



# **STATE OF WYOMING COMPENDIUM OF LAW**

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## Pre-Suit and Initial Considerations

### **Pre-Suit Notice Requirements/Prerequisites to Suit**

- A) **Governmental Claims Act.** All governmental claims must be filed (*i.e.*, presented to) the governmental entity within two (2) years of the occurrence, and suit must be filed within one (1) year of filing the governmental claim. There is a \$250,000.00/person and \$500,000.00/occurrence “cap” on any governmental claim. A governmental entity is authorized by law to purchase liability insurance coverage covering any acts or risks provided under the Wyoming Governmental Claims Act. WYO. STAT. ANN. § 1-39-118(b) (2017). However, if the governmental entity provides coverage beyond the limits of the “cap” for the claimed tort, then immunity is deemed waived to the full extent of those insurance limits. *Id.* Nonetheless, if a governmental entity purchases insurance beyond the limits of the “cap” for the purpose of protecting itself against potential losses under a federal law, the purpose for acquiring coverage beyond the limits of the Act must be stated as either a part of, or included in an a separate amendment to the insurance policy, in order to protect the governmental entity from waiving the protections afforded by the cap. *Id.*

The Governmental Claims Act has been a hot topic in Wyoming over the last several years. The controversy has centered on certain notice provisions in the Wyoming Constitution and Statutes. The requirement for a valid and proper “Notice of Governmental Claim,” although statutorily and constitutionally required to maintain an action, has recently been determined to be a substantive requirement. *Harmon v. Star Valley Med. Ctr.*, 2014 WY 90, ¶ 31, 331 P.3d 1174, 1182. Subject matter jurisdiction is established when the complaint is filed and the government must assert non-compliance with the requirement as a defense or risk waiver. *Id.* The Wyoming Supreme Court has also softened its stance as it applies to the strict compliance with the procedural requirements of the Wyoming Governmental Claims Act. The court recently held that district courts have the discretion to allow claimant to amend his or her complaint to cure any failure in order to comply with the State Constitution and the notice of claim provision of the Wyoming Governmental Claims Act. *Brown v. City of Casper et al.*, 2011 WY 35, 248 P.3d 1136 (Wyo. 2011); *Gess v. Flores*, 2011 WY 48, 249 P.3d 715 (Wyo. 2011); *see also Excel Const., Inc. v. Town of Lovell, Wyoming*, 2011 WY 166, 268 P.3d 238 (Wyo. 2011).

In the current state of the law, WYO. STAT. ANN. § 1-39-113 (2017) requires a “Notice of Governmental Claim” to the responsible entity within two (2) years of discovering the alleged act, error or omission. The Notice must contain:

- (1) The time, place and circumstances of the alleged loss including the name of the public employee involved, if known;
- (2) The name, address and residence of the claimant and his representative or attorney, if any; and
- (3) The amount of compensation or other relief demanded.

Relying upon Article 16, § 7 of the Wyoming Constitution, the Wyoming Supreme Court has further required that the Notice of Claim be signed by the claimant under penalty of

perjury. The Wyoming Supreme Court has dismissed with prejudice several very meritorious claims for failure to comply with the notice requirements. The Court has dismissed claims where no notice is given, given too late, failed to provide a full itemization of the damages, or if the Notice is insufficient in some way, such as a notice signed by the claimant's attorney. *Bell v. Schell*, 2004 WY 153, 101 P.3d 465 (Wyo. 2004). In response to and as an affirmation of the Wyoming Supreme Court's recent decisions, the Wyoming Legislature amended WYO. STAT. ANN. § 1-39-113, modifying subsection (c) and adding subsections (d) and (e). Subsection (d) mandates complaints filed under the Governmental Claims Act must have certain statements. Subsection (e) requires that any claim filed with a governmental entity under the Governmental Claims Act to be signed by the claimant under oath, and it provides a format for such oath.

Finally, WYO. STAT. ANN. § 1-39-114 (2017) requires any Court action to be commenced within one (1) year of the date the Notice of Claim is presented to the governmental agency.

### **Relationship to the Federal Rules of Civil Procedure**

Wyoming has its own Rules of Civil Procedure.

### **Description of the Organization of the State Court System**

- A) **Judicial selection.** Wyoming Judges are appointed by the governor from a group of three nominees selected by the Wyoming Judicial Nominating Commission. The commission provides the method for selection of the justices of the Wyoming Supreme Court, district court judges and circuit court judges. The commission consists of seven members. The chair is the chief justice of the Wyoming Supreme Court, or a justice of the Wyoming Supreme Court designated to act for the chief justice. In addition, there are three members of the Wyoming State Bar engaged in active practice and elected by the state bar. Three electors of the state, not admitted to practice law shall be appointed by the governor. The terms are set and staggered in a manner prescribed by law. Judges then must periodically stand for retention in the general election. *See generally* WYO. CONST. art. 5, § 4.
- B) **Structure.** Wyoming has two trial court levels. Circuit Courts handle misdemeanor criminal matters and civil actions for less than \$50,000.00. WYO. STAT. ANN. § 5-9-101 *et seq.* (2017). District Courts are courts of general jurisdiction and handle all matters not within the jurisdiction of the Circuit Courts. Circuit and District Courts are divided into nine districts encompassing various counties. WYO. STAT. ANN. § 5-3-101 (2017).
- C) **Mandatory ADR.** Wyoming has adopted a version of the Uniform Arbitration Act, Wyoming Statutes § 1-36-101 *et seq.* This Uniform Arbitration Act confirms that written agreements to submit to arbitration are valid and enforceable in Wyoming (Wyo. Stat. Ann. § 1-36-103), and that a Court "shall order" a party to proceed with arbitration if a valid and binding agreement to do so is contained within the parties' agreement. Assignment of cases for alternative dispute resolution is controlled by WYO. R. CIV. P. 40 (2017), which provides a court may, or upon request of a party, shall, "assign the case to (i) another active judge, (ii) a retired judge, or (iii) other qualified persona on limited assignment." W.R.C.P.

