

MONTANA STATE SENATE  
JUDICIARY COMMITTEE  
MINUTES OF THE MEETING

February 3, 1987

The twentieth meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on February 3, 1987 by Chairman Joe Mazurek in Room 402 of the Capitol Building.

COSNDIERATION OF SB 173: Senator Bob Brown, Whitefish, introduced SB 173, which amends the laws relating to spousal privilege. He said spousal privilege is the rule that prohibits a person from testifying against his spouse without the consent of the spouse against whom his testifying. He said the bill would allow a person to testify against his spouse with only his own consent and without the consent of the spouse against whom he testifies. He explained the bill applies to both civil and criminal matters.

PROPOSENTS: Mike McGrath, Lewis and Clark County Attorney, supported the bill because he said he has had cases where the wife will turn in a husband for a crime, but not able to testify against him after he has been charged. He said people do know about this law, because they do use it to their advantages as much as they can. He discussed several cases that he has had where this law interferred. He gave the committee Montana Supreme Court cases to look at (see Exhibit 1).

Mark Murphy, Montana Justice Association, said the court would have to take into consideration the mentality of the spouse if the court decides to put the spouse on the stand after the spouse has agreed to testify against the defendant spouse. He supported the bill.

OPPONENTS: None

DISCUSSION ON SB 173: Senator Crippen asked if the law states that hearsay can not be used against a person. Mr. McGrath said that was true and the hearsay rule protects the 5th amendment right. He said that rule has nothing to do with the one in HB 173. Senator Crippen felt the bill should not be used in criminal cases. Senator Crippen felt man and wife are one person whatever the circumstances are. He pointed out on page 1187 of the first exhibit that it states right there that man and wife have aways been thought of as one person. Mr. McGrath replied that the court has decided, as it reads on page 1187, that a man and wife are no longer one person when it comes to testifying against a spouse in a court of law.

Senator Mazurek asked what other states have passed laws in this area. Mr. McGrath stated this is a federal court idea. Mr. Murphy said most

states still go by the Spousal privilege. Mr. Murphy stated right now in the federal law a wife may testify against her husband on the exception of a rape committed against her by him.

Senator Crippen stated he was concerned about the bill allowing a spouse to testify against a spouse in a criminal case, which makes the spouse a criminal before the trial if the wife is going to testify against him or visa versa.

Senator Halligan commented that the law is there to protect the marriage, but if a spouse is committing crimes, then maybe the marriage would not be saved anyway, so maybe the committee should go along with the bill. Mr. McGrath stated it is very common for one spouse to want to testify against another.

Senator Blaylock asked if a husband was angry with someone and told his wife he was going to kill that person, would she be forced to testify if the police knew about something like this. Mr. McGrath said they could not force a wife to testify against her husband. Mr. McGrath said the present law is preventing complete truth to surface.

Senator Pinsoneault asked if the courts will protect a wife after she has testified for certain reasons. Mr. McGrath said it would depend on the situation.

Senator Brown closed on SB 173.

The committee adjourned the hearing for executive action.

ACTION ON SB 189: SB 189, which was tabled, was brought out on the executive action floor because Senator Van Valkenburg thought the bill was in trouble and wanted to see if he could convince the committee to look at the bill again. Valencia Lane handed out amendments to the bill (see Exhibit 2). Senator Van Valkenburg explained that the bill has been getting a great amount of support from people around the state. Senator Halligan moved to remove the bill from the table. The motion CARRIED. Valencia explained the amendments would allow the school officials to know the identity of students charged or arrested in a beer bust, but the information could not be put on a student's record. Senator Halligan moved the proposed amendments. Senator Blaylock said the identity will be spread all over town if nothing else. Senator Beck stated that no one could keep the names confidential, but so long as it doesn't go on the student's record, then the bill isn't so bad. The motion CARRIED with Senator Blaylock voting no.

Senator Halligan moved the bill DO PASS AS AMENDED. Senator Blaylock said if the rest of the school will know about a charge or arrest, what

would stop the Army from coming into a school and asking teachers about students who have shown interest in joining the service. He said a teacher could tell the Army as easy as any records could show if a kid has been in trouble before. He stated he did not believe it was the school's business to know what kids do after school off school property. He felt it wasn't fair if one student was drinking and one wasn't, but was at the party, get the same punishment. Senator Blaylock didn't like the contracts students signed so they could play in sports either. Senator Pinsoneault said if a student signs a contract to play a sport and the contract says no drinking, then the student should know the consequences. Senator Bishop asked if the passed amendments would only allow an identity of a student if the student was just arrested, but not charged. Senator Halligan said the student can be just charged for being at a beer bust or just seen at one and still be reported. Senator Van Valkenburg thought the three terms were about the same when it came to this bill. Senator Brown felt the guidance counselor will still have some trouble getting information about kids even with this bill. He wanted to insert into the bill that a student must attend a program by the guidance counselor on alcohol. Senator Blaylock asked Senator Van Valkenburg if he ever drank while in high school. Senator Van Valkenburg stated he was caught drinking and the school would not allow him to run for studentbody president because of it. The motion CARRIED with Senator Blaylock voting no.

ACTION ON SB 51: Senator Mazurek asked the committee if they wanted a subcommittee for this bill. The committee, after some reluctance, decided to think about having a subcommittee.

ACTION ON SB 152: The committee received amendments from Senator Walker for SB 152 (see Exhibit 3). Senator Pinsoneault said the law doesn't need to be amended he felt a 180 days was plenty of time to get the issue settled. Senator Mazurek said anytime one changes the statute of limitations it causes problems. He said the bill would have benefits for both sides of the issue, but the language has to be just right for it to work. Senator Mazurek thought maybe 180 days were not enough time. Senator Bishop stated the filing is not hard to do at all. Senator Mazurek thought a filing against the Human Rights Commission was difficult to do. Senator Bishop moved the bill DO NOT PASS. The motion CARRIED with Senator Yellowtail voting no.

ACTION ON SB 161: Valencia gave amendments to the committee (see Exhibit 4). The amendments would extend the term of the justice for another eight years; an extended sunset period. Senator Blaylock moved the amendment. Senator Halligan questioned doing this because the projection, stated in the hearing, made it sound like the case load will be the same as it is now in eight years. The amendment FAILED with Senators Crippen, Pinsoneault, Yellowtail, Galt, and Halligan voting no.

