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Tort Law - The Marriage of Strict Tort Liability and Comparative Negligence - Left Waiting at the Altar - Phillips v. Duro-Last Roofing, Inc.

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TORT LAW—The Marriage¹ of Strict Tort Liability and Comparative Negligence—Left Waiting at the Altar? *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834 (Wyo. 1991).

Michael Phillips labored as a roofer in Laramie, Wyoming for Nyfogle, Inc.² On July 1, 1988, Phillips was working on an apartment building, applying roofing materials distributed by Duro-Last Roofing, Inc. (Duro-Last).³ The roofing material tore and Phillips fell two and a half stories.⁴ Phillips landed on his feet, sustaining various physical injuries, including a compression fracture of his back.⁵

Phillips brought a diversity action⁶ against Duro-Last in the United States District Court for the District of Wyoming,⁷ seeking recovery under theories of negligence, strict liability under Restatement (Second) of Torts sections 402A⁸ and 402B⁹, breach of the implied warranty of merchantability, breach of the implied warranty of fitness

1. The title of the casenote is derived from two previous articles written by Greg Greenlee and Ann Rochelle. See Greg Greenlee & Ann Rochelle, *Comparative Negligence and Strict Tort Liability—A Marriage of Necessity*, 18 LAND & WATER L. REV. 643 (1983) [hereinafter Greenlee & Rochelle I]; Greg Greenlee & Ann M. Rochelle, *Comparative Negligence and Strict Tort Liability—The Marriage Revisited*, 22 LAND & WATER L. REV. 455 (1987) [hereinafter Greenlee & Rochelle II].

2. *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834, 835 (Wyo. 1991). Nyfogle's principal place of business was in Laramie. *Id.*

3. *Id.* Duro-Last's place of business was in Michigan. See Appellee's Brief at 3, *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834 (1991) (No. 90-161) [hereinafter Appellee's Brief].

4. *Phillips*, 806 P.2d at 835.

5. *Id.*

6. See *supra* notes 2 and 3.

7. *Phillips*, 806 P.2d at 835.

8. Section 402A provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1966).

9. Section 402B provides:

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402B (1966).

for a particular purpose, and breach of express warranty.¹⁰ The jury found for Phillips on all three warranty claims and on both strict liability claims.¹¹ Regarding the negligence claim, the jury found Duro-Last forty percent (40%) negligent, Gem City Enterprises (a "ghost" defendant)¹² forty percent (40%) negligent, and Phillips twenty percent (20%) negligent.¹³ The jury awarded Phillips \$187,000 in total damages based on the warranty and strict liability (non-negligence) theories.¹⁴

After the jury verdict for Phillips, the parties disputed whether under Wyoming's amended comparative negligence statute,¹⁵ Phillips' recovery under non-negligence theories should be reduced to forty percent (40%).¹⁶ The amended comparative negligence statute states in seven places that the plaintiff's "negligence" will be compared with the defendant's "fault."¹⁷ The federal district court certified¹⁸ questions to the Wyoming Supreme Court. The questions inquired

10. *Phillips*, 806 P.2d at 836.

11. *Id.*

12. A ghost defendant, as referred to by the court, is an employer who cannot be sued under WYO. STAT. § 27-14-104. Subsection (a) states in part:

(a) 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 . . .

WYO. STAT. § 27-14-104 (1986).

13. *Phillips*, 806 P.2d at 836.

14. *Id.*

15. WYO. STAT. § 1-1-109 (1986) reads:

(a) Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if the contributory negligence of the said person is not more than fifty percent (50%) of the total *fault*. Any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person recovering.

(b) The court may, and when requested by any party shall:

(i) If a jury trial:

(A) Direct the jury to find separate special verdicts determining the total amount of damages and the percentage of *fault* attributable to each actor whether or not a party; and

(B) Inform the jury of the consequences of its determination of the percentage of *fault*.

(ii) If a trial before the court without jury, make special findings of fact, determining the total amount of damages and the percentage of *fault* attributable to each actor whether or not a party.

(c) The court shall reduce the amount of damages determined under subsection (b) of this section in proportion to the amount of *fault* attributed to the person recovering and enter judgment against each defendant in the amount determined under subsection (d) of this section.

(d) Each defendant is liable only for that proportion of the total dollar amount determined as damages under paragraph (b)(i) or (ii) of this section in the percentage amount of *fault* attributed to him under paragraph (b)(i) or (ii) of this section in the percentage of the amount of *fault* attributed to him under paragraph (b)(i) or (ii) of this section.

WYO. STAT. § 1-1-109 (1986). (emphasis added).

16. *Phillips*, 806 P.2d at 836.

17. See *supra* note 15.

18. See *infra* note 77.

whether Wyoming's comparative negligence statute, and the recently inserted "fault" language, applied to recoveries based upon claims of strict liability under sections 402A and 402B and to the three warranty claims.¹⁹ The defendant and amicus curiae,²⁰ independent from the certified question, asked the court to judicially adopt allocation and apportionment theories similar to the comparative negligence statute, in non-negligence actions if the certified questions were to be answered in the negative.²¹

The Wyoming Supreme Court held that the comparative negligence statute does not apply to non-negligence theories and refused to address whether the court should judicially apply apportionment to non-negligence theories.²² The court's holding is inconsistent with the majority of jurisdictions which have either judicially or statutorily applied comparative principles.²³

This casenote suggests that the Wyoming Supreme Court misconstrued the word "fault." The court, through this misconstruction, stopped far short of satisfactory statutory interpretation and policy enunciation. In reaching its decision, the court should have probed further into the legislative history and judicial precedence of Wyoming's comparative negligence statute and strict liability policies. This discussion will also demonstrate why the Wyoming Supreme Court should have imposed a comparative fault scheme without relying exclusively on the legislative intent of the comparative negligence statute. Finally, this casenote will appraise articulated Wyoming policy considerations which support a comparative fault scheme.

BACKGROUND

Over the past twenty years, two doctrines, comparative negligence and strict product liability, have evolved and changed the face of tort litigation.²⁴ Both doctrines emerged independently of each other to alleviate inherent unfairness in tort law. Ironically, the sovereignty of the two doctrines has caused inequity and prejudice. To allay these inequalities, a third doctrine of comparative fault has been applied in many jurisdictions.

19. *Phillips*, 806 P.2d at 835.

20. The Defense Lawyers Association of Wyoming presented an Amicus Curiae Brief to the Wyoming Supreme Court in this matter. *Id.* at 835.

