

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 20, 1991Hearing Room 357 1:00 p.m.Tapes 107 - 109

MEMBERS PRESENT:Rep. Ray Baum, Chair Rep. Marie Bell Rep. Tom Brian
Rep. Kelly Clark Rep. Jim Edmunson Rep. Rod Johnson Rep. Kevin Mannix
Rep. Randy Miller

VISITING MEMBER:Rep. Bill Markham

STAFF PRESENT: Jim Dole, Committee Counsel Jeff Steve,
Committee Assistant Holly Blanchard, Transcriber

MEASURES HEARD:HB 2732 - Tort Liability (PH) HB 3520 - Tort Claims
Against Officers (PH) HB 2843 - Retired Physicians (PH/WS)

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TAPE 107, SIDE A

004 CHAIR BAUM: Opens Subcommittee on Civil Law and Judicial Administration at 1:35 p.m.

HB 2732 - PUBLIC HEARING

010 JIM DOLE, COMMITTEE COUNSEL (EXHIBIT J): Summarizes HB 2732 which limits tort liability of certain charitable organizations. Refers to statutes from three states that provide this kind of liability limitation and ORS 65.369 which limits the liability of directors of certain charitable nonprofit corporations (EXHIBIT J).

040 DENNIS MILLS, Ph.D, REGIONAL DIRECTOR, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL (EXHIBIT A): Testifies in support of HB 2732 and submits proposed amendment (EXHIBIT A). Massachusetts, South Carolina and Texas have similar legislation unanimously upheld by their Supreme Courts. Explains proposed amendments.

065 DAN McCULLOCH, SEVENTH-DAY ADVENTIST AND OREGON FEDERATION OF INDEPENDENT SCHOOLS: Testifies in support of HB 2732 and inclusion of the proposed amendments defining "agent" and including volunteers in EXHIBIT A.

077 GARLAND ROGERS, ASSEMBLIES OF GOD (EXHIBIT B): Testifies in support of HB 273 2. Reads written testimony.

138 WAYNE HOUSE, Th.D., J.D., WESTERN BAPTIST COLLEGE, SALEM (EXHIBIT C): Testifies in support of HB 2732 and suggests an amendment which includes volunteers as a category of agents within the meaning of the bill. Reads written testimony.

158 CHAIR BAUM: HB 2732 applies to all organizations that qualify under 501 (C)(3) status. Opens discussion concerning instances and situations HB 2732 would cover.

164 ROGERS: Gives example of an Assemblies of God Church that was sued for sexual misconduct. Discusses lawsuit.

183 HOUSE: Haven't had a similar situation but without liability limitation an action like this would put us out of business. Insurance costs are already straining our budget. Any additional increases would be difficult.

196 CHAIR BAUM: Have you been notified by your insurance company that these increases are coming?

198 HOUSE: No.

199 MILLS: Notes the Boy Scouts of America settled a \$12.24 million claim. That would bankrupt just about any organization. Most of our schools don't have more than \$1 million in coverage.

205 REP. CLARK: Discusses statement made that said our society and legislatures have been willing to engage in a trade-off for nonprofits, including churches, that provide certain services for the community. Hope the reason for not taking churches is a jurisdictional question and not related to services.

225 HOUSE: Would argue the jurisdictional issue. Justice Brennan used this particular terminology.

231 REP. CLARK: It is a very risky business to tie any kind of special favor to the activities of a nonprofit--especially a church.

243 HOUSE: The only reason that issue was mentioned was because of the Supreme Court decision that used that terminology.

251 REP. CLARK: Discusses nonprofit charities that should be separate.

260 REP. EDMUNSON: Always cautious with anecdotal testimony. Discusses the Boy Scout sex abuse case. Seems the only interest here is the amount of money for insurance and not the lives of the victims.

295 HOUSE: HB 2732 does not include the questions of gross negligence or intentional torts. This deals with simple negligence and not what's being referred to.

302 REP. EDMUNSON: Have a hard time seeing where a limitation of

damages is going to help you at all.

305 ROGERS: The insurance carrier for Teen Challenge Centers of Oregon dropped them because of potential liabilities.

319 REP. MANNIX: Have the churches looked at pooling their resources to seek coverage under a consolidated group plan?

324 MILLS: The Association of Christian Schools International does contract with T. Forest Jones to provide the best coverage possible.

331 REP. MANNIX: Do you have any information to share on estimated costs?

349 CHAIR BAUM: We need specific information on trends in insurance, incidents, etc. The more specifics you can provide the better.