40 also provides for mediation or a settlement conference upon agreement of the parties and provides procedural rules for mediations conducted pursuant to the Rule.

## **Service of Summons**

### **A) Person.**

An individual other than a person under 14 years of age or an incompetent person may be served within the United States:

- (1) By delivering a copy of the summons and of the complaint to the individual personally,
- (2) By leaving copies thereof at the individual's dwelling house or usual place of abode with some person over the age of 14 years then residing therein,
- (3) At the defendant's usual place of business with an employee of the defendant then in charge of such place of business, or
- (4) By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

WYO. R. CIV. P. 4(e) (2017)

### **Individual in a Foreign Country.**

An individual – other than a person under 14 years of age or an incompetent person – may be served at a place not within the United States:

- (1) By any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
- (2) If there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
  - a. As prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
  - b. As the foreign authority directs in response to a letter rogatory or letter of request; or
  - c. Unless prohibited by the foreign country's laws, by:
    - i. Delivering a copy of the summons and of the complaint to the individual personally; or
    - ii. Using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
- (3) By other means not prohibited by international agreement, as the court orders.

Wyo. R. Civ. P. 4 (f) (2017)

**Person under 14 years of Age or Incompetent Person.**

An individual under 14 years of age or an incompetent person may be served within the United States by serving a copy of the summons and of the complaint upon the guardian of, if no guardian has been appointed in this state, then upon the person having legal custody and control or upon a guardian ad litem. An individual under 14 years of age or an incompetent person who is not within the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or f(3).

Wyo. R. Civ. P. 4 (g) (2017)

**B) Serving a Corporation, Partnership, or Association.**

(1) Service upon a partnership, or other unincorporated association, within the United States shall be made:

- a. By delivery of copies to one or more of the partners or associates, or a managing or general agent thereof, or agent for process, or
- b. By leaving same at the usual place of business of such defendant with an employee then in charge thereof.

(2) Service upon a corporation within the United States shall be made:

- a. By delivery of copies to any officer, manager, general agent, or agent for process, or
- b. If no such officer, manager or agent can be found in the county in which the action is brought such copies may be delivered to any agent or employee found in such county.
- c. If such delivery be to a person other than an officer, manager, general agent or agent for process, the clerk, at least 20 days before default is entered, shall mail copies to the corporation by registered or certified mail and marked "restricted delivery" with return receipt requested, at its last known address.

(3) Service upon a partnership, other unincorporated association, or corporation not within the United States shall be made in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C) (i).

Wyo. R. Civ. P. 4(h) (2017)

**C) Waiver.** WYO. R. CIV. P. 4(u) provides that an entity who receives notice of an action in the manner provided by the rule has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service. The notice and request must:

- (1) be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer, manager, general agent, or agent for process, if a corporation, or

- else to one or more of the partners or associates, or a managing or general agent, or agent for process, if a partnership or other unincorporated association;;
- (2) be sent through first-class mail or other reliable means;
  - (3) be accompanied by a copy of the complaint and shall identify the court in which it has been filed;
  - (4) inform the defendant, of the consequences of compliance and of a failure to comply with the request;
  - (5) set forth the date on which the request is sent;
  - (6) allow the defendant a reasonable time to return the waiver, which shall be at least thirty (30) days from the date the request was sent, or 60 days from that date if the defendant is addressed outside the United States; and
  - (7) provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

*Id.*

### **Statutes of Limitations**

- A) **Construction.** No action to recover damages, whether in tort, contract or indemnity, or otherwise shall be brought more than ten (10) years after substantial completion of an improvement to real property for any deficiency in the construction unless otherwise agreed to by the parties to the contract. WYO. STAT. ANN. § 1-3-111(a)(i) (2017).
- B) **Contracts.**
  - (1) **Oral contracts.** Actions for breach of oral contracts must be brought within eight (8) years if the contract is not in writing, either express or implied. WYO. STAT. ANN. § 1-3-105(a)(ii)(A) (2017).
  - (2) **Written.** Actions for breach of written contracts must be brought within ten (10) years if the contract is in writing. WYO. STAT. ANN. § 1-3-105(a)(i) (2017).
- C) **Contribution.** There is no specific statute of limitations for contribution.
- D) **Indemnity.** There is no specific statute of limitations for indemnity.
- E) **Employment.** If the case involves a contract of employment, the limitations for oral and written contracts apply. For causes of action not based on contract, claims must be brought within four (4) years for any action for injury to the rights of plaintiff, not arising out of contract and not enumerated in statute. WYO. STAT. ANN. § 1-3-105(a)(iv)(C) (2017).
- F) **Fraud.** Fraud claims must be brought within four (4) years of action for relief on the ground of fraud. WYO. STAT. ANN. § 1-3-105(a)(iv)(D) (2017).
- G) **Governmental entities.** See Wyoming Governmental Claims Act discussion above, as well as any specific statute of limitations for the specific cause of action.

- H) **Improvements to realty.** A ten (10) year statute of repose applies to actions involving improvements to real property. WYO. STAT. ANN. § 1-3-111 (2017).
- I) **Personal injury.** Personal injury claims must be brought within four (4) years after the cause of action accrues. WYO. STAT. ANN. § 1-3-105(a)(iv)(C) (2017).
- J) **Property damage.** Within four (4) years after the cause of action accrues. WYO. STAT. ANN. § 1-3-105(a)(iv)(B) (2017).
- K) **Survival.** Wyoming recognizes survivorship claims, which are expressly allowed by Wyoming statute. WYO. STAT. ANN. § 1-4-101 (2017). Such a claim continues a case already in existence and becomes an asset of the decedent's estate. A survivorship claim cannot be brought for harm allegedly caused to the estate after the decedent's death. *Connely v. McColloch (In re Estate of Drwenski)*, 2004 WY 5, 83 P.3d 457 (Wyo. 2004). If a claimant is injured by a tortfeasor, and the claimant later dies from an unrelated cause, the claimant's estate has a "survivorship claim" against the tortfeasor. The claimant's personal representative is the only person who can file and settle a "survivorship claim." In a survivorship claim, the estate can recover damages for the *decedent's* pain and suffering, disability, loss of income, and loss of enjoyment of life that the *decedent experienced* prior to his unrelated death.

