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TORTS

INTRODUCTION

During the period covered by this survey, significant tort law developments occurred in the areas of negligence, products liability and defamation. The Montana Supreme Court held in negligence actions that a parent corporation may owe a duty to provide a safe workplace to employees of a wholly owned subsidiary, a successful defense of assumption of risk is no longer a complete bar to a plaintiff's recovery, and the failure to use a seat belt is not a factor to be considered in comparative negligence. In the area of products liability the court established the standard to be used in determining whether a manufacturer has a duty to warn of dangers inherent in his product, and clarified the conditions under which a product owner's conduct is a superseding cause. In a libel per quod defamation action a plaintiff no longer need allege specific evidence of a pecuniary loss to state a claim for relief.

This survey also examines the first case in which the Montana Supreme Court construed the statutory limitation on governmental liability for tort actions. Of special interest to the practitioner are the final two cases discussed in this survey in which named defendants were mistakenly released by plaintiffs' attorneys.

I. ACTIONS IN NEGLIGENCE

A. *Duty to Provide a Safe Workplace*

An employer owes his employees a duty to provide a safe workplace.[1] The employer is immune by statute from liability for an unintentional breach of this duty under the Workers' Compensation Act.[2] The Montana Supreme Court in *Reynolds v. Burlington Northern*[3] held for the first time that a common law duty may be imposed on a parent corporation to provide a safe workplace to employees of a wholly owned subsidiary.[4] Unlike the subsidiary corporation, the parent corporation is not immune from liability under the Workers' Compensation Act for breach of this duty.

Reynolds, an employee of Ksanka Lumber Company, was injured in the course of his employment by the sudden movement of a string of railroad cars owned by defendant Burlington Northern.

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1. Shannon v. Howard S. Wright Constr. Co., _ Mont. _, 593 P.2d 438 (1979); 56 C.J.S. *Master & Servant* § 204 (1948).
2. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 39-71-411 (1979).
3. _ Mont. _, 621 P.2d 1028 (1980).
4. *Id.* at _, 621 P.2d at 1038.

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The injury occurred on a railroad siding leased from Burlington Northern by Ksanka for loading lumber products. Plaintiff's employer, Ksanka Lumber, is a wholly owned subsidiary of Plum Creek Lumber, which, in turn, is a wholly owned subsidiary of Burlington Northern, the defendant. The trial court directed a verdict for the defendant and plaintiff appealed. The supreme court, in a unanimous opinion, reversed and remanded the case for a new trial.

While a number of issues were raised on appeal, of singular interest was the plaintiff's claim that the defendant had a duty to provide a safe workplace because the plaintiff was a business invitee. The court dismissed the plaintiff's theory in short order: business invitees may lawfully claim a duty of reasonable care, but they cannot claim a duty on the part of the premises owner (defendant) to provide a safe workplace.[5] However, based on a novel theory—the parent/subsidiary relation of the two corporations—the court found that the defendant parent corporation had a duty to provide a safe workplace for the plaintiff employee of its subsidiary.

The court began its analysis by finding that the plaintiff performed work more directly connected with the operations of the defendant railroad than to Ksanka Lumber. This finding was based on an examination of the plaintiff's job, which required moving railroad cars owned by the defendant and filling them with woodchips from Ksanka Lumber. From this close connection the court concluded that both Ksanka Lumber and its intermediate parent corporation, Plum Creek, were "alter egos"[6] of the defendant Burlington Northern. The court questioned the justice of allowing the defendant parent corporation to insulate itself from the responsibility of providing a safe workplace for those technically employed by its subsidiary corporation. Not to be dissuaded by a technicality, the court found the plaintiff was an employee of the defendant. Consequently, the general rule obligating an employer to provide a safe workplace was applicable to the parent corporation, and established its duty to provide a safe workplace for the plaintiff.

The court stated the new rule as follows: where one corpora-

5. *Id.* at _, 621 P.2d at 1037.

6. *Id.* at _, 621 P.2d at 1038. The court's use of the term "alter ego" does not conform to the term's technical definition in corporate law. Under the alter ego doctrine, a court disregards the corporate entity and holds an individual — usually a majority stockholder — responsibile for acts done in the name of the corporation. *See* BLACK'S LAW DICTIONARY 71 (5th ed. 1979).

tion is the wholly owned subsidiary of a parent corporation, and where the employee is engaged in duties that are as closely connected to the business of the parent corporation as they are to the subsidiary, then both corporations owe a duty to provide employees of the subsidiary corporation with a safe workplace.[7] No authority was cited for this rule or for the analytical process that created it.[8] The rule seems certain to encourage litigation. By imposing this new duty on the parent corporation while at the same time failing to articulate a criterion by which a particular job can be determined to be as closely connected to the business of the parent as the subsidiary, the court has ensured that it will be called upon repeatedly to determine the "connectedness" of an employee's job to the business of the parent corporation.[9]

Parent corporations need be wary of this new obligation to the employees of wholly owned subsidiaries. With respect to a single obligation—the duty to provide a safe workplace—an employee of a wholly owned subsidiary may be considered an employee of the parent corporation. The parent corporation, while so obligated to its new "employee" in one respect, does not receive the benefit of immunity from suit under the Workers' Compensation Act granted to the subsidiary employer. Historically, workers' compensation and its concomitant tort immunity for employers arose in a similar circumstance—employee tort claims against the employer. It will hardly be surprising if parent corporation defendants are forced to assert those old defenses, such as the fellow servant rule, that were successfully raised prior to the adoption of the Workers' Compensation Act.

The right of the plaintiff Reynolds to sue the defendant Burlington Northern for its alleged negligence in allowing railroad cars to move unpredictably cannot be doubted; what must be ques-

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7. Reynolds, _ Mont. _, 621 P.2d at 1038.

