

## **MINUTES**

### **MONTANA SENATE 55th LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON JUDICIARY**

**Call to Order:** By **CHAIRMAN BRUCE D. CRIPPEN**, on March 21, 1997, at 9:00 a.m., in the Senate Judiciary Chambers (Room 325) of the State Capitol, Helena, Montana.

#### **ROLL CALL**

**Members Present:**

Sen. Bruce D. Crippen, Chairman (R)  
Sen. Lorents Grosfield, Vice Chairman (R)  
Sen. Al Bishop (R)  
Sen. Sue Bartlett (D)  
Sen. Steve Doherty (D)  
Sen. Sharon Estrada (R)  
Sen. Mike Halligan (D)  
Sen. Ric Holden (R)  
Sen. Reiny Jabs (R)  
Sen. Walter L. McNutt (R)

**Members Excused:** None

**Members Absent:** None

**Staff Present:** Valencia Lane, Legislative Services Division  
Jody Bird, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: HB 429, HB 553  
Executive Action: HB 429

#### **HEARING ON HB 429**

**Sponsor:** REP. JACK WELLS, HD 27, Bozeman

**Proponents:** Jim Smith, Montana Sheriffs and Peace Officers Association  
George Bennett, Montana Bankers Association

**Opponents:** Beth Baker, Department of Justice

**Opening Statement by Sponsor:** REP. JACK WELLS, HD 27, Bozeman. I had a meeting with the Montana Sheriffs and Peace Officers Association this past week to discuss the bill. We concluded that it would be most appropriate not to submit the bill now. We

will address some of the problems over the interim to better address the situation next session. The Montana Shooting Sports Association was not happy with this bill either, so I'm asking the Committee to table the bill.

**Proponents' Testimony:** Jim Smith, Montana Sheriffs and Peace Officers Association. We support REP. WELL's request to table the bill. Otherwise, we would oppose this legislation. This has been a contentious issue at the Legislature for the past several sessions. We won't discuss our concerns now unless the Committee requests it.

**George Bennett, Montana Bankers Association.** Bank security experts and law enforcement have determined that a lethal weapon endangers public safety in places such as banks.

**Opponents' Testimony:** Beth Baker, Department of Justice. We oppose the bill and support REP. WELL's request to table it.

**Questions From Committee Members and Responses:** None

**Closing by Sponsor:** REP. WELLS. I appreciate the comments we have received from both sides of this issue, and hope the Committee will honor my request.

#### **EXECUTIVE ACTION ON HB 429**

**Motion:** SEN. MIKE HALLIGAN MOVED TO TABLE HB 429.

**Discussion:** SEN. HALLIGAN. I have made this motion in recognition that the parties will work together for a solution during the interim.

**Vote:** SEN. HALLIGAN'S MOTION TO TABLE HB 429 CARRIED WITH ALL MEMBERS VOTING AYE EXCEPT SEN. BISHOP WHO VOTED NO.

#### **HEARING ON HB 553**

**Sponsor:** REP. JAY STOVALL, HD 16, Billings

**Proponents:** Frank Crowley, attorney, Doney, Crowley & Bloomquist, Helena  
Mike Meloy, attorney, Helena  
Chris Gallus, Montana Chamber of Commerce

**Opponents:** Stan Kaleczyk, Montana Municipal Insurance Authority (MMIA)  
Ward Shanahan, Farmers Insurance Group  
Verne Bertelsen, Montana Senior Citizens Association  
John Sullivan, Montana Defense Trial Lawyers Association  
Larry Akey, National Association of Independent Insurers

Michael Becker, Assistant General Counsel, Montana  
Blue Cross/Blue Shield

Greg Van Horssen, State Farm Insurance

Russell Hill, Montana Trial Lawyers Association  
(MTLA)

Jacqueline Lenmark, American Insurance Association

Tom Hopgood, American Council of Life Insurers

Mona Jamison, Doctors Company

Bill Gianoulious, Department of Administration

**Opening Statement by Sponsor:** REP. JAY STOVALL, HD 16, Billings.

The prevailing person must be awarded attorney fees. I look at this bill as an experiment. I believe this would make people not file a lawsuit without good ground, rather than filing on a contingency-fee basis.

