

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on January 23, 1995, at
10:05 AM.

ROLL CALL

Members Present:

Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: Rep. Bill Carey

Members Absent: Rep. Debbie Shea

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

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

Committee Business Summary:

Hearing: SB 29, HB 158
Executive Action: NONE

{Tape: 1; Side: A}

HEARING ON HB 158

Opening Statement by Sponsor:

REP. DANIEL C. FUCHS, HD 15, opened the hearing on HB 158 by distributing a proposed amendment. **EXHIBIT 1** He gave a history of the Montana Scaffold Act and said the intent of the bill is not to change the safety requirements, but it will permit contractors the opportunity to present the court with information about their side in a scaffold injury case.

Proponents' Testimony:

Mike Young, Great Falls Trial Lawyer, said the intent of the bill is to interject modern-day, common-sense language into the Montana Scaffolding Act since its passage and genesis. He said it does not affect employers or fellow employees who are immune under the Workers' Compensation Act. The basic type of claim this is designed to get is the third-party claim from an employee of a subcontractor or subcontractor of the second degree to a general contractor. He gave examples of the types of things they are trying to avoid with this bill.

Ron McCullough, Vice President, Sletten Construction Company, Great Falls, said that large and small contractors throughout the state representing commercial, residential, industrial and highway contractors support this bill. This bill would not change safety regulations contractors are bound to live by. It can be the negligence of a person which can cause injury for which a contractor can be held liable even if the scaffold is built by all the safety standards.

Lorrin Darby, General Manager, Cogswell Agency, supported HB 158. He said that under the current law, the general contractor has no recourse. Because of the lack of comparative negligence language in the law, insurance companies have just settled because they have no defense.

Bill Bouret, Great Falls Insurance Agent, Cogswell Agency, gave examples of accidents which have occurred with general contractor customers and supporting information of HB 158.

James Smith, First West, Inc., Bozeman, supported the concerns and testimony of the previous proponents. His major concern is the availability of insurance and he described a current situation at his agency.

Roger McGinnis, Executive Director, Independent Insurance Agents Association of Montana, stood in support of this bill as well as the proposed amendments.

Ron Ashab, State Farm Insurance Company, said that homeowner is not immune from the scaffolding act.

Carl Schweitzer, Montana Contractors Association, echoed the comments previously made in support of this bill.

Opponents' Testimony:

Darrell Holzer, AFL/CIO, spoke in opposition to HB 158 in its current form. He said the problem of injuries result from the ongoing, unrelenting demand for increased productivity causing the employee to attempt a short cut to help expedite the process. He said he would submit an amendment for the committee's consideration relative to his various concerns with the bill.

Russell Hill, Montana Trial Lawyers Association, opposed HB 158. He submitted written testimony outlining that opposition.

EXHIBIT 2

Informational Testimony:

EXHIBIT 3 was submitted as supplementary and corrected testimony for HB 158.

{Tape: 1; Side: A; Approx. Counter: 46.0}

Questions From Committee Members and Responses:

REP. BRAD MOLNAR asked if **Mr. Holzer** wanted to include a safety program in his amendment.

Mr. Holzer thought that was absolutely essential.

REP. MOLNAR asked if there is a safety training program included in the apprenticeship program.

Mr. Holzer answered, "Absolutely."

REP. MOLNAR asked if he would be willing to say in the amendment that because they are already trained, if they hire a union employee, they don't have to go through the training program because they have already been instructed.

Mr. Holzer said he would have some difficulty with that because safety training needs to be an ongoing upgrading program.

REP. MOLNAR asked him if he was familiar with the scaffold section in OSHA.

Mr. Holzer said he was.

REP. MOLNAR asked if that does not sufficiently define the safety practices which people would come under regardless of the state law.

Mr. Holzer was a strong proponent of the OSHA laws, but the reality of it is that there are so few OSHA inspectors that only

once every 75 years can the average work place be inspected unless someone raises the issue and specifically requests an OSHA inspection.

REP. AUBYN CURTISS asked if this could be cleared up by an amendment which would define the difference between a ladder and a scaffold.

Mr. Hill said if that is what the proponents want, they would have come in with an amendment which said a ladder is not a scaffold. He felt that would be a legitimate alternative.

REP. CURTISS asked if he thought that would help some of the problems that the proponents have with the bill.

Mr. Hill replied that if they started from scratch and simply defined ladders as being different from scaffold, it would be a great improvement.

REP. DUANE GRIMES inquired if the current statute implies the strict liability **Mr. Hill** testified to.

Mr. Young cited several scaffold cases to prove that anytime there is a violation of the scaffolding act and there is causation, strict liability exists. He means by that that the defense of comparing or contributory negligence is barred. This bill has nothing to do with workers' compensation, or with trying to repeal the Safe Place To Work Act, or with trying to redo safety practices in the industry. In every case he has been involved with, the safety regulations are being followed, but things do happen which cause scaffolding injuries. The intent is to make those pressures and choices a jury issue.