Survivorship actions differ from wrongful death actions in that there is only one award in a survivorship action. Wrongful death actions will have as many awards as there are heirs. It is unknown whether punitive damages are allowed in Wyoming in survivorship actions, because the statute is silent on that point. The wrongful death statute expressly allows punitive damages.

- L) **Tolling.** Several Wyoming statutes enumerate tolling provisions applicable to minors and/or those under a legal disability:
  - (1) **Real property.** "Any person entitled to bring an action for the recovery of real property who is under any legal disability when the cause of action accrues may bring his action within ten (10) years after the disability is removed." WYO. STAT. ANN. § 1-3-104 (2017).
  - (2) **Professional negligence.** Generally, claimants must bring claims within two (2) years of the "act error or omission" giving rise to the claim. WYO. STAT. ANN. § 1-3-107 (2017).. That period will be extended to two years after discovery of the alleged act, error or omission if the claimant can establish it was not reasonably discoverable within a two (2) year period; or the claimant failed to discovery it despite the exercise of "due diligence." WYO. STAT. ANN. § 1-3-107 (2015).

The Wyoming Supreme Court has declared two sections of the Wyoming Statutes dealing with the tolling of professional negligence claims by minors or those under a "legal disability" unconstitutional. In *Kordus v. Montes*, 2014 WY 146, 337 P.3d

1138 (Wyo. 2014), the Court declared Wyoming Statutes § 1-3-107 and 1-3-117 violative of the Open Court’s provision of the Wyoming Constitution Art. 1, § 8. There have been no subsequent decisions interpreting the effect of this ruling, nor has the Wyoming Legislature addressed the striking of these two legislatively enacted statutes, therefore the exact consequence of this decision are not clear at the time of writing this compendium. It is expected, after this ruling, the statute of limitations for the bringing of any professional negligence claim will be tolled until the “legal disability” is removed, after which the claimant has three (3) years to bring the claim.

- M) **Wrongful death.** Claimants must bring wrongful death claims within two (2) years after the death of the decedent. WYO. STAT. ANN. § 1-38-102(d) (2017). The Wyoming Supreme Court has expanded this to hold that a wrongful death action must be brought within two (2) years of the *identification* of the decedent. *Corkill v. Estate of Lynn Rae Knowles*, 955 P.2d 438 (Wyo. 1998). In *In re Estate of Johnson v. Johnson*, 2010 WY 63, 231 P.3d 873 (Wyo. 2010), the Wyoming Supreme Court held Wyoming’s probate statutes do not apply to the appointment of personal representatives in wrongful death actions. Instead, the appointment of a personal representative for purposes of prosecuting a wrongful death claim is a discretionary task to be completed within the wrongful death action itself. However, the *Johnson* decision does not clearly establish how and in what procedure the courts should appoint a personal representative in wrongful death cases. After the *Johnson* decision, some Wyoming District Courts have held that the appointment of a personal representative is a condition precedent to maintaining a wrongful death claim. While not deciding the issue directly, the Wyoming Supreme Court recently wrote “[o]ur opinion in *Johnson* did not define the appointment of the personal representative as a jurisdictional prerequisite or otherwise discuss the tasks or its timing as a condition precedent to maintaining a wrongful death claim.” *Nodine v. Jackson Hole Mountain Resort Corp.*, 2012 WY 72, 277 P.3 112 (Wyo. 2012). Despite making this statement, the Wyoming Supreme Court did not address the issue or the procedure the courts should adopt in the appointment of a personal representative in wrongful death cases. Instead, it held the decision in *Johnson* is not to be applied retroactively.

## Venue Rules

- A) **Real property.** Actions for the recovery, partition, or sale of real property under a mortgage, lien, or other encumbrance shall be brought in the county in which the subject of the action is situated. WYO. STAT. ANN. § 1-5-101 (2017).
- (1) **Specific performance.** An action to compel specific performance of a contract for sale of real property may be brought in the county where any of the defendants reside. WYO. STAT. ANN. § 1-5-103 (2017).
- B) **Corporations.** Actions “against a corporation created under the laws of this state may be brought in the county in which the corporation is situated or has its principle office or place of business.” WYO. STAT. ANN. § 1-5-105 (2017).

- C) **Wrongful death.** “An action for personal injuries or wrongful death may be brought in the county in which the cause of action arose or in the county in which the defendant resides or may be summoned.” WYO. STAT. ANN. § 1-5-109 (2017).
- D) **Others.** Every other action not otherwise provided for shall be brought in the county in which a defendant resides or may be summoned. WYO. STAT. ANN. § 1-5-108 (2017).

## NEGLIGENCE

### **Comparative Fault/Contributory Negligence**

- A) **Modified comparative fault.** Wyoming has a comparative fault statute, WYO. STAT. ANN. § 1-1-109 (2017). Wyoming is a modified comparative fault state. There are two 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 plaintiff recovers nothing from any defendant. *Id.*

For example, if the plaintiff’s injuries are worth \$100,000.00 and the Court or jury determines that the defendant is 29% at fault, the defendant pays \$29,000 to the plaintiff. This rule applies regardless of how many other defendants are named. If a co-defendant is 17% at fault, he pays \$17,000.00 to the plaintiff. But if the plaintiff is 51% at fault, plaintiff recovers nothing from anyone.

