MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Seventh Session
March 21, 2013

The Committee on Judiciary was called to order by Chairman Jason Frierson at 8:06 a.m. on Thursday, March 21, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Wesley Duncan
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Lucy Flores, Clark County Assembly District No. 28
Assemblyman Harvey Munford, Clark County Assembly District No. 6
Senator Pete Goicoechea, Senatorial District No. 19

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Thelma Reindollar, Committee Secretary
Nancy Davis, Committee Assistant

OTHERS PRESENT:

Mark Wenzel, representing Nevada Justice Association
Graham Galloway, representing Nevada Justice Association
Lesley Pittman, representing Keep Our Doctors In Nevada
George Ross, representing Las Vegas Metro Chamber of Commerce
Lisa Foster, representing Allstate Corporation, American Family Insurance Company, St. Mary's Health Plans
Robert L. Compan, Manager, Government and Industry Affairs, Farmers Group, Inc.
Sarah K. Suter, representing Las Vegas Defense Lawyers
Marc C. Gordon, representing Las Vegas Defense Lawyers
Mark E. Trafton, Vice President, General Counsel, Whittlesea Bell Companies
Lawrence Matheis, Executive Director, Nevada State Medical Association
Matthew Sharp, representing Nevada Justice Association
Bill Bradley, representing Nevada Justice Association
Doug Busselman, Executive Vice President, Nevada Farm Bureau Federation

Chairman Frierson:
[Roll was called. Committee protocol and rules were explained.] We have three bills on the agenda for today. I will open the hearing on Assembly Bill 219 and invite Ms. Flores up to introduce her bill.

Assembly Bill 219: Revises provisions governing the award of damages to persons who suffer personal injury. (BDR 3-753)

Assemblywoman Lucy Flores, Clark County Assembly District No. 28:
Thank you, Mr. Chairman and members of the Committee. I am presenting on Assembly Bill 219, and what this bill does is codify a very long-standing common-law rule called the collateral source rule. What this rule says, in its most basic form, is that if you hurt someone, then you are responsible for that damage regardless of what the injured person's insurance coverage is. What brought this to my attention was a California Supreme Court case, *Howell v. Hamilton Meats and Provisions, Inc.*, 52 Cal. 4th 541 (2011), where

the judge diverted from this. We want to ensure that it is codified in state law, given that this is practiced and supported throughout the country.

In terms of the public policy, what this does is this encourages personal responsibility. If someone creates harm they are responsible for it, but the other side is that it encourages folks to insure themselves. Now you are going to hear testimony about lack of fairness, potential windfall, and entitlement to damages from insurance. What that does not take into account is that you are the responsible party who paid your premiums, or you had an employer who paid your premiums. If the person who injured you was able to introduce evidence saying, "I should not have to pay because you were compensated by your insurance," that person, who might not be insured, sometimes benefits more. This is good public policy because it encourages people to insure themselves. For people who do not have insurance and were able to recover the costs of their medical bills, they essentially can end up with more than the responsible party who insured themselves.

I hope that was not too confusing, but that is the basics of this bill; it simply codifies a long-standing rule that has had good public policy behind it. Thank you.

Assemblywoman Spiegel:
Can you please explain how this would work with subrogation?

Assemblywoman Flores:
I am not sure that I can answer that technical question. There may be others who are testifying after me who have more knowledge about that.

Assemblyman Duncan:
Good morning, Assemblywoman Flores. I know that Nevada law has recognized an exception for workers' compensation claims. Will that still be the same? Are there any other areas that will have exception under this statute?

Assemblywoman Flores:
Thank you for the question. Those exceptions still stand currently. There could be other exceptions, but I am not aware of them.

Assemblyman Wheeler:
Could you comment on a court case, for example, where an insurance company is paying $50,000 of a $100,000 settlement? I think what you are saying is that the person who was found at fault would also pay $50,000 so that would basically increase the settlement. Am I correct in my understanding?

Assemblywoman Flores:
If you went to trial, you would be able to say, "I incurred $100,000 in medical bills." The defense would not be able come in and say they paid $50,000 because the claimant had coverage and the insurance company discounted the medical bills. They cannot argue that the damages should be based on the reduced amount, and not the actual claim.

For the person who was injured and had insurance, this does not take into account what could happen in the future. Sometimes, insurance companies will come back a month later, deny the claim, and not pay. Potentially, what you received as compensation in the trial would be less than the actual damages incurred.

This also prevents windfall on the other side. An insurance company can negotiate reduced rates, but it does not mean that the cost was not incurred, it is simply what was negotiated between the insurance company and the hospitals.

Now if that same person did not have insurance and he was billed the full rate of $100,000, he would still be responsible for the $100,000. Why, then, would the person who has insurance get the reduced amount of $50,000 when the uninsured person would be rewarded, if you will, the full amount of $100,000? That is the public policy behind this bill, that we want to encourage people to be insured.

Assemblyman Wheeler:
If we have a $100,000 settlement and the insurance company is already paying for $50,000, in the very end, the person gets $100,000, the insurance company pays $50,000, they pay $50,000, and they stick $50,000 in their pocket. That seems to me to be the bottom line.

Assemblywoman Flores:
It depends on what ends up being the outcome of that trial. All this is saying is that evidence would not be introduced. It does not necessarily mean that the person would end up with the full $100,000. Also in that situation, for the person who has insurance, it does not take into account the premiums that he has been paying. Again who is actually getting the windfall here? Is it the person who was injured, or the insurance companies who have been able to negotiate rates and collect premiums for any number of years from the person who is covered?

Once you take those into account, we get back to the idea of fairness and people being responsible for the damages that they create.

Chairman Frierson:
This bill proposes to put in statute what is existing practice.

Assemblywoman Flores:
Yes, that is correct.

Assemblyman Frierson:
We are not proposing anything new or unheard of in the bill. We are simply putting into statute what is already the practice.

Assemblywoman Flores:
Yes, that is absolutely correct. This rule has recently been reaffirmed by the Nevada Supreme Court in 1996.

Chairman Frierson:
Thank you, Ms. Flores. You were mentioning the policy reasons behind the bill. I am trying to think of this in layman's terms. It seems to me in the absence of this practice, why would we get better insurance if we are going to get dinged for it? For example, two people get into an accident; one person has been paying higher premiums to get better insurance. They get penalized in the absence of this policy because whatever damages they might get are mitigated, but for the person who has the bare bones policy, they are going to try and subtract the insurance from whatever the actual damages are. Is that accurate?

Assemblywoman Flores:
Well, that is actually the point. The point is to encourage people to better insure themselves. The people who have the bare bones policy or have no insurance are the ones who are going to benefit the most, to be quite frank, because they are not getting the benefit of reduced medical costs; they are getting the full sticker price on all the medical care they need. If people get into an accident and they know it is not their fault, they are actually going to end up with more if they do not have insurance.

Assemblywoman Diaz:
Sometimes the cases are not resolved in a timely fashion and so, on top of medical bills, you have living expenses and lost wages. In the example you gave for Assemblymen Wheeler, that $50,000 does not necessarily cover everything that person has had to pay for. Maybe he is not working and has bills to pay. How has he been able to carry on since that accident?

Assemblywoman Flores:
All that is valid. These examples are not black and white, and not taking in all these other things. There is a difference between noneconomic damages and

economic damages, and I do not want to muddy the waters. They are different issues. It goes back to a basic rule about fairness and personal responsibility.

Assemblywoman Diaz:
I am not an attorney but from my understanding, as I was involved in an accident before, compensation for pain and suffering does seem to equate to your medical bills. Insurance companies have the ability to reduce your medical bills to half of that, so your medical bills are now only this amount, therefore, you are only entitled to this compensation. Is that correct?

Assemblywoman Flores:
That is correct to a certain extent in that, if you have an attorney and they are negotiating on your behalf, it affects your ability to negotiate with the insurance companies in terms of what you may be able to recover. This is an evidentiary rule when there is a trial. Many times cases do not go all the way to trial, but if they do, this is saying that what third-party people have paid is irrelevant; it does not matter because these are the full amount of damages that were incurred.

Assemblyman Hansen:
Thank you, Mr. Chairman. We are assuming in this that you have gone to trial. Most of these personal injury cases are settled long before they end up in a courtroom. Because this has never been codified and it has been a common-law precedent that has been used, why did the California court stray? I would like to actually find out if, in fact, that is the case. I am real leery about putting something that has been a common-law practice in the courts and codifying it, because one of the values of common law is there is a flexibility factor. Once this is in statute the common-law principle is gone; now it is the law. That makes me a little nervous about this.

