

MINUTES FOR THE MEETING
JUDICIARY COMMITTEE
MONTANA STATE
HOUSE OF REPRESENTATIVES

March 18, 1985

The meeting of the Judiciary Committee was called to order by Chairman Tom Hannah on Monday, March 18, 1985 at 8:30 a.m. in Room 312-3 of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Brown who was previously excused.

CONSIDERATION OF SENATE BILL NO. 184: Senator Joe Mazurek, District #23, sponsor of SB 184, testified. He said SB 184 was introduced at the request of the Department of Administration. The effect of this legislation would be to reinstate the current limitations which were imposed at the end of the 1983 session on tort damage claims against the state, county and municipal governments including school districts and others. By way of background, the need for this legislation resulted from the 1983 decision of the Montana Supreme Court in Karla White vs. State of Montana wherein the damage limits imposed by the 1977 legislature were deemed unconstitutional. These limits were amended to conform to the Court's ruling and re-imposed at \$300,000 per person and \$1,000,000 per occurrence. If the legislature doesn't do anything, there will be no limit on claims against the state, county and municipal governments. The Department of Administration did a study showing the government liability statutes of some of the surrounding states. Senator Mazurek continued by saying that Montana is on the "liberal" side of the aisle other than Washington and Alaska who have no limitations at all. Senator Mazurek feels that the \$300,000 per person and the \$1,000,000 per occurrence is a reasonable limitation.

Mike Young, administrator of the Insurance and Legal Division of the Department of Administration, testified as a proponent. He said that we do have constitutional authority to pass this type of legislation. Mr. Young gave the committee a quick run down of the problems they have experienced in this particular area. (A copy of his letter and a copy of the study were marked as Exhibits A and B respectively.) He said that basically, the state is self-insured for most of its risks with the exception of automobile and aircraft. He said that he feels somewhere we have all forgotten why the state is waiving immunity, and that is to impose liability to the same extent the private persons have liabilities for their accidents in operations. He said the government has to perform many functions that are highly risky. Another point he made is that in comparison with other states, Montana is at the

liberal end with the exception of Alaska, Washington and California.

Chip Erdmann, representing the Montana School Board Association, testified as a proponent of this bill. He said that school districts do not self insure. He said that the MSBA, as well as other governmental agencies, are not in the business of providing mandated services -- we are not out there to make a profit. A reasonable balance between the needs of the insured party and the interest of government planning services needs to be determined.

Gordon Morris, executive director for the Montana Association of Counties, testified as a proponent. He said this is not a matter of a law that would impact those counties that do not self insure -- it will affect all of them.

Curt Chisholm, deputy director of the Department of Institutions, testified in support of this bill. He said that the state of Montana is asked to do some things by law that are high risk ventures.

Alec Hansen, representing the Montana League of Cities and Towns, spoke in favor of this bill. He told members that if some limitations are not set in tort suits, cities may not be able to acquire insurance. He informed the committee that the League did a survey in the larger cities of Montana. In raising these limits to \$1,000,000 per person and \$3,000,000 per occurrence would have increased insurance premiums in the larger cities in the state of Montana by an average of \$25,000 annually.

OPPONENTS:

Karl Englund, representing the Montana Trial Lawyers Association, testified as an opponent. Mr. Englund submitted a letter written by Erik B. Thueson, who was the attorney of record in the White vs. State case. The letter was marked Exhibit C and attached hereto. One of the things Mr. Englund is concerned with is the present constitutional problem with limits on judgements against the state of Montana which was further addressed in Mr. Thueson's letter, paragraph 4 on the first page. He feels, at the very least, that it would be prudent for this committee to reinstate the sunset provisions for the next biennium, so that during the next legislature, the limits can be further studied and see whether or not they are applicable to the statute.

Jim Moore, trial lawyer from Kalispell, testified as an opponent. He wished the committee to consider the victim's perspective when this bill is further considered. He feels that we should be upholding the "little guy" in every

way possible. He doesn't feel that the state presented any evidence that there is, in fact, a crisis. Mr. Moore informed members that in some very serious cases, a set limitation could be eaten up very quickly in medical costs alone. He said with respect to the schools, cities, and towns and their difficulty in continuing insurance coverage, he suggested that they pool their resources so that they may become self insured. In closing, Mr. Moore suggested that the committee continue the sunset provision for another two years or do away entirely with the limitations.

John Hoyt, an attorney from Great Falls, testified on behalf of himself. He said that the \$300,000 limitation, as everyone agrees, is not fair to the person who is seriously injured. Mr. Hoyt suggested that the state can take out the \$300,000 deductible policy without costing much money and provide for the economic losses for those catastrophic victims. He suggested the bill be amended in this manner.

There being no further opponents, Senator Mazurek closed. He said that since the government is taking higher risks than others, those limits may be appropriate.

The floor was opened for questions.

Rep. Rapp-Svrcek wanted to know if the School Board Association has ever considered the idea of pooling together their resources in order to self insure. Mr. Erdmann said that it is one of the things that is being considered right now.

Rep. Addy wanted to know what 300,000 1973 dollars are now worth. Senator Mazurek stated that he didn't know. Rep. Addy asked Senator Mazurek if he felt this should be taken into account in determining what the limit should be today. Senator Mazurek said "yes, but we should look at what is appropriate today."

