MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Eighth Session
May 19, 2015

The Senate Committee on Judiciary was called to order by Chair Greg Brower at 3:29 p.m. on Tuesday, May 19, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Greg Brower, Chair
Senator Becky Harris, Vice Chair
Senator Michael Roberson
Senator Scott Hammond
Senator Ruben J. Kihuen
Senator Tick Segerblom
Senator Aaron D. Ford

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Bob Compan, Farmers Group, Inc.
Stacey Upson, Farmers Group, Inc.
Justin Harrison, Las Vegas Metro Chamber of Commerce
Tray Abney, The Chamber
George Ross, Institute for Legal Reform; American Tort Reform Association
Joseph Guild, State Farm Insurance Company
Lea Tauchen, Retail Association of Nevada
Paul J. Enos, Nevada Trucking Association
Mark Wenzel, Nevada Justice Association
Bill Bradley, Nevada Justice Association

Robert Eglet, Nevada Justice Association

Chair Brower:
I will open the hearing on Senate Bill (S.B.) 300.

SENATE BILL 300: Revises provisions related to comparative negligence. (BDR 3-938)

Senator Michael Roberson (Senatorial District No. 20):
It may not be in the title, but S.B. 300 is a bill about fairness in lawsuits. Under Nevada law, a plaintiff must be no more than 50 percent at fault to recover damages for injury or death to persons or injury to property under comparative negligence. Liability of each defendant is allocated based on the percentage of negligence attributable to each defendant in certain civil actions. It is a good rule of fairness for our legal system, and it needs to be expanded through S.B. 300.

Since 1973, Nevada has sought to move away from the common-law doctrine of joint and several liability. Ending joint and several liability represents good policy. It is not fair or rational for a defendant who is only minimally liable for a claimant's injuries to be required to pick up the tab for the responsibility of other tortfeasors and pay the entire damages award. Ending the deep pocket doctrine, the idea that a defendant who has money should fully compensate the plaintiff regardless of the degree to which that defendant's conduct contributed to the harm, has long been a goal of Nevada law. I refer you to *Café Moda, L.L.C. v. Palma*. In that case, the court noted that during a 1989 discussion of a bill to amend *Nevada Revised Statute* (NRS) 41.141, it was mentioned that the 1987 shift back to several liability for negligent defendants was designed to prevent the deep-pocket doctrine.

Unfortunately, Nevada's attempts to move away from joint and several liability have been hampered by broad areas of exceptions built into the statute. These exceptions leave a broad array of cases vulnerable to unfair treatment and perpetuate dubious and artificial distinctions among different types of tortious conduct that may be equally responsible for bringing about the harm. Further, the Nevada Supreme Court recently recognized that the structure of NRS 41.141 allows joint and several liability to apply even in situations where the plaintiff has only chosen to sue one tortfeasor despite the fact that multiple

parties were at fault in causing the injury. I refer you to *Humphries v. Eighth Judicial District Court*. In that case, the court noted:

> While allowing a plaintiff to pursue an action against only one negligent defendant for the entirety of the plaintiff's damages is contrary to the policy of applying several liability to a deep-pocket defendant, the statutory scheme in NRS 41.141(4) applies several liability only when there is "more than one defendant," and here, there is only one defendant. ... Accordingly, NRS 41.141 encompasses the circumstances here, wherein the plaintiff has sued one tortfeasor amongst multiple tortfeasors [or cotortfeasors], and the statute does not change the result reached under the traditional joint and several liability analysis: the defendant is still jointly and severally liable for the entire judgment against it.

This interpretation encourages gamesmanship as plaintiffs decide who gets to settle, who gets released and who gets sued. In fact, the Nevada Supreme Court invited the Legislature to consider this situation and decide whether a change to the statute is warranted. In *Humphries*, the court said:

> Although the Legislature enacted several liability for negligent defendants "to prevent the 'deep-pocket doctrine,'" ... the Legislature did not indicate that several liability should be applied in cases such as this where the plaintiff sued only one defendant. We decline New York-New York's invitation to construe NRS 41.141 as doing so, and we leave it to the Legislature to consider the policies behind Nevada's comparative negligence statute and alter the law if they deem it advisable to do so.

Nevada Revised Statute 41.141 should be changed to render Nevada's treatment of defendants and personal injury and property damage lawsuits consistent and fair so that each actor is only liable for the proportion of damage he or she caused. Senate Bill 300 would put in place a comprehensive comparative fault system that places liability proportionally on the shoulders of those who are responsible for the injuries and damages. The comparative fault system set forth in S.B. 300 allows the trier of fact to allocate fault to any person involved in a harmful transaction or incident without regard to that person's participation in the lawsuit. All parties to the lawsuit, as well as settling parties, will be considered, and S.B. 300 also creates a system that

allows for identification of nonparties who may have some responsibility for the injury. The trier of fact may allocate a proportion of fault to those designated nonparties.

Under this comparative fault system, where fault may be portioned out to a party, a settling party or a responsible nonparty properly identified and designated during the course of the lawsuit, the procedural traps and complexities are removed. The jury gets to decide a much more direct question: who is responsible for the damages and in what proportion? The plaintiff has an incentive to bring all responsible parties together in a single lawsuit in order to be efficient and reduce costs. The defendant gets fair treatment in that he or she must pay only that portion of the damage for which that defendant is actually responsible. Notably, while a proportion of fault may be allocated to a nonparty because the nonparty did not participate in the lawsuit, that determination cannot be used against the nonparty in another proceeding.

