MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Bruce D. Crippen, on January 30, 1989, at 10:00 a.m. in Room 325.

ROLL CALL

Members Present: Chairman Bruce Crippen, Vice Chairman Al Bishop, Senators Tom Beck, John Harp, Loren Jenkins, Joe Mazurek, Dick Pinsoneault and Bill Yellowtail.

Members Excused: Senator Mike Halligan

Members Absent: None

Staff Present: Staff Attorney Valencia Lane and Committee Secretary Rosemary Jacoby

Announcements/Discussion: There were none.

HEARING ON HOUSE BILL 115

Presentation and Opening Statement by Sponsor:

Representative Mary McDonough of Billings, District 56, opened the hearing. She explained that House Bill 115 would permit the charge of reasonable adoption process fees; provide for the imposition of a fine on a person convicted of charging or accepting unreasonable adoption process fees; and require a detailed report concerning the adoption process. She urged the committee to support HB 115.

List of Testifying Proponents and What Group they Represent:

Betty Bay, Department of Family Services

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Betty Bay presented written testimony to the committee (Exhibit 1)

Questions From Committee Members: Senator Mazurek asked where the language originated. Rep. McDonough said that the bill was modeled after the North Dakota statute.

Senator Mazurek asked if there was any concern about striking "licensed child investigative agency" as far as affecting the authority to charge reasonable fees. Leslie Taylor, attorney for the Department of Family Services, replied that she didn't think so. She said they were a non-profit organization and were working for no profit in many instances. The cost to the agency is paying for the services for the birth mother including medical expenses and are more than what we charge the adopting company.

Senator Mazurek stated that perhaps there needs to be an exemption for your agency. He asked if the bill should clarify the law so they could charge fees. Representative McDonough stated that this was discussed with other agencies which felt this did not apply and the present fees were basically reasonable. She stated that Section 2, of 20-8-109, related to private placement, so they felt that it would not be a problem.

Senator Mazurek asked a question relating to the procedure. He said that 40-8-109 had requirements that resulted in the birth parents and the prospective adoptive parents having a very tight schedule on which to work. The requirement, he said, that the agency serves copies of the oral agreement on the parties might become an unnecessary hurdle. Leslie stated that the purpose of serving the copy is to assure that the parties have reached an agreement which they both understand. She didn't feel that it would cause a problem, that it was a matter of exchanging the prospective cost.

Closing by Sponsor: Rep. McDonough closed the hearing.

DISPOSITION OF HOUSE BILL 115

Discussion: There was none.

Amendments and Votes: There were none.

Recommendation and Vote: Senator Mazurek MOVED that House Bill 115 BE CONCURRED IN. The MOTION CARRIED UNANIMOUSLY.

HEARING ON SENATE BILL 232

Presentation and Opening Statement by Sponsor: Senator Tom Keating of Billings, representing District 44, opened the hearing. He stated that SB 232 would acknowledge notarial acts performed for use in Montana by a notary public authorized by any jurisdiction to perform notarial acts. He stated that SB 232 was an expansion of the opportunity for the notary commission to perform his function. A person in Montana can apply for a certificate from the Secretary of State, post bond and receive a commission to be a notary public. He can go to another state, North Dakota for example, and acknowledge documents there. However, if an out-of-state notary comes to Montana on business, Montana law does not allow him to perform his notary functions in Montana. This, at times, has been inconvenient and has caused some problems in Eastern Montana. Many times people from Williston and Sidney cross state lines to do business, and it would be helpful to have this option, he stated. He explained that the purpose of the bill is to allow an out-of-state notary to act in Montana. It would be a reciprocal agreement and would be a simple courtesy to the surrounding states, he said.

List of Testifying Proponents and What Group they Represent:

Representative Bob Gilbert of Sidney, District 30

List of Testifying Opponents and What Group They Represent:

None.

Testimony:

Representative Gilbert stated that he agreed with Senator Keating that this was a problem which needed to be addressed. He said the bill would effect convenience and be good business.

Questions From Committee Members: Senator Mazurek asked if there was any reciprocal bond benefit. Senator Keating replied that he didn't know. He stated that the legal people who hire Montana notaries to work in North Dakota and notarize documents there must feel the Montana bonding is sufficient. They haven't shown any concern regarding it, he said.

Senator Mazurek asked if anything special needed to be done by a Montana notary to be legal in North Dakota. Senator Keating responded "NO" and said there were no registration or bonding requirements.