Rep. Addy wanted to know how many "quad" cases now exist. Mr. Young said that they have around 900 and some claims and they have a dozen different quad cases. Mr. Young also mentioned that social security qualifies all these people for disability plus their own insurance.

Rep. Addy said that it seems to him that we are assuring ourselves and making it a state policy that the burden is going to fall upon the injured person - not upon the state. He said that bothers him a little. Mr. Young said that he has seen a number of lawsuits against teenage drivers who have either no insurance or has a limited policy which doesn't begin to pay off the case. Finally, he feels that what is being said is that "I don't like immunity any better than you folks." He said that 10 years ago, the state couldn't be sued at all. From 1955 to 1973, a person could only sue for the amount of insurance carried which was the

minor amount. He sees the state as being out on the far end of recovery here in the historic perspective.

In response to a question asked by Rep. O'Hara, Mr. Hoyt said that social security benefits paid to those who have been seriously injured is not that answer for those people by any means. Rep. O'Hara further questioned Mr. Hoyt as to what the standard rate for attorneys fees in cases against the government is. Mr. Hoyt said that depending on the facts of the particular case, he thought the standard contingent fees would be approximately 20% to 13% of the total damages awarded.

In response to a question asked by Rep. Addy, Senator Mazurek said that the problem in the White case was that the effort that was made was unsuccessful to state a sufficient reason for the state to establish a limit. The Legislative Council, with the help of the Department of Administration, attempted in reimposing these limits to make a better statement of why there was a compelling need for limits at all.

Rep. Addy asked what the state's policy regarding appeals from district court between session. Mr. Young said that they do appeal their cases.

Rep. Miles stated that she is having a problem justifying the \$1,000,000 cap if it is a real multiple injury situation. She wanted to know what the original rationale was. Senator Mazurek said he didn't know.

There being no further questions, hearing closed on SB 184.

CONSIDERATION OF SENATE BILL NO. 200: Senator Chris Chirstiaens, District #17, sponsor of SB 200, testified in support of the bill. The committee previously heard most of Senator Christiaens' testimony on February 12, 1985 when the other punitive damage bills were considered that day. A copy of his written testimony was submitted at that hearing.

Mike Rice, representing Trans-systems Inc. from Great Falls and also representing the Montana Motor Carriers Association, testified in support of SB 200. He said the punitive damage issue in Montana is a very serious concern. He informed the committee that his company has sold their largest operating division in Montana. He said their legal costs in Montana run 30 to 50 times to what they do in any other state. They have had more punitive damage requests in Montana in the last couple years than they have had in all the rest of the prior 38 years. He further stated that they can find no insurance company that will write up their industry here in Montana. He said that to his notice, punitive damages are generally not covered by insurance. For that reason, it has caused his company to look at

other states for major developments. Two years ago, they had 80% of their employees in Montana -- today 80% of their employees are out of Montana. The employment situation is worsening.

Don Ingels, representing the Montana Chamber of Commerce, wished to go on record as supporting this legislation. He said this issue is a major concern of their members.

Les Alke, representing the Montana Banker's Association, testified in support of this bill. Chad Smith, representing the Montana Hospital Association, said the Association thinks this is one of the most important bills being considered. They are particularly concerned about the impact upon all of the hospital industry because of the now new tort that has been exploited in wrongful discharge. He said this has brought a whole new area of liability and has opened a whole new area in punitive damages.

Dave Goss, representing the Billings Chamber of Commerce, wished to go on record as supporting this bill.

Jeff Kirkland, representing the Montana Credit Union League, testified as a proponent to SB 200. He said the members of the league are very concerned with the increasing number of the impact of punitive damages particularly based on wrongful discharge. He said that credit unions are being taken to court with punitive damages in excess of \$750,000 for wrongful discharge suits. The problem they find is that practically all the wrongful suits that he is familiar with have been used as a leverage to force that credit union to settle out of court.

Riley Johnson, representing the National Federation of Independent Business, told the committee that their members are having a very difficult time acquiring insurance.

Irvin E. Dellinger, executive secretary of the Montana Building Dealers Association, stated that the members of the Association are very much in support of this bill.

OPPONENTS:

Karl Englund, representing the Montana Trial Lawyer's Association, gave a brief overview of the law regarding punitive damages. He also informed the committee of what the safeguards are concerning punitive damages. He said that documentary evidence shows that there have not been huge awards submitted to defendants. He referred also to the new rule of evidence which was adopted pertaining to this subject that being Rules of Evidence No. 11. He feels this rule is presently working. This bill provides for a clear and convincing standard for attorney fees which he feels is inappropriate. He feels that the questions as to

what type of conduct merits punitive damages and to what extent they are warranted belong in the hands of the juries. He further believes that there is no great necessity of SB 200.

There being no further opponents, Senator Christiaens closed.

The floor was opened to questions.

Rep. O'Hara wanted to know if most of these punitive damage cases don't line the attorney's pocket fairly well. Mr. Englund said that most attorneys accept cases on a contingent fee contract. In response to another question asked by Rep. O'Hara, Mr. Englund said that it is a rare case where punitive cases are actually awarded. Rep. O'Hara brought out the fact that business people are having problems with acquiring insurance. Mr. Englund said that general insurance policies include coverage for punitive damages.