Senate Bill 300 would apply its system to virtually all situations. Under the bill's comprehensive arrangement, only three circumstances are treated as exceptions. These are delineated in section 1, subsection 7 of the bill. The first is professional malpractice claims against health care providers. This area remains untouched because it is separately treated under NRS 41A.045. Next are workers' compensation claims, as workers' compensation is a separate self-contained category. The final exception is claims in which multiple persons knowingly and deliberately pursued a common plan or designed to commit a tortious act. When that standard is met, it is proper to consider collectively the conduct of the tortious defendants.

In fully and finally rejecting joint and several liability and replacing it with a complete comparative fault scheme, Nevada would render its own system more consistent. Medical malpractice cases in Nevada are already governed by a comparative fault system in which the defendant is responsible for only the percentage portion of damages attributed to that defendant. Further, Nevada would join an increasing number of states, including Colorado, Utah, Oklahoma, Kansas, Wyoming, Florida, Tennessee, Kentucky, Georgia and several other states, that have taken similar approaches.

Bob Compan (Farmers Group, Inc.):
We support S.B. 300. The Legislature has passed monumental changes over the past few years to ensure that Nevada has a probusiness environment. For the

past several years, Nevada has been listed as one of the top ten states for tort reform, and the court system has shown that.

Chair Brower:
When you say that Nevada is in the top ten with respect to tort reform, I assume you mean it is in the top ten states that need tort reform, as opposed to the top ten in terms of successful tort reform. Is that right?

Mr. Compan:
Yes. The American Tort Reform Association has deemed that Clark County is, in the Association's words, one of the top ten "judicial hellholes."

Stacey Upson (Farmers Group, Inc.):
We support this bill. Let me give you an example of how this statute plays out in practice. I had a client who was involved in a three-car accident. One driver went through a red light and hit a second driver, and my client entered the intersection after the first collisions and tapped the back of one of the cars. The driver who went through the red light only had a 15/30 policy; my client had a 250/500 policy.

The law was designed so that individual defendants would each pay his or her proportionate share. That was the intent of the legislation in 1987 and in 1989. When Senator Sue Wagner testified in support of the 1987 legislation, she said the Committee did not want "fault" equated with the ability to pay. She also made it clear that section 4 of NRS 41.141 was intended to abolish joint and several liability in negligence cases. In the example I gave, if a jury determined that my client was only 10 percent at fault and the award to the plaintiff was $1 million, under the statute my client would be responsible for $100,000. However, our courts have been saying that joint and several liability applies. Because the other driver had 15/30 insurance, the court could require my client to pay the entire $1 million award. That was never the intent of the statute as passed in 1987 or 1989.

I would also like to direct your attention to the 1989 legislative history in which Bill Bradley, President of the Nevada Trial Lawyers Association, testified that the 1987 version of the statute was designed to prevent the deep-pocket doctrine, meaning that plaintiffs could not go solely after the defendants with the most money.

In my practice, people who have been involved in a multiple car accident want to know what it means to them financially. We explain that the statute means they should only pay their proportionate share. However, some courts will say that they have to pay all of it because joint and several applies. Our clients ask us, "What remedy do we have?" We tell them that the only true remedy is to take the case up to the Nevada Supreme Court, and that can take 2 to 3 years.

Senate Bill 300 clarifies the intention of the Legislature in 1987 and 1989. It gives the court and attorneys uniformity on both sides of the equation. It prevents inequity. It prevents the gamesmanship that has occurred when attorneys decide to sue one person and not another, and they say, "Look, you have the money; we only have to get you 1 percent at fault, and we're coming after you." Even though the law does not read that way, that is what the courts have been doing in Las Vegas.

This bill brings clarity to both sides so we can inform our clients as to what will occur in litigated cases.

Chair Brower:
I would like your help to further clarify the statutory scheme. Last Session, there was a lot of confusion over the state of the law in Nevada, with much discussion about whether we were a pure several liability state, a joint and several liability state or somewhere in between. Subsequent to the 2013 Session, the *Humphries* case was decided by the Nevada Supreme Court, which clarified the situation. Can you give us your view of whether Nevada is a several state, a several state with exceptions or a joint and several state? How did the *Humphries* case clarify that? What is the state of the law today in Nevada?

Ms. Upson:
In the *Humphries* case, the Nevada Supreme Court looked over the legislative history. In that case, the Nevada Supreme Court said merely negligent defendants would only be responsible for their proportionate share of an accident. If you are only 10 percent at fault, you would pay 10 percent of the amount awarded by the jury. The Nevada Supreme Court also noted in *Humphries* that there were five carveout exceptions in the original statute. They included strict products liability, intentional acts and pollution. In my view, the Nevada Supreme Court could have been slightly clearer, as the Legislature was in 1987 and 1989, indicating that there are only five situations in which joint and several would apply.

That is where the law stands today. There are only five exceptions where joint and several would apply. Senate Bill 300 limits this to three exceptions.

Chair Brower:
Let us consider a hypothetical three-car accident. The driver in car 1 is injured and sues Defendant 1 and Defendant 2. The case goes to trial, and the jury decides both defendants were liable; their negligence caused the accident and the injuries, and the jury awards the plaintiff $100,000. According to the jury, Defendant 1 was 10 percent at fault and Defendant 2 was 90 percent at fault. Under our current statutory scheme, would Defendant 1 and Defendant 2 be severally liable? How much would Defendant 1 and Defendant 2 have to pay of that $100,000?

Ms. Upson:
Under the law, Defendant 1 would owe $10,000 and Defendant 2 would owe $90,000. The jury, by that determination of 10 percent and 90 percent, has allocated through the judicial process what percentage each defendant would pay.