Senator Mazurek said he felt the bonding issue needed further study.

Senator Crippen said the committee had received letters regarding the bill. (Exhibits 5 and 6)

Closing by Sponsor: Senator Keating closed by stating that this would not require extra work for the Secretary of State's office if this bill were enacted. He closed.

HEARING ON SENATE BILL 84

Presentation and Opening Statement by Sponsor: Senator Vaughn of Libby, representing District 1, opened the hearing. She stated that SB 84 would require the registration of sexual offenders by the Department of Institutions and local law enforcement agencies; providing that registration cannot be waived in imposing sentence; and requiring mandatory treatment for sexual offenders imprisoned in the state prison. She explained the bill and its amendments. She presented copies of the amendments to the committee (See Exhibit 2.) She also read a letter from some Libby-area residents who wished to voice their opinion. (See Exhibit 3.)

List of Testifying Proponents and What Group they Represent:

Representative Dorothy Cody of Wolf Point, District 15
Ron Ardis, Attorney for the Child Protection Services
Mike McGrath, Lewis and Clark County Attorney
Mike Sherwood, Montana Trial Lawyers Association

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Representative Cody stated that, in her area, there was a group called Voices for Children, which acted as a strong

advocate for children who were sexually abused. They started an investigation on a registration law, and joined with Senator Vaughn and a Great Falls group who also expressed an interest. She felt this bill reflected their views on the subject and deserved the committee's consideration. The purpose of the bill was to send a strong message that child abuse would not be tolerated in the state of Montana.

Ron Ardis agreed that child abuse is a serious problem. Sexual offenders use conceit, fraud, conspiracy, law and protection to avoid detection. Once a person is a sexual offender, it becomes normal for them, usually originating in a dysfunctional family. He said that sex abuse continues from generation to generation. This law could aid in fighting the problem, he felt, as well as stand up to strict scrutiny by the Montana Supreme Court.

Mike McGrath stated that, last year, 22% of the population of the state prison were sex offenders and 25% of the new admissions to the prison were sex offenders. He said that, eventually, those people were released and would offend again if they are not treated. He supported registration and limitation of employment where children were present. He understood that the governor's budget contained $212,000 for the sex offender treatment program. He urged support of the bill.

Mike Sherwood appeared as a proponent, but said he had some concerns with the bill. He presented written testimony to the secretary. (See Exhibit 4.)

Questions From Committee Members: Senator Beck asked, rather than a 10-year registration, would Senator Vaughn consider a probationary period. She replied she wouldn't object if the committee saw fit to do that.

Senator Mazurek asked Dan Russell, administrator of the Department of Institutions, if he had any concerns about the bill. Dan replied that he worked with Senator Vaughn on the amendments. He said the Department of Justice didn't get into the business of registering anyone for programs such as this. Senator Vaughn said that they do register arsonists now. Mr. Russell felt that the Department of Institutions was better suited to handling the registration.

Senator Mazurek asked for Mr. Russell's comments on Mr. Sherwood's suggestions which would limit the registration to

people who are under state supervision. He said that the man in Libby (see Exhibit 3) would not have been registered because he had completed his entire sentence and was no longer under state supervision when he committed his brutal acts. Dan Russell replied that, once the person is released from prison, they would be registered for a period of ten years after release.

Senator Mazurek stated that Mr. Sherwood wanted to change that and Mr. Russell indicated he would prefer the bill as written.

Senator Beck asked for an opinion on the requirement of the treatment program at the prison. Mr. Russell stated that the amendment that Senator Vaughn had submitted came about as a result of the concern of the Department of Corrections. People who don't admit they have a problem are not very amenable to treatment, he said. He felt that those people should be allowed to get into the educational phase. By doing so, some individuals might finally admit they had a problem and accept treatment.

Senator Jenkins asked how he would feel about a 10-year parole to the end of the probation period. Mr. Russell indicated it would be fine with him.

Senator Beck asked if there were any sex offender criminals who were not sent to prison who might benefit from the program. Mr. Russell stated that there were. That was covered in Section 3, he said. Some people may get suspended sentences for certain sexual offenses.

Closing by Sponsor: Senator Vaughn closed by stating that a first offense is often looked at lightly. But, she felt that could lead to more and more offenses which were more and more serious, sometimes leading to death. She felt that the innocent needed to be protected and thought the bill would be a way of doing that. She urged passage of the bill.

