MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Eighth Session
May 26, 2015

The Committee on Judiciary was called to order by Chairman Ira Hansen at 8 a.m. on Tuesday, May 26, 2015, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 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 www.leg.state.nv.us/App/NELIS/REL/78th2015. In addition, copies of the audio or video of the meeting may be purchased, for personal use only, through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Ira Hansen, Chairman
Assemblyman Erven T. Nelson, Vice Chairman
Assemblyman Elliot T. Anderson
Assemblyman Nelson Araujo
Assemblywoman Olivia Diaz
Assemblywoman Michele Fiore
Assemblyman David M. Gardner
Assemblyman Brent A. Jones
Assemblyman James Ohrenschall
Assemblyman P.K. O'Neill
Assemblywoman Victoria Seaman
Assemblyman Tyrone Thompson
Assemblyman Glenn E. Trowbridge

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman James Oscarson, Assembly District No. 36
Senator Greg Brower, Senate District No. 15

STAFF MEMBERS PRESENT:

Diane Thornton, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Linda Whimple, Committee Secretary
Jamie Tierney, Committee Assistant

OTHERS PRESENT:

Robert Jacot, Private Citizen, Reno, Nevada
Bryan A. Nix, Senior Appeals Officer, Hearings Division, Department of Administration
Adam Laxalt, Attorney General, Office of the Attorney General
Brett Kandt, Special Deputy Attorney General, Office of the Attorney General
Robert L. Compan, Manager, Government and Industry Affairs, Farmers Insurance
Stacey Upson, Attorney, Farmers Insurance
Margo Piscevich, representing Nevada Rural Hospital Partners; and Keep Our Doctors In Nevada
James L. Wadhams, representing Nevada Hospital Association
Justin Harrison, representing Las Vegas Metropolitan Chamber of Commerce
Dan Musgrove, representing CSAA Insurance Group; and The Valley Health System
Tray Abney, Director of Government Relations, Reno Sparks Chamber of Commerce
Mark Wenzel, representing Nevada Justice Association
Graham Gallaway, representing Nevada Justice Association
Lesley Pittman, representing Keep Our Doctors In Nevada
Denise Selleck, representing Nevada Osteopathic Medical Association
Kathleen Conaboy, representing Nevada Orthopaedic Society
George A. Ross, representing Sunrise Hospital and Medical Center; Institute for Legal Reform; and American Tort Reform Association
Jennifer Gaynor, representing Nevada Health Care Association
Daniel Mathis, President/CEO, Nevada Health Care Association
Robert Rourke, Attorney, Rourke Law Firm, Las Vegas, Nevada
Stephen Osborne, representing Nevada Justice Association

Chairman Hansen:
[Roll was called and protocol was explained.] We have six bills on the docket this morning, and we will also have a work session tomorrow. We may try to move Assembly Bill 487 on the floor today. Also, this will probably be our last full-blown meeting, so I would like to let all of the Committee members know what an honor and privilege it has been to be the Chairman of this Committee and to be able to work with you. I think we have shown great decorum and respect for one another. We have strong and very divergent opinions on this Committee, and I think we have been able to express them very freely without any personal animus or animosity. In my three sessions here, being Chairman is by far the greatest privilege I have had, so I want to thank all of you. I especially want to thank Diane Thornton and Brad Wilkinson who have been behind the scenes helping to keep this Committee going and advising us all. Since this is probably the end for us, I just wanted to take a moment to publicly thank you for that.

We are going to go to Assembly Bill 487 very quickly and bring up Assemblyman Oscarson. If you have been living under rock somewhere and not familiar with this whole situation, this bill is basically a verbatim amendment that was on Senate Bill 175 (1st Reprint). They have taken it and used it as an emergency measure. It deals with campus carry and we are going to have a very brief hearing on it and then we will move on to the other bills.

Assemblyman James Oscarson, Assembly District No. 36:
I was just approached to see if you would hear Senate Bill 230 first. We have a young gentleman here in the front—if you would not mind—I appreciate your indulgence.

Chairman Hansen:
I do not mind. Senator Brower is here to present S.B. 230.

Senate Bill 230: Revises provisions governing the payment of compensation to certain victims of crime. (BDR 16-1038)

Senator Greg Brower, Senate District No. 15:
I am here to present Senate Bill 230. I am introducing this bill upon the request of two gentlemen. First of all, I want to introduce you to Aiden Jacot, who is the young man over to my right. His father, Robert Jacot, is here and will testify in a moment, and we have Mr. Bryan Nix from the Department of Administration in Las Vegas who will be able to provide some answers to questions and an explanation of how this bill would actually work. Suffice it to say, this bill is an effort to change the law with respect to our state Fund for the Compensation of Victims of Crime. The effort is to reform the law the best

we can in a monetary sense to make victims of crime whole. With that, I will turn it over to Mr. Jacot and let him give some opening remarks, show a brief video, and then Bryan Nix in Las Vegas is the real subject matter expert on behalf of the Executive Branch, and he can explain how this will work.

Robert Jacot, Private Citizen, Reno, Nevada:
[Video presentation of photographs of Aiden Jacot] Aiden was ten months old on May 12, 2010, when he was shaken and beaten so badly by his babysitter that it caused him to have a skull fracture and swelling to his brain, which caused a lack of oxygen to his brain. The injuries have now left Aiden without the use of his arms, legs, and head. He also cannot eat on his own and must be fed every three to four hours through a G-tube in his stomach. Aiden is blind in both eyes and could suffer a seizure at any given time. He requires 24-hour care. Over the last five years, we have incurred significant cost due to Aiden's injury and care. The Victims of Crime Program has been there every step of the way for us, and without their financial support, there is no way Aiden would be where he is today. Five years ago, we were in the pediatric intensive care unit (ICU) at Renown Regional Medical Center and they told us Aiden would never leave the hospital. Four weeks after being in the pediatric ICU, Aiden did leave the hospital. Aiden's doctors and therapists have told us, "Do not stop what you are doing. You guys are doing a great job." The doctors and therapists have also told us that Aiden's recovery to this point is amazing. Aiden and I are here this morning to respectfully request your consideration of S.B. 230 and to answer any questions you may have for us.

Bryan A. Nix, Senior Appeals Officer, Hearings Division, Department of Administration:
I serve as the Senior Appeals Officer for the Hearings Division of the Department of Administration. In this capacity, I also oversee the Victims of Crime Program, and I have done so for the past 25 years. This bill is intended to lift the statutory cap on how much money we can pay on a claim. The statute currently caps the amount at $150,000. The purpose of lifting that cap is because we have a certain category of claimants who cannot have their bills or needs satisfied within the $35,000 cap we have placed administratively through our policies. We have the category of catastrophic claims for cases like Aiden's where you have traumatic injuries involving paraplegia, blindness, loss of limbs, et cetera. Unfortunately, in Aiden's case, he is going to need long-term care. The care that he requires cannot be provided by any other governmental program, and we are able to provide that at a very efficient rate. In this case, Aiden's claim is probably somewhere in the range of $120,000 currently, but we will run out of that claim amount in another year if this cap is not lifted.

Most of our catastrophic injury claims; we have had 18 in the last 16 years; are typically in the range of $60,000. Of course, Aiden's case is different, and we think there will be other cases like Aiden's in the future. We are simply asking to lift that cap. The State Board of Examiners has policies in place which provide claim cap limits at $35,000, and would have oversight for any claim exceeding $35,000. The State Board of Examiners directly oversees the Victims of Crime Program. They have to vote quarterly on our financial reports. They have to oversee all the appeals on any administrative issue regarding the program. We think they are well-equipped to monitor and control the funds that are paid out on these claims.

The Victims of Crime Program is primarily funded through fines and forfeitures imposed by the courts. It is not a State General Fund agency. We are financially very well set. We have probably $13 million to pay claims and we pay about $6 million to $8 million a year in claims, so we have about a $7 million or $8 million reserve. We do not see this as having any negative financial impact on the state or the Victims of Crime Program, but we do think this will enable us to help more victims like Aiden.

Assemblyman Nelson:
You mentioned federal funding coming in, but in your written materials you think it might go down in the future?

Bryan Nix:
Our federal funding varies based on how much we spend of state funds. They are actually considering raising it from a 60 percent match—which means they will give us 60 cents for every dollar we pay out of state funds—to 75 cents per dollar. We do not anticipate less. Amazingly enough, over the past few years, we have seen our claim costs go down for a variety of reasons—hospital bills are smaller in some situations, some of these violent crimes have reduced in number, and our caseload has not grown like our population has, yet it continues to grow at a moderate rate. The funding we get from the federal government is similarly sourced to criminals and criminal fines at the federal level. They have an incredibly healthy fund—it is just a matter of how much they are going to pay as a percentage of what we have paid out. We do not anticipate it will drop much. We certainly have the reserves in the event that we spend fewer state funds and we get less of a match.

Chairman Hansen:
This is strictly for the victims? There are no attorney fees that factor in any of this money?

Bryan Nix:
No, we have never paid attorney fees on a claim in the 25 years I have been doing this.

Chairman Hansen:
Okay. I just wanted to make sure that was on the record.

Bryan Nix:
It is purely for medical bills and the kinds of costs that Aiden incurs—for instance, home care, prosthetic devices, wheelchairs, et cetera.

Chairman Hansen:
Senator Brower, do you have anyone else you would like to come up at this time?

Senator Brower:
No. On behalf of Mr. Nix and the Jacot family, particularly Aiden, who is once again performing in an outstanding manner here for his third hearing on this bill, we appreciate the Committee's time and consideration. This is as close to a perfect bill as it gets around here, especially given the fact that there is no impact on the General Fund. We hope that we can see quick movement on this bill with the limited time we have left in the session.

Chairman Hansen:
Is there anyone else in Carson City or Las Vegas who would like to testify in favor of S.B. 230? [There was no one.] Is there anyone opposed to S.B. 230? [There was no one.] Is there anyone in the neutral position? [There was no one.] We will close the hearing on Senate Bill 230. Next, we will go to Senate Bill 60 (2nd Reprint) at the request of the Attorney General.

Senate Bill 60 (2nd Reprint): Revises various provisions related to the Office of the Attorney General. (BDR 16-470)

Adam Laxalt, Attorney General, Office of the Attorney General:
I am here to testify about one portion of Senate Bill 60 (2nd Reprint). This bill will establish an official title for the Office of Military Legal Assistance. I have had the opportunity to discuss this with many of you, but this is going to be a first-of-its-kind program—a public/private partnership between lawyers of the State Bar of Nevada and our military community. We believe it is going to be an exceptional program. The concept is that we create no new entitlement and no new bureaucracy. The Office of the Attorney General will be the clearinghouse

to have all military components in the state of Nevada on one side and it will be our job—my job, in particular—to recruit individual lawyers and law firms from around the state who are willing to give up ten hours per year for them to take pro bono cases for our military community.

We started a community in January 2015, and were fortunate enough to have what I believe were the 16 players who were most important to get to the table to make sure we did this right and that we received all the input we needed, which included the commanders of Fallon Naval Air Station, Nellis Air Force Base, and the Nevada National Guard—our reserve components on the military side—as well as our veteran community. On the pro bono side, it included the Legal Aid Center of Southern Nevada, Nevada Legal Services, and a number of the other existing pro bono service providers, the State Bar of Nevada, the Washoe County Bar Association, and the Clark County Bar Association. We had everyone at the table to make sure we were not doing any duplicative services, and we found a universal desire to move forward with this program. Certainly, we are very excited that something like this could emerge, and we are set to move on this program. We have a number of pro bono hours committed from our Bar community already.

Assemblyman Thompson:
How will this program differ from the other pro bono-type of programs in communities? Would this not be a subsection of those types of programs, or would this put those programs at risk?

Adam Laxalt:
This is why it was important for us to get the existing pro bono service providers. I was loosely aware that some of the county and state bars were trying to help our military community. We discovered that no one was actually able to take on this huge burden that the state has. Everyone has a small program but, as we all know, we have over 300,000 veterans and potentially as many as 100,000 who are active-duty or reserve guard unit service members in the state. We are all working together. We are going to continue to meet as a committee with these pro bono service providers, and I am going to use Barbara Buckley of the Legal Aid Center of Southern Nevada as an example. They do a number of services that are going to be able to overlap with our program. As we intake from a military base or from a veterans service officer, we will figure out by a matrix if it is something that should route directly to an existing pro bono service provider or, if it is something that does not fit their criteria, we move over to the pro bono bank of lawyers.

Assemblyman Thompson:
I am really concerned about flow and access. Is this going to be an extra layer that they have to go into a portal and apply online? Right now, they can walk into offices and get that service right then and there.

Adam Laxalt:
The great part about us having everyone at the table is that we will be able to continue to communicate about this. My goal is not to re-create the wheel, which is why we want to get everyone at the table. If someone is already going to a legal service provider, there is nothing to stop them, and it is great. We want to get everyone served the best we can. We believe that we are going to be able to increase awareness. We spend a lot of time at these bases, and we are going to spend the time with the active-duty and reserve judge advocate generals (JAG) and continue to update them on this program. The service members rotate all the time, so programs like this can rise and lower in importance. We believe this is a win-win. We are going to get more people who understand that the service is available.

Assemblyman Elliot T. Anderson:
Would you give me a briefing on what exactly happened with the insurance issue? Was it resolved well, and do you feel comfortable with how it went?

Adam Laxalt:
We had toyed with trying to figure out if we had to create a liability shield by statute and basically ended up getting a universal opinion from the State Bar and legal service providers. We also have the trial lawyers association—all these people are on board. Everyone felt like we should go without that kind of liability shield. In the interim, the Legal Aid Center of Southern Nevada is going to provide a liability shield for anyone who enters the program, and we have been working on a memorandum of understanding with them.

