

HOUSE COMMITTEE ON JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

May 6, 1991 Hearing Room 357 1:00 p.m. Tapes 89 - 91
MEMBERS PRESENT: Rep. Ray Baum, Chair Rep. Marie Bell Rep. Kelly
Clarlc Rep. Jim Edmunson Rep. Rod Johnson Rep. Kevin Mannix Rep. Randy
Miller MEMBER EXCUSED: Rep. Tom Brian VISITING MEMBER: Rep. Bill
Markham STAFF PRESENT: Jim Dole, Committee Counsel Jeff Steve,
Committee Assistant Holly Blanchard, Transcriber MEASURES HEARD: SB
1006, PH/WS HB 2843, PH/WS HB 3101, PH SB 61, PH/WS

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 89, SIDE A 004 CHAIR BAUM: Opens Subcommittee on Civil Law and
Judicial Administration at 1:04 p.m. SB 1006 - PUBLIC HEARING

018 JIM DOLE, COMMITTEE COUNSEL (EXHIBIT A): Summarizes SB 1006 which
would provide that Attorney General and deputies or assistants may
provide volunteer or pro bono legal services on their own time and
expense. 020 RON TALNEY, PRO BONO COMMITTEE, OREGON STATE BAR:
Testifies in support of SB 1006. It brings the Attorney General's Of
fice in line with other government attorneys with similar entitlement.
It would be a significant contribution to the pro bono programs. House
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036 MICHAEL KEENEY, EXECUTIVE DIRECTOR, MARION-POLK LEGAL AID
SERVICE: Testifies in support of SB 1006 which will be a great boost to
the pro bono options in our community. 040 JACK LANDAU, DEPUTY
ATTORNEY GENERAL, DEPARTMENT OF JUSTICE: Testifies in support of SB 1006
because it would remove any legal impediments that prevent Assistant
Attorney Generals from assisting in pro bono work. It also sends an
appropriate signal to the Oregon State Bar that private and public
lawyers should be using their resources to support pro bono activities.

HB 2843 - PUBLIC HEARING 058 DOLE: Summarizes HB 2843 which concerns
liability exemption for retired physicians performing voluntary medical
service. 077 REPRESENTATIVE BILL MARKHAM, DISTRICT 46: Testifies in
favor of HB 2843. Refers to a similar law adopted by the Louisiana
legislature. 124 TOM COONEY, GENERAL COUNSEL, OREGON MEDICAL
ASSOCIATION (EXHIBIT B): Testifies in favor of HB 2843 and submits
proposed amendments (EXHIBIT B). The bill as written grants a partial
immunity for only gross negligence which would not sufficiently protect
a physician to practice without insurance. Other problem is the
vicarious liability of those practicing around the physician. These
proposed amendments address those problems (EXHIBIT B). HB 2843 would
only refer to out-patient care since Oregon hospitals require physician
malpractice insurance. 177 CHAIR BAUM: Section 1 of your proposed
amendments will take care of the vicarious responsibility issue?
185 COONEY: Yes. 192 CHAIR BAUM: Your proposed amendments for
Section 3 would limit these physicians only to out-patient care?
195 COONEY: That's the way the bill would be now. I didn't include a
section suspending the hospital by-laws requiring insurance. This would
only refer to an out-patient setting. 198 REP. JOHNSON: Refers to
county health department noted in Section 3 of the proposed amendment.
Would that make these retired physicians agents of the State of Oregon
if they treated patients who are not referred to them by the county
health department? 204 COONEY: No. That's why I say they would have
to be referred through the county because otherwise I don't think they

would have that protection. Might want to say, "shall accept only referrals from the county health officer.'" 209 REP. JOHNSON: Or, if they work on a patient referred from the county health department, then the physician has this agency status.

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214 REP. MARKHAM: They wouldn't want that other part-it's what they're trying to stay away from.

219 REP. JOHNSON: Section 1 already protects them somewhat by limiting them to wanton misconduct. Section 3 gives them another layer of protection if they become agents of the State of Oregon--if they work on referrals from the health department.

223 REP. MARKHAM: Understands the words "gross negligence" and "wanton misconduct" can be used to mean the same thing. A retired doctor is not going to gamble his retirement years if he thinks he can get sued.

233 REP. JOHNSON: If that's the case, then most retired doctors would not volunteer their service except on referrals. But that doesn't mean the bill needs to be crafted so they can only work on referrals.

245 REP. EDMUNSON: Should the patient be notified of this and consent to be treated under these circumstances?

255 COONEY: Yes, that's fair.

CHAIR BAUM: Recesses the public hearing on HB 2843.

