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CASENOTES

WORKER'S COMPENSATION—The Dilemma of Co-Employee Immunity and the Confusion in the Aftermath of *Mills II*. *Mills v Reynolds*, 837 P.2d 48 (Wyo. 1992).

Early in March 1988, Dunbar Well Service, Inc. employed Timothy Mills, Guy Reynolds and Sid Marks.¹ Mills' supervisor, Guy Reynolds, instructed Mills to paint the hood of a pump truck located in the Riverton shop of Dunbar Well Service.² Sid Marks, another supervisor, had provided an air tank, but had failed to leave instructions for its proper use.³ Mills was seriously injured when the air tank valve burst striking him in the face. The explosion resulted in severe injuries to Mills including the loss of his left eye, the loss of his full vision, physical disfigurement and emotional trauma. These injuries required extensive reconstructive surgery.⁴

Mills filed a negligence suit against his co-employees, Reynolds and Marks, alleging they were negligent for failing to provide safe equipment and failing to provide instructions for the proper operation of the equipment.⁵ The defendants filed a motion for summary judgment, maintaining they were immune from suit pursuant to Wyoming Statute section 27-14-104(a).⁶ This statute provided that worker's compensation was the only remedy available to an employee injured by a co-employee acting within the scope of his employment.⁷ Mills argued that the defendants were not immune because section 27-14-104(a) violated the Wyoming Constitution.⁸ The district court granted the defendants summary judgment finding that section 27-

1. *Mills v. Reynolds*, 837 P.2d 48 (Wyo. 1992) [hereinafter *Mills II*].

2. *Id.* at 50. Reynolds directed Mills to use a regulator, air tank, hoses, paint sprayer, paint and other equipment and materials provided for them at the shop. Mills followed Reynolds' directions in assembling the equipment. Brief of Appellant Timothy L. Mills at 5, *Mills v. Reynolds*, 807 P.2d 383 (Wyo. 1991) (No. 89-193) [hereinafter *Brief of Appellant*].

3. *Brief of Appellant*, *supra* note 2, at 6, *Mills v. Reynolds*, 807 P.2d 383.

4. *Id.*

5. *Id.*

6. WYO. STAT. § 27-14-104(a) (1991) states:

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

7. *Id.*

8. *Mills II*, 837 P.2d at 50 (Wyo. 1992). The plaintiffs claimed the statute violated Wyo. CONST. art. 10, § 4, art. 1, §§ 2, 3, 6, 7, 8, 9, and 34, and art. 3, § 27. *Id.*

14-104(a) was constitutional and provided immunity for Reynolds and Marks.⁹

Marks filed an appeal to the Wyoming Supreme Court, and on March 11, 1991, the court affirmed, in a three-two decision, the district court's decision to grant summary judgment to the defendants.¹⁰ However, on May 6, 1991 the Wyoming Supreme Court granted plaintiff's motion to rehear the case.¹¹ Upon reconsideration, the supreme court reversed its earlier decision and held that Wyoming Statute section 27-14-104(a) was unconstitutional.¹² A plurality opinion declared that the co-employee immunity statute violated the equal protection clause of the Wyoming Constitution.¹³ Thus, the court had abolished co-employee immunity in Wyoming.¹⁴

This casenote first provides a history of worker's compensation laws and co-employee immunity. The casenote examines other jurisdictions to determine the state of the law when a statute is declared unconstitutional and applies those findings to the principle case. It also criticizes the court for failing to articulate the current state of co-employee immunity in Wyoming. Finally, the casenote looks at the non-legal ramifications of the court's decision in *Mills v. Reynolds II*.

BACKGROUND

Worker's compensation laws were first established in response to the rapid industrialization taking place in the United States around the beginning of the twentieth century.¹⁵ Before state legislatures enacted worker's compensation laws, employees rarely recovered from their employers for negligent acts they committed because employers had several ways to avoid liability.¹⁶ Many employers required employees to waive their right to sue as a condition of employment, and those who were not so required generally could not afford to pursue a recovery through the court system.¹⁷ In addition, three common law defenses available to employers - assumption of risk, contributory negligence, and the fellow servant rule - worked to prevent

9. *Mills v. Reynolds*, 807 P.2d 383 (Wyo. 1991), *rev'd*, 837 P.2d 48 (Wyo. 1992) [hereinafter *Mills II*].

10. *Id.*

11. *Id.*

12. *Mills II*, 837 P.2d at 49 (Wyo. 1992).

13. *Id.*

14. *Id.*

15. 1 ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 5.20 (1990).

16. *Id.* § 4.30.

17. *Mills I*, 807 P.2d at 388.

recovery by an injured employee.¹⁸ However, as the number of workers killed and injured in industrial accidents increased, state legislatures realized common law tort liability was no longer meeting the needs of employees.¹⁹ Worker's compensation was the solution.

