MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on March 3, 1995, at 8:00 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. Bill Carey (D)
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. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Members Excused: NONE

Members Absent: NONE

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 192, SB 211, SB 212, SB 286
Executive Action: NONE

{Tape: 1; Side: A}

HEARING ON SB 212

Opening Statement by Sponsor:

SEN. AL BISHOP, SD 9, gave the history behind SB 212 and said there has been an attempt to deal with a defendant who is 50% or less responsible for the plaintiff's injury and is only obligated to pay to the extent of the liability. In cases where a defendant tries to show during the trial that there are other culpable parties who are not named in the suit, the supreme court has said there is a need for some procedural safeguards. The intent of SB 212 was to provide for those safeguards.

He described the recent case which initiated the bill. In Wetch v. Unique Concrete Co. the plaintiff was injured by falling into an excavation the defendant had dug at the back door. At the beginning the plaintiff, her employer and the defendant had talked about how to handle the excavation. The defendant had recommended that the door be barricaded. The employer agreed to take care of it, wanted to keep the door open for ventilation and ultimately did not take care of it. The plaintiff walked out the back door and was injured and sued Unique Concrete. The court held that inasmuch as she was covered by Workers Compensation through her employment, she could not sue the employer. She was able to sue Unique Concrete and collect $200,000 since existing statute provides that the conversation between the three of them could not be shown because the employer was immune.

Proponents' Testimony:

John Alke, Montana Liability Coalition, said the organization he was representing was formed to spearhead tort reform. He submitted history to explain why the bill was important. Prior to 1975 in a negligence action in Montana there were two dominating common law doctrines. The first was contributory negligence--if the plaintiff was at all responsible for the injury, the plaintiff was absolutely barred from recovery. The second was joint and several liability--the plaintiff could choose which defendant would pay the judgment without any respect to comparative fault. In 1975 Montana adopted a system of comparative fault. Under this system, the plaintiff can recover, even if the plaintiff is much more negligent than any of the individual defendants, that portion of the damages not attributable to their own fault from the other defendants. How much, is what this bill intended to address.

He said that Montana made a mistake when it adopted comparative fault because it abolished contributory negligence and ignored joint and several liability. The result was that between 1975 and 1987, comparative fault existed in theory, but not in fact.

He gave an example to illustrate. In 1987 Montana enacted a 50% rule which means that unless a defendant is primarily responsible for an accident (51% or more) a defendant is only liable for their share of the fault. The Newville v. Department of Family Services case struck down the application of the 50% rule to nonparties because of lack of procedural guarantees of a fair trial to the plaintiff. The idea was that the plaintiff would not know until the middle or end of the trial who the defendants were going to blame and it was unclear who had the burden of proof. Newville did not invalidate on a constitutional basis the 50% rule, it only invalidated an application of that rule in the case of nonparty defendants. The effect was that essentially the plaintiff can decide whether the 50% rule applies or not and whether to settle with any of the defendants before trial. Further, if fault cannot be allocated to a defendant, there is a question whether or not that defendant's negligence is even admissible in a plaintiff's trial against another defendant.

The Wetch case said, "No." In that case the plaintiff called the contractor defendant to the witness stand and asked if the defendant knew there was an unsafe condition and if it was true that the contractor undertook no measure to be sure no one would fall out the door and be injured. He was prohibited from saying that the reason he took no action was the conversation with the employer and the plaintiff in which the employer promised to lock the door and put a notice on it and he did not do any of those preventive measures. The court held that since the employer was immune under the laws of workers compensation, allocation of fault could not be given, thus evidence of the employer's negligence was inadmissible.

SB 212 would correct Newville and provide the procedural guarantees the supreme court wanted. If it passed, the defendant would be required in their answer to advise the plaintiff who they would tend to blame for the accident. It would provide that a defendant's lawyers would have the burden of proof that another defendant was responsible for the injury. The plaintiff would not have to disprove it. The bill specified that a defendant would not be in the lawsuit because they settled beforehand, any findings against that defendant were irrelevant. The only reason to discuss that defendant's fault would be for the purposes of fairly determining another defendant's fault.

The basis for the ruling in Wetch was that there were two conflicting statutory provisions; one prohibited an allocation of fault to an employer and the second sentence was being struck in the amendment. He refuted in advance the opponent's objection to the bill that they were being unfair in setting up a situation for blaming parties without actually naming them and giving them a chance to defend themselves. He said that was not true, because as a matter of law a settled defendant or an immune defendant cannot be named. He suggested three questions for the committee to ask of the opponents:

1. Isn't it true that the defendant cannot name a settled party. (They have no choice but to answer yes, that is true.)

2. Isn't it true that the defendant cannot name an immune party. (They have no choice but to say yes, that is true.)

3. Isn't it true that Wetch held that evidence of fault of a party to whom fault cannot be allocated is inadmissible. (They have no choice but to answer that that is true.)

The Wetch decision is **EXHIBIT 1.**

{Tape: 1; Side: A; Approx. Counter: 22.5}

Ward Shanahan, Farmers Insurance Group of Companies, supported the bill.

Jim Tutwiler, Montana Liability Coalition (MLC), said, in support of SB 212, that MLC had been very active in getting the 1987 bill passed because they were concerned that the business community and anyone who had resources, including local government agencies would be vulnerable to large damage awards. He said the Newville and Wetch cases posed a serious threat for the 1987 rule and that the bill being considered was designed to follow the instructions and the guidance which were given in the supreme court decision to restore the joint and several liability statute back where it was.

Ron Ashabraner, State Farm Insurance, urged the committee to act favorably on the bill.

David Owen, Montana Chamber of Commerce, made two points dealing with the joint and several liability statute in that it had stood the test of time with both Republican and Democrat majorities under several challenges. The second point was that the intent was to restore a sound principle at the encouragement of many small businesses.

Tom Hopgood, Montana Independent Bankers Association, rose in support of SB 212.

John Cadby, Montana Bankers' Association, said all the bankers agreed on this bill.

Bill Gianoulias, Chief Defense Counsel, Risk Management and Tort Defense Division, Department of Administration, supported SB 212.

Jacqueline Lenmark, American Insurance Association (AIA), supported the bill.

Don Allen, Montana Wood Products Association, supported SB 212.

Charles Brooks, Billings Chamber of Commerce and Yellowstone County Board of Commissioners, said the bill would lessen the risk and costs of doing business in Montana. It would eliminate some of the inequities which had been discussed.

Sue Weingartner, Montana Solid Waste Contractors, Montana Trial Lawyers, Montana Optometric Association, urged support of SB 212.

Robert White, Bozeman Chamber of Commerce, said this was the responsibility bill and urged the committee to pass it.

Riley Johnson, National Federation of Independent Businesses, urged the passage of the bill.

Gail Abercrombie, Executive Director, Montana Petroleum Association, supported this legislation.

Steve Turkiewicz, Montana Auto Dealers Association, urged support of this bill.

Marie Durkee, Montana Liability Coalition and Executive Director, Montana Taverns Association, supported SB 212.

Jim Kembel, City of Billings, supported the legislation.

Don Hutchinson, Division of Banking and Finance, recommended support for the bill.

Michael Keedy, Montana School Boards Association, said that the testimony both pro and con regarding this bill is complex and potentially confusing. For simplicity's sake, he felt the committee should keep in mind that SB 212 would preserve the desirable features of Montana's present law in the area of joint and several liability and it would correct some constitutional flaws recently identified by the Montana Supreme Court. They urged favorable consideration.

Tom Harrison, Montana Society of CPA's, also supported SB 212.

Mona Jamison, Doctor's Company, stood in strong support of the bill. **EXHIBIT 2**

Stan Kaleczyc, Montana Municipal Insurance Authority, asked the support for the bill so that only a fair amount would be paid by cities and towns when they are held liable in injury cases.

REP. BILL TASH, formerly representing the Hospital Associations, rose in support of the legislation.

Opponents' Testimony:

Russell Hill, Montana Trial Lawyers Association (MTLA), rose in opposition to SB 212. He submitted written testimony. **EXHIBIT 3**

He also submitted copies of letters from attorneys in opposition to SB 212, **EXHIBITS 4 - 14**

He made clear that MTLA both believed and was convinced that this bill was unconstitutional and that it would not correct the constitutional deficiencies pointed out in the Newville case. He also said that MTLA was not asking the committee to trust them, but rather to trust themselves even though the issues bordered on the complex. He said that they were some of the most basic issues involved in law and that was what the supreme court ruled on. He then quoted from his written testimony and from the Montana Supreme Court decision in the Newville case.

He said this bill was not risk-free because once the court found that the language in the statute [27-1-703(4), MCA] was unconstitutional, the court had to reach a second decision in determining whether the whole statute was unconstitutional. The court said it was not essential to the 1987 amendment which is contrary to what the proponents were saying. He said that meant that if the case went back to the supreme court and the supreme court again found that nonparties cannot be brought in, the court would have to revisit whether this language is so central to the 1987 amendment that the entire statute would have to fall.

He said that the drafters and proponents of the bill "simply blew it." They had the means to take care of the problem identified in Newville and they got impatient. In returning to the original questioned proposed to be asked by **Mr. Alke,** following are his answers:

1. **Mr. Hill** said, "That's wrong. You can."

2. **Mr. Hill** said, "The fact is, you can." He referred to a second case, Brockie v. Omo Construction, and quoted from the supreme court decision.

3. **Mr. Hill** responded that was what happened in the Wetch case, but that **Mr. Alke** didn't elaborate that the Wetch case was a unique legal factual situation based on other language in the 1987 amendment that the court didn't stretch for an interpretation. It was the plain meaning of that workers compensation language in the 1987 amendment. The answer to the implied question whether there can be evidence of any immune party is that it is simply unavoidable. He gave an example to prove his point.

{Tape: 1; Side: A; Approx. Counter: 49.0}

The reason behind the 1987 language was the interaction of liability and workers compensation and employers and their immunity from suit when there is a work place injury. He asked the committee to investigate that. He said that when the proponents gave the history of contributory negligence and comparative negligence, they left out the fact that contributory

negligence was a complete bar. If the plaintiff was completely innocent, he could sue any of the defendants and receive the entire recovery from them. The defendant could not receive contribution from another defendant. Comparative negligence wasn't a generous outpouring of sympathy for the plaintiff but was an attempt to bring in other people and get a share of money from the deepest pockets. The plaintiff always pays the cost of the defendant who can't pay under comparative negligence .

He summed up two problems identified in Newville by describing the process in that case. One had to do with bringing in a witness who was significantly at fault at the end of the trial after not having been at the trial or represented prior to the judgment being handed down. The second issue was requiring the plaintiff in the case to defend somebody else who was not in the case. Those were violations of substantive due process.

Norm Grosfield, Helena Attorney, was a former administrator of workers compensation and involved in workers compensation litigation since 1973. He said he wanted to address a concern that the committee and the proponents should have regarding page 2 and the amendment which would affect lines 20 - 24.

{Tape: 1; Side: B}

He said the workers compensation system was based on the principle of the exclusive remedy rule in existence since 1915. That means that if an employer provides workers compensation, he cannot be sued in tort no matter how negligent the employer was. Up to this point, the courts have been consistent in supporting that principle. Removing the language on line 24 would provide the vehicle for courts to negate the exclusive remedy rule; therefore, the employers and their insurers would be subject to potential tort liability in addition to workers compensation coverage.

Lon Dale, Missoula Attorney, testified as an opponent to SB 212 and gave history behind the bill. A practice, which he termed "a knee-jerk" reaction has been occurring in response to Montana Supreme Court decisions which restricted contribution. He outlined the history of that opinion. He said the effect is that every two years the legislature changes the law making it difficult for attorneys and creating a great deal of work for them. He said this bill would change something that doesn't need to be changed. He said they would like to have status quo and continuity. He gave some case examples of what happens when the law is changed. He said the Brockie V. Omo case would be tried for the third time because of changes in the judicial process.

He suggested that the entire bill was unnecessary. He believed that when the Newville and Brockie decisions were read in conjunction with each other that would provide the course of action needed. He said that page 2, line 4 of the bill included third party defendants which were not struck out by the court.