HEARING ON SENATE BILL 229

Presentation and Opening Statement by Sponsor: Senator Paul Boylan of Bozeman, representing District 39, opened the hearing. He said that SB 229 would clarify the exemption of certain persons from the prohibition against debt adjusting.

List of Testifying Proponents and What Group they Represent:

Mike Hall, President of Bozeman Financial Services and Debt Management and Credit Counselling of America

List of Testifying Opponents and What Group They Represent:

Duane Delfy, Consumer Credit Counselling of Great Falls
George Flemming, Accounts Management of Great Falls

Testimony:

Mike Hall stated that he has been in debt management for 25 years and consulting for 20 years. He has provided services for 25 thousand families and has successfully managed $25 million. He said that some people, while they are capable of meeting their own operating expenses and financial liabilities, still feel a need for his services. Others get into debt and become unable to manage without help. He provides services for debt management and for avoiding debt, he said. The bill, he said, provides for bonding of people in the business and also provides fee schedules for financial and debt management services. The fees have not been updated since 1969, and he felt it was time to do so. He wanted to differentiate between professional management companies such as his, and the non-profit management services such as the Consumer Credit Counselling. He said he respected the work the CCC did, and added that he had donated 1500 hours to assisting people who needed services but couldn't afford to pay for them. He said a 15% charge was a fair charge, and pointed out that the increase wouldn't affect present contracts, so it would take 2 or 3 years for the raise to have any impact.

Duane Delfry said he works for a collection agency and was on the board of directors for the Consumer Credit Counselling agency. He appeared as an opponent of the bill saying it asked the people who could least afford it to pay an exorbitant fee. He said his counselling service charges from $5 to a maximum of $25, up to 10% of what they can give us to pay on their bill. He said they were non-profit and

exempt from the law. He stated that the used the law for a guideline, but never charged more than $10%. The bill asks for 15% or a minimum of $25, in addition to a $75 fee to come into the debt adjustment program and a $25 fee to close the account. He said, if a person has only $50 a month to pay debts and is charged the $25 minimum, that is half of what he has to pay. He felt the bill asked too much and asked the committee to leave the law as it presently was.

George Flemming said the people who need his service usually fall into 4 categories: low incomes, casualties of expanded debt, those who can't manage their money, and those who won't pay their bills. He said his collection agency attempts to get people out of debt and turn them into "taxpaying citizens." He agreed that the fee increases being asked in the bill were too high.

Questions From Committee Members: Senator Harp asked if people didn't have the freedom to go to either the profit or non-profit agency. Senator Boylan said they could make a choice. Mike Hall said that 70% of all applicants are eventually turned over to the non-profit agencies. He said they were not interested in charging people who could not afford to pay the fees.

Senator Mazurek questioned that the $10,000 bond would be sufficient, when the management services were dealing with possibly millions of dollars worth of credit. Mike Hall said it was representative of the bonds required by other states including California. He said that if a person wanted to steal, they would, regardless of the bond.

Senator Mazurek asked how a non-profit adjustment service worked. Mr. Hall said that, if a person with a $50,000 income came to him who had accumulated debts, he would review the application, income and expenses and decide whether or not the obligations could be met and come up with a method. In cases where the debtor can pay the debts, the agent would not deal with the creditor, but would simply have a contract helping him pay off the indebtedness. In cases where the debtor doesn't have enough money to pay the debts, the creditor is contacted to have the payments reduced in an effort to avoid bankruptcy. The cause of much indebtedness, he said, is from credit card use and the ensuing interest charged. For the service, most customers across the nation pay a 15% debt management fee, he said.

Senator Mazurek asked what was the distinction between the non-profit and the profit. Mr. Hall said that state law did

not make a distinction between the two.

Senator Mazurek asked if there was any regulation of the industry i.e. salaries, benefits etc. Mike Hall replied no, but said the IRS audits them occasionally.

Senator Jenkins asked how the agency could claim to be non-profit if it accepted money for the service. Mr. Delfy said it was considered a contribution for the effort to avoid bankruptcy. He said the debtor felt better if he did pay for the service than to receive it free. He added that the pay to Consumer Credit was minimal.

Closing by Sponsor: Senator Boylan closed by stating that if persons want to charge for their services, he felt they should be able to do so. He thought the 1969 rate needed to be updated. He closed.

DISCUSSION ON BILLS PREVIOUSLY HEARD

SENATE BILL 180: Senator Mazurek asked that action be postponed.

SENATE BILL 138: Senator Brown asked that action be postponed.

