MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Eighth Session
March 26, 2015

The Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:05 p.m. on Thursday, March 26, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E 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 Aaron D. Ford

COMMITTEE MEMBERS ABSENT:

Senator Tick Segerblom (Excused)

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Cassandra Grieve, Committee Secretary

OTHERS PRESENT:

Garrett Gordon, Community Associations Institute; Olympia Companies; Southern Highlands Homeowners Association
Donna Zanetti, Community Associations Institute
Angela Rock, Southern Highlands Homeowners Association; Olympia Companies
Mark Leon, Mountain's Edge Master Association
Marilyn Brainard, Wingfield Springs Community Association
Pamela Scott, The Howard Hughes Corporation

Glen Proctor
Jon Sasser, Legal Aid Center of Southern Nevada
Kathie Chism
Jonathan Friedrich, Nevada Homeowner Alliance
Barbara Holland, H&L Realty and Management Company
Keith Wand
Bruce Woodbury
J.D. Decker, Administrator, Real Estate Division, Department of Business and Industry
Jennifer Gaynor, Nevada Credit Union League; Fundamental Administrative Services, LLC
Marcus Conklin, Nevada Mortgage Lending Association
George Ross, Nevada Bankers Association
John Cotton, Keep Our Doctors In Nevada
Rudy Manthei, M.D., Keep Our Doctors In Nevada
Robert Rourke, Horizon Hospital and Rehabilitation Center
Darrin Cook, CEO, Horizon Specialty Hospitals
Margo Piscevich, Nevada Rural Hospital Partners Foundation
Kathleen Conaboy, Nevada Orthopaedic Society
Denise Selleck, Executive Director, Nevada Osteopathic Medical Association
Elizabeth MacMenamin, Retail Association of Nevada; Retail Chain Drug Council
Adam Plain, Nevada Dental Association
Stephen Osborne, Nevada Justice Association
Christian Morris, Nevada Justice Association
Lawrence Smith
John Echeverria, Nevada Justice Association

Chair Brower:
I will open the hearing of the Senate Committee on Judiciary with Senate Bill (S.B.) 260.

SENATE BILL 260: Revises provisions governing common-interest communities. (BDR 10-726)

Senator Becky Harris (Senatorial District No. 9):
During the economic collapse, long before I contemplated being a member of the Nevada Senate, I saw the necessity for S.B. 260. As an attorney who represents homeowners losing their homes to foreclosure, I know if homeowners are not making mortgage payments, they are also not making their

association payments. Delinquent association payments pose a problem for banks with regard to superpriority liens and who can lay claim to the title of a property or when foreclosure is appropriate. Senate Bill 260 provides a solution to a larger problem of when associations are able to foreclose.

Generally, the association's lien is not prior to a first security interest on a unit; however, the association's lien is prior to the first security interest on a unit to the extent of certain maintenance and abatement charges and a certain amount of assessments for common expenses. The portion of the association's lien that is prior to the first security interest on the unit is commonly referred to as the superpriority lien.

Senate Bill 260 requires lenders to establish impound accounts for the payments of common-interest community assessments. Since banks already impound for taxes and insurance, they should also impound for association fees. If banks establish impound accounts for association fees, they will have real-time knowledge of their secured interest in those properties. Under S.B. 260, banks will access their customers' accounts to determine if mortgage payments include association dues.

Including association dues with mortgage payments would be helpful for people in various situations: people burdened with writing monthly dues checks, people forgetting about their payments or people who may not want to bother with their household obligations. Under S.B. 260, homeowners will make their mortgage payments and have stability in dealing with the expenses of their properties.

The Committee will hear opposition to this bill from lending institutions. The banks will say putting association fees into impound accounts is something they cannot do and that creating and managing such accounts will be expensive and burdensome. To that argument, I say implementing S.B. 260 will not be any more expensive than having a first mortgage wiped out because of a superpriority lien by an association.

To the claim that S.B. 260 will be burdensome, I point out that banks were able to get the necessary requirements in place to work with the State's Foreclosure Mediation Program. Additionally, since January 2015, WestStar Credit Union voluntarily collects association fees as part of its mortgage payment plan.

Creating an impound account for association fees makes common sense and is good for the consumer and associations. Associations do not want to hire collection companies to go after the homeowner for unpaid dues. Having impound accounts is good for the banks because they will have first-hand, real-time knowledge of their investments. Banks will be in control and be able to make sure association fees are paid in a timely manner, thereby ensuring associations cannot take their security away.

Senator Hammond:
I thank Senator Harris for bringing this consumer-friendly bill to the Committee.

Garrett Gordon (Community Associations Institute; Olympia Companies; Southern Highlands Community Association):
We support S.B. 260 and appreciate Senator Harris putting forward a commonsense solution to this problem. This is the fourth session I have worked on common-interest community bills, and every session deals with the question of whether there should be judicial or nonjudicial foreclosures. Every session, we attempt to sort out answers to questions such as the cost of collections and payment plans.

This Session alone has 25 common-interest community bills, many trying to do a fix for the lending industry relating to superpriority liens and the recent Nevada Supreme Court case, *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014). Even the Nevada Supreme Court attempted a fix hearing that case, posing many of the same questions again: How should the superpriority lien problem be addressed? Should more notice to lenders be provided? Should the process be stretched out? If so, for how long?

Senate Bill 260 is a commonsense solution because an impound account resolves all these problems. With an impound account, there would be no more discussion about associations foreclosing, the cost of collection, how much the costs should be and how long payment plans should continue. Associations want only to be paid so the landscaper can be paid, the gate maintained, the water bill paid, etc.

We understand that an impound account would not apply to a cash buyer, so a provision is necessary to address that. We know impound accounts would not apply retroactively and only be applicable going forward with respect to new loans or the refinancing of loans.

I spoke with Senator Harris about some citation tweaks, so an amendment is needed. Senator Harris agreed to sponsor such an amendment if S.B. 260 goes to work session.

Chair Brower:
If people are in the audience here on behalf of an association that supports this bill, the Committee knows the association community supports this bill. In an effort to save time, please keep your testimonies brief.

Donna Zanetti (Community Associations Institute):
The Nevada Legislative Action Committee of the Community Associations Institute is comprised of people who work for management companies, law firms and collection agencies. We support S.B. 260 even though it may reduce the income we derive from assisting associations with collections. We support the bill because it is good for the associations, which only want to be paid so they can provide the services required of them.

Chair Brower:
As an association payer myself, I think homeowners want to pay their dues and do not want to forget, which is part of the rationale behind S.B. 260.

Angela Rock (Southern Highlands Community Association; Olympia Companies):
I have testified alongside Mr. Gordon countless times over many sessions on the multitude of problems affecting the ability of homeowners to pay their assessments. I testified last week in front of the Assembly Committee on Judiciary on issues regarding judicial or nonjudicial foreclosure and superpriority liens. I was asked how I would solve the problem, and I mentioned S.B. 260.

Put simply, impound accounts solve problems. Providing impound accounts solves the biggest problem of all—which is homeowners forgetting to pay their dues. It also solves the problem of unjust enrichment. It seems unjust that a home worth $800,000 forecloses for $5,000. While S.B. 260 forces an infrastructure shift for the banks, in the end, the bill protects them. Senator Harris outlined that expertly. We support this bill.

Mark Leon (Mountain's Edge Master Association):
I support S.B. 260 and submit my testimony (Exhibit C).

Marilyn Brainard (Wingfield Springs Community Association):
Impound accounts are the best way to solve the current situation. I hope the banks and lending companies find a way to make S.B. 260 work. Impound accounts will protect bank investments as well as the properties. I support S.B. 260.

Pamela Scott (The Howard Hughes Corporation):
I support S.B. 260 because it solves many problems the banks are having with foreclosed properties. The banks have made business decisions to slow down or even stop many foreclosures. We have been tracking bank foreclosures in Summerlin since 2010. In this time, foreclosures in Summerlin reached a high of 1,043 properties; there were 125 foreclosed properties last year. There are still numerous liens filed against properties and many years' worth of foreclosures that have not even happened yet.