Rep. Poff asked Mr. Rice why more truckers were not here to support this bill. Mr. Rice said that many of them don't want to fight this battle any longer. He pointed out again that most major carriers do more business outside the state than in the state.

In response to a question asked by Rep. Miles, Mr. Rice said in the 40 years that they have been in business, they have never had a punitive damage claim filed against them out of state.

Hearing closed on SB 200.

CONSIDERATION OF SENATE BILL NO. 298: Senator William P. Yellowtail, District #50, sponsor of the bill, testified. He said this bill will simply increase the limitation on the number of claims that may be filed in small claims court from three to ten cases. He also pointed out that this will present no fiscal impact.

Riley Johnson, representing the National Federal of Independent Business, said that this is a simple, but very important bill.

Julie DalSoglio, representing the Montana Public Interest Research Group, and Jim Jensen, representing the Montana Magistrates Association went on record as supporting this bill. Mr. Jensen said this bill strikes a continually fair balance. He doesn't feel that we have reached a point where people will be abusing the small claims court for collection purposes.

There being no further proponents or opponents, Senator Yellowtail closed.

The floor was opened to questions from the committee.

Rep. Miles wanted to know how small claims courts are funded. Is it a separate court? Mr. Jensen said that small claims court is a separate department of the justice court. In response to another question asked by Rep. Miles, Mr. Jensen said he doesn't feel that people will abuse the system thereby clogging up the court with unwarranted claims.

Following a few general questions, hearing closed on SB 298.

CONSIDERATION OF SENATE BILL NO. 314: Senator Judy Jacobson, District #36, chief sponsor of this bill, testified. She stated that this bill does one simple thing: A person could be charged with a misdemeanor if he/she did not report known or suspected child abuse or neglect.

John Madsen, representing the Department of Social and Rehabilitative Services, simply stated that they support this bill.

There were no further proponents or opponents, and Senator Jacobson closed.

The floor was opened for questioning.

Rep. Bergene asked if it wouldn't be difficult to prove that a person failed to report a known or suspected child abuse or neglect case. Mr. Madsen said that it certainly is difficult to prove that someone failed to report. The most obvious cases would probably be the ones reported by doctors where the child has actual bruises, etc..

Rep. Mercer suggested that the bill merely stated that if a person knows (not suspects) that a child is being abused, he should be required to report such a case. He feels that we may be going too far if the word "suspected" is left in the bill. Senator Jacobson stated that she prefers the bill the way it is. Most all cases reported by a school official or a physician is based upon suspicion. Mr. Madsen said there is a definite distinction between knowing and suspecting.

Rep. Eudaily wanted to know if the Department of S.R.S. would have adequate staffing to investigate all these reports. Mr. Madsen did say they are having a difficult time at present investigating and keeping up with all these reports, but he doesn't think the result of this legislation will greatly increase the reporting. However, it will encourage those that are questionable in nature to report. He said the department will deal with reports it gets; he further pointed out that children in this state are still dying as a result of abuse and neglect. If those cases had been reported, it is possible that those children would still be alive. Rep. Eudaily had a question as to the liability that teachers may incur. Mr. Madsen said in order for a teacher to be held civilly liable sub-

mitting these reports -- true or not true -- they have to be malicious in intent. So, he doesn't feel that teachers are leaving themselves open to any particular liability just by reporting a suspicion of abuse.

Rep. O'Hara is concerned that the reporting procedure may get out of hand. He wanted Mr. Madsen to give an example of when a teacher may be maliciously at fault in not reporting an abuse case. Mr. Madsen said he didn't know of any examples where professionals failed to report, but malicious reporting of abuse and neglect cases generally arrive out of situations involving divorced parents.

Senator Jacobson informed the committee that the Montana Medical Association has taken no stand on this legislation.

There being no further questions, hearing closed on SB 314.

CONSIDERATION OF SENATE BILL NO. 321: Senator Dave Fuller, District #22, chief sponsor of SB 321, testified. He said this bill was introduced by the request of the Lewis and Clark County Attorney and Judge Henry Loble from the 1st Judicial District. This is an act to revise the laws relating to bail; to require consideration of the danger a person poses to other persons or the community in setting bail and bail conditions. This bill does not allow a judge to deny bail except when the law allows it. A provision in this bill requires a defendant to show that he or she is entitled to bail after a guilty plea is entered or after a verdict comes in, as well as following the imposition of sentencing. Under the present law, a defendant is presumed to be entitled to bail even after he or she has been found guilty. Finally, this bill provides a list of factors that the judge may impose as conditions of bail.

Mark Murphy, assistant attorney general assigned to the County Prosecutor Services' Bureau, presented testimony in place of Marc Racicot. This bill basically does three different things: 1) It changes the situations after conviction upon which bail can be granted; 2) It first assumes that the person is entitled to bail in between conviction and prior sentencing; 3) It assumes just the opposite after sentencing -- it assumes that the person is not entitled to bail, and that he or she has to come in and prove that he is not a danger to society. The bill allows the judge to consider the danger to the community as one of the conditions for determining what is a reasonable bail.

