms and a statement of the premium. Notice shall be provided pursuant to W.S. §26-35-101 not less than 45 days prior to expiration. W.S. §26-35-204. Insured has duty to mitigate by obtaining replacement insurance or contesting cancellation. *Moore v. Continental Ins.*, 813 P.2d 1296 (Wyo. 1996).

Where insured complied with reinstatement provisions in policy during his life and prior to murder and insurer accepted such reinstatement, after the murder but without knowledge of such occurrence, policy is valid. *Bruegger v. National Old Lines Ins.*, 529 F.2d 869 (10th Cir. 1976).

Generally, an insurer waives the right to assert a forfeiture when it accepts or enforces payment of a premium or retains a premium when it knows that the insured has acted in a way which may forfeit the policy.

National Aviation Underwriters v. Tadday, 660 P.2d 1148 (1983).

Moving from Wyoming to Alaska subsequent to obtaining an auto policy providing that the vehicle was principally garaged in Wyoming does not void policy based on misrepresentations. *Sandahl v. Iowa Home Ins.*, 229 F.2d 662 (10th Cir. 1956). Materiality is irrelevant to insurer's right to rescind policy based on misrepresentation if insured had intent to defraud. *White v. Continental Ins.*, 831 F. Supp. 1545 (Wyo. 1993). Insurer does not have duty to investigate representation in application and may rely on insured's representations. *Id.*

Fire policy void where insured breached the contract by concealing and misrepresenting material facts concerning the subject matter of the claim and circumstances of the fire and by intentionally causing the fire. *Unigard Mutual Ins. v. Bluemel*, 485 F. Supp. 668.

Concealment of facts material to the risk will void life policy even though concealment was the result of mistake and made without fraudulent intent. *All American Life v. Krenzelok*, 409 P.2d 766 (Wyo. 1966).

CHattel MORTGAGES

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

See "LIABILITY INSURANCE."

Ambiguity of Terms. Liberally construed in favor of insured. *Alm v. Hartford Fire*, 369 P.2d 216 (Wyo. 1962); *State Farm v. Paulson*, 756 P.2d 764 (1988). Policy is interpreted according to five tenets under Wyoming law: 1) court should give words their common and ordinary meaning; 2) court should determine what parties reasonably intend from policy language; 3) language should not be so strictly construed as to thwart general object of the insurance; 4) court should enforce policy according to its terms absent ambiguity; and 5) ambiguous policy should be construed liberally in favor of insured. *Howton v. Mid-Century*, 819 F. Supp. 1010 (D. Wyo. 1993). Ambiguity exists if language conveys an obscure or double meaning. *Rehnberg v. Hirschberg*, 64 P.3d 115 (Wyo. 2003).

Doctrine of reasonable expectations does not apply where policy terms or exclusions are unambiguous. *State v. Farmers Ins.*, 844 P.2d 1059 (Wyo. 1993); *Ahrenholtz v. Time Ins. Co.*, 968 P.2d 946 (Wyo. 1998). However, even if insured does not read policy, there may exist an equitable claim for reformation to reform the policy in accordance with insured's understanding. *W.N. McMurry Const. Co. v. Community First Ins., Inc.*, 160 P.3d 71 (Wyo. 2007).

If policy is unambiguous, policy application or other evidence are not admissible to vary policy language. *Hatch v. State Farm*, 930 P.2d 382 (Wyo. 1997). When purchasing insurance, a person has a duty to read the policy. *Small v. King*, 915 P.2d 1192 (Wyo. 1996).

Conditional Receipt of Application. Life insurer allowed to cancel application received subject to additional investigation. *Raymond v. National Life*, 40 Wyo. 1, 273 P. 667, (1929).

Inconsistent Policy Terms and Endorsements. Endorsement unambiguously limiting coverage controls over policy language. *Commercial Union v. Stamper*, 732 P.2d 534 (Wyo. 1987). Interpretation of a policy generally limited to materials identified in the integration clause. *Bowen v. Royal Life*, 137 F.3d 1236 (10th Cir. 1998).

Oral Binders. Are allowed. W.S. §26-15-119.

If renewal policy provides less coverage than expiring policy, insurer may be bound by larger limits if insured is not made aware of reduction in coverage. *FDIC v. American Cas.*, 814 F. Supp. 1032 (D. Wyo. 1991).

An insurance carrier may bring a declaratory judgment action against its insured and such does not constitute bad faith. W.S. §1-37-103. The insured must pay its own attorney's fees. *Pribble v. State Farm*, 933 P.2d 1108 (Wyo. 1997); *Sinclair Oil v. Republic Ins.*, 976 F. Supp. 462 (D. Wyo. 1997).

DAMAGES

Appellate Review. Where passion and prejudice have not influenced jury's verdict, amount to be assessed for damages suffered by personal injury plaintiff is within sound discretion of trier of fact. *Union Pacific v. Richards*, 702 P.2d 1272 (Wyo. 1985). Absent award so excessive or inadequate as to shock judicial conscience and raise irresistible inference of passion, prejudice or other improper cause, jury's determination of damages is inviolate. *Lane v. Gorman*, 347 F.2d 332 (10th Cir. 1965). Trial Court justified in entering judgment as matter of law in contradiction to jury award where damages not supported by evidence. *Workman v. Carver*, 87 P.3d 1246 (Wyo. 2004). Plaintiffs appeal of evidentiary rulings on liability rendered moot by jury's finding of no damages. *Serda v. Dennis*, 100 P.3d 860 (Wyo. 2004).

Arbitration Awards. Wyoming has the Uniform Arbitration Act. W.S. §§1-36-101 through 1-36-119.

Comparative Negligence. Plaintiff may not recover anything if more than 50% negligent. There is no contribution between joint tort-feasors. Each negligent defendant is liable only for that portion of the total dollar amounts determined as damages in amount of percent-



age of fault attributed to him. W.S. §1-1-109, *Halliburton v. McAdams*, 773 P.2d 153 (Wyo. 1989). Employer liable only for percentage of fault attributed to employee. *Anderson Highway Signs v. Close*, 6 P.3d 123 (Wyo. 2000). Non-settling defendants are liable for 100% of verdict where jury found them to be 100% at fault and the non-settling defendants are not entitled to credit against the verdict for amounts paid by settling defendants. *Haderlie v. Sonderoth*, 866 P.2d 703 (Wyo. 1993).

Damages and Entry of Default. In view of close relation between issues of fault and damages under comparative negligence statute, defendant who appears prior to entry of default judgment, may contest issues of causation, damages and fault attributable to each actor. *McGarvin v. Welden*, 897 P.2d 1310 (Wyo. 1995); *Schaub v. Wilson*, 969 P.2d 552 (Wyo. 1998). Default judgment void if complaint does not state a sum certain or a sum which can be made certain by computation. *Exotex Corp. v. Rinehart*, 3 P.3d 826 (Wyo. 2000).

Indemnification. Provisions in agreements pertaining to oil, gas or water wells or mine or minerals purporting to indemnify the indemnitee against his own negligence are unenforceable. W.S. §§30-1-131 to 133. Otherwise express and implied indemnity are recognized but strict construction rule applies. *Cities Service Co. v. Northern Production Co.*, 705 P.2d 321 (Wyo. 1985); *Richardson v. Lincoln-Devore*, 806 P.2d 790 (Wyo. 1991). See also *Union Pacific Resources Co. v. Dolenc*, 86 P.3d 1287 (Wyo. 2004).

Psychic Injuries - Mental Pain and Suffering. Negligent infliction of emotional distress is actionable if claimant observed death or serious injury or immediately arrived upon scene, is within group of beneficiaries under wrongful death statute and at time realized serious nature of injury. *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986); *R.D. v. W.H.*, 875 P.2d 26 (Wyo. 1994). Intentional infliction of emotional distress actionable if conduct is extreme and outrageous and conduct goes beyond all possible bounds of decency and no reasonable person could endure distress. *Leithead v. American Colloid*, 721 P.2d 1059 (Wyo. 1986). Party can recover for intentional infliction of emotional distress if they are present when extreme or outrageous conduct is directed at a family member. *Bevan v. Fix*, 42 P.3d 1013 (Wyo. 2002). Inappropriate sexual conduct in work place can give rise to such a claim. *Kanzler v. Renner*, 937 P.2d 1337 (Wyo. 1997). Cannot stem from a lawful act of employer, such as termination. *Hoflund v. Airport Golf Club*, 105 P.3d 1079 (Wyo. 2004). Any claimant in a sexual harassment action must first exhaust all state and federal administrative remedies to provide jurisdiction to court. Laws addressing "gender" and "sex" include sex-

ual harassment. *Id.* Psychic injuries to minor based on sexual assault. *McCreary v. Weast*, 971 P.2d 974 (Wyo. 1999). Damages for emotional distress resulting from property damage only are not recoverable. *Blagrove v. J.B. Mechanical*, 934 P.2d 1273 (Wyo. 1997). To recover damages for emotional distress from breach of duty of good faith and fair dealing, proof of other substantial damages such as economic loss is required. *Farmers Ins. v. Shirley*, 958 P.2d 1040 (Wyo. 1998).

If plaintiff in negligence action can prove negligence, impact and damages, recovery will not be denied merely because injuries are mental rather than physical. *Daily v. Bone*, 906 P.2d 1039 (Wyo. 1995). A defendant's negligent conduct leading to mental injury which causes physical harm or suicide will support claim for damages. *R.D. v. W.N.*, 875 P.2d 26 (Wyo. 1994). Emotional distress damages not recoverable in actions for inverse condemnation. *Miller v. Campbell Cty.*, 854 P.2d 71 (Wyo. 1993).

Term "bodily injury" in liability policy normally precludes damages solely for emotional injury. See *Evens v. Farmers Ins.*, 34 P.3d 284 (Wyo. 2001).

Treating physician may testify that particular condition is accident related using a "differential diagnosis." *Reichert v. Phipps*, 84 P.3d 353 (Wyo. 2004). Medical opinion of causation based upon "differential diagnosis" method is relevant and admissible and assessing the weight and credibility of such an opinion lies solely with the jury as the trier of fact. *Easum v. Miller*, 92 P.3d 794 (Wyo. 2004).