Assemblyman Elliot T. Anderson:
To be clear, they are going to be put on their insurance? Am I understanding that correctly?

Adam Laxalt:
Essentially, any pro bono lawyer who signs up through this program will be covered under their insurance.

Assemblyman Elliot T. Anderson:
Good. Thank you for wrapping it up neatly and working with everyone. I think it is important because there is a lot of experience out there doing this and combining your office with all of our existing service providers is a good way to increase the amount of help that we can give them.

Assemblywoman Diaz:
Is there a way we are going to be prioritizing the cases that we take? Is this something that is going to be worked out later? Are we going to take everyone? That would be awesome.

My second question is about section 11 where it says your area can request donations and gifts. Is there a reporting mechanism that lets the public know who is contributing to this program?

Adam Laxalt:
We have been working to figure out how to take on this huge project. The way we started in this committee was a wish list of all the types of legal services we felt were needed. Then we have been able to go to some of our lawyer partners and some of our legal aid partners and try to figure out what we should start with. We are going to start with six to eight specific civil legal-type issues, and I would rather not go on the record on that right now. We are whittling down what we think we have the capacity to cover for the first year. Again, we are going to be a standing committee so we can continue to monitor this.

You mentioned the volume. On day one we could get 6,000 new clients, which would overrun the program. We envision treating this the way they do in the service, which is active duty always gets first line of coverage. Then active reservist, active guard, and then reservists. Obviously, our goal will be to track all of this. We hope this program, over the next number of years, will be able to cover everyone, and from the start, plan to cover families of service members as well. That is what we are going to do to try to make sure we have a grip on this program to start for the first year. We plan on matrixing this and trying to understand if we are turning away people, who we are turning away, and what type of legal service it is so we will have a good grip in a year on how we can expand.

With the second question, I apologize. We can get back to you. It is something my budget person is tracking for us, but we plan on taking donations from presumably Nevada companies who are willing to support this mission. We know we are going to have a lot of costs that are going to accompany this project. We certainly want to make sure we can reach into the rurals, and it is

something that we are working on already. We do not know how much that is going to be, but we want the capacity to be able to not spend General Fund dollars as we meet these needs.

Assemblyman Ohrenschall:
Sometimes my wife volunteers through the Legal Aid Center of Southern Nevada where she goes to the rescue mission and provides legal advice to people staying there. Sometimes she meets veterans who are homeless and staying at the rescue mission. I wonder if you envision this program trying to reach out to homeless veterans at all? I think we have quite a large number in Las Vegas.

Adam Laxalt:
I have spoken with the gentleman who runs Veterans Village—for those of you who are familiar with it in Las Vegas. It is an incredible program that has turned an abandoned motel into 120 apartments for our homeless veterans. The biggest problem we are going to have is that we need to have criteria to get in. We are going to make sure that people are coming in through JAGs, coming in as far as our active duty National Guard reserve components because they can verify these people are in good standing and are active duty or reserve. For the veteran community, they are going to come through our existing veterans service organizations (VSO). It is a long answer to say that to the extent that the homeless person is an honorably or other than honorably discharged veteran and they are coming through a VSO, that is something we will be able to help at the front end.

The great thing about this project is how collaborative it is. It is a testament to our state that we are able to pick up the phone and I can get a law firm to commit 25 lawyers to this program and we can get all these pro bono service providers who are ecstatic about having this centralized in one place. I can commit to you that we will continue to monitor all the needs. Obviously, my goal would be to meet all the needs in the state. With over 400,000, I am concerned about us being able to do that and want to make sure the Committee understands it is a first step. We are going to work very hard to cover as many veterans and service members as we can.

Assemblyman Nelson:
You are talking about donations, and I presume that is to cover the out-of-pocket costs, such as the filing fees and expert witness fees?

Adam Laxalt:
We will certainly have plenty of travel costs as we try to figure out how to make sure we are doing this within the rurals. One example of something that

we hope to be able to do is at the Fallon Naval Air Station. When they get a 300-person unit that is going to be deployed all of a sudden, we want to be able to write 300 wills ideally with this program with pro bono lawyers who are willing to spend a Saturday and whatever it is going to cost to host that kind of thing. As you can imagine, these bills are going to add up. We also want to, hire a contractor to make sure we can metric this properly and make sure that we can really monitor this program so they can grow and that two years from now, I can bring back to the Legislature how successful we are being, what our thresholds are, such as we found 300 lawyers who were able to help and it allowed us to cover 25 percent of the population and we need X amount more support to cover the rest. These are the kinds of things that we want to be able to cover—some of these outside costs.

Assemblyman Nelson:
I do not see a fiscal note. You are not going to be taking any General Fund money and you are going to absorb all of this within your budget?

Adam Laxalt:
Absolutely.

Chairman Hansen:
My understanding is that this is acceptable to the Secretary of State as well?

Adam Laxalt:
(He nodded his head.)

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General:
I am going to briefly touch on the two other components of S.B. 60 (R2). Attorney General Laxalt detailed the Office of Military Legal Assistance, which would be set forth in sections 10 and 11 of the bill. Sections 1 through 5 transfer administration of an existing program from the Office of the Secretary of State. This program is called the Confidential Address Program and we agree with the Secretary of State's Office that this function makes more sense in the Attorney General's Office because it has a nexus to our existing victim service functions. Address confidentiality programs are available to protect victims of certain types of crimes, such as stalking, domestic violence, and sexual assault. It allows them to obtain a fictitious address to transact certain business and maximizes their safety. There are about 36 such programs nationwide. Our program was established by the Legislature in 1997. There are currently about 680 victims who utilize this program. Once again, this is something that we agreed with the Secretary of State's Office that this function probably made more sense in the Attorney General's Office, and they agreed with it. That is what sections 1 through 5 of this bill would do.

Section 16 extends the life of the Substance Abuse Working Group, which is currently set to sunset on June 30, 2015. It would extend it for another four years to June 30, 2019. The Attorney General chairs the Substance Abuse Working Group, and it is obviously a very important group. We have problems connected with substance abuse throughout our state, and Attorney General Laxalt would like to continue the work of this important group. Section 16 would extend the life of that entity. In a nutshell, those are the three components of S.B. 60 (R2). [Submitted prepared testimony (Exhibit C).]

Chairman Hansen:
Are there any questions? [There were none.] Attorney General Laxalt, is there anyone else you would like to have called up at this time to testify in favor of S.B. 60 (R2)?

Adam Laxalt:
No. Thank you for your time this morning.

[A letter from Secretary of State Barbara Cegavsky was submitted but not discussed (Exhibit D).]

Chairman Hansen:
Is there anyone in Carson City or Las Vegas who would like to testify in favor of S.B. 60 (R2)? [There was no one.] Is there anyone in opposition to S.B. 60 (R2)? [There was no one.] Is there anyone in the neutral position? [There was no one.] We will close the hearing on S.B. 60 (R2) and open the hearing on Assembly Bill 487, which revises provisions governing firearms.

Just so everyone knows, we have discussed this at length in several hearings. There will be no testimony on this today, pro or con. This is an emergency measure from the Speaker, and everyone has had more than their fair share of saying pro or con in this particular bill. I can assure you that you are not going to change anyone's views on this Committee. We are going to have a very brief introduction to it, and that will end the hearing on A.B. 487.

Assembly Bill 487: Revises provisions governing firearms. (BDR 5-1279)

Assemblyman James Oscarson, Assembly District No. 36:
Assembly Bill 487 is the work of a lot of people over a long period of time; two sessions that I am aware of and have been engaged in. I think what we have done is taken the best of this legislation and put it in A. B. 487, which, as you know, is an emergency measure from the Speaker and we have been

allowed to move this forward. We appreciate the support of this Committee and the support of those who have come before us who have worked diligently and tirelessly to bring this legislation forward for those who we feel truly need it.

Chairman Hansen:
My understanding is that this language is identical to the amendment that we had placed on Senate Bill 175 (1st Reprint), which was rejected on the floor. Is that correct?

Assemblyman Oscarson:
That is correct.

Chairman Hansen:
One request for amendment has been approved by the Speaker, and several people have requested to be cosponsors, so we will have that as an amendment as well. We will allow some questions very briefly.

Assemblyman Araujo:
First and foremost, we have a lot of people signed up to testify, so it is really unfortunate that they are not going to get a chance to share their views. I apologize to all the people. Given the restraints, my biggest question is if any of the bill sponsors have actually spoken to the Nevada System of Higher Education (NSHE), that would be directly impacted by this legislation, and taken their perspectives into serious account. They have put a lot of things on the record and their voices are not being heard. I am wondering why we are not listening to the people who would be directly impacted by this legislation.

Assemblyman Oscarson:
I know that there are ongoing conversations with them. I know that I talked as late as yesterday evening with one of the NSHE people and discussed their concerns with him. This bill—the way it is with time constraints the way they are—is prudent and good legislation for us at this point in time. I appreciate your comments and appreciate their concerns and yours as well.

Assemblyman Thompson:
How about the account of the students' perspectives? There were some students who testified that they may actually leave the institutions in Nevada and go elsewhere. Would you speak to that? How much did that weigh in with the decision to make this an emergency measure?

Assemblyman Oscarson:
I think the emergency component was that we want to make sure we put as clean a piece of legislation through as possible to make this happen. I have received letters from students in opposition, but I have received letters from students asking for it as well. One particular student, who is the head of an organization—I do not remember the name—requested specifically that we do this and that it be for the protection of the students. As we well know, some unfortunate circumstances have occurred on campuses, and those who would qualify to carry concealed weapons and go through that process would be allowed to do that and there would be an opportunity for them to protect themselves in those instances. I understand the sensitivity of the issue, but we have worked diligently with people and continue to have those conversations. I appreciate your comments.

Assemblyman Elliot T. Anderson:
Is there any indication that this bill is going to move through the process? I feel like we have gone through this, and I am wondering if this has any better chance than the other one?

Assemblyman Oscarson:
I have every hope that this is going to move forward. There have been no promises made to me specifically. It is a clean bill and will be processed appropriately.

[(Exhibit E), (Exhibit F), (Exhibit G), (Exhibit H), (Exhibit I), and (Exhibit J) were submitted but not discussed.]

Chairman Hansen:
We will close the hearing on Assembly Bill 487 and open the hearing on Senate Bill 291 (2nd Reprint), which provides for the determination of damage awards in certain civil actions.

Senate Bill 291 (2nd Reprint): Provides for the determination of damage awards in certain civil actions. (BDR 3-951)

Robert L. Compan, Manager, Government and Industry Affairs, Farmers Insurance:
The basic premise of this legislation is to protect consumers from fictitious medical expenses and economic damages, which adversely affect the general welfare of Nevada consumers. The problem with the collateral source rule is that it keeps important information relevant to the determination of damages

from reaching the jury. It allows plaintiffs to be compensated twice for the same injury. We are going to call these damages "phantom damages." You will hear testimony from Ms. Upson, who is going to walk you through the bill and the amendment that we are proposing today.

It should be noted that courts of jurisdiction will still instruct the jury to base the general damage offset by paid damages, and only reduce the amount of the award by the amount of these phantom damages. Basically, what happens in court right now is the jury is hearing what the actual damages are, not the paid damages. I am not going to go through the whole testimony; I sent you five pages that I believe you have on the Nevada Electronic Legislative Information System (NELIS) (Exhibit K) which show all of the different states that have adopted the reforms to the collateral source rule. What happens is, if you go and get treated through your medical provider and you pay for that insurance premium, you are paying for their right to negotiate down the actual paid costs. When the jury in Nevada hears those costs, what they are hearing is what the damages are, not what the paid damages are under a pure collateral source rule. We are not asking for that. The jury would only hear what the paid damages were. We are not asking this Committee to do that. We are asking that, after all the damages are assessed and the jury has made the award, they reduce the amount of the double-dipping by that amount.

Now the plaintiff bar may say that they bought insurance and therefore they should be allowed to do this. We did an argument in Assembly Bill 7 (1st Reprint) when we talked about no pay, no play. People who buy insurance should not be penalized. Unfortunately, people who are buying insurance and the uninsured people are being penalized. We are not seeking to have the jury look at the paid damages. It is complicated. We went through two revisions with this on the Senate side. After the second amendment, when the bill came out of the Senate, a lot of people had concerns, the medical malpractice people had some problems with it, the Nevada Hospital Association had some issues with it, and so we worked with them to present the amendment that you have today. I would like to have Ms. Upson walk you through it and answer questions as we go along.

Stacey Upson, Attorney, Farmers Insurance:
I would like to give a brief background history of why this bill is necessary in Nevada and why now. One of the things you will hear is that the collateral source rule has been in existence for more than 100 years. It came over from common law and has been in the United States since the 1850s and 1860s. When the collateral source rule was originally implemented, it was because they wanted to have individuals pay for their harm. There was a deterrent effect to it. There was a societal effect to it that if someone caused harm, they

should pay for the harm. Back during that time frame, you did not have what is in existence today—health insurance policies, personal liability policies, workers' compensation policies, and governmental benefits. The reasons for the origination of the rule are no longer in existence today. That is why there have been changes across the country with the collateral source rule.