If an impound account is set up under S.B. 260 and the bank continues to pay that property's association fees while waiting out its foreclosure, it makes good sense and is less expensive than losing equity on that property, paying collection costs, etc.

Glen Proctor:
I have had my home in Mountain's Edge since 2008 and my mortgage is with JPMorgan Chase. The company has an escrow account for both my Clark County Special Improvement District payment and my taxes, and I have never received a notice of late or nonpayment. The escrow system works, and S.B. 260 is a marvelous solution for every party involved.

The banks are going to say it will cost them money to implement S.B. 260, but many property assessments are due quarterly, so the banks will earn interest on the monthly payments. Banks already have a system in place to handle other types of payments, so they will not have to create a new system to manage association fees.

My association spent $375,000 in collection costs last year, not counting foreclosure notices. That is money the association would not have had to spend if impound accounts had been in place. My assessment might even go down if my association does not have to spend that kind of money yearly.

Jon Sasser (Legal Aid Center of Southern Nevada):
We represent the third group in this process, the homeowners. We think homeowners will benefit along with the banks and the associations. Senate Bill 260 takes care of the problem of remembering to pay. Additionally, only about 10 percent of nonjudicial foreclosures actually go to foreclosure sale. The vast majority of foreclosures are taken care of by homeowners before becoming final, but by that point, homeowners are paying hundreds, if not thousands of dollars, in collection costs for overdue fees.

Senate Bill 260 will help homeowners avoid getting into arrears and help the banks because those collection costs will have been avoided. This bill is a win for all involved.

Kathie Chism:
I live in Yellowstone, a development within Mountain's Edge, so I pay two association fees. Both of my association fees increased this year, and I believe the reason was the huge collection costs my association incurred trying to collect dues owed by people who did not pay their assessments. I support S.B. 260 because it will save me money as a homeowner. Associations will save money on collection costs, and as a result, my assessment costs may stabilize. I am a retired schoolteacher on a fixed income; I cannot afford for my assessments to go up year after year.

Jonathan Friedrich (Nevada Homeowner Alliance):
I support S.B. 260. Does the bill consider those who do not have a mortgage? Also, has there been input from the banking industry on this bill?

Chair Brower:
Your points are good. We will hear testimony from the banking industry today.

Barbara Holland (H&L Realty and Management Company):
I support S.B. 260. This Session, numerous bills in both the Assembly and the Senate use the term "judicial foreclosure." Judicial foreclosure—also discussed last week in the Assembly Committee on Judiciary hearing on Assembly Bill 240—would be disastrous to all associations. No association will be able to afford the time and money to participate in judicial foreclosure.

ASSEMBLY BILL 240: Revises provisions governing liens of a unit-owners' association. (BDR 10-821)

In 2013, the Legislature passed S.B. No. 280 of the 77th Session, which allowed lenders to impound association fees in the way lenders impound property taxes and insurance expenses under *Nevada Revised Statutes* (NRS) 116. Lenders could have taken advantage of that law to insulate themselves from losing loans in their portfolios. Senate Bill 260 changes that language, thereby forcing banks to create impound accounts. This bill solves so many different problems, especially since too many bills this Session have the word "judicial" in them.

It will be too costly for associations to pursue judicial foreclosure. It is already costly for associations to wait for banks to finally foreclose on properties in order to get the money owed. Associations are sitting on a large amount of delinquencies, and homeowners who do pay their assessments are paying increasing assessments solely because the associations do not have enough money to do the basic operations required of them.

This is a good bill, but banks may pose an obstacle by claiming not to know who manages a property. There are ways for banks to access the information needed with regard to management companies. The Real Estate Division is a resource banks can use to solve that issue. Property managers must report to the Real Estate Division yearly on who has the first deed of trust on a property. The Division must be notified every time a management company changes a portfolio or a property is lost to foreclosure. It will be easier for banks to access the necessary information through the Division than for property managers to investigate the various lenders.

This fix to the law is long overdue and will take care of many problems regarding late fees, collection costs, etc.

Keith Wand:
I am a homeowner in Henderson. I met with Senator Harris and Senator Hammond in Carson City regarding S.B. 260. I have been a financial planner in Las Vegas for 10 years and have many contacts in the banking industry. These industry contacts have told me that when association fees are impounded, they are included in the mortgage calculations made when a buyer seeks to qualify for a mortgage.

Because it is likely to be unpopular, Legislators and bankers will not say this, but there are times when people should not buy homes. Association costs should be included in a mortgage; if they were to be included, it may put that house out of reach for a buyer—a reality that needs to be reviewed. I support S.B. 260. We need to protect our communities. Not everyone may favor associations, but they exist for a reason, and we need to fund them.

Bruce Woodbury:
I am an attorney in Boulder City who represents a few associations and other interested individuals. I support S.B. 260.

J.D. Decker (Administrator, Real Estate Division, Department of Business and Industry):
We protect the common-interest community marketplace as well as regulate it and the broader real estate marketplace. It is important to the Real Estate Division that homeowners pay associations in a timely manner. It is also important that the lender protect its security interest in property. Any positive impact this bill would have on the common-interest community marketplace would extend to the broader real estate market.

Jennifer Gaynor (Nevada Credit Union League):
While we appreciate the intent of the bill, we oppose S.B. 260. I submit a written statement outlining the reasons for our opposition (Exhibit D).

Our issues with the bill revolve around the legality and feasibility of implementing S.B. 260. On top of the expected implementation expense, there are technical concerns. One concern is residents within associations may have difficulty disputing erroneous association charges paid via an escrow account. Another concern is credit unions would be required to adjust the variability of association payments out of escrow accounts to address nonregular association payments, such as capital improvements.

There may also be conflict with the Real Estate Settlement Procedures Act and other federal regulations administered and enforced by the Consumer Financial Protection Bureau. The Truth in Lending Act is also a federal regulation that creates variability on when and how escrow accounts should be established.

Another potential issue with S.B. 260 is buyers who want control over paying their property taxes, insurance and association dues. We like to allow buyers

this flexibility, assuming they meet certain credit requirements. We want S.B. 260 to have more flexibility and not be mandatory. We would like to work with Senator Harris to accomplish that.

Chair Brower:
The details you highlighted seem to be something you can work on with the bill's sponsor.

Marcus Conklin (Nevada Mortgage Lending Association):
We are opposed to S.B. 260. We oppose the bill for three reasons, the first reason is the complexity in implementing the bill, as testified by Ms. Gaynor. Property taxes are collected into escrow, and one remit is made to one county. Insurance is collected into escrow, and remits are made to a handful of entities. Association dues will need to be remitted to hundreds, if not thousands, of associations. The law also permits a group of homeowners living in a same neighborhood to create its own association. Tracking association payments will be incredibly complex, especially if current loan contracts need to be included.

The second reason we oppose S.B. 260 is the cost associated with its enactment. Instead of the normal one-time costs associated with creating a loan—the closing costs—we will have to add an impound cost for multiple months.

The bill may solve the problem of delinquent dues, but it does not address penalties or extra association assessments done by an association. Even though owners may be current in their dues structure, that does not ensure they are not carrying penalties.

If you look at the impound structure, dues collections happen up front in the transaction of the home. This lowers the amount that homeowners can actually borrow for their homes. If you take that out, the money available to purchase a home is a little bit lower. Doing this does not change the number of transactions, but it does lower the amount of the transaction, which equates to lower home values.

The third reason we oppose S.B. 260 is it does not look at the diversity of situations. Currently, only homes with federally backed loans that are 80 percent/20 percent (80/20), or worse in terms of owner equity, are required

to have escrow accounts. Not all loans are 80/20, and individual lenders or portfolio lenders have differing standards. This bill promotes wrapping all loans, regardless of the amount, into an escrow account even though there is the option not to do this. I am not sure we want to take that away.

Cash buyers are not addressed in the bill, even though they can equally be delinquent in their dues. With S.B. 260, only those with impound accounts will be paying their dues for certain.

George Ross (Nevada Bankers Association):
We oppose S.B. 260. This is going to be a logistical nightmare for banks. Databases already exist to handle the impound accounts for taxes. No database matches loans with associations; one would have to be created. Banks also use vendors for tax remittances; no vendors exist for associations.