Punitive Damages. Purpose is not to compensate plaintiff but as punishment to defendant to deter others from such conduct in future. *Adel v. Parkhurst*, 681 P.2d 886 (Wyo. 1984). Punitive damages are not favorite of law and are to be allowed with caution within narrow limits. *Town of Jackson v. Shaw*, 569 P.2d 1246 (Wyo. 1977). To recover punitive damages, actor's conduct must amount to aggravation, outrage, malice, or willful and wanton misconduct. See *Cenex, Inc. v. Arrow Gas Service*, 896 F. Supp. 1574 (D. Wyo. 1995). Such damages are based on a defendant's financial worth and several other factors. See, *Farmers Ins. v. Shirley*, 958 P.2d 1040 (Wyo. 1998). Punitive damages may not be recovered from estate of deceased tort-feasor. *Parker v. Artery*, 889 P.2d 520 (Wyo. 1995). To establish punitive damages in bad faith case, it must be shown that insurer intentionally breached its duty and engaged in outrageous conduct. *Farmers Ins. v. Shirley*, 958 P.2d 1040 (Wyo. 1998). Trial court may not grant partial summary judgment as to punitive damages. *Errington v. Zolessi, M.D.*, 9 P.3d 966 (Wyo. 2000). Not abuse of discretion to enter judgment as matter of law denying punitive damages awarded by jury when such damages not sup-



ported by facts and law presented. *Workman v. Carver*, 87 P.3d 1246 (Wyo. 2004).

Collateral Source Rule. This Rule applies in Wyoming to preclude evidence of payment from collateral sources. *Wheatland v. McGuire*, 562 P.2d 287 (Wyo. 1977); *Banks v. Crowner*, 694 P.2d 101 (Wyo. 1985). Doctrine does not apply in condemnation proceedings. *Miller v. Campbell County*, 901 P.2d 110 (Wyo. 1995).

Statutory Caps on Awards. Apply only on claims against governmental entities, limited to \$250,000 per claimant or \$500,000 per occurrence unless insured in excess of such amount. W.S. §1-39-118 (a). Claims against governmental health care providers limited to \$1,000,000 per occurrence. W.S. §1-39-110 (b).

Speculative Damages. Remote, uncertain, and conjectured or speculative damages will not be allowed. *Chrysler v. Tudorovich*, 580 P.2d 1123 (Wyo. 1978).

Mitigation of Damages. One who is injured by wrongful act of another must exercise reasonable care and diligence to avoid loss or minimize resulting damage. *Wyoming Ban v. Bonham*, 563 P.2d 1382 (Wyo. 1977); *McWilliams v. Wilhelm*, 893 P.2d 1147 (Wyo. 1995).

Breach of Contract. General rule regarding damages for breach of contract limits award to pecuniary loss sustained. *U.S.A. through FHA v. Redland*, 695 P.2d 1031 (1985). Damages for incidental or consequential losses are recoverable. *JBC of Wyoming v. City of Cheyenne*, 843 P.2d 1190 (Wyo. 1992).

Interest. Recoverable by a party if amount of damages is liquidated. *ANR Production v. Kerr-McGee*, 893 P.2d 698 (Wyo. 1995).

Apportionment of Damages. If jury is unable to apportion liability between a pre-existing condition and the accident caused conditions, the defendant is liable for the entire disability. *Begley v. Craven*, 769 P.2d 892 (Wyo. 1989).

Wyoming follows the "economic loss rule" which bars recovery in tort when a plaintiff claims purely economic loss without injury to person or property. *D&D Transport v. Interline Energy Servs.*, 117 P.3d 423 (Wyo. 2005).

Recovery of Costs. The allocation and recovery of the costs attributable to the defense of claims that were not covered by the policy of insurance is not permitted, so long as one or more of the claims alleged is covered by the insurance policy. The allocation and recovery of costs attributable to the prosecution of a counterclaim belonging to the insured is permitted, without regard to any tactical or strategic justification for asserting the

counterclaim. *Shoshone First Bank v. Pacific Empl. Ins. Co.*, 2 P.3d 510 (Wyo. 2000).

Loss of Consortium. Minor child has independent claim for loss of parental consortium. *Croft v. Hermes*, 797 P.2d 599 (Wyo. 1990). Wife is entitled to claim for loss of consortium for injury to husband. *Weaver v. Mitchell*, 715 P.2d 1361 (Wyo. 1986). Spouse's claim for loss of consortium is subject to per person liability limits available to injured spouse as such claim is derivative. *National Farmers v. Zuber*, 824 F. Supp. 1017 (D. Wyo. 1993). Damages for loss of consortium are not available when spouse's injuries are merely pecuniary. *Verschoor v. Mountain West*, 907 P.2d 1293 (Wyo. 1995).

Damages recoverable for misappropriation of trade secrets and confidential information. *Briefing.com v. Jones*, 126 P.3d 928 (Wyo. 2006).

See *Vroman v. Town & Country Credit Corp.*, 158 P.3d 141 (Wyo. 2007) for damages related to negligence in writing mortgage.

DEATH

Abatement and Survival. Most causes of action including those for injuries to person, to real or personal property or deceit or fraud survive. W.S. §1-4-101. Actions or proceedings do not abate except those for libel, slander, malicious prosecution, assault, assault and battery, nuisance or against a justice of peace for misconduct in office. W.S. §1-38-102.

Action for Wrongful Death. W.S. §1-4-102.

Damages. Such damages, pecuniary and exemplary, as deemed fair and just. Every person for whose benefit action is brought must prove his respective damages, including loss of probable future companionship, society and comfort. W.S. §1-38-102 (c). Pain and suffering of decedent not proper elements of damage. *Parsons v. Roussalis*, 488 P.2d 1050 (Wyo. 1971). Nor are grief, anguish or mental suffering of survivors. *Coliseum Motor v. Hester*, 43 Wyo. 298, 3 P.2d 105 (Wyo. 1931); but *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986); and *Sims v. Wyoming General Motors*, 751 P.2d 357 (Wyo. 1988) indicates possible recovery for negligent infliction of emotional distress. Each person claiming loss is entitled to prove and recover his or her individual damage. *Jordan v. Delta Drilling Co.*, 541 P.2d 39, 78 A.L.R.3d 1215 (Wyo. 1975); *Knowles v. Corkill*, 51 P.3d 859 (Wyo. 2002). There is no presumption that children of deceased parent are entitled to at least nominal damages. *Id.*

Parties in Interest. Only decedent's personal representative may bring or defend action. *Ashley v. Read Constr.*, 195 F. Supp. 727 (D. Wyo. 1961); *Wetering v.*



Eisele, 682 P.2d 1055 (Wyo. 1984); *Parker v. Artery*, 889 P.2d 520 (Wyo. 1995). Beneficiaries limited to spouse, children, grandchildren, parents, brothers, sisters, grandparents, uncles, aunts and cousins. *Butler v. Halstead*, 770 P.2d 698 (Wyo. 1989). Administrator of estate of decedent who died following surgery not entitled to recover under both survival statute and wrongful death statute. *Parsons v. Roussalis, supra*. Survival statutes permit personal representatives of deceased to prosecute any claims for personal injury deceased would have had but for death. Damages under survival statute limited to those recoverable for wrongful death. Recovery under survival statute subject to disposition for payment of debts, but not so for recovery under wrongful death statute. *Deherrera v. Herrera*, 565 P.2d 479 (Wyo. 1977). Personal injuries resulting in death must be brought as wrongful death action and not a survival action. *Robinson v. Pacificorp*, Slip. Op. 98-365.

Defendant in wrongful death action cannot intervene in probate action as a matter of right and does not have standing to challenge appointment of personal representative. *Halliburton Inc. v. Gunter*, 167 P.3d 645 (Wyo. 2007).

Wrongful death triggers the “per person” not “per occurrence” limits under a liability policy regardless of number of claimants. *Farmers Ins. v. Dalheimer*, Slip Op. 98-111.

Defendant will be liable for a suicide when he intentionally commits a tort which causes emotional or psychic illness which is a substantial factor in bringing about the suicide. *R.D. v. W.H.*, 875 P.2d 26 (Wyo. 1994). A defendant may be liable for both wrongful death damages and damages for negligent infliction of emotional distress in certain circumstances. *Id.* See also “DAMAGES.” Wyoming recognizes “borrowed-servant” doctrine for purposes of wrongful death action, but operator, partner and company not liable under doctrine for death of employee of independent contractor. *Franks v. Independent Production Co.*, 96 P.3d 484 (Wyo. 2004).

Statute of Limitations. Action must be commenced within two years after death of decedent. W.S. §1-38-102 (d). A limited exception exists if the identity of the decedent is not known. *Corkill v. Knowles*, 955 P.2d 438 (Wyo. 1998). Two year statute of limitations is condition precedent to bringing a lawsuit and discovery rule cannot extend the statute. *Robinsin v. Pacificorp, supra*. Wrongful death action is derivative of underlying action that could have been brought by decedent during his lifetime, potentially foreclosing wrongful death based on running of underlying statute of limitations. *Edwards v. Fogarty*, 962 P.2d 879 (Wyo. 1998).

Where action is brought against a deceased defendant, a claim by the plaintiff must first be submitted against estate or the action will be barred. *Scott v. Scott*, 918 P.2d 198 (Wyo. 1996). However, personal representative must give plaintiff statutory notice that estate admitted to probate. *Harris v. Taylor*, 969 P.2d 142 (Wyo. 1998). There is presumption that decedent was exercising due care unless there is evidence to the contrary. *Jones v. Schabron*, 113 P.3d 34 (Wyo. 2005).

Unexplained Absence. Presumption of death is raised after unexplained absence of seven years. W.S. §2-7-101.

Uniform Simultaneous Death Act. W.S. §§2-13-101 through 2-13-107.

DISABILITY

Total and permanent disability for purposes of disability benefits under a group life insurance contract discussed in *Metropolitan v. Harvey*, 54 Wyo. 501, 93 P.2d 930 (1939).

Permanent partial disability, permanent total disability and temporary total disability for Workers’ Compensation defined. W.S. §27-14-102 (a) (xv), (xvi), (xviii). See “WORKERS’ COMPENSATION.”

Pre-judgment interest awarded from time application for disability benefits is made and not from date of denial. *Caldwell v. Life Ins. Co.*, Docket 00-3256 (10th Cir. 2002).

Uniform Disability Policy Provisions Act. Wyoming has adopted the Uniform Disability Policy Provisions Law. W.S. §§26-18-101 through 136. See also W.S. §§26-19-101 through 112 as relates to group and blanket disability insurance.

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables; “AUTOMOBILES.”

Section 31-9-202, W.S. §1977 provides for the suspension of driver’s license for failure to provide proof of financial responsibility following accident. As required by §31-10-101, all policies of insurance insuring against loss resulting from liability for bodily injury or death arising out of ownership, maintenance, or use of a motor vehicle, shall not be issued unless coverage is provided therein with limits provided by §31-9-102 (a) (xi) for damages resulting from owners or operators of uninsured motor vehicles, unless coverage is rejected by the insured. Limits are \$25,000/50,000/20,000.



