

MONTANA STATE SENATE  
JUDICIARY COMMITTEE  
MINUTES OF THE MEETING

March 22, 1985

The fifty-fifth meeting of the Senate Judiciary Committee was called to order at 6:55 a.m. on March 22, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

ACTION ON HJR 37: Senator Yellowtail moved HJR 37 be amended as follows:

1. Page 3, line 8.  
Following: line 7  
Strike: "Court"  
Insert: "Court's Commission on Rules of Criminal Procedure"
2. Page 3, line 12.  
Following: "THAT THE"  
Strike: "COURT"  
Insert: "Commission"
3. Page 3, line 14.  
Following: "of the"  
Strike: "Supreme Court's"  
Insert: "Commission's"
4. Page 3, line 16.  
Following: line 15  
Strike: "can"  
Insert: "need to"
5. Page 3, line 21.  
Following: "Court"  
Insert: "for delivery to the Commission on Rules of Criminal Procedure"

The motion carried unanimously. Senator Brown moved HJR 37 be recommended BE CONCURRED IN AS AMENDED. The motion carried unanimously.

ACTION ON HB 840: Senator Mazurek stated there is a civil procedure which defines a method to get mineral leases off the record. Senator

Galt explained the problem is the one who forgets there is even a record of it. Senator Mazurek stated we made a civil penalty not criminal. Senator Shaw stated he doesn't think what has been suggested will work. Senator Mazurek stated this would give you as the landowner the ability to give a lessee notice and tell him if he doesn't take his lease off the record, you will go to the county attorney, at which time he may become criminally liable. Senator Crippen moved HB 840 be recommended BE NOT CONCURRED IN. The motion failed with Senators Brown, Galt, Pinsoneault, Shaw, and Yellowtail voting in opposition. Senator Pinsoneault moved HB 840 be recommended BE CONCURRED IN. The motion carried with Senators Blaylock, Crippen, and Mazurek voting in opposition.

ACTION ON HB 529: Senator Mazurek stated we presently have an uninsured employers fund which is insolvent. This would give employees benefits in case an employer is uninsured. It is a real problem. Senator Pinsoneault moved HB 529 be recommended BE CONCURRED IN. The motion carried with Senator Shaw voting in opposition.

TABLING OF HB 778: Senator Pinsoneault moved HB 778 be recommended BE NOT CONCURRED IN. Senator Mazurek spoke against the motion. He stated the only problem he has with the bill is you still allow a contingency fee and it comes out of the claimant's share. What they are trying to do is reasonable. In workers' compensation cases, you seldom fight over liability; you fight over what the claimant is entitled to. Part of the reason for this is attorneys' fees are paid on a net recovery basis over and above what the employee receives as benefits. What this bill says is the attorney gets his reasonable rate of compensation over and above the benefits. Senator Brown moved as a substitute motion that HB 778 be recommended BE CONCURRED IN. Senator Mazurek stated there was a concern about the language on page 2, lines 20-23. Senator Daniels reminded the committee about Judge Reardon's testimony on that matter. Senator Towe asked what the purpose of the bill was and asked what we gained from it. Senator Mazurek responded fees being charged on a compensation basis as opposed to a contingency fee. Senator Towe stated it appears the only question is whether fees should be on a contingency fee basis or on an hourly fee basis. Senator Blaylock stated if we have this, it seems that when an injured employee goes to an attorney and asks what he will get charged, the attorney will have to be honest and say he is going to charge him on an hourly basis, and he charges such and such an hour. Without this bill, the attorney won't have to do that. Senator Mazurek stated there is a fee agreement that you get 25%, 33%, or 40% of the net recovery depending on how far the case goes. Everyone uses the same fee agreement. He suggested that in workers' compensation cases, generally speaking, the only dispute is how much money the claimant will get, because there are very few defenses. What he is saying is he is not trying to deprive any attorney of a reasonable fee for services rendered. If an attorney spends 100 hours, he ought to get paid for 100

