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The Availability of Indemnity in Tort Actions Involving the Wyoming Comparative Negligence Statute - Multiple Parties Cause Multiple Problems

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The Availability of Indemnity In Tort Actions Involving The Wyoming Comparative Negligence Statute—Multiple Parties Cause Multiple Problems

While settlements and indemnity have been a part of Wyoming tort law for many years, the Wyoming Comparative Negligence Statute is relatively new.[1] The adoption of comparative negligence in Wyoming is important, in part, because comparative negligence has redefined the roles that settlements and indemnity play in Wyoming tort law. This is particularly true in tort actions involving many defendants who are possibly liable for a plaintiff's injuries.

This comment reviews the history of tort law in Wyoming in actions involving multiple parties. The comment will discuss the adoption of comparative negligence in Wyoming and its effect on the liability among possible defendants in a tort action. The availability of indemnity under the Wyoming Comparative Negligence Statute will also be discussed. The comment will conclude that recent Wyoming Supreme Court decisions in this area have had a negative impact on settlements in actions involving multiple defendants. Finally, this comment will look at other states' analyses of these issues and will suggest a path that Wyoming should follow that will best serve the policies of Wyoming tort law.

I. The History of Tort Law in Wyoming

A. Wyoming's Adoption of Comparative Negligence in 1973

Before its adoption of comparative negligence in 1973, Wyoming followed the common law doctrine of contributory negligence.[2] Contributory negligence barred a plaintiff's claim if the plaintiff's injuries were due in any part to the negligence of the plaintiff.[3] However, the Wyoming Legislature recognized an inherent unfairness in the contributory negligence doctrine which allowed only a completely faultless

1. *See* discussion *infra* part I.
2. Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561, 567 (Wyo. 1992).
3. *Id.*

plaintiff to recover.[4] Therefore, in 1973, the Wyoming Legislature adopted the predecessor to the current comparative negligence statute.[5] The 1973 statute allowed a plaintiff to recover as long as the plaintiff's negligence "was not as great as the negligence of the party against whom recovery was sought."[6] If the plaintiff's negligence was less than the negligence of the party against whom recovery was sought, the amount the plaintiff was entitled to receive was reduced by the plaintiff's percentage of negligence.[7]

The Wyoming legislature's adoption of comparative negligence in 1973 brought with it a corresponding right of contribution among joint tortfeasors.[8] It is important that the right of contribution be distinguished from the right of indemnity. Contribution allows a tortfeasor who has discharged the liability of other tortfeasors to recover the proportionate share of damages from the other tortfeasors.[9] Indemnity, on the other hand, requires one tortfeasor to fully reimburse another tortfeasor who has discharged a liability.[10] While contribution among joint tortfeasors was not recognized under common law in Wyoming,[11] the 1973 legislative changes allowed a defendant who had paid more than his percentage of liability to recover from the other defendants who were found guilty of negligence.[12]

B. The 1986 Amendments to the Wyoming Comparative Negligence Statute

In 1986, the Wyoming Legislature amended its comparative negligence statute.[13] The amendments changed tort law in Wyoming in several significant ways: (1) modification of comparative negligence

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4. *Id.* at 567. *See also* Board of County Comm'rs of County of Campbell v. Ridenour, 623 P.2d 1174, 1179-80 (Wyo. 1981).

5. *Schneider*, 843 P.2d at 567.

6. *Id.* at 568 (quoting 1973 Wyo. Sess. Laws ch. 28) (codified at WYO. STAT. § 1-7.2 (1975)) (amended 1986).

7. *Schneider*, 843 P.2d at 568. *See also* Kirby Bldg. Sys. v. Mineral Explorations Co., 704 P.2d 1266, 1273 (Wyo. 1985).

8. *Schneider*, 843 P.2d at 568. The term "joint tortfeasor" has been used in Wyoming to describe the situation where one or more actors are jointly and severally liable in tort for the same injury to person or property. *Id.* For a discussion of joint and severally liability among tortfeasors, *see* discussion *infra* part I.B.2.

9. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 51, at 341 (5th ed. 1984).

10. *Id.*

11. *See* Convoy Co. v. Dana, 359 P.2d 885 (Wyo. 1961).

12. *Schneider*, 843 P.2d at 568.

13. *Id.* at 569.

principles; (2) elimination of joint and several liability; and (3) elimination of contribution among tortfeasors.

1. Modification of Comparative Negligence Principles

The 1986 amendments to the Wyoming Comparative Negligence Statute allow a plaintiff to recover from a defendant as long as the plaintiff is not more than 50% at fault.[14] Under the 1973 version of the statute, a plaintiff could not recover from a defendant unless the plaintiff's negligence was less than the defendant from whom recovery was sought.[15] Now, a plaintiff who is 50% at fault may recover from a defendant who is also 50% at fault.[16]

The amendments also expand a plaintiff's ability to sue multiple defendants when the plaintiff is partially at fault.[17] Under the 1973 version of the comparative negligence statute, the plaintiff could only recover from a defendant if the plaintiff's percentage of negligence was less than the *individual* defendant's percentage of negligence.[18] However, under the 1986 amendments, "the fault of the plaintiff is compared to the *total* fault of all tortfeasors."[19] Therefore, a plaintiff who is 10% at fault may recover from a defendant who is only 5% at fault, since the plaintiff's percentage of fault is less than 50% of the total.[20]

2. Elimination of Joint and Several Liability

Another change contained in the 1986 amendments is a comparative fault provision that limits a defendant's individual damage liability to a proportion of damages "in the percentage of the amount of fault" attributed to him.[21] The adoption of comparative fault principles in Wyoming eliminated the harsh results of joint and several liability.[22] Joint and several liability allowed a plaintiff to sue one or more tortfeasors together or separately, whichever the plaintiff chose to

14. *Id. See also* WYO STAT. § 1-1-109(a) (1988).

