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.

HOUSE COMMITTEE ON JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

May 2, 1991Hearing Room 357 1:00 p.m.Tapes 86 - 88

MEMBERS PRESENT:Rep. Ray Baum, Chair Rep. Marie Bell Rep. Kelly Clark Rep. Rod Johnson Rep. Kevin Mannix

MEMBER EXCUSED: Rep. Tom Brian Rep. Jim Edmunson Rep. Randy Miller

STAFF PRESENT: Greg Chaimov, Committee Counsel Carol Wilder, Committee Assistant

MEASURES HEARD: HB 2362 -PH SB 372 - PH/WS HB 2354 - PH SB 426 - PH/WS

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TAPE 86, SIDE A

010 CHAIR BAUM: Calls the meeting to order at 1:35 p.m. (Meeting time was changed from 1:00 to 1:30 by Chair Baum.)

HB 2362 - JUDICIAL REVIEW, PUBLIC HEARING

037 GEORGE M. JOSEPH, CHIEF JUSTICE, COURT OF APPEALS, ON OWN BEHALF: Had no part in the design or form of this bill. The bill represents a swatting of flies with a sledge hammer. Mr. Reynolds and Judge Gillette think that there are a number of very serious problems of public access to government that are satisfied by this bill. Is unpersuaded by that. An academic case can be made for many aspects of this bill. The actual pointing out of problems that this bill would solve has never been done, to my knowledge, let alone to my satisfaction. Mr. Reynolds has identified cases where he thinks things simply ought to be clarified. For example, things that ought to be in the writ of review bill. Chief Justice Peterson began with the feeling that the people have the right to be able to know where to go with their problems. I don't challenge

that; I just don't think we're ever going to be able to fully satisfy that. Deal with the problems -- identify the problems first and deal with them in a straightforward fashion. I have read the whole bill and I don't understand it. If you don't understand the bill or don't think it would improve government including public access, don't pass it. I don't think the term, "adversely affected", is the same as constitutional idea of controversy. Bill should be more explicit about judicialable controversy.

175 REP. CLARK: Do we open up to litigation that which was not open to litigation before? Are we giving the courts review authority over statutes, ordinances and enactments and leaving it to the courts? The bill doesn't use the phrase, "substantive due process", but it felt like that to me. How does the bill view those statutes and enactments or is it just the judge's hunch? Do you have any comment about that?

200 JOSEPH: Shares the concern and I'm certain that no member of that committee intended to introduce the idea of substantive review of legislation. My problem is that I do not understand what the bill says in that area and I think, from what you've said, that you don't understand it either. Don't know of any pressing public problem that demands that we put this into this form. I live in Multnomah County. There is a group of people whose lives seem to be devoted to screwing up government. This bill is in some respects is an invitation to that. I think this bill will encourage them.

247 REP. CLARK: Regarding whether or not it opens it up for new lawsuits, maybe it does open it up for new lawsuits but that may be one of the effects of having an efficient system where citizens know where to go. In concept, do you support the idea of a single review place so that you get away from the situation where two or three competent lawyers get together and can't figure out which court to file in so they file in two or three places at once? Is that idea something worth pursuing?

262 JOSEPH: It's certainly worth pursuing and it has been pursued for at least eight years or longer in this bill.

265 REP. MANNIX: Couldn't that specific issue be addressed by a specific law that says for certain kinds of cases if you have misfiled in a particular court that you're considered to have timely filed in the other court and the matter can be transferred or something along those lines?

268 JOSEPH: I understand your counsel has prepared an aneuriSMpill at the last hearing on this bill that had that form and I told Mr. Chaimov this morning that if that amendment were to be seriously considered I would have some friendly criticiSMto make. Oddly enough I find that in the brief conversation that Mr. Reynolds and I had we probably agree on a problem that the amendment does not meet. But I do think a bill can be done that does it effectively.

280 REP. MANNIX: It can be done in the current system too. We don't have to have this change in the system. When you talk about judicialable controversy we do have a concern that has been presented through some written testimony from Kent Thurber - what about Home Plate v. OLCC, that 1975 case that required that the agency state what it found to be the facts and fully explain those facts. People looking at this bill are saying we ought to require substantial reasoning not just substantial evidence, but substantial reasoning for government

decisionmaking. That seems to me to be turning us towards the substantive due process kind of notion where the judges are going to start second-guessing the policymakers.

300 JOSEPH: When I came to the Court of Appeals, the one thing that I knew about administrative law is that administrative law's relationship to law is roughly the same as horse droppings are to horses. It took me a very long time under the tutorage of Judge Gillette to feel at all comfortable about working in administrative law questions. Then when I tried to put what I know about administrative law into the context of this bill, I have a great deal of trouble because I do not understand what is left of administrative law in the sense of how agencies do their business under the Administrative Procedures Act and the review that takes place under this bill. I do not and cannot respond to your question on how agencies will do their business and how it fits into the review, but I'm concerned about it because I don't understand it.

I do have some real concerns in detail, but I would rather not go into those because I don't understand how it works. You've been told that the intention of this bill is to simplify things yet the section on statute of limitations is extremely complex. Two things I particularly object to in the form of the bill. I cannot object too strongly to the very idea that parties can get together and stipulate that their case will be decided by the Court of Appeals. It is unsound judicial policy. Second, for some reason the drafters of this bill have adopted this notice of intention to appeal followed by a petition for review -- the LUBA route. It makes no sense whatsoever unless you think that government ought to be entitled to be put on notice if somebody thinks it's made a mistake and given 28 or 35 days to decide that it has made a mistake. That's very strange. You don't need this two-step thing. I do not understand any rationale for the notice of intent to appeal. The one thing that will give the Court of Appeals or a Circuit Court jurisdiction in this case is the filing of a petition for review which tells the court absolutely nothing. It tells the court that would do the review absolutely nothing about the case that's before it.