Chair Brower:
What was the impact of the *Humphries* case?

Ms. Upson:
It clarified the law. When the Nevada Supreme Court looked at the legislative history involving joint and several liability, district court judges in both Reno and Las Vegas said that Defendant 1 might be responsible for the remaining $90,000 if Defendant 2 could not pay. However, that was not the status of the law. The issue was also addressed in the *Café Moda* case, in which Justice Ron D. Parraguirre noted:

> In 1987, the Legislature again revisited NRS 41.141. This time, it re-implemented several liability amongst codefendants as the general rule, but it carved out five exceptions to this general rule for when joint and several liability would still apply. ... Considering the general rule and the five exceptions together, the practical effect of this amendment was to maintain joint and several liability for all types of defendants except for merely negligent defendants.

In your scenario, the lawsuit would be a negligence-based action, and Defendant 1 would only be responsible for $10,000. The *Humphries* decision clarified that law and gave the district courts direction as to how to apply the statute. Senate Bill 300 gives greater clarification to the *Humphries* opinion.

The *Humphries* opinion also gave plaintiffs an avenue to sue one person because that person has a deep pocket even though some other person is more at fault. Senate Bill 300 brings us back to equity and fairness by saying if you are only going after the party with the deep pocket, we are going to bring all the parties into the case so the jury can make a full, fair and just determination of allocated liability.

Chair Brower:
You believe S.B. 300 both clarifies that we are a pure several state with exceptions and also deals with the nonparty issue that has come up in some cases.

Ms. Upson:
Correct.

Chair Brower:
Let me change the hypothetical case. Suppose the plaintiff is 10 percent at fault, Defendant 1 is 20 percent at fault, and Defendant 2 is 70 percent at fault. Does the attribution of fault to the plaintiff change the outcome under Nevada law?

Ms. Upson:
It does not change the outcome of the case, but it changes the allocation of the money the plaintiff would get. The analysis would be the same under S.B. 300 as it is now. In your hypothetical, if the award was $100,000, Defendant 1 would pay $20,000 and Defendant 2 would pay $70,000. Because the plaintiff was allocated to be 10 percent at fault, that person does not get to recover $10,000 of the award. The total recovery to the plaintiff would be $90,000.

Chair Brower:
You believe under Nevada law, whether there is a fault-free plaintiff or a plaintiff with some apportionment of fault by the jury, the outcome vis-à-vis the defendants is still purely several, in terms of their apportioned obligation to the plaintiff.

Ms. Upson:
Correct. In NRS 41.141, section 4, it states, "Where recovery is allowed against more than one defendant in such an action, except as otherwise provided in subsection 5, each defendant is severally liable to the plaintiff ... ." In that allocation, if the jury allocates responsibility to the plaintiff, the plaintiff cannot recover the sum of money that has been allocated to the plaintiff. If there is an injured person who has no comparative fault, section 4 of NRS 41.141 makes clear that defendants only pay their proportionate share of fault. It is the same whether a plaintiff is partially at fault or not at fault under the law, and it would be the same under S.B. 300.

Chair Brower:
Your view is that the bill would clarify the scenario you describe and then deal with the issue of nonparties or nonnamed parties. Let me pose one more hypothetical. Suppose in our scenario, there were also Driver 3 and Driver 4 whom the plaintiff decided not to name as defendants in the suit. How does S.B. 300 deal with that scenario, looking ahead to a verdict form and the end of trial?

Ms. Upson:
Section 1, subsection 2, paragraph (d) of S.B. 300 indicates that you can list "any third party" on the jury form. Section 1, subsection 6 of the bill states that a defendant can provide notice that a third party is partially or wholly responsible for the accident. In order to get all the information to the jury for a fair and just determination, the bill notes that Defendant 1 or 2 can provide notice by filing a pleading with the court giving the name and last known address of a third party and a brief statement explaining the alleged fault of the third party for the harm and the cause of the action. When that happens, that person can then become part of the suit.

Our goal is to have every person who would potentially be at fault for an injury-producing event in front of a jury so a jury can make a just verdict. If parties are eliminated through tactical reasons simply to get at a deep pocket, a jury will never get a full and complete fair picture in rendering a ruling. This is crucial because you get one shot in front of a jury. People wait years to get in front of a jury. If you have waited all that time for justice to be served, members of the jury should have all the information so they can make a full and fair resolution. That is what S.B. 300 does if a plaintiff or injured person decides not to bring in other culpable parties.

Senator Ford:
As I understand your testimony, you think Nevada law is several liability, generally speaking. If the law is several, that removes one of the reasons for this bill. We do not need to clarify it; you just said the Nevada Supreme Court clarified that as the state of the law under the circumstances in our hypotheticals. Can we not use the normal Civil Rules of Procedure (CRP) when it comes to joining parties? If a defendant thinks there is a codefendant who should have been pleaded, why not invoke CRP Rule 19 or 20 and ask the court to bring the person in or utilize implead or something of that sort? What is the reason for this bill when we already have the tools and the state of the law in existence?

Ms. Upson:
The need for the bill is twofold. In the *Humphries* decision, the Nevada Supreme Court said the injured person does not have to bring in other known parties. The only remedy in existence under the law today is for Defendants 1 and 2 to bring in Defendants 3 and 4 by a third-party complaint. However, that it is not several liability. What happens is you have a verdict form only against Defendants 1 and 2, with a separate verdict form for the third-party complaint against Defendants 3 and 4. That would allow the injured person to collect solely from Defendants 1 and 2 even though Defendants 3 and 4 may have been the most culpable parties. The way the law reads, Defendants 1 and 2 would have to go after Defendants 3 and 4 for the money. If Defendants 3 and 4 did not have money and had 90 percent of the fault for the accident, they would use the statute to get around several liability. Senate Bill 300 forces the plaintiff to bring all the parties into the litigation. If the plaintiff does not, Defendants 1 and 2 can say, "We are notifying you of these other culpable parties; they are coming into the case."

