MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on February 14, 1995, at 8:00 A.M.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Keintz, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 212, SJR 7
Executive Action: HB 83, SB 292, SB 211, SB 318

EXECUTIVE ACTION ON HB 83

Motion: **SENATOR HALLIGAN MOVED HB 83 BE NOT CONCURRED IN.**

Discussion: **CHAIRMAN CRIPPEN.** In reading all of this language it seemed to him the opponents concern themselves with the educational aspect. The other area where he thought an amendment would be helpful is in the area of fine arts. There are quite a number of objections to this from individuals who are anti-pornographic but have a concern about how they would consider fine arts. They had a problem with the standard that was in the bill itself as it would apply to fine arts. To him

there was a clear evidence that there is a problem with pornography and that, perhaps, the local laws are not adequate enough to take care of it. This could well be amended to the point to take care of that problem and yet still meet the majority of the objections.

SENATOR BAER would not object to inserting the word "educational" on line 3, page 3, "serious literary, artistic, political, 'educational' or scientific."

SENATOR HOLDEN referred to page 2, line 26, where material is described. After the word "means", he wished to strike "any magazine or other printed". Page 2, line 30, refers to sexual conduct. He would like to make the sexual conduct definition a little more clear.

SENATOR HALLIGAN stated the reason he made the motion is because none of the amendments change the fundamental problem of adopting a state-wide standard rather than the community standard we have now. Any county or community can adopt a stricter standard. A state-wide standard in this area is not something the legislature should adopt. Amendments are not going to correct that. This adopts an average person's standards which would be inconsistent all across the state of Montana. It would be inconsistent even in the same community.

SENATOR HOLDEN stated that people in local towns and cities did not deal with these issues because they are hard to bring up. We're more bold here in the Capitol.

SENATOR BAER stated it was his understanding this bill is incorporating the Miller vs. California standard which is a nation wide standard applying contemporary behavior standards to determining the definition of obscenity. We are not applying any different standard throughout Montana than we would throughout the rest of the country because we are applying, on line 29, page 2, "contemporary community standards" and that would mean every community in Montana would be able to determine their community standards as to what they determine to be offensive.

SENATOR GROSFIELD stated he supports the motion. If this bill included an explicit definition and the committee knew exactly what they were talking about, he would support it. This bill does not do that. This bill is vague enough so that the average person in a community is not going to know for sure what is obscene and what is not obscene. He referred to the owner of a Mini Mart in rural Montana. They would be applying contemporary community standards but he doesn't know what they might be until a jury decides. We don't know about a specific item until a jury decides. That puts him in a difficult position. He may have to defend himself on an obscenity charge. The proponents said that we are not talking about Playboy here. He felt this might be talking about Playboy in some communities in Montana. He was

also concerned about the inhibiting effect that this bill will have on the arts. This would affect both artists and writers.

SENATOR ESTRADA stated that this bill has passed the House Judiciary, the House floor, and if this bill does nothing else it at least would set a standard for the young people in this state.

CHAIRMAN CRIPPEN stated the reason he suggested an amendment is if this committee feels that there is some ability by the legislature to do something with this bill, then from a procedural standpoint, there ought to be an amendment on it. This bill will come out before the Senate no matter what. He did not want to table it. If the bill goes out on the floor with amendments, there would be more people who might be inclined to vote for it.

Motion: **SENATOR BAER MOVED TO AMEND HB 83.** Line 3, page 3, insert "educational" after the word political.

SENATOR BARTLETT stated she doesn't believe there are any amendments which could save this bill. There are repeated instances in the nation, in the state, and in local communities where a bill such as this one cannot be clear enough to avoid situations in which someone somewhere will think that a particular piece of art or a particular publication is obscene under the terms of the bill. It simply cannot be done.

SENATOR BAER stated that one of the concerns that everyone seems to have in mind is educational use of certain materials. Educational is a start to amend this bill to make it more attractive to everyone.

Vote: The **MOTION CARRIED** on roll call vote with **SENATORS BARTLETT AND DOHERTY** voting **"NO".**

Motion: **SENATOR HOLDEN MOVED TO STRIKE ON PAGE 2, LINE 26, "ANY MAGAZINE OR OTHER PRINTED OR," AND ALSO PAGE 3, LINE 8, STRIKE OUT THE WORD "VAGINAL" AND ON LINE 9, STRIKE OUT THE WORDS "AFTER FUNCTIONS AND LEWD EXHIBITION OF THE UNCOVERED GENITALS,".**

Discussion: **SENATOR HOLDEN** commented there has been ridicule that certain magazines are going to be outlawed in Montana. Also, sexual conduct as defined in this bill may be too broad and in an effort to narrow that definition he made the above amendments.

SENATOR BARTLETT asked **SENATOR HOLDEN** if he considered magazines to be written matter.

SENATOR HOLDEN stated he would not.

SENATOR BARTLETT stated that's important intent for the record.

SENATOR HALLIGAN asked **SENATOR HOLDEN** on what basis he would not consider a magazine written material. Obviously there's printed matter in a magazine as well as pictures.

SENATOR HOLDEN stated his intention was to make sure that there's no way to ban Playboys, Playgirls, etc.

SENATOR NELSON stated magazines are written matter.

CHAIRMAN CRIPPEN clarified the amendment on line 26, page 2, to strike out "any magazine or other printed or written matter,".

Valencia Lane commented he would probably want to keep the word "any".

SENATOR HALLIGAN asked to have the amendment segregated.

CHAIRMAN CRIPPEN segregated the motion. The discussion followed on the first amendment.

SENATOR DOHERTY asked **SENATOR HOLDEN** what reason there was to not ban obscene written material that may be offensive and allow video tapes or statues or computer transmissions to be subject to this law?

SENATOR HOLDEN stated he wanted to take the issue of Playboy, Playgirl, etc., out of this bill.

Vote: The **MOTION FAILED** on oral vote for both parts of the motion.

SENATOR HALLIGAN stated NYPD Blues is what they consider to be potentially pornography. It isn't just Playboy. The bill is too broad. Counties can regulate this on a local level if they wish. This is not something that needs to be governed by the state. We are trying to control family choices. People who want to control their own family choices feel this is an intrusion.

Vote: The **NOT BE CONCURRED IN AS AMENDED MOTION FAILED** on roll call vote with **SENATORS CRIPPEN, BAER, BISHOP, ESTRADA, HOLDEN, and JABS** voting **"NO".**

CHAIRMAN CRIPPEN stated another concern that wasn't mentioned is the bookstore owner. How do you protect the woman who is managing Waldenbooks? A big shipment comes in and there's obscene material in it that's classified as obscene. Are these persons subject to the penalties in the bill? Is there implied intent?

SENATOR HALLIGAN believed that would be covered in the bill. They are exhibiting or making available obscene material.

SENATOR BAER commented that if a city passed a local ordinance that reflected the Miller determination of obscenity, then they

would be subject to that Miller determination upon prosecution, so that would take place now even without this bill should some town in Montana decide to pass an obscenity ordinance.

CHAIRMAN CRIPPEN stated that present law deals with under the age of 18. With mass merchandising, he had a hard time believing that person had any intent.

SENATOR DOHERTY stated that knowledge of the character means general knowledge of the content or with reason to know of the content or character. So, in the instance of a TV station, people working in a TV station who helped transmit NYPD Blues, have reason to know the content of that TV show. They would be guilty under this act.

SENATOR HALLIGAN commented that the part they were forgetting is the Montana Constitution. Forgetting about Miller vs. California, Hawaii and Oregon have found these laws to be unconstitutional. This is a futile act.

SENATOR DOHERTY stated that Great Falls attempted to pass an ordinance like this through the city council. It was a very contentious issue and there were people of good will on both sides of the issue. The city council decided not to pass it. He believed that's where the decision ought to lie is with the local communities and if the local communities want to apply a contemporary community standard and want to subject their business people to the threat of possible prosecution under an ordinance, then that's up to them. It's best left to their decision making. However, for the legislature to tell his community, which has rejected this already, is the height of arrogant centralized power.

Motion: **SENATOR GROSFIELD MOVED TO TABLE HB 83.**

CHAIRMAN CRIPPEN commented it would take a vote of the majority of the committee to take it off the table. This provides, since it has been amended, that there can be a motion made on Order of Business No. 6 to take it from the table and place on second reading. That cannot be done until we have made a determination of this bill. It would have to make the amendment transmittal. By tabling it we have disposed of the bill. We have made an action on that. It could be the final vote on this bill as far as the committee is concerned. Therefore, anyone in the Senate can stand up and move to take the bill from the table.

SENATOR HOLDEN asked **SENATOR GROSFIELD** if he had some amendments before the bill was tabled.

SENATOR GROSFIELD stated he had not. He looked at this bill with that in mind and tried to figure out a way to fix it but couldn't figure out any way to do it.

CHAIRMAN CRIPPEN commented that after transmittal, he would entertain a motion to take it off the table for the purposes of amendment. If that failed, then it would still be tabled. If it passes, then amendments could be made and they could dispose of the bill.

SENATOR BAER commented he didn't see how this bill could be fixed unless they list every lewd and lascivious act that they could imagine and put it into our statute. He didn't think they could accomplish anything by putting it on the table except making it go away in a cowardly way.

Motion/Vote:: **SENATOR BAER MOVED HB 83 BE CONCURRED IN AS AMENDED.** The motion failed with **SENATORS CRIPPEN, BARTLETT, BISHOP, DOHERTY, GROSFIELD, HALLIGAN, NELSON** voting **"NO".**

Vote: (on the original motion to **TABLE HB 83**) The **MOTION CARRIED** on roll call vote with **SENATOR DOHERTY** voting **"NO".**

EXECUTIVE ACTION ON SB 292

Discussion: **SENATOR BARTLETT** stated she had asked in the committee meeting for further information on the fiscal note before the committee acted on this bill. She asked **Dale Taliaferro, Administrator of the Social Services Division of the Department of Health and Environmental Sciences,** to identify whether or not the department saw a fiscal impact and the basis on which he prepared the estimates that are in the fiscal note. On page 2, new section 4, the department is required to annually publish and update the printed materials called for in this bill. She asked if he thought there was a fiscal impact and if so what was covered in the fiscal note to show that intent.

Mr. Taliaferro stated the total for operational costs that they estimated was very close to what they estimated in the fiscal note, but the items are different. They also estimated one FTE for the first year because they thought development of the directory would require a great deal of work. They also wanted to assemble an advisory panel to review the materials. The reporting would probably require a lot of follow-up. They estimated that the expenses of developing and printing the directory in a regional format making it organized so that a hot line could use it would be $10,000 in the first year and then smaller maintenance costs after that. They estimated the hotline would be close to $3,600.

SENATOR BARTLETT asked if the hotline would be a tape recording or a person answering?

Mr. Taliaferro stated they had an FTE to answer it during the daytime and would use a recording at night time. They estimated postage for the brochures and directories at $1,800. Developing the information brochure and printing it would cost $13,700. They allowed $800 for expenses for the handling and assembly to

review and help sort out the materials. The triplicate forms would be $500 and $9,000 would be associated with operation expenses for the FTE.
The amount for the FTE, grade 13, plus benefits would cost $28,000.

SENATOR BARTLETT asked if the calculations included some expenses for the report that the department is required to prepare each year?

Mr. Taliaferro stated he didn't see that on the report.

SENATOR BARTLETT asked if that would have a fiscal impact.

Mr. Taliaferro stated it would.

SENATOR BARTLETT asked it he could give the committee an idea by the next day of what that fiscal impact would be.

Motion: **SENATOR BARTLETT MOVED TO AMEND SB 292. EXHIBIT 1.**

{Tape: 1; Side: B}

Discussion: **SENATOR BARTLETT** stated that the way the bill is currently written, it requires the woman to certify at least 24 hours before an abortion that she has received the material and the physician must also sign that certification. She talked with **SENATOR BROWN** and he agreed with her that the intent of the bill was to make sure that the woman has the material at least 24 hours before the abortion, not necessarily that she has to certify it 24 hours before the abortion but that she has the material 24 hours before the abortion. The effect of this amendment leaves in the requirement that she has the material at least 24 hours before the abortion, but it would remove the requirement that the certification take place 24 hours before the abortion. With this amendment she would have the material 24 hours before the abortion, but she could make the certification at any point prior to the abortion. She believed the amendment stays faithful with the intent and with the goal of the bill, but it removes a glitch in the drafting that may well have been unintentional.

CHAIRMAN CRIPPEN asked if she had **SENATOR BROWN's** approval on this.

SENATOR BARTLETT stated she didn't want to mislead. She talked to him and he still wanted to check with some other people, but on the basis of her description of what she proposed, he agreed that his intent had been to make sure that the woman had the material 24 hours in advance. He has neither approved nor disapproved the amendment. He did know that the amendments were being drafted and would be offered in the committee.

SENATOR HALLIGAN asked **Tim Whalen** what **SENATOR BROWN** had told him about this specific amendment.

Tim Whalen, Montana Right to Life, commented that **SENATOR BROWN** had no objection to the intent of the amendment; however, the amendment is improperly drawn if what is being accomplished is to make the certification at the time the abortion is to be performed. The amendment, as its been drawn, basically takes out the entire 24 hour reflection period. Properly drawn, the language on line 4, page 8, should read "The informed consent must be received at least 24 hours prior to the abortion and certified prior to or at the time of the abortion." By taking out "at least 24", you strike not only the certification being required 24 hours to the abortion, but also that the informed consent be 24 hours before the abortion.

Valencia Lane commented she thought he was wrong when he said that taking out "at least 24 hours" on line 4 eliminates the 24 hours reflection period. Page 8, line 12, clearly states that it has to be provided to her at least 24 hours before the abortion. She didn't believe that taking out "24 hours" on line 4 actually takes out the reflection period.

Tim Whalen felt it would create a conflict in the bill because there are two actions which are informed consent and certification. If you don't make a distinction between the two then you set up a conflict in the bill itself.

SENATOR BARTLETT asked Mr. Whalen if he was suggesting striking the words "and certify" so it would read, "The informed consent must be received at least 24 hours prior to the abortion."

Mr. Whalen stated that it needed to also add that the certification can be performed at the time of abortion. This would be so that it did not create a situation where a person has to make two trips to the abortion clinic.

SENATOR BARTLETT stated that would fine with her.

SENATOR NELSON asked if (2) addressed that informed consent must be certified by a written statement.

CHAIRMAN CRIPPEN stated that if they changed the amendment around to strike "and certified" and leave "at least 24 hours" then after the word abortion end the language.

Valencia Lane stated it would read "and certified prior to or at the time of the abortion."

Motion: **SENATOR BARTLETT WITHDREW THE INITIAL MOTION AND MOVED TO AMEND PAGE 8, LINE 4 TO READ "THE INFORMED CONSENT MUST BE RECEIVED AT LEAST 24 HOURS PRIOR TO THE ABORTION AND MUST BE CERTIFIED PRIOR TO OR AT THE TIME OF THE ABORTION."**

Vote: The motion **CARRIED** on oral vote with **SENATORS BAER AND SENATOR ESTRADA** voting **"NO"**.

Motion: **SENATOR BARTLETT MOVED TO FURTHER AMEND SB 292. EXHIBIT 2.**

Discussion: **SENATOR BARTLETT** stated this amendment,. deals with legislative findings and she proposed to strike (b) which starts on line 18 and (f) on line 28 and (g) beginning on line 29.

CHAIRMAN CRIPPEN asked if **SENATOR BARTLETT** would have any objections to segregating the amendments.

SENATOR BARTLETT stated she offered them as a package because she thought that all three are built on a false premise and that is why she is proposing to strike them. The premise is different in some instances, but they are all false premises.

CHAIRMAN CRIPPEN recapped that there was a motion by **SENATOR BARTLETT** to further amend SB 292.

Vote: The motion **FAILED** on roll call vote with **SENATORS CRIPPEN, BAER, ESTRADA, GROSFIELD, HOLDEN, and JABS** voting **"NO"**.

CHAIRMAN CRIPPEN stated the reason he wanted to segregate was on line 29, the word "many" bothered him. There are abortion facilities who do this, but there are others that don't. We are dealing with legislative intent and findings. He had a problem with the word "many". He asked the committee if they wanted to strike the word many and put in the word "some"?

Motion: **SENATOR NELSON MOVED TO FURTHER AMEND SB 292 BY STRIKING (G).**

Discussion: **SENATOR BARTLETT** believed it was important for each person on the committee to determine whether they are looking at this bill and in particular these legislative findings as reflecting the reality or the purported reality in the state of Montana or if somehow these legislative findings come from national experiences. Within the state of Montana, if that's what our legislative findings pertain to, both (g), which **SENATOR NELSON** moved to strike, and (f) are absolutely unfounded.

CHAIRMAN CRIPPEN stated there was a motion to strike (g).

Substitute Motion: **SENATOR BISHOP MOVED TO FURTHER AMEND SB 292 BY SUBSTITUTING THE WORD SOME FOR MANY ON LINE 29.**

Discussion: **CHAIRMAN CRIPPEN** stated they are dealing with legislative findings and again it's a judgement call. He clarified the substitute motion that the word "some" be inserted on line 28, page 1, after (f) and further that the word "some" would be inserted on line 29, page 1, after (g).

VOTE: The motion **CARRIED** on roll call vote with **SENATORS BARTLETT, DOHERTY, NELSON,** and **HALLIGAN** voting **"NO".**

Motion: **SENATOR NELSON MOVED TO FURTHER AMEND SB 292 BY STRIKING (G).** The motion **FAILED** on roll call vote by **SENATORS CRIPPEN, BAER, ESTRADA, GROSFIELD, HOLDEN** and **JABS** voting **"NO".**

Motion: **SENATOR ESTRADA MOVED SB 292 DO PASS AS AMENDED.**

Discussion: **SENATOR BARTLETT** stated that it is important to point out for the record that there was a proponent witness, Nancy Vigel, who testified that she had an abortion in April of 1976 that involved Susan Kahill as one of the providers. She believed it was necessary to set the record straight because Susan Kahill in April of 1976 was attending school in New York and was not engaged in any form of the practice of medicine either in New York or the state of Montana at that time.

CHAIRMAN CRIPPEN commented that he didn't know if her statement is accurate or if **SENATOR BARTLETT's** is accurate. With both of those statements on the record, anyone who wants to read it can draw their own conclusions. It will be so noted.

SENATOR DOHERTY stated that **SENATOR ECK** asked him to hand out the letter from Dr. Susan Rickland from Bozeman **EXHIBIT 3** referring to the informed consent that occurs in Bozeman at this time. He believes that the legislative purpose and findings are without basis in fact and are merely conjecture. The findings are offensive to the process by which we attempt to find and put down for our record and to make good public policy facts. These findings are conjecture. The finding that the unborn child is a human being from conception until birth is a deeply held religious belief. He doesn't believe that we should be adopting statutes that effect the rights of Montanans on the basis of deeply held religious beliefs. He believes that the civil remedies is extraordinary in viewing other statutes that have been enacted in other states. He further believed that Section 8, in which the woman who was involved in the abortion, would have to go court in order to maintain her anonymity in this situation is another and further intrusion into her right of privacy. He believed the right of intervention in Section 9 is extraordinary and uncalled for and an example of the mischief that this bill is all about. He objects to the reporting that will be done, especially given today's climate of violence against medical providers. Once these individuals are reported to the Department of Health he is not sure that information is confidential. In any event, the provider would then be forced to go to court to attempt to keep that information confidential. This is not an easy issue. There are well intentioned people and well principled people on both sides. However, there are constitutional rights that are guaranteed Montanans not only by the Federal Constitution but by the State Constitution. Montana's right of privacy is explicit and unique. He believes this bill flies in the face of every notion of privacy and of

women making decisions on their own. The intent of the bill is clear to prevent abortions and that's a laudable goal. However, in attempting to do that, it steps across the line and into the most private of decisions and into the patient-doctor relationship. We do not tell doctors what information they have to give other patients when they have other procedures. That is a fundamental flaw with this bill in that it takes fundamental constitutional rights and ignores them.

SENATOR HOLDEN stated that when talking about the intent of this bill, it seemed clear to him during the testimony that we just want to provide some material to the people who want to seek an abortion. Planned Parenthood came in and testified at the hearing that they hand out material to people who plan to have an abortion but they objected to the hospital handing out material for them to read.

SENATOR BARTLETT stated she agreed with all of **SENATOR DOHERTY'S** comments. The intent of this statute is to make it as difficult as possible for a woman in the state of Montana who seeks an abortion to receive one. She didn't believe that Planned Parenthood, or any other opponent to the bill, objected to hospitals preparing materials or doctors preparing material to give to patients. They do that. They provide the material and other medical facilities do so as well. What's called for in this bill is the one and only instance in which the State of Montana, government itself, is to prepare the material. She believed it was important to bring out that in addition to all of the information about adoption services and development of the fetus, risks of abortion, etc., that this pamphlet should include the information on the medical risks associated with carrying a child to term. Assuming that this bill passes, she'd like this committee discussion to put the Department of Health on notice that any material prepared that does not include adequate information about the medical risks associated with carrying a child to term will not satisfy the requirements of this bill and will not fulfill their obligation under this bill.

SENATOR NELSON stated that this bill demeans women. Abortion is a very serious issue. She doesn't believe a woman goes out one day, when pregnant, and decides that she is going to pop into an abortion clinic and have an abortion. It's something that you give serious thought to. There are materials available there. It is not taken lightly. I don't think we need this to tell us what we already know.

SENATOR ESTRADA stated that the committee members are all mature individuals but the 16, 17, 18 year old girl should be able to have 24 hours to have a little material to read.

