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SETTLEMENT OR RELEASE UNDER MONTANA'S MULTIPLE DEFENDANT STATUTE

Solomon Neuhardt

I. INTRODUCTION

Consider the following hypothetical. Accountant is speeding in his car in downtown Missoula, Montana. Accountant carries high insurance policy limits on his automobiles. Accountant runs a red light and broadsides Councilman's car. Councilman is a moderately insured, city council member in Missoula. While the accident between Accountant and Councilman is occurring, Teacher, a young female first-grade teacher, is jaywalking at the same intersection of the accident. As a result of the tremendous impact between the two vehicles, Councilman's car swings around in the intersection and hits Teacher, severely injuring her. Her injuries require expensive surgeries resulting in significant medical expenses.

Teacher sues Accountant and Councilman for her injuries. Teacher settles with Councilman for $200,000 and releases him from liability. Teacher then proceeds to trial against Accountant. At trial, Accountant attempts to have the jury allocate liability to Councilman for Teacher's injuries. The jury returns a verdict for Teacher for $1,000,000 in damages and allocates the negligence of the parties in the following manner: Councilman, 30%; Accountant, 60%; Teacher, 10%.

This scenario raises numerous issues under Montana law. Should the court allow Accountant to attempt to allocate liability
to Councilman at trial although Councilman settled with Teacher? Should the court allow Councilman to appear at trial and defend his reputation and economic interests although he has settled with Teacher and been released from liability? Is Councilman's substantive due process violated when he does not appear at trial to defend his actions but Accountant attempts to allocate liability to Councilman for Teacher's injuries? Should Teacher have to defend Councilman at trial so that the trier of fact does not allocate a disproportionate amount of liability to Councilman because he is not represented at trial?

With regard to the calculation of Teacher's damages, how should the court calculate Accountant's liability to Teacher? Teacher received an "undervalued" settlement from Councilman because he was 30% at fault for Teacher's damages, but Teacher only received $200,000 from Councilman. Should the court only hold Accountant liable for $600,000 (his percentage of fault multiplied by the total damages), or should the court reduce Teacher's damages by the $200,000 settlement and hold Accountant liable for a higher amount because of the undervalued settlement with Councilman? Alternatively, should the court adjust the jury's allocation of the parties' percentage of liability and distribute among Accountant and Teacher the "loss" related to the undervalued settlement with Councilman so that Teacher may attempt to recover her damages?

A contentious issue in Montana is whether a court should allow a defendant to allocate liability to a party who does not appear before the court at trial—known as an empty-chair defendant. The circumstances in which an empty-chair defendant arises are usually in the following situations: either the party is immune from liability, released from liability, cannot be identified, or settled with the plaintiff. Montana's Multiple Defendant Statute allows a defendant to allocate liability only to a person

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1. One commentator summarized the issues surrounding empty-chair defendants: "There are two competing primary objectives of comparative fault. One is adherence to the cornerstone of comparative fault. That is, each person contributing to cause an injury must bear the burden of reparation in exact proportion to his share of the total fault. The other primary objective is the maxim of full compensation to the injured plaintiff. To give priority to one goal is to diminish the other. The evidence of such competition between primary objectives is implicit in the placement of the financial burden attributable to certain nonparty tortfeasors . . . ." Leonard E. Eilbacher, Nonparty Tortfeasors in Indiana: The Early Cases, 21 IND. L. REV. 413, 413-14 (1988). See generally Carol A. Mutter, Moving to Comparative Negligence In An Era Of Tort Reform: Decisions for Tennessee, 57 TENN. L. REV. 199, 262-73 (1990).

2. The phrase "Multiple Defendant Statute" refers to section 27-1-703 and, as

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with whom the plaintiff has settled or released from liability.\(^3\) However, the Montana Supreme Court recently held that allocating liability to a "nonparty" violates the plaintiff's substantive due process rights and, under certain conditions, the nonparty's and the defendant's.\(^4\)

This Comment reviews Montana's Multiple Defendant Statute as it relates to the empty-chair defendant issue. Part II summarizes the "nonparty defense" in other jurisdictions and as it relates to joint and several liability in Montana. Part III analyzes the Montana Legislature's 1997 amendments to the Multiple Defendant Statute and the Legislature's contingent statute. Part IV considers policies that relate to the empty-chair defendant. Part V offers two solutions to the controversy surrounding empty-chair defendants. Finally, Part VI concludes that the current and the contingent Multiple Defendant Statutes are unconstitutional because the statutes violate substantive due process rights.

## II. HISTORICAL BACKGROUND

The law of joint and several liability provides that each tortfeasor whose conduct caused the plaintiff an "indivisible injury" shall be held fully liable for the injury.\(^5\) The indivisible injury theory rests on the impossibility of dividing liability or damages for a single injury stemming from more than one causative force.\(^6\) Consequently, each tortfeasor is liable for the entire amount of damages because the injury cannot be divided.\(^7\) The doctrine employs the belief that wrongdoers, rather than victims,

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3. See MONT. CODE ANN. § 27-1-703 (1997) (Temporary). The word "temporary" is used throughout this Comment to refer to the current Multiple Defendant Statute because the Legislature passed contingent statutes for the primary statute (which are indicated by the word "contingent"). See infra Part II(B)(6) and accompanying text.

4. See Plumb v. District Court, 279 Mont. 363, 927 P.2d 1011 (1996). The phrases "empty-chair defendant" and "nonparty" are used interchangeably in this Comment.


7. See id. In most states, however, paying defendants are entitled to contribution from other tortfeasors on a pro rata basis (each tortfeasor pays an equal amount no matter how minimal his contribution to the damages). See id. § 50, at 338, 340. In Montana, only several liability applies if a defendant is 50% or less negligent. See MONT. CODE ANN. § 27-1-703(2) (1997).
should bear the loss of injury. Thus, the plaintiff may recover the full amount of damages from any one, or any combination, of the defendants who tortiously contributed to the injury. However, the plaintiff's total compensation cannot exceed the damages related to the injury.

Under Montana common law, a non-negligent plaintiff could employ joint and several liability principles to recover damages from multiple tortfeasors who caused injury. A plaintiff could sue one of multiple, negligent parties and recover all damages, regardless of that party's respective degree of fault for the injuries. However, over the past two decades, the Montana Legislature has limited the plaintiff's ability to recover under joint and several liability principles. The empty-chair defendant controversy, among other concerns of various entities in the state, has been a basis for the Montana Legislature to limit a plaintiff's ability to recover under joint and several liability. The nonparty defense issue has not been easy to resolve either in Montana or other states.

A. The empty-chair defendant in other jurisdictions

As states have grappled with the empty-chair defendant issue, various approaches have emerged. Some states require a trial court to consider the negligence of everyone who contributed to the plaintiff's injury, including that of an empty-chair defendant. Several states have adopted specific legislative provi-

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8. See KEETON ET AL., supra note 7, § 65, at 452-53.
10. See id.
11. In defining joint and several liability, the Montana Supreme Court held that "if the concurrent negligence of two or more persons causes an injury to a third person, they are jointly and severally liable, and the injured person may sue them jointly or severally, and recover against one or all." Jones v. Northwestern Auto Supply Co., 93 Mont. 224, 231, 18 P.2d 305, 307 (1932) (citing Black v. Martin, 88 Mont. 256, 292 P. 577 (1930)); see also Panasuk v. Seaton, 277 F. Supp. 979 (D. Mont. 1968).
12. See infra notes 24-26 and accompanying text.
13. Comparing Montana's statutory application of the empty-chair defendant issue with other states is not a simple task because not all states define an empty-chair defendant in the same manner as Montana. Many states have determined that an empty-chair defendant could be one of a multitude of other parties besides a settled or released party, as a nonparty is defined under the Montana statute. See MONT. CODE ANN. § 27-1-703 (1997) (Temporary).
essions to allocate fault if not all tortfeasors are in the case at the time of trial. Still other states explicitly disallow allocation of liability to various categories of empty-chair defendants. The Uniform Comparative Fault Act limits allocation to parties in the lawsuit while adopting a special rule for settled or released parties.

B. Development of the Empty-Chair Defendant Issue in Montana

The empty-chair defendant issue in Montana developed concurrently with joint and several liability, a doctrine that the Legislature adopted in 1977. The statute permitted a plaintiff to obtain and enforce a judgment in the full amount of the damages against one or all of the defendants. In 1981, the Legislature enacted a subsection to the Multiple Defendant Statute that
allowed all parties the right to join any person who may have contributed to the injury. These changes permitted a defendant to join parties to whom the trier of fact could apportion liability.

