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**TORTS—CONTRACT—Joint Tortfeasor Pursues a Breach of Warranty  
Cross-Claim: What is the Proper Measure of Damages? *Centric Corp.  
v. Drake Building Corp.*, 726 P.2d 1047 (Wyo. 1986).**

On October 23, 1980, a fire destroyed the Sweetwater Uranium Mill when a hot spark from a welder ignited a fiberglass wall panel.<sup>1</sup> The mill's owners, Mineral Explorations Company and Union Oil Company,<sup>2</sup> had contracted with Centric Corporation to erect the pre-engineered buildings which were to house the mill.<sup>3</sup> Centric lined the buildings with fiberglass panels it bought from Drake Building Corporation which were supposed to be flame retardant.<sup>4</sup> In its suit against the parties involved in the mill's construction and the panel's manufacturer,<sup>5</sup> Mineral Explorations alleged that the fire would not have occurred if the fiberglass panels had been flame retardant.<sup>6</sup>

Before trial, Drake settled with Mineral Explorations in exchange for a covenant not to sue,<sup>7</sup> leaving only Centric and Kirby, Drake's franchiser, as defendants.<sup>8</sup> Centric filed a cross-claim against Drake for negligence and breach of express warranties.<sup>9</sup> Though Mineral Explorations' suit was brought in negligence, strict liability, breach of contract and breach of warranty, the district court proceeded only on the negligence theory.<sup>10</sup> The district court awarded Drake summary judgment on Centric's cross-claim, holding that the negligence claim had subsumed all warranty claims.<sup>11</sup>

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1. *Centric Corp. v. Drake Bldg. Corp.*, 726 P.2d 1047, 1049 (Wyo. 1986); *Kirby Bldg. Sys. v. Mineral Explorations Co.*, 704 P.2d 1266, 1268 (Wyo. 1985).

2. Mineral Explorations Company and Union Oil Company will be referred to as "Mineral Explorations."

3. Mineral Explorations contracted with Kaiser, who then subcontracted with Centric. *Kirby*, 704 P.2d at 1268.

4. The panels were actually obtained from Kirby Building Systems through its franchisee, Drake Building Corp. *Id.*

5. Kaiser, Inc., Centric Corporation and Kirby Building Systems constructed the Uranium Mill. Centric obtained the fiberglass panels from Kirby, who obtained them from Drake. Drake purchased them from Reichhold. *Id.* Mineral Explorations also sued Gardner-Zemke Company, M.M. Sundt Company and the welder. *Id.*

6. *Id.* Drake asserted that it, "at no time expressly warranted that it would supply fire-retardant panels to Centric." Brief for Appellee at 13, *Centric Corp. v. Drake Bldg. Corp.*, 726 P.2d 1047 (Wyo. 1986) (No. 85-50) [hereinafter Brief for Appellee]. Centric contended that the Drake-Centric agreement set forth specific fire retardative requirements for the fiberglass panels. Brief for Appellant at 11, *Centric Corp. v. Drake Bldg. Corp.*, 726 P.2d 1047 (Wyo. 1986) (No. 85-50) [hereinafter Brief for Appellant].

7. *Kirby*, 704 P.2d at 1270. Drake settled with Mineral Explorations for \$250,000.00. Other settling parties include Kaiser for \$185,000.00, Reichhold for \$600,000.00 and M.M. Sundt for \$150,000.00. The four settlements totaled \$1,185,000.00. *Id.*

8. Gardner-Zemke Company was also a defendant at the trial. *Id.* at 1268.

9. *Centric*, 726 P.2d at 1049. The Wyoming Supreme Court found that Centric pled a breach of warranty cross-claim even though the district judge noted that he could not determine whether it had been pled. *Id.* at 1051, 1049.

10. *Id.* at 1049.

11. *Id.*

After the jury determined each tortfeasor's share of fault,<sup>12</sup> the court awarded Mineral Explorations \$8,392,216.90 in damages, less the amount caused by its negligence and the amount of the settlements.<sup>13</sup> The court then entered judgment against Centric and Kirby, jointly and severally, for over eighty percent of the damages though only fifty percent of the fault had been attributed to them.<sup>14</sup> Drake paid for approximately one-twelfth of the damages it caused because it had settled with Mineral Explorations.<sup>15</sup>

Centric appealed<sup>16</sup> the summary denial of its warranty cross-claim, confronting the Wyoming Supreme Court with the issue of whether "the Wyoming statutes providing for contribution among joint tortfeasors con-

12. The tortfeasors were found negligent in the following percentages:

Kaiser, Inc.	5%	Centric Corporation	20%
Drake Building Corporation	35%	Gardner-Zemke Company	5%
Kirby Building Systems	30%	Reichhold Chemicals, Inc.	0%
M.M. Sundt Construction Company	0%	Mineral Explorations Company and Union Oil Company	5%

*Kirby*, 704 P.2d at 1270.