FIRE INSURANCE

Arson. Insurer raising defense of arson must prove by a preponderance of evidence. *Connecticut Fire v. Fox*, 361 F.2d (10th Cir. 1966). The policy need not specifically contain arson exclusion as arson is not an "accidental loss." *Hatch v. State Farm*, 930 P.2d 382 (Wyo. 1997).

Assignment. Policies assignable or not assignable as provided by policy terms. W.S. §26-15-122.

Chattel Mortgages. Where loan secured by security agreement and financing statement covering insured chattels, creditor need not be beneficiary under casualty insurance to have claim on insurance proceeds paid for fire damage. *Downing v. Stiles*, 635 P.2d 808 (Wyo. 1981).

Contract-Policy. Binder. No specific form required for binder. Can be oral or written and need not contain all terms of insurance contract. *Hursh Agency v. Wigwam*, 664 P.2d 27 (Wyo. 1983); but shall include all usual terms of policy. W.S. §26-15-119 (a). Binder valid for shorter of 90 days or issuance of policy, but may be extended beyond 90 days with written approval of insurance commissioner. W.S. §26-15-119 (b) & (c).

Cancellation. Policy cancelable only for non-payment of premium, material misrepresentation of fact, substantial change in risk assumed or substantial breaches of contractual duties, conditions or warranties. Must be by written notice stating precise reason not less than ten days early for non-payment of premium or 45 days early for other causes. W.S. §26-35-202. For non-renewal must give written notice at least 45 days prior to expiration or anniversary date stating precise reason for non-renewal. W.S. §26-35-203. For renewal on less favorable terms or at higher rates must be written notice of terms and premium due given 45 days prior to expiration or anniversary date. W.S. §26-35-204.

Standard Provisions. Policies must contain standard or uniform provisions unless substitute provisions are approved by Insurance Commissioner. W.S. §26-15-112.

Damages. Proof of Loss. Policy requirement of immediate notice of loss is waived by insurer's retention of proofs of loss and sending adjuster to examine loss. *Connecticut Fire v. Fox*, 361 F.2d (10th Cir. 1966); *Howrey v. Star*, 46 Wyo. 409, 28 P.2d 477 (1934). Payment of part of amount due under policy effects waiver of preliminary proofs of loss. *Id.*

With replacement cost insurance if insured spends less for replacement than the actual cash value, insured is only entitled to what is actually spent. *Colorado Casualty Ins. Co. v. Sammons*, 157 P.3d 460 (Wyo. 2007).

Excessive Policies. Purchase of insurance on property which, with existing insurance, exceeds fair value or interest insured is prohibited, except if insurance of replacement value. W.S. §26-23-101.

GUEST CASES

See "AUTOMOBILES."

HOSPITALS

Subject to bylaws of hospital, medical staff committees have access relating to condition and treatment of patient for several purposes including control over medical staff. W.S. §35-2-609. Reports and findings of hospital staff committees are confidential and privileged. W.S. §35-2-609. This privilege does not extend to the documents reviewed by the committee or prohibit access to information relevant to doctor's accreditation. *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987). Hospital may be held liable for failure to exercise skill maintained by other reputable hospitals in the extension and continuation of staff privileges to physicians. *Sharsmith v. Hill*, 764 P.2d 667 (Wyo. 1988).

Physician does not have unqualified right to practice his profession in public hospitals as long as hospital is not arbitrary, capricious or unreasonable. *Garrison v. Board of Trustees*, 795 P.2d 190 (1990). Staff have no claim against hospital or employee for denial of privileges, suspension or expulsion so long as conduct in good faith. W.S. §35-2-910.

For limitations of release of patients medical records, see W.S. §§35-2-605 through 35-2-617.

For burden of proof as relates to standard of care for health care providers, see W.S. §1-12-601.

Hospital and employees not liable for refusal to provide emergency services if such refusal does not result in permanent illness or injury. W.S. §35-2-115. Emergency assistance (limited immunity) W.S. §1-1-120. See also "MALPRACTICE."

HUSBAND AND WIFE

See Law Digest Tables.

Community Property. Wyoming is not a community property state. W.S. §20-2-114.

Interspousal Immunity. Doctrine of interspousal immunity in tort action has been abrogated in Wyoming. *Tader v. Tader*, 737 P.2d 1065 (1987). One spouse can sue the other for intentional infliction of emotional distress which occurs in marital setting. However, such must be brought as a separate action and cannot be

joined with a divorce proceeding. *McCulloh v. Drake*, 2002 WL 501131 (Wyo. 2001).

Loss of Consortium. Spouse has cause of action for loss of consortium for injuries to her husband, reduced by percentage of fault attributable to injured spouse. *Weaver v. Mitchell*, 715 P.2d 1361 (1986); *Sheeler v. Trans-Chem, Inc.*, 520 F. Supp. 117 (D.C. Wyo. 1981). See "DAMAGES." Spouse has cause of action for loss of consortium resulting from third persons negligent infliction of emotional distress upon other spouse. *Gates v. Richardson*, 719 P.2d 193 (Wyo. 1986). Loss of consortium claim subject to per person limits since claim is derivative. *National Farmers Union v. Zuber*, 824 F. Supp. 1017 (Wyo. 1993).

INFANTS

See "AUTOMOBILES, Age"; "LIMITATION OF TIME FOR COMMENCEMENT OF ACTION"; and "NEGLIGENCE."

Unemancipated minor may not sue parent in negligence, unless sanctioned by statute, or for wrong so clearly invading rights of minor that discord and disorganization would result in family unit. *Ball v. Ball*, 73 Wyo. 29, 269 P.2d 302 (1954); *Oldman v. Bartshe*, 480 P.2d 99 (1971); *But see Tader v. Tader*, 737 P.2d 1065 (1987), suggesting abrogation of inter-family immunity is result of that decision. Wyoming's compulsory insurance statute in automobile cases abrogates intra-family immunity up to and including the minimum requirements of the financial responsibility act. *Allstate v. Wyoming Ins. Dept.*, 672 P.2d 810 (Wyo. 1983). Parental immunity is abrogated in action for ordinary negligence in operation of motor vehicle, which is not deemed an essential parental activity. *Dellapenta v. Dellapenta*, 838 P.2d 1153 (Wyo. 1992). Minor children have an independent claim for loss of parental consortium resulting from injuries tortiously inflicted by third person. *Nulle v. Gillette*, 797 P.2d 1171 (Wyo. 1990). Tort of intentional interference with parental relations requires compelling or inducing child to leave parents and refusing to return the child. *Hoblyn v. Johnson*, 55 P.3d 1219 (Wyo. 2002). Parent cannot deprive child of child's property. *Id.*

Violation of Law. It is prima facie evidence of negligence for infant under age of fifteen years to operate motor vehicle.

Parental relationship itself does not make parent liable for torts of children. *Daniels v. Carpenter*, 62 P.3d 555 (Wyo. 2003). A social host, even when acting in loco parentis is not always liable for torts of infant social guests. *Id.*

Parents of a child under age of 17 generally are liable for property damage up to \$2,000 and does not limit

other liability which can be established. W.S. §14-2-203 (1991).

INLAND MARINE

See generally W.S. §§26-1-101 through 26-33-111.

LIABILITY INSURANCE

Generally, see W.S. §§26-1-101 through 26-33-111.

Cancellation. As to cancellation requirements, conditions, and restrictions see, W.S. §§26-35-101 to 204.

Duty of good faith attaches to insurance agreement. *Compass Ins. v. Cravens*, 748 P.2d 724 (1987). Tort of violation of good faith and fair dealing is viable even if express terms of insurance contract are honored by insurer. Unreasonable or unfair behavior, including oppressive and intimidating claims practices, to gain an unfair advantage is actionable. *Hatch v. State Farm*, 842 P.2d 1089 (Wyo. 1992). Duty of good faith and fair dealing runs from insurer to insured. First party bad faith will lie when insurer refuses to pay claim for policy benefits, when knowingly or recklessly denying benefits without reasonable basis, or if it fails to advise of benefits available to insured. *Herrig v. Herrig*, 844 P.2d 487 (Wyo. 1992). There is cause of action for both first party and third party bad faith. *Id. State Farm v. Shradler*, 882 P.2d 813 (Wyo. 1994). See *Cathcart v. State Farm*, 123 P.3d 579 (Wyo. 2005). Insured need not prevail on contract claim to prevail on breach of good faith claim. *Id.* Third party bad faith will lie if insurer fails to settle a third party claim within policy limits and excess judgment obtained. *Id.* There can be no cause of action by insured for bad faith failure to settle prior to entry of a judgment in excess of policy limits. *Jarris v. Farmers Ins. Co.*, 948 P.2d 898 (Wyo. 1997). There is no cause of action until there has been an entry of judgment in excess of policy limits. *Gainsco Ins. v. Amoco*, 53 P.3d 1051 (Wyo. 2002). If a "double-insured case"; i.e., tortfeasor and injured party both insured by same insurer under different policies, no duty of good faith and fair dealing extends to injured insured asserting claim against insured tort-feasor. *Id.* Uninsured motorist coverage provides first party coverage. *State Farm v. Shradler*, 882 P.2d 813 (Wyo. 1994). Settlement by insurance company is permitted by the policy and cannot form a claim for bad faith. *Elworthy v. Hawkeye Inc., Co.*, Docket 05-8009 (10th Cir. 2006).

In automobile liability policy, underinsured provisions of injured party's policy not applicable where tortfeasor had same amount of liability coverage as the injured party had underinsured coverage. *Farmer's Ins. v. District Court*, 844 P.2d 1099 (Wyo. 1993). Consent to



sue clause is against public policy and not enforceable. *State Farm v. Shrader*, 882 P.2d 813 (Wyo. 1994).

Filing of declaratory judgment action is not evidence of bad faith. *ISLIC v. University of Wyoming*, 850 F. Supp. 1059 (Wyo. 1994). Conduct of defense counsel cannot form basis for bad faith claim. *Id.*

Where insurer defending under reservation of rights and files a declaratory judgment action as to coverage, insured's assignee is not barred from recovery from insurer on a stipulated liability to which insurer did not consent and insured not personally liable. Likewise, such does not violate cooperation clause. *Insurance Co. of North Am. v. Spangler*, 881 F. Supp. 539 (D. Wyo. 1995). However, if insurer is not defending under a reservation of rights, an assignment and stipulated judgment violates cooperation and consent to settlement provisions of the policy. *State Farm v. Winsor*, 5 F. Supp. 2d 1258 (D. Wyo. 1998).