CHAIRMAN CRIPPEN stated he appreciated the comments by those who are opposed to this bill. However, this is a legislative process and while you may have your comments on the record, the record will also reflect that if this bill should not pass through this

committee with a do pass recommendation, then your records will be reflective of the majority of this committee. However, if this bill should pass through with a recommendation of do pass as amended, then the record also will show that it was the majority of the committee, not withstanding your objections, that the legislative intent and purposes and findings are correct in their statements as amended. This bill will come before us on the floor and there will be ample time to discuss it at that time. He appreciated the tenor of the debate on this committee. It's a critical and emotional bill.

Vote: The motion **CARRIED** on roll call vote with **SENATORS BARTLETT, BISHOP, DOHERTY, HALLIGAN,** and **NELSON** voting **"NO".**

EXECUTIVE ACTION ON SB 211

Motion: **SENATOR DOHERTY MOVED TO AMEND SB 211.**

Discussion: **SENATOR DOHERTY** presented the amendments, **EXHIBIT 4.** He talked to County Attorney Paxinos about the bill and they decided to use existing statute. They struck everything after line 1. They went back to existing statute and added biking into the recreational purposes. The City of Billings was concerned about bike paths. They then went to the current statute on restrictions on liability of landowners or his agent or tenant and they added the property that this exemption would apply to would be including property owned or leased by a public entity to make sure that was clear. The next amendment was requested by the Department of Administration, Tort Claims. They were concerned about the $5 and the $10 fee for access to state land as taking the state outside of that no-consideration issue. That would also refer to the next amendment which is the last sentence at the end of (1). They then took the definitions which were in the bill that was presented referring to "'Owner' means a person or entity of any nature, whether private, governmental, or quasi-governmental". In (3) they included "'Property' means land, roads, water, watercourses and private ways. The term includes any improvements, buildings, structures, machinery and equipment on the property." **Dennis Paxinos** has looked at and agrees with this amendments. He made a suggestion for a further clarifying amendment which would be in 302(1), striking the language after who, "makes recreational use of any property" and inserting "uses property for recreational purposes." It would read, "A person who uses property for recreational purposes including property owned or leased by a public entity with or without permission does so without any assurance from the landowner." This covers the bike path area. It satisfies Billings.

SENATOR GROSFIELD stated the issue he was concerned with had to do with a fee. In a state park, who pays the fee? Is the driver paying the fee or can the fee be attributed to everyone in the vehicle? If it's only attributed to the driver, the liability situation for the driver may be different from the

liability situation of the other people in the car, especially the children, and it seems that it would be fair if everyone was in the same boat.

Valencia Lane commented that the way the bill was originally drafted it would have granted immunity even to people who charge for coming onto their land, which was a change from the current law. This goes back to the current law. The person who uses the property does so without assurance that it's safe, if the person does not give valuable consideration directly to the landowner to use the property.

SENATOR BARTLETT questioned how this related to state parks.

Valencia Lane stated that would not be covered by this statute. This statute, which is existing law that we are amending, grants immunity to landowners who allow people to come onto their property without a charge. If the state establishes a park and charges a fee to use that park they don't fall under the protection of this immunity in this statute. This amendment, at the end of (1), does say that valuable consideration does not include the $5 license fee charged by the Department of State Lands so that wouldn't keep them out of the statute.

SENATOR BARTLETT asked if a park fee would.

Valencia Lane stated it would.

CHAIRMAN CRIPPEN asked if there are any instances where the city or county charges a fee for recreational use of a park?

Commissioner Bill Kennedy, Yellowstone County, commented that the City of Billings charges for domes with picnic benches underneath them. The $15 or the $20 charge is only for the use of that shelter. It is not for the use of anything else. If you do not pay that $20 fee and it's open, you can use it. The people are paying the $20 to have it set aside. Other than that, on the city or county parks, there is no fee charged. The state parks in the county charge for camping fees.

CHAIRMAN CRIPPEN commented that the judge that is responsible for bringing this up here, made a ruling inappropriately under the present law. Maybe he did it on purpose to have it clarified.

SENATOR HALLIGAN stated that they have to make sure that the fee is for the shelter only and not for the recreational activity so that they fall under the provisions of this bill.

CHAIRMAN CRIPPEN clarified that it then would also be in the record that the intent of this committee would be that that type of a fee is not a charge for the use of the land unless so designated by the governmental entity.

Vote: The motion to amend **CARRIED** on oral vote with **SENATORS BAER** and **HOLDEN** voting **"NO".**

Motion: **SENATOR DOHERTY MOVED SB 211 DO PASS AS AMENDED.** The motion **CARRIED UNANIMOUSLY** on oral vote.

EXECUTIVE ACTION ON SB 318

Valencia Lane commented that there was concern that the bill as drafted in some instances could actually be a one year statute of limitations and the testimony from the proponents was that that was not what they intended. They meant that one year to catch the tail so there would be a three year statute of limitation unless the activity was discovered after that three years had run and then they should have a one year statute of limitation. The amendment was drafted using the current statute of limitations for attorney's legal malpractice action. There is a three year statute of limitations as provided in the bill. If the act, omission or negligence is discovered after three years, there is still a one-year statute of limitations in which to bring a suit but in no case more than ten years after the action occurred.

Motion/Vote: **SENATOR BISHOP MOVED TO AMEND SB 318.** The motion **CARRIED UNANIMOUSLY** on oral vote.

Discussion: **SENATOR HALLIGAN** commented that the testimony at the hearing indicated the bill was focused on the financial statements. He questioned if this was designed for financial statements or any errors or omissions policy.

Tom Harrison, CPA Association, stated that it was subject to the broad brush which **SENATOR HALLIGAN** just indicated. He views it as encompassing.

SENATOR DOHERTY commented that this bill sets up a complicated system of determining the statute of limitations for an action against an accountant. The current statute of limitations on contracts is eight years. For clarity, all the committee needs to do is use the current statute of limitations on actions against attorneys for legal malpractice, which is three years from date of discovery or when a reasonable person should have discovered and in no case longer than ten years, and add in accountants. He commented that Former Republican Senator Gene Thayer had a very complicated business in which an accountant made serious errors. He and his partner believed they had a lot of money when in fact they had none. They obligated the corporation in many areas. Several years later they found the errors. Senator Thayer sued the accountant who was found negligent. The accountant appealed to the Supreme Court and one of the issues was statute of limitations. Setting up various statutes of limitations will create many more lawsuits.

SENATOR JABS asked how this is handled now.

Tom Harrison commented they are treated under the general statute. There is no separate statute for accountants.

SENATOR GROSFIELD asked what the limitations were for the general statute.

SENATOR DOHERTY commented the general statute is three years for an error or omission and eight years for a contract. For attorneys the time period is three years from discovery or from when a reasonable person should have discovered and in no event longer than 10 years.

SENATOR GROSFIELD asked whether financial statements would go to a contract, the eight year limitation.

Tom Harrison commented this would normally go to the eight year limitation. If someone in the accounting business did not have a contractual letter of engagement, it would be less. If they adhered to that ethical standard, they would be in an eight year statute of limitations.

{Tape: 2; Side: A}

Motion/Vote: **SENATOR ESTRADA MOVED SB 318 BE TABLED.** The motion **CARRIED** on oral vote with **SENATORS HOLDEN, CRIPPEN,** and **BISHOP** voting **"NO".**

HEARING ON SJR 7

Opening Statement by Sponsor:

SENATOR STEVE DOHERTY, Senate District 24, Great Falls, presented SJR 7 which calls for a performance audit to be conducted on the Supreme Court Administrator's Office. The reason is that this particular office has had a charge to set up court automation in Montana. This office has spent close to a million dollars. It is proposing to spend another million dollars. He would like to have a performance audit handled by the Auditor's Office.

Proponents' Testimony:

Pat Chenovick, Administrator of Supreme Court, spoke in support of this resolution. He submitted an amendment **EXHIBIT 5** to the resolution to include in the performance audit all the programs within the judicial branch which would include the Clerk of the Supreme Court, the Law Library, and the Water Court. He presented another handout **EXHIBIT 6** which showed the 72 sites automated within the last six years. During the six years they have been working on automation, they have had approximately $160,000 a year to work with. The technology cycle is starting to outdate the equipment.

Opponents' Testimony: None.

Informational Testimony: None.

Questions From Committee Members and Responses:

SENATOR HOLDEN asked **SENATOR DOHERTY** what the study would accomplish.

SENATOR DOHERTY stated performance audits are one of the valuable functions which are performed in the interim. There should be recommendations of better ways to accomplish projects. Perhaps it may be more cost effective to contract services to computer experts.

SENATOR GROSFIELD asked **SENATOR DOHERTY** if he had a chance to preview the amendments.

SENATOR DOHERTY answered that he hadn't but would be in favor of the amendments. We have spent $1.2 million on court automation. We have been requested to spend another million dollars. He would like an outside look at the status of this program.

SENATOR CRIPPEN asked why he would not like to broaden the audit.

SENATOR DOHERTY answered the Supreme Court Administrator is charged with automation. The Supreme Court Clerk, the Law Library and the Water Court have not been charged with automation. He is concerned about automation in Montana's courts. If the committee wants to include the rest of the judicial branch in this audit, that would be fine. He is only interested in court automation.

SENATOR CRIPPEN asked when the Clerk of Court, the Law Library, or the Water Court was automated?

SENATOR DOHERTY stated he didn't know.

SENATOR GROSFIELD stated there was a large distinction between the original version and the amended version. The bill would audit the Administrator's Office. The amendment would audit the automated information systems in the various areas.

Closing by Sponsor:

SENATOR DOHERTY stated he would take another look at the amendments. The comments he has received from attorneys and clerks of court is that things are not running very smoothly. He believes it is time to audit the program.

HEARING ON SB 212

Opening Statement by Sponsor:

SENATOR AL BISHOP, Senate District 9, Billings, presented SB 212. In 1987 the legislature started a tort reform program. Part of that was dealing with joint and several liability. Prior to 1987, any defendant could be responsible in full for a plaintiff's injury to person or property. This resulted in the "deep pocket" theory. The defendant best able to pay the judgment was the target defendant. That defendant may have been responsible for a very small part of the process which caused the injury to the personal property. In 1987, we adopted the 50% rule. That rule stated that if the defendant was more than 50% responsible for the injury or the action which caused the injuries, he could be held fully responsible. If the defendant were less than 50% involved, he could only be held for that portion. The Supreme Court recently struck this down as unconstitutional. The case involved a target defendant. The target defendants right now are the State of Montana, health care providers and people with money. The court's opinion stated there had to be some procedural safeguards. Under SB 212, if an action is brought by a plaintiff against a defendant, and there were others involved who were also responsible, the defendant would now have a defense in his answer. Before, the defendant could raise this defense at anytime during the trial and surprise the plaintiff. That gave the plaintiff an unfair advantage because there was no way to respond. This bill will put into place the procedural safeguard that the defendant in its answer must plead as a defense that there were others involved in the incident. This would eliminate the element of surprise. It also specifies that the defendant, who would state in the answer that there are other people involved, has the burden of proving that those people were responsible, in part or in full, for the plaintiff's injuries. The finding in that action is not binding on the other people. What the court does in that lawsuit is not binding in any subsequent lawsuits brought by the plaintiff or anyone else against the parties named in the answer who are not actually parties to the lawsuit.

Proponents' Testimony:

John Alke, Montana Liability Coalition, stated that the Coalition spearheaded the 1987 tort reform movement. They reactivated this session to have this bill enacted into law. Prior to 1975, negligence actions in Montana were dominated by two common law doctrines. The first was the doctrine of contributory negligence. Under that doctrine, if a plaintiff was to any degree responsible for his injuries, he was absolutely barred from any recovery. That was a very harsh rule. The second common law doctrine was the doctrine of joint and several liability. After the plaintiff proved he had no responsibility for his own injuries, he was then entitled to his recovery from any defendant who was responsible, even minimally responsible. Another very harsh rule. In 1975, a system of comparative fault was adopted. They abolished the doctrine of contributory

negligence; however, they forgot about the doctrine of joint and several liability. Between 1975 and 1987, there was a system of comparative fault; however, in fact, it was not. An example would be a drunk driver driving down the highway with no ability to respond to traffic. Another driver comes around the curve, driving too fast, crosses the centerline, and the two parties side swipe each other. Because he is incapable of avoiding the other driver, he goes off the road and is killed. His estate gets a good lawyer and files suit against two defendants. One defendant is the driver who crossed the centerline and the other is the State of Montana. The State of Montana is named as a defendant because the edge of the highway was defectively designed. At trial the jury allocates 50% fault to the drunk driver, 49% fault to the driver who crossed the centerline, and 1% fault to the State of Montana. Between 1975 and 1987, the State of Montana could be required to pay all the recoverable damages of the drunk driver which would be the 50% the jury allocated. This was fixed in 1987. The State of Montana would only pay 1%. Now we have **Newvill v. State of Montana Department of Family Services. Newvill** did not invalidate the limit on joint and several liability. **Newvill** said you cannot allocate fault to a party not named by the plaintiff because of lack of procedural guarantees. He presented a scenario wherein, under **Newvill** if he was involved in a car accident with **SENATOR HOLDEN** and **SENATOR DOHERTY.** At trial the jury states he is 20% at fault, **SENATOR HOLDEN** is 40% at fault, and **SENATOR DOHERTY** is 40% at fault. Neither **SENATOR DOHERTY** nor **SENATOR HOLDEN** have to pay more than 40% of his damages. If, however, **SENATOR DOHERTY** settled with him prior to trial for 10%, **SENATOR HOLDEN** would owe 70%. Fault could not be allocated to **SENATOR DOHERTY** because he would no longer be a named party because the plaintiff settled with him outside of court. This does not only cover allocation, in a trial the parties are only permitted to introduce relevant evidence. If **SENATOR DOHERTY** is no longer considered for fault, the evidence of his negligence is inadmissible. The jury is mislead into thinking there isn't another party involved in the accident. SB 212, substantively will make sure that **SENATOR HOLDEN** will not be responsible for more than 40%. Procedurally the bill would make it necessary for **SENATOR HOLDEN'S** attorneys to advise him that they are intending to blame **SENATOR DOHERTY** for the accident. The statute specifically says that his attorneys will not have to disprove **SENATOR DOHERTY'S** negligence. **SENATOR HOLDEN'S** attorneys will have to prove **SENATOR DOHERTY'S** negligence. The bill would say that **SENATOR DOHERTY** is absolutely unaffected by whatever allocation of fault the jury gives to him in the trial with **SENATOR HOLDEN.**

John Sullivan, Montana Defense Trial Lawyers, stated their support of SB 212 and also offered an amendment, **EXHIBIT 7.** The amendment related to a case decided by the Montana Supreme Court on January 18th of this year. This was too late for it to be incorporated into this bill. The decision is **Wetch v. Unique Concrete Co.** The plaintiff in this case worked for a chiropractor who had decided to remodel his office. Unique

Concrete Company was hired to take out the back steps. This left a hole in the ground. The president of Unique met with the doctor and advised him of the hazardous situation. They suggested barricading the door. The doctor didn't want it barricaded and said he would take care it. Unique Concrete continued working in the backyard. Mrs. Wetch, the employee who always used the back door, used the front door for a week. One day, she went out the back door, fell and injured herself. She hired a lawyer who sued Unique Concrete. At the trial, the lawyer put Unique Concrete's President on the stand and told him he knew when the steps were taken out there was a hazardous situation. He also told him that he didn't do anything about it. The witness wanted to explain the reason; however, the judge told him he could not say anything about the employer's negligence. This was appealed to the Montana Supreme Court. The Court stated the district court followed the law. The sentence they want removed states that the negligence of an employer or a co-employee cannot be considered. The employer cannot be sued. Workers' compensation law affords immunity to the employer and any co-employee for any act taken with respect to a workers' compensation accident. That will not change. The jury will be allowed to consider their negligence against a third party. The burden will be on the defendant who presents that evidence to prove its case.

Allen Lanning stated his support for SB 212. In **Newville**, in their zeal to correct a perceived problem of plaintiffs, the Montana Supreme Court perpetrated an injustice on civil defendants. By preventing the allocation of negligence to non-parties, the Supreme Court has reinstated a way for plaintiff's attorneys to unjustly maximize their client's recovery through manipulation of the judicial system. Through settlement and through choosing the parties sued, plaintiffs may impose a lion's share of liability on a defendant who, considering the actions of all the tortfeasers, is only marginally responsible for the accident. This is wrong. Parties who are less than 50% negligent should be responsible only for their share of the negligence. Plaintiff's attorneys argue that without the ability to do this their clients may not be made whole and that that is not fair. It has never been an accepted tenant of law or morality that it is okay to correct one injustice by perpetuating another. Plaintiff's attorneys now also argue that defendants, by virtue of insurance or other assets, do not suffer much from this injustice. As a famous quote states, injustice is not one of those poisons which, although fatal in large doses, may be taken with beneficial affect in small doses. Injustice is fatal in any dose. Some civil defendants may be held liable for injuries for which they have no responsibility whatsoever. Plaintiff's attorney will argue that under SB 212 they will be unfairly prejudiced because the nonparties will have no one to defend them at trial. The plaintiff's attorneys themselves can and should do this. They are responsible to determining who they sue and who they settle with. The crux of the **Newville** decision

was that the old statute violated procedural due process. SB 212 corrects this.

Bill Gianoulias, Chief Defense Counsel Risk Management and Tort Defense Division, spoke in support of SB 212. It is fundamentally fair to let the jury decide who is responsible to pay damages and they must have the information necessary to make that decision. The **Newville** case was defended by their office.

Jim Tutweiler, Montana Liability Coalition, spoke in support of SB 212. This Coalition worked very hard to bring about the enactment of the joint and several liability bill. They believe that this bill will restore fairness and predictability to the system.

Dr. Mike Schweitzer, President of Billings Anesthesiology, spoke in support of SB 212. They believe in equity and fairness in determining the share of economic liability as a proportionate share of their comparative fault in any injury. If they, or an individual in their business, is found liable for a partial share of one's injury, their business or that individual should pay his or her fair share for that injury. They should not have to pay more than their fair share.

Tom Harrison, Montana Society of Public Accountants, stated they support SB 212.

Steve Turkiewicz, Automobile Auto Dealers and Member of the Liability Coalition, spoke in favor in SB 212.

Carl Schweitzer, Montana Contractors Association, spoke in support of SB 212.

Bob Worthington, Montana Municipal Insurance Authority, spoke in support of SB 212.

Marie Durkee, Executive Director of the Montana Tavern Association, spoke in support of SB 212.

Ben Havdal, Montana Motor Carriers Association, spoke in support of SB 212.

Don Allen, Montana Wood Products Association, supports the bill.

Mona Jamison, Doctors' Company, stated they insure 675 Montana physicians and urge support of this bill.

Russ Ritter, Washington Corporations, supports the bill.

Ron Ashabranen, State Farm Insurance, stated they have 320,000 policies in Montana. They support SB 212 and the amendment.

Tom Hopgood, Montana Independent Bankers Association, supports the bill.

Michael Keedy, Montana School Boards Association, spoke in support of SB 212.

Jacqueline Lenmark, American Insurance Association, urged support of SB 212.

Riley Johnson, National Federal of Independent Business, urged support of SB 212.

David Owen, Montana Chamber, stated he has had extensive discussions on whether or not the Court will accept this bill as the answer. He urged the committee to pass this bill so they can get an answer from the Court.

Greg Jackson, Montana Association of Counties, spoke in support of SB 212.

Jerry Lindorf, Montana Medical Association, urged support of SB 212.

Steve Browning, Montana Hospital Association, urged support of SB 212.

Bill Leary, Montana Bankers Association, spoke in support of SB 212.

Charles Brooks, County Commissioners of Yellowstone County and Billings Chamber of Commerce, stated they stand in favor of SB 212.

Opponents' Testimony:

Russell Hill, Montana Trial Lawyers Association, spoke in opposition to SB 212. This bill does not correct the constitutional deficiencies. The Court will find that this bill is constitutional. **Newville** invalidated a small provision of the 1987 amendments on joint and several liability. It did not upset joint and several liability in general. **Newville** said the 1987 amendments are unconstitutional because they violate substantive due process. It subjects nondefendants to being tried in a court and blamed without having the opportunity to defend themselves. That is what SB 212 will reinstitute. The second reason the 1987 amendments are unconstitutional, is because it requires plaintiffs to argue the case of other "nondefendants". Substantial due process is an unique type of unconstitutionality in the law. The Court states that this fundamentally violates the principles of justice and fairness. He presented **EXHIBIT 8.** The Court said there cannot be an empty chair in a courtroom and allow people to point fingers at the empty chair and not fill the empty chair. The proponents are saying that the problem is not that the chair is empty, the problem is it needs new upholstery. He presented written testimony, **EXHIBIT 9.**

{Tape: 2; Side: B}

Randy Bishop stated that in 1987 joint and several liability was modified. If the defendant is less than 50% at fault, he would only pay for the percentage for which he was responsible. The **Newville** decision did not change that. It said that if you want to blame someone else, sue them. SB 212 in (4) provides any party, including the defendant, the opportunity to do that. The **Wetch** decision applies the law the way the legislature wrote it. There is only one circumstance in which the settling party's evidence vanishes. This only happens in an employment situation. The nonparty defendant is not told that they are brought into the case. How does the nonparty defense work? An example would be two cars collide approaching a controlled intersection. Driver of car 1 claims that driver of car 2 ran a stoplight. Driver of car 2 realizes that there is some possibility that he ran the stoplight but he is not sure. An allegation is made about the stoplight. The defense hires an expert who says he noticed that the stoplight stays yellow for a delay of two seconds. The standard should be four seconds. There is a design problem. During the course of deposition, the driver of car 1, the person who was injured, admits that there was a sidewalk sale. Another deposition contains testimony that there is a flashing time and temperature sign on a nearby building. These are all distractions which can generate a nonparty defense. The city could be responsible for the traffic light. The downtown merchants association could be responsible for the sidewalk sale causing a distraction. The business with the sign on the building could also be responsible. These people can end up on the verdict form. The plaintiff can ignore it or he can sue these people. This is a nonparty defense. If there is a real claim, it doesn't need to be hidden.