This particular bill is designed to fairly and adequately compensate a person who has been injured in an accident. This is what has happened previously in the state of Nevada. If someone has $1 million in medical bills, they go before a jury, but insurance only pays $200,000 of that. The jury is awarding the $1 million, thinking those medical bills have to be paid back. They do not know there has been an $800,000 write-off. What has happened in the past is the injured person has been able to keep that windfall of $800,000. What changes have started occurring in the collateral source bill—because it affects insurance premiums across the board and across the country—is we are going to let them blackboard what the charges are, which is $1 million, but if insurance only pays $200,000, they do not get to keep the remaining $800,000. The question you have to ask yourself would be is it fair and equitable in today's society, and if it is, this is the reason why. They still get the blackboard in front of the jury, the full amount of the charges—$1 million. Any pain and suffering award would be based upon that number, not the $200,000 number. Nothing is being taken out of the injured person's pocket other than the windfall that is there.

The one argument that has been presented every single time by the plaintiff's bar is, "Wait a minute. They paid for this insurance, and if there is a windfall, they should keep it." Let us think about that for a second. There are two separate issues. What premium are they paying for? The premium is not for $1 million in coverage. If it was, their premium would be much higher. The premium they are paying is the contracted rate, which is the $200,000. That is what they are paying for, and that is what they are getting back. So the way this bill has been drafted, they would get the blackboard—the $1 million in damages—post trial. A motion could be filed with the courts saying there has been a contractual discount. The injured person is not legally obligated to pay the $800,000, therefore, they should not keep that money.

One provision that was changed in the bill—outside of the original presentation—was the addition of the attorney's fees. Under the amendment that is in front of you (Exhibit L), starting on page 1, lines 37 and 38 and line 39 on page 2, is the cost and attorney's fees incurred by the plaintiff to pay the health insurer or third party pursuant to any lien or right of subrogation. We have deleted that and this is the reason why. That was put in simply for attorneys to make more money in litigated matters. There are already

mechanisms under the law if someone proceeds to trial whether attorney's fees are awarded or not. It has been in existence as long as I have been practicing for 23 years.

The way it works in a litigated case is if we receive an offer from an injured person to settle for $1 million and we do not accept it, it goes to trial and it comes back above $1 million, the court then has the ability to award attorney's fees. Same example—if we serve an offer of judgment for $500,000 and they do not accept it and the award comes in below $500,000, then the defense is able to move for attorney's fees. It is an equitable solution for attorney's fees because each side can weigh the information when the offer comes in. This particular provision on the attorney's fees that we put in would basically violate an individual's Sixth Amendment right to a jury trial because you would go to trial knowing that you could serve an offer which is now null and void by this amendment because they would get to move for attorney's fees as a matter of right. Based upon that, we have deleted that provision to let the existing rules apply.

Rule 68 of the *Nevada Rules of Civil Procedure*, and *Nevada Revised Statutes* (NRS) Chapter 18, address attorney's fees. It does not preclude them from getting attorney's fees. They would have to serve the appropriate offer. That is the particular basis of the collateral source statute. I would note that there is the added language, which was in the original section of NRS 42.021 dealing with professional negligence. There has always been a carve-out for professional negligence. I would defer that to Ms. Piscevich because that is the area she practices, but we put that original language back in so the intent of the legislation in NRS 42.021 could remain in effect, and section 1 would deal with the collateral source provisions as they exist and should exist in the state of Nevada today.

Assemblyman Elliot T. Anderson:
I think the original bill is fair. I would be inclined to support it if it stays as it is written. I have an issue with the amendment because if you are talking about attorney's fees pursuant to a right of subrogation, that means they basically have to pay someone to take care of it. You are not subrogated unless you have an amount that someone else has paid for you. If a health insurance company has paid you money, you are subrogated as to that amount, so they can get some recovery to your judgment. So the language pursuant to a right of subrogation means that someone else has already paid it, so you are really not making someone whole in that case if someone has already paid it. I think

it is a tenet of tort law that the idea is to make the victim whole. If someone has spent money to get recovery, they spent attorney's fees to collect, they have had a health insurance payment—which is money that has already been spent—they need recovery because they have already spent it to make themselves whole. That is what subrogation is. I am wondering why cross it out if it is pursuant to right of subrogation.

Secondly, what does the Sixth Amendment have to do with a civil law? I do not understand how that violates the Sixth Amendment. I have never heard of that being applied in a civil context.

Bob Compan:
Are you referencing the original bill or the first reprint?

Assemblyman Elliot T. Anderson:
I am sorry. I meant the bill as it has been presented to us here, and I am referring to your amendment.

Stacey Upson:
As for the subrogation question, everyone is made whole. When insurance is paid for medical treatment—we will use the example again of $1 million in charges and they pay $200,000—they automatically have a right of subrogation for the $200,000 if someone else is responsible for that particular injury. The reason for that is they only want the policy that should be paying for the injury. So if the injured person does nothing and they choose not to sue, they never have to pay that money back. If the insurance company wants to go after the $200,000, they certainly can, saying, "We should not be paying this. You should be paying the driver of car A." What happens in a litigated case when a matter settles or goes to trial and there is the $1 million, the $200,000 has to be paid back. The subrogation rights are already in existence, and that money is being paid back. That policy is whole. The plaintiff is whole because they do not have to pay the other $800,000. They are getting pain and suffering that has been awarded by the jury. If they have any wage loss, that wage loss is being taken care of by the jury, so the plaintiff is made whole.

The only thing the collateral source bill does, if it does not go into existence, is it gives a windfall to the plaintiff of $800,000 for an amount they never would have had to pay because their insurance contractually made an arrangement with the doctor before treatment ever started. This is what you are going to pay, and this is the reasonable value of the services are that you are taking. If that occurs, it is only a windfall. In relation to the Sixth Amendment right to a trial, here is where it comes to play in the civil action such as this. If I have a client that comes in and I am advising them, "Look, this person has $1 million

worth of charged medical bills and at the end of the day, only $200,000 was paid," they want to contest and go to trial potentially on my ability or other issues. What happens is now, even if they come back at a lower number, there is automatically going to be an award of attorney's fees, when that never would have happened before.

To give you an example on a $1 million award, in Las Vegas they are now giving attorney's fees. That is $400,000 more. If I, as an individual, or any one of your constituents want to exercise their right to trial, they now have to take into account—I can get hit with hundreds and thousands of dollars in attorney's fees. Is that going to change someone's perspective whether they want to exercise their right to a trial? Of course it would. If you look at larger verdicts where there is an astronomical injury—$20 million—and if they give 40 percent in a contingency fee, that is $8 million in attorney's fees. What happens, and how it takes you out of the realm of potentially going to a jury trial, is if you served an offer of judgment, whatever that number is, and you beat that number, the way this amendment provides is that that offer means nothing now. You are going to be hit for attorney's fees no matter what, and it is up to the court to decide. That will affect someone's ability and determination on whether they wish to proceed to trial or not.

Assemblyman Nelson:
I want to make sure I understand that under the most recent iteration of the bill, any collateral source will not be admitted into evidence. Is that correct? It will just be part of the calculation after the verdict?

Stacey Upson:
That is correct.

Assemblyman Nelson:
That is actually quite a compromise from what other states have been doing. On the attorney's fees issue, what you are saying is that the offer of judgment is really the only way under the bill to determine that right now?

Stacey Upson:
No. The way this particular bill is written without the deletion of the attorney's fees is the offer of judgment rule is then null and void. The way the bill amendment reads is that they get attorney's fees to build back up the award. So if the opposing side serves an offer of judgment, it is never going to come into play. It is taking out NRS Chapter 18 and Rule 68 of *Nevada Rules of Civil Procedure*, which then effectively prevents a defendant from ever serving

an offer of judgment. They can never before trial, even if they are being reasonable, serving a number, they are going to say on the other side, "I do not care; I can ignore that offer now because by this we can move for attorney's fees mandatory." It becomes a strict liability.

Assemblyman Nelson:
You would never want that, would you?

Stacey Upson:
I do not think anyone would, unless you are on the other side.

Assemblyman Nelson:
So you are saying you are against that portion being stricken out?

Stacey Upson:
Absolutely.

Assemblyman Thompson:
How often does this occur? I want to use your $1 million example, where people get this windfall of $800,000. Where can we have a balance? People have the right for pain and suffering and wage loss. It is subjective to say whether that $800,000 is a windfall for them or not. Where could the balance be instead of just striking it out?

Stacey Upson:
The balance is already in play by letting them put up the full amount of the billed charges, not the paid charges. The pain and suffering award that a jury would render would be on the full amount of the charges. Other states have said, "No, we are just going to let them blackboard the $200,000 and that is it." That is not what we are trying to do. We are trying to keep it fair by saying, "You can blackboard the $1 million so the jury can give you your pain and suffering on those charges." Posttrial we would then be able to move the court to say, "No, that $800,000 you should not keep." I will give you an example and then I will answer your first question on frequency.

I have talked with jurors after verdicts and they have general questions such as what happens with attorney's fees because they are told in the instructions they are not to consider (1) whether a party has or does not have insurance on both sides of the table, and (2) an award of attorney's fees because there are mechanisms after the trial for that. We explain what happens if there is an offer in the case, and we are upfront. They then ask about the medical bills. I have had cases where it has been $250,000 in charged bills, but insurance paid about $50,000. So the jurors have asked what happened to that money.

Under the law right now, they get to keep it. The jurors I have talked to said, "Well, that is not fair. We thought we were giving that money because those medical bills had to be paid. If we would have known that, we would have done something different."

The other aspect of it is when they were told that, they said, "We thought we were supposed to be the ones making the determination, and now you are telling us after the fact what we found is not even going to apply?" Jurors have issues with it as well because they are giving the pain and suffering on the amount that is before them. That is the first issue. As to frequency, any time insurance is involved and the case goes to trial, it happens every single time. As to the amount, the amount is always going to be dependent upon the case. Is it a soft tissue case? Is it a back surgery case? Is it a neck surgery case? Some have a much higher windfall than others. At the end of the day, if you are leveling the playing field, you are going to let them blackboard the full amount of the charged bills, get their pain and suffering on it, and then at the end, there is the offset for what is the windfall of the phantom damages.

Assemblyman Thompson:
I do not see a lot of my constituents talking about such a windfall, and that is why I wanted to ask about the frequency.

Assemblyman Gardner:
You said it was originally done to make sure that the person who caused the harm would pay for the harm. That is not applicable now because of all the insurance that we carry?

Stacey Upson:
Yes. Let me clarify. When it first came out in England in common law, it was designed as a deterrent because they wanted people to be responsible for whatever harms they caused. Back then, you did not have personal liability insurance or health insurance. Most of the insurance was for shipping and product-type issues. Because of that, the law set up the framework that said we want to have a deterrent effect, we want to have a punitive effect, and we want to have a social, individual responsibility aspect of it that you are going to pay for what you cause.

Fast-forward 150 years and you have the individual defendant who is involved in an automobile accident that is negligence—I am not talking about drinking and driving—but simply for whatever reason they did not see a light. What deterrent effect is there to them when there is insurance to pay for it? There is none. It is not coming out of that person's pocket. So the risk has now shifted, society-wise, to the public by paying higher premiums and by higher

taxes on your property. That is what is shown over the years as to what has happened. That is why other states have stepped in and said, "We are going to help control this. We are not taking any money out of an individual's pocket because they are not being responsible legally for any medical bills, they are getting their full pain and suffering and wage loss." That is the change that is in existence now as opposed to 150 years ago. In England 150 years ago, if a person caused an accident, they paid out of their pocket. That was the deterrent effect and the punitive effect. Now people have automobile coverage, umbrella coverage, workers' compensation coverage, social security disability—it is a societal shift that we are all paying for through higher insurance premiums.

Assemblyman Gardner:
My concern is—let us use your example of the $1 million that was worked down to $200,000—the person who hit the defendant, in one case they pay $1 million plus whatever else and in another case they pay $200,000. So if this bill passes, what you are doing is basically changing what you term a windfall from the person who was injured by the accident to the person who caused the accident?

Stacey Upson:
No. When someone is injured, the true purpose of the law is to give them compensation to make them whole. When you go before a jury, the jury is then making the determination, after they hear all of the evidence, what will make that individual whole. They receive jury instructions, how to look at damages, they hear the evidence to make the person whole. When they give the award for the $1 million in medical bills, they believe that $1 million is having to go to pay the medical bills. Let us say they give $2 million in pain and suffering. Let us say that is what the jury comes back with. They are saying that is what makes that injured person whole. They do not believe that the injured person is going to keep the $800,000, which is indeed the windfall. So if you are looking at it from a commonsense perspective and, if I was in your shoes and if the constituent came to me and asked if you are taking money that is rightfully theirs away from an injured person, the answer is no. All of their medical bills are being paid back. They do not have any legal obligation to pay anything else on the medical bills, and they get pain and suffering. That is the intent of the rule. True collateral source in other states has said, "No, you only get to show the jury the $200,000 and your damages are on that." That is not what this bill is seeking to do. This bill is seeking to let them put up the full amount of the charges, and thereafter, letting the court make the determination after the fact.

You are not taking any compensation out of the person's pocket other than the windfall. Forty percent of that windfall would go to the attorney, in addition to if they served an offer of judgment and beat that, there would be attorney's fees on top of that. It is leveling a playing field to help get things more even, which will help cases resolve sooner.

If you take my example, what happens now is they are going to be forced to go to court because they know they can keep an $800,000 windfall, unless there is something that is making them settle sooner. So what the bill does is simply take away the windfall but leave them with the full compensation under the law.

Assemblywoman Diaz:
I am looking at this through my constituency's lens and you keep referencing the court and the jury. Let us be clear. Many of these claims do not get that far, and it is my understanding—as I am reading this change to the law—that we are putting at a disadvantage a responsible person who has paid their health insurance through their pocket and their medical claims are going to be at a significantly lower value than that person who does not have health insurance. To me, it is about parity and equity and fairness. If I am a responsible person who has been religiously paying for my health insurance, why should my settlement be lower than someone who does not have health insurance? That is my first heartburn with this.