Anne Brodsky, representing the Women's Lobbyist Fund, wished to go on record as supporting this bill.

OPPONENTS:

Susan Cottingham, representing the Montana Chapter of the

American Civil Liberties Union, testified as an opponent. She said that bail has always been used in order to keep a person from fleeing the community and to insure that they return to court or trial. She referred to section 2 of the bill and said that extra discretion is being given to the judge in determining the amount of bail when considering the danger to the community. The issue involved here is whether a person is presumed innocent until proven guilty. We are getting into a situation where you have what is called, "preventive detention." You are allowing people to be detained prior to their trial because they may or may not be a danger to their community. She feels the purposes of the bill are good ones, but she feels that in cases where a person hasn't been convicted of a crime and the judge decides that the person is a danger to the community for some reason, that he could be holding a person without just cause.

There being no further opponents, Senator Fuller closed.

The floor was opened to questions.

Rep. Mercer asked that once a person is convicted, does that person have any constitutional right to bail at all? Mr. Murphy replied "yes."

Rep. Cobb asked as to how many cases last year was Mr. Murphy aware of that there were problems in this bail area? Mr. Murphy said that he is not aware of a large number of cases.

There being no further questions, hearing closed on SB 321.

EXECUTIVE SESSION

ACTION ON SENATE BILL NO. 298: Rep. Hammond moved that SB 298 BE CONCURRED IN. The motion was seconded by Rep. Keyser.

Rep. Eudaily wanted to know why the effective date of January 1, 1986 was included in the bill. Brenda Desmond, the committee researcher, stated that she didn't know the specific reason as to why the effective date was included.

There being no further discussion, the question was called and the motion carried unanimously. Rep. O'Hara volunteered to carry the bill on the floor.

ACTION ON SENATE BILL NO. 314: Rep. Darko moved that SB 314 BE CONCURRED IN. The motion was seconded by Rep. Hammond.

Rep. Rapp-Svrcek moved to amend the bill by deleting any reference made to "suspected" child abuse.

On request of the chairman, Brenda Desmond commented on this area. She interprets "suspected" to mean has reasonable cause to suspect within the meaning of 41-3-201. This is

the section that requires people to report. They are required to report if they know or if they have reasonable cause to suspect. The reason that it is worded that way instead of if they know or suspect, is because whether or not a person suspects is pretty subjective. However, if you say that the person must report if he or she has reasonable cause to suspect, that is a more objective standard than just suspected.

In response, Rep. Mercer said he didn't necessarily agree with Brenda. He pointed out the adult abuse statute says that if you purposely or knowingly fail to report known or suspected abuse, that provides more of a standard. He agrees that while child abuse is a horrible problem in our society, he doesn't feel it will solve the problem to penalize people for not reporting. He feels that it is an insult to threaten certain people with a criminal offense for failing to do their job.

Rep. Rapp-Svrcek withdrew his motion to amend. He further made a substitute motion on line 14 following "who" by inserting "purposely or knowingly". The motion was seconded by Rep. Hammond.

Rep. O'Hara stated that while he agrees with the intent of the bill, he is concerned that we may be going a little beyond what is right.

Rep. Mercer said the trouble with Rep. Rapp-Svrcek's amendment is that it weakens the current law as far as a civil procedure. He feels the criminal and civil aspects should be separated out.

Rep. Rapp-Svrcek agrees with the premise that if an individual knows that a child is being abused but doesn't report it, he should be held responsible. However, he doesn't feel that it should be a crime for a person not to report based on suspicion.

Rep. Gould asked the question of when there is an actual abuse and when there isn't an abuse.

Rep. Hannah feels that this is a really gray area and it is really a judgment call of the person who comes in contact with these situations.

Rep. Addy moved the following amendment:

Page 1, line 17.

Following: "prevention."

Insert: "Any person or official required by law to report known or suspected child abuse or neglect who purposely or knowingly fails to report known child abuse or neglect or purposely or knowingly prevents another person from doing so is guilty of a misdemeanor."

The title of the bill would also be amended to conform with the above language. The motion was seconded by Rep. Mercer.

Rep. Hannah feels this bill will have no real impact one way or the other. It appears to him the reason for including a penalty provision is due to non-compliance. However, there was no testimony given at the hearing that would indicate that there is a non-compliance problem.

Rep. Keyser also pointed out that he feels this type of legislation could take a lot of individual rights away.

Rep. Bergene said that she agrees with Rep. Keyser in that these kinds of statutes erode a little more of individual rights, but this bill definitely comes down on the side of the child.

The question was called on Rep. Addy's motion to amend, and the motion carried on a voice vote.

Rep. Hammond moved that SB 314 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. Keyser and carried unanimously. Rep. Bergene will carry this bill on the floor.

ACTION ON SENATE BILL NO. 184: Rep. Keyser moved that SB 184 BE CONCURRED IN. The motion was seconded by Rep. Eudaily and discussed.

A question was asked as to how this bill differs from the HB 714 which was sponsored by Rep. Spaeth. This bill extends Rep. Spaeth's bill.

Rep. Addy moved to amend SB 184 by extending the sunset two years later. The motion was seconded by Rep. Hammond.

