July 1987

Settlement and Liability in Montana: State ex rel. Deere & Co. v. District Court

Allen P. Lanning

Follow this and additional works at: https://scholarship.law.umt.edu/mlr

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.law.umt.edu/mlr/vol48/iss2/7
SETTLEMENT AND LIABILITY IN MONTANA: STATE EX REL. DEERE & CO. v. DISTRICT COURT

Allen P. Lanning

I. INTRODUCTION

As amended in 1981, Montana Code Annotated section 27-1-703 stated that each party in a negligence action against whom recovery may be allowed is jointly and severally liable for the amount that may be awarded to the claimant. The statute further provided that each joint tortfeasor "has the right of contribution from any other person whose negligence may have contributed as a proximate cause to the injury complained of," and that such contribution "shall be proportional to the negligence of the parties against whom recovery is allowed."

An interpretive difficulty arises, however, when one of several joint tortfeasors settles with the plaintiff in a negligence action. The effect of the settlement and the resulting release of the settling tortfeasor upon the nonsettling tortfeasor's liability and rights of contribution is ambiguous under section 27-1-703. The statute arguably granted defendants a right of contribution from any party whose negligence may have been a proximate cause, irrespective of whether that party has settled with the plaintiff. But such an interpretation violates the policy which encourages settlement and jeopardizes immunization of a settling defendant. Other jurisdictions which have determined that there is no right of contribution in this situation are divided on the effect that the settlement should have on the liability of the nonsettling defendants. In some jurisdictions, the amount of any judgment rendered against the nonsettling defendants is reduced by a dollar credit equal to the amount of the settlement; in other jurisdictions the reduction

1. In 1987, the Montana Legislature revised § 27-1-703 by adopting Senate Bill 51, which was signed by the governor of Montana on April 16, 1987. The revision eliminates joint liability for parties found to be 50% or less negligent for the injury complained of and specifically requires the trier of fact to apportion liability among all persons even those who are not parties to the cause of action. MONT. CODE ANN. § 27-1-703 (1987). The revised statute applies to all causes of action arising on or after July 1, 1987. Id.
5. "Compromises are favored by the court. This is such a universal rule as to require no citation of authority." State Highway Comm'n v. Arms, 163 Mont. 487, 490, 518 P.2d 35, 37 (1974). See also Black v. Martin, 88 Mont. 256, 292 P. 577 (1930).
6. See, e.g., Mayhew v. Berrien County Road Comm'n, 414 Mich. 399, 326 N.W.2d 366
is based on the percentage of the liability attributable to the settling defendant.  

The Montana Supreme Court recently addressed this dilemma in *State ex rel. Deere & Co. v. District Court.* The court held that section 27-1-703 granted nonsettling tortfeasors no right of contribution or indemnity from tortfeasors who settled before judgment was entered. The court further ruled that the amount of the pre-judgment settlement reduces the liability to the plaintiff of the nonsettling tortfeasors on a *pro tanto* (dollar credit) basis only. Four months after the *Deere* decision, however, the Montana Legislature again revised section 27-1-703 to limit joint liability and to require the trier of fact to apportion liability among persons who are not parties to the cause of action. The revision renders section 27-1-703 compatible only with the percent credit rule, arguably overruling the *Deere* decision. This note examines the Montana Supreme Court's interpretation of section 27-1-703 in the *Deere* case, and compares and contrasts the dollar credit rule and the percent credit rule, addressing the ramifications of Montana's retention of the dollar credit rule. Finally, this note discusses the effects of the legislature's 1987 revision of section 27-1-703 on the *Deere* decision.

II. THE CASE

A. Facts and Judicial History

On May 26, 1982, Beaverhead Irrigation Co. was installing an irrigation system on a ranch in Beaverhead County. When a dump truck became mired, plaintiff Robert L. Campbell, an employee of Beaverhead Irrigation Co., assisted in moving the truck. While helping, Campbell was injured when a bulldozer backed into him. The bulldozer, manufactured by Deere, was operated by an em-

---

7. See, e.g., *IOWA CODE ANN.* § 668.7 (West 1986); *TEX. REV. CIV. STAT. ANN.* § 2212a (Vernon 1986). This method of reduction, called the percent credit rule, requires that the finder of fact apportion liability among the nonsettling defendants and the defendant who has previously settled.