21. *Id.*

22. *Id.*

23. See Greenlee & Rochelle II, *supra* note 1, at 456.

24. See Mark E. Roszkowski and Robert A. Prentice, *Reconciling Comparative Negligence and Strict Liability: A Public Policy Analysis*. 33 SAINT LOUIS U. L.J. 19, 20-21 (1988) [hereinafter Roszkowski and Prentice].

Comparative Negligence

Comparative negligence alleviates the harsh "all or nothing"²⁵ result of non-recovery under contributory negligence by making each party responsible for his/her own negligence.²⁶ The policy considerations of the "all or nothing" recoveries of contributory negligence,²⁷ have directed most states to adopt some form of comparative negligence system.²⁸

The Wyoming State Legislature enacted its original comparative negligence statute in 1973,²⁹ adopting Wisconsin's statute verbatim.³⁰ Wyoming's statute evolved through amendments in 1977,³¹ and again in 1986.³² The statute is modified, granting recovery only if the plaintiff's "negligence" is not more than fifty percent (50%) of the total "fault."³³

Significant differences exist between the 1973 statute and the amended 1986 version.³⁴ The word "fault" replaced the word "negligence" in six places of the statute.³⁵ In addition, the 1986 statute com-

25. *Phillips*, 806 P.2d at 839 (Cardine, J., dissenting). Justice Cardine in his dissent states, "Under this contributory negligence doctrine, a party whose fault caused 99 percent of the damage suffered paid nothing because the plaintiff was one percent at fault." *Id.*

26. *Id.* at 838.

27. *Barnette v. Doyle*, 622 P.2d 1349, 1361 (Wyo. 1981).

28. See *supra* note 24 at 30-31, for a review of legislative and judicial implementation of comparative negligence in various jurisdictions.

29. WYO. STAT. § 1-7.2 provided:

(a) Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought. Any damages allowed shall be diminished, in proportion to the amount of negligence attributed to the person recovering.

(b) The court may, and when requested by any party, shall:

(i) If a jury trial, direct the jury to find separate special verdicts;

(ii) If a trial before the court without jury, make special findings of fact; determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributed to the person recovering.

WYO. STAT. § 1-7.2 (Cum. Supp. 1975).

30. *Woodward v. Haney*, 564 P.2d 844, 845 (Wyo. 1977).

31. WYO. STAT. § 1-1-109(b)(iii) (1977). Along with the addition of subsection (b)(iii), several grammatical changes were made to the renumbered statute. Subsection (b)(iii) states: Inform the jury of the consequences of its determination of the percentage of negligence. *Id.*

32. See *supra* note 15.

33. See *supra* note 15.

34. According to Greenlee and Rochelle II, *supra* note 1, at 465, the 1986 amendments changed comparative negligence in four ways.

35. *Id.* at 466. Greenlee and Rochelle noted:

Comparing the 1973 statute to the 1986 law, many references to "negligence" in the 1973 law have been replaced by the term "fault" in the new law. The new comparative act originated as Senate File No. 17. By the time the 1986 law was passed, most references in Senate File No. 17 to the comparison of the defendant's

pares a plaintiff's negligence to all tortfeasors' combined "fault."³⁶ This allows a plaintiff to recover if his percentage of negligence is less than the tortfeasors' aggregate percentage of negligence, even though the plaintiff may be more negligent than an individual tortfeasor. The statute also eliminates joint and several liability and statutory contribution.³⁷

Strict Liability

Strict product liability, as defined in Restatement (Second) of Torts, section 402A (1966),³⁸ emerged simultaneously with comparative negligence. However, strict product liability eliminates the requirement of proving a manufacturer's negligence. While comparative negligence has been largely legislatively implemented, strict product liability is almost exclusively a judicial creation.³⁹ Strict liability does not focus on the manufacturer's conduct, but instead on the product itself.⁴⁰ If the product is found defective and thereby caused an injury, the manufacturer is held liable. This holds true even when a manufacturer's conduct is non-negligent. Strict product liability was created because many times the causes of an injurious incident are unknown,⁴¹ or a plaintiff cannot acquire sufficient evidence from a manufacturer to demonstrate negligence.

Strict product liability also holds the manufacturer liable for representing his product as safe. A consumer relies on a manufacturer to produce a safe product.⁴² The consumer is usually incapable of recognizing defective products, while the manufacturer is exclusively in

"negligence" had been changed to the defendant's "fault."

Id.

36. *Supra* note 15, at (b)(i)(A). See also Greenlee and Rochelle II, *supra* note 1, at 469.

37. *Supra* note 15, at (d).

38. The Restatement's articulation of strict product liability originated from Justice Traynor's concurrence in: *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944); *Greenman v. Yuba Power Prods. Inc.*, 377 P.2d 897 (Cal. 1962); and *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960). See also Roszkowski and Prentice, *supra* note 24, at 24.

39. John W. Wade, *Products Liability and Plaintiff's Fault-The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, (1978) [hereinafter Wade].

40. *Ogle v. Caterpillar*, 716 P.2d 334 (Wyo. 1986), states, when a person is injured by a defect that causes the wheel of a car to come apart, it may be practically impossible to establish that the manufacturer's negligence caused the failure. Let us assume that 5,000,000 wheels for automobiles were manufactured and one was defective. The manufacturing, inspection, and testing procedures may have exceeded engineering standards. Due care was exercised and yet there was one defective wheel. Thus, there may have been an entire absence of negligence in the total manufacturing and sale of the product, yet a totally innocent person was injured when the defective wheel came apart. On these facts, that person justly ought to have a claim.

Id. at 342.

41. Roszkowski and Prentice, *supra* note 24, at 25.

42. *Id.* at 27.

control of the manufacturing process.⁴³

In 1986, the Wyoming Supreme Court, in *Ogle v. Caterpillar*,⁴⁴ adopted the strict liability doctrine as defined in section 402A.⁴⁵ Many of the well-known⁴⁶ policy considerations⁴⁷ were articulated in this landmark Wyoming decision.⁴⁸ The court declared that an innocent consumer should not bear the cost of injury, even if the manufacturer's conduct is meticulous.⁴⁹ The court also stated that strict liability alleviates the overwhelming obstacles of proving a manufacturer's negligence.⁵⁰

Comparative "Fault"

Though these comparative negligence and strict product liability principles emerged independently of each other, many jurisdictions now combine⁵¹ the two precepts to create a hybrid "strict liability comparative fault doctrine." Beginning with *Dippel v. Sciano*,⁵² states have rushed to merge comparative principles into the strict liability doctrine.⁵³ While some states have judicially adopted comparative fault,⁵⁴ others have legislatively enacted comparative fault statutes.⁵⁵ A minority of states have judicially applied comparative negligence statutes to strict liability recoveries.⁵⁶ Other states have not yet judicially applied comparative negligence statutes to non-negligent recoveries, though the statutory language lends itself to such an applica-

43. *Id.* at 28.

