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Damned if You Do, Damned if You Don't: A Contextual Analysis of Co-Employee Liability and Wyoming Workers' Compensation Subrogation

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DAMNED IF YOU DO, DAMNED IF YOU DON'T: A CONTEXTUAL ANALYSIS OF CO-EMPLOYEE LIABILITY AND WYOMING WORKERS' COMPENSATION SUBROGATION

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"That the history and evolution of co-employee liability is fraught with complexities and idiosyncrasies that are not readily parsed is a matter well-known to this Court."[1]

Workers' Compensation is a relatively new concept, having its origins in the nineteenth and twentieth centuries.[2] With industry developing rapidly during the 1800s, society began to realize tort law was not fit to handle workplace injuries.[3] Injured workers in the late nineteenth and early twentieth centuries experienced frequent court losses due to common negligence defenses used by employers: contributory negligence, assumption of the risk, and the fellow-servant rule.[4] Further, employers were concerned about juries allowing their sympathy for injured workers to cloud their judgment.[5] "Eventually, cases involving severe injuries, in circumstances suggesting employer callousness, made their way to judges and juries not instinctively sympathetic to employers' interests."[6] Thus, "The Societal Deal" was born:

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[1] Hannifan v. Am. Nat'l Bank, 2008 WY 65, ¶ 5, 185 P.3d 679, 682 (Wyo. 2008) (the "complexities and idiosyncrasies" only get worse when subrogation is added into the mix).

[2] MICHAEL C. DUFF, WORKERS' COMPENSATION LAW: A CONTEXT AND PRACTICE CASEBOOK 6 (1st ed. 2013).

[3] *Id.*

[4] *Id.*

[5] *See id.*

[6] *Id.*

> upon suffering a workplace injury, a worker would be paid a cash benefit amounting to a proportion (often 2/3) of the workers' average pre-injury weekly wage. The cash benefit would in theory be continued for as long as the injury contributed to the worker's incapacity for work. The worker would also be compensated for medical treatment made necessary by the injury. Recovery of statutory benefits would be the workers' *exclusive remedy*.[7]

Wyoming adopted its version of "The Societal Deal" in 1993.[8] The statute provided:

> 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.[9]

Today, the statute remains largely unchanged, but confusion surrounds its meaning and questions presented to the Wyoming Supreme Court continue to grow.[10] This article will first provide a contextual analysis of Wyoming co-employee liability law and its requirements.[11] Second, this article will discuss the difficulties presented to an employee attempting to collect monies owed to him.[12] This article will then uncover the confusion and intricacy behind the Wyoming Workers' Compensation subrogation system, particularly as it pertains to co-employee liability and third-party liability.[13] Finally, this article will provide an interpretive framework complete with alternative solutions to the problematic subrogation system found in Wyoming Statute section 27-14-105 as it pertains to co-employee

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[7] *Id.* (emphasis added). "It has become a firm general rule that a work related injury may not be the subject of a tort suit. This is known as the exclusive remedy rule." *Id.* at 7.

[8] *See* WYO. STAT. ANN. § 27-14-104(a) (1993). As discussed, Wyoming struggled in defining the extent of the exclusive remedy rule, which lead to strenuous litigation and a question of constitutionality. *See supra* notes 2–7 and accompanying text; *supra* notes 9–10 and accompanying text.

[9] WYO. STAT. ANN. § 27-14-104(a).

[10] *See* WYO. STAT. ANN. § 27-14-104(a) (2015).

[11] *See infra* Part I.

[12] *See infra* Part II.

[13] *See infra* Part III.

liability and third-party liability, with the hopes of providing a workable solution to this confusing and often frustrating law.[14]

I. PROVIDING SOME CONTEXT: THE FACTS OF OUR CASE

Because the theory presented in this article is difficult to discuss in the abstract, an example will provide the context needed to set the stage for both the discussion and argument that follow.

A. Example 1: Workers' Compensation Third-Party Liability Action with Subrogation and Co-Employee Negligence

Peter was a road paver working for a local contracting business, Road Repair, LLC. One day, Peter was driving the paver, attempting to pave a section of the well-maintained Interstate 80 (I-80). Chad, another employee of Road Repair, LLC, was responsible for slowing vehicles as Peter paved the road. The process of slowing vehicles involved standing on the side of the construction site, warning on-coming traffic of the road repair and the requirement to reduce speed ahead. Instead of warning oncoming vehicles, Chad was fraternizing with a female employee. Meanwhile, Darryl, a trucker for Trucking Industries, LLC, was driving on I-80 at breakneck speed. He came upon the beginning of the construction zone and slowed to forty-five miles per hour. The construction zone was properly labeled and the speed limit was posted at thirty miles per hour. Darryl drove past the point where Chad was supposed to warn drivers of the paver. At the same time, Peter began backing up into oncoming traffic without looking. At that moment, Darryl and Peter collided. Peter suffered a cervical neck injury and a fractured arm. Darryl walked away unscathed, and Chad was dateless that night, despite his best efforts. Workers' Compensation paid Peter $400,000.00 in total benefits, so that is the amount of Workers' Compensation's subrogation lien.[15] Peter brought a co-employee liability claim against Chad and a negligence claim against Trucking Industries, LLC.

Outcome 1

Peter's case went to a jury trial. The jury awarded total damages of $900,000.00: including $300,000.00 for medical costs and lost wages, $100,000.00 in future medicals bills, and $500,000.00 for pain and suffering, loss of enjoyment of life, and permanent disability.

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[14] *See infra* Part IV, V.

[15] These include medical care payments, temporary total disability benefits, permanent partial disability, among others. *See* RULES, REGULATIONS AND FEE SCHEDULES OF THE WYOMING WORKERS' COMPENSATION DIVISION, CHAPTER 5, § 4; *see also* WYO. STAT. ANN. §§ 27-14-401 to -408 (2015). For a definition of the foregoing terms, see WYO. STAT. ANN. § 27-14-102 (2015).

The jury apportioned fault as follows:

Darryl:	50% (or $450,000.00)
Chad:	50% (judgment proof)
Peter:	0%

Outcome 2

Peter and Trucking Industries, LLC's insurance company negotiated for several years. Eventually, knowing the risks that a jury could apportion fault in any number of ways, Trucking Industries, LLC's insurance company agreed to settle the case with Peter for $450,000.00. Workers' Compensation agreed to the settlement.

B. Example 2: A Personal Injury Stemming from a Car Accident with Two Liable Defendants

To better show the discrepancies in normal third-party subrogation claims and Workers' Compensation claims, imagine a car accident involving three vehicles. On an icy day in January, Bill (employee) was driving his car when he was hit from behind by Jim (co-employee). While they waited for the police to show up, Betty (third-party) saw Jim and Bill sitting at the intersection. Though Betty applied her brakes, she was unable to stop because of the ice and slammed into Bill, who subsequently hit Jim again. Bill eventually required medical treatment. Bill's and Jim's insurance company was Rancher's Insurance, and Betty's insurance company was The Colonel.