15. *See supra* note 6 and accompanying text.

16. *Schneider*, 843 P.2d at 569.

17. *See* Greg Greenlee & Ann M. Rochelle, *Comparative Negligence and Strict Tort Liability—The Marriage Revisited*, 22 LAND & WATER L. REV. 455, 469 (1987).

18. *Id.*

19. *Id.*

20. *Id.* at 469-70.

21. WYO STAT. § 1-1-109(d) (1988). *See also* Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561, 569 (Wyo. 1992).

22. *See* Greenlee & Rochelle, *supra* note 17, at 468.

do.[23] This made each defendant liable for the entire amount of damages.[24] Conversely, comparative fault principles make each defendant liable for only his percentage of fault, and not for the entire amount of damages.[25]

3. Elimination of Contribution

The adoption of comparative fault principles in Wyoming eliminated the right of contribution among tortfeasors.[26]Contribution was no longer necessary because each actor was responsible only for the percentage of damages attributable to that actor.[27] Put another way, "[b]ecause a less than 100% at fault defendant is no longer liable to the plaintiff for the entire amount of the judgment, as he was under the joint and several liability doctrine, there should be no need for the doctrine of contribution."[28]

C. The History of Indemnity in Wyoming

1. General Indemnity Principles

The principle of indemnity was first accepted in Wyoming in *Miller v. New York Oil Co.*[29] The plaintiff in *Miller* was the landlord of an apartment building who was found guilty of negligence in connection with the death of one of his tenants.[30] The tenant died from asphyxiation due to carbon dioxide produced by a clogged water heater.[31] The Wyoming Supreme Court affirmed the judgment of the trial court granting plaintiff's claim for indemnity against New York Oil, the company that installed the water heater.[32]

The foundation for indemnity lies in the theory that no person should be unjustly enriched at the expense of another person.[33] Therefore, indemnity acts to reimburse a person who has paid more than his

23. Kirby Bldg. Sys. v. Mineral Explorations Co., 704 P.2d 1266, 1273 (Wyo. 1985).
24. Greenlee & Rochelle, *supra* note 17, at 469.
25. *Id.*
26. Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561, 569-70 (Wyo. 1992).
27. *Id.* at 570.
28. Greenlee & Rochelle, *supra* note 17, at 470.
29. 243 P. 118 (Wyo. 1926).
30. *Id.* at 119.
31. *Id.*
32. *Id.* at 123.
33. Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561, 571 (Wyo. 1992). *See also* RESTATEMENT OF RESTITUTION § 1 (1937).

fair share of the damages suffered by a plaintiff. As the Restatement of Restitution states:

> A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct.[34]

Indemnity requires the existence of an independent relationship between the person seeking indemnity, the "indemnitee," and the person against whom indemnity is sought, the "indemnitor."[35] In *Richardson Associates v. Lincoln-Devore, Inc.*,[36] the Wyoming Supreme Court announced three kinds of indemnity actions which establish the relationship and duties of the parties. "Express indemnity" has its source in the specific language of a contract.[37] "Implied contractual indemnity" is derived from the relationship, either contractual or legal, that is implied between the parties.[38] "Equitable implied indemnity" is created either by contractual language not expressly dealing with indemnity or by equitable consideration within the particular case.[39]

2. Indemnity and Comparative Negligence

When the Wyoming Legislature passed the 1973 version of the Wyoming Comparative Negligence Statute, it expressly provided that indemnity was to be retained.[40] The right of indemnity also survived

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34. *Schneider*, 843 P.2d at 572 (quoting RESTATEMENT OF RESTITUTION, *supra* note 33, § 76).

35. *Id. See also* Frazer v. A.F. Munsterman, Inc., 527 N.E.2d 1248, 1251 (Ill. 1988); National Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc., 784 P.2d 52, 54-55 (Okla. 1989).

36. 806 P.2d 790 (Wyo. 1991).

37. *Id.* at 811. Express indemnity can only arise by a contractual agreement where one party expressly agrees to accept the liabilities of another party, and a strict construction rule is imposed on these types of agreements. *See id.* at 811-12.

38. *Id.* at 812. *See* Nomellini Constr. Co. v. Harris, 77 Cal. Rptr. 361, 364 (Cal. Ct. App. 1969) (quoting 42 C.J.S. *Indemnity* § 20, at 594 (1944), for the proposition that indemnity may grow from a liability imposed by law). Implied contractual indemnity requires the existence of a contractual relationship between the parties from which a duty of one party to accept the liabilities of another party can be implied. *Richardson Assocs.*, 806 P.2d at 812.

39. *Richardson Assocs.*, 806 P.2d at 813. *See also* E.L. White, Inc. v. City of Huntington Beach, 579 P.2d 505, 510 (Cal. 1978). In claims for equitable implied indemnity, courts will look at the relationship of the parties to determine if one party agreed to accept the liabilities of another party. *Richardson Assocs.*, 806 P.2d at 812-13.

40. Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561, 568 (Wyo. 1992). *See also* WYO. STAT. § 1-7.4 (1975) (amended 1977) (repealed 1986).

the 1977 legislative amendments to the contribution statute which further sought to distinguish indemnity from contribution.[41] However, with the adoption of comparative fault principles in 1986, the availability of indemnity was made less clear.[42]

The Wyoming Supreme Court, in *Schneider National, Inc. v. Holland Hitch Co.*,[43] was confronted with the question of whether or not the right of indemnity survived the adoption of comparative fault principles in Wyoming. The court first noted that the right of indemnity arose from the common law, while the right of contribution was the result of legislation.[44] As a result, indemnity and contribution represented "mutually exclusive remedies."[45] Because of their differences, the court held that the statutory repeal of contribution could have no effect on the common law right of indemnity.[46]

II. THE PRESENT AVAILABILITY OF INDEMNITY IN WYOMING

The *Schneider* court recognized that indemnity survived the adoption of comparative fault principles in Wyoming. But the Wyoming Supreme Court in *Schneider* went further:

> [I]n holding that a right to indemnity is preserved, we are not saying that the right exists in the same form as it did prior to the adoption of comparative negligence and particularly comparative fault. Our remaining task is to define the present availability of indemnity.[47]

A brief review of the facts in *Schneider* is helpful in understanding the court's holding. The plaintiff in *Schneider*, Horowitz, sued Schneider National, Inc. (Schneider), after one of Schneider's trailers

41. *Schneider*, 843 P.2d at 569. *See also* Cities Service Co. v. Northern Production Co., 705 P.2d 321 (Wyo. 1985). The 1977 legislative amendments assigned new numbers to the comparative negligence statute and also inserted a provision stating that the jury was to be informed of the "consequences of its determination of the percentage of negligence." *Schneider*, 843 P.2d at 568 (quoting WYO. STAT. § 1-1-109(b)(iii) (1977)) (amended 1986). The 1977 legislative amendments to the contribution provisions renumbered the provisions, defined when a joint tortfeasor relationship existed, and also contained additional language to distinguish indemnity from contribution. *Schneider*, 843 P.2d at 568-69.

42. *Schneider*, 843 P.2d at 570.

43. 843 P.2d 561 (Wyo. 1992).

44. *Id.* at 570.

45. *Id.* at 571.

46. *Id.*

47. *Id.*

separated from its tractor while traveling through a road construction site.[48] The trailer veered into the oncoming lane of traffic and struck a vehicle carrying the Horowitz family, killing three of the four occupants of the vehicle.[49] Schneider responded by filing a third-party complaint against Holland Hitch Company (Holland), the manufacturer of the trailer hitch, and Rissler & McMurray Company (Rissler), the contractor supervising the construction on Interstate 80 at the time of the accident.[50]

The United States District Court for the District of Wyoming dismissed Schneider's third-party action against Holland and Rissler.[51] The district court concluded that the indemnity sought by Schneider was inappropriate since Schneider could only be held liable for its share of fault under Wyoming's current comparative negligence statute, and thus no need for indemnity would exist.[52]

The district court's decision was based on the assumption that the liability of each defendant would be determined at trial.[53] However, Horowitz and Schneider settled before the case went to trial, and Holland and Rissler did not participate in the settlement since the action against them had been dismissed; therefore, the fault or liability of all of the parties was never judicially determined.[54]

The United States District Court dismissed the wrongful death action after the settlement.[55] Schneider then filed an appeal of the district court's dismissal of its third-party complaint against Holland and Rissler.[56] In response, the United States Court of Appeals for the 10th Circuit certified several questions to the Wyoming Supreme Court.[57] Certified question "C" to the Wyoming Supreme Court asked:

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48. *Id.* at 563. Schneider National, Inc., was the parent corporation of four other business entities that together operated an interstate trucking firm. *Id.* at 563 n.1.

49. *Id.*

50. *Id.* at 564. Schneider denied it was negligent, but pled in the alternative that any negligence found on its part was "secondary and/or passive" and that any negligence on the part of Holland and Rissler was "primary and/or active." *Id.* Schneider sought indemnity from Holland and Rissler for any amount that Schneider had to pay to Horowitz. *Id.* In the event that indemnity was denied, Schneider pled that the negligence, fault, and/or liability of Holland and Rissler should be determined pursuant to the laws of Wyoming because Holland and Rissler were the sole and direct proximate cause of the accident. *Id.*

51. *Id.*

52. *Id.* at 564-65.

53. *Id.* at 565.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* The questions were certified to the Wyoming Supreme Court pursuant to the Wyoming statute which reads:

i. Does Wyoming law permit a "passively" or "secondarily" negligent[58] actor whose failure to inspect contributed to a third party's injuries to obtain indemnity from the "actively" or "primarily" negligent actors who created or were otherwise directly responsible for the conditions that caused the third party's injuries?

ii. Does Wyoming law grant either "actively" or "passively" negligent actors a right of indemnity against another actor who was liable for the third party's injuries on strict liability or breach of warranty grounds?[59]

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

WYO. STAT. § 1-13-106 (1988).

