

FILED

January 16, 2025
08:51:45 AM

CASE NUMBER: S-24-0225

IN THE SUPREME COURT, STATE OF WYOMING

CLIFFORD C. BAIN,

Petitioner,

v.

CITY OF CHEYENNE, a
Municipality; and EDWARD
BROOKMAN, an individual,

Respondents

S-24-0225

BRIEF OF APPELLEE

J. Mark Stewart (Wy. Bar No. 6-4121)
Catherine M. Young (Wy. Bar No. 7-6089)
DAVIS & CANNON, LLP
422 W. 26th Street
Cheyenne, WY 82001
mark@davisandcannon.com
catherine@davisandcannon.com
307-634-3210

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. STATEMENT OF JURISDICTION.....	1
II. STATEMENT OF THE ISSUES	1
III. STATEMENT OF THE CASE	2
A. NATURE OF THE CASE	2
1. COURSE OF PROCEEDINGS	2
2. STATEMENT OF FACTS	3
IV. ARGUMENT	4
A. WYO. STAT. § 1-39-118(a) DOES NOT VIOLATE WYO. CONST. ART. 10, § 4.....	4
1. Standard of review.	4
2. Section 118(a) does not violate Article 10, § 4 because it is not a law “limiting the amount of damages to be recovered” from governmental entities. 6	
B. ARTICLE 10, § 4(a) DOES NOT APPLY TO GOVERNMENTAL ENTITIES.	14
1. Art. 10 § 4 did not apply to governmental entities on its adoption.	15
2. Art. 10 § 4 must be read in <i>pari materia</i> with Art. 1 § 8.....	16
3. The legislature has the authority to immunize local governments from suit.	18
V. CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases

<i>Alewine v. State, Dept. of Health & Social Servs.</i> , 803 P.2d 1372 (Wyo. 1991)	17
<i>Campbell Cty. Mem'l Hosp.</i> , 2014 WY 3, 317 P.3d 573 (Wyo. 2014).....	8
<i>Cathcart v. Meyer</i> , 2004 WY 49, 88 P.3d 1050 (Wyo. 2004).....	5, 19
<i>City of Torrington v. Cottier</i> , 2006 WY 145, 145 P.3d 1274 (Wyo. 2006).....	8
<i>DeLoach v. Elliott</i> , 710 S.E.2d 763 (Ga. 2011)	19
<i>Diamond Surface v. Cleveland</i> , 963 P.2d 996 (Wyo. 1998)	9
<i>Dir. Of Office of State Lands & Inv. V. Merbanco, Inc.</i> , 2003 WY 73, 70 P.3d 241 (Wyo. 2003)	5
<i>Edinburg Hosp. Auth. v. Trevino</i> , 941 S.W.2d 76 (Tex. 1997)	10
<i>Geringer v. Bebout</i> , 10 P.3d 514 (Wyo. 2000).....	6
<i>Gibson v. State Through Dep't of Revenue & Tax'n</i> , 811 P.2d 726 (Wyo. 1991).....	8
<i>Hall v. Park Cty.</i> , 2010 WY 124, 238 P.3d 580 (Wyo. 2010).....	9
<i>Hamlin v. Transcon Lines</i> , 697 P.2d 606 (Wyo. 1985)	9
<i>Hjorth Royalty Company v. Trustees of University of Wyoming</i> , 30 Wyo. 309, 222 P. 9 (1924).....	18
<i>In re Neely</i> , 2017 WY 25, 390 P.3d 728 (Wyo. 2017)	5
<i>In re West Highway Sanitary and Imp. Dist.</i> , 77 Wyo. 384, 317 P.2d 495 (1957)	6
<i>Martin v. Bd. of Cty. Comm'rs of Laramie Cty.</i> , 2022 WY 21, 503 P.3d 68 (Wyo. 2022) ..	4
<i>McLean v. Maverik Country Stores, Inc.</i> , 135 P.3d 756 (Id. 2006)	19
<i>Mem'l Hosp. of Sweetwater Cnty. v. Menapace</i> , 2017 WY 131, 404 P.3d 1179 (Wyo. 2017)	7, 9
<i>Meyer v. Kendig</i> , 641 P.2d 1235 (Wyo. 1982).....	11, 12, 13, 20
<i>Mgmt. Council of Wyoming Legislature v. Geringer</i> , 953 P.2d 839 (Wyo. 1998).....	5
<i>Millward v. Bd. of Cnty. Commissioners of Cnty. of Teton, Wyoming</i> , No. 17-CV-117-SWS, 2018 WL 9371676, at *4 (D. Wyo. Aug. 21, 2018).....	9, 15
<i>Morris v. Massachusetts Mar. Acad.</i> , 565 N.E.2d 422 (Mass. 1991)	13
<i>Oroz v. Bd. of Cnty. Comm'rs of Carbon Cnty.</i> , 575 P.2d 1155 (Wyo. 1978).....	15, 19
<i>Powers v. State</i> , 2014 WY 15, 318 P.3d 300 (Wyo. 2014)	14
<i>Retail Clerks Local 187 AFL–CIO v. University of Wyoming</i> , 531 P.2d 884 (1975);	18
<i>Russell v. The Men of Devon</i> , 2 Term.Rep. 667, 100 Eng.Rep. 359 (1788).....	15
<i>Schlattman v. Stone</i> , 511 P.2d 959 (Wyo.1973).....	20
<i>Shue v. Burch</i> , 2009 WL 10665775, (D. Wyo. 2009)	13
<i>Smith v. City of Philadelphia</i> , 516 A.2d 306 (Pa. 1986).....	13, 15
<i>Solvay Chemicals, Inc v. Wyo. Dep't of Rev.</i> , 2022 WY 124, 517 P.3d 1146 (Wyo. 2022) ..	17
<i>State v. Snyder</i> , 31 Wyo. 333, 225 P. 1102 (1924)	19
<i>Surface v. Am. Spirit Ins. Companies</i> , 67 P.3d 938 (2003).....	10
<i>Surface v. Am. Spirit Ins. Companies/Great Am. Ins. Companies</i> , 962 P.2d 717 (1998) ..	10