Acceptance or Rejection of Claims. Claim under property or casualty insurance policy shall be rejected or accepted and paid within forty-five (45) days after receipt of claim and supporting bills. Reasonable sum for attorney's fees and interest at 10% per year may be recovered by insured for unreasonable rejection of claims. W.S. §26-15-124. Unfair claims or settlement practices, W.S. §26-13-124. Insurer owes duty of good faith not to unreasonably deny claim, breach of such duty gives rise to independent tort action. Question of bad faith governed by objective standard of whether validity of denied claim was fairly debatable. Punitive damages available upon showing of willful and wanton misconduct by insurer. *McCullough v. Golden Rule*, 789 P.2d 855 (Wyo. 1990).

Insurers writing property and casualty insurance are required to provide certain claims information to insureds within thirty (30) days of written request W.S. §26-3-131.

As to contribution among joint tort-feasors see "NEGLIGENCE."

Insured Obligation of Cooperation. To constitute breach of cooperation clause, insured's non-cooperation must be substantial, material, and prejudicial to insurer. *Iowa Home Mutual v. Fulkerson*, 255 F.2d 242 (10th Cir. 1958). Failure to give reasonable prompt notice of accident may constitute failure to cooperate. *State Farm v. Hollingsworth*, 668 F. Supp. 1476 (D.C. Wyo. 1977).

Duty to Defend. If complaint alleges facts that potentially state case within liability insurance coverage of defendant, insurer of defendant is obligated to defend. *First Wyoming Bank v. Continental*, 860 P.2d 1064 (Wyo. 1993); *Reise v. Union*, 870 P.2d 1066 (Wyo.

1994); *Boston Ins. Co. v. Maddux Well Svc.*, 459 P.2d 777. Duty to defend is broader than duty to indemnify. *Aetna Ins. v. Lythgoe*, 618 P.2d 1057 (Wyo. 1980). Duty extends to excluded matters, such as intentional acts of assault if also allegations of negligence. *Continental, supra. Alm v. Hartford Fire Ins. Co.*, 269 P.2d 216 (Wyo. 1962). Insurer who denies coverage and duty to indemnify may not intervene in subsequent action between third-party and insured. *State Farm v. Colley*, 871 P.2d 191 (Wyo. 1994). Intentional conduct, even if under mistaken belief such is permissible, is still "intentional" and outside the coverage of the policy. *Matlack v. Mt. West Farm Bureau*, 44 P.3d 73 (Wyo. 2002).

Waiver and estoppel cannot extend coverage provided by policy to claims expressly excluded from coverage. *Security Ins. Co. v. Wilson*, 800 F.2d 232 (10th Cir. 1986). Wyoming does not follow the "reasonable expectations" doctrine if policy is unambiguous. *St. Paul Fire & Marine v. Albany County Sch. Dist. No. 1*, 763 P.2d 1255 (Wyo. 1988). Rule of construing terms against insurer not applicable if language clear and unambiguous, in which event terms are to be given their ordinary and usual meaning. *Id.* General principles of construction to be followed in construing insurance agreement. *Commercial Union Ins. v. Stamper*, 732 P.2d 534 (Wyo. 1987).

CGC insurer has no duty to explain or identify gaps in coverage or to warn about exclusions or limitations absent special circumstances. *Sinclair Oil v. Republic Ins.*, 967 F. Supp. 462 (D. Wyo. 1997).

Notice. Insured's eight month delay in notifying carrier of passenger's injury is unreasonable, and no claim can be made unless insured reasonably believes there is no bodily injury. *State Farm v. Hollingsworth*, 668 F. Supp. 1476 (D. Wyo. 1987). Purpose of notice requirement is to enable insurer to carry out timely investigation to verify liability, prevent fraud, and mitigate damages. *State Farm Mut. Auto Ins. Co. v. Hollingsworth, supra.* Giving of notice held condition precedent to insurer's liability. *Phelan v. New Amsterdam Cas. Co.*, 5 F. Supp. 810 (D. Wyo. 1967).

Damage caused by vandals was an occurrence under liability policy, which defined term as event neither expected nor intended by insured. *Compass Ins. v. Cravens, Dargen*, 748 P.2d 724 (Wyo. 1988); *but see St. Paul Fire & Marine v. Campbell County Sch. Dist.*, 612 F. Supp. 285 (D.C. Wyo. 1985), wherein publication of satirical cartoon was an intentional act not within definition of occurrence under general liability policy. Policy providing coverage for uninsured motorists for injuries arising out of the use of uninsured motor vehicle does not extend to instrumentalities other than motor vehicles,



such as guns or knives during an intentional criminal assault. *Ulrich v. USAA*, 839 P.2d 942 (Wyo. 1992).

Punitive Damages. Liability policy provides coverage for punitive damage unless specifically excluded. *Sinclair Oil Corp. v. Columbia Cas. Co.*, 682 P.2d 975 (Wyo. 1984).

Household exclusion clause in automobile policy void to extent of minimum coverage contained in financial responsibility law as such exclusion is in violation of public policy. *Allstate v. Wyoming Ins. Dept.*, 672 P.2d 810 (Wyo. 1983). Household exclusion is valid if it provides minimum coverage. *Pribble v. State Farm Mut. Auto Ins. Co.*, 993 P.2d 1108 (Wyo. 1997). Fellow employee exclusion is valid. *State Farm v. Dyer*, 19 F.3d 514 (10th Cir. 1995). Home owner who gives gas money to unlicensed child driver is not covered under homeowner's insurance policy based on the automobile exclusion in such policy. *Lawrence v. State Farm*, 133 P.3d 976 (Wyo. 2006).

Where two policies provide primary coverage, both share in damages and defense costs in proportion to coverage provided. *Aetna Cos. v. St. Paul Fire & Marine*, 236 F. Supp. 289 (D. Wyo. 1964). Excess carrier not entitled to defense costs from primary carrier after excess insurer instructs counsel to withdraw, unless shows that services provided were necessary. *St. Paul Mercury v. Pennsylvania Cas.*, 642 F. Supp. 180 (Wyo. 1986). Policy of insolvent insurer, assumed by Wyoming Insurance Guarantee Assoc. is collectible insurance within meaning of permissive user's insurance policy stating that insurance with respect to use of non-owned vehicle is excess over any other collectible insurance. *Wyoming Ins. Guar. v. Allstate Indem.*, 844 P.2d 464 (Wyo. 1992).

Stacking. Wyoming does not permit "stacking" where such would result in windfall to insured. *Ramsour v. Grange Ins. Ass'n*, 541 P.2d 35 (Wyo. 1975). And where not permitted by insurance policy by clearly stated terms it will not be allowed. *Commercial Union v. Stamper*, 732 P.2d 534 (Wyo. 1987). See also "AUTO-MOBILES" and "FINANCIAL RESPONSIBILITY."

Claims Made Policy. Under a "claims made" policy liability is indemnified when claim is made or made and reported to insurer during policy period. *Doctors Co. v. Insurance Corp.*, 864 P.2d 1018 (Wyo. 1993).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Professional negligence actions must be brought within two (2) years of alleged act, error or omission, and in case of minor within eight years of birth or two

(2) years from alleged act, error or omission, whichever is greater. Wyoming recognizes the "continuous care" doctrine for medical professionals and the statute of limitations does not begin to run until termination of care and treatment for the same or related illness or injury. *Juregui v. Memorial Hosp. of Sweetwater County and Joseph J. Oliver, M.D.*, 2005 WY 59 (slip opinion). Wyoming further recognizes "single act" exception to "continuous care" doctrine but it is narrowly construed. *Id.* If alleged act, error or omission was not reasonably discoverable, actions may be brought within two (2) years after discovery. W.S. §1-3-107. This limitation period applies to real estate agents and brokers. *Rawlinson v. Greer*, 64 P.3d 120 (Wyo. 2003). This statute applies to licensed or certified professional or health care services including attorneys, accountants and surveyors. *Mills v. Garlow*, 768 P.2d 554 (Wyo. 1989); *Bredthauer v. Christian, Spring, Seilbach*, 824 P.2d 560 (Wyo. 1991). Such applies to licensed outfitters and hunting guides. *Prokop v. Hockhalter*, 137 P.3d 131 (Wyo. 2006). Decedent's personal representative could not bring action where 2-year statute of limitations on professional negligence had expired at time of decedent's death. Since wrongful death action is derivative of underlying claim. *Edwards v. Fogarty*, 962 P.2d 879 (Wyo. 1998).

Actions for personal injury must be brought within four (4) years from date cause of action arose. Likewise, actions for breach of express or implied warranties must be brought within four (4) years from the date the goods were tendered. *Ogle v. Caterpillar Tractor*, 716 P.2d 334 (Wyo. 1986). In action for emotional injuries to minor based on sexual assault, statute of limitations does not run until plaintiff knows or should know of psychic injuries. *McCreary v. West*, 971 P.2d 974 (Wyo. 1999). See also W.S. §1-3-105 (b) (i), (ii).

Actions for wrongful death shall be commenced within two (2) years after death of deceased. W.S. §1-38-102. Two-year period does not begin to run until identity of deceased is known. *Corkill v. Knowles*, 455 P.2d 438 (Wyo. 1998).

Actions for trespass, conversion, fraud or damage to personal property must be brought in four (4) years. W.S. §1-3-105.

Actions for libel, slander, assault, battery, malicious prosecution or false imprisonment must be brought in one (1) year. W.S. §1-3-105.

Governmental Claims. Actions against a governmental entity or a public employee acting within scope of employment must be presented, in writing to governmental entity within two years. Action must be commenced within one year after date claim is filed. There

are certain exceptions for minors. W.S. §1-39-113 and §1-39-114. Statute of limitations is triggered when injury is discovered, not upon identification of source of injury. See *Rawlinson v. Cheyenne BPU*, 17 P.3d 13 (Wyo. 2000). Service and endorsement requirements of W.S. §1-39-113 and §1-39-114 and Article 16, §7 of the Wyoming Constitution are jurisdictional and action barred absent valid notice to governmental agency. *Beaulieu v. Florquist*, 20 P.3d 521 (Wyo. 2001). See also *Beaulieu v. Florquist*, 86 P.3d 863 (Wyo. 2004); *Bell v. Schell v. DOA*, 101 P.3d 465 (Wyo. 2004); *Wooster v. Carbon County Sch. Dist.*, 109 P.3d 893 (Wyo. 2005); and *Wilson v. City of Alpine, Wyoming*, 2005 WY 57 (Slip Opinion).

Wyoming is a discovery state in which statute of limitations is triggered when plaintiff knows or should know of a cause of action. *Nowotny v. L&B*, 933 P.2d 452 (Wyo. 1997). Statute is not tolled until identity of defendant is discovered. *Id.* Normally statute begins to run at time of injury or damage, even though such is slight, continues to occur or additional damage from the act may result. *Woodard v. Cook Ford*, 927 P.2d 1168 (Wyo. 1996). Incarceration does not toll statute of limitations. *Ballinger v. Thompson*, 118 P.3d 429 (Wyo. 2005).

