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## Reinstating Wyoming's Joint & (and) Several Liability Paradigm: Protecting Wyoming's Workforce, Their Families and the Wyoming Worker's Compensation Fund from Uncompensated Injuries and Deaths

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# WYOMING LAW REVIEW

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## REINSTATING WYOMING'S JOINT & SEVERAL LIABILITY PARADIGM: PROTECTING WYOMING'S WORKFORCE, THEIR FAMILIES AND THE WYOMING WORKER'S COMPENSATION FUND FROM UNCOMPENSATED INJURIES AND DEATHS

*John R. Vincent\* and Jessica Rutzick\*\**

Riverton sits within the exterior boundaries of the Wind River Indian Reservation. That places my law office in a unique situation. Depending on the specific facts of each case involving oil and gas field injuries, the outcomes of similarly situated clients can be vastly different depending on the location of where they sustained their injuries.

Riverton's unique geographic location leaves me filing personal injury suits under two different legal paradigms—Wyoming law and Tribal law. Justice in Fremont County may depend on where you get hurt. Inherent in my town's life is the fact that we all have close friends and/or family members who have been

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gravely injured or killed working in oil and gas fields located on and off the Wind River Indian Reservation. Work related injuries on tribally owned minerals are much more likely to be adequately compensated, as compared to injuries on non-tribal leased land.

This is not an insignificant problem. Wyoming has the highest rate of work-place fatalities in the nation. According to Bruce Hinchey, president of the Petroleum Association of Wyoming, this dubious distinction does not surprise him. “You have to consider that most of the jobs that we’re talking about are jobs in mining and the oil and gas sector in which there are a lot of heavy equipment, and different things associated with it,” Hinchey said. “Other states with more manufacturing and tech jobs don’t have that kind of risk.”<sup>1</sup> Given the gargantuan wealth that oil field workers and miners have generated for this state, their employers, and big oil companies, it is surprising that our state laws make it all but impossible for them or their families to sue or to recover compensation for frightful and life-long workplace injuries and deaths. Wyoming’s Workers’ Compensation system also places the injured workman and his family at a significant disadvantage.<sup>2</sup>

The purpose of this article is to shed light on our current system, which does not adequately protect our workers;<sup>3</sup> and to propose the reinstatement of Wyoming’s previous law, which would appropriately place the risk of terrible workplace injuries and deaths on the shoulders of those that *should* bear that risk—the oil and gas industry, and their large out-of-state insurers.

The following case histories are representative of the clients I have represented over the last twenty-five years:<sup>4</sup>

#### CASE HISTORY 1: MARY

This afternoon I met with a long-time neighbor and mother of two boys. Her oldest son was killed in an automobile accident three years ago. Mary came to me seeking help. Her youngest son, John, was killed while working for a drilling company as a roughneck in the oil fields and had provided significant financial support to Mary and his niece and nephew. John had not claimed either Mary or his niece and nephew as dependents on his income tax returns. Because Mary

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<sup>1</sup> Kathleen Miller, *Labor Union: Wyo. Has Highest Rate of Job Fatalities in U.S.*, CASPER STAR TRIBUNE, April 26, 2007.

<sup>2</sup> See George Santini, *The Breaking of a Compromise: An Analysis of Wyoming Worker’s Compensation Legislation, 1986-1997*, 33 LWLR 489 (1998).

<sup>3</sup> Dustin Bleizeffer, *Mining Industry Wants Immunity on Workplace Deaths*, CASPER STAR TRIBUNE, June 23, 2007; Casper Star Tribune Editorial, *Don’t Immunize Mine Managers From Lawsuits*.

<sup>4</sup> These case histories are not actual clients, but serve as realistic and accurate examples of the joint and several legal paradigm.

worked at a convenience store and earned some income, she is unable to establish John provided substantially all of her financial support at the time he was killed on the rig. John's employer had entered into a drilling contract with a major oil and gas company. According to the terms of the contract, the drilling company was an "independent contractor."<sup>5</sup>

John was killed last month at work due to the negligence of a co-employee, commonly known as a "toolpusher," and a representative of the oil company, commonly known as a "company man." It was heart-wrenching for me to hear the heartbreak in Mary's voice, but much more saddening was to have to tell her that she will receive no justice for her son's death. Even though John died because of his employer's poor safety practices, she cannot sue his employer, the drilling company who entered the contract with the major oil and gas company to drill the well.<sup>6</sup>

Under Wyoming's Worker's Compensation system, neither she nor the children John was helping to support can receive the meager benefits otherwise available in a work-related death. That is because Wyoming's Worker's Compensation system only compensates spouses, parents who receive substantially all of their financial support from the deceased worker at the time of the worker's death, and dependent children.<sup>7</sup> Worker's Compensation benefits are not available to surviving parents

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<sup>5</sup> An independent contractor is "one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work." *Combined Ins. Co. of America v. Sinclair*, 584 P.2d 1034, 1043 (Wyo.1978) (quoting *Lichty v. Model Homes*, 211 P.2d 958, 967 (Wyo.1949)).