This law has been in effect in Alaska since the late 1800s and they have half as many tort cases as Montana does, while they have a similar population.

On February 9, 1997 a 60 Minutes program addressed a chemical spill following which many attorneys induced 20,000 people to go to doctors to be checked for ill effects from that spill. It was found that 99.5 percent were not harmed, but the city was awarded \$180 million, and the plaintiffs were awarded \$15 million. Each person who went to the doctor was awarded \$1700, and we, the consumers, paid for this. There are the same number of attorneys in Los Angeles as there are in the entire country of Japan. I will reserve the right to close.

**Proponents' Testimony:** Frank Crowley, attorney, Doney, Crowley & Bloomquist, Helena. In 1995 I sent letters to SEN.S ESTRADA AND GROSFIELD stating that I could not support her bill because of a case I had at that time, but I did acknowledge it would be beneficial in many cases. This case involved the sale of an 80 acre farm, and the sellers, my clients, were retirees. The purchaser was from Colorado. [Mr. Crowley showed the Committee an enlarged photograph of a five-acre pile of sawdust which made up 16 percent of those 80 acres and was visible from a distance of one-third of a mile.]

My client sold and moved to the mid-West and was then sued along with the real estate agent because of the sawdust pile. The case was filed only in tort, and went to a six-day jury trial. The jury found no liability against my clients, but we incurred \$40,000 in costs. The purchaser's attorney said attorney fees in the contract for deed didn't apply. The judge was sympathetic, but said he'd probably be reversed if he decided in our favor, as there is nothing in current law to allow this. Thus, my retired clients would have to pay the attorneys fee, and this bothered me very much.

{Tape: 1; Side: A; Approx. Time Count: #21.8; Comments: 9:27  
a.m.}

**Mike Meloy, attorney, Helena.** I do primarily plaintiff work, but have also represented employers. I have developed a specialty and most of my cases are referred to me by other attorneys. These cases involve auto accident injury, medical negligence, and employment problems. I had 66 new cases last year, and 511 inquiries.

I don't lose cases very often. I don't file frivolous cases, as most are contingency fee, but there are good cases I see which I don't take because of current law. About 25 percent are not good cases, but the rest I decline as I can't afford to take them on a contingency basis.

In car cases, these would be primarily soft tissue injuries, and there was an admitted liability in each of these cases, but by the time we are ready to settle, another attorney is involved for the defendant's insurance company. So, we would have \$10,000 in time invested in a \$15,000 lawsuit.

In some medical negligence cases, a doctor has a letter on correcting the problem. Their case may be worth \$150,000 but the cost of expert witnesses is prohibitive. Most potential new clients are employment cases, but the Legislature put a four-year cap on damages in 1987. Most recover less than \$100,000, and the cases cost \$20,000-\$30,000. There are about 300 of these cases.

Most don't have money and may not be working. If this legislation passes, I believe they'd be willing to take the risk of losing if they filed a tort claim. It would really affect the middle class and senior citizens. It would help me financially, and would give good access to the Court for those who can't afford to come now.

**Chris Gallus, Montana Chamber of Commerce.** We strongly support this legislation.

**Opponents' Testimony:** Stan Kaleczyk, Montana Municipal Insurance Authority (MMIA). The bill doesn't determine who a prevailing party is - the plaintiff who collected money, or the defendant. Secondly, an award is made at each step of litigation in this bill. The plaintiff would win on one or more of six remaining theories.

A typical trial costs \$10-20,000. If the defendant appeals, and the Montana Supreme Court reverses the District Court and wins, the defendant would then receive attorney fees from the plaintiff - maybe \$5-10,000 average).

Another problem is that it doesn't define the attorney fees to which the prevailing party is entitled. Attorneys know there will be windfalls in certain cases and shortages in others. The hope is that over the long haul it will all balance out.