REP. GRIMES asked **Mr. Schweitzer** why this bill would not result in a loosening of the standards and increase negligence on the part of the contractors.

Mr. Schweitzer believed they were not touching the OSHA standards. All the safety standards would remain in place that are required to erect a scaffolding properly.

REP. DEB KOTTEL asked if negligence per se and strict liability were two different concepts in the law.

Mr. Young answered, "Yes."

REP. KOTTEL asked if it was his opinion that the state of the law today is that the scaffolding law imposes a strict liability duty.

Mr. Young replied, "Yes, if there is causation."

REP. KOTTEL asked him to elaborate on his answer.

Mr. Young said there has to be a breach of duty, a breach of the act.

REP. KOTTEL said when going to the issue of breach of duty under a negligent standard, she wondered if that wouldn't be back to the idea of "not strict liability" because there is a finding of a breach of duty and that is an issue of trial.

Mr. Young explained that if there is a violation of the act or OSHA violations applying to the act or Department of Labor regulations applying to the construction of scaffold, there is a breach of duty if there is also causation.

REP. KOTTEL interrupted with, "So, therefore, you do have to find a falling below the standard of care."

Mr. Young continued, "You have to find a violation, you have to find causation. At that point, where this litigation differs from other litigation (other than that against the Burlington Northern) is that you do not get to compare and to get an offset for the employee's own negligence, if any."

REP. KOTTEL desired clarification that this statute does not set up grounds where there can be a liability without any fault; i.e., there is still a finding in these cases of an employer, contractor, etc., falling below some standard of care.

Mr. Young said it has the same affect as strict liability.

REP. KOTTEL inquired if the change in language relating to exercising reasonable care in the matter of scaffolding to a statutory duty to following industry standards becomes the intent to set the standards of care by standards of non-profit trade associations.

Mr. Young said, "No."

REP. KOTTEL asked if that is not what this amended bill does.

Mr. Young said that basically if an individual goes to weekly tool box meetings or has an employee safety booklet, or OSHA regulations are posted and they do not follow them, or if there have been tool box meetings on a weekly basis in which safety practices have been covered and a person goes out and does exactly the same as before, that is what that is intended to hold as comparative negligence. The percentage is up to the jury.

REP. KOTTEL recalled testimony that said scaffolding cannot be made 100% safe.

Mr. Young replied that he did not say that. He has seen perfectly compliant scaffolding abused and the general contractor held liable anyway.

REP. KOTTEL asked if scaffolding can be made 100% safe.

Mr. Young answered, "I suspect you can, if everyone uses it as intended." Then he gave example where it was not used properly.

REP. KOTTEL discussed the public policy reasons behind strict liability as being that it is (1) a dangerous activity that cannot generally be made safe, (2) that it is an activity that is not common in all industries, (3) who is best able to control the instrumentality and (4) someone has to pay the price. It is the person in a public policy decision who benefits the most from engaging in this dangerous activity. She wanted to know if all four of those elements are present in this industry.

{Tape: 1; Side: B}

Mr. Young replied that 60 years ago when the scaffolding acts were passed, all four of those elements were present. Since that time workers' compensation has come into play. In addition there has been OSHA for 25 years which has taken over the definition of a scaffold. Taking those factors into consideration, it may be said that this is the time to say that a person has to exert more care in building the scaffold, but in addition, individual fault in using it must be looked at.

REP. KOTTEL asked if he was against strict liability altogether.

Mr. Young said, "No." But in this case, the person has some control over what they say, do, object to and how they might change the environment which is a jury issue under this bill as presented.

REP. KOTTEL commented that as the country moves toward no-fault insurance an anticipated reduction of premiums would be the result. She asked if in moving away from a no-fault situation with strict liability into a fault situation, increased litigation with increased trials and increased costs and premiums would be the result.

Mr. Young said that all of these trials now exist and whether it is a strict liability on a products claim or negligence claim, he did not see anything changing.

REP. LIZ SMITH asked if any standards are now required for the employer to instruct his employee in regards to safety outside of the OSHA regulations. She wanted to know if there was any standardization among the employer contractors that offers education or instruction to the employees regarding safety.

Mr. McCullough said it would fall under the agencies controlled by the contracts such as the Corps of Engineers or some other agency which would have different requirements than OSHA. Individual contractors may have their own safety training issues. There are no requirements other than OSHA.

REP. SMITH asked if they are using a scaffold which has instructions or safety standards for application of use, whether employers are required to instruct their employee.

Mr. McCullough said that OSHA does require instruction on the safe use of equipment.

REP. SMITH asked if he was aware of contractors having some verification that the employee has received that information.

Mr. McCullough said that is based on the individual contractor.

REP. LOREN SOFT posed the situation where a child climbs on the scaffolding after hours and is injured. He asked where the contractor liability lies.

Mr. Young answered that it a totally different legal issue.

