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Appeal and Error - The Omnipotent Wyoming Supreme Court: New Allegations and Evidence Will Be Heard for the First Time on Appeal - Boller v. Western Law Associates

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APPEAL AND ERROR—The Omnipotent Wyoming Supreme Court: New Allegations and Evidence Will Be Heard for the First Time on Appeal. *Boller v. Western Law Associates*, 828 P.2d 1184 (Wyo. 1992).

The four members of Western Law Associates, P.C. and John L. Vidakovich (the Association) were lawyers.[1] The Association founded the Yellowstone National Bank, served as the bank's principal officers, managed the bank, and were the bank's attorneys.[2] In 1983 the Association persuaded Lewis Boller and Alice Nicholas to become directors of the Yellowstone National Bank.[3] The Association served as attorneys for Lewis Boller and Alice Nicholas regarding bank matters.[4]

As a result of new federal banking standards, the Federal Deposit Insurance Corporation (F.D.I.C.) closed the Yellowstone National Bank on November 1, 1985.[5] As the appointed receiver of the bank, the F.D.I.C. became responsible for preserving bank property.[6] Three years later, the F.D.I.C. sued Lewis Boller and Alice Nicholas alleging that actions of the directors caused the failure of the bank.[7] Mr. Boller and Alice Nicholas then brought third-party claims against the Association.[8] They asserted that any action of the directors leading to the failure of the bank was a result of negligence by the Association.[9] Specifically, Mr. Boller and Mrs. Nicholas alleged that the Association failed to provide proper legal advice and guidance.[10] The trial judge granted the Association's Wyoming Rules of Civil Procedure 12(b)(6) motion[11] to dismiss for failure to state a claim.[12] No answers had

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1. Board of Professional Responsibility v. Vidakovich, 816 P.2d 885 (Wyo. 1991). The court held that disbarment was an appropriate sanction for an attorney who had been convicted of three felonies, involving misapplication of funds, false entry in bank records and obstruction of justice.

2. Appellant's Petition for Writ of Certiorari to the Wyoming Supreme Court at 3, Boller v. Western Law Associates, 828 P.2d 1184 (Wyo. 1992) (No. 90-84) [hereinafter Petition for Cert.]

3. *Id.*

4. *Id.*

5. Boller v. Western Law Associates, 828 P.2d 1184, 1185 (Wyo. 1992). Petition for Cert., *supra* note 2, at 6.

6. Petition for Cert., *supra* note 2.

7. *Id.* at 3. Because of an indemnification agreement between the directors and the bank, the bank was liable for any damages recovered against Boller and Nicholas. Therefore, the F.D.I.C. as the bank's receiver was essentially suing itself. The case was non-suited.

8. Boller v. Western Law Associates, 828 P.2d 1184, 1185 (Wyo. 1992).

9. *Id.*

10. *Id.*

11. Wyoming Rule of Civil Procedure 12 provides:

(b). . . Every defense, in law or fact to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may

been filed.[13] No evidence was received.[14] There was no trial.[15] Lewis Boller and Alice Nicholas appealed to the Wyoming Supreme Court.[16]

The Wyoming Supreme Court affirmed the lower court's grant of the motion to dismiss the third-party claims for failure to state a claim.[17] However, the decision was not based on a failure to present elements of negligence sufficient to withstand the motion to dismiss. Rather, the court held that based on the statute of limitations for professional malpractice, Wyoming Statutes section 1-3-107, the third-party claims were time barred.[18] The allegation that the statute of limitations had run was raised for the first time on appeal.[19]

The Wyoming Supreme Court's decision in *Boller* destroyed the doctrine forbidding consideration of new allegations and evidence for the first time on appeal. Before the *Boller* decision, the Wyoming Supreme Court did not receive new allegations or new evidence on appeal, unless they went to jurisdiction or other fundamental matters.[20] According to Justice Thomas, hearing the statute of limitations allegation for the first time on appeal and deciding the case based on the new allegation was contrary to precedent that had served the Wyoming Supreme Court and justice in an exemplary fashion for many years.[21]

The new rule allowing allegations to be heard for the first time on appeal has many dangerous aspects. First, this casenote discusses the history of the rule forbidding consideration of new allegations and evidence for the first time on appeal and examines the *Boller*

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at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

W.R.C.P. 12

12. *Boller*, 828 P.2d at 1184.

13. Petition for Cert., *supra* note 2, at 4.

14. *Id.*

15. *Id.*

16. *Boller*, 828 P.2d at 1184 The third-party claims were appealed independent of the underlying action brought by the F.D.I.C. As an independent appeal, the case became *Boller v. Western Law Associates.*

17. *Id.* at 1185.

18. WYO. STAT. §1-3-107 (1988) provides:

(a) A cause of action arising from an act error or omission in the rendering of licensed or certified professional or health care services shall be brought within the greater of the following times: (i) Within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission was: (A) Not reasonably discoverable within a two (2) year period; or (B) That the claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.

19. *Boller*, 828 P.2d at 1186.

20. Esponda v. Esponda, 796 P.2d 799, 802 (Wyo. 1990).

21. Boller v. Western Law Associates, 828 P. 2d 1184, 1188 (Wyo. 1992) (Thomas, J., dissenting).

opinion. Then, the casenote analyzes the dangers created by hearing new allegations on appeal. Finally, this casenote concludes that allowing allegations to be heard for the first time on appeal is incompatible with the current Wyoming judicial system.