<i>Sykes v. Lincoln Cnty. Sch. Dist. No. 1 & 2</i> , 763 P.2d 1263 (Wyo. 1988).....	14
<i>Thomson v. Wyoming In-Stream Flow Committee</i> , 651 P.2d 778 (Wyo.1982).....	5
<i>Troyer v. State Dep't. Health & So, Servs., Div. of Vocation Rehab.</i> , 722 P.2d 158 (Wyo. 1986)	12, 13, 17, 20
<i>Weber v. State</i> , 2011 WY 127, 261 P.3d 225 (Wyo. 2011)	8
<i>Weston Cnty. Hosp. Joint Powers Bd. v. Westates Const. Co.</i> , 841 P.2d 841(Wyo. 1992)	18
<i>White v. State</i> , 784 P.2d 1313 (Wyo. 1989)	17
<i>Worthington v. State</i> , 598 P.2d 796 (Wyo. 1979).....	17, 18
<i>Yanero v. Davis</i> , 65 S.W.3d 510 (Ky. 2001)	13

Statutes

WYO. STAT. § 1-1-125(b).....	20
WYO. STAT. § 1-1-129(b).....	20
WYO. STAT. § 1-39-102	20
WYO. STAT. §§ 1-39-105 through 112	8, 9
WYO. STAT. § 1-39-113(a).....	3
Wyo. Stat. § 1-39-118.....	1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 13, 14, 18, 21, 22

Wyoming Constitution

Wyo. Const. Art. 1, § 8	16, 17, 18, 19, 22
Wyo. Const. Art. 10, § 2	16
Wyo. Const. Art. 10, § 4	1, 2, 4, 11, 12, 13, 14, 16, 21, 22
Wyo. Const. Art. 10, §§ 5-10.....	16

Other Authorities

BLACK’S LAW DICTIONARY 925 (7 th ed. 1999)	7, 8
Dictionary.com, https://www.dictionary.com/browse/manner	17
Merriam-Webster, https://www.merriam-webster.com/dictionary/manner	17
Pa. Const. art. III, § 18.....	15
<i>Principles of the Law of Contract</i> 9 (Arthur L. Corbin ed., 3d Am. Ed. 1919)	7
Wyo. Const. art. 10, § 1. Section 2.....	16

Rules

W.R.A.P. 13.03(a).....	1
W.R.A.P. 13.03(c).....	1
W.R.C.P. 56.....	4

I. STATEMENT OF JURISDICTION

Petitioner filed his complaint against Respondents on January 19, 2024. (TR-1) On February 9, 2024, Respondents filed an answer with cross- and counterclaims for interpleader. (TR-15). Petitioner filed his answer to Respondents' counterclaim on March 1, 2024 (TR-77). Petitioner, on April 12, 2024, filed a motion for partial summary judgment asking the district court to find the liability limitation found in WYO. STAT. § 1-39-118 to be unconstitutional. (TR-85). The district court conducted a hearing on Petitioner's motion, denied the motion from the bench, and entered its written decision on August 13, 2024. (TR-285 to 287)

Petitioner submitted his *Petition for Writ of Review* pursuant to W.R.A.P 13.01(a) on August 27, 2024, within the 15-day limit imposed by W.R.A.P. 13.03(a). This Court accepted the Petition by order entered September 24, 2024 – well within the 40-day limit provided under W.R.A.P 13.03(c) – and thus has jurisdiction over this matter.

II. STATEMENT OF THE ISSUES

1. Whether the limitation on the liability of governmental entities, including public employees, for claims brought under the Wyoming Governmental Claims Act violates Art. 10, § 4(a) of the Wyoming Constitution.¹

¹ This is the sole issue before the Court following Petitioner's withdrawal of his equal protection challenge to the constitutionality of WYO. STAT. § 1-39-118(a). *Brief of Petitioner*, p. 2.

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Petitioner Clifford Bain, while riding his motorcycle in Cheyenne, Wyoming in November, 2021, was injured in a collision with a bus owned and operated by Respondent City of Cheyenne and driven by Respondent Edward Brookman. Petitioner's injuries were extensive, and he claims medical expenses well in excess of the limitation on liability under WYO. STAT. § 1-39-118(a)(i). Consequently, Petitioner asks the Court to declare the liability limit to be unconstitutional and violative of Art. 10, § 4 of the Wyoming Constitution.

1. COURSE OF PROCEEDINGS

Petitioner filed his *Complaint* on January 19, 2024. (TR-1). Respondents filed their *Answer of Defendants with Counterclaim and Cross Claim for Interpleader and Declaratory Judgment* on February 9, 2024. (TR-1; TR-15). Petitioner, on April 12, 2024, filed his *Motion for and Brief in Support of Partial Summary Judgment* asking the district court to find the liability limitation found in WYO. STAT. § 1-39-118 to be unconstitutional. (TR-85). Petitioner notified the Wyoming Attorney General of his constitutional challenge through service of his motion. (TR-118). The Attorney General filed her notice of intent to appear and be heard on the issue, and requested leave to participate in any proceedings concerning the constitutionality of WYO. STAT. § 1-39-118(a)(i). (TR-145 to 146). The district court granted the Attorney General's request on April 19, 2024. (TR-157 to 158). After the parties submitted their briefs, the district court held a hearing on Petitioner's

motion on July 18, 2024. (TR-281). Ruling from the bench, the district court held that WYO. STAT. § 1-39-118(a)(i) is not unconstitutional and subsequently entered its written decision on August 13, 2024. (TR-285 to 287). Petitioner submitted his Petition for Writ of Review on August 27, 2024, which the Court granted on September 24, 2024.