13. *Id.* Mineral Explorations' five percent amounted to \$419,610.85 and the settlements totaled \$1,185,000.00. Since Gardner-Zemke's negligence did not exceed the plaintiff's, Gardner-Zemke was not held liable. WYO. STAT. § 1-1-109 (1977) (allows plaintiffs to recover from only those tortfeasors who were more at fault than the plaintiff).

14. *Kirby*, 704 P.2d at 1270. Holding Kirby and Centric liable for \$6,787,606.05, or almost eighty-one percent of the damages, exceeds their pro rata share of negligence by \$2,591,467.60, or almost thirty-one percent.

15. Drake settled with Mineral Explorations for \$250,000.00 while the damage attributable to Drake's negligence was \$2,790,412.12. *Centric*, 726 P.2d at 1056 (Thomas, C.J., specially concurring). Chief Justice Thomas arrived at that figure by deducting the damages caused by Mineral Explorations' negligence from the total amount of damages (\$8,392,216.90) and multiplied that by thirty-five percent. *Id.* Had he multiplied the total amount of damages by thirty-five percent, the amount of damages Drake caused would equal \$2,937,275.92.

16. Kirby appealed before Centric did, arguing that the district court should have reduced Kirby and Centric's liability to approximately fifty percent of the original verdict amount because they were responsible for only half, not over eighty percent of Mineral Explorations' injuries. *Kirby*, 704 P.2d at 1268. Kirby argued that only reducing its amount of liability would comply with Wyoming's negligence law. *Id.* at 1273; *See* WYO. STAT. § 1-1-109 (1977). The Wyoming Supreme Court affirmed the district court's decision, holding that Kirby and Centric were jointly and severally liable to the plaintiff for the sum fixed by the factfinder, less the consideration paid for any covenants not sue under WYO. STAT. § 1-1-113 (1977), and the plaintiff's negligence. *Kirby*, 704 P.2d at 1273. Because Drake and several other tortfeasors had settled with Mineral Explorations under the contribution among joint tortfeasors statute, which provided that the remaining tortfeasors' liability is decreased by the "amount stipulated by the release, . . . or in the amount of consideration paid for it, whichever is greater," WYO. STAT. § 1-1-113 (1977), Drake was not responsible for any contribution to Mineral Explorations' negligence judgment. *Kirby*, 704 P.2d at 1277. Consequently, the court did not reduce the judgment against Kirby and Centric under theories of comparative negligence and contribution among joint tortfeasors.

Shortly after *Kirby* was decided, the Wyoming Legislature repealed WYO. STAT. § 1-1-113 (1977) and replaced it with WYO. STAT. § 1-1-119 (1977 & Cum. Supp. 1987) (when a release or covenant not to sue is given to one party, the other parties are not released or discharged from liability unless the release's terms so provide). Joint and several liability was abolished by amending WYO. STAT. § 1-1-109 (1977). *See*, 1986 Wyo. Sess. Laws, ch. 24, §§ 1-2. WYO. STAT. § 1-1-109 (1977 & Cum. Supp. 1987), now holds tortfeasors liable for their pro rata share of negligence if the plaintiff's contributory negligence does not exceed fifty percent. The abolition of joint and several liability does not affect this casenote or the holding in *Centric* because, presumably, Centric could have pursued its breach of warranty claim against Drake even if it were held liable for only its pro rata share of Mineral Explorations' damages.

stitute an exclusive remedy which forecloses a buyer of goods from pursuing remedies under the Uniform Commercial Code."<sup>17</sup> The court reversed the partial summary judgment against Centric, holding that the Wyoming statutes providing for contribution among joint tortfeasors did not preclude tortfeasors in Centric's position from pursuing remedies under the Uniform Commercial Code.<sup>18</sup> The court then remanded the case for resolution of the warranty claim without determining whether Centric could recover consequential damages under the Wyoming Commercial Code, or damages equalling the difference in the value of the goods accepted and the value of the goods ordered.<sup>19</sup>

Centric may have recovered consequential damages in the underlying negligence action when the court reduced Centric's amount of fault. Therefore, Centric could receive a double recovery if awarded consequential damages in its breach of warranty action. This casenote addresses the proper measure of damages for a breach of warranty claim where the parties' negligence was determined in an earlier action.