State legislatures adapted worker's compensation laws from a German form of social insurance in which both the employer and employee contributed to a fund out of which injured workers received compensation.²⁰ New York first adopted a worker's compensation system in 1910.²¹ Thereafter, the concept quickly spread throughout the rest of the United States.²² However, the American form of worker's compensation differed from the German form in that state statutes required only the employer to make contributions to the compensation fund. Under this new system, to receive compensation, the employee was not required to show fault or breach of duty on the part of the employer.²³ Instead, the system was seen as an exchange, or *quid pro quo*, between employer and employee. By agreeing to pay into the compensation fund, the employer was immunized against common law actions for negligence and large damage awards.²⁴ In exchange for the inability to sue his employer, and a lower recovery, worker's compensation guaranteed the employee quick and certain compensation for his injuries.²⁵

Most state legislatures enacted worker's compensation by statute. However, in Wyoming, article 10 section 4 of the Wyoming Constitution prohibited the legislature from enacting any law limiting the amount of damages to be recovered in a personal injury case.²⁶ Since worker's compensation provided statutory limits on the amount of money awarded for injury, a constitutional amendment became necessary.²⁷ The legislature completed the amendment process in 1913.²⁸

18. 1 LARSON, *supra* note 15, § 4.30. Assumption of risk is based on the theory that an employee voluntarily submits himself to his working conditions and may refuse to work under any conditions he reasonably thinks are dangerous. Therefore, if he is injured, he has "assumed the risk" of his working conditions. *Id.*

Contributory negligence prohibited the recovery of damages if the injured employee was also negligent, regardless of degree. *Id.*

The fellow servant doctrine eliminated the employer's liability if the negligence of another employee caused the worker's injury. *Id.*

19. *Id.*

20. 1 LARSON, *supra* note 15, § 5.10.

21. *Id.* § 5.20.

22. *Id.*

23. *Barnette v. Doyle*, 622 P.2d 1349, 1352 (Wyo. 1981).

24. *Mills I*, 807 P.2d at 389.

25. *Id.*

26. Before the amendment in 1913, article 10 section 4 provided: "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. Any contract or agreement with any employe[e] waiving any right to recover damages for causing the death or injury of any employe[e] shall be void."

27. *Mills I*, 807 P.2d at 389.

28. 1913 Wyo. Sess. Laws, Ch.79. After the amendment, article 10, section 4 read:

The amendment provided the legislature with the power to set up a fund out of which compensation would be paid to employees injured on the job.²⁹ The fund would pay for any injuries except those injuries due to the culpable negligence of the injured employee.³⁰ This compensation was to replace the employee's right to recover damages from the employer through private action.³¹ Soon after the Wyoming voters approved the constitutional amendment, the Wyoming Legislature adopted the Wyoming Worker's Compensation Act.³²

Zancanelli v. Central Coal & Coke Co. was the first case that attacked the constitutionality of Wyoming's worker's compensation statutes.³³ In *Zancanelli*, an injured employee brought a negligence action against his employer for injuries received while in the course of employment.³⁴ The trial court granted immunity for the employer because the statute exempted employers from liability under Wyoming's new worker's compensation laws.³⁵ The employee appealed,

28. 1913 Wyo. Sess. Laws, Ch.79. After the amendment, article 10, section 4 read:

No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void. As to all extrahazardous employments the legislature shall provide by law for the accumulation and maintenance of a fund or funds out of which shall be paid compensation as may be fixed by law according to proper classifications to each person injured in such employment or to the dependent families of such as die as the result of such injuries, except in case of injuries due solely to the culpable negligence of the injured employee. The fund or funds shall be accumulated, paid into the state treasury and maintained in such manner as may be provided by law. The right of each employee to compensation from the fund shall be in lieu of and shall take the place of any and all rights of action against any employer contributing as required by law to the fund in favor of any person or persons by reason of any such injuries or death.

29. *Id.*

30. *Id.*

31. *Id.*

32. 1915 Wyo. Sess. Laws, Ch. 124, § 2 stated:

Compensation herein provided for shall be payable to persons injured in extrahazardous employments, as herein defined, or the dependent families of such, as die, as the result of such injuries, except in case of injuries due solely to the culpable negligence of the injured employee. Said compensation shall be payable from funds in the State Treasury to be accumulated and maintained in the manner herein provided. The right of each employee to compensation from such funds shall be in lieu of and shall take the place of any and all rights of action against any employer contributing, as required by law to such funds in favor of any such person or persons by reason of any such injury or death.

33. *Zancanelli v. Central Coal & Coke Co.*, 173 P. 981 (Wyo. 1918). The court addressed several other issues not within the scope of this casenote. These include the provision that no compensation shall be paid to someone disabled for 10 days or less; whether worker's compensation denies employees the right to be represented by counsel; that the amounts awarded under worker's compensation are unreasonably low; the provision of the act that declares children over the age of 16 shall not be considered dependents; and the provision that if decedent's relatives are nonresident aliens, they only receive 33% of the amount a resident would receive. *Id.* at 988-90.

34. *Id.* at 982.

35. *Id.*

questioning the constitutionality of the new statutes.³⁶ The Wyoming Supreme Court upheld the statutes and recognized that worker's compensation was like a contract, a *quid pro quo*, between employers and employees.³⁷ Thus, the state has the power to require both the employer and employee to give up something to establish a compensation plan for their mutual protection and advantage.³⁸

The Wyoming Supreme Court Creates Co-Employee Immunity

The legislature and the courts did not address the issue of co-employee immunity until the case of *In Re Byrne*.³⁹ In that case, a negligent third party killed an employee who was acting within the scope of his employment.⁴⁰ The Wyoming Supreme Court held that benefits under the Act should be paid to employees even though legal liability for the injury or death of the employee rests in some other third party.⁴¹ Thus, an employee, injured by a negligent third party, could collect worker's compensation and could also choose to pursue his remedy at law against the negligent third party.⁴²

In dicta, the court analogized the situation to one in which an employee injured a co-employee where the state had continually awarded worker's compensation benefits.⁴³ These benefits were properly awarded because the fellow-servant doctrine had been eliminated and employers were responsible for the negligent acts of their employees.⁴⁴ The public generally perceived the *Byrne* decision as eliminating an employee's cause of action against a negligent co-employee.⁴⁵ The court later affirmed this perception in *Blackwell v. Pickett*⁴⁶ when it upheld a summary judgment for a co-employee on the grounds that an employee who received a worker's compensation award is prevented from recovering damages from a co-employee.⁴⁷

The Wyoming Supreme Court Strikes Down Co-employee Immunity

Absolute co-employee immunity continued to be the law in Wyoming until 1974 when the supreme court again dealt with the

36. *Id.*

37. *Id.* at 989.