377 REP. BELL: Concerned about the jury awards that far exceed a church's assets or insurance coverage. Is it likely that a jury would make an award above their coverage?

388 CHAIR BAUM: Only if the award involved punitive damages. Discusses awards for pain and suffering that can balloon pretty high.

TAPE 108, SIDE A

007 REP. MANNIX: Discusses types of issues relating to the bill for which more information is needed.

031 CHARLES WILLIAMSON, OREGON TRIAL LAWYERS' ASSOCIATION: Testifies in opposition to HB 2732. There's nothing in the bill that distinguishes activities that are for profit and those that are not. We would be glad to cooperate with an interim study to dig into insurance problems and determine if there would be savings from artificially limiting liability.

087 REP. MANNIX: Maybe this issue should be viewed in a broader manner. What about putting together a state-sponsored insurance fund for charitable organizations?

092 WILLIAMSON: There are a lot of bills that deal with limited liability. Refers to a joint underwriting agreement that allows the establishment of side risk pools for people who can't get insurance.

HB 2843 - PUBLIC HEARING

124 DOLE: Summarizes HB 2843 concerning retired physicians. The attempt to join HB 2843 into HB 2659 was not successful due to concerns with some conceptual amendments.

127 REP. MANNIX: These are two separate bills that may overlap but they deserve separate attention.

133 DOLE: Submits proposed amendments from committee discussion, EXHIBIT D.

140 REPRESENTATIVE BILL MARKHAM, DISTRICT 46: Testifies in support of

HB 284 3. Refers to the proposed amendments (EXHIBIT D) which reflect the concerns of the OMA.

152 JIM CARLSON, OREGON MEDICAL ASSOCIATION: Discusses the proposed amendments, EXHIBIT D.

181 REP. MANNIX: Any position on including doctors of naturopathy in this?

183 CARLSON: None.

184 REP. MANNIX: Do they have a program similar to the program of the Board of Medical Examiners for retired emeritus physicians?

185 CARLSON: Cannot answer that question.

190 REP. MARKHAM: Don't have any problem adding them onto this bill.

191 DELL ISHAM, OREGON ASSOCIATION OF NATUROPATHIC PHYSICIANS: Under the naturopathic law, don't believe there is a special category for retired physicians. Purpose of bill is to expand access of health care to indigent people and naturopathic physicians would like to participate. Suggests amendments to original bill; add "naturopathic physician" on line 8 and on line 11 add, "or the Board of Naturopathic Examiners."

206 REP. MANNIX: Concerned that Section 4 is not applied.

213 ISHAM: We don't have the same problem as the M.D.s because they must maintain the license and continuing education in order to practice. There is no emeritus status for naturopaths--either they're licensees or they are not.

229 CARLSON: What we are addressing here on the retired physicians side is a classification of retired physician. Think Section 3 addresses a fairly limited role for the retired physician.

253 REP. MANNIX: If the physician is cloaked with protection as an agent of the state, is it necessary to give protection for negligence?

258 CARLSON: Don't have an opinion on that.

281 REP. EDMUNSON: Understands the intent of HB 2843 is to limit the application of protection to retired physicians who are volunteering as public health doctors. Discusses proposed amendment (e) in EXHIBIT D.

300 REP. EDMUNSON: Uncomfortable changing the tort threshold because intentional acts (wanton misconduct) are not subject to the Tort Claims Act which limits liability of public agents and officers. Should the volunteer physicians be treated the same as employed staff physicians by the county health department?

343 CARLSON: Our legal counsel was concerned that these volunteer physicians would not have to purchase their own insurance coverage. That was the intent of the language in Section 3 of the proposed amendments (EXHIBIT D).

358 REP. MANNIX: Suggests liability options for the retired physician.

394 CHAIR BAUM: Is there a fiscal impact on this bill?

TAPE 107, SIDE B

006 CARLSON: Don't know if there's a substantial fiscal impact or not. Think it would be fairly minimal.

012 REP. MANNIX: The fiscal impact happens only if a volunteer does something.

016 CHAIR BAUM: Meant fiscal of any government entity.

021 MARKHAM: Would consider this a savings to the county because they wouldn't have to hire a regular practicing M.D.

023 CARLSON: The counties would be in control of any fiscal outlay on such a program.

027 MARKHAM: A large city might be able to make it under the same thing.

033 JACK LANDAU, OREGON ATTORNEY GENERAL'S OFFICE: The bill draft should not provide exemptions from the Tort Claims Act above and beyond those of ordinary state employees and officials.