Do you have the California case number? I want to do some homework on this. While you are looking that up, does this mean that the damages in the settlements, that the new damages will be negotiated on behalf of the person that was injured? Would the total dollar volume now include what traditionally would be given by the insurance company, that as a negotiating factor would have to be removed? In other words, all the damages, if it is $100,000, would be $100,000 in addition to what the insurance would pay for the medical costs?

Assemblywoman Flores:
The damages would be what is incurred, no less, no more. It is current practice so this definitely is not changing anything.

For your first question, I do not have that case number available but I will ensure that you do get it (Exhibit C).

Assemblyman Hansen:
Thank you. It is unusual for the court to stray from this long-term precedent in common law and cause the need for codification.

Assemblywoman Flores:
If I could comment on that, sometimes you have judges that do not follow precedent. Some really great lawyer made a good argument and convinced the judge who said, I do not care what has been done throughout the country for hundreds of years, this is how I am going to rule.

Chairman Frierson:
In layman's terms, for example, you have two people who get into an accident and incur the same damages. One person has insurance and the other person does not. What you are saying is without this policy, the person without insurance may get the entire value of the damages in a check. The person with insurance, by virtue of his having insurance, gets less.

Assemblywoman Flores:
Yes.

Chairman Frierson:
So $100,000 in damages, both people, one person has insurance. The person without insurance will get a check for $100,000. The person with insurance will get a check minus whatever their insurance has to cover, if this is not policy.

Assemblywoman Flores:
Correct.

Chairman Frierson:
The other policy is that person who has insurance not only gets less, but is there a likelihood that their rates will go up and then they will end up paying more for their insurance? So now, they are getting less and paying higher insurance rates.

Assemblywoman Flores:
Potentially, if there is something they do that the insurance company requires because there is another claim. Generally, I think that is more with casualty insurance than it is with health insurance. I do not know; the insurance industry would have to comment on that. I do not know how they end up raising your

rates. That is exactly it. If this was not in place, then the person with insurance is the one who is penalized.

Assemblyman Carrillo:
How does this play out if they are insured or underinsured with regard to the Affordable Care Act? How does that play into this?

Assemblywoman Flores:
Because this rule is in place in Nevada through common law, it does not. Regardless of what kind of insurance you have, it does not affect the damages that you actually incur.

Assemblyman Carrillo:
You mentioned earlier about having not enough insurance or having the basic insurance plan versus someone who has very good insurance. The person who is insured well would actually get penalized, if this rule was not in place.

Assemblyman Hansen:
Since most of these are settled, I would assume in the settlement that an attorney would say, "My client has been paying these premiums so that would be, in fact, part of the package." If you took it all the way to a court and your side brings up the fact that I have been paying premiums, the judge would take that into account as part of the total package.

Assemblywoman Flores:
If I could explain, what happens in the negotiating phase is completely different from what happens at the trial phase. The reason is when you are negotiating, it is two private parties negotiating with each other. But, once you get into the trial phase, then you have all these rules such as evidentiary rules and collateral source rules.

Assemblyman Hansen:
So you are basically telling me that in a courtroom, I, as the defendant, am not going to bring as evidence the fact that I have been paying premiums on this insurance policy which ought to be factored into the total dollar value right now.

Assemblywoman Flores:
Correct. That information about who has paid what is not evidence that can be brought in, and this is current practice.

Chairman Frierson:
This bill is not only related to lawyers in court and trial. If I get into a car accident individually, I send a demand letter to someone saying that I have incurred these damages. So this would also apply individually.

Assemblywoman Flores:
This is correct.

Chairman Frierson:
Are there any other questions for Ms. Flores? I see none. I am going to now invite those who are here to testify in support of A.B. 219 to come forward.

Mark Wenzel, representing Nevada Justice Association:
I am testifying in support of A.B. 219. [See (Exhibit D) and (Exhibit E).]

Graham Galloway, representing Nevada Justice Association:
Good morning, Mr. Chairman and members of the Committee. I am here testifying in support of this bill.

Chairman Frierson:
Thank you, both. I was hoping that either one of you could maybe answer the question that was raised earlier by Assemblywoman Spiegel on subrogation and explain how that works.

Mark Wenzel:
How this affects subrogation is when there is a settlement achieved in any type of personal injury lawsuit, the health insurance carrier for the person who has been harmed gets what is called subrogation. They basically get the money back that they have paid on behalf of that person. This would, in fact, assist us in getting them as close as possible based upon whatever insurance is out there at the full value of their subrogation rights, whether that is a personal health insurance plan, a group health insurance plan, Medicaid or Medicare, or whoever has paid those bills and has the right of subrogation. It would have no adverse effect, in fact, it would assist us in achieving those subrogation rights in getting the money back to the people who have paid on behalf of the person who has been involved and negatively impacted by the accident.

Assemblywoman Spiegel:
Would the insurance company be able to subrogate back for the full rate card rate of the care that is provided, or the actual marked down rate? How would that work?

Mark Wenzel:
When I get a letter on behalf of one of my clients saying that health insurance company has paid $5,000 in health insurance benefits on behalf of the injured party, that is the amount they expect back. Through my practice, they expect that back and they are very reticent unless other factors come in such as that there is not enough insurance from the adverse driver in an automobile accident case. Then they will negotiate with you for a lesser amount. If there is ample insurance, they will be much more reluctant to negotiate with you a reduced amount. To echo the sentiments of Assemblywoman Flores, this bill is about personal responsibility and fairness. It is our position that the person who causes harm to another person should be responsible for it. We are attempting to legislatively codify what is existing practice so that we remove the uncertainty of this so we can resolve disputes and not waste judicial resources by fighting over this issue virtually in every single case that proceeds toward trial.

Assemblywoman Spiegel:
Just to put this into a real-life example, let us say there are two people who are in two separate car accidents. They both sustain exactly the same injuries. One of them has insurance; the other one does not. Injuries would cost, at full rate card rate, $10,000. The person who does not have insurance would get $10,000 to pay those bills. Would the person who does have the insurance get $10,000, or would they get what they actually would pay their insurance company, and then the insurance company would get the balance? How does that work?

Mark Wenzel:
What this does is it provides a level of consistency. The position of the courts is that both people have had $10,000 in medical bills, which is the full rate card amount of those charges. Historically, that is the amount that has been, and continues to be, the amount we get to present to a jury that says that is the amount of the medical expenses, not the amount that was actually paid through deductibles, copayments, or health insurance premiums.

Chairman Frierson:
Do you have any other questions? I see none. Do you have something to clarify?

Graham Galloway:
Yes, Mr. Chairman. In answer to Assemblywoman Spiegel's question, in this scenario where the one who has insurance goes to court, he is only going to be able to put up the paid rate, not the full card rate. The one who does not have insurance would put up the full value of medical expenses at $5,000. The one

who has insurance would only be limited to put up whatever was paid, say, $2,000. You end up with an inconsistent situation and it is not fair. The individual who has insurance is penalized for having insurance. Thank you.

Mark Wenzel:
Mr. Chairman, a brief point of clarification if I may. Insurance is not introduced into the courtroom for any purpose. The defendant, or the person who caused harm to another person, cannot bring into the courtroom the fact that the person who they just hurt has insurance. Right now that is the status of the law—they cannot do that. This helps to codify that position.

Graham Galloway:
There was a question about insurance premiums. No court in this country allows you to introduce the premiums that you have paid for 20, 30, 40 years for your health insurance to mitigate the argument that you are getting a windfall. You are not allowed to, in the context of regular personal injury case, bring anything about the premiums you have paid. So in answer to Assemblyman Hansen's question, you do not get to present that to show that you should get some credit for it.

Chairman Frierson:
Are there any other questions? I see none. Is there anyone else here in Carson City or in Las Vegas to testify in support of A.B. 219? I see no one. I will open the testimony here and in Las Vegas for those testifying in opposition to A.B. 219 to please come forward.