BACKGROUND

The principle that new allegations or evidence will not be heard on appeal has a long and uniform history of application in the United States. The principle was derived from the pre-19th century English Common Law practice of review under the writ of error.[22] A writ of error did not continue the suit; rather, it commenced a new suit.[23] Because all questions of fact had been decided by the jury in the initial suit, only questions of law were brought before the reviewing court.[24]

The English Chancery courts handled review differently. Rarely, after a Chancery court had issued a decree, were rehearings allowed. Rehearings were sometimes called appeals.[25] At a rehearing, the Lord Chancellor permitted the parties to present new evidence.[26] From the Lord Chancellor's decree, appeal to the House of Lords was allowed.[27] The Lords did not consider new allegations or evidence.[28]

In the modern American court system, the principle that no new allegations or evidence may be brought on review continues to exist. This principle was originally derived from the English writ of error procedure.[29] Contrary to the distinction in England, both the Common Law courts and the Chancery courts in the States applied this principle.[30] The terms writ of error and appeal were used interchangeably.[31] Writs of error might be heard in the Chancery courts and appeals could be heard in the Common Law courts.[32] Regardless of the name used, both courts followed the writ of error procedure and no new evidence or allegations were allowed.[33]

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22. 5 Am. Jur. 2d *Appeal and Error* § 820 (1970).

23. For an in-depth description of the history of new allegations and proof on appeal, *See* Robert W. Millar, *New Allegation and Proof on Appeal in Anglo-American Civil Procedure*, 47 Nw. U. L. REV. 427 (1952).

24. *Id.* at 428.

25. *Id.* (from BOHUN, CURSUS CANCELLARIAE 403 (2d ed. 1723)).

26. *Id.* at 429 (from 2 J. S. SMITH, PRACTICE OF THE COURT OF CHANCERY *33-*34 (1st Am. ed. 1839 from 2d London ed. 1837); 1 HARRISON, PRACTICE OF THE COURT OF CHANCERY (8th ed. 1796), at 436-438; 2 MADDOCK, PRINCIPLES AND PRACTICE OF THE COURT OF CHANCERY 483 (2d ed. 1820).

27. *Id.* (from 1 HARRISON, PRACTICE OF THE COURT OF CHANCERY, (8th ed. 1796) at 454.

28. *Id.*

29. Roscoe Pound, *Appeal and Error-New Evidence in the Appellate Court*, 56 HARV. L. REV. 1313 (1943).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

Eventually, the American Common Law and Chancery courts merged. With the New York Code of Procedure of 1848, New York consolidated administration of its Common Law courts and Chancery courts.[34] Under the New York Code, review followed the writ of error procedure, but was called an appeal.[35] Other states soon followed New York's lead.[36]

Appeals in state courts are for the purpose of resolving questions of law.[37] For that reason, state courts of review do not receive new allegations or evidence. If new allegations or evidence were allowed, then state courts of review would be assuming the role of the fact finder. A strong tradition of distrust of judges has made the jury the preferred finder of fact and a sacrosanct institution in our legal system.[38]

Traditionally, Wyoming has recognized the role of the jury and has strongly adhered to the principle of not allowing new allegations or evidence on appeal. In the modern era, the Wyoming Supreme Court has embraced this doctrine. In 1931, the Wyoming Supreme Court decided *Ideal Bakery v. Schryver*.[39] In *Ideal*, the plaintiff in error raised the allegation that, in her case, application of the Wyoming Worker's Compensation statute violated the Wyoming and U.S. Constitutions. She raised this issue for the first time on appeal. Justice Riner noted that the court did not have to address the issue at all "under the rule that questions not raised below will not ordinarily be considered."[40]

In a 1945 case, *Gore v. John*,[41] Chief Justice Blume stated the rule exactly, "It is a rule of almost universal application that with the exception of such matter as jurisdiction or other fundamental matters[42] the supreme court will not consider any questions which have not been considered by the district court."[43] Since this pro-

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34. Robert W. Millar, *New Allegation and Proof on Appeal in Anglo-American Civil Procedure*, 47 Nw. U. L. REV. 427, 432 (1952).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. This case was brought when the idea of workers' compensation was new. Workers' compensation statutes across the nation were being challenged as unconstitutional. Because the plaintiff failed to raise the issue of constitutionality in the lower court, she tried to raise it on appeal. Ideal Bakery v. Schryver, 299 P. 284 (Wyo. 1931).

40. *Id.* at 293.

41. Gore v. John, 157 P.2d 552, 556 (Wyo. 1945).

42. *See* 5 Am. Jur. 2d *Appeal and Error* § 655 (1962). What the court appears to mean by fundamental matters is error affecting fundamental rights. Under a liberal view of appellate review, some courts consider it to be within their appellate power to review questions of jurisdiction and fundamental rights, absent an assignment of error. *See* State v. Apodaca, 82 P.2d 641 (N.M. 1938); State v. Stenback, 2 P.2d 1050 (Utah 1931).

43. Gore v. John, 157 P.2d 552, 556 (Wyo. 1945).

nouncement, forty-three other Wyoming Supreme Court opinions have reiterated and maintained this rule of procedure for review.[44]

Recently, the Wyoming Supreme Court has emphatically stated and applied this rule. In *Squaw Mountain Cattle Company v. Bowen*, a 1991 case, Justice Cardine said, "[w]e do not address issues raised for the first time on appeal."[45]

In another 1991 case, *Epple v. Clark*, Justice Golden wrote, "This court has taken a dim view of a litigant trying a case on one theory and appealing it on another. Further, we will not consider for the first time on appeal an issue neither raised nor argued to the trial court."[46]

This rule has been frequently addressed in Wyoming over the last forty-seven years.[47] With the exceptions of jurisdiction and other similar fundamental matters, the Wyoming Supreme Court has consistently refused to consider allegations or evidence for the first time on appeal.[48] Under this rule, the court reserves its efficacy for re-

