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CASE NUMBER: S-24-0225

**IN THE SUPREME COURT, STATE OF WYOMING**

CLIFFORD C. BAIN,	)	
	)	
Petitioner,	)	S-24-0225
	)	
v.	)	
	)	
CITY OF CHEYENNE, a municipality;	)	
and EDWARD BROOKMAN, an	)	
individual,	)	
	)	
Respondents.	)	

**REPLY BRIEF OF PETITIONER**

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## **PETITIONER’S REPLY BRIEF**

COMES NOW Petitioner, Clifford C. Bain, by and through his Counsel of Record, and respectfully submits his Reply Brief.

### **NEW ISSUES AND ARGUMENTS RAISED BY RESPONDENTS AND INTERVENOR**

The new issues and arguments presented by Respondents and Intervenor are as follows:

- 1) There is a distinction between “liability” and “damages” such that the limitation of “liability” to \$250,000 in Wyo. Stat. Ann. § 1-39-118(a) does not give rise to the prohibition of limiting “damages” under Article 10, § 4(a) of the Wyoming Constitution. (Respondents’ Brief, pp. 6-13; Intervenor’s Brief, pp. 24-27).
- 2) Intervenor asserts that Article 10, § 4(a) is ambiguous and that the history of its drafting, adoption and framers’ intent is relevant. (Intervenor’s Brief, pp. 18-23).

### **ARGUMENT ISSUE ONE**

There is a distinction between “liability” and “damages” such that the limitation of “liability” to \$250,000 in Wyo. Stat. Ann. § 1-39-118(a) does not give rise to the prohibition of limiting “damages” under Article 10, § 4(a) of the Wyoming Constitution. (Respondents’ Brief, pp. 6-13; Intervenor’s Brief, pp. 24-27).

Respondents and Intervenor argue that there exists a definitional difference between the waiver of liability found in Wyo. Stat. Ann. § 1-39-118(a)(Lexis Nexis) and the prohibition of the limiting of “damages” under Article 10, § 4(a) of the Wyoming

Constitution such that the Constitutional prohibition has no relevance to the statutory waiver, relying on definitions from Black's Law Dictionary (7<sup>th</sup> Edition, 1999). (Respondent's Brief, pp. 6-8).

Article 10, § 4(a), a part of Wyoming's originally adopted Constitution, provides:

No law shall be enacted **limiting the amount of damages** to be recovered for causing the injury or death of any person.

(Emphasis added).

Sect 1-39-118(a) provides:

(a) Except as provided in subsection (b) of this section, in any action under this act, **the liability of the governmental entity**, including a public employee while acting within the scope of his duties, shall not exceed:

(i) The sum of two hundred fifty thousand dollars (\$250,000.00) to any claimant for any number of claims arising out of a single transaction or occurrence; or

(ii) The sum of five hundred thousand dollars (\$500,000.00) for all claims of all claimants arising out of a single transaction or occurrence.

(Emphasis added).

Respondent relies upon the following definitions for liability and damages from Black's Law Dictionary:

"Damages" - "Money claimed by, or ordered to be paid to, a person as compensation for loss or injury." Black's Law Dictionary 393 (7<sup>th</sup> ed. 1999).

"Liability" - "the quality or state of being legally obligated or accountable: legal

responsibility to another or to society, enforceable by a civil remedy or criminal punishment.” Black’s Law Dictionary 925 (7<sup>th</sup> ed. 1999).

Based on these two definitions, Respondents’ argument is that the legislature, in enacting the Wyoming Governmental Claims Act, § 1-39-101, *et seq.* (LexisNexis 2023), encompassed the idea of an ‘extent’ of the waiver of sovereign immunity into the monetary limitation contained in § 1-39-118(a). A reading of the WGCA, *in pari materia*, as is necessary, reveals otherwise. *Saunders v. Hornecker*, 2015 WY 34, ¶ 19, 344 P.3d 771, 777-778 (Wyo. 2015).

Despite what Respondents state in their brief, (p. 9), there is no direct reference in Wyo. Stat. Ann. § 1-39-104 (LexisNexis 2023, 2024 Supp.<sup>1</sup>) to § 1-39-118. The relevant provision in § 1-39-104(a) states: “A governmental entity and its public employees while acting within the scope of duties are granted immunity from liability for any tort except as provided by W.S. 1-39-105 through 1-39-112 and 1-39-123.” Further, each of the provisions referenced have similar language to that found in Wyo. Stat. Ann. § 1-39-105 (LexisNexis

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While the legislature amended § 1-39-104 twice in 2024, one of which took effect immediately on March 22, 2024, *see* 2024 Session Laws, ch. 116, and the other which took effect on July 1, 2024, *see* 2024 Session Laws, ch. 115, the amendments did not affect the specific language at issue in this case, but in fact added two additional waivers of immunity with the same language as used in § 1-39-105. *See* Wyo. Stat. Ann. §§ 1-39-122 and 123 (LexisNexis 2023, 2024 Supp.).