In 1986, the Montana Supreme Court set forth a key decision affecting nonsettling tortfeasors when a joint tortfeasor settles with a plaintiff before judgment. In *State ex rel. Deere & Co. v. District Court*, the court held that a trial court should reduce a plaintiff's recovery against nonsettling tortfeasors by a dollar credit in the amount paid by the settling tortfeasor, instead of the percentage amount proportioned to the degree of fault of the settling tortfeasor. Thus, the court would reduce the nonsettling tortfeasor's liability to the plaintiff by an amount that the plaintiff obtained from the settling defendant.

During the 1980's, tort reform increased throughout the country. In Montana, businesses and government entities voiced concern about increasing insurance costs and the unavailability of some types of coverage. Joint and several liability principles required these entities to pay large judgments, even when a jury allocated minimal percentages of negligence to them. To build up reserves when insurance was unavailable, government entities increased taxes and curtailed community services to pay for the rising insurance costs. A perceived insurance crisis sparked legislative changes to the Multiple Defendant Statute in 1987. These amendments marked the first steps in the development of significant tension between the Montana Legislature and the Montana Supreme Court.

22. See *Deere*, 224 Mont. at 397, 730 P.2d at 404-05. The court reasoned that "...such a holding encourages compromise, lends finality to such compromises, and keeps in force the practice which the legislature has not been shown to have intended to change." *Id.* at 397, 730 P.2d at 406; see also *Whiting v. State*, 248 Mont. 207, 225-26, 810 P.2d 1177, 1188-89 (1991).
26. According to one commentator, the 1987 Legislature "acted wholly for the benefit of defendants and wholly to the detriment of plaintiffs in an attempt to deal with the pervasive effects of the 'insurance crisis.'" Richardson, *supra* note 23, at 201 (citing Judiciary Committee of the Montana State Senate, Minutes of the Meeting, Jan. 15, 1987, at 2-4).
1. The 1987 Amendments

In amending the Multiple Defendant Statute, the Legislature sought "to protect ‘deep-pocket’ defendants such as municipal and county governments when the trier of fact allocated minimal percentages of negligence to them but who nonetheless were required to pay large judgments under joint and several liability principles." The amendments eliminated joint liability in favor of several liability for parties found to be 50% or less negligent for a plaintiff's injuries. Thus, a party 50% or less negligent was only liable for the percentage of the plaintiff's damages allocated to that party. When determining damages, the amendments required the trier of fact to consider the negligence of nearly all persons who may have contributed to the injury, including empty-chair defendants. The Multiple Defendant Statute after the 1987 amendments raised constitutional issues regarding the plaintiff, the defendant(s) at trial, and the empty-chair defendant.

2. Newville v. State

In 1994, the Montana Supreme Court struck down a section of the Multiple Defendant Statute that allowed a nonparty defense because it violated substantive due process. The Newville court held that the statute unreasonably mandated allocation of negligence to nonparties without "procedural safeguards" and imposed a burden on plaintiffs to anticipate a defendant's attempts to apportion blame to nonparties at trial.

30. See Mont. Code Ann. § 27-1-703(4) (1987). The only groups that the statute excluded from consideration by the trier of fact were employers or co-employees covered by a workers' compensation act.

The statute required consideration of "persons released from liability by the claimant." Mont. Code Ann. § 27-1-703(4) (1987). This provision seems to be a legislative reaction to the Montana Supreme Court's holding in State ex rel. Deere & Co. v. District Court, 224 Mont. at 393, 730 P.2d at 402, that joint tortfeasors who have settled with the plaintiff are not subject to contribution claims and that the plaintiff's claim is reduced by the dollar amount of such settlements. Since the nonsettling tortfeasor is not able to sue the settling tortfeasor for contribution for the plaintiff's injuries, the jury should consider the settlor's liability so that the nonsettlor may receive a reduction in liability. See id. at 397, 730 P.2d at 404-05.

32. Id. at 252, 883 P.2d at 802. The court further noted that "[s]uch an apportionment is clearly unreasonable as to plaintiffs, and can also unreasonably affect defendants and nonparties." Id.
The court noted that other states allow the inclusion of nonparties for allocation of liability when the trial court uses procedural safeguards for plaintiffs, defendants, and nonparties. Specifically, the court cited Colorado as an example of a jurisdiction allowing the inclusion of nonparties when apportioning fault, but only when notice has been given by the defendant within 90 days of the commencement of the action. The Newville court also examined New Mexico's rule, which allows a party to call a settling defendant as a witness and requires the court to allow discovery regarding such witnesses as if they remained in the action. Unlike statutes in other jurisdictions, Montana's statute lacked any of these procedural safeguards and therefore violated the plaintiffs', defendants', and nonparties' substantive due process rights.

Moreover, the Newville court was concerned that the amended statute increased the likelihood that a plaintiff would not recover all of his or her damages. Under the 1987 amendments, if a party was found to be 50% or less negligent, then that party was liable for contribution only up to his or her percentage of negligence. As a result, if all defendants collectively were found to be 50% negligent or less, and any defendant was unable to pay the full amount of the judgment against that party, then the plaintiff would be unable to recover all of his or her damages. In addition, the plaintiff and the nonparty faced the possibility that the percentage allocation of negligence to the nonparty would be disproportionate because the nonparty was not represented at trial.

Based on these concerns, the Montana Supreme Court struck down a section of the Multiple Defendant Statute that

33. See id. at 252-53, 883 P.2d at 802-03.
34. See id. at 252-53, 883 P.2d at 802 (citing COLO. REV. STAT. § 13-21-111.5 (1987)).
35. See id. at 253, 883 P.2d at 802 (citing Wilson v. Gillis, 731 P.2d 955, 958 (N.M. App. 1986)). The court cited several examples of how other states use procedural safeguards. See Newville, 267 Mont. at 252-53, 883 P.2d at 802-03.
36. See Newville, 267 Mont. at 253-55, 883 P.2d at 802-03.
37. See MONT. CODE ANN. § 27-1-702 (1987). The court uses the word "contribution" to refer to the percentage of liability for which a severally liable party is responsible. However, one should not confuse the separate and distinct concept of contribution with apportionment of liability among parties. See infra note 107 and accompanying text.
38. See Newville, 267 Mont. at 254, 883 P.2d at 803. In an indirect manner, the court seems to question the constitutionality of several liability, however, the court does not pass judgment on this as an issue in Newville.
39. See id. at 254, 883 P.2d at 803.
allowed a nonparty defense because it violated substantive due process rights.\textsuperscript{40} \textit{Newville} remained the law for less than a year before the Legislature again responded with additional amendments to the Multiple Defendant Statute.\textsuperscript{41} The 1995 amendments to the statute escalated the tension between the Montana Legislature and the Montana Supreme Court.

3. The 1995 Amendments

In response to \textit{Newville}, the 1995 Montana Legislature amended the Multiple Defendant Statute.\textsuperscript{42} The 1995 amendments revived the nonparty defense which the supreme court found unconstitutional in \textit{Newville}. However, the Legislature added a new subparagraph to the statute in an attempt to include the procedural safeguards that the \textit{Newville} court deemed necessary.\textsuperscript{43} Specifically, the 1995 amendments provided that: (1) the defendant has the burden of proving a nonparty's liability; (2) the defendant must affirmatively plead the nonparty defense; and (3) the defendant must notify a nonparty that he or she is being blamed for the plaintiff's injuries.\textsuperscript{44} Unfortunately,

\textsuperscript{40} See \textit{id}. The court held that the following portion of section 27-1-703(4) of the Montana Code violated substantive due process: "[P]ersons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant." \textit{id}. at 255, 883 P.2d at 803.

\textsuperscript{41} In a case decided after \textit{Newville}, the court interpreted the Multiple Defendant Statute to preclude the trier of fact from hearing about or considering the negligence of the plaintiff's employer, in which such evidence may have absolved or substantially limited the defendant's liability if the defendant was doing work at the plaintiff's place of employment. \textit{See Wetch v. Unique Concrete Co.}, 269 Mont. 315, 318, 888 P.2d 425, 427 (1995).

\textsuperscript{42} In response to \textit{Wetch}, the Legislature amended section 27-1-703 of the Montana Code to provide that the negligence of a claimant's employer or co-employee should be considered and determined as part of a nonparty defense. \textit{See MONT. CODE ANN.} § 27-1-703(4) (1995).