Parties by contract can establish a shorter statute of limitations. *Nuhome v. Weller*, 81 P.3d 940 (Wyo. 2003). Failure to serve process within time required under rules of procedure prevents complaint from relating back for statute of limitations purposes. Summons must meet all technical requirements. *Hoke v. Motel 6*, 131 P.3d 369 (Wyo. 2006).

In certain circumstances, a party can toll the statute of limitations by using fictitious (John Doe) defendants. *Bush v. Horton Automatic*, 2008 WY 140.

MALPRACTICE

See also “ATTORNEYS”; “HOSPITALS” and “NEGLIGENCE.”

The Wyoming Medical Review Panel act of 2005 (W.S. §9-2-1513 thru §9-2-1523) was created pursuant to Constitutional Amendment. Service of pleadings and computation of time for claims submitted to the Panel are controlled by the W.R.C.P. W.S. §9-2-1516. Each panel consists of two health care providers (preferably in the same field or sub-field of the alleged tortfeasor), two attorneys, and one lay person. W.S. §9-2-1520. Professional malpractice statute of limitations is tolled during submission of claim to panel, and compliance with the Wyoming Medical Review Panel Act of 2005 is jurisdictional prior to filing any court action. W.S. §9-2-1518. Panel hearings must be conducted within the county

where the legal action must be filed pursuant to W.S. §1-5-101 thru §1-5-109. W.S. §9-2-1521. Except as specifically provided within the act, the W.R.E. and Wyoming Administrative Procedure do not apply to the panel review and the panel’s decision is not subject to review. W.S. §9-2-1521. Deliberations and votes of panel are confidential and no panel member can be held liable for actions within the proceeding or may be called as witness to testify related to deliberations, discussions, decisions or internal meetings of the panel. §9-2-1522, §9-2-1518, and §9-2-1523. The decision of the panel is not binding on any party and may be utilized, along with any submitted materials, in any subsequent litigation at the discretion of the trial judge and in accordance with the W.R.E. W.S. §9-2-1522.

Normally, testimony of qualified expert necessary to establish reasonable probability that conduct violated standard of care and that such violation proximately caused injury. *Harris v. Grizzle*, 625 P.2d 747 (Wyo. 1983); *Meyer v. Mulligan*, 889 P.2d 509 (Wyo. 1995). Except where asserted negligence consists of conduct so obviously wanting in reasonable medical skill and prudence that it may be adjudged even by laymen. *Roybal v. Bell*, 778 P.2d 108 (Wyo. 1989). The defendant-physician’s own affidavit may be sufficient to support summary judgment motion. *Jacobson v. Cobbs*, 160 P.3d 654 (Wyo. 2007). Jury may not be instructed that physician presumed to have acted with due care if adequately instructed regarding burden of proof. Physician patient privilege waived when patient places physical and mental condition into contest. But, discovery of treating physician regarding expert opinions may not be had if treating physician not designated as expert, not employed in anticipation of litigation, and defendants had numerous other experts to support their position. *Wardell v. McMillan*, 844 P.2d 1052 (Wyo. 1992).

Duty of physician to warn patient of possibility of adverse result depends on circumstances of case and general practice of profession. *Govin v. Hunter*, 374 P.2d 421 (Wyo. 1962). Standard of care requires exercise of skill, diligence, and knowledge and must apply the means and methods which would reasonably be exercised and applied under similar circumstances by members of their profession in good standing and in the same line of practice. *Siebert v. Fowler*, 637 P.2d 255 (Wyo. 1981). Physician is required to disclose only such risks that reasonable practitioner of like training would have disclosed in the same or similar circumstances and determination of standard of care or duty imposed upon defendant in medical malpractice case is a matter of law and is not written province of jury. *Roybal v. Bell*, 778 P.2d 108 (Wyo. 1989). No cause of action for wrongful birth recognized. Parents can recover, upon proof of fault and causation, some items of damages for “wrong-



ful life.” *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982).

Psychologist retained by employer to examine employee owes employee no duty of care. *Erpelding v. Lisek*, 71 P.3d 745 (Wyo. 2003).

“Loss of Chance” is cause of action and based on 1) the patient has been deprived of the chance for successful treatment and 2) the decreased chance for successful treatment results from the doctor’s negligence. *McMackin v. Johnson County*, 73 P.3d 1094 (Wyo. 2003). “Loss of Chance” doctrine is not precluded or contrary to Wyoming’s Wrongful Death Statute (W.S. §1-38-101) nor the Governmental Claims Act (W.S. §1-39-109 and 110) so long as timely and procedurally asserted. *McMackin v. Johnson County Healthcare Ctr.*, 88 P.3d 491 (Wyo. 2004). “Loss of Chance” doctrine does not redact comparative fault and the claimant’s “loss of chance” must be substantial cause of the lost chance to survive. *Id.*

Hospitals. Hospitals do not enjoy charitable immunity. *Lutheran Hospitals v. Yepsen*, 469 P.2d 409 (Wyo. 1970). Hospital has legal duty to exercise that degree of care and skill usually exercised or maintained by other reputable hospitals in extension and continuation of medical staff privileges. *Greenwood v. Wierdsma*, 741 P.2d 1079 (Wyo. 1987).

Accountants - W.S. §33-3-201, provides for and limits liability of accountants who prepare, examine or audit financial documents in certain circumstances. Applies to accounting services performed after July 1, 1995.

Architects - See *Garmon v. Williams*, 912 P.2d 1121 (Wyo. 1996). The professional judgment rule applies. Expert testimony by plaintiff is required to show standard of care and breach.

Legal. See “ATTORNEYS.”

Professionals, other than physicians/hospitals, are treated within the context of the standard of care defined for medical/hospital malpractice.

Wyoming Board of Certified Public Accountants has authority to require accountants to retain personal liability for services even when acting as shareholder in corporation. *Porter, Muirhead v. State*, 844 P.2d 479 (Wyo. 1992).

NEGLIGENCE

See Law Digest Tables.

See “AUTOMOBILES.”

Age. Negligence and contributory negligence of infants discussed. *Ramirez v. City of Cheyenne*, 241 P. 710; *Blakeman v. Gopp*, 364 P.2d 986 (Wyo. 1961).

Affirmative Defenses. Defenses such as assumption of risk, last clear chance, open and obvious danger, etc. are dealt with by comparative negligence. W.S. §1-1-109; *Britton v. Booth*, 601 P.2d 532 (Wyo. 1982); *Danulovich v. Brown*, 593 P.2d 187 (Wyo. 1979). In negligence action, because defense of Act of God is superfluous and inappropriate, instruction pertaining to defense of Act of God equally superfluous and inappropriate. *Martinez v. City of Cheyenne*, 791 P.2d 949 (Wyo. 1990). Alleged tortfeasor cannot compel inclusion of all possible claimants into singular action as each claimant is not an indispensable party to the other’s cause of action. *Grove v. Pfister*, 110 P.3d 275 (Wyo. 2005).

Assumption of Risk. A person who takes part in any sport or form of recreation assumes the inherent risk of injury and all legal responsibility for damage, injury or death to himself or to others that results in such inherent risk. W.S. §§1-1-121 through 1-1-123. A similar limitation of liability applies to rodeo participants held by certain organizations. W.S. §1-1-118. Recreational use statute limits liability under certain circumstances. W.S. §§34-19-101 through 34-19-106. Recreational use statute does not apply to sale of product, *i.e.*, a horse. *Keller v. Merrick*, 955 P.2d 876 (Wyo. 1998). Assumption of Risk otherwise not a complete defense. See affirmative defenses above.

Limited Liability. Generally, board members of non-profit corporations and governmental boards are immune. W.S. §1-23-107. Volunteers of non-profit corporations are generally immune except for intentional acts or operating motor vehicles. W.S. §1-1-125. Persons rendering emergency assistance are exempt from civil liability. W.S. §1-1-120. Volunteer physicians under Department of Health immune. W.S. §1-1-120.

Attractive Nuisance. See *Holland v. Weyher/Livsey*, 651 F. Supp. 409 (Wyo. 1987). Attractive nuisance doctrine to be strictly construed. Doctrine applies and possessor of land is liable to child for harm caused by artificial condition if knows or should have known that child likely to trespass and condition poses unreasonable risk of harm. *Thunderhawk v. Union Pacific R. Co.*, 844 P.2d 1045 (Wyo. 1992).

Comparative Fault. In *Board of Comm’rs of City of Campbell v. Ridenour*, 623 P.2d. 1174 (Wyo. 1981) court held that plaintiff’s negligence must be compared with that of each tort-feasor; recovery will be allowed if plaintiff found less negligent than any one joint tort-feasor, rather than comparing plaintiff’s fault with aggregate negligence of all tort-feasors, whether or not

those tort-feasors are all parties to action. Non-party tort-feasors, including immune government agency or state, may be included for consideration of fault upon the verdict form as long as competent proof of the non-party actor's fault is presented. *Pinnacle Bank v. Villa*, 100 P.3d 1287 (Wyo. 2004). The fault of an intentional tort-feasor shall be compared with fault of negligent tort-feasor. See *Teton Cty. Sheriff's Dept. v. Bassett*, 8 P.3d 1079 (Wyo. 2000).

Effective July 1, 1994 comparative fault will apply to an action premised on negligence, strict liability, products liability and breach of warranty. Such also includes defenses based on assumption of risk, misuse or alteration of a product. W.S. §1-1-109. Similarly, for all causes arising after June 11, 1986, amendments to W.S. §1-1-109 have eliminated joint and several liability among joint tort-feasors and repealed W.S. §§1-1-110 through 1-1-113 on contribution. Under amended statute, each tort-feasor is liable only for that proportion of total judgment as percentage of fault which has been attributed to him. Negligence of plaintiff is to be compared to negligence of all defendants. *But see Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d 561 (Wyo. 1992) and *Diamond Surface v. Cleveland*, 963 P.2d 996 (Wyo. 1998), allowing a negligent actor to seek indemnification for strict liability, warranty, and comparative partial indemnity. See also 1-1-109 (1994).

Negligence. Generally what a reasonable person would do in the same or similar circumstances WCPJI 3.04. The failure to comprehend or recognize danger may constitute negligence. *Furman v. REA*, 869 P.2d 136 (Wyo. 1994).