58. The Wyoming Supreme Court stated that "passive negligence, for purposes of indemnity, consist[s] of the failure, of the party seeking indemnity, 'to discover or prevent the negligence or misconduct of another when an ordinarily prudent person would have done so.'" *Schneider*, 843 P.2d at 574 (quoting Tolbert v. Gerber Industries, Inc., 255 N.W.2d 362, 367 (Minn. 1977)). Active negligence, on the other hand, "is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnitee had agreed to perform." *Schneider*, 843 P.2d at 574 (quoting Rossmoor Sanitation, Inc. v. Pylon, Inc., 532 P.2d 97, 101 (Cal. 1975)).

59. *Schneider*, 843 P.2d at 563. In addition to these certified questions, the Tenth Circuit Court of Appeals also certified other questions to be answered by the Wyoming Supreme Court. The other certified questions were:

A. Does Wyoming's current comparative negligence statute, W.S. § 1-1-109 (1988), which requires that damages in an action "to recover damages for negligence" be allocated according to the "percentage of fault attributable to each actor," permit strict liability and breach of warranty to be considered and weighed in the same manner as negligence in determining each actor's "percentage of fault" for the plaintiff's injuries and their corresponding liability for the plaintiff's damages?

B. If Wyoming's current comparative negligence statute does permit equal consideration of negligence, strict liability and breach of warranty in allocating fault and determining each actor's share of damages, does an actor have a right of indemnity against another responsible actor, in the absence of an express contract of indemnity, in the following circumstances:

i. The party seeking indemnity was passively or secondarily negligent while the alleged indemnitor was actively or primarily negligent;

ii. The party seeking indemnity was either passively/secondarily or actively/primarily negligent while the alleged indemnitor was strictly liable to the injured party; or

iii. The party seeking indemnity was either passively/secondarily or actively/primarily negligent while the alleged indemnitor was liable on a breach of warranty grounds?

Id. The Wyoming Supreme Court answered certified question "A" in the negative, relying on its decision in *Phillips v. Duro-Last Roofing, Inc.*, 806 P.2d 834 (Wyo. 1991). *Schneider*, 843 P.2d at 566-67. *See also* Alan W. Mortensen, Note, *The Marriage of Strict Tort Liability and Comparative Negligence—Left Waiting at the Altar?* Phillips v. Duro-Last Roofing, Inc., 27 LAND & WATER L.

The Wyoming Supreme Court, in answering certified question "C", concluded that Schneider did have a valid claim against both Holland and Rissler for equitable implied indemnity.[60] The court stated that "[t]he nature of the indemnity relief available will differ depending upon the theory of liability expressed."[61] In negligence actions, the court believed that sound policy favored the adoption of "partial indemnity" rather than a form of indemnity that would wholly grant or deny compensation to the indemnitee.[62] The supreme court stated that in actions for equitable implied indemnity premised on the negligent breach of a duty between the indemnitor and indemnitee, indemnity liability was to be allocated among the defendants proportionally according to their amounts of comparative fault.[63]

The Wyoming Supreme Court also believed that equitable implied indemnity was available in indemnity actions premised on strict liability and breach of warranty claims. However, the court stated that comparative fault principles do not apply to indemnity actions based on strict liability and breach of warranty.[64] This holding represented a policy choice to shift the liability to the actor in the best position to insure against the loss or spread the loss.[65]

REV. 223 (1992). The supreme court held that its answer to certified question "A" made certified question "B" moot. *Schneider*, 843 P.2d at 567.

60. *See Schneider*, 843 P.2d at 576. In reaching its conclusion, the Wyoming Supreme Court adopted section 886B of the Restatement (Second) of Torts. *Id.* at 575-76. The relevant portions of section 886B to the *Schneider* case provided:

> (1) If two persons are liable in tort to a third person for the same harm and one of them discharged the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.
>
> (2) Instances in which indemnity is granted under this principle include the following:
>
> * * *
>
> (d) The indemnitor supplied a defective chattel or performed defective work upon land or buildings as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect;
>
> (e) The indemnitor created a dangerous condition of land or chattels as a result of which both were liable to the third person, and the indemnitee innocently or negligently failed to discover the defect[.]

RESTATEMENT (SECOND) OF TORTS § 886B (1979).

The Wyoming Supreme Court concluded that under § 886B of the Restatement Schneider had a claim against Holland "for supplying a defective chattel which Schneider failed to discover and against Rissler for creating a dangerous condition which Schneider failed to discover." *Schneider*, 843 P.2d at 576.

61. *Schneider*, 843 P.2d at 576.

62. *Id.* at 576-77.

63. *Id.* at 578.

64. *Id.* at 580-87.

65. *Id. See also* Ogle v. Caterpillar Tractor Co., 716 P.2d 334 (Wyo. 1986).

In summary, the right of indemnity survived the adoption of comparative negligence in Wyoming and the 1986 legislative amendments adopting comparative fault principles in Wyoming. However, the adoption of comparative fault principles changed the availability of indemnity in Wyoming. Of particular concern was the availability of indemnity in tort actions involving many potentially liable defendants. The Wyoming Supreme Court, in the *Schneider* decision, held that a settling defendant can maintain a claim for partial indemnity against a non-settling defendant. This holding by the *Schneider* court creates serious problems in Wyoming tort law.

A. Problems With the Schneider Approach

The main problem with the *Schneider* decision is that it allows a settling defendant, who has supposedly bought his peace through the settlement, to maintain an action against another potentially liable defendant for indemnity. Because of this, a settling defendant can assert a claim against a non-settling defendant for indemnity. Furthermore, the language of the *Schneider* opinion would allow claims for indemnity by settling defendants against other settling defendants.