A big accounting system—a tracking system—would have to be established for associations. Setting up such a system would take time and money. This cost will show up in the expenses people pay for their mortgages, perhaps as larger escrow fees or closing costs. It may not show up in the interest rate, but it will definitely show up in cost to the consumer or homeowner.

If this bill applies to existing loans, that is an even larger problem.

Senator Ford:
Implementing S.B. 260 will be a difficult task, but banks are doing a similar task already. The banking industry knows how to set up a process like this.

Implementing the bill may also be expensive. Associations are going to have to communicate with the banks. The bill is a decent idea sufficient for our consideration. I hope you will figure out a way to assist Senator Harris by offering amendments. Senate Bill 260 represents a decent opportunity to cut down on unnecessary litigation.

Senator Harris:
I have listened to the points made by those opposed to the bill. Hearing testimony will help us fashion a better piece of legislation that will truly address this problem.

I want to clarify that some lenders in Nevada already do this task, so a model exists. There is a way to comply with S.B. 260, and I have been told the model has been successful. It has been proven that putting association fees in impound accounts can happen and can work.

I do not think we will find a perfect solution to this issue of delinquent association fees, but S.B. 260 will go a long way in addressing it. How often do collection companies, associations and legal aid come together to say a bill is a great idea? That unity should underscore how we need to move forward to pass this bill.

Chair Brower:
We will now close the hearing on S.B. 260 and open the hearing on S.B. 292.

SENATE BILL 292: Revises provisions relating to certain civil actions involving negligence. (BDR 3-954)

Senator Michael Roberson (Senatorial District No. 20):
Senate Bill 292 revises chapter 41A of *Nevada Revised Statutes* concerning medical malpractice and awards of noneconomic damages.

Keep Our Doctors In Nevada (KODIN) submitted a proposed amendment that addresses a typographical error in the bill (Exhibit E). I support this amendment and will elaborate on it later in my testimony.

Sections 1, 5, 6, 7, 8 and 10 of the bill delete the words "medical malpractice" and "dental malpractice" from statute and replace that language with the term "professional negligence" in order to broaden the chapter's applicability beyond these two narrow terms.

Section 2 revises the definition of "provider of health care" to include physician assistant, practitioner of respiratory care, occupational therapist, licensed marriage and family therapist, licensed clinical professional counselor, music therapist, athletic trainer, perfusionist, pharmacist and any clinic, surgery center or other entity that employs any such person.

The proposed amendment modifies that list, which will be addressed later.

Section 3 provides that the total noneconomic damages that can be awarded to the injured plaintiff in a civil action brought against a provider of health care claiming injury or death upon professional negligence is $350,000, regardless of the number of plaintiffs, defendants or theories upon which liability may be based.

Section 4 sets forth the means by which a court or other trier of fact must determine the percentage of liability to be assigned to all persons against whom the action is being pursued. This section also establishes the procedure by which the responsibility of a nonparty to the action may be determined in order to accurately determine the fault of named parties—and this is the key—without subjecting the nonparty to any liability.

The typographical error I spoke of earlier is in section 4, subsection 2, paragraph (c). The language in the original bill says "May be introduced as evidence of liability in any action." That statement should say, "May not be introduced as evidence of liability in any other action." The proposed amendment, Exhibit E, addresses this error.

Section 4, subsection 3 provides that, in order to establish the percentage of liability of any party or nonparty, a defendant may submit an affidavit, expert report or expert testimony pursuant to the Nevada Rules of Civil Procedure (NRCP).

Section 6 adds two items to the list of elements, the absence of which will require a district court to dismiss without prejudice an action for professional negligence. These items state that the support affidavit must: one, identify by name, or describe by conduct, each alleged provider of health care; and two, comply with any written report required under Rule 16.1 of the NRCP.

Section 9 provides that the rebuttable presumption of professional negligence described in section 9, subsection 3 does not apply in an action where the plaintiff submits an affidavit or otherwise provides for an expert witness or expert testimony to establish the claim of negligence.

John Cotton and Dr. Rudy Manthei of KODIN will further testify on S.B. 292.

Chair Brower:
The bill provides that the $350,000 cap for noneconomic damages is a per action cap. This was implemented via Question No. 3 of the Statewide Ballot Questions of 2004. Why is there a need for this new language?

John Cotton (Keep Our Doctors In Nevada):
There are judges who are choosing not to read the language in Question No. 3 as written. These judges interpret the language to read that there can be multiple defendants and multiple plaintiffs with actions for $350,000 each, even though the group is in one action for negligence.

Some cases filed have upwards of seven or eight plaintiffs and multiple doctors involved. The language in Question No. 3 used "an action." Senate Bill 292 is an effort to clarify that there is only one $350,000 cap. Senate Bill 292 will eliminate wasted legal fees and motion practice spent trying to enforce this statute. If some judges feel that Question No. 3 needs clarification, S.B. 292 provides that clarity.

Chair Brower:
I am looking at the official explanation that accompanied Question No. 3. The official explanation states, "if passed, would remove the two statutory exceptions to the existing $350,000 cap, and limit the recovery of noneconomic damages to $350,000 per action." I find that direction clear, but it sounds like it is not being interpreted that clearly by some courts.

Mr. Cotton:
Yes. For a minor technical matter, this confusion is wasting time, money and effort fighting something that should not be fought.

Rudy Manthei, M.D. (Keep Our Doctors In Nevada):
I am chairman of Keep Our Doctors In Nevada. I submit my testimony in support of S.B. 292 (Exhibit F).

I submit a document from Nevada Mutual Insurance Company showing that since Question No. 3 passed in 2004, premiums have dropped from 100 percent to 51.2 percent (Exhibit G). There has been a 50 percent drop in malpractice premiums in the last 10 years.

Very simply stated, we are in a good place. KODIN did what it set out to do. We need to continue to work to stay there.

Chair Brower:
Mr. Cotton, we have heard that we are in a good place, but yet we have a bill in front of us. Please explain to the Committee why S.B. 292 is important.

Mr. Cotton:
Senate Bill 292 clarifies technical errors that have periodically arisen from the courts' misinterpretation of Question No. 3. I was asked by KODIN to devise changes lessening the instances of litigation, as well as reiterate the Legislature's intent from the 18th Special Session in 2002 and the Statewide Ballot in 2004. Hundreds of thousands of dollars are spent on unnecessary motions that do need to be filed; S.B. 292 will address this.

When doctors talk about the expense of lawsuits, they are talking about the costs they incur to get to the point of dismissal. We are hopeful S.B. 292 will cut down on that expense.

Section 2 of S.B. 292 defines the term "provider of health care." As Senator Roberson testified, the proposed amendment, Exhibit E, removes many of the names that were added to the bill.

The proposed amendment was necessary because NRS 630A already has a number of different types of caregivers included. It was not our intent to add additional providers of health care into the bill. Our goal with S.B. 292 was to reiterate and clarify KODIN's intent with Question No. 3 from 2004.

Having said that, we did add clinics, surgery centers or other entities that employ any such person because lawyers are filing actions not only against doctors but also against the clinics for which those doctors work or in which those doctors operate.

Some judges are taking the position that clinics are not subject to the $350,000 cap. These judges allow lawyers to go for an amount of money beyond the cap if only the clinic is sued and not the doctor. We took a strong position on that opinion and, in most of the cases, it was upheld that a plaintiff cannot get a liability level higher than the cap from a clinic that is responsible

for a doctor's conduct than it could get against a doctor. Senate Bill 292 will clarify this opinion and take that issue off the table.

The bill will serve the expressed intent of holding the doctor and whatever entity he or she works for to the $350,000 cap. We do not want any more rogue rulings that impact the ability to enforce the cap.

Section 4 of S.B. 292 addresses several liability. I have a case in front of the Nevada Supreme Court right now on this issue, *Piroozi v. Dist. Ct.*, No. 64946 (Nev. filed Feb. 5, 2014).

In the 18th Special Session in 2002 and again in the Statewide Ballot in 2004, the Legislature decided medical malpractice actions would only be several liability. In other words, each defendant in a case would be responsible only for the percentage of negligence allocated by a jury.

