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CASE NOTE

TORT LAW—Re-writing Wyoming’s Co-employee Liability Statute; *Hannifan v. American National Bank of Cheyenne*, 185 P.3d 679 (Wyo. 2008).

*Kara L. Hunter**

INTRODUCTION

On January 22, 2002, Leslie Roy Butts suffered severe injuries while working at the Black Thunder Mine, a coal mine near Gillette, Wyoming.¹ At the time of the accident, Butts worked laying electrical cable in an area of the mine known as the East-West Boxcut.² As Butts worked, a large boulder fell from the high wall of the mine and landed on top of the Terra Gator operated by Butts.³ As a result, Butts sustained severe injuries that rendered him a paraplegic.⁴

The day before Butts’s accident, a safety advisor at the mine, Marty Martens, noticed dangerous conditions in the boxcut.⁵ In addition to noticing high wall instability, Martens noticed that debris filled the catch benches intended to protect workers by catching rubble dislodged from the high wall and, thus, rendered them ineffective as a protective measure.⁶ Martens relayed his concerns to Michael Hannifan, a manager at the Mine.⁷ Hannifan and Kevin Hampleman, also a manager at the Mine, went to the boxcut and visually inspected the high walls.⁸

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¹ *Hannifan v. Am. Nat’l Bank of Cheyenne*, 185 P.3d 679, 681, 685 (Wyo. 2008). American National Bank appeared in the caption because it served as the conservator of Butts’s estate. *Id.* at 681.

² *Id.* at 685.

³ *Id.* A Terra Gator is a piece of heavy equipment used to lay electrical cable. *Id.* Arch Coal, Inc. defines a high wall as “the unexcavated face of exposed overburden and coal in a surface mine or in a face or bank on the uphill side of a contour mine excavation.” Arch Coal, Inc., *Mining Terms*, (2008), <http://www.archcoal.com/community/miningterms.asp> (last visited March 22, 2009).

⁴ *Hannifan*, 185 P.3d at 681.

⁵ *Id.* at 687.

⁶ *Id.* (stating Martens noticed debris filled the catch benches); Brief in Support of Motion for Summary Judgment at 7, *Hannifan v. Am. Nat’l Bank of Cheyenne*, No. 25736 (Dist. Ct., 6th Judicial Dist., Campbell County, Wyo. 2007) [hereinafter Plaintiffs’ Brief] (discussing the purpose of catch benches).

⁷ *Hannifan*, 185 P.3d at 686–87. As the Mine’s safety manager, Hannifan’s responsibilities included identifying dangers and taking action to protect against identified dangers. *Id.* at 686.

⁸ *Id.* at 687. As the general mine manager, Hampleman’s responsibilities included ensuring the overall functioning of the mine. *Id.*

While Hannifan and Hampleman inspected the area, blasting operations took place.⁹ Neither Hannifan nor Hampleman observed the dislodging of any rubble as a result of the blasts.¹⁰ They, therefore, decided to allow mining operations to continue.¹¹

Even before Martens expressed his concerns to Hannifan, others had warned both Hannifan and Hampleman of dangerous conditions in the boxcut.¹² Dan Dowdy, also a mine employee, specifically warned Hannifan and Hampleman that dangerous conditions existed in the boxcut after Dowdy narrowly escaped death when a section of the high wall collapsed.¹³ Additionally, in the months before Butts's accident, a number of employees submitted written comments complaining of high wall instability and referring to the boxcut as a "death trap" and "death valley."¹⁴ Despite these warnings, neither Hannifan nor Hampleman stopped mining operations in the boxcut prior to Butts's injury.¹⁵

Following the accident, Butts applied for and received Wyoming Worker's Compensation benefits.¹⁶ The Wyoming Worker's Compensation Act provides:

The rights and remedies provided in this act . . . are in lieu of all other rights and remedies against any employer . . . or their employees . . . unless the employees intentionally act to cause physical harm or injury to the injured employee.¹⁷

⁹ Appellants' Brief at 5–6, *Hannifan v. Am. Nat'l Bank of Cheyenne*, 185 P.3d 679 (Wyo. 2008) (No. S070156).

¹⁰ *Id.*

¹¹ *Id.*

¹² See *Hannifan*, 185 P.3d at 686–87 (discussing other employees' conversations with Hannifan and Hampleman and written comments delivered to Hannifan).

¹³ *Id.* at 686.

¹⁴ Plaintiffs' Brief, *supra* note 6, at 8–9. Employees submitted these comments as part of a safety training course. *Id.* Hannifan received daily reports summarizing the miners written comments. *Id.* at 9. Following Butts's injury, Hannifan ordered his secretary, Emma Barks, to destroy the comments. *Id.* at 18. Hannifan later produced a copy of one of the reports, but Barks identified the report as missing some critical comments. *Id.* at 21. Specifically, the report no longer contained the references to miners calling the pit "death valley" and a "death trap." *Id.*

¹⁵ See *Hannifan*, 185 P.3d at 688 (noting Hannifan and Hampleman decided to continue operations). Both Hannifan and Hampleman stated in their depositions that they possessed the authority to remedy unsafe situations. Plaintiffs' Brief, *supra* note 6, at 16.

¹⁶ Appellants' Brief, *supra* note 9, at 2.

¹⁷ WYO. STAT. ANN. § 27-14-104(a) (2007). By providing injured workers benefits in lieu of all other remedies, the Act effectively provides employers and co-employees immunity from suit, with the exception that co-employees remain liable for intentional acts. *E.g.*, *Krier v. Safeway Stores 46, Inc.*, 943 P.2d 405, 411 n.2 (Wyo. 1997) (citing WYO. STAT. ANN. § 27-14-104 (1997)) (addressing immunity of employers); *Franks v. Olson*, 975 P.2d 588, 592 n.1 (Wyo. 1999) (citing WYO. STAT. ANN. § 27-14-104(a) (1997)) (addressing immunity of co-employees for all but intentional acts).