Why are we giving a drunk driver and the drunk driver's insurance company a leg up on people like me who are paying their health insurance? Lastly, I want to know why were these amendments not worked on in the Senate? Why were they not added there? Are they being supported by the bill sponsor?

Stacey Upson:
I will defer the last question to Mr. Compan because I am not familiar with that. Here is what I can tell you about the paying of the insurance. The insurance that we buy—I buy health insurance so that if something happens, I have coverage. I do not buy health insurance with the intent that if I am in an accident, I get to keep a windfall. But what I do know is that the premium I pay on my policy of insurance is for the contractual rate of what that amount is going to be. So again, using the $1 million example, my premiums are based on the $200,000 agreed-to rate that those doctors accepted prior to me ever getting treatment. That is what my premium is going towards. If not, my premium would be much higher. In that context, I do not think we are taking anything away unlawfully from someone who has paid for the insurance.

As for your comment regarding a drunk driver, someone who has done something intentional is completely separate and apart because there is going to be a punitive damage claim made within the complaint that all of those punitive damages are always going to be made payable by the person who caused the harm. Insurance never pays that because it is against public policy. Those individuals are not getting a free pass in that regard.

Bob Compan:
Yes, I spoke with the bill sponsor on this. Things move so fast—this bill was heard recently. The amendments were actually put in at the last minute and were not vetted until after the bill had already passed through the second house. He is aware of these.

Assemblywoman Diaz:
If I ask him, he is going to say, "I love this amendment?"

Bob Compan:
I cannot speak for the Senator, but he is aware of them.

Assemblyman Ohrenschall:
Earlier in this session, we had a bill that I was not able to support. In my opinion, it seemed to try to penalize people for not making a right decision in terms of insurance. I almost feel like this penalizes people who have done the responsible thing. I have been lucky enough to have a job where I have health insurance for my family and, notwithstanding having health insurance, I am fighting with them over claims going back 9 or 10 months ago that they have denied and we send them back. These are claims for my kids when they were infants, young toddlers, et cetera. If you are an injured party and you get hit by a drunk driver or a negligent driver, and you are prudent enough that you have medical insurance but you are involved in the kind of things that I am involved with—such as with my medical insurance company where they are stonewalling, denying, or trying to find out if it was a workers' compensation injury—how can we realistically reduce that award when we do not even know if the injured party is going to get paid and made whole? I am worried about that. I also have a question about the amendment.

Bob Compan:
You are going to be whole. You are going to get your body fixed. Under that scenario, we have made sure that hospitals can—you can treat on a lien through a hospital if your insurance company is not going to pay for it. Everyone, sooner or later, is going to be paid whether it is Medicare, Medicaid, or whatever. The jury is still going to hear what the damages are. If you are getting billed, whether the insurance company is paying for it or not, you get

these bills and if it does go to trial, the jury is still going to hear that amount, whether it is the amount paid or it is the actual amount of damages. When it is all said and done at the end of the day, the only thing that is going to be reduced is the amount your insurance company actually paid.

Assemblyman Ohrenschall:
My concern is if it is reduced by what they should pay and then a year down the line they still have not paid and I have the doctor and the anesthesiologist coming after me personally because my insurance never paid, I am concerned about what that is going to do to our people who do not have the kind of resources to fight another insurance company in addition to the wrongdoer who harmed them.

My next question has to do with the amendment and being able to reduce the costs of procurement for the attorney. Is that not going to make it harder for the injured party to find an attorney who is willing to take them to the courthouse? It is all great to say that we are going to make the victim whole, but if they cannot get to the courthouse because no attorney is going to take the risk, could the amendment not potentially hurt injured parties?

Stacey Upson:
No. I respectfully disagree, and this is why. The offers of judgment rule which has been in effect for the 23 years that I have been practicing has not affected anyone taking a litigated case for an injured person because there are mechanisms in the rule where they can serve a demand to settle the case.

I will give you an example of how that works and how they are whole with the attorney's fees and why that provision is not necessary here. It is called an offer of judgment. They serve an offer of judgment. They are willing to settle for $1 million, and they have however much in medical bills that they know they have to pay back contractually. They know there are attorney's fees and whatever costs are in the case. When they send that demand to us, they already know broken down what number is in the injured person's pocket. That person then gives authority to put that number out there, so they know, if we accept it, exactly what amount of money is going in the injured person's pocket. They have had that control over the last 23 years I have been practicing because they serve the number, the numbers are worked out, they get the consent from their clients saying, "If we settle for this amount today, I can get you $300,000 in your pocket." It is tax-free because it is a personal injury settlement. They know that. That stays in existence, even without the attorney's fees provision in here. It is the same rule and statute that has been

in existence in my practice. They use that all the time. Defense uses it all the time if they feel they have served a reasonable offer. Nothing is taken out of pocket for them in that regard, and they do not have a problem getting an attorney.

The only other question I would like to answer is because I realize I did not respond to Assemblywoman Diaz. Is there a disparity of treatment for someone who has insurance and someone who does not? In that context, I would say no, and here is why. If someone is treating on a lien, whatever that lien amount is that is being charged, they have an obligation to pay that lien amount back when the case settles. So if they receive treatment, and it is a $250,000 lien, when the case settles, they have to pay that back. That would be the same charge under insurance. Those rates are negotiated all of the time on a lien and insurance contract amounts on a lien. There is no disparity of treatment for someone who has insurance and someone who does not.

Chairman Hansen:
Okay. We have exhausted that to a certain extent at the moment, as we have two additional bills with similar verbiage and discussion with attorneys. Mr. Compan, do you have anyone else specifically lined up to testify on this bill?

Bob Compan:
Yes, we do. We have Ms. Piscevich from Nevada Rural Hospital Partners to talk about the issues with the hospital liens.

Margo Piscevich, representing Nevada Rural Hospital Partners:
I am an attorney who has practiced for 43 years primarily in the medical malpractice arena. The bill on the attorney's fees basically says that before a judgment is entered, any amount that the plaintiff is required to pay for health insurance or lien, the officer shall determine that. The cost incurred with a lien—in any case, but especially in a medical malpractice case—the subrogation issues are already entwined in the case, whether it is Medicare, Medicaid, or whatever. What you are doing is allowing an attorney's fee over and above the contingency fee. They take a case, for example, on a 40 percent contingency, knowing very well that they are going to have to deal with Medicare, Medicaid, or any insurance subrogation. All you are doing with this particular thing is saying, "Okay, I get my 40 percent, plus I am going to carve out another third of that amount for subrogation work and that gets added on." So it is really an addition to the contingency fee that has already been allowed in any negligence or malpractice case.

We have asked that section 2 be left alone. *Nevada Revised Statutes* 42.021 applies only to medical malpractice cases. In the state of Nevada, there have been two exceptions to the collateral source rule. One is workers' compensation, and there is a statutory scheme that workers' compensation charges are handled differently. This has been from medical malpractice. What it has done is basically allowed the defendant, if allowed to do so by the court, to put in damages of the amount paid versus the amounts charged. I am going to use Ms. Upson's example. If the amounts charged are $1 million, but the amounts paid are $200,000, there is no collateral source. The hospital or doctor cannot sue for that other $800,000, nor is the plaintiff responsible for the other $800,000. There is no collateral source there because no one has to pay that amount. So what has happened is that in the medical malpractice arena, we have been able to put in the amounts charged. It makes a huge difference in a medical malpractice case because we can have care plans that go up to $15 million to $20 million. It makes an amazing difference in those types of cases. We have asked from our particular specialty to just leave NRS 42.021 alone because it only applies in professional malpractice cases. We have asked that you let it be as it is, as the law has been for the past several years since the Keep Our Doctors In Nevada (KODIN) bill.

On the attorney's fee bill, that was not in the original bill in the Senate. It was added through committees—I do not know as I was not part of it. Again, that request for attorney's fees on the subrogations or liens is over and above the contingency fee that was agreed to between the plaintiff and the attorney.

Regarding the attorney's fee for liens, for example, if you are uninsured, there is only one statute that would apply in a medical setting, and hospitals have to reduce their bills by a third, regardless if you have no insurance. The others are set up by contract, whether it is with United Healthcare, the state of Nevada, or whomever the carriers are—Aetna, or Blue Cross, or Blue Shield. I agree with Ms. Upson. When you buy your insurance, you are buying at that lower rate. So if I have my insurance with company A and they are going to pay the doctor $50 for this particular procedure and they charge $100, I do not pay the other $50 and the doctor does not get it. That is what was built into my premium. That is basically the issue in this case. From the professional malpractice, we would just prefer that we keep our own bill. There has been some language added that has been accepted by everyone that says if it is inconsistent with the other, we will work it out in court, and anyone can use those provisions. But if it is inconsistent, then it will be worked out with the courts. I think the actual language is the use or application of one or more of the provisions of section 1 shall in no way limit or contravene the use and application of the provisions of section 2. Section 2 would then remain its own statute.

[Assemblyman Nelson assumed the Chair.]

Vice Chairman Nelson:
Could you tell me again the section number you said you did not want us to mess with?

Margo Piscevich:
If you look at your bill in section 2, it knocks out subsections 1 and 2 of NRS 42.021. This only applies in a medical malpractice case. We are requesting that this bill remain separate. In the amendments, we added the language in section 2, "NRS 42.021 is hereby not amended," and section 3 reads, "The use or application of one or more of the provisions in Section 1 shall in no way limit or contravene the use and application of one or more of the provisions in Section 2. Unless otherwise prohibited, the provisions and remedies found in Sections 1 and 2 may be used in combination with each other and the use or reference to any particular provision(s) in either section does not preclude or limit the use or reference to any other provision(s) therein." So you would be able to say that you have your two things. Collateral source primarily arises in negligence cases. Medical malpractice is a subsection of medical cases. Products do not apply to NRS 42.021. Product cases do not apply. Slip and falls do not apply. We are only asking that that be kept the way it was.

Assemblyman Elliot T. Anderson:
I think we need to clear up the issues. We keep hearing about contingency amounts, but I think you are talking about two separate types of actions. You are talking about subrogation. You are talking about an attorney being retained to get the health insurance company to cover their claim. That is what the amendment looks like to me. You are crossing out the right to get back the money that they spent to get the health insurance company to pay. It may be contingency, or it may not be. Either way, they have had to spend that money to get covered by their insurance company.

Margo Piscevich:
Nevada Revised Statutes Chapter 42 talks about if you are going to go to any type of administrative hearing or trial, it is in a contested setting—an arbitration and mediation. Basically, it says that the court or appropriate judicial officer shall not reduce the judgment by the amount of any payment pursuant to medical payment coverage. That is something that you paid for. It says that you cannot reduce it for what the amount the plaintiff was required to pay for his health insurance benefits. Then it goes to the costs and attorney's fees incurred by the plaintiff to pay the health insurer or third party pursuant to any lien or right of subrogation they get extra for it. You either hire an attorney on

an hourly basis or you hire them on a contingency basis. There are only two ways you can hire an attorney. The problem is that in a negligence case, very rarely are they done on an hourly basis. They are mostly done on a contingency basis and the attorney takes the risk of providing the cost and then once the case settles or goes to verdict, they are reimbursed their costs.

With medical cases, you generally know that you are only going to get the amounts paid, not the amounts charged. There are a zillion contracts out there from Social Security on down, so you are only going to get the amounts paid. From there, it is already known if you have a Medicare or Medicaid lien or you have an Employee Retirement Income Security Act of 1974 (ERISA) health policy. Those are governed by federal statute anyway. You are not going to be affected because the federal takes the preemption. They know you have to compromise. The defense knows it. The plaintiffs know it, and we work together to get it down. I can give you an example. If someone is a Medicare patient and they are over the age of 65, with Medicare, by government regulations—and they set the funding—you will probably get 10 percent of the bill. Then the plaintiff's lawyer works with the defense lawyer to figure out what that is going to be, what that Medicare lien is going to be, because both sides are responsible for it. It is a very complicated system; it just is not what people are thinking.

Collateral source, if you really look at it, is if my company says they are going to pay $10 and the doctor wants $50, he has to take the $10 and no one is responsible for the other $40. He gets paid that $10. Most insurance companies have to accept or reject a bill. Now you are talking about some of this on enforcement with an insurance company without going into litigation. That is a whole different ballgame. If you hire a lawyer on that, it could be a blended rate or hourly plus. But in an actual negligence Medicare malpractice case, we are talking collateral source, and those are the things that go to mediation or trial or some kind of adjudication.

Assemblyman Elliot T. Anderson:
What I meant is that it contemplates that there are two separate—maybe not two separate attorneys, but going after two separate parties. It says any third party.

Margo Piscevich:
No. What happens in the medical arena is you have—as an example we will use Renown Regional Medical Center. They have Hometown Health, which is their insurance company. You have been in an accident. You go in and Hometown Health says, "We have to pay that bill within 30 days." So Hometown Health pays X number of dollars for the X-ray or magnetic

resonance imaging and it is billed at twice that amount. Once you pay that, there can be subrogation. That is handled internally because if there is a car accident involved, they still have paid that amount, but they will then turn to the car insurance company and say, "I think you owe us that" but it is handled internally in a billing office. In a litigation, you never get into that. In litigation, these are your bills, these are the amounts charged, and these are the amounts paid.

Assemblyman Elliot T. Anderson:
We are obviously on different wavelengths, so we will have to take this offline, but it talks about a health insurer. If I get into an accident and I am trying to get my own health insurer to cover me, and they are not covering me, I then hire an attorney to get them to cover me under my policy of insurance. Then there is the auto insurer who is the insurance company for the person who injured me—those are two separate parties.

