

1 _____ BILL NO. _____

2 INTRODUCED BY _____
3 (Primary Sponsor)

4 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING BRIEFING, INCLUDING AFFIDAVITS AND A
5 FINDING BY THE COURT THAT THE EVIDENCE PRESENTED SUPPORTS A CLAIM FOR PUNITIVE
6 DAMAGES, BEFORE A JUDGE MAY GRANT A MOTION TO AMEND; REQUIRING AN EVIDENTIARY
7 HEARING IF REQUESTED; AND AMENDING SECTION 27-1-221, MCA."

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9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10
11 **Section 1.** Section 27-1-221, MCA, is amended to read:

12 **"27-1-221. Punitive damages -- liability -- proof -- award.** (1) Subject to the provisions of 27-1-220
13 and this section, reasonable punitive damages may be awarded when the defendant has been found guilty of
14 actual fraud or actual malice.

15 (2) A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally
16 disregards facts that create a high probability of injury to the plaintiff and:

17 (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury
18 to the plaintiff; or

19 (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

20 (3) A defendant is guilty of actual fraud if the defendant:

21 (a) makes a representation with knowledge of its falsity; or

22 (b) conceals a material fact with the purpose of depriving the plaintiff of property or legal rights or
23 otherwise causing injury.

24 (4) Actual fraud exists only when the plaintiff has a right to rely on the representation of the
25 defendant and suffers injury as a result of that reliance. The contract definitions of fraud expressed in Title 28,
26 chapter 2, do not apply to proof of actual fraud under this section.

27 (5) (a) A request for an award of punitive damages may not be contained within an initial pleading
28 filed by a party with the court. At any time after the initial pleading is filed and discovery has commenced in the

1 lawsuit, a party may move the court to allow the party to amend the pleading to assert a claim for punitive
2 damages.

3 (b) The party making the motion may shall submit affidavits and documentation supporting the
4 claim for punitive damages. A party opposing the motion may submit opposing affidavits and documentation.
5 The court may not allow a party to assert a claim for punitive damages unless the affidavits and supporting
6 documentation submitted by the party seeking punitive damages set forth specific facts supported by
7 admissible evidence adequate to establish the existence of a triable issue on all elements of a punitive
8 damages claim.

9 (c) (i) When the motion to amend is fully briefed, a party may request an evidentiary hearing in
10 which the evidence submitted with the briefs must be presented by live testimony that is subject to cross
11 examination and all applicable evidentiary rules. The court shall hold this hearing prior to the close of discovery.

12 (ii) At the close of the evidence presented at the hearing, the court shall make specific findings of
13 facts based solely on the evidence submitted at the hearing as to whether there is admissible evidence
14 adequate to establish the existence of a triable issue on all elements of a punitive damages claim.

15 (iii) If no party requests an evidentiary hearing, the court may rule on the motion to amend based
16 on the evidence submitted by the parties in the motion and response.

17 (6) All elements of the claim for punitive damages must be proved by clear and convincing
18 evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt
19 about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence
20 but less than beyond a reasonable doubt.

21 (7) Liability for punitive damages must be determined by the trier of fact, whether judge or jury.

22 (8) (a) Evidence regarding a defendant's financial affairs, financial condition, and net worth is not
23 admissible in a trial to determine whether a defendant is liable for punitive damages. When the jury returns a
24 verdict finding a defendant liable for punitive damages, the amount of punitive damages must then be
25 determined by the jury in an immediate, separate proceeding and be submitted to the judge for review as
26 provided in subsection (8)(c). In the separate proceeding to determine the amount of punitive damages to be
27 awarded, the defendant's financial affairs, financial condition, and net worth must be considered.

28 (b) When an award of punitive damages is made by the judge, the judge shall clearly state the

1 reasons for making the award in findings of fact and conclusions of law, demonstrating consideration of each of
2 the following matters:

- 3 (i) the nature and reprehensibility of the defendant's wrongdoing;
- 4 (ii) the extent of the defendant's wrongdoing;
- 5 (iii) the intent of the defendant in committing the wrong;
- 6 (iv) the profitability of the defendant's wrongdoing, if applicable;
- 7 (v) the amount of actual damages awarded by the jury;
- 8 (vi) the defendant's net worth;
- 9 (vii) previous awards of punitive or exemplary damages against the defendant based on the same
10 wrongful act;
- 11 (viii) potential or prior criminal sanctions against the defendant based on the same wrongful act; and
- 12 (ix) any other circumstances that may operate to increase or reduce, without wholly defeating,
13 punitive damages.

14 (c) The judge shall review a jury award of punitive damages, giving consideration to each of the
15 matters listed in subsection (8)(b). If after review the judge determines that the jury award of punitive damages
16 should be increased or decreased, the judge may do so. The judge shall clearly state the reasons for
17 increasing, decreasing, or not increasing or decreasing the punitive damages award of the jury in findings of
18 fact and conclusions of law, demonstrating consideration of each of the factors listed in subsection (8)(b).

19 (9) (a) The judge shall divide the award of punitive damages equally between the prevailing party
20 and the state and shall enter judgment accordingly.

21 (b) Upon entry of a judgment awarding punitive damages, the prevailing party shall provide written
22 notice of the judgment to the state through the attorney general.

23 (c) The costs of litigation related to the award of punitive damages may be deducted from the full
24 award of punitive damages.

25 (d) Reasonable attorney fees related to the award of punitive damages may be deducted from the
26 full award of punitive damages after costs, but attorney fees deducted from the state's share may not exceed
27 20% of the state's share of the award of punitive damages after costs.

28 (e) The award to the state must be deposited in the general fund.

1 (f) The state has no interest in or right to intervene at any stage of a judicial proceeding pursuant
2 to this subsection (9) except to enforce or execute a judgment entered in favor of the state.

3 (g) This subsection (9) does not apply to an award of punitive damages of \$200,000 or less.

4 (10) The jury may not be advised of the requirements under subsection (9) concerning the allocation
5 of money received in payment of an award of punitive damages.

6 (11) This section is not intended to alter the Montana Rules of Civil Procedure governing discovery
7 of a defendant's financial affairs, financial condition, and net worth.

8 (12) Subsections (9) and (10) do not apply to actions in which the state is a party."

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