#### BACKGROUND

In many instances, a breach of express or implied warranties creates a cause of action for both breach of warranty and negligence.<sup>20</sup> Generally, a contract creates a duty, and when the contractor's breach of that duty proximately causes the plaintiff's injuries, an action lies for both breach of warranty and negligence.<sup>21</sup>

In *Cline v. Sawyer*,<sup>22</sup> the Wyoming Supreme Court allowed a trailer park owner to bring an action against a plumber for breach of warranty and negligence in a construction contract because

[i]n construction contracts, there is an *implied warranty that the work will be performed in a skillful, careful, diligent and workman-like manner*. Where negligence on the part of the contractor results in a breach of this warranty, a cause of action *ex contractu* and a tortious action premised on negligence, or both, are available to the contractee. (emphasis added).<sup>23</sup>

In *Sheldon v. Unit Rig & Equipment Co.*,<sup>24</sup> the Tenth Circuit interpreted *Cline* to allow actions for both breach of warranty and negligence in contracts for the sale of goods. There, a 120-ton capacity truck ran over the plaintiff and he sued the truck's manufacturer for both breach of warranty and negligence because of its defectively designed mirrors.<sup>25</sup>

17. *Centric*, 726 P.2d at 1048.

18. *Id.* at 1054.

19. *Id.*

20. 57 AM. JUR. 2D *Negligence* § 47, at 396 (1971).

21. *Id.* at 395-96. See also, 65 C.J.S. *Negligence* § 4(6) (1966). In an action involving both negligence and breach of warranty claims, a party can plead both theories in the alternative. See Wyo. R. CIV. P. 8(a); FED. R. CIV. P. 8(a).

22. 600 P.2d 725 (Wyo. 1979), *aff'd on rehearing*, 618 P.2d 144 (Wyo. 1980).

23. *Id.* at 732.

24. 797 F.2d 883, 887 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1300 (1987).

25. *Id.* at 884.

Although plaintiffs can sue under two or more theories, they normally can recover under only one.<sup>26</sup> In *Reynolds v. Tice*,<sup>27</sup> the plaintiff sued for breach of contract and fraud. The Wyoming Supreme Court held that a plaintiff who pursues remedies under two or more legal theories can recover under only one theory because compensatory damages only "compensate for loss and no more."<sup>28</sup> Thus, "the court has an obligation *sua sponte* to avoid giving instructions which are conducive to an award of double damages."<sup>29</sup> There is, however, one caveat to *Reynolds*: a double recovery is not seen if the defendant has different duties under the various theories or where different damages are available.<sup>30</sup>

### *Different Duties*

In *Reynolds*, the court held that a double recovery against the defendant could result because his duties under the breach of contract claim and the fraud claim were identical.<sup>31</sup> The defendant allegedly breached the contract's provision against untrue statements or misrepresentations in the breach of contract claim.<sup>32</sup> The fraud claim was premised upon the same alleged misrepresentations.<sup>33</sup> If the defendant's duties under the two theories were different, the plaintiff would not have received a double recovery.<sup>34</sup>

*Reynolds* suggests that a plaintiff who seeks damages for breach of warranty and negligence can recover under only one theory if the duties under both theories are the same. If the defendant's duties are different, the plaintiff can recover under both theories.<sup>35</sup>

### *Different Damages*

In *Reynolds*, the court also held that a double recovery against the defendant could result because the same damages were available under the breach of contract claim and the fraud and deceit claim.<sup>36</sup> The court specifically noted that "care should be exercised to avoid double recoveries by allowing the same damages twice under different designations."<sup>37</sup>

26. *Reynolds v. Tice*, 595 P.2d 1318, 1324 (Wyo. 1979). See generally 25 C.J.S. *Damages* § 3, at 629 (1966).

27. 595 P.2d 1318, 1319 (Wyo. 1979).

28. *Id.* at 1324.

29. *Id.* at 1326.

30. See *id.* at 1322-26. As referred to in this casenote, "different damages" are those of a different type (i.e., nominal, compensatory, punitive, etc.), or those of the same type yet stemming from different injuries. The "same" or "identical" damages are those of the same type irregardless of legal theory, which stem from the same injury.

31. *Id.* at 1322-23.

32. *Id.* at 1322. The parties' contract specifically stated that "[n]o representation or warranty in this Agreement by the Sellers, . . . will contain any untrue statement of a material fact, or omits or will omit to state a material fact necessary to make the statements contained therein not misleading." (emphasis added). *Id.* at 1320 n.2.

33. *Id.* at 1323.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1325 (quoting *Ford Motor Co. v. Taylor*, 60 Tenn. App. 271, 446 S.W.2d 521, 530 (1969)).

