STATE OF WYOMING
RETAIL COMPENDIUM OF LAW

Prepared by
Keith J. Dodson, Erica R. Day, and Amy M. Iberlin
Williams, Porter, Day & Neville, P.C.
159 North Wolcott, Suite 400
Casper, WY 82601
(307) 265-0700
www.wpdn.net

Retail, Restaurant, and Hospitality
Guide to Wyoming Premises Liability

Introduction

As our communities change and grow, retail stores, restaurants, hotels, and shopping centers have become new social centers. This change is accompanied by a change in the exposure to liability that owners, occupants, or persons in control of such properties face. This increase in exposure to liability has the potential to significantly harm retail businesses. This compendium aims to help provide owners, occupants, or persons in control of such properties with a basic understanding of some of the common legal issues in premises liability.

Included in this compendium is an overview of the Wyoming state and Federal courts, as well as a summary of basic premises liability concepts for specific issues that are commonly presented. It is our goal that this compendium will help those in the retail industry that may be faced with preventing or defending premises liability claims.

Please feel free to contact one of the authors listed above, or another member of Williams, Porter, Day & Neville, P.C., to discuss any questions about the material covered in this compendium.

Wyoming Court Systems

A. The Wyoming State Court System

The court system in Wyoming is comprised of three (3) different courts: 1) the Wyoming Supreme Court; 2) the District Courts; and 3) the Circuit Courts.

The circuit courts have limited jurisdiction and cover small claim cases and civil cases in which the damages or recovery sought do not exceed $50,000.00. Circuit courts also hear family violence, stalking, forcible entry and detainer cases, and criminal misdemeanor cases. The circuit courts may also set bail for individuals accused of crimes, as well as conduct preliminary hearings in felony cases.

The district courts are the state trial courts, and have general jurisdiction. A district court is located in all 23 counties, and the counties are organized into nine (9) different judicial districts. District court judges preside over felony criminal cases, civil cases with damages or recovery of more than $50,000.00, juvenile cases, and probate matters. The district courts also hear appeals from circuit court decisions. District courts are held in the county seat of each county, and judges regularly travel to the counties within their districts to hear cases arising there.

The Wyoming Supreme Court is located in Cheyenne, Wyoming, and is the final arbiter of state law questions. The Wyoming Supreme Court hears appeals from the district courts, as well as petitions for extraordinary relief from lower court decisions. Further, the Wyoming Supreme Court sets forth definitive rulings on Wyoming state law, which are binding on all other courts and state agencies unless changed by legislative action. The Wyoming Supreme Court consists of five (5) justices serving eight (8) year terms.

B. The Federal District Court for the District of Wyoming

The Federal courts for the District of Wyoming are located in Cheyenne, Casper, Jackson, and Mammoth, Wyoming. The District Court for the District of Wyoming has its own set of local rules, cited as U.S.D.C.L.R.

Negligence

A. General Negligence Principles

Negligence is "failure to use ordinary care."[1] In Wyoming, "ordinary care" is defined as "the degree of care which should reasonably be expected of the ordinary careful person under the same or similar circumstances."[2] Negligence arises from the breach of a duty owed to another.[3] The elements of a negligence claim in Wyoming are duty, breach, causation, and damages.[4]

In terms of premises liability, it is a general rule that "a possessor of land" owes a duty to invitees to maintain the premises in a reasonable safe condition.[5] Owners, occupants, and lessees of land must act as reasonable persons in "maintaining the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk."[6] The standard of care owed to all tort claimants for premises liability is reasonable care under the circumstances, unless the claimant is a trespasser.[7] A trespasser is one who enters or remains "upon the premises of another without the other's permission or acquiescence, either express or implied."[8] An owner, occupant, or lessee owes no duty to a trespasser to maintain the property in a condition that is safe for the trespasser's use, but does have a duty to avoid injuring the trespasser by an "intentional, willful or wanton act."[9]

To all other visitors who may enter onto the premises, the premises owner is charged with an affirmative duty to protect visitors against dangers known to him, and those that are discoverable with the exercise of reasonable care.[10]

B. Elements of a Cause of Action of Negligence

To establish a prima facie case of negligence in Wyoming, it must be shown: "(1) [t]he defendant owed the plaintiff a duty to conform to a specified standard of care, (2) the defendant

---

[1] W.C.P.J.I. 3.02 (2015).
[2] *Id*.
[3] *Lucero v. Holbrook*, 2012 WY 152, 288 P.3d 1232 (Wyo. 2012).
[4] *Id*.
[5] *Valence v. VI-Drug, Inc.*, 2002 WY 113, ¶ 5, 50 P.3d 697 (Wyo. 2002); *Eiselein v. K-Mart*, 868 P.2d 893, 895 (Wyo. 1994); *see also Mostert v. CBL & Assoc.*, 741 P.2d 1090, 1098 (Wyo.1987).
[6] W.C.P.J.I. 9.01 (2015).
[7] W.C.P.J.I. 9.01 (2015) (Use Note).
[8] W.C.P.J.I. 9.02 (2015).
[9] *Id*.
[10] *Hendricks v. Hurley*, 2008 WY 57, 184 P.3d 680, 683 (Wyo. 2012); *Rhoades v. K-Mart Corp.*, 863 P.2d 626 (Wyo. 1993).

breached the duty of care, (3) the defendant's breach of the duty of care proximately caused injury to the plaintiff, and (4) the injury sustained by the plaintiff is compensable by money damages."[11] In terms of premises liability, a landowner in Wyoming "owes a general duty to 'act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk."[12] Stated differently, a store owner has a duty to "use ordinary care to keep the premises in a safe condition, and he is charged with an affirmative duty to protect visitors against dangers known to him and against dangers which he might discover by use of reasonable care."[13] Thus, it must be shown that the landowner had actual or constructive knowledge of the danger, or the circumstances created a reasonable probability that the dangerous condition would occur.[14]

1. Notice

To establish liability for a dangerous condition, the plaintiff traditionally had to demonstrate the owner or possessor of the land either had actual or constructive notice of the dangerous condition.[15] The Wyoming Supreme Court has stated that the notice requirement is unnecessary where the "plaintiff has shown that the circumstances were such as to create a reasonable probability that the dangerous condition would occur, [such] that he need not also prove actual or constructive notice of the specific condition."[16] Actual or constructive notice is also unnecessary where "the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable," under the "operating methods rule."[17]

2. Assumption of Risk

Wyoming is a comparative fault state, and the defense of assumption of the risk has been held to be included with the comparative fault analysis.[18] "The comparative negligence statute directs apportionment of fault occasioned by contributory negligence which is 'not as great as the negligence of the person against whom recovery is sought.' Since in Wyoming, assumption of the risk has been held to be a form of contributory negligence, the obvious legislative intent was to