8. Montana is the first jurisdiction to find such a duty based on the parent/subsidiary relation and the close connection of the plaintiff's job to the parent corporation. In at least one jurisdiction, a defendant corporation raised a similar argument in an attempt to *avoid* tort liability. In Cribbs v. Southern Coatings & Chemical Co., 218 S.C. 273, 62 S.E.2d 505 (1950), the defendant argued that the subsidiary corporation was merely its "alter ego" and the injured plaintiff was an employee of the parent because of the close connection of his work to that of the parent defendant. Next, the defendant argued that as an employee of the defendant, the plaintiff was barred by the South Carolina Workers' Compensation Act. The court held against the defendant, finding that the subsidiary could not be considered the alter ego of the parent because the subsidiary hired its own help, paid its own employees, kept its own books, paid separate income taxes and observed the formalities of independent corporate existence. *Id.* at 277, 62 S.E.2d at 508.

9. Because this determination must be made on a case-by-case basis, the potential exists that within a single work crew some employees may claim a parent corporation's duty to provide a safe workplace, while others on the same crew may not.

tioned is the imposition of a duty to provide a safe workplace based on incidental ownership. As a practical matter, the parent corporation cannot directly dictate to an independent subsidiary corporation the manner in which a safe workplace should be provided. To do so would blur the boundary between the two corporations as separate entities with unpredictable effects on the corporate structure. However, if a parent corporation is to bear the responsibility for the possible negligent action of its subsidiary, increased interference is inevitable.

B. *Assumption of Risk*

Since Montana became a state, a showing of assumption of risk in negligence actions has been a complete bar to a plaintiff's recovery.[10] In *Kopischke v. First Continental Corp.*,[11] the court announced, in dictum, that Montana would join the growing number of jurisdictions[12] that apportion assumption of risk under a comparative negligence statute.[13] The court held that as a matter of law the plaintiff in *Kopischke* did not assume the risk;[14] nevertheless, the court unequivocally stated that the new rule would be applied prospectively to all negligence actions.[15]

Kopischke involved a single car accident caused by a mechanical failure in the steering mechanism. The plaintiff, Rose Kopischke, was thrown from the vehicle and severely injured. The 1971 vehicle was purchased from the defendant (a new and used car dealer) three weeks prior to the injury. Soon after her purchase the plaintiff took the car to a mechanic because of steering and vibration problems. On the repair order the mechanic recommended, "Take the car back, needs lots of work, not safe on the road."[16] At least once after this warning the vehicle vibrated so badly that the plaintiff was forced to stop the car. Because Mr. Kopischke did not believe the car was safe, he warned Mrs. Kopischke not to take the car on the trip that resulted in her in-

10. Note, *Assumption of Risk: Application of the Doctrine in Montana*, 30 MONT. L. REV. 71 (1968).

11. _ Mont. _, 610 P.2d 668 (1980).

12. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Wilson v. Gordon, 354 A.2d 398 (Me. 1976); Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971); Bruswell v. Economy Supply Co., 281 So.2d 664 (Miss. 1973). *But see* Harris v. Hercules, Inc., 328 F. Supp. 360 (E.D. Ark. 1971); Bugh v. Webb, 231 Ark. 27, 328 S.W.2d 379 (1959).

13. Kopischke, _ Mont. _, 610 P.2d at 687.

14. *See* text accompanying notes 19-20 *infra*.

15. Kopischke, _ Mont. _, 610 P.2d at 687.

16. *Id.* at _, 610 P.2d at 670.

jury, but she ignored his warning. The plaintiff was not wearing a seat belt at the time of the accident.

At the trial of the negligence action, plaintiff was awarded $422,500[17] and the defendant appealed. The defendant argued that the trial court erred by failing to submit the issue of assumption of risk to the jury. The plaintiff contended that assumption of risk did not apply and, in the alternative, that assumption of risk should not be a complete bar to recovery, but should be apportioned under Montana's comparative negligence statute. The supreme court agreed with the plaintiff that assumption of risk was not an issue, but went on to state that in future negligence actions assumption of risk should be apportioned under Montana's comparative negligence statute.[18]

In explaining its holding that the evidence was insufficient to allow consideration of assumption of risk,[19] the court said the plaintiff lacked knowledge of the particular condition that created the risk. As reconstructed by the plaintiff's expert, the crash occurred when a transverse link (lower steering control arm) suddenly bent from 10° to 20°, causing the plaintiff to lose control of the car. Comprehension or knowledge of this particular condition is hardly within the grasp of the average motorist. Mrs. Kopischke was, however, thoroughly familiar with the shaking and vibration of the front end of her car. Knowledge of the "particular condition creating the risk" has never been limited by the court to a technical, rather than operational, knowledge of an injury-causing instrumentality.[20] To limit assumption of the risk to a technical understanding of a defect is to reduce the possible application of the defense to those instances where the injury-causing instrumentality is extremely simple or the plaintiff has unusual technical knowledge.

In holding that assumption of risk should be apportioned under the comparative negligence statute (as is contributory negligence), the court relied on an analysis that found assumption of risk to be no more than a variant of contributory negligence. Fun-

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17. The jury found the defendant 65% negligent and the plaintiff 35% negligent. Total damages of $650,000 gave the plaintiff an award of $422,500. Kopischke, _ Mont. _, 610 P.2d at 668.

18. *Id.* at _, 610 P.2d at 683, 687.

19. *Id.* at _, 610 P.2d at 684.