Pursuant to the statutory exception, Butts filed suit against Hannifan and Hampleman.¹⁸ Citing Hannifan and Hampleman's failure to halt mining operations or take other corrective action, Butts alleged Hannifan and Hampleman intentionally failed to correct the dangerous conditions they knew existed in the boxcut.¹⁹ At the close of trial, the jury returned a verdict in favor of Butts, and the court entered judgment on the verdict.²⁰ Hannifan and Hampleman appealed.²¹

On appeal to the Wyoming Supreme Court, Hannifan and Hampleman contended Butts failed to prove that either appellant "intentionally" acted to cause physical harm or injury to Butts.²² Hannifan and Hampleman also argued the court previously erred when it held, in *Bertagnolli v. Louderback*, that the phrase "intentionally act to cause physical harm" extended co-employee liability for willful and wanton misconduct.²³ The court rejected both arguments and affirmed the judgment of the trial court.²⁴

This note evaluates the impact of *Hannifan v. American National Bank of Cheyenne*. First, the background section briefly discusses the history of co-employee liability in Wyoming.²⁵ Second, the principal case section summarizes the reasoning supporting the court's decision to affirm the judgment in favor of the defendants.²⁶ Third, the analysis section illustrates the flaws underlying the court's conclusion that Wyoming Statute § 27-14-104(a) extends liability for willful

¹⁸ *Hannifan*, 185 P.3d at 681. Butts's wife and his two children also filed suit claiming loss of consortium. *Id.* Butts's wife voluntarily dismissed her consortium claim prior to trial. *Id.*

¹⁹ Plaintiffs' Brief, *supra* note 6, at 23 ("Here the undisputed facts demonstrate that these Defendants had knowledge of the dangerous conditions which existed in the east/west boxcut and intentionally in disregard of this risk failed to correct the dangerous conditions.").

²⁰ *Hannifan*, 185 P.3d at 681–82. The jury found Hannifan 18% at fault, Hampleman 25% at fault, and the Thunder Basin Coal Company ("Thunder Basin") 57% at fault. *Id.* While the court included Thunder Basin on the verdict form, Thunder Basin enjoyed statutory immunity under Wyoming Statute § 27-14-104(a), and, therefore, Thunder Basin was not liable for the portion of fault attributed to it by the jury. *See* WYO. STAT. ANN. § 27-14-104(a). The jury awarded damages totaling \$18,000,000 to Butts and \$2,000,000 to his minor children. *Hannifan*, 185 P.3d at 682. The trial court reduced the monetary award to reflect only that portion of fault attributed to Hannifan and Hampleman, and entered judgment for Butts in the amount of \$7,740,000, and for his children in the amount of \$860,000. *Id.*

²¹ Appellants' Brief, *supra* note 9, at 3.

²² *Hannifan*, 185 P.3d at 681.

²³ Appellants' Brief, *supra* note 9, at 3.

²⁴ *Hannifan*, 185 P.3d at 695.

²⁵ *See infra* notes 29–68 and accompanying text (tracking the history of workers' compensation in Wyoming).

²⁶ *See infra* notes 69–88 and accompanying text (discussing the analysis supporting the Wyoming Supreme Court's decision to affirm the judgment in favor of the plaintiffs).

and wanton misconduct.²⁷ Fourth, this note explains how the court's decision to broaden the exception to co-employee immunity adversely affects both employees and employers in Wyoming.²⁸

BACKGROUND

In 1913, the Wyoming State Legislature took the first step toward the creation of Wyoming's workers' compensation system by amending the Wyoming Constitution.²⁹ The Legislature believed the enactment of a workers' compensation system required a constitutional amendment because the provision of benefits, in lieu of all other remedies, limited damages in violation of article 10, § 4 of the Wyoming Constitution.³⁰ The constitutional amendment specifically allowed for the establishment of a workers' compensation fund.³¹ Following the amendment, in 1915, the Legislature enacted the "Workmen's Compensation Law."³²

The Workmen's Compensation Law, as originally enacted, provided immunity from suit to employers contributing to the state fund.³³ While the statute expressly provided immunity from suit only to employers, the Wyoming Supreme Court, nevertheless, extended immunity to co-employees.³⁴ Co-employees enjoyed

²⁷ See *infra* notes 89–135 and accompanying text (explaining why the language of Wyoming Statute § 27-14-104(a) does not extend liability for willful and wanton misconduct).

²⁸ See *infra* notes 136–42 and accompanying text (addressing the impacts of the court's decisions on both employees and employers in Wyoming).

²⁹ 1913 Wyo. Sess. Laws 75 (amending article 10, § 4 of the Wyoming Constitution).

³⁰ *Mills v. Reynolds (Mills I)*, 807 P.2d 383, 389 (Wyo. 1991), *overruled by*, *Mills v. Reynolds (Mills II)*, 837 P.2d 48 (Wyo. 1992), *superseded by statute*, 1993 Wyo. Sess. Laws 68. Prior to amendment, article 10, § 4 of the Wyoming Constitution provided: "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void." WYO. CONST. art. 10, § 4 (amended 1913, 1986, 1988, 2004).

³¹ WYO. CONST. art. 10, § 4 (amended 1986, 1988, 2004). The amendment added the following sentence: "As to all extrahazardous employments the legislature shall provide by law for the accumulation and maintenance of a fund or funds out of which shall be paid compensation . . . to each person injured in such employment." *Id.*

³² 1915 Wyo. Sess. Laws 172.