hours, but if he spends two hours, he ought not to get 33% of a recovery. Senator Crippen asked who paid if the employee loses. Senator Towe stated, as a practical matter, almost all attorneys' fee agreements on workers' compensation cases will be contingency fees. The result is the claimant will end up with less money with this bill. Senator Mazurek stated he doesn't think most lawyers, if they were paid a reasonable rate, would ding the claimant for more fees. Senator Towe stated if you signed an agreement with the client that you are going to get 25%, the client is going to have to pay. Instead of the insurance company paying all of it, the client will have to pick up the rest. Senator Blaylock asked if this bill gave the injured workman better protection. Norm Grosfield stated this bill is an attempt to change a supreme court decision that changed a system that existed for 10 years prior thereto. Mr. Grosfield wanted to reinstate that system. The insurance company has to pay in accordance with a contingency fee. He always accepted the fee the court granted, and he didn't charge any additional amount against the client. His concern is workers' compensation is getting so expensive. The client generally isn't going to get hurt. Karl Englund, Montana Trial Lawyers Association, stated the committee should look at the removal of the word "settlement." This bill says the only time you are entitled to attorneys' fees is if you go to trial. The problem is what Senator Crippen started to get to, which is the contingency agreement can result in the lawyer's getting a larger amount. The supreme court recognizes that, but those settlements offset the ones he loses, in which situation he gets no money. Whether some attorneys will take from their clients or not, he cannot address, because all attorneys do that individually. He believes there is ample room in the Wight case to review the fees; there is a list of criteria to be used. Senator Shaw asked if this would give the uninsured workers' compensation fund some money. Gary Blewett responded he believes it would save the workers' compensation insurance fund money because the amount of fee the insurance fund would have to pay the attorney would be less. He was concerned as well that there was an amount the client will have to pay. He has a rule change in the offing that will reduce the maximum that will be charged. The combination of that rule and this bill would significantly reduce the amount of payment by the client. He doesn't think the claimant should have high costs of paying an attorney for assistance. Senator Brown moved as a substitute motion that HB 778 be amended as follows:

1. Page 2, line 18.

Following: "shall"

Strike: "determine a reasonable attorney fee and"

2. Page 2, line 21.

Following: "on"

Strike: "a"

Insert: "the attorney's"

Following: "fee"

Strike: remainder of line 21 through "fee" on line 22

The motion carried with Senator Daniels voting in opposition. Senator Daniels stated that is one of the things Judge Reardon was complaining about. He will spend as much time on that matter as on the claim. Mr. Grosfield stated the reference to settlement means nothing, because in order to get an award of attorneys' fees against the carrier, the case has to go to court and there must be litigation. The court has so ruled. Senator Towe asked if by taking it out you encourage the insurance company to say you are not entitled to attorneys' fees. Senator Mazurek responded they would then be liable to penalties. Senator Brown moved HB 778 be recommended BE CONCURRED IN AS AMENDED. The motion failed with Senators Crippen, Daniels, Pinsoneault, Towe, and Yellowtail voting in opposition. Senator Pinsoneault moved HB 778 be recommended BE NOT CONCURRED IN AS AMENDED. The motion failed with Senators Blaylock, Brown, Galt, Mazurek, and Shaw voting in opposition. Senator Crippen moved HB 778 be TABLED. The motion carried with Senators Blaylock, Brown, Galt, and Mazurek voting in opposition.

FURTHER CONSIDERATION OF HB 363: Proposed amendments from Representative Bob Marks were distributed to the committee (Exhibit 1). Mr. Petesch explained the first amendment defines clear and convincing evidence. The second defines presumed malice in a manner similar to SB 200. The fourth amendment changes the amount which may be assessed. Senator Towe asked where they came up with the clear and convincing definition. Mr. Petesch stated he is not aware of any place that exists where clear and convincing evidence is defined, although there is a U.S. Supreme Court case that talks about clear and convincing evidence which is similar to this. Senator Towe pointed out the definition of presumed malice does not have the qualification "or reason to believe." Senator Pinsoneault stated defining clear and convincing raises an almost beyond-a-reasonable-doubt standard. He has no problem with that, but by defining clear and convincing is almost beyond a reasonable doubt. Bob James stated that definition is from a case in Michigan. Senator Towe moved HB 363 be amended as follows:

Page 1, line 10.

Following: line 9.

Insert: "NEW SECTION. Section 1. Purpose. The purpose of 27-1-221 is to deter claims for punitive or exemplary damages that are not clearly based in fact and, to that end, the

legislature intends for 27-1-221 to be used in combination with early and ready application and granting of motions for summary judgment pursuant to Rule 56 of the Montana Rules of Civil Procedure where such claims are not based in fact, and the application of the sanctions provided for in Rule 11 of the Montana Rules of Civil Procedure against those parties responsible for making such claims.