John Richardson, MTLA, stated he has had a long time interest in the joint and several liability bill. He asked lawyers what effect this bill would have on the Montana judicial system. He handed out pictures of the child involved in the **Newville** case, **EXHIBIT 10.** This child was nearly beaten to death by a prospective adoptive parent. There were three to four defendants involved at trial. The plaintiffs named the parties who they believed were responsible and the ones they could recover from. They were: the State Department of Family Services; Edna Goodwin, a counselor who knew the adoptive parents; and Martha Kuipers, the wife who refused to recognize what was going on when the child was beaten.
At the end of the trial, the defense decided they wanted other people on the jury verdict form as provided in the joint and several liability statute. They named a number of other people. The Keeters were neighbors and friends of the Kuipers. Dr. Visher had seen the child on one occasion with bruises on her and did not recognize it as an abuse case. The Bozeman Police Department was asked to investigate a beating at a restaurant. By the time the police arrived it was all over with. They did

not have the authority to take her away from the parents. They reported this to the Department of Family Services. DFS did not properly follow up on it. The plaintiffs also asked for a line on the jury verdict form so that the jury could consider any other person. The judge left three on the jury verdict form. Edna Goodwin was probably the reason why the Supreme Court overturned this case. Edna Goodwin settled out beforehand. She was not a witness at trial, she was not present, no one represented her or presented any argument on her behalf; however, she ended up on the jury verdict form. She ended up being 35% responsible for what happened to the child. SB 212 solves some of the problems. Notice is given that certain people will be requested to be on the jury verdict form. SB 212 does not provide that the people will be notified. They are not allowed to defend themselves in court. They may not even know about it. People who are peripheral to the case could end up being 30% liable for what happened in some case. They would not have been informed that the jury was going to consider whether they were negligent. In Montana, there is a constitutional right to notice of the charges against us. We also have a constitutional right to defend against those charges. SB 212 does not solve that problem. The plaintiff now has a large incentive to settle. The more people the plaintiff names as defendant, the greater his burden. The plaintiff is encouraged to settle parties out of the case and narrow it down. The defendants also have an incentive to settle. Under this bill the incentive to settle goes away. Defendants can end up on a jury verdict form after they have settled. The plaintiff settles parties out for the money and narrowing down their burden. Under this bill the defendant can say, at the beginning of trial, he wants other people considered. The plaintiff then can sue the other people. Settlements will not be encouraged, instead there will be more defendants in every case which will drive up the cost of litigation.

Informational Testimony: None.

Questions From Committee Members and Responses:

SENATOR DOHERTY asked what would be wrong with requiring anyone who wants additional persons on the jury verdict form to have these persons brought in as a co-defendant.

John Alke stated that the rule of law in Montana is that when the defendant settles with the plaintiff, it bars any action against him by the other defendants.

SENATOR DOHERTY asked about the Bozeman Police Department or Dr. Visher, in the above example. Why should they be on the verdict form? Why not require the defendant to name them if they want to bring them into the suit?

John Alke stated that is what the bill specifically provides. If this case occurred again and he was the attorney representing FSD

and wanted to blame the Bozeman Police Department, he must notify the plaintiff that that is what he intends to do and then he would have the burden of proof that those parties were at fault.

SENATOR DOHERTY stated that the bill provides that he notify the plaintiff. Why wouldn't it be good policy for him to be required to name them as a party defendant?

John Alke questioned the situation if the defendant was an immune defendant. He can't sue an immune defendant.

John Sullivan answered that in the **Wetch** case that was the problem. Unique Concrete could not name the doctor because he is immune from suit under the workers' compensation law. This bill will change the situation to allow the jury to be told the truth about everything that happened in the accident.

SENATOR DOHERTY asked why the burden should not be placed on the defendant to drag those defendants in who may not be immune from suit or who may have already settled out. Why give the defense the opportunity to blame someone who has not been involved in the lawsuit?

John Sullivan stated that they could if they wanted to do that. This bill would allow them to do that. They have a choice. There is no good reason why you do not allow this opportunity to tell the jury about everything that happened.

SENATOR HALLIGAN asked about providing notice to a nonparty.

John Sullivan stated he would have no objection to adding in this bill that when the answer is served upon the plaintiff, a copy of the answer be served upon anyone in that answer that the blame is pointed at.

SENATOR HALLIGAN stated that even if they provide that other procedural safeguard, what can he do if he is named and no one sues him to get him into the case.

John Sullivan stated he doesn't know if he has a right to intervene or if he would want to intervene. This bill states the jury's allocation of fault cannot affect him.

SENATOR HALLIGAN, referring to the nonparty who sees his or her name in the paper, asked if it would be worse to be notified in that way?

Randy Bishop stated that the person is always better off if he can defend himself. Why would a defendant use the nonparty defense rather than bring a lawsuit when it is easier to prove that someone did wrong if they are not present? The defense bar wants to have the procedural ability to set up a straw man which they can knock down undefended or burden the plaintiff with the obligation to defend that person.

Closing by Sponsor:

SENATOR BISHOP commented that the opponents would rather have the people brought into the lawsuit rather than name them as a nonparty in the answer. If they are brought into the lawsuit, they not only are named but they will have to hire a lawyer to defend themselves. If you believe the defendant in a lawsuit in Montana shouldn't pay more than his or her fair share of whatever the amount of fault that defendant had, you should support this bill.

Additional handout, Doctors' Company, **EXHIBIT 11.**

ADJOURNMENT

Adjournment: The meeting adjourned at 11:30 A.M.

SENATOR BRUCE D. CRIPPEN, Chairman

JUDY J. KEINTZ, Secretary

BC/jjk

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MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL DATE 2/14/95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

SEN:1995
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SENATE STANDING COMMITTEE REPORT

February 14, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration SB 211 (first reading copy -- white), ~~respectfully~~ report that SB 211 be amended as follows and as so amended do pass.

Signed: _____
Senator Bruce Crippen, Chair

That such amendments read:

1. Title, line 5.
Following: ""AN ACT"
Strike: "LIMITING"
Insert: "REVISING THE LAWS RELATING TO"

2. Title, lines 6 and 7.
Following: "PROPERTY;" on line 6
Strike: remainder of line 6 through "IMMUNITY;" on line 7
Insert: "AND"

3. Title, line 7.
Following: "AMENDING"
Strike: remainder of line 7

4. Page 1, line 12 through page 5, line 7.
Strike: everything following the enacting clause
Insert: "**Section 1.** Section 70-16-301, MCA, is amended to read:

"**70-16-301. Recreational purposes defined.** "Recreational purposes", as used in this part, includes hunting, fishing, swimming, boating, water skiing, camping, picnicking, pleasure driving, biking, winter sports, hiking, touring or viewing cultural and historical sites and monuments, spelunking, or other pleasure expeditions."

Section 2. Section 70-16-302, MCA, is amended to read:

"**70-16-302. Restriction on liability of landowner ~~or his agent or tenant~~.** (1) A person who ~~makes recreational use of any property in the possession or under the control of another~~ uses property, including property owned or leased by a public entity, for recreational purposes, with or without permission ~~and without giving a valuable consideration therefor~~, does so without any assurance from the landowner~~, his agent, or his tenant~~ that the property is safe for any purpose if the person does not give a valuable consideration directly to the landowner in exchange for the recreational use of the property. The landowner~~, his agent, or his tenant~~ owes the person no duty of care with respect to the

Amd. Coord.
Sec. of Senate

condition of the property, except that the landowner~~, his agent, or his tenant~~ is liable to ~~such~~ the person for any injury to person or property for an act or omission that constitutes willful or wanton misconduct. For purposes of this section, valuable consideration does not include the state land recreational use license fee imposed under 77-1-802.

(2) As used in this part, "landowner" means a person or entity of any nature, whether private, governmental, or quasi-governmental, and includes the landowner's agent, tenant, lessee, occupant, grantee of conservation easement, water users' association, irrigation district, drainage district, and persons or entities in control of the property or with an agreement to use or occupy property.

(3) As used in this part, "property" means land, roads, water, watercourses, and private ways. The term includes any improvements, buildings, structures, machinery, and equipment on property.

~~(2)~~(4) The department of fish, wildlife, and parks, when operating under an agreement with a landowner or tenant to provide recreational snowmobiling opportunities, including but not limited to a snowmobile area, subject to the provisions of subsection (1), on the landowner's property and when not also acting as a snowmobile area operator on the property, does not extend any assurance that ~~such~~ the property is safe for any purpose, and the department, the landowner, or the landowner's tenant may not be liable to any person for any injury to person or property resulting from any act or omission of the department unless ~~such~~ the act or omission constitutes willful or wanton misconduct."

-END-

SENATE STANDING COMMITTEE REPORT

February 14, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration SB 292 (first reading copy -- white), respectfully report that SB 292 be amended as follows and as so amended do pass.

Signed: _____
Senator Bruce Crippen, Chair

That such amendments read:

1. Page 1, line 28.
Following: "(f)"
Insert: "some"

2. Page 1, line 29.
Following: "(g)"
Strike: "many"
Insert: "some"

3. Page 8, line 4.
Following: "received"
Strike: "and certified"
Following: "abortion"
Insert: "and certified prior to or at the time of the abortion"

-END-

Amd. Coord.
Sec. of Senate

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MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/14/95 BILL NO. HB83 NUMBER 1

MOTION: Baer
Amend HB83 Education

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN	✓	
LARRY BAER	✓	
SUE BARTLETT		✓
AL BISHOP, VICE CHAIRMAN	✓	
STEVE DOHERTY		✓
SHARON ESTRADA	✓	
LORENTS GROSFIELD	✓	
MIKE HALLIGAN	✓	
RIC HOLDEN	✓	
REINY JABS	✓	
LINDA NELSON	✓	

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MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/14/95 BILL NO. HB83 NUMBER 2

MOTION:

Halligan Do Not Concur As Amended

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		✓
LARRY BAER		✓
SUE BARTLETT	✓	
AL BISHOP, VICE CHAIRMAN		✓
STEVE DOHERTY	✓	
SHARON ESTRADA		✓
LORENTS GROSFIELD	✓	
MIKE HALLIGAN	✓	
RIC HOLDEN		✓
REINY JABS		✓
LINDA NELSON	✓	

SEN:1995
wp:rlclvote.man

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MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/14/95 BILL NO. HB83 NUMBER 3

MOTION: Senator Baer - HB 83
Be Concurred in as Amended

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		✓
LARRY BAER	✓	
SUE BARTLETT		✓
AL BISHOP, VICE CHAIRMAN		✓
STEVE DOHERTY		✓
SHARON ESTRADA	✓	
LORENTS GROSFIELD		✓
MIKE HALLIGAN		✓
RIC HOLDEN	✓	
REINY JABS	✓	
LINDA NELSON		✓

SEN:1995
wp:rlclvote.man

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/14/95 BILL NO. HB 83 NUMBER 4

MOTION: Grosfield Table

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN	✓	
LARRY BAER	✓	
SUE BARTLETT	✓	
AL BISHOP, VICE CHAIRMAN	✓	
STEVE DOHERTY		✓
SHARON ESTRADA	✓	
LORENTS GROSFIELD	✓	
MIKE HALLIGAN	✓	
RIC HOLDEN	✓	
REINY JABS	✓	
LINDA NELSON	✓	

SEN:1995
wp:rlclvote.man

10 1

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/14/95 BILL NO. SB 292 NUMBER 5

MOTION: Amend Bartlett 3rd

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		✓
LARRY BAER		✓
SUE BARTLETT	✓	
AL BISHOP, VICE CHAIRMAN	✓	
STEVE DOHERTY	✓	
SHARON ESTRADA		✓
LORENTS GROSFIELD		✓
MIKE HALLIGAN	✓	
RIC HOLDEN		✓
REINY JABS		✓
LINDA NELSON	✓	

SEN:1995
wp:rlclvote.man

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/14/95 BILL NO. 292 NUMBER 6

MOTION: Bishop - Gabs - Amend "Some"

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN	✓	
LARRY BAER	✓	
SUE BARTLETT		✓
AL BISHOP, VICE CHAIRMAN	✓	
STEVE DOHERTY		✓
SHARON ESTRADA	✓	
LORENTS GROSFIELD	✓	
MIKE HALLIGAN		✓
RIC HOLDEN	✓	
REINY JABS	✓	
LINDA NELSON		✓

SEN:1995
wp:rlclvote.man

7 4

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/14/95 BILL NO. 292 NUMBER 7

MOTION: Amend Strike G - Nelson

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN		✓
LARRY BAER		✓
SUE BARTLETT	✓	
AL BISHOP, VICE CHAIRMAN	✓	
STEVE DOHERTY	✓	
SHARON ESTRADA		✓
LORENTS GROSFIELD		✓
MIKE HALLIGAN		
RIC HOLDEN		✓
REINY JABS		✓
LINDA NELSON	✓	

SEN:1995
wp:rlclvote.man

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE
ROLL CALL VOTE

DATE 2/14/95 BILL NO. SB 292 NUMBER 8

MOTION: Estrada DO PASS AS Amended

NAME	AYE	NO
BRUCE CRIPPEN, CHAIRMAN	✓	
LARRY BAER	✓	
SUE BARTLETT		✓
AL BISHOP, VICE CHAIRMAN		✓
STEVE DOHERTY		✓
SHARON ESTRADA	✓	
LORENTS GROSFIELD	✓	
MIKE HALLIGAN		✓
RIC HOLDEN	✓	
REINY JABS	✓	
LINDA NELSON		✓

SEN:1995
wp:rlclvote.man

6 3

EXHIBIT NO. 1
DATE 2/14/95
BILL NO. SB292

Amendments to Senate Bill No. 292
First Reading Copy

Requested by Senator Bartlett
For the Committee on Judiciary

Prepared by Valencia Lane
February 13, 1995

1. Page 8, line 4.
Following: "certified"
Strike: "at least 24 hours"

- withdrawn

Amendments to Senate Bill No. 292
First Reading Copy

Requested by Senator Bartlett
For the Committee on Judiciary

Prepared by Valencia Lane
February 13, 1995

1. Page 1, lines 18 through 20.
Strike: subsection (b) in its entirety
Renumber: subsequent subsections

2. Page 1, lines 28 through 30.
Strike: subsections (f) and (g) through "services"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 2/14/95
BILL NO. SB292

Susan Wicklund, M.D.
Stacey Haugland, Administrator
Holly Hausmann, P.A.
Kristi Campbell, Health Educator

MOUNTAIN COUNTRY WOMEN'S CLINIC

300 North Willson, Suite 3004
Bozeman, Montana 59715
800-544-2413
406-586-1751

February 9, 1995

Dear Senate Judiciary Committee Members:

I would like to make some comments on the proposed Senate Bill 292. My name is Susan Wicklund and I am a physician who provides abortions.

Women coming to my clinic with an unwanted pregnancy are provided with a service much different than many of you have been led to believe. They typically spend two to four hours in the clinic; some of them get abortions and some of them decide to continue the pregnancy. All of them have one-on-one time with a qualified individual who can help them explore all their options, including adoption and going full term. Almost all women who come to the clinic have, however, already spent a great deal of time and energy discussing their options and situations with loved ones, private counselors, clergy or personal physicians.

Of the 2–4 hours spent in the clinic, only 3–4 minutes are actually used to perform the abortion. The remainder of the time is in discussing the options, receiving a very complete informed consent, reviewing birth control options to prevent further unwanted pregnancies, lab work, reviewing medical history and recovery.

We go to great lengths to make sure that women are making an informed choice with no coercion or intimidation by anyone. It is not unusual for us to refuse service to a woman we feel has not completely reviewed her options or for some other reason needs more time to think it through. In other words, when appropriate, we impose our own waiting period. To have this mandated, however, would place a huge financial and emotional burden on hundreds of women, as well as increase their medical risk.

It appears there are two separate possibilities here in regards to the motives of the authors of this bill. First, they are misinformed as to the actual informed consent process that women already receive in reference to pregnancy options, abortion services and procedures. Or second, they know full well that their Section 2 Legislative Purpose and Findings is misleading and largely inaccurate but have drafted the bill primarily to present another obstacle to women who may choose abortion.

Senate Bill 292 would be extremely harmful to the women of Montana, expensive to all taxpayers, and insulting to the physician/patient relationship. Please exhibit some common sense in voting against this bill.

Sincerely,

Susan Wicklund

Susan Wicklund, M.D.

Mountain Country Women's Clinic *Chart #* _____

Informed Consent to Medical Services

Name _____ Date of birth _____ Age _____

I, _____, request and consent to any and all medical treatment, evaluation and follow-up care necessary to the performance upon me of a pregnancy termination procedure at Mountain Country Women's Clinic (MCWC) by its medical staff. **I am aware of alternatives to my pregnancy termination including my right to continue this pregnancy to full term, but I specifically, and of my own free will, voluntarily choose to proceed with termination of my pregnancy.** I have been counseled regarding details of the anticipated medical procedures to be performed and indicate my consent to the medical procedures through my initials by each paragraph below and my signature at the end of the form.

____ 1. I understand that the medical staff must know my past and present medical history, including allergies, blood conditions, prior medication or drugs taken, and any reactions I have had to anesthetics, medicines and drugs. I therefore agree to provide any information known to me and consent to the release of any information relating to my medical history, upon written request.

____ 2. I give my permission for MCWC to request medical records in connection with any prior condition I may have that might have a bearing on this surgery or subsequent complications, and I authorize my prior physicians, hospitals and clinics, as well as follow-up physicians, hospitals and clinics to release all such records, upon my written consent.

____ 3. I understand that information concerning my last period is important to diagnosis and method of treatment to be provided and I, therefore, consent to treatment based upon my statements and recollections and upon findings from physical examinations of me. The first day of my last menstrual period was _____, 19___. This period was ❑ normal, ❑ heavy, ❑ light. The period before it was ❑ normal, ❑ heavy, ❑ light. My periods in the last six months have been ❑ regular, ❑ other. If "other," please describe: _____.

____ 4. I understand that as part of the medical procedures in my pregnancy termination and follow-up care it may be reasonable or necessary to take blood samples, cultures, and other tests to insure the best medical treatment for me and I therefore consent to taking of such samples and tests.

____ 5. I understand that with ultrasound examination the medical staff of MCWC may be able to identify twin pregnancies. If it is determined that I am pregnant with twins, I do/do not (circle one) want to be notified of the twin pregnancy.

____ 6. The medical procedures to be performed require the use of anesthesia, pain killers, or other medications. Local anesthetics do not always eliminate all pain and in a small number of cases some patients experience extremely severe reactions to anesthetics, including instances of convulsions, cardiac arrest or prolonged unconsciousness. I may react badly to medicines or anesthetics; I may have pain or cramps. Having read the above potential risks, I choose to consent to allowing the medical staff of MCWC to give me such anesthetics, pain killers, or medicines as may be necessary or advisable in my case and treatment, with the exception of _____ (none, xylocaine-type, lidocaine, carbocaine).

____ 7. I have been informed and understand the importance of having a follow-up examination two weeks after my pregnancy termination. I intend to go to _____ (physician/clinic) for my follow-up examination. In the event that I choose to have my follow-up with a private physician, I do/do not (circle one) object to MCWC notifying the medical staff providing my follow-up care with information regarding my medical treatment with MCWC or information relevant to aspects of my follow-up care. I further agree to notify MCWC if I encounter any serious health problems occuring after my treatment at MCWC.

____ 8. I understand that any questions I have will be answered by MCWC physicians, nurses and/or health educators. I further understand that if I have any questions or concerns after leaving the MCWC clinic, I may call the clinic at any time to request further information or medical services.

____ 9. I understand that with a pregnancy termination the amount of pregnancy tissue removed from the uterus and the development of the embryo or fetus depend on how many weeks pregnant I am. During the first month of pregnancy, no embryo or fetus is identifiable, even with microscopic examination. By the end of the second month of pregnancy, an embryo may be able to be identified with microscopic examination but cannot be seen with the naked eye. By the end of third month, a fetus can be identified by the naked eye. The fetus may measure up to six (6) cm long and may weigh up to fourteen (14) grams. Although most external body parts can be seen in rudimentary form, the sex of the fetus generally cannot be determined by visual inspection. At all stages of pregnancy at which MCWC performs pregnancy terminations, all tissue in the uterus generally can be easily removed by aspiration through a narrow, plastic tube (1 cm or less in diameter).

____ 10. I understand that the products of conception will be removed during the pregnancy termination procedure and I consent to having them disposed of by the MCWC in a manner they believe appropriate.

____ 11. I have been informed of available methods of contraception, and have selected _____ _____ as my contraceptive choice. I also understand that I may have mild or severe reactions to any contraceptive which I may use.

____ 12. There are risks of minor and major complications with any surgical procedure including a pregnancy termination. Listed are possible complications which may occur in a pregnancy termination procedure: possibility of a performation or tear in the uterus or a laceration of the cervix (2 to 4 in 1,000 cases); possibility of continued pregnancy (ectopic, twins, missed or abortion - 2 in 1,000 cases); possibility of severe bleeding due to missed tissue, a tear, or the inability of the uterus to contract down to normal size (1 in 1,000 cases); possibility of infection (1 in 1,000 cases); possibility of some unanticipated complication which may later result in major surgery being required (i.e., hysterectomy - removal of the uterus, occuring in 1.4 cases per 10,000 abortions); and possibility of death (less than 2 in 100,000 cases). I have read the above and understand what potential complications can occur.

____ 13. I have been informed of the potential risks in medical treatment and procedures relating to pregnancy termination. I voluntarily choose to proceed with the pregnancy termination at this time. I agree to make no claims against MCWC, its employees, agents or any of its medical staff for complications which may occur in the course of the medical treatment except in the event of gross negligence. If I agree to make no claims against MCWC, I agree to be responsible for payment of all costs and attorney's fees incurred by MCWC or any of its medical staff, agents or employees in investigating or defending the claims. I understand that the medical practice of my physician is to be judged according to the standards reasonably acceptable to this practicing medical community.