Rep. Keyser stated that he is against the motion to sunset for two more years. He feels this legislation should go on the statutes. He said that if the limits need to be changed next session due to the inflation factor, they will consider it at that time.


It was Rep. Eudaily's opinion that the sunset be removed completely because he feels it will be much more effective.

Rep. Addy feels this area should be further looked into. A decision in a law case (earlier cited by Mike Young) is expected to be handed down by the Montana Supreme Court relating to this issue, also.

The question was called, and the motion to amend carried 9-8. (See roll call vote.)

Rep. Hammond further moved that SB 184 BE CONCURRED IN AS AMENDED. The motion was seconded by Rep. Darko and carried on a voice vote. The bill will be carried on the floor by Rep. Addy.

ADJOURN: Without objection, the meeting adjourned at 12:00 noon.


TOM HANNAH, Chairman

DAILY ROLL CALL

HOUSE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date 3/18/85

NAME	PRESENT	ABSENT	EXCUSED
Tom Hannah (Chairman)	✓		
Dave Brown (Vice Chairman)			✓
Kelly Addy	✓		
Toni Bergene	✓		
John Cobb	✓		
Paula Darko	✓		
Ralph Eudaily	✓		
Budd Gould	✓		
Edward Grady	✓		
Joe Hammond	✓		
Kerry Keyser	✓		
Kurt Krueger	✓		
John Mercer	✓		
Joan Miles	✓		
John Montayne	✓		
Jesse O'Hara	✓		
Bing Poff	✓		
Paul Rapp-Svrcek	✓		

STANDING COMMITTEE REPORT

.....March 19..... 1985.....

MR. SPEAKER:.....

We, your committee on.....JUDICIARY.....

having had under consideration.....SENATE..... Bill No. 134.....

Third..... reading copy (Blue)
color

REMOVE SUNSET ON DAMAGE LIMIT IN SUITS AGAINST STATE-LOCAL
GOVERNMENTS

Respectfully report as follows: That.....SENATE..... Bill No. 134.....

Be amended as follows:

1. Title, line 5.

Strike: "REPEAL"

Insert: "EXTEND TO JUNE 30, 1987,"

2. Title, line 8.

Strike: "REPEALING"

Insert: "AMENDING"

3. Page 1, line 12.

Strike: "Repealer"

Insert: "Termination Date"

4. Page 1, line 13.

Strike: "repealed"

Insert: "amended to read: Section 9. Termination date.
Section 2 terminates June 30, 1985 1987."

AND AS AMENDED,

BE CONCURRED IN

DO-PASS

ROLL CALL VOTE

HOUSE COMMITTEE JUDICIARY

DATE March 18, 1985 BILL NO. SB 184 TIME 12:00 noon

NAME	AYE	NAY
Kelly Addy	✓	
Toni Bergene		✓
John Cobb		✓
Paula Darko	✓	
Ralph Eudaily		✓
Budd Gould		✓
Edward Grady		✓
Joe Hammond	✓	
Kerry Keyser		✓
Kurt Krueger	✓	
John Mercer	✓	
Joan Miles	✓	
John Montayne	✓	
Jesse O'Hara		✓
Bing Poff	✓	
Paul Rapp-Svrcek	✓	
Dave Brown (Vice Chairman)		
Tom Hannah (Chairman)		✓

Marcene Lynn
Secretary

Tom Hannah
Chairman

Motion: Rep. Addy moved to amend SB 184 by extending the
sunset provision two years later. The motion was seconded by Rep.
Hammond and carried 9-8. (See minutes for actual amendment)

STANDING COMMITTEE REPORT

March 18

19 85

Speaker

MR.

Judiciary

We, your committee on

Senate

having had under consideration Bill No. 293

Third

Blue

..... reading copy (.....)
color

INCREASING NUMBER OF CLAIMS ALLOWED ANNUALLY IN SMALL CLAIMS
COURT

Senate

Respectfully report as follows: That Bill No. 298

BE CONCURRED IN

DOEASGX

STANDING COMMITTEE REPORT

March 13

19 85

MR. Speaker

We, your committee on Judiciary

having had under consideration Senate Bill No. 314

Third reading copy (Blue)
color

MISDEMEANOR FOR FAILURE TO REPORT CHILD ABUSE OR NEGLECT

Senate

314

Respectfully report as follows: That..... Bill No.....

be amended as follows:

1. Title, line 6.

Strike: "OR SUSPECTED"

2. Page 1, line 15.

Following: "is"

Strike: "guilty" through "is"

3. Page 1, line 17.

Following: "prevention."

Insert: "Any person or official required by law to report known or suspected child abuse or neglect who purposely or knowingly fails to do so or purposely or knowingly prevents another person from doing so is guilty of a misdemeanor."

AND AS AMENDED,
BE CONCURRED IN
DO-PASS

DEPARTMENT OF ADMINISTRATION
INSURANCE AND LEGAL DIVISION



TED SCHWINDEN, GOVERNOR

CAPITOL STATION

STATE OF MONTANA

(406) 444-2421

HELENA, MONTANA 59620

March 13, 1985

Representative Tom Hannah
House Judiciary Committee
Room 312, State Capitol
Helena, MT 59620

Re: Senate Bill 184 -- Repeal of Sunset provisions on
damage limits in civil actions against state and
local governments

Dear Representative Hannah:

The Department of Administration has asked Senator Mazurek, as
Chairman of the Senate Judiciary Committee, to sponsor Senate
Bill 184 for the benefit of the State and all political subdivi-
sions.