He said a third party defendant could be brought in under the civil rules of procedure if it was believed that third party was responsible for some of the damages claimed by the plaintiff against the client. He said that principle had existed since the adoption of the rules of civil procedure in the 1960's and was the solution.

He said the important thing is the determination of negligence. That was referenced in the dissent in the Brockie decision to add a course of action that could be used. He quoted that dissent by Judge Weber.

{Tape: 1; Side: B; Approx. Counter: 14.9}

Questions From Committee Members and Responses:

REP. BILL TASH asked, in the Senate Judiciary Committee's deliberation on the bill, how much consideration they gave the Brockie case.

Mr. Alke said no weight was given to the Brockie case because the language which was cited was from the dissent. Dissents don't count because they lose. The ruling of the court was the majority opinion.

REP. TASH asked about the language which was amended out on page 2, lines 21 through 25.

Mr. Alke said the opponents failed to tell the committee that the exclusive remedy rule for workers compensation is a constitutional provision. Statutes don't modify constitutional provisions. This provision deals only with workers compensation in a peripheral manner.

REP. DUANE GRIMES asked how a dissenting opinion in a court decision could be used to resolve the issue.

Mr. Dale said the issue was not an issue in the Omo decision. The issued raised in the defense was not the issue. The issue was that it had been tried twice and the plaintiff was dissatisfied with the verdict and wanted to seek a greater percentage. He described how it worked out in that case. He said the statement, called a dicta, by the dissenting judge is not controlling as far as the issue in the case, but it is a statement of how he felt that particular issue should be addressed. He said that was the proper course of action which the supreme court had not dealt with in a case [as yet].

REP. GRIMES asked if the dicta set a course of action.

Mr. Alke fundamentally disagreed with **Mr. Dale**. He said that was not dicta. Dicta is language in the majority opinion which is not central to the holding of the court. Language in a dissent is dicta, he said. He said he believed **Mr. Dale** was asking the

committee to do nothing because the supreme court would eventually get it right. But he suggested that the legislature has the right in dealing with simple rules of liability to tell the supreme court what the appropriate method for allocating fault is in a system of comparative fault. He said that it was a "red herring" to describe the bill as unconstitutional and that Newville said that no procedure would work. He said that was not true and that the opponents had selectively read from the opinion. He read for the committee what the holding of the court was, "We conclude that section 27-1-703(4), MCA, unreasonably mandates an allocation of percentages of negligence to nonparties without any kind of procedural safeguard." The court outlined other states which have the safeguards and included Indiana after which Montana's statute is modeled. Further quotes from the decision was, "consideration of these procedural safeguards should have been considered by the Montana Legislature at the time of enactment of the statute."

REP. GRIMES asked if the charges raised by the opponents that this was a make-work bill for attorneys was true.

Mr. Alke refused to answer because he said it did not dignify a response. He said the source of law was from the Montana Supreme Court or the higher court and the legislature. He said the legislature has a superior right to establish the law except in areas of constitutional law. He pointed out that he was the only lawyer for the proponents.

REP. DANIEL MC GEE asked what people swear to when they take the stand. (He also expressed his strong anger and sentiment about what was occurring in the hearing as legal posturing and hypocritical.)

Mr. Hill answered, "To tell the truth, the whole truth and nothing but the truth."

REP. MC GEE asked if what is done in the legal profession today fits that sworn statement.

Mr. Hill answered that what he believed they do in the court system is the best method that humanity had ever decided to determine what the truth, the whole truth and nothing but the truth is. He said he knew that he suffered from the public perception that what was going on was legal posturing and mercenary hypocritical. His opinion was that the attorneys genuinely believe strongly in the system and that was behind what was going on at this hearing and in the court system. He believed that a lack of understanding and appreciation of what goes on in the court system was the cause of the negative public opinion about the court system.

REP. MC GEE asked why in the Wetch case the contractor could not tell the court the whole truth which included the conversation with the employer.

Mr. Hill answered it by asking him to look at page 2, line 20 of the bill. The court was applying the clear imperative that was embodied in law. He quoted that section. He summarized that the court specifically said there was nothing ambiguous in it, they had no choice because of the legal prohibition. He suggested the reason that provision was there was that they wanted it included because of the legal complications in relationship between tort liability and workers compensation.

REP. MC GEE repeated back that the court would not allow the truth because of that section of statute.

Mr. Hill answered that in that respect, that was what he was saying.

REP. MC GEE asked **Mr. Alke** if the reason in the Wetch case the contractor could not testify that he had had a conversation with the employer was a result this statute.

Mr. Alke said that was not true. He said it was not true because this same question was in front of the federal courts and they held that the question of the allocation of negligence had nothing to do with proximate cause and that the evidence of the other party should have been admitted to permit the defendant in court to prove that he was not a proximate cause of the accident. He said that was the ruling of the federal court in Montana on this specific statute and this specific question. The Montana Supreme Court said it was not bound and did not like the U. S. federal court's ruling and it issued the ruling in the Wetch case.

REP. LOREN SOFT expressed his anger and negative response to the allegation that the legislature was responsible for the confusion since they change the laws. He asked about the assignment of negligence in the Wetch case and wanted to know what the responsibility or negligence was of the plaintiff.

Mr. Hill answered that the reason for the exclusion of her responsibility was the no-fault compensation system. That system says that injured workers are deprived of certain rights in exchange for making their activities no fault. Some would say that this wasn't a workers compensation case, but there is a fault system and a no-fault system and common parties running side by side. He said he felt it was incorrect to say the two systems were completely independent and he believed that was what was being said with the Wetch amendments.

He disagreed with **Mr. Alke** that the Constitution was what provides an exclusive remedy to employers. He cited article 2, section 16 of the Constitution to prove his point and said it is guaranteed by statute. The dissent in Brockie is not neutered by the fact that is was a dissent. Newville was a unanimous supreme court opinion. The three dissenters in Brockie talked about

Newville because the other four justices disagreed with them; they disagreed on an entirely different issue, he said. He said there was an assessment of fault in that case and suggested that they ask **Mr. Dale** about that.

REP. SOFT was concerned that he had heard no testimony among the attorneys which was in agreement and then the legislature was being asked to solve the problem.

Mr. Hill pointed out a distinction that 80 - 90% of the bulk of laws, which he questioned as being necessary, in the state were not submitted by the unpopular attorneys who he represented.

REP. JOAN HURDLE asked if it was considered a good business practice for a contractor to assign his safety procedures to a chiropractor in a casual conversation. [She was referring to the Wetch case.]

Mr. Brooks answered that in every case the business person must bear some responsibility. He said the contractor did bear some responsibility as far as safety was concerned.

REP. HURDLE wondered if she understood that in the proximate cause of the accident, if this law passed, everybody would be sharing the blame.

Mr. Alke answered that if this law passed and the Wetch case were retried, when the contractor was on the stand and asked if he knew it was an unsafe condition and answered, "yes," and then was asked if he had personally undertaken any safety measure, and then answered, "no," he would then be allowed to give a reason for not having taken the safety precautions.

REP. HURDLE asked if that would have the effect of partially exonerating that contractor from his responsibility to public safety.

Mr. Alke answered that it would not because he would still be found liable for the fact that he didn't do something else but he could explain why he didn't do something else. This is a question of allocation, not black and white--all responsible or not responsible. The jury should be able to allocate the percentages of blame. Without the bill, he could not say that there was another party involved who was also to blame.

REP. HURDLE said it seemed with the bill that nobody would get the blame.

Mr. Alke said there were only three people involved and the court said that the person who was sued couldn't even talk about what the third person did wrong.

REP. HURDLE said she thought the contractor was responsible for safety on his job.

Mr. Alke said he was but the reason she fell into the job site was because the employer wouldn't barricade the door. The contractor doesn't own and control the employer's building.

REP. HURDLE thought the answer to her question was that the proponents felt it was okay for an employer to assign his responsibility to somebody else in a casual conversation.

REP. DEB KOTTEL referred to page 3 and the Senate amendments and asked why that was added.

Mr. Alke said that Senator Halligan reviewed the Newville case and one issue was that the nonparty might not even know that they were being blamed in the trial. During the oral arguments, the supreme court indicated that concern and the Senator wanted a provision added to notify the person being blamed.

REP. KOTTEL referred to page 3, lines 7 through 10, saying that a finding of negligence was not presumptive or conclusive and asked if it was admissible in a subsequent action.

Mr. Alke did not believe it would be because unless that party participated in the case, the party had no opportunity to explain his view of the allocation.

REP. KOTTEL discussed joint and several liability and asked if the bill dealt with all joint and several....

Mr. Alke interrupted, "No, there is an exception in the existing joint and several statute that said it did not apply to people acting in concert." He explained this.

REP. KOTTEL asked if this only affected those tortfeasors who were found to be 50% or less negligent.

Mr. Alke said that was correct.

REP. KOTTEL presented an example of a case involving $100,000 in damages with a plaintiff with 33.3% contributorily negligent and an immune defendant tortfeasor also liable for 33.3%. Then the last defendant was found to be 33.3% negligent. She asked for a comparison of what would happen if it did not pass with what would happen if it did pass.

Mr. Alke replied that if the bill did not pass, the defendant remaining would be liable for 66% of the plaintiff's damages because there could be no allocation of fault to the immune defendant. If the bill passed, he would be liable for only 33.3% to share with all those allocated by the jury.

REP. KOTTEL asked if **Mr. Hill** was in agreement with her last three questions.

Mr. Hill said he could not venture an answer to the first question. He did say that it is a real problem in the Wetch amendment and he handled that in his written testimony. He said if the bill is passed the legislature would be saying what should have happened in the Wetch case.

REP. KOTTEL restated her second question and **Mr. Hill** agreed that was his understanding.

REP. KOTTEL asked if he agreed with the answer to the third question and asked why that would be wrong.

Mr. Hill disagreed with **Mr. Alke** and explained why. He said that **Mr. Alke's** answer presumed that what was talked about in Brockie doesn't apply.

{Tape: 2; Side: A; Comments: Part of the answer was missed in changing the tape.}

He said that with a set of assumptions, **Mr. Alke's** answer was correct with the caveat of the deduction for a settlement. He recommended that the committee read the cases and decide for themselves which set of assumptions needed to be the most controlling.

REP. KOTTEL asked if it was also the understanding that when there was a nonparty defendant the issue becomes who would defend that nonparty defendant. She suggested that it might happen that the jury would allocate inappropriately the blame between the two parties.

Mr. Hill responded that the supreme court in Newville said exactly that. He described another consequence of a bill like this passing.

REP. KOTTEL said no one forces a plaintiff to settle with defendants, **Mr. Hill** agreed.

REP. LINDA MC CULLOCH requested an explanation the importance of the dissent in the Brockie case.

Mr. Hill gave his opinion that the reason for a majority decision and a dissent in the Brockie case did not have to do with what the dissent said about Newville. What split the justices in the Brockie case wasn't what the dissent said about Newville. Secondly, Newville was a unanimous opinion; Justice Weber, who authored the opinion, and the other two dissenters, Turnage and Gray, joined in the opinion. To say that the dissent doesn't count is to say that in a unanimous supreme court decision, there is no reason to follow that, because all of the judges may have done something different. In Brockie the dividing issue was not how they interpreted Newville and what the three dissenters said was the way they suggested that future cases be handled. They did not back off from comparative negligence. The bill was not

about comparative negligence, he said and if the committee believed that was what the bill was about and the section were struck, the whole statute would collapse, he said. "Every supreme court justice knows that comparative negligence is going to hang around, the question is how do we handle that. Do we ascribe negligence to people who are outside the courtroom or do we fine tune the statutes in terms of contribution in negligence to make them be in the courtroom and still ascribe them negligent even if they are immune?" he asked. He concluded that the fundamental adversarial system works.

REP. WILLIAM BOHARSKI could not understand why they were going back and forth between the terms, liability and negligence, in the bill.

Mr. Alke said that the reason there are sometimes references to liability and sometimes references to negligence was that sometimes there is discussion of their negligence, but they would not necessarily be held liable. The term liability is used where the purpose of the action is actually to say that they owe a certain amount as a result of a judgment. Other times, they want to talk about his negligence, but since he actually would not be held liable in a lawsuit, the word negligence is used.