____ 14. I understand that the MCWC staff may need to contact me concerning my follow-up care or for other medical purposes. I prefer to be contacted by telephone/mail (circle one). All further contact should be directed to myself/other: _____ (please specify name, address, phone).

____ 15. **I have read and fully understand the above paragraphs as indicated by my initials. I have had the abortion procedure explained to me. I believe that I fully understand the information provided to me. I voluntarily request that the medical staff of MCWC proceed with my pregnancy termination procedure (abortion) to end my pregnancy.**

Patient's Signature _____ *Date* _____

Staff Signature _____ *Date* _____

Physician Signature _____ *Date* _____

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 2/14/95
BILL NO. SB 211

Amendments to Senate Bill No. 211
First Reading Copy

For the Committee on Judiciary

Prepared by Valencia Lane
February 14, 1995

1. Title, line 5.
Following: ""AN ACT"
Strike: "LIMITING"
Insert: "REVISING THE LAWS RELATING TO"

2. Title, lines 6 and 7.
Following: "PROPERTY;" on line 6
Strike: remainder of line 6 through "IMMUNITY;" on line 7
Insert: "AND"

3. Title, line 7.
Following: "AMENDING"
Strike: remainder of line 7

4. Page 1, line 12 through page 5, line 7.
Strike: everything following the enacting clause
Insert: "**Section 1.** Section 70-16-301, MCA, is amended to read:

"**70-16-301. Recreational purposes defined.** "Recreational purposes", as used in this part, includes hunting, fishing, swimming, boating, water skiing, camping, picnicking, pleasure driving, biking, winter sports, hiking, touring or viewing cultural and historical sites and monuments, spelunking, or other pleasure expeditions."

Section 2. Section 70-16-302, MCA, is amended to read:

"**70-16-302. Restriction on liability of landowner ~~or his agent or tenant~~.** (1) A person who ~~makes recreational use of any property in the possession or under the control of another~~ uses property, including property owned or leased by a public entity, for recreational purposes, with or without permission ~~and without giving a valuable consideration therefor~~, does so without any assurance from the landowner~~, his agent, or his tenant~~ that the property is safe for any purpose if the person does not give a valuable consideration directly to the landowner in exchange for the recreational use of the property. The landowner~~, his agent, or his tenant~~ owes the person no duty of care with respect to the condition of the property, except that the landowner~~, his agent, or his tenant~~ is liable to ~~such~~ the person for any injury to person or property for an act or omission that constitutes willful or wanton misconduct. For purposes of this section, valuable consideration does not include the state land recreational use license fee imposed under 77-1-802.

(2) As used in this part, "landowner" means a person or entity of any nature, whether private, governmental, or quasi-governmental, and includes the landowner's agent, tenant, lessee, occupant, grantee of conservation easement, water users'

association, irrigation district, drainage district, and persons or entities in control of the property or with an agreement to use or occupy property.

(3) As used in this part, "property" means land, roads, water, watercourses, and private ways. The term includes any improvements, buildings, structures, machinery, and equipment on property.

~~(2)~~(4) The department of fish, wildlife, and parks, when operating under an agreement with a landowner or tenant to provide recreational snowmobiling opportunities, including but not limited to a snowmobile area, subject to the provisions of subsection (1), on the landowner's property and when not also acting as a snowmobile area operator on the property, does not extend any assurance that ~~such~~ the property is safe for any purpose, and the department, the landowner, or the landowner's tenant may not be liable to any person for any injury to person or property resulting from any act or omission of the department unless ~~such~~ the act or omission constitutes willful or wanton misconduct.""

EXHIBIT NO. 5
DATE 9/14/95
BILL NO. SJR 7

SJR 7

AMENDED SENATE JOINT RESOLUTION NO. 7

INTRODUCED BY _____

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA INSTRUCTING THE LEGISLATIVE AUDITOR TO CONDUCT A PERFORMANCE AUDIT OF THE CLERK OF COURT, LAW LIBRARY, WATER COURT, AND SUPREME COURT ADMINISTRATOR'S OFFICE IN REGARD TO AUTOMATED INFORMATION PROCESSING; AND REQUIRING ~~THAT~~ A REPORT ~~OF THE RESULTS OF THE PERFORMANCE AUDIT~~ BE SUBMITTED TO THE CHIEF JUSTICE AND 55TH LEGISLATURE.

WHEREAS, the Judicial branch has 30% of the 224 courts of Montana automated since 1988; ~~the budget for the Supreme Court of Montana currently provides for 2.0 FTE and $122,890 a year for court automation activities;~~ and

WHEREAS, the court is requesting General Fund support to ~~an additional 10.0 FTE and $1 million in general fund money a year to~~ continue and expand court automation activities and to replace previously purchased automation equipment; and

WHEREAS, the Legislature has before it a separate bill to put in place a method to provide permanent funding ~~allow filing fees to be charged~~ to support court automation activities; ~~and it is expected that the filing fee would generate approximately $900,000 a year;~~ and

~~WHEREAS, from fiscal year 1988 through fiscal year 1994, the Judiciary has spent a total of $1,179,218 in general fund money on court automation activities; and~~

WHEREAS, the Judiciary does not have staff to perform a internal review of automated information systems. ~~there has not been a legislative performance audit of the Supreme Court Administrator's Office before or since the inception of the court automation program in 1988.~~

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the Legislative Auditor conduct a performance audit of the automated information systems in the Clerk of Court, Law Library, Water Court, and Supreme Court Administrator's Office. ~~from the date of the inception of the Office to the current date whether the agency is carrying out its activities and~~

~~programs efficiently and effectively, with particular attention paid to court automation activities.~~

BE IT FURTHER RESOLVED, the cost associated with this performance audit be appropriated to ~~that~~ the Legislative Auditor and that a report of the ~~findings~~ recommendations be presented to the Chief Justice and ~~of the performance audit to~~ the 55th Legislature.

-END-

EXHIBIT NO. 6
DATE 3/14/95
SB 27

SUPREME COURT INSTALLED AND SUPPORTED COMPUTER SYSTEMS IN MONTANA'S JUDICIAL DISTRICTS

As of January 18, 1995

District	Courts	Location	System
1st	6	Montana Supreme Court, Court Admin, Law Library Lewis & Clark Co. DC, JP & City Courts Broadwater Co. JP/City Court, Townsend	Novell Network - 45 Workstations Novell Network - 24 Workstations 1 Standalone Workstation
3rd	5	Deer Lodge Co. Clerk of DC, Anaconda Deer Lodge Co. JP, Anaconda Granite Co. Clerk of DC, Philipsburg Powell Co. DC & JP, Deer Lodge	1 Standalone Workstation 1 Standalone Workstation 1 Standalone Workstation Novell Network - 8 Workstations
4th	2	Missoula Co. Clerk of DC, Missoula Missoula Co. City Court, Missoula	Novell Network - 12 Workstations Novell Network - 7 Workstations
5th	5	Jefferson Co. Clerk of DC, Boulder Jefferson Co. JP Court, Boulder Madison Co. JP Court, Virginia City Madison Co. Clerk of DC, Virginia City Madison Co. Dist. Court Judge, Virginia City Beaverhead Co. Dist. Court Judge, Dillon	Novell Network - 3 Workstations 1 Standalone Workstation 1 Standalone Workstation 1 Standalone Workstation 1 Standalone Workstation 1 Standalone Workstation
6th	3	Park Co. DC, JP, City Courts, Co. Attorney, Livingston	Novell Network - 11 Workstations
7th	5	Dawson Co. Clerk of DC, Glendive McCone Co., Clerk of DC, Circle Richland Co., District Court, Sidney Richland Co., JP Court, Sidney Wibaux Co. District Court, Wibaux	Novell Network - 6 Workstations 1 Standalone Workstation 2 Standalone Workstations 2 Standalone Workstations 1 Standalone Workstation

8th	1	Cascade Co., Clerk of DC, Great Falls	7 Standalone Workstations (to be networked Spring 95)
9th	5	Glacier Co. Clerk of DC, Cut Bank Glacier Co. JP/City Court, Cut Bank Pondera Co. Clerk of DC, Conrad Pondera Co. JP, Conrad	Novell Network - 3 Workstations 1 Standalone Workstation 2 Standalone Workstations 1 Standalone Workstation
10th	3	Fergus Co. Clerk of DC, Lewistown Judith Basin Co. JP/City, Standford	1 Standalone Workstation 1 Standalone Workstation
11th	3	Flathead Co. DC & JP Courts, Co. Attorney, Kalispell Flathead Co. City Court, Kalispell	Novell Network - 30 Workstations Novell Network - 3 Workstation
12th	3	Chouteau Co. Clerk of DC, Fort Benton Hill Co. Clerk of DC, Havre Liberty Co. Clerk of DC, Chester	1 Standalone Workstation Novell Network - 6 Workstations 2 Standalone Workstations
13th	5	Big Horn Co. Clerk of DC, Hardin Carbon Co. DC & JP, Red Lodge Yellowstone Co. City Court, Laurel Yellowstone Co. District Court, Billings	2 Standalone Workstations Novell Network - 5 Workstations 1 Standalone Workstations Novell Network - 20 Workstations
14th	1	Musselshell Co. JP, Roundup	1 Standalone
15th	4	Roosevelt Co. Clerk of DC, Wolf Point Roosevelt Co. JP/City Court, Wolf Point Sheridan Co. JP, Plentywood	2 Standalone Workstations 1 Standalone Workstation 1 Standalone Workstation

EXHIBIT 6
DATE 2-14-95
SJR 7

16th	6	Custer Co. Clerk of DC, Miles City Custer Co. City Court, Miles City Fallon Co. Clerk of DC, Baker Powder River Co. Clerk of DC, Broadus Powder River Co. JP Court, Broadus Rosebud Co. JP, Colstrip	2 Standalone Workstations 1 Standalone Workstation Novell NetWare Lite - 2 Workstations 1 Standalone Workstation 1 Standalone Workstation 1 Standalone Workstation
17th	4	Blaine Co. Clerk of DC, Chinook Phillips Co. Clerk of DC, Malta Valley Co. Clerk of DC, Glasgow Valley Co. JP, Glasgow	Novell Netware Lite - 2 Workstations 1 Standalone Workstation 2 Standalone Workstations 1 Standalone Workstation
18th	4	Gallatin Co. District Court, Bozeman Gallatin Co. JP, Bozeman Gallatin City Court Montana Water Courts, Bozeman	Novell Network - 18 Workstations Novell Network - 4 Workstations Novell Network - 3 Workstations (DC?) Novell Network - 12 Workstations
19th	3	Lincoln Co. Clerk of DC, Libby Lincoln Co. JP Court, Libby Lincoln Co. JP Court, Eureka	Novell Network - 5 Workstations Novell Netware Lite - 4 Workstations Novell NetWare Lite - 2 Workstations
20th	2	Lake Co. District Court, Polson Sanders Co. Clerk of DC, Thompson Falls	Novell Network - 4 Workstations 1 Standalone Workstation
21st	2	Ravalli Co. Clerk of DC & JP Court, Hamilton	Novell Network - 11 Workstations
TOTAL	72		

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 2/14/95
BILL NO. SB212

AMENDMENTS TO SB 212
SPONSORED BY MONTANA DEFENSE TRIAL LAWYERS

1. Title: line 5.

FOLLOWING: "DETERMINATIONS;"

INSERT: "AND TO PERMIT THE CONSIDERATION OF NEGLIGENCE BY AN EMPLOYER OR COEMPLOYEE IN CERTAIN CIVIL ACTIONS;"

2. Page 1.

FOLLOWING: line 13

INSERT: WHEREAS, on January 18, 1995, the Montana Supreme Court in ***Wetch v. Unique Concrete Co.,*** _____ *P.2d* _____, *52 St.Rptr. 5 (1995)*, interpreted section 27-1-703, MCA, to preclude the trier of fact from hearing about or considering the negligence of the plaintiff's employer, in a case in which that negligence should have absolved or substantially limited the liability of a contractor doing work on the employer's office building; and

WHEREAS, the Legislature wishes to provide that negligence on the part of the claimant's employer or coemployee may be considered and determined as part of a nonparty defense, as provided herein.

3. Page 2, lines 8-12.

FOLLOWING: "listed in this subsection."

STRIKE: remainder of line 8 through "federal government." on line 12.

ks:L.4

EXPLANATION FOR THE AMENDMENT TO SB 212 PROPOSED BY THE MONTANA DEFENSE TRIAL LAWYERS

The Montana Defense Trial Lawyers (MDTL) has proposed an amendment to SB 212 deleting the provision of § 27-1-703 which prohibits the trier of fact from considering the negligence of an injured person's employer or coemployee.

The reason for this amendment is the Montana Supreme Court's decision in ***Wetch v. Unique Concrete Co.***, which was issued on January 18, 1995. The facts of the ***Wetch*** case demonstrate dramatically the reason and need for this amendment.

The plaintiff, Janice Wetch, worked for Dr. Wallick in Miles City. Dr. Wallick decided to remodel his office building. As part of that process, the Defendant, Unique Concrete, was hired to remove the concrete steps outside the rear door of the building.

Before Unique started work, Unique's president talked to Dr. Wallick and the plaintiff about the safety hazard posed by removal of the steps outside the door. Unique's president suggested various things that could be done about the safety hazard, including barricading the door. Dr. Wallick did not want the door barricaded because the office needed ventilation. Dr. Wallick assured Unique Concrete's president that a warning sign would be placed on the door, that the door would be dead-bolted during regular business hours, and that Dr. Wallick would "take care" of the situation.

In reliance on Dr. Wallick's assurances, Unique Concrete did not barricade the back door. They proceeded to remove the steps, which left a hole five to six feet deep under the door where the steps had been.

Knowing the rear steps had been removed, the plaintiff used the front door to come and go from work. However, on the afternoon of September 25, acting out of either forgetfulness or force of habit, Ms. Wetch attempted to leave the building by going out the back door. She opened the door, fell into the hole left by the missing steps, and injured herself.

Ms. Wetch received workers' compensation benefits from Dr. Wallick's insurer. She then filed a lawsuit against Unique Concrete, alleging negligence on the part of Unique Concrete for failing to barricade the door. At trial, Ms. Wetch's attorney was allowed to ask Unique Concrete's president two things: (1) that he knew the missing steps posed a hazardous situation; and (2) that he did nothing to secure the door to avoid the hazardous situation. Unique Concrete's lawyer asked to be allowed to explain why no action had been taken to secure the door -- that this subject had been specifically discussed with both Dr. Wallick and the plaintiff, that Dr. Wallick did not want the door to be secured because of the need for ventilation, and that Dr. Wallick would be the one who would take care of the situation. This testimony was not allowed by the District Court because of the provision of § 27-1-703 which prohibits the trier of fact from considering the negligence of an employer. Not surprisingly, Unique Concrete was found liable. The jury's total damage award in the case was $200,000.

Unique Concrete appealed to the Montana Supreme Court, which affirmed the District Court's decision in an opinion entered on January 18, 1995. In its decision, the Court held that the sentence prohibiting consideration of the employer's negligence left it no choice. MDTL believes that the injustice of the result in this case is manifest, and that there is no

EXHIBIT 7
DATE 2-14-95
SB 212

good reason to prohibit the trier of fact from considering all of the negligence that contributes to an accident, including the negligence of an employer or coemployee.

In order to resolve the problem highlighted in the Supreme Court's decision, MDTL submits that the following sentence should be deleted from the text of § 27-1-703(4):

> However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government.

hk:MDTL.M1

JANICE WETCH, Plaintiff and Respondent, v. UNIQUE CONCRETE CO. a Montana Corporation, Defendant and Appellant.

No. 94-176.
Submitted on Briefs October 28, 1994.
Decided January 18, 1995.
52 St.Rep. 5.
____Mont.____.
____P.2d____.

NEGLIGENCE - TORTS - STATUTES. Plaintiff brought suit for injuries she received in a fall at her workplace where defendant was doing remodeling work. Plaintiff filed a motion in limine to exclude consideration by the jury evidence of her employer's negligence and the district court granted the motion. Following trial, the jury apportioned negligence 51% to defendant and 49% to plaintiff and awarded damages. Defendant appealed. The Supreme Court held:

1. NEGLIGENCE - TORTS. Statute provided that trier of fact, in attributing negligence, may not consider or determine any amount of negligence on part of injured person's employer or co-employee to extent that such employer or co-employee has tort immunity under workers' compensation act. § 27-1-703(4), MCA (1987).

2. NEGLIGENCE - TORTS. Plaintiff's employer was immune from tort liability for plaintiff's injuries because plaintiff was covered by and received benefits under employer's workers' compensation insurance.

3. NEGLIGENCE - TORTS. Statute expressly prohibits any evidence of employer's negligence going to the jury where employer is absolutely immune from tort liability, and any amount of employer's negligence which caused or contributed to plaintiff's injuries cannot be considered or determined by the jury; employer's negligence is not part of liability or damages equation.

4. STATUTES. Supreme Court is not constrained to follow interpretations of state statutes by federal judiciary, especially where statutory language has not been previously interpreted by Supreme Court.

5. STATUTES. Where no constitutional challenge has been made, it is not prerogative of court to construe a clear and unambiguous legislative enactment so as to defeat its obvious mandate and district court correctly applied statute in granting plaintiff's motion in limine.

Affirmed.

**Appeal from the District Court of Custer County.
Sixteenth Judicial District.
Honorable Kenneth R. Wilson, Judge.**

For Appellant: **Calvin J. Stacey**, Stacey & Walen, Billings.

For Respondent: **Thomas M. Monaghan**, Lucas & Monaghan, Miles City.

JUSTICE NELSON delivered the Opinion of the Court.

Unique Concrete, Co., (Unique) appeals from a special jury verdict in favor of Janice Wetch (Janice) finding that Janice's personal injuries were caused 51% by Unique's negligence and 49% by Janice's own negligence and awarding total damages of $200,000. Unique contends that the District Court erred in granting Janice's Motion in Limine restricting evidence of negligence attributable to Janice's employer, Dr. William Wallick (Dr. Wallick). We affirm.

ISSUE

The issue on appeal is whether the District Court properly applied § 27-1-703(4), MCA, (1987), in granting Janice's Motion in Limine.

FACTUAL AND PROCEDURAL BACKGROUND

At the time she was injured, Janice was the full time receptionist, office worker and assistant to Dr. Wallick, a Miles City chiropractor. Janice had worked for Dr. Wallick, first on a part-time basis and later, full time, since August 1984. She and Dr. Wallick were the only two persons who worked in his small, Main Street office building.

In 1989, desiring to add space to his offices, Dr. Wallick hired a local Miles City contractor to remodel the building. Prior to the remodeling, the office building had two doors, one at the front of the building facing Main Street, primarily used by patients, and another door at the rear leading to the parking lot. The rear door was routinely used by Dr. Wallick and Janice. As part of the remodeling project, Unique was hired as one of the subcontractors and was responsible for removing the concrete steps outside the rear door of the building.

Before Unique began work, Larry Kuchynka (Larry), Unique's president, had a conversation with Dr. Wallick, in Janice's presence, in which Larry expressed his concern about the safety hazard posed by the removal of the steps outside the rear door. Larry suggested various measures that could be taken to mitigate the danger, including barricading the door. Dr. Wallick did not want to barricade the door because of the need for ventilation. However, he assured Larry

that a warning sign would be placed on the door, that the door would be dead-bolted during regular business hours and that he (Dr. Wallick) "would take care of it." Relying on Dr. Wallick's statements, Unique did nothing to secure the door and proceeded to remove the concrete steps leaving a vacant hole five to six feet deep under the door where the steps had been.

Janice testified that she recalled discussing the door situation with Dr. Wallick and that she tried to keep the door locked. Moreover, knowing that the steps had been removed, during the week before her accident, Janice changed her routine and began using the front door to enter and leave work. Nonetheless, at about noon on September 25, 1989, out of forgetfulness or force of habit, Janice opened outward the rear door of the office, stepped into the five to six feet hole where the steps had been, and was seriously injured. Janice subsequently received benefits through workers' compensation insurance carried by Dr. Wallick.

In November 1991, Janice filed her complaint against Unique alleging negligence and seeking special and general damages for her injuries. Prior to trial, in its motion for summary judgment, Unique argued that Dr. Wallick's failure to secure the door was negligence and was an independent, superseding, intervening cause which absolved Unique from liability for Janice's injuries. In response, based on § 27-1-703(4), MCA, (1987), Janice filed her Motion in Limine to exclude from consideration by the jury argument or evidence of any conversation between Larry and Dr. Wallick that Wallick would keep the rear door locked during construction; that Dr. Wallick forgot to lock the door approximately one and one-half hours before Janice's fall; and that Dr. Wallick was solely or partially at fault with regard to Janice's fall. Janice's motion was briefed and argued, and, on the first day of trial was granted by the District Court.

Trial began in February 1994. Janice's attorney called Larry and elicited testimony to the effect that he (Larry) was concerned about the hazardous condition posed by the removal of the steps, that he discussed those concerns with Dr. Wallick in Janice's presence, that various measures could be taken to mitigate the danger, but that he (Larry) did nothing to secure the door. Pursuant to the District Court's order granting Janice's Motion in Limine, however, and despite Unique's offer of proof, neither Larry nor Wallick were allowed to detail their conversation about the necessity to barricade the rear door; that Dr. Wallick had refused to have the door barricaded; that Dr. Wallick had agreed to lock the door; and that Larry had relied on Dr. Wallick's statements in that regard as the reason why Unique did not take any measures to secure the door.

DISCUSSION

On appeal, Unique contends that because the District Court granted Janice's Motion in Limine, it was denied its right to a fair trial. Unique argues that the jury was precluded from hearing all of the facts as to how and why Janice's accident occurred and that it was unable to present factual support for its defenses that it was not negligent and that, even if it was, its negligence was not the proximate cause of Janice's injuries, Dr. Wallick's negligence being an independent, superseding and intervening cause.