The issue with this decision is exemplified here: there are two defendants in a case. The jury holds Doctor A 90 percent responsible and Doctor B 10 percent responsible. If the plaintiff were to settle with Doctor A but fail to submit any evidence specific to Doctor A's misconduct, we believe that is a fraud on the jury. Under statute, the jury is not told all the facts of what caused the plaintiff's injury, and so it may overly act in a negative fashion against Doctor B, who, at 10 percent, may have merely committed wrongful conduct.

Statute indicates several liability. When Question No. 3 was codified, no mechanism was put in place to address several liability. Senate Bill 292 puts in a mechanism that allows the conduct of all responsible parties to be displayed in front of a jury. This change in statute will allow a jury to rule on 100 percent of the facts, not on a portion of the facts.

The changes in section 5 are technical in nature, removing language about when cases have to be filed and when cases have to go to trial. Changing the wording with regard to timing of cases clarifies legislative intent. Essentially, absent something out of the ordinary with the judge or a motion, a case has to be tried within 2 years with the intent of getting cases brought to trial even sooner, if possible.

The changes in section 6 are also technical in nature, addressing the use of "professional negligence" over "medical malpractice" or "dental malpractice."

When Question No. 3 was voted on in 2004, the term "professional negligence" was added when the term "medical malpractice" already existed in the wording. Ever since that vote, there has been confusion between the two definitions and how the cap applies. One judge ruled the cap did not apply to professional negligence and that affidavits did not need to be filed, etc. This judge ruled these requirements were only necessary for medical malpractice. A lot of nondoctor defendants covered under this bill are not being pulled into the cap. Senate Bill 292 attempts to correct that ambiguity. The Nevada Supreme Court actually affirmed confusion about the language between professional negligence and medical malpractice. Senate Bill 292 would clarify the language.

Sections 7 and 8 also exchange the term "professional negligence" for "medical malpractice."

Section 9 addresses what is called a concept of res ipsa loquitur, which means, "the thing speaks for itself," or in common law, taking the position that when negligence is self-evident, a jury does not need the assistance of an expert. An example of res ipsa loquitur would be a doctor cutting off a patient's left leg when he should have cut off the right leg.

If res ipsa loquitur is present, plaintiffs are allowed to go to the jury without having to incur the expense of hiring experts. In a res ipsa loquitur situation, the jury is instructed that if one element is proven, the plaintiff is allowed a rebuttable presumption that there was a negligent breach of the standard of care. The jury would not necessarily have to rule against the defendant, but the plaintiff would not need the expert under those circumstances.

Unfortunately, in a myriad of cases, the presumption of negligence is alleged. The plaintiff provides affidavits from experts regarding the presumed negligent act. The matter goes to trial and the plaintiff calls an expert witness. The jury is given both the negligence instruction and the presumption of negligence instruction. This is double-dipping in a tried lawsuit.

We want to clarify the language and have the law comport with law around the Country. Common law holds that if the plaintiff is claiming a presumption of negligence—a standard of care violation—the jury is so instructed to adhere to the statute. If a plaintiff brings in an expert to testify, then the jury does not get the presumed negligence instruction. To bring an expert in to testify when the

plaintiff is claiming the action itself speaks to negligence flies in the face of the law.

This situation is a misstatement of what has been the law for years—even going back to England. Senate Bill 292 clarifies that if plaintiffs want to bring in an expert to testify, they get the negligence instruction and then go to the jury. To have those two elements, an expert and affidavits, is a double-dip on the standard of care issue; this is harmful to doctors.

Senator Ford:
I have already expressed to the witnesses and Senator Roberson my issues with caps. I do not like the notion of capping the division of grief. If a father and a mother lose a son, they do not have to split their grief between themselves and get half of $350,000 each.

I was here in 2003 and 2004 when we discussed this issue, but I left before the vote came. I cannot fathom that we thought back then that the term "action" did not mean legal action.

I have a hard time determining why we would want to require grief splitting in a situation when the word "action" is to indicate legal action. I reviewed Question No. 3, and I understand "action" to be a legal action—versus an event of malpractice. I wonder what kind of conversation was going on during that time period.

This ambiguity has existed since 2004, yet over the course of the last 14 years, premiums have dropped 50 percent. I do not understand the need to clarify that $350,000 must be per action, per event, when the word "action" means a legal action.

Dr. Manthei:
Based on how the initiative was drafted, the interpretation has always been per event. I am a doctor, not an attorney, so I did not participate in drafting it, but I was part of the group. There has been no misunderstanding that it has been anything more or less than that—an event. Question No. 3 was based on a California law that was at least 10 years old before our law took effect—and that California law is per event.

If you get away from "per event," you get away from any kind of predictability. If there is one part of Question No. 3 that is mainly responsible for the controlling and reduction of liability premiums, it is the ability to be predictable about that one issue—per event.

I agree there is no fair way to legislate for these issues. No amount of money will make somebody whole after an event, but the reality is Nevada has health care issues. The State has a responsibility to provide health care to all its citizens.

The State already has limits on damages, which have affected even me. I was rear-ended by a school bus. Is it fair that I lost my ability to practice medicine because of that event and the only recourse was $50,000 from the State? No, it was not fair, but the reality is government services such as health care and education have to be provided to all, and sometimes that is not fair to the few.

Senator Ford:
You are making part of my point that there should not be arbitrary caps placed on damages. Cannot the same jury who determines whether a criminal lives or dies in a criminal case be able to determine how much damage a victim has incurred when rear-ended by a school bus?

You are telling me that "action" means "event." I do not see how "action" and "event" are equivalent, especially when "action" is used in the statute and "action" is used in Question No. 3.

You testified that over the last 14 years, premiums have dropped. How many court cases have interpreted "action" to mean legal action versus "action" as an "event?"

Mr. Cotton:
The majority of judges rule that there is an action against somebody for injuries caused. Let me illustrate the problem we are running into: there is one family with seven children. The family files one action for the group's injuries; it should be viewed by the court as one action, not seven actions; however, not all judges adhere to this view.

The sad part is this: if Nevada does not have any doctors, the State has a major problem. If an unquantifiable number of cases can be brought to court,

premiums cannot be actuarially set. If premiums cannot be actuarially set, they will not continue to drop. If premiums do not continue to drop, the State will not be able to attract doctors. Doctors will not come to Nevada because insurance will not be affordable.

Senator Ford:
As I said earlier, there has to be a better way. I have a lawsuit consortium action, so does my wife, her brother and her brother's wife. Is it correct that those constitute four different actions?

Mr. Cotton:
Those four actions are different rights of recovery or theories of recovery. They are not an action in themselves and that is the problem with these cases. You can have multiple people who can have theories of recovery, but the bottom line is that you still only have one action that you can file. Then you move forward under that one action.

Senator Ford:
Do I have to file them all together? Can I file my own?

Mr. Cotton:
They would be consolidated in an action for negligence and the event that took place.

Senator Ford:
Unless one case ends and I come in later.

Mr. Cotton:
No, you still have the same event and the same action even if you chose to file 2 months after someone else. They are consolidated because the seminal facts are the same: it is the same incident. In medical malpractice, it is whether the doctor's conduct caused somebody to die, lose his or her leg, etc. This issue has been debated all over the Country.

Is this situation fair? This sounds terrible, but for those fighting a specific lawsuit, the issue here today is not about fairness for them. It is about fairness for the entirety of Nevada and that there be fair, reasonably priced access to medical care. That has to trump personal fairness. I do not like that situation, but that is the reality.

From 2002 to 2004, a number of my clients left Nevada—and even before that, they were leaving. Doctors will continue to leave if their premiums climb back up again. If the 50 percent reduction goes back up again, the State will lose more doctors and not be able to attract new ones. At the same time, Nevada is trying to establish a medical school specifically to keep doctors in the State. All these elements are in play with this situation, so when we talk about fairness, we cannot isolate the one aspect of personal fairness.

The Legislature has to decide how to balance these elements. The balance has worked since 2004. We lowered premiums and we are attracting more doctors to the State. The only way we will continue to attract doctors is if we have quantifiable amounts of damage—not acting out of emotion—within a range of fairness. A range of fairness is all that should be promised.