2. STATEMENT OF FACTS

Petitioner Clifford Bain was injured on November 5, 2021, in a collision with a vehicle operated by the City of Cheyenne. (TR-2 to 3; TR-15 to 16). Petitioner submitted a governmental claim to the City of Cheyenne on September 25, 2023. (TR-61 to 74). Progressive Insurance, the insurer of Petitioner’s motorcycle, also submitted a governmental claim to the City.² (TR-26 to 29). After Petitioner filed his *Complaint*, the City answered, admitting liability, and asserting as an affirmative defense that it is immune from liability except to the extent provided by the Wyoming Governmental Claims Act (“WGCA”). (TR-15 to 19). Because the deadline for claimants to submit governmental claims under WYO. STAT. § 1-39-113(a) passed prior to the filing of Plaintiff’s *Complaint*, the City sought to interplead the claimants and to deposit \$250,000 with the Clerk of Court, which represents the maximum liability to which the City and its employee, jointly and severally, could be exposed in this matter pursuant to Section 1-39-118 of the WGCA. (TR-19 to 24). After answering Respondent’s counterclaim (TR-77 to 82), Petitioner challenged

² In his answer to Respondent’s counterclaim for interpleader, Petitioner submitted notice from Progressive waiving its property damage subrogation rights. (TR-80; TR-82).

the constitutionality of Section 118 via a partial motion for summary judgment, arguing that Section 118 violates Article 10, § 4 of the Wyoming Constitution and Equal Protection. For the distinct and narrow question of law presented by the petition for a writ of review, the material facts are limited to the following:

1. Petitioner was injured in a collision with a City-operated vehicle in November 2021. (TR-2 to 3; TR-15 to 16).
2. After Petitioner filed his Complaint, the City admitted liability and sought to interplead all potential claimants and deposit \$250,000 with the Clerk of Court. (TR-61 to 74).
3. The City asserts immunity from liability except to the extent provided by the Wyoming Governmental Claims Act as an affirmative defense. (TR-19).

IV. ARGUMENT

A. WYO. STAT. § 1-39-118(a) DOES NOT VIOLATE WYO. CONST. ART. 10, § 4

1. Standard of review.

A movant is entitled to summary judgment under W.R.C.P. 56 “when he shows ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *Martin v. Bd. of Cty. Comm’rs of Laramie Cty.*, 2022 WY 21, ¶ 5, 503 P.3d 68, 71 (Wyo. 2022). “The determination of whether a statute is constitutional is a question of law[.]” *Id.* at ¶ 6.

Under Wyoming law, “every statute is presumed constitutional and not to be held in conflict with the constitution unless such conclusion is clear, palpable, unavoidable, and

beyond reasonable doubt.” *Dir. Of Office of State Lands & Inv. V. Merbanco, Inc.*, 2003 WY 73, ¶ 32, 70 P.3d 241, 252 (Wyo. 2003). The party challenging a statute’s constitutionality “bears a heavy burden,” and courts are “duty bound to uphold statutes where possible and resolve all doubts in favor of constitutionality.” *Id.* Here, Petitioner presents a facial challenge to WYO. STAT. § 1-39-118(a), “which is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [statute] would be valid.” *Id.*

The Court applies the rules of statutory interpretation when construing the Wyoming Constitution with the fundamental purpose of ascertaining the intent of the framers. *In re Neely*, 2017 WY 25, ¶ 41, 390 P.3d 728, 742 (Wyo. 2017)(citing *Cathcart v. Meyer*, 2004 WY 49, ¶ 39, 88 P.3d 1050, 1065 (Wyo. 2004)). “If the language is plain and unambiguous, there is no need for construction, and we presume the framers intended what was plainly expressed.” *Cathcart*, 2004 WY 49 at ¶ 39, 88 P.3d at 1065. However, constitutional provisions are not reviewed or interpreted in isolation. Instead, “Every statement in the constitution must be interpreted in light of the entire document, with all portions thereof read *in pari materia*.” *Id.* (citing *Mgmt. Council of Wyoming Legislature v. Geringer*, 953 P.2d 839, 845 (Wyo. 1998); *Thomson v. Wyoming In-Stream Flow Committee*, 651 P.2d 778, 790 (Wyo.1982)).

Our cases explain that every statement in the constitution must be interpreted in light of the entire document, rather than as a series of sequestered pronouncements, and that the constitution should not be interpreted to render any portion of it meaningless, with all portions of it read *in pari materia* and every word, clause and sentence considered so that no part will be inoperative

or superfluous.

Id. (quoting *Geringer v. Bebout*, 10 P.3d 514, 520 (Wyo. 2000)). Additionally, where a provision enumerates the subject on which it operates, it is to be construed as excluding from its effect all those not expressly mentioned. *Id.* (citing *In re West Highway Sanitary and Imp. Dist.*, 77 Wyo. 384, 317 P.2d 495, 504 (1957)). Finally, in interpreting the constitution, the Court is not to “ignore the general spirit of the instrument.” *Id.* (citations omitted).