REP. SOFT asked if the same holds true if it is an adult involved.

Mr. Young said it would have a different standard of care to compare the negligence of a 10-year-old child with an adult.

REP. LINDA MC CULLOCH asked the sponsor if he would be amenable to the amendment which was discussed with Mr. Holzer.

REP. FUCHS said he would.

REP. GRIMES asked if this includes employees of the general contractor.

Mr. Young replied that on a construction job or any other work place injury, the employee who is injured on the job cannot sue his own employer whether that is a general contractor, subcontractor or a supplier.

REP. GRIMES said the old legislation read, "all scaffolds erected in the state....." and wanted to know if this actually applies to all scaffolds or all scaffolds used on construction sites or by construction.

Mr. Young answered that it applies to all scaffolds including ladders and mechanical hand lifts as defined by the Montana Supreme Court.

REP. GRIMES asked if it would apply to him if he were to use a scaffold on his house.

Mr. Young said, "No," but that it could if the homeowner was acting as a general contractor or furnishing the scaffold.

REP. GRIMES wanted to be sure they weren't inadvertently putting some additional construction industry standards on private individuals.

Mr. Young said this only applies to contractors, subcontractors and builders. The term, builder, may apply to a homeowner under certain circumstances and then they would come under those standards.

REP. CHRIS AHNER requested **Mr. Holzer's** view on omitting ladders.

Mr. Holzer explained that in the construction industry it is not uncommon to have erected what is called a hanging scaffold which means that it is erected and suspended by cable in some very high locations. Often the only way to get from one point to another on the scaffold is a ladder which is a very integral part of those types of scaffolding situations. To imply there is never any relationship between a ladder and scaffold in the industrial construction industry is not true.

REP. KOTTEL expressed her concern about the language on lines 18 and 19. She asked if a person is given the original material handed out by the American National Standards Institute or OSHA, or National Safety Council and other safety organizations as well as regulations of the employer at a tool box meeting. Further, she asked if those materials being received and read would be the standard of care the employee would be held to.

Mr. Holzer replied that it would not be likely they would be given these documents.

REP. KOTTEL asked if it is sometimes possible that the safety regulations given to an employee by the employer might conflict somewhere with all the regulations disseminated by the non-profit organizations.

Mr. Holzer said he couldn't answer that question.

REP. KOTTEL asked what safety practices are commonly recognized in the construction industry.

Mr. Holzer replied, "OSHA regulations."

REP. KOTTEL asked, "Only OSHA?"

Mr. Holzer replied that not only OSHA but other regulations which the employee may be working under as he had testified before.

REP. KOTTEL asked if all those regulations sometimes conflict with the employer's safety regulations.

Mr. Holzer said those regulations would take precedence over the employer's safety regulations.

REP. KOTTEL recalled he had said in testimony, "It is unlikely that any employee would receive information regarding those other regulations." She asked if that was correct.

Mr. Holzer said, "Not necessarily. In safety meetings those safety regulations and those standards will oftentimes be referenced and talked about."

REP. KOTTEL asked how long those safety meetings last.

Mr. Holzer said they could last anywhere from 15 minutes to 45 minutes depending upon the topic and the contractor. .

Closing by Sponsor:

REP. FUCHS summarized what the bill does with the amendment. He felt the amendment REP. MC CULLOCH had proposed might enhance the bill. He rebutted the opponents' argument about productivity with the statement that most of the workers are on an hourly wage and there is no incentive for them to work faster to make more dollars.

{Tape: 1; Side: B; Approx. Counter: 23.7}

HEARING ON SB 29

Opening Statement by Sponsor:

SEN. SUE BARTLETT, SD 27, brought SB 29, a bill requested by the Department of Social and Rehabilitation Services (SRS) to the committee with the intent of clarifying laws having to do with child support collection.

Proponents' Testimony:

Mary Anne Wellbank, Administrator, SRS Child Support Enforcement Division, identified the purpose of the bill is to clean up problems which they have encountered in processing child support collection enforcement. She "walked" the committee through the various parts of the bill giving history and reasons for the provisions in SB 29. She distributed written testimony from the department's director, Peter Blouke. EXHIBIT 4

Belinda Hamilton, submitted written testimony and recommended amendments to SB 29 from the perspective of the rights and obligations of the payor. EXHIBIT 5

Arlette Randash, Eagle Forum, rose in favor of SB 29 and submitted written testimony. EXHIBIT 6

Laurie Koutnik, Christian Coalition of Montana, said that SB 29 is necessary legislation that not only calls for fiscal responsibility on the part of parents toward their children, but also alleviates some burdens and expenses that are currently covered by the state taxpayers. She felt it also allows those who are administering this program some latitude and sets in place some directives as to how to go about meeting the needs.

Kate Cholewa, Montana Women's Lobby, supports SB 29 and measures which improve child support collection efforts.

Opponents' Testimony:

None

CHAIRMAN CLARK relinquished the chair to **VICE CHAIR DIANA WYATT**.