Governmental Immunity. Limitation of Damages. State of Wyoming, its political subdivisions and their employees are subject to tort liability for number of specified activities by virtue of Governmental Claims Act, W.S. §1-39-101 *et seq.* Strict liability does not apply to governmental entity. *Ableseth v. City of Gillette*, 752 P.2d 430 (Wyo. 1989). Maximum liability is \$250,000 per claimant and \$500,000 per occurrence. No liability for claims of \$500 or less. If governmental entity has insurance with higher limits, or covering liability not authorized by Act, liability is extended to coverage, unless higher coverage is stated in policy to be for protection against losses under federal law. W.S. §1-39-118 (as amended 1986). Maximum liability of government entity for negligent health care by government employees is \$1,000,000 per claimant and occurrence. W.S. §1-39-110 (as amended 1988). Maximum liability for government employed physician is \$1,000,000. W.S. §1-39-118 (1990). Governmental immunity for design, construction, and maintenance of highways comports with constitutional requirements. *White v. State*, 784 P.2d 1313

(Wyo. 1989). Claims based on traffic control devices and improper signs are barred under Governmental Claims Act. *Sponsel v. Park County*, 126 P.3d 105 (Wyo. 2006). No immunity in negligently conducting maintenance activities. *Romero v. Hoppal*, 855 P.2d 366 (Wyo. 1993). Law enforcement officers do not have qualified immunity under Governmental Claims Act for tortious conduct while acting within scope of employment. W.S. §1-39-112. See *Teton Cty. Sheriff's Dept. v. Bassett*, 8 P.3d 1079 (Wyo. 2000). Notice of claim generally must be filed with governmental entity within two years of alleged act, error or omission and lawsuit must be filed within one year thereafter. There are certain exceptions for minors. W.S. §§1-39-113 to 1-39-114. Governmental claim must be signed by clamant under oath and under penalty of perjury. Before co-employee tort litigation can be commenced between employees of a governmental entity, there must be a determination of waiver of immunity. *Harbel v. Wintermute*, 883 P.2d 359 (Wyo. 1994). See "WORKERS' COMPENSATION" *infra*.

Health Care Providers. See "MALPRACTICE."

Imputed Negligence. Driver's negligence cannot be imputed to passenger unless conduct of passenger has material bearing upon drivers operation of car at time of accident. *Martinez v. Union Pacific*, 714 F.2d 1028 (10th Cir. 1983); *Edwards v. Harris*, 397 P.2d 87 (Wyo. 1964). Negligence of bailee cannot be imputed to bailor and such rule is not altered by husband and wife or parent and child relationship, but can be by employer-employee, or other principal-agent relationship. *Wilcox v. Herbst*, 75 Wyo. 289, 295 P.2d 755 (Wyo. 1956). Negligence of operator cannot generally without more be imputed to joint owner of auto. *Moneyham v. Kays*, 405 P.2d 267 (Wyo. 1965). Generally, an employer is not responsible for acts of employee when employee is off duty. *Killian v. Caza Drilling*, 131 P.3d 975 (Wyo. 2006).

Enterprise liability is not recognized in Wyoming. *Hamilton v. Natrona County*, 901 P.2d 381 (Wyo. 1995).

Joint and Several Liability. See discussion under Comparative Negligence above.

Last Clear Chance. See discussion under Affirmative Defenses above.

Liquor Liability/Dram Shop Act. W.S. §12-8-301 has been amended so that no person providing liquor to another is liable for damages caused by intoxicated person if liquor was provided legally and not otherwise in violation of Title 12 Wyoming Statutes. This statute is constitutional and imposes immunity for alcohol provider. *Greenwalt v. Ram Restaurant*, 71 P.3d 717 (Wyo. 2003). Tavern keeper has no duty to protect intoxicated

patron from injuries he causes to himself. *White v. Ha, Inc.*, 782 P.2d 1125 (1989). As to bar fights, see *Rader v. Sugarland Enterprises, Inc.*, 149 P.3d 702 (Wyo. 2006).

Livestock. Normally the issue is whether owner of livestock is negligent in allowing animals to escape on to a public road. *Roitz v. Kidman*, 913 P.2d 431 (Wyo. 1996). Owner of livestock has no duty to prevent animals from entering highway if posted as open range. *Anderson v. Two Dot Ranch*, 49 P.3d 1011 (Wyo. 2002). Statute that requires railroads to maintain fences on each side of track to prevent livestock from getting on track does not create duty of care to motorist who hits a cow that was on road due to a lack of fence. *Long v. Daly*, 156 P.3d 994 (Wyo. 2007).

Dog Bites. In dog bite cases, knowledge of dog's dangerous propensities is not required in a negligence case. If owner knows of dog's dangerous propensity the owner is strictly liable for harm done. *Borns v. Voss*, 70 P.3d 262 (Wyo. 2003).

Negligence per se. Whether violation of a statute is negligence per se depends on all circumstances. *Short v. Spring Creek Ranch*, 731 P.2d 1105 (Wyo. 1987).

Premises Liability. Distinction between tort claimants on basis of status as licensee or invitee is abandoned and except as to trespassers, rule is one of reasonable care under the circumstances. *Clarke v. Beckwith*, 858 P.2d 293 (Wyo. 1993); *Downen v. Sinclair Oil*, 887 P.2d 515 (Wyo. 1994). In slip and fall case plaintiff bears burden of establishing what caused the fall and speculation is not permitted. *Andersen v. Duncan*, 968 P.2d 440 (Wyo. 1998). Owners failure to repair a dangerous condition of which he has notice is an intervening cause to relieve contractor of liability for negligent construction. *Lynch v. Norton*, 861 P.2d 1095 (Wyo. 1993). See *Berry v. Tessman*, 170 P.3d 1243 (Wyo. 2007). Landowner does not have a duty to inspect property for dangerous conditions. To impse liability, landowner must know or have reason to know of a hazard. *Hendricks v. Hurley*, 184 P.3d 680 (Wyo. 2008). Similarly, there is no claim for negligent supervision unless the landowner knows or has reason to know of danger. *Id.* Duty to licensees and invitees may extend to off premises conditions. *Mosterti v. CBL & Assoc.*, 741 P.2d 1090 (Wyo. 1987). *Contra, Holland v. Weyher/Livsey*, 651 F. Supp. 409 (D. Wyo. 1987). General contractor who retains control over manner in which work is performed or assumes affirmative duties as to safety, owes employees of independent contractors a duty of reasonable care. *Abraham v. Andrews*, 893 P.2d 1156 (Wyo. 1995). See *Franks v. Independent Production Co.*, 96 P.3d 484 (Wyo. 2004). Landowner not obligated to protect employees of independent contractor from hazards which are incidental to or a part of their work. *Dow v. Louisiana Land Co.*, 77

F.3d 342 (10th Cir. 1996). *Cornelius v. Powder River Energy Corp. Inc.*, 152 P.3d 387 (Wyo. 2007). Vendor of land has duty to disclose to vendee any natural or artificial condition which present a danger. *Dubray v. Howshar*, 884 P.2d 23 (Wyo. 1994). No duty exists which requires either the removal or a warning of an obvious danger. *Paulson v. Andicoecha*, 926 P.2d 955 (Wyo. 1996). Owner or occupier not liable for injuries resulting from slip and fall on natural accumulation of ice and snow. *Pullman v. Outzen*, 924 P.2d 416 (Wyo. 1996). Municipal ordinance requiring removal of snow and ice provides valid standard of care within that municipality rather than common law rule. *Pinnacle Bank v. Villa*, 100 P.3d 1287 (Wyo. 2004). Open-and-obvious danger rule from ice and snow would thus apply to comparative fault of claimant. *Id.* To recover, plaintiff must show defendant created or aggravated a snow and ice hazard and the condition is more dangerous than it would be in its natural state. *Id.* Pedestrian packed snow and ice is natural accumulation. *Id.* Whether to adopt law or ordinance as standard of care is discretionary. *Landsiedel v. Buffalo Properties*, 112 P.3d 610 (Wyo. 2005). Person seeking to use law to establish standard of care must be within class of persons the law was designed to protect. *Burnett v. Imery*, 116 P.3d 460 (Wyo. 2005). As to attractive nuisance, see *Holland, supra*; *Dellapenta v. Dellapenta*, 838 P.2d 1153 (Wyo. 1992). See also "IN-FANTS." The open and obvious danger rule applies to naturally occurring forces of wind. *Valance v. VI-Doug*, 50 P.3d 697 (Wyo. 2002). Recreational Safety Act immunizes providers of recreational activities from inherent risks of sport or activity. *Dunbar v. Jackson Hole Resort*, (03-8057) (10th Cir.). Adjoining property owners whose irrigation practices cause flooding of neighboring property may be liable under negligence, trespass and nuisance principles. *Reed v. Cloninger*, 131 P.3d 359 (Wyo. 2006).

Bicycles. Bicyclist has same right as pedestrian to use a crosswalk or sidewalk. While on the road, a bicyclist must observe all traffic laws. *Nish v. Schaefer*, 138 P.3d 1134 (Wyo. 2006).

Landlord-Tenant. Common law immunity and its exceptions replaced by Wyoming Residential Property Act. Landlord required to maintain property in a fit and habitable condition. Remedies provision of W.S. §1-21-1201, *et seq.*, exclusive for corrective action but does not preclude personal injury action. New standard is that of reasonable care under the circumstances. *Merrill v. Jansma*, 86 P.3d 270 (Wyo. 2004). Landlord owes duty to tenant and any person on the premises by right of tenant to exercise reasonable care over those areas which landlord retains control, *i.e.* common areas. *Lyden v. Winer*, 878 P.2d 516 (Wyo. 1994). Stairwell to renter's residence not a "common area" to which landlord retains



control, *Flores v. Simmons*, 999 P.2d 1310 (Wyo. 2000), but must maintain in fit and habitable condition and use reasonable care under the circumstances. *Merrill v. Jansma*, 86 P.3d 270 (Wyo. 2004). Landlord not responsible for one tenant's dog's attack on another tenant when landlord did not have knowledge of dog's dangerous propensities and attack did not occur in area under landlord's control. *Roberts v. Klinkosh*, 986 P.2d 153 (Wyo. 1999).

Liability for Criminal Acts. Defendant must have and exercise control over the premises. Issue is one whether landowner knew or had reason to know of likelihood of criminal conduct. *Krier v. Safeway*, 943 P.2d 405 (Wyo. 1997).

Duty of Tavern Keeper. *Hanna v. Cloud 9*, 889 P.2d 529 (Wyo. 1995). See liquor liability and dram shop, above.

Negligent Entrustment. Is a cause of action in Wyoming. *Moore v. Kiljonder*, 604 P.2d 204 (Wyo. 1979). See "AUTOMOBILES."

Employers must provide employees a reasonably safe place to work and must warn of unsafe conditions. *Footo v. Simele*, 139 P.3d 455 (Wyo. 2006).

Violations of building codes are only evidence of negligence and not negligence *per se*. *Frost v. Allred*, 148 P.3d 17 (Wyo. 2006).