2. Section 118(a) does not violate Article 10, § 4 because it is not a law “limiting the amount of damages to be recovered” from governmental entities.

The plain language and ordinary meaning of WYO. STAT. § 1-39-118(a)(i) demonstrates that it is not a law limiting the amount of damages to be recovered but instead defines the limits of the cause of action against a governmental entity. The statute provides that “in any action under [the WGCA], **the liability of the governmental entity**, including a public employee acting within the scope of his duties shall not exceed: (1) the sum of two hundred fifty thousand dollars (\$250,000) to any claimant for any number of claims arising out of a single transaction or occurrence.” WYO. STAT. § 1-39-118(a) (emphasis added). “Liability” is defined as “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 (7th ed. 1999).^{3, 4} “Damages” on the other

³ Black’s Law Dictionary continues:

The term “liability” is one of at least double signification. In one sense it is the synonym of *duty*, the correlative of *right*; in this sense it is the opposite of *privilege* or *liberty*. If a duty rests upon a party, society is now commanding performance by him and threatening penalties. In a second sense, the term “liability” is the correlative of *power* and the opposite of *immunity*. In this case society is not yet commanding performance, but it will so command if the possessor of the power does some operative act. If one has power, the other has a liability. It would be wise to adopt the second sense exclusively. Accurate legal thinking is difficult when the fundamental terms have shifting senses.

925 (7th Ed. 1999)(quoting Anson, *Principles of the Law of Contract* 9 (Arthur L. Corbin ed., 3d Am. Ed. 1919)).

⁴ This Court adopted this definition of liability in *Mem'l Hosp. of Sweetwater Cnty. v. Menapace*, 2017 WY 131, ¶ 18, 404 P.3d 1179, 1184 (Wyo. 2017). In that case, the Supreme Court evaluated Section 118(b) of the WGCA which authorizes governmental entities “to purchase liability insurance to cover ‘all or any portion’ of its liability under the WGCA” and whether doing so extended the hospital’s liability. *Menapace*, 2017 WY 131 at ¶21 - 26, 440 P.3d at 1184 - 85. The Court’s analysis of Section 118(b) confirms

hand is defined as “Money claimed by, or ordered to be paid to, a person as compensation for loss or injury.” BLACK’S LAW DICTIONARY 393 (7th ed. 1999). This Court’s jurisprudence regarding the WGCA makes clear that rather than a law imposing a limit on the damages that may be recovered from a governmental entity, WYO. STAT. § 1-39-118 instead, is part and parcel of the WGCA which defines and limits the liability of governmental entities.

The Wyoming Supreme Court has addressed the legislative intent underpinning the WGCA on numerous occasions. In enacting the WGCA, the “legislature sought to retain the common law principle that a governmental entity is generally immune from lawsuits, while acknowledging that fairness requires authorizing lawsuits against a governmental entity in certain statutorily defined situations.” *Campbell Cty. Mem’l Hosp.*, 2014 WY 3, ¶ 19, 317 P.3d 573, 578 (Wyo. 2014). To that end, the Court has consistently held that the WGCA is a “close-ended” tort claims act. *Weber v. State*, 2011 WY 127, ¶ 11, 261 P.3d 225, 227 (Wyo. 2011)(stating “[U]nless a claim falls within one of the statutory exceptions to governmental immunity stated in Wyo. Stat. Ann. §§ 1–39–105 through 1–39–112, it is barred.”); *City of Torrington v. Cottier*, 2006 WY 145, ¶ 7, 145 P.3d 1274, 1277 (Wyo. 2006); *Gibson v. State Through Dep’t of Revenue & Tax’n*, 811 P.2d 726, 728 (Wyo. 1991).

The WGCA “unambiguously expresses the intention to grant immunity in all but

that the section concerns the limitation on liability and, as the Court stated, “With the enactment of the WGCA, the Wyoming legislature clearly defined a governmental entity’s legal liability.” *Id.* at ¶ 26, 404 P.3d at 1185.

very limited circumstances.” *Diamond Surface v. Cleveland*, 963 P.2d 996, 1000-01 (Wyo. 1998). “[U]nder the WGCA, immunity is the rule and liability is the exception.” *Hall v. Park Cty.*, 2010 WY 124, ¶ 10, 238 P.3d 580, 583 (Wyo. 2010). The Act permits liability “in those certain specified instances which are contemplated by the Act, **and only to the extent contemplated.**” *Hamlin v. Transcon Lines*, 697 P.2d 606, 613 (Wyo. 1985) (emphasis added). Since immunity is the rule, the only right of action against a governmental entity is the right that is provided and defined by the WGCA.

This is to say that governmental liability is “specifically delimited by the mandates of the [WGCA]”. *Hall* 2010 WY 124 at ¶ 12 fn.4, 238 P.3d at 585 fn.4 ; *Mem’l Hosp. of Sweetwater Cnty. V. Menapace*, 2017 WY 131, ¶19, 404 P.3d 1179, 1184 (Wyo. 2017)(stating that a governmental entity’s liability “is defined and limited by the WGCA.”). Reading WYO. STAT. § 1-39-118(a) *in pari materia* with the other provisions of the WGCA demonstrates that the section is not a limitation on recoverable damages, but instead defines the extent to which a right of recovery exists. Section 104 of the WGCA grants immunity from tort liability to governmental entities except “in those specified instances” identified in WYO. STAT. §§ 1-39-105 through 112, but “only to the extent contemplated” in Section 118(a). In other words, Section 118(a) is a “specified limit[] on the state legislature’s waiver of immunity” that “define[s] the extent to which governmental immunity has been waived.” *Millward v. Bd. of Cty. Comm’rs et al.*, 2018 WL 9371676 (D. Wyo. Aug. 21, 2018). Section 118(a) is, both by its plain language and through its relation to the other provisions of the WGCA, a limitation on the liability of and on the right to recover against a governmental entity and cannot be characterized as a law limiting the

amount of damages that may be recovered in a tort action.