SENATE BILL 208: The committee received correspondence from the Montana Liability Coalition for consideration of the bill. (See Exhibit 7)

SENATE BILL 209: Senator Brown asked for further time on the bill.

SENATE BILL 145: Valencia Lane said that she had been contacted by the Veterans' Administration attorney who wanted the committee to consider an amendment. There were concerns about a federal court case, he had told her.

DISPOSITION OF SENATE BILL 214

Discussion: Senator Crippen stated that the bill needed a fiscal note, but said it was not ready. He had spoken to leadership, and had been told that the bill could come out of committee without the fiscal note if the committee chose to do that. The fiscal note would be ready for discussion on the Floor of the Senate.

Recommendation and Vote: Senator Harp MOVED that SB 214 DO PASS. The MOTION CARRIED UNANIMOUSLY.

DISPOSITION OF HOUSE BILL 38

Recommendation and Vote: Senator Harp MOVED that HB 38 BE CONCURRED IN. Senator Mazurek stated that there had been questions about the retroactive possibilities for the bill. After further discussion, Senator Harp WITHDREW his motion.

DISPOSITION OF HOUSE BILL 172

Recommendation and Vote: Senator Harp MOVED that SB 172 DO PASS. After discussion, it was decided not to act on Senator Pinsoneault's bill in his absence.

ADJOURNMENT

Adjournment At: 12:00 noon.

SENATOR BRUCE D. CRIPPEN, Chairman

BDC/rj

minrj.130

ROLL CALL

JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989 Date Jan 30 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR CRIPPEN	✓		
SENATOR BECK	✓		
SENATOR BISHOP	✓		
SENATOR BROWN	✓		
SENATOR HALLIGAN		✓	
SENATOR HARP	✓		
SENATOR JENKINS	✓		
SENATOR MAZUREK	✓		
SENATOR PINSONEAULT			
SENATOR YELLOWTAIL	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

January 30, 1989

MR. PRESIDENT:

We, your committee on Judiciary, having had under consideration HB 115 (third reading copy -- blue), respectfully report that HB 115 be concurred in.

Sponsor: McDonough (Mazurek)

BE CONCURRED IN

Signed: Bruce D. Crippen, Chairman

SCRHB115.130

SENATE STANDING COMMITTEE REPORT

January 30, 1989

MR. PRESIDENT:

We, your committee on Judiciary, having had under consideration SB 214 (first reading copy -- white), respectfully report that SB 214 do pass.

DO PASS

Signed: Bruce D. Crippen

Bruce D. Crippen, Chairman

H.C. 1/30/89 3:04 pm.

scrib214.130

SENATE JUDICIARY
EXHIBIT NO 1
DATE 1-30-89
BILL NO HB 115

DEPARTMENT OF FAMILY SERVICES

STAN STEPHENS, GOVERNOR

(406) 444-59

STATE OF MONTANA

P.O. BOX 80
HELENA, MONTANA 596

January 30, 1989

Testimony in support of HB 115
ESTABLISHING A PENALTY FOR CHILD PROCUREMENT

Betty Bay, Department of Family Services

Montana Law does not currently address the issue of selling children for profit. To protect children and their birth and adoptive parents, we believe there must be a penalty for charging unreasonable fees.

As an example, I know of a birth mother who contacted prospective adoptive parents regarding relinquishing her unborn child. As the baby's birth date got closer, the birth mother kept "raising the ante." The prospective adoptive parents requested guidelines regarding what they could provide financially. Conversely, the birth mother believed she was entitled to certain compensation and would find adoptive parents to provide what she was requesting.

There are expenses which should be allowed when a birth parent decides he/she is unable to parent and selects parents for the child. House Bill 115 defines the costs for adoption services and requires that an accounting of expenses be filed with the court. Defining and reporting expenses is necessary for birthparents and adoptive parents.

House Bill 115 will provide guidance to birth parents and prospective adoptive parents. Knowing that expenses will be reported to the court may prevent the potential for either party being taken advantage of. If it appears a child is being sold, appropriate action can be taken.

