

1 SENATE BILL NO. 323

2 INTRODUCED BY W. MCNUTT, ELLIS, BECK, BITNEY, R. BROWN, DEPRATU, EKEGREN,
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5 A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING THE EXCLUSIVE REMEDY PROVISION IN THE
6 WORKERS' COMPENSATION ACT TO PROVIDE AN INJURED EMPLOYEE WITH A CAUSE OF ACTION
7 FOR DAMAGES AGAINST AN EMPLOYER OR A FELLOW EMPLOYEE WHO CAUSES INTENTIONAL
8 INJURY; DEFINING "INTENTIONAL INJURY"; AMENDING SECTION 39-71-413, MCA; AND PROVIDING
9 AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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11 WHEREAS, Montana's workers' compensation law is the exclusive remedy for an employee injured
12 or killed in the scope of employment, as included in Article II, section 16, of the Montana Constitution and
13 implemented by the Legislature in section 39-71-411, MCA; and

14 WHEREAS, the exclusive remedy provision of workers' compensation can be described as a quid
15 pro quo exchange of rights and remedies, which is intended to relieve an injured employee of the
16 responsibility of undertaking lengthy and expensive legal action to recover compensation for job-related
17 injuries by proving an employer's negligence while relieving the employer of the burden of defending
18 against work-related claims through the traditional common-law defenses of contributory negligence,
19 assumption of risk, and the fellow servant rule to defeat the employee's claim; and

20 WHEREAS, in 1973, the Montana Legislature enacted section 39-71-413, MCA, which allowed
21 an injured employee to sue a servant or employee of the employer when the injury was the result of an
22 intentional or malicious act by the servant or employee of the injured employee's employer; and

23 WHEREAS, in a 2000 decision, *Sherner v. Conoco, Inc.*, 2000 MT 50, 298 Mont. 401 (2000), the
24 Montana Supreme Court revisited the standard used for determining whether an employer's act or omission
25 was protected under the exclusive remedy; and

26 WHEREAS, the court applied section 39-71-413, MCA, to employers and held that actual malice,
27 as described in section 27-1-221, MCA, which provides that a person acts with malice if an employer has
28 knowledge of facts or intentionally disregards facts that create a high probability of injury and deliberately
29 acts with conscious or intentional disregard or indifference to that high probability, would be the standard
30 applied; and

1 WHEREAS, the exclusive remedy provision in the Workers' Compensation Act should provide that
2 an injured employee has a cause of action for damages against an employer or the employer's employee
3 only if the employer or fellow employee causes an intentional injury.

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

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7 **Section 1.** Section 39-71-413, MCA, is amended to read:

8 **"39-71-413. Liability of employer or fellow employee for intentional and malicious and deliberate**
9 **acts or omissions -- additional cause of action -- intentional injury defined.** (1) If an employee ~~receives an~~
10 ~~injury~~ is intentionally injured by an intentional and deliberate act of the employee's employer or by the
11 intentional and deliberate act of a fellow employee while performing the duties of his employment ~~and the~~
12 ~~injury or injuries so received by the employee are caused by the intentional and malicious act or omission~~
13 ~~of a servant or employee of his employer, then,~~ the employee or in case of his death ~~his~~ the employee's
14 heirs or personal representatives ~~shall,~~ in addition to the right to receive compensation under the Workers'
15 Compensation Act, ~~have a right to prosecute any~~ have a cause of action ~~he may have~~ for damages against
16 ~~the servants or employees of his employer causing the injury~~ person whose intentional and deliberate act
17 caused the intentional injury.

18 (2) An employer is not vicariously liable under this section for the intentional and deliberate acts
19 of an employee.

20 (3) As used in this section, "intentional injury" means an injury caused by an intentional and
21 deliberate act that is specifically and actually intended to cause injury to the employee injured and there
22 is actual knowledge that an injury is certain to occur."

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24 **NEW SECTION. Section 2. Effective date -- applicability.** [This act] is effective on passage and
25 approval and applies to injuries that occur on or after [the effective date of this act].

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