Other courts examining similar questions similarly hold that a limitation on liability is distinct and different than a limitation damages. The Oregon Court of Appeals examined a statute similar to WYO. STAT. § 1-39-118(a) in *Surface v. Am. Spirit Ins. Companies/Great Am. Ins. Companies*, 962 P.2d 717 (1998), *aff'd sub nom. Surface v. Am. Spirit Ins. Companies*, 67 P.3d 938 (2003). In that case the statute at issue stated:

“(1) Liability of any public body or its officers, employees or agents acting within the scope of their employment or duties on claims within the scope of ORS 30.260 to 30.300 shall not exceed:

* * * * *

“(b) \$100,000 to any claimant as general and special damages for all other claims arising out of a single accident or occurrence unless those damages exceed \$100,000, in which case the claimant may recover additional special damages, but in no event shall the total award of special damages exceed \$100,000.”

Id. at 719. In answering the question of whether the statute “is a limit on liability or merely caps the amount of money that the government will pay” the court said

By its express terms, the statute provides that “liability” shall not exceed the specified dollar limitations. It therefore operates to define the scope of a government tortfeasor's liability, not just the amount of government funds available to cover that liability. . . . To be sure, the OTCA necessarily limits the amount of damages that an injured party may recover from a government tortfeasor, but it does so only as a necessary consequence of the statute's limitation on liability.

Id. Likewise, the Texas Supreme Court has characterized the Texas Court Claims Act, which contains a similar statute limiting governmental liability to prescribed amounts, not as circumscribing a plaintiff's total recovery but, instead, as a delineating “the extent of the government's waiver of immunity from liability.” *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997).

The Petitioner offers no authority to demonstrate how or why WYO. STAT. § 1-39-118(a) is anything other than what it says it is – a limitation on the liability of governmental entities. Instead, Petitioner focuses only on the ultimate effect of the liability limit to argue that it violates Art. 10 § 4(a), which he characterizes as a “succinct and clear prohibition” on the legislature “limiting the recovery of damages.” *Petitioner’s Brief*, p. 15. Ignoring the fact that, on its face Section 118(a) is a limit on governmental liability not a limit on recoverable damages, he accuses Respondents and the State of seeking “to place words in the prohibition which do not appear.” *Id.* In fact, it is the Petitioner that asks the Court to amend the constitutional provision. Petitioner is, in essence, asking the Court to read Art. 10, § 4(a) as a prohibition on the enactment of any law “which amounts to a limitation on damages.” This argument was roundly rejected in the two seminal cases interpreting Art. 10 § 4.

In *Meyer v. Kendig*, the plaintiff argued that legislation (W.S. § 27-12-103(a)) which granted immunity to co-employees for negligence regardless of degree violated Art. 10 § 4 of the Wyoming Constitution. 641 P.2d 1235 (Wyo. 1982). The plaintiff in *Meyer* argued that the language of § 4 – “No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person” – prohibited the legislature from granting immunity to co-employees. 641 P.2d at 1239. The Court contrasted this sentence with the next sentence in § 4 – “Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void” – and said the language in § 4 that Petitioner relies on here “relates only to the amount

of damages.”⁵ *Id.* The Court said “A ‘limitation in amount’ and a ‘right to recover’ were regarded as separate issues and treated separately by the framers of the Wyoming Constitution. The plain language of such first sentence and its ordinary meaning reflects its prohibition to be against laws limiting ‘the amount of damages.’” *Id.* (citation omitted). Even though the ultimate effect of the immunity legislation limited the plaintiff’s recovery of damages to zero, the Court found that the legislation was not an act limiting the amount of damages. The Court said the fact that the immunity statute did not limit the amount of damages, “is determinative of the constitutionality of such section insofar as Art. 10, § 4 of the Wyoming Constitution is concerned.” *Id.*

The Wyoming Supreme Court in *Troyer v. State Dep’t. Health & So. Servs., Div. of Vocation Rehab.* rejected again the argument Petitioner makes here. 722 P.2d 158 (Wyo. 1986). In *Troyer*, a plaintiff injured by a malfunctioning elevator procured by the Wyoming Department of Health, challenged the constitutionality of the WGCA. Just as the Petitioner does here, the plaintiff in *Troyer* conflated the ultimate effect of the legislation with its expressed purpose, arguing that the WGCA violated Art. 10 § 4 because “According to appellant, the elimination of his cause of action amounts to a limitation on his damages.” *Id.* at 163. The Court, citing *Meyer*, flatly rejected the argument and again held that while

⁵ Following amendment of Art. 10 § 4 authorizing the legislature to enact legislation mandating alternative dispute resolution or review by a medical panel before the filing of a civil action against a health care provider, this sentence is now found in subsection (c). Wy. Sess. Laws 2004, House Enrolled Joint Resolution No. 11, § 1.

“Article 10, § 4 may prevent the legislature from imposing arbitrary limits on damages, [] it does not prevent limitations on the types of actions which may be brought against the State.” *Id.* at 163. The Court said that “if the first sentence of Art. 10 § 4 were given the broad application urged by appellee, it would conflict with, and would make enactments impermissible on, such subjects as comparable negligence, statutes of limitation, contribution among joint tortfeasors, etc.” *Id.* (quoting *Meyer*, 641 P.2d at 1239).