20. *See* W. PROSSER, LAW OF TORTS § 68 (4th ed. 1971) (knowledge of particular risk is an element of assumption of risk). The requirement that a plaintiff be aware of the "particular *condition* creating the risk" seems to exist to account for a situation where the defendant's conduct exposes the plaintiff to several risks. In this situation a plaintiff's knowledge of one risk does not mean he assumes the risk of all the dangers. *See generally* Westlake v. Keating Gold Mining Co., 48 Mont. 120, 136 P. 38 (1913).

damental to this analysis is the distinction between contractual and voluntary, or implied, assumption of risk. Contractual assumption of risk occurs when the plaintiff agrees to relieve the defendant of a duty of reasonable care by an expess or implied contract.[21] Voluntary assumption of risk occurs when the plaintiff knowingly encounters a risk created by the defendant's negligence.[22] Having made the above distinction, the court quoted from numerous cases[23] that held voluntary assumption of risk to be simply a form of contributory negligence. Once voluntary assumption of risk has been rechristened "contributory negligence," it is within the purview of the comparative negligence statute and apportionment follows. Contractual assumption of risk, on the other hand, remains a complete bar to a plaintiff's recovery because it cannot be interpreted to be a form of contributory negligence. The practical effect of apportionment is strikingly simple: a jury may find all the elements of voluntary assumption of risk to be present, yet not find that a plaintiff assumed 100% of the risk of injury.

In contrast to the court's conclusion in *Kopischke* that voluntary assumption of the risk is "really" contributory negligence, prior decisions of the court had emphasized the analytic dissimilarity between the two defenses.[24] As recently as 1978, in *Brown v. North American Manufacturing*,[25] the court held that the consensual nature and subjective standard of voluntary assumption of risk, as opposed to the involuntary nature and objective standard of contributory negligence, warranted allowing assumption of risk and denying contributory negligence as a defense in a products liability action.[26]

Courts in other jurisdictions have sought to preserve the analytical distinction between assumption of risk and contributory negligence, yet still achieve apportionment of assumption of risk under a comparative negligence statute.[27] The apportionment is done by broadening the conceptualization of comparative negli-

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21. Wilson v. Gordon, 354 A.2d 398, 401 (Me. 1976) *cited in* Kopischke, _ Mont. _, 610 P.2d at 686. *See also supra* note 10, at 72-77.

22. Wilson v. Gordon, 354 A.2d 398, 401-02 (Me. 1976) *cited in* Kopischke, _ Mont. _, 610 P.2d at 686.

23. Li v. Yellow Cab Co., 13 Cal. 3d 733, 532 P.2d 1226, 1240-41, 119 Cal. Rptr. 858, 872-73 (1975); Wilson v. Gordon, 354 A.2d 398, 401-03 (Me. 1976); Springrose v. Willmore, 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971).

24. Brown v. North American Mfg. Co., 176 Mont. 98, 110-11, 576 P.2d 711, 719 (1978), Stenberg v. Beatrice Foods Co., 176 Mont. 123, 127, 576 P.2d 725, 728 (1978).

25. 176 Mont. 98, 576 P.2d 711 (1978).

26. *See* Brown, 176 Mont. at 110-11, 576 P.2d at 719.

27. *See, e.g.*, Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 92, 515 P.2d 821, 826 (1973).

gence to include voluntary assumption of risk, instead of enlarging the concept of contributory negligence to include voluntary assumption of risk. While both reasoning processes arrive at the same conclusion, a broadening of comparative negligence to include assumption of risk is superior because it conforms to the policy underlying comparative negligence, namely, liability in proportion to fault, and preserves the distinction between assumption of risk and contributory negligence. In addition, the suggested method of apportioning assumption of risk would provide sound precedent for the future inclusion of other defenses into comparative negligence.[28]

C. *Seat Belt Defense*

The Montana Supreme Court was presented with its first opportunity to rule on the seat belt defense[29] in *Kopischke v. First Continental Corp.*[30] The court followed the majority of jurisdictions in holding that there is no common law duty to use seat belts while riding in an automobile;[31] consequently, the failure to use a seat belt cannot be contributory negligence and cannot be considered under the comparative negligence statute. The defendant in *Kopischke* unsuccessfully argued that the trial court erred in refusing to present to the jury the question of whether Mrs. Kopischke's failure to use a seat belt contributed to her injuries. It was defendant's contention that Montana's adoption of comparative negligence should, in all cases, allow the jury to consider the failure to "buckle up" as contributory negligence.[32]

In its analysis of the seat belt defense, the court quoted extensively from recent cases in other jurisdictions[33] and relied heavily

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28. The suggested analysis would have provided guidance to the Montana federal district courts in their recent conflicting applications of assumption of risk in product liability suits. Zahrte v. Sturm, Ruger & Co., 498 F. Supp. 389 (D. Mont. 1980) (assumption of risk is complete bar in products liability). *But see* Trust Corp. of Montana v. Piper Aircraft Corp., _ F. Supp. _, 38 St. Rptr. 249, (D. Mont. 1981) (assumption of risk is apportioned under comparative negligence statute in products liability).

29. The "seat belt defense" describes a showing by the defendant that the plaintiff was not wearing an available seat belt or other restraining device, and that had the device been worn, the plaintiff would not have sustained injuries as severe as those received, thereby reducing the defendant's liability. W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 254 (1979) [hereinafter PRODUCTS LIABILITY].

30. _ Mont. _, 610 P.2d 668 (1980).

31. *Id.* at _, 610 P.2d 683.

32. *Id.* at _, 610 P.2d at 679. *Accord*, Horn v. General Motors Corp., 34 Cal. App. 3d 773, 110 Cal. Rptr. 410 (1973); Bentzler v. Braun, 34 Wis. 2d 626, 149 N.W.2d 627, 639-40 (1967). *See* Annot., 80 A.L.R.3d 1033 (1977).