In this example, Bill's medical treatment will be covered initially by the medical payment coverage under his own vehicle insurance plan. However, his insurer, Rancher's Insurance, is entitled to subrogation if Bill decides to bring suit against Jim and Betty.[16] Of course, fault must be allocated.[17] Bill is not restricted because his insurance company is the same as Jim's. This is a stark difference from the traditional Workers' Compensation system, especially when Workers' Compensation is nothing more than workplace insurance.[18] This is an example of how a plaintiff, in a case outside the realm of Workers' Compensation, can claim against two wrongdoers and how subrogation is handled in those situations. Now that the readers have a good idea of how a typical third-party claim is handled outside of the realm of Workers' Compensation, it would be prudent to delve into the complexities when Workers' Compensation is inserted into the equation.

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[16] *See* WYO. STAT. ANN. § 31-10-104 (2015).

[17] *See* WYO. STAT. ANN. § 1-1-109(e) (2015).

[18] *See* WYO. STAT. ANN. § 1-1-104; *see also* DUFF, *supra* note 2, at 349.

II. CO-EMPLOYEE LIABILITY AND THE WYOMING WORKERS' COMPENSATION SYSTEM

A. The History of Co-Employee Liability is Fraught with Constitutional Idiosyncrasies

As stated above, the exclusive remedy rule provides immunity for employers who pay their premiums to the Workers' Compensation system.[19] In 1974, the Wyoming Supreme Court adopted the common law doctrine holding that co-employees could be liable when their own negligence caused injury to other employees.[20] Perhaps realizing the Wyoming Supreme Court had potentially opened the floodgates, in 1975 the legislature limited the scope by providing co-employees with immunity when they were "acting within the scope of their employment unless the employees [were] *grossly negligent*."[21] The term "grossly negligent" was changed in 1977 to "culpably negligent."[22] By taking a giant step back, gouging employees' rights and remedies, the Wyoming legislature abrogated co-employee claims and, instead, provided for total immunity of co-employees who acted within the scope of their employment.[23] Although it took six years, the Wyoming Supreme Court held the statute unconstitutional in violation of the Wyoming Equal Protection Clause.[24] Thus, Wyoming's current co-employee liability law was born.

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[19] *See* WYO. CONST. art. X, § 4; *see also supra* notes 2–10 and accompanying text.

[20] *See* Markle v. Williamson, 518 P.2d 621, 624 (Wyo. 1974), *superseded by statute*, Wyoming Worker's Compensation Act, 1975 Wyo. Sess. Laws ch. 149, § 1, *as recognized in* Cottonwood Steel Corp. v. Hansen, 655 P.2d 1226 (Wyo. 1982).

[21] 1975 Wyo. Sess. Laws ch. 149, § 1 (emphasis added).

[22] 1977 Wyo. Sess. Laws ch. 142, § 1.

[23] *See* 1986 Wyo. Sp. Sess. Laws ch. 3, § 3. In 1986, Wyoming Statute section 27-14-104(a) read:

> The rights and remedies provided in this act for an employee and his dependents for injuries incurred in extrahazardous employments are in lieu of all other rights and remedies against any employer making contributions required by this act, or his employees acting within the scope of their employment, but do not supersede any rights and remedies available to an employee and his dependents against any other person.

WYO. STAT. ANN. § 27-14-104(a) (1986).

[24] *See* Mills v. Reynolds, 837 P.2d 48, 54 (Wyo. 1992). The court specifically held:

> [W]e do not perceive that complete immunity for co-employees who were acting within the scope of their employment was the least onerous means by which the objective of the Act could be achieved. Section 27-14-104(a) precluded employees from bringing suit against co-employees who committed intentional torts while they were acting within the scope of their employment. In essence, that provision permits an employee to intentionally harm a co-employee without being concerned about civil liability. While such immunity may slightly decrease the number of lawsuits filed by employees and increase the number of employees who will be guaranteed compensation, it severely burdens the State's undeniable interest in prohibiting an individual from committing an intentional tort without

With Wyoming's Workers' Compensation system providing a cloak of immunity for employers, it is often difficult for injured employees to collect compensation for their injuries. Although *Mills v. Reynolds* provided that co-employees can be held liable for their actions, the Wyoming Supreme Court has raised the bar for injured employees to obtain co-employee compensation.[25] The law in Wyoming requires the injured worker to meet an extremely high standard to collect from a co-employee.[26] Wyoming Statute section 27-14-104(a) provides the all too important exclusive remedy rule.[27] Reading this statute, it is difficult to determine exactly when an employee is legally liable to another employee. Although the statute requires that an employee "intentionally act to cause physical harm or injury to the inured employee,"[28] the Wyoming Supreme Court has struggled to define what constitutes an intentional act.[29]

B. Developing a Concise Framework for Co-Employee Liability: Bertagnolli v. Louderback

Although the requirements of co-employee liability have been addressed previously, no case has put them as succinctly as *Bertagnolli v. Louderback*. On November 13, 1996, a mine foreman instructed Joe Bertagnolli, a mine worker, to shovel ore in the west end of the shuttle belt area of the mine.[30] Bertagnolli requested the shuttle belt be "locked out" so it could not be turned on while he was shoveling.[31] The shift supervisors discussed the issue and told Bertagnolli the

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> the possibility of liability. Harmony in the work place may actually be enhanced if an employee knows that the worker next to him will be legally accountable for some of his actions, and, even though the parties have not presented facts concerning insurance costs and the financial status of the workers' compensation fund, we would be hard pressed to hold that those objectives could be attained only under a scheme which provided complete immunity to employees.

Id. at 55 (citations omitted); *see also* Bertagnolli v. Louderback, 2003 WY 50, ¶ 14, 67 P.3d 627, 631–32 (Wyo. 2003).

[25] *See Bertagnolli*, ¶ 16, 67 P.3d at 633.

[26] *Id.*

[27] *See* WYO. STAT. ANN. § 27-14-104(a) (2015) ("The rights and remedies provided in this act for an employee . . . are in lieu of *all other rights and remedies against any employer* . . . making contributions required by this act . . . ." (emphasis added)).

[28] *Id.*

[29] *See, e.g.*, *Bertagnolli*, 2003 WY 50, 67 P.3d 627; Case v. Goss, 776 P.2d 188 (Wyo. 1989); Loredo v. Solvay Am. Inc., 2009 WY 93, 212 P.3d 614 (Wyo. 2009); Smith v. Throckmartin, 893 P.2d 712 (Wyo. 1995).

[30] *See Bertagnolli*, ¶ 5, 67 P.3d at 629 ("The shuttle belt moves raw ore from the level of the mine on which mining occurs to lower levels. It resembles an open rail car, with a long, continuous belt on top and travels up and down a track . . . by means of a steel cable attached to both ends of the car. The cable makes a large loop around several pulley wheels called 'sheave wheels.'").

