

SENATE JUDICIARY SUBCOMMITTEE
ON CIVIL PROCESS

Hearing Room
Tapes - 4

MEMBERS PRESENT:

Rep. Del Parks, Chair
Sen. Neil Bryant, 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 May, Committee Assistant

MEASURES HEARD:

SB 385 - Public Hearing.

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

004 CHAIR BRYANT: Calls the meeting to order at 3:38 pm. Explains subcommittee process and how these meetings will proceed. (EXHIBIT A)

052 MAX WILLIAMS, COMMITTEE COUNSEL: Explains ORS 67, Uniform Trial Court rules, and statutes that are included in SB 385. (EXHIBITS B-1,-2,-3)

PUBLIC HEARING ON SB 385

Witnesses:

John Dilorenzo, Oregon Litigation Reform Coalition
Tim Woods, Vice President of Act III Theaters
Don McIntire, Oregonians Against Lawsuit Abuse
Joe Gilliam, National Federation of Independent Business
Betsy Bailey, Associated Oregon Industries
Ed Patterson, Oregon Association of Hospital & Health Systems
Chip Lasenby, Legal Counsel for Governor Kitzhaber
Ted Hughes, Oregon Associated of Nurserymen, Pacific Northwest Paint

Council

Scott Gallant, Oregon Medical Association
Van Valkenburgh, Oregon Trial Lawyers
Carey Shaye, ARC of Oregon, Save Our Rights Coalition
Don Corson, Oregon Trial Lawyers

078 JOHN DILORENZO, OREGON LITIGATION REFORM COALITION: Testifies and submits written testimony in support of SB 385. (EXHIBITS C-1, C-2)

282 CHAIR PARKS: A defendant in a criminal case who is found not guilty should be awarded his attorney fees?

286 DILORENZO: I would modify that only in that, the government is not entitled in a criminal case to be awarded of their attorney fees. Continues with testimony, explaining EXHIBIT C-1.

420 CHAIR BRYANT: Cites a meeting to come later in February on how this bill will effect practicing law.

434 CHAIR PARKS: If a person loses a case, they don't pay the other persons attorney fees?

444 DILORENZO: That is my understanding of the bill, unless there is a statute or an attorney fee provision in the contract.

TAPE 2, SIDE A

010 CHAIR PARKS: That is part of the problem, cites stalking example and how this bill could have a negative effect on some good people. The best place to resolve these issues might not be in the judiciary department.

026 DILORENZO: I understand your discomfort with that stalking law, that is why I distinguished the one-way fee shifting laws in thirds. The substantive committees should be consulted, but they are not as well equipped to deal with the procedural provisions that this bill addresses.

040 CHAIR PARKS: Likes the Alaska approach, cited in Dilorenzo's previous testimony. Concerned about frivolous litigation and caps on attorney fees.

Discusses those possible implications on SB 385. Why wasn't the capping of attorney fees addressed in SB 385?

065 DILORENZO: I tried to address it, but could not come up with appropriate language. That is why we referenced ORS 67.

077 CHAIR PARKS: Asks about summary judgment area, the correlation of the defendant prevails on a summary judgment. Why wouldn't the plaintiff if the defendant prevails, be able to receive attorney fees for having to defend against a summary judgment proceeding.

087 DILORENZO: Even if the defendant isn't under any other statute or rule entitled normally, under this bill, where the defendant prevails on summary judgment, the defendant would be entitled to an award. If one of the parties is entitled to an award of attorney fees, that would be included in what the judge awarded.

095 CHAIR PARKS: The concept embodied is that, but if you lose, you shouldn't have brought the action. Discusses discouraging people from filing a frivolous motion for summary judgment.

106 SEN. SORENSON: Could you provide a list of the coalition members that are advocating this?

112 DILORENZO: Yes, there are separate coalitions on each bill.

137 SEN. SORENSON: Are there other states, besides Alaska, that have experience with a bill of this kind?

139 DILORENZO: Texas, cites EXHIBIT C.

144 SEN. SORENSON: What is the federal bankruptcy application? What is your view on the practical impact of this, gives example.

155 DILORENZO: The bankruptcy laws are federal, so all you can do is your best with the Oregon laws.

164 SEN. SORENSON: There has been an increase in litigations between corporations. What can we do to not clog up the judicial system with these cases?

174 DILORENZO: In the two-way fee shifting area, the second third of the laws have to do with those that control the commercial relationships between business entities. Discusses that SB 385 deals with what would control it.

181 SEN. SORENSON: I thought this legislation would effect the typical contract case?

183 DILORENZO: This does not effect the typical case under current Oregon law. Under current Oregon law, however, there are special laws that control fee shifting. Discusses that SB 385 will not effect the typical case, but will affect all one-way fee shifting laws.