The practical result of the *Schneider* decision is that it will have a chilling effect on defendants' willingness to settle in tort actions involving multiple parties.[66] Additionally, the transaction cost associated with litigation will skyrocket as defendants sue one another for indemnity after the original action commenced by the plaintiff has long since been resolved.[67]

A comparison of Wyoming's approach to tort actions involving multiple defendants with the approaches followed in other states is useful in determining how the policies associated with the availability of indemnity in negligence actions could be better served in Wyoming. In analyzing how other states approach this problem, it is apparent that change in Wyoming most likely must originate with the Wyoming Legislature.

66. *See* discussion *infra* part IV.A.
67. *Id.*

III. COMPARATIVE NEGLIGENCE, CONTRIBUTION, AND INDEMNITY IN OTHER STATES

A. Comparison of Wyoming Approach With General Trends in Tort Law

1. Joint and Several Liability

As previously mentioned, the Wyoming Comparative Negligence Statute, as amended in 1986, eliminated joint and several liability among possibly liable defendants in tort actions.[68] This decision is consistent with a minority trend among some states to abrogate joint and several liability.[69] However, joint and several liability still exists in many states.[70]

2. Contribution

With the adoption of comparative fault principles in the 1986 amendments to the comparative negligence statute, the Wyoming legislature eliminated the right to contribution it created under the 1973 version of the comparative negligence statute.[71] Wyoming is in the minority as most states still have some form of contribution.[72] However, at least one commentator seems to agree with the Wyoming approach to contribution:

> Under the older common-law rule, a tortfeasor who pays a judgment for which he and other tortfeasors are jointly and severally liable has no enforceable right to contribution from the others. If comparative negligence is to fulfill its role of appor-

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68. *See supra* part I.B.2.

69. VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.4 (2d ed. 1986). Schwartz summarizes the positions taken by several states regarding the existence of joint and several liability among tortfeasors. *Id.*

70. *Id.* As of 1986, these states included Arkansas, Colorado, Oregon, Idaho, Washington, California, and West Virginia. *Id.*

71. *See supra* part I.B.3.

72. HENRY WOODS, COMPARATIVE FAULT § 13:5 (2d ed. 1987). As of 1987, the following states had adopted some form of the Uniform Contribution Among Tortfeasors Act: Alaska, Arkansas, Colorado, Delaware, Florida, Hawaii, Maryland, Massachusetts, Mississippi, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Wyoming. *Id.* § 13:5 n.3. He does note later that Wyoming's contribution statute has been repealed. *Id.* app. at 363 (Supp. 1993). Woods listed the following states as having broad contribution statutes that left many of the questions regarding contribution to the courts: Georgia, Kentucky, Louisiana, Virginia, and Wisconsin. *Id.* § 13:5 n.4. He listed the following states as having contribution provisions within their comparative fault statutes: Arizona, Idaho, Iowa, Minnesota, Oregon, Pennsylvania, Texas, Utah, and Washington. *Id.* § 13:5 n.5. Michigan, West Virginia, Nebraska, Illinois, Missouri, New York, Maine, and California were listed as having unique positions. *Id.* § 13:5.

tioning damages on the basis of fault, this rule must be abolished. If the legislature fails to modify the common-law rule, the change should be made by the courts.[73]

3. Indemnity

The rules regarding the availability of indemnity are quite different among jurisdictions. However, some general statements can be made. First, since the adoption of comparative fault principles in many states, indemnity actions usually arise out of a contractual relationship.[74] Second, the adoption of comparative fault principles has eliminated the need for indemnity claims based on "active-passive negligence" or "primary-secondary negligence."[75] Third, traditional notions of indemnity still exist which allow a non-negligent party to recover the full amount paid on behalf of a negligent party.[76] However, indemnity actions that sought to get around the "no-contribution-among-joint tortfeasors rule will be suspect . . . [and] [t]hey certainly will not be expanded."[77]

The Wyoming Supreme Court in *Schneider* allowed a defendant to maintain a claim for "partial indemnity" against another defendant.[78] Very few states allow actions for partial indemnity. California allows actions for partial indemnity under its adoption of comparative fault principles.[79] Kansas also allows claims for comparative implied indemnity, "but has limited it to product liability chain-of-distribution cases."[80] Because California and Kansas, like Wyoming, have somewhat unique views on the availability of indemnity in multi-party actions, their statutes and case law will be examined in the sections that follow.

B. The California Approach

A California court has listed the policies involved in the decision of whether or not a settling defendant can maintain an action for indemnity against another defendant.[81] The first and most important policy, accor-

73. SCHWARTZ, *supra* note 69, § 16.7 at 273.

74. WOODS, *supra* note 72, § 13:11 at 261.

75. *Id.* § 13:11 at 262.

76. SCHWARTZ, *supra* note 69, § 16.9 at 290.

77. *Id.*

78. *See supra* part II.

79. SCHWARTZ, *supra* note 69, § 16.9 at 291. *See also* American Motorcycle Ass'n v. Superior Court of Los Angeles County, 578 P.2d 899 (Cal. 1978).