\textsuperscript{43} \textit{See MONT. CODE ANN.} § 27-1-703(6) (1995).

\textsuperscript{44} \textit{See MONT. CODE ANN.} § 27-1-703(6) (1995). Shortly after the Governor signed the 1995 amendments into law, the court decided \textit{Ganz v. United States Cycling Fed'n}, 273 Mont. 360, 903 P.2d 212 (1995), and held that a defendant may not avoid liability by claiming that some other person who was not at trial helped cause the plaintiff's injury. \textit{See Ganz} at 368, 903 P.2d at 216. In \textit{Ganz}, the jury was presented with the potential fault of a nonparty. \textit{See id.} at 367, 903 P.2d at 216. The court held that the district court should have given the jury an instruction to not consider the negligence of a nonparty. \textit{See id.} at 367, 903 P.2d at 216-17 (citing \textit{Newville}, 267 Mont. at 255-56, 883 P.2d at 804). The plaintiff's proposed jury instruction provided that: "[m]ore than one person may be liable for causing an injury. A defendant may not avoid liability by claiming that some other person, whether or not named as a defendant in this action, helped cause the injury." \textit{Id.} at 367, 903 P.2d at 216. The district court's refusal to give the plaintiff's proposed jury instruction, combined with the defendant's closing argument that the jury should place blame on
the revised Multiple Defendant Statute was also rife with constitutional issues that the Montana Supreme Court would readdress one year later.

4. Plumb v. District Court

In 1996, the Montana Supreme Court again struck down sections of the Multiple Defendant Statute that allowed a nonparty defense as violative of substantive due process. In *Plumb v. District Court*, the plaintiffs sought damages from Missoula's Southgate Mall for losses related to Roberta Plumb's slip and fall injuries. Southgate Mall alleged that the Plumbs' injuries were caused, in whole or in part, by a third party—specifically, Mrs. Plumb's treating physician, Dr. Timothy J. Adams. The district court allowed the Mall to allege that Dr. Adams contributed to, or caused, Mrs. Plumb's injuries and that the court should reduce or eliminate the Mall's liability accordingly. Dr. Adams was not joined in the suit, and the Plumbs petitioned the Montana Supreme Court for supervisory control regarding the empty-chair defendant issue. The court stated that the constitutional issue was whether a defendant could attempt to reduce its liability, pursuant to section 27-1-703(6) (1995) of the Montana Code, by asserting that an unnamed third party caused or contributed to the plaintiffs' damages without violating principles of substantive due process under the federal and state constitutions.

After setting forth the legislative and decisional history that had led to the empty-chair defendant issue, the *Plumb* court stated that the 1995 amendments did not allow for an "unnamed third person" to appear at trial and defend himself. By that omission, the 1995 Legislature failed to recognize the "central point" of *Newville* — that the percentage allocation of negligence to the nonparty might be higher because counsel did not represent the nonparty at trial. *Plumb* concluded that the Multiple

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46. See *Plumb*, 279 Mont. at 366, 927 P.2d at 1013.
47. See id. at 367, 927 P.2d at 1014.
48. See id. at 368, 927 P.2d at 1014.
49. See id. at 371, 927 P.2d at 1016.
50. See id.
51. See id. at 376, 927 P.2d at 1019.
52. See id.
Defendant Statute violated substantive due process for the following three reasons:

1. The 1995 version of the statute permitted defendants to assign liability for the plaintiff's damages to a third party without affording the third party an opportunity to defend himself at trial.\(^53\)

2. The statute jeopardized the plaintiff's right to recover damages for which the defendant at trial is responsible because the procedure creates the opportunity for a disproportionate allocation of liability to a nonparty.\(^54\)

3. As noted in Newville, "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 the unrepresented parties."\(^55\) Furthermore, "requiring the plaintiff's attorney to serve in such a dual capacity was antithetical to his or her primary obligation, which is to represent the plaintiff."\(^56\)

The court also noted that Montana's rule of third-party practice provides a means by which a defendant can seek contribution from an unnamed person or party.\(^57\) This rule affords a person who was joined as a result of the third-party practice the opportunity to participate in discovery, to cross-examine those witnesses who blame him or her, and to present evidence on his or her behalf.\(^58\) The one exception to the third-party practice in which a defendant cannot join a co-tortfeasor arises when a co-tortfeasor settles with the plaintiff.\(^59\) Based on language in the 1981 version of the Multiple Defendant Statute and \textit{Deere}, co-tortfeasors may not name settling tortfeasors as third party defendants for the purpose of contribution.\(^60\)

\(^{53}\) See \textit{id.} at 377, 927 P.2d at 1020.

\(^{54}\) See \textit{id.}

\(^{55}\) \textit{Id.} at 378, 927 P.2d at 1020 (quoting Newville v. State, 267 Mont. 237, 252, 883 P.2d 793, 802 (1994)).

\(^{56}\) \textit{Plumb,} 279 Mont. at 378, 927 P.2d at 1020.

\(^{57}\) See \textit{id.} (citing \textit{MONT. R. CIV. P.} 14(a) and 20(a)). According to the court, apportionment of liability pursuant to these procedures would be rationally related to the Legislature's objective of assigning liability based on the degree of a party's fault for another party's damages. \textit{See Plumb,} 279 Mont. at 378, 927 P.2d at 1020. Once again, the court appears to interchange apportionment of liability with contribution. \textit{See infra} note 107 and accompanying text.

\(^{58}\) \textit{See Plumb,} 279 Mont. at 378, 927 P.2d at 1020. The supreme court's joiner solution for the empty-chair defendant issue resolve's substantive due process issues for the nonparty, but not for a plaintiff. \textit{See infra} Parts III(A)(1), (2), (3).

\(^{59}\) \textit{See Plumb,} 279 Mont. at 377, 927 P.2d at 1020.

\(^{60}\) \textit{Id.} at 378-79, 927 P.2d at 1020-21. \textit{See also} \textit{MONT. CODE ANN.} § 27-1-703(2) (1981). Once again, the court interchanges contribution with apportionment of liability.
The *Plumb* court struck down portions of the statute that allowed allocation of liability to nonparties\(^{61}\) and every procedural safeguard that the Legislature implemented in 1995.\(^{62}\) Furthermore, the court held that the statute violated the right of substantive due process guaranteed to plaintiffs and nonparties by Article II, Section 17, of the Montana Constitution and the Fourteenth Amendment to the United States Constitution.\(^{63}\) Thus, even an amendment to the Montana Constitution probably would not resolve the empty-chair defendant issue. In spite of the Montana Supreme Court's efforts in *Plumb*, the decision stood for less than a year before the Legislature again amended the Multiple Defendant Statute.\(^{64}\)

5. 1997 Amendments

*Plumb* provoked a legislative response that intensified the friction between the supreme court and the Legislature regarding the empty-chair defendant issue.\(^{65}\) The 1997 Legislature

\(^{61}\) Mont. Code Ann. § 27-1-703(4) (1995) provided "[t]he liability of nonparties, including persons released from liability by the claimant and persons immune from liability to the claimant, must also be considered by the trier of fact, as provided in subsection (6)."

\(^{62}\) See *Plumb*, 279 Mont. at 379, 927 P.2d at 1021.

\(^{63}\) The court's conclusion that the statute violated the right to substantive due process under the Montana Constitution was "independent of and separate from" an analysis of those rights under the United States Constitution. Id. at 379-80, 927 P.2d at 1021.

\(^{64}\) While *Plumb* was pending before the supreme court, *Reynolds v. United States and CBI Services, Inc.*, 280 Mont. 191, 929 P.2d 844 (1996), was certified to the court for supervisory control. *Reynolds* sought to strike down the 1995 version of the Multiple Defendant Statute because the statute allegedly violated Montana's constitutional right to full legal redress. The court held that *Plumb* rendered it unnecessary to reach the constitutional issue of the right to full legal redress. See *Reynolds*, 280 Mont. at 195, 929 P.2d at 846.

After the *Plumb* decision, in *State ex rel. Maffei v. District Court*, 282 Mont. 65, 935 P.2d 266 (1997), the court reversed a district court holding which allowed the defendant to assert a nonparty defense pursuant to section 27-1-703(6) of the 1995 Montana Code. See *Maffei*, 282 Mont. at 68, 935 P.2d at 267. The district court ruling which allowed the nonparty defense occurred before *Plumb*. See *Maffei*, 282 Mont. at 67, 935 P.2d at 267. Thus, *Maffei* reaffirms the court's holding that the 1995 statutory nonparty defense is unconstitutional on its face. However, the *Maffei* court held that "whether the evidence of a third party's negligence is admissible on some other basis is a matter better left in the first instance to the discretion of the District Court." *Maffei*, 282 Mont. at 68, 935 P.2d at 267.