Chair Brower:
I call upon others to testify in support of S.B. 292.

Jennifer Gaynor (Fundamental Administrative Services, LLC):
We support S.B. 292 because it creates clarity and avoids unnecessary and expensive litigation. We have submitted a proposed amendment to add further clarity to the bill by enhancing the language of section 2 to ensure that skilled nursing facilities, as defined in NRS 449.0151, are included in the entities listed in S.B. 292 (Exhibit H).

Our proposed amendment would also make clear that a plaintiff cannot circumvent the limitations of NRS 41A by bringing in an additional claim under NRS 41.1395. Physicians may not encounter this situation very often, but Nevada's skilled nursing facilities do. Skilled nursing facilities spend money on needless litigation defending themselves over this confusion.

Nevada's skilled nursing facilities have not had a rate increase in almost 20 years and, in fact, have had their rates cut. Most skilled nursing facilities operate at a 1.5 percent margin, which is very tight. Hundreds of thousands of dollars are spent on lawsuits litigating these technicalities, and it is draining for these businesses.

Chair Brower:
We will consider your proposed amendment.

Robert Rourke (Horizon Hospital and Rehabilitation Center):
I represent many skilled nursing facilities in the Las Vegas area and litigate quite often with Mr. Cotton. His explanation as to why we need to rectify and clarify some of the issues in this statute was spot on. I echo Mr. Cotton's testimony with regard to the cost to the clinic being potentially higher than the cost to the doctors that the clinics employ. What is happening to clinics is also happening to skilled nursing facilities.

While nurses and therapists are covered under statute, almost every single lawsuit we encounter makes the claim that skilled nursing facilities are not covered by NRS 41A. With a few exceptions, these cases are dismissed, but not before the facility incurs an exorbitant cost. As was testified by Ms. Gaynor, the margins, the costs and the availability of insurance for these types of facilities makes staying in business tough. These issues are magnified when money has to be allocated to defend a case that will most likely be dismissed.

While we welcome the elimination of the confusion surrounding medical malpractice and professional negligence claims, our priority is that the definition of provider of health care include skilled nursing facilities. Naming skilled nursing facilities in the definition will ensure we will not have to litigate every single case with the same issues at a huge cost.

When I say at a huge cost, I am not only referring to my clients' costs but costs to the system. Judges have crowded dockets already and are hearing these types of motions and arguments repetitively. The associated costs are attributable not only to filing a motion but doing the discovery in advance to prepare the fact pattern for that motion. Adding skilled nursing facilities to S.B. 292 is important and will be consistent with Question No. 3.

The second change in our proposed amendment, Exhibit H, relates to NRS 41.1395. Not all doctors have experienced this issue yet; but some are seeing it more recently …

Chair Brower:
Please remind the Committee what NRS 41.1395 states.

Mr. Rourke:
The elder abuse statute, or NRS 41.1395, provides an avenue for damages for injury or loss suffered by an older or vulnerable person from abuse, neglect or exploitation. In both skilled nursing facilities and hospitals, we see plaintiffs post tort reform. Plaintiffs file lawsuits containing causes of action for NRS 41.1395 as a way to get around the caps of NRS 41A. These lawsuits focus on the neglect portion of NRS 41.1395, which states,

> "Neglect" means the failure of a person who has assumed legal responsibility or a contractual obligation for caring for an older person or a vulnerable person, or who has voluntarily assumed responsibility for such a person's care, to provide food, shelter, clothing or services within the scope of the person's responsibility or obligation, which are necessary to maintain the physical or mental health of the older person or vulnerable person. For the purposes of this paragraph, a person voluntarily assumes responsibility to provide care for an older or vulnerable person only to the extent that the person has expressly acknowledged the person's responsibility to provide such care.

The key language in this paragraph is "which are necessary to maintain the physical or mental health of the older or vulnerable person."

Plaintiffs are blending negligence under NRS 41A—professional negligence—with neglect under NRS 41.1395. It is extraordinarily expensive to defend this cause of action.

In the end, most judges accept that NRS 41A and NRS 41.1395 cannot be read in harmony while giving meaning to the caps in 41A and still providing for double damages, attorney's fees, unlimited damages and costs under essentially the same fact pattern with one motion proceeding under neglect and one motion proceeding under negligence. To address this issue in statute, we propose language be added to NRS 41.1395 stating that when an action is due to professional negligence, it will be governed by NRS 41A, and if that occurs, then NRS 41.1395 is no longer an available remedy.

We ask that if the definition of provider of health care is expanded to include skilled nursing facilities, changes be made throughout the NRS to maintain consistency. That is, if changes to the definition of provider of health care are

made to NRS 41A, then the same changes must be made to NRS 629.031 and NRS 42.021. Making changes to the language across the NRS will preclude us from having to face arguments like we have been in which the provider of health care is defined under NRS 41A one way and then defined under NRS 629 another way.

Darrin Cook (CEO, Horizon Specialty Hospitals):
I support S.B. 292 and the proposed amendment, Exhibit H. I submitted my written testimony for the record (Exhibit I).

Margo Piscevich (Nevada Rural Hospital Partners Foundation):
I have practiced law 43 years with 25 to 30 of those years practicing professional malpractice. This means I have worked continually with lawyers, doctors and hospitals.

I support S.B. 292 and concur with the proposed amendment, Exhibit E. I agree that caps on damages is a public policy issue. Question No. 3 worked fine for the first few years it was implemented and then some judges decided to interpret it to be a cap per person, not per action—about 25 percent of judges do this.

I agree with the addition of section 4, subsection 2, paragraph (c) to the law.

Regarding the definition of professional malpractice, the term includes numerous entities from lawyers to engineers to licensed professionals. My preference would be to use professional malpractice and maybe include medical malpractice or dental malpractice. Professional malpractice applies to all licensed practitioners whether you are an architect or an engineer.

Regarding the bill's statement of bringing a trial within 2 years, I have never seen this happen. Generally, parties stipulate that the case can be brought later because the parties will receive preferential settings. We also have to contend with a conflict between the way Clark County and Washoe County, the State's two largest counties, set trials. Washoe County gives a firm setting of 18 months out, 24 months out, 30 months out, etc. Clark County has a calendar call and the case may go on that first calendar call, but it is not certain.

In my experience, it takes at least 3 years to get cases to trial because of various conflicting situations, including the fixed setting date used in Washoe County and the stacked calendar used in Clark County.

Regarding section 6, I agree on the necessity that an affidavit identify the physicians or nurses, etc., or that it at least identify the practitioners' actions. For the past 5 years, complaints have been coming in that say, "The conduct in this hospitalization was below the standard of care." The affidavit will say the testifier is an expert witness who agrees with the allegations of the complaint. That is literally the allegation of the affidavit. We do not know the identity of the person or that person's alleged misconduct.

I have one case where seven nurses from two different shifts are named. I understand the plaintiffs may not know the contents of what is going to be said, but it can definitely be said what misconduct was done: a misdiagnosis, a wrong injection, the wrong amount—the plaintiff can at least state the nature of the misconduct. It is costly to defend these cases.

Regarding the res ipsa loquitur, yes, there are simple solutions for when the wrong leg is amputated. It is a given, and an expert witness is not needed for determination; however, an expert witness is needed on causation. There can be many different issues in a medical setting that are bad, but those issues may not have caused anything.

If there is going to be expert testimony, then res ipsa loquitur is sort of "inside baseball." If res ipsa loquitur is used and there is causation, then it is important not to give both jury instructions because it becomes confusing.

Kathleen Conaboy (Nevada Orthopaedic Society):
We support S.B. 292 and KODIN's proposed amendment, Exhibit E. I want to address Senator Ford's concerns about fairness. We see this as a policy tension between a physician providing good care and a physician being available to provide good care. Clarity and predictability in the law is crucial so doctors can run effective business models.

Senator Ford:
I appreciate your perspective, but the patient needs to be in that calculus as well. My concern is that with the $350,000 cap, we are being asked to decide that grief be divided among those who have been aggrieved by a physician's

malpractice. That important policy consideration weighs heavily on me. My vote is not needed to pass this S.B. 292, but if you want me to vote for this bill, we need to have a conversation about finding an alternative.