<sup>6</sup> WYO. STAT. ANN. § 27-14-104 (2007) provides:

Exclusive remedy as to employer; nonliability of co-employees; no relief from liability; rights as to delinquent or noncontributing employer. The rights and remedies provided in this act for an employee including any joint employee, and his dependents for injuries incurred in extrahazardous employments are in lieu of all other rights and remedies against any employer and any joint employer making contributions required by this act, 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, but do not supersede any rights and remedies available to an employee and his dependents against any other person.

<sup>7</sup> WYO. STAT. ANN. § 27-14-403(d) (2007) provides:

If an injured employee entitled to receive or receiving an award under paragraph (a)(ii), (iii) or (iv) of this section dies due to causes other than the work related injury, the balance of the award shall be paid:

(i) To the surviving spouse;

(ii) If there is no surviving spouse or if the spouse remarries or dies, the balance of the award shall be paid to the surviving dependent children of the employee. Each surviving dependent child shall receive a share of the award in the proportion that the number of months from the death or remarriage until the child attains the age of majority, or if the child is physically or mentally incapacitated until the child attains the age of twenty-one (21) years, bears to the total number of months until all children will attain these ages;

unless they receive substantially all of their financial support from their deceased child.<sup>8</sup> The only benefit Mary will receive is a \$10,000 burial payment and a letter from the Governor saying the state is sorry about her son's death.<sup>9</sup>

Mary explained that the people that caused John's death were the drilling contractor's toolpusher and the operator's company man. I told Mary she cannot sue co-employees unless the co-employee "intentionally acted to cause physical harm or injury to the John."<sup>10</sup>

Even if Mary could seek compensation from John's co-employee, the insurance that may otherwise cover the co-employee's liability may not be available because intentional and expected activities are typically excluded from coverage.<sup>11</sup> These insurance companies will also argue they do not have to provide insurance coverage because John was killed at work by a fellow employee, which also precludes coverage.<sup>12</sup>

Mary also wanted to sue the oil and gas company for her economic damages resulting from John's death. Tears welled up in her eyes when I explained that was not a readily available option. According to Wyoming law, "the employer of an

(iii) If there is no surviving spouse or if the spouse remarries or dies and there are no dependent children or the children have attained the age of majority or twenty-one (21) if physically or mentally incapacitated, or die, the balance of the award shall be paid to a surviving parent of the employee if the parent received substantially all of his financial support from the employee at the time of injury. If two (2) remaining parents of the employee who received substantially all of their financial support from the employee at the time of the injury survive the employee, the balance of the award shall be divided equally between the two (2) parents;

(iv) Payment of the award shall cease:

(A) If there is no surviving spouse, dependent children or dependent parents;

(B) Upon remarriage or death of a spouse and there are no dependent children or dependent parents;

(C) Upon the death of a dependent child as to payments to that child; and

(D) Upon the death of a dependent parent as to payments to that parent.

<sup>8</sup> *Id.*

<sup>9</sup> WYO. STAT. ANN. § 27-14-403(e) (2007).

<sup>10</sup> WYO. STAT. ANN. § 27-14-104 (2007).

<sup>11</sup> The Wyoming Supreme Court has defined "willful and wanton" misconduct as having essentially the same legal effect as the statutory language "intentionally act to cause physical harm or injury" found in Wyo. Stat. § 27-14-104(a). 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. *See, Bertagnolli v. Louderback*, 2003 WY 50, ¶ 15, 67 P.3d 627, 632 (Wyo. 2003).

<sup>12</sup> Whether this exclusion applies may depend on whether the policy has a "severability of interest clause." *Barnette v. Hartford Ins. Group*, 653 P.2d 1375 (Wyo. 1982); *Page v. Mountain West Farm Bureau Mut. Ins. Co.*, 2 P.3d 506 (Wyo. 2000); *Rodabaugh v. Continental Cas. Co.*, 62 F.3d 1429 (Table), 1995 WL 471082 (C.A.10 (Wyo.)) Unpublished Disposition.

independent contractor is not liable for physical harm caused to another by an act or omission of the alleged independent drilling contractor or his servants.”<sup>13</sup> “Two limited exceptions to non-liability have been recognized [by the Wyoming Supreme Court]: (1) [if] a workplace owner/employer (operator) exercises a controlling and pervasive role over the independent contractor’s work; or (2) [the] owner (operator) assumes affirmative safety duties.”<sup>14</sup>

The first exception does not apply unless the owner/employer (operator) has the right to control the details of the work.<sup>15</sup>

The owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract-including the right to inspect, the right to stop the work, the right to make suggestions or recommendations as to details of the work, the right to prescribe alterations or deviations in the work-without changing the relationship from that of owner and independent contractor or the duties arising from that relationship.<sup>16</sup>

The second exception is equally difficult to establish.<sup>17</sup>

Beginning in 1912,<sup>18</sup> our Supreme Court has been called upon to determine the factors indicating the status of independent contractors. In 1986 and 1987, the Court announced its decisions recognizing the two exceptions noted above.<sup>19</sup> Since then, with the exception of *Jones v. Chevron*,<sup>20</sup> the Supreme Court has refused to apply either exception. Following the Supreme Court’s lead, Wyoming’s federal court has changed its view announced in *Capellen v. Cooper Industries, Inc. et al.*

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<sup>13</sup> *Hittel v. WOTCO, INC.*, 996 P.2d 673, 676 (Wyo. 2000) (citing RESTATEMENT (SECOND) OF TORTS § 409 (1965)); *Hill v. Pacific Power & Light Co.*, 765 P.2d 1348, 1349 (Wyo.1988); *see also, Noonan v. Texaco, Inc.*, 713 P.2d 160, 164-67 (Wyo.1986).

<sup>14</sup> *Franks v. Independent Production Co., Inc.*, 96 P.3d 484, 489 (Wyo. 2004); *see also, Hittel*, 996 P.2d at 676; *Jones v. Chevron*, 718 P.2d 890, 896 (Wyo.1986).

<sup>15</sup> *Noonan*, 713 P.2d at 164.

<sup>16</sup> *Id.* at 165; *Stockwell v. Parker Drilling Co., Inc.*, 733 P.2d 1029, 1033; *Ramsey v. Pacific Power & Light*, 792 P.2d 1385, 1388 (Wyo. 1990); *Cornelius v. Powder River Energy Corp., Inc.*, 2007 WY 30 ¶13, 152 P.3d 387, 391 (Wyo. 2007).

<sup>17</sup> *See, e.g., Abraham v. Andrews Trucking Co.*, 893 P.2d 1156, 1157-58 (Wyo. 1995); *Franks*, 96 P.3d at 491.

<sup>18</sup> *Acme Cement Plaster Co. v. Westman*, 122 P. 89 (Wyo. 1912).

<sup>19</sup> *Noonan*, 713 P.2d 160, 166; *Jones*, 718 P.2d 890, 893-94; *Stockwell v. Parker Drilling Co., Inc.*, 733 P.2d 1029, 1033 (Wyo. 1987).

<sup>20</sup> *Jones*, 718 P.2d at 896.

and *Hull v. Chevron*.<sup>21</sup> Now both the Supreme Court and the federal court have rendered either exception, for all intents and purposes, meaningless.<sup>22</sup>

Since 1986, the Shoshone and Arapahoe Tribal Court located on the Wind River Indian Reservation at Ft. Washakie, Wyoming, has continued to adhere to the holding expressed in *Capellen* and the authorities relied upon in that opinion. That holding recognizes that a duty may be created if the operator retains the right to direct the manner of the independent contractor's performance or assumes affirmative safety duties. Additionally, the applicable federal oil and gas lease and relevant regulations create a duty on the part of the operator, which is owed to all employees, including the employees of an independent contractor.<sup>23</sup>

Wyoming's retreat from a system of law which provided an injured worker and his family with some modest method to obtain redress for his injuries or death has now resulted in virtual immunity for operator negligence and reckless disregard for the safety of Wyoming's citizens. This departure is now so complete that the district courts have rendered opinions in which they acknowledge the Supreme Court's disinclination to find operator liability. The district courts view this trend to be so conclusive that in a recent case decided in Fremont County, the district court noted:

Well established Wyoming law provides that an operator, such as Ultra, is not obligated to protect the employees of an independent contract, such as Cyclone, from hazards that are incidental to or a part of the work the contractor was hired to perform. In essence, the operator owes no duty of care to the independent contractor's employees.

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While it is clear that Wyoming oil and gas drilling industry can be a potentially dangerous line of work, it is equally clear that the Wyoming Supreme Court has repeatedly rejected efforts

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<sup>21</sup> *Capellen v. Cooper Industries, Inc. et al.*, U.S. District Court for the District of Wyoming, C88-0030J (federal regulation calling for lessee to have due regard for the health and safety of employees creates a duty on operator owed to all employees, including independent contractors); *Hull v. Chevron U.S.A., Inc.*, 812 F.2d 584, 589-90 (10th Cir. 1987).