REP. BOHARSKI specifically spoke to lines 20 through 24 on page 2 being removed.

Mr. Alke replied that the 1987 language was poorly drafted and it had been a "festering sore" until the Wetch decision. The language was in there because someone in 1987 took the advice which was given [in the legislature] to address the exclusivity of remedy in this statute. He said that was wrong; the exclusivity of remedy is in the constitutional provision. There are two totally conflicting sentences in the statute. He directed the committee to the portions which did this.

REP. BOHARSKI asked if that meant that as a result of that language and the possible conflict in the law, the supreme court looked at the language on lines 19 through 24 and said they could take a look at that contract.

Mr. Alke said that was correct.

REP. BOHARSKI then asked about the new language as saying that they can look at that consistent with the top of page 2.

Mr. Alke said that was correct.

REP. BOHARSKI asked if the language on page 3 dealt with the ability of someone to -- who's going to do the defending, who's going to do the prosecuting, who's going to pay the attorney fees, etc. -- in determining the negligence even though they know that person is not liable because he is constitutionally exempt.

Mr. Alke said that was correct.

{Tape: 2; Side: A; Approx. Counter: 13.6}

Closing by Sponsor:

SEN. BISHOP said in closing that it was plain that some action must be taken. He addressed the suggestion that the supreme court would not look on anything done in the legislature favorably. He said that the court pointed out what the legislature must do in the Newville case and he cited the source of that opinion. He said he thought the Wetch case was not fair and that it was up to the legislature to do something about it.

HEARING ON SB 286

Opening Statement by Sponsor:

SEN. FRANKLIN, SD 21, said SB 286 was brought to her by an attorney and former justice of the peace as a measure to deal with pre-trial costs. It would put in statute that when a paternity case is determined, the judge may include an order for pre-trial costs.

Proponents' Testimony:

Jim Elshoff, Great Falls Attorney, said there was no provision within the current act for recovery of attorney fees and court costs. He submitted written testimony along with a copy of the Parentage Act. **EXHIBIT 15**

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. KOTTEL asked the sponsor about the fiscal note referring to the possible additional costs to the district court and wanted to know what it might cost the counties. The sponsor referred the question.

Mr. Elshoff said guardian ad litem fees were presently in the statute. He believed this would not have any impact on the counties per se. Without the legislation, the petitioner who brings a lawsuit currently may be required to apply for AFDC benefits and that the impact would be the same if the committee did nothing. Whatever that impact would be would be lessened if they were able to go to the other parent to get child support from them.

REP. KOTTEL asked if the court would take into consideration whether or not the party was financially able to pay the costs.

Mr. Elshoff said section 40-4-110, MCA, essentially says that the court shall consider the financial circumstances of both parties and may order either party to reimburse the other for fees.

Closing by Sponsor:

SEN. FRANKLIN closed.

{Tape: 2; Side: A; Approx. Counter: 35.0}

HEARING ON SB 192

Opening Statement by Sponsor:

SEN. FRED VAN VALKENBURG, SD 32, said that SB 192 would provide that the salary of the county prosecutor services coordinator would be equivalent of that of a full-time county attorney.

Proponents' Testimony:

Attorney General Joe Mazurek, supported the bill and informed the committee that neither the Department of Justice nor **John Connor**, who presently holds the position, had asked for the bill. The sponsor had initiated the bill and the department was fully in support of it. He outlined the duties of the position and the importance of it.

Leo Giacometto, Governor's Office, outlined the need for the position and their strong support of this bill.

Loren Tucker, Madison County Attorney, Montana County Attorney's Association, attested to the attributes, dedication and hard work of the people who have held the position. In order to retain the high quality of personnel needed in the position and the required diversity of skills, the incumbent and any future recruit for it should be paid at a competitive level. As a part-time county attorney, he echoed the contents of a letter he presented from another part-time county attorney in presenting examples of the quality of work and the quantity of work exercised by this position. **EXHIBIT 16**

Dennis Paxinos, Yellowstone County Attorney, asked who would move to Helena to take a $10,000-a-year cut in pay to take the job. He said there is no attraction for the position at its current rate of pay. He said the county attorneys are paid more than the person in this position which trains the county attorneys throughout the state. The position often requires the prosecution of cases for county attorneys who are paid more than the incumbent.

John Flynn, Broadwater County Attorney, said the creation of this position was the biggest help in fighting crime, particularly violent crime, in the state. For the state to keep this

important position, it must be funded commensurate with the job requirements and standard of performance and expertise expected and needed.

Opponents' Testimony:

None

Questions From Committee Members and Responses:

REP. MC GEE asked what the current salary is for the Attorney General.

Attorney General Mazurek, replied that it is $50,841.

REP. MC GEE asked what the current salaries for the Lieutenant Governor and the Governor are.

Leo Giacometto said he thought the Lieutenant Governor's is around $41,000, the Governor's is about $55,000.

{Tape: 2; Side: B}

REP. GRIMES asked if this position reports to the Attorney General and had they ever considered making it an exempt position.

Attorney General Mazurek said that elected officials have a group of positions which they can hire at their discretion which are not part of the classification basis. The Governor made the decision to classify this particular position because of the importance of making the selection based on merit and experience as well as avoiding the risk of losing the job with a changeover in the administration.

REP. SOFT asked if classified is the same as exempt.

Attorney General Mazurek answered that it was not. Classified means that it fits into the classification and pay plan.

REP. SOFT said that the bill indicates that it is an exempt position.

Attorney General Mazurek said it is exempt from the classification and pay plan in terms of fitting into a step or grade, but the salary is actually set by reference to the county attorney salary. It would be a permanent position based on merit as opposed to the position serving at the pleasure of the elected official.

REP. BOHARSKI asked why the title is training coordinator instead of prosecutor.

Attorney General Mazurek said he is the training coordinator for all the county attorneys, but he is also the state's special prosecutor. The title was decided by the legislature some years ago.

Closing by Sponsor:

SEN. VAN VALKENBURG made his closing remarks in summary of the need for the passage of the bill and the crucial importance of the position.

HEARING ON SB 211

Opening Statement by Sponsor:

SEN. THOMAS KEATING, SD 5, opened by saying that SB 211 dealt with recreational use of property and exemption from liability of the owner if there is no fee charged for the use of the property. The reason for the bill was that there had been a conflict in the interpretation of the language of the law. This bill was designed to clarify that language. It also was intended to clarify that cities, counties, quasi-municipal organizations, irrigation/conservation districts are included in the exemption.

{Tape: 2; Side: B; Approx. Counter: 16.4}

Proponents' Testimony:

Dennis Paxinos, Yellowstone County Attorney, said this was a nonpartisan issue. He said that this statute has been on the books for many years and it has been interpreted by federal courts which found that parks and corporations were not liable for injuries which had occurred on the recreational-use lands. Although they could be sued for willful and wanton misconduct, they cannot be sued for some negligent acts such as icy sidewalks or chuckholes in bike paths, as long as the land is donated and there are no charges for its use.

Charles Brooks, Yellowstone County Board of County Commissioners, Billings area Chamber of Commerce, said this is a state-wide bill. They are finding recreational facilities shrinking because of the liability factors involved. He submitted an editorial from a local newspaper for the committee's information.
EXHIBIT 17

Stan Kaleczyc, Montana Municipal Insurance Authority (MMIA), said the availability of recreational properties is a growing concern for the MMIA and the cities and towns. In addition, there are more novel offers, but the courts in the state are reluctant to recognize that the local governments have the same immunity as private property owners when land is made available at no charge for recreational purposes. The bill would resolve that problem.

John Shontz, Montana Association of Realtors, said this bill would impact private property owners and the increasing pressure for private property to be opened for recreational use in Montana.

Jim Kembel, City of Billings, asked for support of SB 211.

Bob Frazier, University of Montana Campuses, said this was a very important issue to Missoula. He cited areas it would positively affect.

REP. JOAN HURDLE, HD 13, rose in support of the bill.

Opponents' Testimony:

Russell Hill, Montana Trial Lawyers Association (MTLA), stood in conditional opposition to SB 211 and presented written testimony. He was not challenging the intent of the proponents to clarify their contention that in current Montana law governmental land owners enjoy the same protections under the existing recreational immunity statute as private owners. He outlined proposed amendments. **EXHIBIT 18**

{Tape: 2; Side: B; Approx. Counter: 45.7}

Questions From Committee Members and Responses:

REP. MC GEE referred to lines 26 and 27 of page 1 and understood that if valuable consideration had been given for the use of the property, they could be held liable. Then on the top of page 2, which referred to the $5 fee to enter state lands for the specific purpose of recreation, there was a provision for exemption from liability. It seemed contradictory.

SEN. KEATING said that was true that the $5 fee charged by the state for recreational use was specifically exempt under the language of this statute.

REP. MC GEE asked if that meant if someone were injured while using state lands for recreation, they would have yielded their right of recourse against the state through the $5 fee.

SEN. KEATING responded, "Not if the injury occurred because of willful misconduct. If the state knowingly left a hazard upon which the person was hurt, they would not be exempt from liability."

REP. MC GEE asked if they would have to prove, "knowingly."

SEN. KEATING answered that they would have to show that the state knew that that hazard was there.

REP. LIZ SMITH asked if this bill would affect the donation or unsupervised collection boxes for fees.

SEN. KEATING said that the word, "directly," would apply. A contribution is not a direct payment for recreational use. He cited the example of hunters leaving a portion of the animal on the doorstep of the farmer who allowed them the use of the land. That is not a charge by the farmer, but it is a gift or contribution, an expression of a thank you for the land use.

He said an example had to do with snowmobilers in obtaining trails must cross fee property. The fish, wildlife and parks department leases private property from individuals who receive a consideration for that lease arrangement. The owner is actually being compensated for the use of that land. That landowner is exempt because he is not receiving direct payment from the snowmobiler who recreates there.

REP. SMITH discussed hunting access examples where a private landowner receives a $25 fee.

SEN. KEATING said they would not be exempt from liability. He said there was a companion bill dealing with recreational use of agricultural land.

REP. KOTTEL asked if this bill distinguished between artificial leasing occurring conditions and naturally occurring conditions.

Mr. Hill said the major improvement which was made in the bill in the Senate was instead of completely deleting Montana's recreational-use statute and adding in new language, this decision was to amend current law. If the bill passed, he believed the first trial lawyer to become involved would say that Montana's recreational law wasn't designed for buildings or malls. The bill itself does not make that distinction between any kind of property.

REP. KOTTEL said that to her an attractive nuisance was an artificially occurring condition on a piece of property that is a danger to an infant who doesn't appreciate the risk involved. It would involve a minor cost to correct the problem and would cause serious danger to the child. She asked if they would no longer be able to bring an attractive nuisance lawsuit on recreational property.

Mr. Hill said in his opinion that was a real danger because nearly everything a child does is a recreational use. He was not sure he agreed that an attractive nuisance doctrine has to be artificially created.

REP. KOTTEL asked if in the case of someone putting up a swing set near a mine shaft on their property and a child died as a result of falling into the mine shaft, would there be no redress even though it was an artificial condition.

Mr. Hill said the only possible redress would be to argue that it was willful or wanton misconduct.

REP. KOTTEL asked where willful and wanton begins and stops in terms of simple negligence.

Mr. Hill said that willful is basically criminal, it is intended. Wanton is so grossly negligent that it is just as if it were intended. For example, if a person drove 30 miles an hour in a 15-mile-an-hour school zone, that is not wanton misconduct; but if a person drove 120 miles an hour, it would be wanton misconduct. It is flagrant disregard for the safety of others.

REP. SHIELL ANDERSON asked if **Mr. Hill** was aware of exculpatory causes and whether those had been holding up in lease hunting situations.

Mr. Hill answered that in terms of leasing out private property for hunting to private parties, he did not know the answer. He said he understood that HB 195 would address it. MTLA stood in support of that bill because it would grant immunity.

REP. SOFT asked **Mr. Paxinos** for his position on the amendments suggested by MTLA.