Without S.B. 300, there will be cases where plaintiffs intentionally go after only one defendant and leave out other defendants, regardless of the allocation of fault, because they do not have money. That is what we are left with.

Senator Ford:
Under the situation you just described, the tortfeasors still have the ability to recover from other negligent tortfeasors. It is not as though the defendants are left without a remedy. They can still sue the other defendants and recover funds. I am less sympathetic about their situation than I am about the plaintiff's situation. When an innocent plaintiff has been injured by the negligence of joint

tortfeasors, why should that person be required to undergo the allocation of blame?

Let us go back to my other question. I do not use CRP Rules 19 and 20 that much, but it seems to me that if the joint tortfeasors are as necessary and indispensable in order to allocate blame and fault, they should be brought in under a litigant's analysis into the current lawsuit. Your argument is that the Nevada Supreme Court has already said Nevada is only several here, and if it is only several under pure negligence cases, why would you not be able to utilize the CRP to show that because it is only several, it is a necessity that the other joint tortfeasors be brought into the lawsuit?

Ms. Upson:
Because in *Humphries*, the Nevada Supreme Court said we cannot. Specifically, the court said, "[W]e conclude that the district court's order compelling joinder of Ferrell as a necessary party under NRCP 19(a) was in error." Ferrell was the person the parties believed was responsible for the harm because he started the fight. Even though that argument was specifically made because several liability would apply, the Nevada Supreme Court said no. That is where the Nevada Supreme Court also said, as Senator Roberson noted, that if the Legislature wants to step in and look at this, that is what needs to be done.

Senator Ford:
Did *Humphries* have negligent defendants and a nonnegligent plaintiff?

Ms. Upson:
In *Humphries*, comparative fault was alleged. The general premise was that one person started a fight, but the plaintiff sued only the casino for not having appropriate security.

Senator Ford:
That means there was one intentional tortfeasor and one negligent tortfeasor. That is not the circumstance I am talking about with two negligent tortfeasors and a nonnegligent plaintiff. I am trying to understand why that would not require a joinder under CRP 19. I do not think *Humphries* directly speaks to that. Therefore, I am left with the question of why S.B. 300 is necessary. If you indicate that the law is several, then I do not think we need this bill.

Senator Roberson:
It is clear to me, in reading what the court said in the *Humphries* case, that the Court is contemplating a situation with more than one negligent tortfeasor, not one negligent and one intentional. Again, in the *Humphries* decision, the court said:

> While allowing a plaintiff to pursue an action against only one negligent defendant for the entirety of the plaintiff's damages is contrary to the policy of applying several liability to a deep-pocket defendant, the statutory scheme in NRS 41.141(4) applies several liability only when there is "more than one defendant," and here, there is only one defendant.

I would say that NRS 41.141 also encompasses the situation in Chair Brower's hypothetical case.

> Accordingly, NRS 41.141 encompasses the circumstances here, wherein the plaintiff has sued one tortfeasor amongst multiple cotortfeasors, and the statute does not change the result reached under the traditional joint and several liability analysis: the defendant is still jointly and severally liable for the entire judgment against it.

I do not think the court made distinction between types of tortfeasors.

Ms. Upson:
I agree with Senator Roberson's comments. The Nevada Supreme Court did not delineate between one type of tortfeasor and another. In the *Humphries* decision, the Court said that an injured person can choose to sue only one person. The remedy then is to bring a third-party complaint. If the Legislature wants to step up, it is up to the Legislature to do so. The law allows injured people to sue those with the deepest pockets even if they are only 1 percent at fault. This bill does not allow that gamesmanship. It requires compliance with the intent of the statute as stated in 1987 and 1989, and it provides guidance to the court. We get rulings that are inconsistent with NRS 41.141, and this bill will provide the necessary clarity for everyone involved. Without it, there will continue to be the gamesmanship of suing the deep pocket.

Chair Brower:
Your point is that it is not enough that the sole defendant named can, by way of a third-party complaint, bring in other potential tortfeasors. That does not solve the problem, as you see it.

Ms. Upson:
It does not. That is taking several liability, meaning you are only responsible for your percentage of fault for an accident, and making you responsible for 100 percent of the fault for the accident. If you bring someone else in on a third-party complaint and the plaintiff's verdict is rendered against you for $1 million, you will be liable for that $1 million, even though a jury could have allocated 90 percent fault to the third party you brought in. If that third party does not have the ability to pay, the plaintiff has now circumvented the statute to get to the deep pocket, which is the reason why the statute was enacted in the first place.

Senator Segerblom:
You are the 1 percent defendant, and you have a $10 million insurance policy. What is wrong with having you pay the entire award?

Ms. Upson:
There are differing views on that.

Senator Segerblom:
Exactly. There are differing views on who should pay for it. Should the plaintiff, who is not at fault at all, have to suffer, or should you, who have a $10 million insurance policy, let your insurance company pay for it?

Ms. Upson:
The trend is to move away from the deep-pocket doctrine. When someone in a suit is 1 percent at fault, what equity and fairness is there in having that person pay 99 percent of the award? If a plaintiff is 1 percent at fault, should that preclude the plaintiff from recovering the other 99 percent of the award? If you take that equation on both sides of the coin, if a defendant should be responsible for 1 percent as the deep pocket, then a plaintiff who is 1 percent at fault should recover nothing. But if you are looking at equity and fairness and everyone paying proportionate to their fault, that is what S.B. 300 does. That is what the prior statute does.