191 SEN. SORENSON: Cites concern on Section 49, pg. 27; landlord - tenant act. Asks if this law is used?

213 DILORENZO: I will try to get you that information.

214 SEN. SORENSON: This does not effect the workers compensation laws? Asks about Section 112, pg. 59.

225 DILORENZO: Section 112 of the bill concerns ORS 653.285, explains.

233 SEN. BAKER: Asks if marriage disillusion, adoption and paternity are going to be exempt from SB 385 rules.

238 DILORENZO: I was originally going to suggest that they be exempt, but we want to keep domestic relations out. Cites Section 54.

249 SEN. MILLER: Can you speculate as to how the one way fee shifting got messed up?

257 DILORENZO: Discusses how and why fee shifting were changed.

286 SEN. MILLER: There is a lot of merit for the loser pay concept. Why is it no longer fair after you exceed \$20,000?

292 DILORENZO: That was a compromise, explains and gives examples.

314 REP. BROWN: Cites statistics from National Center for state court, showing that tort case filings have either been static or declined. If you have any evidence to the contrary, I would like to see that.

318 DILORENZO: Your impressions are correct. SB 385 is a more qualitative approach to the type of justice people can get.

329 REP. BROWN: Cites Alaska example. Is their approach quality not quantity?

336 DILORENZO: I don't know.

340 REP. BROWN: Would a defendant who refused to negotiate be entitled to attorney fees?

342 DILORENZO: Explains offer of settlement provisions. We are hoping this will cause more reasonable offers to be put on the table.

362 REP. BROWN: You stated that the plaintiff is not always the party in interest. Are you referring that the plaintiff's attorney might be the real party in interest?

366 DILORENZO: Gives example of the party in interest.

387 REP. BROWN: You would favor some sort of government regulation about how much people earn for a case?

390 DILORENZO: No, I'm suggesting that the parties are made whole, which should apply to the defendant as well.

406 REP. JOHNSTON: Is it fair to say that there is a concern about fairness? By our making the changes you have suggested, it will make things more even?

417 DILORENZO: I believe that the pendulum has swung too far, there are inequities.

424 REP. JOHNSTON: We give the plaintiff the burden of proving the case, and the defendant doesn't have that same burden. What does the defendant have to prove?

436 DILORENZO: The defendant has nothing to prove. But if the defendant has a position that is vindicated, then they should never have been to court in the first place.

444 REP. JOHNSTON: You are right. We need to try to find a balance.

TAPE 1, SIDE B

015 DILORENZO: We need to correct those inequities and have no fee shiftings, or have two-way fee shiftings.

019 REP. JOHNSTON: Do we need to be worried about a chilling effect? Gives Washington State Law example. Under Oregon law, if the court isn't willing to adopt that rule, then the plaintiff will have to pay defense costs.

034 DILORENZO: The proper forum for advancing that law is not in the courts, but at the legislature.

036 REP. JOHNSTON: So you look to the legislature to advance the State of the tort law?

037 DILORENZO: The courts aren't the most effective forum for advancing or changing the law.

045 REP. TIERNAN: There is size and population in Alaska as to why there is more litigations there per capita. How do the sanctions under SB 385 differ from existing ORS 210.105, or ORCP 17C?

061 DILORENZO: We have changed the discretionary rules, explains. We've looked to the Federal rule 11 as a model, explains.

083 REP. TIERNAN: Doesn't Oregon already have reciprocity of attorney fees statute for contract actions?

087 DILORENZO: Yes, we are taking that concept and extending it to other actions outside scope of contracts.

094 CHAIR PARKS: Why did you make it 'from when the suit is filed', rather than the existing statute?

101 DILORENZO: Explains chart, EXHIBIT H.

111 CHAIR PARKS: You don't care either way?

112 DILORENZO: I wanted to be sure that the bill we presented was workable.

115 CHAIR PARKS: You include expert witness fees, that would be a change from existing law?

118 DILORENZO: That is correct. The whole intention is to treat defendants like the plaintiffs, explains.

123 CHAIR PARKS: Tort actions are different than contract action, explains.

131 DILORENZO: I believe that, but if there is a statute that controls, it will control the award. The intent of SB 385 wasn't to interfere with contractual arrangements, other than the procedural mechanism for being able to make an offer of settlement.

137 CHAIR PARKS: We have a bill that provides for raising the jurisdictional limit of the small claims, and a provision upon removal to an arbitrator. Would that be consistent and therefore excluded from this bill?

150 DILORENZO: As long as it is constitutional. If it can help persons with small claims, it is something we should pursue.

155 CHAIR PARKS: The constitutionality being the \$200?

157 DILORENZO: There is a right that is inviolate to a jury trial.

158 CHAIR PARKS: Let me know what you think. That could be an alternative.

172 TIM WOODS, VICE PRES. OF ACT III THEATERS: Testifies and submits written testimony in support of SB 385. (EXHIBIT D)

297 CHAIR BRYANT: You would be in favor of extending this bill to be a full loser pay?

299 WOODS: Yes.

300 CHAIR BRYANT: Many of the cases you cited would be over the \$20,000 and not covered by the prevailing party clause except for the portion dealing with frivolous law suits or claims.