If the plaintiff in *Reynolds* succeeded on the breach of contract claim, his damages would have placed him "in the same position as he would have been had the contract been performed, less proper deductions."<sup>38</sup> If the plaintiff succeeded on the fraud and deceit action, his damages would have been measured in one of two ways.<sup>39</sup> The "loss of bargain" rule awards damages equalling the "difference between the actual value of the property at the time of making the contract and the value it would have possessed if the representations had been true."<sup>40</sup> Under the "out-of-pocket loss" rule, damages are "the difference between the actual value of the property at the time of making the contract and the value of the purchase money or other consideration parted with for the property."<sup>41</sup> If the plaintiff recovered under both legal theories, a double recovery would have resulted.<sup>42</sup>

Although *Reynolds* dealt with breach of contract and fraud, it suggests that where the plaintiff seeks to recover damages for breach of warranty and negligence, he can recover under only one theory where the damages sought are the same. If the damages are different, a plaintiff could recover damages under more than one theory.<sup>43</sup> For example, a plaintiff may seek compensatory damages under a breach of contract or warranty claim and punitive damages under a tort claim. While punitive damages are not available in contract claims,<sup>44</sup> plaintiffs can recover punitive damages in tort actions arising out of a breach of contractual duties.<sup>45</sup> A double recovery is not possible because one set of damages is compensatory and the other set punitive.

### *Plaintiff's Negligence as a Defense to Breach of Warranty*

Since a plaintiff can bring an action for both breach of warranty and negligence, one must consider what role his share of fault under comparative negligence plays in determining his recovery under a breach of war-

38. *Id.* at 1323. WYO. STAT. § 34-21-293(b) (1977), provides that: [t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

See also U.C.C. § 2-714(2) (1978).

39. *Reynolds*, 595 P.2d at 1323 (citing 37 AM. JUR. 2D *Fraud and Deceit* §§ 353, 355 (1968)).

40. *Id.* at 1323 (citing 37 AM. JUR. 2D *Fraud and Deceit* §§ 353, 355 (1968)). The loss of bargain rule is almost identical to the language in WYO. STAT. § 34-21-293(b) (1977). See *supra* note 38.

41. *Reynolds*, 595 P.2d at 1323 (citing 37 AM. JUR. 2D *Fraud and Deceit* §§ 353, 355 (1968)).

42. *Id.*

43. The Wyoming Supreme Court in *Reynolds*, *id.* at 1325, relied upon 25A C.J.S. *Damages* § 181 (1966), which states that:

instructions must be so framed as not to mislead the jury into a duplication of the elements of recovery, or into an award of damages twice for the same loss, although instructions enumerating different items of recovery, even if redundant or repetitive in character, are not objectionable if so worded that no reasonable jury would construe them as permitting double or duplicative recovery for single items. (emphasis added).

44. See WYO. STAT. § 34-21-106(a) (1977); U.C.C. § 1-106(1) (1978).

45. See, e.g., *Cook Assoc. Inc. v. Warnick*, 664 P.2d 1161, 1167 (Utah 1983); *Hal Taylor Assoc. v. UnionAmerica, Inc.*, 657 P.2d 743, 750 (Utah 1982).

ranty claim.<sup>46</sup> The Wyoming Supreme Court first confronted this issue in *Murphy v. Petrolane-Wyoming Gas Service*.<sup>47</sup> In that case, the plaintiff started his store on fire while trying to light his water heater.<sup>48</sup> The trial court ruled for the defendant gas retailer, holding that the plaintiff's contributory negligence barred his recovery for breach of warranty and negligence.<sup>49</sup> The Wyoming Supreme Court reversed, finding no evidentiary basis for the plaintiff's contributory negligence.<sup>50</sup> The court did not expressly agree with the trial court that contributory negligence constituted a defense to breach of warranty actions, but stated, in dictum, that the

*blanket exclusion of contributory negligence as a defense in breach-of-warranty cases is unjustified, . . . [because] [o]ne of the difficulties in precluding such defense is the consequent deprivation of an opportunity to show that the real cause of the injury was from another source than the agency furnishing the product. (emphasis added).*<sup>51</sup>

Nine years later in *Cline*,<sup>52</sup> the Wyoming Supreme Court held that it was proper to use a plaintiff's negligence in assessing breach of warranty damages in construction contract cases.<sup>53</sup> However, the court did not discuss the extent to which the plaintiffs' negligence would reduce their recovery in a breach of warranty claim.

In *Sheldon*,<sup>54</sup> the defective mirror case, the trial court denied the plaintiff recovery on his negligence action because neither the defendant's nor the employer's negligence exceeded the plaintiff's, although their combined negligence did.<sup>55</sup> Since the plaintiff's pro rata share of fault precluded recovery on the negligence claim, the trial court did not allow recovery under the breach of warranty claim.<sup>56</sup> The Tenth Circuit reversed the trial court's decision, holding that even though Wyoming's comparative negligence statute<sup>57</sup> precluded recovery in the negligence action, it did not bar recovery under the breach of warranty action.<sup>58</sup> The court then allowed

46. See generally J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-8, at 411 (2nd ed. 1980); 17 AM. JUR. 2D *Contracts* § 371, at 815 (1964).