SB 1006 WORK SESSION

280 MOTION, REP. EDMUNSON: Moves SB 1006 to the Full Committee with a "do pass" recommendation. 290 VOTE: 5-0

AYE: Edmunson, Johnson, Mannix, Miller, Baum NO: None EXCUSED: Brian, Clark, Bell

Motion passes, Rep. Miller to carry.

HB 2843 - PUBLIC HEARING

327 REP. MARKHAM: This bill would allow retired physicians to do a good turn for society.

334 REP. MANNIX: Isn't wanton misconduct just a notch below intentional misconduct?

337 COONEY: Yes, but so is gross negligence. In Williamson v. McKenna, the courts said gross negligence and wanton misconduct are synonymous. Use of "wanton misconduct" is used to eliminate any misconception.

344 REP. MANNIX: Suggests a general, statutory provision that says anywhere "gross negligence" is used it means the same as "wanton misconduct." House Committee on Judiciary May 6, 1991 - Page 4

347 COONEY: You could, but that's what the case said. 370 MARKHAM:
Submits EXHIBITS C (1-4) for committee use and referral. 382 CHARLES
WILLIAMSON, OTLA (EXHIBIT D): We oppose HB 2843. Realize the bill is
well-intended but don't feel poor people in Oregon should be forced to
give up their legal rights to receive medical care. Think the original
bill is unconstitutional. Suggests the public body providing the medical
service could purchase malpractice coverage for the volunteer doctors.
TAPE 90, SIDE A 004 REP. CLARK: How is that proposal any different from
SB 833 which the OTLA opposes? 010 WILLIAMSON: Public bodies referred
to have the Tort Claims Act. SB 833 isn't needed to extend it to a tort
claims limit. We oppose having any hospital, clinic, doctors or other
entity in the state set up a program and say they have the tort claims
limits too--that's what we oppose. Discusses the notification issue. 032
CHAIR BAUM: What if this addressed just out-patient care? No major
surgeries, just minor office procedures. 040 WILLIAMSON: We would be
opposed as a matter of principle. There are quite serious operations
being done on an out-patient basis. This is a good deal for the
hospitals which should cover these physicians. No liability just doesn't
make sense. The root of the problem is in the insurance industry and not
in the tort system. Malpractice premiums have been substantially reduced
by about 30 percent. Refers to the malpractice premium chart, Page 3,
(EXHIBIT D).

094 CHAIR BAUM: Discusses chart and loss ratio. 117 WILLIAMSON: The
insurance companies are doing well right now--they're making a profit.
There have been increased losses and will research it. 139 REP. MILLER:
What is a "runaway" case? 140 WILLIAMSON: Generally it means a jury has
given more than a plaintiff was entitled to. 151 REP. CLARK: Discusses
the idea of a piece-meal revisitation of the entire tort liability
question. 163 WILLIAMSON: We don't think it needs to be revisited. 184
REP. CLARK: The only check on the system now is individual attorney
judgement. 221 GREG SMITH, ATTORNEY, OTLA: Addresses the issue of
lawyer representation of injured patients and costs involved.
277 REP. JOHNSON: The check on the system is what it costs the
lawyers to take on a medical

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malpractice case? 286 SMITH: It's an economic one and the validity and
merits of a case. 303 REP. CLARK: Discusses the "check" issue on the
system. 318 WILLIAMSON: Discusses costs of trying these cases in court.
340 REP. MANNIX: Ninety-eight percent of these cases don't go to trial,
right? 346 SMITH: That's not an accurate figure. It's much lower than
car accident cases that settle. 352 REP. MANNIX: Then what is the
percentage of medical malpractice cases that actually get to trial? 354
SMITH: About 10 percent or more get to trial. 357 REP. MANNIX:
Discusses number of cases filed and those tried. There's a tremendous
value to the threat of a lawsuit and the threat of a trial. Those values
are paid out because of fear of the litigation process. 386 WILLIAMSON:
Refers to OB GYN cases. Not looking at a lot of cases going to trial or
settling before trial. TAPE 89, SIDE B 005 REP. MANNIX: The choice here
seems to be between getting some physicians to volunteer their medical
services for free or not having their services at all. Need to weigh no
services versus the cost to society. 021 WILLIAMSON: Understands but
feels it would be simple for hospitals and clinics to pay for volunteer
doctors' insurance to provide the services.

030 REP. BELL: Think this bill is exciting. Malpractice insurance has
scared the seat of human kindness right out of our medical people.

Raises not)fication issue. 047 WILLIAMSON: That makes a small difference because a not)fication waiver would most likely be extracted under duress. 051 REP. BELL: That would take away the opportunity of choice on the part of the patient. 062 WILLIAMSON: We have no problem if the doctor wants to render the service without insurance. But the service shouldn't be rendered without liability coverage. 087 REP. BELL: What if the type of facilities is described in the bill? 094 WILLIAMSON: We feel the resources should be made use of wherever possible.