[11] *Lucero v. Holbrook*, 2012 WY 152, ¶ 7, 288 P.3d 1228, 1232 (Wyo. 2012).
[12] *Berry v. Tessman*, 2007 WY 175, ¶ 9, 170 P.3d 1243, 1245-46 (Wyo. 2007) (*quoting Clarke v. Beckwith*, 858 P.2d 293, 296 (Wyo. 1993).
[13] *Rhodes v. K-Mart Corp.*, 863 P.2d 626, 629-30 (Wyo. 1993) (*quoting Buttrey Food Stores Div. v. Coulson*, 620 P.2d 549, 522 (Wyo. 1980).
[14] *Id.*
[15] *Rhodes v. K-Mart Corp.*, 863 P.2d 626, 629-30 (Wyo. 1993).
[16] *Id.* (*quoting Buttrey*, 620 P.2d at 552).
[17] *Halvorsen v. Sweetwater County School Dist. No. 1*, 2015 WY 8, ¶ 9, 342 P.3d 395 (2015).
[18] *Brittain v. Booth*, 601 P.2d 532, 534-35 (Wyo. 1979).

include it within the apportionment."[19] Thus, assumption of the risk is not a defense to a negligence action, but a basis for apportionment of fault.[20]

Liability Checklist/Considerations for Negligence Claims

1. Defendant's relationship to property where plaintiff's accident occurred:

□ Owner?

□ Tenant?

□ Party in "possession" of property?

2. Was there a defective condition on the premises involved in plaintiff's accident?

3. Defendant's notice – did defendant:

□ Actually create the defective condition?

□ Have actual notice of the defective condition?

□ Have constructive notice of the condition?

□ Were the circumstances such as to create a reasonable probability that the dangerous condition would occur?

[19] *Betts v. Crawford*, 965 P.2d 680, 687 (Wyo. 1998); *Id*.
[20] *Id*.

Specific Examples of Negligence Claims

Premises liability cases arise from a variety of conditions. However, each is subject to the same elements of proof.

A. "Slip and Fall" Cases

1. Snow and Ice – Natural Accumulation

It is well-established in Wyoming that "an owner or occupier of a premises will not be liable for injuries resulting from a slip and fall on a natural accumulation of ice or snow."[21] "A proprietor is not considered negligent for allowing the natural accumulation of ice due to weather conditions where he has not created the conditions. The conditions created by the elements, such as the forming of ice and falling of snow, are universally known and there is no liability where the danger is obvious or is as well known to the plaintiff as the property owner."[22] Thus, a storekeeper is not under a duty to remove natural and obvious accumulations of snow and ice from the public sidewalk in front of his business unless local ordinances provide otherwise.[23]

Wyoming courts have found the natural accumulation rule to be justified because the magnitude of the burden to prevent plaintiff from injury due to snow and ice is too great and "natural winter conditions make it impossible to prevent all accidents."[24] This rule also serves to cover incidents where the snow and ice accumulate in a way that creates a "lurking danger, i.e., the ice is covered by the snow."[25]

---

[21] *Paulson v. Andicoechea,* 926 P.2d 955, 957 (Wyo. 1996); *Eiselein v. K-Mart,* 868 P.2d 893, 895 (Wyo. 1994); *Petersen v. Campbell County Memorial Hosp. Dist.,* 760 P.2d 992, 994 (Wyo.1988); *Sherman v. Platte County,* 642 P.2d 787, 789 (Wyo.1982); *Johnson v. Hawkins,* 622 P.2d 941, 943 (Wyo.1981); *Bluejacket v. Carney,* 550 P.2d 494, 497 (Wyo.1976); *Wattsv. Holmes,* 386 P.2d 718, 719 (Wyo.1963).

[22] *Bluejacket v. Carney*, 550 P.2d 494, 497 (Wyo. 1976).

[23] *Johnson v. Hawkins*, 622 P.2d 941, 943 (Wyo. 1981).

[24] *Eiselein*, 868 P.2d at 898

[25] *Paulson v. Andicoechea,* 926 P.2d 955, 957 (Wyo. 1996) (*quoting Sherman v. Platte County*, 642 P.2d at 789) (concluding that pedestrian packed snow and ice is not substantially more dangerous that snow and ice in its natural state and an owner will not be liable for a slip and fall accident based on such conditions); *but see Selby v. Conquistador Apartments, Ltd.*, 990 P.2d 491 (Wyo. 1999) (holding that there was a genuine issue of material fact which precluded summary judgment regarding whether defendant landlord's placement of dumpster by the parking lot created shadows which prevented the ice from melting and constituted a dangerous condition).

Further, the plaintiff is better suited to prevent injuries caused by slips and falls on snow or ice because the plaintiff may take precautions at the moment the conditions are encountered.[26] "Even if the plaintiff is unaware of the ice or snow he happens to slip on, he may be charged with knowledge that ice or snow is a common hazard in the winter, one which he must consistently guard against."[27] Thus, there is no liability when the dangers surrounding the natural accumulation of ice and snow are "obvious or as well known to the plaintiff as the defendant."[28]

By contrast, where the snow or ice is not a natural accumulation but is an artificial or unnatural accumulation, the landowner may be liable for any injuries which result.

> The landowner has the right to improve his land by a change of grade or by the construction of buildings even if the natural course of surface water is thereby changed. But he has no right to collect surface water into an artificial channel and discharge it upon the way [or permit it to accumulate] in a greater quantity than would have been discharged if the natural conformation of his land had not been altered.[29]

To establish an unnatural or artificial accumulation of snow and ice, the plaintiff must show that the defendant "created or aggravated the hazard, that the defendant knew or should have known of the hazard, and that the hazardous condition was substantially more dangerous than it would have been in its natural state."[30] Thus, an owner or occupier of the premises owes a duty to prevent injuries caused by the unnatural accumulation of ice or snow, which occurs when the owner or occupier "creates an accumulation of water in a manner substantially different in volume or course than would naturally have occurred."[31]

The Wyoming Supreme Court has emphasized that an owner's duty is triggered where the accumulation is *substantially* different in volume or course, noting that "[e]ven the most ably constructed and carefully maintained parking lot will probably contain minor indentations in which naturally occurring water can accumulate and freeze," and that such an accumulation is still to be considered naturally occurring.[32]