³³ *Id.* The statute provided: "The right of each employee to compensation from such funds shall be in lieu of and shall take the place of any and all rights of action against any employer contributing, as required by law to such fund." *Id.*

³⁴ *Mills I*, 807 P.2d at 390. The extension of co-employee immunity resulted from the court's decision in *Byrne. Id.* (citing *In re Byrne*, 86 P.2d 1095 (Wyo. 1939)). In *Byrne*, the court considered whether an employee injured by a third party could recover workers' compensation benefits. 86 P.2d at 1097. The court held the employee could recover benefits regardless of the liability of a third party. *Id.* at 1102. Apparently, the Wyoming Supreme Court perceived this decision as extending immunity from suit to co-employees. *Mills I*, 807 P.2d at 390.

immunity from suit until 1974 when the Wyoming Supreme Court reinstated the right to sue a negligent co-employee in *Markle v. Williamson*.³⁵

Shortly after the court decided *Markle*, the Legislature amended Wyoming's workers' compensation statute to provide co-employees immunity from suit for all but gross negligence.³⁶ In 1977, the Legislature again amended the statute, changing the standard for co-employee liability from gross negligence to culpable negligence.³⁷ In 1986, the Legislature amended the statute to extend complete immunity to co-employees.³⁸ The court considered the constitutionality of complete immunity in *Mills v. Reynolds (Mills I)*.³⁹

The Mills Decisions

In *Mills I*, the Wyoming Supreme Court considered whether Wyoming Statute § 27-14-104(a) violated the Wyoming Constitution.⁴⁰ Timothy Mills filed suit against two co-employees for injuries resulting when a pressure regulator burst in his face.⁴¹ In a separate action, Levi Bunker filed suit against a co-employee for injuries resulting when Bunker attempted to move electrical equipment connected to electricity.⁴² Both Mills and Bunker acted pursuant to instructions from their co-employee supervisors, the defendants.⁴³ In both actions, the defendants moved for summary judgment, arguing Wyoming Statute § 27-14-104(a) extended complete immunity to co-employees.⁴⁴ The district court consolidated the two cases for purposes of a summary judgment hearing.⁴⁵ Following a hearing, the

³⁵ See *Markle v. Williamson*, 518 P.2d 621, 621–25 (Wyo. 1974) (affirming the entry of judgment against defendant, a co-employee of the decedent, for the wrongful death of the decedent on the ground that neither Wyoming Statute § 27-50 (1957) nor the Wyoming Constitution provided co-employees immunity from suit).

³⁶ WYO. STAT. ANN. § 27-312(a) (1975) (“The rights and remedies provided in this act . . . are in lieu of all other rights against any employer . . . or his employees . . . unless the employees are *grossly negligent*.”) (emphasis added).

³⁷ *Id.*

³⁸ WYO. STAT. ANN. § 27-14-104(a) (1986). The Legislature repealed Wyoming Statute § 27-312(a) and enacted Wyoming Statute § 27-14-104(a). *Id.* Wyoming Statute § 27-14-104(a) (1986) stated: “The rights and remedies provided in this act . . . are in lieu of all other rights and remedies against any employer . . . or their employees.”

³⁹ *Mills I*, 807 P.2d at 385.

⁴⁰ *Id.* at 385–86.

⁴¹ *Id.* at 387–88.

⁴² *Id.* at 388.

⁴³ *Id.* at 388. While Marks, one of the co-employees sued by Mills, never instructed Mills to use the equipment, Marks provided the painting equipment used by Mills. *Id.* at 387.

⁴⁴ *Mills I*, 807 P.2d at 388.

⁴⁵ *Id.*

district court granted summary judgment for all defendants.⁴⁶ Mills and Bunker appealed, arguing the statute violated various provisions of the Wyoming Constitution.⁴⁷ On appeal, the Wyoming Supreme Court rejected the appellants' arguments and held the statute constitutional.⁴⁸

Following the court's decision, the court granted appellants' petition for rehearing.⁴⁹ Upon rehearing, the court reversed its prior decision and held the statute unconstitutional.⁵⁰ While a majority of the court held the statute unconstitutional, a majority of the court failed to reach a conclusion as to why the statute violated the Wyoming Constitution.⁵¹ The case, therefore, establishes as precedent only the conclusion that complete co-employee immunity violates the Wyoming Constitution.⁵²

Following *Mills II*, the legislature again amended Wyoming Statute § 27-14-104(a).⁵³ Pursuant to the amendment, the Legislature provided co-employees immunity "unless the employees *intentionally act* to cause physical harm or injury to the injured employee."⁵⁴ The Wyoming Supreme Court considered the statute, in depth, in *Bertagnolli v. Louderback*.⁵⁵

⁴⁶ *Id.*

⁴⁷ *Id.* at 392. Mills and Bunker argued the statute limited damages in violation of the art. 10, § 4 of the Wyoming Constitution and deprived appellants of the right to access the courts in violation of equal protection guarantees. *Id.*

⁴⁸ *Id.* at 386.

⁴⁹ *Mills II*, 837 P.2d at 49, *superseded by statute*, 1993 Wyo. Sess. Laws 68.

⁵⁰ *Id.* The court reversed by a three to two (3-2) decision. *Id.* at 49-55.

⁵¹ *See id.* at 49-71. Chief Justice Macy held the statute unconstitutional as violative of Equal Protection, reasoning the right to access the courts constituted a fundamental right. *Id.* at 55. Justice Cardine held the statute unconstitutional because it violated article 10, § 4 of the Wyoming Constitution. *Id.* at 56. He characterized the right to access the courts as an ordinary right. *Id.* at 56. Justice Urbigit held the statute violated equal protection, concluding the right to access the courts was a fundamental right. *Id.* at 60. Justice Thomas held the statute constitutional and held the right to access the courts constituted an ordinary right. *Id.* at 67. Justice Golden also held the statute constitutional and also characterized the right to access the courts as fundamental. *Id.* at 71.

⁵² *See McCutcheon v. State*, 604 P.2d 537, 542 (Wyo. 1979) (quoting *North v. Superior Court of Riverside County*, 502 P.2d 1305, 1309 (Cal. 1972)) (stating the judgment of an equally divided court is without force as precedent); *see also Altria Group v. Good*, 129 S. Ct. 538, 554 (2008) (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987)) ("Because the 'plurality opinion . . . did not represent the views of a majority of the Court, we are not bound by its reasoning."); *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910) ("[T]he principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.").

⁵³ WYO. STAT. ANN. § 27-14-104(a) (1993).

⁵⁴ *Id.* (emphasis added).

⁵⁵ 67 P.3d 627, 631-32 (Wyo. 2003).