Together, *Meyer* and *Troyer* establish that Article 10, § 4(a) does not forbid the legislature from limiting a right to recover, even to the extent of prohibiting it outright. If a statute granting absolute immunity to governmental entities (and even to private parties) does not violate Article 10, § 4(a) it follows that waiving governmental immunity in certain statutorily defined situations up to the limit of liability set by Section 118(a) does not run afoul of Article 10, § 4(a). *See Morris v. Massachusetts Mar. Acad.*, 565 N.E.2d 422, 428 (Mass. 1991)(“It is clear, therefore, that the Legislature intended to waive immunity only up to the \$100,000 limit. The cap is one term of the waiver. Because [absent its consent] the Commonwealth would be entitled to complete immunity, it follows that the Commonwealth may partially waive its immunity.”).

Other courts that have considered such limitations in the context of constitutional statutes prohibiting limits on the amount of damages that may be recovered have reached similar conclusions. *See e.g., Smith v. City of Philadelphia*, 516 A.2d 306, 309 (Pa. 1986) (holding that a statutory limit on damages recoverable from governmental entities did not violate a constitutional provision similar to Article 10, § 4(a)); *Yanero v. Davis*, 65 S.W.3d 510, 523-525 (Ky. 2001) (same); *Shue v. Burch*, 2009 WL 10665775, at * 8 (D. Wyo. 2009)

(“Many states have adopted statutes limiting the amounts or kinds of damages recoverable against government tortfeasors Those courts that have addressed the question . . . have almost uniformly held them to be constitutionally valid.”).

Finally, Petitioner’s reliance on *Sykes v. Lincoln Cnty. Sch. Dist. No. 1 & 2*, 763 P.2d 1263, 1266 (Wyo. 1988) to construe Section 1-39-118(a)(i) as a limitation on the amount of damages that may be recovered is unavailing. *Sykes* did not concern Section 118 nor the Wyoming Constitution and provides no analysis of the limitation. Instead, the issue in *Sykes* concerned whether a BOCES (Board of Cooperative Education Services) was a governmental entity in its own right or an agent of the several governmental entities that comprised the Board. *Id.* at 1265-66. The language Petitioner relies on is found in a footnote explaining that the plaintiffs in that action argued BOCES was an instrumentality of the several individual school districts because they desired to have the liability limit in Section 118(a)(i) to apply separately to BOCES and each appellee school district.

In sum, Section 118(a) of the WGCA is a limitation on the legislature’s waiver of immunity, rather than a limitation on recoverable damages, and therefore does not violate Article 10, §4(a) of the Wyoming Constitution.

B. ARTICLE 10, § 4(a) DOES NOT APPLY TO GOVERNMENTAL ENTITIES.

Again, in construing the Wyoming Constitution, courts “follow essentially the same rules as those governing the construction of a statute.” *Powers v. State*, 2014 WY 15, ¶ 9, 318 P.3d 300, 304 (Wyo. 2014). The fundamental goal is “to ascertain the intent of the framers.” *Id.* In determining the framers’ intent, courts look to the plain and unambiguous

language of the constitution, interpreting each constitutional provision “in light of the entire document, rather than as a series of sequestered pronouncements.” *Id.* In doing so, the court reads all constitutional provisions *in pari materia*, considering every word, clause, and sentence “so that no part will be inoperative or superfluous.” *Id.*

1. Art. 10 § 4 did not apply to governmental entities on its adoption.

The governmental immunity enjoyed by municipal and county governments came from the common law of England – more specifically the case of *Russell v. The Men of Devon*, 2 Term.Rep. 667, 100 Eng.Rep. 359 (1788). *Oroz v. Bd. of Cnty. Comm'rs of Carbon Cnty.*, 575 P.2d 1155, 1157(Wyo. 1978). Consequently, from the time the Wyoming Constitution was adopted in 1890 until the Wyoming Supreme Court abrogated governmental immunity in *Oroz* in 1978, governmental entities such as the City of Cheyenne were immune to suit. The framers of the Wyoming Constitution “would have had no reason to concern themselves with governmental liability in tort.” *Millward v. Bd. of Cnty. Commissioners of Cnty. of Teton, Wyoming*, No. 17-CV-117-SWS, 2018 WL 9371676, at *4 (D. Wyo. Aug. 21, 2018). In *Smith v. City of Philadelphia*, the Pennsylvania Supreme Court considered whether a statute limiting the damages that may be recovered against a governmental entity violated a constitutional provision prohibiting the legislature, in pertinent part, from limiting “the amount to be recovered for injuries resulting in death, or for injuries to persons or property” except concerning workmen’s compensation. 516 A.2d 306, 308 (Pa. 1986)(quoting in part Pa. Const. art. III, § 18). The court rejected the argument that the prohibition should apply “to all cases, not merely those involving private defendants,” because “the Framers would have had no occasion to apply the prohibition

against limiting damages to government, for government, at that time, was immune from suit.” *Id.* at 309.

This understanding is bolstered by looking at the context in which the Wyoming framers placed Art. 10 § 4. Article 10 is under the heading “Corporations” and all of the remaining provisions of the article concern corporations exclusively. Section 1 directs the legislature “to provide for the organization of corporations by general law.” Wyo. Const. art. 10, § 1. Section 2 concerns state control and regulation of corporations. Wyo. Const. art. 10, § 2. The remaining sections of Article 10 all concern the limitations on corporate activities. Wyo. Const. art. 10, §§ 5-10. There is nothing in Art. 10 § 4 to suggest the framers ever intended the provision to apply to governmental entities. In total, the plain language of Article 10, § 4(a), read *in pari materia*, demonstrates that it does not apply to governmental entities and therefore does not prevent the legislature from waiving the liability of governmental entities to a prescribed amount.