44. 716 P.2d 334.

45. See Greenlee & Rochelle II, *supra* note 1, at 470-72 for a discussion of strict products liability policies in *Ogle*.

46. *Ogle*, 716 P.2d at 342.

47. See Roszkowski and Prentice, *supra* note 24, at 25-30, for a discussion of the policy considerations of strict product liability.

48. *Ogle*, 716 P.2d at 342.

49. *Id.*

50. *Id.*

51. See Roszkowski and Prentice, *supra* note 24, at 21-22, n.6, for citations of legal commentary addressing this merger.

52. *Dippel v. Sciano*, 155 N.W.2d 55, 63 (Wis. 1967).

53. See Greenlee & Rochelle II, *supra* note 1, at 457-62.

54. *Id.* at 460-62. See also *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985); *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *Kaneko v. Hilo Coast Processing*, 654 P.2d 343 (Haw. 1982); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

55. See Greenlee & Rochelle II, *supra* note 1, at 457-59. See COLO. REV. STAT. § 13-21-406 (1985); CONN. GEN. STAT. ANN. § 52-572o (West Supp. 1987); IDAHO CODE § 6-1404 (Supp. 1986); MICH. COMP. LAW ANN. § 600.2949 (1) (West 1986); MINN. STAT. ANN. § 604.01 (West Supp. 1987); NEB. REV. STAT. § 25-21, 185 (1985); WASH. REV. CODE ANN. §§ 4.22.005, - .925 (Supp. 1987); ILL. REV. STAT., ch. 110, §§ 2-1107.1, -1116 (1971); IOWA CODE ANN. § 668.1 to .10 (West Supp. 1986); UTAH CODE ANN. §§ 78-27-37, -38 (Supp. 1986); ALASKA STAT. § 09.17.060, and ALASKA STAT. § 09.17.900; FLA. STAT. § 768.81; KY. REV. STAT. ANN. § 411.182; MO. REV. STAT. § 537.765; N.D. CENT. CODE § 32-03.2-01; TEX. CIV. PRAC. & REM. § 33.001 (1986 and Supp. 1989).

56. See Greenlee & Rochelle II, *supra* note 1, at 457. See *infra* notes 120-122 and accompanying text.

tion.⁵⁷ As the foregoing illustrates, varied avenues exist⁵⁸ for implementing comparative fault principles in strict liability settings.⁵⁹

PRINCIPAL CASE

Unlike the majority of jurisdictions, the Wyoming Supreme Court refused the opportunity to combine comparative negligence with strict liability and warranty (non-negligence) theories.⁶⁰ The court, in holding that the comparative negligence statute did not apply to non-negligent recoveries,⁶¹ stated two reasons for declining the merger. First, the court held that application of the statute to non-negligence theories would be creating judicial legislation.⁶² Second, the court stated that absent legislative intent, statutory interpretation required that unambiguous words be given their plain and ordinary meaning. The court held "fault" was clear and unambiguous and therefore must be given its plain and ordinary meaning of "negligence."⁶³ At that point the court stopped its analysis and did not resort to any further rules of statutory construction.⁶⁴

The defendant argued that by replacing the word "negligence" with the word "fault," the comparative negligence statute demonstrates the legislature's intent to diminish a plaintiff's recovery in non-negligence actions *pro rata* by the percentage of plaintiff's contributory negligence.⁶⁵ The court did not fully analyze the possible reasons for the replacement of "negligence" with the term "fault" in six instances in the statute.⁶⁶ It therefore sided with plaintiff Phillips in deciding that the word "fault" is clear and unambiguous. Accordingly, the court held that "fault" is synonymous with "negligence" and has no broader meaning.⁶⁷

After disposing of the statutory argument, the court refused to answer issues beyond the certified questions.⁶⁸ It declined to judicially

57. See *Greenlee & Rochelle II*, *supra* note 1, at 459-60.

58. See E. Wayne Thode, *Some Thoughts on the Use of Comparisons in Products Liability Cases*, UTAH L. REV. 1981 at 3.

59. See Roszkowski and Prentice, *supra* note 24, for discussion about the way many states have implemented such mixing of comparative negligence and strict product liability.

60. *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834 (Wyo 1991).

61. *Id.* at 836.

62. *Id.* at 836-37.

63. *Id.* at 837.

64. *Id.*

65. *Id.* at 836.

66. *Id.* at 837. Footnote 3 states in part, "Black's Law Dictionary 548 (5th ed. 1979) lists the first synonym for fault to be negligence We cannot find any real difference in statutory effect that results from the change made." *Id.*

67. *Id.* at 837.

68. See Certification Order From the United States District Court For the District of Wyoming to the Supreme Court of the State of Wyoming at 2, *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834 (89-0317-B)(Wyo. 1991). The order did not mention judicially applying comparative principles. *Id.*

adopt the comparative principles into non-negligence actions.⁶⁹ The defendant⁷⁰ and amicus curiae Defense Lawyers Association of Wyoming ardently argued that the court should discretionally apply comparative principles.⁷¹ However, the court asserted that these arguments were not the subject of the federal district court's query to the Wyoming Supreme Court.⁷²

Though the court stated it had no apparent authority to judicially implement comparative fault, it rejected it based upon three grounds.⁷³ First, the court held that responding to questions posed by the defendant and not by the federal district court would intrude upon the comity relationship⁷⁴ with the federal courts.⁷⁵ The court found that it was not expressly authorized to go beyond the specific certified questions⁷⁶ pursuant to the Federal Court State Law Certificate Procedure Act.⁷⁷ The court unequivocally stated that it would not issue advisory opinions, and would limit itself to actual cases⁷⁸ and controversies.⁷⁹

Secondly, due to the absence of a factual record in the appellate proceeding, the court declined to rule on defendant's argument for judicial adoption.⁸⁰ The court stated that based on the sketchy factual situation presented, conjecture would have been required to make

69. *Phillips*, 806 P.2d at 837.