Bertagnolli v. Louderback

In *Bertagnolli*, the Wyoming Supreme Court considered whether the district court erred by granting summary judgment in favor of two co-employee defendants.⁵⁶ Joe Bertagnolli filed suit against two co-employee supervisors, Larry Westbrook and Max Louderback, after Bertagnolli suffered a severe injury that resulted in the eventual amputation of his right leg, to a point just below the knee.⁵⁷ Bertagnolli filed suit pursuant to Wyoming Statute § 27-14-104(a), alleging Westbrook and Louderback intentionally ordered him to work next to equipment they knew posed significant dangers to workers.⁵⁸ Westbrook and Louderback moved for summary judgment on the basis that Bertagnolli failed to prove the defendants knew of the dangerous conditions.⁵⁹ The trial court granted the defendants motions.⁶⁰

On appeal, the Wyoming Supreme Court began by clarifying the standard for co-employee liability.⁶¹ The court reviewed Wyoming Statute § 27-14-104(a) and concluded the statute extended liability for both intentional acts and willful and wanton misconduct.⁶² The court reasoned the statutory language and the willful and wanton misconduct standard were legally equivalent because both the statute and the willful and wanton misconduct required intentional acts.⁶³ The court also concluded the Legislature intended to extend liability for willful and wanton misconduct because the Legislature amended the statute in light of the court's decision in *Mills II*, declaring immunity for intentional acts and willful and wanton misconduct unconstitutional.⁶⁴

⁵⁶ *Id.* at 629.

⁵⁷ *Id.* at 630. Bertagnolli tripped while shoveling coal and caught his right heel in the components of a shuttle belt. *Id.* The shuttle belt moved ore through the mine. *Id.* at 629. When Bertagnolli's heel caught, the components severed his right heel. *Id.* at 630. Following eleven unsuccessful surgeries, doctors amputated Bertagnolli's foot. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Bertagnolli*, 67 P.3d at 630. For purposes of the summary judgment motion, both parties stipulated the standard codified in Wyoming Statute § 27-14-104(a) and the willful and wanton misconduct standard constituted the appropriate co-employee liability standard. *Id.* A stipulation of the parties as to the law is not binding on the court, however. *L.U. Sheep Co. v. Bd. of County Comm'rs*, 790 P.2d 663, 674 (Wyo. 1990).

⁶¹ *Bertagnolli*, 67 P.3d at 631.

⁶² *Id.* at 632.

⁶³ *Id.*

⁶⁴ *Id.* at 632–33 (citing *Mills II*, 837 P.2d at 55). The court characterized *Mills II* as holding co-employee immunity for intentional acts and willful and wanton misconduct unconstitutional. *Id.* (citing *Mills II*, 837 P.2d at 55). The court then relied on the premise that the Legislature knows the state of the law and enacts statutes in accordance with the law. *Id.* at 633 (citing *Fosler v. Collins*, 13 P.3d 686, 689 (Wyo. 2000)).

Following the court's clarification of the standard for co-employee liability, the court addressed the defendants' motions for summary judgment.⁶⁵ The court concluded the district court erred by granting the motions because questions of fact remained.⁶⁶ The court, therefore, remanded.⁶⁷ While the actual disposition of *Bertagnolli* is not relevant for purposes of this note, the legal conclusions reached in *Bertagnolli* remain relevant because the court relied on the same conclusions in reaching its decision in *Hannifan*.⁶⁸

PRINCIPAL CASE

In *Hannifan v. American National Bank of Cheyenne*, the Wyoming Supreme Court considered the appropriateness of a jury verdict in favor of an injured mine employee against two co-employee defendants.⁶⁹ The court held Wyoming Statute § 27-14-104(a) extended co-employee liability for both intentional acts and willful and wanton misconduct.⁷⁰ The court then concluded sufficient evidence existed to support the jury finding that Hannifan and Hampleman "acted with willful and wanton, *intentional negligence*."⁷¹

Majority Opinion (Justice Hill, Joined by Justices Golden, Kite, and Burke)

The majority began its analysis by addressing the standard for co-employee liability.⁷² The court stated, in no uncertain terms, that *Bertagnolli* serves as a complete restatement of the law.⁷³ Following this statement, the court quoted a substantial portion of the *Bertagnolli* decision, including the conclusion "the concept of willful and wanton misconduct has essentially the same legal effect as the statutory language."⁷⁴ The court supported this conclusion by advancing two lines of reasoning.⁷⁵ First, the court reasoned both the statutory standard and the willful and wanton misconduct standard require intentional acts.⁷⁶ Second, the court reasoned the Legislature intended to extend co-employee liability for willful

⁶⁵ See *id.* at 634–35 (reviewing the facts and the propriety of the district court's judgment).

⁶⁶ *Bertagnolli*, 67 P.3d at 635.

⁶⁷ *Id.*

⁶⁸ See *Hannifan*, 185 P.3d at 682–84 (quoting *Bertagnolli* extensively).

⁶⁹ *Id.* at 681.

⁷⁰ *Id.* at 683.

⁷¹ *Id.* at 695.

⁷² *Id.* at 683.

⁷³ *Hannifan*, 185 P.3d at 683.

⁷⁴ *Id.* (quoting *Bertagnolli*, 67 P.3d at 632).

⁷⁵ *Id.*

⁷⁶ *Id.* (quoting *Bertagnolli*, 67 P.3d at 632).

and wanton misconduct because the Legislature amended the statute after the court's decision in *Mills II*, holding co-employee immunity for intentional acts and willful and wanton misconduct unconstitutional.⁷⁷

After concluding willful and wanton misconduct constituted the appropriate standard for co-employee liability, the court addressed the remaining issues raised by Hannifan and Hampleman on appeal.⁷⁸ First, the court considered whether sufficient evidence existed to support the jury verdict in favor of Butts.⁷⁹ The court reviewed the evidence and concluded sufficient evidence existed to support the finding that (1) Hannifan and Hampleman knew of the dangerous conditions in the boxcut, (2) had supervisory authority for Butts's safety, and (3) disregarded the risks of danger.⁸⁰

Second, the court addressed the adequacy of the jury instructions given by the trial court.⁸¹ The court compared the proposed and given instructions and concluded the trial court adequately apprised the jury of the law.⁸² Third, the court considered whether the trial court abused its discretion by denying Hannifan and Hampleman's motions for either a mistrial or new trial.⁸³ The court found the trial court did not abuse its discretion by denying either motion and, therefore affirmed the lower court's judgment.⁸⁴

⁷⁷ *Id.* (quoting *Bertagnolli*, 67 P.3d at 632–33).