Janice maintains that the District Court correctly granted her Motion in Limine and kept the offered argument and evidence from the jury because amendments to § 27-1-703, MCA, made by the 1987 legislature, specifically removed from consideration and determination by the fact finder any amount of negligence on the part of the injured person's employer to the extent that such employer had tort immunity under Montana's Workers' Compensation Act. We conclude that the District Court's application of § 27-1-703(4), MCA, to prohibit the offered testimony and evidence from being considered by the jury was correct.

The issue raised in this case is one of first impression. While this Court recently held certain portions of § 27-1-703(4), MCA, (1987) unconstitutional, *Newville v. State of Montana* (1994), ___ Mont. ___, 883 P.2d 793, our decision in that case did not address the language of the statute at issue here, nor is there any constitutional issue raised in this appeal with respect to that part of the statute. Rather, the issue here involves one of merely applying the clear and unambiguous requirements of the statute to the facts before the court.

[1] In pertinent part, § 27-1-703(4), MCA, (1987), provides:

> (4) ... However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government.

That language, along with other provisions, was added to § 27-1-703, MCA, by the 1987 Legislature as a part of its tort reform legislation. See *Newville*, 883 P.2d at 799.

There is nothing ambiguous or unclear about the statutory language at issue. The legislature has provided that the fact finder may not "consider or deter-

mine any amount of negligence" on the part of the injured person's employer to the extent the employer has tort immunity under the Workers' Compensation Act.

[2] It is undisputed that Dr. Wallick was Janice's employer and that he is immune from tort liability for her injuries because she was covered by and received benefits under his workers' compensation insurance. See, Article II, Section 16, Constitution of the State of Montana and § 39-71-411, MCA. Unique, nevertheless, argues that it should be able to completely absolve its own liability by offering evidence, argument and instruction to the jury that it did not secure the rear door because Dr. Wallick said he would take care of it; because Dr. Wallick refused to allow Unique to barricade the door; because Dr. Wallick negligently failed to secure the rear door himself; and because Dr. Wallick's negligence was the proximate cause of Janice's injuries.

[3] Obviously, Unique can only prevail in that defense if the trier of fact is, first, allowed to "consider" evidence of Dr. Wallick's alleged negligent acts and omissions from testimony of what Dr. Wallick said he would do and from what he then actually did or failed to do, and, second, if the trier of fact is then allowed to "determine" from that evidence that it was Dr. Wallick's negligence, and not Unique's, that proximately caused Janice's injuries. That, of course, is precisely the sort of evidence that the statute expressly prohibits from going to the jury. Because Dr. Wallick is absolutely immune from tort liability for her injuries, *any* amount of his negligence which caused or contributed to Janice's injuries cannot be considered or determined by the jury. Dr. Wallick's negligence is simply not a part of the liability or damages equation.

[4] While the parties argue for and against the fairness of the statute and the rationale underlying its adoption, that is not the issue. Moreover, we have considered the authorities cited by Unique and do not find them persuasive. While Judge Battin's interpretation of the statutory language in *Weaselboy v. Ingersoll-Rand* (April 10, 1991) 10 Mont. Fed. Rpt. 41, differs from ours, we are not constrained to follow the interpretations of Montana's statutes by the federal judiciary, especially where the statutory language at issue has not been previously interpreted by this Court. The statutory prohibition is clear and unambiguous, and no argument has been advanced that the portion of the statute at issue is unconstitutional.

[5] Absent such a challenge, it is not the prerogative of this or of any other court to construe a clear and unambiguous legislative enactment so as to defeat its obvious mandate. Accordingly, we are compelled to hold that the District Court correctly applied § 27-1-703(4), MCA, (1987), in granting Janice's Motion in Limine.

AFFIRMED.

CHIEF JUSTICE TURNAGE, JUSTICES GRAY, HUNT and WEBER.

WHAT THE MDTL AMENDMENT TO SB 212 WILL NOT DO

Based on literature already distributed by the Plaintiffs' Trial Lawyers Association (MTLA), it is expected that an argument may be made to the effect that the amendment proposed by MDTL will result in some form of threat to Montana employers. There is no such threat.

Under Montana law, an employer and its employees are absolutely immune from being sued for any negligent act which causes a workers' compensation accident. That law will remain unaffected by SB 212. Employers and their employees cannot be sued under SB 212 or under the MDTL proposed amendment.

All the amendment does is allow the jury to consider any negligence by the employer or a coemployee in determining the percentage of negligence attributable to the defendant being sued by an injured employee. The defendants in these cases, which are known as "third-party" actions, are usually contractors or product manufacturers. The amendment provides for a fair allocation of negligence to the defendant, with no monetary risk whatsoever to the employer or its employees. They cannot be named in the suit, nor will they be required to hire attorneys to defend themselves. Because of their immunity under the workers' compensation laws, they are treated under SB 212 as "nonparties." SB 212 expressly provides that any finding of negligence by a nonparty "is not a presumptive or conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty." This means that any decision made concerning the negligence of an employer or its employees is not binding on them. Instead, that decision is used only for purposes of allocating an appropriate share of negligence to the persons or entities who are actually parties in the lawsuit.

The overall purpose of the MDTL amendment is to insure that there is a fair allocation of negligence in negligence lawsuits. The only way that can be done is to allow the jury to consider the negligence of all of the persons who contributed to an accident. The jury should be told the truth about all of the acts of negligence by all of the participants in an accident. When the jury isn't told the truth about all of the negligent participants, you have results like the ***Unique Concrete*** case, where a cement contractor is being required to pay over $100,000 for an accident that was not caused by his negligence, but by the negligence of the injured party's employer.

**For every breach of trust,
whether it is for ox, for ass, for sheep,
for clothing, or for any kind of lost thing,
of which one says, "This is it,"
the case of both parties
shall come before the judges;
he whom the judges shall condemn
shall pay double to his neighbor.**

Exodus 22:9

**If a malicious witness rises against
any man to accuse him of wrongdoing,
then both parties to the dispute
shall appear before the Lord,
before the priests and the judges
who are in office in those days;
the judges shall inquire diligently,
and if the witness is a false witness,
and has accused his brother falsely,
then you shall do to him
as he had meant to do to his brother;
so you shall purge the evil
from the midst of you.**

Deuteronomy 19:16-20

Montana Trial Lawyers Association

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February 14, 1995

Sen. Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: Senate Bill 212

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to Senate Bill 212, which amends Sec. 27-1-703, MCA, but fails to correct the constitutional deficiencies in that statute.

Background. The Montana Supreme Court, in *Newville v. State of Montana Department of Family Services,* 51 St.Rep. 758 (1994), invalidated those "empty chair" portions of Montana's joint-and-several statute which (1) subjected so-called non-defendants to blame in Montana courts without the opportunity to defend themselves, and (2) required plaintiffs to defend those so-called non-defendants.

The quotations from *Newville* accompanying this testimony demonstrate that the Montana Supreme Court invalidated the statute ***because the "empty chair" was empty, not just because the "empty chair" needed new upholstery.*** For example:

- "We conclude that the allocation of percentages of liability to nonparties violates substantive due process as to the plaintiffs." (*Newville,* page 765)
- ". . . the due process clause contains a substantive component which bars arbitrary governmental actions *regardless of the procedures used to implement them,* and serves as a check on oppressive governmental action." (*Newville,* page 763)

Senate Bill 212. This bill mistakenly presumes (at page 1, line 11), "the basis of the holding [in *Newville*] was that the statute lacked certain procedural safeguards" which would otherwise have made the "empty chair" acceptable. Consequently, this bill mistakenly presumes that it can merely add certain procedural upholstery and thus furnish the courts of justice in Montana with "empty chairs" again. MTLA disagrees with

both presumptions.

Under Senate Bill 212, (1) so-called non-defendants ***will still be subjected to blame in Montana courts without the opportunity to defend themselves,*** and (2) plaintiffs ***will still be required to defend those so-called non-defendants.***

Far from correcting such constitutional defects, the procedural "safeguards" in SB 212 actually aggravate the injustice of an "empty chair" in several respects. Section 6(d) of the bill, for example, authorizes a real defendant to add a so-called non-party defendant *even after the statute of limitations has expired for that non-party,* depriving a plaintiff of any ability to add that non-party as an additional defendant. Nothing in the 1987 statute went so far.

Likewise, Section 6(b) of the bill--by providing that "[a] finding of negligence of a nonparty is not a presumptive or conclusive finding as to that nonparty for purposes of a prior or subsequent action involving that nonparty"--indicates that (1) a finding of negligence of a nonparty is a presumptive or conclusive finding for purposes of the present action, and (2) in prior or subsequent actions which do not "involve" that nonparty (i.e., where the nonparty is again a nonparty), those findings of negligence may indeed be presumptive or conclusive evidence.

Finally, MTLA notes that the Montana Supreme Court in *Newville,* having declared the "empty chair" provision of Sec. 27-1-703, MCA, unconstitutional, then addressed the next question: whether the constitutional defect extended beyond the specific "empty chair" phrases. The Court said:

> "We here conclude that the unconstitutional portion of Sec. 27-1-703(4), MCA (1987), is not essential to the integrity of the statute, nor was it an inducement to its enactment. We further conclude that the remainder of the statute is capable of being executed in accordance with the legislative intent." (*Newville,* page 766)

MTLA believes that the Legislature's enactment of SB 212, in light of the testimony of proponents of SB 212, will require the Montana Supreme Court when it again declares "empty chair" provisions unconstitutional, to also reconsider whether such provisions are indeed essential to the entire joint-and-several statute and thus whether the remainder of the statute can survive without them.

If MTLA can provide more information or assistance to the Committee, please notify me. Thank you again for this opportunity to oppose SB 212.

Respectfully,

Russell B. Hill, Executive Director

WHAT--EXACTLY--DID THE MONTANA SUPREME COURT SAY IN *NEWVILLE V. STATE OF MONTANA?*

"While the listed reasons for enactment of comparative negligence tort reform legislation are valid governmental purposes, *we conclude that the Montana Legislature has acted arbitrarily and unreasonably in responding to this need. **We conclude that the allocation of percentages of liability to nonparties violates substantive due process as to the plaintiffs.**"* [emphasis added]

"We hold that the following portion of Sec. 27-1-703(4), MCA (1987), violates substantive due process:

> . . . persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. . . .

While we hold that the naming of "any other persons who have a defense against the claimant" *violates substantive due process where such persons are not parties,* we further emphasize that the reference in the statute to "any other persons who have a defense against the claimant" is so vague as to make its meaning impossible to understand." [emphasis added]

". . . the due process clause contains a substantive component which bars arbitrary governmental actions ***regardless of the procedures used to implement them,*** and serves as a check on oppressive governmental action." [emphasis added]

"As a result of our holding of unconstitutionality, *we have eliminated that portion of the statute which allowed an allocation of negligence to nonparties*, and in particular to nonparties who had been released from liability by the claimant, nonparties who were immune from liability to the claimant, and any other nonparties who have a defense against the claimant." [emphasis added]

"Substantive due process primarily examines the underlying substantive rights and remedies to determine *whether restrictions, such as those placed on **both remedies and procedures** in this case*, are unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute." [emphasis added]

"In the case before us, plaintiffs contend that Sec. 27-1-703, MCA (1987), *arbitrarily prejudices **plaintiffs by requiring them to exonerate nonparties.*** They contend [1] there is no reasonable basis to require any plaintiff to prepare a defense at the last minute for nonparties whom defendants seek to blame for the injury, but who have not been joined as defendants; ***and*** [2] that *there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties,* particularly when they do not know until the latter part of the trial that defendants will seek to place blame on unrepresented persons. ***These procedural problems*** [plural] ***form the basis for our holding that Sec. 27-1-703, MCA (1987), in part violates substantive due process.***" [emphasis and brackets added]

"We conclude that Sec. 27-1-703(4), MCA (1987), *unreasonably mandates an allocation of percentages of negligence to nonparties* without any kind of procedural safeguard. . . . *Such an apportionment is clearly unreasonable as to plaintiffs, **and can also unreasonably affect defendants and nonparties.***" [emphasis added]

"We here conclude that the unconstitutional portion of Sec. 27-1-703(4), MCA (1987), ***is not essential to the integrity of the statute,*** nor was it an inducement to its enactment." [emphasis added]

NEWVILLE *SAYS THE "EMPTY CHAIR" IS EMPTY--*
SB 212 SAYS IT JUST NEEDS NEW UPHOLSTERY!

STRAIGHT TALK ABOUT SB 212

Not Just a Bill--A Bill of Goods

Proponents of Senate Bill 212 describe it as a simple procedural change to "conform" with the Montana Supreme Court's *Newville* decision. ***They're dead wrong.*** To the contrary, SB 212 runs counter to *Newville* and licenses lawyers and insurance companies to run roughshod over Montanans in court.

Encourage Settlements, Not Lawsuits

SB 212 should have been titled, "The Clogged-Court Act of 1995." It will render prompt settlements nearly impossible. Even simple disputes will instantly "morph" into complex multi-party monsters under SB 212, confusing to everyone but lawyers. The so-called "procedural improvements" in SB 212 guarantee that more Montanans will be sued. Ask proponents of the bill--they know. Settlements with individual defendants, even those only marginally related to the lawsuit, will become too risky for lawyers on all sides to consider. So under SB 212, trials will require more litigants, more lawyers, more time--***and more money.***

The Guilty Pay Less, Montana Picks Up the Tab

Existing Montana law encourages personal accountability. Not so SB 212. *No innocent person has ever paid a dime of compensation under Montana's joint and several liability laws.* Every defendant who pays has first been found guilty of negligence--negligence which has inflicted medical bills, lost income, disability or death upon some Montanan. But SB 212 will allow the careless to evade their responsibilities and pay less for the medical bills and lost wages they caused.

Who picks up the tab? Sometimes the injured person, but most often ***our overburdened Medicaid and welfare systems.*** In effect profitable private insurance companies want to evade legitimate claims by *picking the "deep pockets" of the State of Montana and Montana taxpayers.* SB 212 says they can.

Woe to "Non-Party" Defendants--Like You

Under SB 212, you or your business can be trapped as a "non-party" defendant with no way to defend yourself. Your insurance company won't help, because you aren't really being sued. The judge can't help, because rules of court don't allow "non-motions" by "non-parties" who seek "non-dismissal" merely to protect their good name. And skilled defense lawyers for other defendants certainly won't help, since they ***want*** to blame you.

A judge or jury that never saw your face, that only heard one side, can blame you. And if it does, you will read about your conviction in the morning headlines. You will answer calls from family, friends, customers, patients, and clients "just wondering what's up." How will you explain? Just as importantly, if this happens to one of your constituents, how will you explain a vote in favor of SB 212?

DON'T BE FOOLED BY THE "EMPTY CHAIR"--VOTE <u>NO</u> ON SB 212

EXHIBIT 9
DATE 2-14-95
SB 212

JEANNINE NEWVILLE and DAMON GANNETT, Co-Guardians ad litem for R.M., a minor, Plaintiffs, Appellants and Cross-Respondents,

v.

STATE OF MONTANA, DEPARTMENT OF FAMILY SERVICES, an agency of the state of Montana, Defendant, Respondent and Cross-Appellant.

No. 92-310.
Submitted March 16, 1994.
Decided August 29, 1994.
51 St.Rep. 0758.
___Mont.___.
___P.2d___.

NEGLIGENCE - CONSTITUTIONAL LAW - STATUTES - EVIDENCE - JURY - DAMAGES - TORTS - LOCAL GOVERNMENT. Plaintiffs appealed from a jury verdict in negligence action concerning severe injuries inflicted upon minor child by her foster father while in his care pending an adoption, which verdict attributed negligence under Montana comparative negligence statute to state department of family services (30%), foster mother (35%) and a professional counselor (35%). The Supreme Court held:

1. NEGLIGENCE. Where plaintiffs have established they could suffer economic loss if a percentage of negligence were attributed to unrepresented parties, plaintiffs have standing to assert the rights of the unrepresented parties.

2. CONSTITUTIONAL LAW. Theory underlying substantive due process reaffirms fundamental concept that the due process clause contains a substantive component which bars arbitrary governmental actions and serves as a check on oppressive governmental action.

3. CONSTITUTIONAL LAW. Substantive due process primarily examines underlying substantive rights and remedies to determine whether restrictions are unreasonable or arbitrary when balanced against purpose of legislature in enacting statute.

4. CONSTITUTIONAL LAW. To satisfy guarantees of substantive due process, a statute must be reasonably related to a permissible legislative objective.

5. CONSTITUTIONAL LAW - STATUTES. Section 27-1-703(4), MCA (1987), unreasonably mandates allocation of percentages of negligence to nonparties without any kind of procedural safeguard.

6. CONSTITUTIONAL LAW - STATUTES. Portion of 27-1-703(4), MCA (1987), stating "persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant" violates substantive due process.

7. CONSTITUTIONAL LAW - STATUTES. If an invalid part of a statute is severable from the rest, the portion which is constitutional may stand while the part which is unconstitutional is stricken and rejected, unless such provision is necessary to the integrity of the statute or was an inducement to its enactment.

8. CONSTITUTIONAL LAW - STATUTES. Unconstitutional portion of 27-1-703(4), MCA (1987), is not essential to the integrity of the statute, was not an inducement to its enactment and remainder is capable of being executed with the legislative intent.

9. EVIDENCE - NEGLIGENCE. In Montana, expert testimony is required as to the standard of care of professional and as to the professionals violation of that standard of care before trier of fact may find such professional negligence.

10. EVIDENCE. District court erred in permitting counselors name to be listed on special verdict form when standard of care for a professional counselor had not been established by evidence and there were no specific jury instructions as to professional standard requirement.

11. EVIDENCE. Where no causal connection was ever made establishing a medical link between actions of biological parents and childs present condition, district court abused its discretion in admitting evidence concerning biological parents and in allowing department to comment on such evidence during closing argument.

12. JURY. There is no reversible error in the giving or refusing of certain instructions, where jury instructions, viewed in their entirety, state the correct law applicable to the case.

13. JURY. Section 41-3-201 requires the department of family services to notify county attorney of a report of child abuse, and court erred in refusing to give offered jury instruction relating to that duty.

14. DAMAGES - JURY. Amount of damages awarded is solely within province of jury and, although jury is not given carte blanche in that regard and there must be some substantial evidence to sup-

port verdict, jury is not bound by the testimony of experts.

15. DAMAGES - JURY. Court erred in instructing jury by failing to include provision that the only amounts to be adjusted to present cash value are future earnings and future medical costs.

16. DAMAGES. As required by 25-9-402, MCA, special verdict form should state whether amount of future damages had been reduced to present value by jury.

17. TORTS - LOCAL GOVERNMENT. Governmental entity may be immune from tort liability if tort was committed while entity was performing a quasi-judicial function even when governmental unit is not characterized as a quasi-judicial entity.

18. TORTS - LOCAL GOVERNMENT. Core determination for immunity to apply to the function of the agency is that it be quasi-judicial rather than administrative or ministerial.

19. TORTS - LOCAL GOVERNMENT. Where department is required by statute to license and train foster care providers and to investigate adoptive homes, department was, at all times leading up to the tort sued upon, acting ministerially.

20. TORTS - LOCAL GOVERNMENT. Although immunity may apply to the exercise of a quasi-judicial function where there is no statutorily-designated quasi-judicial board, department in this case was not carrying on investigation of the sort which is granted immunity, such as part of a contested hearing.

21. TORTS - LOCAL GOVERNMENT. Department was not acting in quasi-judicial role where no contested case or adversarial type of proceeding was involved and departments actions were not discretionary but rather were mandated by statute and were ministerial and administrative in nature.

22. TORTS - LOCAL GOVERNMENT. Department is not granted immunity by statute granting immunity for persons required to report and investigate child abuse; statute is intended to protect individuals such as teachers, doctors and psychologists who are required to report suspected abuse.

Affirmed in part, reversed in part and remanded.

**Appeal from District Court of Gallatin County.
Eighteenth Judicial District.
Honorable John Warner, Judge.**

For Appellant: **Monte D. Beck, John J. Richardson**, Beck Law Offices, Bozeman; **Larry A. Anderson, Howard F. Strause**, Great Falls.

For Respondent: **R.H. Bellingham, T. Thomas Singer,** Moulton, Bellingham, Longo and Mather, Billings.

For Amci: **Robert J. Phillips, John E. Bohyer,** Phillips & Williams, Missoula; **Randy J. Cox,** Boone, Karlberg & Haddon, Missoula (Montana Defense Trial Lawyers Association)

L. Randall Bishop, Jarussi & Bishop, Billings; **Donald W. Molloy,** Billings; **David R. Paoli,** Missoula (Montana Trial Lawyers Association)

JUSTICE WEBER delivered the Opinion of the Court.

This is an appeal by the plaintiffs from a jury verdict arising out of the Eighteenth Judicial District Court, Gallatin County, in favor of plaintiffs' ward, R.M., in a negligence action concerning severe injuries inflicted upon R.M. by her foster father while in his care pending an adoption. The jury attributed negligence under Section 27-1-703, MCA, Montana's comparative negligence statute, to the State of Montana Department of Family Services (30%), the foster mother (35%) and a professional counselor who had treated the foster mother and father over a period of years (35%). The foster father was not listed on the special verdict form because the District Court found his conduct was intentional and not negligent. Amici curiae Montana Defense Trial Lawyers and Montana Trial Lawyers Association also presented the Court with arguments concerning constitutional issues. We affirm in part, reverse in part and remand for a new trial.

Plaintiffs now seek a new trial solely against the State of Montana Department of Family Services (the Department), presenting the Court with numerous issues, as does the Department in its Cross-Appeal, which we have restated as follows:

I. Do the plaintiffs have standing to assert the rights of unrepresented third persons included on the verdict form?

II. Is Montana's comparative negligence statute, Section 27-1-703(4), MCA, unconstitutional as amended by the 1987 legislature?