70. Appellee's Brief, *supra* note 3, at 18-19. Appellee states, "If this Court answers 'no' to some or all of the questions certified to it by the Federal Court, it seems apparent that the Federal Court would need to be instructed for practical purposes and for purposes of judicial economy as to whether the State of Wyoming judicially adopts comparative principles for application in cases of strict liability and breach of warranty."

Id.

71. Brief of Amicus Curiae Defense Lawyers Association of Wyoming at 3, *Phillips v. Duro-Last*, 806 P.2d 834 (Wyo 1991) (No. 90-161)[hereinafter Brief of Amicus Curiae]. "Assuming, for the sake of argument, that this court adopts Phillips' first position and merely answers the certified questions 'no,' what have we gained?" *Id.*

72. *Phillips*, 806 P.2d at 837.

73. *Id.*

74. Comity is defined as: "[t]hat courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

75. *Phillips*, 806 P.2d at 837.

76. *Id.*

77. WYO. STAT. § 1-13-106 provides:

The supreme court may answer questions of law certified to it by a federal court when requested by the certifying court if there are involved in any proceeding before the federal court questions of law of this state which may be determinative of the cause then pending in the federal court, and as to which it appears to the federal court there is no controlling precedent in the existing decisions of the supreme court.

WYO. STAT. § 1-13-106 (1986).

78. *Phillips*, 806 P.2d at 837-38 (citing *Kurpjuweit v. Northwestern Dev. Company*, 708 P.2d 39 (Wyo. 1985); *Knudson v. Hilzer*, 551 P.2d 680 (Wyo. 1976); *Tobin v. Pursel*, 539 P.2d 361 (Wyo. 1975)).

79. *Phillips*, 806 P.2d at 837.

80. *Id.*

such a ruling.⁸¹ Absent a sufficient factual record⁸² the court would not take such a dramatic step in defining Wyoming's tort law.⁸³

Finally, the court held that if the comparative negligence statute was applicable, the plaintiff would be "ghosted"⁸⁴ out of forty percent (40%) of his recovery.⁸⁵ The plaintiff, who cannot statutorily recover from his employer,⁸⁶ would lose forty percent (40%) of his recovery based on strict liability and warranty theories. The court made this finding even though the theories have nothing to do with the employer.⁸⁷

Justice Cardine dissented, asserting that a party should only be responsible for that portion of damages caused by his/her own fault.⁸⁸ He maintained that the majority's holding was nothing short of the transposition of the ancient contributory negligence doctrine.⁸⁹ To avoid this reversal of results, Cardine gave a much broader definition to the word "fault" as used in Wyoming's comparative negligence statute.⁹⁰

Cardine contended that "fault" encompasses all parties' conduct in negligence, breach of warranty, and strict product liability.⁹¹ He noted that in a warranty action, "fault," as defined in the Uniform Commercial Code, is incorporated into the comparative negligence statute.⁹² Cardine also indicated that under section 402A actions, a defendant's "fault" is in creating a defective product and placing it in the stream of commerce.⁹³ He further added that a plaintiff's "fault" is in her contribution to her injuries through product misuse, assumption of risk, or contributory negligence.⁹⁴ Cardine asserted⁹⁵ that this explanation is the only interpretation of "fault" that makes sense of the comparative negligence statute.⁹⁶ He exhorted the legislature to correct the erroneous definition of "fault" that now exists as a result of the majority's holding.⁹⁷

81. *Id.* at 838.

82. *Id.*

83. *Id.* at 836-37.

84. *See supra* note 12.

85. *Phillips*, 806 P.2d at 838.

86. *See supra* note 12.

87. *Phillips*, 806 P.2d at 838.

88. *Id.* (Cardine, J., dissenting).

89. *Id.* at 840.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* "It makes no sense that plaintiff's own fault should be chargeable on one theory of recovery but paid for by defendant on another theory." *Id.*

96. *Id.*

97. *Id.*

ANALYSIS

The Wyoming Supreme Court's refusal to merge comparative negligence with strict product liability, misrepresentation and breach of warranty theories is based on an inadequate definition of the word "fault." A closer examination reveals that the word "fault," especially in tort law, means substantially more than negligence. Because "fault" is ambiguous, the court's statutory and judicial interpretation of Wyoming's comparative negligence statute is inadequate.

Further analysis demonstrates that the court should have applied the comparative negligence statute to non-negligence recoveries. It also demonstrates that judicial implementation of comparative fault principles is within the bounds of the court's discretion, independent of any statutory construction. Such an implementation would satisfy many of the public policy demands left unanswered in light of the court's holding.

"Fault" - Muddy and Ambiguous

The court did not adequately address the plaintiff's strongest arguments.⁹⁸ Without delving into an interpretation of the word "fault," the court could have reasoned that the 1986 legislature could not have intended the comparative negligence statute to apply to section 402A recoveries. The Wyoming Supreme Court adopted section 402A on March 19, 1986, in its *Ogle* decision.⁹⁹ The Wyoming Legislature, which amended the comparative negligence statute, adjourned on March 15, 1986, four days before *Ogle* was decided.¹⁰⁰ In addition the legislature entitled the statute "Comparative Negligence."¹⁰¹ The plaintiff argued that the statute's title demonstrates an expressed legislative intent to apply the statute only to negligence actions.¹⁰²

Without analyzing the plaintiff's compelling arguments, the court probed into the ambiguities of the word "fault."¹⁰³ The court held that "fault" was inconsequentially inserted for "negligence" in the amended statute.¹⁰⁴ However, the Wyoming Supreme Court has previously held that "[w]hen the legislature adopts a statute, it is presumed to have done so with full knowledge of existing state law with reference to the subject matter."¹⁰⁵ Furthermore, "[i]t must be as-

98. Phillips' Brief on Certified Questions From The United States District Court at 17, *Phillips v. Duro-Last Roofing Inc.*, 806 P.2d 834 (Wyo. 1991) (No. 90-161)[hereinafter Phillips' Brief].

99. *Ogle v. Caterpillar*, 716 P.2d 334 (Wyo. 1986).

100. *Phillips*, 806 P.2d at 836.

101. See *supra* note 15.

102. Phillips' Brief, *supra* note 98, at 21.

103. *Phillips*, 806 P.2d at 836.

104. *Id.* at 837.