80. SCHWARTZ, *supra* note 69, § 16.9 at 291.

81. Sears Roebuck & Co. v. International Harvester Co., 147 Cal. Rptr. 262 (Cal. App. 2d 1984).

ding to the California Court of Appeal, is to compensate the plaintiff for her injuries. The second policy is to encourage settlement among the parties involved in the litigation. The third policy is to equitably apportion the damage award among those responsible for the injuries.[82] A fourth policy mentioned by the California Court of Appeal is "that of reduction of the transactional cost through simplification of the litigation process . . . ."[83] While the Supreme Court of California did not recognize the fourth policy in its decision in *American Motorcycle Ass'n v. Superior Court of Los Angeles County*,[84] this author believes reduction of transactional cost is a valid policy that courts should consider.

While California courts do allow claims for partial indemnity between defendants,[85] a defendant who settles in good faith is released from all claims for partial indemnity asserted by other defendants.[86] The California legislature codified this holding in § 877.6 of the California Code of Civil Procedure.[87] That section of the procedural code also provides for a pre-trial hearing to determine whether or not a settlement is made in good faith.[88]

The California approach to the availability of indemnity has its critics. One major criticism of the California approach is that it clogs the court system with "minitrials" to determine whether or not a defendant has settled in good faith.[89] Apart from clogging the courts, minitrials also contradict the policy of providing full compensation to a plaintiff by delaying the case and thereby depleting the plaintiff's resources and enthusiasm to prosecute.[90] Finally, minitrials can lead to contradictory findings of liability and contradictory percentages of liability.[91] Therefore, the California approach to the availability of indemnity among multiple defendants does not serve the policies its own courts have listed as being involved in this area.

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82. *Id.* at 264.

83. *Id.*

84. 578 P.2d 899 (Cal. 1978). For a discussion of the availability of equitable indemnity in California and the policy considerations involved with its availability, *see* Daniel Waltz, *Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity?* 74 CAL. L. REV. 1057 (1986).

85. *See* sources cited *supra* note 79 and accompanying text. *See also* Thomas P. Quinn, Jr., Comment, *Indemnity in California: Is it Really Equitable After* American Motorcycle *and Section 877.6?*, 18 PAC. L.J. 201, 201 (1986).

86. *Id.*

87. *Id.* at 201-02.

88. *Id.*

89. Robert E. Oakes, Note, *Far West Financial Corp. v. D & S Co. and the Abolition of Total Equitable Indemnity: What a Long, Strange Trip It's Been*, 21 PAC. L.J. 147, 189-90 (1989).

90. *Id.* at 190.

91. *Id.*

C. The Kansas Approach

The Kansas approach to the availability of indemnity between multiple defendants is superior to the approaches followed in other states in two important ways. First, Kansas encourages the joinder of all possibly liable persons in one lawsuit.[92] Second, Kansas allows claims for comparative implied indemnity but limits these to product liability cases involving a chain of distribution.[93]

1. Joinder of All Possibly Liable Parties in One Lawsuit

One important section in the Kansas Statutes provides for the joining of all parties that could possibly be responsible for a plaintiff's injuries in a negligence action:

> On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury or property damage, any other person whose causal negligence is claimed to have contributed to such death, personal injury or property damage shall be joined as an additional party to the action.[94]

The joinder provisions contained in the Kansas comparative negligence statute are broader than the joinder provisions contained in the Federal Rules of Civil Procedure and most state rules of civil procedure. Like Rule 19 of the Federal Rules of Civil Procedure, the Kansas statute does allow for "joinder of persons needed for just adjudication."[95] The

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92. *See* discussion *infra* part III.C.1.

93. *See supra* note 80 and accompanying text.

94. KAN. STAT. ANN. § 60-258a(c) (1983).

95. FED. R. CIV. P. 19. Subdivision (a) of Rule 19 of the Federal Rules of Civil Procedure provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the persons's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the persons's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

FED. R. CIV. P. 19(a). Subdivision (b) of Rule 19 states:

Kansas statute also encompasses the permissive joinder provision of Rule 20 of the Federal Rules of Civil Procedure.[96] However, the Kansas statute is broader because it requires joinder, upon motion of a party, of persons who could not otherwise be joined to the action under the rules of civil procedure. These include situations where a person has settled outside of court or where the name or location of a person is not known.[97]

The purpose behind the Kansas statute is to prevent plaintiffs from undermining the comparative fault provisions by suing only one of many potentially liable defendants.[98] As a result, the Kansas statute "benefits only the defendant through potential reduction of the percentage of fault attributable to him rather than benefitting the plaintiff through increased recovery."[99]

In construing the joinder provisions contained in the Kansas statutes, the Kansas Supreme Court in *Eurich v. Alkire*[100] decided that it was the intent of the Kansas legislature to have the rights and liabilities of all

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If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(b). Rule 19 of the Kansas Rules of Civil Procedure is substantially similar to the federal rule. *See* KAN. R. CIV. PRO. 19.

96. Rule 20 of the Federal Rules of Civil Procedure states:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

FED. R. CIV. P. 20(a). Rule 20 of the Kansas Rules of Civil Procedure is substantially similar to the federal rule. *See* KAN. R. CIV. P. 20(a).

97. Brown v. Keill, 580 P.2d 867, 875 (Kan. 1978).

98. McGraw v. Sanders Co. Plumbing & Heating, 667 P.2d 289, 295 (Kan. 1983).

99. *Id.* (quoting Ellis v. Union Pac. R.R. Co., 643 P.2d 158 (Kan. 1982), *aff'd on reh'g* 653 P.2d 816 (Kan. 1982)).