Senator Brown moved the bill DO PASS. The motion CARRIED.

ACTION ON SB 160: Karl Englund presented some amendments (see Exhibit 5). Senator Pinsoneault thought the Englund amendments was too complex and redundant. The committee discussed different language for the amendments (see Exhibit 6). Senator Blaylock wanted to use the word "have" over the word "has" in the amendments (Exhibit 6). Senator Pinsoneault moved the amendments (Exhibit 6). The motion CARRIED.

Senator Brown moved the bill DO PASS AS AMENDED. The motion CARRIED.

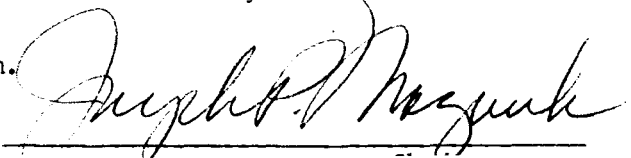
ACTION ON SB 181: Valencia explained the amendments she prepared for the committee (see Exhibit 7). Senator Halligan did not like amendment #8 because he thought the reinstatement fee should be \$25 instead of \$50. Senator Halligan moved the amendments and changed the \$50 to \$25 in the 8th amendment. The motion CARRIED.

Senator Mazurek said some of the judges wanted to see Chapter 12, juveniles, included in this bill. Senator Brown moved to include Chapter 12 into the bill (2nd amendment on the Standing Committee Report). The motion CARRIED.

Senator Brown moved the bill DO PASS AS AMENDED. Senator Mazurek said the bill is not a simple thing of "not paying the fine" issue, but making sure that the one who never thinks he will have to pay the fine, will pay the fine. The motion CARRIED with Senator Beck voting no.

CONSIDERATION OF SB 52 AGAIN: Andrea Bennett, the State Auditor, presented to the committee information on how the insurance rate system works now and how the bill would work. She gave the committee information on the collected fees a year and the insurance regulation budget (see Exhibit 8). She also gave the committee a graph on expenditures vs. fees (see Exhibit 9). She also presented flex rating personnel vs. modified request of this Legislature (see Exhibit 10). She explained she has two half-time people who work with the insurance rates system. She said she has no one with financial background that could tell if the rates are discriminatory or not. She said the Auditor's Office will need both the modifieds and the flex system for the bill to work. She also mentioned that she had no investigators in the Auditor's Office to look at the insurance rates. Senator Brown asked why the flex system is the better system. Ms. Bennett replied that a band will keep the rates stable where the system now is not doing that. Senator Mazurek asked if the flex rating system was to pass, would the department be able to do the job without the extra funding. Ms. Bennett said they could not. Senator Crippen stated that while the flex system does has good merit to it, it has not worked out all the problems of this division. He suggested that Montana really study the other states that have this and find out the weakness in the system. Ms. Bennett felt the flex is more fair to people. She said the policy holders are paying \$647,000 into the General Fund and that is not fair. Ms. Bennett said it is hard to compare other states insurance rates systems to ours because every state has different insurance rates.

The committee adjourned at 12:00 p.m.



# ROLL CALL

Judiciary

COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 3

NAME	PRESENT	ABSENT	EXCUSED
<u>Senator Joe Mazurek, Chairman</u>	X		
<u>Senator Bruce Crippen, Vice Chairman</u>	X		
<u>Senator Tom Beck</u>	X		
<u>Senator Al Bishop</u>	X		
<u>Senator Chet Blaylock</u>	X		
<u>Senator Bob Brown</u>	X		
<u>Senator Jack Galt</u>	X		
<u>Senator Mike Halligan</u>	X		
<u>Senator Dick Pinsoneault</u>	X		
<u>Senator Bill Yellowtail</u>	X		

Each day attach to minutes.

DATE: 2/3/81

ADDRESS: 3840 Kiki Dr.

PHONE: 444-3816

REPRESENTING WHOM? MONTANA COUNTY ATTORNEYS ASSOCIATION

APPEARING ON WHICH PROPOSAL: SB 173

DO YOU: SUPPORT?   X   AMEND?            OPPOSE?           

COMMENTS: \_\_\_\_\_

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

STATE REPORTER  
Box 749  
Helena, Montana 59624

SENATE JUDICIARY

EXHIBIT NO. 1

DATE FEB. 3, 1987

BILL NO. SB 173

VOLUME 43

No. 85-350

LINDA J. MILLER,

Plaintiff and Appellant,

v.

Submitted: Mar. 14, 1986

Decided: Jun. 26, 1986

FALLON COUNTY, CECIL P. MILLER,  
DAVIS TRANSPORT, INC., and PREFAB  
TRANSIT CO.,

Defendants and Respondents.

NEGLIGENCE--CONTRACTS, Appeal from summary judgment granted on the basis of interspousal tort immunity and on the basis of a pre-injury release form. The Supreme Court held: (1) The defense of interspousal tort immunity is abolished in Montana, overruling previous decisions to the contrary, (2) An entity cannot contractually exculpate itself from liability for willful or negligent violations of legal duties, whether they be rooted in statutes or case law, and (3) Even a waiver which constitutes a private contract between private individuals is invalid if it seeks to exempt one from liability for those actions specified in the statute.

Appeal from the Sixteenth Judicial District Court, Fallon County, Hon. A.B. Martin, Judge

For Appellant: Lucas & Monaghan, Miles City

For Respondent: Anderson, Edwards & Molloy, Billings  
Anderson, Brown Law Firm, Billings  
Moulton Law Firm, Billings  
Denzil R. Young, Baker  
Cecil J. Stacey, Billings

For Amicus Curiae: Rossbach & Whiston For Rosina Woodhouse, Missoula  
Sandall, Cavan, Smith, Howard & Grubbs; W. Corgin  
Howard for Audrey D. Noone, Billings

Mr. A. Lance Tonn argued the case orally for Appellant; Mr. Donald W. Molloy for Miller; Mr. Steven J. Harman for Davis Transport; and Mr. Sidney R. Thomas for Prefab Transit.

Opinion by Justice Morrison; Chief Justice Turnage and Justices Harrison, Sheehy and Hunt concur. Justice Weber dissents and filed an opinion in which Justice Gulbrandson joins.