---

[26] *Id.*
[27] *Id.*
[28] *Paulson v. Andicoechea*, 926 P.2d 955, 957 (Wyo. 1996).
[29] *Eiselein*, 868 P.2d at 898 (*quoting Harrison v. Poli-New England Theatres, Inc.*, 23 N.E.2d 99, 100 (Mass. 1939); *see also Valence v. VI-Doug, Inc.*, 50 P.3d 697, 702 (Wyo. 2002) (stating that the rationale behind the natural accumulation rule applies to other elements of nature, such as the wind).
[30] *Paulson*, 926 P.2d at 957-58 (Wyo. 1996).
[31] *Eiselein*, 868 P.2d at 898.
[32] *Id.*

2. Slippery Surfaces

In Wyoming, the notice and knowledge requirements of premises liability will be disregarded when the plaintiff demonstrates the circumstances created a reasonable probability that the dangerous condition would occur.[33] The owner of a store "must use ordinary care to keep the premises in a safe condition, and he is charged with an affirmative duty to protect visitors against dangers known to him and against dangers which he might discover by use of reasonable care."[34]

In *Buttrey Food Stores Division v. Coulson*, the Wyoming Supreme Court determined the defendant grocery store was liable when the plaintiff slipped and fell after she stepped off the rubber mats at the entry of the store and slipped on a puddle in the store.[35] The Court concluded it was not necessary to infer notice, because "[i]n an instance such as this where the existence of water on the floor of the store premises was a reasonable probability because of the weather conditions no proof of actual or constructive notice is required."[36] However, a defendant's knowledge of the dangerous condition is one factor to consider when assessing the respective percentages of negligence.[37]

Similarly, in *Rhoades v. K-Mart*, the Wyoming Supreme Court reversed a directed verdict granted to the defendants and stated that the circumstances surrounding the plaintiff's fall in the store were such a jury could conclude K-Mart had constructive notice of a foreign substance on the floor or that there was a foreseeable risk of slippery floors because of potential soda or water spills.[38] In *Rhoades*, the plaintiff slipped and fell in an aisle where a K-Mart employee discovered evidence of a spill, in the form an overturned cup and straw, from which a trail of liquid extended to where the plaintiff slipped.[39] Although there was no evidence K-Mart had actual knowledge of the spill, there was "evidence from which the jury could find that K-Mart, in the exercise of reasonable care, should have known of the substance on the floor."[40] The Court supported its conclusion by quoting the rule established in *Buttrey*, that "when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, the logical basis

[33] *Buttrey Food Stores Division v. Coulson*, 620 P.2d 549, 552 (Wyo. 1980).
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Rhoades v. K-Mart Corp.*, 836 P.2d 626, 631 (Wyo. 1993).
[39] *Id*. at 628-29.
[40] *Id*. at 630.

for the notice requirement dissolves. Then, actual or constructive notice of the specific condition need not be proved."[41]

By contrast, in *Downen v. Sinclair*, the Wyoming Supreme Court granted summary judgment in favor of the defendant-proprietor because the plaintiff could not demonstrate that the shower in which she slipped and fell was slippery or was coated with a foreign surface.[42] The evidence showed that the shower tiles were clean, dry, and clear of any foreign substance.[43] As the plaintiff did not plead, and could not prove that a shower cleaning product had been left on the tiles and not washed away, there was no evidence the defendant acted negligently or failed to act and caused the plaintiff's injuries.[44]

3. Defenses

Evidence of an injury or accident does not necessary indicate a property owner was negligent or liable for the damage(s). Wyoming courts recognize the defenses of natural accumulation,[45] obvious danger, and comparative negligence.

a. The Obvious Danger Rule

The obvious danger rule is related to the natural accumulation rule, and a limited discussion of its supporting rationale is discussed above in the Snow and Ice section. "Closely related to the natural-accumulation rule is the open and obvious danger rule which provides that no duty exists which requires either the removal of an obvious danger or a warning of its existence."[46] The obvious danger rule only relates to natural causes, "as it would be irrational to 'provide that one who creates a known and obvious danger has no duty to correct it because it is known and obvious."[47] However, a non-natural obvious danger may still be weighed in determining the parties' respective negligence.[48] Further, a landowner will be liable, even for a naturally occurring, obvious, known danger, if the landowner created an expectation of heightened safety for people on the premises.[49]

---

[41] *Rhoades*, 836 P.2d at 630 (*quoting Buttrey*, 620 P.2d at 553).
[42] *Downen v. Sinclair Oil Corp.*, 887 P.2d 515, 519 (Wyo. 1994).
[43] *Id*.
[44] *Id*.
[45] The natural accumulation rule is discussed above in the Snow and Ice sections, and therefore will not be discussed in this section.
[46] *Eiselein*, 868 P.2d at 895; *O'Donnell v. City of Casper*, 696 P.2d 1278, 1283 (Wyo. 1985); *Sherman*, 642 P.2d at 789.
[47] *Eiselein*, 868 P.2d at 895.
[48] *Id*.
[49] W.C.P.J.I. 9.10 (2015); *Berry v. Tessman*, 2007 WY 175, ¶ 13, 170 P.3d 1243, 1246 (Wyo. 2007).

b. Plaintiff Fails to Establish a Defective Condition

The plaintiff in a premises liability claim must be able to establish there was a defective or dangerous condition. If a defective or dangerous condition does not exist, there is no liability.[50]

c. Contributory Negligence

Pursuant to WYO. STAT. § 1-1-109, contributory fault does not bar recovery if the claimant's fault is not assessed to be more than 50% of the total fault of all actors. However, any damages recovered shall be "diminished in proportion to the amount of fault attributed to the claimant" and "[e]ach defendant is liable only to the extent of that defendant's proportion of the total fault determined." WYO. STAT. § 1-1-109. In a premises liability case, "the question of negligence under the applicable standard is still presented to the trier or fact, who is charged with comparing the respective negligence of the plaintiff and the defendant."[51]

[50] *See Downen v. Sinclair Oil Corp.*, 887 P.2d 515 (Wyo. 1994).
[51] *Buttrey Food Stores Div.*, 620 P.2d at 553.

Liability Checklist/Considerations for "Slip and Fall" Cases

1. Ice and snow

□ "Natural Accumulation" – was the slip and fall caused by the natural accumulation of ice and snow?

□ "Obvious Danger" – was the defective or dangerous condition as obvious to the plaintiff as to the defendant?

2. Slippery surfaces

□ Was a foreign substance applied?

3. Defenses to "slip and fall" type cases

□ Was there no defect or is plaintiff unable to specify the cause of his or her fall?

□ Was the defect the result of the natural accumulation of ice and snow?

□ Was the defect "open and obvious?"