<sup>22</sup> *Dow v. Louisiana Land & Exploration Co.*, 77 F.3d 342, 344-45 (10th Cir. 1996); *Franks*, 96 P.3d at 490-91; *Cornelius*, 152 P.3d at 391; *Jones*, 718 P.2d at 895; *Hjelle v. Mid-State Consultants, Inc.*, 394 F.3d 873, 877-79 (10th Cir. 2005); *Abraham*, 893 P.2d at 1157-58; *Hill*, 765 P.2d at 1348.

<sup>23</sup> *Capellen v. Cooper Industries, Inc. et al.*, U.S. District Court for the District of Wyoming, C88-0030J, Order on Motion for Summary Judgment (citing *Hull*, 812 F.2d at 589-90); *Marathon Oil Co. v. Johnston*, Court of Appeal of the Wind River Indian Reservation, Case No. AP-04-003, Judgment and Opinion of the Court of Appeals (April 6, 2006) (quoting *Jones*, 718 P.2d 890 (Wyo. 1986)).

to hold operators liable in cases very similar to the facts of this case. While the Court is sympathetic to family of Mr. Fried and respects the efforts of their attorneys, the law is clear and this Court must follow it.<sup>24</sup>

In *Fried v. Ultra Resources, Inc.*, the terms of the day-work drilling contract provided unequivocally as follows:

IN CONSIDERATION of the mutual promises, conditions and agreements herein contained, and the specifications and special conditions set forth in Exhibit "A" and Exhibit "B" attached hereto and made a part hereof (the "Contract"), *Operator engages Contractor as an independent contractor* to drill the hereinafter designated well or wells in search of oil or gas *on a Daywork Basis*. (emphasis supplied).

For purposes hereof, the term "Daywork" or "Daywork Basis" means the *Contractor shall furnish equipment, labor, and perform services as herein provided, for a specified sum per day under the direction, supervision and control of Operator* (inclusive of any employee, agent, consultant or subcontractor engaged by Operator to direct drilling operations). (emphasis supplied).

Moreover, Ultra had initiated its safety pay program in which it offered monetary payment to the contractor's employees based upon safe work practices and work longevity and referred to API recommended practices. Contractual terms are ordinarily accorded great significance in determining the parties' relationship. Thus, the notion that a conflict between unambiguous contract terms and conflicting witness testimony does not create a jury issue is, at best, troublesome.

The Wyoming Supreme Court's rule is so entrenched that the issue of fact between the unambiguous contract language and witness testimony was overlooked in order to permit entry of summary judgment holding the operator owed no duty of care to employees working on the operator's location. This flies in the face of well established law calling for the application of the parties' contract to determine their relationship.<sup>25</sup>

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<sup>24</sup> *Fried v. Ultra Resources, Inc.*, Ninth Judicial District Civil Action No. 35045 (Nov. 5, 2007).

<sup>25</sup> "While it is true that a contract is not conclusive evidence of the status of the relationship between parties, it is a strong indication of the intended association." *Noonan*, 713 P.2d at 165.



Moreover, the district court would not allow a trial on the material questions of control, assumption of safety duties, and whether the operator had a duty of care described the API standards. These API standards have been recognized by the industry's experts as intended to protect the health and safety of both operator and contract employees. Nevertheless, the district court declined to adopt the API standards as an independent standard of care.

Pronouncements of the Wyoming Supreme Court under either exception have accordingly made it virtually impossible for an injured oil field worker or his family to prevail in a civil suit. These decisions are so one-sided that district courts will now abide by the Supreme Court's direction to effectively provide immunity for all oil company operators, no matter the facts and circumstances leading to the roughneck's death or injury.

Since 1986, most of the reported cases brought by employees of independent contractors against the oil companies were dismissed in summary judgment. This trend, in the guise of a Rule 56 proceeding, strikes at the heart of our constitutional right to a jury trial and the aversion to legislative or judicial immunity from suit.<sup>26</sup> This trend is based on the epitome of a legal fiction grounded in the belief that a workman or his family is justly compensated by our workers' compensation system for serious injury or death or that oil and gas operators who make billions of dollars drilling and operating oil and gas fields in our state do not control operations or the people working on their locations. We in Wyoming have created a legal fiction to provide the oil company operator immunity at the expense of our workers and our jury system.

The Shoshone and Arapahoe Tribal Court has refused to follow this misguided course. In the recent case of *Johnston v. Marathon*, the Shoshone and Arapahoe Tribal Court of Appeals upheld the notion that:

If the work is done on the employer's own land, he will be required to exercise reasonable care to prevent activities or conditions which are dangerous to those outside of it or to those who enter it as invitees. In all of these cases, he is liable for his personal negligence, rather than that of the contractor.<sup>27</sup>

In Wyoming's court system, Mary and her two grandchildren will have to live on social security and food stamps now. Their future was eclipsed by the brilliant oil boom and Wyoming's disparate legal system.