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100 CHAIR BAUM: The bill as drafted has the practical affect of only allowing out-patient treatment because hospitals would allow what's being proposed without insurance coverage. 106 REP. MILLER: Is signing a waiver for a physician any different than signing a statement that would give a lawyer about 40 percent of whatever is recovered? 108 WILLIAMSON: Yes. 109 REP. MILLER: Confirms that 80 percent of medical malpractice cases turn out to be losers. 116 SMITH: Understands from reading national trial lawyers magazines that of cases that aren't settled and are tried to a jury verdict, 80 percent across the country result in defense verdicts in favor of the medical provider. 120 REP. MILLER: Under the definition of verdicts in favor of the provider, does that mean that the plaintiffs walk out with zero or less than requested? 124 SMITH: Understands it to be zero. Discusses the proposed amendments under Section 1. That is such a blanket grant of immunity. Discusses standard of reasonable care required by all Oregon physicians. This bill will create a second class on the part of physicians and patients. Doesn't like use of term "wanton misconduct.~ Suggests a tort claims cap to limit exposure of these retired physicians. Also wants competency training for them. 178 WILLIAMSON: We'd have no objection to the Louisiana law described by Representative Markham where the state would indemnify these physicians or pay for their malpractice coverage. 181 REP. CLARK: Is your argument on unconstitutionality the same as before? 184 WILLIAMSON: Trial by jury, privilege and immunities. 189 REP. CLARK: Has that issue been litigated? 199 WILLIAMSON: In Oregon it has not been litigated. In Washington it was found unconstitutional. Don't believe there are any previous opinions about putting the cap on tort claims at zero. 212 DOLE: Our research indicates it's up in the air in Oregon. 219 REP. CLARK: Do either of you know what lines 10-11 mean? 222 COONEY: Knows that the physicians must advise the Board of Medical Examiners that they're going to retire. 237 REP. CLARK: Is there a continuing education requirement for physicians as there is for lawyers? 238 COONEY: In the Medical Association there is. -

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246 R1; P. CLARK: Discusses at what point a retired physician becomes outdated. 252 COONEY: This needs some insight from the Board of Medical Examiners. By rule or regulation, they could require some minimal continuing medical education. 262 REP. MANNIX: Suggests adding language to Section 3 concerning appropriate medical education. 272 COONEY: Think the Board will want to pass regulations that would apply to the retired physicians so it's supervised. 275 REP. BELL: No other states have laws similar to this? 278 WILLIAMSON: Not that I'm aware of. 281 REP. BELL: Quite certain the State of Utah has something similar.

287 CHAIR BAUM: Haven't done a nationwide search? 305 WILLIAMSON: That's correct. 309 REP. EDMUNSON: Discusses options. Wants more information. 332 REP. MANNIX: Believe this is a narrow issue with a narrow solution. Not interested in reforming the Tort Reform Act. Want to know what's happening elsewhere. 337 Rh P. CLARK: The constitutional issue was whether it would unconstitutionally limit the right to trial by jury. 349 RFP. MANNIX: That was dealt with last session.

374 REP. CLARK: Needs to see some amendments, some minimum CME requirement. HB 2843 - WORX SESSION 388 MOTION, REP. MANNIX: Moves the proposed amendments from the Oregon Medical Association (EXHIBIT B) with the following changes: Line 3, change "the retired physician" to "a retired physician". Line 4, remove the "e" at the end of the word "therefore". Add the following language to Section 3: "The county health officer may require evidence of appropriate continuing medical education as a condition to allowing or continuing the registration." TAPE 90, SIDE B There being no objection, the amendments are so adopted. 006 MOTION, REP. MANNIX: Moves the OMA amendments as amended to HB 2843.

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There being no objection, they are so adopted.

013 REP. BELL: Think the word "shall" should be replaced with "may" in Section 3 of the OMA amendments.

017 MOTION, REP. MANNIX: Moves to change the "shall" to "may".

020 CHAIR BAUM: The OMA suggested the word "only" be added after the word "accept".

026 REP. MANNIX: Withdraws motion to change the "shall" to "may" and instead move to add the word "only" before the word "accept".

041 CHAIR BAUM: Right now the bill would require the physician to work for the county health office. 043 REP. BELL: That will defeat the whole purpose of the bill. 047 CHAIR BAUM: This is in line with your amendments? 051 COONEY: I thought "accept only referrals" should be used. Perhaps it could say, "may accept only referrals". 057 REP. BELL: The goal here is to get more care to more people as safely as possible. Tying them into the referral means someone from the agency will have to see them. There's already a backlog. 066 COONEY: Unless there's the tie-in to the state or county agency, we can't get the protection of the Tort Claims Act. 078 REP. MANNIX: Restates the motion with, "to the extent the physician treats any person upon a referral from the county health officer, the physician shall be deemed an agent of the state." In either event, the physician would have to register but accepting referrals would tie in with the state.