303 WOODS: We will take responsibility for our actions, but we want others to do the same.

305 SEN. SORENSON: In the cases you cited, did your attorneys think that these cases were frivolous?

315 WOODS: We do not have a corporate attorney. We use our insurance company and have a \$25,000 deductible.

326 SORENSON: You are not aware if any allegations of frivolousness was made by your side? Most of these cases you cited above \$20,000 would not

be effected by SB 385.

341 WOODS I would hope that SB 385 would make the plaintiff file law suits more appropriately.

347 SORENSON: How can we control litigation costs? Is there a way to reduce the amount of money you're spending on legal fees?

365 WOODS: SB 385 would be an excellent start.

374 SORENSON: Have you had involvement with Oregon Counsel on Court Procedures?

379 WOODS: No.

380 SORENSON: Explains the Oregon Counsel on Court Procedures. I'm concerned that this counsel has not received these proposals, have you given them to them?

393 WOODS: No.

395 CHAIR BRYANT: The counsel has been sent copies of SB 385.

398 SORENSON: Does this corporation provision help your business?

414 WOODS. Doesn't know.

417 REP. TIERNAN: Does the offer of settlement apply to any amount of money, or \$20,000 and under?

421 MAX WILLIAMS, COMMITTEE COUNSEL: That applies to any amount.

424 REP. TIERNAN: If they make an offer of settlement which is low, would he be entitled to dollars returned?

430 CHAIR PARKS: Questions attorney fees.

437 MAX WILLIAMS, COMMITTEE COUNSEL: That is correct.

442 CHAIR PARKS: What function does the \$20,000 have?

443 MAX WILLIAMS, COMMITTEE COUNSEL: As I understand, the \$20,000 cap applies to any action that is brought under the \$20,000 amount, would be a loser pay rule.

TAPE 2, SIDE B

011 REP. JOHNSTON: Explains prevailing attorney fees.

015 REP. TIERNAN: Discusses other hearings regarding frivolous law suits. Names five companies that agreed on legal reform.

029 REP. JOHNSTON: Discusses that there is a council available to decide if suit has merit or not. Would this kind of system be of help to you?

046 WOODS: Yes, but cites that some parts of company are in different states that have to conform to their own state laws.

053 REP. BROWN: You're hoping that SB 385 will discourage the amount of frivolous law suits?

056 WOODS: Yes.

060 DON MCINTIRE, OREGONIANS AGAINST LAWSUIT ABUSE: Testifies in support of SB 385.

134 REP. BROWN: If I had evidence to show that other states that have enacted legal reform such as this haven't actually reduced the amount of suits that lack merit, would you think that this legal reform was as good?

140 MCINTIRE: Cites examples.

161 REP. BROWN: The problem may be one of perception. Does the public perceive that the justice system is messed up?

163 MCINTIRE: Yes, even some lawyers do as well.

166 REP. JOHNSTON: There are two categories of law suits, gives examples. What about the claim that isn't meritless, but may not prevail? Explains what happens in that situation now, and how that will differ under SB 385.

190 MCINTIRE: You cannot litigate perfection.

192 REP. JOHNSTON: Life isn't fair for defendants, so we decided to cure that by making life not fair for the plaintiffs?

194 MCINTIRE: The unfairness to some defendants is practically immoral.

195 REP. JOHNSTON: If we prevent some plaintiffs from reaching the courtroom, then we will be having a hearing in 2-4 years, with someone telling us the that the "unfairness to plaintiffs is practically immoral".

198 MCINTIRE: If they have a justifiable case, then the resources can be found. Right now there is a one way street.

208 REP. TIERNAN: The point is to control the lawsuits so that the costs of them are under control. Hopefully we can encourage people to settle their disputes without taking them to the point were the costs are insurmountable.

218 MCINTIRE: The offers of compromise make sense to me.

221 REP. TIERNAN: I'm not aware of a bill like SB 385 passing in any other state.

230 SEN. SORENSON: Should we do as the English did for the jury trial system?

242 MCINTIRE: Are we talking about loser pays?

243 SEN. SORENSON: Some of the criticism has been that the juries have awarded insignificant money or amounts of money that you would disagree with? Do you want to see a restriction?