Lesley Pittman, representing Keep Our Doctors In Nevada:
We most certainly agree that any person who causes harm to another should be responsible for making that person economically whole, but from our perspective, this legislation is unnecessary. As indicated by the proponents, this is currently practiced as common law. Plaintiffs' attorneys are presently allowed to place in evidence the higher amounts as a collateral source allowing the jury to decide on damages. From our perspective, you will allow plaintiffs to claim sums that they never paid. This will artificially, in our minds, inflate settlements and judgments resulting in higher premiums from insurers to all businesses and individuals in Nevada, not just doctors. From our perspective, the only persons who benefit are claimants and their counsel through unjust enrichment. It begs the question, why should a plaintiff be allowed to get money back that they never spent in the first place? Reimbursement should be for the loss and plaintiffs are limited to recovery of actual bills paid, there then made whole. After all, is that not the concept behind personal injury law? Why would you allow the law to make someone "whole plus plus"?

Chairman Frierson:
Thank you, Ms. Pittman. My only question is, taking into consideration the purpose of personal injury law, is that not also the purpose of having insurance is so that you have protection, and that you get the full benefit of damages?

Lesley Pittman:
Mr. Chairman, I agree. Insurance is a valuable commodity and it is something that, unfortunately, some folks are not in a position to have.

Assemblywoman Cohen:
Why should a defendant benefit because they happen to get into a car accident with someone with plenty of good insurance as opposed to a car accident with someone who had bad insurance?

Lesley Pittman:
We would not see this as a defendant benefitting. Again, it is about making the injured person whole economically and whether that is done through an insurance company or through damages that are paid in full to someone who is not insured, they are getting back their economic loss.

Assemblywoman Cohen:
But in effect, the defendant is benefitting because they are paying less damages because their plaintiff happens to have very good insurance.

Lesley Pittman:
That may be the case but again, if the idea is to make the person who is damaged whole economically, that is being done whether it is through an insurer or through damages that are paid in full to someone who is uninsured.

Assemblyman Wheeler:
It seems to me that insurance is there when there is no other recompense to you. The insurance company can also be reimbursed as part of this settlement. I do not see the defendant actually benefitting from the judgment because the judgment is the same no matter what. It is the actual plaintiff who is benefitting—if they have insurance and they do not reimburse their insurance company—because they would be getting a larger amount of money. To me that is double jeopardy. Is that what you are saying here?

Lesley Pittman:
That is from our perspective. Again, we are making whole the individual who is harmed, and that is the purpose behind personal injury law. We believe that is being accomplished.

Chairman Frierson:
Are there any other questions for Ms. Pittman?

Assemblyman Hansen:
Personal injury cases very rarely go to trial. In most cases, they are settled well before trial. Another thing I have noticed is if you, in fact, do not have insurance, you have a difficult time securing a lawyer who wants to handle the case because they cannot get paid. However, the argument that they brought up is, in the scenario where I do not have insurance and I get the $100,000, I do get the same thing but I have also been paying premiums for 20 years on it. In effect, I am kind of getting less than the guy who has been doing it unfairly. How do you respond to that?

Lesley Pittman:
In the scenario used earlier, the person who is uninsured and is getting $100,000 still has to pay their medical bills, or a portion of that. From our end, we do not see that as any sort of benefit. They are going to be utilizing the damages paid to pay for their medical bills because they do not have an insurance company to do that for them.

Assemblyman Hansen:
So it all balances out in the long run is how you are looking at it.

Chairman Frierson:
Actually I am glad that issue came up because another issue that came to mind is damages for future therapy. I do not know if it quite balances out if the person that gets money for physical therapy for three months decides not to get the therapy.

Lesley Pittman:
Mr. Chairman, I do not know how you would address that. That is an individual decision on the part of the injured party.

Chairman Frierson:
I am trying to flesh out this issue when two people walk away from this circumstance, what do they have in the furtherance of making them whole? And, if we assume that the person who has no insurance and has three months of physical therapy decides not to get that therapy done, then he walks away with the money for that therapy in his pocket. The people who have insurance do not have that as an option because they go through the insurance so there still seems to be an unequal result either way. I realize that you cannot legislate absolutely every possible scenario. It almost sounds like we are trying to, in the reverse. There still seems to be an inequity in an inability to tighten it the way

that some would like it to prevent somebody from having the option to walk away with cash in their pocket. Any other questions?

Assemblyman Hansen:
I understand the rules of evidence say you cannot bring premiums into a trial situation. However, I assume that when compensation is being discussed in the negotiations, does that come into play? Do the lawyers for the insurance companies try to factor that into the discussions to ensure there is some sort of equitable arrangement for them?

Lesley Pittman:
I am not an attorney, so I would like to defer that question to someone else who might be able to answer that.

Assemblyman Hansen:
I would assume that there is a rule in trial, but not in the negotiation side where that cannot be added in as a factor. I would like to have that addressed as that seems to be a key point in this whole discussion.

Chairman Frierson:
Thank you, Mr. Hansen. We have given examples of medicals, but this would also deal with property damage like damage to your car, whether or not you want to buy another new car, get a cheaper car, or not get a bumper fixed and pocket the money.

Assemblyman Ohrenschall:
My question has to do with the comment that this could raise rates. Since this is the existing law now, just not codified, how do you see it raising rates if it were to become a statute?

Lesley Pittman:
From our perspective, the codification of common law allowing some flexibility, that codification will reduce that flexibility and allow for greater settlements, greater judgments that will impact the insurance rates for all Nevadans. I would like to allow someone from the insurance industry who may be here to respond to that in particular.

Chairman Frierson:
If anybody has information and is planning on testifying, or Ms. Flores in closing, what the status is of this policy in states across the country, that would probably provide us with some helpful insight.

George Ross, representing Las Vegas Metro Chamber of Commerce:
We are opposed to A.B. 219. I would say upfront that we heartily endorse Ms. Pittman's testimony. We agree with that in full. Going back to the scenario used earlier, when the injured party who did not have insurance ends up paying his bill, things are pretty equalized. I do not think we should be making legislation based upon the idea that a person may not follow through on the prescription for his therapy. For those who have insurance, when you look at your hospital bill, typically you have a bill charged and then when you do the calculation, you note that your insurance company paid maybe 16 percent of that bill charge. The uninsured person's bill, if he can pay at all, typically is not very different than that. This bill is only being brought because there are apparently some evolutions beginning to go along in common law. What we see is a very common thing that happens in legislatures where things begin to change in the world, and all of a sudden somebody says we better freeze status quo before we get hurt. I think really that is what is happening here.

In addition to what Ms. Pittman had to say, I would like to draw your attention to section 1, subsection 2, paragraph (b). It goes back to the billed charges. Virtually nobody pays billed charges. If you are insured, you pay a percentage somewhere in the teens of the billed charges. If you are uninsured and your income is two times the poverty level or below, you do not even get charged; if you are four times the poverty level or below, you pay some percentage of the cost of your treatment, and above that is negotiable, and rarely do you end up paying anything approaching the billed charges. The only people who pay billed charges are insurance companies where somebody has gone to an out-of-network facility or out-of-network doctor. This is really where a lot of the benefit of this bill is, in section 2 (b) because it really preserves a multiple of the cost to be recovered.

Essentially then, we do not feel this bill is necessary. We should just let common law evolve.

Chairman Frierson:
Could you address two things? One of them is letting common law evolve. Could it be argued in your opinion anyway that this would actually cut down on some litigation because it would not be common law subject to interpretation, or litigation but rather adopted in statute making it clear, at least, until the Legislature would change it?

George Ross:
I think it clarifies an opportunity to higher recoveries and therefore, might be attractive to more litigation.

Chairman Frierson:
My other question is, in the insurance industry, I have gotten my insurance bill and then months later, got an adjusted bill with a different amount. In your opinion, if you were to settle a case based on what you actually paid after your insurance paid it out as opposed to what is common law now and then you get a bill later that says that you owe a little more money, would you be able to revisit that damages amount to take into consideration in the adjustment that your own insurance company would make?

George Ross:
Mr. Chairman, as I am not a lawyer and have no health insurance company clients, I do not have any real basis to answer that other than pure speculation.

Chairman Frierson:
Thank you, Mr. Ross.

Lisa Foster, representing Allstate Corporation, American Family Insurance Company, St. Mary's Health Plans:
I represent three insurance companies, all of which are opposed to this bill. They have concerns about codifying this. They think the process, as it is now, is working. I think I heard the arguments on the other side that there could be a deterrent to purchasing insurance if this does not pass. All my insurance companies think, of course, that more people should be insured, not less. I will try and answer your questions. There are some defense attorneys in Las Vegas that are probably better at answering the questions. Thank you.