- B) **Apportionment.** Wyoming juries are required to apportion causative fault to non-party “actors” who may have been negligent. An immune employer is a frequent example of a non-party actor. Strategically, you frequently want to argue that a non-party actor has much of the comparative fault. In Wyoming, plaintiffs have the burden of collecting from each negligent defendant.
- C) **Application.** The Wyoming Supreme Court interprets the Wyoming Comparative Fault Act in a manner favorable to defendants. For example, the Wyoming Comparative Fault Act is applied even where (a) the plaintiff is not negligent (*see Anderson Highway Signs & Supply v. Close*, 6 P.3d 123 (Wyo. 2000)); (b) one or more defendants commit intentional torts (*see Bd. of Cnty. Comm’rs v. Bassett*, 8 P.3d 1079 (Wyo. 2000)); and (c) whether a non-party actor is immune from suit (*see Pinnacle Bank v. Villa*, 2004 WY 150, 100 P.3d 1287 (Wyo. 2004)). The comparative fault statute includes within the definition of “fault” negligence, strict tort or strict products liability, including breach of warranty, assumption of risk, and misuse or alteration of a product.
- D) **Caps.** There is no limit or cap on personal injury damages in Wyoming. The state constitution prohibits any statutory cap on damages.
- E) **Collateral Source.** It is generally recognized in Wyoming tort law that compensation received by the plaintiff from a collateral source, wholly independent of the wrongdoer, cannot be deducted from the damages for which the defendant tortfeasor is liable. *Hurde*

*v. Nelson*, 714 P.2d 767, 770 (Wyo. 1986).

F) **Medical Damages (Paid v. Unpaid).** While the collateral source doctrine is applicable in Wyoming, a growing debate is occurring as to whether a plaintiff is entitled to recover the full amount billed for medical services or just the amount actually paid since it is common—especially in the context of workers’ compensation, insurance, Medicare, and Medicaid—for the billed amount for medical services to be reduced and/or written-off. The United States District Court for the District of Wyoming has held that a plaintiff is entitled to recover the entire amount originally billed by his or her healthcare providers, including the Medicare adjustments (amounts unpaid and written-off). *Lurus v. Rissler & McMurry Co.*, 02-cv-174-J (August 2004). Several other trial courts in Wyoming have held a Plaintiff is entitled to introduce the full amount billed, and prevented defendants from introducing evidence of the written-off amounts. Those cases include the United States District Court for the District of Wyoming in *Mathis v. Huff & Puff Trucking*, CV-29-F, and the District Court for the Third Judicial District, Sweetwater County, Wyoming in *Ghuman and Kaur v. Legacy Transportation Systems, LLC*, C-11-322-J. Until this issue is squarely addressed by the Wyoming Supreme Court, Plaintiffs are able to introduce the full amount billed by their health care providers.

## Exclusive Remedy—Workers' Compensation Protections

- A) **Exclusivity.** The receipt of worker's compensation benefits by an employee and his dependents for injuries incurred in extra hazardous employments are in lieu of all other rights and remedies against any employer and any joint employer making contributions to the worker's compensation fund, or their employees acting within the scope of their employment unless the employees intentionally act to cause physical harm or injury to the injured employee. WYO. STAT. ANN. § 27-14-104 (2017).
- B) **Intentional injuries.** The Worker's Compensation Act does not prevent an injured employee from pursuing his remedy at law against third parties or against co-employees who intentionally act to cause physical harm or injury. The Wyoming Supreme Court has held the phrase "'intentionally act to cause physical harm or injury' equate[s] to willful and wanton misconduct." *Bertagnolli v. Louderback*, 2003 WY 50, ¶ 15, 67 P.3d 627, 632 (Wyo. 2003).

## Indemnification

- A) **Scope.** In all cases (except for oil, gas, or water wells, and mines), indemnity agreements are valid and enforceable in Wyoming.
- B) Indemnity agreements pertaining to any well for oil, gas or water, or mine for any mineral, which purport to indemnify the indemnitee against loss or liability for damages for: (i) death or bodily injury; (ii) injury to property; (iii) any other loss, damage, or expense arising under either (i) or (ii) from:
  - (1) The sole or concurrent negligence of the indemnitee or the agents or employees of the indemnitee or any independent contractor who is directly responsible to such indemnitee; or
  - (2) From any accident which occurs in operations carried on at the direction or under the supervision of the indemnitee or an employee or representative of the indemnitee or in accordance with methods and means specified by the indemnitee or employees or representatives of the indemnitee, are against public policy and are void and unenforceable to the extent that such contract or indemnity by its terms purports to relieve the indemnitee from loss or liability for his own negligence. This provision shall not affect the validity of any insurance contract or any benefit conferred by the Worker's Compensation Law.

WYO. STAT. ANN. § 30-1-131 (2017).

- C) **Own negligence.** Except as provided in WYO. STAT. ANN. § 30-1-131 (2017), indemnity agreements that seek to indemnify one for his own negligence are generally enforceable in Wyoming, but the indemnitee must use very clear and explicit language that the indemnitor is agreeing to indemnify him for the indemnitor's own negligence. *See id.*

## Joint and Several Liability

Joint and several liability does not exist in Wyoming State Courts<sup>1</sup>. WYO. STAT. ANN. § 1-1-109 (2017). Each defendant is liable only to the extent of that defendant's proportion of the total fault. The usual rule is that a defendant pays *only* for *his own* percentage of the total (100%) causative fault.

## Strict Liability

A) **Products.** The Wyoming Supreme Court adopted the RESTATEMENT (SECOND) OF TORTS § 402A in *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986). Accordingly, Wyoming recognizes causes of action in strict products liability. As set forth by the Court in *McLaughlin*, Wyoming has not abrogated § 402A regarding chain of commerce issues. *McLaughlin v. Michelin Tire Corp.*, 778 P.2d 59, 64 (Wyo. 1989). As such, a distributor and a seller may be held liable for a defective product.

(1) **Misrepresentation.** A plaintiff may also recover under a theory of strict liability for the misrepresentation, by the manufacturer, of the product. *Phillips v. Duro-last Roofing, Inc.*, 806 P.2d 834 (Wyo. 1991). Further, a manufacturer has a duty to adequately warn of a known defect or danger inherent in its product.