SENATE JUDICIARY
EXHIBIT NO. 2
DATE 1-30-89
BILL NO. SB 84

Amendments to Senate Bill No. 84
First Reading Copy

Requested by Senator Vaughn
For the Committee on Judiciary

Prepared by Connie Erickson
January 9, 1989

1. Title, line 9.
Following: "prison;"
Insert: "RESTRICTING EMPLOYMENT OF PERSONS REQUIRED TO REGISTER;"

2. Page 1, line 23.
Strike: "45-5-504"

3. Page 2, line 7.
Strike: "The department shall obtain the address where the person expects to reside upon release or discharge or suspension of his sentence"
Insert: "Upon sentencing the district court shall obtain the address where the person expects to reside during the term of his sentence, upon release or discharge of his sentence, or during the term of his suspension and shall notify the department"

4. Page 3, line 11.
Following: "department"
Strike: remainder of line 11 and lines 12, 13, and 14 in their entirety
Insert: "and the local law enforcement agency, having local jurisdiction over the new place of residence."

5. Page 4.
Strike: lines 5 and 6 in their entirety
Insert: "may be sentenced to a term of imprisonment of not less than 90 days or a fine not to exceed $250, or both."

6. Page 7, line 14.
Following: "the"
Insert: "educational phase of the"

7. Page 7, line 15.
Strike: "treatment"

SENATE JUDICIARY
EXHIBIT NO. 2, p.2
DATE 1-30-89
BILL NO. SB 84

8. Page 7.
Following: line 15
Insert: "NEW SECTION Section 10. Employment restrictions. (1) A person required to register under [sections 1 through 9] may not be employed in or own or operate a child day-care facility or be employed by a school district for the duration of the registration.
(2) A person required to register under [sections 1 through 9] who holds a teacher or specialist certificate shall have that certificate suspended for the duration of the registration.

NEW SECTION. Section 11. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Renumber: subsequent sections

Proponents Dorothy Corley – "Voices for Children" from Wolf Point etc

Jon Anderson – Prosecutor office Wolf Point – Roosevelt County
Mike McGrath – Lewis & Clark Co attorney
Christy Mervit – Mental Health Center
Michael [illegible]

Have given letter to secretary from people at home

Can we afford the program – can we not afford to do it
{So many times the 1st offense not quite so serious but the 2nd time invariably ends in murder.}

22% of state prison – sex offenders
25% new admission were sex offenders

Dan Russell – Dept of Corrections

No opposition in Senate Judiciary –
Only concern on floor / Senate was Cost of

45.5-502

sb008401.ace

SENATE JUDICIARY
EXHIBIT NO 3
DATE 1-30-89
BILL NO SB84

P.O. Box 599
Troy, MT 59935
January 15, 1989

Senator Eleanor Vaughn
Capitol Station #130
Helena, MT 59620

Dear Senator Vaughn,

We would like to express our very strong support of Senate Bill #84. Young Ryan Van Luchen was brutally murdered by a man who had been previously convicted of sexually assaulting 2 young boys in the same area Ryan's body was found in. We feel that if the provisions in this bill had been law, perhaps this terrible tragedy would have been avoided.

We also support any other legislation that would assist in the protection of our children (and punishment of those who harm them) such as the other bill now proposed that would allow for the death penalty in cases where death resulted during a sexual assault.

Thank you so much for you hard work in presenting this legislation, we greatly appreciate it, and appreciate your efforts in keeping us informed of what is happening in our State Legislature.

Jane L. Bain
JANE L. BAIN

Doris M. Davis
DORIS M. DAVIS

Velva Shaver
VELVA SHAVER

Earl F. Bain
EARL F. BAIN

Linda J. Meyer

SENATE JUDICIARY
EXHIBIT NO. 4
DATE 1-30-89
BILL NO. SB 84

WITNESS STATEMENT

NAME Mike Sherwood BUDGET

ADDRESS

WHOM DO YOU REPRESENT? MTLA

SUPPORT ✓ OPPOSE AMEND

COMMENTS:

Re: SB 84

I support with these concerns!

1) 45-5-302 includes misdemeanors sexual assault

2) § 7 may ~~conflict~~ conflict with Art II, § 28 Mont. Const. regarding restoration of all civil rights after release from state supervision

3) Mandatory Treatment in Program may

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Form CS-34A
Rev. 1985

SENATE JUDICIARY
EXHIBIT NO. 2
DATE 1-30-89
BILL NO. SB 232

MERIDIAN OIL

January 26, 1989

Senator Bruce Crippen
Capitol Station
Helena, Montana 59602

RE: Senate Bill 232

Honorable Senator Crippen:

It has come to my attention that Senate Bill 232 will be voted upon Monday, January 30, 1989. As a landman, employed by Meridian Oil Inc., I believe that SB-232 should be approved and become a law in the State of Montana as a reciprocity arrangement with the State of North Dakota.