105. *Wetering v. Eisele*, 682 P.2d 1055, 1061 (Wyo. 1984) quoted in *Phillips*, 806 P.2d at 840 (Cardine, J., dissenting).

sumed that the legislature did not intend futile acts and that in amending the statute the legislature intended to change the law."¹⁰⁶ Therefore, the court erroneously assumed that the legislature intended a futile act by changing "negligence" to "fault."

A closer examination reveals that the legislature did not intend a futile act by inserting "fault" for "negligence." This is especially true in that five of the six places "fault"¹⁰⁷ was inserted, the statute addresses the defendant's conduct, which is based upon both non-negligence and negligence theories.¹⁰⁸ The legislature had full knowledge of the existing law and intended to change it by replacing "negligence" with "fault." Using the above canons of statutory interpretation, the court should have probed further into the distinction between "fault" and "negligence" to ascertain the legislature's intent in amending the statute.

Interestingly, the Wyoming Supreme Court provided a comparison which undermines its own rationale used to support its holding by citing *Huffman v. Caterpillar Tractor Co.*¹⁰⁹ In *Huffman*, the Tenth Circuit Court of Appeals made a blatant distinction between the words "fault" and "negligence."¹¹⁰ While the Wyoming Supreme Court held that the word "fault" is "clear and unambiguous," the Tenth Circuit held that "a multiplicity of meanings have attached to the terms 'comparative negligence' and 'comparative fault.'"¹¹¹ The Tenth Circuit Court of Appeals continued: "when a distinction is made, it is usually explained or implied that 'fault' is a broader term, encompassing a wider range of culpable behavior or responsibility for injury than that covered by the term 'negligence.'"¹¹²

Recent tort litigation differentiates so conspicuously between "negligence" and "fault" that the National Conference of Commissioners on Uniform State Laws has adopted the Uniform Comparative Fault Act.¹¹³ The Act defines "fault" as broader than simple contribu-

106. *Wetering v. Eisele*, 682 P.2d 1055, 1061 (Wyo. 1984) quoted in *Phillips*, 806 P.2d at 840 (Cardine, J., dissenting).

107. Black's Law Dictionary provides the following definition of fault: "Under general liability principles, 'fault' is a breach of a duty imposed by law or contract. The term connotes an act to which blame, censure, impropriety, shortcoming or culpability attaches." BLACK'S LAW DICTIONARY 609 (6th ed. 1990).

This is a much broader definition of a defendant's liability than the plaintiff's contributory negligence defined as, "The act or omission amounting to want of ordinary care on part of complaining party . . ." BLACK'S LAW DICTIONARY 1033 (6th ed. 1990).

108. See *supra* note 15.

109. *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470, 1476, 1479 (10th Cir. 1990) cited in *Phillips*, 806 P.2d at 837, n.3.

110. *Huffman*, 908 F.2d at 1474.

111. *Id.*

112. *Id.* See also, *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 145 (N.J. 1979) where the New Jersey Supreme Court held that "[w]e read the term 'negligence' in our act as being subsumed within the concept of tortious fault."

113. UNIFORM COMPARATIVE FAULT ACT (Supp. 1983).

tory negligence.¹¹⁴ "Fault" includes

[a]cts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to *strict tort liability*. The term also includes *breach of warranty*, assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. (emphasis added).¹¹⁵

"Fault" in the Uniform Commercial Code has a much broader definition than that given to "negligence" by the court. Wyoming Statute section 34.1-1-2d(a)(xvi) defines the word "fault" as a wrongful act, omission or breach.¹¹⁶ This also demonstrates that breach of warranty actions may be easily incorporated into Wyoming's comparative negligence statute, just as is done under the Uniform Comparative Fault Act.¹¹⁷ The court mistakenly brushed the issue aside by asserting that the plain and unambiguous meaning of "fault" is "negligence."¹¹⁸ Further judicial interpretation was needed to answer the certified questions because "fault" is demonstratively ambiguous.

Stare Decisis Wisconsin Style

Having no Wyoming legislative history or antecedent judicial interpretation by which to interpret the ambiguous word "fault," the Wyoming Supreme Court should have looked to its sister courts in deciding the issue. Other jurisdictions have judicially applied their legislatively enacted comparative negligence statutes to strict product liability recoveries.¹¹⁹ Kansas,¹²⁰ New Jersey,¹²¹ and most importantly, Wisconsin,¹²² have set the precedent which the Wyoming Supreme Court should have followed.¹²³

114. UNIFORM COMPARATIVE FAULT ACT § 1(b), 12 U.L.A. 37 (Supp. 1983).

115. *Id.*

116. *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834, 840 (Wyo. 1991) (Cardine J., dissenting). Justice Cardine states, "Actions for damage caused by breach of implied warranty of merchantability, breach of implied warranty of fitness for particular purpose, and breach of express warranty are brought pursuant to the U.C.C. W.S. 34.1-2-313, -314, -315." *Id.* (Cardine J., dissenting).

Chief Justice Urbikit also states, "[W]arranty theories have a statutory foundation in present time based upon the Uniform Commercial Code . . ." *Id.* at 838.

See *infra* note 173.

117. See *supra* note 114.

118. *Phillips*, 806 P.2d at 837.

119. *Greenlee & Rochelle I*, *supra* note 1, at 654-55. *Greenlee & Rochelle II*, *supra* note 1, at 457.

120. *Albertson v. Volkswagenwerk Aktiengesellschaft*, 634 P.2d 1127 (Kan. 1981).

121. *Cartel Capital Corp. v. Fireco of N.J.*, 410 A.2d 674 (N.J. 1980).

122. *Dippel v. Sciano*, 155 N.W.2d 55 (Wis. 1967).

123. *Greenlee and Rochelle I*, *supra* note 1, at 658.

In 1973, Wyoming adopted Wisconsin's comparative negligence statute verbatim.¹²⁴ Though the Wyoming statute has since been amended,¹²⁵ "[t]he judicial interpretation of adopted legislation is given great weight because it constitutes legislative precedent so useful in ascertaining legislative intent."¹²⁶ The Wyoming Supreme Court ignored this useful precedent.

The court has previously referred to the Wisconsin Supreme Court's judicial construction of Wisconsin's comparative negligence statute.¹²⁷ The court reasoned that the Wyoming Legislature, in adopting Wisconsin's comparative negligence statute verbatim, also adopted Wisconsin's judicial interpretation.¹²⁸ By finding the word "fault" to be clear and unambiguous, the Wyoming Supreme Court did not take this next step in answering the certified questions. A step which would have produced dramatically different results.