Mr. Paxinos spoke to the amendments.

{Tape: 3; Side: A}

REP. SOFT said he was not sure whether **Mr. Paxinos** was in agreement with the amendments.

Mr. Paxinos said he did not have a black and white answer though he could find an exception to every one of the amendments.

REP. SOFT asked if he was generally saying he did not support the amendments.

Mr. Paxinos said he guessed he was not supporting the amendments.

Closing by Sponsor:

SEN. KEATING said the proposed amendments might cause more problems than they would solve because they would restrict the intent of the bill. He felt this bill would do the most good for the most people.

Motion: **REP. ANDERSON MOVED TO ADJOURN.**

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

ADJOURNMENT

Adjournment: The meeting was adjourned at 12 noon.

Bob Clark
BOB CLARK, Chairman

Joanne Gunderson
JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 3/3/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓ 9:30	~~✓~~	
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓	9:20 ~~✓~~	
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓		
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓	9:25 ✓	
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

EXHIBIT 1
DATE 3/3/95
SB 212

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.

EXHIBIT 2
DATE 3/3/95
SB 212

JAMISON LAW FIRM
ATTORNEYS AT LAW

POWER BLOCK BUILDING, SUITE 4G
HELENA, MONTANA 59601

MONA JAMISON
STAN BRADSHAW

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

TO: House Judiciary Committee Members

FROM: Mona Jamison, Lobbyist for The Doctors' Company

RE: Senate Bill 212

DATE: March 3, 1995

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 no 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.

EXHIBIT 3
DATE 3/3/95
SB 212

Montana Trial Lawyers Association

Russell B. Hill, Executive Director
#1 N. Last Chance Gulch
Helena, Montana 59601
Tel: (406) 443-3124
Fax: (406) 443-7850

March 3, 1995

Sen. Bob Clark, Chair
House Judiciary Committee
Room 312-1, 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. No principle of justice is older or more fundamental in Western civilization than the right of a citizen to a defend herself or himself. The earliest Old Testament scriptures, for example, recognized as law:

> "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*

Last year, the Montana Supreme Court, in *Newville v. State of Montana Department of*

Family Services, 51 St.Rep. 758, invalidated the "empty chair" portions of Sec. 27-1-703, MCA, 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)

In December 1994, the Montana Supreme Court again addressed the fundamental and historical injustice of "empty chair" provisions in *Brockie v. Omo Construction,* 51 St.Rep. 1322, where three of the most conservative Justices (including the author of *Newville*) declared:

- "For this analysis, the key aspect is that *Newville* determined there could be no allocation of negligence to *non-parties.*" (*Brockie,* page 1328)

Those three Justices went on to specify in *Brockie* that a defendant who wants to blame someone else can name that third party as a co-defendant (not as a non-party)--<u>even if that third party is immune from liability to the claimant</u>--and thereby obtain an allocation of fault against that third party.

Senate Bill 212: the "empty chair." This bill mistakenly presumes (at page 1, line 11) that "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 <u>aggravate</u> 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.

And since SB 212 prohibits defendants from asserting a nonparty defense unless they comply with specific notice requirements, and since a defendant cannot possibly notify unidentified nonparties, SB 212 will operate to prohibit a defendant from ever allocating negligence to unidentified (though real) tortfeasors.

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)

In light of the repeated public testimony by the sponsor and proponents of SB 212 that the bill is a core feature of Montana's 1987 amendments to joint-and-several liability, MTLA believes that the Legislature's enactment 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.

Senate Bill 212: the work-comp employer. In the Senate Judiciary Committee, proponents of SB 212 succeeded in expanding the bill far beyond *Newville* with an amendment deleting current protections for Montana employers (page 2, lines 20-24). As the bill acknowledges (page 1, lines 17-25), the late amendments responded to another Montana Supreme Court case, *Wetch v. Unique Concrete*, 52 St.Rep. 5, decided after the 1995 Montana Legislature had already convened.

In that case, the Montana Supreme Court simply applied the 1987 statute originally enacted at the request of many of the same proponents who now support SB 212:

> "There is nothing ambiguous or unclear about the statutory language at issue. The legislature has provided that the fact finder may not "consider or determine 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." (*Wetch*, page 7)

MTLA believes, however, that SB 212 misinterprets the Court's holding in *Wetch* and threatens Montana's current workers-compensation protections for employers:

- First, the *Wetch* amendment creates a statutory conflict between Sec. 39-71-411, MCA, which provides that "an employer is *not subject to any liability whatever* for the death of or personal injury to an employee covered by the Workers Compensation Act . . ." SB 212, however, will clearly require fact-finders to consider the liability of employers (page 2, lines 17-19) and clearly require defendants to bear the burden of proof as to an employer's liability (page 3, line 11).
- Second, by expressly subjecting those employers to nonparty--and thus third-party--status, the bill will unavoidably entangle those employers in litigation. No longer will it be pointless for employees to include their immune employers in lawsuits involving workplace injuries--to the contrary, it will become essential. Employers will become subject to legal costs, attorney fees, discovery, and sanctions.
- Third, by declaring (at page 1, lines 20-22) that in *Wetch* the employer's negligence should have substantially limited the liability of the contractor, SB 212 presumably contemplates the applicability of Sec. 27-1-703(3), MCA, to the facts of that case--and therefore presumes that, even if the contractor was jointly liable for the full amount of damages, that joint liability should have been limited by contribution from the employer.

In short, MTLA believes that the *Wetch* amendment to SB 212 will compromise the exclusive remedy protections which Montana employers currently enjoy pursuant to Article II, Section 16 of the Montana Constitution and the Workers' Compensation Act.

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,

RBH

Russell B. Hill
Executive Director

EXHIBIT 3
DATE 3-3-95
SB 212

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!

EXHIBIT 4
DATE 3/3/95
SB 212

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January 31, 1995

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

Re: Senate Bill 212

Dear Senator Crippen:

I write this letter in opposition to Senate Bill 212. I am quite familiar with the Newville case and decision since I represented defendant Martha Kuipers in the trial of that action.

My major concern regarding Senate Bill 212 is its (1) fundamental unfairness and (2) discouragement of settlements. A "nonparty defense" is a new legal creature, neither a plaintiff or defendant in litigation. In the Newville case, defendant Edna Goodwin reached a settlement with the plaintiffs expecting to buy peace of mind. Unfortunately, this did not occur. She suffered additional embarrassment through newspaper reports of negligence notwithstanding her absence as a party or witness at trial. The bill is fundamentally unfair. The City of Bozeman was the other "nonparty defense" under this bill.

If any party believes another party is responsible, the existing rules of civil procedure covers all concerns raised by this Senate Bill. The "nonparty defense" provisions of this bill are fraught with inequities and will provide futile ground for future litigation, and a further wasting of valuable resources of the citizens of Montana, the insurers of Montana, and the governmental entities of Montana.

I thank you for your consideration of this letter.

Sincerely,

Mark L. Guenther

MLG:cap

EXHIBIT 5
DATE 3/3/95
SB 212

GARY L. BEISWANGER
ATTORNEY AT LAW

Rocky Village Center I
1500 Poly Drive
Billings, Montana

406-248-2694

MAILING ADDRESS:
P.O. Box 20562
Billings, MT 59104

February 3, 1995

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

Re: SB 212

Dear Bruce:

Do you, or your business, want to be held liable for damages as the result of a lawsuit in which you or your business is not a party and about which you know nothing until the judgment is rendered?

SB 212 is not a procedural change to conform to the Montana Supreme Court decision Newville v. State of Montana. SB 212 is counter to Newville. This is a dangerous bill. Please vote **NO**.

Sincerely yours,

GARY L. BEISWANGER

GLB:jb

HOWARD F. STRAUSE
Attorney at Law
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Fax (406) 771-7227

EXHIBIT 6
DATE 2/3/95
SB 212

January 30, 1995

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

Dear Senator Crippen:

I am writing to you in regard to Senate Bill 212, an amendment to Montana's Joint and Several Liability Law. I believe those amendments would not serve the people of Montana.

Let me give you an example of the past harm caused by the present Joint and Several Liability Law, which would resurface under Senate Bill 212. I represented an individual who was a passenger in a vehicle. The driver of the vehicle was a very close friend of the passenger. An accident resulted. The passenger was of the opinion and the evidence certainly indicated that the driver of the vehicle he was in, was not in any way at fault. Instead, the accident was the total fault of the other driver.

Although the Defendant in this lawsuit was able to join the other driver as a named Defendant, he did not do so. This was done for purely tactical reasons. Senate Bill 212 would allow this practice to continue.

Instead of joining the other driver as a Defendant, the Defendant chose to, at trial, blame the "empty chair". The Defendant knew that it would be much easier to blame a person who was not in the courtroom and not able to present a defense.

On the other hand, since the Plaintiff did not feel that the driver of the car in which he was a passenger was at fault, that Plaintiff could not name as a party that driver. To do so would have been a violation of Rule 11, MT.R.Civ.P. Additionally, since those two individuals were close friends, naming the driver would have had the effect of not only destroying the friendship, but cause that driver to needlessly incur attorney's fees, not to mention inconvenience and worry.

The bottom line is if a Defendant feels some other person is responsible and there are facts to support that belief, the Defendant name that person as a party. Under Montana's present law, and the *Newville* decision, a Defendant would be totally protected under these circumstances. There is no good reason to allow a Defendant to point the finger at someone else, when that Defendant decides not to name that person as a party to a lawsuit.

Sincerely yours,

Howard F. Strause

HFS/jan

EXHIBIT 7
DATE 3/3/95
SB 212

LAWRENCE A. ANDERSON

ATTORNEY AT LAW

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FAX (406) 771-7227

January 31, 1995

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

RE: SB 212

Dear Senator Crippen:

I wrote the briefs which successfully challenged the constitutionality of § 27-1-703 M.C.A. in *Newville v. State of Montana Department of Family Services*, 883 P.2d 793, 51 St.Rptr. 758 (1994). I have reviewed SB 212.

Senate Bill 212 does not correct the deficiencies which the Supreme Court found in the *Newville* case.

In addition, SB 212 should more aptly be characterized as the Lawyer's Work Relief Bill. It will ensure that Plaintiff's lawyers will have to undertake an epistemological analysis of causation and list all conceivable persons in the epistemological chain of causation as defendants. This will assure much additional work for insurance defense lawyers and other lawyers in defense of people in the epistemological chain of causation. Further, it will assure that the primary purposes of Rule 1 of the Montana Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action" will never be met in a personal injury action.

This bill will also ensure that innocent victims of wrongful conduct will go uncompensated because of the elaborate and arbitrary process guaranteed by SB 212. It will assure that wrongdoers will succeed in shifting responsibility for their wrongful conduct to the public.

Very truly yours,

Lawrence A. Anderson

LAA/hjr

cc: Eve Franklin
Chris Christiaens
Steve Doherty
Bill Wilson

EXHIBIT 8
DATE 3/3/95
SB 212

LAW OFFICES OF
ALAN J. LERNER

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Fax (406) 756-9105

January 31, 1995

The Honorable Larry L. Baer
Montana State Senator
Montana State Capitol Building
Capitol Station
Helena, MT 59620

Re: *Senate Bill No. 212*

Dear Larry:

I urge you, as a member of the Senate Judiciary Committee, to do everything in your power to kill SB 212, which has the purpose of overruling *Newville*. The bill attempts to re-establish the "empty chair" defense. I believe the bill as drafted is unconstitutional, but will not address that issue now.

The main problem with the bill is that it will make every lawsuit into a "federal case". Where a defense attorney gets a shot at muddying the waters with defendants who the jury can't see, the defense attorney will take that opportunity. For instance, assume that a citizen is driving along a Montana highway/road when he is hit from behind by another driver with adequate insurance. The at-fault driver tells his insurance company that the road was constructed or maintained in such a way as to create some danger. Even though the case against the state or county for negligent construction or maintenance of the road is not strong, the insurance company would be encouraged by SB 212 to advance such a theory. The injured citizen may not choose to pursue such a far-fetched, weak theory against the state or county for strategic and tactical reasons; namely, making it appear to the jury that his real case is weak or he is simply out to get all he can get from anyone, regardless of the fault. Under the dictates of SB 212, however, the injured citizen would be foolish not to join the state or county in the suit on the unlikely event that a jury would find some fault with the road construction or maintenance.