By way of background, the need for this legislation resulted
from the 1983 decision of the Montana Supreme Court in Karla
White v. State of Montana wherein the damage limits imposed by
the 1977 Legislature were deemed unconstitutional. These
limits were amended to conform to the Court's ruling and
reimposed at \$300,000 per person and \$1,000,000 per occurrence
in the waning days of the 1983 Legislature. However, it was
felt that a sunset provision was necessary in order to review
the amount of those limits in 1985.

The following information is provided by the department in
support of retaining the existing \$300,000 per person,
\$1,000,000 per occurrence damage limit:

I.
CLAIMS DATA

- (A) Total number of self-insured nonautomobile
claims made since July 1, 1977 900+
- (B) Number of active litigation files as
of 12/31/84 113
- (C) Number of cases filed since 11/26/84 24

(D) Table of actual loss payments

	<u>FY78 & 79</u>	<u>FY80 & 81</u>	<u>FY82 & 83</u>	<u>FY84</u>	<u>FY85*</u>
Claims					
Paid	\$47,115	\$144,339	\$2,943,589	\$1,305,784	\$1,313,746
Leg.Fees	19,956	137,840	299,270	308,749	164,774
Misc.Exp.	<u>578</u>	<u>14,007</u>	<u>95,085</u>	<u>74,728</u>	<u>79,394</u>
TOTALS	\$67,649	\$296,186	\$3,337,944	\$1,689,261	\$1,557,914

*Amounts shown are only for 6 month period ending 12/31/85

II.

LOSS RESERVES AND ACTUARIAL REPORT

(A) Loss reserves for pending litigation - Ins. & Legal Div.

<u>Claims Value</u>	<u>Legal Fees</u>	<u>Claims Expense</u>
\$4,832,000	\$532,000	\$274,200
TOTAL:		\$ 5,638,200
Total Assets - Self-Insurance Reserve Fund as of 6/30/84		8,600,000
Net Reserves		<u>2,961,800</u>

(B) Actuarial Evaluation - Coopers & Lybrand for period ending June 30, 1984

Estimated liabilities of existing claims and claims incurred but unreported	\$19,800,000
Less State's assets as of 6/30/84	8,600,000
Deficit for existing claims and claims incurred but unreported	<u>\$11,200,000</u>

As you can see from the above, the State has gone from a healthy surplus in 1982 to an \$11.2 million deficit from an actuarial standpoint. In its report, Coopers and Lybrand attribute this result to increased claim reporting, higher average claim cost, and the expansion of the State's liability to include noneconomic damages as well as economic losses by plaintiffs under the White decision.

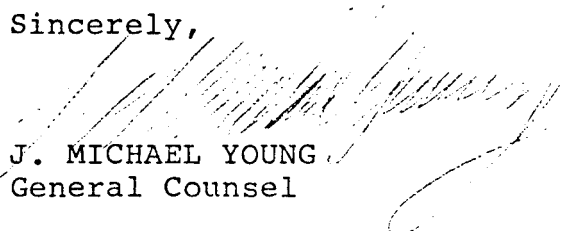
In addition, I have attached the results of a survey taken of western states to compare their liability limits to Montana's

existing limits. With the exception of Washington and Alaska, which have no limits, Montana has favorable dollar limitations by comparison. Also, Montana has total exposure on virtually all state activities whereas other states have retained immunity in various specific activities such as law enforcement or highway design.

Although there is no exact means to estimate the cost of no damage limits for state government, it is inevitable that verdicts against the State similar to the recent \$3,000,000 judgment against Burlington Northern will occur. Even if only three or four such catastrophe losses occur in the existing litigation, the State's ability to pay from available reserves would be totally exhausted.

Your support for this legislation would be greatly appreciated.

Sincerely,



J. MICHAEL YOUNG
General Counsel

gk

GOVERNMENT LIABILITY STATUTES OF WESTERN STATES

<u>STATE</u>	<u>LIMITS</u>	<u>IMMUNITY</u>
North Dakota		Sovereign immunity for State only
New Mexico	100,000 PD 300,000/500,000 BI	See #1 below
Alaska	No limits	None
Idaho	500,000 CSL	See #2 below
Wyoming	500,000 CSL	See #3 below
Washington	No limits	None
Colorado	150,000/400,000	See #4 below
Oregon	50,000 PD 100,000/300,000 BI	See #5 below

1. New Mexico excludes from immunity:

- a. Highway design and maintenance
- b. Motor vehicle operation
- c. Personal injury caused by law enforcement personnel
- d. Premises liability - buildings, state parks, machinery and equipment
- e. Airport liability
- f. Operation of medical facilities
- g. Liability for health care providers

2. 120-day limitation for filing claims. There is immunity from: E&O, assessment of a fee or tax, establishment of a quarantine, personal injury by law enforcement personnel, claims arising from acts of National Guard, claims arising from riots or mob violence and claims from highway design.