I would request that you support SB-232.

Yours very truly,

Robert A. Kay
Landman

RGC:mlm/806

SENATE JUDICIARY
EXHIBIT NO. 6
DATE 1-30-89
BILL NO. SB 232

MERIDIAN OIL

January 26, 1989

Senator Bruce Crippen
Capitol Station
Helena, Montana 59602

RE: Senate Bill 232

Honorable Senator Crippen:

It has come to my attention that Senate Bill 232 will be voted upon Monday, January 30, 1989. As a landman, employed by Meridian Oil Inc., I believe that SB-232 should be approved and become a law in the State of Montana as a reciprocity arrangement with the State of North Dakota.

I would request that you support SB-232.

Yours very truly,

Paul A. Hirt

Paul A. Hirt
Landman

RGC:mlm/806

MONTANA LIABILITY COALITION
Post Office Box 1730
Helena, Montana 59624
(406) 442-2409

January 31, 1989

Senator Bruce Crippen
Senate Judiciary Committee
Capitol Station
Helena, MT 59620

Re: Senate Bill 208

Dear Senator Crippen:

Under Senate Joint Resolution 24 the 48th Legislature requested that the Supreme Court cause draft legislation to be prepared for consideration by the 49th Legislature that would "...accurately reflect the current usage and interpretations..." of the statutory provisions on venue. A copy of SJR No. 24 is attached.

In response to this directive the Supreme Court Commission on the Rules of Evidence submitted "Recommendations for Revisions in Venue Statutes prepared by the Montana Supreme Court Commission on the Rules of Evidence" which has been provided to the Committee among the documents presented in support of Senate Bill 208. The recommendations included a report by the Commission. Legislation, under SB 91, was presented to the 49th Legislature and enacted as Chapter 432, Laws of 1985.

At the time of the Commission study the Montana case law on the contract and tort exceptions to the residency provisions of the venue statues included three reported cases. Two of theses cases (Hanlon vs. Great Northern and Morgan and Oswood vs. U.S.F.&G.) are cited at page 9 of the Commission's report. The third case, not referenced in the Commission report is a case from the United States District Court, Tassie vs. Continental Oil Corp. Mont. 1964) 228 F.Supp. 807.

Hanlon involved consideration of both the tort and contract exceptions; Morgan-Oswood involved the contract exception, only; and, Tassie involved the tort exception, only. Hanlon holds, by direct implication, that both contract and tort exceptions are available to the non-resident defendant. Morgan and Oswood holds that the contract exception is not available to the non-resident defendant. Tassie holds that while the contract exception would be available to the non-resident defendant, the tort exception is not available to
the non-resident defendant. It is with this background of cases that the Supreme Court addressed the issue presented by McAlear v. Kasak in January of 1987. A copy of the opinion and decision in McAlear is attached.

In McAlear the Supreme Court, fully cognizant of the Federal Court holding in Tassie correctly observed that the Supreme Court had never held that a plaintiff has an absolute choice of forum in a tort action, concluding that the plaintiff McAlear in bringing his action in a county other than the county where the tort occurred had chosen an improper site for venue. 731 P2d 910.

It is submitted that issues presented by SB 208 cannot be resolved in any single case decision or combination of decisions because of the conflicting conclusions of those decisions. The issue presented by SB 208 must be either resolved through the pronunciation of legislative policy as to whether or not a non-resident defendant will be entitled to the significant and valuable legal rights that are possessed by the resident defendant under the tort and contract exceptions to the residency provisions of the venue statutes; or left for the Supreme Court in its consideration of pending cases.

At the Committee hearing, the Liability Coalition and other opponents addressed the policy issue presented by SB 208 as a legislative authorization or approval of "forum shopping" in tort cases involving a non-resident defendant or all non-resident defendants. We will not repeat the arguments against "forum shopping" at this time. Beyond the consideration of the practice of "forum shopping" against non-residents as "good" or "bad" is the more fundamental question that is presented under the equal protection clause of the Constitution of Montana, Article II, Section 4. In its application, SB 208 denies the non-resident the protection afforded to the resident defendant in the selection of the proper forum for the trial of contract and tort actions.

If the Committee elects to let the decision in McAlear stand by taking no favorable action on SB 208 it will leave the resolution of the matter to the Supreme Court in the two cases pending before it that present the conflicting results of McAlear and Morgan-Oswood.