As is apparent, the "empty chair" defense proposed by SB 212 will needlessly increase the cost and complexity of litigation. I believe that if this bill is passed, the courts will become even more clogged than they are at the present time.

More importantly, an injured party may not be justly compensated for his or her damages due to the "empty chair" defense. The defense would allow at-fault parties to escape responsibility for their negligent acts while penalizing those who have been injured.

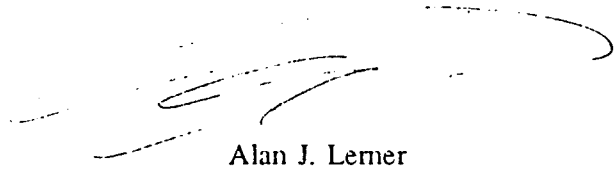
Finally, on the subject of attempting to apportion percentages of fault, there can be no objective standard. As a trial attorney with more than 20 years experience, I find it impossible to assign percentage numbers of fault to various potential defendants in any type of litigation. The process of attempting to set a percentage of fault on a responsible party is extremely misleading for the bar and jury and results in the jury guessing at numbers.

SB 212 merely discourages settlement, increases the cost and complexity of litigation, further muddies the waters, and exacerbates an already untenable, unfair and unreliable system of fault apportionment.

Thank you very much for considering my comments. I look forward to seeing you when you return from the wars. You seem to be making quite a splash in Helena. I read a lengthy and complimentary article in the Missoulian about you this morning.

See you when you get back. Best personal regards.

Very truly yours,



Alan J. Lerner

AJL/lco

EXHIBIT 9
DATE 3/3/95
SB 212

Bottomly Law Offices

Attorneys:
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Anne Biby

Lori Johnson,
Legal Assistant

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January 31, 1995

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

Re: Senate Bill 212

Dear Senator Crippen:

This is a note to register my strong opposition to Senate Bill 212. Under the guise of a mere procedural change, to conform with Montana Supreme Court's *Newville* decision, this Bill makes matters worse in almost all ways.

Accountability and responsibility are key words this year. Senate Bill 212 promotes just the opposite. It does this by protecting wrongdoers for accountability of their acts against innocent victims. It then dumps the burden, in many cases, at the foot of the taxpayers in the form of medicaid and welfare benefits which we have to pay for seriously injured victims.

Make no mistake, any defendant who has a legitimate claim against a non-party should be able to join that person as a defendant. However, to allow them to join "phantom" defendants to point fingers at is grossly unfair. (Haven't you ever seen the cartoon *Family Circle*'s depiction of the ghosts "I don't know" and "Not Me" as the ever present ghosts who stole the cookies from the cookie jar?)

Joint and several liability is perfectly fair and proper when dealing with multiple defendants, all of whom are substantially at fault. Can you imagine three bank robbers arguing to a judge that their sentence should be cut in thirds because three people participated rather than one? All but the most insignificant wrongdoers should be required to be accountable and responsible for the full damage that they caused. (This

does not prevent them from offsetting any settlements other defendants have paid or suing other defendants themselves to get contribution.)

I strongly urge you to: (1) require that if a defendant wants to defend on the basis of someone else's fault, they must name them as a party; (2) make complete joint and several liability the law when dealing with completely innocent victims; and (3) make several liability only applicable to those defendants who are truly nominal, i.e., ten percent at fault or less.

I have several cases where the injustice of this Bill would make you cringe. However, the *Newville* case itself is perhaps the best example of how responsibility and accountability can be thwarted by the use of phantom defendants' smoke and mirrors.

Sincerely,

BOTTOMLY LAW OFFICES

Joe Bottomly

JRB/lmj

EXHIBIT 10
DATE 3/3/95
SB 212

Bottomly Law Offices

Attorneys:
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January 31, 1995

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

Dear Senator Crippen:

I am writing to address my concerns about Senate Bill 212. This bill will do nothing to reduce litigation--instead, it will force parties to sue every conceivable entity involved, no matter how tangentially, in an injury. Otherwise, some defense attorneys will continually point to "the empty chair" in an effort to divert the blame for an injury onto an entity which can neither defend itself nor testify for the jury's benefit.

Our Supreme Court has already ruled that, if a defendant seeks to shift the blame to another entity, he must bring that party into the lawsuit so that the jury can make an informed decision regarding liability. Clearly from the number of defense verdicts in Montana, our juries are already cautious about assigning blame to the parties being sued.

Certainly, if a defendant genuinely believes that another entity is negligent, he will not hesitate make it a party to the lawsuit. We should be suspicious of attorneys who *want* to keep that chair empty--certainly they seek to lay the blame at the feet of some phantom party without allowing him to speak in his own defense.

I urge you to take a close look at Senate Bill 212 and the effects it will have. If a party is accused, then let him be heard.

Sincerely,

Anne Biby

Anne Biby

EXHIBIT 11
DATE 3/3/95
SB 212

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59103

Donald W. Molloy
Roberta Anner-Hughes

406- 248-7521
(Fax) 406-248-7525

January 31, 1995

Senator Bruce Crippen
Senate Judiciary Committee
Room 325
State Capitol
Helena, MT 59620

Dear Senator Crippen,

I am writing in regard to Senate Bill 212. I am writing as a mother, a citizen, and a trial lawyer, in that order. Senate Bill 212 could result in far more harm than good. The provisions which allow Defendants to attempt to blame non-parties will only add to judicial problems, not resolve them.

I generally consider legislation by considering scenarios of what could take place should something happen to my own children. If you pass this law, it will allow wrongdoers to simply point their fingers to another person, someone who isn't even in the room. Frankly it is the type of behavior that we discourage as parents, and will not tolerate as adults. If my child is seriously injured or killed through another's negligence, that wrongdoer can point to someone else as the cause, without ever calling that person to the stand or seating that person in a courtroom.

The bill says, ". . . the trier of fact shall consider the negligence of nonparties. . ." My first question is how? How can anyone consider the negligence of another when there is no one to defend that position, or cross-examine that position?

As a lawyer, I believe the bill will only keep people from settling lawsuits, something none of us want. Our profession is much maligned these days and I think it is something each of us needs to consider. However, by passing this bill, we are encouraging non-settlement and game playing. Stopping this bill would be a step in the right direction.

I appreciate your work in Helena. I only ask that you think of individual Montana citizens when you vote. I would urge you not to pass Senate Bill 212.

Sincerely,

MOLLOY LAW OFFICES

Roberta Anner-Hughes

EXHIBIT 12
DATE 3/3/95
SB 212

Joe Arvizu Rodriguez
ATTORNEY AT LAW

P.O. BOX 820
LAME DEER, MONTANA 59043
TELEPHONE: 406/477-6315
FAX: 406/477-8361

February 1, 1995

Russell B. Hill
Executive Director
MTLA
Helena, MT 59601

RE: Senate Bill 212

Dear Mr. Hill:

Pursuant to your request, enclosed please find two (2) letters to both Bruce Crippen and Reiny Jabs.

Please feel free to contact my office if I may be of further assistance regarding this bill.

Sincerely,

JOE A. RODRIGUEZ
Attorney At Law

JAR/bf

enclosures

Joe Arvizu Rodriguez

ATTORNEY AT LAW

P.O. BOX 820
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TELEPHONE: 406/477-6315
FAX: 406/477-8361

January 31, 1995

Sen. Reiny Jabs
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: Senate Bill 212

Dear Senator Jabs:

As a lawyer servicing rural Montanans, I have encountered situations where the "empty chair" provisions of Montana's 1987 joint/several amendments, Section 27-1-703 (4), MCA, have devastated rural working class people.

In one case in particular, the evidence against the corporate defendant was so extensive and soundly supported by evidence at trial, that the Judge commented during jury deliberations that he was certain we would return to Court for the calculation of damages phase of the trial. Everyone was taken aback by the jury's finding of no negligence by the defendant.

The defendant was able to try the case against non-parties and convince the jury that everyone but the defendant was guilty. The evidence demonstrated that the corporate defendant, a tavern, sold well over a dozen alcoholic beverages to an already obviously intoxicated individual. This person later killed herself and two other innocent motorists in a tragic motor vehicle accident.

Rather than curing the deficiencies of 27-1-703 (4) MCA, SB 212, would serve to make such inequitable legal results more easily obtained by wealthy defendants.

I believe that SB 212 will not benefit working class and rural Montanans, and I urge you to oppose this measure.

Sincerely,

JOE A. RODRIGUEZ
Attorney At Law

JAR/bf

EXHIBIT 12
DATE 3-3-95
SB 212

Joe Arvizu Rodriguez
ATTORNEY AT LAW

P.O. BOX 820
LAME DEER, MONTANA 59043
TELEPHONE: 406/477-6315
FAX: 406/477-8361

January 31, 1995

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

RE: Senate Bill 212

Dear Senator Crippen:

As a lawyer servicing rural Montanans, I have encountered situations where the "empty chair" provisions of Montana's 1987 joint/several amendments, Section 27-1-703 (4), MCA, have devastated rural working class people.

In one case in particular, the evidence against the corporate defendant was so extensive and soundly supported by evidence at trial, that the Judge commented during jury deliberations that he was certain we would return to Court for the calculation of damages phase of the trial. Everyone was taken aback by the jury's finding of no negligence by the defendant.

The defendant was able to try the case against non-parties and convince the jury that everyone but the defendant was guilty. The evidence demonstrated that the corporate defendant, a tavern, sold well over a dozen alcoholic beverages to an already obviously intoxicated individual. This person later killed herself and two other innocent motorists in a tragic motor vehicle accident.

Rather than curing the deficiencies of 27-1-703 (4) MCA, SB 212, would serve to make such inequitable legal results more easily obtained by wealthy defendants.

I believe that SB 212 will not benefit working class and rural Montanans, and I urge you to oppose this measure.

Sincerely,

JOE A. RODRIGUEZ
Attorney At Law

JAR/bf

EXHIBIT 13
DATE 3/3/95
SB 212

Joan Jonkel Attorney At Law
250 Station Drive
Box 8687
Missoula, MT 59807
406/721-1835

January 30, 1995

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

Dear Senator Crippen:

I am writing to urge you not to support SB 212.

Far from clarifying the situation with regard to Section 27-1-703 MCA, this bill will further complicate matters and encourage additional lawsuits instead of equitable settlements.

Thank you.

Very truly yours,

Joan Jonkel

JOAN JONKEL

JJ/rc

EXHIBIT 14
DATE 3/3/95
SB 212

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January 27, 1995

Senator Gary Forrester
Montana Legislature
Montana State Capitol
Capitol Station
Helena MT 59620

Dear Senator Gary:

I recently noted that you are signed on as sponsor of SB 212.

I hope that you will reconsider. This bill is a disaster. I would like the opportunity to talk with you about it.

Senate Bill 212 is going to create terrible conflicts and have a significant impact on innocent people. I urge you to withdraw your support of this bill. Again, I certainly would like the opportunity to visit with you about it.

Is there some time I can come to Helena to visit you about this bill?

Sincerely,

MOLLOY LAW OFFICES

Donald W. Molloy

DWM:sp

bcc Russ Hill

General Practice
Emphasizing Family Law

James D. Elshoff

EXHIBIT 15
DATE 3/3/95
SB 286

9 Third Street N, Suite 305
(406) 453-4343

Attorney at Law
Author: "Montana Family Law Handbook"

P.O. Box 53
Great Falls, MT 59403

March 3, 1995

House Judiciary Committee
Room 312-1, Montana House
Capitol Bldg., Helena, MT 59620

Hon. Representatives:

My argument today is in favor of your passing SB-286.

Section 40-4-110, MCA (1993), provides for attorney fees in proceedings for dissolution of marriage, legal separation, division of property, child custody, visitation, child support, and health insurance.

However, Montana's Uniform Parentage Act, §§ 40-6-101 through 40-6-303, MCA (1993), contains no provision for attorney fees or court costs. This point was stressed recently in ***In re the Paternity of W.L.*** (1993), 259 Mont. 187, 855 P.2d 521, 50 St. Rep. 751.