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44. *See,* Oatts v. Jorgenson, 821 P.2d 108 (Wyo. 1991); Squaw Mountain Cattle Co. v. Bowen, 804 P.2d 1292 (Wyo. 1991); Epple v. Clark, 804 P.2d 678 (Wyo. 1991); Esponda v. Esponda, 796 P.2d 799 (Wyo. 1990); Matter of Estate of McCue, 776 P.2d 742 (Wyo. 1989); Ricci v. New Hampshire Ins. Co., 721 P.2d 1081 (Wyo. 1986); White v. Fisher, 689 P.2d 102 (Wyo. 1984); Dennis v. Dennis, 675 P.2d 265 (Wyo. 1984); Belle Fourche Pipeline Co. v. Elmore Livestock Co., 669 P.2d 505 (Wyo. 1983); Valentine v. Ormsbee Exploration Corp., 665 P.2d 452 (Wyo. 1983); U.S. Aviation, Inc. v. Wyoming Avionics, Inc., 664 P.2d 121 (Wyo. 1983); Matter of Altman's Estate, 650 P.2d 277 (Wyo. 1982); Matter of Parental Rights of PP, 648 P.2d 512 (Wyo. 1982); ABC Builders, Inc. v. Phillips, 632 P.2d 925 (Wyo. 1981); City of Rock Springs v. Police Protection Ass'n, 610 P.2d 975 (Wyo. 1980); Nickelson v. People, 607 P.2d 904 (Wyo. 1980); Matter of State Bank Charter Application of Sec. Bank, Buffalo, 606 P.2d 296 (Wyo. 1980); Scherling v. Kilgore, 599 P.2d 1352 (Wyo. 1979); Schaefer v. Lampert Lumber Co., 591 P.2d 1225 (Wyo. 1979); Roush v. Roush, 589 P.2d 841 (Wyo. 1979); Merritt v. Merritt, 586 P.2d 550 (Wyo. 1978); Minnehoma Financial Co. v. Pauli, 565 P.2d 835 (Wyo. 1977); Zwick v. United Farm Agency, Inc., 556 P.2d 508 (Wyo. 1976); Knudson v. Hilzer, 551 P.2d 680 (Wyo. 1976); Allen v. Allen, 550 P.2d 1137 (Wyo. 1976); Mader v. James, 546 P.2d 190 (Wyo. 1976); Pritchard v. State, Division of Vocational Rehabilitation, Dept. of Health and Social Services, 540 P.2d 523 (Wyo. 1975); Oedekoven v. Oedekoven, 538 P.2d 1292 (Wyo. 1975); Weber v. Johnston Fuel Liners, Inc., 519 P.2d 972 (Wyo. 1974); Karns v. Karns, 511 P.2d 955 (Wyo. 1973); Joly v. Safeway Stores, Inc., 502 P.2d 362 (Wyo. 1972); Guggenmos v. Tom Searl-Frank McCue, Inc., 481 P.2d 48 (Wyo. 1971); Steffens v. Smith, 477 P.2d 119 (Wyo. 1970); Beckle v. Beckle, 452 P.2d 205 (Wyo. 1969); Gerdom v. Gerdom, 444 P.2d 34 (Wyo. 1968); Moore v. Kondziela, 405 P.2d 788 (Wyo. 1965); Matter of Bridger Valley Water Conservancy Dist., 401 P.2d 289 (Wyo. 1965); Thickman v. Schunk, 391 P.2d 939 (Wyo. 1964); Rayburne v. Queen, 76 Wyo. 393, 306 P.2d 367 (Wyo. 1957); Strom v. Felton, 302 P.2d 917 (Wyo. 1956); Application of Northern Utilities Co., 247 P.2d 767 (Wyo. 1952); Gaido v. Tysdal, 235 P.2d 741 (Wyo. 1951); Dulaney v. Jensen, 181 P.2d 605 (Wyo. 1947).

45. Squaw Mountain Cattle Co. v. Bowen, 804 P.2d 1292, 1296 (Wyo. 1991).

46. Epple v. Clark, 804 P.2d 678, 681 (Wyo. 1991).

47. Given the number of cases cited, one is justified in believing that the Wyoming Supreme Court had adopted the rule.

48. *See, e.g.,* Ideal Bakery v. Schryver, 299 P. 284 (Wyo. 1931).

viewing questions of law. The trial court hears allegations, and a jury of one's peers makes findings of fact.[49] Nevertheless, the court ignored these separate and independent roles in *Boller*.

PRINCIPAL CASE

In *Boller v. Western Law Associates*, the Wyoming Supreme Court addressed whether Lewis Boller and Alice Nicholas had failed to state a claim.[50] The trial court found that Boller and Nicholas failed to state a claim for professional malpractice and granted the Association's motion to dismiss.[51] The Wyoming Supreme Court did not address issues relative to presentation of the elements of negligence.[52] Rather, the court found that the statute of limitations barred the claim.[53]

The majority explained when the statute of limitations began to run. The court cited *Mills v. Garlow* for the proposition that "Wyoming is a 'discovery' state, which means the statute of limitations is not triggered until the plaintiff knows *or has reason to know* the existence of the cause of action."[54] The court equated "reason to know" with "reasonably discoverable".[55] Thus, when Boller and Nicholas *actually knew* of the negligent acts was not important.[56] However, when the negligent acts were *reasonably discoverable* was important.[57]

The court found that "due diligence" on the part of Boller and Nicholas would have required an investigation of why the bank was closed.[58] According to the court, if the attorney's negligence had been a factor contributing to the bank's closing, then Boller and Nicholas would have discovered the malpractice upon ascertaining the reasons