Chairman Frierson:
Are there any questions for Ms. Foster?

Assemblyman Wheeler:
If there were an amendment to this to make sure that the insurance company was part of the reimbursement of this settlement, would you still be in opposition to it?

Lisa Foster:
I think they will be in opposition to codifying this whole process. I would have to check with my clients, but that would be my current understanding.

Chairman Frierson:
Are there any other questions? I see none.

Robert L. Compan, Manager, Government and Industry Affairs, Farmers Group, Inc.:
I will try to answer some of the questions that came up. If collateral source rule becomes a law, when we are settling claims it is a double-dipping situation. If somebody goes to their medical provider and gets a $5,000 bill for treatment, now that is negotiated down to $2,000. That $2,000 is the fee that is actually paid to the medical providers. Currently under the collateral source rule, we are looking at $2,000 and they are allowed to double-dip and we will give them that $2,000 on top of it. So we will take that $2,000 and base the general damages on that. If this rule is passed, that $2,000 now becomes $5,000. When I say it becomes $5,000, some costs that are negotiated down are things that are not usual and customary. I do not know if you have ever heard of the $200 aspirin. We look at them as excessive, so providers who end up paying the bills say that this is not quite right so therefore, we would like not to see the collateral source rule codified under section 1, subsection 2, paragraph (b). I am always being asked how this is going to affect insurance; it already is affecting insurance. When you double-dip, you are looking at $5,000 in medical specials, and then $5,000 given to the plaintiff from the defendant and then predicating the general damages based on that. So you have an extra $5,000, per se, out there. That affects insurance premiums—that is what you are paying for.

If we had our druthers, we would rather see the collateral source rule be removed so it would just be a single source rule of evidence. We are in opposition to the bill strictly because of that point. We do not want to have to pay for a $200 aspirin or that $400 syringe that is costing maybe $1 or $2. I know that is an extreme case, but I think it makes the point clear.

Chairman Frierson:
Thank you, Mr. Compan. Just so we are clear, what you are opposed to is current practice though. The $200 aspirin is what we are already paying, so you are saying you do not want to codify that because you do not agree with the current practice, so it is not a new thing.

Robert Compan:
Right now under current statute, we are not paying for that $200 aspirin. We are paying for the reduction in what the actual medical costs that are provided to us from the claimant or from the plantiff's representative. We believe that under section 1, subsection 2, paragraph (b) on this, it would remove that restriction under the collateral source rule and will allow them to pay for that $200 aspirin and most costs.

Chairman Frierson:
So it is your belief that this bill tries to accomplish something that is not what current practice is.

Robert Compan:
Yes, it is this. We believe that it is going to raise the cost of the special damages and therefore, the repercussions will be in general damages costing more, and insurance rates will likely be even higher than they are now.

Chairman Frierson:
Are there any questions for Mr. Compan?

Assemblyman Hansen:
I have heard a bit of a dichotomy in the testimonies. In the absence of this bill passing, insurance companies say fewer people will buy insurance but every insurance company so far has testified against it. If they are correct, you are shooting yourself in the foot. Do you see, in the absence of this bill passing, that you are going to start losing policies?

Robert Compan:
Absolutely not. Insurance is mandatory in the state of Nevada. I am saying that if this bill passes, I am looking at it the other way. By codifying the rule and not allowing us to reduce the amount of discounted services, insurance is going to go higher, hence, people will stop buying insurance even though it is mandatory by law to have it.

Assemblyman Hansen:
So it is no longer affordable as the costs go up.

Robert Compan:
Yes, sir. One more thing in closing is basically, the attorneys at our home office have said if A.B. 219 is passed, an attorney will be able to present the $5,000 bill rather than the $2,000 bill they negotiated to the responsible driver and the auto insurer. The insurer will then be required to consider $5,000 when evaluating claims, even though the bill was satisfied for only $2,000.

Chairman Frierson:
I am a little confused because before now, I was under the impression that this is current practice under the law, and that this was trying to codify it. Those who were opposed to codifying it oppose the current practice, but that this was not proposing to do anything new. I would ask the attorneys on either side, if they could provide the Committee with some clarification on that. I think that

would be helpful because before now, I was under the impression that this was not proposing anything that was not current practice.

Robert Compan:
Thank you, Mr. Chairman. I have one more comment. It is our thought process that it does codify collateral source rule, but it also adds to the collateral source to take away the discounted portion of the medical payments and make it whole.

Chairman Frierson:
Mr. Duncan, do you have a question?

Assemblyman Duncan:
Thank you, Mr. Chairman. It may be better answered by some attorneys who practice in the defense area. I am having a hard time following. We are talking about a very small percentage of cases. This rule really applies at the trial setting. Right now evidence cannot come forward to the court, this or that for insurance. I am not following how the discounted rate versus what you are actually going to pay is going to somehow create this calamity. I am really trying to understand where you are coming from.

Robert Compan:
Thank you. I am going to defer to the defense attorneys that are in Las Vegas. When we receive a demand package in our office, it includes the discounted rate. If it were to be codified under section 1, subsection 2, paragraph (b), that discounted rate would be washed and would represent say, that $5,000 rate. That is our understanding.

Assemblyman Duncan:
But you are talking about pretrial, right?

Robert Compan:
Yes.

Assemblyman Duncan:
Is it your testimony or your belief that this is somehow going to affect the pretrial negotiations? My understanding is that the parties will be able to take into account all of these things still when they are negotiating, and then if the parties settle prior to trial, the insurance companies are going to be able to make the argument that we paid a reduction here so therefore, you are not entitled to $5,000; you are actually entitled to $2,000. That is my understanding, and I just do not see this bill changing that. If it is your testimony that, in fact, it is changing, I think that it is interesting. I do not think that is the intent of the bill.

I would like to hear from the insurance defense attorneys as well, but I think you are talking about something different. I am an attorney, too, so I am sensitive to rules of evidence of this coming in. This evidence is not coming in anyway at the trial phase.

Robert Compan:
I can only relate this to my personal experience as a liability claims adjuster years ago. I would think that a prudent claimant knowing the law would be able to do the same thing on his own.

Assemblyman Wheeler:
I would like to ask the same question as I asked Ms. Foster regarding double-dipping. If the insurance company pays part of the bill, why should the defendant pay part of the bill? If the insurance company were guaranteed to be reimbursed for the out-of-pocket spent at the discount rate, as part of that settlement, would you then oppose this bill?

Robert Compan:
On the principle of codifying it in law, we would probably oppose that part of it. To answer your question about receiving some of the monies back, subrogation is a big part of insurance. If you receive a demand for $5,000 in medical specials and you are able to receive that back after it has already been paid, or vice versa where the health providers were able to turn around and demand that from the insurance company, and then settlement is predicated based on the actual damages, that would be something the industry would be more than happy to look at.

Chairman Frierson:
Are there any other questions for Mr. Compan? I see one. Thank you. Is there anyone else in Carson City offering testimony in opposition to A.B. 219? Is there anyone in Las Vegas in opposition of A.B. 219?

Sarah K. Suter, representing Las Vegas Defense Lawyers:
We are in opposition to A.B. 219. This bill will not just impact cases that go to trial; it will impact cases throughout the litigation and negotiation and mediation phases of a case.

The California Supreme Court decision in *Howell v. Hamilton Meats and Provisions, Inc.*, 52 Cal. 4th 541 (2011) was a near-unanimous California Supreme Court decision which declared plaintiffs are only entitled to recover what was actually paid for their treatment, not the full inflated medical bills that no one ever pays. Under *Howell*, plaintiffs still get their medical bills paid, but they do not receive an undeserved windfall. *Howell* is a decision reflecting

common sense and fairness. Thus, in California, a leading and influential state for jurisprudence, when an injured plaintiff receives medical care for injuries, and the medical providers accept negotiated amounts for treatment received, a common everyday occurrence, the plaintiff may recover medical specials in an amount up to, and no more than, the negotiated, actually paid amount. No longer can plaintiffs recover the inflated medical bills. [Ms. Suter continued to read from (Exhibit C).]

Chairman Frierson:
Is it your belief that this bill proposes to do something that is not current practice?