8. *Id.* Mont. at _, 730 P.2d 396 (1986).

9. *Id.* at _, 730 P.2d at 402. Contribution and indemnity are different remedies. This case note is concerned only with the right of contribution, which is a statutory right in Montana. Much said in this note will also apply to indemnity, since the Montana Supreme Court has treated the remedies similarly procedurally. *Deere,* Mont. at _, 730 P.2d at 406.

10. *Deere,* Mont. at _, 730 P.2d at 405.

ployee of Wade's Backhoe Services.  

Campbell filed suit against Deere and Wade's Backhoe Service in April 1983. Campbell and Deere reached a settlement agreement in May 1983. Under the terms of the agreement, Deere paid Campbell $25,000 and Campbell released Deere from all claims, although reserving his claim against Wade's Backhoe Service. In the release, Campbell agreed to indemnify Deere from any other claims arising out of the action, including claims of contribution from joint tortfeasors. Pursuant to stipulation, the district court dismissed the action against Deere with prejudice on May 19, 1983.

In March 1984, Wade's Backhoe Service filed a third party complaint against Deere. The third party complaint sought indemnity and contribution under theories of negligence and strict liability. Deere filed an answer to the third party complaint in April 1984. In October 1985, Deere filed a motion to amend its answer to include the defense of release and at the same time filed a motion for summary judgment, asserting that after settling with the plaintiff and being dismissed with prejudice, it could not be brought back into the action. In November 1985, the district court denied both of Deere's motions. Campbell and Deere then applied to the Montana Supreme Court to procure a writ of supervisory control directing the district court to grant Deere's motions.

B. The Holding

In Deere, the Montana Supreme Court determined that, under section 27-1-703, "a joint tortfeasor who settles with the claimant before judgment of the claim is entered in a district court is not subject to claims for contribution or indemnity from the nonsettling joint tortfeasors against whom judgment may be rendered." Although the statute provides that the right of contribution is "proportional to the negligence of the parties against whom recovery is allowed," the court ruled that a tortfeasor who has previously settled is not a party against whom recovery is allowed. When a plaintiff, through settlement, releases a defendant from liability, no recovery is allowed against that defendant.

12. Id. at ___, 730 P.2d at 398.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id. at ___, 730 P.2d at 402.
20. Deere, ___ Mont. at ___, 730 P.2d at 402. See also North v. Bunday, ___ Mont. at ___ Mont. at ___.
The Montana Supreme Court further held that the effect of a settlement by one tortfeasor is to diminish the plaintiff's recovery, and hence the liability of the nonsettling tortfeasor, by a dollar credit equal to the consideration paid or to be paid by the settling tortfeasor. In retaining the dollar credit rule, the Montana Supreme Court explicitly rejected the percent credit rule. The court reasoned that the dollar credit reduction, which has been the practice in Montana, is more effective in encouraging compromise and settlement than the percent credit rule. Justice Gulbrandson dissented on the retention of the dollar credit rule. He urged that Montana "follow the modern trend and adopt the percent credit rule."

