

Comparative/Contributory Negligence

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Montana is a comparative negligence state. Under Montana law, a plaintiff's contributory negligence is a defense to negligence, but it does not completely bar the plaintiff's recovery. *Peterson v. Eichhorn*, 344 Mont. 540, ¶ 31, 189 P.3d 615 (2008) (citing Mont. Code Ann. § 27-1-702). The law requires awards to be diminished in proportion to the percentage of negligence attributable to the person recovering so long as the plaintiff's negligence does not exceed 50 percent. *Id.*, *Payne v. Knutson*, 323 Mont. 165, ¶ 18, 99 P.3d 200 (2004) (holding it was not error to bar recovery and instruct the jury not to attribute fault to defendants where jury concluded plaintiff was 51 percent or more negligent). The applicable statute provides:

Contributory negligence does not bar recovery in an action by a person or the person's legal representative to recover damages for negligence resulting in death or injury to the person or property if the contributory negligence was not greater than the negligence of the person or the combined negligence of all persons against whom recovery is sought, but any damages allowed must be diminished in the proportion to the percentage of negligence attributable to the person recovering.

Mont. Code Ann. § 27-1-702.

Contributory negligence may be considered even in negligence per se claims and in claims involving a nondelegable duty. *Nelson v. Shumaker Trucking and Excavating Contractors, Inc.*, 347 Mont. 1, ¶¶ 67-71, 196 P.3d 1265 (2008) (contributory negligence properly considered in workplace safety claim). Contributory negligence is not a defense however, in strict liability actions. Mont. Code Ann. § 27-1-719. And if the plaintiff is awarded punitive damages, that award cannot be reduced by the percentage of plaintiff's contributory negligence. *Shahrokhfar v. St. Farm Mut. Auto. Ins. Co.*, 194 Mont 76, 84, 634 P.2d 653, 658-59 (1981).

When contributory negligence is alleged, Montana allows presentation of a multiple-cause jury instruction. *Neal v. Nelson*, 347 Mont. 431, ¶ 32, 198 P.3d 819 (2008). Further, "even when a defendant is negligent as a matter of law, the issue of contributory negligence on the part of the plaintiff and the degree of comparative negligence, if any, is normally an issue for the jury or fact-finder to resolve." *Peterson v. Eichhorn*, 159 P.3d at ¶ 32.

Joint and Several Liability

Montana's joint and several liability law has been the subject of a long dispute between the Montana Legislature and the Montana Supreme Court. The legislature has tried to allow juries to apportion fault to non-parties, including defendants who settled, but the Court has struck down as unconstitutional three versions of the legislature's joint and several liability laws. See annotations to Mont. Code Ann. § 27-1-703. The legislature's latest version of the statute was adopted in 1997. The legislature enacted both a "temporary" provision that will remain in force until declared unconstitutional, and a backup or contingent provision that becomes effective if the temporary provision is declared unconstitutional. *Id.* The contingent provision is relatively straightforward: "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."

The current (temporary) statute is not so simple. It imposes joint and several liability only on parties who are determined to be more than 50% negligent, but requires the defendant to join any party to whom liability is attributed and establishes detailed procedures for the joinder process. Mont. Code Ann. § 27-1-703. The statute places the burden of establishing the negligence of third parties, and of proving the injury is divisible on the defendant. *Truman v. Montana Eleventh Judicial Dist.*, 315 Mont. 165, ¶ 33, 68 P.3d 654 (2003). If the injury is indivisible, the defendant is liable for all the damages. *Id.* at ¶ 32.

In practical terms, the statute requires a jury verdict form to list the plaintiffs if they were allegedly negligent, all defendants, all parties with whom the plaintiff has settled, and all parties released from liability. Mont. Code Ann. § 27-1-703(4), (6). The jury then determines the percentage of fault of each person or entity listed on the verdict form. *Id.* However, the trier of fact may not consider the negligence of parties who are immune from liability, parties who are not subject to the state's jurisdiction, and parties who could have been but were not named as third-party defendants when determining the percentage of fault. Mont. Code Ann. § 27-1-703(6)(c)(i)-(iii). The Montana Supreme Court has made clear that presentation of evidence regarding the alleged negligence of an unnamed defendant is prohibited and the jury may not consider the negligence of an unnamed party. *Truman v. Montana Eleventh Judicial Dist.*, 315 Mont. 165, ¶¶ 22, 31, 68 P.3d 654 (2003).

Once the jury renders a verdict, a defendant has a right of contribution from other defendants, but has no right to contribution from settled parties. *Durden v. Hyrdro Flame Corp.*, 295 Mont. 318, ¶¶ 24, 26, 52, 983 P.2d 943 (2004). Moreover, the right of contribution is proportionate only to the percentage of fault attributable to the contributing party. *Id.* at ¶ 52.