Ms. Conaboy:
The physicians we represent do see the patient as paramount, and that is why there is tension for them. Doctors need predictability.

Denise Selleck (Executive Director, Nevada Osteopathic Medical Association):
I support S.B. 292. The Nevada State Medical Association asked me to relay its support for the bill as well as support for the proposed amendment, Exhibit E.

Elizabeth MacMenamin (Retail Association of Nevada; Retail Chain Drug Council)
We support S.B. 292. I am opposed to the proposed amendment, Exhibit E. We were excited to see pharmacists included in the original bill, but the proposed amendment strikes pharmacists from the list of providers. I would like the Committee to consider including pharmacists and will speak with the bill's sponsor.

Adam Plain (Nevada Dental Association):
We support S.B. 292.

Stephen Osborne (Nevada Justice Association):
It was testified that Nevada is in a good place and that rates have stabilized. Senate Bill 292 attempts to expand the scope of the $350,000 cap on damages. This further expansion violates the Seventh Amendment of the U.S. Constitution, which is a right to trial by jury. In fact, the Nevada Constitution provides that the right to jury trial be secured to all and remain inviolate forever.

This bill does not fairly compensate victims and limits the meritorious cases—not the frivolous cases, but the cases that have merit and value. It does not limit the health costs for consumers and does not ensure quality of care.

In 2002, it was agreed and voted upon that $350,000 would be for each plaintiff and each defendant. A bill presented in 2003 did not pass, so by law, it went to the voters. In that initiative, Question No. 3 was presented, but not fairly. In *Jones v. Heller*, No. 43940 (Nev. Sep. 18, 2004) (order granting in part petition for writ of mandamus), seven Nevada Supreme Court Justices held

that the initiative removed two statutory exceptions to the cap: one, gross negligence, and two, exceptional circumstances. Despite this issue, the intent of Question No. 3 is still per plaintiff, per defendant.

The Nevada Supreme Court ruled that the condensation and explanation of Question No. 3 misinformed the voters—that it was deficient and could not stand. Despite that ruling, the explanation remained and was distributed to voters. *Nevada Revised Statute* 41A.035 clearly states the singular: "a" provider of health care based upon professional negligence and "the" injured plaintiff. Singular. In fact, the term "professional negligence" is defined in NRS 41A.015 as "a" negligent act or omission to act. Again, singular.

The term "action" was testified to be clear, but seven Nevada Supreme Court Justices did not interpret it that way. Seven Supreme Court Justices ordered those two statutory exemptions to the cap to be removed.

Chair Brower:
What is the year of the case you are citing?

Mr. Osborne:
September 18, 2004.

Chair Brower:
Is that the unpublished *Jones v. Heller* decision?

Mr. Osborne:
I do not know.

Chair Brower:
Legislative Counsel informs me it was an unpublished order. In the time since that Nevada Supreme Court order, have a majority of district court judges decided the other way?

Mr. Osborne:
Some judges have ruled that way, many judges have not.

Chair Brower:
Do you know how many judges have ruled one way or the other?

Mr. Osborne:
I do not. I do not know if those statistics are even available.

Senate Bill 292 extends the law. Yes, there are problems with the statute and Mr. Cotton went over those issues. I will address a few of those issues in my testimony.

Even though Nevada is in a good place and is stable with regard to doctors working in the State, S.B. 292 expands the cap to additional parties. I did not hear testimony today about the new language stating awarded damages must not exceed $350,000 regardless of the number of theories upon which liability may be based—not merely those issues related to professional malpractice.

For instance, in Las Vegas, Dr. Dipak Desai was convicted of murdering his patient. There is a $350,000 cap for murdering his patient because the verdict was based upon his treatment of the patient.

Chair Brower:
To be clear, the murder case is a criminal case. A wrongful death case would have a $350,000 cap.

Mr. Osborne:
Yes, but Dr. Desai was convicted of murdering his patient, so that would be considered part of the theory of the wrongful death.

Chair Brower:
Correct. And damages would be capped at $350,000.

Mr. Osborne:
Correct. The statute also shifts the costs of the malpractice from the negligent parties to the victim and then to the State. If there is no recovery and the victim becomes a ward of the State, that puts a burden on Nevada's Medicaid system.

Section 6 ...

Chair Brower:
Please clarify for the Committee if we are talking about noneconomic damages versus economic damages. A victim of medical malpractice—a plaintiff—can recover all economic damages, all past and future medical bills, all past and

future income loss; everything needed to make that plaintiff whole in terms of monetary loss. Is it correct to say the sky is the limit?

Mr. Osborne:
No, that is not necessarily correct.

Chair Brower:
Would a cap apply to economic damages under the statute?

Mr. Osborne:
That is taken on a case-by-case basis. Future medical expenses are not subject to the cap.

Chair Brower:
Is only pain and suffering subject to the cap?

Mr. Osborne:
It is not only pain and suffering. It is disability, disfigurement, loss of limbs; it is everything that the patient has experienced.

Chair Brower:
Everything that is unquantifiable.

Mr. Osborne:
No, not necessarily unquantifiable because the damage has to be quantified at some point. It has to have a price tag attached to it, for example, a medical bill. These are called special damages. The cap, as proposed, is arbitrary and one size fits all. No matter how many plaintiffs or how many defendants there are, the cap sits at $350,000.

Section 4 provides the trier of fact can consider any person who could have contributed to the negligence. I would like to emphasize the words "could have." There is no requirement of disclosure of this mystery person, but "any person" that is chosen "could have" it required. There has to be some level of proof or disclosure.

We spoke with Mr. Cotton about these issues and he has agreed to work on the language with us. The bill's language, as is, will further reduce the cap as well as other damages. For example, if it is found that a radiology technician

"could have" contributed to the negligence and is included in the verdict form, that will operate to further reduce the total amount. If this radiology technician is 50 percent responsible, the way S.B. 292 is written, the cap is then reduced 50 percent, which is not fair without any kind of proof or disclosure.

The bill allows for a person to be brought into a case to lower damages, but then a plaintiff cannot bring that person in for any other action. I am not sure of the purpose for doing that. You have responsibility, but then you say it cannot be used in any further way once it has been determined.

Section 6 amends NRS 41A.071, which is a preliminary procedural requirement. This is the affidavit of merit. At the beginning of a case, many key facts are unknown, especially when only a partial set of medical records is provided. Hospitals will not include an incident report or a current report; those reports are held back until after a case is filed.

For example, a patient is dropped while being moved from the gurney to the operating table. The patient's operation was for a deviated septum, but following the drop, he has a herniated disc. At this point, as the plaintiff's attorney, you do not know key information such as who was involved in the transfer or who actually dropped the patient. You have to go forward without knowing elements of that nature.

Section 6, subsection 4 of S.B. 292 discusses complying with Nevada Rules of Civil Procedure 16.1 at the initial pleading stage. Rule 16.1 of NRCP is the expert report requirement that is to be completed after the discovery process. The language of the bill requires the plaintiff to comply with this rule at the initial stage of proceedings, but that is simply not possible.

In section 9, the bill's sponsors want to add the language "provider of health care caused the" personal injury or death. The key word is "caused," which takes the rebuttable presumption, or the res ispa loquitur, out of play. In 23 years of practicing law, I have never seen a case that says the medical record provides the cause of subsequent injuries.

With S.B. 292, a plaintiff is asked to prove negligence without an expert, which simply cannot be done. A plaintiff has to provide for the cause of damage for the clear liability actions, but if an expert is used, a plaintiff no longer has that

rebuttable presumption. This is not a double-dip, as testified by the bill's sponsors.

Senator Ford:
There is a public policy issue to keeping doctors in Nevada. The division of $350,000 by the number of plaintiffs seems to accomplish that goal. Are there alternatives to this issue other than a cap?

Mr. Osborne:
Public policy also supports that when voters vote on something, they be aware of what they are actually voting on—which did not happen with Question No. 3.

You stated when you originally examined the language, you read the word "action" and did not fathom that negligence could be split. The Nevada Supreme Court also stated the language was deficient and could not stand. The Court also found the cap to be per plaintiff, per event and was not part of the amendment made.