249 MCINTIRE: There have been some poor jury decisions, discusses. SB 385 starts Oregon on new legal reform.

298 JOE GILLIAM, NATIONAL FEDERATION OF INDEPENDENT BUSINESS: Testifies and submits written testimony in support of SB 385. (EXHIBITS E-1, E-2)

350 BETSY BAILEY, ASSOCIATED OREGON INDUSTRIES: Testifies in support of SB 385.

371 ED PATTERSON, OREGON ASSOCIATION OF HOSPITALS & HEALTH SYSTEMS: Testifies in support of SB 385.

408 CHAIR BRYANT: Please make those comments available in writing.

416 REP. JOHNSTON: When a case is dismissed on demerits, how does it get back into the court?

424 GILLIAM: My understanding is that they change some points in the case and file it again with another lawyer.

436 REP. JOHNSTON: That is an argument for Section 11 of SB 385. Are you interested in awarding a percentage of fees, or of the defendant recouping all of the fees?

TAPE 3, SIDE A

014 GILLIAM: We believe that 100 percent of the fee should be recoverable. I represent people who don't have a lot of money, gives example.

021 REP. JOHNSTON: Will this be different if you are confronted with a non-frivolous lawsuit where you happen to prevail?

023 GILLIAM: The rules of the system make that judgment, explains.

028 REP. JOHNSTON: SB 385 doesn't distinguish between frivolous and non-frivolous. Should there be a distinction between those two?

031 GILLIAM: All of the cases should be treated the same, explains.

037 REP. JOHNSTON: Ms. Bailey, do you agree?

038 BAILEY: Not prepared to address that question.

040 PATTERSON: Our goal is to help reduce the cost of defending against these type of cases, and in that, reduce the cost of health care.

055 SEN. SORENSON: Could you each give me a definition of "frivolous"?

064 BAILEY: "Not in good faith, based on existing law, which is an argument that can be made as an extension of existing law."

068 GILLIAM: Basically, "cases without merit", cites example.

073 PATTERSON: In most cases for hospital, the insurance company attorney is willing to settle early before going to court. In most cases the plaintiff will look around to find one lawyer who will go after a case just to get money whether it has merit or not, that is frivolous.

087 REP. TIERNAN: Do you think the system, as described by EXHIBIT C-2, would help the businesses you deal with in controlling costs?

092 PATTERSON: Yes, this makes sense to me.

095 GILLIAM: The people I represent were favorable to this. It forces the defendant to put forth a legitimate offer, explains.

102 BAILEY: Yes.

108 CHIP LASENBY, LEGAL COUNSEL FOR GOVERNOR KITZHABER: Testifies on SB 385. Cites concerns of the governor.

127 CHAIR BRYANT: The bill that comes out of this committee will help the people and add some legal reform.

134 REP. TIERNAN: Has the Governor taken a position on SB 385?

136 LASENBY: The Governor has no position, it was the process of hearing SB

385 hat concerned the Governor.

140 SEN. SORENSON: Could you give us an overview on if the state agencies will put some input in on this?

154 LASENBY: My intention is to do an analysis to take to the Governor so he can take a position.

162 CHAIR BRYANT: Those comments would be helpful. Let us know if you have questions.

173 TED HUGHES, OREGON ASSOCIATION OF NURSERYMEN, PACIFIC NORTHWEST PAINT COUNCIL: Testifies in support of SB 385.

192 SCOTT GALLANT, OREGON MEDICAL ASSOCIATION: Testifies in support of SB 385.

295 VAN VALKENBURGH, OREGON TRIAL LAWYERS: Testifies in opposition to SB 385.

- what is frivolous?
- \$20,000 can be just as important to smaller companies
- this favors the large corporation
- need large debate on this bill, or will end up in large litigations
- could be chilling effect on attorneys fees

TAPE 4, SIDE A

010 CAREY SHAYE, THE ARC OF OREGON, SAVE OUR RIGHTS COALITION: Testifies in opposition to SB 385.

- cites examples of people with smaller incomes

048 DON CORSON, OREGON TRIAL LAWYERS: Testifies in opposition to SB 385.

- the average Oregonian family cannot afford to pay
- cites Sections of bills and explains how they are not correct, or don't balance out.

198 CHAIR BRYANT: Adjourns the hearing at 6:10 pm.

Submitted by, Reviewed by,

Sarah May Debby Johnson
Committee Assistant Committee Coordinator

EXHIBIT SUMMARY:

- A. Statement by Senate & House Chairs - Staff - 2 pages
- B-1 ORS Statutes - Staff - 7 pages
- B-2 Chapter 67 rules - Staff - 4 pages
- B-3 Uniform Trial Court Rules - Staff - 4 pages
- C-1 Testimony on SB 385 - John Dilorenzo - booklet
- C-2 Chart Board - John Dilorenzo
- D. Testimony on SB 385 - Tim Woods - 3 pages
- E-1 Testimony on SB 385 - Joe Gilliam - 2 pages
- E-2 Testimony on SB 385 - Joe Gilliam - 1 page
- F. Testimony on SB 385 - Don Corson - 4 pages
- G. Testimony on SB 385 - Eugene Organ - 1 page