Under this bill, the question of amount is left unanswered. I have presented draft amendments to Valencia Lane for the Committee (**EXHIBIT #1**) hb055301.avl. New Section 2 at the bottom of page 1 of the amendments attempts to define prevailing party. Subsections (c), (d), and (e) deal specifically with monetary judgements and defendant settlements. Subsection (2) has a typographical error. We need to insert "not" following "may" on page 2 of the amendments. At the bottom of page 2, new Section 3 contains the lodestar formula typically used in federal court. It also deals with contingencies or other novel fee agreements. New Section 4 on page 3 of the amendments addresses intermediary issues, final judgement, appeals, and arbitration.

I am asking you to consider these amendments, but even with them it won't be a cure-all. A judgment-proof claimant has nothing to lose, and so attorney fees won't be recoverable, but a wealthy person can take this risk.

The final concern is for the plaintiff to make a calculated decision on the possibility of spending his or her own resources on attorney fees if he or she loses in court.

**Ward Shanahan, Farmers Insurance Group.** We endorse the amendments submitted by Mr. Kaleczyc, but we oppose the bill as it is written. Section 4 of the amendments would alleviate the administrative nightmare in the bill. Right now the Court can't interfere with contingency fee arrangements. It makes more sense to include attorney fees under Rule 68, rather than just limit them to costs.

**Verne Bertelsen, Montana Senior Citizens Association.** It seems this bill would put the average Montana senior citizen in a precarious position, and that is a serious problem, unless every senior citizen can be assured of getting the best attorney to represent their case.

**John Sullivan, Montana Defense Trial Lawyers Association.** It sounds good that the loser pays, but that is not the American rule of law for the past 200 years. It has been rather the English rule for centuries.

*{Tape: 1; Side: B; Approx. Time Count: #12.0; Comments: None}*

The amendments were extremely complex, and this should give you an idea of the complexity of law you are dealing with here. You can't undo this overnight, as there are two fundamental flaws. There is not equality to pay out there in the real world. In 90 percent of cases, if the defendant loses, he does have the ability to pay attorney fees - \$30-\$40,000 in employment cases. Plaintiffs, however, don't have the ability to pay. I do a lot of employment discrimination work, and I've never collected attorney fees from a plaintiff when I lose a case.

Secondly, the amendment would help the less than five percent of cases going to trial. Most cases are settled prior to the date of trial via mediation now. Settlements are based on evaluation of risk of loss and cost of the court case. A settlement conference has a 'fact club' and a 'law club'. This bill would create a whole of a 'law club' for settlement conferences.

We know costs of defense are \$10-40,000 with a 50 percent chance of losing in court. I believe this would add \$5000 to every case settled in the future in Montana. I have settled a number of cases, and wanted to take them to trial, believing I could have won, but if I had lost, my client could have been hit with \$10,000 to pay the winning party's attorney fees. There's a reason we have American rule and not British rule.

**Larry Akey, National Association of Independent Insurers.** We write about one-third of the policies in the U.S. today. The bill sounds good on its face, but you can't repeal the law of unintended consequences, and the bill would end up doing the exact opposite of what **REP. STOVALL** is trying to accomplish. I suggest this is bad legislation, and that the amendments won't fix all the problems. I am asking for an opportunity to reword this for the next legislative session.

**Michael Becker, Assistant General Counsel, Montana Blue Cross/Blue Shield (EXHIBIT #2).** We generally support the effort to discuss litigation, but believe the bill will increase the amount paid and demanded. We also believe there will be an increase in the number of cases filed because of recovery of attorney fees.

**Greg Van Horssen, State Farm Insurance.** We oppose this bill, but if it passes we ask that you seriously consider adding the proposed amendments.

**Russell Hill, Montana Trial Lawyers Association (MTLA) (EXHIBIT #3).** We have tiers of attorneys in terms of success in Montana, and Mr. Meloy gets lots of referrals.