Senator Segerblom:
At the end of the day, if that 1 percent defendant had not been there, you do not know if the accident would have happened or not. If you have a defendant with a $10 million insurance policy and a plaintiff who did not do anything wrong, you want to compensate that plaintiff—and you are saying that the $10 million policy is not available. Will the insurance rates go down because of that? Why do we want to make this change?

Chair Brower:
That is an extralitigation issue, more of a rate-setting and insurance policy issue.

Ms. Upson:
I can talk about it in general terms and what I see in my practice. If an insurance company knows it will have to write rates for someone who could be 1 percent at fault for an accident and nothing beyond that, rates are going to go up. I have had clients come in after litigated cases in which a small portion of fault was allocated to them, and because they had the money, it was paid, and their rates went up.

As to how rates are done across the board on an actuarial basis, I do not know. From a commonsense standpoint, S.B. 300 will have an effect on insurance rates as well as on which cases go to trial. With a level playing field, everyone will know that defendants will only be paying for their requisite share of the damages.

Senator Segerblom:
Mr. Compan, can you tell us that you will reduce rates by 50 percent if this law passes?

Mr. Compan:
I cannot answer that. However, the insurance market in Nevada is competitive. My company is working on a combined ratio of 104. That means that for every dollar we bring in, we spend $1.04. If an insurance company can reduce litigation costs and become profitable, it can be competitive. To be competitive, we have to have competitive prices. Insurance rates will probably go down if the tort environment in Nevada is cleaned up. I hope that answers your question.

Senator Segerblom:
I think it does. When you say costs would go down, that tells me that the money you save will go straight into the insurance companies' pockets.

Chair Brower:
The goal of this bill is to address the decisions and expectations of juries being frustrated by the joint and several concept. I have a portrait of James Madison in my office with a quote from him: "Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature." When a jury hears all the evidence and decides that Defendant 1 is 10 percent liable and Defendant 2 is 90 percent liable, and yet Defendant 1 will have to pay the entire award, that is a problem in the eyes of many people. That is what bills like this are aimed at addressing.

Justin Harrison (Las Vegas Metro Chamber of Commerce):
We support S.B. 300. We believe this measure would significantly reduce the number of frivolous lawsuits in Nevada and lower the associated costs of doing business in Nevada. We have handed an article entitled, "What is Tort Reform and Why Does it Matter to My Business?" (Exhibit C). This article explains the litigation environment in Nevada.

Tray Abney (The Chamber):
We support S.B. 300, which we think can help address the judicial system in Nevada. This is not just a legal issue or an insurance issue; it is an economic development issue. The better our legal system is, the more friendly and fair it is, the more companies will be willing to move here.

Chair Brower:
Let me emphasize that this Committee is not here with the goal of making the tort laws more business-friendly for the sake of making them more business-friendly. Fairness is our goal, and it is the goal of the sponsor of this bill. That is what we need to keep our collective eye on as we move forward.

Senator Ford:
I agree that fairness is the key; however, fairness is in the eye of the beholder. When you are talking about an innocent victim who did nothing wrong and has been hurt, how is it fair that that person may not be fully recompensed when you have joint tortfeasors? That is the fairness issue I am focusing on. I understand the fairness issue on the defendant's side. When you have two

tortfeasors, but the one who is richer pays the lion's share of the award, how is that fair? But I look at fairness from the perspective of the innocent plaintiff. That is why I have problems with this bill.

Chair Brower:
Given our system and our constitution, fairness ultimately comes down to what the jury says after hearing all the evidence. What the jury says should be paramount.

George Ross (Institute for Legal Reform; American Tort Reform Association):
We support S.B. 300. This is about fairness. There are different concepts of what is fair, equitable and just. We believe this bill restores a sense of balance to the justice system in Nevada. For too long, it has been skewed in one direction. This bill brings it back. We have heard that the innocent victim needs to be recompensed. What about the defendant who is barely negligent or barely at fault, the driver who happened to be the fifth car in a multi-vehicle collision? This is not just about cars, of course. It could be about three companies that successively operated a mine that ultimately turned out to have had leaching. It could be three or four companies that owned a waste pit at a mine. It could be three or four companies that operated a service station. We are talking about the whole range of economic activity. Do we go after the company that is the richest only because it is the richest, or do we allocate fault fairly and justly?

Many of us remember the hearings on A.B. No. 240 of the 77th Session. I am a nonlawyer; I will stay out of those legal arguments. But if there is anything a nonlawyer could learn in that particular hearing, it was that there are as many views about the joint and several state of law in Nevada as there are lawyers. I heard different viewpoints from testifiers on both sides and from all the members of the Committee. This is something that desperately needs to be clarified. It is difficult to obey or administer the law when the law is unclear and inconsistent. We have to know what is right and what is wrong; we have to know what we can do; we have to know how to settle a situation, whether it is civil or criminal.

That is our plea. We think this bill restores a sense of fairness and justice to the Nevada legal system.

Chair Brower:
I suppose some might suggest that it is fair to saddle the 10 percent defendant with 100 percent of the liability because that defendant was smart enough to buy insurance and have a good policy, although we hear in the context of another bill being considered this Session that we should not punish people who do the right thing and buy insurance.