Reversed and remanded.

\_\_\_\_ Mont. \_\_\_\_

\_\_\_\_ P.2d \_\_\_\_

Miller, Plaintiff and Appellant, v.  
Fallon County, Defendants and Respondents  
43 St.Rep. 1185

SENATE JUDICIARY

EXHIBIT NO. 1

DATE 2-3-87

BILL NO. S.B.

Mr. Justice Morrison delivered the Opinion of the Court.

Linda J. Miller appeals judgment of the Sixteenth Judicial District Court, County of Fallon, which granted summary judgment to defendants, Cecil P. Miller (Miller), Davis Transport, Inc. (Davis), and PreFab Transit Co. (PreFab). We reverse.

Linda Miller (appellant) was injured in a one vehicle truck accident. Her husband, Cecil Miller, an independent truck driver, was the driver of the truck. Miller had entered into a contract for services with Pre-Fab on August 3, 1982. As part of that contract, Miller delivered a load of mobile home frames from Elkhart, Indiana, to Belgrade, Montana. The delivery was made November 2, 1982.

Appellant accompanied her husband on the trip. They stayed in Belgrade, Montana, the night of November 2. The next day, Miller, on behalf of PreFab, entered into a contract with Davis whereby Miller agreed to haul a load of lumber from Townsend, Montana, to Minnesota for Davis. The accident occurred November 3, 1982, while the Millers were traveling to Minnesota. Appellant was thrown from the truck and is now a paraplegic.

She filed an action March 22, 1984, against Fallon County, alleging negligent design of a roadway; Miller, alleging negligent, careless and unlawful operation of a vehicle; Davis, alleging vicarious liability for Miller's negligence; and PreFab, alleging vicarious liability for Miller's negligence. The vicarious liability actions are premised on allegations that Miller was the employee of Davis and/or PreFab at the time of the accident.

Miller, Davis and PreFab filed motions for summary judgment on the basis of interspousal tort immunity. PreFab additionally sought summary judgment on the basis of the following pre-injury release form signed by appellant on September 12, 1981:

"Application to travel with my husband.

"\* \* \*

"Furthermore, in the event of an accident or other manner wherein I may lose my life, be injured, or in any way contribute to the injury or loss of life to another, I hereby waive any rights whatsoever against Pre-Fab Transit Co. for what otherwise might be its liability and agree that Pre-Fab Transit Co., its agents, employees and contractors are to be held harmless in all respects by virtue of my being a passenger in said vehicle."

The motions were briefed and argued. Thereafter, the District Court granted the motions for summary judgment on the basis of interspousal tort immunity. The pre-injury release was also held to support PreFab's motion. Following Rule 54(b), M.R.Civ.P., certification, notice of appeal was timely filed. The following issues are raised:



Miller, Plaintiff and Appellant, v.  
Fallon County, Defendants and Respondents  
43 St.Rep. 1185

SENATE JUDICIARY  
EXHIBIT NO. 1  
DATE 2-3-87  
BILL NO. S.B. 173

1. Whether the District Court committed reversible error in granting summary judgment in favor of Miller on the basis of the defense of interspousal tort immunity?

2. Whether the District Court committed reversible error in granting summary judgment in favor of Davis and PreFab on the basis of its finding that the defense of interspousal tort immunity is available to a spouse's employer?

3. Whether the District Court committed reversible error by granting summary judgment to PreFab on the basis of a waiver given to PreFab by appellant.

### THE DOCTRINE OF INTERSPOUSAL TORT IMMUNITY

The doctrine of interspousal tort immunity derives from the common law. When Montana became a state, it adopted the common law of England as "the rule of decision in all the courts of this state." Section 1-1-109, MCA. The doctrine of interspousal tort immunity is a creature of court decision and subject to change by the courts. *Fernandez v. Romo* (Ariz. 1982), 646 P.2d 878, 880. *Brooks v. Robinson* (Ind. 1972), 284 N.E.2d 794, 797.

This Court has previously refused to abolish the doctrine of interspousal tort immunity. *Conley v. Conley* (1932), 92 Mont. 425, 15 P.2d 922; *Kelly v. Williams* (1933), 94 Mont. 19, 21 P.2d 58; *State ex rel. Angvall v. District Court* (1968), 151 Mont. 483, 444 P.2d 370; and *State Farm Mutual Automobile Ins. Co. v. Leary* (1975), 168 Mont. 482, 544 P.2d 444. However, judicial modification of the common law is sometimes required to prevent great injustice or to insure that the common law is consonant with the changing needs of society. *Digby v. Digby* (R.I. 1978), 388 A.2d 1. In fact, "[t]he strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs." *Brooks v. Robinson*, 284 N.E.2d at 797.

The doctrine of stare decisis is not an impenetrable bar to conforming common law to the needs of a dynamic and evolving culture:

"This Court recognizes that courts may have previously fashioned a rule of immunity from wrong-doing, having adopted a posture at an earlier date in response to what appeared to be desirable then as a matter of policy; yet when it later appears to be unsound within a given context, especially when the reasons upon which the immunity is based no longer exist, it remains within the domain of the judiciary to reject the applicability of such a rule."

*Launa v. Clayton* (Tenn. 1983), 655 S.W.2d 893, 897.

The historical reasons for retention of immunity are: 1) unity--the common law concept that husband and wife are one person; 2) family harmony; and 3) the possibility of fraud and collusion. These reasons no longer dictate such a harsh and absolute result. See *Tobias, Interspousal Tort Immunity in Montana*, 47 Mont.L.Rev. 23 (1986).

Miller, Plaintiff and Appellant, v.  
Fallon County, Defendants and Respondents  
43 St.Rep. 1185

The concept of unity originated at a time when a woman relinquished her rights as an individual when she married.

"The 'supposed unity' of husband and wife, which serves as the traditional basis of interspousal disability, is not a reference to the common nature or loving oneness achieved in a marriage of two free individuals. Rather, this traditional premise had reference to a situation, coming on from antiquity, in which a woman's marriage for most purposes rendered her a chattel of her husband."

Freehe v. Freehe (Wash. 1972), 500 P.2d 771, 773. The concept of unity is outmoded and has been significantly eroded by both statutory and case law.

Family harmony will not be destroyed by the filing of a lawsuit. If a family is sound, it will most likely survive the legal action. A weak family bond cannot be strengthened by our judicial system.