B. Off Premises Hazards

The Wyoming Supreme Court has previously recognized a duty exists to warn others of reasonably foreseeable off-premises dangers, and that, under certain circumstances, liability may be imposed on a landowner for failure to do so.[52] In *Mosert v. CBL & Assoc.*, the Court determined that a movie theatre had a duty to warn its patrons of a life-threatening flash flood occurring nearby when city officials advised the population to stay off the streets.[53] By contrast, the Court did not extend the duty to hold the landlord liable for breaching the same duty, noting the landlord did not have possession of the property, or the opportunity to warn the patrons.[54]

C. Liability for Violent Crime

There is a very limited amount of case law in Wyoming regarding a business owner or premises lessee's liability for criminal acts perpetrated upon an employee or visitor to the premises.

In *Krier v. Safeway Stores*, 46, Inc., the Wyoming Supreme Court was encouraged to adopt the RESTATEMENT (SECOND) OF TORTS § 344 (1965) concerning premises liability for violent crimes, but avoided reaching a conclusion on adopting the Restatement by determining the lessee was not the "possessor of land," regardless of title ownership.[55] It remains to be seen whether Wyoming would adopt the Restatement view in another case where the plaintiff was able to establish that the defendant was a "possessor of land."

Wyoming previously followed the common law rule that "persons in possession or control of business premises face no tort liability for on-premises criminal attacks against non-trespassers, even though there exists a duty to protect those appropriately on the premises from unreasonable risks of harm."[56] However, in *Krier*, the Wyoming Supreme Court noted the common law has changed, "with the vast majority of jurisdictions finding a duty to protect those lawfully on the premises from criminal acts of third parties under limited circumstances."[57] What approach the Wyoming Supreme Court will adopt in determining premises liability for criminal actions remains to be seen.

---

[52] W.C.P.J.I. 9.11 (2015); *Mostert v. CBL & Assoc*., 741 P.2d 1090, 1096 (Wyo. 1987); *Dubis v. Dresser Indus.*, 649 P.2d 198 (Wyo. 1982).
[53] *Mostert*, 741 P.2d at 1096.
[54] *Id*.
[55] *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405, 409-10 (Wyo. 1997).
[56] *Id*. at 412.
[57] *Id*. at 413.

Wyoming has followed the common law rule for imposing premises liability on the tenant, rather than the landlord.[58] "Tenant's rights were best protected by the common law view that a landlord's lease to a tenant was the conveyance of the premises for the term of the lease. From that view, the tenant was the owner and occupier subject to all responsibilities of one in possession and burdened with maintaining the premises in a reasonably safe condition to protect persons who come upon the land."[59] In *Krier*, the plaintiff asserted that the landlord should be liable for the death of an employee who was killed by a burglar who entered the premises by climbing an antenna and entering through the skylight.[60] Although the Court did not indicate whether it would support the adoption of Restatement §344, it noted that the landlord did not retain control over the roof and skylight in such a way that he would have a duty of care to exercise reasonable care to prevent criminal intrusion.[61]

1. Tavern Keepers Liability for Violent Crime

Although Wyoming law is limited as to case law regarding general premises liability for criminal actions, there is case law describing a tavern keeper's duty to an invitee to exercise reasonable care in protecting the invitee from physical assault.[62]

> [A] tavern keeper owes a duty to his invitee to exercise reasonable care in protecting the invitee from the physical assault of another invitee if the injured invitee proves: a disturbance which did attract or should have attracted the tavern keeper's attention; the lapse of a reasonable amount of time between the attracting disturbance and the subsequent tortious act on the injured invitee by the other invitee, within which time period the tavern keeper had the opportunity to avert the impending danger or subsequent tortious act; and a relationship between the attracting disturbance and the subsequent tortious act.[63]

The disturbance must be "action, threat of action, or some type of demonstration."[64] It is not sufficient if the disturbance is merely a battle of violent words.[65]

---

[58] *Krier*, 943 P.2d at 410 (*citing Ortega v. Flaim*, 902 P.2d 199, 202 (Wyo. 1995).
[59] *Id.*
[60] *Krier,* 943 P.2d at 411.
[61] *Id*. at 415-16.
[62] *Hanna v. Cloud 9, Inc.*, 889 P.2d 529, 532 (Wyo. 1995) (*citing White v. HA, Inc.*, 782 P.2d 30, 32 (Wyo. 1989)).
[63] *Id.*
[64] *White*, 782 P.2d at 32; *see Mayflower Restaurant Co. v. Griego*, 741 P.2d 1106 (Wyo. 1987) (finding a threat to assault an injured patron, accompanied by shirt grabbing, satisfied the attracting disturbance standard).
[65] *Hanna*, 889 P.2d at 532.

2. Defenses

In situations where the plaintiff is injured in a criminal attack, the defendant will need to demonstrate a lack of foreseeability and control.[66] Of importance will be any facts tending to demonstrate that the defendant could not foresee such an attack, such as by reviewing prior police or crime reports, and that the defendant was not "in possession" of the property such that liability can be imposed for a third party's criminal behavior.[67]

[66] *Krier*, 943 P.2d at 411.
[67] *See Krier*, 943 P.2d 405.

Liability Checklist/Considerations for Criminal Activities

1. Control

□ Was the defendant "in possession" of the property where the criminal attack occurred?

□ Was the attack foreseeable manner?

2. Foreseeability

□ Was defendant aware of prior criminal activity?

□ Did the attack occur in a "high crime" neighborhood?

□ Was the criminal activity at issue similar to prior criminal activities (i.e., shoplifting vs. violent crimes)?

D. Claims Arising From the Wrongful Prevention of Thefts

The National Retail Federation estimates that annual shoplifting rates have risen 3%-4% for the last five years.[68] As well as negatively impacting loss of inventory and sales, shoplifting poses an additional problem to retailers who attempt to prevent shoplifting, potentially giving rise to lawsuits for assault, battery, false imprisonment, and negligence, as well as punitive damages claims.

Wyoming has adopted WYO. STAT. § 6-3-405, which provides protection for merchants or shopkeepers who suspect an individual of shoplifting. The statute provides that:

> (a) A peace officer, merchant or merchant's employee who has reasonable case to believe a person is violating W.S. 6-3-404 may detain and interrogate the person in regard to the suspected violation in a reasonable manner and for a reasonable time.
>
> (b) In a civil or criminal action for slander, false arrest, false imprisonment, assault, battery or wrongful detention based upon a detention and interrogation pursuant to this section, it is a defense that the peace officer, merchant or merchant's employee had reasonable case to believe the person was violating W.S. 6-3-404 and the detention and interrogation were conducted in a reasonable manner and for a reasonable time.[69]

There is limited Wyoming law discussing the potential pitfalls a retailer faces by attempting to prevent shoplifting and being accused of wrongfully preventing theft. As of now, there is not a case which cites WYO. STAT. § 6-3-405, or describes its application. Thus, the discussions below represent the best estimate of how Wyoming courts would adjudicate such matters.