Joseph Guild (State Farm Insurance Company):
We support S.B. 300 for the clarification purposes that have been articulated by the previous speakers. I believe only Bill Bradley and I were here to hear this issue in 1987 and 1989 when the law was first passed. I have followed this issue my entire legal career and before that in discussions in law school. This bill is a simple clarification, and we urge your passage of it.

Lea Tauchen (Retail Association of Nevada):
We support S.B. 300.

Paul J. Enos (Nevada Trucking Association):
We support S.B. 300. We have heard a lot about multivehicle collisions. In the case of trucking companies, that is where comparative negligence comes into play. If Trucking Company A is a small company, it may not have invested in the training and technology needed for safety. It could be 90 percent at fault. If Trucking Company B is a large company, it probably does invest in safety and technology. In that instance, Company A may be 90 percent at fault and Company B only 10 percent at fault; but because Company B is bigger, it has deep pockets and is saddled for 100 percent of the award. Mr. Ross is right. Is it fair to go after those companies that are barely liable? We think this is a good bill that restores balance and a sense of fairness and justice and consistency to the law.

Mark Wenzel (Nevada Justice Association):
We oppose S.B. 300. I would like to personally thank the entire Committee for your open doors and open minds in discussing this issue. Thank you for hearing our concerns. This is the way this process should work.

The discussion we have heard on this topic today identifies that there is a potential shift in the public policy of the State of Nevada. In 1989, the Nevada Supreme Court ruled on *Buck v. Greyhound Lines, Inc.*, and Chief Justice Tom Steffen said: "[I]t is better to fully compensate an innocent victim of the

combined negligence of multiple defendants than to assure that each defendant is held responsible only for his proportionate share of the plaintiff's damages." That one quote reflects the differences between joint and several liability and the change to strictly several liability proposed in S.B. 300.

It is the position of the Nevada Justice Association that it is better to fully compensate an innocent victim who has done nothing wrong. We acknowledge that sometimes that means people who have a smaller percentage of the liability are forced to pay more than they otherwise would.

This body needs to recognize the shift this bill makes. It is our opinion that the status of the law is fair. It is the position of this body that the status of the law recognizes in many instances that the more fair way to go is to fully compensate someone who is innocent of any wrongdoing. It is our position that the appropriate public policy is to give someone who has done nothing wrong full recovery, even if it lends itself to inequality in the determination of liability versus the determination of how much each person will wind up paying. That is the policy argument.

Chair Brower:
You may remember that last Session, the Committee was frustrated because we could not get two lawyers in a row to agree on what the state of the law was in this area. Since then, the *Humphries* case was decided. Would you agree that under NRS 41.141, as interpreted by *Humphries*, Nevada has a system of several liability, albeit with the exceptions previously noted?

Mr. Wenzel:
In the situation presented by the *Humphries* decision, I would agree. In that case, comparative negligence was a potentially applicable defense. The *Humphries* case involved an altercation between a group of people at a casino. People were pointing fingers: "You started the fight." "No, you threw the first punch." "No, it was you." In that circumstance, where the plaintiff is partially responsible for the damages, I would concur that several liability is the status of the law.

Chair Brower:
Let us put *Humphries* aside and go back to the three-vehicle car accident scenario we discussed earlier. The plaintiff is 0 percent liable, Defendant 1 is

10 percent liable and Defendant 2 is 90 percent liable. Is the liability between the defendants several or joint and several under current law?

Mr. Wenzel:
In that scenario, I would say it would be joint and several liability.

Chair Brower:
So if the verdict was $100,000, either defendant could be obligated to pay the entire amount.

Mr. Wenzel:
Yes. If one party does not have enough insurance, the injured party can turn to his or her own underinsured motorist coverage. Obviously, that would not help in a situation like a barroom fight, but with a motor vehicle accident, you would have the option to make up the difference if Defendant 2 only had $15,000 worth of insurance.

Chair Brower:
In my second scenario, the plaintiff is 10 percent at fault, Defendant 1 is 20 percent at fault and Defendant 2 is 70 percent at fault. Is that joint and several or just several?

Mr. Wenzel:
That would be several liability.

Chair Brower:
Is that because the plaintiff was apportioned some fault by the jury?

Mr. Wenzel:
Yes.

Chair Brower:
You believe that NRS 41.141 distinguishes between those two scenarios based on whether the plaintiff is free of fault. If the plaintiff bears no fault, it is joint and several; if the plaintiff bears some fault, it is several.

Mr. Wenzel:
Yes.

Chair Brower:
I believe Ms. Upson had a different view; she stated that in both scenarios, the state of the law is several liability.

Mr. Wenzel:
That is how I interpreted her testimony.

Chair Brower:
We are back to the same confusion we had last Session.

Mr. Wenzel:
Yes.

Bill Bradley (Nevada Justice Association):
In my opinion, that is the benefit of the status of comparative law in Nevada. For many years, this body has recognized and created an exception for the fault-free plaintiff. That is what we are really talking about today. I would contend that in 1987 and 1989, the decision was made that if the plaintiff is free of fault, there is still joint liability. We were all misled in law school because we always called this "joint and several," and that is confusing. It is either joint liability or several liability, not both.

The Nevada Supreme Court has created this public policy exception for the innocent victim of two or more cotortfeasors. Remember, though, that it has to be independent acts of negligence. That is really important to take into account in this debate. Two people came together to create this harm, but even if they had not come together, either one could have caused harm. It takes two independent acts of negligence. When the public policy was vetted in 1987 and 1989, a decision was made if a plaintiff is fault-free, there is joint liability, rather than see injured persons turn to Medicaid or Medicare, where the government picks up the responsibility. I struggle with when we call it joint and several because that is misleading. It is joint liability if the plaintiff is fault-free, and that accomplishes the make-whole doctrine. It also prevents that victim from having to turn to the government for support. When plaintiffs bear responsibility in the harm, they are now subject to several liability.