ARGUMENT IN FAVOR OF ENACTING A STATUTE FOR ATTORNEY FEES AND COURT COSTS:

Women who are pregnant and must retain an attorney to prosecute a paternity action in order to receive child support, are thus treated differently than married women; this may create a suspect classification of persons, violative of the equal protection clause of the U.S. Constitution.

- blood tests cost approx. $150.00 per person for all three persons--child, mother, and alleged father.
- the mother must pay these costs up front, since no presumption of paternity exists as with married women.
- as an infant's blood cannot be drawn until the infant is at least six (6) months of age, the mother is put to a substantial period of non-support, eventually creating arrearages.
- the current filing fee for a paternity action is $90.00.
- the current decree fee for a paternity action is $45.00.
- an average contested paternity case consumes at least five (5) hours of attorney time.

- average attorney fees are approx. $90.00 per hour.

Thus, an unmarried woman in an average paternity case is likely to incur the following costs:

attorney fees:	$ 450.00
filing fee:	90.00
service of process:	20.00
blood test costs:	450.00
decree fee:	45.00
	========
Total:	$ 1,055.00

In ***State of Arizona v. Sasse*** (1990), 245 Mont. 340, 801 P.2d 598, 47 St. Rep. 2171, the Montana Supreme Court held unconstitutional, § 40-6-108(1)(b), MCA, which placed a 5-year limit on actions to declare the non-existence of the father-child relationship. The Court's reasoning was that such a bar created a classification distinguishing children with presumed fathers from children without presumed fathers.

The current version of Montana's Uniform Parentage Act, as can be seen by the result in ***W.L.***, supra, establishes that same suspect classification, by depriving children of non-marital relationships of the support to which they are entitled. The duty of support begins at conception, and necessarily includes regular medical checkups, birthing expenses, delivery, and post-natal care.

The discrimination here, however, further extends to the mothers. They are the ones who must front the monies to prosecute a paternity action. If they are unable to bring their action with a view to being reimbursed for attorney fees and court costs, they may likely be relegated to the welfare rolls.

In two (2) cases, the Montana Supreme Court held that if the effect of denying maintenance to a spouse in need would render (her) a ward of the State, then the trial court should award maintenance. ***In re the Marriage of D.C. v. M.C.*** (1981), 195 Mont. 505, 636 P.2d 857, 38 St. Rep. 2027; ***Stenberg v. Stenberg*** (1973), 161 Mont. 164, 505 P.2d 110.

I believe ***D.C.*** and ***Stenberg*** can be analogized here: if the effect of denying attorney fees and court costs is to relegate mothers to the welfare rolls, then fees and costs ought to be recoverable.

EXHIBIT 15
DATE 3-3-95
SB 286

PROPOSED LANGUAGE:

Section 40-6-___, MCA:

> "**Attorney fees -- costs.** (1) In any action or proceeding brought pursuant to this chapter, the district court shall award reasonable attorney fees to the prevailing party, for maintaining or defending such action or proceeding, including sums for legal services rendered and guardian ad litem fees, incurred, and costs incurred prior to the commencement of the proceeding or after entry of judgment. The Court may order that the amount be paid directly to the attorney, who may enforce the order in his or her own name.
>
> (2) In any action or proceeding brought pursuant to this chapter, the district court shall award costs of the action, including reasonable costs for blood tests and for service of process; for lost wages, and for reasonable medical expenses incurred incident to the pregnancy."

CURRENT LANGUAGE OF § 16, UNIFORM PARENTAGE ACT:

> "The court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including blood tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by [appropriate public authority]."

As can be seen by the attached copy of § 16 of the Uniform Parentage Act, the several states which adopted that section did not do so uniformly, but omitted certain phrases, or modified them.

Montana has not adopted that section at all, and such non-adoption has left a gaping hole in the remedies which would restore the aggrieved party to whole.

Further, as a policy issue, the requirement to pay attorney fees and costs might discourage more responsibility on the part of would-be parents, and lower relegation to the welfare rolls.

Respectfully submitted,

James D. Elshoff

whose contract and tort counterclaims based on mother's failure to use birth control devices had been dismissed from paternity action. Linda D. v. Fritz C., 1984, 687 P.2d 223, 38 Wash.App. 288.

Illegitimate children have the same judicially enforceable right to support as do legitimate children. People in Interest of S. P. B., Colo. 1982, 651 P.2d 1213.

In paternity action brought by mother and child, evidence was sufficient to support the award of $10,000 back child support. Nettles v. Beckley, 1982, 648 P.2d 508, 32 Wash.App. 606.

8. Record of proceedings

Trial court after informal hearing entered its "judgment" determining paternity and temporary custody in violation of statutes requiring that record of proceedings be kept, and that recommendation for settlement be made by court, and thus the judgment was void and of no force and effect. Matter of TRG, Wyo.1983, 665 P.2d 491.

9. Res judicata

Judgment of domestic relations court declaring that child was issue of marriage between child's mother and her husband was not res judicata to action brought by putative father in juvenile court pursuant to R.C. §§ 3111.04, 3111.06(A) to determine paternity of child, absent showing that putative father was in privity with parties or persons in privity and identity of issues in divorce proceeding. Gatt v. Gedeon, 1984, 485 N.E.2d 1059, 20 Ohio App.3d 285, 20 O.B.R. 376.

Initial determination of custody in paternity proceeding was res judicata even though parties were living together at time and did not dispute or litigate custody. Knutson v. Primeau, Minn.App.1985, 371 N.W.2d 582.

10. Review

In action brought under Uniform Parentage Act, role of Supreme Court in reviewing trial court's findings regarding visitation rights is to determine whether or not such findings are clearly erroneous. C.B.D. v. W.E.B., N.D.1980, 298 N.W.2d 493.

District court's determination under Uniform Parentage Act on matter of child support is treated as finding of fact and will not be set aside by court on appeal unless it is clearly erroneous. Id.

Bastardy act of Washington territory was properly reviewable by state Supreme Court as successor to Territorial Supreme Court, and was properly invalidated by State Supreme Court, and thus statute which requires that paternity suits be tried to the court did not violate constitutional article which guarantees right of trial by jury on basis that since territorial bastardy act was enacted in penal rather than civil code, right to jury trial in filiation actions was included when State Constitution was enacted. State ex rel. Goodner v. Speed, 1982, 640 P.2d 13, 96 Wash.2d 838, certiorari denied 103 S.Ct. 140, 459 U.S. 863, 74 L.Ed.2d 119.

§ 16. [Costs]

The court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including blood tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by [appropriate public authority].

COMMENT

This allows the court to apportion the cost of litigation among the parties or, if a party is indigent, charge it to the appropriate public authority.

Action In Adopting Jurisdictions

Variations from Official Text:

California. Omits last sentence.

Colorado. Omits last sentence.

Hawaii. Substitutes "the State, or such person as the court shall direct" for "[appropriate public authority]".

Minnesota. Provisions relating to the subject matter of sections 16 and 19 of the Uni-

form Act are combined in one section of the Minnesota act, which reads as follows:

257.69 Right to counsel; costs; free transcript on appeal.

"Subdivision 1. In all proceedings under sections 257.51 to 257.74, any party may be represented by counsel. If the public authority charged by law with support of a child is a party, the county attorney shall represent the public authority. If the child receives public assistance and no conflict of interest exists, the county attorney shall also represent the custodial parent. If a conflict of interest exists, the court shall appoint counsel for the custodial parent at no cost to the parent. If the child does not receive public assistance, the county attorney may represent the custodial parent at the parent's request. The court shall appoint counsel for a party who is unable to pay timely for counsel in proceedings under sections 257.51 to 257.74.

"Subd. 2. The court may order expert witness and guardian ad litem fees and other costs of the trial and pre-trial proceedings, including appropriate tests, to be paid by the parties in proportions and at times determined by the court. The court shall require a party to pay part of the fees of court-appointed counsel according to the party's ability to pay, but if counsel has been appointed the appropriate agency shall pay the party's proportion of all other fees and costs. The agency responsible for child support enforcement shall pay the fees and costs for blood tests in a proceeding in which it is a party, is the real party in interest, or is acting on behalf of the child. However, at the close of a proceeding in which paternity has been established under sections 257.51 to 257.74, the court shall order the adjudicated father to reimburse the public agency, if the court finds he has sufficient resources to pay the costs of the blood tests. When a party bringing an action is represented by the county attorney, no filing fee shall be paid to the clerk of court.

"Subd. 3. If a party is financially unable to pay the cost of a transcript, the court shall furnish on request a transcript for purposes of appeal."

Montana. Omits this section.

Wyoming. Omits last sentence.

Library References

Children Out-of-Wedlock ⇐75.
C.J.S. Bastards § 137 et seq.

WESTLAW Electronic Research

See WESTLAW guide following the Explanation pages of this volume.

Notes of Decisions

1. Blood tests

In a civil paternity suit where an indigent defendant's motion for blood tests had been granted, the indigent is entitled to have the compensation of the expert conducting the tests paid initially by the county; the compensation of the appointed expert shall be fixed by the court and ordered paid by the county, subject to being later taxable to the parties as costs in the action. Michael B. v. Superior Court of Stanislaus County, 1978, 150 Cal.Rptr. 586, 86 C.A.3d 1006.

§ 17. [Enforcement of Judgment or Order]

(a) If existence of the father and child relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated under this Act or under prior law, the obligation of the father may be enforced in the same or other proceedings by the mother, the child, the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, support, or funeral, or by any other person, including a private agency, to the extent he has furnished or is furnishing these expenses.

(b) The court may order support payments to be made to the mother, the clerk of the court, or a person, corporation, or agency designated to administer them for the benefit of the child under the supervision of the court.

child relationship was not time barred. State of Ga. ex rel. Brooks v. Braswell, Minn.1991, 474 N.W.2d 346.

Uniform Parentage Act does not preclude application of doctrine of res judicata to determine parentage. State ex rel. Daniels v. Daniels, Colo.App.1991, 817 P.2d 632.

Under doctrine of res judicata, divorce decree which specifically found that two children were born as issue of marriage was bar to husband's proceeding under Parentage Act for determination of nonexistence of parent-child relationship; husband and mother were identical parties in divorce proceeding, divorce proceeding dealt with question of paternity and both district court and parties found that son and daughter were born of marriage, question of paternity was directly related to final adjudication of divorce proceedings, and both husband and mother had same fundamental interests in determination of paternity in divorce proceeding. Matter of Paternity of JRW, Wyo.1991, 814 P.2d 1256.

Res judicata did not bar child from bringing paternity action under Uniform Parentage Act, although child's mother had brought unsuccessful paternity action against same putative father pursuant to prior paternity statute; child was not substantially identical party as mother and was not in privity with mother since child had different interests in establishing existence of paternity. Ex parte Snow, Ala.1987, 508 So.2d 266, on remand 508 So.2d 269.

9a. Estoppel

Adjudication in dissolution or annulment action concerning paternity of child estops husband or wife from raising that issue in any subsequent action or proceeding. In re Marriage of Holland, 1986, 730 P.2d 410, 414 Mont. 224.

9b. Collateral attack

Former husband's failure to raise defense of nonpaternity during dissolution proceedings in which child support orders were issued barred him from collaterally attacking the determination of paternity which implicitly supported the award of child support incident to that proceeding. State ex rel. Daniels v. Daniels, Colo.App.1991, 817 P.2d 632.

9c. Prejudgment interest

Mother's claim in paternity action to recover past expenditures for child born out of wedlock was unliquidated and did not earn prejudgment interest; amount due was contingent upon court's determination as to father's liability for past support. R.E.M. v. R.C.M., Mo.App.1991, 804 S.W.2d 813.

10. Review

Whether requested name change is in the best interest of minor child is factual determination for the trial court but, when facts are presented by stipulations, affidavits, and other documentary material, appellate court may draw its own conclusions from the evidence. D.K.W. v. J.L.B., Colo.App.1990, 807 P.2d 1222.