III. Did the District Court err in allowing the jury to allocate a percentage of negligence to Edna Goodwin, who settled with the plaintiffs prior to trial, when no evidence had been introduced to establish the standard of care for a professional counselor?

IV. Did the District Court err in admitting evidence concerning R.M.'s biological parents?

V. Did the District Court err in instructing the jury?

VI. Is the Department immune from tort liability for its failure to protect R.M.?

VII. Who is to be included on the special verdict form if there is a subsequent trial in this action?

The plaintiffs in this case are co-guardians ad litem for R.M., an American Indian child born to a 16-year-old mother. R.M.'s natural mother left R.M. in the custody of her grandmother prior to the age of seven months and could not be located when R.M. was subsequently removed from her grandmother's home by the police at the age of seven months. Because R.M.'s mother could not initially be found and her father was unavailable, the court appointed a guardian ad litem for her and placed her in the temporary custody of the Department.

In addition to R.M.'s birth mother being under age, she and the birth father had problems with intellectual functioning and with drug and alcohol abuse. R.M.'s birth mother had dropped out of school in the 7th grade and had an I.Q. of 69. The parental rights of both R.M.'s biological parents were terminated in Yellowstone County, giving the Department permanent custody of R.M. in October 1987.

After obtaining custody of R.M., the Department placed her in a series of foster homes. By the time she was four years old, she had been in seven foster homes, including the home of Dennis and Martha Kuipers. The Department removed R.M. from some of these homes because of allegations of physical abuse, sexual abuse, or neglect.

Although R.M. was available for adoption during the time she was being placed in foster care, she was not an easy child to place because of behavioral problems of the type caused by abuse. Adoptive placement was further complicated because any adoptive placement had to comply with the provisions of the Indian Child Welfare Act 25 U.S.C. Section 1915.

Following a series of events beginning when Dennis Kuipers heard from a friend that R.M. was available for adoption, the Department placed R.M. in foster care with Dennis and Martha Kuipers (the Kuipers) of Belgrade, Montana, with the intent that the Kuipers would adopt her if they were qualified by the Department as adoptive parents. This was done in September 1988 after the Department investigated the Kuipers. This placement was referred to by the Department as a "fos/adopt" placement.

Dennis Kuipers is of American Indian ancestry and thus better qualified to adopt R.M. under the Indian Child Welfare Act than a non-Indian person. Dennis Kuipers himself had been adopted by a non-Indian family at a young age after being abused, neglected and abandoned. He wanted to adopt R.M. because of the positive experience of his own adoption. The Kuipers were foster parents at all times during this action as the adoption was never completed.

Testimony was presented at trial which indicated that the Department did not conduct a proper investigation prior to placing R.M. in the Kuipers' home. For example, in response to a request for recommendation for adoption, the Kuipers' counselor, Edna Goodwin, wrote that Dennis Kuipers was "working on his issues of rage" and that "there was previously an issue of abuse by Dennis to his wife and to one of their two children." The Department did not contact Edna Goodwin about her comments in her letter despite permission from the Kuipers to do so. Other testimony was presented which indicated that the Department also did not follow up on other reports of abuse or check its own records for reports of abuse by Dennis Kuipers.

Ed Neuman, a Department employee, supervised the "fos/adopt" placement during the two months after R.M. was placed with the Kuipers. On October 2, 1988, just three weeks after R.M. was placed in the Kuipers' home, witnesses stated that Dennis Kuipers beat R.M. outside the Rax restaurant in Bozeman, Montana, partly in view of restaurant patrons and partly concealed within the family van. Dennis Kuipers became upset with R.M. because she had wet her pants. When he brought R.M. into the restaurant, she had black marks on her cheeks, and was described as having a fixed stare as though she were in shock. One witness testified that she looked like a "zombie."

These descriptions came from two couples who observed the incident from a location inside the Rax restaurant very near to where the Kuipers' van was parked. One witness, Salvatore Provenzano, telephoned the Bozeman police from the restaurant to report the incident. Salvatore Provenzano and his wife, Joy Provenzano, went to the police station at the request of the officers to provide the Bozeman Police Department with a written report. By the time the officers had arrived at the restaurant, however, the other witnessing couple, the Stewarts, had left the restaurant. The Stewarts provided the Bozeman police with a written statement later that same week.

Two officers responded to Salvatore Provenzano's report and came to the restaurant to investigate. Officer Linda Sanem took Martha Kuipers aside and asked her numerous questions. During that interview, Martha Kuipers was holding R.M. Martha Kuipers believed at that time that no abuse had occurred. She apparently had been in the rest room and also behind a partition in the restaurant ordering food during the abuse incident. She testified that up until the time of

Dennis Kuipers' plea agreement when he admitted to hitting R.M. outside the restaurant, she believed that no abuse had occurred there.

At the restaurant, while holding R.M., Martha Kuipers convinced Officer Sanem that nothing had occurred. Testimony at trial indicated that because R.M.'s hair was long, thick and dark, it may have hidden physical signs of abuse. Other testimony was presented that any initial redness may have disappeared by the time the officers arrived and any subsequent bruising may not have been present yet.

Officer Sanem testified that R.M. had bruises on her face but they looked like they were not newly-inflicted. She further testified that since none of the witnesses actually saw Dennis Kuipers hit R.M. -- they only saw his open hand and then his fist going up and down inside the van -- and there were no apparent newly-inflicted bruises, the officers did not have probable cause to arrest Dennis Kuipers for assault. She testified that she felt uncomfortable about not being able to do anything further at that time. At the time of the investigation, the officers did not have the written reports from the Provenzanos and the Stewarts and had only briefly spoken to Salvatore Provenzano over the phone when he reported the incident. Sanem further testified:

> Unless there's obvious signs of violence, you know, physical injuries, we have to rely on what witnesses tell us as to what actually occurred. And one point of fact in this matter, that he, in fact, did not see the fist actually hit the child, does not constitute an assault.
>
> From our point of view, we have to look at it from a criminal standpoint and in order for it to be an assault under that statute. If there's no sign of an injury, then we have to -- have to have actually have that contact, and he couldn't say that he actually saw that.

Officer Sanem also testified that she believed Martha Kuipers' statement that the child had bruises from falling down a lot lately and that the Department was aware of that. Nonetheless, Officer Sanem told Martha Kuipers that the incident would be referred to the Department. Officer Sanem further testified that she has since had further law enforcement training and would not have made the same assessment of the Rax incident if she had had the training prior to that time.

Officer Sanem testified that she was "very suspicious about the bruises, but it was obvious to [her] that that hadn't just occurred and it was an incident that obviously needed to be further investigated." She further testified that the officers had two options -- to refer the incident to the Department or to take immediate custody of the child. When she observed R.M., it did not appear that she had been crying and she felt that they did not have cause to take her. At that time, she had not investigated any other abuse cases in which a child had been hurt within the previous 15-20 minutes. Officer Sanem did not call the Department that day and was off duty the following day; she left that duty of reporting the incident to the Department to Officer Paul Erickson, the other officer who was also at the Rax restaurant to investigate the report.

Officer Erickson interviewed Dennis Kuipers at the Rax restaurant and was convinced by him that he had not hit R.M., but rather may have been waving a diaper up and down or something like that. Officer Erickson, however, also advised Dennis Kuipers that the incident would be referred to the Department and more thoroughly investigated by them. Officer Erickson testified that he had been "fooled" by Dennis Kuipers.

However, the matter was referred to the Department for investigation prior to the close of the police investigation. The remainder of the police investigation included getting written statements from the Provenzanos and the Stewarts. No charges were made against Dennis Kuipers as a result of that investigation.

As previously stated, Ed Neuman supervised the placement of R.M. with the Kuipers on behalf of the Department. The Kuipers called Neuman to report the Rax incident to him later that afternoon because the police officers had told them that the Department would be notified. Dennis Kuipers' discussion with Neuman minimized the seriousness of the incident and he denied hitting R.M.

Officer Erickson reported the Rax incident to the Department for further investigation. The police report actually states that R.M. was injured and an investigation was pending. The Department did investigate the incident but trial testimony demonstrated that the Department's investigation was very limited. The investigator did not search the Department's own files to check for prior reported incidents of abuse by Dennis Kuipers. That search would have provided information about the prior incident of abuse which had been investigated by the Department. In addition, the Department did not report the matter to the County Attorney as will be subsequently discussed.

One month later, on November 1, 1988, Dennis Kuipers severely beat R.M. As a result of this beating, R.M. had bruises over most of her body and she was hospitalized for two weeks. During the hospitaliza-

tion, R.M. was initially in a coma. She also had seizures and was paralyzed on one side of her body. A craniotomy had to be performed to relieve acute fluid pressure on her brain. Medical experts testified at the trial that R.M. had lost substantial brain tissue as a result of the beating and that the damages were irreversible.

The plaintiffs initially sued Dennis Kuipers, Martha Kuipers, Edna Goodwin (the Kuipers' counselor), and both the Department and its employee, Ed Neuman. The claim against Neuman was dismissed by the court. Both Dennis Kuipers and Edna Goodwin settled with the plaintiffs prior to trial and were dismissed pursuant to their respective agreements with the plaintiffs following the settlement conference. The trial proceeded against the remaining defendants -- Martha Kuipers and the Department.

The special verdict form presented to the jury included the Department, Martha Kuipers and Edna Goodwin. Dennis Kuipers was not included on the special verdict form because the District Court ruled that his intentional conduct made him jointly and severally liable for all damages and that Section 27-1-703(4), MCA, does not permit apportionment of liability for intentional conduct.

The jury awarded total damages of $637,480, apportioning negligence comparatively -- 30 percent to the Department, 35 percent to Martha Kuipers and 35 percent to Edna Goodwin. Subsequent to the trial, Martha Kuipers settled with the plaintiffs and has been dismissed with prejudice, leaving the Department as the sole defendant in this negligence action.

ISSUE I: Standing.

Do the plaintiffs have standing to assert the rights of unrepresented third persons included on the verdict form?

As a threshold issue, we address the Department's argument that plaintiffs do not have standing to challenge the constitutionality of Section 27-1-703, MCA, because by doing so they are not asserting their own constitutional rights, but rather the rights of unrepresented third parties such as settling parties and unsued tortfeasors. Although this opinion does not address the rights of unrepresented parties in the context of determining whether they have been denied procedural due process or equal protection, and although our ruling on substantive due process relates to plaintiffs primarily, we do agree with plaintiffs that they have standing to assert the constitutional rights of such third parties.

Plaintiffs correctly argued that their own potential economic loss gives them standing to assert the rights of third parties. They argued that unrepresented parties included on the verdict form can diminish a named defendant's portion of negligence below 50 percent, thereby making that defendant only severally liable, and that any defendants still in the action had the power to attribute blame to unrepresented tortfeasors, thereby reducing the potential damage award to less than 100 percent because plaintiffs would be unable to collect damages from unsued tortfeasors. These results could affect a totally innocent plaintiff such as R.M. in the same manner as they could affect a plaintiff with any contributory negligence up to 50 percent.

We considered a similar issue in *Belth v. Bennett* (1987), 227 Mont. 341, 349, 740 P.2d 638, 643, where this Court held that a state agency's records of insurance companies were not open to public inspection. The Court also concluded that because there was a potential economic loss to insurance companies as a result of suits by insurance consumers, the companies had a potential economic injury sufficient to establish standing. *Belth*, 740 P.2d at 641. Also, in *Montana Human Rights Division v. City of Billings* (1982), 199 Mont. 434, 443, 649 P.2d 1283, 1288, we allowed the city to assert the privacy rights of its employees because of potential economic injury to the city from possible lawsuits against it by its employees if it divulged personal information about its employees without their consent. Both *Belth* and *Montana* Human Rights Div. held that a party facing potential economic injury may assert the constitutional rights of others.

[1] We conclude the plaintiffs here have established they could suffer economic loss if a percentage of negligence were attributed to unrepresented parties. We further conclude the plaintiffs have established a standing sufficient to assert the rights of the unrepresented parties such as settling parties and unsued tortfeasors.

We hold plaintiffs have the right to raise constitutional issues relating to Section 27-1-703, MCA, which affect the rights of unrepresented third parties.

ISSUE II: Constitutional Issues.

Is Montana's comparative negligence statute, Section 27-1-703, MCA, unconstitutional as amended by the 1987 legislature?

The plaintiffs contend that Section 27-1-703, MCA, violates the constitutional guarantees of procedural and substantive due process and equal protection and thus a new trial is required in this case. As discussed below, the Court concludes that Section 27-1-703(4), MCA, violates substantive due process. As a result,

the Court declines to address the other constitutional issues.

This case represents constitutional challenges to major changes in Section 27-1-703, MCA, which were enacted by the 1987 Montana Legislature. Section 27-1-703, MCA, was a major vehicle for tort reform enacted by the Montana Legislature in response to demands from numerous factions in this state. That section concerns the determination of liability when there are multiple defendants involved in an action based upon negligence. Section 27-1-703, MCA (1987), as amended by the 1987 legislature, is set forth in its entirety in the appendix to this opinion, as is its predecessor, Section 27-1-703, MCA (1985).

The 1987 Senate Judiciary Committee minutes indicate that Senate Bill 51 (SB 51), which amended Section 27-1-703, MCA, was patterned after a bill in Washington state. That bill was drafted as an attempt to change Washington's comparative negligence statute and was intended to match liability for damages to fault of each of the parties involved in a tort action, excepting only the fault of employers and co-employees to the extent of their tort immunity under the Workers' Compensation Act. The stated aim of SB 51 was to protect "deep pocket" defendants such as municipal and county governments when they were faced with minimal percentages of negligence assigned to them by juries but nonetheless required to pay large judgments under joint and several liability principles.

As pointed out by Victor E. Schwartz in his comparative negligence treatise, a substantial minority of states have now abolished or severely limited the common law doctrine of joint and several liability:

> In the mid-1980's, a significant number of states changed the joint liability rule, in part, because of growing awards against "deep pocket" defendants who might be only peripherally responsible for plaintiff's injuries. A few states cut the Gordian knot by abolishing the doctrine outright or limiting it to those who have acted in concert. Nevada abolished it except in cases involving strict liability, intentional torts, toxic wastes, concerted acts, or products liability. A number of other states have attempted to serve competing goals of fairness and loss distribution by adopting systems for imposing joint liability only for "noneconomic" damages or for certain percentages of fault. Some states have adopted a combination of exceptions.

V. Schwartz, *Comparative Negligence* Section 16.4 (2d ed. Supp. 1993).

The major changes in Section 27-1-703, MCA (1987), related to joint and several liability and the addition of subsection (4) mandating the trier of fact to consider the negligence of various described persons and parties in order to determine liability and apportion the percentage of liability among all such persons. Section 27-1-703(4), MCA (1987), provides in pertinent part:

> (4) ... For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. The trier of fact shall apportion the percentage of negligence of all such persons...

The above-quoted subsection (4) is new and takes the place of the following from the prior statute:

> Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons.

[2,3] The theory underlying substantive due process reaffirms the fundamental concept that the due process clause contains a substantive component which bars arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action. Even though a plaintiff may have no property or liberty interest grounded in state law which is protected from arbitrary government action, such action still may be subject to review under substantive due process. Substantive due process primarily examines the underlying substantive rights and remedies to determine whether restrictions, such as those placed on both remedies and procedures in this case, are unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute. *See* J. McGuinness and L. Parlagreco, *The Reemergence of Substantive Due Process As A Constitutional Tort: Theory, Proof, and Damages,* 24 New Eng. 1129, 1133 (1990).

Substantive review for due process violations applies to enactments which affect individual constitutional rights, and may thus include a review of an enactment's inherent procedural fairness. Rotunda & Nowak, 2 *Treatise on Constitutional Law: Substance and Procedure* Section 15.4 (2d ed. 1992).

In addressing a substantive due process challenge in *Harrison v. Chance* (1990), 244 Mont. 215, 225, 797 P.2d 200, 206, we referred to our analysis in *Linder v. Smith* (1981), 193 Mont. 20, 28-29, 629 P.2d 1187, 1192, stating: "The legislature is free to impose rea-

sonable procedural requirements on the available remedies so long as those requirements have a rational basis." Although the *Linder* Court held there was no substantive due process violation on the basis of the issues as raised by the parties, it did excise a portion of the statute on substantive due process grounds, stating:

> We find claimant's due process contentions to be without merit, particularly when considered in view of the limited effect which the panel's decision can have in Montana in subsequent litigation. We do address one issue, though, which was not initially raised by the parties to the litigation, but which came to our attention during the hearing in this case. Section 27-6-704(2), MCA, provides that "[no] statement made by any person during a hearing before the panel may be used as impeaching evidence in court." In order to uphold the constitutionality of the panel act, we determine that this section must be severed from the act. It is fundamental to our adversarial system that litigants retain the right to impeach the sworn testimony of a witness testifying against them. We are mindful that this provision was enacted to aid the fact-finding by the panel and to preserve the confidentiality of the proceedings. But we cannot say that a litigant will receive a full and fair hearing if he is unable to fully cross-examine in court the witnesses that testified in the prior hearing.
>
> *Linder*, 629 P.2d 1192.

[4] In *Raisler v. Burlington N. Ry. Co.* (1985), 219 Mont. 254, 263, 717 P.2d 535, 541, this Court stated, "Substantive due process analysis requires a test of the reasonableness of a statute in relation to the State's power to enact legislation." Its essence is that the State cannot use its power to take unreasonable, arbitrary or capricious action against an individual. *Raisler*, 717 P.2d at 541. Therefore, in order to satisfy guarantees of substantive due process, a statute enacted by the legislature must be reasonably related to a permissible legislative objective. *Raisler*, 717 P.2d at 541. *See also Ball v. Gee* (1990), 243 Mont. 406, 412, 795 P.2d 82, 86, citing *In re C.H.* (1984), 210 Mont. 184, 194, 683 P.2d 931, 936.

In *Montana Milk Control Bd. v. Rehberg* (1962), 141 Mont. 149, 158-59, 376 P.2d 508, 514, this Court determined that substantive due process was not violated by legislation which allowed the State to control the retail price of milk and determined that the legislation was reasonably related to the permissible legislative purpose of ensuring an adequate supply of wholesome milk to the citizens of Montana. More recently, in *In the Matter of the Adjudication of the Yellowstone River* (1992), 253 Mont. 167, 179, 832 P.2d 1210, 1217, we stated that the State's regulatory power over adjudicating water rights must be exercised consistent with principles of substantive due process:

> A statute must be reasonably related to a permissible legislative objective to satisfy substantive due process guarantees.... The 1972 Montana Constitution mandates that the legislature "establish a system of centralized records." There can be no doubt that Section 85-2-226, MCA, was enacted for a permissible legislative objective.
>
> However, the appellants challenge whether ... Section 85-2-226, MCA, is reasonably related to the objective of adjudicating water rights. It is contended that ... [Section] 85-2-226, MCA, ... fails to be reasonably related to these objectives, because its operation results in the elimination of existing water rights. (Citations omitted.)

In *Matter of Yellowstone River*, 832 P.2d at 1217, we ruled that the challenged statute did not violate substantive due process in that it was a reasonable means of "compelling comprehensive participation, extinguishing duplicative and exaggerated rights, and ridding local records of stale, unused water claims." The statute's filing requirement was "neither burdensome, unreasonable nor unrelated to the legitimate and proper legislative objectives." *Matter of Yellowstone River*, 832 P.2d at 1217. We further noted that neither the Supreme Court nor other states addressing the constitutionality of statutes requiring filing had found the filing requirement to be more than a minimal burden. *Matter of Yellowstone River*, 832 P.2d at 1217.

Although most of the challenges brought to this Court which have been grounded in substantive due process have failed, we have ruled that substantive due process was violated by a restrictive covenant in *Town & Country Estates Ass'n v. Slater* (1987), 227 Mont. 489, 493, 740 P.2d 668, 671. The restrictive covenant which violated substantive due process in *Town & Country Estates* allowed a Design Review Committee to disapprove house plans and prevent construction of homes in the subdivision. We held that the covenant was vague to a degree that violated substantive due process and was enforceable only when used in connection with some general plan or scheme. *Town & Country Estates*, 740 P.2d at 671.

In *Town & Country Estates*, the houses already built in the subdivision were each unique in design and demonstrated a "cacophony of styles" with a "hybrid mix of traditional, Tudor, ranch, and contemporary" with the only common design characteristics being a 2400 square foot size minimum and a shake

roof. *Town & Country Estates*, 740 P.2d at 671. The Court stated:

> If the subdivision itself lacks consonance, the Slaters' plan cannot lack harmony. In the context of [Town and Country Estates] and Slaters' plan, the term "harmony of external design" lacks the mutuality of obligation central to the purpose of a restrictive covenant. In view of the wide variety of designs, no one seemed burdened by the covenant except the Slaters.
>
> ...
>
> The approval or disapproval of plans by the [Design Review Committee] must be based upon an objective design standard. Without a quantifiable standard to guide them, the decision ... is unenforceable... . We hold that the Slaters' house fell well within the broad architectural spectrum of [Town & Country Estates] houses. *Applied to the ... subdivision and the Slaters' plan, we hold that Article V lacks sufficient objectivity, and is vague to a degree that denies substantive due process to the Slaters.*

Town & Country Estates, 740 P.2d at 671. (Emphasis supplied.)

In the case before us, plaintiffs contend that Section 27-1-703, MCA (1987), arbitrarily prejudices plaintiffs by requiring them to exonerate nonparties. They contend there is no reasonable basis to require any plaintiff to prepare a defense at the last minute for nonparties whom defendants seek to blame for the injury, but who have not been joined as defendants; and that there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of unrepresented parties, particularly when they do not know until the latter part of the trial that defendants will seek to place blame on unrepresented persons. These procedural problems form the bases for our holding that Section 27-1-703, MCA (1987), in part violates substantive due process.