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49. 47 Am. Jur. 2d *Jury* § 3 (1962).
50. Boller v. Western Law Associates, 828 P.2d 1184, 1185 (Wyo. 1992).
51. *Id.* at 1184.
52. *Id.* at 1185.
53. *Id.* at 1188.
54. *Id.* at 1185 (quoting Mills v. Garlow, 768 P.2d 554, 555 (Wyo. 1989)(emphasis added).
55. *Id.* at 1186 (Wyo. 1992). The court argued that if an injury becomes reasonably discoverable, then there is reason to know of the injury. However, because an injury is reasonably discoverable does not mean that the injured has any reason to know of the injury. For example, in this case, even if the malpractice was reasonably discoverable within two years of the bank being closed, Lewis Boller and Alice Nicholas did not have any reason to know they had been injured until the F.D.I.C. initiated its suit. By analogy, if a surgical clamp is left inside of a person, then it is reasonably discoverable by an X-ray at any time immediately following the completion of surgery. However, the person may not discover the clamp until the injury manifests itself (through unexplained pain, etc.). This manifestation, triggering the discovery, may occur at a point in time greater than the limitations period after the date of surgery. Under the court's interpretation of the discovery rule, the malpractice action against the surgeon should be barred, because the negligence was discoverable immediately following the surgery.
56. *Id.* at 1185.
57. *Id.*
58. *Id.*

for the bank's closure.[59] Therefore, the majority made a factual determination[60] that the malpractice was reasonably discoverable at the time the bank closed or within a few months thereafter.[61] The court concluded that the statute of limitations was triggered on November 1, 1985, the day the bank closed.[62] Boller and Nicholas filed their claim on August 19, 1989.[63] Therefore, the court determined that the two-year statute of limitations had run.[64]

The majority was not persuaded by Boller and Nicholas' argument that the statute of limitations defense should not be considered, because it was raised for the first time on appeal.[65] The court noted that W.R.C.P. 8 requires that "in pleading to a preceding pleading a party shall set forth affirmatively . . . statute of limitations."[66] Nonetheless, the court held the defense applicable. Although the Association did not affirmatively plead the statute of limitations defense, the court found that the defense appeared on the face of the complaint.[67] The majority employed the antiquated doctrine that if the defense appears on the face of the complaint, then the complaint is subject to a demurrer.[68] The court explained that the doctrine applies to the demurrer's successor, the motion to dismiss for failure to state a claim.[69] Because Boller and Nicholas appealed the lower court's grant of a motion to dismiss, and the court found the statute of limitations defense on the face of the complaint, the court allowed presentation of the statute of limitations issue for the first time on appeal.

Further, the court declared a "practical" reason for addressing the statute of limitations issue. According to the majority, judicial economy dictated addressing the statute of limitations issue.[70] The court hypothesized a scenario where it granted Boller and Lewis leave

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59. *Id.* at 1186.

60. The court resolves a fact question. Fact questions are those issues which concern facts or events and whether such occurred and how they occurred. Fact questions are for the jury. BLACK'S LAW DICTIONARY 593 (6th ed. 1991).

61. Boller v. Western Law Associates, 828 P.2d 1184 (Wyo. 1992).

62. *Id.* at 1185.

63. *Id.* at 1186.

64. *Id.* at 1187. Approximately three years and ten months had elapsed from the date which the court found triggered the statute of limitations and the date the complaint was filed by Boller and Nicholas.

65. *Id.* at 1186. The court also addressed the procedural issue of whether a statute of limitations defense may be considered under a W.R.C.P. 12(b)(6) motion to dismiss for failure to state a claim. The court found that it was appropriate to consider the statute of limitations under W.R.C.P. 12(b)(6).

66. Boller v. Western Law Associates, 828 P.2d 1184, 1186 (Wyo. 1992).

67. *Id.* The court uses the date the bank was closed (November 1, 1985) and the date the complaint was filed (August 9, 1989) to determine that the two-year statue of limitations had run. The dates appear in the complaint or on its face.

68. *Id.*

69. *Id.*

70. *Id.* at 1187.

to amend their complaint or found that the claim withstood the motion to dismiss.[71] Under the hypothetical, the Association would file an answer raising the statute of limitations defense. The trial court would then find for the Association based on this defense.[72] The propriety of the statute of limitations would be an issue raised on a second appeal to the Wyoming Supreme Court.[73] Based on this hypothetical, the court reasoned that it was more efficient to address the statute of limitations issue for the first time on appeal.[74] Upon addressing this issue, the court found that the statute of limitations operated to bar Lewis Boller and Alice Nicholas' attorney malpractice claims.[75]

Justice Thomas, joined by Justice Macy, dissented. Justice Thomas perceived the statute of limitations as a non-issue. He argued that the statute of limitations was an affirmative defense that must be raised in the pleadings.[76] Otherwise, the defense was waived. Because the Association did not plead the defense, they waived it. According to Justice Thomas, Boller and Nicholas could recover even if the period of limitations had expired.[77]

Next, Justice Thomas objected to the majority's decision to hear the statute of limitations issue. He criticized the majority for disregarding the long-standing rule forbidding consideration of issues that are raised for the first time on appeal.[78] Justice Thomas further argued that judicial economy as a policy reason was not strong enough to support an action directly contravening "precedent that has served this court and the interests of justice in an exemplary fashion for many years."[79]

Also, Justice Thomas disagreed with the majority's interpretation of the discovery rule. He stated the same proposition as the majority, "Wyoming is a 'discovery state' which means that the statute of lim-

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71. *Id.* The court does not characterize these future actions as hypothetical. Rather, the court believes the events necessarily will occur. Because the Wyoming Supreme Court cannot know what will happen in the future, this author refers to these future events as hypothetical.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1188.

76. Boller v. Western Law Associates, 828 P. 2d 1184, 1188 (Wyo. 1992) (Thomas, J., dissenting).

77. Justice Thomas would have held that the complaint adequately stated a claim and remanded the case to the trial court. Boller v. Western Law Associates, 828 P. 2d 1184, 1190 (Wyo. 1992) (Thomas, J., dissenting).

78. *Id.* (citing Squaw Mountain Cattle Co. v. Bowen, 804 P.2d 1292 (Wyo. 1991); Epple v. Clark, 804 P.2d 678 (Wyo. 1991); Esponda v. Esponda, 796 P.2d 799 (Wyo. 1990); U.S. Aviation, Inc. v. Wyoming Avionics, Inc., 664 P.2d 121 (Wyo. 1983); Roush v. Roush, 589 P.2d 841 (Wyo. 1979); Thickman v. Schunk, 391 P.2d 939 (Wyo. 1964); Gore v. John, 157 P.2d 552 (Wyo. 1945); Ideal Bakery v. Schryver, 299 P. 284 (1931)).

