

SENATE JUDICIARY SUBCOMMITTEE
ON CIVIL PROCESS

Hearing Room
Tapes - 43

MEMBERS PRESENT:

Rep. Del Parks, Chair
Sen. Neil Bryant, Vice-Chair
Rep. Kate Brown
Rep. Bryan Johnston
Rep. Leslie Lewis
Rep. Bob Tiernan
Sen. Ken Baker
Sen. Randy Miller
Sen. Peter Sorenson

STAFF PRESENT:

Holly Robinson, Committee Counsel
Max Williams, Committee Counsel
Sarah Watson, Committee Assistant

MEASURES HEARD:

SB 385 - Work Session
SB 386 - Work Session
SB 482 - Work Session

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE , SIDE A

003 CHAIR BRYANT: Calls the meeting to order at 5:32 p.m.

WORK SESSION ON SB 386

008 MOTION: SEN. BRYANT: Moves to RECONSIDER the vote by which "the committee passed SB 386 to the full committee with a DO PASS recommendation".

010 CHAIR BRYANT: Explains motion.

024 VOTE: Hearing no objection, the MOTION CARRIES.

025 MOTION: REP. BROWN: Moves to ADOPT SB 386-10 amendments dated 04/14/95.

026 REP. BROWN: Explains -10 amendments to SB 386.

036 CHAIR PARKS: Where is SJR41 at?

038 CHAIR BRYANT: It is in the Rules committee.

040 CHAIR PARKS: What is the effect of this amendment on SJR41?

042 CHAIR BRYANT: It would then, permanently remove the statute that is currently unconstitutional.

043 MAX WILLIAMS, COMMITTEE COUNSEL: Discusses how SJR41 and SB 386 relate. Discusses -10 amendments to SB 386 that are considered for adoption. (EXHIBIT A)

051 CHAIR BRYANT: Under existing law today, it couldn't be pursued under a civil cause of action but possible under ORICO.

058 VOTE: Hearing no objections the amendments are ADOPTED.

059 MOTION: SEN. MILLER: Moves SB 386 AS AMENDED be sent to the floor with a DO PASS recommendation.

060 SEN. SORENSON: If we have adopted the -10 amendments, are we then going to vote on what other parts of SB 386 will go forth?

065 CHAIR BRYANT: No, explains.

066 SEN. SORENSON: What bill is before the committee?

067 CHAIR BRYANT: SB 386 as amended, including the -10 amendments.

068 SEN. SORENSON: SB 386 has been amended many times before today, and I don't know what I'm voting on.

073 CHAIR BRYANT: Not only the -10 amendments, but the other amendment that have been approved.

074 MAX WILLIAMS, COMMITTEE COUNSEL: Explains the -10 amendments.

077 SEN. SORENSON: There is no other bill that we are voting on?

078 MAX WILLIAMS, COMMITTEE COUNSEL: The other amendments are included in the -10 amendments.

079 SEN. SORENSON: Ok, I understand.

080 VOTE: 6-3 MOTION PASSES
AYE: Sen. Baker, Miller, Bryant - Rep. Lewis, Tiernan, Parks
NO: Sen. Sorenson - Rep. Brown, Johnston

WORK SESSION ON 482

092 MAX WILLIAMS, COMMITTEE COUNSEL: SB 482 prohibits award of punitive damages in civil cases. Discusses -11 amendments. (EXHIBIT B)

165 CHAIR PARKS: I don't think this is a real issue, explains. Discusses how this would effect the plaintiff. I want to pursue it and leave it in as it is. Cites, line 9 about remedial measures. One of the things the court could consider is the money that they have already paid. Discusses conceptual amendment. If the defendant makes a good faith attempt, the court could and maybe should remove the punitive damages all together.