If the Committee elects to overrule the decision in McAlear it provides a legislative endorsement of "forum shopping" against non-resident defendants, a practice that has never been authorized or approved by the Montana Supreme Court and which presents more serious fundamental questions of legislative denial of equal protection of the laws.

Respectfully Submitted,

James A. Robischon

James A. Robischon, Counsel
Montana Liability Coalition

Enclosure

in accord with accepted practice at the plant, and was in accordance with their repeated and usual procedure. Massey was found to be an employee at the time of the accident. Selensky's temporarily parking his truck in an area where parking was not permitted is legally insignificant for purposes of determining his status as employee.

When analyzing misconduct for the purpose of determining status, a distinction must be made between prohibited activities outside the boundaries of the ultimate work to be done, such as using a machine to cut paper for employee's personal use, in violation of company policy, and prohibited methods of doing the work, such as a pilot who, while giving a lesson, flies at an altitude in violation of a rule limiting altitude. Misconduct which involves violation of regulations or prohibitions relating to method of accomplishing a task does not take an employee outside the course and scope of employment. See 1A Larson, Workmen's Compensation Law, Sec. 31, pp. 6–8. Parking in a restricted zone on the employer's property while punching-in had been a common practice of numerous employees over a considerable period of time. Such a practice is not that type of conduct which takes one outside the course and scope of his employment.

We find the negligent act of parking his truck for the purpose of punching-in does not remove Selensky from the co-employee immunity protecting him from common law liability.

We reverse and remand to the District Court for an order consistent with this opinion.

TURNAGE, C.J., and HARRISON, WEBER, SHEEHY and HUNT, JJ., concur.

MORRISON, Justice, dissents as follows:

This rather amazing majority opinion flies directly in the face of the first case before this Court entitled *Massey v. Selensky* (Mont.1984), 685 P.2d 938, 41 St.Rept. 1596. In that case we held there was a fact question about whether Selensky was at work when he temporarily stopped his pickup truck on the employer's premises. Selensky walked into the clock house to "punch-in" and then was going to return to his vehicle so that he could take it to the employee parking lot. The trial court held that, as a matter of law, Selensky was not at work at the time he stopped the truck. He certainly had not punched in.

This Court finds as a matter of law that Selensky was "on the job" when he temporarily stopped the truck. The very most favorable view to the defense should result in a fact question that must be resolved by the jury. This would require reversing summary judgment in favor of the plaintiff and remanding for a trial.

This Court, in finding there is no fact issue, runs directly contrary to our decision. If there was no fact question for submission to a jury then the first case should have resulted in summary judgment for the defendant.

The majority opinion is but another example of the inconsitency of approaches emanating from this Court. We do not follow the law. We simply make it up as we go.

I vigorously dissent.

Allen L. McALEAR, Plaintiff and Appellant,

v.

Deborah KASAK, Defendant and Respondent.

No. 86–255.

Supreme Court of Montana.

Submitted on Briefs Nov. 13, 1986.

Decided Jan. 13, 1987.

Rehearing Denied Feb. 19, 1987.

Defamation suit was brought, out-of-state defendant sought change of venue

which was granted by the Fourteenth Judicial District Court, Meagher County, Roy Rodeghiero, J., and plaintiff appealed. The Supreme Court, Hunt, J., held that defendant could receive change of venue to county in which tort occurred.

Affirmed.

Venue ⇐46

Former resident of state, sued for defamation based on sexual harassment allegations in wage complaint, could receive change of venue to county in which alleged tort occurred after suit was brought in county which, apparently, had no relation to person or occurrence in action. MCA 25-2-118, 25-2-118(1), 25-2-122.

Allen L. McAlear, Bozeman, for plaintiff and appellant.

James P. Reynolds, Helena, for defendant and respondent.

HUNT, Justice.

This is an appeal from an order granted by the District Court of the Fourteenth Judicial District, Meagher County, changing venue in a tort action. Plaintiff appeals. We affirm.

There is one issue on appeal: Did the District Court err in changing venue?

Plaintiff Allen McAlear filed an action for defamation against Deborah Kasak. Kasak had worked briefly in McAlear's law office. She left her employment and filed an action against McAlear with the Human Rights Commission alleging sexual harassment.

After filing her complaint with the Human Rights Commission, she filed a wage complaint with the Labor Standards Division. In explaining her reason for quitting or discharge, she set forth her allegations of sexual harassment by McAlear.