79. Boller v. Western Law Associates, 828 P. 2d 1184, 1188 (Wyo. 1992) (Thomas, J., dissenting).

itations is not triggered until the plaintiff knows *or has reason to know* the existence of the cause of action."[80] However, Justice Thomas interpreted this language to mean that the statute of limitations is triggered when plaintiffs have an actual reason to know of the injury.[81] The statute of limitations is not triggered because the injury is discoverable. Under this interpretation, and given the lack of evidence, Justice Thomas commented, "Neither the Wyoming Supreme Court nor the trial court, other than by conjecture and assumption, has any real capacity to ascertain whether 'the plaintiff kn[ew] or ha[d] reason to know the existence of the cause of action.'"[82]

Justice Thomas then stated the standard of review for motions to dismiss. The motion can only be sustained when it is clear on the face of the complaint that the plaintiff is not entitled to relief.[83] The facts alleged in the complaint must be taken as true when reviewing the motion.[84] In *Boller*, The complaint alleged that Boller and Nicholas recently discovered the malpractice. Justice Thomas found it possible that discovery of the cause of action might very well have been delayed under the circumstances.[85] He argued that the issue of tolling the statute of limitations could only be resolved on the basis of facts addressed directly to the issue of the statute of limitations.[86] Justice Thomas described the record in this case as devoid of facts addressing the statute of limitations issue.[87]

Finally, Justice Thomas believed that by hearing the statute of limitations allegation for the first time on appeal and rendering a decision based on the allegation, the court wrongfully denied Lewis Boller and Alice Nicholas their day in court.[88] Justice Thomas would have reversed the lower court's decision to grant the motion to dismiss for failure to state a claim and remanded the case for further proceedings in the trial court.[89]

ANALYSIS

In 1945, Chief Justice Blume set down the rule "that with the exception of such matter as jurisdiction or other fundamental matters

80. *Id.* (quoting Mills v. Garlow, 768 P.2d 554, 555 (Wyo. 1989)(emphasis added)).
81. *Id.*
82. *Id.* at 1189.
83. Boller v. Western Law Associates, 828 P.2d 1184, 1188 (Wyo. 1992) (Thomas, J., dissenting) (citing Paravechio v. Memorial Hospital of Laramie County, 742 P.2d 1276 (Wyo. 1987), *cert. denied* 485 U.S. 915 (1988); In re Sullivan's Estate, 506 P.2d 813 (Wyo. 1973)).
84. *Id.*
85. *Id.* at 1190.
86. *Id.* at 1189.
87. *Id.*
88. *Id.* at 1190.
89. *Id.*

the Supreme Court will not consider any questions which have not been considered by the district court."[90] Since 1945, forty-four Wyoming cases followed the rule.[91] The rule was a time-honored tradition of Wyoming appellate procedure. As recently as 1990, Justice Rooney, the author of the *Boller* opinion, stated the principle as, ". . . normally we will not consider matters raised for the first time on appeal unless they go to jurisdiction or are otherwise of a fundamental nature."[92] Nothing indicated that the court would abandon this rule.

Breaking the Rule

In *Boller*, the court allowed a statute of limitations defense to be presented for the first time on appeal.[93] However, the statute of limitations issue did not go to jurisdiction or any other fundamental matter. Thus, the *Boller* decision created a rule allowing new allegations to be raised for the first time on appeal.

The majority cited six cases as authority for hearing the statute of limitations allegation.[94] Of these six cases, three were decided in the previous century and the other three were decided in the early part of this century. If the court believed that reviewing allegations initially raised on appeal was a time-honored Wyoming tradition, then it should have cited modern cases advocating such a principle.[95]

In fact, the cases cited did not support that principle. Instead, the cases established that if a defense appeared on the face of a complaint, then the complaint was subject to a demurrer.[96] This principle was not applicable in *Boller*. First, the statute of limitations defense did not appear on the face of the complaint, because the complaint stated that Boller and Nicholas "recently discovered the negligent conduct."[97] Second, when reviewing the 12(b)(6) motion to dismiss, the facts alleged had to be taken as true.[98] Because of their

90. Gore v. John, 157 P.2d 552, 556 (Wyo. 1945).

91. *See supra* note 44 and Gore v. John, 157 P.2d 552 (Wyo. 1945).

92. Esponda v. Esponda, 796 P.2d 799, 802 (Wyo. 1990).

93. Boller v. Western Law Associates, 828 P. 2d 1184, 1185 (Wyo. 1992). The statute of limitations defense was raised in appellee Runyan's brief.

94. *Boller*, 828 P.2d at 1186, (citing Bonnifield v. Price, 1 Wyo. 172 (1874); Cowhick v. Shingle, 37 P. 689 (Wyo. 1894); Columbia Savings & Loan Association v. Clause, 78 P. 708 (Wyo. 1904); Union Stockyards National Bank of South Omaha, Nebraska v. Maika, 92 P. 619 (Wyo. 1907); Horse Creek Conservation District v. Lincoln Land Company, 92 P.2d 572 (Wyo. 1939); Upton v. McLaughlin, 105 U.S. 640 (1881)).

95. Perhaps the court does not cite any modern cases, because since the 1931 *Ideal Bakery* decision, the court has expressly refused to receive new allegations on appeal.

96. *See infra* note 117.