2023):

A governmental entity is **liable for damages resulting** from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any motor vehicle, aircraft or watercraft.

(Emphasis added).

Each of the sections providing for a cause of action provides that the government is “liable for damages \* \* \*.” The waiver of immunity is contained in § 1-39-104 and the subsequent sections specifically define what each waiver entails, including the right to recover damages. It is not until § 1-39-118(a) that the legislature ‘limited’ the ‘damages’ which are recoverable under each of those sections. The only reasonable interpretation of the unambiguous provisions of the WGCA is that § 1-39-118(a) is a limitation on the ‘damages’ for which each of the waivers, including § 1-39-105, specifically permit recovery. Each of the waivers contain a general right to recover damages. It is only in § 1-39-118(a) that the recoverable damages are limited to the specific amounts contained therein.

Respondent cites to *Memorial Hospital of Sweetwater County v. Menapace*, 2017 WY 131, 404 P.3d 1179 (Wyo. 2017) to support its argument. It is true that, in determining whether an insurance policy provided expanded coverage under § 1-39-118(b), this Court cited to a similar definition of liability from Black’s Law Dictionary. ¶ 18, 404 P.3d at 1184. But *Menapace* was focused on issues related to the proper interpretation of an insurance policy and whether it expanded coverage under subsection (b) of § 1-39-118. ¶ 17, 404 P.3d

at 1183-1184. That portion of Subsection (b) which was under consideration provides:

(b) A governmental entity is authorized to purchase liability insurance coverage covering any acts or risks including all or any portion of the risks provided under this act. Purchase of liability insurance coverage shall extend the governmental entity's liability as follows:

(I) If a governmental entity has insurance coverage either exceeding the limits of liability as stated in this section or covering liability which is not authorized by this act, the governmental entity's liability is extended to the coverage;

\* \* \*

A reading of the decision and the application of Subsection (b)(I) supports Petitioner's position. The legislature, in enacting this specific provision, differentiated between obtaining insurance coverage which extended the 'amount' recoverable under § 1-39-118(a) from expanding the waiver of liability which is found in the WGCA.

*Section 118(b)* allows a governmental entity to purchase liability insurance to cover "all or any portion" of its liability under the WGCA, and *Section 118(b)(i)* allows a governmental entity to extend its liability to the extent of coverage. Both aspects of *Section 118* are entirely permissive. A governmental entity may elect to purchase insurance or not, extend its liability or not. It thus does not run afoul of *section 118* or its aims if a governmental entity purchases liability insurance that does not extend its liability or if an insurance policy is interpreted to cover only that liability found in *WGCA sections 105 through 112*.

¶ 23, 404 P.3d at 1185.

Clearly, the legislature differentiated between 'the amount of damages' under § 1-39-118(a) and the waiver of liability contained in §§ 1-39-105 through 112. While it used the term 'liability' in both situations, the concepts being addressed are separate, just as Petitioner asserts. The waivers of immunity in § 1-39-104 and §§ 1-39-105 through 112 are separate

and distinct from the limitation on the amount of damages contained in § 1-39-118(a).

## ISSUE TWO

Intervenor asserts that Article 10, § 4(a) is ambiguous and that the history of its drafting, adoption and framers' intent is relevant. (Intervenor's Brief, pp. 18-23).

The Attorney General asserts that the Constitutional provision is ambiguous, in somewhat obscure language, thus requiring an investigation into its history:

Reading article 10, section 4 in context suggests, at minimum, some latent ambiguity and the need for further inquiry into its meaning, opening the door to consideration of the history of its adoption and the framers' intent.

(Intervenor's Brief, p. 18).

What appears absent from Intervenor's argument is the manner in which Article 10, § 4(a) is ambiguous, other than it is 'latent.' The term 'latent' and 'latent ambiguity' are defined by Black's Law Dictionary 883 (6<sup>th</sup> ed. 1990) as follows:

**Latent** - Hidden; concealed; dormant; that which does not appear upon the face of a thing; as, a latent ambiguity.

**Latent ambiguity.** A defect which does not appear on the face of language used or an instrument being considered. It arises when language is clear and intelligible and suggests but a single meaning, but some extrinsic fact or some extraneous evidence creates a necessity for interpretation or a choice between two or more possible meanings. *Conkle v. Conkle*, 31 Ohio App.2d 44, 285 N.E.2d 883, 887

By relying upon these definitions, Intervenor is admitting that the language of Article 10, § 4(a) is "clear and intelligible on its face". Further, while latent ambiguities have been

identified by the Supreme Court in contracts, *see e.g. Larson v. Burton Construction, Inc.*, 2018 WY 74, ¶¶ 36-40, 421 P.3d 538, 549-550 (Wyo. 2018)(Dissenting Opinion Justice Kautz); and with respect to court judgments, *See, e.g. Van Vlack v. Van Vlack*, 2024 WY 130, ¶¶ 22-24, 560 P.3d 268 (Wyo. 2024), Petitioner has not found a case in which ‘latent ambiguities’ have been discussed with respect to constitutional interpretation. Such a claim would appear to be contrary to settled interpretive standards applicable to cases such as this.