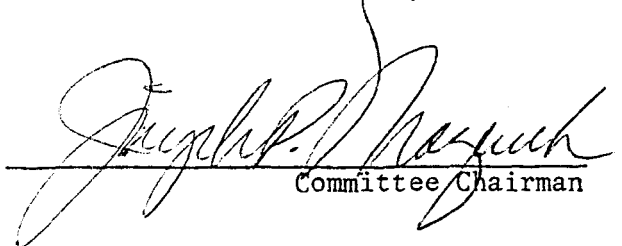
Renumber: subsequent sections

It does two things. First, you are trying to avoid going all the way through the trial. You can always apply for a summary judgment or a partial summary judgment. The judges generally are hesitant to grant summary judgments if there is any evidence. We say we want them to take a strong look at it and get it out of the trial. Second, the new Rule 11 applies and allows a judge to issue sanctions against an attorney who signs a pleading that has no basis. It does not accomplish a great deal, but it doesn't hurt anyone. The motion to amend carried unanimously. Senator Towe moved amendment No. 1 be adopted. He stated he is not sure you can justify that kind of a definition from any source, but it doesn't hurt. The motion to accept amendment No. 1 carried with Senators Blaylock, Daniels, and Mazurek voting in opposition. Senator Towe stated he doesn't like the proposed definition of presumed malice without the phrase "has reason to know." He stated he would like to go back to SB 200's definition of presumed malice. Senator Crippen stated he had no problem with the definition of actual malice. There is no cap, and that takes care of the Ford Pinto type case. But when you get into the area of reason to know, there will be a real question of what in the world is reason to know. Senator Mazurek stated you have unlimited punitive damages. He asked if that had an impact on this question. Senator Crippen moved as a substitute motion we adopt the proposed definition of presumed malice and amendments No. 2 and 3. Senator Towe stated he thinks it is unnecessary, and you still have the kinds of problems that come up in product liability cases where someone will say, if you don't tell me, I won't know. Senator Pinsoneault asked how they thought the jury would react if that ever came up in discovery. Senator Towe stated the judge would have to throw it out because it is not presumed malice. Senator Crippen stated that could be considered to be actual malice. Senator Towe moved as a substitute motion that the committee adopt the same definition of presumed malice as in SB 200 as that definition is right out of case law. The motion failed with Senators Brown, Crippen, Galt, Pinsoneault, and Shaw voting in opposition. Chairman Mazurek stated the committee would then revert to Senator Crippen's motion to adopt the proposed amendment titled subparagraph (3) relating to presumed malice. Senator Pinsoneault moved as a substitute motion that we simply eliminate the definition of presumed malice from the bill. Senator Mazurek asked why. Senator

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Pinsonneault responded the supreme court has already defined presumed malice. Senator Crippen did not feel we should just sit back and let the supreme court legislate and tell us what we are going to do. Senator Pinsonneault withdrew his motion. The motion to adopt the amendment labeled subparagraph (3) carried with Senators Blaylock, Daniels, Towe, and Yellowtail voting in opposition. Senator Towe moved that amendment No. 4 entitled paragraph (6)(a) be adopted. Senator Mazurek explained that strikes the \$500,000 limit. Senator Crippen moved as a substitute motion that proposed amendment No. 4, section (6)(a) and (b), be adopted. His reasoning was this is a case of compromise. The House wants a \$500,000 cap. We are coming back and saying no, we don't want any limit on actual damages. At the same time, we need to discuss the subsection (b) where we are talking about the \$100,000 and 1% cap. Senator Towe asked about striking the \$100,000. Senator Mazurek stated that benefits little and hurts big. Senator Towe stated if you put in \$100,000, that tends to be the pattern, and that is what everyone gets. He asked how you complied with subparagraph (8) if in fact you do not know what the net worth is. He asked who would make a determination of net worth in order to apply the limits. Senator Daniels suggested there would be a bifurcated hearing. Senator Crippen agreed to amend his motion by striking \$100,000 and inserting \$25,000. The motion carried with Senators Blaylock and Mazurek voting in opposition. Senator Crippen moved amendment No. 4, subparagraphs (7) and (8), be adopted. The motion carried with Senators Daniels and Mazurek voting in opposition. Senator Pinsonneault moved HB 363 be recommended BE CONCURRED IN AS AMENDED. The motion failed with Senators Blaylock, Daniels, Mazurek, Towe, and Yellowtail voting in opposition. Senator Towe explained the problem is the definition of presumed malice.

There being no further business to come before the committee, the meeting was adjourned at 8:00 a.m.

  
Committee Chairman



# STANDING COMMITTEE REPORT

MARCH 18

19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 363

Third reading copy (Blue color)

## LIMITING PUNITIVE DAMAGES IN CIVIL ACTIONS

Respectfully report as follows: That HOUSE Bill No. 363

Third reading copy

Be amended, as follows:

1. Page 2, line 2.

Following: "EVIDENCE."

Insert: "Clear and convincing evidence means evidence which is unmistakable and free from serious or substantial doubt."