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<sup>26</sup> WYO. CONST. art. I, § 9.

<sup>27</sup> Judgment and Opinion of the Court, *Marathon Oil Co. v. Johnston*, 33 ILR 6095 (2006) (quoting *Jones v. Chevron U.S.A., Inc.*, 718 P.2d 890, 893-94 (Wyo. 1986)).

Had John been killed at work on an oil and gas lease owned by the Arapahoe or Shoshone Tribe, a completely different and more just result would be available to Mary and to John's niece and nephew. That is because the Shoshone and Arapahoe Tribal Law and Order Code still recognizes the common law rule of joint and several liability and contribution among joint tortfeasors.<sup>28</sup> While the wrongful death statute is the same in Tribal Court as in Wyoming,<sup>29</sup> Wyoming Worker's Compensation and independent contractor laws, combined with the repeal of joint and several liability, create an incongruity. Oil and gas development has progressed on the Wind River Reservation at the same pace as in the State of Wyoming. However, the Tribes' legal system has clearly not impeded mineral and economic development on the Reservation.

This article does not ask for any "new-fangled" laws. Rather, we are suggesting that the legislature reinstate Wyoming's joint and several liability and independent contractor laws that were in place prior to 1986. We are also suggesting legislative enactments which provide a real opportunity for injured workmen and their families to have a fair chance of redress in our court system.

The Shoshone and Arapahoe Tribal Law and Order Code is identical to Wyoming's previous statute pre-1986. While Wyoming's legislature fell prey to an onslaught of calls for tort reform, the Shoshone and Arapahoe Tribal Councils kept their Law and Order Code in tact and did not repeal either joint and several liability or contribution among joint tortfeasors. Over twenty years of experience with Wyoming's contributory fault statute and its Worker's Compensation scheme reveals that this current system is broken and the pre-1986 paradigm worked far better to protect Wyoming's workforce and Wyoming's Worker's Compensation Fund.

All agree that the benefits received under Wyoming's Worker's Compensation system are wholly inadequate.<sup>30</sup> As one journalist explained:

Each state's legislature determines exactly how much immunity employers get, and courts weigh in, too. Utah's Legislature passed a law last year providing wider immunity for employers, for example. In Wyoming, for decades the Legislature has favored

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<sup>28</sup> Law and Order Code of the Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, Wyoming, § 14-1-3 (1986).

<sup>29</sup> Law and Order Code, § Ch. 10; WYO. STAT. ANN. § 1-38-101 (2007).

<sup>30</sup> A prominent attorney who defends companies in personal injury suits stated the program does not come close to providing compensation that injured workers need. He recalled a worker who received only \$16,000 for losing a leg and noted that a widow of a killed worker can expect only about \$100,000. Dustin Bleizeffer, *Mining Industry Wants Immunity On Workplace Deaths*, CASPER STAR TRIBUNE, June 23, 2007.

employers, but every so often the state Supreme Court pushes back a bit for the workers. Once in a while, lawyers get traction and win siz[e]able pots of money for victims and their families, but it happens rarely.<sup>31</sup>

Had John been killed on Tribal lands, those responsible for John's death would have to compensate Mary for this tremendous loss, such as his lost wages and the loss of John's care, comfort, and society. The outcome is significantly different under Wyoming's laws.

In Tribal court and under Wyoming's preceding system of joint and several liability and contribution, the imputed duty is a mixed question of fact and law. Thus, the jury is permitted to determine whether the mineral operator assumed affirmative safety duties, retained control over the work site, or deviated from industry standards.

Mary can sue the oil company for John's death. In that case, the oil company may seek contribution and/or indemnity from the contractor drilling company. Under this system, the oil company is at risk to justly compensate survivors of work-related injuries and deaths. After all, these workers are responsible for performing the dangerous work leading to production of valuable minerals for the oil and gas companies. The oil companies are in the best position to protect against and to absorb the terrible costs associated with workplace injuries and deaths.

Within the joint and several paradigm, the oil company may include other "actors" on the verdict form for the purpose of apportioning fault. However, so long as the defendant oil company's negligence is greater than the negligence attributed to John, Mary may recover the whole amount of the judgment (less John's share of the negligence) from the oil company. The oil company must then sue the contractor under the contribution act or under the indemnity provisions of the drilling contract, which typically contain such clauses. In this fashion, the oil company may recover any amount it pays in excess of its proportionate share of liability. Because Mary must pay the Worker's Compensation lien, she has not received a double recovery and the wrongdoers are required to pay for all damage suffered by Mary, not a sum awarded under the Worker's Compensation system, which all concur is grossly inadequate.