407 REP. JOHNSON: Are you for or against the bill?

409 JOSEPH: I'm against the bill in principle and in form.

TAPE 87, SIDE A

SB 372 - DISCOVERY OF ACCIDENT INFORMATION, PUBLIC HEARING

012 AL WOLFE, LEGAL INVESTIGATOR, EUGENE: Submits and summarizes written testimony in favor of SB 372 (EXHIBIT A).

052 CHARLIE WILLIAMSON, OREGON TRIAL LAWYERS ASSOCIATION: I understand that the Restaurant and Beverage Association and bar and tavern owners may want to have an amendment to let additional categories of people have access to these reports. I am not particularly anxious to keep them a secret but we have worked over the interim through the interim Judiciary Committee and in the Senate and hammered out amendments on this bill with the district attorneys to get their approval to it in its present form. It's somewhat of a delicate balance the way it is and we're not trying to keep these reports a secret from people who have a legitimate interest in using them. I would hate to see the bill fail because we're trying to expand it further at this point in the session.

067 REP. BAUM: Which one of these amendments?

069 WILLIAMSON: There's been no amendment drafted or proposed. I understand from Mr. Cross that there's a thought of an amendment. We don't have any objection to the two amendments (that you're considering).

070 CHAIR BAUM: You have a preference over whether we define a drug or a controlled substance. The difference in the statute is drugs are broader. They may include some prescription drugs or some over-the-counter drugs that are overdose (inaudible). Controlled substances are generally either prescription or illegal.

077 WILLIAMSON: We would like the broadest one. The Senate and the interim committee proposed that the bill actually apply to all crimes. It was narrowed to meet the District Attorney's concerns.

080 REP. CLARK: Have we already heard from district attorneys?

083 CHAIR BAUM: No, we're just starting off.

085 WILLIAMSON: They had some concerns that it was really broad and I think they really want to see how it works. Mr. Penn does have some concerns about how it's going to work and he will tell you that if he has problems he tends to come back next session and try to tighten it up. We would have every intention of helping him. We do not want any of these records being released interfering with the criminal prosecution; it's just in the best interest of the victims to have the criminal convicted and it should help in any of the civil litigation. I would hope that we may be able to come back next session and that this bill works very well and we may be able to discuss broadening it to other crimes.

095 LAWRENCE WOSSROCK, OTLA: Testifies in favor of SB 372. Submits letter, dated 4-30- 91 from MADD, supporting the bill (EXHIBIT B).

100 DALE PENN, OREGON DISTRICT ATTORNEYS ASSOCIATION: Testifies in favor of

SB 372. We have no intention of prohibiting a victim from being able to be successful in a civil claim. At the same time we want to insure that separate investigations do not destroy the ability to convict someone who is truly guilty of the crime. There have been some situations where that has occurred but we're hopeful that with the conditions that are in the bill that this won't be a problem. Regarding the amendments I would suggest that the one using the word "drug" is more appropriate because when we charge someone with driving under the influence there are times when the mixture of alcohol and prescription drugs would have the effect of the person being impaired. We don't want to complicate it by restricting it to "controlled substances".

145 REP. CLARK: The question that I asked before, the interim idea had been "all crimes" and that language came out in the Senate. Do you have anything to add to the comments that we got from the prior witnesses about why that was so.

152 PENN: We have concerns. I would agree that in many circumstances the civil investigation can actually assist the criminal case. The real intent was primarily in the kinds of auto accidents cases. It was expanded because it was thought it might be a good idea. Gives examples

of cases where someone was harmed. I would rather pursue this slowly and see how well it works.

200 BILL CROSS, OREGON RESTAURANT ASSOCIATION: After the bill was amended on the Senate side and narrowed down to alcohol and drugs we picked up on our tracking system and sent a copy of the bill to a defense attorney who specializes in liquor liability cases. So I'm simply circulating a letter that he responded to (EXHIBIT C). He wasn't able to be here today and I think his letter is a little broad but I think what he is suggesting is there ought to be an opportunity for any potential licensees that may be named in a criminal investigation also to have that early notification if in fact a civil suit arises out of the case to be able to start preparing for that case. Our problem with the liquor liability cases that are filed, many instances they are filed a year to two years later after the incident. The turnover in our industry is such that a lot of the employees are gone; a lot of the customers have changed so it's very difficult to reconstruct what may have occurred with respect to an incident. There is some language that was passed in 1987 that requires law enforcement agencies in criminal cases in collisions where alcohol was used to report to the Oregon Liquor Control Commission then any named licensees by the individual responsible for the accident. The OLCC then publishes that report annually. I'm wondering if there may be a tie between that language in there and an opportunity to narrowly include those parties in a similar situation so that there would be some parity in who would have an opportunity to look at that information. We're not suggesting that we open it up to anybody.

247 REP. JOHNSON: Isn't it true that if a victim got this information and filed a suit against a restaurant, bar, etc., as soon as that suit was filed the restaurant would have the right to discover everything that the victim-plaintiff had in his possession regarding the case which would include these reports?

257 CROSS: That is true. Unfortunately those filings would typically occur oftentimes very close to the statutes of limitations which is two years whereas the criminal investigation and prosecution would typically occur relatively soon after the incident so while we would have a discovery opportunity it would be stale.

265 CHAIR BAUM: We have kind of a difficult situation here because we have a bill that's gone all the way through the Senate. Did you have an opportunity to present this proposed amendment over there?

268 CROSS: No, we didn't. At the time, the language included all crimes and so we didn't pick up on the legislation. It wasn't until it became A-Engrossed that we discovered that it was going to be narrowed to alcohol and drug and that's when we began to realize that there was going to be an impact.

275 REP. BAUM: We have a situation here where we have it narrowly drawn to alcohol and drug related and you're kind of asking us to go ahead and expand that to someone who probably in some percentage of those cases may be drug in. He was drinking there before he went out on the road and killed these people, so you're afraid of some third party liability potential. But what we have here is we're going to have most of these cases right now simply aimed at the driver who does the deed, whoever causes the injury who was under the influence of alcohol. We like to accommodate some concerns in your area about giving us the same information that the victims are getting in case we happen to be where

the perpetrator got the alcohol. That's your concern, but we have no information to say that there's a problem out there for you folks that deserves being included in the bill at this point. Are you finding out that people are suing you regularly for this kind of activity? How's this going to help?

298 CROSS: In 1987 when the tort form measures were enacted by the Legislative Assembly, one of those measures required OLCC maintain records on suits that they were made aware of and to be the collection agency for information regarding law enforcement data that related to automobile collisions that involved alcohol use.