1. False Imprisonment

False imprisonment is defined in Wyoming as the unlawful restraint or detention by one person of the physical liberty of another, without consent or legal justification.[70] The damages associated with the tort of false imprisonment include a sum which fairly and reasonably compensates the plaintiff for the "shame, humiliation, disgrace, and mental anguish" suffered as a

---

[68] Bill Laitner, *Retail Fraud Is More Than Just Shoplifting – And Now It's a Felony*, Detroit Free Press, March 30, 2013, available at http://www.freep.com/article/20130330/NEWS06/303300100/Retail-fraud-is-more-than-just-shoplifting-and-now-it-s-a-felony.

[69] WYO. STAT. § 6-3-405.

[70] W.C.P.J.I. 21.05 (2015); WYO. STAT. 6-2-203 (defining elements of criminal false imprisonment); *Kimberly v. City of Green River*, 663 P.2d 871 (Wyo. 1983); *Waters v. Brand*, 497 P.2d 875, 878 (Wyo. 1972).

result of false imprisonment.[71] Wyoming law does not set forth a precise rule for ascertaining recovery for false imprisonment.[72] However, the Wyoming Supreme Court has stated that "[t]he mere unlawful detention of a person constitutes a basis of recovery of at least nominal damages."[73] Punitive damages may be awarded for false imprisonment.[74]

2. Malicious Prosecution and Abuse of Process

Claims for false imprisonment that result in arrests may also led to claims of malicious prosecution and abuse of process.

In Wyoming, the torts of malicious prosecution and abuse of process are two distinct torts. A plaintiff claiming malicious prosecution must prove: 1) the institution or continuation of either criminal or civil judicial proceedings; 2) such proceedings were at the instance of the defendant; 3) the termination of the proceedings was in favor of the plaintiff; 4) malice; 5) a lack of probable cause in instituting the original proceedings; and, 6) the plaintiff suffered an injury or damage as a result.[75] An allegation of malicious prosecution cannot succeed where there is probable cause to institute the proceedings.[76] A plaintiff may seek compensatory damages for malicious prosecution, including special and general damages for personal loss and injury, mental and physical suffering, humiliation, embarrassment, shame, public disgrace, and reputational harm.[77] Special damages may include "expenses actually incurred for attorneys' fees, bonds, court expenses, loss of business or income, and for medical care and treatment if appropriate."[78] Punitive damages may also be available, as a punishment and a deterrent.[79]

Abuse of process is defined as the use of a "legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed."[80] The plaintiff must prove that the defendant had an ulterior purpose and engage in a "willful act in the use of the legal process not proper in the regular conduct of the proceeding."[81] It is sufficient for the plaintiff to prove the defendant improperly used the legal process for an improper use, even if the process was

[71] W.C.P.J.I. 21.06 (2015); *Shaw*, 569 P.2d 1246; *Waters*, 497 P.2d at 878.
[72] *Id.*
[73] *Waters*, 497 P.2d at 878.
[74] W.C.P.J.I. 21.06 (2015)(Use Note); *Waters*, 497 P.2d at 878.
[75] W.C.P.J.I. 21.19 (2015)
[76] *Id.*
[77] W.C.P.J.I. 21.20 (2015).
[78] *Id.*
[79] *Id.*
[80] W.C.P.J.I. 21.18 (2015).
[81] *Id.*

legitimately begun.[82]

3. Defamation

An individual may also assert claims of defamation based on the wrongful prevention of theft. In Wyoming, the elements of defamation are:

1. The Defendant made a false and defamatory communication concerning the Plaintiff; and

2. The Defendant made an unprivileged publication to a third party; and

3. At the time of the publication:

   a. The Defendant knew that the communication was false, or

   b. The Defendant acted in reckless disregard of whether the communication was false, or

   c. The Defendant acted negligently in failing to ascertain whether the communication was false; and

4. The Plaintiff suffered a loss of something having economic or pecuniary value as a result of the publication.[83]

A defamatory communication is defined as one that "tends to hold the Plaintiff up to hatred, contempt, ridicule, or scorn; or causes the Plaintiff to be shunned or avoided; or tends to injure the Plaintiff's reputation as to diminish the esteem, respect, goodwill, or confidence in which" the plaintiff is held.[84] However, a conditional or qualified privilege exists where the defendant has an interest in the subject matter of the communication, as does the person to whom the publication is made, and a "communication honestly made in order to protect such common interest is privileged and cannot result in liability to the defendant unless the plaintiff can prove actual malice and knowledge of the falsity of the communication."[85] It remains to be seen whether such a qualified or conditional privilege would be found to protect a retailer or shopkeeper who wrongfully attempted to prevent theft or wrongfully accused an individual of shoplifting.

---

[82] *Id.*
[83] W.C.P.J.I. 18.02 (2015).
[84] W.C.P.J.I. 18.01 (2015); *Abromats v. Wood*, 2009 WY 100, 213 P.3d 996 (Wyo. 2009); *Hoblyn v. Johnson* 2002 WY 152. 55 P.3d 1219 (Wyo. 2002); *Lever v. Community First Bancshares, Inc.*, 989 P.2d 634, 637-38 (Wyo. 1999).
[85] W.C.P.J.I. 18.09 (2015).

4. Negligent Hiring, Retention, or Supervision of Employees

Another claim often raised by plaintiffs who claim to have been wrongfully accused of shoplifting is that the employee was improperly hired, trained, or supervised. In Wyoming, the law generally recognizes only two (2) situations in which an employer is held liable for the negligent acts of his employees: when the employee is acting within the scope of his employment pursuant to the doctrine of *respondeat superior* and when the employee is acting outside the scope of his employment but is on the employer's premises or is using the chattel of the employer and the employer knows or has reason to know that it has the ability and opportunity to control the employee.[86]

Unlike a claim of *respondeat superior*, a negligent supervision or hiring claim is not based on imputed or vicarious liability, but rather on the employer's own negligence in failing to exercise due care to protect third parties from the foreseeable tortious acts of an employee.[87] A claim based on negligent supervision or hiring requires a showing that the employer failed to exercise reasonable care for the benefit of third parties in supervising or hiring its employees.