⁷⁸ *Hannifan*, 185 P.3d at 684–85.

⁷⁹ *Id.* at 684.

⁸⁰ *Id.* at 689.

⁸¹ *Id.*

⁸² *Id.* at 692. The court, however, proposed the following instruction for future use:

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

Id. at 692 n.2.

⁸³ *Hannifan*, 185 P.3d at 693. At the conclusion of the trial, Hannifan and Hampleman requested the trial court grant a mistrial or new trial based upon statements made by Butts's counsel during closing arguments. *Id.* at 694–95. Butts's counsel informed the jury that any fault attributed to Thunder Basin, a non-party to the suit on account of immunity extended under the Wyoming Worker's Compensation Act, would diminish the Butts's recovery. *Id.*

⁸⁴ *Id.* at 695. The majority concluded, “[t]he evidence was sufficient to sustain the jury's conclusion that the Appellants acted with willful and wanton, *intentional negligence*.” *Id.* (emphasis added).

Concurring Opinion (Chief Justice Voigt)

In a concurring opinion, Chief Justice Voigt expressed concern that the court created an exception to co-employee immunity not intended by the Legislature.⁸⁵ First, Chief Justice Voigt reasoned the court's decision blurred the distinction between intentional harms and willful and wanton misconduct.⁸⁶ Second, Chief Justice Voigt interpreted Wyoming Statute § 27-14-104(a) as requiring both an intent to act and an intent to cause harm and highlighted that the court's definition of willful and wanton misconduct contemplated only an intent to act.⁸⁷ Nevertheless, Chief Justice Voigt cited adherence to stare decisis and joined the result reached by the majority.⁸⁸

ANALYSIS

This section begins by discussing the doctrine of stare decisis, cited by Chief Justice Voigt as his primary reason for concurring in the court's decision.⁸⁹ Next, the analysis illuminates the flaws underlying the court's decisions in *Bertagnolli* and *Hannifan*.⁹⁰ The analysis concludes by considering the adverse impact of the court's decision on Wyoming employees and employers.⁹¹

The Doctrine of Stare Decisis

The doctrine of stare decisis charges courts to adhere to past decisions.⁹² Despite the commanding nature of the doctrine, stare decisis constitutes a policy doctrine, not an unyielding rule requiring blind adherence to past decisions.⁹³ As the court previously recognized, courts should not adhere to past decisions when those decisions rely upon incorrect principles of law, poor reasoning, or unworkable standards.⁹⁴ In *Cook v. State*, the Wyoming Supreme Court stated,

⁸⁵ *Id.* at 695 (Voigt, C.J., concurring).

⁸⁶ *Id.* (Voigt, C.J., concurring).

⁸⁷ *Id.* (Voigt, C.J., concurring).

⁸⁸ *Hannifan*, 185 P.3d at 695 (Voigt, C.J., concurring).

⁸⁹ *See infra* notes 92–96 and accompanying text (clarifying the doctrine of stare decisis).

⁹⁰ *See infra* notes 97–135 and accompanying text (explaining the errors made by the court in both *Bertagnolli* and *Hannifan*).

⁹¹ *See infra* notes 136–42 and accompanying text (discussing the adverse impact of the court's decision on employees and employers in Wyoming).

⁹² *E.g.*, *Borns v. Voss*, 70 P.3d 262, 271 (Wyo. 2003) (citing BLACK'S LAW DICTIONARY 1414 (7th ed. 1999)); *State ex rel. Wyo. Worker's Comp. Div. v. Barker*, 978 P.2d 1156, 1161 (Wyo. 1999) (quoting *Goodrich v. Strobbe*, 908 P.2d 416, 420 (Wyo. 1995)); *see also* BLACK'S LAW DICTIONARY 1443 (8th ed. 2004) (defining stare decisis as “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation”).

⁹³ *E.g.*, *Barker*, 978 P.2d at 1161 (quoting *Goodrich*, 908 P.2d at 420); *Goodrich*, 908 P.2d 420 (quoting *Jones v. State*, 902 P.2d 686, 692–93 (Wyo. 1995)).

⁹⁴ *E.g.*, *Borns*, 70 P.3d at 271 (citations omitted); *Dunnegan v. Laramie County Commr's*, 852 P.2d 1138, 1140 (Wyo. 1993); *Cook v. State*, 841 P.2d 1345, 1353 (Wyo. 1992).

“[w]isdom does not come to us often. . . . When it does, we should embrace [it,] not slavishly reject it because of a questionable application of legal doctrine.”⁹⁵ Nevertheless, in *Hannifan*, the court chose to follow the flawed co-employee liability standard adopted in *Bertagnolli*.⁹⁶

The Flawed Standard of Liability

In *Bertagnolli*, the court initially held that Wyoming Statute § 27-14-104(a) extended co-employee liability for both intentional acts and willful and wanton misconduct.⁹⁷ The court supported this conclusion by reasoning: (1) the statutory standard and the willful and wanton standard amounted to legal equivalents, and (2) the Legislature intended the 1993 amendment to extend liability for willful and wanton misconduct.⁹⁸ As the following analysis illustrates, the court’s conclusion that the statutory standard amounts to willful and wanton misconduct ignores the structure of the statutory language and equates two contrary legal concepts.⁹⁹

As indicated by the statutory language “unless the employees intentionally act to cause physical harm or injury,” Wyoming Statute § 27-14-104(a) contemplates both the intent to act and the intent to cause harm.¹⁰⁰ Intent requires the actor *desire* the consequence of his act or believe the consequence is substantially certain to follow.¹⁰¹ Willful and wanton misconduct requires that the actor *disregard* the

⁹⁵ *Cook*, 841 P.2d at 1353.