47. 468 P.2d 969 (Wyo. 1970).

48. *Id.* at 971.

49. *Id.* In 1973 the Wyoming Legislature adopted a comparative negligence scheme. See *supra* note 16.

50. *Murphy*, 468 P.2d at 978.

51. *Id.* at 975.

52. 600 P.2d at 725.

53. *Id.* at 732.

54. 797 F.2d at 883.

55. *Id.* at 885. The plaintiff was forty percent negligent, the defendant was thirty percent negligent and the plaintiff's employer was thirty percent negligent. *Id.* WYO. STAT. § 1-1-109 (1977) would not allow a plaintiff to recover against any tortfeasor with a lesser share of negligence. See *supra* note 16 for subsequent statutory amendments.

56. *Sheldon*, 797 F.2d at 885.

57. WYO. STAT. § 1-1-109 (1977). See *supra* note 16.

58. *Sheldon*, 797 F.2d at 886.

the plaintiff to recover the total damages assessed by the jury<sup>59</sup> under the breach of warranty claim less those attributable to his negligence.<sup>60</sup>

A review of *Murphy* and *Cline* suggests that Wyoming uses a plaintiff's negligence only to calculate the amount of damages in a breach of warranty action. *Sheldon* goes one step further by allowing a plaintiff in a breach of warranty action to recover the total amount of damages assessed less the amount attributed to his negligence. *Sheldon* also suggests that consequential damages in a breach of warranty action are similar to compensatory damages in a negligence action.<sup>61</sup>

In *Centric Corp. v. Drake Building Corp.*, the Wyoming Supreme Court went one step further than *Sheldon* by addressing an issue of first impression: whether a joint tortfeasor can recover damages for breach of warranty from another tortfeasor after their liability was established in an earlier negligence action.

#### THE PRINCIPAL CASE

In a unanimous opinion written by Chief Justice Thomas, the Wyoming Supreme Court allowed Centric to pursue its breach of warranty claim against Drake even though both parties were found negligent in an earlier action and Mineral Explorations had released Drake from liability.<sup>62</sup> When making this decision, the court found three of Centric's arguments persuasive.

Centric first argued that Drake had expressly warranted that the fiberglass panels were flame retardant.<sup>63</sup> The court found that Centric had contracted with Drake for the fiberglass panels which Drake may have guaranteed to be fire retardant.<sup>64</sup> Since there was a material question of fact regarding the existence of any warranties, the trial court's summary judgment against Centric was erroneous.<sup>65</sup> If such a warranty existed, Centric would be entitled to the damages proximately resulting from Drake's breach of warranty.<sup>66</sup>

Centric then denied that its negligence precluded recovery under the Wyoming Uniform Commercial Code.<sup>67</sup> Relying upon *Cline*, the court held that Centric's negligence would reduce, but not preclude, its recovery.<sup>68</sup> In other words, Centric can recover damages proximately caused by Drake's breach, but not those damages attributed to Centric's negligence.

59. *Id.* at 887-88. The jury assessed damages of \$540,000.00 under both the breach of warranty and negligence claims. *Id.* at 885.

60. *Id.* at 888. The plaintiff was found forty percent negligent. This reduced his recovery to \$324,000.00. *Id.*

61. *Id.* at 887-88.

62. *Centric*, 726 P.2d at 1054. As of March 17, 1988, the date for a retrial had not been set. Telephone interview with an agent for Reeves & Murdock, Centric's counsel.

63. *Centric*, 726 P.2d at 1049; Brief for Appellant, *supra* note 6, at 11-16.

64. *Centric*, 726 P.2d at 1052.

65. *Id.*

66. *Id.* at 1053.

67. *Id.* at 1049; Brief for Appellant, *supra* note 6, at 16-19.

68. *Centric*, 726 P.2d at 1053. Chief Justice Thomas, specially concurring, also relied upon *Sheldon* to support this proposition. *Id.* at 1056 (Thomas, C.J., specially concurring).



Third, Centric argued that Drake's settlement with Mineral Explorations did not bar Centric's warranty claim because the statutory remedy of contribution among joint tortfeasors is separate from any remedy granted by the Uniform Commercial Code.<sup>69</sup> The court agreed, holding that the Uniform Commercial Code is designed to solve contractual disputes between the buyers and sellers of goods.<sup>70</sup> On the other hand, contribution is designed to circumvent common law indemnity by solving those situations in which several unrelated parties are liable to another party for damages.<sup>71</sup> Since the Uniform Commercial Code and the contribution statutes serve different purposes, Centric was allowed to bring its breach of warranty action.<sup>72</sup>

The Wyoming Supreme Court held that Centric could recover from Drake upon a showing that Drake's breach of warranty caused Centric's injuries.<sup>73</sup> However, the court declined to determine the scope of damages Centric could recover in its breach of warranty action. This issue will soon be before the court if either Centric or Drake disagrees with how the trial court resolves their contractual dispute. Justice Rooney and Chief Justice Thomas addressed this issue in separate, specially concurring opinions.