We have 460 attorney members who don't get many referrals. This bill is far-ranging, and will affect lots of small businesses in Montana. We believe it pits large business against small business in intimidating circumstances.

Another policy problem is that it radically increases one's dependence upon one's attorney, and if one chose the wrong attorney, one would pay the bill. The bill should go down. The amendments are a good effort, but are very complex, so they would added to the complexity of the law.

We are okay with the lodestar amendment on page 1, Subsection (b), of the amendments - it's all or nothing award of attorney fees. The most important problem with the amendments is in Subsection (2) on page 2, as it requires plaintiffs to make

demand for settlement, but doesn't require the same of the defendant, nor set a time line for defendant response. It's easily fixed by changing "claimant" to "party" and following "demand" you could insert "or an offer of settlement".

*{Tape: 1; Side: B; Approx. Time Count: #30.5; Comments: None}*

**Jacqueline Lenmark, American Insurance Association.** We endorse the testimony of prior opponents, and would add points concerning defendants with insurance policies. Not every policy covers costs, or all costs of defense of a given claim. Then the defendant would have to cover the excess. You must also consider the interplay with HB 572 and its pure comparative negligence component.

We have concerns with the lodestar formula, as we believe there will be increased litigation. We need to address rates and the novelty of the issue being sued over. If the Committee chooses a subcommittee for HB 553, that would be better, but we'd prefer to see it tabled. **SEN. CRIPPEN.** I don't like subcommittees, so you won't see them in the Senate Judiciary Committee.

*{Tape: 1; Side: B; Approx. Time Count: #34.2; Comments: 10:23 a.m.}*

**Tom Hopgood, American Council of Life Insurers.** We endorse the amendments and ask the Committee to seriously consider them.

**Mona Jamison, Doctors Company.** We strongly oppose this bill, and urge examination and adoption of the amendments if you must pass it.

**Bill Gianoulious, Department of Administration.** We have an amendment for contingent voidness at the request of the Governor's office (**EXHIBIT #4**), and an amendment to exclude tort claims against a governmental entity (**EXHIBIT #5**). **SEN. BRUCE CRIPPEN.** The contingent voidness amendment is inappropriate here, but we would be glad to explain it to you later.

**Questions From Committee Members and Responses: SEN. STEVE DOHERTY.** Would you be amenable to a study of this issue? **John Sullivan.** I don't believe the bill can be fixed with time or study.

**SEN. DOHERTY.** Does the "may not" language, as proposed, affect the offers of judgment? **John Sullivan.** The offers of judgment were adopted in Montana in 1960 and have been in Rule 68 since. I would have to do two kinds of offers of judgments to recover. The people have tried hard with these amendments, but the bill is broken to start with.

*{Tape: 2; Side: A; Approx. Time Count: #00; Comments: 10:30 a.m.}*

**Ward Shanahan.** We're changing the statutes on costs in this legislation, and Rule 68 deals with costs, but the bill says it doesn't, and that is a problem.

**SEN. DOHERTY.** Will we increase or decrease the likelihood of alternative dispute resolution in Montana with this bill? **John Sullivan.** The amendments speak of action ten days before the trial, but the money has already been spent. The mediation concept will be affected by this bill, and costs will increase by several thousand dollars per case.

**SEN. SHARON ESTRADA.** I carried this last session. Please address Mr. Sullivan's statement on mediation, and whether people will settle out of court more. **Mike Meloy.** These are sort of the same question. In the arena we are already having attorney fees permitted to the winner (human rights cases). My experience in human rights cases is when to go to settlement conference, and have the right to recover attorney fees. It permits attorneys to get fees without reducing dollars that might ultimately be given to the plaintiff. In many cases, particularly in discrimination such as humiliation, embarrassment, and emotional distress, attorneys costs are more than the amount they are asking for the client. So, my fees would come out of whatever was recovered, but the client doesn't understand this, and this fact alone can keep cases from being settled.