97. Boller v. Western Law Associates, 828 P. 2d 1184, 1189 (Wyo. 1992) (Thomas, J., dissenting).

98. Paravechio v. Memorial Hospital of Laramie County, 742 P.2d 1276 (Wyo. 1987), *cert. denied* 485 U.S. 915 (1988); *In re* Sullivan's Estate, 506 P.2d 813 (Wyo. 1973).

narrow focus on the appropriate grounds for granting the now obsolete demurrer, these cases cannot justify hearing new allegations on appeal which support or undermine a trial court's decision to grant a motion to dismiss. Nevertheless, the Wyoming Supreme Court did in fact hear the new allegation.[99]

The court addressed the issue and determined that the statute of limitations was a valid defense.[100] The majority based this decision on its factual determination that the negligent acts were reasonably discoverable when the bank closed.[101] However, nothing in the record suggests that Boller and Nicholas could have known of the malpractice at the time the bank closed. In fact, after the bank was closed, the F.D.I.C. refused to share information about its investigation with Boller and Nicholas.[102] Also, the F.D.I.C. would not release bank documents.[103] All of this suggests that until the F.D.I.C. filed its complaint against the bank directors, Lewis Boller and Alice Nicholas could not have known and had no reason to know of the malpractice.[104]

In a further effort to justify the new rule, the court cited judicial economy as a policy reason for allowing new allegations to be raised for the first time on appeal.[105] In the *Boller* case, the court saved time and effort by deciding the case based on the allegations raised on appeal. There was no remand and consequently no trial. There was no second appeal. Substantial court time and taxpayer money were saved.

However, the problems created by hearing new allegations for the first time on appeal and resolving the case based on these allegations outweigh the benefits of saved time and money. First, the court may deny individuals their right to a trial by jury.[106] Second, the only recourse to an unfavorable determination by the Wyoming Supreme Court of an allegation first raised on appeal is an appeal to the United States Supreme Court.[107] Because of the U.S. Supreme

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99. Boller v. Western Law Associates, 828 P. 2d 1184, 1186 (Wyo. 1992).

100. *Id.* at 1188 (Wyo. 1992).

101. *Id.* at 1186.

102. Appellant's Brief on Petition for Rehearing at 6, Boller v. Western Law Associates, 828 P.2d 1184 (Wyo. 1992) (No. 90-84) [hereinafter Petition for Rehearing].

103. *Id.*

104. Furthermore, Lewis Boller and Alice Nicholas had not suffered any injury until the F.D.I.C. filed its suit on August 19, 1989. Lewis Boller and Alice Nicholas' malpractice claim was filed within two years from the date of the injury causing F.D.I.C. suit. "There can be no cause of action until there is injury," Banner v. Town of Dayton, 474 P.2d 300, 302-05 (Wyo. 1970).

105. Boller v. Western Law Associates, 828 P. 2d 1184, 1187 (Wyo. 1992).

106. WYO. CONST., art. 1, § 9. Under the Wyoming Constitution, the right to trial by jury is inviolate. The right to a trial by jury for criminal and civil cases is preserved.

107. U. S. CONST. art. III, § 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under the

Court's jurisdiction,[108] in many cases, there may be no recourse.

Third, the Wyoming Supreme Court like other appellate courts is far removed from the trial courts. Many aspects of the trial determine whether an allegation is true. For example, the credibility of evidence and witnesses supporting the allegation are determined at trial. The Wyoming Supreme Court does not have the benefit of the overall impression of parties and allegations created by a trial.

Fourth, the new rule allows for surprise on appeal. Allegations which the other side is not prepared to effectively rebut will be raised for the first time on appeal. Years of legal reform created liberal discovery rules in order to eliminate surprise at trial.[109] Allowing the element of surprise to be a deciding factor on appeal runs counter to the prevailing legal trend.

Finally, as demonstrated by the *Boller* decision, the new rule is subject to abuse by the court. The rule can be used to protect attorneys and other favored groups or individuals from damaging lawsuits. Yet, the rule can also be used to subject disfavored individuals to new damaging allegations. It should also be noted that the new rule may not further judicial economy at all. Assuredly, the number of cases appealed will increase when practitioners realize that new allegations may be raised on appeal.

Trial by Jury

Of the problems resulting from allowing new allegations to be heard for the first time on appeal, the most socially significant and legally troublesome issue is the denial of trial by jury. Preservation of the right to trial by jury was one benefit of the old rule.[110] Prior to the court's decision, new issues or allegations would not be heard on appeal, unless they went to jurisdiction or similar fundamental matters.[111] Absent these special circumstances, the Wyoming Supreme Court did not hear new allegations for the first time on appeal. There-

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Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -to all Cases of Ambassadors, other public Ministers and Consuls; -to all Cases of admiralty and maritime Jurisdiction; -to Controversies between two or more States; between a State and Citizens of another State; -between Citizens of different States; -between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens of Subjects . . . .

108. *Id.*

109. *Developments in the Law-Discovery*, 74 HARV. L. REV. 940 (1961).

110. Statutes which have attempted to grant courts of review the power to hear new allegations and evidence on appeal have been stricken as violating the right to trial by jury. The Wyoming Constitution preserves the right to trial by jury. Robert W. Millar, *New Allegation and Proof on Appeal in Anglo-American Civil Procedure*, 47 NW. U. L. REV. 427, 435 (1952).