Justice Rooney argued that the trial court should limit recovery to those actual damages equalling the "difference between the cost of the goods delivered and that of the goods ordered,"<sup>74</sup> as provided under Wyoming Statute section 34-21-293(b).<sup>75</sup> Justice Rooney argued that the trial court in *Kirby Building Systems v. Mineral Explorations Co.*<sup>76</sup> resolved Centric's negligence.<sup>77</sup> That resolution of the parties' negligence decided issues of incidental and consequential damages under the Uniform Commercial Code.<sup>78</sup> Therefore, if Centric recovered consequential damages in its breach of warranty action, Drake would be required to pay twice even though Mineral Explorations released Drake of the vast majority of its liability with a covenant not to sue.<sup>79</sup>

On the other hand, Chief Justice Thomas believed that Drake had not even paid its share of the damages once.<sup>80</sup> The amount that Drake settled

69. *Id.* at 1050; Reply Brief for Appellant at 14, *Centric Corp. v. Drake Bldg. Corp.*, 726 P.2d 1047 (Wyo. 1986) (No. 85-50). The settlement was under Wyo. STAT. § 1-1-113(a)(ii) (1977). See *supra* note 16.

70. *Centric*, 726 P.2d at 1053.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1055 (Rooney, J., specially concurring).

75. Wyo. STAT. § 34-21-293(b) (1977), *supra* note 38.

76. 704 P.2d 1266 (Wyo. 1985).

77. *Centric*, 726 P.2d at 1055 (Rooney, J., specially concurring).

78. *Id.*

79. *Id.* Justice Rooney argued that "[t]he statutory provision against contribution, [Wyo. STAT. § 1-1-113 (1977)], by *Drake Building Corporation* should not be subject to avoidance by a joinder of a contract claim with the original negligence claim. Centric Corporation should not have two bites of the same apple." (emphasis in original). *Id.* Ironically, Justice Rooney supported implementing the provision against contribution when he ardently argued that it should be declared inoperative in *Kirby*. See generally *Kirby*, 704 P.2d at 1278-82 (Rooney, J., dissenting).

80. *Centric*, 726 P.2d at 1056 (Thomas, C.J., specially concurring).

for was less than one-twelfth the amount it would have paid if it were held liable for its pro rata share of negligence.<sup>81</sup> Therefore, allowing Centric to recover all consequential damages caused by Drake's breach of warranty would best serve justice.<sup>82</sup>

The court properly reversed and remanded *Centric* to resolve Centric and Drake's contractual dispute. Centric should be able to recover appropriate damages if Drake breached any warranties.<sup>83</sup>

#### ANALYSIS

Generally, two types of damages for breach of warranty are available: (1) actual damages equalling the difference between the cost of goods delivered and that of the goods ordered;<sup>84</sup> and (2) any consequential damages stemming from Drake's breach.<sup>85</sup> Consequential damages are those which do "not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act."<sup>86</sup> Since Drake's breach indirectly caused Mineral Explorations' judgment against Centric, it is seeking consequential damages. However, the consequential damages Centric seeks to recover from Drake would have the effect of indemnifying it for its liability to Mineral Explorations.<sup>87</sup> In *Kirby*, however, Centric was ostensibly paid those consequential damages when it received a percentage reduction in its fault.<sup>88</sup> Since Centric had already received consequential damages from Drake, a double recovery would result if Centric receives consequential damages again. Therefore, the court should award Centric only actual damages as Justice Rooney suggests.

If Centric were suing for consequential damages not related to Mineral Explorations' judgment, its recovery should not be limited to the difference in the cost of the goods ordered and the cost of the goods received. For example, if Centric incurred property damage separate to Mineral Explorations' in the Sweetwater Uranium Mill fire, and Drake's breach

81. Drake caused thirty-five percent of Mineral Explorations' \$8,932,216.90 in damages. *Kirby*, 704 P.2d at 1270. Therefore, Drake was responsible for \$2,937,275.92 of Mineral Explorations' damages. This amount exceeds Drake's \$250,000.00 settlement by \$2,687,275.92.

82. *Centric*, 704 P.2d at 1055 (Thomas, C.J., specially concurring). WYO. STAT. § 34-21-294(b) (1977) governs the recovery of consequential damages. It provides in part that:

(b) Consequential damages resulting from the seller's breach include:

(i) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and  
(ii) Injury to person and property proximately resulting from a breach of warranty.