"[I]t is difficult to perceive how any law barring access to the courts for personal injuries will promote harmony. If this were a valid sociological consideration, the Legislature could orchestrate even greater harmony by abolishing the statute giving the right to divorce."

Coffindaffer v. Coffindaffer (W.Va. 1978), 244 S.E.2d 338, 342.

The destruction of family harmony is even less of a concern because of insurance. A spouse is normally not seeking redress against the other spouse, but rather spouse's insurance carrier. See Fernandez, 646 P.2d at 881-882. In Transamerica Insurance Co. v. Royle (Mont. 1983), 656 P.2d 820, 40 St.Rep. 12, we recognized the effect of insurance on suits against parents by their minor children. The same rationale applies here. "The existence of liability insurance prevents family discord and depletion of family assets in automobile negligence cases . . . (citations omitted)." Royle, 656 P.2d at 823, 40 St.Rep. at 16.

Our decision in Royle, 656 P.2d at 823-824, 40 St.Rep at 16. is also instructive concerning the problems of fraud and collusion. The possibility of fraud and collusion exists throughout all litigation. One of the many functions of a judge or jury is to determine the facts of the case, including the potentially collusive aspect of the parent-child or interspousal relationship. Thus, the possibility of fraud or collusion is not sufficient reason to warrant continued reliance on interspousal tort immunity. The defense is abolished in Montana. Previous decisions to the contrary, cited above, are overruled.

The abolition of the doctrine of interspousal tort immunity renders unnecessary consideration of whether the doctrine is available to the allegedly-negligent spouse's employer.

#### THE EFFECTS OF THE PRE-RELEASE FORM

More than a year prior to the accident, appellant requested and

Miller, Plaintiff and Appellant, v.  
Fallon County, Defendants and Respondents  
43 St.Rep. 1185

received permission from PreFab to ride with her husband on interstate trips. In return, PreFab insisted that she sign a document entitled "Application to Travel with My Husband" which states in pertinent part:

"Furthermore in the event of an accident or other manner wherein I may lose my life, be injured, or in any way contribute to the injury or loss of life to another, I hereby waive any rights whatsoever against Pre-Fab Transit Co. for what otherwise might be its liability and agree that Pre-Fab Transit Co., its agents, employees and contractors are to be held harmless in all respects by virtue of my being a passenger in said vehicle. (Emphasis supplied.)

The trial judge held that this waiver absolves PreFab from any liability with respect to appellant. On appeal, appellant contends the waiver is unenforceable because it is against public policy.

The waiver constitutes a private contract between private individuals. Generally, private parties are allowed to contract away liability for negligent acts if the interest of the public is not involved and the contracting parties stand on equal footing. Checkley v. Illinois Central Railroad Co. (Ill. 1913), 100 N.E. 942; Haynes v. County of Missoula (1973), 163 Mont. 270, 279-280, 517 P.2d 370, 376. See also Speiser, Krause and Gans, The American Law of Torts, § 5:39, p. 1095 (1983).

"A different result has obtained where a facility of service is offered as a matter of convenience--rather than one of necessity. In such instances, if the user assumes a risk of loss, there appears to be no basis for holding the exculpatory provision invalid on the ground that the parties were in an unequal bargaining position inasmuch as the user is under no compulsion to accept the offer of service or its terms."

However, the fact that the waiver is a private contract is not determinative in this case. We must also decide whether the waiver is in violation of § 28-2-702, MCA, which states:

"Contracts which violate policy of the law - exemption from responsibility. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent, are against the policy of the law."

This Court has never before had occasion to interpret the statute. It was adopted verbatim from California in 1895.

"Montana follows the rule of statutory construction that where a statute is adopted from a sister state, it is ordinarily presumed that the legislature borrows the construction placed upon it by the highest court of the state from which it is borrowed, Although such construction is not binding upon this Court. (Citations omitted.)

Miller, Plaintiff and Appellant, v.  
Fallon County, Defendants and Respondents  
43 St.Rep. 1185

Lawrence v. Harvey (1980), 186 Mont. 314, 321, 607 P.2d 551, 556. We therefore find the interpretation of the statute by the California Supreme Court in Tunkl v. Regents of University of California (Cal. 1963), 383 P.2d 441, 32 Ca.Rptr. 33, to be persuasive. Consistent with that decision, we hold that the words "his own" qualify the term "fraud," as well as the terms "willful injury to the person or property of another" and "violation of law, whether willful or negligent."

Next we must determine whether "his own" includes the employer as well as the employee. In Tunkl, supra, the California court held that its equivalent statute applies equally to a "corporation's 'own' liability and vicarious liability resulting from negligence of agents." 383 P.2d at 448, 32 Cal.Rptr. at 40. Likewise, we hold that our statute applies to a corporation's vicarious liability.

To summarize, § 28-2-702, MCA, is interpreted to mean that no person or corporation may contract to exempt himself or itself from responsibility for his, its or its employee's: (1) fraud; (2) willful injury to the property or person of another; (3) negligent or willful violation of law.

But, what is meant by the term "violation of law, whether willful or negligent?" The California Supreme Court has not resolved this question. However, the legal meaning of the terms contained in the phrase is undisputed. Law consists of constitutions, Wickham v. Grand River Dam Authority (Okla. 1941), 118 P.2d 640, 643; statutes and case law, Erie Railroad Co. v. Tompkins (1938), 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188, 1194; as well as common law, Fenn v. Holme (1859), 62 U.S. 481, 486, 21 How. 481, 486, 16 L.Ed. 198, 200. Thus, pursuant to the clear and unambiguous language of § 28-2-702, MCA, an entity cannot contractually exculpate itself from liability for willful or negligent violations of legal duties, whether they be rooted in statutes or case law. We therefore determine the statute has application in this setting.

The dissent contends that § 28-2-702, MCA, invalidates only those waivers which affect the public. This contention is contrary to the specific words of the statute. The statute itself states that any contract which exempts anyone from responsibility for fraud, willful injury or the willful or negligent violation of law, is against the policy of the law. Nothing in the statute limits its application to contracts which involve the public interest. Thus, even a waiver which constitutes a private contract between private individuals is invalid, and in violation of public policy, if it seeks to exempt one from liability for those actions specified in the statute.