305 CHAIR BAUM: You know that information?

307 CROSS: Yes.

308 CHAIR BAUM: When OLCC is informed one of their licensees may have been tangentially involved in this, we have a statute that says that they are to notify your folks?

310 CROSS: The statute requires them to maintain that information. I don't think the statute requires them to inform the licensee but I think they do that as a matter of practice.

320 CHAIR BAUM: We have a statute that says, "Upon receipt of the notice described in Section 1, the Commission shall cause licensee or permit to be named as provided to be notified of the receipt of the notice and of its contents".

322 CROSS: That is the statute and that's correct. They also publish annually that information and that's where I've gotten the information that there are fewer suits being filed today than there were five or six years ago. So the problem may not be as significant as it was but there are still a number of third-party liability suits filed and you're correct not all of them do involve licensees; they involve other third parties who may have supplied the alcoholic beverages.

350 CHAIR BAUM: This bill's been through the Senate. You'd like to give access to licensees that may be named in the police reports upon request. The OLCC gives you a notice when they're reported as a licensee in a police report by existing statute. What additional things are we going to give you if we entertain this amendment that's not going to jeopardize this process without complicating it but providing you still something more substantive than what you already have if OLCC follows the statute.

355 MIKE MCCALLUM, DIRECTOR, GOVERNMENT RELATIONS, OREGON RESTAURANT ASSOCIATION: It's my understanding that when the OLCC gives us information concerning an incident that's all they give us, information that an incident has occurred. We don't necessarily get any of the details about how or what the other factors are within that incident itself and I believe that if there's additional information that's being released via this report that in fact the licensee could benefit from that information.

367 CROSS: Additionally, law enforcement is usually involved just at the scene of the accident if the person involved is able to give a name where they were last served, etc. That will go in the law enforcement report and that is transferred to OLCC. That doesn't include any

additional names that might come up at a later point in time when they are talking about actually filing a case against that individual.

382 WILLIAMSON: We would be glad to work in the interim with these folks to try to work some language out. I'm really concerned with the difficulty that we've had to get to this point with the DA's that it would be very hard to work something out especially when we have no language at this point in this session. The measure summary in this bill has been exactly the same with respect to its statement of alcohol and drug involvement since the interim committee made the change. That's one of the reasons the Senate narrowed the bill back down because it inadvertently broadened the bill to any criminal conduct but the measure summary still said alcohol and drugs.

398 CHAIR BAUM: We're going to have the opportunity to move either the -1 or the -2 amendments plus raise the issue that's been raised by Mr. Cross and Mr. McCallum. But I would suggest that since the consensus from Mr. Williamson and Mr. Penn was the -2 amendments prepared by Counsel dated 5-2-91 we may move those. Then I need to get an indication from the members of the committee of whether they want to deal with the other matter now or save it for later.

412 REP. CLARK: Talking about dealing with the issue that the restaurant folks brought to us, is it that the Senate isn't going to like that?

415 CHAIR BAUM: I'm not sure what it might do. I'm willing to deal with it.

417 REP. CLARK: It seems that the worst that could happen is the Senate wouldn't like it for whatever reason, a conference committee would be appointed and rather than let the bill die at that point pull that language out of there in conference committee if they had to get the bill to survive. I don't know why the Senate would hate it that much.

TAPE 86, SIDE B

052 CHAIR BAUM: (Asks Mr. Penn to return for a question.) What if we entertained an attempt to bring licensees under the OLCC into this situation, what would be your response just so we have it on the record?

060 DALE PENN: I wasn't aware of this until this afternoon when we walked in and although it appeals immediately as a parity issue I have concerns about it now that I know a little bit more about it. All we're really talking about is a window of some months time. If there is a notice from OLCC that's provided that puts someone on notice, as soon as the criminal case is resolved then those reports are on a public record and they can be obtained simply by letter or request. That's mandatory release at that point. I am concerned about the fact that some police investigations do not establish who the third party potential lawsuit might be filed against. I don't know when I'm supposed to do this and when I'm not without having precise language in front of me to look at. But because there is a notice from OLCC if they are aware of it, it does become a public record as soon as the criminal case is completed. The people who can be harmed are the potential plaintiffs because of this lack of head start, but any information that came out in the criminal case that's available to the defense they are on notice that this is a case we need to watch. I am concerned about broadening the bill because of the abuses in rape and traffic cases. We're willing to try to work

with this and see how it works for two years.

097 REP. BELL: If this information is released to the victim, is the victim then able to release it to the alcohol beverage server? If the victim wanted to help this case along to show cause?

100 REP. BAUM: After the lawsuit's been filed there are some discovery procedures that will probably require that the information be revealed. Whatever they have in relation to the case they generally have to show the other party. That's the way general civil law works. I think that they could get this because at that point they could go up to the courthouse if the criminal trial's over and get it themselves. In the meantime all they have is notice which identifies the parties and that you were mentioned as being the server in the chain of events.

115 REP. BELL: It's hard for me to understand why they wouldn't know until they got notice because surely if someone were named someone would come and question them. Someone would ask if this guy was really here. Wouldn't there be some follow-through on the original case that they'd go back to that establishment?

118 CHAIR BAUM: There may or may not be depending on whether there's any criminal liability potential for the server.

120 REP. BELL: I mean just in gathering evidence for the original case.

122 CHAIR BAUM: It depends on the police department.

SB 372 - WORK SESSION

130 MOTION: Rep. Clark moves the -2 amendments dated 5-2-91, Counsel Amendment #2, be adopted.

VOTE: There being no objection, Chair Baum so moves.

135 CHAIR BAUM: We have a situation where the folks from the Oregon Restaurant Association came in and asked if they could have an amendment to bring in the same opportunities for licensees and permittees under the OLCC system to also have access to the police reports if they are named as a server in the police reports that same way that the victims are given access. We have five votes on this committee and all five of us have to deal with that issue or else we can't move on the issue but we can move on the bill. Where are you, Rep. Bell, on this?

145 REP. BELL: I just have not yet seen the need. If I were a restaurant owner and I got this notice, but I didn't think that I was going to be part of the suit I don't think I would want to hire a lawyer to go get the information and prepare a case just in case I got a suit against me. I don't know that I would go to all that effort to prepare a case when there had been no case filed against me.