⁹⁶ *Hannifan*, 185 P.3d at 683 (“The *Bertagnolli* case now serves as a complete restatement of Wyoming’s jurisprudence in this regard.”); *see infra* notes 97–135 and accompanying text (explaining the flaws underlying the *Bertagnolli* court’s adoption of a willful and wanton misconduct standard for co-employee liability).

⁹⁷ *Bertagnolli*, 67 P.3d at 633.

⁹⁸ *Id.* at 632–33 (“We continue to believe 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.’”).

⁹⁹ *See infra* notes 100–15 and accompanying text (explaining that the statute requires both an intent to act and an intent to cause harm and illustrating the differences between the concepts of intent and willful and wanton misconduct).

¹⁰⁰ *Hannifan*, 185 P.3d at 695 (Voigt, C.J., concurring) (“It appears to me that the word ‘intentionally’ applies both to the word ‘act’ and to the word ‘cause.’ If that was not the legislature’s intent, the phrase would read ‘unless the employees intentionally act and cause physical harm or injury to the injured employee.’”).

¹⁰¹ *E.g.*, *Burrow v. Delta Container*, 887 So. 2d 599, 602 (La. Ct. App. 2004) (citing *Bazley v. Tortorich*, 397 So. 2d 475, 481 (La. 1981)); *Vasquez v. Six Flags Houston, Inc.*, 120 S.W.3d 445, 448 (Tex. App. 2003) (citing *Rodriguez v. Naylor Industries, Inc.*, 763 S.W.2d 411, 412 (Tex. 1989)); *Security Title Guar. Corp. of Baltimore v. McDill Columbus Corp.*, 543 So. 2d 852, 855 (Fla. Dist. Ct. App. 1989) (citing *Deane v. Johnston*, 104 So. 2d 3, 8 (Fla. 1958)); *cf.* BLACK’S LAW DICTIONARY 825 (8th ed. 2004) (defining intent as “[t]he state of mind accompanying an act, esp. a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial.”).

consequence of an act when a reasonable person would know the act would, in a high probability, result in harm to another.¹⁰²

The two standards differ in substantial ways.¹⁰³ First, the standards differ in the intent required.¹⁰⁴ In *Danculovich v. Brown*, the court expressly stated “the intent in willful and wanton misconduct is not intent to cause the injury.”¹⁰⁵ In *Hannifan*, the court also acknowledged the difference by noting that willful and wanton misconduct requires only “a state of mind approaching intent to do harm.”¹⁰⁶ Second, the standards differ with respect to the showing of knowledge required.¹⁰⁷ Willful and wanton misconduct, as defined by the court in *Hannifan*, requires knowledge of a high degree of probability of harm.¹⁰⁸ Intent, however, requires either the actor desire to cause the harm or act with substantial certainty harm will follow.¹⁰⁹ While knowledge of a probability of harm suffices to prove willful and wanton misconduct, it fails to prove intent.¹¹⁰ Third, the standards differ in whether an objective or subjective state of mind is required.¹¹¹ The

¹⁰² *E.g.*, *Hannifan*, 185 P.3d at 692 n.2 (proposing future instruction on the appropriate standard for co-employee liability); *Bertagnolli*, 67 P.3d at 632 (citing *Weaver v. Mitchell*, 715 P.2d 1361, 1370 (Wyo. 1986)); *Mayflower Rest. Co. v. Griego*, 741 P.2d 1106, 1115 (Wyo. 1987)); *see also* PROSSER AND KEETON ON TORTS 213 (W. Page Keeton ed., West Publishing Co. 1984) (1941) (citing RESTATEMENT (SECOND) OF TORTS, § 500 (1965)).

¹⁰³ *See infra* notes 104–15 and accompanying text (illustrating the ways the standards differ).

¹⁰⁴ *See Danculovich v. Brown*, 593 P.2d 187, 193 (Wyo. 1979) (stating the intent in willful and wanton misconduct differs from the intent to cause harm).

¹⁰⁵ *Id.*

¹⁰⁶ *Hannifan*, 185 P.3d at 692.

¹⁰⁷ *Compare id.* at 692 n.2 (defining willful and wanton misconduct as requiring knowledge of a high degree of probability of harm), *with Burrow*, 887 So. 2d at 602 (citing *Bazley*, 396 So. 2d at 481) (stating intent requires the actor desire to cause the consequence of the act or believe the consequence is substantially certain to follow).

¹⁰⁸ *Hannifan*, 185 P.3d at 692 n.2. The court defined willful and wanton misconduct 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.

Id.

¹⁰⁹ *E.g.*, *Burrow*, 887 So. 2d at 602 (citing *Bazley*, 397 So. 2d at 481); *Vasquez*, 120 S.W.3d at 448 (citing *Rodriguez*, 763 S.W.2d at 412); *Security Title Guar. Corp. of Baltimore*, 543 So. 2d at 855 (citing *Deane*, 104 So. 2d at 8).

¹¹⁰ *See* PROSSER, *supra* note 102, at 36; *see also* *Oros v. Hull & Assocs., Inc.*, 302 F. Supp. 2d 839, 844 (D. N.D. Ohio 2004) (citing *Fyffe v. Jenos, Inc.*, 570 N.E.2d 1108, 1112 (Ohio 1991)); *Jackson v. Latini Mach. Co.*, 960 F. Supp. 1043, 1049 (D. E.D. La. 1997) (citing *Williams v. Gervais F. Favrot Co., Inc.*, 573 So. 2d 533 (La. Ct. App. 1991)).