38. *Id.* at 990.

39. 86 P.2d 1095 (Wyo. 1939). The court also addressed whether worker's compensation is properly awarded for injuries occurring outside the state and whether trucking is interstate commerce and exempt from the Worker's Compensation Act.

40. *Id.* at 1096. Byrne was killed by a drunk driver while acting within the scope of his employment as a truck driver. *Id.*

41. *Id.* at 1100.

42. *Id.* at 1100.

43. *Id.* at 1101.

44. *Id.*

45. *Mills I*, 807 P.2d at 390.

46. 490 P.2d 347 (Wyo. 1971) (mem).

47. *Id.*

issue in *Markle v. Williamson*.⁴⁸ In *Markle*, a negligent employee caused the death of a co-employee while both were acting within the scope of their employment.⁴⁹ The deceased's wife filed an action against both the employer and the negligent employee.⁵⁰ The district court granted the employer's motion for summary judgment finding that the worker's compensation laws precluded a suit against an employer contributing to the worker's compensation fund.⁵¹ However, the trial court denied the negligent employee's motion for summary judgment and the case was tried leading to a verdict in favor of the deceased's wife.⁵²

The negligent co-employee filed an appeal alleging that, under Wyoming's worker's compensation laws, an employee cannot sue a co-employee when both are acting within the scope of their employment.⁵³ The Wyoming Supreme Court affirmed the trial court's judgment and reinstated an employee's common law right to sue a co-employee for ordinary negligence.⁵⁴ The court refused to allow the common law right for one employee to sue another to be destroyed unless expressly done so by statute.⁵⁵ The statute in effect at the time of Markle's death explicitly provided immunity only to employers and did not contain any language granting immunity to co-employees.⁵⁶ Under the statute, if an employee is injured due to the negligence of someone "other than the employer," the employee may pursue his cause of action against the negligent third party.⁵⁷ The court found co-employees to be someone "other than the employer."⁵⁸ Therefore, one employee could sue another for negligent acts committed within the scope of their employment.⁵⁹

Legislative Response

In an attempt to stem the large flow of litigation created by the court's ruling in *Markle*, the Wyoming legislature amended the worker's compensation statute to extend immunity to negligent co-em-

48. 518 P.2d 621 (Wyo. 1974).

49. *Id.* Williamson was killed in an explosion and fire at the Texaco, Inc. Refinery near Casper, Wyoming. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 622.

53. *Id.*

54. *Id.*

55. *Id.* at 623.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 625.

ployees unless they were found "grossly negligent."⁶⁰ However, creative lawyers continued to find many ways around the term "grossly negligent" and into the employer's deep pocket.⁶¹ So the statute was again amended in 1977 to substitute the word "grossly" with the more restrictive "culpable" standard.⁶²

In 1982, *Meyer v. Kendig*⁶³ came before the court attacking the constitutionality of the 1977 statutory amendment. In *Meyer*, an injured truck driver brought an action against her co-employee claiming both ordinary and culpable negligence. Defendants moved to dismiss the claim of ordinary negligence under the amended statute.⁶⁴ The trial court denied the motion and held Wyoming Statute section 27-12-103(a) violated three provisions of the Wyoming Constitution: article 1, section 34;⁶⁵ article 3, section 27;⁶⁶ and article 10, section 4.⁶⁷ These articles provide, respectively, for the uniform operation of laws, prohibit special legislation, and prevent the legislature from limiting the amount of damages recoverable for personal injuries. The case went to trial on the claim of ordinary negligence and the jury entered a verdict of \$330,000 against the negligent co-employee.⁶⁸

On appeal, the Wyoming Supreme Court held Section 27-12-103(a) did not violate article 1, section 34 or article 3, section 27.⁶⁹ These

60. 1975 Wyo. Sess. Laws, Ch. 149 § 1 (amended 1977) provided:

The rights and remedies provided in this act [§§ 27-310 to -388] for an employee and his dependents for injuries incurred in extra hazardous employments are in lieu of all other rights and remedies against any employer making contributions required by this act, or his employees acting within the scope of their employment unless the employees are *grossly* negligent, but do not supersede any rights and remedies available to an employee and his dependents against any other person.

The Wyoming Supreme Court has defined "gross negligence" as "a degree of negligence substantially greater than ordinary negligence, although something short of willful and wanton misconduct." *Moore v. Kondziela*, 405 P.2d 788, 789 (Wyo. 1965).

61. Answer Brief of Amicus Curiae Rocky Mountain Oil and Gas Association, The Wyoming Mining Association, The Wyoming Trucking Association, Inc. and The Associated General Contractors of Wyoming, Inc. In Response to Appellants' Petition for Rehearing at 6, *Mills v. Reynolds II*, 837 P.2d 48 (Wyo. 1992) (No. 89-193).

62. 1977 Wyo. Sess. Laws, Ch. 142, § 1, § 27-12-103(a) (repealed 1986). The Wyoming Supreme Court has defined "culpable negligence" as "willful and serious misconduct." *Brebaugh v. Hales*, 788 P.2d 1128, 1136 (Wyo. 1990). The plaintiff must demonstrate that the tortfeasor intentionally committed an unreasonable act disregarding a known or obvious risk that has a high probability of creating harm. *Id.*

63. 641 P.2d 1235 (Wyo. 1982).