Contrary to PreFab's allegations, Congress has not preempted this area of law by enacting the Interstate Commerce Act. The relevant statute is 49 U.S.C. § 10722(d)(2) (1982), which states in pertinent part:

"A common carrier providing transportation subject to the jurisdiction of the Commission . . . may provide transportation

Miller, Plaintiff and Appellant, v.  
Fallon County, Defendants and Respondents  
43 St.Rep. 1185

without charge for officers and employees (and their families) of that carrier, (by exchange of passes or tickets), or a telegraph, telephone, or cable company."

This section allows PreFab to provide free transportation to certain specified individuals, including appellant. It does not regulate the liability which potentially accompanies the provision. Therefore, Montana is free to legislate with respect to the liability incurred. Eisenman Seed Co. v. Chicago, Milwaukee, St.Paul and Pacific Railroad (1973), 161 Mont. 197, 203, 505 P.2d 81, 84.

Finally, again contrary to PreFab's allegation, Illinois law should not control. We recognize that the contract between PreFab and Miller originated in Illinois. However, § 28-2-702, MCA, delineates the types of contracts Montana will refuse to recognize regardless of their origin.

We remand this cause to the trial court. If liability is found based upon a willful or negligent violation of law, the waiver as it pertains to PreFab, Davis and Miller violates § 28-2-702, MCA, and may not be relied on by any of the three defendants.

Reversed and remanded.

\* \* \* \* \*

Mr. Justice Fred J. Weber dissents as follows:

I concur with the majority opinion and its abolition of the doctrine of interspousal tort immunity. I dissent from its conclusion with regard to the pre-release form.

I disagree with the majority conclusion that a negligent violation of law by PreFab, Davis or Miller constitutes a violation of § 28-2-702, MCA, so that the waiver may not be relied on.

The majority opinion points out that this Court has never had occasion to interpret § 28-2-702, MCA, and further points out that the statute was adopted verbatim from California in 1895. The majority then concludes that the interpretation of the statute by the California Supreme Court in Tunkl is persuasive. Unfortunately the rationale of the majority opinion actually is strikingly different from the rationale in Tunkl. The majority concludes that under §28-2-702, MCA, an entity cannot contractually exculpate itself from liability for negligent violations of legal duties whether they are rooted in statutes or case law. Tunkl approached the same code section with an entirely different rationale.

Tunkl emphasized that the code section had been interpreted in various ways by California cases, some strictly, some very liberally so that the authority for Tunkl under California cases was limited. Tunkl did emphasize that all of the California cases consistently held that the exculpatory provision of the code section would stand only if the public interest was involved. Tunkl then set forth a number of

Miller, Plaintiff and Appellant, v.  
Fallon County, Defendants and Respondents  
43 St.Rep. 1185

factors to be considered in determining whether or not the public interest was effected by the release agreement. Included are such factors as whether it is a business which is suitable for public regulation; whether a party is performing a service of great importance to the public which is practically necessary to the public; whether a party is willing to perform this for any member of the public; whether there is an essential nature of services being performed and a decisive advantage in bargaining strength; whether there is superior bargaining power and a standardized adhesion contract; and whether a party is placed under the control of the party to be exculpated. Clearly the present case does not set forth facts justifying the application of the public interest rule under Tunkl. In other words, if the rationale of Tunkl were applied in the present case, the holding would be contrary to the majority opinion here.

In Tunkl the California court distinguished private voluntary transactions from public interest cases and stated:

"While obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party, the above circumstances pose a different situation."

Tunkl, 383 P.2d at 446. This Court applied the rationale of Tunkl in Haynes v. County of Missoula (1973), 163 Mont. 270, 517 P.2d 370. Even though this Court was interpreting § 28-2-702, MCA, it followed the public interest rationale of Tunkl and quoted extensively from Tunkl. In addition, this Court in Haynes referred to the provision in Restatement, Contracts, § 575 making an exemption from liability illegal if a party is charged with the duty of public service, and the bargain relates to negligence in the performance of any part of its duty to the public, for which it has received or been promised compensation. Without going into Haynes in any more detail, it is clear that this Court adopted the public interest rationale of Tunkl. I therefore conclude that neither Tunkl nor Haynes is authority for the position taken in the present majority opinion.

I dissent from the primary conclusion of the majority opinion that an entity cannot contractually exculpate itself from liability for either willful or negligent violations of legal duties whether they are rooted in statutes or in case law, under the provision of § 28-2-702, MCA. As I look at this statute which was enacted by our Montana Legislature in 1895, I note that it addresses contracts which are against the policy of the law of this state. Section 28-2-702, MCA, states that all of the following contracts are against the policy of Montana: contracts which exempt anyone from responsibility for fraud, willful injury to person or property, or violation of law, whether willful or negligent. It is clear that in order to discourage anyone exempting himself for his own fraud, such a provision is appropriate. In a similar manner, it is appropriate to eliminate an exemption for willful injury to person or property. This leaves the last portion which is the violation of law, whether willful or negligent. Again there is a clear policy apparent in a prohibition which applies to willful violation of law. That element is not present in this case.

Miller, Plaintiff and Appellant, v.  
Fallon County, Defendants and Respondents  
43 St.Rep. 1185

This leaves only the question of the negligent violation of law. I conclude that negligent torts were not contemplated by this section.

I invite the attention of our Montana Legislature to the majority opinion in order that it may determine if it approves of the interpretation of § 28-2-702, MCA.

\* \* \* \* \*

Mr. Justice Gulbrandson dissenting:

Mr. Justice Gulbrandson joins in the foregoing dissent of Mr. Justice Weber.