[5] We conclude that Section 27-1-703(4), MCA (1987), unreasonably mandates an allocation of percentages of negligence to nonparties without any kind of procedural safeguard. As a result, plaintiffs may not receive a fair adjudication of the merits of their claims. It imposes a burden upon plaintiffs to anticipate defendants' attempts to apportion blame up to the time of submission of the verdict form to the jury. Such an apportionment is clearly unreasonable as to plaintiffs, and can also unreasonably affect defendants and nonparties.

We note that other states have enacted tort legislation allowing the inclusion of nonparties. Colorado, as an example, allows the inclusion of nonparties when apportioning fault, but only when notice has been given by the defendant within 90 days of commencement of the action. *See* Colo. Rev. Stat. Section 13-21-111.5 (1987). Indiana requires a defendant to assert a nonparty defense and to bear the burden of proof of that defense if the defense is asserted as part of an answer filed more than 45 days prior to the running of the statute of limitations on a claim against a nonparty. *See* Ind. Code Section 34-4-33-10 (1985). Like Indiana, Kansas places the burden of bringing in other parties, including those who have settled, on the defendant. *Glenn v. Fleming* (Kan. 1987), 732 P.2d 750, 756. Although Kansas has abolished joint and several liability altogether, it does not allow apportionment of percentage of total damages to any person who is not a party. *See* Kan. Stat. Ann. Section 60-258a(d) (1977). The establishment of the nonparty defense in Indiana has brought many questions about the definition of "nonparty" and the procedural mechanisms for bringing in additional defendants. Schwartz, *Comparative Negligence* Section 16.5 (2d ed. 1986 & Supp. 1993).

Numerous other comparative negligence statutes -- although rarely similar to an act of another state -- include some type of procedural safeguard for plaintiffs, defendants and nonparties. Ohio's tort reform law, for example, limits allocation of negligence to parties before the court. Schwartz, *Comparative Negligence* Section 16.5 (2d ed. Supp. 1993); Ohio Rev. Code Ann. Section 2315.19(B)(4) (1991). New Mexico allows settling defendants to be called as witnesses and allows discovery regarding such witnesses as if they remained in the action. *Wilson v. Gillis* (N.M. Ct.App. 1986), 731 P.2d 955, 958.

We have noted some of the procedural safeguards provided by other jurisdictions to emphasize that Montana's statute provides none of these protections. Our review of the comparative negligence statutes from other jurisdictions does not provide much help in the present case, however. Nearly every state has a unique statute with nuances which make its case law interpreting the statutes of little help to other courts.

We have previously mentioned that SB 51 was patterned after Washington state's statute. Yet SB 51 is substantially different from the 1986 enactment of Wash. Rev. Code Ann. 4.22.070, which is also set forth in the appendix to this opinion. A striking difference is that the Washington statute preserved joint and several liability for innocent plaintiffs. In contrast, Section 27-1-703, MCA (1987), treats all plaintiffs alike, lumping totally innocent plaintiffs -- like R.M.

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in this case -- with those plaintiffs whose comparative negligence may be as much as 50 percent. The effect of Section 27-1-703, MCA (1987), is to diminish plaintiffs' ability to collect 100 percent of damages in situations like the present case. Where the trier of fact attributes less than 51 percent of the negligence to each person on the verdict form, plaintiffs may be unable to collect for the portion of negligence attributable to judgment-proof defendants, immune tortfeasors, or other persons who may be included on the verdict form but who have not been a part of the action.

Such was the case with the persons listed on the special verdict form in the present case. Edna Goodwin was an unrepresented nonparty on the basis of her settlement prior to trial. Although Goodwin settled prior to trial and was no longer a party, she nonetheless was included on the verdict form as a settling party pursuant to Section 27-1-703(4), MCA. No attorney represented Goodwin's interests at trial and as a result, it is possible that the application of percentage of negligence was higher than would have been appropriate had the facts as to her case been presented by her own counsel.

None of the parties introduced evidence relating to the standard of care of a professional counselor. Goodwin was included on the verdict form as required by Section 27-1-703(4), MCA, without any instruction to the jury as to the proper standard of care for a professional counselor. On the verdict form the jury allocated 35 percent of the negligence to Ms. Goodwin, 35 percent to Mrs. Kuipers and 30 percent to the Department. Section 27-1-703(5), MCA, provides that if a party is found to be less than 50 percent negligent, that party is liable for contribution only up to the percentage of negligence attributed to him. As a result, under the verdict given, if any party is unable to pay the full amount of the judgment against that party, there will then be an inability on the part of the plaintiffs to collect all damages. *See State ex rel. Deere & Co. v. District Court* (1986), 224 Mont. 384, 730 P.2d 396, for its treatment of joint and several liability prior to the 1991 enactment of Section 27-1-703(5), MCA.

In many jurisdictions -- some mentioned above -- comparative negligence statutes allow an apportionment of liability to immune parties and settling parties. However, these jurisdictions have procedural aspects which provide for notice to plaintiffs, specific burdens of proof, and other procedures for safeguarding the rights of all involved -- parties and nonparties alike. Consideration of these procedural protections should have been considered by the Montana Legislature at the time of the enactment of the statute.

While the listed reasons for enactment of comparative negligence tort reform legislation are valid governmental purposes, we conclude that the Montana Legislature has acted arbitrarily and unreasonably in responding to this need. We conclude that the allocation of percentages of liability to nonparties violates substantive due process as to the plaintiffs.

[6] We hold that the following portion of Section 27-1-703(4), MCA (1987), violates substantive due process:

> ... persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. ...

While we hold that the naming of "any other persons who have a defense against the claimant" violates substantive due process where such persons are not parties, we further emphasize that the reference in the statute to "any other persons who have a defense against the claimant" is so vague as to make its meaning impossible to understand.

This raises the question as to whether the above holding renders the entire statute unconstitutional. In the enactment of SB 51, the 1987 Montana Legislature included the following "severability clause":

> Section 3. **Severability.** If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.
>
> Chapter 505, 1987 Mont. Laws 1232, 1233.

[7] As pointed out in Montana Auto. *Ass'n v. Greeley* (1981), 193 Mont. 378, 399, 632 P.2d 300, 311, if the invalid part of a statute is severable from the rest, the portion which is constitutional may stand while the part which is unconstitutional is stricken and rejected. That case further emphasized that a statute is not totally destroyed because of an improper provision, unless such provision is necessary to the integrity of the statute, or was an inducement to its enactment. When an unconstitutional portion of the act is eliminated, if the remainder is complete in itself and capable of being executed in accordance with apparent legislative intent, it must be sustained. *Montana Auto. Ass'n*, 632 P.2d at 311.

[8] We here conclude that the unconstitutional portion of Section 27-1-703(4), MCA (1987), is not essential to the integrity of the statute, nor was it an inducement to its enactment. We further conclude that the remainder of the statute is capable of being executed in accordance with the legislative intent. As

a result of our holding of unconstitutionality, we have eliminated that portion of the statute which allowed an allocation of negligence to nonparties, and in particular to nonparties who had been released from liability by the claimant, nonparties who were immune from liability to the claimant, and any other nonparties who have a defense against the claimants.

Therefore, in accord with our holding, the lined through portion of Section 27-1-703(4), MCA (1987), as illustrated below is hereby excised from the statute as unconstitutional:

27-1-703. Multiple defendants -- determination of liability. ...

(4) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, [and] third-party defendants~~, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant.~~ The trier of fact shall apportion the percentage of negligence of all such persons. However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government. Contribution shall be proportional to the liability of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

ISSUE III: Counselor's standard of care.

Did the District Court err in allowing the jury to allocate a percentage of negligence to Edna Goodwin when evidence was not introduced as to the standard of care for a professional counselor?

[9] The issue presented is whether the jury was properly instructed as to the remaining defendants' burden in establishing the negligence of a professional counselor. The jury was allowed to apportion negligence to Goodwin based on an ordinary standard of care instruction. Plaintiffs contend that the District Court should have instructed the jury on the standard of care for a professional counselor. The District Court determined that no standard of care had been established by expert testimony for a professional counselor. This Court has not previously ruled on whether the standard of care for a mental health counselor must be established by expert testimony or whether the jury is able to determine this on their own. We address this issue for the benefit of the parties in the event it remains an issue on retrial. It is the rule in Montana that expert testimony is required as to the standard of care, and as to the professional's violation of that standard of care, before a trier of fact may find such professional negligent. In *Carlson v. Morton* (1987), 229 Mont. 234, 239, 745 P.2d 1133, 1136, the Court stated that expert testimony identifying the doctor's care as negligent or the doctor's own testimony clearly establishing his own conduct as negligent was necessary. This has been applied as well to dentists and orthodontists in *Llera v. Wisner* (1976), 171 Mont. 254, 262, 557 P.2d 805, 810; to manufacturers and distributors of pharmaceuticals in *Hill v. Squibb & Sons* (1979), 181 Mont. 199, 207, 592 P.2d 1383, 1388; and to abstractors of title in *Doble v. Lincoln County Title Co.* (1985), 215 Mont. 1, 5, 692 P.2d 1267, 1270. Most recently, the Court has required expert testimony to establish the standard of care for a veterinarian in *Zimmerman v. Robertson* (1993), 259 Mont. 105, 108, 854 P.2d 338, 340.

The rationale for requiring expert testimony to establish a standard of care for professionals acting in their professional capacity is that such professionals are required to possess a minimum standard of special knowledge and ability, and as a result juries which are composed of laypersons are normally incompetent to pass judgment on such questions without the assistance of expert testimony. *Carlson*, 745 P.2d at 1137. Professors Prosser and Keeton suggest that although most of the decided cases have dealt with medical doctors,

> the same is undoubtedly true of dentists, pharmacists, psychiatrists, veterinarians, lawyers, architects and engineers, accountants, abstractors of title, and many other professions and skilled trades.

Zimmerman, 854 P.2d at 339, citing Prosser & Keeton on The Law of Torts, Section 32 (5th ed. 1984). Montana's prior decisions on this issue are in accordance with the general rule as summarized by Prosser and Keeton.

We hold that expert testimony was required to establish the standard of care for Ms. Goodwin as a professional counselor before the jury could allocate a percentage of negligence to her.

Section 27-1-703(4), MCA, mandated that the trier of fact consider the negligence and apportion the same to persons such as counselor Goodwin who have been released from liability. As a result, the District Court was faced with the difficult decision and concluded that in order to comply with the statute, it was necessary to instruct the jury to use the ordinary standard of care to apportion negligence to counselor Goodwin. This was necessary because neither party had established a standard of care for a professional counselor and the question arose at the time of settling jury instructions, which was after the conclusion of the submission of evidence. While the District Court had limited choice, we conclude that it was reversible error to apply the ordinary negligence standard to counselor Goodwin.

[10] We hold that the District Court erred in permitting Goodwin's name to be listed on the special verdict form when the standard of care for a professional counselor had not been established by evidence, and there were no specific jury instructions as to the professional standard requirement.

ISSUE IV: Admission of evidence.

Did the District Court err in admitting evidence concerning R.M.'s biological parents?

At the beginning of the trial, plaintiffs submitted a Motion in Limine to exclude all of defendants' highly prejudicial evidence concerning R.M.'s natural parents. Although plaintiffs themselves introduced evidence that R.M.'s natural parents both had low I.Q.s, and had used alcohol and kept her in a neglectful environment during the first few months of her life, they contend on appeal there was no evidence submitted which demonstrated that R.M.'s parents' genetics or actions caused any mental or physical defects to R.M. As a result, plaintiffs contend the District Court committed reversible error in allowing the Department to introduce certain evidence and to argue and comment on such evidence during its closing argument.

At the beginning of the trial, the Department argued that it could establish a causal connection between the natural parents and R.M.'s mental impairment. Premised upon the establishment of a causal connection, the District Court allowed the defendants to introduce evidence about the natural parents. Plaintiffs argue that the connection between the natural parents and R.M.'s mental impairment was never made, that the court erred in failing to admonish the jury and again erred in allowing closing arguments on the evidence. They contend this was plain error under Montana law and should have been excluded as more prejudicial than probative. They claim that without any connection to R.M.'s present condition, the evidence concerning her natural parents was inherently prejudicial and is reversible error. As explained below, we agree with plaintiffs that this was reversible error.

Defendants' closing argument included the following statements:

> Now, we know from the evidence that there are some hereditary influences at work with [R.M.]. There were drug and alcohol problems in the past there. She was a victim of early abuse and neglect. And I'm really sorry she went through that, but that's nothing that any of us can do anything about except to help her try to get over it in the future.
>
> We know that her parents had problems emotionally and socially, and we've got evidence that those kind of things have a long, lasting effect.

The Department contends the evidence was properly admitted for three reasons: (1) plaintiffs opened the door by asking their own experts whether genetic factors contributed to R.M.'s functional deficits; (2) defendants properly inquired about R.M.'s parents to impeach the plaintiffs' experts and since the evidence was not complete, defendants had to cross-examine the experts in this area because the experts based their opinions on incomplete information; and (3) the evidence about R.M.'s parents was relevant to R.M.'s damages because her impairments were caused by a variety of factors, including genetic factors, according to a witness for the Department, and plaintiffs' own experts testified that factors other than the brain injury contributed to her current problems. They claim this last statement that plaintiffs' own experts testified that factors other than the brain injury contributed to her current problems provided the medical link required by *Kimes v. Herrin* (1985), 217 Mont. 330, 705 P.2d 108.

In *Kimes*, the court allowed testimony regarding family fighting and drinking by the appellant's father in an action where damages were at issue and the reasons for the appellant's symptoms were critical to the issue of damages. The appellant was a two-year-old at the time of her injuries from an automobile accident. Several years later she exhibited symptoms including listlessness, drowsiness and staring. At trial, the respondent introduced testimony about family fighting and her father's drinking to show that these symptoms were caused by the appellant's environment and not the collision.

We stated that the evidence about her family environment was relevant under Rule 401, M.R.Evid., because it had a tendency to make the alleged cause of the symptoms more or less probable than it would

be without the testimony and, thus, must be weighed to determine whether it should be excluded under Rule 403, M.R.Evid. *Kimes*, 705 P.2d at 110. Rule 403, M.R.Evid., provides that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice.

The decision whether or not to exclude such evidence will not be reversed by this Court unless the district court has abused its discretion. *Kimes*, 705 P.2d at 110. We stated:

> We hold that the District Court abused its discretion in allowing this testimony. The District Court demonstrated some concern over the admissibility of the questioned testimony and allowed the testimony because the respondent assured the District Court that home environment would be medically linked to the appellant's symptoms. We note that both parties' expert witnesses indicated that poor home environment may cause symptoms such as were exhibited by appellant. However, no evidence at trial established a medical connection between poor home environment and the appellant's symptoms.

Kimes, 705 P.2d at 110.

[11] In this case, the Department never made the causal connection. The Department is correct in stating plaintiffs did ask their expert some questions relating to R.M.'s biological parents. Although testimony was elicited from several witnesses regarding R.M.'s biological parents, none of the evidence links her impairment to the natural parents. After a careful review of the record, we conclude that the testimony provided by the medical experts failed to establish a medical link between the actions of R.M.'s biological parents and any condition which R.M. had prior to the beatings by Dennis Kuipers. On the basis of our holding in *Kimes*, we conclude that the similar sort of evidence introduced here and commented upon in defendants' closing argument was more prejudicial to R.M. than probative. We further conclude, as in *Kimes*, that although the medical experts of both parties indicated that genetic factors and other information about the biological parents could contribute to R.M.'s present condition, no evidence was presented to make the causal connection more probable than not in this case.

We hold the District Court abused its discretion in admitting evidence concerning R.M.'s biological parents and in allowing the Department to comment on such evidence during its closing argument.

ISSUE V: Jury Instructions.

Did the District Court err in instructing the jury?

Plaintiffs contend that the District Court made several errors involving jury instructions which constitute reversible error. We will consider the same to the extent needed by the parties on retrial. As stated in *Story v. City of Bozeman* (1993), 259 Mont. 207, 222, 856 P.2d 202, 211:

> When examining whether certain jury instructions were properly given or refused, we must consider the jury instructions in their entirety and in connection with other instructions given and the evidence introduced at trial.

[12] There is no reversible error in the giving or refusing of certain instructions if the jury instructions, viewed in their entirety, state the correct law applicable to the case. *Walden v. State* (1991), 250 Mont. 132, 137, 818 P.2d 1190, 1193. Bearing these principles in mind, we address the contentions of the plaintiffs concerning the District Court's treatment of jury instructions in this case.

a. *Did the District court err in instructing the jury on the Department of Family Services' duty to report child abuse to the County Attorney?*

The District Court refused to give a jury instruction offered by the plaintiffs on the Department's statutory duty to report child abuse cases to the County Attorney. This is a matter of interpreting Section 41-3-201, MCA, which provides in pertinent part:

> (1) When the professionals and officials listed in subsection (2) know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected, they shall report the matter promptly to the department of family services or its local affiliate, which then shall notify the county attorney of the county where the child resides.
>
> (2) Professionals and officials required to report are:
>
> ...
>
> (g) a peace officer or other law enforcement official; ...

In *Demaree v. Safeway Stores, Inc.* (1973) 162 Mont. 47, 54, 508 P.2d 570, 575, the Court said that a jury instruction which assumes as fact a matter legitimately in controversy, as shown by the evidence, is erroneous. The fact issue here, according to the Department, was whether "reasonable cause" to suspect abuse or neglect applied to both the law enforcement officers *and* the Department. We conclude that it applied only to the police officers.

The Department did not notify the County Attorney of the report it received from the Bozeman Police

Department concerning the Rax incident. We conclude that the plain language of this statute required the Department to report the Rax incident to the Gallatin County Attorney. This was not done.

Plaintiffs' proposed Instruction No. 30 relating to the Department's duty to report abuse was as follows:

> When the Department of Family Services receives a report of child abuse, it is required to report the incident to the County Attorney where the child resides.

The District Court refused to give this instruction and the plaintiffs claim this affected the percentage of negligence attributed to the Department and is reversible error. The Department contends that the instruction was properly refused as it did not apply to the evidence in this case because police had no reasonable cause to suspect abuse at the Rax restaurant. This does not agree with the record.

The record indicates police believed there was reasonable cause to suspect abuse, but determined there was no probable cause to arrest Dennis Kuipers. The officer who observed the child also testified that she was new on the job and could not readily identify certain signs which she later learned should have alerted her that the child had been abused at the Rax restaurant, and that she likely had probable cause then to arrest Dennis Kuipers. Nonetheless, that is irrelevant here because the case *was* reported to the Department and the statute quoted above requires the Department subsequently to report it to the County Attorney.

[13] The "reasonable cause" reference in Section 41-3-201, MCA, applies to the police having reasonable cause to suspect abuse or neglect. As we have stated, it does not apply to the Department. The statute requires the Department, upon receiving such a report, to notify the County Attorney of the county where the child resides. Plaintiffs' proposed Instruction No. 30 was a correct statement of the law and was improperly refused.

One of the theories of plaintiffs' case was that the County Attorney was deprived of the opportunity to protect R.M. because of the Department's failure to comply with the statute. The District Court's failure to instruct the jury on the duty of the Department to notify the County Attorney prevented plaintiffs from arguing this theory of the case and could have affected the percentage of negligence attributed to the Department by the jury. In accord with the principles stated above from *Story* and *Walden,* refusal of plaintiffs' proposed instruction failed to state the correct law of the case.

We hold the District Court erred in refusing to give the plaintiffs' offered jury instruction relating to the Department's statutory duty to report the Rax incident to the Gallatin County Attorney's office.

b. *Did the District Court err in instructing the jury on discounting economic damages?*

Plaintiffs presented testimony by an expert in economics who estimated future economic damages at $1,400,000 and testified about the present value of that amount. Plaintiffs' expert prepared his evaluation by using projected future medical costs based upon figures given to him by the Missoula Community Hospital head injury clinic. The economist then testified in detail about his method in reducing the damages to present value. Plaintiffs contend that the instruction given by the court allowed R.M.'s damages to be reduced twice -- first by the expert's testimony and then by the jury.

Plaintiffs contend that although the District Court instructed the jury on the proper law, there was no information given to the jury from which they could base their own calculations to reduce to present value any amount they arrived at as an appropriate award if different from the amount asked for by the plaintiffs. Plaintiffs' estimate of future damages through the economist was a much larger figure than the amount allowed by the jury. Plaintiffs contend that it is not known how the jury could have reduced the award because no instruction was given in that regard. They contend there should have been another instruction telling the jury how to calculate present value if they did not accept the expert's measure of damages. The Department counters that the law of Montana allows the jury to disregard the experts entirely in determining the level of damages.

[14] Although the plaintiffs' estimate of $1,400,000 in future medical expenses alone was uncontested and the plaintiffs asked for much more in damages, it is within the province of the jury to reject entirely the amount of damages estimated by experts. Plaintiffs argue that "we must assume that the jury followed the law in this case and again discounted the damage figures given to the jury by Plaintiff's expert." Although the amount of damages is solely within the province of the jury, the jury is not given carte blanche in that regard and there must be some substantial evidence to support the jury verdict. *Tappan v. Higgins* (1989), 240 Mont. 158, 160, 783 P.2d 396, 397. The District Court correctly instructed the jury that it was not bound by the testimony of the experts. We conclude there is no basis to assume that the damage figures provided by plaintiffs' expert were discounted twice -- once by the expert and again by the jury.

Instruction No. 35, offered by defendants and objected to by the plaintiffs, provided as follows:

> You must adjust future economic losses to their present cash value.
>
> Present cash value is a sum of money which, together with what that money may reasonably be expected to earn in the future, when invested at a reasonable rate of return, will produce the dollar equivalent of such future damages.
>
> In arriving at present cash value you may also consider the effect that inflation and increases in wages will have on offsetting the amounts that money will earn.