64. *Id.*

65. Wyo. CONST. art. 1, § 34 states: "All laws of a general nature shall have a uniform operation."

66. Wyo. CONST. art. 3, § 27 states in part:

The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: For . . . limitation of civil actions; . . . granting to any corporation, association or individual . . . any special or exclusive privilege, immunity or franchise whatever In all other cases where a general law can be made applicable no special law shall be enacted.

67. *Meyer*, 641 P.2d at 1236.

68. *Mills I*, 807 P.2d at 390.

69. *Meyer*, 641 P.2d at 1240.

provisions of the constitution only mean the statute must be reasonable and "must operate alike upon all persons in the same circumstances."⁷⁰ According to the court, the statute was reasonable in view of its objectives⁷¹ and operated alike on all employees.⁷² In addition, the Wyoming Supreme Court found that section 27-12-103(a) did not violate article 10, section 4 because the statute did not "limit the amount of damages to be recovered," it merely limited the "cause of action available for recovery."⁷³

The court held a "limitation on damages" and a "right to recover" were separate issues and had been treated as separate issues by the framers of the constitution.⁷⁴ Maintaining that the plain language of article 10, section 4 only prohibits laws limiting the "amount of damages,"⁷⁵ the court concluded the statute did not limit damages; rather it merely restricted a right to recover which was not prevented by the constitution.⁷⁶ Finally, the court held section 27-12-103(a) did not violate article 1, section 8,⁷⁷ providing for equal access to the courts.⁷⁸ The court stated, "the fact that the courts are required to be open and to afford justice for injury done does not mean that a party is assured of success in a legal action, or that standards cannot be set for, and limitations placed upon, causes of action . . ."⁷⁹ The Wyoming Supreme Court held the "culpable" standard to be constitutional.

The legislature soon realized that the "culpable" standard had failed to curb the abundance of co-employee litigation.⁸⁰ In 1986, the legislature further amended article 10, section 4 to extend coverage of worker's compensation, at the election of the employer, to all employment.⁸¹ That same year, the legislature codified this provision⁸²

70. *Id.*

71. *Id.* The court listed the objectives as, "harmony among employees, the maintenance of a sound worker's compensation fund, and the overall purpose and philosophy behind the Worker's Compensation Act." *Id.*

72. *Id.*

73. *Id.* at 1239.

74. *Id.*

75. *Id.*

76. *Id.*

77. WYO. CONST. art. 1, § 8 states: "All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may by law direct."

78. *Meyer*, 641 P.2d at 1240.

79. *Id.* at 1241. For a complete discussion of *Meyer v. Kendig*, see Patrick R. Day, Note, 18 LAND & WATER L. REV. 355 (1983).

80. Answer Brief of Amicus Curiae Rocky Mountain Oil and Gas Association, The Wyoming Mining Association, The Wyoming Trucking Association, Inc., and The Associated General Contractors of Wyoming, Inc. In Response to Appellants' Petition for Rehearing at 6, *Mills v. Reynolds II*, 837 P.2d 48 (Wyo. 1992) (No. 89-193).

81. In 1986 the following two sentences were added to WYO. CONST. art. 10, section 4: Subject to conditions specified by law, the legislature may allow employments

and further extended the employer's immunity to co-employees acting within the scope of their employment.⁸³ The legislature had reestablished full co-employee immunity under Wyoming law.⁸⁴

The Wyoming Supreme Court Response

The constitutionality of the statute granting full immunity to co-employees was soon tested in the original *Mills v. Reynolds*.⁸⁵ In that case, the Wyoming Supreme Court upheld the constitutionality of Wyoming Statute Section 27-14-104(a).⁸⁶ The supreme court specifically found that the legislature has the power to eliminate an employee's cause of action against a co-employee.⁸⁷ The court reached its decision by applying and extending the holding in *Meyer v. Kendig*.⁸⁸ The court concluded that the co-employee immunity statute did nothing more than further restrict a cause of action and the legislature has the authority, under *Meyer*, to restrict a cause of action even to the point of complete elimination.⁸⁹

The court additionally rejected the argument that the statute violated employees' due process rights and concepts of fundamental fairness because of the lack of a *quid pro quo* between co-employees.⁹⁰ First, the majority found that co-employee immunity is in the nature of a *quid pro quo*. An employee is giving up his right to sue a co-employee and in exchange is protected against any suit brought against him by a co-employee.⁹¹ Second, the court held even in the absence of a *quid pro quo*, it does not have the authority to substitute its views of fairness for those of the legislature.⁹² The court then dis-

not designated extrahazardous to be covered by the state fund at the option of the employer. To the extent an employer elects to be covered by the state fund and contributes to the fund as required by law, the employer shall enjoy the same immunity as provided for extrahazardous employments.

82. WYO. STAT. § 27-14-108(h) (1991 & Supp. 1992) provides in part:

Any employee not enumerated under this section or not employed in an extrahazardous occupation enumerated under this section may be covered and subject to the provisions of this act and his employment shall be treated as if extrahazardous for purposes of this act, if his employer elects to obtain coverage under this act and makes payments as required by this act. An employer electing coverage may only elect to cover all his employees

83. WYO. STAT. § 27-14-104(a) (1991 & Supp. 1992). See *supra* note 6.

84. *Mills I*, 807 P.2d at 391.

85. *Id.*

86. *Id.* at 392.

87. *Id.*

88. *Id.* at 393. See *supra* text accompanying notes 63-79.