3. Wyoming has immunity, except for claims from:

- a. Contracts entered into by a governmental entity
- b. Negligence while operating a motor vehicle
- c. Premises liability

- d. Operation of an airport
- e. Operation of a public utility (except for failure to provide electricity or natural gas)
- f. Operation of a medical facility
- g. Health care providers who are government employees
- h. Operation of public facilities
- i. Tortious conduct of law enforcement officers

One year limitation on filing claims, except on minor age 7 or less then two years or until age of 8, whichever is longer.

4. Colorado has immunity except as follows:

- a. Vehicle operations
- b. A dangerous condition in any institution or premise
- c. A dangerous condition in any public building
- d. A dangerous condition on any public roads
- e. A dangerous condition of any public facilities
- f. From operation of public water, gas or sanitation facilities

If a public entity obtains insurance coverage from an insurance company it is deemed to have waived any immunity available, up to the amount of the coverage.

5. Oregon has immunity from punitive damages, discretionary acts, workers' compensation, settlement of taxes and from riots or mob actions. They have a 180-day limitation (from date of discovery) for filing claims.

jjc

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P. O. BOX 2566
(406) 727-7304

February 5, 1985

Senate Judiciary Committee
Capitol Station
Helena, MT 59620

Dear Committee members:

A few years ago, I represented a young lady named Karla White. She was attacked and brutally beaten by an escapee from Warm Springs State Hospital. In the lawsuit which followed, White v. State, the Montana Supreme Court ruled that the legislative created limitations on recovery from the government then in existence were unconstitutional.

After this ruling, the legislature quickly passed the current limitations on recovery from a government entity. I understand that these limitations are now under review. I would like to have the following comments made part of the record when you consider this matter.

I can say unequivocally that the current limitations on recovery for damages are unconstitutional. I can say this with some confidence because the current legislation was based upon the dissenting opinion of a justice in the White case. In other words, the current legislation is directly contrary to the majority decision in that important constitutional case. Because of this, I would suggest that the committee carefully revise the legislation so it does, in fact, pass constitutional muster.

In my opinion, any attempt to limit recovery of damages when the defendant is a government entity violates equal protection of the law. It creates two classes of victims who have suffered injury because of government negligence. Those with lesser injuries are entitled to full compensation. Those with immense injuries, meriting recovery of damages in excess of the current \$300,000 limitation, are deprived of full redress for their injuries. This is a classic form of discrimination which does not pass constitutional muster where, as here, we are dealing with a fundamental constitutional right.

February 6, 1985
Page 2

Be that as it may, I recognize that as a practical matter, the legislature may well impose limitations on damages anyhow. If this is true, I would suggest that you seriously consider and study the possibility of requiring government entities to purchase some sort of umbrella insurance policy, that would increase recovery above the current \$300,000 limitation.

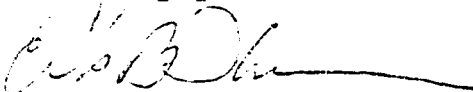
For instance, an umbrella policy that would increase damage coverage to one million dollars would probably only amount to a few cents in taxes per capita in the area where any government entity, large or small, has its tax base.

Extending the limits in such a manner would not clear up the constitutional problems, but it would certainly decrease the size of the class of victims who will not receive full recovery when injured by the government. Moreover, it will also decrease the hardships and adverse impact upon those whose injuries are still so severe that a million dollar limit will not compensate them for all of their losses. In short, for very little extra expense, such an umbrella insurance plan would greatly reduce the reprehensible aspects of the current damage limitations.

In summary, the people of this state are entitled to great care by the legislature when the legislature chooses to limit fundamental constitutional rights. I think this at least requires an impartial and careful study of how the limits on damages can be adjusted without significantly affecting the fiscal integrity of our government entities. I would hope that the committee and legislature would consider such a plan and act accordingly.

I thank you in advance for this opportunity to express my thoughts as a concerned citizen of this state.

Sincerely yours,

A handwritten signature in dark ink, appearing to read 'Erik B. Thueson', with a long horizontal flourish extending to the right.

Erik B. Thueson

EBT:eml

STATEMENT BY R. STEPHEN BROWNING
ON BEHALF OF FIRST BANK SYSTEMS IN SUPPORT OF
SB 200 BEFORE THE HOUSE JUDICIARY COMMITTEE
MARCH 18, 1985

Mr. Chairman and members of the Committee, I will limit my remarks on SB 200 to a few fundamental legal concepts. I want the Committee to consider certain basic distinctions between civil wrongs and criminal wrongs. I have listened to the proponents of this bill and I believe that they have presented many compelling arguments. However, they have overlooked what I believe to be the basic flaw in the current statute dealing with punitive damages (27-1-22, MCA).

To begin with, it is my firm judgment that the Montana statute on punitive damages strays from certain legal fundamentals that distinguish civil law from criminal law. In criminal law we protect society from serious criminal actions by punishing criminals through incarceration. (Incarceration serves three societal purposes: first, to deter others from committing crimes; second, to punish the criminal; and third, to protect society from the criminal.) However, in civil law, we protect the individual by seeking to compensate him or her for damages caused by the wrongs of others.