(2) **Standard.** The five elements necessary to a cause of action for strict liability for products are:

(1) That the sellers were engaged in the business of selling the product that caused the harm; (2) that the product was defective when sold; (3) that the product was unreasonably dangerous to the user or consumer; (4) that the product was intended to and did reach the consumer without substantial change in the condition in which it was sold; and (5) that the product caused physical harm to the plaintiff/consumer.

*Estate of Coleman by & through Coleman v. Casper Concrete Co.*, 939 P.2d 233 (Wyo. 1997).

(3) **Comparative fault.** Comparative fault principles apply to products liability cases. WYO. STAT. ANN. § 1-1-109 (2017). If, for example, the jury finds that a product defect is only 18% of the cause of the plaintiff's injuries, the manufacturer, then, is liable for only 18% of the total award.

(4) **Economic loss.** A plaintiff cannot recover for a purely economic loss due to failure of the defective product. *Cont'l Ins. v. Page Eng'g Co.*, 783 P.2d 641, 647 (Wyo. 1989). A plaintiff may only collect damages for injury to his person or property. *Id.* at 648-49.

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<sup>1</sup> This compendium does not address the Northern Arapaho and Shoshoni Tribal Court which is located in the State of Wyoming, but operates very differently.

## Willful and Wanton Conduct

*Hannifan v. Am. Nat'l Bank of Cheyenne*, 2008 WY 65, 185 P.3d 679 (Wyo. 2008) reads:

The concept of willful and wanton misconduct has essentially the same legal effect as the statutory language intentionally act to cause physical harm or injury. Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know that such conduct would, in a high degree of probability, result in harm to another.

## DISCOVERY

### Electronic Discovery Rules

- A) **Scope.** WYO. R. CIV. P. 34(a) governs the scope of electronic information. It provides for discovery of:

[A]ny designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; any designated tangible things; or . To permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

- B) **Wyo. R. Civ. P. 34: Procedure:**

(1) **Contents of the Request.** The request:

- a. Must describe with reasonable particularity each item or category of items to be inspected;
- b. Must specify a reasonable time, place and manner for the inspection and for performing the related acts; and
- c. May specify the form or forms in which electronically stored information is to be produced.

(2) **Responses and Objections.**

- a. *Time to Respond* – The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.
- b. *Responding to Each Item.* – For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later

than the time for inspection specified in the request or another reasonable time specified in the response.

- c. *Objections.* – An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.
- d. *Responding to a Request for Production of Electronically Stored Information.* – Unless otherwise stipulated or ordered by the court, in producing documents or electronically stored information:
  - 1. A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
  - 2. If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
  - 3. A party need not produce the same electronically stored information in more than one form.

(3) **Nonparties.**– A nonparty may be compelled to produce documents and tangible things or to permit an inspection.

- C) **Undue burden.** “A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost” absent a showing of good cause pursuant to Rule 26(b)(2)(C) of the Wyoming Rules of Civil Procedure. WYO. R. CIV. P. 26(b)(2)(B).

### **Expert Witnesses**

- A) **Forms of disclosure – reports required.** WYO. R. CIV. P. 26(a)(2) requires a designation at least ninety (90) days prior to trial, unless otherwise ordered by the Court, that identifies “any person who may be used at trial to present evidence under Rules 702, 703 or 705 of the Wyoming Rules of Evidence.” If the evidence is “intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26 (a)(2)(B) or (C), within 30 days after the other party’s disclosure.

(1) If the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony, this disclosure must be accompanied by a written report prepared and signed by the witness or a disclosure signed by counsel for the party. The report must contain:

- a. A complete statement of all opinions the witness will express and the basis and reasons for them;
- b. The facts or data considered by the witness in forming them;
- c. Any exhibits that will be used to summarize or support them;
- d. The witness’s qualifications, including a list of all publications authored in the previous 10 years;
- e. A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

f. A statement of the compensation to be paid for the study and testimony in the case.

- (2) If the witness is not required to provide a written report, this disclosure must state:
- a. The subject matter on which the witness is expected to present evidence under the Wyoming Rule of Evidence 702, 703, or 705; and
    1. A summary of the facts and opinions to which the witness is expected to testify.

**B) Discovery of expert work product.**

- (1) A testifying expert's report, as well as the "basis and reasons" for his opinions must be disclosed in routine discovery.
- (2) Any trial preparation materials are discoverable:  
[O]nly upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, or legal theories of an attorney or other representative of a party.

Wyo. R. Civ. P. 26(b)(3).

- (3) *Draft Reports or Disclosures.* Rules 26 (b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26 (a)(2), regardless of the form in which the draft is recorded. Wyo. R. Civ. P. 26 (b) (4) (B)
- (4) *Communications between a Party's Attorney and Expert Witness.* Rules 26 (b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26 (a)(2)(B), regardless of the form of the communications, except to the extent the communications:
  - a. Relate to compensation for the expert's study or testimony;
  - b. Identify facts or data that the party's attorney provided and that expert considered in forming the opinions to be expressed; or
  - c. Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

Wyo. R. Civ. P. 26 (b) (4) (C)

- (5) *Non-testifying experts.* With respect to a non-testifying expert or consultant, the information is discoverable only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. WYO. R. CIV. P. 26(b)(4). However, reports and conclusions of an examiner performing a Medical Evaluation are treated differently. WYO. R. CIV. P. 35(b) provides:

## Non-Party Discovery

- A) **Subpoenas.** Subpoenas are governed by WYO. R. CIV. P. 45. An attorney, as an officer of the court, may issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice. The clerk of court will also issue a subpoena signed, but otherwise in blank, to a party requesting it who shall complete it before service. The issuance of a subpoena commands the nonparty to appear and, if ordered, to produce documents or other tangible items within the scope of the matter at a specified time and place.

All subpoenas must set forth the text of WYO. R. CIV. P. 45(c), (d), and (e). WYO. R. CIV. P. 45(a)(1)(A)(iv).