65. See Judiciary Committee of the Montana State Senate, Summary of the Minutes of the Meeting, March 20, 1997, at 7 for an example of the spirited debate surrounding the legislative response to *Plumb* ("This is raw, naked power and aggression to the Montana Supreme Court . . . ").
passed two bills in response to *Plumb*: House Bills 571 and 572. House Bill 571 considerably changed joint and several liability in Montana.\(^{66}\) House Bill 572 contains contingent statutes that will take effect if the supreme court strikes down, or otherwise declares invalid, House Bill 571.

Under the current statute, the only nonparties to whom a defendant may attempt to allocate liability are persons with whom the plaintiff has settled or released from liability.\(^{67}\) Like the 1995 amendments, a defendant may allege that a “nonparty” under the statute caused or contributed to the plaintiff’s injuries\(^{68}\) and this defendant has several burdens of proof if he makes such an allegation, including the negligence of the nonparty, any standard of care that would apply to the nonparty, and that the negligence of the nonparty contributed to the plaintiff’s injuries.\(^{69}\) The defendant must “affirmatively plead the [plaintiff’s] settlement or release as a defense in the answer.”\(^{70}\) Also, a defendant may plead such a defense after the defendant has filed an answer, but only under certain conditions.\(^{71}\) Consistent with the 1995 amendments, notice must be given to the nonparty who the defendant alleges caused or contributed to the claimant’s injuries.\(^{72}\)

House Bill 571 also changes how a trial court determines the liability of the remaining defendant(s) at trial when the plaintiff settled with or released a party from liability. House Bill 571 replaces Montana’s common law pro tanto, or dollar credit, rule with a percent credit rule.\(^{73}\) Thus, a court will reduce a judgment against one or more defendants by the percentage of liabili-

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66. See infra Part III(A), (B) for an analysis of the statutory changes.

67. See MONT. CODE ANN. § 27-1-703(6)(a), (b), (c) (1997) (Temporary).


69. See MONT. CODE ANN. § 27-1-703(6)(e)(i)-(iii) (1997) (Temporary). Once again, a “nonparty” under the current statute is only a person with whom the plaintiff has settled or released from liability. See MONT. CODE ANN. § 27-1-703(6)(a), (b), (c) (1997) (Temporary).


71. See MONT. CODE ANN. § 27-1-703(6)(f)(i) - (iii) (1997) (Temporary). The statute delineates the requirements for pleading the nonparty defense after the defendant has filed his answer.


ty allocated to a person with whom the plaintiff has settled or released from liability, rather than a dollar-for-dollar offset of a settlement amount. House Bill 571 also includes a provision that requires the plaintiff to assume the liability that the trier of fact allocates to the settled or released person. 74 Interpreted literally, this provision could greatly reduce the plaintiff's chances of recovery. 76

6. The Contingent Statutes

The Legislature inserted a nonseverability clause in House Bill 571. 76 Therefore, if the Montana Supreme Court finds any part of the Bill unconstitutional or invalid, then it must strike down the current Multiple Defendant Statute 77 in its entirety. The contingent statutes, included in House Bill 572, would then replace House Bill 571. If enacted, House Bill 572 would drastically change comparative negligence in Montana by: (1) abolishing joint and several liability and providing for several liability only for most tort actions; 78 (2) resurrecting the nonparty defense in its entirety; 79 (3) implementing the percent credit rule contained in the current statute; 80 (4) replacing comparative negligence with comparative fault 81 and (5) allowing comparison of the plaintiff's negligence to the combined fault of the defendant(s) and nonparties. 82

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74. See MONT. CODE ANN. § 27-1-703(6d) (1997) (Temporary) provides "[a] release of settlement entered into by a claimant constitutes an assumption of the liability, if any, allocated to the settled or released person."

75. See infra in Part III(B)(1).


81. See MONT. CODE ANN. §§ 27-1-702, -705 (1997) (Contingent). "Comparative negligence" defines the doctrinal change created by legislative adoption of principles limiting the effect of contributory negligence and measuring negligence in percentage terms for the purpose of reducing the plaintiff's recovery in proportion to the percentage of negligence attributed to that actor. See John Scott Hickman, Note, Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability, 48 VAND. L. REV. 739, 740 n.9 (1995). "Comparative fault" principles apportion damage recovery among multiple or joint tortfeasors according to the percentage of fault attributed to those actors after reduction for the plaintiff's percentage of negligence. See id.

III. ANALYSIS

In light of *Plumb* and *Newville*, the current Multiple Defendant Statute: (1) does not violate the nonparty's substantive due process; (2) still violates the plaintiff's substantive due process; (3) creates new constitutional issues for the plaintiff which also violate substantive due process rights; and (4) violates the defendant's substantive due process. Furthermore, the contingent statute is clearly unconstitutional under both *Plumb* and *Newville*.

A. The Nonparty Defense Today

*Plumb* set forth three issues with respect to the Multiple Defendant Statute after the 1995 amendments. First, the statute did not afford an opportunity for a nonparty to appear and defend himself at trial.83 Second, the statute created the opportunity for a disproportionate allocation of liability to a nonparty which jeopardized the plaintiff's chance of recovering all his or her damages.84 Third, the court held that the procedure forced a plaintiff to defend a nonparty at trial, and that doing so is antithetical to his obligation to represent the plaintiff.85 *Plumb* based its holding on a violation of substantive due process rights.86 The court held that portions of the 1995 version of the Multiple Defendant Statute were not rationally related to a legitimate governmental objective.87 The Legislature's 1997 amendments attempted to resolve the constitutional issues set forth in *Plumb*.

1. The Empty-Chair Defendant's Substantive Due Process

The current Multiple Defendant Statute satisfies the *Plumb* court's requirements for a nonparty's substantive due process. In *Plumb*, the court held that the 1995 amendments to the Multiple Defendant Statute violated substantive due process rights *inter alia* because the statute permitted defendants to assign liability for the plaintiff's damages to a third party without affording the

84. *See id.* at 377-78, 927 P.2d at 1020.
85. *See id.* at 378, 927 P.2d at 1020.
86. *See id.* at 377, 927 P.2d at 1019.
87. *See id.*
third party an opportunity to defend himself. That section of the statute, according to the court, violated the substantive due process right of the nonparty.

As the court recognized prior to Plumb, the constitutional due process clause contains a substantive component. The essence of substantive due process is that the State cannot use its police power to take unreasonable, arbitrary or capricious action against an individual. The guaranty of due process "demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." The court will uphold legislation if the laws have a reasonable relation to a proper legislative purpose.

A substantive due process analysis essentially requires that the court decide, first, whether the legislation in question is related to a legitimate governmental concern, and second, whether the means chosen by the Legislature to accomplish its objective are reasonably related to the result sought to be attained. The first inquiry is whether the statute addresses a permissible legislative objective. The court noted in Newville and Plumb that "apportionment of liability among those responsible for a person's damage is a legitimate government concern." Given the existence of a valid legislative objective, the sole remaining issue for a substantive due process analysis is whether the 1997 amendments are "reasonably related" to that objective.

A statute must reasonably relate to a permissible legislative objective to satisfy due process guarantees. In Plumb, the

88. See id. at 377, 927 P.2d at 1020.
89. See id.
92. Id., at 193, 683 P.2d at 936 (citing Nebbia v. New York, 291 U.S. 502, 525 (1934)).
94. See Plumb, 279 Mont. at 372, 927 P.2d at 1016.
95. See id.
96. Id. (citing Newville, 267 Mont. at 254, 883 P.2d at 803).
97. See In re the Adjudication of the Yellowstone River, 253 Mont. 167, 832
court struck a portion of section 27-1-703 of the Montana Code on the grounds of substantive due process *inter alia* because the statute permitted a defendant to assign liability to a third party who did not have an opportunity to defend himself thereby jeopardizing the third party's professional reputation and economic interests.\(^98\) The *Plumb* court held that the statute violated substantive due process because the statute was not reasonably related to a permissible legislative objective.\(^99\)

The current statute satisfies the *Plumb* court's requirements for a nonparty's substantive due process rights because the court must give the nonparty "the opportunity to be represented by an attorney, present a defense, participate in discovery, cross-examine witnesses, and appear as a witness of either party."\(^100\) House Bill 571 overcomes the *Plumb* court's holding that the statute violates substantive due process because a third party was not afforded an opportunity to appear and defend himself.\(^101\)

In the hypothetical set forth at the beginning of this Comment, Councilman settled with Teacher and presumably will not appear at trial to defend himself. In all likelihood the trial court would not allow him to appear at trial to defend himself *because* he has settled with the plaintiff. However, as a member of the city council, Councilman has an interest in protecting his professional reputation and economic interests.\(^102\) Furthermore, if Teacher did not sue Councilman and he could not intervene in

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\(^{98}\) See *Plumb*, 279 Mont. at 377-78, 927 P.2d at 1020.