111. Oatts v. Jorgenson, 821 P.2d 108 (Wyo. 1991); Squaw Mountain Cattle Co. v. Bowen, 804 P.2d 1292 (Wyo. 1991); Epple v. Clark, 804 P.2d 678 (Wyo. 1991).

fore, new allegations which necessarily turn on issues of fact were never heard. Determining issues of fact is the unique province of the jury.[112] Under the new rule, allegations which turn on issues of fact can be received and decided by the Wyoming Supreme Court. In *Boller*, the court circumvented the jury and imposed its own factual determinations.[113]

The court stated, "The fact of discovery is not determinative . . . . The question is whether or not the acts, errors, and omissions were 'reasonably discoverable within a two (2) year period' and whether or not 'due diligence' was exercised by appellants to discover the acts, errors or omissions within the two year period."[114] Whether the malpractice was "reasonably discoverable" and whether "due diligence" was exercised were questions of fact.[115] Questions of fact should have been determined by a jury.[116]

However, the court concluded, "If the closure was a result of appellees' negligence . . . such was definitely *reasonably discoverable* at the time of the closure . . . ."[117] The factual issue of when the malpractice was "reasonably discoverable" was never tried before a jury. By determining that the malpractice was discoverable at the time of the bank's closure, the Wyoming Supreme Court denied Boller and Nicholas their right to have a jury as finder of fact for the issue of when the malpractice was discoverable.[118]

Also, the Wyoming Supreme Court denied Boller and Nicholas their right to have a jury resolve the issue of "due diligence". The court declared, "When the bank was closed on November 1, 1985, 'due diligence' on the part of appellants would certainly require a determination as to the reason for the closure . . . ."[119] Nothing in the record demonstrated that Boller and Nicholas were less than diligent in attempting to determine the reasons for the closure of the bank.

No evidence on these two issues was presented to the court. The court's determination that with "due diligence" Boller and Nicholas would have "reasonably discovered" the Association's malpractice is a conclusion with which reasonable men may differ. If the conclusion was apparent, then Justice Thomas would not have believed that

112. 47 AM. JUR. 2d *Jury* § 3 (1962).
113. Boller v. Western Law Associates, 828 P.2d 1184, 1186 (Wyo. 1992).
114. *Id.* at 1185.
115. Fact questions are those issues which concern facts or events and whether such occurred and how they occurred. Fact questions are for the jury. BLACK'S LAW DICTIONARY 593 (6th ed. 1991).
116. 47 AM. JUR. 2d *Jury* § 3 (1962).
117. Boller v. Western Law Associates, 828 P.2d 1184, 1186 (Wyo. 1992).
118. WYO. CONST. of 1990, art. 1, § 9.
119. Boller v. Western Law Associates, 828 P.2d 1184, 1185 (Wyo. 1992).

"[d]iscovery of the cause of action might very well have been delayed under the circumstances."[120] Arguably, by making dispositive findings of fact, the Wyoming Supreme Court denied Lewis Boller and Alice Nicholas their right to a trial by jury.[121]

As a result, the court violated the Wyoming Constitution. Article I, § 9 of the Wyoming Constitution guarantees the right of trial by jury. The right to a jury trial is inviolate in criminal cases. In a civil case, a trial by jury is guaranteed, but must be demanded pursuant to Rules 38 and 5(d) of the Wyoming Rules of Civil Procedure. Lewis Boller and Alice Nicholas met this requirement. Therefore, they were guaranteed a jury trial. Nevertheless, in *Boller*, the Wyoming Supreme Court, in resolving the new issues and allegations, made findings of fact which should have been decided by a jury. The failure of the court to remand the case for further findings of fact denied Boller and Lewis their right to a trial by jury as guaranteed by the Wyoming Constitution.[122]

The great majority of states have determined that hearing new allegations and evidence on appeal violates state constitutional provisions for jury trial in civil cases.[123] Furthermore, allowing an appellate court to hear new allegations and evidence on appeal generally extends the court's jurisdiction beyond the limits contemplated in a state's constitution. For example, a North Carolina statute authorized the North Carolina Supreme Court to direct and take new testimony for any case pending in the court.[124] Notwithstanding the mandate of the statute, the North Carolina Supreme Court realized it could not hear new evidence or determine questions of fact.[125] The North Carolina Supreme Court simply had appellate jurisdiction.[126] The trial

120. Boller v. Western Law Associates, 828 P.2d 1184, 1190 (Wyo. 1992) (Thomas, J., dissenting).

121. WYO. CONST., art. 1, § 9.

122. The new rule allowing the Wyoming Supreme Court to hear new allegations for the first time on appeal raises a more subtle Federal Constitutional question. The Sixth Amendment to the U.S. Constitution preserves the right to trial by jury in criminal cases. The right to trial by jury in criminal cases has been incorporated through the Fourteenth Amendment to apply to the States. In *Boller*, the Wyoming Supreme Court did not expressly limit its power under the new rule to civil cases. The *Boller* decision does not suggest that the Wyoming Supreme Court would be less inclined to apply the new rule in a criminal case. In a criminal case, allowing new allegations which are based on issues of fact to be heard for the first time on appeal would be a violation of due process under the Fourteenth Amendment as a violation of the incorporated Sixth Amendment right to trial by jury in criminal cases.

Because *Boller* is a civil case, the Sixth Amendment right to trial by jury does not apply. The Seventh Amendment of the U.S. Constitution does guarantee the right to trial by jury in federal civil cases. The U.S. Supreme Court does not see the right to a trial by jury in civil cases as a fundamental right. Therefore, the U.S. Supreme Court has not seen fit to incorporate this provision through the Fourteenth Amendment and make it applicable to the states.

123. Robert W. Millar, *New Allegation and Proof on Appeal in Anglo-American Civil Procedure*, 47 NW. U. L. REV. 427, 435 (1952).

124. N.C. CODE § 965 (1883); N.C. GEN. STAT. § 7-13 (1943).

125. Bank of New Hanover v. Blossom, 89 N.C. 341 (N.C. 1883).

126. *Id.*

courts alone had original jurisdiction and the power to receive evidence and determine questions of fact.[127]

No statute in Wyoming specifically empowers the Wyoming Supreme Court to hear new allegations or make findings of fact. The taking of this power by the court is less justifiable than if the power were provided by statute. At least, a statutory provision is the mandate of the people. However, even if such a statute did exist, it would violate the right, guaranteed in Wyoming, of jury trial in civil cases and would likely be an unconstitutional extension of the Wyoming Supreme Court's jurisdiction.[128] Accordingly, the independent action by the court granting itself authority to hear new allegations and make findings of fact on appeal is equally a violation of these constitutional provisions.[129]

The Players

Because of the ominous ramifications, the makeup of the *Boller* court is an interesting aspect of the decision. Because Justices Urbigkit and Golden recused themselves, the majority is made up of retired Justices,[130] Raper and Rooney, and Justice Cardine.[131] The dissent is made up of Justices Thomas and Macy.[132] From what may be divined from Justice Urbigkit[133] and Justice Golden's[134] previous opinions, there is a strong indication that if they had heard the case, then they would have joined Justices Thomas and Macy, leaving Justice Cardine

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127. *Id.*

128. WYO. CONST., art. 1, § 9; art. 5, § 2.

129. Goodman v. State, 644 P.2d 1240 (Wyo. 1982). The Wyoming Supreme Court determined that it cannot supersede the right to a jury trial through exercise of its rule-making power. Arguably, the court should not be able to supersede the right to a jury trial through its appellate power.