[31] *Id.* ¶ 6, 67 P.3d at 630.

belt would not be locked out.[32] Bertagnolli objected and was told if he did not do the job, he would be fired.[33] While shoveling the ore approximately five feet behind the rail car, the car started to move towards him; he attempted to get out of the way, but his foot was caught in a pinch point between a cable and the sheave wheel.[34] The wheel severed the back portion of Bertagnolli's foot.[35]

Bertagnolli filed a lawsuit against his supervisors under Wyoming Statute section 27-14-104(a), alleging the supervisors willfully, wantonly, and intentionally ordered him to work near active equipment known to cause amputation and death.[36] The supervisors claimed they did not know the sheave wheel was unguarded, and, thus, they could not have intentionally caused Bertagnolli's injury.[37] The district court granted summary judgment in favor of the supervisors.[38] On review, the Wyoming Supreme Court reversed.[39]

The court clarified the history of co-employee liability law and its relationship with the Workers' Compensation system.[40] Accepting Bertagnolli's argument, the court proffered the following three factors for finding co-employee liability: "(1) knowledge of the hazard or serious nature of the risk involved, (2) 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."[41] The court made specific note of the supervisors' knowledge of the dangers surrounding the shuttle belt.[42] Moreover, the court stated that the narrow issue of whether the sheave wheel was unguarded ignored the general risks of working in the shuttle belt area and further ignored the dangers of working around an active shuttle belt.[43]

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[32] *Id.*

[33] *Id.*

[34] *Id.* ¶ 7, 67 P.3d at 630.

[35] *Id.*

[36] *Id.* ¶ 8, 67 P.3d at 630.

[37] *Id.*

[38] *Id.* ¶ 9, 67 P.3d at 630.

[39] *Id.* ¶¶ 26–27, 67 P.3d at 635.

[40] *Id.* ¶¶ 12–14, 67 P.3d at 631 (discussing the common law and statutory history of co-employee liability).

[41] *Id.* ¶ 16, 67 P.3d at 633. The court uses the word factors; however, in researching the many cases surrounding co-employee liability, it seems that these "factors" are treated more like elements. *See, e.g.*, *Bertagnolli*, 2003 WY 50, 67 P.3d 627; Case v. Goss, 776 P.2d 188 (Wyo. 1989); Loredo v. Solvay Am. Inc., 2009 WY 93, 212 P.3d 614 (Wyo. 2009); Smith v. Throckmartin, 893 P.2d 712 (Wyo. 1995).

[42] *See Bertagnolli*, ¶ 24, 67 P.3d at 635 ("In the supervisors' depositions, they both, albeit reluctantly, acknowledged the extremely hazardous nature of the work done in and around the energized shuttle belt . . . .").

[43] *See id.* ¶¶ 24–26, 67 P.3d at 635.

Bertagnolli provides a very concise framework for co-employee liability. Therefore, with this framework in mind, it would be prudent to analyze all three requirements to gain further understanding of what must be proven to survive a summary judgment motion.

C. *Knowledge of the Hazard or Serious Nature of the Risk Involved Means "Actual Knowledge"*

The first requirement of maintaining a co-employee liability action is proving that the responsible party had "knowledge of the hazard or the serious nature of the risk involved."[44] In *Calkins v. Boydston*, Calkins worked as an operator for Boydston and Franzen, which performs well service work for oil companies.[45] On February 8, 1986, Calkins was oiling a running pump truck when his right leg caught the drive shaft, causing serious injury.[46] Calkins presented evidence that Boydston, the secretary-treasurer of the company, knew the pump needed to be replaced, but Calkins never mentioned that the drive shaft was unguarded on that particular pump truck.[47] To overturn the summary judgment ruling, Calkins had to show "that Gerald and Marinell Boydston had *actual knowledge* that the pump was unguarded and that their failure to provide a guard was done willfully."[48] The Wyoming Supreme Court affirmed the district court's grant of summary judgment in favor of the defendants.[49] In its short decision, the court announced "[t]he case law is clear that appellant must show that the Boydstons knew of the risk of harm or that the risk was obvious and yet they willfully disregarded the risk. The evidence in the record fails to make such a showing."[50]

Given the court's reasoning above, a large hurdle must be overcome in order to maintain a co-employee liability case: actual knowledge of the injury-causing instrumentality.[51] Judging by *Boydston*, it would be a highly contested matter to determine whether Chad, the flagger from Example 1, had actual knowledge of injury-causing instrumentality, i.e. the oncoming truck. Chad would argue that he was not present at the scene, and, thus, could not have known about the oncoming truck. However, citing to *Bertagnolli*, Peter would counter that Chad

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[44] *Id.* ¶ 16, 67 P.3d at 633.

[45] Calkins v. Boydston, 796 P.2d 452, 453 (Wyo. 1990).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 456 (emphasis added).

[49] *Id.*

[50] *Id.*; *see also* Barnette v. Doyle, 622 P.2d 1349, 1362–63 (Wyo. 1981) (stating that evidence was presented demonstrating that an employee told the defendant he was concerned for his safety because the emergency brake on one of the vehicles did not work. The court's finding of culpable negligence was based on the defendant's knowledge that the vehicle was unsafe and yet he purposely refused to fix it.).

[51] *See Calkins*, 796 P.2d. at 456.

was disregarding the "general risks" posed by not having a flagger on the road.[52] The general risks in this case are that oncoming drivers are unaware of what is occurring ahead, will not slow down without warning, and will not exercise due caution given the circumstances, thus increasing the risk of a serious incident. Therefore, it seems that Peter could meet this element of the co-employee liability test.

D. The Co-Employee Must Be Responsible for the Injured Employee's Safety

It is not enough that a co-worker merely works with the injured employee; the co-employee must have some level of responsibility for the injured employee's safety.[53] Ordinarily, Wyoming law requires the employer to provide its workers with a "reasonably safe place to work and with competent co-workers."[54] In specifying what an employer must do, the court requires the following:

> In the discharge of this duty, the employer must exercise the care and skill that a person of ordinary prudence would observe under the circumstances in furnishing employees with reasonably safe machinery, appliances, tools and place to work, in keeping the same in reasonably safe repair, and in employing competent and sufficient employees with whom to work.[55]

However, the duty is not always the same. For example, the Wyoming Supreme Court has held that in the area of extra-hazardous employment, the court requires the employer take "every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken."[56]

The Wyoming Supreme Court was presented with the issue of identifying exactly who bears responsibility for the employee's safety in *Case v. Goss*.[57] Daniel Case, a coal mine worker, was severely and permanently injured when he slipped and fell on a hidden grease spot.[58] Case sued ten co-employees.[59] The major

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[52] *See* Bertagnolli v. Louderback, 2003 WY 50, ¶ 26, 67 P.3d 627, 635 (Wyo. 2003) (holding that "the district court viewed the issues too narrowly and failed to address . . . the supervisors' knowledge of the *general risks* posed by the shuttle belt." (emphasis added)).

[53] *See id.* ¶ 16, 67 P.3d at 633.

[54] Case v. Goss, 776 P.2d 188, 192 (Wyo. 1989).

[55] *Id.* (citing Mellor v. Ten Sleep Cattle Co., 550 P.2d 500, 503–04 (Wyo. 1976)).

[56] *Case*, 776 P.2d at 192 (citing Brittain v. Booth, 601 P.2d 532, 535 (Wyo. 1979)).

[57] *See generally Case*, 776 P.2d 188.

[58] *Id.* at 190.