199 CHAIR BRYANT: Cites how Rep. Parks conceptual amendment could be put into effect.

203 CHAIR PARKS: That is fine.

204 SEN. BAKER: Do you want money damages?

206 CHAIR PARKS: It should be limited to punitive damages, explains.

210 SEN. BAKER: Do they pay the punitive damages, or do they pay the equivalent of punitive damages. They don't pay punitive damages until after the judgment.

213 CHAIR PARKS: Your punitive damages award could be defeated, if they had prior to a judgment being entered, paid my judgment.

217 SEN. BAKER: Do you want it limited to punitive damages?

218 CHAIR PARKS: Yes.

219 REP. JOHNSTON: I think the committee has gone a long way, explains. I wish the committee could have gone a little further. I don't think there is a constitutionality issue, explains. Discusses that what is bad about the law is that some economic incentive has to remain for someone to bring an action, explains.

252 CHAIR BRYANT: Twenty percent would still be an incentive, explains.

262 REP. JOHNSTON: Where the underlying damages are slight, we have taken away the incentive to pursue and seek this action.

267 SEN. SORENSON: I am interested in how we might amend this bill on the remitter factor on page 3, lines 5-11. Discusses possible amendment.

282 CHAIR PARKS: That is my position. It should be limited, explains. Discusses possible due process issue.

292 SEN. SORENSON: Discusses amendment on line 5, using "any reduction".

297 CHAIR BRYANT: It only deals with the punitive damages award.

298 SEN. SORENSON: We should, to be consistent, have a provision for multiple awards of compensatory damages, should be a factor to allow the court to increase the amount of punitive damages that a jury has awarded.

309 CHAIR PARKS: You are right.

MOTION: REP. PARKS: moves to AMEND SB 482 by inserting "conceptual amendment".

VOTE: Hearing no objections the conceptual amendments are ADOPTED.

311 SEN. SORENSON: Why are we doing it as a one way thing, if we are concerned that the juries may have made a wrong decision. We should be putting a provision in that allows a court to add to an insufficient award of punitive damages.

319 CHAIR PARKS: My amendment is not intended to correct an jury decision, it is intended to make people clean up their act. This should give them an economic incentive to make society safer. The jury doesn't know about other cases, nor do they know about remedial action, explains.

336 SEN. SORENSON: Section 2 does seem to imply that the court is reviewing the award to see if it is in the range of damages that a rational jury would be entitled to award.

343 CHAIR BRYANT: I don't think that the courts can do that.

344 REP. TIERNAN: I think that Rep. Parks is right. I think that the reduction of attorney fees would make this bill very difficult to support, explains. Twenty percent is still a lot.

373 MOTION: REP. PARKS: moves to AMEND SB 482 by deleting "all" on page 3, line 9 of the bill, and by inserting ", including punitive damages previously paid" after "damages" on page 3, line 11 of the bill.

384 REP. JOHNSTON: I recommend that we say "including punitive damages previously paid for the same action", explains.

399 CHAIR BRYANT: Reads how conceptual amendment would now read, "similar causes of action".

404 MOTION: SEN. BRYANT: moves to AMEND SB 482 by inserting "similar causes of action" after "previously paid" on page 3, line 11 of the bill.

VOTE: Hearing no objections the amendments are ADOPTED.

406 MOTION: SEN. MILLER: Moves to ADOPT SB 482-11 amendments AS AMENDED dated 04/21/95.

410 SEN. BAKER: I think Rep. Johnston is correct, explains and discusses -11 amendments. This is an anti-consumer protection statute, explains. Twenty percent is not adequate funding.

428 CHAIR BRYANT: Under products liability and consumer protection, you would have the right to recover attorney fees.

430 SEN. BAKER: You can under that statute, but there are situations where you cannot.

TAPE 43, SIDE A

004 SEN. SORENSON: My concern about SB 482 and the -11 amendments is that the concerns raised by the public are not addressed in this bill, explains.

Discusses purpose of punitive damages. Gives example of how bill would work. Discusses reduction of attorney fees on plaintiff side. We should not pass this bill or the -11 amendments.