In Wyoming's current system, Mary cannot recover the percentage of fault that may be attributed to the drilling contractor because of the Worker's Compensation immunity law. Furthermore, the oil company is absolved from any liability or obligation to pay for that part of the judgment attributed to the

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<sup>31</sup> Ray Ring, *Disposable Workers of Oil and Gas Fields*, HIGH COUNTRY NEWS, April 2, 2007.

fault of the immune contractor. This means that this tremendous risk of injury and death is placed on the shoulders of Wyoming's working people rather than on the companies that reap huge profits from the oil and gas industry.

It has been observed that:

Other aspects of state laws also appear to be rigged against accident victims and their families, making it all but impossible for them to sue even in the face of apparently extraordinary management negligence. At times, the industry and the whole government system treat tenaciously loyal workers as if they were as disposable as a broken drill bit. The victims' own character traits—from stoicism to lack of formal education to a tendency to use alcohol or drugs or both—often set them up to take the hit.<sup>32</sup>

Over the years this significant difference between the state and tribal systems has resulted in vastly disparate outcomes for my clients.

Consider the following verdict of \$500,000, with John being found 10% at fault, the drilling subcontractor 40% and the oil company 50% at fault. In Tribal Court, Mary would receive \$450,000, less the \$10,000 repayable to the Wyoming Workers' Compensation Division for John's burial costs—\$440,000 total before attorney's fees and costs. However, under Wyoming law, Mary would only receive \$250,000—50% of the verdict which is attributable to the oil company's negligence.

The Wyoming Supreme Court has held that this outcome is justifiable because Worker's Compensation benefits are supposed to be available.<sup>33</sup> The rub is that the benefits are grossly insufficient *and* they are not equally available to survivors, depending only on the arbitrary familial circumstances of the killed employee. Despite the fact that Mary is not eligible for Worker's Compensation benefits covering John's life, she will nevertheless be obligated to repay the \$10,000 burial benefit in full to the Wyoming Worker's Compensation Division, leaving her with a recovery of \$240,000 in state court. Thus, neither Mary nor John's niece and nephew will be compensated by Worker's Compensation at all. This illogical outcome is not justifiable under this rationale. After accounting for attorney's fees and costs, Mary will be left with a fraction of what she would recover in Tribal Court.

Adding insult to injury is the fact that insurance companies for the drilling and oil companies, may offer to settle under W.R.C.P. 68 for a pittance thereby

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<sup>32</sup> See Ring, *supra* note 31, at 9.

<sup>33</sup> See, e.g., *Franks*, 93 P.3d at 495.

threatening Mary's lawyer and Mary for recovery of the costs and attorney's fees if the case is dismissed in summary judgment or they don't recover that offer at trial.

	Gross Verdict	Recovery From Oil & Gas Co.	Recovery From Contractor	Worker's Comp. Division Benefits Paid	W.C. Reimbursement	Mary's Net Recovery (before atty fees and costs)
Tribal Court	\$500,000	\$450,000	\$0	\$10,000	\$10,000	\$440,000
WY State Court	\$500,000	\$250,000	\$0	\$10,000	\$10,000	\$240,000

#### CASE STUDY #2: MELISSA

Talking to Mary about this capricious outcome, I am reminded of another client who lost her husband to the oil fields. This client, Melissa, had three young children and a husband, who was earning \$80,000 a year as a driller, with hope of becoming a drilling superintendent for one of Wyoming's many successful drilling companies. Melissa's husband, Eric, was killed on a rig 100 miles from their home. At the time of his death, Eric was thirty-eight years old and had a bright future in the oil and gas industry. Melissa was a stay-at-home mother.

Melissa received \$130,000 for Eric's death from the Worker's Compensation system, payable at the rate of two-thirds of the statewide average monthly wage, over a period of five years,<sup>34</sup> even though an economist calculated Eric's future earning potential at a present value of \$600,000. As of October 2007, two-thirds of the average statewide monthly wage is \$2,108.00.<sup>35</sup>

Assuming Melissa received a verdict in the amount of \$600,000, the ultimate recovery for both Melissa and the Worker's Compensation Fund would be vastly different, depending on which court issued the verdict. Eric was ten percent at fault, his employer was forty percent, and the oil and gas company was fifty percent at fault.

In Tribal Court, Melissa would receive ninety percent or \$540,000. She would have to reimburse the Wyoming Worker's Compensation Division in full—\$130,000.<sup>36</sup> The oil company would collect the subcontractor's forty percent through its indemnity provision or the contribution law.

<sup>34</sup> "For those employees whose actual monthly earnings are greater than or equal to the statewide average monthly wage, the award shall be two-thirds (2/3) of the employee's actual monthly earnings, but the award shall be capped at and shall not exceed the statewide average monthly wage." WYO. STAT. ANN. § 27-14-403(c)(iii) (2007).

<sup>35</sup> State of Wyoming Department of Employment, Statewide Average Monthly Wage Table, <http://wydoe.state.wy.us/doe> (2007).

