Wyoming By Richard Mince, Laurie Rogers, and Shaina Case

PRE-SALE DUTIES Scope of Duty to Warn If a plaintiff already knows of a danger or hazard, there is no duty to warn. Parker v. Heasler Plumbing & Heating Co., 388 P.2d 516, 518-19 (Wyo. 1964) (noting that no one needs notice of what is already known). A duty to warn arises where there are latent defects and hazards of which a reasonable user would not have knowledge. Id.; Bridger v. Arctic Cat, Inc., No. 13-CV-193-SWS, 2015 U.S. Dist. LEXIS 179383, at *34 (D. Wyo. Jan. 22, 2015) (holding the legal duty to warn consumers extended only to known, latent dangers of snowmobiles). To impose a duty to warn on a manufacturer, the danger must be other than one of common knowledge. Parker, 388 P.2d at 518. Where a product has been flawlessly manufactured but there exists a likelihood that the product could cause harm unless properly used, a duty to warn arises. Loredo v. Solvay Am., Inc., 2009 WY 93, ¶20, 212 P.3d 614, 632 (Wyo. 2009). The factfinder "must consider whether the product 'is in a defective condition unreasonably dangerous by virtue of the absence of adequate warning or instruction.' The defect in the product must be shown to be the manufacturer's failure 'to warn about the dangers associated with the product.'" Id. Relationship between Duty to Warn and Duty of Safe Design Manufacturers generally have a duty to produce products that are reasonably safe for their intended use. Maxted v. Pac. Car & Foundry Co., 527 P.2d 832, 835 (Wyo. 1974). A manufacturer, however, may have a duty to warn or instruct about the intended use to render the product reasonably safe if the intended use is not reasonably apparent. Additionally, some products may pose certain hazards even when flawlessly manufactured and used as intended. In such cases, the manufacturer must adequately advise of known risks so the user can make an educated choice about the use of the product which may be deemed beneficial notwithstanding the presence of danger. Rohde v. Smiths Med., 2007 WY 134, ¶31, 165 P.3d 433, 440-41 (Wyo. 2007) (discussing the nuances between liability arising from faulty manufacture or design and liability arising from failure to warn of the danger). Theories of Liability Product liability claims present themselves in any of the following liability theories: negligence, strict liability, and breach of express and implied warranties. Negligence In a products liability action premised on negligence, a plaintiff must prove that the manufacturer, seller, or distributor breached a duty of care owed to him and thereby proximately caused him injury. McLaughlin v. 2 Product Liability: Warnings, Instructions, and Recalls Wyoming Michelin Tire Corp., 778 P.2d 59, 63 (Wyo. 1989). Although the duties owed to plaintiffs under a negligence theory of products liability vary, the duties all relate to the reasonableness of a defendant's actions. Id. at 64. The manufacturer must exercise reasonable care to plan, design, and manufacture its product so that the product is reasonably safe for its intended use. Id. The duty of a seller or distributor is to exercise the necessary care that a reasonably prudent manufacturer would under the same circumstances. Id. A product that is not reasonably safe for the user is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller and such omission of an alternative design renders the product not reasonably safe. Loredo, ¶20, 212 P.3d at 630. Strict Liability Wyoming adopted §402A of the Restatement (Second) of Torts. Thom v. Bristol-Myers Squibb Co., 353 F.3d 848, 851–52 (10th Cir. 2003) (citing Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 341–42 (Wyo. 1986)). Section 402A provides that a seller of a defective, unreasonably dangerous product will be held strictly liable for any physical harm to a user or consumer or his property if: (1) the seller is engaged in the business of selling the product; and (2) it is sold to and reaches the consumer