Although dismissal of paternity action brought pursuant to Alabama Uniform Parentage Act as part of multiparty, multi-claim action constituted final judgment for purposes of appeal under Rule 54(b), appeal was dismissed due to absence of Rule 54(b) certification, rather than remanded, where appeal was filed outside 14-day period, and record did not reflect that paternity case was properly joined with divorce action or required waivers of right to jury trial by all parties. C.L.D. v. D.D., Ala.Civ.App.1991, 575 So.2d 1140.

§ 16. [Costs].

Action in Adopting Jurisdictions

Variations from Official Text:

Colorado. In first sentence, substitutes "shall order" for "may order".

Hawaii. Substitutes "genetic tests" for "blood tests".

New Mexico. Section reads: "The court may order reasonable fees of counsel, experts, the child's guardian and other costs of the action and pre-trial proceedings, including blood or genetic tests, to be paid by any party in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid from court funds."

North Dakota. Substitutes "genetic tests" for "blood tests".

Wyoming. Substitutes "genetic tests" for "blood tests".

Notes of Decisions

1. Blood tests

In paternity action in which results of genetic testing clearly excluded indigent putative father as natural father of child, costs of genetic testing were properly taxable against mother and would thus be paid by county child support agency under statute authorizing payment of court costs by local social service agency when custodian was recipient of Aid for Dependent Children and defendant was found to be indigent. Little v. Stoops, 1989, 585 N.E.2d 475, 65 Ohio App.3d 758.

After father established paternity, trial court abused its discretion in awarding him $408 as costs for blood tests in absence of any record evidence as to actual costs of tests; although father had attempted to introduce report of tests into evidence, it was excluded because it had not been designated as exhibit pursuant to pretrial order. Matter of SAJ, Wyo.1989, 781 P.2d 528.

2. Attorney's fees

Mother was entitled to attorney fees and costs to establish paternity, even though neither father nor mother had much more than minimal assets; father contested paternity even after first blood test establishing paternity and had higher net income, and mother had custody of child and incurred further costs, even though motion for summary judgment was confessed after results of second blood test. Carnes v. Dressen, Ill.App. 4 Dist.1991, 574 N.E.2d 845.

Awarding attorney fees to mother who prevailed in paternity action was not an abuse of discretion, even though putative father argued that he was financially unable to pay mother's attorney fees; there was no error in procedure in awarding such attorney fees where court received extensive evidence concerning both parties' relative income and living expenses and about amount of time and labor mother's attorney put into the case; and as to that court thought fees were mandatory when mother prevailed; trial court's comment that mother, having prevailed, was entitled to attorney fees meant that court, in its discretion, determined mother to be entitled to fees after she prevailed. Jiles v. Spratt, 4 Dist.1990, 142 Ill.Dec. 21, 552 N.E.2d 371, 195 Ill.App.3d 354.

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Fee-shifting provision of Illinois Parentage Act did not extend to attorney fees incurred by mother in successfully defending putative father's appeal of paternity judgment, notwithstanding mother's contention that term "action" in provision was broad enough to include appeals. Brezinsky v. Chervinko, 1989, 139 Ill.Dec. 203, 545 N.E.2d 588, 192 Ill.App.3d 124.

Application for fees filed by attorney who represented mother in proceeding for visitation brought by father under Parentage Act should have been made in pending parentage proceeding and could not, during period of that proceeding, be brought as new action in another court. Gitlin v. Hartmann, 1988, 125 Ill.Dec. 426, 530 N.E.2d 584, 175 Ill.App.3d 805.

Award of attorney fees and expenses at trial of paternity action is a matter of trial court's discretion and will not be disturbed absent abuse of that discretion. J.L.B. v. T.E.B., Minn.App.1991, 474 N.W.2d 599.

Appointment of counsel for father in paternity proceeding was a condition precedent to any obligation of the Department of Health and Social Services to assume the cost of representation. State By and Through Dept. of Family Services v. Jennings, Wyo.1991, 818 P.2d 1149.

Court's award of attorney fees of $975 to mother in action to modify child support payments was proper based upon evaluation of resources of parties and fact that fees represented less than half of legal expenses incurred by mother. Pippins v. Jankelson, Wash.1988, 754 P.2d 105, 110 Wash.2d 475.

3. Appellate fees

Award of appellate fees rests within discretion of Court of Appeals on appeal of paternity action. J.L.B. v. T.E.B., Minn.App.1991, 474 N.W.2d 599.

§ 17. [Enforcement of Judgment or Order].

Action in Adopting Jurisdictions

Variations from Official Text:

California. In subsec. (c), second sentence reads: "All remedies for the enforcement of judgments, including imprisonment for contempt, apply."

New Mexico. In subsec. (a), substitutes "any interested party" for remaining text following "other proceedings by".

Subsec. (b) reads: "The ~~court may order support pay~~ments to be made to the mother; the clerk of the court; or a person, corporation or agency designated to collect or administer such funds for the benefit of the child, upon such terms as the court deems appropriate."

§ 18. [Modification of Judgment or Order].

Action in Adopting Jurisdictions

Variations from Official Text:

California. Section now reads: "The court has continuing jurisdiction to modify a judgment or order made under this part. A judgment or order relating to an adoption may only be modified in the same manner and under the same conditions as a decree of adoption may be modified under Section 228.10 or 228.15."

Colorado. Designates Official Text provisions as subsec. (1), and adds a subsec. (2) which reads: "The court may modify an order of support only in accordance with the provisions of and the standard for modification in section 14-10-122, C.R.S."

Hawaii. Designates Official Text provisions as subsec. (a), and adds a subsec. (b) which reads: "(b) In those cases where child support payments are to continue due to the adult child's pursuance of education, the child support enforcement agency, three months prior to the adult child's nineteenth birthday, shall send notice by regular mail to the adult child and the custodial parent that prospective child support will be suspended unless proof is provided by the custodial parent or adult child, to the child support enforcement agency, prior to the child's nineteenth birthday, that the child is presently enrolled as a full-time student in school or has been accepted into and the plans to attend as a full-time student for the next semester a post-high school university, college or vocational school. If the custodial parent or adult child fails to do so, prospective child support payments may be automatically suspended by the child support enforcement agency, hearings officer, or court upon the child reaching the age of nineteen years. In addition, if applicable, the agency, hearings officer, or court may issue an order terminating existing assignments against the responsible parent's income and income assignment orders."

New Mexico. Section reads: "The court has continuing jurisdiction to modify or revoke a judgment or order for future support."

Wyoming. The provisions of W.S.1977 § 14-2-113(f), set out in the variation note in the main volume, now read: "(f) The court has continuing jurisdiction to modify a judgment or order made pursuant to W.S. 14-2-101 through 14-2-120. Provisions respecting support may be modified only upon a showing of a substantial and material change in circumstances. If any order of support provides for periodic payments or installments to the clerk of court, any amount unpaid at the time it is due shall become a judgment by operation of law. An order for child support is not subject to retroactive modification except the order may be modified with respect to any period during which a petition for modification is pending, but only from the date notice of that petition was given to the obligee, if the obligor is the petitioner, or to the obligor, if the obligee is the petitioner."

Notes of Decisions

½. Construction with other laws

Best interests of the child standard for modification of a child support order under the Parentage Act, is different than the material change in circumstances standard under the statute applicable to divorced parents. State ex rel. Dix v. Plank, 1989, 780 P.2d 171, 14 Kan.App.2d 12.

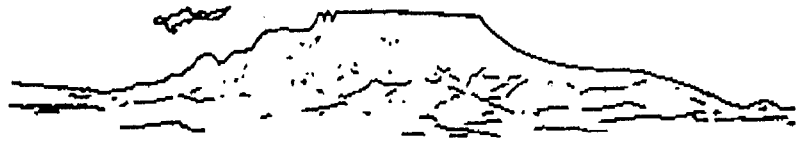

EXHIBIT 16
DATE 3/3/95
SB 192

Hubble & Ridgeway

Attorneys at Law

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Fax (406) 566-2612

March 2, 1995

Senator Fred Van Valkenburg
Montana State Senate
Helena, MT 59601

BY FAX
Fax Number 444-4057

RE: Senate Bill 192

Dear Senator Van Valkenburg:

I am truly sorry prior commitments prevent me from testifying in the House Judiciary Committee regarding Senate Bill 192. However, I request that you read this letter to the committee on my behalf as I strongly support the bill.

I am a lawyer in Stanford, Montana. I am also the part time County Attorney for Judith Basin County. During 1994, several things happened in Judith Basin County which brought me into close contact with the County Prosecutorial Services Bureau of the Montana Attorney General's Office.

First, the Department of Fish Wildlife and Parks concluded a successful undercover operation concerning the activities of an outfitter in the Little Belt Mountains in Judith Basin County. In mid March, the Department conducted a major raid in Judith Basin County resulting in the arrests of seven people. Ultimately, I filed charges against nine people consisting of approximately 100 counts.

Second, on March 27, 1994 Judith Basin County had its first murder in nearly 50 years when a ranch hand killed his boss, Wayne Stevenson, one of the most prominent Angus breeders in the world. That case brought immediate, intense national media attention on Judith Basin County. These two major incidents, occurring within a matter of days of each other, taxed our county's resources to the breaking point.

However, John Connor called me just a day or so after Wayne Stevenson's murder to offer us help. I didn't know what to

expect, having had no reason to previously use the services of his department. Still, I knew I needed whatever help I could get. John immediately dispatched Bob Fairchild and Ward McKay of the Criminal Investigation Bureau to Stanford. They both pitched in and provided invaluable service which allowed us to essentially solve the case in a matter of a few days.

At the same time, I decided that I had a conflict of interest which would prevent me from prosecuting Mr. Stevenson's killer. I therefore disqualified myself and asked John Connor to appoint someone to take over the prosecution. Mr. Connor appointed himself and Betsy Horsman-Witala. They took the case over and pressed the prosecution forward with the result that Mr. Stevenson's killer was convicted in November and will probably be in the Montana State Prison for the rest of his life.

I can't help but compare that case to the Simpson case now going on in California. The murders occurred at the same time, but our killer is convicted and in prison. In spite of dozens of lawyers working on the case, and maybe because of them, the Simpson case will apparently go on for months and months with no resolution in sight.

Montana's successful prosecution of Wayne Stevenson's murderer, and many others in recent years, is a direct result of the skill, dedication, and good lawyering of John Connor and the people he supervises in the Department of Justice.

At the same time John was taking over the Stevenson murder case, I realized I was in over my head on the fish and game cases. I again asked John to appoint someone to help me. John appointed Paul Johnson. With Paul's invaluable assistance, we have been able to obtain convictions in six of the cases with three cases still pending resolution, but which I am sure will result in convictions.

I guess the point of my letter is that the people of Montana are indeed fortunate to have excellent people like John Connor, Betsy Horsman-Witala, Paul Johnson, Ward McKay, and Bob Fairchild, and all of the other folks in the Department of Justice and the County Prosecutorial Services Bureau working on their behalf. Their work reflects great credit on themselves, the Department of Justice, and the State of Montana.

I fully and wholeheartedly support Senate Bill 192 which will provide a salary to the head of the County Prosecutorial Services Bureau which is commensurate with the duties, responsibilities,

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SB 192

and the performance of the incumbent. I urge the committee to approve the bill and I urge the full House to approve it.

Thank you.

Sincerely,

JAMES A. HUBBLE

JAH:cr

Proposal key to BikeNet

Call the Legislature and expresss your support of Senate Bill-211

2/1/95

Billings Gazette Feb 01 1995

LITIGATION IS TYING this nation in knots.

Propose a recreational project, public or private, and watch the fear grow. Finally, comes the question: "What's the liability?" The question is well warranted. People are too quick to drop their own irresponsibility into the nearest deep pocket.

So recreational opportunities are, for good reason, shrinking. But now there is a bill before the Legislature that offers hope.

The purpose of Senate Bill 211 is "to encourage owners of public and private property to make the property available to the public for recreational purposes by limiting the owner's liability toward persons entering upon the property and toward persons who may be injured or otherwise damaged by the acts or omissions of persons who enter upon the property."