057 PAUL SNIDER, ASSOCIATION OF OREGON COUNTIES: Makes sense that a local government can control its liability by deciding whether to hire such a physician.

065 DARYL GARRETTSON, ASSISTANT LEGAL COUNSEL, MARION COUNTY: Understands the bill to read that a county health officer can determine whether to participate. There would be a fiscal impact but it would have to be accepted by the county. As long as the option for coverage is up to the county, don't believe Marion County would object to the bill nor AOC.

083 CHARLES WILLIAMSON, OREGON TRIAL LAWYERS' ASSOCIATION: Refers to Section 2 of the proposed amendments (EXHIBIT D).

088 REP. MANNIX: Reviews discussion. Whatever government entity agreed to have the physician serve would be liable--effectively making the physician an employee of that entity without pay.

101 WILLIAMSON: Don't know a bill is required to do that. Don't have any objection to that.

105 CHAIR BAUM: There's some indication that if the broad tort limitation is covered, it may cover instances of gross negligence that occur.

114 REP. BELL: Raises concern about changing the direction of the bill.

122 CARLSON: The reason for the change in direction is to address the issue of the retired physician not having to purchase medical malpractice insurance coverage just to do some limited services. Working for the county will put them under insurance liability protection.

HB 2843 - WORK SESSION

174 MOTION, REP. MANNIX: Moves a conceptual amendment to HB 2843:

Incorporate some of the concepts of the proposed amendments regarding retired emeritus physicians and apply it also to naturopaths; that a physician who registers with a county medical officer of the county where the physician will be practicing and take referrals through the county medical officer; under these circumstances, the physician will not be personally liable except for intentional acts but the physician will become an agent of the government covered by the Tort Claims Act for such volunteer care for those patients. Since standard liability would be in order, written notices would not be required to be given to the patients treated under these circumstances.

196 There being no objection to the conceptual amendment, it is so adopted.

196 MOTION, REP. MANNIX: Moves HB 2843 as amended to the Full Committee with a "do pass" recommendation.

VOTE: 7-0

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

Motion passes, Rep. Markham will carry.

HB 3520 - PUBLIC HEARING

220 JIM DOLE, COMMITTEE COUNSEL (EXHIBITS I1-I3): Summarizes HB 3520 and refers to three proposed amendments (EXHIBITS I1, I2 & I3). Notes there is a fiscal impact.

225 JACK LANDAU, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE (EXHIBIT E): Testifies in support of HB 3520. Summarizes proposals described in written testimony (EXHIBIT E). In times of shrinking resources, the Department of Justice thinks it's appropriate to look at the extent we will permit the state and its officers to be held liable in court.

280 REP. EDMUNSON: Wants clarification on statement concerning the Tort Claims Act.

284 LANDAU: Understood the argument to be that the Tort Claims Act provides a limit on the state's liability, that the limit does not however apply to liability on the part of individual officers who have been sued.

295 REP. EDMUNSON: It only applies to the state's responded superior liability as the employer but not the individual agents, state officers who are agents of the state?

310 LANDAU: That was the argument. Our point is that it creates a serious loophole in the limitation. No court has ever agreed with that. We just wouldn't like to see it again. Continues discussion of written testimony.

370 REP. EDMUNSON: Shouldn't there be some liability where imminent danger is clearly recognized by authorities?

397 LANDAU: It is a fair point. If there are situations where the state or its officers should be held responsible the legislature should say so--not the courts. Agencies are faced with limited resources, potentially competing state policy objectives and they have to make

choices. Continues discussion of written testimony.

TAPE 108, SIDE B

044 REP. MANNIX: Refers to the counties' proposed amendments to HB 3520 (EXHIBIT I1). Are they necessary to define discretionary activity? On line 3, suggests the words, "discretionary function or duty" rather than "discretionary decision".

048 LANDAU: Agrees with language suggestion on line 3. Thinks the language in the proposed amendments tracks the case law and would be useful to the courts in applying the discretionary immunity provisions.

061 REP. MANNIX: By enacting them it would avoid a creative court in the future deciding to rewrite them.

071 ELYSE CLAWSON, ASSISTANT DIRECTOR, DEPARTMENT OF CORRECTIONS (EXHIBIT F & I2): We support HB 3520 with our proposed amendments (EXHIBIT I2). Discusses written testimony and proposed amendments.