Sarah Suter:
The current practice is that the full amount of the medical bills that were incurred do come in at trial, but the juries are instructed to determine the reasonable amount of the medical bills. That is Nevada Jury Instruction 10.02. The defense can introduce evidence of what is reasonable and customary in the industry. The jury can look at several things and they make the decision as to what is reasonable. Also, in the negotiation phase of the case, we often argue and are successful in only paying the amounts that the plaintiff actually paid.

Chairman Frierson:
Right, and that is current practice and that will still be allowed in negotiations. I want my Committee to be clear on the policy arguments for and against, but factually what the state of the law is right now. I thought the state of the law was this bill in practice, and that this bill was attempting to codify it. But I am hearing from a couple of people that it is their understanding this bill is trying to accomplish something that is not actual common law in Nevada.

Sarah Suter:
Mr. Chairman, I do not believe this is the current practice.

Assemblyman Hansen:
The testimony we have heard is that the California Supreme Court case was a substantial break with the common law. Is, in fact, the common law that set in stone that this is some major new precedent set by the Supreme Court?

Marc C. Gordon, representing Las Vegas Defense Lawyers:
I would like to clarify that because I think I can help break down A.B. 219 so we have a full understanding of what it is doing. For the moment, take section 1, subsection 2, paragraph (b) out of A.B. 219, and what you have left is a correct codification of the collateral source rule in Nevada which, by the way, is a rule of evidence. When you take away section 1, subsection 2,

paragraph (b), you have an attempt by the proponents of this bill to put into statute the collateral source rule as it presently operates in Nevada.

Section 1, subsection 2, paragraph (b) which I, in particular, am speaking to in opposition, is a brand new element. It is an element that you are being asked to adopt and it is far from settled in Nevada; it is far from settled across the country. The one place that it has been settled recently is in California by the California Supreme Court in the *Howell* case. It is not a lower court case; it is not a district court nor a trial court case. It was a near unanimous decision of the California Supreme Court which held that the entitlements to the medical bills actually paid is not part of the collateral source rule. It is not even affected by the collateral source rule. It is simply that in comparing whether a plaintiff should recover the medical bills as charged, which will never be paid as we know in most discounted situations, should the plaintiff be entitled to receive the money that is actually paid. It is simply a question of medical bills paid versus medical bills billed. The California Supreme Court held that, as a matter of fairness and equity, the plaintiff should only recover what has actually been spent, that anything in excess of that is a windfall, an undeserved windfall.

Ms. Suter has made some remarks from a presentation that we submitted to the Committee earlier this morning (Exhibit C). It gives you the description of the *Howell* case, what it did, and to clarify, there is some movement in Nevada to ask the Nevada Supreme Court to follow *Howell*. This is a matter of some dispute. It has not reached the Nevada Supreme Court yet. But this idea of medical bills paid versus medical bills billed is unsettled and is probably going to end up before the Nevada Supreme Court. I think section 1, subsection 2, paragraph (b) of the bill that is before you is an end run to prevent the Nevada Supreme Court from addressing the issue. Personally, I have never thought it good policy to codify a rule of evidence like the collateral source rule. This rule is a common-law rule that has been around for centuries. It is adopted in nearly every state and it simply says that evidence of a third-party payment is not admissible at trial. That is all it says. I am unaware of any other states that have codified the collateral source rule; California has not. This would be a very new step for Nevada to codify this type of rule of evidence and go against what is called *stare decisis*, go against the rule of precedent where courts, case by case by case, determined under current circumstances whether the rationale for a rule still applies. The Legislature will, in fact, as other speakers have mentioned, put in stone not only the collateral source rule of evidence but also put in stone section 1, subsection 2, paragraph (b), which is far from settled and which the courts have not been able to address in Nevada.

So I hope that explains and breaks down what we are looking at. My recommendation to the Committee is to codify everything except section 1,

subsection 2, paragraph (b). I do not think it is a wise policy by the Legislature but if you do, I recommend you leave out section 1, subsection 2, paragraph (b), or else you amend it to say, "evidence of discounts is admissible, or that discounted payments would be considered." In California, as I understand it, what they do is that the trial court simply reduces any award of medical bills by the amounts of discounts that the plaintiff will never be obligated to pay.

Chairman Frierson:
Thank you, Mr. Gordon.

Assemblyman Hansen:
That was an answer to my question.

Chairman Frierson:
Finally, I was waiting for somebody to talk about the fact that there is concern about pending litigation and that it is part of the nature of some of the opposition, to preserve the opportunity to challenge it because it is not, in some opinions, settled. Mr. Duncan, did you have a follow-up? Mr. Hansen, did you have a follow-up?

Assemblyman Hansen:
Thank you for the answer. It was very educational. So what you told me in answer to my question was everything in this is common law except section 1, subsection 2, paragraph (b), which has nothing to do with the common law as it has been applied. I just want to get that clarified. Thank you very much and I look forward to your testimony.

Assemblyman Duncan:
Thank you, Mr. Chairman. Mr. Gordon, just to be clear, would you agree that the *Howell* case from California basically upheld the collateral source rule as it stands, everything excluding section 1, subsection 2, paragraph (b) of the proposed legislation? I want to be clear that the *Howell* case upheld the collateral source rule as we know it except for the part where it expands the scope of economic damages to include expenses that the plaintiff never incurred. Is that a fair statement?

Marc Gordon:
Mark, jump in here if you think you could elaborate on it.

Mark E. Trafton, Vice President, General Counsel, Whittlesea Bell Companies:
I have been a litigator since 1997. I have tried these types of cases and am fairly familiar with the issues at hand. Let me just start with a basic example, and then I will get to that specific question.

As has been said repeatedly throughout the testimony today, I think everybody on either side of this issue can agree that the purpose of litigation of personal injury cases is to make a person whole. Now let me be a little bit more specific and give a silly example of that. If I buy a product on sale and I determine at some later date that I do not like it, I take it back because the store has a great return policy. The product that I bought, let us say it is a TV, is no longer on sale and it is back up to the retail price. The store is not going to give me the retail price; they are going to give me the money that I spent on buying that TV. That analogy works here in this situation. Here is how. If you cause a car accident by running into the rear end of my car and I am injured and I break my arm, I go to the doctor. The charge for fixing my broken arm is $10,000. That is just the general charge that the surgeon has to fix my arm. I have to pay that amount, $10,000, to get my arm fixed. That is what you owe me to make me whole because your duty as a defendant in a lawsuit, that you caused, is to put me back into the position I was before the accident. Now if I have health insurance and the doctor accepts $2,000 to fix my broken arm, then that is the amount of money that you should have to pay me, $2,000, not $10,000. It should be the amount of money that the doctor accepts as full payment.

Now here is where the *Howell* case comes in, specifically, this bill. This bill is combining two concepts of law. It is attempting to cover the collateral source rule, although I do not think it covers it completely. It is also covering a second concept having to do with economic damages, making a person whole. That is the second part, making a person whole and how do you do that. Is it the amount that the doctor accepts, or is it the amount the doctor bills? That part is still being litigated heavily throughout Nevada. It is now settled by the *Howell* decision in California. I highly encourage everybody on the Committee to read this decision whether you end up agreeing or not. It is just very well-reasoned; you can see clearly when you read this decision the arguments on both sides of this issue, and all of the questions that have been raised today are addressed in this *Howell* decision. The *Howell* decision leaves the collateral source rule in place, which is also what we have in Nevada from the 1996 Proctor case, *Proctor v. Castelletti*, 112 Nev. 88, 911 P.2d 853 (1996), which basically says that you cannot introduce insurance in a courtroom for any purpose. Now how to reconcile these two things, which is what I hear all the time from people on the other side of this issue—how can you have testimony in a trial about a lesser amount of medical bills because there is an insurance company involved, therefore, the collateral source rule prohibits you from talking about this? Here is how it works, and here is how I propose it can work. You have a doctor on the stand and, by the way, this is exactly what was discussed in the *Howell* decision. You say, "Dr. Smith, how much did you accept as full payment to fix Mr. Trafton's broken arm?" The doctor says $2,000; that is it;

end of story. There is no mention of insurance; collateral source rule is still intact; and nobody says to Dr. Smith, "Wait a minute, did you accept that because you have an insurance agreement?" That is inadmissible. What is admissible or should be admissible, in my opinion, is how much the doctor accepted for full payment of the services to fix my broken arm. If it is $2,000, then you, as the person who caused my broken arm, owe me $2,000. That is as simple as I can make it. I am happy to answer your questions if anybody has any.