33. Fischer v. Moore, 183 Colo. 392, 393-94, 517 P.2d 458, 459-60 (1973); McCord v. Green, 362 A.2d 720, 725 (D.C. 1976); Miller v. Miller, 273 N.C. 228, 238, 160 S.E.2d 65, 73

on a 1977 Washington Supreme Court decision, *Amend v. Bell.*[34] This decision was the Washington court's first decision on the seat belt defense since that state's adoption of comparative negligence. The factual situation in *Amend* involved a two car intersection collision. The Washington court held that the defendant should not be able to diminish the consequences of his negligence (by reducing the plaintiff's award) because of the plaintiff's failure to anticipate the defendant's negligence.[35]

Justice Harrison, in his dissenting opinion,[36] emphasized the factual distinctions between the many cases cited by the majority and the circumstances of the injury in *Kopischke.* He implied that the majority ignored those facts, such as the mechanic's warning, that indicated the plaintiff was aware of the probable danger from driving the vehicle.[37] Justice Harrison concluded his dissent by arguing that whenever a state has a comparative negligence statute, the use of seat belts to mitigate an injury is always a proper question.[38]

The positions taken by the majority and the dissent on the seat belt defense represent polar opposites. The majority would exclude in every case the seat belt defense, whereas the dissent claims the failure to use seat belts should always be a jury question. Both positions overlook a third possibility, i.e., allowing the seat belt defense to be raised only when a plaintiff reasonably anticipated, or should have anticipated a defendant's negligence. This rule is consistent with the policy underlying comparative negligence: a plaintiff should be compensated for only those injuries caused by the negligence of the defendant. This alternative to the total prohibition of the seat belt defense is explicitly recognized in *Amend v. Bell.*[39] "Only if the plaintiff should have so anticipated the accident can it be said that the plaintiff had a duty to fasten the seat belt prior to the accident."[40] Had the Montana court adopted the complete statement of the rule in *Amend,* the events preceding Mrs. Kopischke's injury arguably presented a jury question of whether she had anticipated the defendant's negligence and

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(1968); Fields v. Volkswagen of America, Inc., 555 P.2d 48, 61-62 (Okla. 1974); Amend v. Bell, 89 Wash. 2d 124, 129, 570 P.2d 138, 143 (1977).

34. 89 Wash. 2d 124, 570 P.2d 138 (1977).

35. *Id.* at 132, 570 P.2d at 143, *cited in* Kopischke, _ Mont. _, 610 P.2d at 690.

36. Kopischke, _ Mont. _, 610 P.2d at 690 (Harrison, J., dissenting). Justice Harrison dissented from the court's opinion only with regard to the failure of the trial court to allow an instruction on the seat belt defense; he concurred on all other issues.

37. *Id.* at _, 610 P.2d at 691 (Harrison, J., dissenting).

38. *Id. See also* note 32 *supra.*

39. 89 Wash. 2d 124, 570 P.2d 138 (1977).

40. *Id.* at 133, 570 P.2d at 143 *cited in* Kopischke, _ Mont. _, 610 P.2d at 680.

consequently had a duty to wear a seat belt. If there were such a duty and a breach of that duty, then the plaintiff's failure to wear a seat belt would be considered as an element of contributory negligence and apportioned under the comparative negligence statute.

The court in *Kopischke* relied on policy arguments in its consideration of assumption of risk and the seat belt defense. The new treatment of voluntary assumption of risk adopted in *Kopischke* implements the policy of the comparative negligence statute—justice is best served by a flexible weighing of the relative fault of each party. Certainly the apportionment of assumption of risk furthers this policy. Is the majority's holding on the absolute bar of the seat belt defense in accord with this policy? Probably not. By denying a defendant the opportunity to reduce his liability to a plaintiff in those few instances where a plaintiff failed to use a seat belt and had prior knowledge of the defendant's negligence, the court has created a rule in which liability is not strictly proportional to fault.

II. Products Liability

A. *Duty to Warn*

An otherwise properly designed and manufactured product may be unreasonably dangerous if a manufacturer fails to warn the consumer of dangers inherent in the foreseeable use of the product.[41] What kind of test should be applied in determining whether a product requires a manufacturer's warning? The Montana Supreme Court addressed this question for the first time in *Rost v. C.F. & I. Steel Corp.*[42] The court held that a warning is required if the degree of danger associated with the product without a warning would not be tolerated by a reasonable manufacturer.[43] Under this test a manufacturer may have a duty to warn even those users who have actual knowledge of the danger.[44]

The plaintiff in *Rost* was injured when the elevator in which he was a passenger fell because of a cable failure. The plaintiff sued the defendant manufacturer of the elevator cable alleging the defendant failed to warn the elevator owner (a nonparty) of the dangers inherent in the use of the cable and, therefore, that the cable was defective within the meaning of the Restatement (Sec-

41. *See, e.g.*, Shuput v. Heublein, Inc., 511 F.2d 1104 (10th Cir. 1975) (failure to warn of possible injury caused by removing plastic stopper from champagne bottle).

42. _ Mont. _, 616 P.2d 383 (1980).

43. *Id.* at _, 616 P.2d at 385 *citing* Phillips v. Kimwood Mach. Co., 269 Or. 485, 490-91, 525 P.2d 1033, 1036-37 (1974).

44. *See* text accompanying notes 50-51 *infra*.

ond) of Torts § 402A.[45] Testimony at the trial established that the elevator owner had maintained, inspected, and replaced elevator cables for over twenty years before the accident. Also, a few years before the plaintiff's injury the elevator owner had been a passenger in the elevator when a cable snapped. The jury found for the defendant, and the plaintiff appealed on the ground that an instruction concerning the manufacturer's duty to warn was reversible error. The court held the instruction was error, but not reversible error, and unanimously affirmed the defense verdict.