*Id.* See also U.C.C. § 2-715(2) (1978).

83. *Centric*, 726 P.2d at 1052.

84. See WYO. STAT. § 34-21-293(b) (1977), *supra* note 38.

85. See WYO. STAT. § 34-21-294(b) (1977), *supra* note 82.

86. BLACKS LAW DICTIONARY 352 (5th ed. 1979). See also WYO. STAT. § 34-21-294(b), *supra* note 82.

87. Since Centric has been held liable to Mineral Explorations, any consequential damages recovered from Drake under the breach of warranty action would offset Centric's liability. This is, however, an action for breach of warranty, not indemnity. The effect of insurance, indemnity and exculpatory contracts are beyond the scope of this casenote.

88. *Kirby*, 704 P.2d at 1270.

of warranty proximately caused those losses, consequential damages are proper. Those losses were not considered or awarded by the jury when it determined Mineral Explorations' damages in the underlying negligence action. However, where the damages Centric seeks is for its liability to Mineral Explorations, consequential damages should not be available.

To demonstrate why Centric would recover twice from Drake if consequential damages were awarded, four issues must be addressed. First, whether Centric recovered from Drake in the underlying negligence action. Second, whether Drake owed Centric differing duties in the negligence and breach of warranty actions. Third, whether the damages for breach of warranty differ from those available in the negligence action. Fourth, whether Centric's contributory negligence should reduce its recovery for breach of warranty.

### *Centric's Recovery from Drake*

In *Kirby*, Mineral Explorations' damages were calculated under a negligence theory even though it also sued for breach of warranty.<sup>89</sup> Since Mineral Explorations sued for breach of warranty, the jury viewed evidence of Centric and Drake's contractual relationship.<sup>90</sup> By weighing Centric and Drake's contractual relationship when assessing their percentage of liability, the jury found that Centric caused only twenty percent of Mineral Explorations' injuries while Drake caused thirty-five percent.<sup>91</sup> If Centric had no contractual relationship with Drake, the jury may have found Centric's causation to have been greater than twenty percent. Centric was ostensibly awarded consequential damages from Drake by this reduction in its amount of causation.<sup>92</sup>

Chief Justice Thomas argues that Centric should be able to recover consequential damages from Drake because Drake had not even paid its share of damages once.<sup>93</sup> This argument fails to acknowledge that Drake responded to Mineral Explorations for the share of damages resulting from its negligence by settling out of court.<sup>94</sup> According to Justice Rooney, it is irrelevant whether that payment was pursuant to a judgment or a settlement.<sup>95</sup> Since Drake's settlement reduced Centric's liability, Centric would receive a double recovery if awarded consequential damages again.<sup>96</sup>

89. *Centric*, 726 P.2d at 1049.

90. See generally *Kirby*, 704 P.2d at 1268.

91. *Id.* at 1270.

92. Centric could argue that although its amount of causation was reduced because of Drake's breach of warranty, its liability remained the same because of Drake's settlement with Mineral Explorations. This argument is correct because Centric was ultimately held jointly and severally liable for more of Mineral Explorations' injuries than it caused. *Kirby*, 704 P.2d at 1270. Since *Kirby* was handed down, the Wyoming Legislature abolished joint and several liability in order to hold tortfeasors liable for their pro rata share of fault. See WYO. STAT. § 1-1-109 (1977 & Cum. Supp. 1987), *supra* note 16. This prevents tortfeasors from being held liable for more than their share of fault, and precludes them from using arguments like Centric's in the future.

93. *Centric*, 726 P.2d at 1056 (Thomas, C.J., specially concurring).

94. *Id.* at 1055 (Rooney, J., specially concurring).

95. *Id.*

96. *Id.*

*Different Duties*

Under *Reynolds*, a plaintiff cannot recover the same damages from a defendant under two or more legal theories when the defendant's duties under those theories are the same.<sup>97</sup> In the underlying negligence action, Drake allegedly breached its duty to deliver flame retardant fiberglass panels to Centric.<sup>98</sup> Likewise, Centric alleged that Drake breached its duty to provide Centric with flame retardant fiberglass panels in its breach of warranty cross-claim.<sup>99</sup> Since Drake's duties were the same under the negligence and breach of warranty theories, Centric should recover consequential damages under only one theory.<sup>100</sup> Centric recovered from Drake for delivering flammable panels in the underlying negligence action. Awarding Centric additional consequential damages for the same breached duty in a breach of warranty action violates *Reynolds*.<sup>101</sup>