89. *Mills I*, 807 P.2d at 393.

90. *Id.* at 395. Mills acknowledged that the importance of a *quid pro quo* was first recognized in *Zancanelli* as a justification for employer immunity. However, he argued that a *quid pro quo* was lacking between co-employees because the injured worker is deprived of a "fundamental" common law right and gets nothing in return. *Brief of Appellant* at 15-16.

91. *Mills I*, 807 P.2d at 393.

92. *Id.* at 395.

cussed the injured employee's contention that co-employee immunity violated an injured worker's constitutional right of access to the courts.⁹³ The court reiterated its position taken in *Mulls v. Wienbarg*⁹⁴ that the guarantee of access to the court simply means a plaintiff is not delayed or foreclosed from filing and pursuing a claim through the courts.⁹⁵ Lack of a claim or elimination of a cause of action does not deny a party access to the courts.⁹⁶ Access to the courts "does not guarantee a recovery, nor does it demand that a remedy be available. The absence of a right to recover does not equate to a denial of access to the courts."⁹⁷

Finally, the *Mills I* court rejected the argument raised by the injured employee that Wyoming Statute section 27-14-104(a) violated employees' rights to equal protection and the statute acted as "special legislation."⁹⁸ The injured co-employee argued equal protection was violated because immunity was extended only to those employees engaged in extrahazardous employment. The court dismissed this argument because the legislature adopted Wyoming Statute section 27-14-103(g),⁹⁹ which permits all non-hazardous employers to be covered at the option of the employer. Now all employees may receive equal benefit under the act; therefore, the statute did not violate equal protection.¹⁰⁰ The court used the same reasoning to dismiss the "special legislation" claim.¹⁰¹ While this decision appeared to settle the issue of co-employee immunity, the Wyoming Supreme Court decided to rehear the case a few months later.¹⁰²

PRINCIPAL CASE

In *Mills II*, the Wyoming Supreme Court reversed its earlier decision reached in *Mills I*.¹⁰³ A plurality opinion held that the co-employee immunity statute violated equal protection.¹⁰⁴ Justice Cardine concurred in the result; however, he held co-employee immunity was a limitation on damages which is prohibited by article 10, section 4 of the Wyoming Constitution.¹⁰⁵ As a result, the court reversed a

93. *Id.* at 395-6.

94. 212 P.2d 380 (Wyo. 1949).

95. *Mills I*, 807 P.2d at 396.

96. *Id.*

97. *Id.*

98. *Id.* at 397.

99. Now codified as WYO. STAT. § 27-14-108(h) (1991 & Supp. I 1992). See *supra* note 82.

100. *Mills I*, 807 P.2d at 397.

101. *Id.*

102. *Mills II*, 837 P.2d at 48.

103. *Id.*

104. *Id.*

105. *Id.* at 56 (Cardine, J., specially concurring).

decision it had made only months earlier, thereby striking down co-employee immunity. However, the justices striking down the law could not agree on the rationale for doing so.

Justice Macy wrote the plurality opinion in which Justice Urbigkit concurred.¹⁰⁶ The plurality held the statute violated the equal protection provisions of article 1, section 2;¹⁰⁷ article 1, section 3;¹⁰⁸ article 1, section 34;¹⁰⁹ article 3, section 27;¹¹⁰ and article 1, section 8¹¹¹ of the Wyoming Constitution.¹¹² To apply an equal protection analysis, the plurality identified two levels of classification created by the statute.¹¹³ The first class consisted of those people who have suffered or will suffer from the negligent acts of co-workers; the second class consisted of employees involved in extrahazardous employment.¹¹⁴ When legislation has created classifications, those classifications must bear a rational relationship to a legitimate state objective.¹¹⁵ However, if the classifications involve a fundamental right or an inherently suspect class, the court must apply the strict scrutiny test.¹¹⁶

The plurality then examined the statute to determine which level of scrutiny to apply. The classifications identified by the court treated "similarly situated people differently."¹¹⁷ Since these classifications did not involve inherently suspect classes, the court examined the statute to determine whether or not it infringed upon a fundamental right.¹¹⁸ The plurality failed to find a fundamental right it had previously recognized; so the plurality declared the right of access to the courts a fundamental right under article 1, section 8 of the Wyoming Constitution.¹¹⁹ Justice Macy concluded article 1, section 8 implicitly guarantees "meaningful access to the courts" to any injured indi-

106. *Id.* at 48.

107. Wyo. CONST. art. 1, § 2 states: "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."

108. Wyo. CONST. art. 1, § 3, states:

Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

109. *See supra* note 65.

110. *See supra* note 66.

111. *See supra* note 77.

112. Justice Urbigkit had urged this position in his dissent in *Mills I*, 807 P.2d at 398 (Urbigkit, C.J., dissenting).

113. *Mills II*, 837 P.2d at 53.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* A fundamental right is one which the constitution guarantees explicitly or implicitly. *Id.*

119. *Id.* at 54.

vidual.¹²⁰ Upon finding a fundamental right, the court applied the strict scrutiny test.¹²¹

For a statute to pass the strict scrutiny test, it must be supported by a "compelling interest" which cannot be satisfied by less intrusive means.¹²² While Justice Macy recognized the state concerns as legitimate,¹²³ he held these concerns failed to qualify under any previously court-identified compelling interests.¹²⁴ Therefore, the legislature's infringement on the fundamental right of access to the courts was not justified.¹²⁵ The plurality also stated that the statute was not the least intrusive means for accomplishing the articulated objectives.¹²⁶