Margo Piscevich:
This would not cover your first case. This is only for a case that is going into litigation in some form. It talks about a plaintiff in "the initial presentation of a case to a judge, jury, tribunal, arbitrator, or other finder of fact, claim the full amount of any past and future medical expenses...." This is not a case where you are upset with your insurance company, which everyone is. I do not know anyone who is happy with their health insurance coverage.

Assemblyman Elliot T. Anderson:
I am just making the point that it is contemplated under the attorney's fees provisions that are proposed to be struck out. Health insurer—Farmers, for example, is an auto insurer. They are two separate insurance companies, and the person who has fought to get their health insurer to pay for them and then gets recovery from an auto insurer, they have already spent that money and it should not be reduced for that amount because it is not a windfall. You are making them whole. In fact, someone else is getting the windfall if you strike out those provisions.

Margo Piscevich:
Let us look at the system that we are talking about. You hire an attorney on an hourly or contingency basis. If you are hired on a contingency basis, which they all are in Medicare malpractice, they are already getting their amount. They know they have to deal with these liens. It is part of representing the plaintiff that goes with the territory. I did personal liability, meaning auto insurance defense, for 25 years. You know you have to deal with those. That is part of the job of what you accept. They want money over and above the contingency fee. That is what this bill provides, and that is what should be

taken out. We are not talking about you going individually against your insurance company. That is a different case. It could even be a bad faith case, and then again it would be on a contingency.

Assemblyman Nelson:
This is fascinating for all the lawyers. We are getting the equivalent of five days of first-year torts and advance torts in law school.

Assemblyman Araujo:
Who do you typically represent in the courtroom?

Margo Piscevich:
I primarily represent doctors, lawyers, and hospitals.

Assemblyman Araujo:
You mentioned this is a very complicated issue and I am looking at this through the lens of my constituents and all the working class residents of Nevada. Noting that this is a complicated issue, who is going to defend them?

Margo Piscevich:
They have plaintiff's lawyers. The plaintiff's lawyers sign them up on a contingency agreement. They generally take 40 percent. Within that package, they do everything related to that claim, whether it is an automobile accident, medical malpractice claim, or a slip and fall. They take the responsibility of dealing with the health care providers, if that is necessary. It can be—and in probably 10 percent of the cases, there can be a complication. I am not going to say it is a perfect system. Everyone wants to get their medical payments back. All this bill is saying is that if you hire a lawyer, they know they have to take this on. There is no reason they should get money over and above their contingency.

The other thing that they are doing on this is really double-dipping. If you are going to take it on a contingency, then you pay 33 percent. A general contract is 33 percent, if we can get the money before we file a lawsuit. If we file a lawsuit, the contingency goes up to 40 percent because you have these issues, and if it goes on appeal, the contingency can go up to 50 percent. All of them are different, but it has to be in writing. Now if you are hiring a lawyer for a business transaction, you are paying an hourly rate. They are very rarely done on a contingency basis. The only ones are very large subrogation cases, like multimillions of dollars.

Assemblyman Araujo:
With all due respect, I stand firm on my ground. I think this is adding additional burdens to the average consumers that we are elected to represent.

Margo Piscevich:
The average consumer hires really good lawyers. They are not underrepresented. It is an extra amount of money that the plaintiff's lawyers are receiving.

Assemblyman Araujo:
I respectfully disagree with that.

Vice Chairman Nelson:
Just for the record, you are speaking in support of the bill.

Margo Piscevich:
I am speaking in support of the amendment. I do not have any problem with section 1 of the bill itself. I would just like section 2 out and the attorney's fee provision out.

James L. Wadhams, representing Nevada Hospital Association:
I think we have more of a drafting issue than we have a debate issue. I think if section 2 of S.B. 291 (R2) is deleted, then the existing law on NRS 41.021 stays exactly as it is in the law and as it was adopted by an initiative petition in 2007. It has been on the books for a number of years. The Nevada Hospital Association supports leaving NRS 42.021 by itself, and I defer to the Legislative Counsel Bureau. I think if we simply delete section 2, that will be the case.

Vice Chairman Nelson:
As you know, if you want to say ditto, that is acceptable.

Justin Harrison, representing Las Vegas Metropolitan Chamber of Commerce:
I will ditto the remarks of Mr. Wadhams.

Dan Musgrove, representing CSAA Insurance Group; and The Valley Health System:
CSAA Insurance Group is in favor of the bill. The Valley Health System and I agree with Mr. Wadhams' comments on behalf of the Hospitals' perspective.

Tray Abney, Director of Government Relations, Reno Sparks Chamber of Commerce
Ditto.

Vice Chairman Nelson:
Is there anyone else in support of the bill? [There was no one.] Is there anyone in opposition? [There was no one.] Is there anyone in the neutral position?

Mark Wenzel, representing Nevada Justice Association:
The efforts on behalf of everyone to make S.B. 291 (R2) acceptable to everyone is worthy of noting. Myself, members of the Nevada Justice Association, Senator Roberson—who is the bill sponsor—Senator Brower, who is the Chair of the Senate Committee on Judiciary where this bill was heard, have all worked together tremendously hard for a number of hours to try and take what was to me and my organization a very unacceptable concept and to try and make it into the best possible bill. I think that it is not a perfect bill by any stretch, but certainly one that takes everyone's interest into consideration. I think that is what S.B. 291 (R2) has done. It has reached across the aisle, given everyone an effort to be heard, and taken people's considerations into effect. I think it does exactly what a piece of legislation should in that it takes concerns that the sponsor and proponents obviously had and addresses concerns that people in opposition have to it. The biggest hot button issue that I received from the people who were in support of the bill concept but opposed to the attorney's fees and cost provision was the fact that attorney's fees and costs are part and parcel of what is generally referred to as the procurement cost.

The procurement costs are: what is the cost that someone who has been injured needs to expend in order to become whole? I think this echoes somewhat Assemblyman Anderson's concerns about if someone is injured and they are forced into litigation, forced into retaining an attorney because the other party is not being straight up with them, is not being fair with them, then what are those people's costs? For this, the cost would be the cost of the premiums. The premiums that the injured party spent to procure that insurance to get those bills down lower was not taken into consideration in the original bill. Through negotiation and a good faith effort with the bill sponsor, with the Senate Judiciary Chair, and members of our organization, those premiums are now part and parcel of this bill that has passed with bipartisan support through the Senate.

The next addition was the addition of the attorney's fees and costs for the person who has been injured to build back up their medical expenses. I will use an example that I have talked about with several of you. It occurred just several blocks from here. I had a client a couple of years ago who was out for a jog in the morning on the side of the road and a drunk driver who just got done getting high with one of his friends drove home at the same time this woman—who was a state employee and had health insurance—was on the side of the road jogging. The stone-drunk driver drifted off the side of the road,

ran over the top of this woman while she was jogging on the gravel side of the road, fractured her skull, and she was Care Flighted to Renown Regional Medical Center for treatment of a fractured skull and a broken neck. Because that woman had the foresight to get health insurance through her job working for the state, when she went in to seek medical attention, the $100,000 or so in medical expenses that she had were reduced down.

The question is, why were those medical expenses for her reduced down to about half of what they would be for someone who did not have insurance? The reason why they were brought down was the fact that every single pay period that woman has money taken out of her paycheck—just like many, if not all, of us do—to get medical insurance to protect ourselves and our families in case something happens. It was because of her planning, her foresight, the money that is taken out of her pocket each pay period, and that is why her bills were reduced down. So her medical expenses would have been a little over $100,000 had she not had medical insurance, but because she did, they were reduced. Her claim against the drunk driver's auto insurance carrier was denied. Inexplicably, unbelievably denied because the auto insurance company took a statement from the drunk driver and asked, "Why did you hit this person?" He said, "Well, she was jogging out in the middle of the road." That was the drunk driver's excuse for why he ran over this woman. This woman was forced to come to my law firm, and forced to retain an attorney to represent her.

We interviewed a neighbor who said, "She was not in the middle of the road. She was on the side of the road jogging in the gravel roadway. I saw it; I was out that morning about 6 o'clock getting my paper and I saw the whole thing." When we received the police photographs, it confirmed exactly what this neighbor said. She was literally knocked out of her shoes and her shoes were photographed right on the gravel road where she said she was jogging. Eventually, after retaining my law firm and me personally, this woman was able to receive some compensation. She was able to get paid back for the medical expenses, the couple of months that she missed from work, and for her pain and suffering. That is why I think, in the collateral source context that we are currently talking about, it is fair to take into consideration the fact that this woman was forced into litigation, was forced to incur attorney's fees, and those fees should be built back in when you are dropping that $100,000 in charges down to the $50,000 that was actually paid to compensate her medical providers. That $50,000 is now built back up with the attorney's fees and costs and with the premiums she paid. These are the procurement costs which were not in the originally drafted bill but which are in the version of the bill that was passed with bipartisan support in the Senate and the version of the bill that is in front of you here today. I would request that that very important provision remain in the bill that you will eventually be voting on.

Graham Gallaway, representing Nevada Justice Association:
I would like to address my comments to the amendment being proposed. I would first like to address Ms. Upson's example of the $1 million medical expense situation. If you have $1 million in medical expenses, you are missing body parts, your brain is scrambled beyond repair, or you are a quadriplegic. I hardly find any windfall in that situation. When you are an innocent person minding your own business and then one day later you are a quadriplegic, I do not think you can use the term "windfall" in that situation.

As for Mr. Compan's use of the words "phantom damages," I like to use the term "phantom recovery," because the jury is not told about the expenses that an injured party, a victim, an accident victim incurs—the attorney's fees, procurement costs, and cost of litigation. When a jury does give an award, they are not understanding that all of a sudden a big chunk of that is going to go to cost. I think it is inappropriate to use the words phantom damages. I think phantom recovery is a better term.

Going back to the $1 million example because that seems to be high on the list of the proponents of the amendment, there are no million dollar cases falling out of the sky. Most are $5,000, $10,000, $15,000, or $25,000 cases. The numbers are not $800,000—the high numbers that were being used a few minutes ago—most cases also settle without litigation, so no one is getting attorney's fees in those situations. When you settle without litigation, when you settle with the insurance companies directly, they are not paying attorney's fees. The injured parties, in the majority of cases, are being compensated for the attorney's fees and the procurement costs.

The concept of using fees and costs in a posttrial situation—we already have something that exists in our body of law. In the workers' compensation situation—if you have been injured in a tort case, but you are on the job, you have a tort case and you have a workers' compensation case, but you have to pay back the workers' compensation carrier for expenses they have paid out on behalf of the injured worker. Under our case law, the Nevada Supreme Court has deemed it appropriate for the court to consider fees and costs in that situation. It is similar to this. If they do it in a workers' compensation situation, there is no reason not to do it here.

We are talking about a posttrial calculation. We are not talking about giving $800,000 on top of what has already been awarded. This is just a calculation done after the fact, and it is just putting more money back into the injured party's pocket. It is not putting it back into the attorneys' pockets.

The attorneys are not charging 40 percent and then asking for the $800,000 that Ms. Upson was talking about. That is just a calculation that puts more money back into the injured party's recovery.

[Assemblyman Hansen reassumed the Chair.]

Assemblyman Ohrenschall:
Am I incorrect in thinking that it is going to be harder for injured parties to find an attorney willing to work on contingency with the provisions of the amendment? That is the way I interpret it, but am I misunderstanding it?

Mark Wenzel:
It absolutely will, especially as Mr. Gallaway alluded to a moment ago on a smaller case. Again, I wish these $1 million dollar cases and $20 million cases that were referred to earlier were more frequent but thankfully for the people who are injured, they are not more frequent. On a smaller case, if that provision is not built in there, that impetus for the insurance company to do something that perhaps they should have done from the beginning with people and actually treat people fairly instead of forcing them into litigation, without that provision in there, it is darn near impossible for people in a smaller case to retain an attorney to represent them. There is virtually nothing left. If you reduce the medical expenses down to the amount that was actually paid and that is the only number that you get, if it is not a big dollar case and perhaps there is not a wage loss component to it, or a very nominal wage loss component—in my 20-year history as both an insurance defense attorney as well as representing injured parties—if it is a smaller case, the pain and suffering component is going to be very nominal. In a whiplash-type of case, it is going to be very, very small.

Assemblyman Ohrenschall:
In many of those cases then, if the injured victim cannot get to the courthouse or cannot get an attorney who is willing to take their case because of the new provisions, they probably are not going to be made whole.

Mark Wenzel:
Absolutely not.

Assemblyman Elliot T. Anderson:
I want to get out a little bit on what the Nevada Justice Association is giving up on this because it feels—I know you have not been in opposition or going after it—on this version you have come to a compromise. I know originally you were opposed and now you are not opposed anymore. Is that correct?

Mark Wenzel:
Yes.

Assemblyman Elliot T. Anderson:
What did you give up?

Mark Wenzel:
We gave up the current status of the law. I am glad you mentioned it. This is not some arcane concept. There is information that is provided on NELIS (Exhibit K). This is a concept that in the last couple of years three different federal judges in the state of Nevada—Judge Jones, Judge Dawson, Judge Mahan—have all confirmed that the collateral source rule, this prohibition from introducing evidence of health insurance for any purposes, is still the law in the state of Nevada. It gives them very learned explanations as to why, if there is a windfall to be had, the windfall should go to the person who is paying their health insurance, that is getting those bills reduced down as opposed to, to use my example, the drunk driver that ran over the victim on the side of the road. Their insurance company should not get that windfall. It should be the person who has been injured and paying the health insurance premiums.

Chairman Hansen:
You testified in favor of the bill?