\(^{99}\) See id. at 379, 927 P.2d at 1021.

\(^{100}\) *Plumb*, 279 Mont. at 377, 927 P.2d at 1020. If read and applied literally, the statute only allows a nonparty the opportunity to intervene in an action if the defendant plead the defense of settlement or release *after* the filing of that defendant's answer. The statute requires that a defendant who alleges that a settled or released person is at fault shall affirmatively plead the settlement or release as a defense in the answer. See MONT. CODE ANN. § 27-1-703(6Xf) (1997) (Temporary). The statute creates the opportunity for a nonparty to intervene in the action to defend against claims affirmatively asserted, but the statute limits intervention to when a defendant "gains actual knowledge of a settled or released person after the filing of a defendant's answer . . . ." MONT. CODE ANN. § 27-1-703(6Xf) (1997) (Temporary) (emphasis added). Thus, the statute appears to only allow a nonparty the opportunity to intervene if the defendant plead the nonparty defense after the filing of that defendant's answer. However, there is no legal or practical reason to believe that a court would apply the statute in such an absurd manner.

\(^{101}\) See *Plumb*, 279 Mont. at 377, 927 P.2d at 1020.

\(^{102}\) In *Plumb*, the third party, Dr. Adams' "professional reputation and economic interests [were] jeopardized without an opportunity to personally appear on his own behalf, cross-examine those witnesses who might criticize the care he provided, or offer evidence in support of his course of treatment." *Id.* at 377, 927 P.2d at 1020.
the action and defend himself, the percentage of liability assigned to Councilman would not be a reliable or accurate apportionment of liability, and thus would not be rationally related to the objectives for which the 1995 amendments were enacted.\textsuperscript{103} However, the current statute gives the nonparty a choice whether to settle the case or defend himself trial.

Thus, House Bill 571 satisfies the \textit{Plumb} court's requirements for preventing a violation of a nonparty's substantive due process. Nonetheless, the Multiple Defendant Statute still violates a plaintiff's substantive due process.

2. The Plaintiff's Substantive Due Process

Notwithstanding the Legislature's amendments, the Multiple Defendant Statute still violates the plaintiff's substantive due process when a nonparty chooses not to appear at trial because the procedure jeopardizes the plaintiff's right to recover damages for which the defendant at trial is responsible. \textit{Plumb} held that the nonparty defense jeopardizes the plaintiff's right to recover damages from the nonsettling defendant because "this procedure affords for disproportionate assignment of liability to an unnamed, unrepresented, and nonparticipating third person."\textsuperscript{104} Application of the statute assumes that the trier of fact can reliably and accurately determine the nonparty's proportionate share of liability. In situations in which a nonparty does not provide a defense at trial, the likelihood increases that a trier of fact will allocate a disproportionate amount of liability to the unrepresented party.

The fact that the nonparty does not appear at trial to defend himself is at the crux of the empty-chair defendant issue for the plaintiff's substantive due process rights. A plaintiff, or a co-tortfeasor, cannot force a nonparty to appear at trial and defend himself to prevent a violation of the plaintiff's substantive due process. The \textit{Plumb} court stated that the one exception to allowing joinder of a third party for a multiple defendant action arises in the situation of a settling tortfeasor who may be partially liable for the plaintiff's damages.\textsuperscript{105} A co-tortfeasor would not be able to join a settling tortfeasor because settling tortfeasors may not be named as third party defendants for the purpose of contribution.\textsuperscript{106}

\textsuperscript{103} See id.
\textsuperscript{104} \textit{Plumb}, 279 Mont. at 377, 927 P.2d at 1020.
\textsuperscript{105} See \textit{Plumb}, 279 Mont. at 378-79, 927 P.2d at 1020.
\textsuperscript{106} See id. Co-tortfeasors may only seek contribution from parties "against
However, the potential for a disproportionate allocation of liability to a third party still exists under the statute if the non-party does not appear at trial to defend himself. This procedure significantly jeopardizes the plaintiff’s right to recover the amount of damages for which the defendant at trial is proportionally responsible. The disproportionate assignment of liability to an unrepresented and nonparticipating third person violates the plaintiff’s substantive due process rights as the court held in Plumb.

3. Duties of the Plaintiff

When settled or released persons do not appear at trial to defend themselves, the statute violates the plaintiff’s substantive due process because the plaintiff must then defend that party. As discussed in Plumb, there is no reasonable basis to require the plaintiff’s counsel to defend a nonparty. In addition, requiring a plaintiff’s attorney to defend a nonparty is “antithetical to his or her primary obligation, which is to represent the plaintiff by proving the plaintiff’s case.” Arguments framed to defend the nonparty’s conduct may detract from the force of the plaintiff’s case. Arguments framed to defend the nonparty’s conduct may detract from the force of the plaintiff’s case-in-chief. Such a duty contradicts the premise of the adversary system. The plaintiff’s primary purpose...
is to prove that the defendant at trial—rather than a nonparty—was negligent, and that the plaintiff was not negligent. Therefore, House Bill 571 violates the plaintiff's substantive due process rights because the plaintiff will need to defend the nonparty at trial and to require a plaintiff's attorney to serve in such a dual capacity violates the plaintiff's substantive due process.\footnote{112 See id.; see also Newville v. State, 267 Mont. 237, 252, 883 P.2d 793, 802 (1994).}

4. Defendant's Substantive Due Process

In contrast to a plaintiff's view of the empty-chair defendant issues, not allowing a defendant to allocate liability to all co-tortfeasors, rather than just settled or released parties, violates his or her substantive due process. The Multiple Defendant Statute states that the only party to whom a defendant may attempt to allocate liability who is not at trial is a settled or released person.\footnote{113 See MONT. CODE ANN. § 27-1-703(6)(c) (1997) (Temporary).} However, a co-tortfeasor could be immune from liability, not subject to the jurisdiction of the court, or unknown. If a defendant cannot allocate fault to any co-tortfeasor, this violates his substantive due process because he is not able to reduce his liability because of the actions of a negligent party. Furthermore, the defendant's rights outweigh the nonparty's interest because the defendant has tangible interests at stake, unlike a nonparty.

In addition, requiring a defendant to exonerate himself as well as attempt to allocate liability to a third party may violate a defendant's substantive due process rights. A defendant must prepare two cases—one in which he defends himself and another in which he attempts to allocate liability to the nonparty. This is similar to the violation of a plaintiff's substantive due process that occurs when he or she must also prepare two cases—one in which he proves that the defendant at trial was negligent and another in which he attempts to defend the settled or released party. Thus, the Multiple Defendant Statute violates the defendant's substantive due process in the same manner as the plaintiff's rights are violated when he must also prepare two cases for trial.

\footnote{112 See id.; see also Newville v. State, 267 Mont. 237, 252, 883 P.2d 793, 802 (1994).}

\footnote{113 See MONT. CODE ANN. § 27-1-703(6)(c) (1997) (Temporary).}
B. Further Substantive Due Process Issues with the 1997 Amendments

Two sections unique to the 1997 amendments also violate a plaintiff's substantive due process: the requirement that a plaintiff must assume the liability of the settled or released person and the replacement of the pro tanto rule with the percent credit rule. These provisions violate a plaintiff's substantive due process because the statute significantly increases the chance that the plaintiff will not recover all of his damages.

1. Assumption of Nonparty's Liability

The requirement that a plaintiff assume the liability of settled or released parties violates substantive due process because the rule greatly reduces the claimant's chance of recovery. Applying the statute literally, a trial court must attribute the settled or released party's percentage of fault to the claimant, as though the claimant was comparatively negligent to the extent of the settled person's fault. As stated previously, a plaintiff may recover sought after damages as long as his contributory negligence is "not greater than the negligence of the person or the combined negligence of all persons against whom recovery is sought." Allocating liability of settled or released parties to the plaintiff will significantly increase the chance that the plaintiff's negligence would be greater than that of the defendants against whom recovery is sought and thus the court would deny the plaintiff recovery.