The simplest means to ascertain the legislative intent of Wyoming's comparative negligence statute¹²⁹ would have been to follow Wisconsin's judicial interpretation. Wisconsin was the first state to permit the application of a comparative negligence statute to strict

124. *Supra* note 29.

125. The plaintiff goes to great length to distinguish the present amended statute with the one adopted verbatim from Wisconsin. See Phillips' Brief, *supra* note 98, at 16.

126. *Woodward v. Haney*, 564 P.2d 844, 846 (Wyo. 1977). The court also states, "[t]he intent of the Wyoming State Legislature was to adopt the Wisconsin judicial construction of the comparative negligence statute at the date of enactment . . ." *Id.*

127. *Id.* at 845. The court states, "The decisions of the courts of another state from whence came legislation in question are very persuasive when applying statutes which are identical or very similar to those enacted by our own Legislature." *Id.*

See also, *Woodward*, 564 P.2d at 846, n.3, citing *Simpson v. Anderson*, 526 P.2d 298 (Colo. App. 1974); *McGinn v. Utah Power & Light Company*, 529 P.2d 423 (Utah 1974); *Holland v. Peterson*, 518 P.2d 1190 (Idaho 1974). Colorado, Utah and Idaho have also followed Wisconsin's judicial interpretation of its comparative negligence statute.

128. *Woodward*, 564 P.2d at 845.

Where a statute that has been construed by the courts of last resort of another state has been enacted in the same terms by the Wyoming Legislature, the Legislature is presumed to have adopted it as a part of the law and intended the same construction apply in this state.

Id.

129. Rochelle and Greenlee offer a reply to the plaintiff's argument that under the statute's title, "fault" is plain and unambiguous.

It could, however, be argued that the new statute is limited to a comparison of the "negligence" of the parties. The title is "Comparative Negligence;" the preamble says that the act applies to "a plaintiff in a negligence action;" and the first sentence of the statute provides that "Contributory negligence shall not bar recovery in an action . . . for negligence . . ." However, rules of statutory construction require that "all portions of an act must be read in *pari materia*, and every word, clause and sentence of it must be considered so that no part will be inoperative or superfluous." Unless "fault" is limited to negligence, to say this statute is a comparative negligence statute, allowing only the comparison of negligence would be to ignore the many references to fault in the statute as well as the statute's clear directive requiring the jury to determine the percentage of the fault of each actor.

Rochelle & Greenlee II, *supra* note 1, at 467-68. (citations and italics omitted).

liability actions.¹³⁰ Wisconsin has held strict liability to be negligence per se,¹³¹ thus facilitating the incorporation of strict liability into the comparative negligence statute. Such an interpretation¹³² by the Wyoming Supreme Court would have been sound¹³³ based on Wisconsin's judicial interpretation.

Strict Liability is Judicial Enactment

The Wyoming Supreme Court could have ratified a comparative fault scheme on its own initiative without probing into legislative intent.¹³⁴ By applying Wyoming's comparative negligence statute to sections 402A, 402B and breach of warranty theories, the court would not be changing the comparative negligence scheme mandated by the legislature.¹³⁵ The court would only be applying the principles laid out by the legislature in further defining Wyoming's judicially-created strict liability law.¹³⁶ Strict product liability is common-law adopted by the Wyoming Supreme Court, not the legislature.¹³⁷ As such, the court should¹³⁸ have further defined the strict product liability law of Wyoming without delving into legislative intent behind the comparative negligence statute.¹³⁹

The Wyoming Supreme Court has the authority to adopt any strict liability comparative fault scheme it deems fit. Adoption of a scheme that parallels Wyoming's comparative negligence statute would be most in line with recognized Wyoming policies.¹⁴⁰ The court,

130. Greenlee & Rochelle I, *supra* note 1, at 658.

131. Dippel v. Sciano, 155 N.W.2d 55, 64 (Wis. 1967).

132. Appellee's Brief, *supra* note 3, at 13. Minnesota and New Jersey, both of which have enacted Wisconsin's comparative negligence statute as their own, have followed Wisconsin's judicial interpretation and applied their comparative negligence statute to § 402A actions. See Busch v. Busch Constr. Inc., 262 N.W.2d 377, 393 (Minn. 1977); Suter v. San Angelo Foundry & Machine Co., 406 A.2d 140, 147 (N.J. 1979).

133. Board of County Comm'r v. Ridenour, 623 P.2d 1174, 1180 (Wyo. 1981), the court states, "[t]he Wyoming Courts have made it clear that the intent of the Wyoming State Legislature was to adopt the Wisconsin judicial construction of that comparative negligence statute at the date of its enactment." *Id.*

134. Brief of Amicus Curiae, *supra* note 71, at 24.

135. *Id.* at 25.

136. Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 341 (Wyo. 1986).

137. *Id.*

138. Victor E. Schwartz, COMPARATIVE NEGLIGENCE § 12.2 at 197 (2d ed. 1986) cited in Brief of Amicus Curiae, *supra* note 71, at 24.

[I]t is within the power of the judiciary to decide what defenses are appropriate in strict liability cases, and there is no reason why comparative negligence should not be selected in the appropriate situation . . . [S]ince the legislature has endorsed comparative negligence, it is reasonable to apply it as a principle of common law where it would be helpful.

Victor E. Schwartz, COMPARATIVE NEGLIGENCE § 12.2 at 197 (2d ed. 1986).

139. See *supra* note 77.

140. Thibault v. Sears, Roebuck & Co., 395 A.2d 843, 850 (N.H. 1978). The New Hampshire Supreme Court held: "We judicially recognize the comparative concept in strict liability cases parallel to the legislature's recognition of it in the area of negligence." *Id.*

in ascertaining the meaning of the word "fault" as incorporated in the comparative negligence statute, has placed this issue under the negligence scheme.¹⁴¹ Yet its holding does not affect the comparative negligence statute, but instead touches upon the doctrine of strict liability. By looking to legislative intent, the court successfully avoided the delicate predicament of defining how strict product liability should coexist with negligence theories.¹⁴² The certified questions from the federal district court explicitly asked the Wyoming Supreme Court to determine whether or not Wyoming's comparative negligence statute applies to doctrines adopted by the state supreme court,¹⁴³ not the legislature.¹⁴⁴ As such, the supreme court inaccurately addressed the question with statutory interpretation directed toward negligence. The court should have answered the questions by addressing strict liability policies it had previously articulated.