<sup>36</sup> WYO. STAT. ANN. § 27-14-105(a) (2007).

In Wyoming court, under the existing comparative fault statute, Melissa's gross recovery would only be \$300,000, representing just the oil company's fifty percent share of the negligence. Melissa has to reimburse the Worker's Compensation Division one-third of her gross recovery, or \$100,000.<sup>37</sup> Melissa would receive \$200,000 and the Worker's Compensation Division is not fully reimbursed the full \$130,000 of benefits.

Notably, the funds Wyoming recovers are achieved *only* because of the risk Melissa and her attorney took in bringing suit. Yet the Worker's Compensation Division does not fully recognize that Melissa incurred attorney's fees and costs to recover the funds on its behalf. The Division's current policy forces Melissa to bear this cost individually for the benefit of the State's fund. This is the case even though the Division is authorized by statute to accept less than the State's claim for reimbursement. The current policy is to permit only a seven percent reduction in the lien amount to reflect the cost and expenses Melissa and her attorney incurred to recover money for the State of Wyoming.<sup>38</sup> The State's refusal to employ the prior policy to reduce the lien by one-third to reflect Mary's attorney's fees and costs is more troubling when one considers that the State of Wyoming has several statutory vehicles enabling it to sue those who cause employee injuries for reimbursement of the wage and medical benefits the State provides.<sup>39</sup>

Even more disturbing to Melissa is that the ultimate beneficiary of the recovery of the \$100,000 to the Division is the drilling contractor itself because the company's rating is improved when their Worker's Compensation account is reimbursed.<sup>40</sup>

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<sup>37</sup> WYO. STAT. ANN. § 27-14-105(a) (2007).

<sup>38</sup> WYO. STAT. ANN. § 27-14-105(b) provides in pertinent part:

If there is a settlement, compromise or release entered into by the parties in claims against a person other than the employer, the attorney general representing the director shall be made a party in all such negotiations for settlement, compromise or release. The attorney general and the director, for purposes of facilitating compromise and settlement, may in a proper case authorize acceptance by the state of less than the state's claim for reimbursement. The proceeds of any judgment, settlement, compromise or release are encumbered by a continuing lien in favor of the state to the extent of the total amount of the state's claim for reimbursement under this section and for all current and future benefits under this act. The lien shall remain in effect until the state is paid. . . .

<sup>39</sup> WYO. STAT. ANN. § 27-14-105(b), (c), (e), (g) (2007).

<sup>40</sup> WYO. STAT. ANN. § 27-14-105(a) (2007).

	Gross Verdict	Recovery From Oil & Gas Co.	Recovery From Contractor	Worker's Comp. Division Benefits Paid	W.C. Reimbursement	Melissa's Net Recovery (before atty fees and costs)
<b>Tribal Court Remedy</b>	\$600,000	\$540,000	\$0	\$130,000	\$130,000	\$410,000
<b>WY State Court Remedy</b>	\$600,000	\$300,000	\$0	\$130,000	\$100,000	\$200,000

In Wyoming, a single parent needs to earn almost three times the minimum wage just to provide the basic necessities for herself and her children. In 2002, the most recent year for which this data is available, child care expenditures alone for employed mothers with child care costs average \$412 per month.<sup>41</sup> Thus, Melissa would need to earn at the very least a living wage of \$2,472 per month, or \$15.45 per hour per forty-hour work week. The average annual earnings for women across the State are \$21,217. (Compare that to the average annual wage for men as \$38,393).<sup>42</sup>

Melissa will have a fraction of the net \$200,000 after the costs incurred in bringing suit. This paltry amount of funds will do little to keep Melissa above poverty level. Unless Melissa can secure a job earning over \$2,500 per month, her family will exist at the poverty level. Unfortunately, there are very few job opportunities for Wyoming women to earn this amount of money.<sup>43</sup>

### CASE HISTORY #3: JIM

This disparity is equally obvious in cases of serious injury, not just workplace deaths. In another of my cases, my client, Jim, was severely injured in an explosion on a drilling rig. Jim was blown from the rig floor when fluids escaping from the well bore ignited and exploded. He suffered life-long debilitating injuries caused by embedded hydrogen sulfide gas and blunt force trauma to many areas of his body including his back, legs, and abdomen.

Jim's medical expenses totaled \$300,000 and he was totally disabled. Wyoming Worker's Compensation Division paid Jim's medical expenses and provided total permanent disability benefits of \$130,000. Jim was forty-five years old with two

<sup>41</sup> Dona Playton & Stacey L. Obrecht, *High Times in Wyoming: Reflecting the State's Values by Eliminating Barriers and Creating Opportunities for Women in the Equality State*, 7 WYOMING L. REV. 295 (2007).