Questions From Committee Members and Responses:

REP. DANIEL MC GEE asked if it is always the case that the obligor is a he and the obligee is a she.

Ms. Wellbank said that in about 5% of the cases the obligor is a she.

REP. MC GEE referred to page 9, lines 12 through 15 and asked **Ms. Wellbank** to go through that portion.

Ms. Wellbank said that Montana has child support guidelines which all courts and all administrative agencies must use to calculate the amount of support due. When that calculation is made, they look at the obligor's earning and the obligee's earning and look at extra ordinary medical expenses, child care and make the calculation and roll it all into one thing called child support. Once in a while a judge doesn't do that but orders an amount for child support plus an additional amount in medical expenses. Because the division only has the authority to collect child support orders, they cannot collect anything other than that definition. That section expands the definition to allow the division to collect any order for other types of expenses.

REP. MC GEE asked who this order is sent to.

Ms. Wellbank replied that when the order is issued, it is sent to the obligor and when it becomes a withholding order for an employer, the order is sent to the employer. It would direct the amount to be collected to be sent to the division.

REP. SMITH asked how the division arrived at ten years as an accrual period.

Ms. Wellbank explained how this portion of the bill simplifies the collection of judgments by clarifying what the past legislation did in extending the statute of limitations.

REP. SMITH proposed a case scenario where a parent of a child who turns 16 is no longer eligible for Medicaid and asked if this 10-year accrual period meant that the obligation stands until the child reaches age 26.

Ms. Wellbank said this was not so, that there are two ways people can apply for the services. One is, anyone whether they owe support or receive support and whether or not they are on AFDC, can request services and the division is obligated to provide them. The other way is if they are on welfare, they are automatically referred to the system for the collection of child support. If the child went off welfare and the custodial parent chose not to pursue enforcement and closed the case with the division, they would not pursue it but the statute of limitations would remain the same on that support order to 10 years beyond the age at which the support order terminates.

REP. MOLNAR recalled that **Ms. Wellbank** had said that \$100 would be taken in lieu of an insurance policy in child support cases. He asked if that amount is deducted in the case of a child living with an obligee and who is covered by a policy.

{Tape: 2; Side: A}

Ms. Wellbank referred to page 10, section 9, number 4 as addressing this question and said it is in effect if the obligor fails to provide insurance.

REP. MOLNAR asked if the department buys insurance for the child when the \$100 is collected.

Ms. Wellbank replied that they do not. She said a bill being introduced by **SEN. ECK** would address many of the insurance issues.

REP. MOLNAR wanted to know when SRS collects the money and the child is under the custody of the Department of Family Services (DFS) as a youth in need of supervision, if they give that money to DFS for this purpose.

Ms. Wellbank said that the \$100 penalty in number 6 of section 9 goes to the general fund.

REP. MOLNAR stated that that is just a penalty and doesn't take care of the child.

Ms. Wellbank answered that he was correct.

REP. MOLNAR referred to page 6, lines 17 through 20, which states the excess amount of the obligation may be kept by the obligee and submitted a case history which applied to this situation. He could see what the department is trying to correct but that the language of the bill doesn't accomplish it.

Ms. Wellbank said there were several sections which tie this together and it is in fact only in situations where the support order is annualized that it has resulted in an under collection in some cases and over collection in others.

REP. MOLNAR asked if those sections speak to the fact that if this bill is passed, the obligee still must pay the under amount, but the obligor keeps the over amount.

Ms. Wellbank said the obligor should be paying the money to the division to ensure that the obligor gets proper credit and if there is an overpayment, the department is required to return that amount of overpayment.

REP. MOLNAR asked if there wasn't a simpler method which would eliminate the return payment process.

Ms. Wellbank said it was a difficult question. It is conceivable that someone could pay in advance, but if any arrears were owed, they would first need to pay for the arrearages. If an employer is withholding there are certain consumer credit act restrictions that limit them taking up to 50% of the obligor's earnings. She felt this system was simpler.

REP. MOLNAR talked about testimony which indicated a problem in the emphasis being on support collection without enforcement of visitation rights of the obligor. He asked if the department has attempted to correct some of these problems.

Ms. Wellbank philosophically agreed. The department has discussed it. It could be legislated that one responsibility of the department would be to enforce custody and visitation. It is not one of the functions of the department at this time to enforce visitation or custody and one problem is that the custodial parent does not allow the obligated parent to visit the child; meanwhile the department continues to enforce child support.

VICE CHAIR WYATT reminded the committee to keep their questions to the bill.

REP. SOFT referred to **Ms. Hamilton's** testimony about a person collecting child support from two states and asked what type of tracking mechanism the department has in place to intercept that type of activity.

Ms. Wellbank said this is a complicated question because the testimony dealt with an out-of-state person and Montana has no control over what happens out of state. In Montana and under all the federal statutes, AFDC is tied in with child support and any time an AFDC case is handled by the department, the obligor is notified to re-direct payment to the division and other states would do that as well. The obligor should not be making payment direct to the obligee. If it involves fraudulent collection, the obligee can be prosecuted for welfare fraud.