163 REP. JOHNSON: It seems like you could require the victim, if the victim wants to bring a suit against the liquor establishment, to send copies of those papers after the victim gets them from the DA within 30 days or whatever or else loses the right to bring an action against the liquor establishment. Keep the DA out of it.

178 REP. MANNIX: The reason why I am nervous about this proposed amendment is that it raises issues that (1) are not clear to me in terms

of how I might want to move, and (2) are not subject to real public notice because it's not like people out there knew that we might be considering this issue in the context of this bill, and (3) it's a novel twist of things. Yesterday we had a bill in Family Justice where there was a new issue brought into a bill but it was something that I thought was clean and I understood it and I had a definite opinion on it. I don't think this is clean; I don't understand it and I don't have a definite opinion. Since we haven't had a chance to have witnesses testify from all perspectives that makes me nervous. I happen to like the notion and I would like to see that accomplished at some point, but we're passing on the Senate bill where the Senate will probably concur with any amendments we make and I would want to make sure it was clean because there's some trip levers in the system that could be a problem here when we're talking litigation. I happen to feel very strongly that the restaurant and tavern people ought to have access and ought to have prompt access. I want to make sure we address that carefully.

200 REP. CLARK: My initial reaction was I wanted to support the proposed amendment. After listening to Mr. Penn, I think I'm convinced that the bill has been put together in the spirit of almost a pilot project. In that regard, it's a little bit of an experiment. I didn't understand at first the concern of the District Attorneys Association on not just the proposed Restaurant Association amendment but why we couldn't have this subject to all crimes. I think I do understand that now and I don't think anybody on this committee wants to hinder the criminal case and reluctantly my suggestion is that we ought to look again at that issue in two years.

220 REP. MANNIX: Over time, I'm open to opening up this concept with appropriate controls. I like this as a starting point and I do get a little concerned about unnecessary baggage at this point.

225 REP. BELL: As soon as they became a defendant if there ever was a suit, then they would have immediate access to all the materials, wouldn't they, and there would be a timeframe in which they could prepare their case. The only advantage here is giving them a little more lead time, which in most cases you don't have that lead time anyway.

232 REP. BAUM: Mike, this is my concern. I don't have a problem in doing this for them. I'd like to see some kind of confidentiality requirement for use for litigation purposes only and some restrictions on it. So I'm willing to consider it with those conditions.

Committee takes a brief recess.

250 REP. CLARK: I'll make an attempt at a conceptual amendment; it would be a variation on Rep. Johnson's idea. The idea would be that two conditions be placed on the release of records to the crime victim: (1) confidentiality, and (2) the records be made available to the establishment. The victim would have to notify the establishment if the victim intends to file a lawsuit.

268 REP. MANNIX: I would be open to saying that the victim, as a second condition, must agree to immediately provide the records to the establishment. If the establishment is named in the records, the establishment shall be provided with same discovery courtesy of the victim. The victims would have to make the copies and provide it to the establishment.

280 REP. BELL: If I'm the victim, I don't think I'm responsible to be issuing reports to anybody. If I intend to sue them and I file a complaint then maybe I have some intent but I'm going to have enough to do to put my life back together without worrying about reports that have to be sent to other people other than the police department.

283 REP. JOHNSON: If you wanted those reports for your own information and the DA said you could have them but only if you promise to send them to the establishment, wouldn't you think you could do that?

285 REP. BELL: That's ridiculous. If they're willing to let it go to the establishment they can send it. I don't think that should have to be a requirement of my getting the reports.

289 REP. JOHNSON: We just don't have to let you have the reports.

290 REP. BELL: That's blackmail.

292 REP. MANNIX: Just require that within ten days after filing any complaint against an establishment that the victim that has received these reports must automatically turn over those documents to the establishment. That's when you decide to sue someone, you have to do discovery anyway. Instead of requiring the establishment go all the way through discovery, you just hand it over. Or, within ten days after filing suit against an establishment you must notify the establishment that you received records from the District Attorney and the District Attorney is able to release those records to the establishment. Then your victim doesn't have to make photocopies.

307 REP. BELL: Why can't we put it back on the police department and say, "with the permission of the victim, he can release the records". If it's the victim you're concerned about whether or not the records get released and it's the establishment that wants them, why can't they get permission from the victim and have the department release them and take that area of burden off the victim. I thought the intent of the bill was to help the victim.

315 REP. MANNIX: But you are helping the victim. The victim brings legal action against someone else who may become a victim of civil action and they're trying to defend themselves.

320 REP. BELL: I believe as soon as they are part of a lawsuit they would have their access anyway. I don't see why we are going through this exercise.

325 REP. MANNIX: From this conversation, I think it's pretty clear that we are delving into some new territory. Maybe we should back off. If we can't come up with something that's pretty much concensus, I don't want to have problems with the bill.

330 REP. CLARK: Withdraws conceptual amendment.

335 REP. BELL: Just to explain my reaction here, it wasn't so much that I'm opposed to them having the information but I certainly don't want any more burden put on victim to have to be required to do anything.

340 MOTION: Rep. Mannix moves SB 372 as amended with -2 Counsel amendment to the Full Committee with a Do Pass recommendation.

VOTE: In a roll call vote, the motion carries with all members

present voting AYE. Reps. Brian, Edmunson, and Miller were excused.

355 CHAIR BAUM: Closes the work session on SB 372 and opens a public hearing on SB 426.

SB 426 - PUBLIC HEARING

370 CARL MYERS, OREGON STATE BAR: Introduces Andy Morrow, a Portland attorney appearing on behalf of the business law section of the Bar and they were the initial sponsors of this bill. As the committee may recall, SB 426 was before the committee several weeks ago. At the time, the committee had some problems with one of the sections of the bill that dealt with non-profit corporations making loans to officers or directors as part of a recruitment package. At that point, the committee's questions became some reservations. Based on that, that section of the bill was removed. Since the business law section felt that this was a fairly important part of the whole bill enabling non-profit corporations to do some things for their betterment, we attempted and were successful at getting someone here to explain why non-profit corporations need that part of the bill. We're here to ask the committee to reconsider and possibly reinstate the section that had been omitted in the previous committee meeting. Introduces Dr. Jerry Hudson, President of Willamette University, to speak on behalf of Willamette University, Lewis and Clark University, and Reed College, three fine institutions in this state all of whom I think have experienced some of the problems that might be corrected by reinstatement of that portion which was omitted.