“A person commanded by subpoena to appear at a deposition may be required to attend only in the county wherein that person resides or is employed or regularly transacts business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the state may be required to attend only in the county wherein that nonresident is served with a subpoena or at such other convenient place as is fixed by an order of court.” WYO. R. CIV. P. 45(b)(4).

A subpoena for trial or hearing may require the person subpoenaed to appear at the trial or hearing irrespective of the person’s place of residence or employment. WYO. R. CIV. P. 45(b)(3).

- B) **Time frames for responses.** A subpoena must permit a reasonable time for response, and failure to do so is grounds to quash the subpoena. *See* WYO. R. CIV. P. 45(c)(2)(B), 45(c)(3)(A). A person commanded to produce and permit inspection, copying, testing or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises – or to producing electronically stored information in the form or forms requested. Wyo. R. Civ. P. 45 (c) (2) (B).

## Privileges

- A) **Attorney-client privilege.** The Wyoming attorney-client privilege is codified at WYO. STAT. ANN. § 1-12-101 (2017) and prevents an attorney from testifying “concerning a communication made to him by his client . . . in that relation, . . . or his advice to his client . . . .”

- B) **Work product**—Any trial preparation materials are discoverable

. . . if the party shows that it has a substantial need of the materials to prepare the party’s case and that the party cannot, without undue hardship, obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required

showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, or legal theories of an attorney or other representative of a party concerning the litigation.

WYO. R. CIV. P. 26(b)(3).

C) **Self-critical analysis.** This privilege has not been recognized nor considered in Wyoming.

D) **Others for Consideration.**

a. **Clergy.** Wyoming also considers as privileged and prevents from testifying “[a] clergyman or priest concerning a confession made to him in his professional character if enjoined by the church to which he belongs.” WYO. STAT. ANN. § 1-12-101 (2017).

b. **Spousal privilege.** WYO. STAT. ANN. § 1-12-104 (2017) reads:

No husband or wife shall be a witness against the other except in criminal proceedings for a crime committed by one against the other, or in a civil action or proceeding by one against the other. They may in all civil and criminal cases be witnesses for each other the same as though the marital relation did not exist.

## Requests to Admit

A) **Procedure.** WYO. R. CIV. P. 36(a) reads:

A party may serve upon any other party a written request to admit, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) (1) relating to:

- a. Facts, the application of law to fact, or opinions about either; and
- b. The genuineness of any described documents.

B) **Time to Respond.** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

C) **Answer.** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of the matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

## **EVIDENCE, PROOFS & TRIAL ISSUES**

### **Accident Reconstruction**

- A) Accident reconstructions have not been subjected to an independent admissibility analysis, but would be decided under the familiar standards of all expert testimony as expressed by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 1176, 143 L. Ed. 2d 238 (1999). This standard for admissibility of expert testimony was adopted by the Wyoming Supreme Court in *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999).
- B) The only special rule in Wyoming pertains to accident reconstructions performed by law enforcement officers. WYO. STAT. ANN. § 31-9-209 (2017) provides that law enforcement reports shall not be “any evidence of the negligence or due care of either party, at the trial of any action at law to recover damages.”

### **Appeal**

- A) **When permitted.** WYO. R. APP. P. 1.04 (2017) reads:

A judgment or appealable order entered by a district court may be: affirmed, reversed, vacated, remanded, or modified by the supreme court for errors appearing on the record.

A judgment rendered, or appealable order made, by an administrative agency, circuit or municipal court, upon an appeal or proceeding for judicial review, may be: reversed, vacated, remanded, or modified by the district court for errors appearing on the record.

WYO. R. APP. P. 13.02 (2017) reads:

A writ of review may be granted by the reviewing court to review an interlocutory order of a trial court in a civil or criminal action, or from an interlocutory order of an administrative agency, which is not otherwise appealable under these rules, but which involves a controlling question of law as to which there are substantial bases for difference of opinion and in which an immediate appeal from the order may materially advance resolution of the litigation.

- B) **Timing.** WYO. R. APP. P. 2.01(a) (2017) reads:

An appeal from a trial court to an appellate court shall be taken by filing the notice of appeal with the clerk of the trial court within 30 days from entry of the appealable order and concurrently serving the same in accordance with the provisions of Rule 5, WYO. R. CIV. P., (or as provided in WYO. R. CR. P. 32 (c)(4)) . . . . Contemporaneously with the filing of the notice of appeal with the clerk of the trial court, a copy of the notice of appeal shall also be filed with the clerk of the appellate court .

If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 15 days of the date on which the first notice of appeal was filed. Wyo. R. A. P.

### **Biomechanical Testimony**

Biomechanical testimony has not been subjected to an independent admissibility analysis, but would be decided under the familiar standards of all expert testimony as expressed by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 1176, 143 L. Ed. 2d 238 (1999). This standard for admissibility of expert testimony was adopted by the Wyoming Supreme Court in *Bunting v. Jamieson*, 984 P.2d 467 (Wyo. 1999).

### **Convictions**

WYO. R. EVID. 404(b) (2017) reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

### **Day in the Life Videos**

Day in the Life Videos have not received thorough evaluation in a Wyoming Court, and therefore are subject to the same tests and admissibility requirements as photographs, charts, drawings and models.

### **Dead Man's Statute**

Wyoming's Dead Man's Statute is located at WYO. STAT. ANN. § 1-12-102 (2017) and provides:

In an action or suit by or against a person who from any cause is incapable of testifying, or by or against a trustee, executor, administrator, heir or other representative of the person incapable of testifying, no judgment or decree founded on uncorroborated testimony shall be rendered in favor of a party whose interests are adverse to the person incapable of testifying or his trustee, executor, administrator, heir or other representative. In any such action of suit, if the adverse party testifies, all entries, memorandum and declarations by the party incapable of testifying made while he was capable, relevant to the matter in issue, may be received in evidence.

### **Medical Bills**

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.