There is one thing I did not hear earlier in this discussion: if the plaintiff is 10 percent at fault, it converts to several liability. Regardless of the amount of insurance, the liability of the two defendants is 70 percent and 20 percent, and

the chips fall where they may with respect to those two codefendants' share of the responsibility and the award. That is excellent public policy for Nevada.

Chair Brower:
Your reference to government support assumes the plaintiff has no private health insurance, which we are now mandated to have.

Mr. Bradley:
That is an interesting sidelight to this argument, yes.

Senator Harris:
Would you be open to the idea of adding an exception for a fault-free or at-fault plaintiff to the bill, so there is no confusion among attorneys with regard to how we apportion joint and several versus several liability?

Mr. Wenzel:
That is already the status of the law. I was at the forefront last Session in trying to clarify that. I would be more than happy to do so again if this body deems it appropriate to clarify that joint liability would be applicable for a fault-free plaintiff.

Chair Brower:
As Yogi Berra said, this is déjà vu all over again. Where in the statute does it say that a fault-free plaintiff enjoys joint liability?

Robert Eglet (Nevada Justice Association):
Section 1 of NRS 41.141 says the statute applies "[i]n any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense ... ." The statute only covers situations in which there is a legitimate claim that the plaintiff was comparatively negligent.

The Nevada Supreme Court made that clear in the *Buck* decision in 1989. In that case, a car broke down on Highway 95 north of Las Vegas late one night. The driver tried to make a U-turn, and the car stalled in the middle of the road, perpendicular to the road. A Good Samaritan came and shined his headlights in front of them to alert vehicles coming the other direction, but his lights blinded the driver of a Greyhound bus, who hit the stalled car. There were twin 3-year-old girls in the back seat of the car, and they were severely injured. In

that case, Greyhound argued that there was only several liability and it could only be held responsible for a percentage of the fault. The Nevada Supreme Court pointed out that the statute specifically states that this language dealing with several liability only applies when there is comparative negligence. That is the explanation.

Chair Brower:
The statute uses the word "asserted." Did you say the court has interpreted that to mean more than asserted?

Mr. Eglet:
We believe the law is pretty clear that you cannot assert claims or defenses that are not legitimate. It is improper, or it is a rule violation. There are other laws this Legislature has passed in which attorneys can be sanctioned along with their clients. We believe there has to be colorable evidence that someone is comparatively negligent. You cannot say, for example, that the 3-year-old twins in the back of the car were somehow comparatively negligent.

Chair Brower:
I will grant you that. However, if the defendant believes that the plaintiff could have some fault and asserts that as an affirmative defense, would that under the statute be enough to trigger several?

Mr. Wenzel:
As you said, this is déjà vu all over again. This is exactly what we all tried to clarify the last time. I do not think the bare assertion of a comparative negligence defense throws you into several liability.

Chair Brower:
Is there a case on that?

Mr. Wenzel:
The Nevada Supreme Court discussed that in *Buck* when the Court said that the defense must be well-grounded in fact or warranted by law. The Court cited CRP Rule 11. We can portray different scenarios on either end of the spectrum to show the absurdity of that. I do not think just asserting an affirmative defense of comparative negligence kicks you into several liability; there has to be some evidence to support that. Ultimately, that would be the jury's finding.

Chair Brower:
This continuing disagreement and confusion supports the proponents' suggestion that we need some clarification.

Mr. Wenzel:
The point on the bill itself that gives me the most concern is including nonparties and settling parties on any type of verdict form. There are a lot of reasons not to include such parties. It has never been done before under Nevada law. It is confusing to a jury. It would slow down the settlement process. I would not want to be a plaintiff lawyer and settle with one defendant if the remaining defendant can later on bring those settling defendants into the lawsuit. If you guess wrong and you settle with someone, you are setting yourself up for failure as a plaintiff lawyer.

Let me give a quick hypothetical on that. Parties 1, 2 and 3 are named in a lawsuit, and I let parties 2 and 3 out, thinking that they are more peripheral players than party 1. A jury comes back and decides that parties 2 and 3 have the lion's share of the responsibility. By letting them out at a discounted price, I have just committed malpractice. I do not mean to get too deep into the weeds, but there are a lot of good reasons to settle out with some people during the course of litigation as opposed to just keeping everybody involved in the case.

Chair Brower:
That does bring up a lot of questions that may be too far in the weeds for now. I do not want to monopolize our time.

Mr. Eglet:
This comes down to a policy issue. When it was originally put into law, the policy reason behind joint and several liability was if there was a culpable defendant who was insolvent, it was better that someone who is culpable pay the remaining share of the liability rather than letting the injured party who has done nothing wrong suffer without being fully compensated. The contrary argument of that policy debate, which we have heard today, is that people should only be completely financially responsible for their percentage of fault. Those are the two weighing policy issues on both sides, and there are certainly arguments to be made on both sides. These arguments have gone on in Nevada and other states for decades. If you go completely several liability, that is too severe of a penalty against innocent people who are simply victims of others'

negligence. If you go completely to joint and several, that causes problems for businesses and people who are not that negligent.

One thing that is lost in this debate is that when we talk about "barely negligent" or "barely at fault" or "10 percent liable," those are misnomers under the law. Plaintiffs have to prove that each defendant in the case was negligent. They also have to prove that each defendant's negligence was a legal cause of the injury, which means they have to show that it was the actual and proximate cause of the injury.