5. Shopkeeper Immunity

Despite the many claims a wrongfully detained plaintiff may possibly bring against a defendant, Wyoming provides some protection to retailers who attempt to detain suspected shoplifters. WYO. STAT. § 6-3-405 (2013) provides:

> (a) A peace officer, merchant or merchant's employee who has reasonable cause to believe a person is violating W.S. 6-3-404 may detain and interrogate the person in regard to the suspected violation in a reasonable manner and for a reasonable time.
>
> (b) In a civil or criminal action for slander, false arrest, false imprisonment, assault, battery or wrongful detention based upon a detention and interrogation pursuant to this section, it is a defense that the peace officer, merchant or merchant's employee had reasonable cause to believe the person was violating W.S. 6-3-404 and the detention and interrogation were conducted in a reasonable manner and for a reasonable time.[88]

Although there have not been any cases in Wyoming discussion this statute, it appears the principle requirement is that retailers are reasonable in their suspicion and detention of suspected shoplifters.

---

[86] *Killian v. Caza Drilling, Inc.*, 2006 WY 42, ¶ 28, 131 P.3d 975, 987 (Wyo. 2006).
[87] *Shafer v. TNT Well Serv., Inc.*, 2012 WY 126, ¶ 10, 285 P.3d 958, 962 (Wyo. 2012).
[88] *Id.*

Liability Checklist/Considerations for Wrongful Attempts to Stop Thefts

1. False arrest/imprisonment

□ Intent to confine plaintiff?

□ Plaintiff conscious of the confinement?

□ Applicable privilege?

□ Did defendant merely report the facts to the authorities?

2. Malicious prosecution

□ Criminal proceeding commenced?

□ Proceeding terminated in favor of accused? (i.e., not a plea or defective warrant)

□ Absence of probable cause?

□ Existence of actual malice?

6. Food Poisoning

Food poisoning and contamination claims are often brought under a variety of theories including negligence, product liability, and breach of warranty. A negligence cause of action against a restaurateur is predicated upon its duty to exercise care and prudence respecting the fitness of the food it furnishes for consumption. If a claim is brought under a products liability theory, a defendant will be held liable if a plaintiff can show that it is reasonably certain that the

product, when put to normal use, would be dangerous if it were defective.[89] As in any personal injury action, a plaintiff must show a causal relationship between the contaminated product and their illness.

E. Construction-Related Accidents

Claims arising under this section are evaluated according to the general negligence principles previously discussed. Under Wyoming law, the tort of negligence must be based upon the breach of a duty where that breach proximately caused an injury to the plaintiff.[90] In order to be held liable, the employer must have retained at least some degree of control over the manner in which the work was done at the construction site at the time of the injury. "It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work his own way."[91]

In Wyoming, a non-delegable duty arises when a general contractor is involved in a (1) inherently dangerous activity or (2) activity necessitating special precautions can be applied here.[92]

[89] *McLaughlin v. Michelin Tire Corp.*, 778 P.2d 59, 64 (Wyo. 1989)
[90] *Allmaras v. Mudge*, 820 P.2d 533, 536 (Wyo. 1991).
[91] *Ramsey v. Pac. Power & Light*, 792 P.2d 1385, 1386 (Wyo. 1990).
[92] *Allmaras v. Mudge*, 820 P.2d 533, 538 (Wyo. 1991).

Liability Checklist/Considerations for Construction-Related Accidents

1. Determine status

□ Owner?

□ Lessee/tenant with control over the work being performed?

□ Did the accident arise from a non-delegable duty?

□ Did the worker's actions constitute comparative negligence?

Indemnification and Insurance – Procurement Agreements

A. Indemnification

In all cases (except for oil, gas, or water wells, and miners[93]), indemnity agreements are valid and enforceable in Wyoming. As a general rule, "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payer is barred by the wrongful nature of his conduct."[94] "A prerequisite to a claim for indemnity is the existence of an independent legal relationship under which the indemnitor owes a duty either in contract or tort to the indemnitee apart from the joint duty they owe to the injured party. The independent relationship may be established by an express indemnity agreement, indemnity implied form contract, or indemnity imposed by equitable considerations. Where there is an express indemnity provision, its parameters are derived from the specific language . . . ."[95]

In *Richardson Assoc. v. Lincoln-Devore, Inc.*,[96] the Wyoming Supreme Court acknowledged three (3) classifications of indemnity actions, which reflect the prior relationship of the parties and limit the availability of indemnity. Express indemnity is derived from the specific language of a contract.[97] Implied contractual indemnity, also known as implied in fact indemnity, comes from the relationship, contractual or legal, implied between the parties.[98] Finally, equitable implied indemnity is created by a relationship implied in law between the person seeking indemnity and the person from whom indemnity is sought for a negligent or tortious act.[99]

Except as provided in WYO. STAT. § 30-1-131, indemnity agreements that seek to indemnify one for his or her own negligence are generally enforceable in Wyoming; however, they are difficult to draft. In Wyoming, "contracts exculpating one from the consequences of his own acts are looked upon with disfavor by the courts."[100]

---

[93] WYO. STAT. § 30-1-131 (Indemnity agreements involving oil, gas or water wells, and mines are statutorily prohibited in Wyoming).
[94] *Schneider Nat., Inc. v. Holland Hitch Co.*, 843 P.2d 561, 572 (Wyo. 1992) (*citing* Restatement of Restitution § 76 (1937)).
[95] *Diamond Surface, Inc. v. Cleveland*, 963 P.2d 996, 1002 (Wyo. 1998) (*quoting Schneider*, 843 P.2d at 572-573) (internal quotations omitted).
[96] 806 P.2d 790, 811-814 (Wyo. 1991).
[97] *Wyo. Johnson, Inc. v. Stag Industries, Inc.*, 662 P.2d 96, 99 (Wyo. 1983).
[98] *Gainsco Ins. Co. v. Amoco Production Co.*, 2002 WY 122, ¶ 55, 53 P.3d 1051, 1067 (Wyo. 2002).
[99] *See Miller v. New York Oil Co.*, 243 P. 118, 121-133 (Wyo. 1926).
[100] *Wyoming Johnson, Inc. v. Stag Industries, Inc.*, 662 P.2d 96, 99 (Wyo. 1983) (citations omitted).