III. Analysis

A. The Development of the Right of Contribution Among Joint Tortfeasors in Montana

Prior to 1977, there was no right of contribution among tortfeasors in Montana. In 1977, after the adoption of the comparative negligence statute, the Montana Legislature established joint and several liability among tortfeasors and gave tortfeasors a right of contribution in comparative negligence actions.
The Montana Supreme Court first interpreted this statute in *Consolidated Freightways Corp. v. Osier.*\(^2\) The case centered on a question certified to the Montana Supreme Court from the federal district court judge in Missoula: whether, as a matter of substantive law, a tortfeasor had a cause of action for contribution or indemnity against any joint tortfeasor not named by the plaintiff as a defendant in the action.\(^2\) The Montana Supreme Court construed section 27-1-703 narrowly, ruling that the statute applied only to comparative negligence actions where recovery is allowed against more than one party.\(^3\) The court further held that the statute only granted a right of contribution from defendants against whom judgment had been recovered by the plaintiff.\(^4\) The practical effect of this decision was to give "the plaintiff power to determine from whom joint tortfeasors could seek contribution; under *Consolidated Freightways Corp.,* tortfeasors had no right of contribution from parties not named by the plaintiff as defendant in the action. Noting the refusal of the Montana Legislature to enact a provision permitting mandatory joinder of all tortfeasors upon motion by any party in a cause of action, the court concluded that the legislature had intended the statute to be a narrow exception to the pre-existing "substantive rule" against contribution among joint tortfeasors in Montana.\(^5\)

The court's conclusion was strongly repudiated by the legislature. At the next session (in 1981), the legislature amended section 27-1-703 in response to the *Consolidated Freightways Corp.* decision.\(^6\) The amendment expanded the statute to include a right of

\(^2\) Lanning: Settlement and Liability in Montana: State Ex Rel. Deere & Co. v. District Court

\(^5\) Published by The Scholarly Forum @ Montana Law, 1987
contribution for tortfeasors in the situations in which the right was specifically denied in Consolidated Freightways Corp.: the right of contribution shall apply to all actions in negligence, not merely comparative negligence actions; and a defendant may bring any party who is liable into the suit. The amendment also appeared to establish a system of comparative fault.

B. The Problem

Montana Code Annotated section 27-1-703, as amended in 1981, established the right of defendants to recover contribution from joint tortfeasors who have not been brought into the action by the plaintiff. However, the statute did not clearly delineate whether a tortfeasor may recover contribution or indemnity from a joint tortfeasor who, after having been brought into the action, settled with the plaintiff prior to judgment.

The difficulty stems from the language of amended section 27-1-703. The statute seemingly conferred a right of contribution against anyone who may be contributorily negligent. The status of the third party, vis-a-vis the plaintiff, was not made a condition of or restriction on the contribution rights. Moreover, the legislature intended the amended statute to be broad enough in scope to remove the strictures placed upon the original statute in Consolidated Freightways Corp. Yet the statute provided that contribu-
tion "be proportional to the negligence of the parties against whom recovery is allowed." A settling defendant is released from the cause of action and immunized from suit. Once immunized from suit, a recovery can no longer be had from that defendant. Upon settlement, the tortfeasor is no longer a party against whom recovery is allowed, and there is no right to contribution under the statute. In Deere, the Montana Supreme Court was faced with resolving this apparent contradiction in the statute.

C. Three Possible Solutions

Without indicating a preference, the American Law Institute's Restatement of Torts recognizes three possible ways of treating the effect of a release of a tortfeasor upon the right of other tortfeasors to contribution from him: (1) the release extinguishes the claim of the injured party but another tortfeasor may obtain contribution from the settling tortfeasor if he pays more than his equitable share of the obligation; (2) the release given in good faith extinguishes the claim of the injured party and prohibits other tortfeasors from obtaining contribution from the settling tortfeasor, but the settlement amount is deducted from any future judgment against the other tortfeasors; (3) the release extinguishes the claim of the injured party and prohibits other tortfeasors from obtaining contribution from the settling tortfeasor, but any judgment against the nonsettling tortfeasors is reduced by the percentage of the liability attributable to the settling tortfeasor. The first approach, allowing contribution, was adopted in the 1935 Uniform Contribution Among Joint Tortfeasors Act, while the second approach, the dollar credit rule, was adopted in the 1955 Uniform Contribution Among Joint Tortfeasors Act, and the third approach, the percent credit rule, was adopted in the 1977 Uniform Comparative Fault Act.