088 REP. BELL: Would like "shall accept" better than "shall only accept". 091 MOTION, REP. MANNIX: Moves to change the provisions in Section 3, line 3 to read, "and, to the extent the physician treats any person upon referral from said county health officer, shall be deemed an agent of the State". 112 REP. BELL: Discusses percentage of cases. Wants to leave a window for treatment. 117 REP. MANNIX: This is not dealing with the load of business. 132 CHAIR BAUM: Plans to bring HB 2843 back for another work session.

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137 REP. EDMUNSON: Suggests consumer protection language.

154 REP. CLARK: Suggests language concerning certification by OMA for continuing education under the liability limits in Section 1.

SB 61- WORK SESSION

171 DOLE: Summarizes SB 61 and the proposed amendments, SB 61-A2 (EXHIBIT E). 190MOTION, REP. MILLER: Moves the SB 61-A2 amendments.

191 There being no objection, the amendments are so adopted.

192 MOTION, REP. MILLER: Moves SB 61 as amended to the Full Committee with a "do pass" recommendation. 195 DOLE: Refers to additional amendments by Senator Kitzhaber and the Oregon Health Division. It became evident that request is not within the "relating to" clause in the current version of SB 61. 216 VOTE: 7-0

AYE: Clark, Edmunson, Johnson, Mannix, Miller, Bell, Baum NO: None
EXCUSED: Brian

Motion passes, Rep. Bell to carry.

HB 3101 - PUBLIC HEARING

246 DOLE: Summarizes HB 3101.

262 DARYL GARRETTSON, ASSISTANT LEGAL COUNSEL, MARION COUNTY (EXHIBIT F,): Testifies in favor of HB 3101 which puts Oregon law back where it was prior to the 1990 Supreme Court decision. It reinstates a prior Court of Appeals opinion, Jackson v. Olson. Refers to written testimony (EXHIBIT F).

TAPE 91, SIDE A

001 REP. MANNIX: What you are saying is the Supreme Court decision has said that there can be a cause of action against the driver of the emergency vehicle if a third person who's being pursued violates the law and injures someone. In effect, the government is being made liable for the actions of this third person. HB 3101 would say government is not liable for those actions unless there is some affirmative act beyond a pursuit or its continuation that the government did to cause this accident.

008 GARRETTSON: That's correct. _ Ihcee minutes contain materials which paraphrase and/or summarize statements de during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceeding., please refer to the tapes. House Committee on Judiciary May 6, 1991 - Page 10

024 ALVIN ALLEN, MARION COUNTY SHERIFF'S OFFICE AND OREGON SHERIFFS' ASSOCIATION: We support HB 3101. 029 TOM MASON, SERGEANT, CITY OF EUGENE (EXHIBITS G & H): Testifies in support of HB 3101. Reads written testimony (EXHIBIT G). Refers to graphic display of number of pursuits (EXHIBIT H) which has declined in the City of Eugene. 068 REP. MANNIX: Raises issue of civil liability and police understanding of what it is. 073 MASON: The officers understand the parameters for operating their own vehicle but now the burden has been placed on them to be responsible for the actions of others. 078REP. MANNIX:

Wouldn't it be fair to think someone who's evading a police officer might do other harmful things? 081 MASON: Yes.

083 REP. MANNIX: It's a Catch 22 situation- dare not maintain pursuit because that person might endanger someone else.

092 CHAIR BAUM: Closes Subcommittee on Civil Law and Judicial Administration at 3:03 p.m.

Submitted by: Reviewed by: Holly Blanchard David Harrell
Transcriber Office Manager

EXHIBITS LOG:

A - Staff Measure Summary/Voting Chart, SB 1006, Committee Counsel, 2 pages
B - Proposed Amendments, HB 2843, Oregon Medical Assoc., 1 page
C1 - Letter, HB 2843, Rep. Bill Markham, 1 page
C2 - Memo from Office of Legislative Counsel, HB 2843, Rep. Bill Markham, 1 page
C3 - Article, HB 2843, Rep. Bill Markham, 12 pages
C4 - Article, HB 2843, Rep. Bill Markham, 12 pages
D - Written testimony, HB 2843, Oregon Medical Assoc., 4 pages
E - Proposed Amendments, SB 61-A2, Committee Counsel, 1 page
F - Written testimony, HB 3101, Daryl Garrettson, Marion County, 6 pages
G - Written testimony, HB 3101, Public Safety, City of Eugene, 2 pages
H - Graphic Chart, HB 3101, Public Safety, City of Eugene, 1 page _