without substantial change in the condition in which it was sold. Restatement (Second) of Torts §402A (1979). Wyoming has mentioned and cited to the Restatement (Third) of Torts, which describes when a product is defective. Campbell v. Studer, Inc., 970 P.2d 389, 392 n.1 (Wyo. 1998) (commenting briefly in a footnote on §2(b), (e), regarding alternative designs); Loredo, ¶20, 212 P.3d at 630 (citing Campbell and the Restatement (Third) of Torts); Bridger, at *29-30 (citing to Restatement (Third) Torts: Products Liability §§2(c), 16(a)); Herrera v. Buckingham, No. 15-CV-0128-F, 2015 U.S. Dist. LEXIS 184702, at *7 (D. Wyo. Oct. 9, 2015) (noting that the Wyoming Supreme Court may, but has not yet, adopted the Restatement (Third) of Torts). Breach of Warranty The Uniform Commercial Code governs actions for breach of warranty, which includes breaches for both implied and express warranties. Wyo. Stat. Ann. §34.1-2-313 (covering express warranties); Wyo. Stat. Ann. §34.1-2-314 (covering implied warranties of merchantability); Wyo. Stat. Ann. §34.1-2-315 (covering implied Product Liability: Warnings, Instructions, and Recalls Wyoming 3 bears the risk and reward of settling with a defendant. The remaining defendants are not entitled to credit or set-offs for amounts paid by settling co-defendants. Accordingly, there is no right of contribution against a joint tortfeasor. Manufacturer A "manufacturer or seller of a machine, dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers." Parker v. Heasler Plumbing & Heating Co., 388 P.2d 516, 517-18 (Wyo. 1964). In cases where remote users are involved, a manufacturer or seller has a duty of guarding against hidden defects and of giving notice of concealed dangers. Id.; see also supra re: Scope of Duty to Warn. Distributor While there is no case directly on point, Wyoming's comparative fault system appears to have superseded the traditional §402A concept that all persons in the chain of distribution may be held liable on strict products liability theories. As such, negligence concepts will likely determine whether a distributor will be held liable for a failure to warn. A distributor or retailer will likely be held liable if it had adequate knowledge of a danger and failed to pass that knowledge on to the user or the next party in the chain of distribution. Component Part Supplier While Wyoming has not specifically addressed this issue, a component part supplier would likely have a duty to warn the manufacturer of the finished product and/or the end user, depending on the specific facts of the case consistent with general negligence principles. Retailer Please refer to the discussion above regarding distributors. Practically, however, the comparative fault doctrine should minimize any resulting liability. Bailor Wyoming addressed the issue of bailment and stated two standards, one for gratuitous bailment and the other for bailment for mutual benefit. See Waggoner v. Gen. Motors Corp., 771 P.2d 1195 (Wyo. 1989). A gratuitous bailment is where either the bailor or the bailee is the sole beneficiary of the bailment. In such cases, the bailor has a minimal duty to warn of defects likely to cause injury that he has actual knowledge of at the time of lending. Id. at 1198-99. In contrast, in a bailment for mutual benefit (one where both parties to the contract receive a benefit, such as a bailment for hire), the bailor "must perform a reasonable inspection before transfer to determine if the chattel is fit for the purposes intended and warn of defects discoverable with reasonable care or make the article safe for its intended purpose." Id. at 1199; Tietema v. Nat'l Oilwell Varco, Inc., No. 14-CV-39-SWS, 2014 U.S. Dist. LEXIS 187184, at *10 (D. Wyo. Dec. 22, 2014) (agreeing that in bailment for mutual benefit, the bailor must perform a reasonable inspection before transfer). Employer Wyoming has not specifically addressed this issue. However, Wyoming case law addresses an employer's duty to the employee with respect to the employee's working environment: 4 Product Liability: Warnings, Instructions, and Recalls Wyoming It is the duty of the master, in the performance of such

nondelegable duties to exercise ordinary or reasonable care, or, as otherwise expressed, the care and skill that a man of ordinary prudence would observe under the circumstances. And it is generally held that it is the master's duty for the protection of his employees to exercise such care and skill in the following particulars, among others: (1) To furnish them with reasonably safe machinery, appliances, tools, and place to work, and to keep the same in reasonably safe repair. (2) To employ competent and sufficient employees with whom to work. The master is not, however, liable for a failure to furnish a safe place to work if the complaint centers upon a danger which the employer does not know of and concerning which he is not chargeable with knowledge, or which arises in the progress of the work and constitutes part of its details and risks. . . . The duty of the employer to guard his workmen against unnecessary and unreasonable