27-1-703 in response to the ruling in Consolidated Freightways Corp. Deere, Mont. at ____, 730 P.2d at 400.
41. Deere, Mont. at ____, 730 P.2d at 402.
42. Restatement (Second) of Torts § 886A, comment on caveat (1979). Yet another approach is the pro rata credit rule. Deere, Mont. at ____, 730 P.2d at 407 (Guilbrandson, J., dissenting). Under this approach, the nonsettling defendant's liability is reduced by a proportion equal to the number of settling tortfeasors divided by the total number of tortfeasors. This is a primitive method of apportionment, neither as equitable nor as accurate as the percent credit rule, and so will not be discussed in this note. It is similar to the common law "majority rule" set forth in the 1955 Uniform Contribution Among Tortfeasors Act, which merely divided liability equally among the tortfeasors in the action.
43. Restatement (Second) of Torts § 886A, comment on caveat (1979). Many states
1. The Right of Contribution Approach

The first approach permits a nonsettling tortfeasor to recover contribution from a settling tortfeasor whenever the settlement amount is less than the settling tortfeasor's share of the liability. The trier of fact determines the percentage of liability of the settling tortfeasor. Thus, there is a right of contribution from settling tortfeasors under this approach. This ensures that the right to seek contribution is not dependent upon the plaintiff's choice of defendants. If the plaintiff settles for a nominal sum with all of the defendants except one target defendant who may have a small proportionate share of the liability, the plaintiff's collusive settlement is negated by the nonsettling defendant's right of contribution against the settling defendants. In the absence of indigent co-defendants, each nonsettling defendant should recover contribution for any amounts paid to the plaintiff which are greater than his proportionate share of the fault.

Unfortunately, permitting nonsettling tortfeasors to recover contribution from settling tortfeasors discourages settlement, contrary to the almost universally accepted rule that the law favors compromise and settlement. A right of contribution would nullify any benefit to be gained through settlement. As the California Court of Appeals noted, "few things would be better calculated to discourage settlement of disputed tort claims, than knowledge that such a settlement lacked finality and would but lead to further litigation with one's joint tortfeasors, and perhaps further liability." The joint tortfeasor would have a positive incentive to remain in the action in order to minimize his liability. Because

have adopted the 1955 version of the Uniform Contribution Among Joint Tortfeasors Act, which recommends the dollar credit rule. The 1977 Uniform Comparative Fault Act, superseding the 1955 Uniform Contribution Among Joint Tortfeasors Act, has been adopted in part by a number of states, although no state has adopted the U.C.F.S. in its entirety. Some states have judicially adopted the percent credit rule. Montana has not adopted any model act. See Deere, ___ Mont. at ___, 730 P.2d at 404.

44. E.g., P has a negligence claim against D1 and D2 for $100,000. P settles with D1 for $10,000 prior to the time of trial and obtains a verdict of $100,000 against D2. The jury determines that D1 was 50% negligent and D2 was 50% negligent. Under the first approach, D2 has a right of contribution from D1 for any amount paid to P over D2's share of the liability. In Deere, this was the approach advocated by defendant Wade Hanson. Deere, ___ Mont. at ___, 730 P.2d at 403.

45. Id.

46. See generally Consolidated Freightways, 185 Mont. at 448-50, 605 P.2d at 1082 (Haswell, C.J., dissenting).

47. See cases cited supra note 5.


the first approach effectively frustrates settlements, jurisdictions are reluctant to adopt it or allow contribution from settling tortfeasors.50

2. The Dollar Credit Approach

Under the second approach, a release from the plaintiff immunizes the settling tortfeasor from claims of contribution by the nonsettling defendants, but reduces the judgment pro tanto by a dollar credit equal to the amount of the settlement.51 The Montana Supreme Court adopted this solution in the Deere case.52 The court bifurcated the issue, first considering whether there was a right of contribution from settling tortfeasors, then determining the effect of the settlement on the liability of the nonsettling tortfeasors.53 The court narrowly construed section 27-1-703, finding dispositive the language that “contribution shall be proportional to the negligence of the parties against whom recovery is allowed.”54 The court reasoned that a party who has settled is not a party against whom recovery is allowed, and so is not liable for contribution under the statute.55 The Montana Supreme Court then determined that any judgment recovered against the nonsettling tortfeasors would be reduced by a dollar credit equal to the amount of the settlement, and not by the percentage of the fault attributable to the settling tortfeasor.56 The dollar credit rule generally has been recognized to be the law in Montana.57 In 1930, the Montana Supreme Court stated that a settlement agreement “releases the tortfeasor to whom it is executed as if it were in fact an express agreement not to sue, and to that extent releases the other tortfeasors pro tanto only.”58 In Deere, the court justified its retention of the dollar