¹¹¹ *Compare Hannifan*, 185 P.3d at 692 n.2 (stating willful and wanton misconduct requires a reasonable person would know harm would result), *with Burrow*, 887 So. 2d at 602 (citing *Bazley*, 397 So. 2d at 481) (defining intent as requiring the actor desire the consequences of his act).

court's formulation of the willful and wanton misconduct standard requires a reasonable person would know a high probability of danger existed, an objective standard.¹¹² Intent requires the "actor desire" the consequence of his act, a subjective standard.¹¹³ With respect to the subjective standard, the focus is on the actor rather than a hypothetical reasonable person.¹¹⁴ As this discussion suggests, the Wyoming Supreme Court erred by equating two contrary legal principles.¹¹⁵ The court also erred by reasoning the Legislature intended to extend liability for willful and wanton misconduct.¹¹⁶

In *Bertagnolli*, the court concluded the Legislature intended co-employees to remain liable for willful and wanton misconduct.¹¹⁷ The court reasoned the Legislature amended the statute knowing of the court's decision in *Mills II*, which the court construed as holding co-employee immunity for intentional acts and willful and wanton misconduct unconstitutional.¹¹⁸ In *Mills II*, the court defined the issue as whether Wyoming Statute § 27-14-104(a), granting co-employees *complete* immunity from suit, violated the Wyoming Constitution.¹¹⁹ In the opening paragraph of the decision, the court specifically held that the extension of *complete* immunity to co-employees violated the Wyoming Constitution.¹²⁰ Following the court's initial statement of the holding, Justice Macy, the author of the plurality opinion, addressed the reasoning supporting the plurality's holding.¹²¹ In this discussion, Justice Macy only discussed complete immunity.¹²² In fact, he failed to even mention "willful and wanton misconduct" until the second to last paragraph of the plurality's nearly eight page decision.¹²³

¹¹² *Hannifan*, 185 P.3d at 692 n.2 ("Willful and wanton misconduct is the intentional doing of an act, or an intentional failure to do an act . . . under circumstances and conditions that a reasonable person would know, or have reason to know, that such conduct would . . . result in harm to another." (emphasis added)).

¹¹³ *E.g.*, *Burrow*, 887 So. 2d at 602 (citing *Bazley*, 397 So. 2d at 481); *Vasquez*, 120 S.W.3d at 448 (citing *Rodriguez*, 763 S.W.2d at 412); *Security Title Guar. Corp. of Baltimore*, 543 So. 2d at 855 (citing *Deane*, 104 So. 2d at 8).

¹¹⁴ BLACK'S LAW DICTIONARY 1465 (8th ed. 2004) (defining subjective as "[b]ased on an individual's perceptions, feelings, or intentions, as opposed to externally verifiable phenomena").

¹¹⁵ *See supra* notes 97–114 and accompanying text (explaining why the concepts of intent and willful and wanton misconduct differ).

¹¹⁶ *See infra* notes 117–34 and accompanying text (explaining why the court erred by concluding the Legislature intended to extend liability for willful and wanton misconduct).

¹¹⁷ *Bertagnolli*, 67 P.3d at 632–34.

¹¹⁸ *Id.*

¹¹⁹ *Mills II*, 837 P.2d at 49.

¹²⁰ *Id.*

¹²¹ *See id.* at 49–55 (providing the court's analysis).

¹²² *See id.* (considering the constitutional challenge to *complete immunity*).

¹²³ *See id.* at 49–56 (stating for the first time "[i]n summary, the legislature's grant of complete immunity to co-employees, which includes immunity for intentional acts and for willful and wanton misconduct, infringed upon the fundamental right to access to the courts").

While the plurality opinion fleetingly mentioned willful and wanton misconduct, the opinion focused almost entirely on complete immunity.¹²⁴ Taken as a whole, the opinion makes it very difficult for the Legislature to discern whether the court would hold the extension of co-employee immunity for willful and wanton misconduct unconstitutional.¹²⁵ Therefore, the *Bertagnolli* court erred by assuming the court enunciated its holding in *Mills II* with the clarity necessary to provide the Legislature with notice as to the state of the law.¹²⁶ In addition to this error, the court also erred by failing to consider the legislative history behind the amendment to the statute.¹²⁷

In 1993, when the Legislature sought to amend Wyoming Statute § 27-14-104(a), the State Senate considered and rejected a State House amendment seeking to impose co-employee liability for culpable negligence.¹²⁸ Following the Senate's rejection of a culpable negligence standard, the Senate adopted an amendment imposing liability only when employees "intentionally act to cause physical harm or injury."¹²⁹ The Senate's rejection of a willful and wanton misconduct standard becomes evident by comparing the court's definitions of "culpable negligence" and "willful and wanton misconduct."¹³⁰

A comparison of the Wyoming Supreme Court's definitions of "culpable negligence" and "willful and wanton misconduct" reveals that the definitions essentially mirror one another.¹³¹ In fact, in *McKenna v. Newman*, the court defined "culpable negligence" as willful and serious misconduct.¹³² The court then

¹²⁴ *Mills II*, 837 P.2d at 49–55 (illustrating the court's devotion of its efforts to a discussion of the constitutionality of complete immunity).

¹²⁵ *See id.* (discussing the constitutionality of complete immunity and mentioning willful and wanton misconduct only in the second to last paragraph of the opinion).

¹²⁶ *See Bertagnolli*, 67 P.3d at 632–33 (stating the court presumes the Legislature knows of the court's decisions and enacts legislation accordingly).

¹²⁷ *See id.* at 632–33 (stating the court's conclusion is "consistent with the parameters of statutory construction" but failing to consider any legislative history).

¹²⁸ 1993 LEGISLATIVE DIGEST, H.B. 0034, 82–85.

¹²⁹ *See id.* (containing the votes rejecting the culpable negligence standards and approving the intentional language).

¹³⁰ *See infra* notes 131–34 and accompanying text (comparing the definitions of culpable negligence and willful and wanton misconduct).