400 JERRY HUDSON, PRESIDENT, WILLAMETTE UNIVERSITY: This is not of monumental importance to the university but is of significance to us because we, like my colleagues at Lewis and Clark and at Reed, engage in recruitment of faculty, senior staff, and senior administrators, from a national pool. We found that there are many occasions in which the ability to attract the very best to our institutions might indeed be connected in some measure with the ability to recruit with as good a package as possible. In my own case, before coming to Willamette I was President of Hamlin University in St. Paul, Minnesota. I was provided a home on campus. Several of our institutions in Oregon do not provide President's residences and frankly had I been recruited to one of those I would have not been in a position to consider that unless at the same time they were in a position to have made a short-term loan to assist with a down payment. That's not uncommon in the recruitment of outstanding faculty members which continues to be the case in some of the finest institutions across the country. We believe that as long as there are adequate safeguards then certainly in looking at this bill, there are two or three provisions that provide very adequate safeguards in terms of adequate safeguards in terms of notifying the attorney general's office and limiting it to the recruitment time only and of a short-term nature. With those limitations on it, we believe it would be of great assistance in attracting even better people to our Oregon institutions.

442 REP. MANNIX: Thank you for coming. One of the main reasons we stripped it out last time was because we had no real live person who came to us to tell us there was a real live problem. My question is, do we need this for directors as well as officers because it says director or officer?

TAPE 87, SIDE B

040 HUDSON: I am not aware of any situation in regard to directors except that in almost all institutions not only the President, but sometimes the Chief Financial Officer, would be directors and I don't know how you would exclude it. To my knowledge, there isn't any desire to have this for directors except those officers who are directors. If there would be some way to include that group.

050 REP. MANNIX: But we wouldn't be excluding a director, but there may be a complication since there may be some cases some day where someone's being brought in just to be Chairman of the Board of Directors. Is that an officer of the corporation or is that a director who is then an officer of the board and you can get into those fine distinctions. Maybe we want to avoid that kind of problem by leaving the language as it is.

055 ANDY MORROW, BUSINESS LAW SECTION, OREGON STATE BAR: Typically, the position of Chairman of the Board of Directors is not considered an officer of the corporation; it's a position within the board itself. That can vary according to the position with respect to the corporation.

060 REP. MANNIX: Could we suppose then there might be an instance where someone for some reason wants to recruit someone to get on a board to be Chairman of the Board if it's going to be a very active board and they may want to work out some kind of a loan for that person and that's not an officer of the corporation?

067 MORROW: That's correct.

067 REP. CLARK: Is there a difference and should the law recognize the difference between Willamette University, Lewis and Clark College, United Way, and Skidrow Avenue Food and Shelter, a much smaller entity, much different kind of entity, shoestring budget at one extreme and you folks at the other. Is there a difference between an institution such as yours and service- oriented nonprofit charitable kinds of enterprises?

085 MOORE: I think one of the things here is there are other than educational institutions which might be benefitted by this. Perhaps one of the distinctions that occurs to me is the relative size of the budget. Is a guarantee of Skidrow Food and Shelter going to be helpful to the particular person being recruited in getting a loan. It would be difficult just thinking about it conceptually in terms of how exactly do we define the distinction between those types of institutions. The distinction that is made presently is to deal with public benefit and religious corporations in this process rather than the mutual benefit which are the trade associations.

105 REP. BAUM: Dr. Hudson, now do you have the ability to track faculty by giving them that option?

112 HUDSON: Any faculty or administrator who would not be an officer or director we have that for but we do not have it unless this is included.

112 REP. BAUM: I'm trying to figure out who we would really be benefitting here if we already have it working in some areas for everybody's that's an officer, everybody but officers and directors. But we seem to have a unique situation of control here over the corporation. It's fine to do it for the rank-and-file employees. Then you have a Board of Directors who also is tied in financially with the

corporation. Where are we missing the boat? Let's say we have a college that didn't have a President's home on campus, you're saying if they wanted to hire a new President you should bring him in and sit him down there and not have to worry about giving him some guarantee or loan help to get a house.

130 HUDSON: I think there's just a couple of occasions in which the ability to attract and compete with other institutions who are offering the kind of incentives that would attract people to come would be lacking if that ingredient were eliminated. We are limiting it to the original recruitment package so as to avoid any of the potential for abuse that one might imagine or conjure up. But in the initial recruitment stage, the ability to be able to give a short-term loan to a senior administrator has some advantage particularly as the only alternative that I can think of other than losing them would be to increase the compensation package which would be more costly to the institution than simply making a loan available to them.

145 REP. BELL: In your estimation, is making these loans just an enticement benefit? How many of your people that are coming and are that high-caliber really need to have a loan in order to put a down payment on the house they're going to move into?

155 HUDSON: I cannot give a percentage. I think it would depend on the particular circumstances. There could well be someone we've recruited from California where the real estate values have been high and they've been able to sell their house there and there's no need or problem so that would not become a factor. There could be other situations where somebody might not have had any equity in place and making that possible for them to borrow the down payment. Equity would be the deciding factor in their willingness to accept the invitation to come.

163 REP. BELL: So this wouldn't be an across-the-board offer?

164 HUDSON: No.

165 REP. BELL: Do you charge the current rate of interest that a financial institution would charge?

168 HUDSON: Yes.

170 REP. BELL: You don't see yourself in competition with free enterprise and the financial institutions that are available in that area?

173 HUDSON: No, I don't think that we're excluding business for them. In some ways, by making this possible they're able to finance the purchase of a house entirely and go through the financial institutions for the purchase of a house.

175 REP. BELL: Mr. Chairman, is it your understanding that this also includes religious organizations and other kinds of non-profit organizations?

177 REP. BAUM: Yes, it does.

178 REP. BELL: Theoretically in a metropolitan area there could be quite a number of loans, right?

179 REP. BAUM: Right.

180 REP. BAUM: When you make a recruitment package loan for a down payment on a home, you're not charging the going bank rate? Don't you give them some break on interest to encourage them to come?

187 HUDSON: We would negotiate that but I would say the effort would be to try to not give them the benefit of a lower interest rate. The benefit is simply in trying to make it available to them.