> "A contract of indemnity purporting or claimed to relieve one from the consequences of his failure to exercise ordinary care must be strictly construed. Accordingly, it is frequently stated as the general rule that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms, or unless no other meaning can be ascribed to it. Mere general, broad, and seemingly all-inclusive language in the indemnifying agreement has been said not to be sufficient to impose liability for the indemnitee's own negligence. It has been so held, for instance, with regard to the words 'any and all liability.'"[101]

Thus, in Wyoming:

> [A]n agreement for indemnity is construed strictly against the indemnitee, particularly when the indemnitee was the drafter of the instrument. [citation omitted]. If the indemnitee means to throw the loss upon the indemnitor for a fault in which he himself individually shares, he must express that purpose beyond any peradventure of doubt. [citation omitted]. The test is whether the contract language specifically focuses attention on the fact that by the agreement the indemnitor was assuming liability for indemnitee's own negligence. [citation omitted].[102]

B. Insurance Procurement Agreements

To avoid problems with indemnification provisions and to make sure that there is a financially responsible entity to satisfy claims, contracts and leases frequently contain insurance procurement provisions. A contract to procure or provide insurance coverage is distinct from and treated differently than an agreement to indemnify.[103]

The law is clear that an agent who, with a 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 any damage resulting.[104] An agent's liability arises under the concept that he or she is agent for the insured in negotiating for a policy and owes a duty to the principal to exercise reasonable skill, care and diligence in causing the issuance of a policy. The agent's liability may arise either for

[101] *Id.* (citing 41 Am.Jur.2d, Indemnity § 15, pp. 669-700 (1968)).
[102] *Id.*
[103] *See Arrow Const. Co., Inc. v. Camp*, 827 P.2d 378, 384 (Wyo. 1992).
[104] *Id.* at 381; *Hoiness–LaBar Ins. v. Julien Const. Co.*, 743 P.2d 1262, 1273 (Wyo.1987); *Hursh Agency, Inc. v. Wigwam Homes, Inc*., 664 P.2d 27, 32 (Wyo. 1983).

breach of contract or negligent default in the performance of a duty imposed by contract.[105] The measure of damages in such an action is "that amount which would have been recovered had the insurance been furnished as agreed."[106] Moreover, a party to a contract to procure insurance may sue on the third-party insured's behalf.[107]

C. The Duty to Defend

"[A]n insurer's duty to defend is broader than its duty to provide coverage."[108] "'The obligation to defend is an independent consideration in liability insurance, and it is invoked by any claim alleged in the complaint that is potentially covered under the policy."[109] "If the policy potentially covers one or more claims, the insurer has a duty to defend all claims, and any doubts about coverage should be resolved against the insurer."[110]

The duty to defend is broader than the duty to indemnify. Consequently, courts apply a broad or liberal rule in construing the duty to reasonably give effect to the intention of the parties and do not apply the "clear and unequivocal rule" generally applied to indemnity provisions.[111]

---

[105] *Hursh Agency, Inc.*, 664 P.2d at32 (citing 43 Am.Jur.2d Insurance § 139, pp. 221–222; Annot., Liability of Insurance Broker or Agent to Insured for Failure to Procure Insurance, 64 A.L.R.3d 398 §§ 2 and 3 in particular; 3 Anderson, Counch on Insurance 2d §§ 25:46, 25:47, 25:57–25:60).
[106] *Action Ads, Inc. v. Judes*, 671 P.2d 309, 312 (Wyo.1983).
[107] *Id.*
[108] *Matlock v. Mountain W. Farm Bureau Mut. Ins. Co.*, 2002 WY 60, ¶ 15, 44 P.3d 73, 79-80 (Wyo. 2002) (citing *Shoshone First Bank v. Pacific Employers Insurance Co.*, 2 P.3d 510, 513-514 (Wyo. 2000).
[109] *Id.*
[110] *Id.* (citing *Alm v. Hartford Fire Insurance Co.*, 369 P.2d 216, 219 (Wyo. 1962)).
[111] *Northwinds of Wyoming, Inc. v. Phillips Petroleum Co*., 779 P.2d 753, 759-60 (Wyo. 1989).

Damages

A. Compensatory Damages

"Compensatory damages are awarded to reimburse an individual for losses suffered as a result of another's failure to perform some duty."[112] These types of damages "are designed to make the individual whole; that is, to place him in the condition he would have been in if the other party had adequately performed the duty owed."[113] There is no limit or cap on personal injury damages in Wyoming. The state constitution prohibits any statutory cap on damages. Recoverable damages for personal injuries in Wyoming include: A) the pain, suffering, and emotional distress experienced as a result of the injuries and those reasonably probable to be experienced in the future; B) disability and/or disfigurement; C) loss of enjoyment of life and any loss of enjoyment of life reasonably probable to be experienced in the future (the award for this specific element should not duplicate the award given or any other element of damage); D) the value of time, earnings, profits, salaries lost to date, and the present cash value of any earnings reasonably probable to be lost in the future, taking into consideration any lost earning capacity of the plaintiff; E) the reasonable expense of necessary medical care, treatment, and services received to date and any medical expense probable to be incurred in the future; and F) the reasonable expense of necessary help in the home that has been required as a result of the injury and any such help that is reasonably probable to be required in the future.[114]

As discussed above, Wyoming has a comparative fault statute.[115] Wyoming is a modified comparative state, which means there are two (2) fundamental negligence "rules" in Wyoming. First, a tortfeasor pays only his or her own percentage of fault (negligence). Second, if the plaintiff's fault (negligence) is 51% or more, then the plaintiff recovers nothing from any defendant. Wyoming juries are also required to apportion causative fault to non-party "actors" who may have been negligent.

B. Collateral Source

It is generally recognized in Wyoming tort law that compensation received by the plaintiff

[112] *Alexander v. Meduna*, 2002 WY 83, ¶ 36, 47 P.3d 206, 217 (Wyo. 2002).
[113] *Id.*
[114] *See* W.C.P.J.I. 4.01 (2016).
[115] *See* WYO. STAT. § 1-1-109.

from a collateral source, wholly independent of the wrongdoer, cannot be deducted from the damages for which the defendant tortfeasor is liable.[116]

C. Medical Damages (Billed v. Paid)

An injured plaintiff is entitled to receive the reasonable expense of necessary medical care, treatment, and services received to date and any medical expense reasonably probable to be incurred in the future. Medical bills, like any other document or writing, are subject to the requirements of proper foundation and relevancy. Additionally, recent decisions indicate a plaintiff is entitled to receive the amount actually billed for the medical care, treatment, or services and not just the amount actually paid by him or her.[117] Nonetheless, there is some question on whether all adjustments or write-offs are fully recoverable in Wyoming.