¹³¹ *Compare Krier*, 943 P.2d at 417 (citing *Smith v. Throckmartin*, 893 P.2d 712, 716 (Wyo. 1995)) (defining culpable negligence as "the intentional commission of an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm will follow"), *with Hannifan*, 185 P.3d at 683 (quoting *Bertagnolli*, 67 P.3d at 632) (defining willful and wanton misconduct as "the intentional doing of an act, or an intentional failure to do an act, in reckless disregard of the consequences and under circumstances . . . 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").

¹³² 902 P.2d 1285, 1286 (Wyo. 1995) (citations omitted).

used the definition of culpable negligence to define willful misconduct.¹³³ If the terms “culpable negligence” and “willful and wanton misconduct” actually equate to the same standard, the Legislature’s rejection of a culpable negligence standard also rejects the willful and wanton misconduct standard.¹³⁴ The court’s decision to impose co-employee liability, regardless of the Legislature’s intent, significantly impacts employees in Wyoming.¹³⁵

Impact of the Court’s Decision in Hannifan

The court’s decision in *Hannifan* significantly and adversely impacts employees in the State by imposing the incidental costs of industry on those employees personally.¹³⁶ As a result of the court’s decision, a manager who makes one questionable decision in the course and scope of employment, such as the decision to allow mining to continue, now faces personal liability.¹³⁷ A manager’s life savings, the investments he plans to use to pay for his children’s college, and potentially even the retirement funds he will depend on in his later years of life are now at risk.¹³⁸ Such a result is inherently unfair.

The court’s decision also adversely impacts employers in Wyoming by imposing additional costs.¹³⁹ Some employers, facing pressure from risk adverse management employees, will ultimately obtain additional insurance to cover those employees.¹⁴⁰ Employers end up paying twice, once in the form of

¹³³ *Id.* (citations omitted) (“[C]ourts allow a party to establish that willful misconduct has occurred by demonstrating that an actor has intentionally committed an act of unreasonable character in disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow.”).

¹³⁴ *Compare Krier*, 943 P.2d at 417 (citing *Smith*, 893 P.2d at 716) (defining culpable negligence), *with Hannifan*, 185 P.3d at 682 (quoting *Bertagnolli*, 67 P.3d at 632) (defining willful and wanton misconduct).

¹³⁵ *See infra* notes 136–42 and accompanying text (addressing the impact of the decision on employees and the employers in Wyoming).

¹³⁶ *See Mills II*, 837 P.2d at 66 (Thomas, J., dissenting) (discussing his concern that employees will face personal liability for their co-employees work-related injuries).

¹³⁷ *See id.* (Thomas, J., dissenting) (considering the consequences of the court’s decision in *Mills II*).

¹³⁸ *Id.* (Thomas, J., dissenting) (stating “[t]he homeowner’s insurance of every worker who owns a home; that worker’s personal and real property; that worker’s savings accounts and investments; and, perhaps, even that worker’s retirement fund may all become available to respond to the claim for damages”).

¹³⁹ *See id.* (Thomas, J., dissenting) (discussing the effects of the court’s decision in *Mills II*, including increased costs to the employer resulting because “[h]e pays by his contribution to the workers compensation fund, and he pays by virtue of what will have to be additional premium for his liability insurance”).

¹⁴⁰ *See id.* (Thomas, J. dissenting) (discussing the effect of the decision on employers and stressing the increased cost to employers deriving from the maintenance of liability insurance).

contributions to the State's workers' compensation fund and a second time in the form of insurance premiums paid to insure managers from personal liability.¹⁴¹ The Legislature could not have intended such a result.¹⁴²

CONCLUSION

In *Hannifan v. American National Bank of Cheyenne*, the Wyoming Supreme Court affirmed a jury verdict in favor of an injured mine employee against two co-employees.¹⁴³ The court reached this conclusion by adopting its earlier holding, reached in *Bertagnolli*, that Wyoming Statute § 27-14-104(a) extends co-employee liability for intentional acts and willful and wanton misconduct.¹⁴⁴ While Chief Justice Voigt expressed concern the court's decision created an exception to co-employee immunity not intended by the Legislature, he cited *stare decisis* and joined the majority result.¹⁴⁵ As discussed, however, courts should not adhere to precedent based upon incorrect conclusions of law.¹⁴⁶

Bertagnolli advanced several incorrect conclusions, including the conclusion that the statutory standard and the "willful and wanton misconduct" standard constitute legal equivalents.¹⁴⁷ *Bertagnolli* also advanced the incorrect conclusion that the Legislature intended to extend liability for willful and wanton misconduct.¹⁴⁸ Despite the errors in *Bertagnolli*, the *Hannifan* court adopted and extended *Bertagnolli's* holdings.¹⁴⁹ As a result, employees in Wyoming now face personal liability for decisions made in the course and scope of employment and employers face increased costs deriving from paying both workers' compensation dues and liability insurance premiums.¹⁵⁰

¹⁴¹ *Mills II*, 837 P.2d at 66 (Thomas, J., dissenting).

¹⁴² *Id.* (Thomas, J. dissenting) ("When this situation is recognized for what it is, it does seem that the product of the new decisions is antithetical to the intent of the workers' compensation statutes.").

¹⁴³ *Hannifan*, 185 P.3d at 695.

¹⁴⁴ *Id.* at 683.

¹⁴⁵ *Id.* at 695 (Voigt, C.J., concurring).

¹⁴⁶ *See supra* notes 92–96 and accompanying text (discussing the doctrine of *stare decisis* and the principle that courts should not adhere to decisions based on incorrect legal conclusions).

¹⁴⁷ *See supra* notes 97–115 and accompanying text (explaining why the statutory standard and the willful and wanton misconduct standard differ).

¹⁴⁸ *See supra* notes 117–34 and accompanying text (explaining why the court's conclusion that the Legislature intended to extend liability for willful and wanton misconduct is incorrect).

¹⁴⁹ *See Hannifan*, 185 P.3d at 683 (stating that *Bertagnolli* serves as a complete restatement of the law and quoting *Bertagnolli* extensively).

¹⁵⁰ *See supra* notes 136–42 and accompanying text (discussing in detail the adverse impact of the court's decision on Wyoming's employees and employers).