50. Id.
51. E.g., if P settles with D1 for $10,000 and later recovers a verdict of $100,000 in which D1 is found 50% negligent and D2 is found 50% negligent, then the settlement amount is subtracted from the verdict ($100,000 - $10,000 = $90,000) and P may recover $90,000 from D2, even though D2's negligence only caused $50,000 of the damage.
52. Deere, Mont. at ___, 730 P.2d at 404-05. This was the position adopted by plaintiff Robert Campbell and settling defendant Deere. Id. at ___, 730 P.2d at 403.
53. Id. at ___, 730 P.2d at 398.
54. Id. at ___, 730 P.2d at 402 (emphasis added).
55. Id.
56. Id. at ___, 730 P.2d at 404-05.
57. Black v. Martin, 88 Mont. 256, 292 P. 577 (1930). But cf. Azure v. City of Billings, 182 Mont. 234, 596 P.2d 460 (1979), where the Montana Supreme Court held that the dollar credit rule was applicable where damages are indivisible, but would be improper where damages are apportioned.
58. Black, 88 Mont. at 267-68, 292 P.2d at 580.
credit rule by asserting that it "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." 59

Since settling tortfeasors are immune from contribution, the dollar credit rule does encourage settlement. Plaintiffs are assured of recovering the entire amount of any judgment rendered less the settlement amount. But any nonsettling defendants may be saddled with paying a much greater percentage of the judgment than their liability merits, without any hope of recovering contribution from the other tortfeasors. 60 The plaintiff has the option of settling with one or more of the defendants. If he settles for an amount less than what he would have recovered from that defendant at trial, then it is not he who must make up the difference, but the nonsettling defendants. 61 In effect, the nonsettling tortfeasors involuntarily become the plaintiff's insurers against his own poor judgment when settling for less than he is entitled.

Arguably, the heavy burden that the dollar credit rule places on nonsettling defendants may provide a powerful impetus for defendants to seek settlement. In reality, though, many defendants seeking settlement for their share of the liability are prevented from doing so by the plaintiff. A plaintiff will often target certain defendants, refusing to settle with them, while releasing others for nominal sums. Chief Justice Haswell, dissenting in Consolidated Freightways Corp., recognized that:

Plaintiff's choice of defendants is frequently determined by considerations foreign to a fair and just apportionment of the loss. Sometimes that choice is made on the basis of comparative financial responsibility or ease of collection among the respective tortfeasors; at times the existence or nonexistence of liability insurance is the controlling factor; at other times it is governed by plaintiff's business, social, blood or marriage relationship to one or more of the tortfeasors; occasionally whim, spite or collusion determines plaintiff's choice of defendants . . . . 62

To prevent collusion, the 1955 Uniform Contribution Among Joint Tortfeasors Act requires that settlement be made in good faith. 63 The Montana court in Deere also set forth good faith as

59. Deere, ___ Mont. at ___, 730 P.2d at 405.
60. Id. at ___, 703 P.2d at 407 (Gulbrandson, J., concurring and dissenting).
61. Id.
62. Consolidated Freightways Corp. v. Osier, 185 Mont. at 449, 605 P.2d at 1082 (Haswell, C.J., dissenting).
63. Restatement (Second) of Torts § 886A, comment on caveat (1979).
necessary to settlement. The effectiveness of this requirement in preventing collusive settlements has yet to be determined. The dollar credit rule gives the plaintiff the power to control the ultimate apportionment of his loss among those responsible based upon his settlement decision rather than upon each tortfeasor's share of the fault. The majority in Deere did not address the burden that the dollar credit rule places on the nonsettling defendant.