[59] *Id.* (Case brought suit against even more co-employees, but several defendants went unserved).

issue was whether each of the co-employees owed a duty to keep Case safe.[60] The Wyoming Supreme Court dismissed Case's suit against four co-employees from the production department because they had no responsibility for supervision, training, or assignment of employees in the maintenance department, including Case.[61] Because the production department's control was, in the court's words, "general at best," summary judgment in favor of the production employees was proper.[62] The Wyoming Supreme Court, however, found the safety coordinator, among others, partially responsible for the incident.[63] The court emphasized that the safety coordinator of the mine had the duty to "establish, implement and maintain safe working conditions and procedures at the mine to conform to state and federal regulations . . . ."[64] Because the safety coordinator was "uniquely aware of the dangerous condition of the boom . . . and Case's numerous complaints to him about it," the court found the safety coordinator responsible.[65]

Given the discussion set forth by the court in *Case*, a co-employee must have more than a general responsibility for the injured employee's safety.[66] It is not enough that a co-employee *could* have control over the injured employee, instead there must be some level of direct responsibility for the injured employee's safety.[67] Thus, in Example 1, we are faced with the problem of whether Chad was generally responsible for Peter's safety when Chad was assigned the task of flagging down oncoming traffic. It is worth noting that the court has never required a co-employee to be an actual supervisor to be found liable; succinctly put, a co-employee has a general duty to avoid endangering fellow workers by committing serious misconduct in reckless disregard of the consequences.[68] In applying the foregoing to the facts of our case, Chad has a general duty to avoid endangering Peter. Considering the court has used the term "duty," a negligence element, the question becomes, did Chad act as a reasonable construction worker in failing to do his job flagging vehicles? The answer appears to be easy: Chad

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[60] *See id.* at 192 (Case's co-employees were divided among two departments, production and maintenance. The production department operated the dragline and other equipment involved in mining, while the maintenance department focused on repair.).

[61] *Id.* at 193.

[62] *Id.*

[63] *See id.* at 195.

[64] *Id.*

[65] *Id.* at 196 (evidence was also presented that the safety coordinator received a maintenance request to clean the grease spot, but the safety coordinator failed to remedy the situation, thus supporting the court's decision to reverse summary judgment against the safety coordinator).

[66] *Id.* at 194.

[67] *Id.*

[68] *Id.* at 191 n.2 ("We do not mean to imply, however, that a co-employee must be in a supervisory capacity in order to be found culpably negligent. [C]o-employees are subject in general to a duty not to endanger fellow workers by engaging in serious misconduct in reckless disregard of the consequences.").

failed to act reasonably. During his employment, he avoided doing his job, a job critical to the safety of Peter, and instead focused on extra-curricular activities.[69] Chad had more than a mere general responsibility. Chad was supposed to, in this specific instance, ensure that Peter would be protected from oncoming vehicles. Thus, a court would likely find this case met the "responsibility" element.

E. The Pinnacle of Determining Liability: Willful and Wanton Misconduct

Although stated differently in *Bertagnolli*, willful and wanton misconduct is both the act and the intent requirement for a co-employee liability case.[70] According to Wyoming Statute section 27-14-104(a), to be held liable a co-employee must "intentionally act to cause physical harm or injury to the injured employee."[71] The Wyoming Supreme Court has interpreted this requirement as equivalent to "willful and wanton misconduct."[72] Before the 1993 amendment to Wyoming Statute section 27-14-104(a), the court defined 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 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.[73]

Much litigation surrounds this requirement and whether a co-employees' actions constitute willful and wanton misconduct.[74] However, the court has attempted to tackle willful and wanton misconduct by showing what it is not, instead of stating what it is.[75]

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[69] *See supra* Part I.

[70] *See* Bertagnolli v. Louderback, 2003 WY 50, ¶ 16, 67 P.3d 627, 633 (Wyo. 2003). Although not clear, it seems the court in *Bertagnolli* equates the willful requirement with the third element, "willful disregard of the need to act despite the awareness of the high probability that serious injury or death may result." *Id.*

[71] WYO. STAT. ANN. § 27-14-104(a) (2015).

[72] *See Bertagnolli*, ¶ 15, 67 P.3d at 632.

[73] Weaver v. Mitchell, 715 P.2d 1361, 1370 (Wyo. 1986); *see also* Mayflower Restaurant Co. v. Griego, 741 P.2d 1106, 1115 (Wyo. 1987). The court clarified that it is not an intent to cause the injury; rather, the intent to do an act, or an intent not to do an act. *See* Case v. Goss, 776 P.2d 188, 191 (citing Mitchell v. Walters, 100 P.2d 102 (Wyo. 1940)).

[74] *See, e.g.*, Smith v. Throckmartin, 893 P.2d 712 (Wyo. 1995); Bettencourt v. Pride Well Serv., Inc., 735 P.2d 722 (Wyo. 1987); Loredo v. Solvay Am. Inc., 2009 WY 93, 212 P.3d 614 (Wyo. 2009); Formisano v. Gaston, 2011 WY 8, 246 P.3d 286 (Wyo. 2011).

[75] *See Smith*, 893 P.2d at 714.

In distinguishing willful misconduct from ordinary negligence, the actor's state of mind is determinative.[76] The court—understanding that state of mind is often difficult to establish and prove—stated:

> In order to prove that an actor has engaged in willful misconduct, one must demonstrate that he acted with a state of mind that *approaches intent to do harm*. State of mind, of course, may be difficult to prove. Accordingly, courts 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*.[77]

At first glance, it may seem that the court has relaxed the statutory standard, but, in reviewing the case law, the court remains stringent in its application.[78] For example, willful misconduct is not evinced when a co-employee obtains knowledge of a dangerous condition and fails to correct it;

> [w]illful misconduct does not arise merely from "a thoughtless, heedless, or inadvertent act, or an error in judgment," it is "more than mere mistake resulting from inexperience, excitement or confusion . . . it is "an *extreme departure from ordinary care*, in a situation where a high degree of danger is apparent."[79]

The court has had a multitude of opportunities to determine which actions constitute willful and wanton misconduct and which actions fall short.[80] The court has determined that falling asleep at the wheel while transporting a fellow employee home, despite working fifty-three hours straight, does not rise to the level of willful and wanton misconduct.[81] The court clarified that even though the driver *could have* avoided these long hours, the conduct fails to rise to the level of willful and wanton misconduct.[82] The court has also held that a co-employee's

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[76] *See id.*

[77] *Id.* (emphasis added).

[78] *See Formisano*, ¶¶ 12–16, 246 P.3d at 290; *Loredo*, ¶ 17, 212 P.3d at 627.

[79] *Loredo*, ¶ 17, 212 P.3d at 627–28 (quoting *Smith*, 893 P.2d at 714) (emphasis added).

[80] *See, e.g.*, Bertagnolli v. Louderback, 2003 WY 50, 67 P.3d 627 (Wyo. 2003); Case v. Goss, 776 P.2d 188 (Wyo. 1989); *Loredo*, 2009 WY 93, 212 P.3d 614; Van Patten v. Gipson, 2011 WY 98, 253 P.3d 505 (Wyo. 2011); *Formisano*, 2011 WY 8, 246 P.3d 286.

[81] *Formisano*, ¶ 28, 246 P.3d at 293. The injured employee argued that Gaston "intentionally drove while 'sleep deprived,'" which constitutes approach to do harm. *Id.* ¶ 22, 246 P.3d at 292.