041 SEN. MILLER: I agree with Rep. Tiernan. If we can reduced the unnecessary costs associated with the creation, distribution, price of products available to consumers, then bills like this are in the best interest of consumers and protect consumers.

052 REP. JOHNSTON: I disagree with Sen. Sorenson. The purpose of punitive damages are to assist in the regulation of the marketplace, explains. What

is so good about what this committee has done, is that it takes the punitive damages and uses it effectively, explains. Gives case example.

071 CHAIR BRYANT: There are many improvements to our current statutes, explains those changes, additions, and improvements. The damages for punitive damages are not meant to be compensatory damages, explains. This is better than what we have now and deserves the committee's support.

091 VOTE: Sen. Sorenson objects to the motion. The amendments are ADOPTED.

092 MOTION: SEN. MILLER: Moves SB 482 AS AMENDED be sent to the House and Senate Full committees with a DO PASS recommendation.

VOTE: 6-3 MOTION PASSES
AYE: Sen. Baker, Miller, Bryant - Rep. Lewis, Tiernan, Parks
NO: Sen. Sorenson - Rep. Brown, Johnston

WORK SESSION ON SB 385

100 CHAIR PARKS: Discusses letter from Governor who has objections to parts of this bill. I believe to go forward with the bill in it's current form would be a mistake. I would move to continue the hearing on this bill for a week from today to allow more time for the chairs to discuss the issues.

124 CHAIR BRYANT: If the motion is approved, I would still like to walk through the bill tonight to find what the opinions are of the members.

131 CHAIR PARKS: That is fine.

132 CHAIR BRYANT: If one co-chair wants to recess for one week, then we will recess for one week. Discusses SB 385 in it's current form of A engrossed.

150 REP. TIERNAN: Why is the governor's office waiting until the last minute to bring these issues up?

156 CHAIR PARKS: Discusses letters from governor and the AARP concerning the issue of prevailing party fees. The second concern is the way in which the attorney fees involving the state are treated and the effect that will have on the ability of the state to regulate various areas.

173 SEN. MILLER: Is this the first time we have heard from the governor on this issue?

175 CHAIR PARKS: I have heard twice before from the governor that he was concerned about this.

180 CHAIR BRYANT: I received the letter from the governor last week. I have had two conversations with the Attorney General and Chip Lasenby, discusses. The AG mentioned his concern about the state having to pay attorney fees if they should lose on an enforcement action. The bill as engrossed, answers that question, explains.

196 MAX WILLIAMS, COMMITTEE COUNSEL: Discusses issues that the governor was concerned with. SB 385 places the state on the same footing as any other litigant under those statutes.

212 SEN. MILLER: I wouldn't express a lot of confidence that if we put this bill off for another week, that this will satisfy the governor. I think we should proceed with this bill and work it tonight. Discusses his concern about not passing SB 385 out of the committee.

235 REP. TIERNAN: I agree with Rep. Miller. Discusses letter from governor. I don't think there is anything that the governor has brought up, that the committee can't decide upon.

247 CHAIR PARKS: I like to reason with people, but it would not be profitable to move this bill.

266 SEN. MILLER: Would we have the assurance that if we come back next week, it will not be dragged out anymore? Can we as a committee understand that there will be no more concessions without a good reason?

276 CHAIR PARKS: I don't agree that this isn't a good reason. I would like to move this tonight, but I don't think it is possible. I would assure you that if we come back next week that is the last time we will meet.

282 REP. TIERNAN: If there are any more changes to the bill, there might be some vote changes.

290 SEN. MILLER: I understand and agree with that.

293 SEN. BAKER: Rep. Tiernan doesn't want to work the bill.

296 SEN. MILLER: The chair's would like to work the bill.

311 MAX WILLIAMS, COMMITTEE COUNSEL: Discusses SB 385A bill and amendments.

Continues discussing the bill section by section.