Chairman Frierson:
Is there anyone else in Las Vegas to offer testimony in opposition, because we are running out of time?

Assemblyman Ohrenschall:
I have a brief question on fairness. We heard earlier from Ms. Suter about how the billed rate to the uninsured person is off, unreasonable, and illusory, and that troubles me hearing that because I know that the insureds do not get that discounted rate. If you could put the doctor on the stand and he can list exactly what he got paid, why is it not fair to have the plaintiff to be able to admit how much he has paid through the years to be able to have that insurance so that they can get that discounted rate and not be exposed to the unreasonable and illusory rate, to quote Ms. Suter?

Mark Trafton:
That is a fair question which I have heard a few times today. I am not trying to avoid answering that question, but the way the law currently is, in *Proctor*, no evidence of insurance can come in. Even if this bill was adopted, still, no evidence of insurance can come in. So there is just no way the way the law currently is, or the way the law is being proposed to allow a plaintiff to come in and talk about how much insurance premiums he has paid. The fact is, remember, if I break my arm in a car accident and you have caused that accident, you have to make me whole; that is what the basic concept of civil law is all about—putting me back into the position I was before the accident. And to do that, the *Howell* case articulates this beautifully. The way to make me whole is to actually pay me what was paid. It is an equal transaction, no more, no less; it is 100 percent whole. So I hope that answers the question.

Assemblyman Duncan:
If we codify the bill as is and we leave in section 1, subsection 2, paragraph (b), then in the scenario that you just posed, the plaintiff's attorney could pose the question to the doctor, "what were you going to charge?" The doctor could answer $10,000 versus $2,000. Is that correct?

Mark Trafton:
That is correct. I respect Mr. Gordon and we work together on a lot of issues. I differ slightly on his seeming willingness to be okay with section 1, subsection 2, paragraph (b) as it stands. I think section 1, subsection 2, paragraph (b) goes further than the collateral source rule because it says you cannot basically offer any evidence that the medical bills were discounted. If that language is codified, that is very troublesome, in my opinion, because again, you are getting away from the equality here.

Assemblyman Duncan:
So section 1, subsection 2, paragraph (b) codifies what *Howell* says that they should not be doing in California, that is, it is basically expanding this bill for economic damage to include costs that the plaintiff never incurred.

Mark Trafton:
Absolutely correct.

Assemblyman Duncan:
Thank you, sir.

Chairman Frierson:
Is there anyone in Las Vegas wishing to offer testimony in opposition?

Lawrence Matheis, Executive Director, Nevada State Medical Association:
We oppose the bill for the reasons that Ms. Pittman and others have said. I would be happy to answer any questions.

Chairman Frierson:
Thank you very much. I see no questions. Is there anyone in Carson City or in Las Vegas wishing to testify in a neutral position? I see no one. I would ask Ms. Flores to make any closing remarks about the bill before we close the hearing.

Assemblywoman Flores:
Just a couple of quick points. To Assemblyman Duncan's recent point, I did state this at the very beginning that this is on the radar because what you just heard is what is currently happening. That is the argument that is being made over and over again as a result of this California decision. What California is saying you should not do is what Nevada and the majority of the country is currently doing. So this bill—do not be confused or misled—currently codifies what is current practice. We cannot bring in discounts, other third-party payers, none of that. What you just heard is what is currently being litigated and currently being argued. So two things, Assemblyman Duncan is right in terms

of legal analysis. In terms of intuitive insight, Assemblyman Hansen gave one of the best examples of unjust enrichment and making the person whole. When Assemblyman Hansen asked about that $100,000 medical payment, and the response was that person did not get a windfall and was not unjustly enriched because they did not have insurance and the whole $100,000 was paid, the flip side and the point of this, is the person who got the unjust enrichment is the insurance company. That other person did not get anything additional; they just got their $100,000 paid for, but who benefited in that situation was the insurance company because they paid half of that because they were able to negotiate those rates with the doctors. In addition to that, they have received all of those premiums throughout the course of that entire time. So in that situation, who was the person who was unjustly enriched? That is what this boils down to.

We have provided the Committee with the citation for the *Howell* case. The *Howell* case might have some controlling factor in California and defense attorneys, as you just heard, would like that to be the case in Nevada but it is just not. In order to avoid all of these arguments, the litigation, we think it is good public policy to codify what has currently been practiced in Nevada via this bill. Thank you for your time, Committee.

Chairman Frierson:
Thank you. With that, I am going to close the hearing on A.B. 219. I will now open the hearing on Assembly Bill 240.

Assembly Bill 240: Revises provisions relating to civil actions. (BDR 3-1021)

Assemblyman James Ohrenschall, Clark County Assembly District No. 12:
Good morning, Mr. Chairman and members of the Judiciary Committee. Thank you for hearing A.B. 240. Today is quite the day for bills having to deal with civil actions. Assembly Bill 240 is a little bit farther down in Chapter 41 of *Nevada Revised Statutes* (NRS) and deals with comparative negligence. While my colleague, Assemblywoman Flores's bill, had to do with codifying a common-law rule, A.B. 240 is more about clarifying what is already the law in Nevada. Assembly Bill 240, if enacted, I believe, will help save judicial resources. It will lead to less needless litigation, and I believe it has the possibility of helping lower insurance rates through the reduction of hours of needless litigation and motions, debating an issue that really has been settled for many years.

This issue is comparative negligence. I do not practice in this area, and I had to refresh myself on this. I imagine that a lot of the lay members of the Committee are perhaps a little confused on this. I brought a few of my son's

toys here to explain the issue (Exhibit F). Please disregard any closeness or similarity. Here we have Ira, intelligent driver. Ira is a very safe person. He makes sure that his car is always mechanically sound; he gets up at 4:30 in the morning, and checks his tire pressure, cold. He makes sure his vehicle is very safe. Ira does not drink and he turns off his cell phone whenever he gets in his car. Ira is what we call the fault-free plaintiff. So one day, we have Ira, the intelligent driver, the fault-free plaintiff, at a four-way stop preparing to proceed. As you would expect, Ira looks both ways; the coast is clear; and he proceeds at the posted speed limit through the intersection. Out of the blue, unbeknownst to Ira, comes lead-footed Wes. Lead-footed Wes is in quite a hurry to make an appointment and does not see Ira in the middle of the intersection. In his hurry to make his appointment, he rear ends Ira. Ira, our fault-free plaintiff, did not contribute to this accident. Lead-footed Wes is responsible and Ira can collect 100 percent of his damages against lead-footed Wes. That is a pretty simple scenario. There is one defendant and one plaintiff. It gets a little more complicated if we bring in our love-to-text Andrew. Ira is still our fault-free driver, but now he is injured by both vehicles. Lead-footed Wes who is in a hurry to get to his meeting and love-to-text Andrew who just cannot not text when he drives and also, did not see Wes and Ira in the intersection. Ira is still fault-free in this scenario and under current Nevada law, Ira can collect his damages jointly and severally against lead-footed Wes and love-to-text Andrew. What that means is if lead-footed Wes has an insurance policy and love-to-text Andrew does not, lead-footed Wes' insurance policy can pay 100 percent of Ira's damages. The goal here, as we heard with A.B. 219, is to make the victim whole. The history of the common law has been less about putting the burden on the victim to try and sort out percentages in this scenario and the fault-free victim, but rather about making him whole. Then lead-footed Wes and love-to-text Andrew can sort out the percentages of liability. In this scenario, it looks like lead-footed Wes is probably more liable than love-to-text Andrew. And that has been the history of the common law and that is how Nevada law is now.

Nevada Revised Statutes 41.141 also addresses the issue where Ira is not fault-free. Let us say today Ira decided to answer some text messages on his phone and he was not paying attention at the intersection. He still gets hit by lead-footed Wes and love-to-text Andrew, but now Ira is not fault-free. Under Nevada law, if Ira is less than 50 percent at fault and the jury decides that, if it is a jury trial, he can still collect but he will collect severally, meaning that lead-footed Wes, if he is liable for perhaps 60 percent of the damages, and love-to-text Andrew for 20 percent, he would have to go to them individually to collect that judgment.