D. Nominal Damages

Wyoming follows the general rule that "nominal damages can be awarded where a cause of action for a legal wrong is established though there is no proof of actual damages."[118]

E. Punitive Damages

Punitive damages are allowed in Wyoming if a defendant's conduct constitutes "willful and wanton misconduct."[119] Punitive damages are not allowed where a defendant's conduct is only "negligent" or "grossly negligent."[120] "Willful and wanton misconduct" is defined as "the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences, and under such circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would, with a high degree of probability, result in harm to another."[121] In explaining the definition of willful and wanton misconduct, the Wyoming

[116] *Hurde v. Nelson*, 714 P.2d 767, 770 (Wyo. 1986).
[117] *See Prager v. Campbell County Memorial Hosp.*, 731 F.3d 1046 (10th Cir. 2013).
[118] *State ex rel. Willis v. Larson*, 539 P.2d 352, 355 (Wyo. 1975).
[119] *Cramer v. Powder River Coal, LLC*, 2009 WY 45, ¶ 17, 204 P.3d 974, 979 (Wyo. 2009).
[120] *Danculovich v. Brown*, 593 P.2d 187, 1923(Wyo. 1979).
[121] W.C.P.J.I. 4.06 (2016)

Supreme Court has written:

> "The aggravating factor which distinguishes willful misconduct from ordinary negligence is the actor's state of mind. In order to prove that an actor has engaged in willful misconduct, **one must demonstrate that he acted with a state of mind that approaches intent to do harm**."[122]

It has further explained that:

> The intent in willful and wanton misconduct is not an intent to cause the injury, but it is an intent to do an act, or an intent to not do an act, in reckless disregard of the consequences, and under such circumstances and conditions that a reasonable man would know, or have reason to know, that such conduct would, **in a high degree of probability**, result in substantial harm to another.[123]

F. Wrongful Death and Survivorship Actions

1. Wrongful Death Actions

In Wyoming, wrongful death claims are controlled by statute. Pursuant to WYO. STAT. § 1-38-101, "[w]henever the death of a person is caused by wrongful act, neglect or default such as would have entitled the party injured to maintain an action to recover damages if death had not ensued, the person who would have been liable if death had not ensured is liable in an action for damages." Wrongful death actions must be brought by a wrongful death representative for the benefit of the beneficiaries.[124] Actions for wrongful death must be brought within two (2) years of the decedent's death,[125] and wrongful death representatives are required to provide notice as set forth in WYO. STAT. §1-32-105 prior to commencing suit.

Each person for whose benefit a wrongful death action is brought has the opportunity to and must prove their respective damages.[126] Beneficiaries may claim damages for loss of future companionship, society, and support, but not for emotional anguish or feelings of abandonment.[127] The court will award pecuniary and exemplary damages in an amount to which it believes each

---

[122] *Cramer*, ¶ 17 (quoting *Bryant v. Hornbuckle*, 728 P.2d 1132, 1136 (Wyo. 1986)) (emphasis supplied).
[123] *Danculovich*, 593 P.2d at 193 (citation omitted) (emphasis supplied).
[124] WYO. STAT. § 1-38-102(a).
[125] WYO. STAT. § 1-38-102(d).
[126] WYO. STAT. § 1-38-102.
[127] WYO. STAT. § 1-38-102(c); *see also Knowles v. Corkill*, 51 P.3d 859 (Wyo. 2002); *Muir v. Haggerty*, 314 P.2d 948 (Wyo. 1957); *Coliseum Motor Co. v. Hester*, 3 P.2d 105 (Wyo. 1931).

beneficiary is entitled.[128] Exemplary or punitive damages are only awarded in wrongful death cases if it is established that the defendant committed willful and wanton misconduct, and not merely gross negligence.[129] Any damages recovered in a wrongful death suit do not become part of the decedent's estate, and thus are not subject to the decedent's debts.[130]

Under the Wyoming Wrongful Death statute, the pain and suffering of the decedent prior to death is not recoverable as damages.[131]

2. Survivorship Actions

In Wyoming, a separate and distinct cause of action for a survivorship action is recognized.[132] A wrongful death or a survivorship action may be brought; however, both types of actions cannot be maintained.

If a survivorship action is brought under the survivorship action, a cause of action in existence continues and the injured' party's claim after his or her death is an asset of the estate. A survivorship action thus protects the creditors of the estate.[133] On the other hand, a wrongful death action, discussed above, does not protect the creditors of the estate as these types of actions are new causes of action outside of the decedent's probate of his or her estate.[134]

---

[128] WYO. STAT. § 1-38-102(c).
[129] WYO. STAT. § 1-38-102; *see also Danculovich v. Brown*, 593 P.2d 187 (Wyo. 1979).
[130] *Tuttle v. Short*, 288 P.524 (Wyo. 1930).
[131] *See Parsons v. Roussalis*, 488 P.2d 1050, 1052 (Wyo. 1971) (stating that "[w]hile we can fully agree that by the amendment in 1947 the legislature effectively permitted a cause of action for personal injuries to survive, we reject plaintiff's thesis that it meant to allow recovery under both the survival statute and the wrongful death act. Where a decedent's death is due to wrongful injuries, suit is permitted under either § 1-28 or §§1-1065 and 1-1066; but recovery is limited to that stemming from wrongful death – pain and suffering of the decedent, according to the words of the statute, having no part in establishing damages.").
[132] WYO. STAT. § 1-4-101 *et seq.*
[133] *DeHerrera v. Herrera*, 565 P.2d 479, 482 (Wyo. 1977).
[134] *Id.*

DRAM SHOP

A. Dram Shop Act

In Wyoming, no person who has legally provided alcohol to any other person is liable for damages caused by the intoxication of the other person, pursuant to WYO. STAT. § 12-8-301.[135] However, alcohol providers who do not comply with the mandates of Title 12 and have not "legally provided" alcohol may be liable.[136] "Injured persons have the opportunity in all cases to be compensated by the intoxicated persons, and to be compensated in those cases in which the intoxicated person was unlawfully served."[137] For example, alcohol providers who serve underage persons are exposed to liability to third persons who are injured by the unlawfully served underage patron.[138] A non-licensee alcohol provider, such as a social host, may be liable for furnishing alcohol to an underage person that is not the provider's legal ward, medical patient, or immediate family member.[139]

[135] WYO. STAT. § 12-8-301; W.C.P.J.I. 9.13 (2015).
[136] *Id*.
[137] *Greenwalt v. Ram Rest. Corp. of Wyoming*, 2003 WY 77, ¶ 63, 71 P.3d 717, 738-39 (Wyo. 2003); *Daniels v. Carpenter*, 2003 WY 11, 62 P.3d 555 (Wyo. 2003); *Daley v. Wenzel*, 30 P.3d 547 (Wyo. 2001).
[138] *Id*.
[139] WYO. STAT. § 12–6–101(a).