The erroneous instruction stated that a manufacturer had no duty to warn of a potential danger if the manufacturer could reasonably expect the user would discover and recognize the danger.[46] The instruction was error because it implied that the subjective knowledge of the elevator owner (concerning the danger of cable breakage) was relevant to the determination whether the defendant manufacturer had a duty to warn. The court reached its conclusion by first drawing a distinction between an objective and a subjective determination of whether a warning should be given by a manufacturer.[47] An objective determination requires the court to focus on the product and a hypothetical, reasonable manufacturer:[48] Would a reasonable manufacturer accept the degree of danger associated with the use of his product without a warning? A subjective determination requires the court to focus on the particular consumer and the particular manufacturer:[49] What is the manufacturer's expectation of harm considering the consumer's knowledge of the inherent danger?

The court said the subjective determination more closely resembled negligence principles than it did strict liability because it focused on the reasonableness of a user's conduct rather than the danger a product poses to the public.[50] Therefore, a jury instruction incorporating the subjective approach is inappropriate in products liability. Because the jury could have inferred from the instruction that the elevator owner's prior knowledge of the dangerous condition relieved the defendant of a duty to warn, the instruction was error. The objective test, which does not refer to a

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45. The RESTATEMENT (SECOND) OF TORTS § 402A (1965) was adopted by Montana in Brandenburger v. Toyota Motor Sales, 162 Mont. 506, 513 P.2d 268 (1973).

46. Rost, _ Mont. _, 616 P.2d at 385.

47. *Id. Rost* is the second reported decision, following Jackson v. Coast Paint, 499 F.2d 809 (9th Cir. 1974), to make this distinction explicit; other decisions have implicitly followed the distinction. *See, e.g.*, Ulrich v. Kasco Abrasives Co., 532 S.W.2d 197 (Ky. 1976).

48. Rost, _ Mont. _, 616 P.2d at 385-86.

49. *Id.*

50. *Id.*

plaintiff's knowledge, is the appropriate test to be applied in determining whether a manufacturer has a duty to warn.[51]

The court tempered the apparent unfairness of allowing a product owner with full knowledge of the potential dangers of a product to claim, in some circumstances,[52] a right to be warned of recognized dangers, by its recognition that a breach of a duty to warn can be a basis for liability only if the breach is the proximate cause of a plaintiff's injury.[53] Where a user has actual knowledge of the dangers inherent in the use of a product, the breach of a duty to warn cannot be the proximate cause of a plaintiff's injury;[54] consequently, whether a manufacturer did or did not have a duty to warn is irrelevant to liability based on a duty to warn when the user has actual knowledge of the danger.

Although the "duty to warn" instruction was error, the court held it was not reversible error because the most explicit warning would not have prevented the injury to the plaintiff.[55] The proximate cause of the plaintiff's injury was not the defendant's failure to warn the elevator owner of the dangers associated with elevator cables, it was the elevator owner's failure to maintain and inspect the cable.[56]

B. *Superseding Cause*

A manufacturer is not liable for injuries resulting from the use of his product where the product owner's failure to maintain or inspect the product is the superseding cause of the plaintiff's injuries.[57] In *Rost v. C.F. & I. Steel Corp.*,[58] the supreme court adopted this rule and clarified the conditions under which a product owner's conduct is a superseding cause. The primary considerations are foreseeability of the user's negligent intervention, his knowledge of the danger and ability to prevent injury, and an acknowledged re-

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51. *Id.*

52. Namely, where an objective determination finds a warning necessary, but not given.

53. Rost, _ Mont. _, 616 P.2d at 385. A showing of proximate cause is a necessary predicate to plaintiff's recovery in strict liability. *See* Brown v. North American Mfg. Co., _ Mont. _, 576 P.2d 711, 719 (1978).

54. PRODUCTS LIABILITY, *supra* note 29, at 223-24. *See* Patrick v. Perfect Parts Co., 515 S.W.2d 554 (Mo. 1973).

55. Rost, _ Mont. _, 616 P.2d at 385. "[W]e have no doubt that the defendant's failure to warn [sic] of the dangerous uses of its cables would have fallen on deaf ears." *Id.* at _, 616 P.2d at 387.

56. *Id.* at _, 616 P.2d at 385.

57. *Id.* at _, 616 P.2d at 386. RESTATEMENT (SECOND) OF TORTS § 452(2), comment f (1965).

58. _ Mont. _, 616 P.2d 383 (1980).

sponsibility to maintain and inspect the product.

The court in *Rost* found "persuasive evidence" that the jury decided the proximate cause of the plaintiff's injury was the elevator owner's failure to maintain and inspect the cable.[59] The responsibility to prevent injury shifted from the defendant to the elevator owner because he knew that cables wear unevenly and require regular maintenance and inspection to prevent cable failure, and because he had personal knowledge of a cable failure.[60] In addition, the manufacturer could not have reasonably foreseen that the owner would negligently inspect the cable eight to ten days before the accident. Testimony presented at the trial established the dangerous condition would have been easily seen two months before the accident.

Because the issues of superseding cause and duty to warn are independent considerations in a products liability action, the presence of a superseding cause will not relieve a manufacturer of a duty to warn. However, as in *Rost*, the superseding cause and not the failure to warn would be the proximate cause of an injury. Personal knowledge of the danger by the intervening party (in *Rost*, the elevator owner) is relevant to a finding of proximate cause, whereas knowledge of the danger is irrelevant in an objective determination of a manufacturer's duty to warn.

Rost acknowledges the right of a defendant manufacturer to offer evidence of the negligent repair and maintenance of his product by a nonparty on the issue of proximate cause. This "right" is particularly valuable to an industrial equipment manufacturer because of the increasing number of product liability suits brought by employees of an employer who purchased the manufacturer's product. Because the purchaser, as employer, is immune from suit under the Workers' Compensation Act, injured employees are frequently resorting to suits against the manufacturer of the injury-causing product.[61] The defense of superseding cause, as articulated in *Rost*, is directly applicable to this kind of employee/manufacturer suit.