This instruction was taken from MPI 25.91; however, the pattern instruction was not given in its entirety. The following was omitted:

> The only amounts to be adjusted to present cash value are future earnings and future medical costs. The discount principles stated in this instruction do not apply to any other damages.

The Comment to this instruction states that an instruction on present value "should not be given unless there is sufficient foundation in the testimony to allow the jury to make the adjustment." MPI 25.91 Damages - Present Value.

If the instructions in their entirety correctly state the law, there is no reversible error. We conclude, however, that Instruction No. 35 as given by the District Court omitted a very necessary portion regarding which amounts are to be discounted to present value and thus did not correctly state the law.

[15] We hold that the District Court erred in instructing the jury by Instruction No. 35 and failing to include the provision that the only amounts to be so adjusted to present cash value are "future earnings and future medical costs."

For assistance at retrial, we emphasize that neither party made reference to Section 25-9-402, MCA, which provides:

> **25-9-402. Findings by trier of fact -- civil actions.** In any action for personal injury, property damage, or wrongful death where liability is found after trial and in which $100,000 or more in future damages is awarded to the claimant, the trier of fact shall make a separate finding as to the amount of any future damages so awarded *and state whether the amount of future damages has been reduced to present value.* (Emphasis supplied.)

[16] While the special verdict form used in this case provided for findings on future damages, there was no separate statement by the jury as to whether the amount of future damages had been reduced to present value as required by statute. Upon retrial, this statute should also be followed.

ISSUE VI: Governmental Immunity.

Is the Department immune from tort liability for its failure to protect R.M.?

In its Cross-Appeal, the Department argues that it is immune from tort liability for two reasons. First, it contends that the acts of approval for adoption, foster placement and investigation of the child abuse report were quasi-judicial functions in which the Department was acting in a quasi-judicial capacity and, therefore, the District Court should have dismissed the tort claim against it because the Department was acting in a discretionary capacity concerning the placement of R.M. in the Kuipers' home. Second, it argues that it is immune from tort liability based on the language of Section 41-3-203, MCA, which grants immunity to persons investigating or reporting incidents of child abuse or neglect under Sections 41-3-201 or 41-3-202, MCA.

This Court has addressed and clarified the concept of quasi-judicial immunity in several cases. In *Koppen v. Board of Medical Examiners* (1988), 233 Mont. 214, 219, 759 P.2d 173, 176, we stated that the Board of Medical Examiners was a quasi-judicial body because of the nature of its vested discretion to determine whether or not to adjudicate an alleged violation by a licensee. However, the Board of Medical Examiners was subject to the notice and hearing requirements of the Montana Administrative Procedure Act (MAPA), Section 2-4-101, MCA, et seq., and its decisions were subject to judicial review -- key aspects of our ruling that the Board of Medical Examiners was a quasi-judicial body and absolutely immune in the exercise of that determination. *Koppen,* 759 P.2d at 176.

In so holding, we cited *Butz v. Economou* (1978), 438 U.S. 478, 513-14, 98 S.Ct. 2894, 2914, 57 L.Ed.2d 895, 920:

> We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages.

The *Butz* court characterized quasi-judicial immunity as a logical descendant of prosecutorial immunity. The significance of that analogy is that immunity in both circumstances is based on the *nature of the functions* carried out by agencies or officials. *Butz,* 438 U.S. at 511-16, 98 S.Ct. at 2913-15, 57 L.Ed.2d at 919-22.

Thus, unlike the Board of Medical Examiners in *Koppen*, in *State Bd. of Dentistry v. Kandarian* (1991), 248 Mont. 444, 813 P.2d 409, the Board of Dentistry was proceeding against a nonlicensee under Section 37-4-328(3), MCA, which did not require an administrative hearing before the Board of Dentistry under MAPA. The Board was acting in its capacity as an executive agency seeking an injunction in the district court, thereby putting itself in the role of litigant or advocate, not adjudicator. *Kandarian*, 813 P.2d at 412. The Board of Dentistry argued for immunity similar to prosecutorial immunity. We emphasized that there were procedural safeguards inherent in the prosecutorial system which acted as a check on the prosecutor's independence and which were not present in that case. *Kandarian*, 813 P.2d at 412.

In *Koppen*, 759 P.2d at 176, the Court summarized *Butz* and two Montana opinions, *Ronek v. Gallatin County* (1987), 227 Mont. 514, 740 P.2d 1115, *cert. denied*, 485 U.S. 962, 108 S.Ct. 1226, 99 L.Ed.2d 426, and *State ex rel. Dept. of Justice v. District Court* (1977), 172 Mont. 88, 560 P.2d 1328, as follows:

> [They] stand for the proposition that entities called upon to function judicially should be immunized in order to facilitate the proper execution of their duties. However, the basis for these decisions ... is the common law.

[17] Thus, our decisions governing tort liability of governmental agencies provide that a governmental entity may be immune from tort liability if it committed a tort while performing a quasi-judicial function even when the governmental unit is not characterized as a quasi-judicial entity.

[18] We addressed this issue at some length in *State ex rel. Workers' Compensation Division v. District Court* (hereinafter *Great Western Sugar*) (1990), 246 Mont. 225, 805 P.2d 1272. We said that the core determination for immunity to apply to the function of the agency there was that it be quasi-judicial rather than administrative or ministerial, noting that our prior decisions had clouded the distinction. Section 2-15-102(9), MCA, of MAPA defines "quasi-judicial function" as:

> "Quasi-judicial function" means an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies... .

In *Great Western Sugar*, 805 P.2d at 1277, we further clarified this as follows:

> ... Here, the statutory scheme mandates that the Division at least review a self-insurer's financial condition. Admittedly the statutes and administrative rules grant the Division discretion in renewing GW's application as a plan No. 1 self-insurer. However, in this case the Division never exercised this discretion to determine GW's eligibility to self-insure its risk under plan no. 1. Rather, there was an admitted complete failure by the Division to undertake any of the review necessary to made such a determination. *Thus, the negligence occurred at a stage where the Division's function was entirely ministerial:* (Emphasis supplied.)
>
> "Official action, the result of performing a certain specific duty arising from designated facts, is a ministerial act... . Another way of expressing the same thought is that a duty is to be regarded as ministerial when it is a duty that has been positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated; the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion.... And that a necessity may exist for the ascertainment, from personal knowledge or from information derived from other sources, of those facts or conditions, upon the existence or fulfillment of which, the performance of the act becomes a clear and specific duty, *does not operate to convert the act into one judicial in its nature.*" (Emphasis is original.)
>
> The discretion afforded by the statutes and rules in this case was never exercised, rather, the Division breached its underlying duty, mandated by the statutory scheme for plan no. 1 insurance, to investigate GW's eligibility to self-insure. Such act was purely ministerial ... and cannot be a basis for invoking quasi-judicial immunity:
>
> "Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in "discretionary activity" is irrelevant if, in a given case, the employee did not render a considered decision.... " (Citations omitted.)

We then noted that our analysis was limited to common-law quasi-judicial immunity, but that the "exercise of judgment and discretion" required by Section 2-15-102(9), MCA, of MAPA to invoke immunity was analogous to the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. Section 2680(a), under which the FTCA does not waive immunity for claims based on negligence of governmental employees exercising or performing discretionary functions of a federal agency, regardless of whether the discretion is abused. *Great Western Sugar*, 805 P.2d at 1277-78.

In *Berkovitz v. United States* (1988), 486 U.S. 531, 536, 108 S.Ct. 1958-59, 100 L.Ed.2d 531, 540-41, the United States Supreme Court said immune acts must involve "permissible exercise of policy discretion":

> [T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.

Both in *Great Western Sugar* and as recognized by the District Court in this case, there was a failure of the agency to follow procedures that would enable the agency to make a decision:

> The duties imposed by the statutory scheme on the Division's employee were purely investigative, ministerial and administrative. Because the Division failed to perform its duty to review or examine GW's application as prescribed by statute, and because simply performing this duty does not involve the use of quasi-judicial discretion, the Division is not protected by quasi-judicial immunity at this stage. The Division has simply not functioned as such under these facts.

[19] *Great Western Sugar,* 805 P.2d at 1278. The Department is required by statute to license and train foster care providers and to investigate adoptive homes. *See* Section 41-3-1103(b) and (d), MCA; Section 41-3-1142, MCA; and Section 41-3-202(1) and (2), MCA. We conclude the Department, at all times leading up to the tort sued upon in this case, was acting ministerially.

The conclusion we reach in classifying the Department's actions is significant only if quasi-judicial immunity can only attach to a *quasi-judicial body* which is carrying out the function. *Great Western Sugar,* 805 P.2d at 1276, which controls here, provides in pertinent part:

> We conclude that immunity does not attach because the Division is not expressly designated a quasi-judicial board, *see* Section 2-15-124, MCA, *see* generally Title 2, Chapter 15, MCA, nor was it performing a quasi-judicial function as will be discussed below... .

The Department in this case was not a statutorily-designated quasi-judicial board. *Great Western Sugar,* 805 P.2d at 1277-78, provides that immunity is not confined to entities which are statutorily-designated as quasi-judicial boards. *Gerber v. Commissioner of Ins.* (1990), 242 Mont. 369, 371-72, 786 P.2d 1199, 1200-01, provides further clarification that quasi-judicial immunity may apply beyond the context of a quasi-judicial board as the Insurance Commissioner is not designated accordingly, yet the Insurance Commissioner may be afforded quasi-judicial immunity for quasi-judicial functions. For example, in *Gerber,* the Insurance Commissioner's method of conducting an investigation was protected by quasi-judicial immunity because the applicable statutes expressly designated investigations as discretionary acts. *Gerber,* 786 P.2d at 1200-01. *See also Trout v. Bennett* (1992), 252 Mont. 416, 427, 830 P.2d 81, 88.

[20] We agree with the Department that immunity may apply to the exercise of a quasi-judicial function where there is no statutorily-designated quasi-judicial board involved in the action. However, like the Workers' Compensation Division in *Great Western Sugar,* the Department here was not carrying on an investigation of the sort which is granted immunity such as one that is a part of a contested case hearing; it is not entitled to immunity when it is not a quasi-judicial body carrying out a quasi-judicial function.

[21] We conclude the Department was not acting in a quasi-judicial role in its actions in this case. There was no contested case hearing involved, nor was there any other adversarial type of proceeding. In addition, the Department's actions were not discretionary, but were mandated by statute and were ministerial and administrative in nature.

[22] The Department's second argument relating to immunity is that it is granted statutory immunity by Section 41-3-203, MCA, which provides immunity for persons required to report and investigate child abuse under the provisions of Sections 41-3-201 and 41-3-202, MCA. This immunity is not intended for the Department; rather, it is intended to protect individuals such as teachers, doctors, and psychologists who are required to report suspected abuse. The stated public policy of Montana is to "provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection." Section 41-3-101(2), MCA. We conclude that Section 41-3-203, MCA, also does not immunize the Department from tort liability.

We hold the Department is not immune from tort liability for its failure to protect R.M. in this case.

ISSUE VII: Who is to be included on the special verdict form in a subsequent trial?

On retrial, under our holding on Issue II, the trier of fact can consider the negligence of the following parties to the action: claimant, injured person, defen-

dant and third party defendants. In the absence of a record and briefing comprehensively addressing it, we conclude it is not appropriate to further address this issue.

Affirmed in part, reversed in part and remanded.

CHIEF JUSTICE TURNAGE, JUSTICES HARRISON, GRAY, TRIEWEILER, NELSON and HUNT concur.

APPENDIX

Section 27-1-703, MCA (1987), provides as follows:

27-1-703. Multiple defendants -- determination of liability. (1) Except as provided in subsections (2) and (3), whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) Any party whose negligence is determined to be 50% or less of the combined negligence of all persons described in subsection (4) is severally liable only and is responsible only for the amount of negligence attributable to him, except as provided in subsection (3). The remaining parties are jointly and severally liable for the total less the amount attributable to the claimant.

(3) A party may be jointly liable for all damages caused by the negligence of another if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

(4) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. The trier of fact shall apportion the percentage of negligence of all such persons. However, in attributing negligence among persons, the trier of fact may not consider or determine any amount of negligence on the part of any injured person's employer or coemployee to the extent that such employer or coemployee has tort immunity under the Workers' Compensation Act or the Occupational Disease Act of this state, of any other state, or of the federal government. Contribution shall be proportional to the liability of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

(5) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties shall contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party. A party found to be 50% or less negligent for the injury complained of is liable for contribution under this section only up to the percentage of negligence attributed to him.

Section 27-1-703, MCA (1985), provided:

27-1-703. Multiple defendants jointly and severally liable -- right of contribution. (1) Whenever the negligence of any party in any action is an issue, each party against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant but has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of.

(2) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. Whenever more than one person is found to have contributed as a proximate cause to the injury complained of, the trier of fact shall apportion the degree of fault among such persons. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed. Nothing contained in this section shall make any party indispensable pursuant to Rule 19, M.R.Civ.P.

(3) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in

a pending or subsequent action for contribution from the noncontributing party.

Washington state's similar statute reads as follows:

Section 4.22.070. Percentage of fault -- Determination -- Limitations.

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages, including the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities immune from liability to the claimant and entities with any other individual defense against the claimant. Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages. The liability of each defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

(b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants total damages.

(2) If a defendant is jointly and severally liable under one of the exceptions listed in subsections (1)(a) or (1)(b) of this section, such defendant's rights to contributions against another jointly and severally liable defendant, and the effect of settlement by either such defendant, shall be determined under RCW 4.22.040, 4.22.050, and 4.22.060.

(3)(a) Nothing in this section affects any cause of action relating to hazardous wastes or substances or solid waste disposal sites.

(b) Nothing in this section shall affect a cause of action arising from the tortious interference with contracts or business relations.

(c) Nothing in this section shall affect any cause of action arising from the manufacture or marketing of a fungible product in a generic form which contains no clearly identifiable shape, color, or marking.

Wash. Rev. Code Ann. Section 4.22.070 (1988).

PLAINTIFF'S EXHIBIT
58

EXHIBIT NO. 10
DATE 3/14/95
SB13

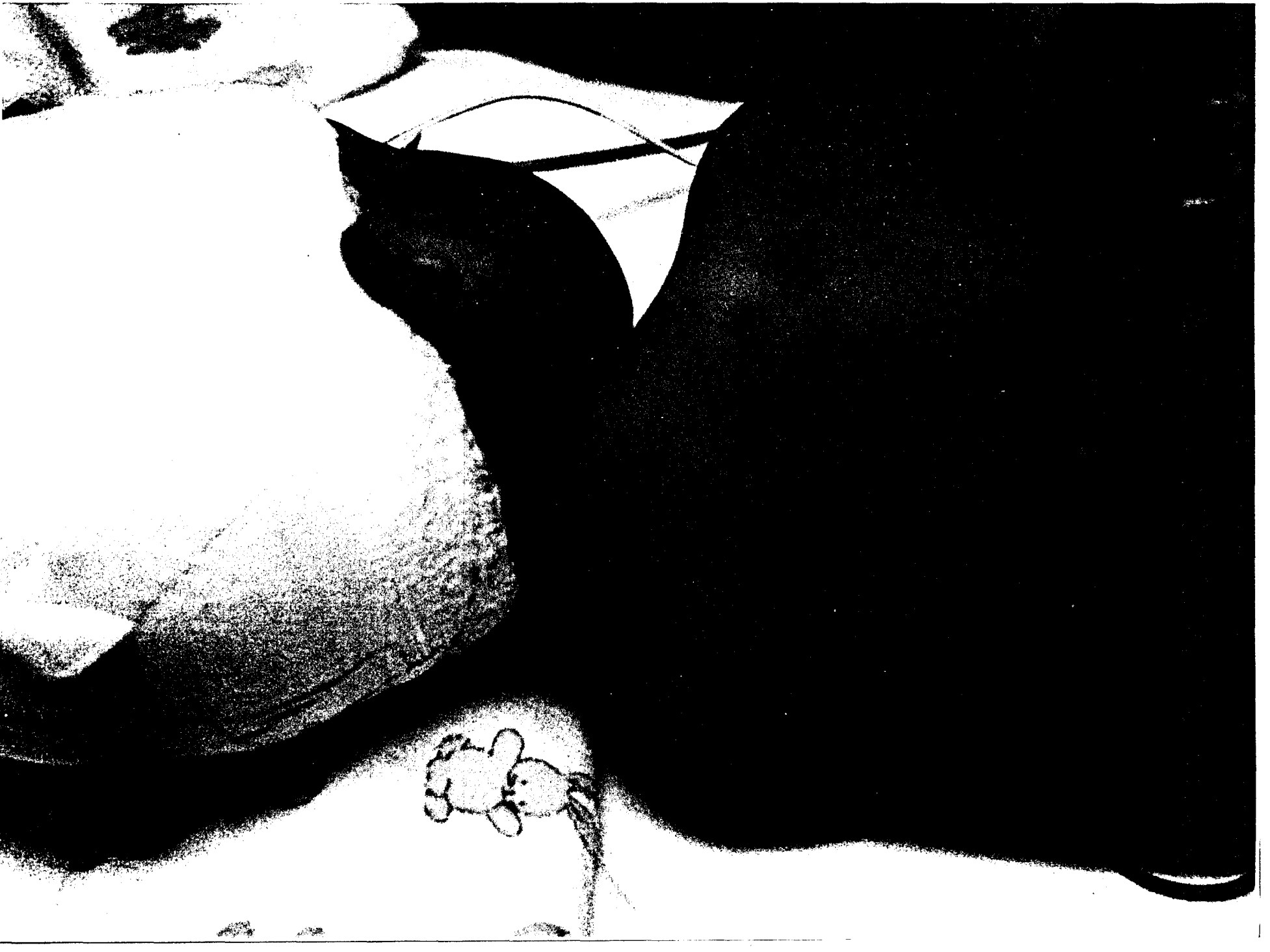

EXHIBIT 10
DATE 2-14-95
SB 212

JAMISON LAW FIRM
ATTORNEYS AT LAW
MONA JAMISON
STAN BRADSHAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

PHONE: (406) 442-5581
FAX: (406) 449-3668

EXHIBIT NO. 11
DATE 2/14/95
SB 212

February 14, 1995

Senator Bruce Crippen, Chair
Members of the Senate Judiciary Committee
State Capitol
Helena, Montana 59620

RE: Senate Bill 212

Dear Senator Crippen and Members of Senate Judiciary Committee:

The Doctors' Company insures approximately 675 of Montana's 1450 physicians for medical malpractice. I am writing to express our support for SB 212, which addressed procedural safeguards in Montana's joint and several liability statute identified last year by the Montana Supreme Court in Newville v. Dept. of Family Services.

Medical liability cases frequently involve multiple defendants. For example, a birth may involve at least three doctors (obstetrician, neonatologist, and anesthesiologist), several nurses, and the hospital. Often one or more of the named defendants may settle with plaintiff prior to trial. In other instances, that individual or entity may not be named by plaintiff as a defendant at all, particularly where insurance coverage is lacking.

The Newville case holding prohibits use of the "empty chair" defense at trial, regardless of actual liability. Therefore, a doctor whose liability exposure is minimal may be held financially accountable for the total amount of damages.

We believe that this result is patently unfair. We urge your support for SB 212, which will restore the use of the balanced approach to liability intended by Section 27-1-703 of the MCA.

Thank you.

Sincerely,

Mona Jamison

Mona Jamison
Lobbyist for the Doctors' Company

DATE 2/14/95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 212
SJR 7

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Allen Lanning		SB 212	X	
Charles R. Brooks	Bigs Chamber	SB 212	X	
Randy Bishop	MTLA	212		X
David Ohlson	MT Chamber	212	✓	
John Sullivan	MDTL	212	✓	
Jim Tutwiler	MT Liability Coal	212	✓	
Bill Evans	RNTD - Right of Abode	212	—	
Bill LEARY	MT. Bankers Assn	212	✓	
Jerome Loendorf	MT Med Assn	212	✓	
Mike Schweitzer	Billings Anesthesiology	212	✓	
Greg Jackson	MACO/MSA	212	✓	
John Richardson	MTLA	212		✓
Jacqueline Lenmark	MT. Ins. Ass'n	212	✓	✓
Bob Ashbaker	State Farm Ins	212	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

REGISTER.F10

DATE 2/14/95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 212

SJR 7

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Richard Miller	State Library	HB 83		✓
Roger McGlenn	Ind. Dependent Ins. Agents Assoc. of MT	SB-212	✓	
Marie E. Darkee	MT TAVERN ASSN	SB 212	✓	
Wallace A. Keedy	MSBA	SB 212	X	
Mona Jamison	Doctors' Co.	SB 212	✓	
DAN WALKER	MT LIAB COALITION	SB 212	✓	
STAN KALECZYC	MT MUNICIPAL INSURANCE AUTHORITY	SB 212	✓	
Riley Johnson	NFIB	SB 212	✓	
Ben Havdahl	MT Motor Carriers Ass	SB 212	✓	
Steve Turkiewicz	Mt. Auto Dealers Assn	SB 212	✓	
Bob Worthington	MMIA	SB 212	✓	
Steve Browning	MHA	SB 212	✓	
Tom Hopgood	Mt. Ind. Bankers Assn	SB 212	✓	
Don Allen	MT. Wood Products Assn	SB 212	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE _____

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

_____

< ■ > PLEASE PRINT < ■ >

Name	Representing	Bill No.	Check One: Support	Check One: Oppose
Debbie Berney	PIA - Prof. Ins. Agts	212	✓	
Gail Abercrombie	MT Petroleum Assn	212	✓	
Brad Griffin	MT Retail Assn.	212	✓	
Carl Schweitzer	MT Cont Assn	212	✓	
Russell B Hill	MTLA	SB 212		✓

VISITOR REGISTER

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REGISTER.F10