382 SEN. BAKER: Asks about page 6, line 1 and if the sanction can involve prohibiting the practice of law by the attorney for a week? What are non-monetary penalties?

387 MAX WILLIAMS, COMMITTEE COUNSEL: I don't know. Discusses that SB 385 tracks closely with the federal rule of civil procedure 11.

394 SEN. BAKER: Right now the Supreme Court is the only body that can suspend or limit practice of an attorney. This would give them the ability to do that.

398 MAX WILLIAMS, COMMITTEE COUNSEL: I agree that a court would not have the ability to limit the practice of an attorney. I would be happy to look into the background of the rule and see if I can find a description of what is intended by that.

407 SEN. BAKER: Or we could strike that "non-monetary penalty" language.

409 CHAIR BRYANT: I don't know what the non-monetary penalty might be, so if we can't think of one, then we will consider striking that language.

413 MAX WILLIAMS, COMMITTEE COUNSEL: Continues discussing and explaining sections of bill.

TAPE 42, SIDE B

010 SEN. SORENSON: What happens when there is a flurry of motions before a deposition or another event and the parties accelerate those motions. Is there any opportunity to provide the notice for the instances when these instances get complicated?

019 MAX WILLIAMS, COMMITTEE COUNSEL: I don't see any language that would allow that.

022 SEN. SORENSON: Where is the 20 day period?

023 MAX WILLIAMS, COMMITTEE COUNSEL: Cites line 34, of page 5 of bill.

025 SEN. SORENSON: That is a blanket prohibition of sanctions on anything within 21 days?

027 MAX WILLIAMS, COMMITTEE COUNSEL: Yes, explains.

030 SEN. SORENSON: If a person learns of something within 21 days of the hearing, then sanctions may not be imposed under the language of the bill.

036 MAX WILLIAMS, COMMITTEE COUNSEL: I agree.

040 SEN. SORENSON: Is this an amendment to the ORCP?

047 MAX WILLIAMS, COMMITTEE COUNSEL: I agree. Continues discussing and explaining bill sections.

072 SEN. SORENSON: Is there an appellate case that defines the language used on lines 21-22 on page 6?

075 MAX WILLIAMS, COMMITTEE COUNSEL: There are several federal cases that apply that same or similar standard under the federal summary judgment cases.

078 SEN. SORENSON: In Lane county, there has been a view that courts will not grant summary judgments for fear that they might be reversed. Is that intended to deal with that problem?

083 MAX WILLIAMS, COMMITTEE COUNSEL: Yes, that is exactly the problem that

this language is intended to solve.

086 SEN. SORENSON: Is our decision on that, to allow for partial summary judgment? That might be helpful.

092 MAX WILLIAMS, COMMITTEE COUNSEL: This language would make clear that it would be just summary judgment that a person would get the award. I don't think anyone had a concern that partial summary judgment was going to be available.

106 SEN. SORENSON: Part of the concern is that unless I can find a rule for partial summary judgment, there is no such thing by definition. Cites language on summary judgment.

119 SEN. BAKER: At one time, Oregon did not have partial summary judgment. Has that been amended in the last few years?

120 CHAIR BRYANT: I don't think that it has been amended, but I think some judges will grant partial summary judgment.

122 SEN. SORENSON: Some will not because a person cannot show that they are entitled to a judgment as a matter of law, and they will not grant it.

135 MAX WILLIAMS, COMMITTEE COUNSEL: Continues discussion and explanation of sections of bill.

168 REP. BROWN: Asks about what line 22G means?

172 MAX WILLIAMS, COMMITTEE COUNSEL: That is one section ahead. Explains the purpose of that section in the bill.

180 SEN. SORENSON: Asks about the locality rule on line 11, pg. 7. What is the locality?

194 MAX WILLIAMS, COMMITTEE COUNSEL: I recall no discussion about the locality, explains.

209 SEN. SORENSON: What does the language in the locality add to the phrase, "or similar legal services"?

214 MAX WILLIAMS, COMMITTEE COUNSEL: I would be happy to look at that issue and see how the courts have interpreted that.