Practical examples explain the consequence of this change. Returning to the hypothetical set forth at this beginning of this Comment, assume that Teacher settles with Councilman for $200,000. Teacher proceeds to trial against Accountant and the

114. Mont. Code Ann. § 27-1-703(6)(d) (1997) (Temporary) provides “[a] release of settlement entered into by a claimant constitutes an assumption of the liability, if any, allocated to the settled or released person.” The significant aspect of the plaintiff assuming the nonparty's liability is that a plaintiff has a greater likelihood of crossing over the 50% “bar” in which the court will deny recovery. Russell Hill of the Montana Trial Lawyers Association asked the following questions with regard to the statutory provision that a plaintiff must assume the liability for a settlement or release: “Does that mean that a plaintiff who is 25% at fault who settles with a defendant who is 26% at fault is thereby barred from all recovery? Has he assumed that liability?” The question was not addressed. See Judiciary Committee of the Montana State Senate, Summary of the Minutes of the Meeting, March 20, 1997, at 5.


jury returns a verdict for $1,000,000 and allocates the negligence of the parties in the following manner: Accountant, 45%, Councilman, 45%, Teacher, 10%. If Teacher assumes the liability for the Councilman, the combined negligence of Teacher and Councilman is more than 50%. In this situation, the court must deny Teacher recovery because her "contributory negligence" is greater than that of Accountant. Alternatively, if the jury apportions more than 50% of the blame to Councilman, then Teacher is also completely denied recovery because she is more than 50% contributorily negligent as a result of assuming Councilman's liability.

The statute discourages a plaintiff from settling because he must assume liability for the settled or released person. Therefore, the claimant will not risk having a settled or released person not appear at trial to defend himself because the court will deny him recovery if the combined negligence of the plaintiff and the nonparty is greater than that of the persons against whom recovery is sought.

2. The Effect of Settlement and the Percent Credit Rule

The Legislature's abolition of the pro tanto rule and adoption of the percent credit rule violates the plaintiff's substantive due process because the rule decreases the chances that the plaintiff will recover all of his damages when he receives an

117. If the plaintiff must assume the liability of the settled or released person as the statute requires, a defendant may wish to embellish the negligence of a nonparty to attempt to have the plaintiff cross the fifty-percent threshold in which the court must deny him recovery. Assume, for instance, the following: (1) the negligence of tortfeasors A, B, and C combine with the negligence of the plaintiff to cause an injury to the plaintiff, (2) the negligence of each party, including the plaintiff, is approximately equal (25% for each party), and (3) the plaintiff settles with A. If the trier of fact comes to the "correct" conclusion, the court should assess each party with 25% of the fault. Thus, the combined fault of A and the plaintiff should equal fifty percent and he will be able to recover the balance of his damages (fifty percent). However, if the defendant is able to embellish the fault of A so that A's percent of fault is more than 25%, then the plaintiff could be denied any recovery if his total negligence (that of himself and A) is greater than fifty percent.

118. On the other hand, if the liability of a settled or released person is not allocated to the claimant, such a procedure may encourage the plaintiff to settle. If a plaintiff settles with a tortfeasor, the factfinder's allocation of fault to a settling nonparty should not concern the plaintiff. The plaintiff knows that the non-settling parties will attempt to persuade the factfinder to allocate all, or at least a majority, of the fault to the settling nonparty, and the plaintiff has made a considered judgment that settlement is, nevertheless, in the plaintiff's best interest. See John M. Burman, Wyoming's New Comparative Fault Statute, 31 LAND & WATER L. REV. 509, 532 (1996).
undervalued settlement or he is not negligent. The Deere court recognized that the pro tanto rule "encourages compromise, lends finality to such compromises, and keeps in force the practice which the Legislature has not been shown to have intended to change." Although it is possible that a plaintiff could recover more than the jury's determination of damages, use of the percent credit rule violates the plaintiff's substantive due process because the rule jeopardizes the plaintiff's chance to recover all of his damages.

How the percent credit rule functions is best illustrated through examples. Returning to the hypothetical set forth at the beginning of this Comment, assume Teacher settles with Councilman for $200,000 and proceeds to trial against Accountant. If the jury awards $1,000,000 in damages and finds Teacher 10% at fault, Accountant 60% at fault, and Councilman 30% at fault, Teacher will have to bear the burden of the loss attributable to the undervalued settlement with Councilman. If Teacher had gone to trial with Councilman, he would have paid $300,000 rather than $200,000. Under the percent credit rule, the released person is discharged from all liability but the plaintiff's recovery against other tortfeasors is reduced by the amount of the released person's "equitable share of the obligation." Thus, using the percent credit rule for calculating damages, Councilman is completely discharged after settling with Teacher. Councilman's share of fault ($300,000) is subtracted from

119. In adopting the percent credit rule, the Legislature appears to have utilized language from the UNIF. COMPARATIVE FAULT ACT, § 6, 12 U.L.A. at 147-48, which is intended to show the effect of releasing a party from liability. The UNIFORM ACT utilizes the percent credit rule as does Montana's Multiple Defendant Statute. However, Montana's statute uses the word "percentage" rather than "amount" as is used in the UNIFORM ACT to calculate the percentage of liability for the remaining tortfeasors. See MONT. CODE ANN. § 27-1-703(6xd) (1997) (Temporary); UNIF. COMPARATIVE FAULT ACT, § 6, 12 U.L.A. at 147. Nonetheless, using either the UNIFORM ACT or Montana's statute should yield the same result for calculating liability.

The Legislature's adoption of the percent credit rule may violate Montana's constitutional right to full legal redress when an injury occurs during employment. Reynolds v. United States, 280 Mont. 191, 929 P.2d 396, 405 (1996), sought to strike down the 1995 version of the multiple defendant statute because the statute allegedly violated Montana's constitutional right to full legal redress for reasons unrelated to the percent credit rule. However, a plaintiff could raise such a constitutional argument regarding the drawbacks of the percent credit rule in an employment context.


122. UNIF. COMPARATIVE FAULT ACT, § 6, 12 U.L.A. at 147.
Teacher's recovery and Teacher recovers $600,000 from Accountant for a total of $800,000 from both defendants. Alternatively, Teacher would have recovered $900,000 if she had gone to trial with both defendants. The percent credit rule thus places the risk of an undervalued settlement on the plaintiff.\textsuperscript{123} This potentially has a discouraging effect on settlements because the plaintiff may lose a portion of his or her damages.\textsuperscript{124}

In the case of an overvalued settlement, however, the plaintiff is able to keep any portion of the settlement that is above the settled person's equitable share of the obligation.\textsuperscript{125} If Teacher settles with Councilman for $900,000, the Teacher receives a windfall of $600,000 because Councilman was only 30\% liable.\textsuperscript{126} This result tends to counteract the potential disincentive to settle.\textsuperscript{127}

Allocating the settling tortfeasor's share of fault to the plaintiff in the case of an undervalued settlement is inconsistent with the principle that liability should be apportioned according to fault.\textsuperscript{128} In the previous example, although only 10\% at fault, Teacher bears one third of Councilman's 30\% share of fault ($100,000 of Councilman's $300,000 share of fault).\textsuperscript{129} The defendant may attempt to justify this result because the plaintiff contracted for the settlement and consciously took on the risk of an undervalued settlement.\textsuperscript{130}

The issue of the plaintiff not recovering his or her damages under the percent credit rule presents a similar problem when the plaintiff is not negligent. Assume the same facts in the previous hypothetical except that Accountant was found to be 70\% negligent rather than 60\%, Councilman, 30\%, and Teacher was not negligent. In such a case, Teacher would recover $900,000 ($200,000 from the settlement with Councilman and $700,000 from Accountant). Once again, Teacher has borne the loss of $100,000 attributable to the undervalued settlement with Coun-

\begin{itemize}
  \item \textsuperscript{123} See Smith & Wade, supra note 121, at 983.
  \item \textsuperscript{124} See id.; see also H. Anthony Miller, Extending the Fairness Principle of Liability American Motorcycle: Adoption of the Uniform Comparative Fault Act, 14 PAC. L.J. 835, 866 (1983); John W. Wade, The Uniform Comparative Fault Act, 14 FORUM 379, 391 (1979).
  \item \textsuperscript{125} See Smith & Wade, supra note 121, at 983.
  \item \textsuperscript{126} See id.
  \item \textsuperscript{127} See id.; see also UNIF. COMPARATIVE FAULT ACT, § 6 cmt, 12 U.L.A. at 147-48; Miller, supra note 124, at 866.
  \item \textsuperscript{128} See Smith & Wade, supra note 122, at 983.
  \item \textsuperscript{129} See id. at 983-84.
  \item \textsuperscript{130} See id.
\end{itemize}
cilman.