risks extends, not only to those that are known to him, but also to such as a reasonably prudent man, in the exercise of ordinary diligence, would know or discover, having regard to the danger to be avoided. Foote v. Simek, 2006 WY 96, ¶12, 139 P.3d 455, 459-60 (Wyo. 2006) (quoting Engen v. Rambler Copper & Platinum Co., 121 P. 867 (Wyo. 1912)). A similar result is likely when dealing with products liability where an employer should warn its employees of those dangers it is aware of or of those of which it has been warned. Please note that while employers may enjoy workers' compensation immunity, in some circumstances it may have its fault assessed as a non-party actor. Also see the discussion below regarding sophisticated users/ buyers. Adequacy of Warning or Instructions Factors to Consider "Unlike traditional strict liability claims, a claim for failure to provide adequate warnings incorporates some negligence components in determining whether the warning is necessary and/or whether the warnings provided were adequate." Rohde, ¶32, 165 P.3d at 441(citation omitted). "An adequate warning of an unapparent risk is one that is reasonable under the circumstances." Thom, 353 F.3d at 853(citation omitted). With respect to drugs and medical devices, "[a] warning is adequate if it reasonably discloses all inherent risks and enables a prescribing physician to weigh the benefits of a drug's use against the attendant risk." Estate of Tobin v. SmithKline Beecham Pharms., 164 F. Supp. 2d 1278, 1288 (D. Wyo. 2001). The following considerations, while not exclusive, are relevant in determining whether a warning is adequate as a matter of law: 1) the warning must adequately indicate the scope of the danger; 2) the warning must reasonably communicate the extent or seriousness of the harm that could result from misuse of the drug; 3) the physical aspects of the warning must be adequate to alert a reasonably prudent person to the danger; 4) a simple directive warning may be inadequate when it fails to indicate the consequences that might result from failure to follow it; and 5) the means to convey the warning must be adequate. Thom, 353 F.3d at 853 (citation omitted). These same principles should apply with respect to products other than pharmaceuticals. Product Liability: Warnings, Instructions, and Recalls Wyoming 5 Location of Warning Though Wyoming has not specifically addressed this issue, the location of a warning may be considered when determining whether a warning is adequate. As stated above, the physical aspects of the warning must be adequate to alert a reasonably prudent person to the danger. Content of Message See Location of Warning above. Obvious Hazards There is no duty to warn of the potential hazards of a product which the user of a product is aware. Parker, 388 P.2d at 519 ("No one needs notice of what he already knows."); see O'Donnell v. Casper, 696 P.2d 1278, 1287 (Wyo. 1985) (holding that the duty of a product manufacturer, as opposed to a land owner, is "to warn users of known, latent dangers.") (emphasis added). Note that courts interpreting O'Donnell sometimes cite the case for the proposition that comparative fault completely subsumed the open and obvious defense, though this is only true for the causation element. Reasonably

Foreseeable Misuse Wyoming has not specifically addressed this issue. Misuse is still a viable comparative fault defense in products liability actions. Anderson v. Louisiana-Pacific, 859 P.2d 85, 88 (Wyo. 1993). Misuse is defined as "using a product for an unintended or unforeseeable purpose." Id. (citing Schneider Nat'l, Inc., 843 P.2d 561). Misuse also includes "using the product in an obviously dangerous manner" because it is "the same as using it for an unintended or unforeseeable purpose." Id. However, "even in cases where a product has been flawlessly manufactured, if there is, nevertheless, the likelihood that the product could cause harm unless properly used, a duty to warn arises." Loredo, ¶20, 212 P.3d at 632 (citation omitted). Note that the Plaintiff raised reasonably foreseeable misuse in Loredo, but the Court did not specifically address the issue. It seems that a manufacturer has a duty to warn/instruct on the intended use if not reasonably apparent but should not have a duty to warn against product misuse, even if foreseeable. Foreign Language or Use of Pictorials Wyoming has not specifically addressed either of these issues. Effect of Promotion Wyoming has not addressed this issue. Overwarning Wyoming has not addressed this issue. Those You Must Warn Bystanders Wyoming has not addressed this issue. 