**SEN. ESTRADA.** Would this bill increase litigation and taxes? Is this bill good without the amendments? **Mike Meloy.** My take is some amendments probably do improve the bill, but the prevailing party amendments look like a mess. So, if you pass the bill, you should let the Courts sort this out. Rule 68 is used now primarily by the defendant to cut off rights to attorney fees in situations where he or she loses, and if the plaintiff doesn't accept, then under federal rule, the plaintiff can't accept any more fees.

**SEN. RIC HOLDEN.** What is the second point concerning the two major problems you see with this bill? **John Sullivan.** The effect on settlement and the mediation process, and no equal ability to pay. Attorneys need to talk to clients about this.

**SEN. HOLDEN.** I am asking you to summarize page 3, Section 4 of the proposed amendments. **Stan Kaleczyk.** During the course of a suit, a lot of motions are field, and if we win on a motion, we are not automatically entitled to attorney fees, but Section 4 is designed so we don't get attorney fees until the end of the day and the trial is over.

**SEN. HOLDEN.** This legislation is part of the Republican Action Plan, so I am asking Russell Hill and Ward Shanahan to provide amendments to page 2.

**SEN. ESTRADA.** To follow-up on **SEN. HOLDEN's** request, I would like an explanation of the amendments, and ask that you visit with Mr. Meloy and Mr. Crowley.

*{Tape: 2; Side: A; Approx. Time Count: #18.6; Comments: 10:47 a.m.}*

**SEN. REINY JABS.** If this bill passes, you'd have more cases, so would this actually cut down on frivolous suits? **Mike Meloy.** There are probably four or five other attorneys in Montana who specialize as I do. In my view the political motivation in this bill will not happen if it passes, but I believe it is good, as it will give more people access to the Court who can't afford to go there now.

**SEN. JABS** asked the same question of Frank Crowley. **Frank Crowley.** We don't specialize in litigation, and I am not a tort reform expert, but I believe it would cut down on the number of frivolous suits, but I can't predict statistics right now.

*{Tape: 2; Side: A; Approx. Time Count: #22.5; Comments: 10:53 a.m.}*

Rule 11 of Civil Procedure provides that courts may award sanctions against attorneys filing pleadings, etc., without good cause or merit. This rule is being used with increasing frequency in some courts. I don't say that is a substitute for this bill.


**Closing by Sponsor: REP. STOVALL.** I have a report on the Alaska tort caseload for the Committee's review (**EXHIBIT #6**). I am not surprised that the trial lawyers and the insurance companies oppose this bill, as they make billions of dollars from us, the people. We need tort reform, and this is a good place to start.

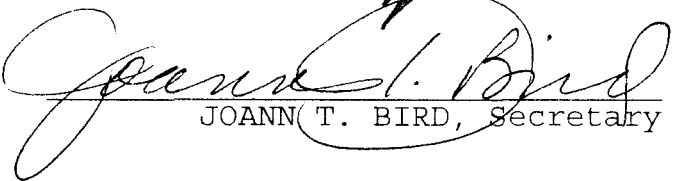
A girl we know can't afford to drive her car at \$500 per quarter for auto insurance. I believe our system is broken. People on contingency tend to go after deep pockets. A constituent in my district in Briarwood whose plumbing was put in wrong and even passed inspection by the city, wants to go after the plumber. She has a very good case, but not enough money involved for a contingency payment, so went through the Department of Commerce. They'll charge him \$1000 while it cost her \$15,000 to fix the problem.

This rule seems to work well in other places of the world and in Alaska. I recently found a man named Victor Swartz, an expert on tort reform, who said he would try to FAX some amendments as the bill does need an amendment on limiting attorney fees. I don't agree with all of the amendments proposed by Mr. Kaleczyk. We need to try this, as something needs to be done, and this is a good place to start.

ADJOURNMENT

Adjournment: 11:03 a.m.

  
SEN. BRUCE D. CRIPPEN, Chairman

  
JOANN T. BIRD, Secretary

BDC/JTB