2. Art. 10 § 4 must be read in *pari materia* with Art. 1 § 8

Mindful of the rules for construing constitutional provisions *supra*, the court must also interpret Article 10, § 4(a) in light of Article 1, § 8. The second sentence of Article 1, § 8 of the Wyoming Constitution provides: “Suits may be brought against the state in such manner and in such courts as the legislature may by law direct.” The plain language of this section demonstrates that the framers intended for the legislature to have complete control over suits against the state. Petitioner contends that “manner” must be narrowly construed to be limited to “procedure and method.” *Petitioner’s Brief*, p. 22. He contends that the authority granted in Art. 1 § 8 only allows the legislature to dictate the procedure and venue.

Id. at pp. 22-23.

This argument fails to acknowledge that commonly accepted definitions of the term “manner” are exceptionally broad. *See e.g., Manner*, Dictionary.com, <https://www.dictionary.com/browse/manner> (last visited Apr. 23, 2024) (“a way of doing, being done, or happening; mode of action, occurrence, etc.”); *Manner*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/manner> (last visited Apr. 23, 2024) (“a characteristic or customary mode of acting; a mode of procedure or way of acting”); *see also Solvay Chemicals, Inc v. Wyo. Dep’t of Rev.*, 2022 WY 124, ¶ 16, 517 P.3d 1146, 1151 (Wyo. 2022) (looking to common dictionary definition when term is not defined by statute).

Moreover, Petitioner’s argument ignores that the Wyoming Supreme Court has interpreted Article 1, § 8 as a complete delegation of authority to the legislature to regulate suits against the state, including the extent of governmental liability. *Troyer*, 722 P.2d at 162-63 (quoting *Worthington v. State*, 598 P.2d 796, 809-812 (Wyo. 1979)) (holding Article 1, § 8 “can hardly be construed as anything but a delegation to the legislature of the power to regulate the entire field [of suits against the state] and not an invitation to the courts to invade that domain.”); *accord Alewine v. State, Dept. of Health & Social Servs.*, 803 P.2d 1372, 1375 (Wyo. 1991) (declining to deviate from established view that under Article 1, § 8 “the power to determine whether, and to what extent, the state is liable to suit is vested in the legislature.”) (emphasis added); *White v. State*, 784 P.2d 1313, 1317 (Wyo. 1989) (“We have long held that the second sentence of [Article 1, § 8] grants the legislature the power to determine the extent to which the State and its subdivisions are subject to suit. . . . For us to hold otherwise would be tantamount to holding the constitution

unconstitutional.”) (internal citations omitted).⁶ It is well-settled that Article 1, § 8 grants the legislature broad authority to regulate suits against the state and its political subdivisions. Section 118(a) of the WGCA is a proper exercise of that authority.

3. The legislature has the authority to immunize local governments from suit.

Petitioner asserts that Art. 1 § 8 of the Wyoming constitution is inapplicable to determining whether WYO. STAT. § 1-39-118(i) is constitutional because his action is “not one against the State.” *Petitioner’s Brief*, p. 9. Although he offers no cogent argument on the topic, he appears to assert that Art. 1 § 8 does not authorize the legislature to regulate suits against the State’s political subdivisions. The argument is unconvincing. The Wyoming Supreme Court, looking to Art. 1 § 8, has held that “The Constitution of the State of Wyoming provides that no suit may be maintained against either the state **or its various governmental components, including any and all ‘governmental entities,’** without the consent and direction of the legislature.” *Weston Cnty. Hosp. Joint Powers Bd. v. Westates Const. Co.*, 841 P.2d 841, 847 (Wyo. 1992) (citing Wyo. Const. art. 1, § 8; *Worthington v. State*, 598 P.2d 796 (Wyo.1979); *Retail Clerks Local 187 AFL–CIO v. University of Wyoming*, 531 P.2d 884 (1975); *Hjorth Royalty Company v. Trustees of University of Wyoming*, 30 Wyo. 309, 222 P. 9 (1924)(emphasis added).

⁶ The Court in *Troyer* noted that the argument that Art. 1 § 8 limits the legislature to prescribing only procedure and venue was put forth by Justice Rose in his dissent in *Worthington v. State* and rejected by a majority of the Court. 722 P.2d at 162.

Furthermore, regardless of the distinction between governmental immunity and sovereign immunity and whether Art. 1, § 8 extends the legislature’s authority to regulate causes of action against local governments, the legislature has the authority to do so as an exercise of its plenary power. The Wyoming Constitution “is not a grant but a limitation upon legislative power.” *Cathcart v. Meyer*, 2004 WY 49, ¶ 45, 88 P.3d 1050, 1067 (Wyo. 2004)(citing *Witzenburger v. State ex rel. Wyoming Cmty. Dev., Auth.* 575 P.2d 1100, 1124 (Wyo. 1978); *State v. Snyder*, 31 Wyo. 333, 225 P. 1102, 1105 (1924)). Thus, under its plenary power, “the legislature may enact any law not expressly or inferentially prohibited by the constitution.” *Id.* (citations omitted). “This plenary power of the legislature is the rule for all purposes of civil government, and a prohibition to exercise a particular power is an exception.” *Id.* (citation omitted).