Mark Wenzel:
We testified in a neutral capacity because we have worked out some of the differences that we had earlier. We are not in opposition to the version that has passed through the Senate with bipartisan support. I would like to applaud Senators Roberson and Brower in particular for working through many of those differences that we had when we did testify in opposition at the Senate Judiciary Committee level.

Chairman Hansen:
Is there anyone else who would like to testify in the neutral position at this time? [There was no one.] We will close the hearing on S.B. 291 (R2) and open the hearing on Senate Bill 292 (1st Reprint), which revises provisions relating to certain civil actions involving negligence.

Senate Bill 292 (1st Reprint): Revises provisions relating to certain civil actions involving negligence. (BDR 3-954)

Lesley Pittman, representing Keep Our Doctors In Nevada:
I am here on behalf of KODIN, which is an acronym for the organization Keep Our Doctors In Nevada. I am joined by Ms. Piscevich in full support of Senate Bill 292 (1st Reprint). I will go through a brief background on why we are here today with this bill and walk through some of the general provisions.

In 2002, Nevada's health care delivery system was in a crisis. Doctors were leaving Nevada due to skyrocketing medical malpractice insurance premiums. Insurers who offered those type of coverage programs were leaving Nevada, and we had obstetric-gynecology facilities shutting down. In response to that, Governor Kenny Guinn called a special session and there were some statutory changes made to help stabilize the medical malpractice insurance premium market, but those changes made statutorily did not go far enough. In 2004, the group KODIN initiated a ballot question to put a couple more provisions in law that would help stabilize the medical malpractice insurance market. Principally, one key piece of that ballot question was to put a cap of $350,000 on pain and suffering for medical malpractice cases, and also to implement a statute of limitations. Those reforms were passed by 60 percent of Nevada voters, and those reforms have worked. I believe there is an exhibit that has been submitted to you that shows Nevada mutual insurance company medical malpractice premiums have dropped significantly since 2004 (Exhibit M). Again, the KODIN initiative worked, and we are in a great place.

The problem is that in the past couple of years, there have been some district court decisions that have been inconsistent with each other and inconsistent with what we believe is the intent of the KODIN initiative and the 60 percent of the voters who approved it. That is why S.B. 292 (R1) is here before you today. It is nothing more than clarifying what we believe was the intent and the voters' approval of the KODIN Initiative of 2004. I will walk through some of the main provisions of the bill.

First, section 2 adds the following to the definition of provider of health care under *Nevada Revised Statutes* (NRS) 41A.017. It adds physician assistant, clinic, surgery center, professional corporation or physicians' group practice that employs any such person and its employees. This was really designed because the KODIN initiative captures only physicians and hospitals, but as our health care delivery system has changed and morphed over the years, there are hospitals that have clinics and there are urgent care centers, so this is designed to capture those entities as well.

Second, the legislation clarifies—and this is very important—that noneconomic damages awarded in professional negligence actions must not exceed $350,000 regardless of the number of plaintiffs, defendants, or theories upon which the liability may be based.

Third, the legislation extends the time to trial requirement on medical malpractice cases from two years to three years. Fourth, it also requires that when an action is filed in district court that the court shall dismiss the action if the action is filed without an affidavit that supports the allegations contained in the action, is not submitted by a medical expert, and does not specifically and factually outline the name or describes by conduct each eligible negligent health care provider.

Fifth, it clarifies that all actions against health care providers will be subject to the mandatory settlement conference provisions. The legislation also provides that the rebuttable presumption shall not apply in cases where any plaintiff submits an expert affidavit pursuant to NRS 41A.071, or otherwise designates an expert witness to establish that the specific provider of health care deviated from the accepted standard of care and does not preclude any party to the suit from designating and presenting expert testimony as to the legal or proximate cause of any alleged personal injury or death.

The legislation also revises the definition of professional negligence within NRS 41A.015, as "the failure of a provider of health care, in rendering services, to use the reasonable care, skills or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." We believe this language helps clarify and clear up the definition of professional negligence.

Finally, an amendment was brought forward by the bill sponsor that provides that the board of trustees of a school district or the governing body of a charter school that allows or establishes a school-based health center to locate on or in school premises, buildings, or other school district facilities is not subject to a suit for and is not liable for civil damages resulting from any act or omission by an employee or volunteer of such a center.

[Assemblyman Nelson assumed the Chair.]

Assemblyman Elliot T. Anderson:
My question is on rebuttable presumption. The way I read it now, it appears like the exception swallows the rule. It looks like *res ipsa loquitur* would not apply in any case, so what I want to figure out is what cases would still be left?

Lesley Pittman:
I would like to hand the microphone over to Ms. Piscevich so she can respond to that question.

Margo Piscevich, representing Keep Our Doctors In Nevada:
Res ipsa still applies. For example, if you cut on the wrong side of the body and there is an explosion, those issues all apply. All this amendment is doing on the *res ipsa* is basically saying it does not apply if you have a medical affidavit. If you have a *res ipsa* case, you do not need the medical affidavit. If you come in with a medical affidavit, then you do not get the presumption. For example, I was supposed to have my left knee replaced and they replaced the right knee, you do not need a medical affidavit. However, you may need something on causation and damages, and that still allows the plaintiff or the defendant to put in that evidence on causation and damages, but it does not gut the five exceptions.

Assemblyman Elliot T. Anderson:
I want to follow up with that because that language refers as an internal reference to NRS 41A.071 which is proposed to be amended by section 6 of the bill.

Margo Piscevich:
Section 6 is the beginning of the case. You have to have an affidavit in order to bring the case. When you file your complaint, you need an affidavit by a doctor. What was happening, and the reason section 6 came into play, is because you would have a complaint that says medical malpractice occurred. Then you would have an affidavit that said, "I reviewed the records and I agree with allegations of the complaint." That does not tell you what happened or whom or what date. Section 6 is strictly the provision that says when you bring your case, you have to have an affidavit that tells the defense what happened. You do not have to know the person, but you can say—I am not going to use the *res ipsa* case that the person developed a decubitus ulcer or the person got an infection or the nurse did not call the doctor in time or whatever— all of that is at the beginning of the case so that the defense has an idea of what the allegations are. I believe the *res ipsa* is in section 9.

Assemblyman Elliot T. Anderson:
Section 9 added language referring to section 6 as amended. It refers to NRS 41A.071. So as I read the *res ipsa* section, it says that if you file that affidavit, you do not get the rebuttable presumption. When I look back up to when you have to file the affidavit, it looks like you have to file it in every case under section 6 in the existing law.

Margo Piscevich:
As a practical matter, you would be smarter to do it. The Supreme Court has said in case law that you do not need the affidavit in *res ipsa*, but you are probably going to need expert witness testimony at the time of trial. All this is saying is you still keep your five exemptions. However, if you produce an affidavit, then it is no longer *res ipsa*. You can still say they did the knee replacement on the wrong knee. That is a no-brainer. They cut off the wrong finger or whatever the issue may be. That one you do not need an affidavit for, but it also allows the plaintiff as well as the defense to use affidavits on causation and damages.

Assemblyman Elliot T. Anderson:
It might be helpful to get that case because the way I read it, it looks like you would have to file to get the benefit of the rebuttable presumption you would need to file an affidavit. Maybe we could talk about that offline because I do not want to take any more of the Committee's time today. It looks like if you do not file the affidavit under section 6, you would have the district court dismiss the action, but then under the *res ipsa* section, if you file the affidavit, you do not get the rebuttable presumption. It looks like it could swallow the rule to me.

Margo Piscevich:
I think the language says, "The rebuttable presumption pursuant to subsection 1 [of NRS 41A.100] does not apply in an action in which a plaintiff submits an affidavit pursuant to NRS 41A.071." That means if you want to do it, that is fine, but then you do not have the rebuttable presumption. You do not have to file it. As the case progresses, you are obviously going to disclose experts on causation and damages because things can happen that sound like they are bad but there is no causation. For example, you can go in for a surgery and come out with a nerve injury because of positioning. That is not negligence. You are going to need an expert somewhere along the way to say that positioning is one of the risks.

Assemblyman Elliot T. Anderson:
If there is case law that supplements that statute, please send it to me because that makes more sense and would help me understand why that does not swallow the rule.

Assemblywoman Fiore:
In section 3 of this bill, it limits the amount of an award to a total of $350,000 regardless of the number of plaintiffs. If this bill was in place in 2007, that Dr. Dipak Desai case—I am not talking about the product liability aspect of it,

but the actual case against the clinic, the doctor, or the insurer—how would we handle it? If you recall that incident, there was a ton of patients. What would happen under this bill in section 3? Would we be limited?

Margo Piscevich:
I was not in Las Vegas nor do I know all about that case other than he was convicted criminally and there was a case against the manufacturer. I do not know what happened in the underlying case, but I know there were multiple people involved. The concept is not made for that case, and that is why I think it went into the drug part of it and everything else into the criminal. It became an intentional tort, not a negligent tort. I do not know if it proceeded through the medical malpractice arena. However, the general run-of-the-mill medical malpractice cases against one or two doctors and a hospital or one or two nurses, what it is saying in those cases is that the claim of not calling the doctor in time and having an adverse result on the delivery of a baby, that is one claim that is $350,000. That is what has happened. It has always been interpreted as one claim. However, there were four or five cases in Clark County that said it is per person, per doctor, and that was never the intent of KODIN. It was limited to two per claim.

Assemblywoman Fiore:
As we vote new law and new language into law, the judges can only abide by the language. In section 3, it is crystal clear that if this would have taken place in 2007, there would have been quite a lot of plaintiffs who would have been out of luck.

Margo Piscevich:
Actually, KODIN came into effect in 2004 and it has been interpreted to be $350,000 per claim by 98 percent of the judges in this state. When there is an abnormal finding such as seven plaintiffs or something like that, it does not give us a stable or predictable plan of attack for either the plaintiffs or the defendants or especially the insurance companies who are writing for these doctors. The cap is there for a reason, and it is for the predictability of making sure we can keep doctors in this state so we can all evaluate the case and say "You have $500,000 in special damages, $500,000 in medical, $300,000 in lost earnings, and you get another $350,000." It can apply in a wrongful death case. It may seem arbitrary, but it works, and it keeps our doctors here. California's cap is $250,000. They have had it in effect for 20-plus years. They interpret it as one cap per claim, as have we, except for a couple of judges in Las Vegas who did not. We are trying to make it extremely clear that it is $350,000.

Vice Chairman Nelson:
The $350,000 only applies to noneconomic damages. Is that correct?

Margo Piscevich:
Correct.

Vice Chairman Nelson:
Why do you not explain the difference to the Committee between the different things, because I think we are getting some confusion that the plaintiffs are only entitled to $350,000 total, and that is not correct.

Margo Piscevich:
In medical malpractice, they have changed the name from special damages to economic damages and noneconomic damages. As another example, in an automobile accident, pain and suffering is noneconomic. Economic damages are your medical expenses, loss of earnings, and whatever other out-of-pocket expenses you may have. So if it is a wrongful death, you have funeral expenses and those sorts of things. The cap is only on the noneconomic part of the case, not the economic part.

Assemblyman Gardner:
I will probably want to talk with you offline as well. I read section 9 the same as Assemblyman Anderson does. I think section 3 might cause us more issues than not. I do not do medical malpractice, but if I did and I said okay, regardless of the number of plaintiffs and I have seven plaintiffs, then I would just file seven cases. Would this not provide diseconomy of scale?

Margo Piscevich:
Not at all. What would happen if you filed seven cases—let us assume it is a wrongful death case and you have a wife and six children and this is all one occurrence. You would be consolidated into one, and you would still have one cap.

Assemblyman Gardner:
In section 6, the additional two subsections 3 and 4 we are putting we are putting in there, let us say I got injured in a hospital and all I know is that I had a surgery and it went wrong. How am I supposed to know who the anesthesiologist was, who the nurses were, who exactly did the damages to me.

Margo Piscevich:
You do not need to know that. You have to know that something went wrong in the surgery and it is either the doctor, the surgeon and his assistant, or a nurse, or someone at the hospital. You have to know what conduct you did, and in order to bring the affidavit to start with, you have to have someone review the medical records. Someone in a similar specialty has to review those records, so they would look at it and say, "I think what went wrong occurred in the surgery"—let us make this up—"I assume the blood pressure went low for too long." You do not have to know who did it, you have to know the conduct. So someone could come in and say that it appears that during the surgery the blood pressure dropped for too long a period of time and it resulted in brain damage. You do not have to say the doctor did it. You have to say the conduct or identify the person.

Assemblyman Gardner:
In Section 6, subsection 4, it says, "Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms." I think that is where the issue was. I agree that we can talk about the conduct that caused it, but how am I supposed to know? For example, it was not the actual surgeon who caused the problem, but someone who read my records wrong, such as reading my magnetic resonance imaging (MRI) wrong. How am I supposed to know it was the MRI guy, and not the surgeon or the nurse?

Margo Piscevich:
You do not need to say that. You just need to know the conduct. The MRI was misinterpreted, which caused me subsequent problems. Now we know to focus on the MRI and then we can do the investigation. The plaintiff's lawyer will be doing the same thing, and knowing how I have seen these cases pled, generally they put in fictitious Does, and say it could be a physician, nurse, or physician assistant. But you do not need to say that. You need to say the MRI was misinterpreted and it resulted in A, B, C, and D. Everyone knows at least where to focus. We need the conduct or the surgeon who messed up. He caused me a problem with my arm when I went in for my leg. At least we know where to go. We know it is the operating team. That is the problem. We get these complaints, and we have no idea what we are talking about.

Assemblyman Gardner:
In this case, I have a doctor review and we get the affidavit. He says it was the MRI. Upon discovery, we find out it actually was not the MRI, it was the surgeon who misinterpreted what the MRI guy had told him, and then we find out it was not the MRI and it was actually the surgeon. Will the plaintiffs be able to amend their complaint?