6 Product Liability: Warnings, Instructions, and Recalls Wyoming Allergic Persons Wyoming has not addressed this issue. Sophisticated Users Wyoming has not specifically addressed this issue. However, the Court has weighed the sophistication and knowledge of a buyer of a product when determining whether a manufacturer was liable when a buyer refused a safety option offered. See Loredo, ¶26, 212 P.3d at 635 ("This is especially true when, as here, the buyer was sophisticated and knowledgeable about the product and the uses of the product."). The danger of a product will be more evident and obvious to a sophisticated user than to the general public. Wyoming court Product Liability: Warnings, Instructions, and Recalls Wyoming 7 Heeding Presumption The Wyoming Supreme Court has not addressed this issue. Available Defenses for those within Chain of Distribution Known/Patent Dangers and Risks Because there is no duty to warn of known or patent dangers, this defense is available to those within the chain of distribution. See When is it Necessary to Warn above. Dangers or Risks Unknown to the Manufacturer This defense should also be available to those within the chain of distribution unless the particular defendant has its own personal knowledge of the risk separate and apart from the manufacturer. Misuse Misuse of a product is an affirmative defense. Anderson, 859 P.2d at 88. In Wyoming, misuse of a product is defined as "using a product for an unintended or unforeseeable purpose." Id. (citing Schneider Nat'l, Inc., 843 P.2d 561). Further, "using the product in an obviously dangerous manner is the same as using it for an unintended or unforeseeable purpose." Id. Contributory Negligence/Failure to Heed Warning/Assumption of Risk Because of Wyoming's comparative fault system, (see The Effect of Comparative Fault, addressed above) defenses such as product misuse, failure to heed a warning, and assumption of the risk are analyzed as an element of comparative fault. See Murphy v. Petrolane-Wyo. Gas Serv., 468 P.2d 969, 976 (Wyo. 1970) ("A plaintiff who exposes himself in disregard of warnings when an ordinarily prudent man similarly situated would not is guilty of negligence, but such a warning must be definite in order to be properly considered as informing him of the danger, and when the facts are undisputed the contributory negligence becomes a matter of law."). Purely Economic Loss Wyoming does not permit recovery in tort for damage caused to the product itself. Continental Ins. v. Page Eng'g Co., 783 P.2d 641, 649 (Wyo. 1989). Statute of Repose Wyoming's Statute of Repose may bar a plaintiff's products liability claim arising out of improvements to real property. Claims for personal injury, property damage, and wrongful death are barred ten (10) years after substantial completion of such improvements. Wyo.

Stat. Ann. §1-3-111. Whether an Expert is Required on Warning Issues Wyoming has not specifically addressed this issue. Wyoming courts, however, generally apply a Dauberttype analysis to the admissibility of expert testimony with respect to warning issues in product liability cases. Estate of Tobin, at *12-17; WYO. R. Evid. 702; Lippincott v. State Indus., No. 97-8003, 1998 U.S. App. Lexis 8327, *5-7 (10th Cir. April 29, 1998); Anderson, 859 P.2d at 87–88. However, in practical terms, the use 8 Product Liability: Warnings, Instructions, and Recalls Wyoming of expert testimony as to the adequacy or inadequacy of a warning may be required to ultimately succeed. For example, the United States District Court for the District of Wyoming made the following statement in a finding for the defendant: "Plaintiff has brought forth no expert willing to testify that the warnings as they existed back in 1983 were inadequate. On the other hand, defendants have produced expert testimony that, in fact, the warnings were adequate." Jacobs, 693 F. Supp. at 1035. Whether the Duty to Warn has Been Preempted with Respect to Any Product Wyoming has not addressed this issue. POST-SALE DUTIES Wyoming has not addressed any of the issues related to post-sale duties to warn. It is likely, however, that Wyoming will follow the majority rule related to post-sale duties to warn. Wyoming has addressed the duty to retrofit a product, however, holding there is no duty to retrofit a product that was not defective when it was sold. See Loredo, ¶20, 212 P.3d at 632. AUTHORS:

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