Senator Ford:
Please restate your answer.

Mr. Osborne:
In *Jones v. Heller*, the order says nothing changed from prior statute—the prior statute being per plaintiff, per defendant—and each gets a separate cap. The Nevada Supreme Court found the per plaintiff, per defendant cap to still be in place, meaning multiple caps, not one cap for the entire case.

At the same time, however, the Justices cited two exceptions that were wrongly removed from the condensation and explanation of Question No. 3. The Justices wrote that neither the condensation nor the explanation accurately reflected that Question No. 3, upon passage, would remove the two statutory exceptions of gross negligence and exceptional circumstances shown by clear and convincing evidence.

Senator Ford:
Are there alternatives to this issue other than a cap?

Mr. Osborne:
The bill's sponsors testified Nevada is in a good place and premiums have been reduced by 50 percent. I am not sure why there needs to be an alternative. The statute does not compensate victims of meritorious cases that show their damages are over and above the $350,000 cap because that is the only time the cap operates.

If the jury does not find that a plaintiff's noneconomic damages are over and above the capped amount, the judge does not have to reduce anything down. The jury does not get to hear about the cap until after the trial is over.

Chair Brower:
Regarding *Jones v. Heller*, the order states it is unpublished and shall not be regarded as precedent and shall not be cited as legal authority, according to Supreme Court Rule 123. It is not a unanimous decision: signed by three justices, two dissenting in part and concurring in part. It is interesting that the order is dated September 18, 2004.

From the timing, it appears a challenge was made to Question No. 3 prior to the November 2004 election. The Court granted in part petition for a writ of mandamus, filed by those challenging the wording of Question No. 3. Nevertheless, Question No. 3 was on the ballot less than 2 months later. What happened between the date of the unpublished order and Election Day in 2004?

Mr. Osborne:
There was the initial majority decision, two comparing opinions and one dissenting. All Justices found the same thing with regard to the language—it was deficient. Justice William Maupin dissented only because of the timing.

It was too late to redo the ballot, so voters received the misinformed, deficient, cannot-stand language and then, on the back of the ballot, additional pages were added correcting the language.

Chair Brower:
Did the deficient language go to voters despite the Supreme Court's order?

Mr. Osborne:
Correct. The actual ballot that voters received had a note on the cover that said,

> Attention voter: after your sample ballot was printed, the Nevada Supreme Court ruled the wording originally submitted for the question and explanation for State Question No. 3 did not adequately, fairly or sufficiently describe the question and its ramifications. The revised State Question No. 3, its explanation and the arguments for and against the question are printed on the blue pages, 16A-16F, inserted after page 16.

Chair Brower:
I am not sure *Jones v. Heller* has the specific issue we are dealing with today.

Christian Morris (Nevada Justice Association):
I am a trial attorney. It is important to keep good doctors in Nevada. Lawyers do not like to sue doctors because doctors usually help people. Doctors cannot be sued unless there is an affidavit from an expert who has looked at the actions and agreed those actions are below the standard of care; this safeguard is already in place. Senate Bill 292 is not a clarification of statute but an expansion.

There is a cap of $350,000. I have not heard that 75 percent of judges say the law holds per event or per action and 25 percent say it is per plaintiff, per defendant. I practice in Las Vegas. I know some judges allow for it. I have always had judges allow per plaintiff, per defendant. There is a split, though.

Chair Brower:
Have you always held this view?

Ms. Morris:
In the time I have taken these cases, yes, that has always been my view, but I have not had many cases. I do not know of any statistics, but there is a disconnect as to how to apply the law.

Section 4 outlines the responsibility of a nonparty. If a facility has been found to be 90 percent responsible, that percentage should be allowed on the verdict form so the jury receives the full version of what happened.

The jury knows that another party has been found responsible, but the language in S.B. 292 states that a nonparty can be anyone—even someone not party to the action. This means that a doctor who is not involved in the case, who is not

named as a defendant and who has not had an opportunity to present himself or herself as a defendant can be listed in the verdict form. No doctor wants his or her name listed on the verdict form without a chance to defend himself or herself. No doctor wants to have a percentage of responsibility in a malpractice case to which he or she is a nonparty.

Section 5 states dismissal of an action is a bar to the filing of another action upon the same claim, but that does not mean the doctor will not be subjected to some sort of discipline from a medical board.

The language of the bill is not safe language that protects doctors; it actually exposes doctors to some degree.

Another thing …

Chair Brower:
Mr. Cotton, does the bill intend to have nonparties named on the verdict form?

Mr. Cotton:
The language in the bill is not clear.

Chair Brower:
We will address that language issue later.

Ms. Morris:
Another thing to consider is the affidavit requirement. The expert affidavit that is required in order to file a medical malpractice claim is based on information available at the beginning of the case. This information is limited in scope, and there is a 1-year statute of limitations.

Discovery is when medical records are gathered, depositions taken, written discovery done. An expert is disclosed 90 days before the end of discovery. An expert affidavit, a requirement of NRCP 16.1, has to fully state all opinions and the basis of such opinions to be presented at trial. One simply cannot ask for that initial expert affidavit in support of the complaint to fulfill the NRCP 16.1 obligation until the discovery process is complete.

It was testified that the nature of the misconduct needs to be made known. Misconduct which rises to the level of medical malpractice is stated in the

affidavit. It is unreasonable to ask an initial expert to apply all of his or her opinions before the case has even started. Existing law is sufficient, and the affidavit requirement should remain.

Lawrence Smith:
I am a member of the Nevada Justice Association, but I testify today representing myself.

Regarding section 4, where nonparties are allowed to be put on the verdict form, a nonparty virtually does not exist anymore; it is the law of unintended consequences.

Plaintiff attorneys who do not want to get sued for malpractice themselves later on are going to name every person who has a fingerprint anywhere on the care of their client. As such, S.B. 292 will create more litigation, not less. No plaintiff's attorney will take a chance on fault being attributed to those who are not already defending themselves because the plaintiff cannot collect.

If putting nonparties on the verdict form is allowed to stay, there will be an explosion of litigation within the same case—and other bills being heard this Session allow nonparties to be put on the verdict form. Every single person who has anything to do with the matter will have to be named in case the defendant blames him or her.

This situation will have to be approached carefully because individuals who may have even a slight amount of responsibility will have to be named. The focus is normally not on that, though. Normally, the plaintiff's attorney will only look at those who are the main cause of the incident; but if everybody is on the verdict form, then everybody will get invited to the party.

Chair Brower:
It works that way already.

Mr. Smith:
I work in this part of law daily, and that is not the way it works.

Chair Brower:
More often than not, it does work that way.

John Echeverria (Nevada Justice Association):
I am a personal injury and medical malpractice lawyer. I am not a member of the Nevada Justice Association, but the Association asked me to testify on the statute and S.B. 292.

If the goal of the bill is correct—that we are clarifying problems in statute—then I fully support S.B. 292. There is confusion in medical malpractice litigation, and this confusion leads to needless motions. I would like to see the law clarified.

The law does not need clarification with respect to the caps and the direction this bill takes those caps. The issue of caps is a policy argument. If we are just correcting technicalities, we need to focus on the difference in opinion between judges. It seems some judges have interpreted the code to read $350,000 per plaintiff, per defendant and others have read it to mean $350,000 for everybody.

The reason for the cap was to create some predictability for the purposes of insurance for doctors. With or without a cap, there can still be predictability in insuring doctors.

The insurance company that insures Doctor A and the insurance company that insures Doctor B are making the same analysis on risk. If Doctor A and Doctor B, each with their own insurance policies, are brought into the same malpractice case, both get the benefit of the $350,000 cap. The insurance companies write insurance policies based on an actuarial of a doctor's exposure. Senate Bill 292 addresses the actuarial issue to the benefit of the insurance companies—companies that continue to maintain a higher actuarial number.

The policy issue of $350,000 per plaintiff, per defendant is an argument for another bill and should not be the focus of S.B. 292. The problems with the rest of the bill revolve around language and how to interpret that language. Senate Bill 292 will create more litigation and more disputes on how to interpret its language.