3. The Percent Credit Approach

The burden placed upon nonsettling defendants by the dollar credit rule is nonexistent under the third approach set forth by the American Law Institute. Under this approach, any judgment rendered against the nonsettling defendant is reduced by the percentage of fault attributable to the settling defendant. Called the modern rule, the percent credit rule was intended in the 1977 Uniform Comparative Fault Act to supersede the dollar credit rule. The percent credit rule has been adopted in a number of states.

Under the percent credit rule, a plaintiff will not recover the full amount of any judgment against nonsettling tortfeasors if he settled for an amount less than the amount of the judgment attributable to the fault of the settling tortfeasor. The Montana Supreme Court implied that this might not adequately protect the plaintiff. Actually, the percent credit rule merely places the plaintiff in a multiple-defendant action on an equal basis with the plaintiff in a single-defendant action. In the latter, the plaintiff takes a chance when settling: he may receive more through settlement than through trial, or he may receive less. But ultimately, he has immunized the defendant from suit and may recover no more from that defendant. Similarly, in multiple-defendant actions, the plaintiff's release should immunize the defendant from suit and

64. Deere, ___ Mont. at ___, 730 P.2d at 404.
65. See generally the dissent of Chief Justice Haswell in Consolidated Freightways Corp., 185 Mont. at 444, 605 P.2d at 1081 (Haswell, C.J., dissenting).
66. RESTATEMENT (SECOND) OF TORTS § 886A, comment on caveat (1979). E.g., if P settles with D1 for $10,000 and later recovers a verdict of $100,000 in which D1 is found 50% negligent and D2 is found 50% negligent, then P can recover only $50,000 from D2, since D1's liability (50% or $50,000) was extinguished by settlement, even though the settlement amount was only $10,000.
68. The percent credit rule has been adopted judicially and statutorily. See Bartels v. City of Williston, 276 N.W.2d 113 (N.D. 1979); Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963); TEX. REV. CIV. STAT. ANN. § 2212a (Vernon 1986); IOWA CODE ANN. § 668.7 (West 1986). The dollar credit rule is still operative in some states that adopted the 1955 Uniform Contribution Among Joint Tortfeasors Act.
69. Deere, ___ Mont. at ___, 730 P.2d at 404.
the plaintiff should recover no more than the settlement amount for the share of the liability attributable to the settling defendant.

In Deere, the Montana Supreme Court found this argument inconsistent with the principles of joint and several liability. Joint and several liability protects the plaintiff from being unable to recover against certain tortfeasors: those who are insolvent and those who, through no action of the plaintiff, are immune from suit. Joint and several liability was not intended to ensure a full recovery from those defendants who the plaintiff has voluntarily immunized from suit. Under the percent credit rule, when a plaintiff settles with a defendant, he waives his right of joint and several liability against that defendant.

The majority in Deere also feared that the settling defendant would be forced to remain in the action in order that its proportion of the fault may be determined. However, Justice Gulbrandson pointed out in his dissent that "the percent credit rule does not require that the settling tortfeasor be retained as an additional defendant or third-party defendant." The determination of the percentage of fault attributable to the settling defendants "does not require the settling defendants to remain parties because the allocation, if any, of the causal negligence to the settling tortfeasors is merely a part of the mechanics by which the percentage of causal negligence of the nonsettling tortfeasor is determined." The percent credit rule accords with the 1981 version of section 27-1-703, which required that the trier of fact apportion fault among all persons (not parties) who have contributed as a proximate cause to the plaintiff's injury. Section 27-1-703 was a comparative fault statute which provided for apportionment. A comment to the Uniform Comparative Fault Act states that the dollar credit rule is not appropriate under a system of apportionment of damages between tortfeasors. The Montana Supreme Court recognized this in Azure v. City of Billings, when it held that a dollar credit deduction is improper when damages may be apportioned.

70. Id.
71. Id.
72. Bartels, 276 N.W.2d at 121-22.
73. Id. See also Justice Gulbrandson's discussion in his dissent. Deere, ___ Mont. at ___, 730 P.2d at 409 (Gulbrandson, J., dissenting).
74. Deere, ___ Mont. at ___, 730 P.2d at 404.
75. Id. at ___, 730 P.2d at 410 (Gulbrandson, J., dissenting).
78. Id.
tioned between two or more parties. Since 1981, section 27-1-703 has required apportionment in all cases where more than one person is found to be at fault. Therefore, the court’s reasoning in Azure would require that the percent credit rule be adopted in Montana, since section 27-1-703 does not allow contribution from tortfeasors who have settled.