## Alternative proposed amendments to SB 189:

## 1. Title, line 4.

Following: "PROVIDE FOR"

Strike: "PUBLIC"

## 2. Title, line 5.

Following: "DISCLOSURE"

Insert: "TO CERTAIN SCHOOL OFFICIALS"

## 3. Title, line 7.

Following: "SUBSTANCE"

Insert: "OR A DANGEROUS DRUG"

Following: "AMENDING"

Strike: "SECTIONS"

Insert: "SECTION"

Following: "41-5-601"

Strike: "AND 41-5-602"

## 4. Page 1, line 24.

Following: line 23

Strike: "Publicity may not be withheld as to the"

Insert: "The"

## 5. Page 2, line 1.

Following: "45-5-624"

Insert: "or 45-9-102 may be disclosed by law enforcement  
officials to the administrative officials of the school in  
which the youth is a student. However, the information may  
not be further disclosed by the school officials"

## 6. Page 2, line 2 through line 3, page 3.

Strike: section 2 in its entirety



Amend SB 152 (white copy) as follows:

Page 1, line 6

Following: "INCREASED IF THE"

Strike: "PARTIES ATTEMPT TO RESOLVE THE DISPUTE BY SETTLEMENT,  
ARBITRATION, OR ANY OTHER METHOD"

Insert: "COMPLAINANT HAS ATTEMPTED TO RESOLVE THE DISPUTE THROUGH  
A GRIEVANCE PROCEDURE"

Page 1, line 9

Following: "DATE"

Strike: "AND A RETROACTIVE APPLICABILITY DATE"

Page 1, line 25 through line 1 on page 2

Following: provided in

Strike: subsections (2)(b) and (2)(c)

Insert: subsection (2)(b)

4. Page 2, lines 4 through 18

Strike: Subsections (b) and (c) in their entirety

Insert: (b) In the event that the complainant has initiated efforts  
to resolve the dispute underlying the complaint by following  
the procedures of any formal or informal grievance procedure  
established by a collective bargaining agreement, contract,  
rule, policy, or practice, the complaint need not be filed  
until 180 days after the conclusion of the grievance  
procedure.

Renumber: Subsection (d) as subsection (c)

Page 2, line 23

Following: in

Strike: subsections (2) and (3)

Insert: subsection (2)

Page 3, lines 2 through 16

Strike: Subsections (2) and (3) in their entirety

Insert: (2) In the event that the complainant has initiated efforts  
to resolve the dispute underlying the complaint by following  
the procedures of any formal or informal grievance procedure  
established by a collective bargaining agreement, contract,  
rule, policy, or practice, the complaint need not be filed  
until 180 days after the conclusion of the grievance  
procedure.

Renumber: Subsection (4) as subsection (3)

Page 4, lines 2 through 3

Strike: Subsection (2) in its entirety

Proposed amendments to SB 161 (prepared for the sponsor by  
Legislative Council staff):

1. Title, lines 4 and 5.  
Following: " "AN ACT" on line 4  
Strike: the remainder of line 4 through "PROVISION" on line 5  
Insert: "EXTENDING THE TERMS"
2. Title, lines 6 and 7.  
Following: "COURT" on line 6  
Strike: the remainder of line 6 through "REPEALING" on line 7  
Insert: "FOR AN ADDITIONAL 8 YEARS; AND AMENDING"
3. Page 1, line 10.  
Following: "Section 1."  
Strike: "Repealer."
4. Page 1, line 11.  
Following: "is"  
Strike: "repealed."  
Insert: "amended to read:  
"Section 5. Effective period. This act is effective  
until the first Monday of January, ~~1989~~ 1997, at which time  
the number of associate justices authorized by this act  
shall revert to four. The code commissioner is directed to  
make appropriate changes in the Montana Code Annotated to  
reflect the intent of this section.""

DATE FEB. 3, 1987BILL NO. SB 160

PROPOSED AMENDMENTS FOR SB160-- AN ACT TO GENERALLY  
REVISE AND CLARIFY THE LAWS RELATING TO STATUTES OF  
LIMITATION ON COMMENCEMENT OF A CIVIL ACTION

*England*

1. ~~1~~ Page 2, line 6, after the word "until" Following: "injury"  
STRIKE: ~~"the injury"~~ "has"  
INSERT: ~~"the"~~ facts constituting the claim "have"
- ~~2~~ Page 2, line 6,  
STRIKE: ~~"has"~~  
INSERT: ~~"have"~~
2. ~~3~~ Page 2, line 9. Following: "injury"  
STRIKE: ~~"injury is by its"~~ "is by its"  
INSERT: ~~"A"~~ facts constituting the claim are by their"

BE AMENDED AS FOLLOWS:

1. Page 2, line 6.

Following: "injury"

Strike: "has"

Insert: "or facts constituting the claim have"

2. Page 2, line 9.

Following: "injury"

Strike: "is by its"

Insert: "or facts constituting the claim are by their"

BE AMENDED AS FOLLOWS:

1. Page 2, line 6.

Following: "injury"

Strike: "has"

Strike: "is by its"

Following: "injury"

BE AMENDED AS FOLLOWS:

1. Page 2, line 6.

Following: "injury"

Strike: "has"

Insert: "or facts constituting the claim have"

2. Page 2, line 9.

Following: "injury"

Strike: "is by its"

Insert: "or facts constituting the claim are by their"

S.B. 181

1. Title, line 7.  
Following: "OFFENSES"  
Insert: "; AND REQUIRING PAYMENT OF A REINSTATEMENT FEE"
2. Page 1, line 21.  
Following: "to"  
Insert: "post the set bond amount or"  
Following: "or"  
Insert: "appear"
3. Page 1, line 23.  
Following: "to"  
Insert: "forfeit the posted bond amount or to"
4. Page 1, line 23.  
Following: "fine"  
Insert: "of \$100 or more"
5. Page 1, line 23.  
Following: "costs"  
Insert: "of \$100 or more"
6. Page 1, line 24.  
Following: "amount"  
Insert: "of \$100 or more"
7. Page 2, line 2.  
Following: "section"  
Insert: ", including the reinstatement fee"
8. Page 2, line 3.  
Following: line 2  
Insert: "Section 2. Provisional licenses prohibited--  
reinstatement fee. (1) No provisional, restricted, or  
probationary license may be issued upon a suspension under  
[section 1].  
(2) A person whose license is suspended under [section  
1] must pay a reinstatement fee of \$50 to the court.  
Section 3. Reinstatement of license. Upon receipt of  
notification from the court that the operator or chauffeur  
has appeared, posted the bond, or paid the fine, costs, or  
restitution amounts and the reinstatement fee, the  
department shall immediately reinstate the license."