100. 579 P.2d 1207 (Kan. 1978).

persons involved in an occurrence determined in one action.[101] A result of this one action rule is that a plaintiff must join all possibly liable defendants in one lawsuit. Those defendants who are not joined as parties or who are not joined for the purpose of determining their percentage of fault will be free from all liability.[102]

2. Limited Availability of Comparative Implied Indemnity

The Kansas Supreme Court, in *Kennedy v. City of Sawyer*,[103] allowed claims for comparative implied indemnity[104] between joint tortfeasors, but only when one tortfeasor entered a settlement for the plaintiff's entire injuries and obtained a release from the plaintiff which released all possibly liable tortfeasors from liability.[105] The *Kennedy* court stated:

> Settlements between injured parties and tortfeasors are favored in the law, and the policy of settlement should be encouraged by providing that a release by an injured party of one tortfeasor does not release other tortfeasors from claims of indemnity. *If the release agreement expressly releases all tortfeasors*, the settling tortfeasor should be able to seek apportionment from his co-tortfeasors based on comparative degrees of responsibility.[106]

A later Kansas Supreme Court case, *Ellis v. Union Pacific R. Co.*,[107] severely limited the holding in the earlier *Kennedy* case. The *Ellis* court observed that Kansas' joinder provisions allowed a defendant to join all possibly liable tortfeasors in one action.[108] The court stated that the purpose of the joinder provisions was to reduce the amount of damages that could be recovered from a defendant by apportioning fault among all potentially liable parties.[109] The joinder provisions, however, could not be used to increase the possible recovery to the plaintiff.[110] In other words,

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101. *Id.* at 1208.

102. Albertson v. Volkswagenwerk Aktiengesellschaft, 634 P.2d 1127, 1132 (Kan. 1981).

103. 618 P.2d 788 (Kan. 1980).

104. One commentator has said that comparative implied indemnity is really only contribution based on proportionate fault. WOODS, *supra* note 72, § 13:14 at 281.

105. *Kennedy*, 618 P.2d at 803.

106. *Id.* at 803-04 (emphasis added).

107. 643 P.2d 158 (Kan. 1982).

108. *Id.* at 164.

109. *Id.*

110. *See id.*

"[b]y suing one defendant, the plaintiff knows that he will recover *only* the percentage of damage for which that defendant is responsible."[111] The defendant can then settle the claim, but the defendant cannot settle the claim on behalf of other defendants who have not had a claim asserted against them by the plaintiff.[112] The *Ellis* court summarized its opinion in the following way:

> The settling defendant cannot, however, create liability where there is none. One defendant in a comparative negligence action cannot settle a claim on behalf of a party against whom the plaintiff could not recover and then seek contribution from that party in proportion to the percentage of causal negligence attributable to that party. The plaintiff may choose to forego any recovery from other tort-feasors. In that event, a settling defendant has no claim to settle but his own.[113]

After *Ellis*, a settling defendant cannot maintain an action for comparative implied indemnity against non-settling defendants who have not had a claim filed against them by the plaintiff.

IV. POLICY-BASED ANALYSIS OF WYOMING TORT LAW INDICATES PATH WYOMING SHOULD TAKE

Statutes and court decisions from other states, especially California and Kansas, illustrate the problems with Wyoming's current approach to the availability of indemnity in multi-party actions. Wyoming should adopt an approach that better serves the policies associated with the availability of indemnity. Those policies, as listed by the California Court of Appeal in *Sears Roebuck & Co. v. International Harvester Co.*,[114] are:

1. Compensating the plaintiff;
2. Liability on behalf of all parties in proportion to their percentage of fault in causing plaintiff's injuries;
3. Encourage settlement;
4. Arguably, reduce transaction cost associated with simplification of the litigation process.

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111. *Id.* at 165.
112. *See id.*
113. *Id.* at 166.
114. 147 Cal. Rptr. 262 (Cal. Ct. App. 1984).

While the California Court of Appeal listed these policies in a hierarchy, this author takes the position that the policies should be given equal treatment and that each policy can be served under a tort law approach similar to that used by Kansas.

A. Policy-Based Analysis of Wyoming's Current Approach to Negligence Actions Involving Multiple Parties

The adoption of the comparative negligence statute in 1973 meant the end of contributory negligence in Wyoming.[115] Plaintiffs can now maintain an action for negligence as long as they are not greater than 50% at fault.[116] This action taken by the Wyoming Legislature is beneficial because it serves the policy of compensating plaintiffs.

The adoption of comparative fault principles through the 1986 amendments to the comparative negligence statute also benefit Wyoming tort law. Comparative fault principles strongly serve the policy of holding all defendants in a suit liable for only their percentage of fault.[117] On the other hand, the adoption of comparative fault lead to the elimination of joint and several liability in Wyoming.[118] The abolition of joint and several liability undermines the policy of compensating plaintiffs because each defendant is no longer liable for the total amount of damages. However, this does not necessarily mean that the plaintiff will not be fully compensated. For this reason, the benefits gained from the adoption of comparative fault principles in Wyoming greatly outweigh the costs.