Justice Cardine filed a special concurrence joined by Justice Urbigkit.¹²⁷ His position in *Mills II* is in direct contradiction to his opinion in *Mills I*.¹²⁸ In *Mills I*, Justice Cardine recognized the power of the legislature to eliminate common law causes of action.¹²⁹ However, in *Mills II*, he contended that article 10, section 4 of the Wyoming Constitution, which prohibits the legislature from limiting the amount of damages recoverable for personal injury, is a direct limitation on the power of the legislature to eliminate a cause of action.¹³⁰ Justice Cardine agreed with the result reached by the plurality; however, he concluded the statute violated only article 10, section 4 and not equal protection. Justice Cardine further disagreed with the plurality's declaration that access to the courts is now a fundamental right.¹³¹

Instead, Justice Cardine looked to the intent of the framers of article 10, section 4. The justice believed the framers were particularly

120. *Id.*

121. *Id.*

122. *Id.*

123. The state concerns were: "(1) the assurance of compensation for injured workers in a timely manner; (2) the elimination of the risk of suits; (3) the promotion of harmony among workers; (4) the maintenance of a financially stable worker's compensation fund; and (5) the prevention of increased insurance costs." *Id.*

124. *Id.* Compelling interests previously identified by the court were: providing effective defense counsel to counter a prosecutor at trial to ensure the integrity of the adversarial system, protecting the welfare of children, punishment of crimes, regulating sexual relations between parties when one party does not consent or lacks the capacity to consent, and preventing conflicts of interest in public employment. *Id.* at 54-55.

125. *Id.* at 55.

126. *Id.*

127. *Id.* at 56 (Cardine, J., concurring specially).

128. Justice Cardine concluded that he was wrong in his vote to affirm in *Mills I* and that "whether being wrong and admitting a mistake is a virtue or a detriment, I leave to debate. For me, it is enough that I do what the law and history tell me is the right thing to do." *Id.* at 56.

129. *Mills I*, 807 P.2d at 398 (Cardine, J., concurring). Justice Cardine stated, "I have no doubt that the legislature can create or eliminate causes of action" and "the constitutional power of the legislature to abolish this cause of action is so clear, it has never been questioned." *Id.*

130. Justice Urbigkit had also urged this position in his dissent in *Mills I*. *Mills I*, 807 P.2d at 398 (Urbigkit, C.J., dissenting).

131. *Mills II*, 837 P.2d at 56 (Cardine, J., specially concurring).

interested in protecting the right of individuals to recover damages for injury caused by the negligence of others.¹³² Justice Cardine also rejected the distinction between "limiting damages" and "restricting a right to recover" as set out in *Meyer*.¹³³ Rather, Justice Cardine stated that the framers clearly wanted to preserve the right of individuals to recover damages and the only way to protect this right is to preserve the cause of action by which damages are recovered.¹³⁴ He also stated that the cause of action is the "vehicle for recovery."¹³⁵ Thus, if a cause of action is eliminated, the amount of damages to be recovered is effectively limited to zero. Justice Cardine concluded this limitation violated article 10, section 4 which prohibits the legislature from limiting the amount of damages recoverable for personal injuries. The framers intent was to provide insurance for the employer, not co-employees.¹³⁶

Justice Urbigkit filed a concurring opinion, reaffirming the arguments he set forth in his *Mills I* dissent.¹³⁷ In addition to the provisions of the Wyoming Constitution cited by Justices Macy and Cardine, Justice Urbigkit found that the statute violated article 1, section 1;¹³⁸ article 1, section 6;¹³⁹ and article 1, section 7.¹⁴⁰ Justice Urbigkit determined that these provisions were violated because, under the statute, the government was arbitrarily exercising its power to deny an injured employee a fundamental right.¹⁴¹ He further asserted that the statute violated article 1, section 22;¹⁴² and article 19, section 7¹⁴³ because it jeopardized labor by denying them the right

132. *Id.* at 57.

133. *Id.* See *supra* text accompanying notes 63-79.

134. *Mills II*, 837 P.2d at 58 (Cardine, J., specially concurring).

135. *Id.*

136. *Id.*

137. *Mills II*, 837 P.2d at 59 (Wyo. 1992) (Urbigkit, J., concurring). In *Mills I*, Justice Urbigkit contended that full co-employee immunity was unconstitutional because it violated art. 10, § 4 and art. 1, § 8. Justice Urbigkit would also have overruled the holding reached in *Meyer v. Kendig*. *Mills I*, 807 P.2d at 398 (Urbigkit, C.J., dissenting).

138. WYO. CONST. art. 1, § 1 states:

All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper.

139. WYO. CONST. art. 1, § 6 states: "No person shall be deprived of life, liberty or property without due process of law."

140. WYO. CONST. art. 1, § 7 states: "Absolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

141. *Mills II*, 837 P.2d at 59 (Urbigkit, J., concurring).