Renumber: subsequent sections

7029u/L:JEA\WP:jj

FISCAL YEAR	TOTAL INSURANCE INDUSTRY TAXES & FEES	COLLECTED REGULATORY FEES	INSURANCE REGULATION BUDGET	INSURANCE FTE's	EST. # OF CO. AUTH. IN MT.	# OF AGENTS IN MT.	# OF EXAMS GIVEN	# OF CONSUMER COMPLAINTS
1964	2,854,238.0	151,050.0	69,168.0	11.5	582.0			
1965	2,977,239.0	136,942.0	63,883.0	11.5	620.0			
1966	3,167,053.0	145,250.0	75,499.0	11.5	648.0			
1967	3,415,952.0	140,760.0	91,338.0	11.5	651.0			
1968	3,517,507.0	147,510.0	98,028.0	11.5	707.0			
1969	3,822,617.0	147,574.0	93,376.0	11.5	756.0			
1970	4,931,700.0	353,566.0	114,101.0	12.0	805.0			
1971	5,383,425.0	364,254.0	112,156.0	12.0	823.0			
1972	6,115,751.0	373,655.0	137,565.0	12.0	842.0			
1973	6,812,473.0	409,056.0	142,800.0	12.0	897.0			
1974	7,366,923.0	428,157.0	246,362.0	19.0	945.0	5,296.0	1,106.0	2,033.0
1975	8,323,217.0	598,265.0	397,294.0	19.0	955.0	5,481.0	1,133.0	2,247.0
1976	9,483,281.0	584,003.0	342,775.0	19.0	969.0	5,559.0	1,116.0	2,241.0
1977	11,239,651.0	579,433.0	452,518.0	19.0	956.0	5,256.0	1,251.0	2,262.0
1978	12,656,322.0	668,879.0	400,107.0	20.0	985.0	5,553.0	1,247.0	2,069.0
1979	14,367,308.0	895,409.0	403,554.0	20.0	996.0	5,866.0	1,191.0	1,987.0
1980	15,177,033.0	753,832.0	429,235.0	20.0	1,016.0	6,567.0	1,324.0	1,914.0
1981	15,967,069.0	872,647.0	458,777.0	20.0	1,049.0	6,974.0	1,378.0	1,694.0
1982	16,754,178.0	1,049,767.0	542,781.0	22.0	1,127.0	7,635.0	1,497.0	1,869.0
1983	17,725,218.0	1,179,719.0	613,048.0	22.0	1,200.0	7,455.0	1,742.0	1,968.0
1984	19,517,173.0	1,180,030.0	604,071.0	22.0	1,218.0	8,310.0	1,881.0	1,721.0
1985	20,798,049.0	1,157,380.0	665,167.0	22.0	1,275.0			
1986	23,759,335.0	1,170,584.0	704,665.0	22.6	1,300.0			
1987	24,291,379.0	1,332,049.0	684,705.0	24.0	1,315.0			

SENATE JUDICIARY

EXHIBIT NO. 8

DATE Feb. 3, 1987

BILL NO. 5B52

# INSURANCE - EXPENDITURES VS FEES

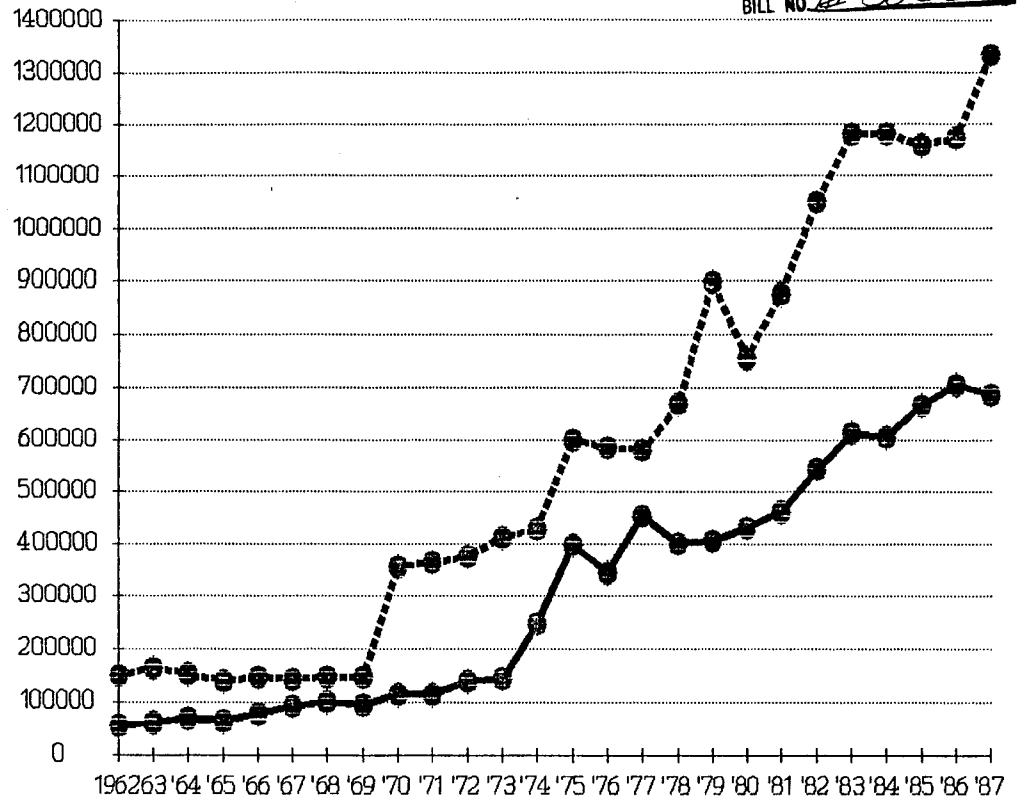
—●— Expenditures  
 - - -●- - Insurance Fee Revenues