119 CHAIR BAUM: Refers to DOC proposed amendments under Section 4.

125 CLAWSON: We're referring to when probation and parole officers are operating within the scope of their duties.

140 LANDAU: The purpose of our proposal and the DOC amendments is to define what kind of conduct would be considered discretionary. So, writing in "discretionary" is redundant.

146 REP. MANNIX: Discusses liability for violating rules and procedures. Under the DOC amendments, they would not be liable for those decisions--period. Don't think you want that kind of limitation; otherwise, you'll be litigating what was policy and procedure. Believe you want to say there's an exemption for liability about parole or probation decisions and actions.

160 CLAWSON: Believe you are correct.

185 CHAIR BAUM: Discusses Section 4 of the DOJ (DOC) amendments.

197 LAURIE SKILLMAN, DEPUTY ADMINISTRATOR, DIVISION OF FINANCE AND CORPORATE SECURITIES, DEPT. OF INSURANCE AND FINANCE (EXHIBIT G & I3): Testifies in support of HB 3520 and submits proposed amendment (EXHIBIT I3). Reads written testimony.

306 DOLE: Discusses DIF proposed amendments.

315 CHARLES WILLIAMSON, OREGON TRIAL LAWYERS' ASSOCIATION (EXHIBIT H): Discusses written testimony of Kathryn Clarke, attorney (EXHIBIT H). Opposes the enactment of the amendments on lines 37-39, Page 3 of HB 3520.

340 CHAIR BAUM: What is the ultimate statutory limitation?

347 WILLIAMSON: Ten years for a regular injury and five years for medical. Refers to the six- month notice problem.

367 CHAIR BAUM: Any recommendations?

370 WILLIAMSON: Discusses ultimate repose at the top of Page 2 of HB

3520. Continues discussion of EXHIBIT H.

TAPE 109, SIDE A

014 CHAIR BAUM: Tort claims limitations are usually within the scope of employment. Malfeasance and misfeasance and intentional conduct seems to be outside the scope of employment.

018 WILLIAMSON: Gives example of someone being let out of prison by a prison employee.

021 CHAIR BAUM: Argument could be made that's not within the scope of their employment to purposely avoid the law.

042 WILLIAMSON: Discusses employee liability under tort claims.

064 REP. BRIAN: Questions the rationale behind the elimination of discovery.

082 LANDAU: Principle reason is because that's what the language of the law and the history of the 1981 legislative law indicates. A two-year statute of limitations was enacted in 1969. There were changes to that law, and the 1981 law was supposed to bring us back to a clean two-year statute of limitations. The state has to draw a line someplace.

097 WILLIAMSON: Refers to EXHIBIT H concerning the discovery rule. Don't think it's correct in saying that's what the legislature intended.

112 GARRETTSON: Encourage passage of HB 3520 with our amendment concerning discretionary immunity.

126 CHAIR BAUM: Adjourns Subcommittee on Civil and Judicial Administration at 3:20 p.m.

Submitted by,

Reviewed by,

Holly Blanchard
Manager

David Harrell Transcriber

Office

EXHIBIT LOG:

A - Proposed Amendments, HB 2732, Dr. Dennis Mills, Assoc. of Christian Schools International, 2 pages B - Written testimony, HB 2732, Garland Rogers, Assemblies of God, 7 pages C - Written testimony, HB 2732, H. Wayne House, Th.D., J.D., Western Baptist College, 1 page D - Proposed Amendments, HB 2843, Jim Carlson, OMA, 2 pages E - Written testimony, HB 3520, Jack Landau, Dept. of Justice, 4 pages F - Written testimony, HB 3520, Elyse Clawson, Dept. of Corrections, 2 pages G - Written testimony, HB 3520, Laurie Skillman, Dept. of Insurance and Finance, 8 pages H - Written testimony only, HB 3520, Kathryn Clarke, presented by Charles Williamson, OTLA, 3 pages I1 - Counties' Proposed Amendments, HB 3520, Committee Counsel, 1 page I2 - D.O.J. (D.O.C.) Proposed Amendments, HB 3520, Committee Counsel, 1 page I3 - D.I.F. Proposed Amendments, HB 3520, Committee Counsel, 1 page J - Staff Measure Summary and ORS, HB 2732, Committee Counsel, 13 pages K - Written testimony, HB 2732, Committee Counsel, 5 pages L - Written testimony, HB 2732, Committee Counsel, 2 pages M - Proposed Amendments, HB 3520, Committee Counsel, 2 pages N - Written testimony, HB 3520, City of Eugene,

Committee Counsel, 1 page