What A.B. 240 proposes to clarify in NRS 41.141 is a defense that either Andrew or Wes impose against Ira, that defense of comparative negligence. They want to try to prove that he was text-messaging at the time of the accident. The current law is ambiguous, and the Nevada Supreme Court has stated that very fact as recently as last year. So what this bill is trying to do is to clarify that a defendant cannot just assert that defense in a pleading; they cannot just say, "We should not be 100 percent liable because Ira is at fault." It has to be proven. That is why I believe A.B. 240 is about essential fairness. We are not saying either party should have to pay the 100 percent if the plaintiff was at fault, but we are saying that it must be proven. I am happy to answer any questions.

Assemblywoman Cohen:
What is the Nevada Supreme Court case you mentioned?

Assemblyman Ohrenschall:
It is *Café Moda, LLC v. Donny Palma*, 128 Nev. Adv. Op. 7, 272 P.3d 137 (2012).

Chairman Frierson:
Are there any other questions? I see none. If there is anyone in Carson City or in Las Vegas to testify in support of A.B. 240, please come forward now.

Matthew Sharp, representing Nevada Justice Association:
I am here with Bill Bradley on behalf of and in support of A.B. 240. As a trial lawyer myself, I have learned when somebody does an excellent job in presenting a very complex issue, there is no point for me to really add anything. I can give you the specifics of the bill. You can see that is what is being proposed in section 1, subsection 1

The current law says that in a case, and I am paraphrasing, in which comparative negligence is asserted as the defense, and most in the trial bar have always believed that "asserted as a defense" means the jury finds a plaintiff to be comparatively negligent, that is asserted as a defense. This goes back to a 1989 case called *Buck v. Greyhound Lines, Inc.,* 105 Nev. 756, 783 P.2d 437 (1989), but that is generally the way the trial bar has approached that. [See (Exhibit G).] Over time, clever lawyering, whatever you want to call it, has taken that phrase to mean that if I file a response to a complaint and I put "asserted as a defense," then I can avoid responsibility. From our view, that does not make any sense. The purpose of this statute is to make people responsible and to make people whole. If a person is fault-free, they should be made whole. If they are not fault-free, then they should share in the responsibility. That is all that we are trying to accomplish. Sometimes you

come to the Legislature to clarify ambiguities in the statute, and we think this does so. We think this is a fair, reasonable, and responsible result. With that, I will answer your questions.

Chairman Frierson:
Are there any questions for Mr. Sharp? I see none. Is there anyone else in Carson City or in Las Vegas to testify in support of A.B. 240? I see no one. I will now invite those in Carson City and in Las Vegas who are in opposition to A.B. 240 to come forward.

George Ross, representing Las Vegas Metro Chamber of Commerce:
I was hoping we would have similar representation from the defense bar in Las Vegas when this came up. So I will put the Las Vegas Metro Chamber of Commerce on record as opposing A.B. 240. We are concerned that it would open the door to more expensive pursuit of, on the joint liability, the deep-pocketed defendant and invite more lawsuits when that occurs.

Chairman Frierson:
Thank you, Mr. Ross. Are there any questions for Mr. Ross? I see none. If there is anyone in Las Vegas wishing to testify in opposition, now would be the time to come forward. I see no one. Is there anyone in Carson City or in Las Vegas wishing to testify in a neutral position regarding A.B. 240? I see no one. Mr. Ohrenschall, do you have any closing remarks?

Assemblyman Ohrenschall:
Yes, Mr. Chairman. I have a lot of respect for my friend, George Ross, but I think there might be some misunderstanding about this bill. I have passed two bar exams and I needed quite a tort refresher to understand this issue. I do not see this bill as changing existing law. The fault-free plaintiff, before this bill, and if this bill passes, still has the right to collect jointly and severally against the defendants, the goal being making the victim whole. If the victim has some fault, then it would only be a several judgment; that does not change. We are just saying that one of the defendants cannot just allege that the victim has fault. It needs to be proven which, as I understand, is what has been going on since 1973 when this was added. In my opinion, this will save litigation costs and save time in court. In terms of very creative attorneys trying to litigate this point about whether just asserting it is enough, I think our basic sense of fairness tells us that it is one thing to say that he is guilty, too, but it should be proven.

Chairman Frierson:
Thank you very much. With that, I will close the hearing on A.B. 240. We have one more bill on today's agenda and that is Assembly Bill 250. I will

open the hearing on A.B. 250 and invite Mr. Munford to come up to introduce this bill.

Assembly Bill 250: Provides immunity from civil liability to certain persons for injuries or death resulting from certain equine activities. (BDR 3-243)

Assemblyman Harvey Munford, Clark County Assembly District No. 6:
Thank you, Mr. Chairman and members of the Committee. I am here to present A.B. 250, also known as the Equine Activity Liability Bill. Nevada is one of only four states without an Equine Activity Liability law. The other states are California, Maryland, and New York. The language in this bill is very similar to the law in Montana. Passing A.B. 250 will help horse show sponsors, guides and outfitters, farriers, horse trainers, boarding stables, and other professionals get affordable liability insurance. [Mr. Munford continued to read from Exhibit H).]

Chairman Frierson:
Do you have any questions for Mr. Munford?

Assemblyman Duncan:
Thank you, Mr. Chairman. Thank you, Mr. Munford. I was just wondering, for the Committee, if you could give us an idea of an activity right now, since we do not have this law, that would be subject to civil liability whereas if this is law is enacted, it would not. It would make it a little more concrete for me.

Assemblyman Munford:
I think a very solid and strong example would be a parade where there are always horses participating in parades, and a horse suddenly becomes spooked. The horse bolts and runs into the crowd. Maybe someone in the crowd could be injured. Who is going to be held liable, the owner of the horse or the parade sponsors? Who would cover the losses of those who are injured? There are many examples. In a working ranch, sometimes they bring guests on the ranch when they might be branding or having a roundup. These are innocent guests and friends, and they might be subject to some injury as a result of being on the ranch with the horses, with the cow they are branding. Is the rancher liable? Those are some examples.

Assemblyman Wheeler:
Having seen a lot of examples of this, this is a bill that is long overdue and I want to thank you for bringing it. The thing I want to make sure is that negligence is not covered in this bill. Someone who is negligent obviously has a civil liability, but I have seen cases that this bill would cover where owners of stables especially rental stables, cannot get liability insurance in California or

Nevada, where they can in other states because of the incredible lawsuits that have been brought against them for just trivial things.

Assemblyman Munford:
Thank you.

Chairman Frierson:
My only question is the inclusion of spectator in this, and why a spectator would not be given some type of opportunity to seek responsibility for any injuries. They are not engaging in anything other than watching. I am concerned that nobody is negligent—the horse hops the fence, a child in the stands who has never been to a rodeo before gets trampled by the horse, and the rodeo sponsor's response is, "Sorry, you should have read the fine print on the back of your ticket."

Assemblyman Munford:
What you are saying has validity. I think the biggest concern of people who own horses is not that they are against covering losses, but they want to have the opportunity to obtain or purchase liability insurance. The cost can be so expensive. They want some protection in that area, that in some way the cost could be decreased. Sometimes insurance companies have the total liberty to charge whatever they want depending on the event, and so that is a primary intent of this legislation.

Chairman Frierson:
Are there any other questions for Mr. Munford? I see none. I would invite those in Carson City or in Las Vegas in support of A.B. 250 to come forward now.

Doug Busselman, Executive Vice President, Nevada Farm Bureau Federation:
Mr. Chairman and members of the Committee, on behalf of the Nevada Farm Bureau Federation, we are here to support this piece of legislation, and we greatly appreciate Assemblyman Munford for bringing this proposal forward. I began my advocacy for farmers and ranchers in Nevada at my first legislative session in 1989. We have dealt with this type of bill in almost every session since then. We have supported it each time it has come up because we believe it is very important that those folks who are involved with horses have this type of protection from needless litigation and liability, given the fact that most of the people who interact with their horses do so with the knowledge that horses can harm you. There needs to be some level of individual responsibility so that when you do participate at a riding stable that you understand that you are subject to possibly being hurt just because you voluntarily went there. And so,

we are very appreciative of having another opportunity to promote this legislation and encourage your support in passage.

Assemblywoman Diaz:
How often do these types of civil litigations or possible lawsuits against the people who own the facilities?