(3) Presumed malice exists when a person has knowledge, which knowledge may be proven by direct or circumstantial evidence, of facts which create a high degree of risk of harm to the substantial interests of another, and either deliberately proceeds to act in conscious disregard of or indifference to that risk, or recklessly proceeds in unreasonable disregard of or in indifference to that risk."

2. Page 2, line 3.

Strike: "(3)"

Insert: "(4)"

~~EXCESS~~

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 1

DATE 03 22 85

BILL NO. HB 363



3. Page 2, line 9

Strike: "(4)"

Insert: "(5)"

4. Page 2, line 14

Strike: Lines 14 and 15 in their entirety.

Insert: "(6) (a) In cases of actual fraud, or actual malice, the jury may award reasonable punitive damages after considering the circumstances of the case.

(b) In all other cases where punitive damages are awarded, punitive damages may be in an amount up to but no greater than \$100,000 or 1% of the defendant's net worth whichever is greater.

yes (7) If a plaintiff sought exemplary damages at trial, but such damages were not awarded, the court shall submit to the jury a question concerning whether the jury found in the evidence presented any reasonable basis in fact for seeking exemplary damages. If the response to the question is negative, the court may, in its discretion as a penalty against such party, the party's attorney, or both, assess damages in an amount not to exceed what is determined by the court to be reasonable attorney fees and costs of the defendant incurred in defense of such claims.

(8) In cases where punitive damages may be awarded, the jury shall not be instructed, informed or advised in any manner as to the limitations on the amount of exemplary or punitive damages as set forth in section 6b."

And as concurred in  
DO PASS

secretary and chairman. Have at least 50 printed to start.)

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 032285 House Bill No. 363 Time 8:52 am

NAME	YES	NO
Senator Chet Blaylock		X
Senator Bob Brown	X	
Senator Bruce D. Crippen	X	
Senator Jack Galt	X	
Senator R. J. "Dick" Pinsoneault	X	
Senator James Shaw	X	
Senator Thomas E. Towe		X
Senator William P. Yellowtail, Jr.		X
Vice Chairman		
Senator M. K. "Kermit" Daniels		X
Chairman		
Senator Joe Mazurek	X	

Secretary Cindy Staley Chairman Mazurek <sup>(6)</sup> <sup>(4)</sup>

Motion: amendment - adopt (3)  
presumed malice

(include enough information on motion—put with yellow copy of committee report.)

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 2  
DATE 03-22-85 6:55 am  
BILL NO. H.B. 363

# STANDING COMMITTEE REPORT

March 22

19 85

MR. PRESIDENT

## JUDICIARY

We, your committee on.....

## HOUSE BILL

529

having had under consideration.....

No.....

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(Senator Mazurek)

## WORKERS' COMP. REMEDIES WHEN EMPLOYER IS UNINSURED

## HOUSE BILL

529

Respectfully report as follows: That.....

No.....

BE CONCURRED IN

~~DO PASS~~

~~DO NOT PASS~~

Senator Joe Mazurek

Chairman.

# STANDING COMMITTEE REPORT

March 22

19. 35

MR. PRESIDENT

JUDICIARY

We, your committee on

HOUSE BILL

having had under consideration

No. 340

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(Senator Smith)

REMOVAL OF OIL LEASES FROM COUNTY RECORDS UPON EXPIRATION

HOUSE BILL

Respectfully report as follows: That

No. 340

BE CONCURRED IN

~~XXXXXX~~

~~XXXXXXXXXX~~

Senator Joe Mazurek

Chairman.

# STANDING COMMITTEE REPORT

March 22

19 55

MR. PRESIDENT

## JUDICIARY

We, your committee on

## HOUSE JOINT RESOLUTION

37

having had under consideration

No.

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(Senator Mazurek)

## RESOLUTION TO SUPREME COURT REQUESTING REVIEW OF HEARSAY RULE

## HOUSE JOINT RESOLUTION

37

Respectfully report as follows: That

No.

be amended as follows:

1. Page 3, line 3.

Following: line 7

Strike: "Court"

Insert: "Court's Commission on Rules of Criminal Procedure"

2. Page 3, line 12.

Following: "THAT THE"

Strike: "COURT"

Insert: "Commission"

3. Page 3, line 14.

Following: "of the"

Strike: "Supreme Court's"

Insert: "Commission's"

4. Page 3, line 16.

Following: line 15

Strike: "can"

Insert: "need to"

5. Page 3, line 21.

Following: "Court"

Insert: "for delivery to the Commission on Rules of Criminal Procedure"

~~SENATOR~~

AND AS AMENDED

~~SENATOR~~

BE CONCURRED IN

Senator Joe Mazurek

Chairman.