200 MYERS: There are a number of people unfortunately who don't think Oregon is the greatest place to be. They sometimes need some encouragement to come from some other state to work and live in our beautiful country. Sometimes just coming to Oregon is not enough incentive and the institutions need to do more and this would greatly help them.

SB 426 - WORK SESSION

207 MOTION: Rep. Mannix moves to reinsert Section 6 in SB 426 with the correction of "indemnification" to "identification" as stated on line 33 of p. 6.

VOTE:Hearing no objection, Chair Baum so moves.

MOTION:Rep. Mannix moves SB 426 as amended to the Full Committee with a Do Pass recommendation.

VOTE:The motion is carried with all members present voting AYE. Reps. Brian and Miller were excused.

HB 2362 - JUDICIAL REVIEW - PUBLIC HEARING

235 BILL VAN VACTOR, LANE COUNTY: Submits and summarizes written testimony in opposition to HB 2362 (EXHIBIT D). Subsequent to the testimony on behalf of Lane County, the Executive Director of the Lane County Housing Authority, Chris Todis, asked an opinion of our office as to whether or not the bill could potentially affect the decisions his agency makes with regard to tenants in the low income housing projects that he manages. I said it probably would apply. His immediate concern is that he already has two processes he must comply with, one under federal law and the second under state law. The purpose of this testimony is solely to request that if it looks like HB 2362 is going to proceed and become law that an additional exception be inserted into the bill so the Housing Authority does not have to follow three different processes in the event of a legal challenge should there be a termination of a tenancy or some disagreement.

255 CHAIR BAUM: It's the Chair's point of view that it probably will never get that far. But we'll see.

HB 2354 - WRONGFUL DEATH, PUBLIC HEARING

260 LAWRENCE WOSSROCK, OREGON TRIAL LAWYERS ASSOCIATION: Mr. Myer mentioned that it was rather indefinite as to whether you're going to graft discovery onto the bill as we thought it was before the Eldrich case, whose discovery are you talking about? So we've attempted to address that with the amendment. The amendment indicates that discovery is to be made by the person represented or a person for whose benefit the action might be brought if the person is not the wrongdoer. As you

probably know, discovery is in just about every aspect of tort law now. It's in the statutes when it comes to medical malpractice cases; it's two years from the date of the injurious action or two years from the date that the negligence should have been discovered or was known. Right now it doesn't apply to wrongful death cases. After the Eldrich case it is now possible that you can lose your claim for wrongful death before you die because the statute says that the statute of limitations starts to run, not from the date of death, but from the occurrence of the injury causing death. Sometimes that's immediate in the case of an auto accident. But in the case of exposure to toxins, it may be more than three years until death ultimately results. It's now possible in face of Eldrich to lose the claim before the future decedent dies and to remedy that we think that the statute of limitations should run when the people that benefit from the lawsuit reasonably would discover that there is a claim. That's the purpose of it. It's the shortest statute of ultimate repose on the books. You have five years after an injurious accident in a medical malpractice case. On other sorts of general negligence cases we have a ten-year statute of ultimate repose. In this case you have a three-year statute. That's our proposal. People shouldn't lose their claim before they even know they have one. That's what the state of the law is right now.

333 CHARLIE WILLIAMSON, OREGON TRIAL LAWYERS ASSOCIATION: At the initial hearing on this the objections to the bill from the OADC were that the discovery rule is just too indefinite. You can't pin it down and it was unclear as to who would be the person to discover it. We tried to address those issues in the amendments the best we could. We gave the OADC the broadest possible group to discover it. If any beneficiary or their personal representative discover it the amendment was drafted in the favor of the defense. Secondly, we put in that there would be an absolute three-year cap; you wouldn't have people discovering things long ago after the three-year statute of limitations which is in essence what it is now but this would say that the discovery would not extend that three years. We tried to address their problems. I have conducted some negotiations with Mr. Hamilton from the ODAC to try to work out something that's agreeable to everybody, but essentially the ODAC does not like the discovery rule and would not agree to any proposal.

355 REP. MANNIX: Was there some prior longstanding interpretation where we had cases decided or was this a turnaround?

362 WOSSROCK: There's two cases and I submitted a memorandum last time I testified before you. They were Court of Appeal cases, Repp v. Haun, and Shaunnesy v. (inaudible), both of which held that the doctrine of discovery applied in wrongful death cases. When the Supreme Court decided the Eldrich case which changed all of this, for reasons that I can't fully understand, they never even mentioned the two Court of Appeal cases that I just cited.

370 REP. MANNIX: I have your memo here and you do have those cases mentioned.

371 WOSSROCK: That was what we thought was the law until Eldrich came down. The Supreme Court doesn't often comment about Court of Appeals cases.

380 SCOTT MEYER, OREGON ASSOCIATION OF DEFENSE COUNSEL: I have to disagree about the state of the law and what everybody thought the law was, based on these Court of Appeals decisions and was changed by

Eldrich. Let's go back to 1967 when the statute was enacted. Quoting from the Eldrich opinion, cited at 307 OR 500, 1989, p. 504 , where the opinion discusses the legislative history of the statute of limitations, the wrongful death case. At that time, it changed it from two years from the date of death to three years from the date of injury. That's what they did in 1967, the statute that we're talking about amending here. "Senator Cook at the Senate Judiciary Committee hearing on May 15, 1967, noted that a person could die one day short of the expiration of the three-year period and that the right to an action could be lost the next day. Rep. Carson, sponsor of the bill and who testified at the Senate committee hearing, agreed that such a result was arbitrary, but stated that the House Judiciary Committee was of the opinion that a date certain was needed and that three years was a reasonable choice." So the legislature knew in 1967 that the statute could run on a cause of action before death and they decided that even though that's the case we need a date certain. That's the position of OADC, the date certain. Right now we have a simple, workable statute with a date certain and we are encouraging the committee not to change it to make it more complicated. The amendment addresses one of our concerns. One of the things I raised last time I spoke before the committee was the fact that the original bill doesn't say to whom the discovery rule applies. Is it the decedent, the personal representative, or the beneficiaries of the estate? They have solved that with the amendment by saying to whom it applies -- anybody, either the personal representative, the decedent, or the beneficiaries. But it doesn't solve the basic problem of applying the discovery rule to these individuals. And in fact when you see this in print, when you see that amendment, it becomes apparent how difficult this is going to be. For example, you apply that discovery rule to the decedent. The decedent's dead. We cannot ask her what she knew nor can you ask her facts from which you can infer what she should have known. It's very difficult to apply it to the decedent. So if you apply it to a personal representative, say the decedent's spouse who's appointed six or eight months after the death, and you ask that person what the decedent knew at a given time or what the decedent should have known. Immediately several legal questions come to mind. Do you put that personal representative in the shoes of the decedent or do you hold that personal representative to the standard of a reasonable personal representative? If you do that, what do you do with corporate fiduciary representatives, like banks who are appointed personal representatives? #1, who do you ask, "should have known"? You're talking about a corporation, a bank.