142. WYO. CONST. art. 1, § 22 states in part: "[t]he rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the state."

143. WYO. CONST. art. 19, § 7 states:

It shall be unlawful for any person, company or corporation, to require of its servants or employes as a condition of their employment, or otherwise, any contract or agreement whereby such person, company or corporation shall be released or

to recover damages for their injuries.¹⁴⁴ Justice Urbigkit also found that co-employee immunity violates three principles of Worker's Compensation.¹⁴⁵ Finally, the justice determined that the legislation was arbitrary.¹⁴⁶ All of these factors lead him to the conclusion that co-employee immunity cannot conceivably pass constitutional muster.¹⁴⁷

In his dissenting opinion, Justice Thomas, joined by Justice Golden, reprimanded the court for failing to follow the rule of stare decisis. Justice Thomas stated that this doctrine clearly requires the court to follow its holding reached in *Meyer v. Kendig*, and that the majority blatantly ignored this precedent.¹⁴⁸ Justice Thomas adhered to the position he initially articulated in the majority opinion in *Mills I*.¹⁴⁹ He pointed out the majority lacks any "clear, cogent, and unequivocal" reason for reversing the decision reached in *Mills I*.¹⁵⁰ Justice Thomas found the plurality opinion and the majority's inability to agree on the basis for its decision to be an "institutional failure."¹⁵¹

Justice Golden, joined by Justice Thomas, also filed a dissenting opinion¹⁵² in which he, like Justice Thomas, adhered to the majority opinion articulated in *Mills I*.¹⁵³ Justice Golden believed the majority misunderstood the meaning of article 1, section 8¹⁵⁴ of the Wyoming Constitution. Justice Golden asserted this provision of the constitution is not a limit on lawmakers, and the legislature may abolish or alter common law causes of action as long as the statute does not violate some other provision of the constitution.¹⁵⁵ Therefore, Justice

discharged from liability or responsibility, on account of personal injuries received by such servants or employees, while in the service of such person, company or corporation, by reason of the negligence of such person, company or corporation, or the agents or employees thereof, and such contracts shall be absolutely null and void.

144. *Mills II*, 837 P.2d at 63 (Urbigkit, J., concurring).

145. *Id.* at 63. First, Urbigkit stated that co-employee immunity would lead to an unsafe workplace; second, the statute would deplete the Worker's Compensation fund, leading to its insolvency; third, the injured worker will bear the burden of injuries inflicted by a negligent co-employee. *Id.*

146. *Id.* at 64.

147. *Id.*

148. *Mills II*, 837 P.2d at 64 (Thomas, J., dissenting). Justice Thomas felt the court had a duty to the bench, the bar, and the citizens of Wyoming to reach a majority decision, particularly in cases involving the constitutionality of a statute. *Id.*

149. *Id.* at 65. See *supra* text accompanying notes 86-101.

150. *Mills II*, 837 P.2d at 65 (Thomas, J., dissenting).

151. *Id.*

152. *Mills II*, 837 P.2d at 68 (Golden, J., dissenting).

153. *Id.*

154. See *supra* note 77.

155. *Mills II*, 837 P.2d at 68 (Golden, J., dissenting). Justice Golden undertook an extensive review of similar provisions in constitutions of sister states. In doing so, he found Idaho, South Dakota, Montana and several other states have a constitutional provision similar to article 1, section 8. In those states, the courts have consistently held that this provision does not speak to lawmakers, but to those who attempt to apply the law. *Id.* at 68-69.

Golden contended the legislature has the power to grant co-employees immunity and *Mills I* should not be overruled.

ANALYSIS

The Wyoming Supreme Court created confusion among judges, lawyers, employers, and employees and left them guessing as to the current state of the law. Currently, it is unclear whether the supreme court intended employees to be liable for acts of ordinary negligence or only for acts of culpable negligence; the court did not state what level of immunity was now applicable to co-employees. The Wyoming legislature took a separate and affirmative action in repealing the old "culpable" statute. The legislature then substituted the old law with the statute that extended the coverage of employers' full immunity to include co-employees.¹⁵⁶ The Wyoming Supreme Court has never articulated whether the old law is resurrected or if the state of the law returns to the common law when a statute is declared unconstitutional. The court had these two options available to determine what the current state of the law should be.

In some jurisdictions, when a statute is declared unconstitutional, the statute is considered to be void *ab initio*.¹⁵⁷ This means the statute is completely void from its inception. An early United States Supreme Court case, *Norton v. Shelby County*,¹⁵⁸ dealt with this issue. The Court stated an unconstitutional act is "as inoperative as though it had never been passed."¹⁵⁹ If the Wyoming Supreme Court had applied this principle to their decision in *Mills II*, it would have found that the statute was void from its enactment in 1987. Since the old statute had already been affirmatively repealed then there would be no applicable statute in existence on this point. The standard for co-employee liability, therefore would return to the common law standard of ordinary negligence.

The Wyoming Supreme Court's other alternative was to declare that the law as it existed prior to the unconstitutional statute, was still in effect. Generally, this principle is applied to an amended statute.¹⁶⁰

156. 1986 Wyo. Sess. Laws, ch. 3, § 3.

157. *Huffman v. Dawkins*, 622 S.W.2d 159 (Ark. 1981).

158. 118 U.S. 425 (1886).

159. *Id.* at 442.

160. Thirty-five other states and the United States Supreme Court have long held that when an amended statute is declared unconstitutional, the statute as worded prior to the amendment is reenacted. Annotation, *Previous Statute as Affected by Attempted but Unconstitutional Amendment*, 66 A.L.R. 1483 (1930). Additional cases from other jurisdictions not reported in the annotation include *Clark v. State*, 287 A.2d 660 (Del. 1972); *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952); *State v. Bloss*, 637 P.2d 1117 (Haw. 1981); *State v. Greenburg*, 187 N.W.2d 751 (Neb. 1971); *Clark County by and through Bd. of City Comm'rs v. City of Las Vegas*,

However, in *State v. Wannamaker*,¹⁶¹ the South Carolina Supreme Court held that if a full statute has been declared unconstitutional, the statute does not "affect, modify, or supersede a valid statute . . ." and "the result of holding a statute unconstitutional is to reinstate a prior statute on the same subject which has been replaced."¹⁶² *State v. Reed*,¹⁶³ a South Dakota case, involved a newly enacted statute that had essentially reenacted an entire previous statute, adding a few new provisions and amendments.¹⁶⁴ In declaring the modified statute unconstitutional, the South Dakota Supreme Court held that the law, as it had existed prior to the new provisions and amendments was still in effect.¹⁶⁵

If this principle had been applied in *Mills II*, the Wyoming Supreme Court would have reenacted the statute in effect prior to the unconstitutional statute providing for full co-employee immunity. The prior statute provided immunity for co-employees unless they were culpably negligent. That statute had already passed constitutional scrutiny in *Meyer v. Kendig*,¹⁶⁶ and therefore, should be the current state of the law.