As set out in *Oroz*, governmental immunity is a common law doctrine. 575 P.2d 1155, 1157 (Wyo. 1978). The legislature may modify or repeal common law causes of action. *Greenwalt v. Ram Rest. Corp. of Wyoming* 2003 WY 77, ¶¶ 34-36, 71 P.3d 717, 728–29 (Wyo. 2003). *See also DeLoach v. Elliott*, 710 S.E.2d 763, 765 (Ga. 2011) (holding the legislature has authority to modify common law rights of action and rejecting constitutional challenges to governmental immunity); *McLean v. Maverik Country Stores, Inc.*, 135 P.3d 756, 761 (Id. 2006) (“It is clear that, under the Idaho Constitution, the legislature has the power to modify or repeal common law causes of action.”). Thus, the legislature “has the power to abolish substantive common law rights, including those traced to the common law of England, in order to attain a permissible legislative object.” *Greenwalt, supra*. 2003 WY 77, ¶¶ 34, 71 P.3d at 728 (citing *Schlattman v. Stone*, 511 P.2d 959, 960–62

(Wyo.1973).⁷ One needs to look no further than Title 1, of the Wyoming statutes to understand that the legislature has been regulating civil actions from the state's inception. In particular, the statutes of limitation and repose set out Chapter 3 of that title curtail and modify innumerable civil causes of action and have the effect of "limiting the amount of damages" that a tort victim may recover.

This Court has repeatedly recognized that grants of immunity are within the legislature's authority. *Troyer*, 722 P.2d at 163; *White*, 784 P.2d at 1318. This authority extends even to private parties.⁸ *Meyer*, 641 P.2d at 1239. Certainly, if, under its plenary

⁷ In this instance, the legislature expressly stated the legislative objective of the grant and subsequent limited waiver of immunity for local governments in WYO. STAT. § 1-39-102 - "This act is adopted by the legislature to balance the respective equities between persons injured by governmental actions and the taxpayers of the state of Wyoming whose revenues are utilized by governmental actions on behalf of those taxpayers."

⁸ Statutes granting immunity for acts and omissions resulting in damage or injury are not limited to governmental entities. For examples see WYO. STAT. § 1-1-125(b) (granting immunity to those volunteering services to nonprofit organizations and volunteer firefighters); WYO. STAT. § 1-1-129(b) (granting immunity to volunteer health care professionals); WYO. STAT. § 35-4-906(b)(granting immunity to individuals administering epinephrine auto-injectors or an opiate antagonists); WYO. STAT. 25-26-103(a)(granting

power, the legislature may modify and alter common law causes of action and grant immunity even to private parties, it no doubt has the constitutional authority to regulate the immunity of, and causes of action against, governmental entities receiving and expending taxpayer monies.

V. CONCLUSION

The Wyoming constitution grants the legislature the broad authority to regulate causes of action and the immunity of the state and its political subdivisions, including the City of Cheyenne. The Wyoming Governmental Claims Act is an integrated legislative enactment that exercises that authority by granting immunity to local governments, providing explicit and distinct waivers of that immunity for well-defined acts, and limiting that liability to specific dollar amounts. WYO. STAT. § 1-39-118(a). This limitation on the liability of local government cannot be construed as a limitation on the amount of damages that may be recovered within the prohibition against such limits in Art. 10, § 4 of the Wyoming constitution. Furthermore, it cannot seriously be doubted that the framers of Wyoming's constitution did not intend for the prohibition on damage limitations to apply to governmental entities, which enjoyed immunity at the drafting and adoption of the constitution. However, even if the prohibition could be deemed to apply to governmental

immunity for ordinary negligence to individuals employing an automated external defibrillator (AED)).

entities, the prohibition must be construed in harmony with the legislature's constitutional power to regulate actions against the state and its political subdivisions under Art. 1 § 8 as well as the legislature's broad plenary powers to regulate civil actions in general. The Court's long and well-established precedence on this issue demonstrates that Wyo. Stat. § 1-39-118(a) meets constitutional muster. In contrast, adopting the broad reading of Art. 10, § 4's prohibition urged by Petitioner would fundamentally alter the landscape of civil law and would profoundly invade the legislature's plenary authority under the constitution. The City of Cheyenne therefore urges the Court to affirm the district court's determination that WYO. STAT. § 1-39-118(a) is constitutional.

DATED this 16th day of January, 2025.

s/ J. Mark Stewart

J. Mark Stewart (Wy. Bar No. 6-4121)

Davis & Cannon, LLP

P.O. Box 43

307/634-3210 (telephone)

307/778-7118 (fax)

mark@davisandcannon.com

Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Brief of Appellee* was served electronically via the Wyoming Supreme Court C-Track Electronic Filing system on this 16th day of January, 2025 on the following:

Larry B. Jones
Colin M. Simpson
BURG SIMPSON ELDREDGE HERSH AND JARDINE, P.C.
1135 14th Street
Cody, Wyoming 82414
(307) 527-7891
ljones@burgsimpson.com
csimpson@burgsimpson.com
Attorneys for Petitioner

Bridget Hill, Wyoming Attorney General
Mark A. Klaassen, Deputy Attorney General
Tim Miller, Senior Assistant Attorney General
Prentice B. Olive, Assistant Attorney General
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002
(307) 777-3608
bridget.hill@wyo.gov
mark.klaassen@wyo.gov
tim.miller@wyo.gov
prentice.olive@wyo.gov

The original plus six copies of the foregoing will be hand delivered to the Wyoming Supreme Court on January 16, 2025.

I have accepted the terms for e-filing and this document is an exact copy of the written document filed with the Clerk. All privacy redactions have been made and this document is free of viruses.

s/ J. Mark Stewart
Davis & Cannon, LLP