Strengthens Policies of Ogle v. Caterpillar and Comparative Negligence

The Wyoming Legislature and Supreme Court, respectively, adopted comparative negligence and section 402A to meet defined policy goals.¹⁴⁵ Although the plaintiff¹⁴⁶ and court¹⁴⁷ suggested that a merger of the doctrines of comparative negligence and strict liability weakened their application, a closer examination demonstrates that comparative fault strengthens these policy goals in both the strict liability and comparative negligence regimes.¹⁴⁸

141. Phillips v. Duro-Last Roofing, Inc., 806 P.2d 834, 837 (Wyo. 1991).

142. *Id.*

143. See *supra* note 40.

144. Phillips, 806 P.2d at 835.

145. Ogle, 716 P.2d at 342. See also *supra* note 45.

146. Phillips' Reply Brief at 6-11, Phillips v. Duro-Last, Inc., 806 P.2d 834 (Wyo. 1991) (No. 90-161).

147. See Phillips, 806 P.2d at 838.

148. Appellee's Response to Appellant's Reply Brief at 3-4, Phillips v. Duro-Last Roofing, Inc., 806 P.2d 834 (Wyo. 1991) (No. 90-161), states:

None of those policies would be undermined by the application of comparative fault principles to products cases.

It is often stated that the application of comparative principles to products liability cases "will not dilute the fundamental goals of strict liability or that it furthers the policy goals of Section 402A." These policy goals were intended to accomplish several discrete objectives, including (1) relief for plaintiffs from the burden of proving negligence, which was difficult if not impossible under the circumstances of many products cases; (2) protection to consumers of products sold in modern large-scale, impersonal markets, who must rely to some extent upon the products' presence on the market as an assurance of safety; and (3) the redistribution of loss so that manufacturers or the society as a whole, rather than consumers, will bear the costs arising from the defective condition of products. A variety of courts have contended that all three of these policies are promoted by the application of comparative principles. [emphasis supplied and citations omitted.]

Id.

Protects Innocent Plaintiff

The court in *Ogle* stated that when an innocent plaintiff is injured by a defective product, it is better that the manufacturer bear the loss.¹⁴⁹ A comparative fault scheme would ensure that an innocent victim not be required to bear the burden of loss or the burden of proof in showing negligence. It would also prohibit a manufacturer from being held as an absolute insurer¹⁵⁰ of its product when the plaintiff has acted culpably. Comparative fault protects a plaintiff to the degree of his innocence while alleviating the burden of proving negligence.

Alleviates "All or Nothing" Recoveries

The Wyoming Supreme Court has recognized that in section 402A actions, a manufacturer will not be held liable when there is an intervening cause produced by the plaintiff.¹⁵¹ By rejecting the opportunity to insert comparative principles into Wyoming tort law, the court's decision in *Phillips* is not congruent with *Ogle*'s policies.¹⁵² The court effectively held the manufacturer liable for the plaintiff's intervening causation or the plaintiff solely responsible for the manufacturer's defective product.

The Wyoming Supreme Court has recognized affirmative defenses to strict liability and breach of warranty actions.¹⁵³ These defenses, if raised in a negligence action, would only reduce the amount of recovery *pro rata* with the plaintiff's contributory negligence.¹⁵⁴ Yet in a strict liability context, the defenses would totally bar the plaintiff's recovery.¹⁵⁵ This inconsistency flies in the face of the philosophy of

149. *Ogle*, 716 P.2d at 342. The court states, "When a defective article enters the stream of commerce and an innocent person is hurt, it is better that the loss fall on the manufacturer, distributor or seller than on the innocent victim." *Id.*

150. *Id.* at 345. "Even if a product is defective, unmerchantable or negligently manufactured, the seller may not be liable for a plaintiff's injuries which are caused by unforeseeable alterations in the product rather than the original defects." *Id.*

151. *Id.*

152. See *Phillips*, 806 P.2d at 840 (Cardine, J., dissenting).

153. *Ogle*, 716 P.2d at 345. The court recognized material alteration as defined in Restatement (Second) of Torts § 402A(1)(b) as a defense to negligence, strict liability and breach of warranty actions.

154. See *supra* note 15.

155. The Restatement comments explain:

Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of *assumption of risk*, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, *he is barred from recovery.* (emphasis added).

RESTATEMENT (SECOND) OF TORTS § 402A, cmt. n, (1966).

comparative negligence. For example, Comment (n) of section 402A states that assumption of risk is a defense to section 402A "as in other cases of strict liability,"¹⁵⁶ and if raised successfully,¹⁵⁷ completely bars plaintiff's recovery.¹⁵⁸ However, two Wyoming precedents discourage such a result.

First, the Wyoming Supreme Court has held that the absolute defense of assumption of risk is no longer acceptable and that Wyoming recognizes no distinction between assumption of risk and contributory negligence.¹⁵⁹ Instead, assumption of risk is a basis for apportioning fault between the plaintiff and defendant as a form of contributory negligence.¹⁶⁰

Section 402A comment (g),¹⁶¹ known as the misuse defense,¹⁶² is another recognized defense to strict product liability. It also precludes recovery if raised successfully by the defendant. Again, misuse by the plaintiff can and should be viewed as a form of comparative negligence,¹⁶³ not to bar, but only to diminish a plaintiff's recovery under section 402A.¹⁶⁴ By applying a comparative fault standard in the area of breach of warranty and strict liability, the Wyoming Supreme Court could have eliminated all distinctions between assumption of risk, product misuse and contributory negligence. Such an action would have further synchronized Wyoming tort law.

Secondly, just as the Wyoming Supreme Court in *Phillips*¹⁶⁵ should have for policy reasons adopted the comparative negligence statute for a comparative fault scheme,¹⁶⁶ it should have eliminated the "all or nothing" results in strict product liability theories.¹⁶⁷ While strict product liability developed to ameliorate the difficulties of proving a manufacturer's negligence,¹⁶⁸ it can act as a total bar to a plain-

156. *Id.*

157. This defense has not been expressly adopted in Wyoming, yet the supreme court has precedent in adopting such a defense. See *supra* note 138.