The majority in Deere, however, found no legislative intent to replace the dollar credit rule. This finding entirely disregards the legislature’s adoption of a comparative fault statute, which is compatible with a percent credit rule. Moreover, since the dollar credit rule was judicially created in Montana, no legislative intent is necessary to replace it. The dollar credit rule should have been judicially replaced by the percent credit rule in Montana in the Deere decision.

D. Practical Considerations of the Deere Decision

The Montana Supreme Court’s retention of the dollar credit rule casts into doubt the effect of “Pierringer” releases, which are used by many plaintiffs in settling with one of several tortfeasors. These releases developed as a result of the Wisconsin case of Pierringer v. Hoger which adopted the percent credit rule in a comparative fault jurisdiction. In a Pierringer release, the plaintiff contractually accepts the percent credit rule; the amount of any judgment rendered against the nonsettling tortfeasors is reduced by the percentage of fault attributable to the settling tortfeasor. Under the Deere decision, these releases may only be effective to the extent of a dollar credit reduction for the amount of the consideration received from the settling tortfeasor. If settling parties are unable to contract around the dollar credit rule, then the legitimacy of the Pierringer release in Montana is uncertain.

The Deere ruling may also affect jury instructions in actions with multiple defendants. Section 27-1-703 requires the trier of fact to apportion damages between all persons who may have con-

81. The Deere court cited Azure as support for the dollar credit rule in Montana. The Azure decision stated that the dollar credit rule was proper when damages are indivisible but improper where damages are apportioned. Azure, 182 Mont. 234, 247, 596 P.2d at 460.
82. Deere, — Mont. at —, 730 P.2d at 404-05.
84. 21 Wis. 2d 182, 124 N.W.2d 106 (1963).
85. Some states with statutory dollar credit rules have amended their statute so that any judgment against nonsettling tortfeasors is reduced by a dollar credit in the amount of consideration for the settlement, or any amount stipulated in the settlement, whichever is greater. E.g. ARIZ. REV. STAT. ANN. § 12-2504 (1984); IDAHO CODE § 6-805 (1986). Under this statutory scheme, Pierringer releases would be effective.
tributed as a proximate cause to the action.66 The statute does not require that such persons be parties to the action. Under the statute, jury instructions would instruct the jury to apportion fault among the plaintiff, the defendants, and any other person who may be liable for the injury, even though there would be no right of contribution from the latter. The Montana Supreme Court in Deere, however, asserted that it would make no sense to apportion fault among settling defendants (and by analogy other persons who are not parties) since there is no right of contribution from them.67 Apparently, under the Deere ruling, liability need only be apportioned between parties in the action, a result which is inconsistent with the language of section 27-1-703.68

E. The 1987 Revision of Section 27-1-703

In April 1987, four months after the Deere decision, the Montana Legislature again revised section 27-1-703.69 The revised stat-

---

86. This is true for § 27-1-703 as amended in 1981 and also as revised in 1987. The 1987 revision specifically lists persons (such as defendants who have settled) who are not parties to the action but among whom negligence must be apportioned.
87. Deere, —— Mont. at ——, 730 P.2d at 404.
88. Both the first and third approaches set forth by the American Law Institute require apportionment of the fault between settling and nonsettling defendants. Adoption of the third approach, the percent credit rule, would be consistent with the language of MONT. CODE ANN. § 27-1-703(1) (1985), which was not altered by the 1987 revision.
89. The statute was revised by the adoption of Senate Bill 51, which also amended § 27-1-702. As revised, section 27-1-703 reads:

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

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

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

(4) On motion of any party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, third-party defendants, persons released from liability by the claimant, persons immune from liability to the claimant, and any other persons who have a defense against the claimant. The trier of fact shall
ute retains most of the existing language but contains significant additions. Section 27-1-703 of the Montana Code Annotated as revised in 1987, (1) abolishes joint liability for all parties whose negligence is less than 50 percent of the total negligence, except that a party may be liable for damages caused by another's negligence if both parties acted in concert or if one party acted as the agent of another; (2) specifically requires the trier of fact to apportion negligence among all persons whose negligence may have contributed to the claimant’s injury, whether they are parties to the action, have settled with the plaintiff, or are immune from liability; and (3) limits liability for contribution from parties found to be less than 50 percent negligent to the percentage of negligence attributable to each such party.90

Although the Montana Legislature did not expressly adopt the percent credit approach in its revision of section 27-1-703, the changes made by the legislature strongly support the adoption of the percent credit rule in Montana. The 1981 version required apportionment among all persons whose negligence contributed to the injury; the 1987 version expressly states that negligence shall be apportioned among persons who are not parties to the action, including defendants who have settled with the plaintiff.91 The revised statute limits joint liability, indicating a desire by the legislature that individual defendants should only be responsible for their share of the fault, unless they were over 50 percent negligent. These changes are consistent with a percent credit approach, and not with the dollar credit approach retained by the Montana Supreme Court in Deere

1987 Mont. Laws _____. The revision contains a severability section and applies to all causes of action arising on or after July 1, 1987.

90. Id.
91. Id. See supra notes 74-76 and accompanying text.
The result reached by the Deere court is no longer viable under revised section 27-1-703. The Montana Supreme Court's justifications for retaining the dollar credit rule no longer exist. The Deere court believed the percent credit rule to be inconsistent with joint liability. The legislative revision to section 27-1-703 severely restricts joint liability. The Deere court asserted that it is pointless to apportion fault among settling defendants. Section 27-1-703 now expressly requires the trier of fact to apportion negligence among settling defendants. If Deere had been decided after the 1987 revision of section 27-1-703, the Montana Supreme Court would have only one option: adoption of the percent credit rule.

IV. Conclusion

There is no universally adopted solution determining the effect that the settlement of one tortfeasor will have upon the liability and rights to contribution of the other tortfeasors. The first approach listed by the American Law Institute, which allows contribution from settling tortfeasors, unduly burdens the plaintiff and the settling defendants but benefits nonsettling defendants. Conversely, the second approach adopted by the Montana Supreme Court in Deere, which disallows contribution but reduces the judgment by a dollar credit equal to the amount of the settlement, benefits the plaintiff and the settling defendants but unduly burdens nonsettling defendants. The third approach, which disallows contribution but reduces the judgment in proportion to the settling defendants' percentage of fault, does not unduly burden any party. This approach, the percent credit rule, is compatible with Montana's comparative fault statute and with the use of P i e r ringer releases in this state. It protects the plaintiff's and defendants' right to settle but does not make nonsettling defendants involuntary insurers of the plaintiff if he settles with one tortfeasor for less than he would have recovered from that tortfeasor at trial. The percent credit rule is beneficial to all parties in an action.

The Deere decision not only unfairly burdens nonsettling defendants, but does not conform with Montana statutory law, par-

92. Deere, ___ Mont. at ___, 730 P.2d at 404.
94. Deere, ___ Mont. at ___, 730 P.2d at 404.
96. As the Third Circuit Court of Appeals stated, "[o]f the two remaining choices [dollar credit or percent credit] . . . a system which taxes nonsettling tortfeasors to the extent of their negligence, and no further, is the more equitable." Gomes v. Brodhurst, 394 F.2d 465, 468 (3d Cir. 1968).
Particularly after the 1987 revision of section 27-1-703. Only the percent credit rule is compatible with the legislative revision of section 27-1-703. The revised statute implicitly overrules the *Deere* decision. The Montana Supreme Court should reconsider its retention of the dollar credit rule, and, as Justice Gulbrandson urged, "follow the modern trend and adopt the percent credit rule."97 Failing this, the legislature should adopt the rule compatible with Montana's comparative fault statute: the percent credit rule.