Defendant may be relieved from liability by unforeseeable intervening cause. *Bloomquist v. State*, 914 P.2d 812 (Wyo. 1996). Normally intervening cause is a question of fact. *Coleman v. Casper Concrete*, 939 P.2d 233 (Wyo. 1997).

Proximate Cause. *Fiedler v. Steger*, 713 P.2d 773 (Wyo. 1986), defines consequences of act of negligence. See also *DeWald v. State*, 719 P.2d 643 (Wyo. 1986) "Proximate cause means that the accident or injury must be the natural and probable consequence of the act of negligence."

Res Ipsa Loquitur - See *Goedert v. Newcastle*, 802 P.2d 157 (Wyo. 1990). This doctrine does not apply when a party attempts to prove specific acts of negligence. *Allen v. Wal-Mart*, 00-8004 (10th Cir. 2001).

Sudden Emergency. If emergency did not arise due to fault of actor, actor is entitled to instruction that one who acts in emergency is not held to same degree of care as at other times. *Hill v. Sweeney*, 201 P.165, 28 Wyo. 57 (1921); *McPike v. Scheuerman*, 398 P.2d 71 (1965).

Standard of Care. There is not a higher degree of care when a dangerous instrumentality is involved such as propane or electricity. However what constitutes ordinary care increases as the danger increases. *Wyrulec v.*

Schutt, 866 P.2d 756 (Wyo. 1993); *Mackrell v. Bell*, 795 P.2d 776 (Wyo. 1990).

If parties enter a contract and allocate risks, the economic loss rule precludes recovery in tort. *Rissler & McMurray v. Sheridan Area Water*, 929 P.2d 1228 (Wyo. 1996).

Employer not liable where unauthorized passenger sustains injury in employer's vehicle. *Beardsley v. Farmland Co-op*, 530 F.3d 1309 (10th Cir. 2008)

NO-FAULT INSURANCE

There is no provision for this in Wyoming.

PENALTY AND ATTORNEY FEES

Absent a specific statute or contract provision, each party pays their own attorney's fees. *Hamilton v. Town of Greybull*, 942 P.2d 410 (Wyo. 1997).

See "LIABILITY INSURANCE," Insurance headings and W.S. §26-15-124.

PRIVILEGED COMMUNICATIONS

Attorney-client Privilege. *Burk v. Burznski*, 672 P.2d 419 (Wyo. 1983). Privilege applies to insurance defense counsel's communications with insurer. *Arnold v. Mt. West Farm Bureau*, 707 P.2d 161 (Wyo. 1985). Insured's report to his insurer regarding claim or potential claim is generally privileged. *Thomas v. Harrison*, 634 P.2d 328 (1981). Physician-patient privilege and Attorney-client privilege W.S. §1-12-101. Mental Health Professions Practice Act privilege W.S. §33-38-113. Clergyman or priest, W.S. §1-12-101. Husband and wife W.S. §1-12-104. Whether a statement is a privileged marital communication depends on nature and circumstances of communication. The privilege may be raised by either spouse and it survives the death of spouse. *Curran v. Pasek*, 886 P.2d 272 (Wyo. 1994). Spousal privilege applies even if separated or estranged. *Pinther v. Pinther*, 888 P.2d 1250 (Wyo. 1995).

PRODUCTS LIABILITY

Strict Liability. In *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986), strict liability as per §402 (A), Restatement Second, Torts, was recognized as independent action. Cases in other jurisdictions interpreting §402 (A) can be relied upon. Warranty disclaimers not applicable to strict liability. Four year statute of limitations for tort claims applied. Manufacturer or seller liable only if his product is expected to and does reach consumer without substantial change in condition in which sold. Product purchaser may not recover for purely economic loss to failed product. *Continental Ins.*

v. Page Eng'r, 783 P.2d 641 (Wyo. 1989). Manufacturer is not insurer and has no duty to make accident-proof equipment. *Wells v. Jeep Corp.*, 532 P.2d 595 (Wyo. 1975). Manufacturer's duty is to exercise reasonable care in planning, designing, and manufacturing to insure it is reasonably safe to use. *O'Donnell v. City of Casper*, 696 P.2d 1278 (Wyo. 1985). Reasonableness of design determined by weighing likelihood and gravity of injury occurring against costs of precautions manufacturer would have taken to avoid hazard of injury. *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978). Electricity is not a product for which strict liability may be imposed. *Wyrulec v. Schutt*, 866 P.2d 756 (Wyo. 1993). Manufacturer's duty to make reasonably safe product extends to protection of those expected to use product. *Caterpillar Tractor Co. v. Donahue*, 674 P.2d 1276 (Wyo. 1983). Normally plaintiff must establish a "defect." A defective product is one which is not reasonably safe or unreasonably dangerous. If a product is safe for normal handling and consumption, it is not defective. *Campbell v. Studer*, 970 P.2d 389 (Wyo. 1998). Circumstantial evidence sufficient to establish that product defective. *O'Donnell v. City of Casper*, 696 P.2d 1278 (Wyo. 1985). Not necessary to prove specific defect or produce defective product. Evidence of failure along with remaining facts may be determinative of defect. *Valentine v. Ormsbee Exploration*, 665 P.2d 452 (Wyo. 1983). Inference of product defect allowed upon proof of malfunction, absence of abnormal use, and no reasonable secondary cause for malfunction. *Simo v. GMC*, 7511 P.2d 357 (Wyo. 1988).

Defenses. Comparative fault principles do not apply to a plaintiff's recovery if based on strict liability or breach of warranty in actions occurring prior to July 1, 1994. *Phillip v. Duro-Last*, 806 P.2d 834 (Wyo. 1991). Effective July 1, 1994 comparative fault will apply to all actions premised on negligence, strict liability, products liability and warranty. Such will also include defenses based on assumption of risk, misuse or alteration. W.S. §1-1-109. If misuse is foreseeable then it is not a defense. *Anderson v. Louisiana-Pacific*, 859 P.2d 85 (Wyo. 1993). See also "NEGLIGENCE" and "DAMAGES." As to claims based on negligence, "state-of-the-art" at manufacture, testing, and feasibility of alternative designs are to be considered. *Maxted v. Pacific Car & Foundry*, 527 P.2d 832 (Wyo. 1974). Even if product defective, seller may not be held liable for injuries caused by unforeseeable alterations. *Ogle v. Caterpillar*, *supra*.

RELEASE

A release discharges another from an existing or asserted duty, claim or obligation and it bars recovery

thereon. Such are contractual in nature. *M&A Constr. v. Akzo Nobel Inc.*, 936 P.2d 451 (Wyo. 1997).

For causes of action accruing on and after June 11, 1986, release or covenant not to sue or to enforce judgment given in good faith to one of two or more persons does not discharge other tort-feasors liable for same injury or wrongful death unless its terms so provide, W.S. §1-1-119. For effect on claims against others and liability of discharged tort-feasor for contribution see amended §1-1-109, discussed under "NEGLIGENCE."

REPRESENTATION AND WARRANTIES

To avoid liability on policy it must be established that the misrepresentation or breach of warranty by the insured related to material facts concerning the subject matter of the insurance or is material to the risk insured. *Unigard Mut. Ins. Co. v. Bluemel*, 485 F. Supp 668 (D. Wyo. 1979); *All American Life Co. v. Kvenzelok*, 409 P.2d 766 (Wyo. 1966). See "ACCIDENT AND HEALTH INSURANCE" and "CANCELLATION."

SERVICE OF PROCESS

See Rule 4, Wyoming Rules Civil Procedure.

By Whom Served. Process can be served within state by sheriff, or by his undersheriff or deputy, of county where service made or any person of the age of majority who is not party and has been appointed by clerk. Service outside state can be made by any of above or U.S. Marshal. If service by person other than sheriff, it will be without effect if fail to properly appoint person to deliver service. *Gookin v. State Farm*, 836 P.2d 229 (Wyo. 1992). State and Federal courts permit service of process by notice and waiver via mail. Rule 4. A person who fails to claim a certified letter may not claim they did not receive notice. *Wilson v. Witt*, 952 P.2d 214 (Wyo. 1998).

Means of Service. Process can be served upon individual by serving personally or leaving copies of summons and complaint at his dwelling house or usual place or abode with family member over age 14, employee, or agent authorized to receive service of process. Service upon infant under 14 or incompetent is completed by serving guardian, legal custodian, or guardian ad litem. Partnerships and unincorporated associations can be served by delivery of summons and complaint upon partner, associate, managing general agent, or employee in charge at usual place of business. Service upon domestic corporation is completed by delivery to officer, manager, general agent, or agent for service of process. If no such person found in county where action filed, may deliver process to any agent or employee within county, but clerk must mail copies of process to corpora-

tion by registered mail, return receipt requested, at least 20 days before entry of default. State or municipal department or agency, or public corporation can be served by delivering process to chief executive officer, secretary, any member of governing body, or person in charge of principal office.

Service by publication is permitted in limited situations.

Other Service. As to personal service outside the state see Rule 4 (e). For service upon non-resident motorist, see W.S. §1-6-301 and "AUTOMOBILES." For service upon unlicensed foreign corporation, see W.S. §17-16-504.

Non residential service of process statutes are to be strictly construed and each statutory requirement is jurisdictional. For service on the Wyoming Insurance Commissioner as agent for service of process on certain insurers, see W.S. §26-3-122. Defendant has 30 days to answer after substituted service upon Insurance Commissioner. *Gookin v. State Farm*, 826 P.2d 229 (Wyo. 1992). Nonresident service can be used in circuit and district courts. *State Farm v. Kunz*, 186 P.2d 378 (Wyo 2008).

Defunct corporation can sue and be sued. *Cata-mount Constr. Co. v. Timmis Ent.*, 193 P.3d 1153 (Wyo. 2008).

It is critical to timely answer a complaint. The Wyoming Supreme Court has severely limited the ability of the trial courts to set aside defaults. *Flour Daniel v. Seward*, 956 P.2d 1131 (Wyo. 1998).

SUBROGATION

At common law, insurer's right to subrogation must be enforced in name of insured or in name of insured for benefit of insurer, but under statute providing that action must be presented in name of real party in interest, insurer may enforce in its own name, if the insured's loss was paid in full. Rule 17, W.R.C.P.; *Gardner v. Walker*, 373 P.2d 598 (Wyo. 1962). To protect right of subrogation, insurer must provide notice of its claim. *Stilson v. Hodges*, 934 P.3d 736 (Wyo. 1997).

W.S. §26-13-113, provides that if insurer decides to subrogate, insurer shall include deductible in subrogated loss claim, and shall pay deductible without any deduction for expenses of collection before any of recovery is applied to any other use.