*Different Damages*

*Reynolds* also prohibits recovering damages from a defendant under two different legal theories when the damages are the same.<sup>102</sup> Conversely, if the damages are different, a plaintiff may recover under two or more theories. In breach of warranty actions, plaintiffs can normally recover consequential damages and damages equalling the difference in the value of the goods received and that of those ordered. Since Centric has already recovered the equivalent of consequential damages in the underlying negligence action, it should not recover them in the breach of warranty action. However, Centric did not recover actual damages equalling the difference in the value of the goods received and that of those ordered in the underlying negligence action. Therefore, it should be able to recover those damages as Justice Rooney suggests.<sup>103</sup>

*Centric's Contributory Negligence*

Under *Murphy, Cline* and *Sheldon*, a plaintiff's contributory negligence reduces consequential damages in breach of warranty actions. Generally, a plaintiff is entitled to those consequential damages resulting from the defendant's breach of warranty.<sup>104</sup> In *Kirby*, the jury found that Centric caused twenty percent of Mineral Explorations' injuries.<sup>105</sup> Since Centric

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97. *Reynolds*, 595 P.2d at 1322-23.

98. *Kirby*, 704 P.2d at 1268.

99. *Centric*, 726 P.2d at 1049; Brief for Appellant, *supra* note 6, at 11-16.

100. Centric could argue that Drake had a reasonable person's duty to deliver conforming goods in the negligence action. But, on the other hand, Drake had an absolute duty to deliver conforming goods in the breach of warranty action. Centric could possibly recover consequential damages with this argument because Drake's duty in the breach of warranty action may be subject to a higher standard of care.

101. See *Centric*, 726 P.2d at 1055 (Rooney, J., specially concurring).

102. *Reynolds*, 595 P.2d at 1325 (quoting *Ford Motor Co. v. Taylor*, 60 Tenn. App. 271, 446 S.W.2d 521, 530 (1969)).

103. See *Centric*, 726 P.2d at 1054 (Rooney, J., specially concurring).

104. See WYO. STAT. § 34-21-294(b)(ii) (1977), *supra* note 82.

105. *Kirby*, 704 P.2d at 1270.

was found negligent in the earlier action, its recovery of consequential damages should be reduced by the percentage of its fault.<sup>106</sup>

As demonstrated above, awarding Centric consequential damages from Drake for breach of warranty results in a double recovery. However, assuming that Centric can recover consequential damages from Drake, Centric's recovery should be reduced by its negligence. If Centric's failure to inspect the fiberglass panels for flame retardancy was a proximate cause of Mineral Explorations' injuries, Centric's consequential damages should be reduced by the amount attributed to its negligence.<sup>107</sup>

Centric's negligence should not reduce its recovery of actual damages. Wyoming Statute section 34-21-293(b)<sup>108</sup> does not restrict the recovery of actual damages for a breach of warranty to those proximately caused by the seller's breach. Even if it did, a seller who delivers nonconforming goods is the proximate cause of the delivery's nonconformance, not the buyer.

#### CONCLUSION

In *Centric* the Wyoming Supreme Court allowed Centric to pursue its breach of warranty claim against Drake after both parties were found negligent in an underlying negligence action. Upon remand, the trial court should be wary of the damages it awards to Centric. Centric should not recover consequential damages from Drake as Chief Justice Thomas suggests because the court awarded Centric the equivalent thereof in *Kirby* by reducing its amount of fault. Since the court did not award Centric actual damages equalling the difference in the value of the goods received and that of those ordered in the underlying negligence action, it should be able to recover them in its breach of warranty action as Justice Rooney suggests.

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106. *Sheldon*, 797 F.2d at 886. Centric argued that its negligence was its failure to inspect the fiberglass panels for flame retardancy. Brief for Appellant, *supra* note 6, at 36. Since this negligence was "passive," it should not be used to reduce Centric's recovery from Drake. Brief for Appellant, *supra* note 6, at 31, 36 (citing *Miller v. New York Oil Co.*, 34 Wyo. 272, 284, 243 P. 118, 121 (1926)). Official comment five to U.C.C. § 2-715 (1978) (codified in Wyoming as WYO. STAT. § 34-21-294 (1977)), rejects this argument by providing that:

[w]here the injury involved follows the use of goods without discovery of the defect causing the damage, the question of "proximate" cause turns on whether it was reasonable for the buyer to use the goods without such inspection as would have revealed the defects. If it was not reasonable for him to do so, or if he did in fact discover the defect prior to his use, the injury would not proximately result from the breach of warranty. (emphasis added).

Drake could argue that Centric had a duty to inspect the panels in the breach of warranty action. If it was determined in *Kirby* that Centric had a reasonable duty to inspect the goods in the underlying negligence action, Drake can use Centric's negligence as a defense in the breach of warranty action.

107. See *supra* note 106.

108. See *supra* note 38.