TAPE 88, SIDE A

007 REP. MANNIX: I'm picking up on your point. It seems to me it's going to be what a person in the circumstances of that person reasonably should have known. Since you're asking that question, I think the answer to me is pretty clear what the answer is. I would think the judges will interpret those kinds of points. I would prefer to have you address the broader philosophical issue as to would the amendment to the bill, the bill says basically the statute of repose would be three years after the death of the decedent but it still allows three years to run from an earlier date if it should have been discovered, focusing on the injury event itself. So if you have someone who suffers some sort of complications from a particular injury but they linger we're not talking 20 years or 10 years, we're talking three years from when that injury occurred. But do you really have hard case scenarios where it's going to be all that difficult to talk about when someone reasonably should have discovered something?

022 MEYER: The question would be, why do you think the personal representative should step into the shoes of the decedent? That's not in the statute anywhere. And what you've done is basically described the case like the Court of Appeals would do. All I'm saying is the Court of Appeals will have to decide this and it's going to cause more litigation and more uncertainty because we don't know specific answers to those questions like what standard these people are going to be held to. For example, the only time the discovery rule has ever been applied before is to an injured person. Now we're expanding it to dead people and personal representatives and we don't know the parameters as to how the rule's going to apply.

037 REP. MANNIX: Under the current law, within three years after the occurrence of the injury causing the death of the decedent, it might be that no one but the decedent knew when the injury occurred. We find the body in the woods a year later. But if I took your argument, I could apply it to current law and say the person died and he's not available to ask. It seems to me we could carry this to nonsensical extremes. There's always going to be difficult scenarios for any kind of statute of limitations type of bill. Haven't they tried to deal with other reasonable kinds of concerns that might arise?

045 MEYER: Yes, and I'll address that. Let me just address what you just said, that there's always going to be hard cases. But not always, not when you've got a date certain like the statute we've got -- three years from the date of injury causing the death. It's simple; it's easy; there's nothing to litigate about it. Any attorney in any case can figure it out pretty simply. The new amended rule is going to result in Court of Appeals interpretations.

057 REP. MANNIX: We did this on sex abuse cases. We had testimony from people who had blacked out the event when they were minors and then after they become adults and they were dysfunctional in their marriage or their interpersonal relationships they went into counseling or they sought psychiatric care. During that process, certainly this curtain which had rung down on their abuse situation was pulled aside and they discovered that they were abused when they were younger and had blacked it out and this was the cause of their injury. We passed a bill that said that we're going to allow that as an alternative triggering point, an alternative in recognition that there are circumstances where one can blank out and where justice would be denied. Granted, that had to do with intentional wrongdoing because we're talking about an abusive person and maybe we'll be a little tougher or easier in terms of standards of getting it to the courts. My question is, aren't we now finding over time with medical science with the complications that are out there and with the advance of medical science that we're able to discern better and better what may have been, we'll discover later what was the cause of death, whereas with today's science we might not have. So this bill would give a little more flexibility to allow us to recognize that tomorrow's science may give us a better answer?

080 MEYER: There's no question that it would. But when you do that you're opening up claims that would have been expired within the current statute and these lawsuits may be brought several years after death, now under the amendment up to three years. That's a long time to decide the cause of death or when an injury occurred that resulted in death. About your question about the amendment, the three-year part, we like that, if you're going to apply a discovery rule to a death case it ought to have some point such as three years after the death as a cap. That's less

than the ten-year statute of ultimate repose that would have applied to the original bill. So that's a good part of the amendment, if you're going to go with the discovery rule. Our point is that the discovery rule has not been a very workable rule even applied to injury cases when we apply it to an injured person who can testify and give a deposition and tell us what she knows or facts from which we can affirm what she should know. It hasn't worked well there. It's difficult. Now it's going to be even more difficult because we've got people who are not the injured person; we've got people who are no longer available to give us any information and we don't have the clear parameters as to how the rule applies to them.

107 REP. BELL: I'm not an attorney so you'll have to be patient with me. In order to have a wrongful death suit, you have to have a dead person, don't you?

110 MEYER: Correct.

111 REP. BELL: If a person is injured and it's the kind of injury that it takes four years for them to die, then tell me what your suggestion is. Does that mean that they can have no wrongful death suit?

115 MEYER: What happens is if a person is injured, during that four-year period I assume they know they're injured?

118 REP. BELL: Let's go either way.

119 MEYER: If they know they're injured, they file a lawsuit for their injuries and then if they die while that suit is pending it automatically converts into a wrongful death claim. If they have no idea that they're injured, then they've got three years from the date of injury and if it goes further than that then they've lost their claim.

125 REP. BELL: Let me give you a real life situation. My mother was hit by a car, sustained real bad injuries and was in the hospital for some time. She chose not to sue because the individual that hit her was a young person with no insurance and lived around the corner from her. If she were to have died from that some years later, the rest of the family might have felt differently. We might have thought she was too easy on this person and might have wanted to do something about it. I can see where maybe there wouldn't be a suit in progress and maybe it was more than four years. Under your suggestion, I can see that a family would have no recourse.

135 MEYER: That's right. The family would be bound by the decedent's wishes while she was alive because she gave up her right to sue by letting the statute expire. The family's bound by that.

140 REP. BELL: I didn't tell you I guess this mother was a real optimistic person who didn't think that she was going to die or had that faith that she was going to make it through while everybody else was thinking this is more serious than you think it is.

142 MEYER: The only other recourse would be to have a conservator appointed and go ahead and file the suit on her behalf. We're hypothesizing in this kind of case. I never knew this statute ought to be one to try to correct a problem like that.