### **Offers of Judgment**

Offers of Settlement, as they are termed in Wyoming, are permitted by WYO. R. CIV. P. 68 (2017) and may be served on an adverse party at any time more than sixty (60) days after service of the complaint and more than twenty-eight (28) days before the trial begins. Furthermore:

If within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance with proof of service. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs. As used herein, “costs” do not include attorney’s fees. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

*Id.*

### **Relationship to the Federal Rules of Evidence**

Wyoming has adopted its own Rules of Evidence. As the rules are modeled after their Federal counterpart, cases interpreting the Federal counterparts are highly persuasive. *See Brown v. Michael Pryor, P.C.*, 954 P.2d 1349, 1350 (Wyo. 1998).

### **Seat Belt and Helmet Use Admissibility**

- A) Wyoming does not have a “helmet defense” in motorcycle cases; there are no statutes or court decisions that require motorcycle drivers or passengers to wear helmets. While defense counsel can argue that a plaintiff’s duty of reasonable care for his own safety should require that he wear a helmet, no Wyoming trial court will ever give such an instruction. Juries will decide whether a helmet-less motorcycle driver used reasonable care for his own safety when he failed to wear a helmet on a case-by-case basis.
  
- B) **Safety restraints.** The Wyoming Legislature has enacted the Child Safety Restraint Act, WYO. STAT. ANN. § 31-5-1301 *et seq.* (2017), and the Safety Belt Usage Act, WYO. STAT. ANN. § 31-5-1401 *et seq.* The Wyoming Legislature specifically states that a “person’s failure to wear a safety belt as required by this act shall not be admissible in any civil action.” WYO. STAT. ANN. § 31-5-1402(f) (2017). No such prohibition is found in the Child Safety Restraint Act, although it does state “[v]iolation of this article does not constitute evidence of negligence or recklessness and does not constitute a basis for criminal prosecution except as set forth in this article.” WYO. STAT. ANN. § 31-5-1305.
  - (1) **Application.** The Wyoming Supreme Court has not yet had occasion to interpret or construe this legislation. Most trial counsel believe that the act means what it says: evidence of a driver’s failure to wear available safety restraints is not admissible. A minority of Wyoming defense counsel, however, believes that the act merely prohibits mention of this statutory seat belt requirement at a civil trial. They believe that defense counsel should still be able to argue that adults have a common-law duty of ordinary care to use their available seat belts independent of any statutory mandate. *See Dellapenta v. Dellapenta*, 838 P.2d 1153 (Wyo. 1992).

In a later case applying Wyoming Law, the United States District Court for the District of Wyoming concluded the statute barred any evidence of seat belt non-use

regardless of the statutory and common law duties. Therefore it appears the seat belt defense is no longer available in Wyoming. *Huff v. Shumate* 360 F. Supp 2d 1197 (D. Wyo. 2004).

## **Spoliation**

Spoliation is the withholding, hiding or destruction of evidence relevant to a legal proceeding. In Wyoming, the general rule is that a party's bad-faith withholding, destruction, or alteration of a document or other physical evidence relevant to proof of an issue at trial gives rise to a presumption or inference that the evidence would have been unfavorable to the party responsible for its nonproduction, destruction, or alteration. *See generally Coletti v. Cudd Pressure Control*, 165 F.3d 767 (10th Cir. 1999).

## **Subsequent Remedial Measures**

Subsequent remedial measures refer to a change, repair, or precaution taken after an event or injury has occurred.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

WYO. R. EVID. 407 (20157).

## **Use of Photographs**

Photographs are demonstrative evidence. They serve as a visual aid to the jury/judge to supplement the testimony of a witness's verbal testimony. As long as the verbal testimony the photograph seeks to supplant makes a fact in evidence more or less probable, it should be admissible.

Before entering it into evidence, a photograph must pass a two-prong test. First, the photo must be authenticated by someone who has personal knowledge of the video that can testify that it accurately portrays what it is meant to show. WYO. R. EVID. 901 (2017). Second, like all evidence, it is subject to a judicial balancing test to ensure that it is not more prejudicial than helpful to any party involved in the trial. WYO. R. EVID. 403 (2017).

## **DAMAGES**

### **Caps on Damages**

There is no limit or cap on personal injury damages in Wyoming. The state constitution prohibits any statutory cap on damages. WYO. CONST. art. 10, § 4.

### **Calculation of Damages/Available Items of Personal Injury Damages**

Recoverable damages for personal injury 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 this date, and the present cash value of any earnings reasonably probable to be lost in the future, taking into consideration any lost earning capacity of the plaintiff.
- E) 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.
- 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.

See discussion of medical damages (paid v. unpaid) under “Negligence.”

### **Lost Opportunity Doctrine**

- A) The lost opportunity doctrine, called the doctrine of loss of chance of survival in Wyoming is cognizable.
- B) **Prima facie case.** Generally, to prevail on a claim that the physician's failure to evaluate and treat a patient caused the patient to lose the chance for survival, the plaintiff must show the following:
  - (1) The patient has in fact been deprived of the chance for successful treatment; and
  - (2) The decreased chance for successful treatment more likely than not resulted from the physician's negligence.

*McMackin v. Johnson Cnty. Healthcare Ctr.*, 2004 WY 44, 88 P.3d 491 (Wyo. 2004). Under this analysis, the causal connection between the defendant's omission and the decedent's injury can be established if the defendant's omissions increased the risk of the harm suffered by the plaintiff.

- C) **Apportionment of percentages.** A plaintiff is not required to establish the lost chance of recovery or survival in an exact percentage for the matter to be submitted to the jury. The jury is to consider evidence of percentages of the lost chance in the assessment and apportionment of damages. The damages recoverable by the plaintiff equal the total sum

of the damages for the underlying injury or death multiplied by the percentage of the lost chance. *Id.*

## **Punitive Damages**

- A) **Standard.** Punitive damages are allowed in Wyoming if an insured's conduct constitutes "willful and wanton misconduct." Punitive damages are not allowed where an insured's conduct is only "negligent" or "grossly negligent."