130. INT. OPER. PROC. SUP. CT. 1(b)(v).

> Under this rule, the Chief Justice appoints members of the judiciary to sit in place of any justice who is disqualified or unable for any other reason to sit on any case. At the time *Boller* was heard, Justice Urbigkit was Chief Justice. It is unclear from the rule and the opinion how justices Raper and Rooney were selected. Perhaps Chief Justice Urbigkit selected these justices or perhaps justice Thomas as the senior justice sitting for the case selected them. It is also interesting to note that the attorneys arguing the case were not notified of the substitutions. The rules for the Internal Operating Procedure of the Supreme Court do not provide for notifying the attorneys arguing the case of justice substitution. Further, in *Boller*, Justices Golden and Urbigkit did not explain why they recused themselves. The rules for the Internal Operating Procedure of the Supreme Court do not require a justice who has recused himself to state his reasons for recusal.

Id.

131. Boller v. Western Law Associates, 828 P.2d 1184, 1184 (Wyo. 1992).

132. *Id.*

133. *See* Brooks v. Zebre, 792 P.2d 196, 203 (Wyo. 1990). Justice Urbigkit's dissent in *Zebre* demonstrates a justifiable intolerance for protecting attorneys from malpractice claims.

134. *See* Epple v. Clark, 804 P.2d 678, 681 (Wyo. 1991). Justice Golden has shown strong support for the principle that new allegations or evidence will not be heard for the first time on appeal.

as a lone dissenter. Thus, the *Boller* decision raises the specter of whether the decision of the retired justices will be honored as *stare decisis*.

Given the precedent[135] and the contrasting view of Justice Golden,[136] the principle that new allegations and evidence will not be heard for the first time on review will likely be restored as soon as possible. Although reinstating the principle would be just, this sort of action is foreboding. If the Wyoming Supreme Court does reinstate the principle that new allegations and evidence will not be heard for the first time on review, then *stare decisis* has diminished value in Wyoming. Retired justices can create new precedent destroying past precedent. Upon their return, sitting justices can overturn the decisions of the retired justices. This lack of consistency hurts the credibility of the court and can only lead to bewilderment for attorneys.

Shaping the New Rule

In the end, if the Wyoming Supreme Court honors *stare decisis* and is determined to allow new allegations on appeal, then certain rules should apply. For example, under the modern British system, the British Court of Appeal has the power to hear new evidence in support of or against new claims.[137] In cases such as *Boller*, where the validity of a new allegation rests on issues of fact, the Wyoming Supreme Court should take evidence from both sides before reaching its decision.

Perhaps, limitations on when the court will hear new allegations could be imposed. For instance, new allegations raised for the first time on appeal as a result of lack of diligence in the lower court should not be heard.[138] With this limitation to the rule, the court in *Boller* could not have heard the statute of limitations defense for the first time on appeal. Because the statute of limitations must be pled affirmatively in the first responsive pleading, the attorneys for the Association were not diligent in raising the defense. In order for the rule allowing new allegations to be heard for the first time on appeal to be applied justly, a system of review different in many aspects from the traditional American appeals process would have to be adopted. Standing alone, the new rule does not fit into Wyoming's traditional American system of review.

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135. *See supra* note 44 and Gore v. John, 157 P.2d, 552 (Wyo. 1945).

136. *See supra* note 134.

137. 38 & 39 VICT. c. 77, First Schedule, Ord. 58, r. 4.

138. Robert W. Millar, *New Allegation and Proof on Appeal in Anglo-American Civil Procedure*, 47 NW. U. L. REV. 427, 431 (1952). *See* Nash v. Rochford Rural Council, 1 K.B. 393 (1917). This is the rule followed by the Court of Appeal in England.

CONCLUSION

The Wyoming Supreme Court created a new rule for judicial review. The court can now hear new allegations raised for the first time on appeal. In *Boller*, the Wyoming Supreme Court blurred the clearly defined rule of judicial review that new allegations will not be heard for the first time on appeal.

Hearing new allegations for the first time on appeal is usually dangerous. Basing a decision on new allegations raised on appeal denies litigants their right to a trial by jury. Further, allowing parties to raise new allegations for the first time on appeal reintroduces an element of surprise to litigation. Failure to predict and prepare for the allegations that might be raised on appeal could cost a litigant the case. The increased attorney's fees that accompany increased preparation for the appeal will increase the financial costs. Perhaps more significantly, there is now a greater incentive to appeal, because litigants may try a case on one theory and appeal it on another.

In *Boller*, the court does not give a clear and definite rule for when new allegations will be heard on appeal. The court does not explain why it chose to break with precedent and hear the Association's allegation that the statute of limitations had run. The court just goes ahead and hears the new allegation and then decides the case based on the allegation. In Wyoming, judicial review is no longer confined to issues raised in the lower court, but instead new allegations may be heard on appeal for the first time. The new power of the court to hear new allegations raised on appeal is too broad for the current American judicial system. The new power is unfair to litigants. The new power has been abused in *Boller* and is prone to abuse in the future.

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