III. DEFAMATION

Since 1915[62] a plaintiff alleging libel per quod[63] has been re-

59. *Id.* at _, 616 P.2d 386. *See* text accompanying note 45 *supra*.

60. *Id.*

61. The employer's immunity from suit does not prevent the defendant manufacturer from proving that the negligence of the immune nonparty was the proximate cause of the plaintiff's injury. Clement v. Rouselle Corp., 372 So. 2d 1156, 1158 (Dist. Ct. App. Fla. 1979).

62. Lemmer v. The Tribune, 50 Mont. 559, 564, 148 P. 338, 339 (1915). *See also*

quired to plead special damages to state a claim for relief. An allegation of special damages must include facts showing a specific pecuniary loss beyond general injury to reputation.[64] In *Gallagher v. Johnson*[65] the supreme court modified this restrictive pleading requirement; now, a plaintiff need only plead some elements of actual injury. "Actual injury" may include facts establishing impairment of reputation, personal humiliation or a specific pecuniary loss.[66]

Plaintiff Gallagher, a public official,[67] filed suit alleging the defendant had made written statements attacking him. Plaintiff's appeal brief admitted that his injuries could not be measured in terms of lost contracts or personal business opportunities.[68] The defendant moved to dismiss plaintiff's complaint on the gound that the plaintiff failed to allege special damages, i.e., facts showing a specific pecuniary loss. The district court determined from the pleadings that the statements were libel per quod and dismissed the complaint for failure to plead special damages. On appeal, the Montana Supreme Court reversed,[69] holding the complaint stated a claim for relief even though it failed to allege facts detailing a specific dollar loss.

The court relied on a single lengthy quotation from *Madison v. Yunker*[70] to resolve the issue whether special pecuniary damages must be pleaded in a claim alleging libel per quod. *Madison* is a 1978 decision holding unconstitutional a Montana statute requiring a putative plaintiff to seek a public retraction prior to the filing of a defamation action. Immediately following the quotation the court stated, "*Madison* has adequately stated Montana's position on the [special damage] issue presented here."[71] Unfortunately, the manner in which *Madison* resolves the issue of pleading special pecuniary damages is far from clear.

Ilitaky v. Goodman, 57 Ariz. 216, 112 P.2d 860 (1941); Karrigan v. Valentine, 184 Kan. 783, 339 P.2d 52 (1959); Chase v. New Mexico Publishing Co., 53 N.M. 145, 203 P.2d 594 (1949).

63. A libel per quod is defined as a written statement, innocent on its face, that becomes defamatory only in light of additional facts. L. ELDREDGE, THE LAW OF DEFAMATION 177 (1978) [hereinafter cited as DEFAMATION].

64. *See* Lemmer v. The Tribune, 50 Mont. 559, 564, 148 P. 338, 339 (1915); 53 C.J.S. *Libel & Slander* § 170(d) (1948); 50 AM. JUR. 2d *Libel & Slander* § 420 (1970).

65. _ Mont. _, 611 P.2d 613 (1980).

66. *Id.* at _, 611 P.2d at 617.

67. Defamation law makes a distinction between private individuals and public figures. In this survey, public official is meant to be a subset of the class of public figures. The plaintiff did not contest his status as a public official.

68. Gallagher, _ Mont. _, 611 P.2d at 614.

69. Shea, J., dissenting (written dissent to be filed at a later time).

70. _ Mont. _, 589 P.2d 126 (1978).

71. Gallagher, _ Mont. _, 611 P.2d at 618.

The quotation from *Madison* used by the court does not directly address the abandonment of the special pecuniary damage pleading requirement. In fact, neither the plaintiff nor the defendant cited the *Madison* case to the court in their briefs on the issue.[72] *Madison's* only reference to damages is a quotation from *Gertz v. Robert Welch, Inc.*,[73] in which the United States Supreme Court restricted libel recovery to actual injury absent a showing of malice. Actual injury, as defined by the Court, includes impairment of reputation and mental anguish, but need not include evidence which assigns a dollar value to the injury.[74]

Because the court did not clearly articulate the manner in which *Madison* and *Gertz* resolve the pleading requirement issue, the analytical basis for the holding can only be inferred. The court apparently reasoned that because a plaintiff need only show actual injury—which may or may not include evidence of a specific pecuniary loss—to recover damages from the defendant, the plaintiff should not be held to a more restrictive pleading requirement beyond what must be proved at trial to recover damages. In this way, the court substituted the less demanding "actual injury" for the stricter requirement of special damages.[75]

Although it is difficult to determine just how broadly the *Gallagher* opinion will be applied, the opinion suggests that private citizens as well as public officials will be held to the pleading requirement of actual injury and not special damages.[76] Because the *Madison* case, on which the *Gallagher* decision relied, did not establish the status of the *Madison* plaintiff as a private citizen or public official, a plausible argument can be made that the new pleading requirement extends to both classes of plaintiffs. The court also did not address the adoption of "actual injury" as the pleading requirement for slander per quod; such an extension

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72. *Id.* at __, 611 P.2d at 617.

73. 418 U.S. 323, 349-50 (1974).

74. *Id.*

75. A noted defamation authority, Laurence H. Eldredge, argued in support of a similar result.

> If state courts which have in the past required proof of narrowly defined 'special damages' would substitute a requirement of proof of 'actual injury' as defined by the Supreme Court of the United States, this would go far toward ameliorating the harshness of the present law, which prevents worthy plaintiffs, who cannot prove 'special damage' even when it exists, from obtaining that public vindication of a good name which is the primary function of a verdict for the plaintiff.