[82] *See id.* ¶ 26, 246 P.3d at 293 ("Being tired, but 'feeling okay,' Gaston got in the driver's seat after a long day's work, intending to drive home to Gillette, less than two hours away. Even assuming that some of the late hours of work could have been avoided by Gaston, we do not see this conduct as meeting the test for co-employee liability under the Wyoming Workers' Compensation Act. While there certainly was some possibility of Gaston falling asleep and causing an accident,

violation of a company policy, which leads to the injury, is not enough to rise to the level of willful and wanton misconduct.[83] Similarly, the court has held that a co-employee need not act immediately to solve an issue regarding a defective or problematic piece of equipment.[84] Finally, the court has emphasized that mere safety violations are not enough to rise to willful misconduct.[85]

Given the history outlined above, it appears that the Wyoming Supreme Court and the state legislature want to limit the number of co-employee liability cases.[86] The case law surrounding co-employee liability requires a fact-intensive, often frustrating, initial consultation with a client who seeks remediation for injuries sustained as a result of an ignorant and dangerous co-employee.[87] Often, a client can leave the initial consultation even more confused and without clear answers about whether his or her claim holds merit.[88]

Re-examining Example 1, the issue is whether Chad *intentionally* acted, or failed to act, in reckless disregard of the consequences. Chad's conduct must be an *extreme* departure from the ordinary standard of care and it must be in a situation where a high degree of danger is *apparent*.[89] Given these standards, it is unlikely that Chad acted with a state of mind "approaching intent to do harm."[90] There

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we cannot say that Gaston intentionally acted to cause physical harm to Fromisano, or that these circumstances were such '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.'").

[83] *See Van Patten*, ¶¶ 24–31, 253 P.3d at 511–12. Evidence was also presented that the injured employee had no reason to believe the other employee's intended him harm by using the manrider to release the tugger line and that if the co-employees believed the manrider to open the storm gate was unsafe, they would not have done so. *See id.*

[84] *See Loredo*, ¶¶ 17–18, 212 P.3d at 629. In *Loredo v. Solvay Am. Inc.*, the plaintiff's supervisor was aware the plaintiff's work as a mine roof bolter took the plaintiff through unbolted parts of the mine and knew that the bolter's tramming functions were off. *See id.* The court determined that the defendant adhered to the mine's roof bolting plan and he agreed to have the bolter fixed during the down-shift. Moreover, the court made much ado about the fact that the defendant never threatened to fire the plaintiff about complaining. *See id.*

[85] *See* Smith v. Throckmartin, 893 P.2d 712, 715–16 (Wyo. 1995) ("Appellant, in attempting to demonstrate [appellee's] alleged culpable negligence, relies heavily on violations of OSHA regulations concerning safety training and equipment. While these asserted violations may constitute evidence of ordinary negligence, they do not demonstrate a state of mind consistent with culpable negligence, which requires knowledge or obviousness of a *high probability of harm*." (alteration in original) (citation omitted)).

[86] *See supra* notes 70–84 and accompanying text.

[87] *See supra* notes 70–84 and accompanying text.

[88] As seen in the cases cited, there is rarely "a smoking gun" found. This, coupled with the fact that these clients are often on the brink of bankruptcy and could be severely disfigured or have unseen severe internal injuries, can take an emotional toll on both the lawyer and the client.

[89] *See supra* Part I; *see also Smith*, 893 P.2d 712; *Loredo*, ¶ 17, 212 P.3d at 627–28.

[90] *See Smith*, 893 P.2d at 714.

are no facts that show Chad was intentionally acting to harm Peter.[91] Although Chad was likely aware that, by doing his job, Peter would be protected and the accident may not have occurred as it did, his failure to act is unlikely to rise above the standard of ordinary negligence. Much like the cases above, the court would likely be reserved in finding co-employee liability in this specific case. In fact, this case is very similar to *Formisano v. Gaston*.[92] In that case, and particularly relevant here, the court stated that

> [w]hile there certainly was some possibility of Gaston falling asleep and causing an accident, we cannot say that Gaston *intentionally* acted to cause physical harm to Formisano, or that these circumstances were such "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."[93]

Looking at the key words, "intentionally" and "high degree of probability," it seems that Chad's conduct would fall short in the third element and thus, no co-employee liability would be available.

III. WORKERS' COMPENSATION CLAIM FOR FUTURE MEDICAL EXPENSES

Although Chad's conduct likely falls short of "willful and wanton misconduct," a jury could determine that Chad was negligent.[94] Thus, the remainder of this article will assume such and discuss the repercussions of a negligence determination and its interplay with the Workers' Compensation system. The first issue is the concept of future medical expenses and coverage of the same in Workers' Compensation.

A. The Statute is Unclear as to Whether or Not the Division of Workers' Compensation Can Be Reimbursed for Future Medical Bills

As provided in Example 1, and common in the personal injury practice realm, future medical expenses are speculative but, nevertheless, are collectible in tort claims.[95] However, due to the speculative nature of future medical expenses,

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[91] *See supra* Part I.

[92] *Compare supra* Part I, *with* Formisano v. Gaston, 2011 WY 8, 246 P.3d 286 (Wyo. 2011).

[93] *Formisano*, ¶ 26, 246 P.3d at 293 (emphasis added).

[94] It is important to note that if the jury finds Chad negligent, Peter will be unable to collect from him due to the exclusive remedy rule.

[95] *See supra* Part I; *see also* WYO. CONST. art. X, § 4(a) ("No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person."); Rudy v. Bossard, 997 P.2d 480, 485 (Wyo. 2000) (stating, "[w]e conclude that this evidence was sufficient to warrant allowing the jury to consider the issue of Sharon's future medical expenses.").

the question remains: Does Workers' Compensation have a right to collect a portion of the future medical expenses? The statute is equally unclear.[96] The pertinent part provides:

> [I]f the employee recovers from the third party or the coemployee in any manner including judgment, compromise, settlement or release, the state is entitled to be reimbursed for all payments made, *or to be made*, to or on behalf of the employee under this act but not to exceed one-third (1/3) of the total proceeds of the recovery without regard to the types of damages alleged in the third-party action.[97]

This language could imply future medical expenses, but it could also imply payments for incurred medical expenses, temporary total disability, permanent partial disability, or permanent disability that have yet to be paid.[98] Under the plain language of the statute, it is ambiguous whether or not the phrase "or to be made" includes future medical care.[99]

Given that the statute is ambiguous, the various canons of construction must be utilized to interpret and understand the statute. In doing so, one must use the conflicting canons of construction, specifically *in pari materia* and *ejusdem generis*.[100] The employee would assert the canon *in pari materia*, requesting the court to look at the statute as a whole to determine whether or not the phrase "to be made" includes future medical care.[101] In so arguing, the employee would

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[96] *See generally* WYO. STAT. ANN. § 27-14-105 (2015).

[97] WYO. STAT. ANN. § 27-14-105(a) (emphasis added).

[98] *See* WYO. STAT. ANN. § 27-14-102 (defining the various benefits available to employees injured while on the job); *see also* WYO. STAT. ANN. §§ 27-14-401 to -408 (2015) (the Workers' Compensation statutes on employee benefits).

[99] In explaining statutory interpretation, the United States Supreme Court stated:

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.

Caminetti v. United States, 242 U.S. 470, 485 (1917).

[100] *See infra* notes 101–12 and accompanying text.