219 REP. BROWN: They are referring to the fact that attorney's in Salem make a lot less money than the attorney's in Portland.

221 SEN. SORENSON: They do?

230 CHAIR BRYANT: We are not making any motions in the bill tonight.

233 SEN. SORENSON: The locality is the site of the litigation and not the site where the lawyers live.

241 MAX WILLIAMS, COMMITTEE COUNSEL: Continues with discussion and explanation of sections in bill.

282 REP. JOHNSTON: Cites that section 7 has other pieces in it that help clear up problems. The threshold is too high and the ceiling is too high in the prevailing party fee section.

293 REP. BROWN: Cites an amendment by Mr. Markee.

295 CHAIR BRYANT: Passes out amendment and discusses.

303 MAX WILLIAMS, COMMITTEE COUNSEL: Continues with discussion of bill and

prevailing party statute.

320 CHAIR BRYANT: On page 8, line 34 it doesn't include class action or family law cases.

325 REP. BROWN: Family law cases are excluded?

326 CHAIR BRYANT: Divorce cases is what I am talking about.

327 REP. BROWN: That goes for domestic partnership, modifications, etc.?

328 SEN. BAKER: Paternity has it's own attorney fee clauses.

331 CHAIR BRYANT: We can identify them by statute.

333 REP. BROWN: If the bill passes regarding the family law court, if we could have this say, "any matter relating to family law", that would be good.

335 CHAIR BRYANT: We have to check on conflicting amendments.

336 SEN. SORENSON: Asks about \$10,000 on line 6, of page 8. Do we have any jurisprudence knowledge or opinion on the due process issues? Cites case and gives example.

361 CHAIR BRYANT: It wouldn't go to the state, it would go to who ever the prevailing party is.

369 SEN. SORENSON: A prevailing party fee is to assist the prevailing party in dealing with the cost of the litigation. If their costs are below the amount that is awarded against them, then their property has been taken in part by the state, namely the judge. That example is my concern.

381 CHAIR BRYANT: You are free to look into that.

392 CHAIR PARKS: One of the considerations should be on page 8GH, cites language. That should be an additional to the judge in awarding prevailing party fees.

401 MAX WILLIAMS, COMMITTEE COUNSEL: That was accidentally left out.

402 CHAIR PARKS: Ok.

415 SEN. BAKER: I have some questions about pg. 8. I don't mind the ten thousand dollars, but that should be limited to the subsection A, explains.

I would want to eliminate lines 13-23 and limit it only to section A.

TAPE 43, SIDE B

013 MAX WILLIAMS, COMMITTEE COUNSEL: Continues with discussion and explanation of sections of bill.

021 REP. JOHNSTON: I think that is an "either", "or"?

025 MAX WILLIAMS, COMMITTEE COUNSEL: I does appear that the option is to keep it at \$25,000 or bump it to \$50,00.

028 REP. JOHNSTON: I think that is cleaner.

030 MAX WILLIAMS, COMMITTEE COUNSEL: Continues discussion of bill.

044 SEN. SORENSON: Are we making any changes to the use of arbitration? Are we allowing the court to have public employees be arbitrators, or whether we should make the decision to have the arbitration done by private parties? Cites lines 1-12, on pg. 10.

061 MAX WILLIAMS, COMMITTEE COUNSEL: The idea was to not change the current statutory arbitration system, explains.

067 SEN. SORENSON: We have a potential of having arbitration becoming as confusing as civil litigation. Discusses having private parties handle the arbitration. The private sector can often do a better job than the public sector.