150 REP. BELL: That's my point. I think you have this great idea about the date and have a nice little package that's real convenient for a

lawyer but I don't think that fits people. No matter how good the package is, the people aren't going to be able to use it.

157 REP. BAUM: We have an opportunity to look at our own legislative history much like a court looking back at what a previous opinion has said on the same subject. We have to be convinced by a compelling argument that it's time to change it.

160 REP. MANNIX: I have to be consistent about one thing. I have always espoused the notion that we get to do whatever we darn well please in terms of what's good public policy at any given time and we can decide that we want to specifically overrule a judicial decision, we can decide we want to make law. I've made a big deal when people have said, "You can't do that; the courts said differently!" I say, "Well, that's what the courts said in interpreting the law; we get to decide what the law is unless it's a constitutional issue". I respect the ebb and flow. I am interested in maintaining some predictability in the litigation process. I don't want to see us turning around every day and deciding we're going to pass another bill because the court did one decision that we didn't like. At some point, we've got to have some trend and sometimes the Legislature may do things that I may not personally agree with in terms of changing the direction of things. I'm still open to the notion here but I'm interested in the policy debate about access to the justice system, predictability in the justice system, and fairness to everybody. That's the tough part.

198 WOSSROCK: Would it be O.K. if I responded to a couple of comments of Rep. Bell and share mine? When it comes to predictability Mr. Meyer mentions that the difficult thing to start a statute from a date of discovery when it's hard to determine when that is, I don't think that really changes anything. I think we've got a hard problem before lawyers and litigants right now. If it's three years from the occurrence of the injury causing death, if you're talking about toxic exposure or misdiagnosis of cancer, or even the misdiagnosis of any sort of potentially fatal disease, when the occurrence of the injury causing death occurred is already a problem. I'm not suggesting we need to change the whole statute, but we're already dealing with the problem and in my mind that's what lawyers, courts, juries, and judges are for, to try to decide some of those tough problems. When the occurrence of the injury causes death and the failure to diagnose cancer, is it the second after the misdiagnosis or exposure to toxic? Is it the second after the toxic exposure or is it the point in which the victim becomes so exposed that they'll now lose the chance of survival they once had. Or in the misdiagnosis of cancer, the cancer advances to the point where they lose the chance of 50 percent survival or greater? It's a hard decision to make already. I don't think to put the discovery rule on top of that changes anything that's already existing in the law. We did have this rule undisputed for nine years until the Eldrich case came along. It was understood by everybody in this state, I think, that discovery applied to death cases.

222 REP. MANNIX: The two extremes of predictability here would be to say (a) you never have access to the courts; that's very predictable, or (b) you always have access to the courts, no limitations whatsoever. All of you are trying to guide us as to where we fall in between there.

230 WOSSROCK: We do have a three-year cutoff with this statute; as Mr. Meyer pointed out, it is a ultimate statute of repose here. It is the shortest on the books. No one will be able to bring a case beyond three years. The injustice that we're asking you to remedy is to make sure

that people don't lose their claim for wrongful death before they die. In the example that Rep. Bell put forth, I think some defense lawyers would disagree with Mr. Meyer that if you file a case within two years or more than four years from the date of death as an injury action and then the person dies before that action is resolved but more than three years from the occurrence of the injury, I think you're going to have a hard time under current law filing a death case. They're going to say that you missed the time limit; you missed the three years. Just because you had a former injury accident pending, because the courts have long said that wrongful death cases are a separate and distinct cause of action. I think you're going to have a hard time converting an injury action into a wrongful death case unless you've complied with the three-year statute. Again, you have the reality; you can lose your claim before you knew you had it, and before you died in some instances. Maybe even if you knew you had the claim. That's what we're asking you to remedy here.

247 REP. CLARK: The Legislature could fiat that the wrongful death action is not separate from the personal injury action. The personal injury could be rolled over, could it not?

250 WOSSROCK: It could.

255 REP. CLARK: Would that be an easier way to get at the same issue?

256 WOSSROCK: Except that one of the reasons that the wrongful death claims are three years rather than two. You're talking about a situation where the case was originally filed while the person's alive, the person then expires ...

260 REP. CLARK: And you've been told in the past by the courts if you haven't filed your wrongful death case, you may be out of luck. What if we provided by statute ....No, you're not out of luck. If you file the personal injury case and the person dies, that filing of the personal injury case is sufficient to hold the statute of limitations ...

265 WOSSROCK: That might in the particular set of facts, Rep. Clark. But the other set of facts, let's assume there's a toxic exposure. No one really knows what caused Mr. Jones to become prematurely senile and die until he had an autopsy. That autopsy was more than three years later and found out he was full of some foreign substance.

268 REP. CLARK: I recognize it wouldn't cover everything, but it seems to me it might need to be considered along with this issue.

272 MEYER: It's my understanding and I can't give you the case or the statutes that the rollover occurs now, but I was operating under the assumption that if you've already filed a personal injury action then you're protected in your later wrongful death action.

275 REP. CLARK: It's not clear. It ought to at least be clear what the rule is.

280 MEYER: We agree, and I think that could be remedied.

283 REP. BAUM: We will contemplate a work session on this bill in the future.

290 REP. CLARK: I would ask for Counsel's assistance. The issue that I brought up just a minute ago, if you file a personal injury action and

then later on the person dies whether that does or does not hold the statute of limitations. Mr. Wossrock seemed to think that it does not, and that we may be out of luck there. The courts seem to have said that you can't roll that over to a wrongful death case. Mr. Meyer thought that might be wrong, so if we can get some clarification on that before the next work session. If it's not clear, then I'm going to propose an amendment that clarifies it one way or another.

The committee takes a brief recess.

300 CHAIR BAUM: Adjourns the meeting at 4:00 p.m.

Submitted by: Reviewed by:

Carol Wilder Greg Chaimov Assistant Counsel

EXHIBIT LOG:

A -Testimony on SB 372 - Alden B. Wolfe, Legal Investigator - 2 pages. B-Testimony on SB 372 - Barbara Stoeffler, MADD - 1 page. C -Testimony on SB 372 - Bill Cross, Oregon Restaurant Association - 2 pages. D -Testimony on HB 2362 - William Van Vactor - 1 page. E -Testimony on HB 2362 - Kent Thurber - 2 pages.