Closing by Sponsor:


SEN. BARTLETT added that sections 6, 11 and 13 deal with annualizing the child support being deducted in accordance with the dual period that a particular employer uses. This provision that deals with payments in excess of the monthly amount due is specific language that is required in order to make the annualizing work.

Motion: REP. GRIMES MOVED TO ADJOURN.

{Comments: This set of minutes is complete on two 60-minute tapes.}

ADJOURNMENT

Adjournment: The meeting was adjourned at 12:10 PM.



BOB CLARK, Chairman



JOANNE GUNDERSON, Secretary

BC/jg



The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

8:15 a m Mon 1/23

Bob

I'm presenting a
bill in business + labor

Liana Wyatt may
vote for me in Judiciary
this morning.

Sincerely

Joak Hurdle

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL

DATE 1/23/95

| NAME | PRESENT | ABSENT | EXCUSED |
|--------------------------------------------|----------------|--------|----------------------|
| Rep. Bob Clark, Chairman | ✓ | | |
| Rep. Shiell Anderson, Vice Chair, Majority | ✓ <i>late</i> | | |
| Rep. Diana Wyatt, Vice Chairman, Minority | ✓ | | |
| Rep. Chris Ahner | ✓ | | |
| Rep. Ellen Bergman | ✓ | | |
| Rep. Bill Boharski | ✓ | | |
| Rep. Bill Carey | | | ✓ |
| Rep. Aubyn Curtiss | ✓ | | |
| Rep. Duane Grimes | ✓ | | |
| Rep. Joan Hurdle | ✓ <i>late*</i> | | <i>see attached*</i> |
| Rep. Deb Kottel | ✓ | | |
| Rep. Linda McCulloch | ✓ | | |
| Rep. Daniel McGee | ✓ | | |
| Rep. Brad Molnar | ✓ | | |
| Rep. Debbie Shea | | ✓ | |
| Rep. Liz Smith | ✓ | | |
| Rep. Loren Soft | ✓ | | |
| Rep. Bill Tash | ✓ | | |
| Rep. Cliff Trexler | ✓ | | |

Proposed Sponsored Amendment to HB 158

1. Page 1 Line 21 following "exceptions. (1)" strike the remainder of line 21 through 25 and insert:

"A contractor, subcontractor, or builder who uses or constructs a scaffold on a construction site is liable, when the damages are caused by the negligence of the contractor, subcontractor, or builder in the use or construction of the scaffold, subject to the application of 27-1-702, for damages sustained by any person, except a fellow employee or immediate employer who uses the scaffold ."

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January 23, 1995

Rep. Bob Clark, Chair
House Judiciary Committee
Room 312-1, State Capitol
Helena, MT 59620

RE: HB 158

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to House Bill 158, revising state scaffolding laws. If SB 158 operates as its proponents apparently intend, it will raise workers compensation costs in Montana by increasing serious injuries and decreasing subrogation payments to workers-compensation insurers.

MTLA believes, however, that SB 158 will not operate as its proponents intend and may, in fact, remove whole categories of employees from Montana's workers compensation system and subject their employers to civil liability.

Background. Montana's scaffolding laws, codified at Sec. 50-77-101 et seq., MCA, were first enacted before the advent of workers compensation in the state. The rationale behind those scaffolding laws remains as true today as then: working at great heights is extremely dangerous, and injuries caused by falls are extremely costly. Moreover, workers frequently exercise less control over their own safety at great heights than their employers do. Consequently, as Gov. Racicot correctly emphasizes, preventing such workplace injuries in the first place makes enormous sense.

Negligence per se. Proponents of HB 158 apparently believe that Sec. 50-77-101, MCA, creates strict liability for injuries whenever a contractor, subcontractor, or "builder" violates the statute. MTLA disagrees. A violation of Sec. 50-77-101, MCA, creates negligence per se, not strict liability. The difference is substantial. Strict liability subjects a defendant to liability *even when that defendant took all possible care*. Negligence per se, however, simply means that, when the defendant violates a statute specifically designed to protect a specific plaintiff, then legally that defendant is

responsible for *some* degree of negligence. MTLA believes, however, that:

- SB 158 does not remove scaffolding-law violations from the application of negligence per se.
- The statutory duty of a contractor, subcontractor, or "builder" to provide safe scaffolding also arises from other statutes which SB 158 ignores, such as Sec. 50-71-201, MCA.
- Negligence per se does not defeat the applicability of comparative negligence (i.e., reducing a plaintiff's damages to reflect his/her own fault). MTLA has been unable to find any Montana statute or court decision which prevents judges or juries from considering the negligence of workers in scaffolding-accident cases. To the contrary, the Montana Supreme Court in *Mydlarz v. Palmer/Duncan Construction Co.*, 682 P.2d 695, 703 (1984), expressly held: "Liability does not become fixed upon the showing of a scaffolding-associated injury." A plaintiff must still demonstrate that the violation caused the injury.