[101] *See* Bd. of Cty. Comm'rs v. Crow, 2003 WY 40, ¶ 40, 65 P.3d 720, 733–34 (2003). In *Crow* the Wyoming Supreme Court described the overall interpretation of statutes when it stated:

> Our standard of review with respect to the construction of statutes is well known. In interpreting statutes, our primary consideration is to determine the legislature's intent. All statutes must be construed *in pari materia* and, in ascertaining the meaning of a given law, all statutes relating to the same subject or having the same general purpose must be considered and construed in harmony. Statutory construction is a question of law, so our standard of review is de novo. We endeavor to interpret statutes in accordance with the legislature's intent. We begin

point to subsections (e) and (f) of the statute in asserting his or her claim that the Division of Workers' Compensation is not entitled to future medical costs.[102] In both subsections, the statute states: "From any amounts recovered under this subsection, the state is entitled to an amount equal to all sums awarded as benefits to the employee or his estate, *all anticipated future medical costs* and all costs of litigation."[103] Because the legislature chose to use the phrase "all anticipated future medical costs" in subsections (e) and (f), it could be argued, under the canon *in pari materia*, that the legislature omitted the phrase in subsection (a) and chose to use "to be made" purposefully.[104] The legislature purposefully distinguished "to be made" from "all anticipated future medical costs," indicating its intent to exclude future medical costs from recovery.[105] Additionally, subsections (e) and (f) involve the Division of Workers' Compensation bringing the claim on the employee's behalf.[106] Therefore, a rational argument could be made that the Division of Workers' Compensation is not entitled to future medical expenses.[107]

The Division of Workers' Compensation would claim that the legislative intent behind the statute is to reimburse or subrogate Workers' Compensation for amounts paid.[108] In addition to arguing legislative intent, the Division of Workers'

> by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. We construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe all parts of the statute in *pari materia.* When a statute is sufficiently clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of statutory construction. Moreover, we must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation.

Id. (citations omitted).

[102] *See* WYO. STAT. ANN. § 27-14-105(e)–(f).

[103] *Id.* (emphasis added).

[104] *See* Keats v. State, 2003 WY 19, ¶ 28, 64 P.3d 104, 113 (Wyo. 2003) (stating, "[w]e are not, however, free to ignore any word that the legislature has chosen to place in a statute, and every word is presumed to have a meaning.").

[105] *Id.*

[106] *See* WYO. STAT. ANN. § 27-14-105(e)–(f).

[107] Of course, in some instances this argument would be irrelevant, such as those circumstances triggering the part of the statute where the state's recovery cannot "exceed one-third (1/3) of the total proceeds of the recovery without regard to the types of damages alleged in the third-party action." WYO. STAT. ANN. § 27-14-105(a).

[108] *See* Streeter v. Amerequip Corp., 968 F. Supp. 624, 629 (D. Wyo. 1997) stating:

> The clear language of the Worker's Compensation Act demonstrates that the purpose of the act is to assure quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at reasonable cost to employers. The act provides for mutual renunciation of common law rights by both employees and employers.
>
> . . . One of the significant provisions of the Wyoming Worker's Compensation Act, § 27-14-105(b) set out above, is designed to protect the state's lien rights,

Compensation could also use the canon *ejusdem generis*.[109] As previously stated, the phrase "to be made" is ambiguous in the statute.[110] Under the concept of *ejusdem generis*, future medical payments could be included in a Workers' Compensation subrogation lien, if one: (1) reviews the entirety of the statute; (2) looks at the intent of the legislature; (3) understands that "to be made" indicates a future action; and (4) future medicals being referenced in sections wherein the State of Wyoming brings a suit on the employee's behalf.[111] Given the legislative intent behind Wyoming Statute section 27-14-105 and *ejusdem generis*, the Division of Workers' Compensation would be well within its confines to argue it is entitled to future medical payments. Yet, the plain language coupled with *in pari materia*, as well as the Division's ability to deny future coverage, suggest a limit on the Division's ability to collect on future medical coverage.[112]

B. If the Statute Does Allow for Future Medicals, the Division Should Not Be Allowed to Deny Coverage of Future Benefits

As previously stated, the Division of Workers' Compensation would predictably argue that future medical expenses are included in order to ensure that they are recompensed for payments "to be made" to the employee.[113] If it is determined that future medical expenses are included, the consequences could extend to other statutes, rules, and regulations.[114] For example, on any claim for medical or hospital care, the Division of Workers' Compensation "may approve or deny payment of all or portions of the entire amount claimed . . . ."[115]

> in the event of a settlement or judgment in favor of the injured worker in an action involving third parties or others. The provisions requiring notice to the Department of Employment and the Attorney General are designed to provide a mechanism that will ensure preservation of the State of Wyoming's lien rights. The failure to ensure that the State receives notice that enables the State to protect its rights of reimbursement and preserve lien rights may have consequences that were never intended by the employee, employer or third party who enters into a settlement of a personal injury case, as described in the statute. The primary beneficiary of Wyo. Stat. § 27-14-105 is the State of Wyoming.

[109] *See* DiFelici v. City of Lander, 2013 WY 141, ¶ 15, 312 P.3d 816, 821 (Wyo. 2013) ("The principle of *ejusdem generis* tells us that 'general words, [associated with] an enumeration of words with specific meanings, should be construed to apply to the same general kind or class as those specifically listed.'" (alteration in original) (citation omitted)).

[110] *See supra* notes 96–99 and accompanying text.

[111] *See* WYO. STAT. ANN. § 27-14-105(a), (e), (f). *In pari materia* and *ejusdem generis* are not interdependent in this respect.

[112] *See supra* notes 95–111 and accompanying text. The Division's ability to deny coverage is covered in depth in the next section. *See infra* Part III.B.

[113] *See supra* notes 95–111 and accompanying text.

[114] *E.g.*, WYO. STAT. ANN. § 27-14-601 (2015).

[115] WYO. STAT. ANN. § 27-14-601(b).

Additionally, if a future surgery is recovered in the lawsuit, the Division of Workers' Compensation could still deny preauthorization for the surgery.[116] Certainly, the argument against Workers' Compensation being able to deny benefits is premised upon the Division of Workers' Compensation collecting future medical expenses. It should be irrelevant as to what is ultimately collected in the lawsuit for purposes of future medical expenses because the current statute both defines and confines Workers' Compensation's subrogated claim.[117] Under the statute, the Division of Workers' Compensation may deny the future medical benefits, deeming the benefits as "not necessary" or "not caused by the accident."[118] Denial would not preclude the employee from seeking treatment by or through his or her medical insurance coverage. If the Division of Workers' Compensation is allowed to recover on future medicals, then the Division of Workers' Compensation should be precluded from denying future coverage. Otherwise, Workers' Compensation is utilizing the statute as both a shield (i.e., reaping the benefits of collecting future medicals in a third party claim) and a sword (i.e., denying the same as "not necessary" or "not caused by the accident").

IV. ATTORNEY'S FEES—THE ARBITRARY PERCENTAGE

Third-party liability claims with the underlying medical bills and lost wages paid by Workers' Compensation will vary in the different types of contingency

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[116] *See* WYO. STAT. ANN. § 27-14-601(o) (laying out the requirements for preauthorization).

> The division pursuant to its rules and regulations may issue a determination of preauthorization for an injured worker's nonemergency hospitalization, surgery or other specific medical care, subject to the following:
>
> (i) The division's determination that the worker suffered a compensable injury is final and not currently subject to contested case or judicial review;
>
> (ii) A claim for preauthorization is filed by a health care provider on behalf of the injured worker;
>
> (iii) The division's determination pursuant to this subsection is issued in accordance with the procedures provided in subsection (k) of this section;
>
> (iv) Following a final determination to preauthorize, the necessity of the hospitalization, surgery or specific medical care shall not be subject to further review and providers' bills shall be reviewed only for relatedness to the preauthorized care and reasonableness in accord with the division's fee schedules.