McAlear, pro se, brought an action against her for defamation based on the allegations in her wage complaint. McAlear brought the suit in Meagher County. Kasak, who currently lives in Pennsylvania, filed a motion to dismiss and a motion for change of venue. The District Court granted the motion for change of venue and moved the action to the Eighteenth Judicial District, Gallatin County, where McAlear's office is located, and, where Kasak worked while she was employed by McAlear. The district judge did not rule on the motion to dismiss. McAlear appeals the order changing venue.

McAlear contends that because Kasak is a nonresident of the State of Montana, he may select any county as the site for his action, and she may not object. He relies on § 25-2-118, MCA, which states:

> Unless otherwise specified in this part:
>
> (1) except as provided in subsection (3), the proper place of trial for all civil actions is the county in which the defendants or any of them may reside at the commencement of the action;
>
> (2) if none of the defendants reside in the state, the proper place of trial is any county the plaintiff designates in the complaint;
>
> (3) the proper place of trial of an action brought pursuant to Title 40, chapter 4, is the county in which the petitioner has resided during the 90 days preceding the commencement of the action.

We wish to call attention to the first line of the statute, "Unless otherwise specified in this part ..." The remainder of part 2 deals with the proper place of venue for specific types of actions. "Defamation is made up of the twin torts of libel and slander ..." Prosser, Law of Torts, at 737 (5th Ed.1984). Section 25-2-122, MCA, deals specifically with tort actions. It provides:

> The proper place of trial for a tort action is: (1) the county in which the defendants, or any of them, reside at the commencement of the action; or (2) the county where the tort was committed. If the tort is interrelated with and dependent upon a claim for breach of contract, the tort was committed, for the purpose of determining the proper place of trial, in

the county where the contract was to be performed.

In this case, the defendant does not reside within the State of Montana. The tort was committed, if at all, in Bozeman where McAlear has his office and where the alleged damage to his reputation occurred. It is unclear why the action was filed in Meagher County. It apparently has no relation to any person or occurrence in this action.

The general rule is that the defendant is entitled to be sued in the county of his residence. Section 25-2-118(1), MCA; *Letford v. Kraus* (Mont.1983), 672 P.2d 265, 40 St.Rep. 1802. The defendant in this case is a nonresident of the State of Montana and may be sued in any *proper* county. *Tassie v. Continental Oil Corp.* (D.Mont.1964), 228 F.Supp. 807. However, we have never held that a plaintiff has an absolute choice of forum. A tort action may be brought in either the county of the defendant's residence, or the county where the tort occurred. *Seifert v. Gehle* (1958), 133 Mont. 320, 323 P.2d 269. Where plaintiffs file the action in an improper county, defendants may change venue to any proper county. *Dalton v. Carr and Sons* (D.Mont.1986), 630 F.Supp. 726. In this case, plaintiff chose a county that is an improper site for venue. Defendant moved for and received a change of venue to a proper county: the site where the tort occurred. The District Court did not err.

HARRISON, MORRISON, WEBER and GULBRANDSON, JJ., concur.

MONTANA AGRA-CHEMICAL, INC., a Montana corporation, Plaintiff and Respondent,

v.

Gerald JACOBSON, Defendant and Appellant,

No. 86-389.

Supreme Court of Montana.

Submitted on Briefs Nov. 13, 1986.

Decided Jan. 13, 1987.

Motion to file cross complaint was denied by the Eighteenth Judicial District Court, Gallatin County, Thomas Olson, J., and movant appealed. The Supreme Court, Weber, J., held that movant, who had obtained judgment in his favor on complaint against him, was not "aggrieved party" entitled to appeal.

Affirmed.

Appeal and Error ⇐151(5)

Pro se defendant who obtained judgment in his favor in suit against him alleging funds were due on account was not "aggrieved party" who could appeal denial of motion to file cross complaint alleging usury, illegal trespass, and conversion by plaintiff where defendant had been permitted to present counterclaim in justice court and won judgment on basis that counterclaim damages would reasonably offset plaintiff's claim. MCA 25-33-101.

See publication Words and Phrases for other judicial constructions and definitions.

Jerry R. Bechhold, Bozeman, for defendant and appellant.

Morrow, Sedivy & Bennett, Lyman H. Bennett, III, Bozeman, for plaintiff and respondent.

WEBER, Justice.

Mr. Jacobson, appearing as a pro se defendant, obtained a judgment in the Justice

DATE 1-30-89

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