While the adoption of comparative negligence and comparative fault principles benefitted Wyoming tort law, other actions taken by the Wyoming Legislature and Wyoming Supreme Court have not been so positive. Wyoming currently does not have a one action rule that requires a plaintiff to file suit against all possibly liable defendants in one proceeding.[119] While this practice may serve the policy of compensating the plaintiff because the plaintiff can bring subsequent actions against other defendants, it severely discourages two other policies. First, the policy of making all defendants liable for their percentage of fault is undermined when all defendants are not joined in one action. Second, allowing plaintiffs to maintain subsequent actions against other possibly liable parties

115. *See supra* part I.A.
116. *See supra* part I.B.1.
117. *See supra* part I.B.2.
118. *Id.*
119. Schneider Nat'l, Inc. v. Holland Hitch Co., 843 P.2d 561, 579 (Wyo. 1992).

discourages the policy of reducing transaction costs associated with simplification of the litigation process.

The Wyoming Supreme Court's adoption of partial indemnity in the *Schneider* decision has also had a negative impact on Wyoming tort law. The Wyoming Supreme Court in *Schneider* permitted a settling defendant to maintain an action for partial indemnity against a non-settling defendant. At first glance, this holding appears to encourage settlement among parties; if a defendant knows he can settle and still maintain a claim for indemnity against another defendant, the defendant will be encouraged to settle. However, as Justice Cardine points out in his dissenting opinion in *Schneider*,[120] the majority's approach allows settling defendants to seek indemnity from each other.[121] This result will severely discourage settlements because a settling defendant will not know if he has been released of all liability in the action. In addition, permitting a defendant to settle in the original action and subsequently maintain an action for partial indemnity undermines the policy of reducing the transaction cost associated with simplification of the litigation process.

B. Policy-Based Analysis Indicates Approach Wyoming Should Take

Wyoming could greatly improve the approach it takes to negligence actions involving multiple parties by making two changes to the current law. First, Wyoming should adopt a one action rule that requires a plaintiff to sue all possibly liable defendants in one proceeding. This will not adversely affect the policy of compensating plaintiffs because plaintiffs still receive the same amount of damages; the damages are simply coming from different sources. The policy of holding all defendants liable for their percentage of fault will be advanced by having all parties present in one action.[122] This will also reduce the transaction cost associated with simplification of the litigation process by preventing subsequent suits by

120. *Id.* at 588-89 (Cardine, J., dissenting).

121. *Id.* at 589.

122. Wyoming does allow the negligence of both parties and non-parties to be determined in one action. Board of County Comm'rs of County of Campbell v. Ridenour, 623 P.2d 1174, 1191 (Wyo. 1981). The main purpose behind this practice "is to accurately gauge the percentage of plaintiff's own contributory negligence, if present, which is an important finding since it will operate to reduce a plaintiff's recovery or completely preclude recovery if greater than that of each of the actors, separately determined on a one-on-one basis." Kirby Bldg. Sys. v. Mineral Explorations Co., 704 P.2d 1266, 1272 (Wyo. 1985) (quoting Palmeno v. Cashen, 627 P.2d 163, 165-66 (Wyo. 1981)). However, under the 1986 amendments to the comparative negligence statute, Wyoming compares the negligence of the plaintiff to the total fault of all the parties. *See supra* part I.B.1. Therefore, it seems the main purpose in allowing the negligence of non-parties to be determined is no longer applicable. The negligence of all parties and non-parties should be determined in one action, however, because this best serves the policies involved in multi-party negligence actions.

the plaintiff against other defendants and by limiting subsequent suits for indemnity between defendants.

Second, Wyoming should either judicially or legislatively overrule the portion of the *Schneider* decision that allows a settling defendant to seek partial indemnity from other defendants. In exchange for giving up this right, a settling defendant should be released from any further claims for partial liability, either by the plaintiff or other defendants. In this way, a settling defendant will be completely released from the action, which is presumably the reason he entered into the settlement agreement in the first place. Settlements will be encouraged under this approach because settling defendants will know that they have "bought their peace" and they will no longer be liable to the plaintiff. Furthermore, the policy of reducing the transaction cost associated with simplification of the litigation process will also be served by prohibiting subsequent claims for partial indemnity.

V. CONCLUSION

Tort law in Wyoming has seen many recent changes. One of the more important changes came with the adoption of comparative negligence and comparative fault principles in Wyoming. The adoption of these principles changed the way courts look at negligence actions, especially negligence actions where more than one defendant may be found liable for a plaintiff's injuries.

The Wyoming Supreme Court's opinion in *Schneider National, Inc. v. Holland Hitch Co.*, decided after the adoption of comparative fault principles in Wyoming, has created special problems in Wyoming tort law. The *Schneider* court allowed a settling defendant in a negligence action to maintain an action for partial indemnity against non-settling defendants. Arguably, a settling defendant could seek partial indemnity from other settling defendants as well. A close look at *Schneider* reveals that certain policies associated with compensation, comparative fault, settlements, and judicial economy are not served by the court's decision. Statutes and court opinions from other states reveal a better approach that Wyoming should take in dealing with negligence actions involving multiple defendants.

First, Wyoming needs to adopt a rule which requires all possibly liable parties in a negligence action to be joined in one action. Second, Wyoming should not allow settling defendants to sue other defendants for partial indemnity. Finally, Wyoming must protect settling defendants from contribution and partial indemnity claims made by non-settling and set-

tling defendants. By making these changes, Wyoming will successfully balance the competing policy considerations that arise in negligence actions involving multiple defendants.

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