SENATE JUDICIARY

EXHIBIT NO. 9

DATE FEB. 3, 1987

BILL NO. HB 5052



## INSURANCE FUNDING

FISCAL YEAR	INSURANCE REGULATION FEES COLLECTED	ACTUAL EXPENDITURES TO REGULATE	EXCESS FEES	COLLECTIONS TO EXPENDITURES
64	151,050.0	69,168.0	81,882.0	46%
65	136,942.0	63,883.0	73,059.0	47%
66	145,250.0	75,499.0	69,751.0	52%
67	140,760.0	91,338.0	49,422.0	65%
68	147,510.0	98,028.0	49,482.0	67%
69	147,574.0	93,376.0	54,198.0	63%
70	353,566.0	114,101.0	239,465.0	32%
71	364,254.0	112,156.0	252,098.0	31%
72	373,655.0	137,565.0	236,090.0	37%
73	409,056.0	142,800.0	266,256.0	35%
74	428,157.0	246,362.0	181,795.0	58%
75	598,265.0	397,294.0	200,971.0	66%
76	584,003.0	342,775.0	241,228.0	59%
77	579,433.0	452,518.0	126,915.0	78%
78	668,879.0	400,107.0	268,772.0	60%
79	895,409.0	403,554.0	491,855.0	45%
80	753,832.0	429,235.0	324,597.0	57%
81	872,647.0	458,777.0	413,870.0	53%
82	1,049,767.0	542,781.0	506,986.0	52%
83	1,179,719.0	613,048.0	566,671.0	52%
84	1,180,030.0	604,071.0	575,959.0	51%
85	1,157,380.0	665,167.0	492,213.0	58%
86	1,170,584.0	704,665.0	465,919.0	60%
87 (BUDGETED)	1,332,049.0	684,705.0	647,344.0	51%
TOTALS	14,819,771.0	7,942,973.0	6,876,798.0	

FLEX-RATING PERSONNEL VS. MODIFIED REQUEST

<u>Flex-Rating Bill</u>	<u>FY88</u>	<u>FY89</u>	<u>Modifieds</u>	<u>FY88</u>	<u>FY89</u>
1 Actuary	\$ 59,756	\$ 58,416	1 Actuary	\$59,756	\$58,416
2 Attorneys	61,368	58,896	.5 Attorney	15,342	14,724
3 Field Investigators	117,666	114,084	2 Field Invst.	78,444	76,056
1 Clerical	17,149	15,998	1 Adm. Aide- Examiners	17,149	15,998
1 D.P. Support	17,149	15,998	1 Adm.Aide- License	17,149	15,998
Total	<u>\$273,088</u>	<u>\$263,392</u>	.5 Compliance Specialist	11,411	11,370
			1 Compliance Specialist	32,450	31,219
			High Speed Vol. Printer	25,400	2,900
			Additional Disk Storage	16,250	1,250
			Total	<u>\$273,351</u>	<u>\$227,931</u>

<u>Modified Less Flex-rating</u>	<u>FY88</u>	<u>FY89</u>
.5 Compliance Specialist	\$11,411	\$11,370
1 Compliance Specialist	32,450	31,219
High Speed Volume Printer	25,400	2,900
Additional Disk Storage	16,750	1,250
Total	<u>\$85,511</u>	<u>\$46,739</u>



# STANDING COMMITTEE REPORT

February 3

87

19.....

MR. PRESIDENT

## SENATE JUDICIARY

We, your committee on.....

SENATE BILL

152

having had under consideration..... No.....

**first**

reading copy ( **white** )  
color

**Extend time for filing complaint with human rights commission.**

SENATE BILL

152

Respectfully report as follows: That..... No.....

~~DO NOT PASS~~

DO NOT PASS

.....  
Senator Mazurek

Chairman.

# STANDING COMMITTEE REPORT

February 3

19 37

MR. PRESIDENT

## Senate Judiciary

We, your committee on.....

having had under consideration..... Senate Bill No. 160

first reading copy ( white )  
color

**An act to generally revise and clarify the laws relating to statutes of limitation on commencement of a civil action.**

SENATE BILL

160

Respectfully report as follows: That..... No.....

### BE AMENDED AS FOLLOWS:

1. Page 2, line 6.

Following: "injury"

Strike: "has"

Insert: "or facts constituting the claim have"

2. Page 2, line 9.

Following: "injury"

Strike: "is by its"

Insert: "or facts constituting the claim are by their"

AND AS AMENDED

DO PASS

~~XXXXXXXXXX~~  
DO NOT PASS

Senator Mazurek

Chairman.

# STANDING COMMITTEE REPORT

February 3

37

19.....

MR. PRESIDENT

We, your committee on **SENATE JUDICIARY**

having had under consideration **Senate Bill** No. **161**

**first** reading copy ( **white** )  
color

**Repeal sunset provision of two supreme court associate justice positions.**

Respectfully report as follows: That **Senate Bill** No. **161**

DO PASS

~~DO NOT PASS~~

Chairman.

# STANDING COMMITTEE REPORT

SB181

February 3, 1987

MR. PRESIDENT

Judiciary

We, your committee on.....

Senate Bill

181

having had under consideration..... No.....

first

white

reading copy (.....)

color

## SUSPENDING DRIVER'S LICENSE FOR FAILURE TO APPEAR OR TO PAY FINE

Respectfully report as follows: That.....Senate Bill..... No.....181.....

BE AMENDED AS FOLLOWS:

1. Title, line 7.

Following: "OFFENSES"

Insert: "; AND REQUIRING PAYMENT OF A REINSTATEMENT FEE"

2. Page 1, line 17.

Following: "61-5-309,"

Insert: "chapter 12, part 6,"

3. Page 1, line 21.

Following: "to"

Insert: "post the set bond amount or"

Following: "or"

Insert: "appear"

4. Page 1, line 23.

Following: "to"

Insert: "forfeit the posted bond amount or to"

Following: "fine"

Insert: "of \$100 or more"

Following: "costs"

Insert: "of \$100 or more"

5. Page 1, line 24.

Following: "amount"

Insert: "of \$100 or more"

~~DO NOT PASS~~

~~DO NOT PASS~~

CONTINUED

Chairman.

February 3,

87

19.....

6. Page 2, line 2.

Following: "section"

Insert: ", including the reinstatement fee"

7. Page 2, line 3.

Following: line 2

Insert: "Section 2. Provisional licenses prohibited --

reinstatement fee. (1) No provisional, restricted, or probationary license may be issued upon a suspension under [section 1].

(2) A person whose license is suspended under [section 1] shall pay a reinstatement fee of \$25 to the court.

Section 3. Reinstatement of license. Upon receipt of notification from the court that the operator or chauffeur has appeared, posted the bond, or paid the fine, costs, or restitution amounts and the reinstatement fee, the department shall immediately reinstate the license."

Renumber: subsequent sections

AND AS AMENDED

DO PASS

Senator Mazurek