In *Weaver v. Mitchell*, 715 P.2d 1361, 1369-70 (Wyo. 1986), the Wyoming Supreme Court defined the narrow limits under which punitive damages may be awarded:

**Punitive damages are not a favorite of the law and are to be allowed with caution within narrow limits.** Since the purpose of punitive damages is not to compensate a plaintiff, but to punish a defendant and deter others, **such damages are to be awarded only for conduct involving some element of outrage, similar to that usually found in crime.** The purpose of punitive damages is not to provide a windfall to plaintiffs and their attorneys, but to publicly condemn some notorious action or inaction on the part of the defendant. (internal citations omitted.)

We have approved punitive damages in circumstances involving outrageous conduct, such as intentional torts, torts involving malice and torts involving willful and wanton misconduct. **Punitive damages are not appropriate in circumstances involving inattention, inadvertence, thoughtlessness, mistake, or even gross negligence.** (citation omitted.)

(emphasis added).

In Wyoming, punitive damages are awarded only for willful and wanton misconduct. Such conduct is defined as follows:

Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know that such conduct would, in a high degree of probability, result in harm to another.

*Thunder Hawk By and Through Jensen v. Union Pac. R.R. Co.*, 844 P.2d 1045, 1051 (Wyo. 1992). See also, *Farmers Ins. Exchange v. Shirley*, 958 P.2d 1040, 1052 (Wyo. 1998), wherein the Wyoming Supreme Court stated that "intentional action does not necessarily involve willful and wanton misconduct."

Wyoming law simply does not allow punitive damages if the action or inaction of a defendant involves inattention, inadvertence, thoughtlessness, or mistake. *Weaver*, 715 P.2d at 1369-70. Moreover, punitive damages are not appropriate even when the culpable conduct arises to the degree high enough to be characterized as "gross negligence." *Id.*

The Wyoming Supreme Court has defined gross negligence as follows:

. . . Indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. **But it is something less than the willful, wanton and reckless conduct . . . .** (citations omitted).

*Id.* at 1370 (emphasis added).

Willful and wanton misconduct must not be confused with ordinary negligence or even gross negligence. Willful and wanton misconduct does not involve mere mistake, inattention, indifference or even utter forgetfulness or one's duty. It requires conduct that is so egregious so as to rise above gross negligence and above total indifference and utter forgetfulness of one's duty. The conduct must be outrageous and utterly reckless and under circumstances that a reasonable person would know that such outrageous conduct is highly likely to injure someone. In that sense, it is similar to intentional torts, torts involving actual malice, and the commission of crimes. *Weaver*, 715 P.2d at 1369-70.

Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances and conditions that a reasonable person would know, or have reason to know that such conduct would, in a high degree of probability, result in harm to another.

*Hannifan v. Am. Nat'l Bank of Cheyenne*, 2008 WY 65, 185 P.3d 679 (Wyo. 2008).

- B) **Insurability.** In Wyoming, punitive damages are automatically covered unless they are “expressly excluded” in the insurance policy. If punitive or exemplary damages are expressly excluded in the policy, Wyoming courts honor that exclusion. *Sinclair Oil Corp. v. Columbia Cas. Co.*, 682 P.2d 975 (Wyo. 1984). In *Sinclair Oil*, the Wyoming Supreme Court also held “that it is not against the public policy of the State of Wyoming to insure against either liability for punitive damages imposed vicariously based on willful and wanton misconduct or personal liability for punitive damages imposed on the basis of willful and wanton misconduct. *Id.*
- C) **Caps.** There are no caps or limits on the amount of punitive damages that can be legally awarded to a claimant in Wyoming.

### **Recovery and Pre- and Post-Judgment Interest**

- A) In the absence of a contract or agreement between the parties for a different rate, all decrees and judgments for the payment of money bear interest at the rate of 10% per year from the date of rendition until paid. WYO. STAT. ANN. § 1-16-102 (2017).

- B) **Prejudgment interest.** Prejudgment interest is potentially available on liquidated sums when the amount due is readily computable by simple mathematical calculation. *See Zitterkopf v. Roussalis*, 546 P.2d 436, 439 (Wyo. 1976).

### Recovery of Attorneys' Fees

- A) **American rule.** *Alexander v. Meduna*, 2002 WY 83, 47 P.3d 206 (Wyo. 2002) reads:

Wyoming subscribes to the American rule regarding recovery of attorney fees. Under the American rule, each party is generally responsible for his own attorney fees. However, a prevailing party may be reimbursed for his attorney fees when express statutory or contractual authorization exists for such an award. Moreover, an exception may be applied in the circumstances of fraud and the corollary award of punitive damages.

- B) **Lodestar test.** In determining the amount of attorney's fees awarded when such statutory or contractual authorization exists, Wyoming employs the two-factor federal lodestar test. WYO. STAT. ANN. § 1-14-126(b) (2017). These factors are: "(1) whether the fee charged represents the product of reasonable hours times a reasonable rate; and (2) whether other factors of discretionary application should be considered to adjust the fee either upward or downward." *Schlesinger v. Woodcock*, 2001 WY 120, 35 P.3d 1232 (Wyo. 2001).
- C) **Authority.** Possible sources of the express statutory or contractual authorization for an award of attorney's fees include WYO. STAT. ANN. § 1-14-124 (2017) which allows for attorney's fees in an action for the recovery of money only or for the recovery of specific real or personal property.
- D) **Subrogation.** Attorney's fees are also authorized when collecting an amount that is the subject of a subrogation right in another party. "The general rule is that the insured may retain out of the fund recovered from the wrongdoer, after the payment of the policy, the costs and reasonable expenses incurred in the litigation, for it would be unjust to require him to incur expenses for the recovery of money for the benefit of the insurer, without being allowed to reimburse himself." *Iowa Nat'l Mut. Ins. Co. v. Huntley*, 78 Wyo. 380, 395 (1958) (internal quotation omitted).

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.**