Margo Piscevich:
Yes, you can amend if you find out there is a specific person. You can also put in there that you believe it could be either one. I have seen them pled that it could either be the surgeon who misread it or the radiologist misread it. We do not know. If you have an expert reviewing the files and they cannot tell who did what, you say, "It could be the surgeon, the radiologist, or the physician assistant. We do not know." You do not need to know that specifically, but you have to give us an idea of what is happening.

Assemblyman Trowbridge:
Going back to Senate Bill 291 (R2), we received the definition between punitive effect and charges: pain and suffering and lost wages in terms of a settlement. Now we are introducing a new term "noneconomic damages." Where does that fit in? Is that the charges from the hospital?

Margo Piscevich:
The medical malpractice has its own little section. They define economic and noneconomic damages. Economic would be the medical expenses, the loss of earnings, or the cost of a funeral if it is a wrongful death. The noneconomic is the pain and suffering. What happens in a medical malpractice trial is that the jury is not told about the cap. They say, "This is for pain and suffering," and it is reduced by the judge later. There is generally not even any reference to the cap.

Assemblyman Trowbridge:
In the case that we are talking about with the six children, it would have the cap of the $350,000 per case for six kids and they divvy up the $350,000?

Margo Piscevich:
Correct. That would be a wrongful death case when you have multiple plaintiffs. It is generally not the normal run-of-the-mill case. It is generally because someone is injured, becomes a paraplegic, has brain damage, or something to that effect.

[Assemblyman Hansen reassumed the Chair.]

Assemblywoman Diaz:
My question pertains to the effect of this new legislation being put into place. We had a little boy earlier today—I want to understand the implication of this law going through. Let us pretend Aiden, who was here earlier, was in the state he was because of medical malpractice, and we cap this to $350,000.

We heard from the parents that he needs care 24 hours a day, 7 days a week, probably a lot of therapy, and a lot of medical attention. What does this do for Aiden?

Margo Piscevich:
Aiden will get all of that 24-hour-a-day care and all of the special therapy. Those are special damages. He will be provided with whatever the care plan provides for, assuming it is a case of negligence. If he needs 24-hour-a-day nursing care, assisted care, special testing, and special therapy, those are the special damages. He only gets $350,000 in pain and suffering, but all of his future care is covered.

Assemblyman Ohrenschall:
I agree with you that I do not think the voters wanted all the physicians involved in a malpractice case to be on the hook if they were not involved, but what if someone goes in for surgery on their knee and the anesthesiologist commits malpractice and they suffer brain damage and the surgeon also commits malpractice and they have to get their foot amputated? Has that victim not been harmed by both doctors in separate instances and should they not be able to recover noneconomic damages for both?

Margo Piscevich:
No. That is one event. They are in the surgery. An occurrence is what occurs at the time of the medical malpractice. That is one event.

Assemblyman Ohrenschall:
There are two separate instances of malpractice—it is two separate injuries to the body. One body, but two separate injuries.

Margo Piscevich:
You cannot have a surgery without an anesthesiologist and a surgeon, so it is one event. What will happen in that case, if there is brain damage, there will be a care plan that says you need X number of tests, X amount of nursing, and X amount of daily care. That is the economic. The economic does not go away. I think that one of the policy reasons behind the cap is because in medical malpractice, if there is a catastrophic result, the damages are catastrophic. If you have brain damage and you cannot work again and you are 40 years old, you have several million dollars right there in loss of earnings. We are not talking the $15,000, $25,000, or $50,000 case. We are generally talking in multimillions. All you are doing is adding on additional monies that do not provide for predictability for even assessing the cases or for the insurance companies.

If it is criminal conduct or something really bad, there is an exemption for that. If someone was grossly negligent and it was criminal, such as your case in Las Vegas, there would be an exception for that. If it is negligence, there is a $350,000 cap because no one intends to hurt a patient. Absolutely no one.

Chairman Hansen:
Thank you. Ms. Piscevich, do you have someone else you would like to have called up at this time to testify in favor of the bill?

Denise Selleck, representing Nevada Osteopathic Medical Association:
Ditto.

Kathleen Conaboy, representing Nevada Orthopaedic Society:
Ditto.

James L. Wadhams, representing Nevada Hospital Association:
Ditto.

George A. Ross, representing Sunrise Hospital and Medical Center:
Ditto.

Chairman Hansen:
Is there anyone in opposition to S.B. 292 (R1)?

Jennifer Gaynor, representing Nevada Health Care Association:
The Nevada Health Care Association is a nonprofit organization dedicated to promoting public health and welfare for improved postacute care among health care providers in Nevada. We support the substance of S.B. 292 (R1) with the exception of the current version of section 2 of the bill which amends the definition of the term "provider of health care" for the purposes of NRS 41A.017. With the amendments that were made to this section in the Senate, the sponsors have added in some new entities as part of this definition including clinics, surgery centers, professional corporations, and physicians' group practices. We are fine with them being included; however, by adding in these additional specific entities, S.B. 292 (R1) could now be interpreted to exclude key health care providers, including but not limited to, postacute care medical facilities throughout the state of Nevada.

This version of the definition of provider health care is therefore very concerning to the Nevada Health Care Association. If S.B. 292 (R1) were to pass with this definition intact, our postacute care facilities in Nevada would become the attractive target for plaintiff's attorneys and it could cripple the industry.

Therefore, we are presenting an amendment (Exhibit N) and I would like to add that the language we are concerned with was not something that was requested in an amendment or discussed in the hearing in the Senate. It was added by the sponsor during the work session; therefore, this is our first opportunity in a hearing to address this concern.

Our proposed amendment will ensure that the protections of NRS Chapter 41A apply to licensed health care professionals like doctors and nurses regardless of the category of medical facility where they are providing professional services. This would allow the sponsor to keep the specifically enumerated new categories of physician facilities they added without causing the harm that we fear. However, if the amendment language we are presenting is not workable to the Committee, we would request alternatively that the language of section 2 in S.B. 292 (R1) be stricken in its entirety, leaving the definition of provider of health care as it was prior to the introduction of this bill, the way that it had been adopted by the voters of the state of Nevada by initiative petition. With me to explain a little more is Daniel Mathis, the President and Chief Operating Officer of the Nevada Health Care Association, who will talk very briefly about the practical impacts that this could have on the industry, as well as Robert Rourke, an attorney who represents these facilities to discuss the legal ramifications and to answer any questions you may have.

Chairman Hansen:
Just so you know, I am strongly interested in your amendment.

Daniel Mathis, President/CEO, Nevada Health Care Association:
On insurance availability for skilled nursing facilities (SNF), a large percentage of these provider types are self-insured because insurance is either unavailable or very expensive for this level of postacute care provider. Another issue that we are concerned with is that as the costs increase for skilled nursing for this segment, bed availability will become an issue. We are seeing that right now with ventilator beds available in northern Nevada. Currently, they are only available in southern Nevada, and we feel like other changes in the business model are on the horizon.

The effort to clarify language for providers of health care has fallen short for SNF providers whose clinicians provide the same services in both acute and postacute care settings. In SNFs, clinicians including physicians, registered nurses, licensed practical nurses, certified nursing assistants, registered dieticians, and trained, licensed therapists provide direct care services to a patient population, including complex wound care, intravenous therapy, G-tube feeds, ventilator services, and physical, occupational speech, and respiratory therapy. These same services are provided by the same licensed

clinicians in hospitals across the state; however, they do not enjoy the same protection under the current language in section 2 of S.B. 292 (R1) when they provide such services in a SNF setting.

Skilled nursing facility providers operate on very thin margins. Nationally, it is 1.8 percent—and Nevada is very similar—after years of both Medicare and Medicaid funding cuts. On May 1, 2015, skilled nursing facilities started admitting behavioral residents who, up to now, have been sent out of state because appropriate programming was not available for Nevadans. Skilled nursing facility providers are concerned that their efforts to provide this new programming will result in another area of exposure for litigation without being included as a provider of health care. While skilled nursing facility providers are happy now to be able to offer this new programming, we feel additionally exposed while providing a much-needed service. Please approve S.B. 292 (R1) with the inclusion of skilled nursing facilities or similar language in the definition of provider of health care. [Daniel Mathis submitted his testimony (Exhibit O).]

Robert Rourke, Attorney, Rourke Law Firm, Las Vegas, Nevada:
I am an attorney with Rourke Law Firm and defend claims against both acute and postacute care facilities. The practicality of what is being proposed in the work session language in section 2 of S.B. 292 (R1) will have a dramatic effect upon the postacute clients that I represent. As Ms. Gaynor pointed out, we are not opposed to having individuals necessarily enumerated under section 2 such as professional corporations, physicians' groups, surgical centers, or clinics, but when you do that to the exclusion of the postacute care setting, the argument will come—because I have faced this argument for many years in the district court in front of various judges—that the postacute facilities are not covered. What is the practical effect? If we are talking about policy that we want to make sure that the citizens of the state have adequate access to health care, a vital role in that is the postacute care setting. The way that the postacute care setting gets skirted is simply by not naming the individual providers of health care such as our nurses or therapists, but they name the postacute care facility as the defendant, and do not name the provider.

When you take that to the conclusion and read section 3, it says, "In an action for injury or death against a provider of health care based upon professional negligence." You have the caps, and you have the protections afforded under NRS Chapter 41A. They do not sue the provider of health care. They then argue that you do not have the caps. So we now have—Mr. Mathis can tell you the number of beds—over 5,000 beds that are going to be exposed and become the target of the plaintiffs' lawyers in the state because of the way this

language is fashioned in section 2. I would echo the comments of Ms. Gaynor that we need to strike section 2 or include all of the health care providers. The easiest way to do that is through enumerating the medical facilities' definition that we already have in our statutes. I think that is the simplest, clearest, and most effective way to ensure that we have the right policy, and that is that the citizens of the state have the ability to seek the medical care in a reasonable manner. I also echo the comments of Mr. Mathis as it relates to the insurance. The majority of my clients, as it relates to postacute, are self-insured because they are trying to scramble to get coverage that they can afford.

Chairman Hansen:
Is there anyone else in opposition?

Robert Rourke:
Chairman Hansen, may I clarify the record? When I said that they are self-insured, it is that they buy policies that the individuals control. It is not fully self-insured. I want to make sure that it is clear for the record.

Chairman Hansen:
Is there anyone else who would like to testify in opposition to S.B. 292 (R1) at this time? [There was no one.] Is there anyone in the neutral position?

Stephen Osborne, representing Nevada Justice Association:
We are neutral on S.B. 292 (R1). We worked on some language with KODIN and with others. While we do not support caps in any form or fashion, we remain neutral on the bill as presented. We are in opposition to any amendment that would expand the "provider of health care" definition. The caps that are enjoyed by KODIN at this time are in place because of prior legislation. There was a special session in 2002 specifically for doctors and hospitals only when they had the so-called health care crisis. A bill was proposed in 2003 by KODIN and was rejected by both houses. It then went to the voters and was passed in 2004. It has been in existence since 2004. It is specific and limited to those parties. It is an infringement on our constitutional right to a jury trial, which is specifically to remain inviolate, meaning it should not be tampered with whatsoever. It is the most fundamental right that we have in this state to have a trial by jury. To expand this to additional parties would violate that Seventh Amendment right. When you talk about it, it shifts the responsibility from the negligent parties to the victims of malpractice. It also puts more burden on our state for those people who are not insured and for those people who become unemployed due to disability. It does have a financial impact on people who are injured in our state due to malpractice and through no fault of their own.

When you talk about the skilled nursing facilities, you are also talking about a component of our most vulnerable type of people. These are the people who need a higher level of care, and they are completely dependent upon it. When you have that, they are vested with the rights and responsibility to care for them. When they do not fulfill that obligation, it is not right to put that burden and cap on the victim or the people of this state.

Assemblyman Elliot T. Anderson:
What cases would the rebuttable presumption be left for?

Stephen Osborne:
This was not our provision. This was something that was passed by the sponsor. With regard to *res ipsa*, it has to do with the specifics of the standard of care. You do not need an affidavit at the complaint stage because you have the enumerated items on the affidavit requirement. That is my understanding of the bill. If you do retain an expert, they do not want to have the rebuttable presumption in addition to your expert testimony.

Assemblyman Elliot T. Anderson:
We will talk about it offline to be respectful of the Committee's time.

[(Exhibit P) was submitted but not discussed.]

Chairman Hansen:
Is there anyone else who would like to testify in the neutral position? [There was no one.] Normally, I would bring Ms. Pittman back up, but you are going to have to talk with the other people who have concerns over this bill. I would definitely like to see some of that amendment language discussed between the two parties, so hopefully we can work out some resolutions. In the meantime, I am going to close the hearing on Senate Bill 292 (R1) and open the hearing on Senate Bill 296 (2nd Reprint), which revises provisions relating to exemplary or punitive damages in certain civil actions. It will be presented by Mr. Ross.

Senate Bill 296 (2nd Reprint): Revises provisions relating to exemplary or punitive damages in certain civil actions. (BDR 3-940)

George A. Ross, representing Institute for Legal Reform; and American Tort Reform Association:
I am here on behalf of the Institute for Legal Reform and the American Tort Reform Association. Senate Bill 296 (2nd Reprint) attempts to reform punitive damage statutes in the state of Nevada. Currently, product liability is not under the existing three times compensatory damages cap. This bill proposes to say first that you cannot bring punitives in the initial stage of the case. I will explain

that in a moment as to why that would be an improvement. Second, we would move products under the cap but have full exceptions so that for particularly egregious behavior, you still would not get the cap. It does not take away punitive damages. It just moves the products under the cap as long as they do not meet those four exceptions.