Insurer which pays loss not covered by policy is volunteer and enjoys no right of subrogation, and could not claim legal or equitable subrogation. Likewise, because there was not contract assigning subrogation rights by insured to insurer, latter could not claim conventional or

contractual subrogation. *Commercial Union Ins. Co. v. Postin*, 610 P.2d 984 (1980).

WAIVER AND ESTOPPEL

Where liability is denied on policy, company is deemed to have waived requirements as to proof of loss. *Kahn v. Traders Ins. Co.*, 4 Wyo. 419. Where knowledge of condition avoiding policy was possessed by agent who wrote policy company is estopped to set up defense based upon such condition. See *Summers v. Mutual*, 12 Wyo. 369, 75 P. 937. Insurer, paying portion of fire loss with knowledge that policy had been violated by non-disclosure of chattel mortgage, is thereafter barred from asserting violation as defense to action for balance of fire loss. Investigation of loss by agent held waiver by insurer of formal notice of loss. *Howrey v. Star*, 46 Wyo. 409, 28 P.2d 477.

By taking complete charge of fire loss and instructing motel owners to secure property, winterize it, have area cleaned, keep remaining undamaged units available for business, and keep file on all expenses therefore so that they might be included in settlement, individual adjuster went beyond mere investigation of fire and proof of loss was waived notwithstanding agreement providing that no action of insurer in investigating loss would waive any conditions of policy. *Connecticut Fire Ins. Co. v. Fox*, 361 F.2d 1.

Waiver is an intentional relinquishment of a known right. *O'Donnell v. Blue Cross*, 76 P.3d 308 (Wyo. 2003).

Proof of waiver and estoppel as to coverage, even though policy is usually construed in insured's favor, must be clear. *Sowers v. Iowa Home*, 359 P.2d 488.

Waiver and estoppel cannot extend coverage of policy or bring within coverage risks which are specifically excluded. *Ricci v. New Hampshire Ins. Co.*, 721 P.2d 1081 (Wyo. 1986); *Verschoor v. Mountain West*, 907 P.2d 1293 (Wyo. 1996).

An amendment or modification of policy leaves intact those provisions of original agreement not expressly or impliedly superceded. *O'Donnell v. Blue Cross, supra*.

WORKERS' COMPENSATION

See Law Digest Tables.

Wyoming has a state administered worker's compensation program. W.S. §27-14-101 *et seq.* Injured employee must normally report the injury within 72 hours to employer and file an injury report within 10 days. W.S. §27-14-502. Statutory presumption of denial only arises when claimant fails to comply with both dead-

lines. *Wesaw v. Quality Maintenance*, 19 P.3d 500 (Wyo. 2000). Mentally incompetent persons not bound by deadlines. *Collicott v. Wyoming Workers' Comp.*, Slip Op. 2001 WY 35 (April 4, 2001)

Statutory Lien. In event of recovery by injured employee from third party, state department of worker's compensation has statutory lien upon proceeds of settlement or judgment up to amount of its statutory right of reimbursement paid by it to injured employee, W.S. §27-14-105 (b). Worker's compensation department director and attorney general shall be served by certified mail with copy of complaint filed in any suit pursuant to W.S. §27-14-105 (a). Service of complaint on director and attorney general is jurisdictional requirement to maintenance of suit. State is entitled to be reimbursed for all payments made or to be made not to exceed one-third (1/3) of total proceeds of recovery and attorney general representing director shall be made party in all negotiations for settlement, compromise or release and to facilitate compromise and settlement may authorize acceptance by state of less than state's claim for reimbursement, W.S. §27-14-105. Before offering settlement to employee, third-party or its insurer shall notify state of proposed settlement and give state 15 days to object. If notice not given, state may bring separate action for all payments made to employee. Injured employee or estate may request state to bring an action on his behalf and if requested, will extend statute of limitations for 6 months.

Decision of hearing examiner constitutes res judicata. *Tysver v. State*, 896 P.2d 116 (Wyo. 1995). Uncontested award of benefits by Division is not "final adjudication" to apply doctrine of issue preclusion. *Tenorio v. State*, 931 P.2d 234 (Wyo. 1997).

Employer Immunity. Exclusivity provision of sister states' workers' compensation laws will be recognized provided such does not violate public policy. *Wheeler v. Parker Drilling*, 803 P.2d 1279 (Wyo. 1987). Contributing employer is absolutely immune from all common-law tort remedies brought by employee or his dependents arising out of employees' injury or death incurred in extrahazardous employments - including causes of action for intentional tort or culpable negligence. *Parker v. Energy Development Co.*, 691 P.2d 891 (Wyo. 1984). Extrahazardous employments are enumerated in W.S. §27-14-108 (a). Employer not engaged in extrahazardous employment may elect coverage. If election is made, employer must cover all employees. Elected coverage not effective until 30 days after employer's notice of election. W.S. §27-14-108 (g).

Third Party Actions. W.S. §27-14-104 provides immunity to co-employees acting within the scope of their employment unless they acted intentionally to cause harm or injury. The intent to cause harm or injury

is the same as willful and wanton misconduct. *Bertagnolli v. Louderback*, Slip Op. 02-65 (1993). Temporary employee from temporary employment agency is not "employed" by the employer for purposes of immunity. *SOS Staffing v. Fields*, 54 P.3d 761 (Wyo. 2002). Temporary service provider not vicariously liable for torts of temporary employee working for another employer. *Id.* Statute of limitations on co-employee claims begins to run when plaintiff knows or should know of injury. *James v. Montoya*, 963 P.2d 993 (Wyo. 1998).

Third party claims for contribution against contributing employer are barred by the exclusivity of Act. *Pan American Petroleum v. Maddux*, 586 P.2d 1220 (Wyo. 1979). However, third party claims for express common law and implied indemnity against contributing employer are allowed. *Id.*; *Schneider National v. Holland Hitch*, *supra*; *Diamond Surface v. Cleveland*, 963 P.2d 996 (Wyo. 1998); *Gainsco v. Amoco*, 53 P.3d 1051 (Wyo. 2002).

In determining if injury is compensable, it is a question of fact whether there is a nexus between the employment and the injury. *Chapman v. Meyers*, 899 P.2d 48 (Wyo. 1995). Injuries while going to or from work are normally not compensable. Under second compensable injury rule, worker must prove by a preponderance of the evidence that injury for which he is seeking benefits resulted from prior work accident. *Matter of Walsh*, 931 P.2d 241 (Wyo. 1997). Worker must prove work accident caused injuries and not a pre-existing condition. *Id.*

In contested case hearing, attorney for employee regardless of outcome and attorney for employer if employee prevails are entitled to statutory attorney's fees. W.S. §27-14-602.

Coronary Conditions. Employees can receive compensation for work-related coronary condition upon showing following: period of employment stress unusual or abnormal to occupation; exertion during such period of stress; competent medical evidence of direct causal connection between exertion and cardiac condition; and acute symptoms of cardiac condition manifested within 4 hours after causative exertion. W.S. §27-14-603; *Nuanes v. Wyoming Workers' Comp. Div.*, 694 P.2d 86 (Wyo. 1985).

Mental Injury. Worker may not recover for mental injury unless mental injury is the result of a physical injury. W.S. §27-14-102; *Frantz v. Capbell County Hosp.*, 932 P.2d 750 (Wyo. 1997). Work stress causing panic attacks held compensable. *In re, Summers*, 987 P.2d 153 (Wyo. 1999).

Potential Injury. Mere exposure to contaminant that may cause illness or disease is not a compensable injury.

Williams v. Wyoming Workers' Comp., 2 P.3d 543 (Wyo. 2000).

Injuries Occurring over Period of Time. To recover for injuries which occur over a substantial period of time, employee must prove by competent medical authority that claim arose out of and in course of employment and that: 1) direct causal connection between work and injury, 2) injury was natural incident of the work, 3) injury can be fairly traced to employment as proximate cause, 4) injury not caused from hazard employee equally exposed to outside of work, and 5) injury is incidental to character of business. W.S. §27-14-603.

Casual connection must exist between employment and injury. Normally injuries occur going to work or leaving work and are not compensable. W.S. §27-14-102 (a). Employee performing personal projects while at work is not entitled to benefits for injuries relating to personal projects. *Stuckey v. State*, 890 P.2d 1097 (Wyo. 1995).

Temporary Permanent Injury. Deference given to treating physician's recommendation of temporary total disability as matter of public policy. *Wyoming Workers' Comp. v. Henricksen*, 53 P.2d 221 (Wyo. 2001).

As to permanent total disability, Wyoming adheres to "odd-lot doctrine." Employee has initial burden of proof to show cannot perform any work at gainful occupation for which he is reasonably suited by training or experience and that his services are non-marketable in all well known branches of labor market in community so as to provide steady income. If shown, employer has burden to prove that light work of special nature not generally available, which could be performed by employee, is available. *Nagle v. State*, 2008 WY 99; *Lebsack v. Town of Torrington*, 698 P.2d 1141 (Wyo. 1985); *City of Casper v. Bowdish*, 713 P.2d 763 (Wyo. 1986). As to temporary total disability benefits, or if impairment is limited, employee has burden of establishing unavailability of work to person in his condition. Employer may defend on ground that employee refused suitable work. *Leonard v. McDonalds of Jackson Hole*, 746, P.2d 1261 (Wyo. 1987). W.S. §27-14-404 if employer offers temporary light duty and if employee medically qualified for light duty, he must accept or lose 2/3

of benefits. Effective July 1, 1987, statutory definition under which above cases were decided was amended. See W.S. §27-14-102 (a) (xvi) and W.S. §27-14-406. Illegitimate child of deceased worker entitled to compensation benefits and an unduly restrictive time limitation to prove parentage is unconstitutional. *State v. Halstead*, 795 P.2d 760 (1990).

Grandchildren of worker may be eligible for benefits. *State v. Rivera*, 796 P.2d 447 (1990).

Engaging in unsanitary or injurious conduct which slows or prevents recovery from injuries can result in forfeiture of benefits. W.S. §27-14-407; *Division v. Bergeron*, 948 P.2d 1367 (Wyo. 1997).

Normally co-employees are immune from suit. However, in limited circumstances they may be liable.

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

"A co-employee is liable to another co-employee if the employee acts intentionally to cause physical harm or injury. To act intentionally to cause physical harm or injury is to act with wilful and wanton misconduct. Wilful 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, wilful and wanton misconduct requires the co-employee to have 1) actual knowledge of the hazard or serious nature of the risk involved; 2) direct responsibility for the injured employee's safety and work conditions; 3) wilful disregard of the need to act despite the awareness of the high probability that serious injury or death may result."

Hannifan v. American Natl Bank of Cheyenne, Wyoming Supreme Court, 2008 WY 65.