I want to give you an example to illustrate this. Years ago, I represented a family in which the father drove his daughters to school every morning. He was a young accountant in Las Vegas with two little girls, 8 and 10 years old. He was going through an intersection with a four-way stop sign. He had the right of way. As he was going through the intersection, a 22-year-old drug addict who had been up all night came speeding through the intersection and smashed into him. At the same time, there was a large delivery truck coming the other way. The truck driver was not familiar with the area and was trying to figure out where he was going, and there were some trees the city should have trimmed back that partially blocked his stop sign. He ran through the stop sign and smashed into the car as well. The father was killed, one of the girls ended up a paraplegic, and the other was severely burned. The little girls were obviously negligent-free, which meant the family was able to keep their house, and the kids could be taken care of without being dependent on government services. The truck driver who ran the stop sign was not as culpable as the drug addict, but both were negligent and legal causes of their injury.

The only time people talk about percentages of fault is when they are comparing multiple defendants who have independent actions of negligence. Each of those are independent actions of negligence. It is not a concerted effort on their part. Each of them is negligent; each of their actions was a legal cause of the injury. That is the situation we have here.

I do not want everyone to forget that the plaintiff still has to prove that each defendant was negligent and legally responsible. The only time percentage of fault comes up is when you are comparing that to everyone else. To respond to the scenario Ms. Upson gave, where there had been a significant collision and immediately after that her client tapped the other cars, the plaintiff still must prove not only that her client was negligent but that the client's negligence was

the legal cause of the injuries. If it was just a minor bump after a significant accident, that will be a difficult road to travel. As the statute is written, someone who is completely innocent does not get strapped with not getting fully compensated. That is good policy for the people of Nevada.

Senator Roberson:
Mr. Eglet and I have been speaking about these issues all Session, and I am sensitive to the arguments he makes. I know there are two sides to this. I think there are potentially unfair results with several liability and also with joint liability. That is what we are struggling with—what is fair. In either system, you are going to have results that are unfair to someone, whether it is a deep pocket defendant under joint liability or certain plaintiffs under several liability. We have also talked about some compromises and what some other states have done to address this. We have discussed the West Virginia law, which I believe came into existence in the last year or two. As I understand the West Virginia law, it is several liability, but if the plaintiff cannot collect from certain tortfeasors who have been allocated liability after a good faith effort, that plaintiff can go back to court to collect the difference from the solvent remaining responsible parties. Correct me if I do not have that exactly right. What about that as a solution, as a compromise to this issue of what is fair?

Mr. Bradley:
That scenario scares me. The initial tort claim keeps you in litigation for 3 to 5 years. With the West Virginia law, the jurisprudence has not been fleshed out yet, but I assume whoever loses in that case can appeal. When that appeal is decided and you find you cannot recover from that defendant, you have to come back to court and make another claim, which can also be appealed. That is a burdensome system on both sides. I see the costs going up dramatically because of the appeals. I appreciate the intent behind it, but unless we can figure out a way to stop people from appealing these decisions, it will go on forever. It is a vicious circle of litigation, and I do not know when you get out of it. The underlying intent of the scheme is nice, but it is not practical, particularly now that we have an intermediate appellate court. Cases will start at the intermediate appellate court, then go to the Supreme Court, then come back down for reallocation. If you do not like the reallocation, you go back up again and again. Right now, we are looking at 3 to 5 years on appeal on some of the significant cases in Nevada.

Ms. Upson:
We who defend people who were involved in accidents have a saying: Take plaintiffs as you find them. If the person in an accident is a man in his seventies and thus more susceptible to injury, and a 20-year-old would not have been injured in the accident, you take that plaintiff as you find him. That is the law in Nevada. The same law should apply to defendants in an accident: that you take them as you find them with what ability they have to pay. We are taught as children that you take responsibility for what you have caused. That is drummed into our heads from an early age, and we have a right to a jury system. When we get in front of a jury, a jury is being afforded certain information to ultimately make a decision, and as I think was pointed out earlier, there is dissension with juries. When jury members realize there has been an allocation of fault, but one party is going to be liable for all of it, they feel that is not equitable or fair.

The other comment I have is about what an individual has to prove in a courtroom. Mr. Eglet was right that an individual plaintiff has to prove causation for an injury. What was left out of that equation is in front of a court or a jury, plaintiffs only have to say that multiple people were involved. They do not have to apportion out that liability in percentages. That burden the Nevada Supreme Court shifts to the defendants, and the defendants then have to come forward with specific evidence saying this is what we believe the evidence shows as to the allocation of damages. Thereafter, the plaintiff can rebut that.

Senate Bill 300 lets people pay for their requisite responsibility. The law is never completely fair; we can never put someone back in the same position they were in before. But what we can look at from a public policy standpoint is what is fair and what is equitable. Is it ever equitable for someone to pay for something that is not their fault?

It is also clear that there is dissension among attorneys as to the meaning of NRS 41.141 and its applicability in certain situations. In our view, this bill provides the clarity that is needed. It provides personal responsibility only for the damage that is caused—and we are enabled by the Sixth Amendment right to a jury trial for the jury to make that determination after hearing all the evidence.

Chair Brower:
I will close the hearing on S.B. 300. We are adjourned at 5:06 p.m.

RESPECTFULLY SUBMITTED:

Lynn Hendricks,
Committee Secretary

APPROVED BY:

Senator Greg Brower, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	1		Agenda
	B	4		Attendance Roster
S.B. 300	C	4	Justin Harris / Las Vegas Metro Chamber of Commerce	What is Tort Reform and Why Does it Matter to My Business?