<sup>42</sup> Sylvia D. Jones, *Wyoming Labor Force Trends*, The Wyoming Department of Employment, Research and Planning, Vol. 44 No. 4 (2007).

<sup>43</sup> See Playton & Obrecht, *supra* note 41, at 13.

college-age children. His wife works as a teacher's aid and earns \$15,000 per year. The expert economist considered Jim's income of \$110,000 per year and concluded that the present value of his economic losses was \$2,000,000 plus the past and future medical expenses. Once again, assume Jim was ten percent at fault, the toolpusher forty percent, and the company man fifty percent at fault for Jim's injuries.

In Tribal court, Jim received a verdict of \$1,000,000. He received the full amount of the verdict from the oil company less ten percent, or \$900,000. Although the Worker's Compensation Statute permits a larger reduction, the Division will only reduce its lien by seven percent. Thus, Jim will have to reimburse Worker's Compensation Division \$430,000 reduced by seven percent, leaving him with a recovery (before attorneys fees and costs) of \$500,100.<sup>44</sup>

In Wyoming state court, under the same circumstances, Jim would only receive a gross recovery of \$500,000. He would then have to reimburse Worker's Compensation in the amount of \$166,666, less seven percent, or \$155,500. Jim's recovery, before attorney's fees and costs, would be \$154,999. In other words, a difference of over \$155,000.

The average price of existing housing in Wyoming has risen to over \$130,000 and the average monthly rent for a two bedroom dwelling exceeds \$520 per month.<sup>45</sup> The difference between the recoveries in State and Tribal courts reflects the cost of a modest home in which Jim could live and modify to accommodate his disability.

	Gross Verdict	Recovery From Oil & Gas Co.	Recovery From Contractor	Worker's Comp. Division Benefits Paid	W.C. Reimbursement	Jim's Net Recovery (before atty fees and costs)
<b>Tribal Court Remedy</b>	\$1,000,000	\$900,000	\$0	\$430,000	\$430,000	\$500,100
<b>WY State Court Remedy</b>	\$1,000,000	\$500,000	\$0	\$430,000	\$155,500	\$344,500

In Wyoming we have long recognized the need to treat our neighbors fairly. We appreciate the wonderful opportunities the oil and gas industry has provided to our children and our communities. We have also recognized that these opportunities are not free.

<sup>44</sup> \$399,900 is paid to the Worker's Compensation Fund.

<sup>45</sup> See Playton & Obrecht, *supra* note 41, at 13.



With the latest oil and gas boom, Wyoming passed a version of the surface owner accommodation act to mitigate against the harsh effects of the mineral dominant estate theory. The legislature amended the law of eminent domain to put surface estate owners (farmers, ranchers, and other private property owners) on a more even playing field in disputes with oil companies over pipeline and road easements. Wyoming has taken steps to protect its incredible natural resources, such as the Wyoming Range, from further oil and gas development. We even protect bears, wolves, deer, sage grouse, and other wildlife from harm arising from oil and gas development. The legislature has provided additional funding to the eight counties most impacted by oil and gas activities and the State has gone to great lengths to provide equal educational opportunities to our children.

#### CONCLUSION

It is time now to follow the lead of our neighbors on the Wind River Indian Reservation and our other Western neighbors, Montana, South Dakota, Texas, New Mexico, Alaska, and Nebraska, as well as over half of the states in the Union.<sup>46</sup> We must reinstate a system of laws that puts our injured Wyoming workers and their survivors on an equal playing field with the huge multinational oil and gas producers and insurance companies. It is time to reinstate the law of joint and several liability.

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<sup>46</sup> See, e.g., NEB. REV. ST. § 25-21,185.10 (2006) (Nebraska); M.C.L.A. 600.2957 (1996) (Michigan); I.C.A. § 668.4 (1997) (Iowa); N. M. S. A. 1978, § 41-3-2 (1987) (New Mexico); C.G.S.A. § 52-572o (1984) (Connecticut); 735 ILCS 5/2-1117 (2003) (Illinois); N.H. REV. STAT. § 507:7-e (1990) (New Hampshire); West's RCWA 4.22.070 (1993) (Washington); V.A.M.S. 537.067 (2005) (Missouri); W.S.A. 895.045 (2006) (Wisconsin); MISS. CODE ANN. § 85-5-7 (2004) (Mississippi); McKinney's CPLR § 1602 (1986) (New York); SDCL § 15-8-1 (2007) (South Dakota); 14 M.R.S.A. § 156 (1999) (Maine); MCA 27-1-703 (2007) (Montana); other states with joint and several liability include Minnesota, Texas, Hawaii, Alaska, California, Pennsylvania, South Carolina, Arkansas, West Virginia, Massachusetts, Indiana, and North Carolina.