DEFAMATION, *supra* note 63, at 204. *See also* C. MORRIS, MODERN DEFAMATION LAW 38 (1978).

76. The *Madison* decision relied on a passage from *Gertz* which discussed the evidenciary requirements for a private person to recover in a libel action.

appears reasonable because of the similarity between libel and slander.[77]

Pleading and proof requirements in a defamation action reflect a balance between freedom of speech and press, and the individual's right to recover for libel. Simply put, if the pleading requirements are too stringent, few agrieved plaintiffs will be allowed a public forum in the courts to vindicate their good name. By relaxing the pleading requirements of a libel action, the Montana court has opted to follow an interpretation of *Madison* and *Gertz* that will undoubtedly please public figures, but may have a chilling effect in the publishing community.

IV. GOVERNMENTAL IMMUNITY

Governmental immunity was totally abolished by the Montana Constitution, Article II, section 18. In 1974, the constitution was amended to provide the legislature with a procedure for reestablishing immunity.[78] In 1977 the legislature enacted MCA § 2-9-104 (1979),[79] a statutory limitation on governmental tort liability. In *Mackin v. State of Montana*[80] the supreme court interpreted MCA § 2-9-104 (1979) for the first time. The court construed the statute to be a limitation on the collection of non-economic damages against a governmental entity *after* its liability on all damage claims have been determined by final judgment. The statute does not prohibit a judicial determination of certain types of damages, such as non-economic damages.

Plaintiff Sharon Mackin brought an action against the State of Montana for injuries to her child allegedly caused by the negligence of the state. An amended complaint stated both special damages and general non-economic damages. On a motion for partial summary judgment, the state prevailed with its contention that non-economic damages could not be claimed against the state. Final judgment was then entered in favor of the state against all claims for non-economic damages. On appeal, the Montana Su-

77. Jacron Sales Co. v. Sindorf, 276 Md. 580, 592, 350 A.2d 688, 695 (1976). *See generally* RESTATEMENT (SECOND) OF TORTS § 580B, comment e (1977).

78. MONT. CONST. art. II, § 18.

79. MCA § 2-9-104 (1979) states in relevant part:

(1) Neither the state . . . nor any political subdivision of the state is liable in tort action for: (a) noneconomic damages; or

(b) economic damages . . . in excess of $300,000 for each claimant . . . .

(2) the legislature . . . may, in its sole discretion, authorize payments for noneconomic damages or economic damages in excess of the sum authorized . . . or both, upon petition of plaintiff following a final judgment . . . .

80. _ Mont. _, 621 P.2d 477 (1980).

preme Court reversed and remanded for trial on all damage claims.

Relying on MCA § 2-9-104 (1979), the state argued that it was immune from tort claims for non-economic damages. Plaintiff countered with the claim that the statute was unconstitutional under the 1972 Montana Constitution. The supreme court did not reach the constitutional issue; the decision was based on statutory construction.

The court noted that although the limited liability statute did provide immunity from non-economic damage claims, the statute also provided a procedure that allowed a governmental body, in its sole discretion, to authorize payment for non-economic damages upon petition of the plaintiff following a final judgment.[81] The majority reasoned that the only way to give effect to both provisions of the statute and preserve a judicial determination of non-economic damages, was to allow the plaintiff to proceed to final judgment on all damage claims. Following the procedure set out in the statute, the plaintiff would then present a petition for recovery of the non-economic damages to the governmental entity. To hold otherwise would force a plaintiff to present his claim for non-economic damages to a governmental entity unfamiliar with such actions and without the benefit of a developed record of the claim. Under the majority's construction of MCA § 2-9-104(2) (1979), a plaintiff must proceed to final judgment on his non-economic claim or he cannot petition the governmental entity for the damages.[82]

Chief Justice Haswell, dissenting,[83] was unconvinced by the majority's interpretation of the statute. He argued that the apparent conflict between sections of the statute should be resolved by eliminating any judicial determination of non-economic damages and allowing the governmental entity to decide the extent of the non-economic damages. This would conserve judicial resources because the governmental entity is not bound to pay the plaintiff the jury award; it may decide "in its sole discretion" the amount the plaintiff would receive.

V. Mistaken Release of Defendants

The Montana court decided two cases during 1980 in which named defendants were mistakenly released by plaintiffs' attorneys. Both attorneys were held to their error by the court. In *Kussler v. Burlington Northern, Inc.*[84] the plaintiff released a joint

81. Mackin, _ Mont. _, 621 P.2d at 481. *See also* note 79 *supra.*
82. *Id.* at _, 621 P.2d at 481-82.
83. *Id.* at _, 621 P.2d at 483.
84. _ Mont. _, 606 P.2d 520 (1980).

tortfeasor and fell victim to the rule that release of one joint tortfeasor is a release of all.[85] However, the court was persuaded by the plaintiff's arguments to abolish the joint tortfeasor release rule, albeit prospectively, thereby denying the plaintiff the benefit of his appeal. In *City of Havre v. District Court*[86] the plaintiff stipulated in a pretrial conference to a dismissal with prejudice of the person who caused plaintiff's injury. The plaintiff intended to sue the tortfeasor's principal, the city of Havre. The court held the stipulated dismissal of the agent to be equivalent to a judgment on the merits, and therefore, it dismissed the claim against the principal.[87]

The factual situation in *Kussler* arose when the vehicle in which plaintiff's husband was a passenger collided with a Burlington Northern train at a railroad crossing. A suit alleging negligence was filed against Burlington Northern and the State of Montana. The plaintiff executed a general release of the vehicle owner without explicitly reserving the right to sue the defendants.[88] The defendants sought and received summary judgment based on the release of the vehicle owner. The supreme court affirmed the summary judgment.