Non-delegable duties. Moreover, despite the intentions of proponents, SB 158 does not alter Montana law making certain duties of contractors, subcontractors, and "builders" *non-delegable*. For instance, the non-delegable duty of a contractor or subcontractor to protect the safety of workers often arises from contract, i.e. between an owner and general contractor. SB 158 would not affect these duties.

More importantly, as the Montana Supreme Court recognized in *Stepanek v. Kober Construction*, 191 Mont. 430 (1981), the adoption in 1972 of Montana's new Constitution clearly prevented owners, general contractors, subcontractors, "builders" and the like from delegating a duty of safety to employees covered by workers compensation. Article II, Section 16 of the Montana Constitution protects an employee's "immediate employer" from civil liability if that employer provides workers compensation coverage. But that Constitutional provision also makes certain employment-related duties non-delegable since workers compensation is a no-fault system; since remote owners/general contractors/etc. could easily subvert the constitutional language if they could delegate their duties down the line to an "immediate employer"; and since "immediate employers" shielded from liability by workers compensation obviously have much less incentive to prevent the type of workplace injuries addressed by scaffolding laws.

House Bill 158. Aside from the intention of its proponents, MTLA believes that House Bill 158 contains serious problems, including:

- **The definition of "scaffold" and "scaffolding."** HB 158, for example, doesn't limit this definition to construction-related activities. Temporary shelving and car jacks fall within the definition. The specific exclusion for ladders indicates that, without such an exclusion, equipment similar to ladders should be included. And the exclusion for "other mobile construction equipment" is terribly broad--broad enough to include even mobile scaffolding, precisely the type of equipment which the statute presumably intends to address.

- **Section 1, subsection (2).** By imposing a statutory duty of care on employees, this section conflicts with Montana's no-fault workers compensation scheme, at least regarding "immediate employers."

- **The phrase "person working on or near a scaffold."** This language imposes a duty on employees to follow complex safety practices designed to apply to industry employers. This language also applies to any employer "working on or near" a scaffold. The language is not limited to scaffolding-related safety practices and regulations.

- **The phrase "safety practices commonly recognized in the industry."** This language would replace the current duty of a contractor, subcontractor, or "builder" to exercise reasonable care in the matter of scaffolding with a statutory duty to follow an incredibly complicated array of safety practices detailed by such industry experts as the American National Standards Institute (ANSI), the National Safety Council (NSC), Underwriters Laboratories (UL), the American Society of Safety Engineers, the Institute for Product Safety, and even individual scaffolding manufacturers and OSHA.

- **The phrase "safety regulations required by the person's employer."** This language makes no provision for instances in which industry safety practices and employer safety regulations are inconsistent or even contradictory. *At minimum, SB 158 should clarify that an employee is not negligent if he/she is following the orders or safety regulations of an employer.*

- **Section 2, subsection (1).** This language makes an employer liable for negligence. It unreasonably limits the scope of this section to contractors, subcontractors, and something called "builders," thus relieving such entities as owners from the duties imposed by current law.

- **The phrase "who uses or constructs a scaffold on a construction site."** This language extends to any person (not just employers or employees) who uses or constructs the scaffold, but it abolishes the protections in current law for such entities as passersby.

- **The phrase "except a fellow employee or immediate employer."** This language, taken from Montana's Constitution where it applies to the legal redress available to employees, makes little sense here where it applies to the duty of employers.

If I can provide additional information or assistance to the Committee, please allow me to do so. Thank you again for this opportunity to express MTLA's opposition to House Bill 158.

Respectfully,



Russell B. Hill
Executive Director

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 Governor
 Paul M. Warren
 Governor

January 26, 1995

Rep. Bob Clark, Chair
 House Judiciary Committee
 Room 312-1, State Capitol
 Helena, MT 59620

RE: HB 158

Mr. Chair, Members of the Committee:

Thank you for this opportunity to supplement--and correct--MTLA's written testimony to this committee regarding HB 158 on January 24, 1994.

1. As MTLA testified, Scaffolding Act cases do hinge on "negligence per se."
2. As MTLA testified, Scaffolding Act cases do consider the carelessness/fault of injured employees, because:

- "Negligence per se" only applies when an employer violates a Scaffolding Act requirement *which was designed to prevent the type of injury which occurred*. Clearly, for example, the Montana Legislature intended guard rails on scaffolding to prevent accidental falls. But just as clearly, the Montana Legislature did not intend guard rails to prevent employees from intentionally throwing themselves from scaffolds, and did not intend guard rails to absolutely guarantee the safety of drunk employees. In such cases, the fault of employees would bar recovery.