This bill is long overdue. It suggests that if a hunter asks to hunt on private land and then shoots himself in the foot, the responsibility for his carelessness stays on his shoulders where it belongs.

This does not force landowners to open their land. It only allows protection to those amenable to open their land. It applies only to those lands for which there is no commercial charge.

Billings and Yellowstone County are working to build BikeNet, a series of pedestrian and bicycle paths around Billings that will offer our children safe passage, that will offer Billings families golden days in the sun. Passage of SB-211 is a key to that dream.

So call 1-406-444-4800 and leave a message for your senator. Urge him or her to vote for the bill. Do your part to help open doors in Montana to a better world.

They caused difficulties for working parents. And they weren't much fun for the teachers and their families, either.

But I don't recall any president of the United States saying that he could not stand by while children were being deprived of their book learning and households were being disrupted.

These strikes were a local governmental labor dispute — none of the federal government's business — and they were settled by local officials and unions.

Although unions have declined in strength and membership, strikes are not a novelty. And when they happen, somebody inevitably suffers. The workers and their families don't have paychecks. The business being struck might take a painful hit to its profits.

And there is always a ripple effect to a strike. The striking workers have less money to spend with local merchants. Suppliers of the company that is struck lose business.

But unless it creates a national emergency — and few strikes do — the president of the United States doesn't an-

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SB 211

failing to notice that we were expe
ing a national emergency.

Although I'm a baseball fan, I
aware that my loved ones or I wo
in any grave danger if we could
Sammy Sosa flail at a high inside fa

It was a lot more worrisome
the Chicago firemen walked out
discovered that my garden hose ha
eral leaks.

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sce frazzled mothers on TV. Appa
their suffering isn't as severe as
some grinning patron of a sports ba

I'm sure that the baseball st

■ A FUNDAMENTAL DEBATE

Governmentrevie

Time is perfect to correct this nation's course

COMMENTARY

David Broder

National columnist

WASHINGTON IS experiencing a "back-to-the-basics" movement that can carry great benefits for the country — if it is sustained at the level of seriousness it requires. Fundamental questions about the Constitution and the role of government are being debated in a way that has not happened in generations.

The House Republicans deserve credit for starting the process with their Contract With America, a dead-aim assault on the assumptions of the welfare state. It has been broadened by the new Republican majority among the nation's governors and now the Senate has been dragged into the fight as well. Some Democrats are beginning to speak up on their side of the argument. While one could wish for a more assertive stance on the part of the president, the ingredients are almost all in place for a good national discussion of these questions.

This is the right time for such a test of ideas to occur. As President Clinton has said, the New Deal, World War II and the Cold War — the defining experiences of the last six decades — are over. The generation of politicians shaped by those events has yielded power to its sons and daughters. A new millennium is only five years away. If we in the news media do our part in communicating the arguments with force and clarity, the people of this country will really have a chance to render their verdict on what kind of nation this will be.

As Gov. Mike Leavitt (R) of Utah
ed out in an interview last week, 18
have Democratic legislatures, 19
Republican legislatures and the r
der are split. Most of the citie
Democratic mayors; most of the
Republican governors. Congress
publican, but the Democrats ho
White House. No single party can
nate the debate.

Leavitt and Nebraska Gov. E
jamin Nelson (D) are organizir
part of the process. It is a Confer
the States, where the 50 governc
bipartisan delegations from each
lature will meet twice this year to
structural proposals for constit
changes aimed at "redressing th
ance" between the national gove
and the states.

Anyone who wants to und
why the moment is right need on
the new Chatham House pap
"The Rebirth of Federalism," by
B. Walker of the University of Co
cut, a longtime student of inter
mental relations. His summary
forces that have made the nation
ernment dominant in the federal
and that have bred the "rampa
trust" that now pervades all le
government tells you why the gov
project could not be more timely.

EXHIBIT 18
DATE 3/3/95
SB 211

Montana Trial Lawyers Association

Russell B. Hill, Executive Director
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March 3, 1995

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

RE: Senate Bill 211

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to Senate Bill 211, which dramatically alters current Montana law regarding recreational-use immunity.

Background. This bill apparently responds to a preliminary ruling by a Billings judge in a lawsuit which the City of Billings subsequently won. That ruling was never appealed and has no precedential authority. It certainly does not upset current Montana law, which already extends recreational-use immunity to governmental landowners. See, for example, *Fisher v. U.S.*, 534 F.Supp 514 (1982), in which a federal district court applying Montana law ruled that the government, as owner of the Lee Metcalf National Wildlife Refuge, was immunized by Montana's recreational-use statute from liability for a young girl who died on an educational field trip when a raised snowplow blade fell.

With such slim justification, however, SB 211 proposes to overhaul Montana's current recreational-use statute, Sec. 70-16-302, MCA, and seriously complicate well-settled law regarding "landowners" and "property." Where previous Montana Legislatures have enacted laws encouraging landowners to make natural, undeveloped land accessible to Montanans for recreation without charge, the proponents of SB 211 are asking this Legislature to enact a law which grants immunity to landowners ***regardless of the character of the property, and regardless of the public's right already to access the property.*** In doing so, the bill also severely disables Montana's long-held "attractive nuisance" doctrine which protects small children from attractive dangers.

Senate Bill 211. This bill uses incredibly broad and imprecise language to exempt federal and state governments, commercial enterprises, and urban property owners from

accountability for their carelessness:

- The expansive definition of a property "owner" (page 2, lines 2-5) now genuinely includes "a person or entity of any nature": not just private citizens or governments which actually own land, but also tenants, occupants, lessees, and anyone else in control of property or using property. ***In fact, many so-called recreationists prejudiced by SB 211 will actually be owners injured by the carelessness of someone else "in control of" their property.***

- The expansive definition of "property" (page 2, lines 6-7) no longer includes just natural, undeveloped land which an owner cannot reasonably maintain in a safe condition for recreationists. The definition of "property" now includes governmental and business property which is extensively developed and requires constant maintenance: ***highways, shopping centers, amusement parks, movie theaters, sports stadiums, health clubs, racetracks, indeed everything "on" land.*** Regardless of the limited intent of proponents, SB 211 extends immunity to vast new circumstances involving "recreational purposes."

- The existing definition of "recreational purposes" (page 1, lines 16-19) clearly contemplates only outdoor activities in primarily natural settings. But by expanding the scope of "landowner" and "property" so dramatically, SB 211 threatens the current interpretation of such terms in this section as "pleasure driving," "touring or viewing cultural and historical sites and monuments," and "other pleasure expeditions." To help prevent SB 211 from mutating far beyond its proponents intentions--from reaching such "recreational purposes" as pleasure driving on Montana's scenic highways; visiting Montana's historic towns and cultural centers; even shopping expeditions--MTLA urges the committee to clarify that Sec. 70-16-301, MCA, refers to <u>outdoor</u> activities and does <u>not</u> include such everyday activities as driving, shopping, attending movies or sports events, etc.

- The new language regarding "direct" payment for access to property (page 1, lines 26-27) ignores the many situations in which so-called recreational users have paid for access "indirectly"--for example, when they accompany other users who <u>did</u> pay, or when they pay one so-called "landowner" but not another. MTLA urges this committee to delete the word "directly" on page 1, line 27 of the bill.

Again, thank you for this opportunity to express MTLA's concerns about SB 211. If I can provide more information or assistance to the Committee, please notify me.

Respectfully,

Russell B. Hill, Executive Director

Amendments to Senate Bill No. 211
Third Reading Copy (Blue Copy)

Requested by the Montana Trial Lawyers Association
For the House Judiciary Committee

Prepared by Russell B. Hill
March 3, 1995

1. Page 1, line 18.
Following: "other"
Insert: "outdoor"

Reason for the amendment: This amendment clarifies the intent of the bill and its proponents, consistent with current law, that recreational purposes consist of outdoor activities and do not include indoor activities at developed facilities which require extensive maintenance.

2. Page 2, line 19.
Following: "purposes."
Insert: " "Recreational purposes," as used in this part, does not include pleasure drives on public streets and highways; casual shopping in public stores; attendance at movie theaters, athletic events, or health clubs; or any similar activity."

Reason for the amendment: This amendment, or any substantially similar amendment preferred by this committee, will clarify the expressed intent of the bill and its proponents that the term "recreational purposes" does not include every activity on land which might be primarily for pleasure.

3. Page 1, line 27.
Strike: "directly"

Reason for the amendment: This amendment will protect the intent of the bill and its proponents to address genuinely gratuitous access without artificially excluding situations in which a recreationist gains access by virtue of payments from someone else (for example, as a non-paying guest of someone who does pay) or by virtue of payments to one so-called "landowner" but not another.

HOUSE OF REPRESENTATIVES
VISITORS REGISTER

JUDICIARY COMMITTEE DATE 3/3/95

BILL NO. SB 212 SPONSOR(S) Sen. Bishop

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	Support	Oppose
Lon Dale 2555 Sunright, Missoula, MT	Self		✓
Tom Hopgood	Mt. Indep. Bankers Assoc.	✓	
Charles R. Brooks	Bldg. Chamber	✓	
JIM TILTWILER	MT Liability Coalition	✓	
W James Kembel	City of Billings	✓	
MARIE DURKEE	MT LIABILITY ASSN MT TAVERN ASSN	✓	
JAMES D. ELSHOFF	SELF (SB 286)	✓	
BOW ASHABRANER	State Farm Ins	✓	
GREG JACKSON	MACO/MRIA	✓	
Sue Weingartner	Montana Solid Waste Coal. MT Optometric Assn	✓	
Norm Grosfield			✓
JOHN CADBY	MT BANKERS ASSN	✓	
Sue Weingartner	MT Defense Trial Lawyers	✓	

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
Mona Jamison	Doctors' Co	✓	
STAN KALECZYC	MT MUNICIPAL INSURANCE AUTHORITY	✓	
David Owen	MT Chamber	✓	
Ben Havdahl	MT Motor Carriers Assn	✓	
Jim AHRENS	MT Hospital Assn	✓	
DAN WALKER	US WEST	✓	
DEBBIE BERNEY	P.I.A.	✓	
John Alke	MT. Liability Coalition	✓	
Russell B Hill	MT Trial Lawyers		✓
[illegible]	Ont Med Assoc.	✓	
J. Shontz	MT Assoc Realtors	X	

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
Michael Keedy	MSBA	X	
Bob Worthington	MPED	✓	
Donald W. Hutchinson	Division of Banking & Fin	✓	
Jacqueline Lenmark	Am. Ins. Assoc.	✓	
Bill Grandpa's	Dept. of Admin	X	
Robert White	Bozeman Chamber	X	
Don Allen	MT. Wood Products Assn	✓	
Roger McGlenn	FIAM	✓	
Wendy Hanaka	Farmers Insurance Group	✓	
RILEY JOHNSON	NFIB	✓	
GAIL ABERCROMBIE	MT Petroleum Assn	✓	
Steve Turkiewicz	MT Auto Dealers Assn	✓	
Tom Harrison	MT. Soc of CPA's	—	

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JUDICIARY COMMITTEE DATE 3/3/95

BILL NO. SB 192 SPONSOR(S) Sen. Van Valkenburg

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
LOREN TUCKER	Montana County Attorneys Assn	✓	
John Flynn	Broadwater County	✓	
Leo Giacometto	Governors Office	✓	
JOE ROBERTS	MT. CTY. ATTYS ASSOC	✓	

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JUDICIARY COMMITTEE DATE 3/3/95

BILL NO. SB 211 SPONSOR(S) Sen. Keating

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NAME AND ADDRESS	REPRESENTING	Support	Oppose
Charles K. Brooks	Yellowstone County	✓	
W. James Kembel	City of Billings	✓	
Ron Ashabraner	State Farm Ins	✓	
Bob Frazier	UM Campuses	✓	
Bob Westlingtal	MMIA	—	
Dennis Paxinos	Yllwstn Co	—	
Ward Shanahan	Farmers Ins. Group	✓	
STAN KALOCZYC	MT MUNICIPAL INSURANCE AUTHORITY	✓	
J Shontz	MT ASSOC. REALTORS	✓	
Russell B Hill	MT Trial Lawyers		✓

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