The pro tanto approach presents similar problems under comparative negligence.\(^{131}\) However, the plaintiff has a greater chance of recovering his or her damages and preventing a violation of substantive due process. Under the pro tanto approach, the amount of settlement is deducted from the judgment regardless of the settling party's share of fault.\(^{132}\) The nonsettling defendant would bear the full risk of an undervalued settlement in Montana if he was more than 50% negligent because he would have to pay the difference between the judgment and the settlement.\(^{133}\) In the example set forth at the beginning of this Comment, the allocations of negligence are Councilman, 30%, Accountant, 60%, and Teacher, 10%. Accountant would pay 90% of an $800,000 judgment (the $1,000,000 in damages less the $200,000 settlement with Councilman) or a total of $720,000 despite being only 60% at fault.\(^{134}\) Thus, Teacher would be "overcompensated" because she received $920,000 in damages despite being 10% negligent.

Modifying the example above, the pro tanto approach allows the plaintiff to recover all of his damages if he is not negligent and the defendant at trial is more than 50% negligent. Assume that the allocations of negligence are Councilman 30%, Accountant, 70%, and Teacher, 0%. Accountant would pay $800,000 (the $1,000,000 in damages less the $200,000 settlement with Councilman). Thus, Teacher will recover all her damages. Although the pro tanto approach presents problems similar to the percent credit rule, this approach increases the likelihood that the plaintiff will recover all of his or her damages and thus prevent a violation of substantive due process.

3. In Search of Substantive Due Process

House Bill 571 may achieve some of the Legislature's goals within Plumb's framework. The Plumb court held that joining a third party defendant using Montana's third-party practice is a

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131. See id.
133. Several liability has existed in Montana since the 1987 amendments to the Multiple Defendant Statute. Thus, if the nonsettling defendant is found to be 50% or less negligent, then he or she is only liable for his or her percentage of fault. See MONT. CODE ANN. § 27-1-703(2) (1997).
134. Accountant pays 90% of the $800,000 because Teacher was 10% negligent. See Smith & Wade, supra note 121, at 984 n.90.
method of apportioning liability that would be rationally related to the Legislature’s objective of assigning liability based on the degree of a party’s fault for another party’s damages.\textsuperscript{135} The statute states that the defendant may only attempt to allocate fault to settled or released persons.\textsuperscript{136} Furthermore, \textit{Plumb} does not require joinder for parties with whom the plaintiff has settled because \textit{Deere} does not allow such a joinder for purposes of contribution.\textsuperscript{137} Thus, in light of \textit{Deere}, the \textit{Plumb} court may have taken the position that allocating liability to settled or released persons does not violate the plaintiff’s substantive due process. Neither plaintiffs nor defendants can legally force a settled nonparty to appear at trial and defend himself, so allocation of liability to such a party may be acceptable.\textsuperscript{138} Therefore, the Multiple Defendant Statute may comport with \textit{Plumb} in this manner.

However, the Legislature’s solution fails to consider the previously discussed substantive due process issues noted in \textit{Plumb}. When the third party does not appear at trial and defend himself, the probability that the amount of liability allocated to the nonparty will increase. Furthermore, the plaintiff should not have to defend the nonparty—such a requirement is antithetical to the plaintiff’s obligation to present his own case.\textsuperscript{139} Thus, even using joinder, with the possible exception for settled persons, the Multiple Defendant Statute does not comport with the \textit{Plumb} court’s view of the plaintiff’s substantive due process rights.

\textbf{C. The Contingent Statutes\textsuperscript{140}}

If the supreme court strikes down the Multiple Defendant Statute as unconstitutional or invalid, the contingent statutes (House Bill 572) will become effective and replace the existing statute in its entirety.\textsuperscript{141} The contingent statutes would greatly

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\item \textsuperscript{135} See Plumb v. District Court, 279 Mont. 363, 378, 927 P.2d 1011, 1020 (1996).
\item \textsuperscript{136} See MONT. CODE ANN. § 27-1-703(6)(f) (1997) (Temporary).
\item \textsuperscript{137} See Plumb, 279 Mont. at 378-79, 927 P.2d at 1020-21.
\item \textsuperscript{138} But see infra Part V for possible solutions.
\item \textsuperscript{139} See Plumb, 279 Mont. at 378, 927 P.2d at 1020.
\item \textsuperscript{140} See MONT. CODE ANN. §§ 27-1-702, -703, -705, -706 (1997) (Contingent).
\item \textsuperscript{141} An issue regarding the contingent statute is whether the Legislature can enact “contingent” legislation that depends on another statute being struck down or being declared invalid. If the Legislature anticipates that the supreme court may strike down a statute, it could simply enact a “back-up” statute for every piece of legislation. Most jurisdictions hold that a Legislature may make a law to become
\end{itemize}
change negligence law in Montana. The statutes would abolish joint and several liability in favor of only several liability for most tort actions. The contingent statutes also adopt a comparative fault standard for negligence actions.

The contingent statute's approach to the nonparty clearly violates the plaintiff's substantive due process rights. The contingent Multiple Defendant Statute entirely resurrects the nonparty defense without any of the procedural safeguards that the Newville court deemed necessary. House Bill 572 fails to consider the substantive due process violations established in both Newville and Plumb.

By enacting the contingent statute, the Legislature has sent a message to the Montana Supreme Court that dares the court to strike down House Bill 571, because the consequences of doing so will be the effectuation of an "anti-plaintiff's rights" statute—the contingent Multiple Defendant Statute. The contingent statutes have provisions that favors the defendant, such as the abolition of joint and several liability for most tort actions and the resurrection of the nonparty defense without any of the procedural safeguards that the court mandated in Newville. The rebirth of the nonparty defense will re-establish the same empty-chair defendant issues found after the 1987 amendments.


142. See MONT. CODE ANN. § 27-1-705 (1997) (Contingent). Joint and several liability has either been completely abolished or limited in some fashion in thirty seven comparative negligence jurisdictions. See WOODS & DEERE, supra note 73, § 13:4, at 234. The remaining nine jurisdictions follow the common law rule of joint and several liability. See id. at 234-35.

143. See MONT. CODE ANN. §§ 27-1-702, -705 (1997) (Contingent). See Hickman, supra note 81, at 749-50 for the numerous issues associated with abolishing joint and several liability and adopting comparative fault. A jurisdiction without joint and several liability tends to promote inefficient plaintiff behavior. With joint and several liability, a plaintiff needs to bring only one action to recover his full damages. The defendant was then responsible for a second action to obtain contribution from nonjoined parties. Without joint and several liability, a plaintiff may choose to bring two or more separate actions to obtain full compensation for his injuries. A plaintiff may bring separate actions for purely strategic purposes. For example, a plaintiff may keep a defendant in reserve so that if the first trial did not result in a sufficient judgment, he would have a second chance at a satisfactory recovery. See id.

144. MONT. CODE ANN. § 27-1-705(3) (1997) (Contingent) provides "[i]n determining the percentage of fault of persons who are parties to the action, the trier of fact shall consider the fault of persons not a party to the action, based upon evidence of those persons' fault, that is admissible in evidence."

145. The multiple defendant statute and the issue of the empty-chair defendant raises a multitude of legal or constitutional issues merely mentioned or not discussed in this Comment, such as the right of privacy of the nonparty, the plaintiff's right to
However, if the supreme court chooses to strike down the current statute, it may strike down sections of the contingent Multiple Defendant Statute at the same time because the statute is also unconstitutional.

IV. POLICY CONSIDERATIONS FOR THE EMPTY-CHAIR DEFENDANT

Professor Schwartz, a leading comparative negligence commentator, argues that "a result more compatible with the goals of comparative negligence is reached by determining the negligence of all concurrent tortfeasors irrespective of whether they are parties to the suit."146 Thus, Schwartz encourages including the fault of an empty-chair defendant when determining the liability of the remaining defendants.