What we really hear about is balance. We would argue that over the past several decades the tort liability laws of the state of Nevada have not been particularly balanced; they have been kind of tilted in a particular direction. We are trying to restore balance and restore a sense of justice and fairness. Basically this whole issue is about how you perceive justice and fairness. We would argue that a defendant who has done little to nothing wrong deserves the same kind of fair treatment that a plaintiff does. Clearly, we are not saying that a plaintiff deserves nothing. We are not taking away his right to go to court, and we are not taking away even his punitive damages awards, which, in some cases, would be limited. Let us look at how the statutes of the state of Nevada define some of the key words in punitive damages. This really drives the rest of what I am going to be saying for the rest of my time.

As used in *Nevada Revised Statutes* (NRS) 42.001, unless the context requires otherwise, "conscious disregard"—which is one of the keys to getting punitive damages—means the knowledge of the probable harmful effects of a wrongful act and—this is key—a willful and deliberate failure to act to avoid those consequences.

"Malice, express or implied," means conduct which is intended—another key word—to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others. It is conscious disregard. It is intentional behavior, it is malice, it is cruelty, and it is a wrongful and deliberate failure.

The use of punitive damages in civil litigation as a tool, as a deterrent, and to punish egregious conduct is somewhat controversial. Some states do not even allow it. They let the attorney general and other enforcement agencies address conduct that warrants punishment. In the states that do allow private litigants to pursue punitive damages, such as Nevada, all too often the claim is misused or misapplied, requiring remediation in posttrial or appellate proceedings.

Nevada has long allowed juries in most civil cases to allow punitive damages in exceptional cases involving malicious and despicable conduct. In practice, however—and this is one of the real key points as to why we believe this bill would be helpful and necessary—punitive damages claims are not raised only in exceptional cases. They are pled in the vast majority of personal injury and

product liability cases. Where an exceptional remedy is commonly evoked, the system is broken down. This overuse results in damage to the integrity of the civil justice system. Simply raising an allegation changes the dynamic of a lawsuit. It raises the stakes to a much higher level. Those gigantic judgments that you occasionally see in the newspaper are, generally speaking, punitive damages. The existence of allegations of egregious conduct in a public filing has the potential to stain the defendant's reputation even if the allegations are meritless. Further, because they are usually uninsurable, the ongoing financial viability of individuals in small businesses are put into immediate doubt, often leading to quick settlements on unfavorable terms and pressure on their insurance to do the same in order to ensure an enterprise's continued existence, even when the claims of liability of any sort are defensible. A lot of what we see in the tort world in the bills that are brought before this Legislature over the years has to do with the balance of power at various stages in the case waiting for settlements. Instead of the recognized purposes, punitive damages are used as a threat without regard to the legitimacy of the claims, and even when that happens, it is not appropriate.

We think S.B. 296 (R2) would rein in this abusive use of punitive damages claims. Section 1 precludes the inclusion of damages in initial filings. Before a claimant can raise punitive damages, he must develop evidence and convince the trial court that a prima facie case can be made with admissible evidence that the defendant's conduct can actually be demonstrated to rise to that exceptional level of egregiousness—which we talked about being necessary in Nevada law to justify a punitive claim. Section 1 would put the onus on claimants to ensure there is real evidence for imposing against a defendant a cost and burden of the offending punitive damages claim, including not only the psychological threat of higher damages, but also the burden of adding discovery on topics such as the company's finances. This particular limitation has been deployed in a number of states, including Colorado, Florida, and Oregon.

The next section of the bill deals with punitives under the cap, and I will have to say that first, I want to thank the sponsor of this bill, Senator Roberson, for bringing this bill. He tried very hard to work with both sides to come up with a fair and balanced bill. He did try to take into account both the interest of the defendants and the interest of the plaintiffs. Unfortunately, there was a last-minute amendment added on the Senate floor, which was not adequately vetted and we have not had a chance to vet. The clients who I represent, which involve many large companies in the United States, felt that they could not support that final amendment. The prior wording was much more to their liking, quite frankly, and we felt much more balanced in terms of serving the

interest of a balanced sense of justice. Consequently, we are proposing an amendment to the bill that came over to you from the Senate, and I will explain that in a few minutes.

There are four areas of exceptions in the proposed amendment (Exhibit Q). In section 3.2, subsection 3, "The manufacturer, distributor or seller intentionally, and in violation of any applicable laws or regulations," we would like to add, "'as determined by the responsible government agency', withheld from or misrepresented to a governmental agency information material to the approval of the product and that information is material and relevant to the harm that the plaintiff allegedly suffered." In section 3.2, subsection 4, "After the product was sold," we would like to put back in, "'a government agency found that' the manufacturer, distributor or seller intentionally violated any applicable laws or regulations by failing to report risks of harm to that governmental agency." What we are doing here is getting an objective standard of whether this standard was violated. What happens is there are a lot of regulatory filings, a lot of information goes back and forth. Under the bill as it came to you, a plaintiff's attorney can go through all those filings. It is very easy to second-guess, very easy to go back and re-create a story that you want it to have, and then you end up having to have a jury trial based upon putting all this together that you find in discovery. What we feel is that in many cases, this raises into question and brings in the punitives—companies who did little or nothing wrong, if a story can be made.

This bill does not keep the plaintiff from getting punitive damages. It puts an objective standard rather than making this a subject of years and years of litigation and ultimately a jury trial at great expense. It does not deny the plaintiff at least three times punitives. Everything can be second-guessed, and this puts in an objective standard. That is why Arizona, which is the state that originated the concept of the exceptions now included in subsections 3 and 4, included a requirement that an agency must make an objective determination of violation before the manufacturer is stripped of their veil of protection against product liability suits. Without that agency determination, there frankly is not very much protection left for manufacturers at all, and in the view of my clients, this essentially means that the cap would only apply to essentially nonregulated businesses and that does not mean very many because most businesses are now regulated one way or the other.

The exchanges between the agency and the company would be a tremendous discovery, so we feel that by having the agency make that determination when companies are involved in the kind of conduct that I described when I read you what is defined as punitive damages, that conduct would clearly go forward and be outside the gap. We are not denying people that right.

We would love to see this bill passed with the amendment for the reasons I just described. I would again stress that we are not taking punitive damages away. Having said that, if we cannot amend section 3 in this manner, we would prefer that section 3 be deleted from the bill and go forward with section 1.

Assemblyman Araujo:
With the passage of S.B. 296 (R2), can punitive damages still be sought against companies who produce defective products?

George Ross:
Absolutely. This bill does not take away the right to seek punitive damages; it just says you do not get it when you bring the initial case. When you bring your initial case, and after you have gone through discovery, you can go to a judge and say, here is the evidence, I should be able to get punitives, the judge can grant that if he sees enough evidence. Secondly, you then have the issue of if you are under the cap or not. You can at least go for the three times compensatories, and if you fall under one of those four exceptions, then you get no cap at all and you still get to have punitive damages. We are trying to get a little more balance in the overall system.

Assemblyman Nelson:
As determined by the responsible government agency, I guess that is going to be pretty easy to determine. I presume it is the one regulating the defendant?

George Ross:
That would be correct.

Assemblyman Nelson:
Would it be the U.S. Food and Drug Administration in the instance of a drug?

George Ross:
Yes.

Assemblyman Nelson:
Without this amendment, would it be the jury who would make that determination?

George Ross:
Yes, it would.

Assemblywoman Diaz:
I keep hearing the word "balance." Would you clarify exactly how this version of S.B. 296 (R2) balances it for both sides?

George Ross:
We are not taking away punitive damages. We are creating a situation where a company that did not intentionally do the kind of behaviors that are described as punitives, that is on a margin, that makes them inadvertent acts, that does not meet that high standard of what exactly is punitives to the extent that those exceptions would not apply to them and we feel that would be a better balance. The companies who did engage in egregious behavior would still be outside the cap, but the companies for whom something may have happened are going to get the benefit of the cap. There are all sorts of acts and things that happen that are not intentional. People do not intend to hurt people and they do not intend to make products that are going to harm people.

Assemblywoman Diaz:
You have mentioned the company's side of it, but where is the little guy's side of it—the person who gets harmed by this?

George Ross:
The little guy side of it is that we did not take away punitive damages and we still have him at a three times compensatory cap even with this bill. Most punitive cases in the state of Nevada—that three times cap applies. Products are one of the few items that are exempted from that cap.

Assemblyman Ohrenschall:
My question has to do with the amendment and the governmental agency action. A lot of times we are beholden to our friends in the federal agencies in terms of their discovering there is an issue. As you and I know, they move very slowly. What if there are press accounts about a product that might have an issue, might be unsafe, maybe our state Department of Health and Human Services feels it is unsafe or our Attorney General feels it is unsafe, but the appropriate federal agency has not acted yet and maybe they are not going to act for another year or two. Is that going to put an injured party in our state in a position to where we are waiting on the people in Washington, D.C., and we are blocking that person from getting to the courthouse?

George Ross:
I suspect that the smart thing to do would be to bring that case and see what happens. I do not think this would necessarily block that person, particularly the way you described it.

Chairman Hansen:
Due to limited time, I will put on the record that the Las Vegas Metropolitan Chamber of Commerce, the Reno Sparks Chamber of Commerce, and the Retail Association of Nevada are all proponents of the bill.

Graham Gallaway, representing Nevada Justice Association:
We signed in neutral on this bill because there has been a lot of effort amongst all of the different parties and the sponsors of this bill to craft something that we could all live with, albeit uncomfortably. We are neutral on the bill, but on this recent proposed amendment that was just presented to you, I would have to say that we are in opposition to it.

I find it interesting when the big corporations of the world say that the playing field is not level and is tilted against them. Think about what happens in these product liability cases, and that is what we are talking about—it is an individual, some poor schlep, one of your constituents. Maybe I should not have said that term, constituent, but rather an honest individual who is going up against the biggest corporations in the world with legions of attorneys and legions of experts. We oppose the amendment being pitched to you here because using the government agencies acquiescence to some product or approving some product I think is a failed standard. Look at all the products that every day we see something in the paper. Airbags, automobile ignitions, car seats—the National Highway Traffic Safety Administration passed the Pinto. There are products. There are legions of products that the government has approved and then later subsequently learned were highly dangerous. We are opposed to the proposed amendment.

Mark Wenzel, representing Nevada Justice Association:
The changes to subsections 3 and 4 that Mr. Ross mentioned were in an earlier version. They were excised out as part of an effort to reach an accord with the bill's sponsor and the Senate committee chairman. Government agencies just do not find that someone is trying to make a defective product. The language that is trying to be inserted in there is a standard that is incapable of being established. That is the genesis of why we had issues with it and why that language was ultimately stricken by the bill sponsor and the committee chairman and approved with bipartisan support on the Senate side. Leaving things in the hands of federal government entities—I have a great deal of problem with that because, as Mr. Galloway alluded to, there are many products that the government has approved, perhaps not knowing the full range of issues that were with the product internally. It is not an appropriate standard to have to determine whether or not a product is defective or if the manufacturer knew that product had problems during the research, development, and manufacturing stage.

Chairman Hansen:
Are there any questions? [There were none.] Is there anyone in Carson City or Las Vegas who would like to testify in the neutral position on S.B. 296 (R2)? [There was no one.] We will close the hearing on S.B. 296 (R2) and open it up for public comment. Is there anyone who would like to address the Committee at this time? [There was no one.]

Assemblyman Nelson:
I have spoken with many people and we are very grateful to you as Chairman for the way you have conducted this Committee. I am personally grateful for the confidence you showed me in making me your Vice Chairman. You have dealt with a lot of lawyers and a lot of opinions on this Committee and have done an excellent job. We are grateful for that. Thank you.

Chairman Hansen:
Thank you very much for those nice comments. The meeting is adjourned [at 10:52 a.m.].

RESPECTFULLY SUBMITTED:

_____
Linda Whimple
Committee Secretary

APPROVED BY:

_____
Assemblyman Ira Hansen, Chairman

DATE: _____

EXHIBITS

Committee Name: Assembly Committee on Judiciary

Date: May 26, 2015 **Time of Meeting: 8 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 60 (R2)	C	Brett Kandt, Special Deputy Attorney General	Letter in support
S.B. 60 (R2)	D	Barbara Cegavske, Secretary of State	Letter in support
S.B. 487	E	Daniel Reid, National Rifle Association	Letter in support
S.B. 487	F	J. L. Rhodes, Stillwater Firearms Association	Letter in support
S.B. 487	G	Lesley Dickson, Nevada Psychiatric Association	Letter in opposition
S.B. 487	H	Chuck Price, UNR, Faculty Senate	Testimony in opposition
S.B. 487	I	Nevada System of Higher Education	"NSHE Arguments Against Concealed Weapons on Campus"
S.B. 487	J	Christopher Lively, Students for Concealed Carry	Testimony in support
S.B. 291 (R2)	K	Robert L. Compan, Farmers Insurance	Testimony
S.B. 291 (R2)	L	Robert L. Compan, Farmers Insurance	Proposed Amendment
S.B. 292 (R1)	M	Lesley Pittman, Keep Our Doctors In Nevada	Chart
S.B. 292 (R1)	N	Jennifer Gaynor, Nevada Health Care Association	Proposed Amendment
S.B. 292 (R1)	O	Daniel Mathis, Nevada Health Care Association	Testimony

S.B. 292 (R1)	P	Rudy Manthei, Keep Our Doctors in Nevada.	Testimony in support
S.B. 296 (R2)	Q	George Ross, Institute for Legal Reform, and American Tort Reform Association	Proposed Amendment