- "Negligence per se" *only applies when the violation of a Scaffolding Act requirement actually caused the injury*. If the violation had nothing to do with the injury--if, for example, the injured employee's carelessness and not the violation caused the injury--then the Scaffolding Act imposes no liability on the employer.

3. Nevertheless, once a court or jury finally applies negligence per se to an employer, then Mr. Young's testimony regarding Scaffolding Act cases is correct: the employer cannot at that stage reduce compensation by comparing its own fault to that of the employee.

Consequently, MTLA's testimony on January 23 at page 2, lines 7-8, regarding comparative negligence is incorrect to the extent that it refers to Scaffolding Act cases. I apologize for that misstatement. I respectfully ask this committee to accept my correction.

4. Still, as MTLA testified, Montana law prohibits consideration of an employee's contributory negligence (along with other historical defenses to a workers compensation claim) not just because of Sec. 50-77-101, MCA, but also *because of the "immediate employer" language in the Montana Constitution, Art. II, Sec. 16.* Consequently, MTLA continues to believe that HB 158 will not alter constitutional, non-delegable imperatives by simply amending Sec. 50-77-101, MCA.

If I can provide additional information or assistance to the Committee, please allow me to do so. Thank you again for this opportunity to clarify MTLA's opposition to House Bill 158 and correct my mistake.

Respectfully,

A handwritten signature in cursive script, appearing to read "Russell B. Hill".

Russell B. Hill
Executive Director

DEPARTMENT OF
SOCIAL AND REHABILITATION SERVICES

EXHIBIT 4
DATE 1/23/95
SB 29



MARC RACICOT
GOVERNOR

PETER S. BLOUKE, PhD
DIRECTOR

STATE OF MONTANA

P.O. BOX 4210
HELENA, MONTANA 59604-4210

Senate Bill 29
Sponsored by Senator Sue Bartlett
Written Testimony of Peter S. Blouke, PhD, Director
Department of Social and Rehabilitation Services

The Department of Social and Rehabilitation Services, Child Support Enforcement Division currently handles over 42,000 child support cases, with the caseload increasing at the rate of approximately 300 cases per month.

The SRS/CSED's primary mission is to ensure that children receive the monetary support that is rightfully and legally theirs by locating absent parents, establishing paternity in out-of-wedlock births, establishing, enforcing and modifying child support orders, and collecting and distributing child support monies to the families to which they belong. As the caseload and the public's need for SRS/CSED services continues to grow, the department is continually searching for methods of more efficient division operation while, at the same time, serving and satisfying the needs of its constituents.

With this goal in mind, the department has proposed SB29 to assist in enhancing the efficiency and effectiveness of the state Child Support Enforcement Program.

Thank you for your consideration of this legislation.

Submitted by:

Peter S. Blouke
Peter S. Blouke, Ph.D., Director
Department of Social and
Rehabilitation Services

Belinda Hamilton
5601 Alabama Dr.
Helena, Mt. 59601

EXHIBIT 5
DATE 1/23/95
FB 29

SB 29

Generally revising child support enforcement laws

Recommend:

Pass with amendments

Mr. Chairman, Ladies and Gentlemen of the Committee:

I am Belinda Hamilton and I am a provider and a recipient of child support payments.

I have some concerns with this Senate Bill concerning child support enforcement laws. Everything that I have read addresses the rights of the payee and how these rights will be enforced. However, there doesn't seem to be any one protecting the rights of the payor.

The law is very clear on the fact that if you don't make your monthly payments on schedule the government (child support enforcement) has the right to withhold these payments from your income. If you don't carry medical insurance on the dependent, child support enforcement has the legal right to attach the payors wages for an extra \$100.00 per month to cover such costs.

No where (that I could find) is it written what the responsibilities of the payee are. How they must abide by the court order also. It should be very clear to this party what the punishment will be for not following the court order.

Some of the issues that I feel should be addressed are;

- * Collecting A.F.D.C. while collecting child support directly from the payor.

Child support payments were sent directly to the payee, while she collected A.F.D.C. not only in one state but two states. The states tried to collect from the payor for this time period (he had receipts). This is how we know she collected in both states. When it was brought to the attention of child support enforcement we were told that the only punishment for this blatant fraud would be that if she reapplied for A.F.D.C. in this state they would withhold enough of her benefits to pay back what she had collected illegally.

- * Visitation rights.

This is as much a part of the court order as the child support and insurance. Yet, no one is going to enforce this. In our case the mother has refused to let the father have any contact what so ever with the child. To pursue this would mean that we must hire 2 or 3 attorneys, because they were divorced in one city, the child resides in another state, and the father lives in another city. This is another expense to the father.

- * Insurance.

The payor is required to keep medical insurance on the dependents. If he does not, his wages can be attached for \$100.00 per month. However, if the payee does not give the information needed to the payor or his insurance company, she is still allowed to receive A.F.D.C..

- * Withholdings shouldn't exceed a certain amount per child.