078 CHAIR PARKS: There are parts of the state that wouldn't be sufficient private arbitrators. The courts would have to fashion a system based upon realities. The bill does leave a lot of discretion to the court, but that is the way it is.

087 SEN. SORENSON: What about making it in the State Court administrator?

089 CHAIR PARKS: That would be an appropriate amendment. Is there a provision that says there are no attorney fees in arbitration? It isn't my intention that there should be attorney fees awarded in an arbitration proceeding.

103 MAX WILLIAMS, COMMITTEE COUNSEL: Explains overall how SB 385 would work.

108 CHAIR PARKS: If someone appealed the award of attorney fees, would the person be entitled to attorney fees?

111 MAX WILLIAMS, COMMITTEE COUNSEL: That is solved in subsection 6 on page 12. This requires a special situation for appeals on award of attorney fees, explains.

125 CHAIR PARKS: If attorney fees are awarded against you, and you appeal, then if you prevail, that not only improves the position on the underlying issues, that terminates your obligation to pay attorney fees.

133 MAX WILLIAMS, COMMITTEE COUNSEL: It is a little confusing, I'm not sure that is what happens.

137 REP. JOHNSTON: It is fairly clear as to what happens.

139 CHAIR PARKS: Discusses provision under ORS 36.405. I don't favor the awarding of expert witness fees in any event. One of the things I wanted was the scheme devise of the Supreme court to report what actually happened as a result of this system.

162 MAX WILLIAMS, COMMITTEE COUNSEL: I met with the State Court Administrator on that issue and discussed their proposed amendments. They may, now that there is more time, submit those amendments that might clear up your concerns.

169 CHAIR PARKS: On page 15, there is a provisions that is supposed to be eliminated from current law, which occurs three times in the bill, discusses.

200 SEN. BAKER: Cites problems and concerns with the bill on page 11, line 14.

206 REP. JOHNSTON: I have a concern about this section, it is too harsh. Discusses concerns. I would refer it to arbitration under a voluntary proposal, explains.

218 MAX WILLIAMS, COMMITTEE COUNSEL: My understanding is that we have not deleted the section relating to arbitration that currently allows submission to arbitration.

221 REP. JOHNSTON: It would be wise to put a line it to clarify that.

225 MAX WILLIAMS, COMMITTEE COUNSEL: Isn't that already in the bill?

228 BILL SIME, PRACTICE AND PROCEDURES COMMITTEE: My understanding is that the court, by stipulation can submit a case to arbitration.

230 MAX WILLIAMS, COMMITTEE COUNSEL: That doesn't show up in the bill because we haven't amended that section yet.

233 REP. JOHNSTON: It would be better, if the judge feels appropriate, that they refer to it as a voluntary arbitration.

248 SEN. BAKER: Continues citing sections of concern.

273 CHAIR PARKS: The point is that the person who is going to pay attorney fees is the person who got the attorney in the case in the first place.

279 SEN. BAKER: You have to build the skills into do a good job with the minimum amount of effort. Continues citing sections of concern.

311 CHAIR BRYANT: If any other member has any other concerns or issues, please drop a note to one of us in the Senate Judiciary committee.

317 MAX WILLIAMS, COMMITTEE COUNSEL: Cites proposed amendment about section 21, the survival statute. Cites letter by Bill Sime, EXHIBIT F.

334 CHAIR BRYANT: Adjourns the hearing at 7:15 pm.

Submitted by, Reviewed by,

Sarah Watson Debra Johnson
Committee Assistant Committee Coordinator

EXHIBIT SUMMARY:

- A. Proposed Amendments to SB 386 - Staff - 6 pages
- B. Proposed Amendments to SB 482 - Staff - 5 pages
- C. Proposed Amendments to SB 385 - Staff - 1 page
- D. Proposed Amendments to SB 385 - Staff - 1 page
- E. Testimony on SB 385 - John Glascock - 1 page
- F. Proposed Amendments to SB 385 - Bill Sime - 1 page