Section 3 adds the language "regardless of the number of plaintiffs, defendants or theories upon which liability may be based." If the cap is applied to all theories upon which liability could be based, it would immunize a doctor from battery. An ear, nose and throat doctor who performs a colonoscopy—and has never been trained in that capacity—commits battery, and that is egregious.

That cause of action for battery should not be subject to the cap because that doctor performed something in which he or she has no training.

Chair Brower:
How does that square with the language that says "In an action for injury or death against a provider of health care based upon professional negligence … "?

Mr. Echeverria:
A battery is not professional negligence.

Chair Brower:
Is that a separate action?

Mr. Echeverria:
Yes, it is a separate cause of action, but it is covered by this limitation.

Chair Brower:
I will consider that further. Thank you.

Mr. Echeverria:
The real problem is in section 2. In addition to the arguments already raised, the main problem is two different words are being used to describe conduct: responsibility and fault. Responsibility and fault are two different concepts. That language needs to be rewritten.

Somebody may be responsible for an injury but not be legally at fault. It is a problem if a jury is entitled to assign a percentage of fault to someone who does not have legal responsibility.

Mr. Cotton stated the goal of the bill was to allow the defendant doctor to talk about the doctor who settled out. For example, Doctor A is found to be 90 percent negligent and settles out. The jury is not entitled to consider that when assessing the remaining 10 percent of fault. If the goal of the bill is to allow the defendant Doctor B to talk about defendant Doctor A, who settled out, that can be accomplished. Senate Bill 292 goes beyond that consideration and allows the jury to consider the conduct of a doctor who may not have ever even known he or she was listed and discussed in the case.

There are ways to solve Mr. Cotton's concerns, but this bill does not achieve that. This bill creates more problems.

Chair Brower:
Does naming the person on the verdict form differ from the classic empty chair defense?

Mr. Echeverria:
Yes. Statute states only the parties before the court are named.

Chair Brower:
That is the classic empty chair defense argument.

Mr. Echeverria:
Empty chair defense can be made, but there is no proof of it.

Chair Brower:
No appearance on the verdict form …

Mr. Echeverria:
Correct, but with S.B. 292, that person will be put on the verdict form and the jury will be asked to assess responsibility. The language about anybody being responsible could be a nurse who should have consulted with her peers or with the doctor but may not have been negligent in not doing so.

Not being forced to name the person who the defense wants to put on the ballot is also problematic. I would hate to be a doctor waking up one morning and seeing in the headlines that I was found 80 percent liable for Mr. Smith's death, never having known the case existed. Now I have adverse publicity and other problems. There are ways to solve these issues, and Mr. Cotton is willing to discuss how the language might be tightened up to accomplish his goals.

I agree with Ms. Piscevich that the definition of professional negligence should be tightened to specifically cover medical negligence. I am concerned some judges may interpret even more broadly the term "professional negligence."

I echo the concerns about the requirement of NRCP 16.1 regarding the filing of an affidavit prior to the filing of a lawsuit.

Mr. Cotton:
To rebut the concern that if the noneconomic cap of $350,000 remains and Nevada consequently ends up with wards of the State, I remind the Committee that economic losses are in addition to noneconomic losses.

If an injured party would have earned $3.5 million over a lifetime, then he or she will get $3.5 million plus $350,000 for noneconomic damages. If juries allocate responsibility properly and there is evidence of past and future medical expenses and past and future economic losses, the cap is not going to make anybody a ward of the State.

I disagree with the argument that several liability reduces the cap. If the defendant is 10 percent responsible, the plaintiff may only get $35,000 from that defendant, but that does not reduce the cap. That is allocating the percentage of damage. If the defendant causes 100 percent of the damage, 100 percent will be assessed. If it is 50 percent, it is 50 percent. The jury makes that determination once it has all of the evidence, not parts of it.

Chair Brower:
What about the issue of the nonparty being at portion fault?

Mr. Cotton:
The nonparties—whether done by other or done by name—do not have a reportable judgment against them. On one level, it is a jury allocation question and then, later on, on another level, the judge applies whatever verdict the jury found. A judgment is not entered against somebody named as a nonparty at fault. The doctors are not going to name a nurse as a nonparty who is 3 percent at fault. The rules of discovery cover this concern. If there is a belief that somebody caused the injury, that has be to disclosed, and disclosures are made throughout the course of litigation. If the plaintiffs choose to join the cases, they can.

Chair Brower:
You envision adding a person to a lawsuit if the plaintiff's lawyer agrees that the person has potential liability.

Mr. Cotton:
Correct. We do not want to have a situation where the plaintiff gets to decide who appears in front of the jury as opposed to who actually is responsible. If

plaintiffs choose not to join somebody or wait too long and have a statute of limitation problem on Doctor A, that should be a penalty on Doctor B, who remains in the case.

Chair Brower:
The jury verdict form will potentially name the person, but the ultimate judgment will not.

Mr. Cotton:
Correct. The ultimate judgment is never found against that person when it is allocated out that way for several liability. There will be no judgment entered against Doctor A. He may not be there, but there is not a judgment that he has to report to his insurance carrier or medical examiners board—or anyone else. This is just not done.

Senator Ford:
Can the defendant bring that person in as well?

Mr. Cotton:
It is not likely that person can be brought in on a third-party action.

Senator Ford:
It may not be likely, but is it possible?

Mr. Cotton:
I do not have the burden of proving who was damaged or how much that person was damaged …

Senator Ford:
That is true, but if you want to put that person on the verdict, you can bring the person in, correct?

Mr. Cotton:
Yes. In theory, you can bring them in as a party. Often, plaintiffs wait until the day before the statute has run out to sue somebody, and then it is too late to bring in someone.

Regarding the issue of the affidavit of merit, I wholeheartedly disagree. I get these types of affidavits constantly with verbiage such as "I am Joe Smith of

the University of California, Los Angeles. I have all this background and, in my opinion, these defendants caused this injury because they violated the standard of care." These affidavits do not offer anything more.

These types of attestations were clearly not the intent of the 2002 legislation where the affidavit was exchanged for the screening panel. The idea behind the 2002 legislation was you still have to get someone to say, "These defendants did the following acts and they violated the standard of care, by … " An attorney's access to a client's medical records can be made available with a HIPAA release. These records can be had 2 years before the filing and can be given to the experts.

If experts look at the medical record and cannot determine which doctor did something wrong, then those doctors should not be joined as a party to a lawsuit. To blanket-join four or five defendants, then weed them out and throw them off to the side during the process of discovery—because it is no sweat off the plaintiff's back to do that—is unfair to doctors who should not have been joined in the first place. Doctors have to report when they are joined in a case, whether or not their own responsibility is eventually dismissed.

Senator Ford:
How is this any different from an expert report?

Mr. Cotton:
Rule 16.1 of the Nevada Rules of Civil Procedure outlines all the theories and the facts that a case can be based upon. If the expert has the medical records, that expert can use those records to make a determination 6 months down the line. That future determination can be made at the time of filing and keep doctors from being exposed.

It is so easy to throw in four or five doctors and then dismiss them one at a time, but doctors are required to report when they are joined onto a case. That information goes to their insurance carriers and to the Board of Medical Examiners. Statute allows for defendants to be joined with a sloppy affidavit, and this is 180 degrees from what we intended when we dropped the screening panel.

Chair Brower:
Seeing no more business or public comment, I adjourn the meeting at 3:16 p.m.

RESPECTFULLY SUBMITTED:

_____
Cassandra Grieve,
Committee Secretary

APPROVED BY:

_____
Senator Greg Brower, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	**Exhibit**		**Witness or Agency**	**Description**
	A	1		Agenda
	B	8		Attendance Roster
S.B. 260	C	1	Mark Leon	Letter in Support
S.B. 260	D	2	Nevada Credit Union League	Letter in Opposition
S.B. 292	E	2	Keep Our Doctors In Nevada	Proposed Amendment
S.B. 292	F	2	Rudy Manthei	Support Testimony
S.B. 292	G	1	Nevada Mutual Insurance Company	Policy Rate Reductions Chart
S.B. 292	H	5	Fundamental Administrative Services, LLC	Proposed Amendment
S.B. 292	I	1	Darrin Cook	Written Testimony