158. See generally Jack Fienberg, *The Applicability of a Comparative Negligence Defense in a Strict Product Liability Suit Based On Section 402A of the Restatement of Torts 2d (Can Oil and Water Mix?)* 42 INS. COUNS. J. 39 (1975); James B. Sales, *Assumption of the Risk and Misuse in Strict Tort Liability-Prelude to Comparative Fault*, 11 TEX. TECH L. REV. 729 (1980).

159. *Barnette v. Doyle*, 622 P.2d 1349, 1362 (Wyo. 1981). The court states, "As we have just discussed, the doctrine of assumption of risk will not bar recovery in this state." *Id.*

160. *Id.* at 1361-62.

161. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. g (1966). The comment explains that "The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed." *Id.*

162. *Greenlee & Rochelle I, supra* note 1, at 647.

163. See *supra* note 138.

164. *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1302 (Utah 1981).

165. *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834 (Wyo. 1991).

166. See *supra* note 140.

167. *Phillips*, 806 P.2d at 839 (Cardine, J., dissenting).

168. *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 342 (Wyo. 1986).

tiff's recovery.¹⁶⁹ Comparative negligence eliminated this result in the negligence field.¹⁷⁰ In light of such established policies, the Wyoming Supreme Court should have taken the opportunity to adopt comparative principles to protect the plaintiff¹⁷¹ in strict liability actions.¹⁷²

It appears that the court is leaving open the possibility of merging comparative fault¹⁷³ principles¹⁷⁴ in the future.¹⁷⁵ Yet the court should have clarified the issue due to its implemental precedent in the strict products liability area.¹⁷⁶ Such an action would have prevented needless expense and litigation in future actions.¹⁷⁷

169. Appellee's Response to Appellant's Reply Brief at 8, *Phillips v. Duro-Last, Inc.*, 806 P.2d 834 (Wyo. 1991) (No. 90-161). Appellee argues that the appellant assumed the risk and intentionally misused the product. *Id.* at 14.

170. Roszkowski & Prentice, *supra* note 24, at 39-40 n.93 and accompanying text.

171. *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301 (Utah 1981). The Utah Supreme Court held that the comparative negligence statute did not apply to strict products liability, yet that comparative principles would apply to award a plaintiff recovery when affirmative defenses are successfully raised, holding that: "The defense in a products liability case, where both defect and misuse contribute to cause the damaging event, will limit the plaintiff's recovery to that portion of his damages equal to the percentage of the cause contributed by the product defect." *Id.* at 1303-04.

172. Brief of Amicus Curiae, *supra* note 71, at 3. The effect of the court answering "no" will offer no guidance by which Judge Brimmer could proceed, if Brimmer found that the plaintiff's 20% negligence were an assumption of risk. As the amicus curiae explained, "If Judge Brimmer so holds, and applies comment n of 402A literally, plaintiff loses, at least on a 402A claim, despite the jury's finding that the defendant's product was defective." *Id.* at 4.

173. It is already established that a plaintiff's negligence is compared with a manufacturer's liability in breach of warranty actions. See *Cline v. Sawyer*, 600 P.2d 725, 732 (Wyo. 1979); *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969, 975 (Wyo. 1970); *Sheldon v. Unit Rig Equip. Co.*, 797 F.2d 883, 886 (10th Cir. 1986).

174. See *infra* note 177.

175. *Phillips v. Duro-Last Roofing, Co.*, 806 P.2d 834, 838 (Wyo. 1991). The court states that, "[w]e decline the invitation to expand this opinion as a certified issue case and answer each of the questions that are actually presented in the negative." *Id.*

176. See *supra* note 138.

177. See *Horowitz v. Holland Hitch Co.*, No. 91-44. Certified questions again have been presented to the Wyoming Supreme Court by the Tenth Circuit Court of Appeals in regards to this issue. The case has been argued and is pending. The first two questions presented are:

- A. Does Wyoming's current comparative negligence statute, W.S. 1-1-109 (1988), which requires that damages in an action "to recover damages for negligence" be allocated according to the "percentage of fault attributable to each actor," permit strict liability and breach of warranty to be considered and weighed in the same manner as negligence in determining each actor's "percentage of fault" for the plaintiff's injuries and their corresponding liability for the plaintiff's damages?
- B. If Wyoming's current comparative negligence statute does permit equal consideration of negligence, strict liability and breach of warranty in allocating fault and determining each actor's share of damages, does an actor have a right of indemnity against another responsible actor, in the absence of an express contract of indemnity, in the following circumstances:
 - i. The party seeking indemnity was passively or secondarily negligent while the alleged indemnitor was actively or primarily negligent;
 - ii. The party seeking indemnity was either passively/secondarily or actively/primarily negligent while the alleged indemnitor was strictly liable to the injured party; or
 - iii. The party seeking indemnity is either passively/secondarily or actively/primarily negligent while the alleged indemnitor was strictly liable to the injured party;

CONCLUSION

The Wyoming Supreme Court incorrectly held that "fault" is clearly and unequivocally synonymous with "negligence." A further inquiry demonstrates that "fault" has been defined in a wide number of ways. As such the court should have effected further judicial statutory construction in answering the certified questions.

Following the rules of statutory construction, the Wyoming Supreme Court should have observed Wisconsin's judicial interpretation that the comparative negligence statute applies to strict products liability and warranty actions. Such a judicial interpretation would merge comparative principles into the strict products liability theory as accomplished by the court in warranty actions and by the legislature in negligence actions. Application of Wisconsin's interpretation would go far in promoting congruent tort litigation in Wyoming.

The Wyoming Supreme Court declined to make strict product liability a securely defined area of law. If the court felt the Wisconsin approach was unacceptable, as the creator of strict products liability it should have implemented an acceptable comparative mechanism. The court not only rejected a marriage of necessity,¹⁷⁸ but increased the insupportable tension between negligence and strict product liability in Wyoming. It can only be hoped that the engagement is still on and that the marriage will occur at the hands of a future legislature or Wyoming Supreme Court.¹⁷⁹

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marily negligent while the alleged indemnitor was liable on breach of warranty grounds?

See Notice of Agreement to Answer Certified Questions, *Horowitz v. Holland Hitch Co.*, (No. 91-44).

178. See *Greenlee & Rochelle I*, *supra* note 1, at 643.

179. Has the wedding date been rescheduled? See *supra* note 177. See also Brief of Appellee *Holland Hitch Co.* at 13, *Horowitz v. Holland Hitch Co.*, (No. 91-44) where the appellee states, "*The Wyoming Supreme Court should reverse its decision in Phillips.*" (emphasis added). *Id.*