Frequently, wrongs to be protected against can be identical acts. For example, if I were to hit you and injure you, I would have perpetrated a wrong not only against you personally but against society as well. In common law these wrongs were distinguished in criminal law and civil law. For criminal purposes, I would have committed a criminal battery, which was punishable by a fine or imprisonment or both. In civil law, I would have caused damage to you, which was a tort compensable by an action in battery. Thus, a single act was actionable in both civil courts and criminal courts.

These distinctions carried over into modern statutory law. It is still a crime for me to hit you. Additionally, you can recover against me in a civil action for battery.

I believe that, with respect to punitive damages, the fundamental distinction between civil wrongs and criminal wrongs was lost in our statutory law when certain damages were not compensable in civil actions. That is, for many years pain and suffering and/or emotional distress were not recognized as being compensable in civil actions. To correct this situation, our legislature in 1895 made these injuries compensable under punitive damages theory. However, times have changed and so has the scope of damages now recognized as being actionable. Any serious scholar of the law will tell you that all significant damages suffered as a result of tortious conduct are now fully compensable. Thus, the reason for retaining punitive damages in our civil code is no longer valid.

Let me focus your attention briefly upon the bill at hand. Lines 16 through 18 of page 1 of SB 200 state that "in addition to the actual damages, [the court] may give damages for the sake of example and by way of punishing the defendant." Put another way, the court is treating "tortious" conduct as if it were a "crime" and requiring the defendant to pay a penalty or fine by way of punishing the defendant for the act and also serving as an example to the rest of society.

The above quoted language makes it clear that the Montana Legislature enacted 27-1-221 MCA in the form of a crime. This belief is supported further by the language of SB 200 found on lines 15 and 16 of page 1 where the current law provides that "the defendant has been guilty of oppression, fraud, or malice ...". The word "guilty" is a term of criminal law, not civil law. In civil law we talk of liability. In criminal law we talk of guilt. The conclusion to draw is that punitive damages are by their very nature criminal and not civil.

The point I am trying to make is that the people of Montana today are protected by civil law without punitive damages. If someone is injured by the act of another -- even when that act is fraudulent, malicious, or oppressive -- all personal injuries suffered as a result of that act are compensable. To the extent that societal injuries result, then the act should be made a crime.

The opponents of this bill say that they are trying to take the profit out of reprehensible behavior. I don't disagree with that objective. I only disagree with the means of implementing it. Let's make the offensive acts crimes and remove them from the punitive damages section of our civil codes.

If the legislature wants to "set an example" for this kind of behavior or if the legislature wants to "punish" this kind of behavior or if the legislature wants to "protect" society from this kind of behavior, then I believe the appropriate course would be for the Montana legislature to pass a law defining this kind of criminal behavior to be a criminal act punishable under Montana's criminal laws.

Montana has an excellent criminal justice system in place. This system works. It can deal with new crimes. I would recommend that the Judiciary Committee consider the enactment of legislation making it a crime for people in Montana to engage in behavior where "the defendant has been guilty of oppression, fraud, or malice." I realize that these terms are somewhat vague. It will take time and debate to provide the kind of clarity to insure that all due process requirements can be met with such a criminal law of this type. I would be happy to work with the Committee in insuring that all such protections are observed.

VISITORS' REGISTER

HOUSE JUDICIARY

COMMITTEE

BILL NO. SB 184 (Sen. Mazurek);
 SB 200 (Sen. Christiaens);
~~SB 298 (Sen. Yellowtail);~~
 SPONSOR SB 314 (Sen. Jacobson);
~~SB 321 (Sen. Fuller)~~

DATE March 18, 1985

NAME (please print)	RESIDENCE REPRESENTING	SUPPORT	OPPOSE
Mike Young	State of Mont. (D.A.)	X	
Jim Moore	Self		X
ARL EDWARDS	MT. Trial Lawyers		184 200
Julie Dalgaard	Mat PIRG	298	
Ruby Johnson	NFIB	SB 298 SB 200	
Le Morris	MACO	184 200	
Tanell Loring			
Rob Merwin			
John Madsen	SRS	314	
MARK MURPHY	MCAA	321	
Deor Goss	Bellings Chamber of Commerce	SB 200	
Harold Ude	CENREX	SB 200	
Hal Stearns	N West Bank -	200	
Ann Mulligan	MBMDF	SB 200	
John Cady	MT Bankers Ass'n	SB 200	
A H Bole	MT Chamber of Commerce	SB 200	
Roger McGLENN	INDEPENDENT INSURANCE AGENTS OF MT.	SB 200	
CHAD SMITH	MONT HOSP ASS'N	SB 200	
BOB JAMES	STATE FARM; WAI	SB 200	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE JUDICIARY

COMMITTEE

BILL NO. _____

DATE March 18, 1985

SPONSOR _____

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Tim Higgins	FARMERS Ins. Group-Helen	SB200	
Alec Hansen	MT. LEAGUE OF CITIES	SB 184	
Don Ingels	MT Chamber of Commerce	SB 200	
Ben Hordahl	MT Motor Vehicle Assn	SB 200	
Jeffrey M. Kirkland	MT Credit Unions League	SB 200	
Don Allen	USA Wood Products Assn	SB 200	
Susan Cunningham	MT. ACLU	SB	SB 321
Anne Brodsky	WLF	SB 321	
Steve Browning	First Bank System	SB 200	

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PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.