Id.

[117] Readers of this article are likely shouting at the writers saying, "You just told me that the statute is ambiguous," to which the response is, "You are right, however, the statute limits the Division of Workers' Compensation to one-third of total recovery, and the statute is clear in that respect."

[118] *See* RULES, REGULATIONS AND FEES SCHEDULES OF THE WYOMING WORKERS' SAFETY AND COMPENSATION DIVISION, § 1; *see also* WYO. STAT. ANN. § 27-14-601(o).

fee agreements entered into by an injured party and an attorney.[119] The Wyoming Legislature anticipated the varying degrees of attorney's fees when it enacted the statute at issue: "Any recovery by the state shall be reduced pro rata for attorney fees and costs in the same proportion as the employee is liable for fees and costs."[120] If that is not arbitrary enough, "[t]he 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."[121] The statute bases the attorney's fees on the term "recovery," which is limited to one-third of the total recovery.[122]

Cases involving Workers' Compensation can be quite complex as to liability and even require parties to follow special guidelines when initiating a lawsuit.[123] This allows attorneys, knowing the risks that may be encountered, to take cases

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[119] Attorney's fees vary among practicing attorneys, and the Rules Governing Contingent Fees for Members of the Wyoming State Bar allow for varying fees, restricting the fees to a "reasonableness" standard. Rule 5(f) of the Rules Governing Contingent Fees for Members of the Wyoming State Bar provide the following factors in determining reasonableness of the contingency fee:

> In its determination of the reasonableness of the fee, upon review, the committee may consider as applicable the following criteria:
>
> (1) the amount of costs incurred or advanced by the attorney in representing the client;
>
> (2) the time and labor required;
>
> (3) the novelty and difficulty of the questions involved;
>
> (4) the skill requisite to perform the legal service properly;
>
> (5) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney;
>
> (6) the fee customarily charged in the locality for similar legal services;
>
> (7) the amount involved in the controversy and the benefits resulting to the client;
>
> (8) the time limitations imposed by the client or by the circumstances;
>
> (9) the nature and length of the professional relationship with the client;
>
> (10) the experience, reputation, and ability of the attorney or attorneys performing the services; and
>
> (11) the contingency or the certainty of the compensation.

WYO. CT. R. 5(f), https://perma.cc/ZQR7-68GF.

[120] WYO. STAT. ANN. § 27-14-105(a) (2015).

[121] WYO. STAT. ANN. § 27-14-105(b).

[122] *See generally* WYO. STAT. ANN. § 27-14-105.

[123] *See* WYO. STAT. ANN. § 27-14-105(b) (requiring any party bringing a claim under Wyoming Statue section 27-14-105(a) to send the complaint to the director of Wyoming Workers' Compensation Division and the Attorney General by certified mail return receipt requested in order for a court to have jurisdiction over the case).

on a higher contingency fee.[124] Consequently, the injured party is able to shift some of the burdens to the Division of Workers' Compensation "in the same proportion as the employee is liable for [attorney's] fees and costs."[125] Certain employees, while having to pay their attorney a higher fee percentage of the total recovery, benefit more than others who have to pay the standard one-third contingency fee, because the Division of Workers' Compensation pays the same percentage of the employee. If Workers' Compensation is to be bound by the contingency fee agreement entered into by the employee, the Division of Workers' Compensation should be a party to the contract under the longstanding doctrine of privity of contract; this may not necessarily be a workable solution for a number of reasons.[126] A more workable solution would be to disregard the contract and to have the legislature set the percentage that Workers' Compensation will reduce their claim to account for the employee's attorney's fees, say, for example, thirty-three and one-third percent (33.33%) or even forty percent (40%) to account for the various difficulties that could arise in bringing these claims.

While the Division of Workers' Compensation will reduce its subrogation claim by accounting for the employee's attorney's fees, the legislature has given the Division wide latitude in further reducing its claim in order to facilitate "compromise and settlement."[127] Upon a plain reading of the statute, the reduction of its subrogation claim can take place in any case. In cases involving co-employee negligence, reducing the subrogation claim makes sense because the Division of Workers' Compensation can account for the negligence to provide a more equitable outcome. In other circumstances, certain employees may get better bargains, providing for a less equitable approach. The legislature intended to be fair to employees who bring a third-party liability claim under the Workers' Compensation statutes, as duly indicated by allowing for reduction by the Division of Workers' Compensation to account for the employee's attorney's fees as well as allowing reduction of its subrogation claim in order to promote the settlement of a claim.[128] Yet, the statute is too broad and should be narrowly tailored to limit the circumstances in which the Division of Workers' Compensation reduces its claim, such as circumstances involving co-employee or employer negligence. The result would be a more equitable result to all

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[124] *See supra* note 119 and accompanying text (wherein the factors "the time and labor required," "the skill requisite to perform the legal service properly," "the contingency or the certainty of the compensation," among others, can justify the higher contingency fee).

[125] WYO. STAT. ANN. § 27-14-105(a).

[126] *See* Larsen v. Sjogren, 226 P.2d 177 (Wyo. 1951) (stating "[t]he parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it, and of all claims under it, a third party has no right to insist that it has been broken." (citation omitted)).

[127] *See* WYO. STAT. ANN. § 27-14-105(b).

[128] *See generally* WYO. STAT. ANN. § 27-14-105(a)–(b).

employees. In conclusion, the attorney's fees provisions of Wyoming Statute section 27-14-105 should be more precisely drafted to provide fairness to employees across the board.

V. CONCLUSION

A. The Subrogation Statute as It Currently Functions, and How It Should Function

The subrogation statute becomes even more muddled, and perhaps completely unfair, when we factor in co-employee liability and the Wyoming Workers' Compensation Division's ability to subrogate on these claims. Thus, we will conclude by using the facts in Example 1 to show how Workers' Compensation is likely to subrogate its claim, discuss the unfairness of that scenario, and provide what we believe is a workable solution to this unfairness that takes both the Division's interests and the employees' interests into account.[129]

1. Outcome 1: Plain Reading of the Statute

As a quick review, Peter's case goes to a jury trial. The jury awards total damages of $900,000.00. The jury specifies the damages as follows: (1) $300,000.00 for medical costs and lost wages; (2) $100,000.00 in future medicals bills; and (3) $500,000.00 for pain and suffering, loss of enjoyment of life, and permanent disability.

The jury apportions fault as follows:

Darryl:	50% (or $450,000.00)
Chad:	50% (negligence, not willful and wanton misconduct)
Peter:	0%

Workers' Compensation is limited to one-third of the total recovery.[130] In this scenario, Peter is going to recover only $450,000.00 of the $900,000.00 judgment based upon Darryl's negligence and because Chad was a negligent co-employee who likely would not reach the level of willful and wanton misconduct. Thus, under the Workers' Compensation statutes and foregoing case law, Peter cannot collect from Chad. Remember, Workers' Compensation has a $400,000.00 subrogation claim. However, Workers' Compensation will be limited to $150,000.00 of its $400,000.00 based upon the statutory limitation

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[129] *See supra* Part I; *see also infra* notes 130–44 and accompanying text.