Doug Busselman:
I am not sure that I know how many instances there have been where this has taken place. Given the perception that it could happen, it does drive insurance rates higher from a risk avoidance process and could make it impossible to purchase the insurance in the first place. You have the combination of either high rates if you can buy the insurance, or the inability to even buy insurance. It is just the threat of there being a liability that causes the problem of being able to get affordable insurance to protect yourself should that happen.

Assemblyman Hansen:
I believe you said that almost all the states in the West have something similar to this. It already is law in other states yet in our state, we cannot seem to get it into statute. What has been the result in those other states, and have there been problems that opponents bring up in these hearings?

Doug Busselman:
I do not know all the states but I do know in past experiences where we have brought forward proposals, they have been based on Colorado as being one of the model states that we follow in terms of providing that type of protection. [See (Exhibit I).] I do not know what Colorado's experience has been.

Assemblyman Ohrenschall:
Are the rates lower in Colorado than here in Nevada?

Doug Busselman:
I do not know the answer to that, but I can confer with my colleagues in Colorado and get back to you with information.

Chairman Frierson:
Is there anyone else in Carson City or in Las Vegas in support of A.B. 250? [There was no one.] I would invite those to testify in opposition to A.B. 250 to come forward both here and in Las Vegas.

Graham Galloway, representing Nevada Justice Association:
With all due respect to Assemblyman Munford and all the equine lovers out there including myself, we respectfully oppose this legislation because of the

immunity that it provides equine owners, equine activity sponsors, and equine professionals. Our organization believes that everyone should be fully responsible for their actions and fully accountable for any harm that they may cause. When you give out immunity, you are giving somebody a free pass. Immunity should be meted out, or provided in the most sparing or most significant situations. There is no compelling state interest here that requires you to change the existing law regarding negligence, responsibility, and liability. Equine activity is great; there is nothing wrong with it; we do not oppose it. But we do oppose immunity. The language of this statute unfortunately does cover exceptions but it does not specifically exclude negligent acts. In looking over those, I do not believe that it says negligence is excluded. It talks about certain acts being excluded, but not negligence. Thank you, Mr. Chairman.

Assemblyman Wheeler:
Is it not true that negligence is actually part of the court proceeding? The only way you can bring a civil suit like this is to assert negligence, therefore, it would have to be something you would have to prove in the court. Is that correct?

Graham Galloway:
Yes, you are correct. In order for a claimant to prevail in litigation and a lawsuit, they would have to establish that some actor has been negligent in some form. I agree with your comment and I think the statute, in some ways, provides that, but what concerns us is that you open this bill up with immunity. And as I have heard the sponsor of the bill say that it is not intended to immunize negligent actors, but I am not entirely sure if you take the negligent actors out who this is immunizing.

Assemblyman Munford gave the situation of a horse bolting in a parade. If I am a spectator in a parade, unfortunately, it is your horse, sort of like a car where you have an obligation to control your car; you have an obligation to control your horse. I understand that horses are a little trickier than cars. Being a horse person myself, I do appreciate that and understand that. What Assemblyman Munford is proposing here, fundamentally, we do not oppose, but by immunizing someone, and I am not sure how that works given the language of this bill, I do not think that is in the best interest of the citizens of the state.

Assemblyman Wheeler:
As far as immunizing, I do not read it that way. Having grown up around this business—one of the reasons I came to Nevada was to work on a horse field—I see that a good attorney such as yourself would be able to prove that the rider or owner of the horse was negligent in putting that particular animal in that parade. That burden of proof should be there. Instead what I see this bill

taking care of is the frivolity of lawsuits. I am just wondering without this change, is this not going to keep insurance not just abnormally high, but actually to where no one can afford it? In that case, if the horse rider, the stable owner, or the outfitter could afford the insurance, trial lawyers could go after the insurance company with the deep pockets.

Graham Galloway:
Unfortunately, no matter what we do, and we try our hardest contrary to what a lot of people believe, you are never going to prevent frivolous lawsuits. We, as lawyers, get tagged for that and for the most part, a lot of that is not us. It is unreasonable people who are bringing frivolous lawsuits, but this bill will not change that. The bill does say an equine activity sponsor or equine professional is immune and that is my concern. If you are giving immunity out, there should be a compelling state interest that requires it, otherwise, it should just be back on the general negligence standard, the reasonable person standard. I understand what is being attempted, but I think this is the wrong way to go about it.

Chairman Frierson:
Are there any other questions? I see none. Is there anyone else here or in Las Vegas offering testimony in opposition to A.B. 250? [There was no one.] Is there anyone in Carson City or in Las Vegas to testify in the neutral position? [There was no one.]

I do see Senator Goicoechea. Were you here for moral support, or if you missed an opportunity to testify, I do not want to prevent you from being able to do so, so I would invite you up.

Senator Pete Goicoechea, Senatorial District No. 19:
Mr. Chairman and members of the Committee, this bill is a bill that I brought last session. It continues to be an issue out there, and I think the key component of this bill as it deals with equine liability is it has to be intentional negligence. That is what we are trying to get at. In trying to get some protection out there for the equine industry and people who are in equine recreation.

We have had cases where neighborhood children come over and practice with your children on your property and an accident occurs, you are automatically liable for that activity, for the other person's horse. And that is what the intent of this bill is—trying to avoid some of the exposure that you would unintentionally incur if, in fact, your children were riding with someone else's children at your house and an accident occurred. How do we avoid that automatic perception that you are liable just because they were on your

property, or at an event that you were sponsoring? There has to be a certain amount of negligence proven here. I would hope there would be some way we could craft this language and get some amendments in here to really get to the crux of it. Thank you.

Chairman Frierson:
Thank you, Senator Goicoechea.

Assemblyman Martin:
I am still a little confused. I understand the intent of the bill and thank you for bringing it forward. But going back to the parade example where the horse bolts into the crowd and injures a child, if this bill is passed, who would be responsible for that child's injuries?

Senator Goicoechea:
Clearly there are scenarios, but you are talking a parade route. Is it not any different than if you ran over someone with your car in that parade? That is a little different scenario but are you automatically liable at the point because you participated in that parade and that child ran under your horse? Are you liable?

Assemblyman Martin:
I think you are identifying a very situational event. I would argue that it is probably a very different situation. I am just trying to really understand who would have liability. Obviously if the child ran out onto the parade route and got trampled by the horse, heaven forbid, that is a different situation than the horse entering the crowd, otherwise causing the injury.

Senator Goicoechea:
Clearly we would be in court trying to determine that, and I will be honest with you, it would almost be automatic that the horse and the rider would be brought into court. It is the perception that the horse is always at fault, and that is what this bill is intending to do—is to take away the automatic perception just because it is a horse.

Chairman Frierson:
Are there any additional closing remarks? [There were none.] Mr. Munford, do you have any additional closing remarks before we close the hearing?

Assemblyman Munford:
Thank you, Mr. Chairman. I appreciate the Senator coming forward and sitting with me. I concur with what he was saying.

Assemblyman Ohrenschall:
I just wanted to commend my colleague, Mr. Munford. I have seen this bill come from my rural colleagues, and it is really great for someone from the urban part of the state to carry it through. Regardless of how we feel on this issue, I think it is great that you are championing this issue because there are a lot of people who do keep horses in the urban part of our state, too. So thank you very much, Mr. Munford.

Chairman Frierson:
Thank you and with that, I will close the hearing on A.B. 250. I invite anyone who may have any public comments to come forward now, either here or in Las Vegas. Seeing none, I do not believe we have any matters from previous hearings. So with that, I will now adjourn today's meeting [at 10:44 a.m.].

RESPECTFULLY SUBMITTED:

_____
Thelma Reindollar
Committee Secretary

APPROVED BY:

_____
Assemblyman Jason Frierson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 21, 2013 **Time of Meeting: 8:06 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 219	C	Assemblywoman Lucy Flores	California Supreme Court *Howell* case
A.B. 219	D	Mark Wenzel, Nevada Justice Association	Affirm the Collateral Source Rule
A.B. 219	E	Mark Wenzel, Nevada Justice Association	Gresham V. Petro
A.B. 240	F	Assemblyman James Ohrenschall	Cars visual aid
A.B. 240	G	Matthew Sharp, Nevada Justice Association	Joint and Several Liability
A.B. 250	H	Assemblyman Harvey J. Munford	Prepared written testimony
A.B. 250	I	Doug Busselman, Executive Vice President, Nevada Farm Bureau Federation	West Colorado Revised Statutes