The court justified its decision affirming the district court by examining four of its prior decisions directly on point.[89] Fifty years of case law unambiguously supported the defendants' position. "[R]elease of one joint tortfeasor releases the others, unless there are clear provisions in the release to the contrary."[90] Although the plaintiff did not intend to dismiss the defendants by the release of the vehicle owner, his intent could not be considered absent an ambiguity in the release that would entitle the plaintiff to present parol evidence.[91]

The weight of plaintiff's arguments did, however, prevail. The court concluded that the old rule lacked adequate justification and announced that after the *Kussler* decision the rule in Montana would follow the rule proposed by the Restatement (Second) of Torts § 885: "the release of one joint tortfeasor is not a release of

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85. *Id.* at_, 606 P.2d at 522-23. *See* text accompanying notes 90-92 *infra.*

86. _ Mont. _, 609 P.2d 275 (1980).

87. *Id.* at _, 609 P.2d at 278. *See* text accompanying note 100 *infra.*

88. Kussler, _ Mont. _, 606 P.2d at 523.

89. McCloskey v. Porter, 161 Mont. 307, 506 P.2d 845 (1973); Beedle v. Carolan, 115 Mont. 587, 148 P.2d 559 (1944); Lisoski v. Anderson, 112 Mont. 256, 292 P. 577 (1930). *Accord,* Breen v. Peck, 28 N.J. 351, 146 A.2d 665 (1958).

90. McCloskey v. Porter, 161 Mont. 307, 311-12, 506 P.2d 845, 848-49 (1973), *cited in* Kussler, _ Mont. _, 606 P.2d at 523.

91. Kussler, _ Mont. _, 606 P.2d at 522-23.

any other joint tortfeasor unless the document is intended to release the other tortfeasors, or the payment is full compensation, or the release expressly so provides."[92] The court declined to make the new rule apply to the plaintiff in *Kussler*, choosing to rule prospectively because "[i]t would be manifestly unfair to change [retroactively] a law which has been relied upon in this jurisdiction."[93]

The court found the policy arguments offered against the old rule persuasive. In *Adams v. Dion*[94] the Arizona Supreme Court discarded the old rule because it discouraged settlements, led to results unintended by the parties and trapped unwary plaintiffs. The Montana court examined the historic policy for the rule—that joint tortfeasors caused indivisible harm and, as such, created one indivisible cause of action[95]—and found it no longer convincing in light of the arguments offered by the Arizona court.

In *City of Havre v. District Court*[96] the court was asked to determine the effect on a principal's liability of a stipulated dismissal with prejudice of its agent. The city of Havre, defendants in a civil action, appealed on a writ of supervisory control a decision by the district court refusing to dismiss the claim against the city. The civil suit arose when Ronald Boucher, while fleeing a robbery, was shot and seriously injured by a Havre policeman, Officer Dramstad. Boucher filed suit against Dramstad, the city of Havre and Hill county. At the pretrial conference the plaintiff and defendant Dramstad stipulated to a dismissal with prejudice of the claim against Dramstad. The remaining defendants then moved for summary judgment on the grounds that the dismissal with prejudice of Dramstad operated to dismiss them as well. The district court denied the motion and the appeal followed. The supreme court vacated the denial and instructed the district court to enter judgment with prejudice for the remaining defendants.

The court offered two arguments for its holding. The first argument presented by the court analogized *Havre* to earlier cases holding the release of a single joint tortfeasor to be a release of all joint tortfeasors. Justice Daly, writing for the majority, argued that

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92. *Id.* at _, 606 P.2d at 524.

93. *Id.* Strict application of this policy would seriously impair the functioning of the appellate system. Justice Shea commented on the prospective application of the newly adopted rule. "The majority perceives the unjustness of the law it is overthrowing prospectively today, but commits an unjust result in the process . . . . It is manifestly unjust not to give the plaintiff here the benefit of such ruling." Kussler, _ Mont _, 606 P.2d at 525.

94. 109 Ariz. 308, 309, 509 P.2d 201, 203 (1973). The Arizona court did not apply the rule prospectively, but gave the benefit of the new rule to the plaintiff.

95. 66 AM. JUR. 2d *Release* § 37 (1973).

96. _ Mont. _, 609 P.2d 275 (1980).

because the plaintiff made no explicit reservation of a right to sue the remaining defendants in the stipulation for dismissal, the stipulation therefore effected a dismissal of all defendants. No reference was made to the court's analysis in *Kussler*, where a similar rule was evaluated and discarded because it discouraged settlements, led to unintended results and trapped unwary plaintiffs.[97]

The court's second and more compelling argument cited Montana case law for the proposition that a dismissal with prejudice is equivalent to a final judgment on the merits adverse to the plaintiff.[98] Because the liability of the remaining defendants was based on respondeat superior, the defendants could have no liability because their agent had no liability as a result of the dismissal with prejudice. The court's refusal to examine the intent of the parties to the stipulation beyond the face of the document is consistent with Montana law;[99] other jurisdictions, however, allow parol evidence to prove the intent of the parties in precisely this circumstance.[100]

The holdings in *Kussler* and *Havre* show the court's intent to interpret contractual releases and stipulations before the court in drastically different ways. The Restatement rule on contract releases, adopted by the court in *Kussler*, would allow parol evidence to prove intent in every disputed case, whereas an "on its face" construction of a stipulated release cannot be varied by parol evidence. The wary practitioner, mindful of the court's holding in *Havre*, should choose a contractual release whenever a defendant is to be released from suit.

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97. *See* text accompanying note 9 *supra*.
98. Schuster v. Northern Co., 127 Mont. 39, 45, 257 P.2d 249, 252 (1953).
99. *Id.*
100. *See, e.g.*, Denny v. Mathieu, 452 S.W.2d 114 (Mo. 1970).