The primary principle underlying an interpretation of constitutions or statutes is that the intent is the vital part, and the essence of the law. (Sutherland Stat. Const., Sec. 234, *People v. Potter*, 47 N.Y. 375.) “The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it. In the case of all written laws, it is the intent of the lawgiver that is to be enforced.” (Cooley Const. Lim., 55.) Such intent, however, is that which is embodied and expressed in the statute or instrument under consideration. “The intent must be found in the instrument itself.” (Cooley Const. Lim., 55; Sutherland Stat. Const. Sec. 234.) If the language employed is plain and unambiguous, there is no room left for construction. It must be presumed that in case of a construction the people have intended whatever has been plainly expressed. Courts are not at liberty to depart from that meaning which is plainly declared.

*Rasmussen v. Baker*, 7 Wyo. 117, 128, 50 P. 819, 821 (Wyo. 1897).

For any ambiguity to be ‘latent,’ it must be hidden, yet when the language is ‘clear and unambiguous,’ there is no room left for construction. Intervenor’s argument thus flounders when it asserts the ambiguity is latent.

The authorities relied upon by Intervenor to establish a meaning other than what Article 10, § 4(a) actually says, fail to address the right audience. Intervenor relies upon the

history of the drafting of the provision, citing to the debates and changes to the various drafts. (Intervenor’s Brief, pp. 18-23). Relying on cases from other jurisdictions, and specifically on *Millward v. Board of County Commissioners*, 2018 WL 9371676 (Wyo. Dist. Ct., August 21, 2018), Intervenor argues that the Federal District Court was correct in holding “the framers never intended it to apply to cases involving governmental defendants.” (Intervenor’s Brief, p. 22, citing *Millward, supra* at \*4). Under this Court’s reasoning in *Rasmussen, supra*, Intervenor’s argument views the meaning of the constitutional provision from the wrong audience.

The constitution derives its force from the people who adopted it, and it is the intention of the people which is to be sought for. (Cooley's Const. Lim., 66.) That learned author says, "It is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." \* \* \*.

*Rasmussen, supra*, at 131, 50 P. at 822.

Whatever the drafters did during the convention, however many versions of the provision were considered, or whatever argument was presented at that time, is not shown to have been the basis of the adoption of the Wyoming Constitution. There is no argument that this ‘evidence’ was presented to the voters. Absent such a showing, Intervenor’s argument is not relevant to how the voters would have understood Article 10, § 4(a). “Relevant evidence” is defined as: “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

probable that it would be without the evidence.” Rule 401, W.R.E. Where is the connection, the relationship between what the drafters ‘did’ and what the voters ‘read’? Even if the Court accepts the Intervenor’s position that there exists a ‘latent ambiguity’ in the constitutional provision, it has not shown that the understanding of the voters as to the plain and ordinary meaning of the words used was in any manner affected.

The Intervenor’s reliance upon *Millward, supra*, as well as the cases from other jurisdictions such as *Smith v. City of Philadelphia*, 516 A.2d 306 (Pa. 1986), do not address the central question about the voters’ understanding of the meaning and application of Article 10, § 4(a) of the Wyoming Constitution and are thus not on point. Intervenor’s ‘latent ambiguity’ is contrary to the rules of construction for constitutional provisions and does not rebut Petitioner’s arguments.

## **CONCLUSION**

An analysis of the additional arguments put forth by the Respondents and Intervenor do not provide a sufficient answer to Petitioner’s position as set forth in his initial brief. The above arguments, coupled with those presented in his initial brief clearly establish the unconstitutionality of the limitations of damages provisions in § 1-39-118(a). Article 10, § 4(a) means what it says - the State is without authority to limit the amount of damages for personal injury or death which are recoverable under an otherwise appropriate cause of action. Petitioner therefore respectfully renews his requests that the Court declare the

limitations contained in § 1-39-118(a) unconstitutional, finding the asserted affirmative defense of the Respondents without merit, and remand this matter to the trial court for further proceedings consistent with that determination.

Dated this 31<sup>st</sup> day of January, 2025.

\_\_\_\_\_/s/\_\_\_\_\_  
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### **CERTIFICATE OF COMPLIANCE**

I, Larry B. Jones, hereby certify that this document, and its attachments, complies with the Wyoming Rules of Appellate Procedure, satisfies all privacy redaction requirements, that the physical document is, with the exception of the privacy redactions, identical with that filed electronically and that this document has been scanned for and is free of viruses.

\_\_\_\_\_/s/\_\_\_\_\_  
Larry B. Jones