The policy of the law is to encourage settlement, however, including the fault of the empty-chair defendant when calculating the plaintiff's damages does not encourage settlement. In Blake v. Hy Ho Restaurant, Inc.,147 the Illinois Supreme Court held that "[t]o require that a defendant's fault be assessed despite its prior settlement with plaintiff would frustrate Illinois public policy favoring peaceful and voluntary resolutions of claims through settlement agreements."148 The Illinois Supreme Court held that appellants' argument that their respective liability should be reduced by the pro rata share of the dismissed defendant's liability is

misdirected and erroneous. If such were the case, a nonsettling defendant would receive a double benefit. First, any judgment amount entered in favor of a plaintiff would be reduced to reflect the partial settlement. Then, potentially, the nonsettling defendants would reap an additional benefit if found [50% or less] at fault because the judgment having once been reduced to reflect the settlement could be subject to less than full satisfaction under the terms of [the statute].149

Fundamentally, the nonparty issue has become inextricably bound to the question of joint and several liability.150 Those who believe defendants should be liable only for their proportion-

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146. SCHWARTZ, supra note 14, § 15-5(a), at 313-14.
147. 652 N.E.2d 807 (Ill. 1995).
148. Blake, 652 N.E.2d at 810.
149. Id.
150. See Mutter, supra note 1, at 268.

https://scholarship.law.umt.edu/mlr/vol59/iss1/7
ate share of fault, such as the current Montana Legislature, insist that the negligence of absent tortfeasors must be considered. Those who are more concerned with adequate compensation for injured plaintiffs, such as the Montana Supreme Court, resist the inclusion of nonparties if proportional liability is the accompaniment. The preamble to House Bill 571 states that the Legislature wants to allocate liability among all parties involved, including plaintiffs, defendants, and other potentially liable persons. If only for the sake of simplifying multiple defendant litigation in Montana, the Legislature and the Supreme Court should construct negligence law that is fair to all the parties involved.

V. POTENTIAL SOLUTIONS

The goal of developing a workable Multiple Defendant Statute should be to satisfy Montana's constitutional requirement of substantive due process, as expressed in Plumb, in addition to fairness to all parties involved. In 1984, two commentators set forth solutions to the empty-chair defendant issue in the context of joint and several liability that fairly allocate damages among the parties involved and do not violate the substantive due process rights of the plaintiff, the defendant(s), or the nonparty: ignoring the nonparty's fault or allocating damages among parties to the suit. The solutions are designed for jurisdictions that have "pure" joint and several liability law where several liability will not apply to defendants. Montana is not such a jurisdiction because it utilizes several liability for defendants who are 50% or less negligent. However, the solutions below are modified for a jurisdiction such as Montana utilizing hypotheticals previously set forth.

151. See House Bill 571 page 1, 1.19.
152. See Smith & Wade, supra note 121, at 984-85.
154. The examples utilized for the potential solutions in Part V are "simple" in that they do not represent complex litigation where you may have multiple plaintiffs and several defendants. In such a case, all of the defendants could be severally liable, for example, and the plaintiff(s) may receive undervalued or overvalued settlements from one or more of the defendants. The solutions in Part V do not attempt to address such complex examples, however a court may be able to apply one of the solutions set forth to fairly resolve a suit for all the parties involved.
A. Ignoring Nonparty's Fault

The first solution ignores the nonparty's fault to achieve fair loss apportionment among all parties.155 Returning to our hypothetical, Teacher settles with Councilman for $200,000 and proceeds to trial against Accountant. The jury awards $1,000,000 in damages and finds Teacher 10% at fault, Accountant 60% at fault, and Councilman 30% at fault. If the Councilman's fault is not considered, then Teacher's 10% share and Accountant's 60% share distributed among the two parties would result in a 14% fault share for Teacher (10%/70%) and a 86% share for Accountant (60%/70%).156 Accountant would then be liable to Teacher for $688,000 (86% of $800,000) rather than $600,000.157 This is arguably a just result because Teacher and Accountant have borne the loss due to the undervalued settlement in proportion to their relative degrees of fault.158 In short, ignoring the nonparty's fault achieves fair loss apportionment because it distributes the undervalued settlement among the parties at trial.159

B. Allocate Damages Among Parties To Suit

Another possible method for distributing the nonparty's fault is to allocate the damages associated with the nonparty's share of fault among all parties in proportion to their fault by using the Uniform Comparative Fault Act's method of apportioning the liability of an insolvent defendant.160 Montana, Minnesota, and Connecticut utilize language from the Uniform Comparative Fault Act to apportion liability among parties to the suit when a nonparty's equitable share of the obligation is uncollectible.161 Montana can utilize a similar approach for a nonparty.

Dividing the risks of an undervalued settlement and the benefits of an overvalued settlement among all parties propor-

155. See Smith & Wade, supra note 121, at 984.
156. The 14% fault share for Teacher and the 86% share for Accountant are rounded for simplicity.
157. See Smith & Wade, supra note 121, at 984.
158. See id.
159. See id.
160. See id. at 985. See also Hickman, supra note 81, at 745 n.33.
161. See MONT. CODE ANN. § 27-1-705(5) (1997) (Temporary). Minnesota reallocates the share of an insolvent tortfeasor among all parties including the plaintiff. See MINN. STAT. § 604.02 (2). By comparison, Connecticut reallocates only among defendants. See CONN. GEN. STAT. § 52-572h(g). See generally, Hickman, supra note 81, at 745 n.33.
tionate to fault achieves a fair loss apportionment without reducing incentives for settlement. Returning to our first example given supra Part III(B)(2) in which the Teacher received an undervalued settlement of $200,000 from Councilman and the jury finds Councilman 30% at fault, Teacher and Accountant would “share” the $100,000 uncollectible loss (the difference between the $300,000 which Councilman would have paid without a prior settlement and the $200,000 Councilman actually paid in settlement). The loss is shared in proportion to the relative fault of Accountant and Teacher. If Accountant (60% at fault) pays Teacher an additional $83,000 towards the uncollectible loss of $100,000, then Teacher (10% at fault) absorbs $17,000 of the $100,000 in lost damages since the ratio of Teacher’s liability to Accountant’s is six to one. By contrast if, as in the second example given supra Part III(B)(2) in which the Teacher receives an overvalued settlement of $900,000 from Councilman (in which Councilman is only 30% at fault), then Teacher (10% at fault) and Accountant (60% at fault) mutually benefit and share the $600,000 excess in proportion to their relative fault with the result that Accountant pays no damages. In the case of a settlement greater than the total damages, the plaintiff receives no additional recovery but keeps the excess. This result encourages settlement.

VI. CONCLUSION

The current Multiple Defendant Statute satisfies the supreme court’s requirements for protecting a nonparty’s substantive due process. However, the statute continues to violate the plaintiff’s substantive due process based on Plumb and Newville. The statute jeopardizes a plaintiff’s chance of recovery when a

162. See Smith & Wade, supra note 121, at 985.
163. See id. at 985 n.95.
164. See id. The damage amounts are rounded to simplify this example.
165. See id. Accountant pays no damages towards the $1,000,000 judgment because Teacher was 10% at fault. Councilman’s $900,000 settlement is subtracted from the $1,000,000 judgment.
166. See id.
167. See id. In summary, full loss allocation discourages defendants from establishing an absent party’s liability because all parties would proportionally share the absent party’s percentage of fault. See id. at 980. Adopting full loss allocation equalizes the burden of litigating the liability of the absent parties and provides an incentive to plaintiffs and defendants to join every tortfeasor. See id. Under full loss allocation, the plaintiff and the defendant have a strong motivation to join all solvent tortfeasors to avoid proportionate reallocation. See id. at 981.
settled or released person does not appear at trial to defend himself and still requires the plaintiff to defend the nonparty at trial. The statute violates a defendant's substantive due process rights because he is only able to allocate liability to a settled or released person rather than any co-tortfeasor. In addition, the statute creates new substantive due process violations, including the requirement that the plaintiff must assume the liability allocated to the nonparty and the adoption of the percent credit rule that increases the chance that the plaintiff will not recover all of his or her damages. Furthermore, the contingent Multiple Defendant Statute plainly violates the plaintiff's substantive due process because the statute resurrects the nonparty defense without any procedural safeguards that the Newville court found necessary. The contingent Multiple Defendant Statute does not consider any of the substantive due process violations found in both Newville and Plumb. Either solution offered in Part V can strike a balance between the opposing positions of the Montana Legislature and the Montana Supreme Court. After all, the goal of the Legislature and the supreme court is to construct negligence law that is constitutional and fair to all the parties involved.