[130] *See* WYO. STAT. ANN. § 27-14-105(a).

of one-third of the total recovery.[131] From that, Workers' Compensation should reduce its amount pro rata by attorney's fees.[132] Assuming a standard one-third contingency fee agreement and that Workers' Compensation applies it to the reduced portion ($150,000.00) rather than off the top of its entire subrogation lien ($400,000.00), Workers' Compensation would walk away with $100,000.00.[133] Peter would walk away from a $900,000.00 judgment with $200,000.00 in his pocket and future medical bills of $100,000.00.[134]

2. Outcome 2: The Undeterminable Fault Settlement

In the previous outcome, fault was determinable, so subrogation claims and the amount recovered can be reduced proportionately. Because this is a settlement, it is impossible for a determination of fault without some independent body to make a determination.[135] Therefore, if a settlement occurs between Peter and Trucking Industries, LLC, the amount of subrogation should be limited to the statutory one-third and then reduced by the statutory attorneys' fees and costs.[136] Also, in the event of settlement, the Division of Workers' Compensation is permitted by statute to be present, and may accept less in order to facilitate settlement.[137] This would allow the employee and the third-party to claim comparative fault in order

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[131] *See generally id.* Of course, Workers' Compensation will argue for $100,000.00 for future medicals or a total lien of $500,000.00 but, again, the legislature chose the phrase "to be made" instead of the "all anticipated future medical costs" used in sections (e) and (f). Based upon the facts set forth, Workers' Compensation's claim for future medicals would prove to be moot, but upon the appropriate factual circumstances, it could be a substantial factor in determining the amount of Workers' Compensation lien.

[132] *See generally id.*

[133] The $100,000.00 represents $150,000.00 (the total recovery as presented) less pro rata attorney's fees of one-third ($50,000.00).

[134] The $200,000.00 stems from $150,000.00 to the attorney in this matter, based upon a one-third contingency fee, and $100,000.00 to the Division of Workers' Compensation.

[135] The authors played with the idea of creating an independent body to make a decision in a limited forum, but determined that defense counsel would have very little incentive to provide for a defense as they have already agreed to pay a sum certain. Additionally, the defendant would have no incentive to provide testimony to assist in determining fault, and the defendant would be one of the few individuals with first-hand knowledge and testimony regarding the case. Lastly, Workers' Compensation could present their side as to the comparative fault, but ultimately the legislature has provided Workers' Compensation significant flexibility in resolving matters. *See infra* note 138 and accompanying text.

[136] *See* WYO. STAT. ANN. § 27-14-105(a).

[137] See WYO. STAT. ANN. § 27-14-105(b), which provides as follows:

> 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.

to reduce the subrogation claim with Workers' Compensation.[138] However, the legislature has provided no framework for those arguing to reduce the Workers' Compensation subrogation claim, which ultimately leaves it up to an arbitrary decision maker as to the final potential resolution.

3. Altering "Outcome 1: Plain Reading of the Statute" to Provide a Conservative Approach with Fault Apportioned and a More Equitable Remedy

Under the plain language of the statute, Workers' Compensation gets a windfall. From an insurance standpoint, it was able to provide immunity to the employer/co-employee and still able to collect on its subrogation lien. In our example, it was able to provide immunity of $450,000.00 and still receive $150,000.00 of reimbursed costs. While Workers' Compensation did receive a reduced amount because the statute provides that subrogation is based upon "gross recovery" and not "gross judgment," Workers' Compensation's claim to the "gross recovery" was not reduced by the apportioned fault.[139]

The statute should be written to take into account the negligence of the people covered by Workers' Compensation. This proposal would ultimately be more equitable to the employee and emphasize the basic concepts of insurance. In this example, Peter cannot collect from Chad because of the co-employee immunity exception for willful and wanton conduct.[140] Thus, Workers' Compensation has shielded $450,000.00 from judgment.[141] With only $450,000.00 to recover—under a standard comparative fault analysis—Workers' Compensation should be reduced to subrogation of only half of that amount because of Chad's comparative negligence.[142] Accordingly, Workers' Compensation should only be able to collect on a $225,000.00 gross recovery figure.[143] With the limitation of one-third of the total gross recovery, Workers' Compensation can collect $75,000.00, less its pro

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[138] While it appears that the third party would not care if Workers' Compensation should be subrogated a lesser amount, the third party has an interest in apportioning as much fault as possible on the co-employee in order to reduce the overall settlement.

[139] For example, Workers' Compensation claim was reduced from $900,000.00 to $450,000.00 based upon the apportioned fault of fifty percent (50%) to Darryl and fifty percent (50%) to Chad. However, Workers' Compensation does not have to reduce the apportioned fault from the gross recovery, just from the gross judgment. These are merely interpretations of the statute because the statute does not provide for comparative negligence claims.

[140] *See generally* WYO. STAT. ANN. § 27-14-104 (2015).

[141] *See id.*

[142] *See generally id.*

[143] $450,000.00 divided by fifty percent (50%), as determined by the jury, for a total of $225,000.00 gross recovery.

rata share of attorneys' fees and costs.[144] In this scenario, Workers' Compensation walks away with one-half of what it received in Outcome 1, which accounts for the jury's allocation of Chad's negligence. This proposed adjustment to the Workers' Compensation subrogation lien in third-party liability claims allows for fairness to the employee in matters involving negligence by co-employees that takes into account the heightened "willful and wanton misconduct" standard.

B. Parting Thoughts on Future Development in This Area of Law

The Division of Workers' Compensation is able to utilize the statutes, as written, as a shield (blocking claims of co-employee liability in negligence actions) and a sword (subrogating the claim without respect to comparative fault and denying future benefits). It is possible that the legislature attempted to remedy this situation by limiting subrogation recovery in third-party actions brought by a covered employee to one-third of the total recovery, as well as allowing for the reduction of fees in order to promote settlement. In our opinion, the legislature did a sufficient job in articulating a statute that can revolve very fact-dependent scenarios. That being said, the statute does have inherent ambiguity and unfairness.

The legislature should do three things to provide clarity for Wyoming Statute section 27-14-105. First, the legislature needs to take into account co-employee negligence. Arguably the legislature did this by limiting recovery to one-third of the total recovery, but that limitation should be further reduced by the comparative negligence of a co-employee due to the mere fact that the co-employee was indemnified for his or her actions. Second, the legislature needs to clarify whether or not future medical expenses are included in the Workers' Compensation subrogation claim. If the legislature determines that future medical expenses are includable in a Workers' Compensation subrogation lien, then Workers' Compensation should be prevented from denying future benefits to the employee. Finally, the legislature needs to set the percentage that a Workers' Compensation's subrogation claim is reduced, so all employees are treated the same by Workers' Compensation. The set percentage should be independent of the amount of attorney's fees agreed to by the employee. The legislature has been gratuitous in allowing the Division of Workers' Compensation to reduce its claim to promote settlement, but the legislature should narrow the circumstances in which the Division may do so (i.e., in the event of co-employee liability). If the legislature takes these actions, fairness to employees and a clearer framework for practicing lawyers will result.

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[144] $75,000.00 less one-third (1/3) on a presumed contingency fee for a total of $50,000.00.