The Wyoming Supreme Court should have applied the rule that if a statute is unconstitutional, the prior version of the statute is still in effect. Throughout the history of co-employee immunity in Wyoming, the legislature has continuously restricted an injured employee's right to recover. It took many years for the legislature to reach the culpable negligence standard. If this standard is not reenacted by the Wyoming Supreme Court, the legislature will be forced to take the same steps it had already taken to protect ordinarily negligent co-employees.

In addition, this action would leave a void between the time of the repeal of the culpable negligence standard in 1987, and the legislature's reenactment of the same standard. During this void, the

by and through Bd. of City Comm'rs, 628 P.2d 1120 (Nev. 1981); *State ex rel. Thornton v. Wannamaker*, 150 S.E.2d 607 (S.C. 1966); *State v. Reed*, 63 N.W.2d 803 (S.D. 1954); *State ex rel. Dieringer v. Bachman*, 48 S.E.2d 420 (W.Va. 1948).

This has been found to be the situation even if the amended act purported to repeal the previous version of the statute. In *State v. Clark*, the North Dakota Supreme Court stated "when legislation that is enacted to repeal, amend or otherwise modify an existing statute, is declared unconstitutional, it is a nullity and cannot affect the existing statute in any manner." *State v. Clark*, 367 N.W.2d 168, 169 (N.D. 1985). Similarly, an early case in New York, *People ex rel. Farrington v. Mersching*, declared that a void amendment could not repeal anything, and the previous act is in full force as if the amendment had never been passed. *People ex rel. Farrington v. Mersching*, 79 N.E. 884, 888 (N.Y. 1907).

161. 150 S.E.2d 607 (S.C. 1966).

162. *Id.* at 610.

163. 63 N.W.2d 803 (S.D. 1954).

164. *Id.* at 804.

165. *Id.*

166. See *supra* text accompanying notes 63-79.

co-employee immunity standard would drop all the way back to an ordinary negligence analysis. The extreme dichotomy created would unjustly punish those employees expecting to be protected for actions of ordinary negligence during this void.

The Impact of the Court's Decision

The court's decision also undermines the purpose of Worker's Compensation. Worker's Compensation statutes were enacted not only to benefit employees, but also to insure employers against large judgments that might be awarded if employees were allowed to sue. However, with the elimination of co-employee immunity, employers are once again facing the possibility of paying out large sums of money to protect their workers.¹⁶⁷ Many employees will now demand their employers provide them with liability insurance as a condition of employment.¹⁶⁸ The employer will be paying double for the immunity it supposedly received from worker's compensation statutes.¹⁶⁹ In addition, employers may be required to indemnify or defend their negligent employees. These increased demands will greatly increase costs for Wyoming employers.¹⁷⁰ If employers refuse these demands then the cost to Wyoming employees will be severe. Every time an employee makes a mistake on the job, he will be vulnerable to a costly lawsuit.

The court's decision will also have serious, non-legal, ramifications. Currently, only ten states, including Wyoming, permit co-employees to sue one another.¹⁷¹ When a business is deciding whether or not to locate in Wyoming, co-employee liability will be one of the factors taken into consideration. The added cost of insurance for its employees will encourage businesses to look at surrounding states such as, Colorado, Nebraska, Utah, Idaho and Montana which provide immunity for businesses and their employees.¹⁷² Employers could achieve substantial savings by relocating in a state that provides them and their employees more protection from lawsuits. It could have a disastrous impact on Wyoming's already fragile economy if employers begin relocating.

While Justice Urbigkit sought to "open the courthouse doors" to injured employees,¹⁷³ the court has effectively opened a floodgate

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

168. *Id.*

169. *Id.*

170. *Id.*

171. 2A LARSON, *supra* note 15, § 72.11 n.13.2. Those states that permit co-employees to sue one another include Alabama, Arkansas, Maryland, Minnesota, Missouri, New Hampshire, Rhode Island, South Dakota, and Vermont. *Id.*

172. *Id.*

173. *Mills I*, 807 P.2d at 399 (Urbigkit, C.J., dissenting).

of litigation that will end up costing employers, employees, and the judicial system a lot of time and money. This, in turn, injures everyone through crowded court dockets, higher costs to employers, and higher prices for the consumer.

CONCLUSION

In *Mills II*, the Wyoming Supreme Court failed to set forth any guidelines for the future of co-employee immunity. The court completely ignored the major question presented by its decision: what is the current state of the law? Regardless of the principle the court chooses, it should have articulated what standard applied when a statute is declared unconstitutional. By failing to set forth the prevailing law, the supreme court has encouraged employees to file suits against their co-employees for acts of mere ordinary negligence. If the Wyoming Supreme Court later determines that the correct standard in these cases is culpable negligence, they created a lot of unnecessary litigation by not articulating this in *Mills II*. Had the court followed the example of many other jurisdictions, it would have found that co-employees should still enjoy immunity in Wyoming for acts of ordinary negligence.

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