In one instance the court ordered support was \$150.00, because he did not appear at a hearing they raised the support to \$1000.00 per month. This leaves him \$400.00 per month to live on. Which means that he cannot even afford housing. He filed a Modification request with the child support enforcement but was told they were back logged and didn't know when they would get to his case. The payor is allowed 10 days to respond to any withholding notices. They are required to respond in a timely manner and when they don't the payor suffers again

- * All monthly statements concerning arrearage of support should match.

The total are different from the IRS to the child support enforcement in each state. The payor should be able to read these statements and know exactly what is in arrears.

I realize that, yes, there are some deadbeat fathers out there. There are also some that would like to spend time with their children or at least be allowed to talk to them. These are the fathers that pay the support, keep the insurance and still have no rights if the mother refuses (unless he can retain an attorney).

I am asking you to take time and review these concerns and try to come up with a bill that will be fair to both parties.

Thank you for your attention to this matter.

January 23, 1995

House Judiciary
SB 29

For the record my name is Arlette Randash, representing Eagle Forum, a nationwide grassroots organization of women dedicated to strong families and sound government policy.

I rise in favor of SB 29. The breakdown of families has been particularly devastating to single parents rearing children. The U.S. Department of Commerce says "that for all children under 6 who live with only their mother, 66% live in poverty. One child out of every five in the nation lives in poverty and of all age groups children are the most likely to be poor." By 1991 12.9% of American children are dependent on AFDC and 2/3 of them will receive AFDC for eight years or more.

In 1960 less than 10% of children were being reared in single parent families. Today that figure has tripled, in 1991 28.6% of children were in single parent families. In fact 73% of children from single parent families will be in poverty at some point during their childhood while only 20 percent of children in two parent families will ever experience poverty. 22% of those children experiencing poverty will experience it for 7 years or more. William Galston in "A Progressive Family Policy for the 1990's" writes that "The economic consequences of a parent's absence are often accompanied by psychological consequences, which include higher than average levels of youth suicide, low intellectual and education performance, and higher than average rates of mental illness, violence and drug use."

Those facts are grim.....and they are well substantiated. Everyone of us has either been a single parent or have been friends or the employer of a struggling single parent. We have witnessed the strain as single parents struggle to meet the emotional needs of their children. This bill strengthens laws that will help the single parent receive the financial support necessary to make ends meet. Of coarse, not only will single parents be aided by the passage of this bill but those parents who are remarried.

Furthermore, when parents liable for support are held responsible, the taxpayers are spared from the onerous burden of meeting the needs of children insufficiently supported from delinquent parents. Moreover, the accountability in being called to responsibility will serve to chill irresponsible parenting.

Unfortunately, as an employer I hate to see one more responsibility placed on overburdened employers, however, they too benefit from employees, especially those who are single parents, who are less stressed in meeting their family responsibility, and from the savings to the taxpayers in general. But in truth the bill offers remuneration to offset the effort to deduct the child support and pay the district court.

I urge a "do pass" on SB 29.

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY

COMMITTEE

DATE 4/23/95

BILL NO. HB 158 SPONSOR(S) Rep. Fuchs

PLEASE PRINT

PLEASE PRINT

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| NAME AND ADDRESS | REPRESENTING | Support | Oppose |
|------------------------|----------------------------------------------|---------|--------|
| <i>[Signature]</i> | <i>Self</i> | ✓ | |
| <i>Ron Ashah</i> | <i>State Farm Ins.</i> | ✓ | |
| <i>Roger McBlain</i> | <i>INDEPENDENT INS. AGENTS' ASSOC. OF MT</i> | ✓ | |
| <i>James T. Smith</i> | <i>FIRST WEST, INC BOZEMAN, MT.</i> | ✓ | |
| <i>ROBERT DAVIS</i> | <i>COGSWELL AGENCY</i> | ✓ | |
| <i>BILL DOUBRETT</i> | <i>COGSWELL AGENCY</i> | ✓ | |
| <i>DARRELL HOLZER</i> | <i>MT. ST. AFL-CIO</i> | | ✓ |
| <i>RON MCCULLOUGH</i> | <i>SUETTER CONSTRUCTION CO.</i> | ✓ | |
| <i>Carl Schweitzer</i> | <i>MT Cont Ass'n</i> | ✓ | |
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PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HR:1993

wp:visbcom.man

CS-14

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY

COMMITTEE

DATE

BILL NO. SB 29 SPONSOR(S) SEN. BARTLETT

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

| NAME AND ADDRESS | REPRESENTING | Support | Oppose |
|---------------------------------------------|-----------------|---------|--------|
| M.A. Wellbank | SRS-CSED | ✓ | |
| Kate Cholewa | MT Nonres Lobby | ✓ | |
| 5601 ALABAMA DR. ALMA Bessie Hamilton | SELF | ✓ | |
| Arlene Randolph | EAGLE Forum | ✓ | |
| Laurie Koutnik | CC of MT | ✓ | |
| Smearlett | S.D. 27 | ✓ | |
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