MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Eighty-Second Session
April 27, 2023

The Committee on Judiciary was called to order by Chair Brittney Miller at 9:01 a.m. on Thursday, April 27, 2023, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. Copies of the minutes, including the Agenda [Exhibit A], the Attendance Roster [Exhibit B], and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/82nd2023.

COMMITTEE MEMBERS PRESENT:

Assemblywoman Brittney Miller, Chair
Assemblywoman Elaine Marzola, Vice Chair
Assemblywoman Shannon Bilbray-Axelrod
Assemblywoman Lesley E. Cohen
Assemblywoman Venicia Considine
Assemblywoman Danielle Gallant
Assemblyman Ken Gray
Assemblywoman Alexis Hansen
Assemblywoman Melissa Hardy
Assemblywoman Selena La Rue Hatch
Assemblywoman Erica Mosca
Assemblywoman Sabra Newby
Assemblyman David Orentlicher
Assemblywoman Shondra Summers-Armstrong
Assemblyman Toby Yurek

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator Edgar Flores, Senate District No. 2

STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Bradley A. Wilkinson, Committee Counsel
Devon Kajatt, Committee Manager
Traci Dory, Committee Secretary
Ashley Torres, Committee Assistant

OTHERS PRESENT:

Sean Claggett, Private Citizen, Las Vegas, Nevada
Paul J. Moradkhan, Senior Vice President, Government Affairs, Vegas Chamber
Misty Grimmer, representing Nevada Resort Association
Cheryl Blomstrom, representing Nevada Trucking Association
Jamie S. Cogburn, President, Nevada Justice Association

Chair Miller:
[Roll was called. Committee protocol was explained.] We have two bills on our agenda today. The first one is Senate Bill 252, presented by Senator Edgar Flores. I will open the hearing on Senate Bill 252. Senator Flores, you may proceed when you are ready.

Senate Bill 252: Revises provisions governing civil actions. (BDR 2-852)

Senator Edgar Flores, Senate District No. 2:
I am here to present Senate Bill 252. Joining us via Zoom from Las Vegas is attorney Sean Claggett, who is not only an amazing member of the legal community but is also a subject matter expert when it comes to focus groups, which will be the entire focus of this conversation under *Nevada Revised Statutes* (NRS) 18.005.

Before I hand it off to the subject matter expert, I would like to lay the groundwork of why we are here presently engaging in this conversation. During the interim, as many of us do, we go out into the community and speak with stakeholders. During a conversation over vegan tacos, we were engaging in conversation about what we can do as a community to ensure that we have equity, transparency, and consistency in the court system. That is where I want to draw your attention to NRS 18.005; there is a whole host of costs that are mentioned in there. When there is a lawsuit, Party A suing Party B, you go to trial, and at the end the judge, in his or her discretion, can award reasonable costs. Reasonable costs are laid out. When we say "reasonable costs," it is possible that a judge could make the determination that they do not want to award any; that is reasonable. The judge could make the determination to not award anything for whatever reason because they do not think whatever you brought forth is reasonable. It is also possible that the judge does not take into consideration certain costs, and therein is where we want to engage in this particular conversation.

Mr. Claggett will have a very in-depth conversation about focus groups and explain that when he goes to trial, very often and very consistently, judges will award reasonable costs for the cost of focus groups. But unfortunately, it is not across the board, and it is not always happening. As attorneys, we have a duty of care, and through that duty of care, we have to utilize every available mechanism to act and protect our client. Focus groups were not always readily available 20 or 30 years ago, and there was not a tool accessible to all attorneys. For the attorneys who are sitting in this Committee, I cannot imagine that anyone here would ever go to trial without engaging at least two or three different focus groups. It is now common practice. It is an expectation from your client. In fact, there have been folks in opposition, and I remind everyone that even those in opposition of this bill, they would never with any reason, allow for a case to go to trial without them utilizing focus groups. It really is an expectation. In my opinion, and Mr. Claggett will speak in-depth to this, you run the risk of exposing yourself as an attorney to liability if you do not utilize every tool available and you expose yourself to being in violation of your professional responsibility in your duty of care to your client.

I will let him get in-depth in that because he really is the subject matter expert, but I just wanted to hit this point, and this is the most important point. The reason focus groups are so important is it allows for people to realize whether or not they have a strong case. Let us assume that Party A is suing Party B, and both engage in a series of focus groups; Party A realizes, I have a really weak case and it is not in my best interest to continue to pursue this matter. Either you will settle and/or simply not do it. You will advise your client this case is not strong. We have done x amount of focus groups; we realize that we are not there. And it will discourage an individual from pursuing that. On the other side of it, it is possible that Party B realizes that Party A has an incredibly strong case. If we go to trial, we are going to spend a lot of money going to trial through experts; we are going to spend a lot of money through court fees; we expose ourselves to a lot more liability if we do not settle. You will encourage people to come to the table and say, Let us sit down and maybe agree to some type of settlement and avoid the very long journey of going to trial. This is better for everybody, particularly the person who was harmed. At the end of the day, we so often focus on the attorneys, but the whole point of going to trial is that somebody was harmed and we are trying to cure that harm.

Through the language in this bill, we are doing three things. First, we are creating a standard where now every judge, when there is a trial and they are talking about reasonable costs, will take it into consideration. They do not have to award anything, but they will now all consistently take the cost of focus groups into consideration. Second, we will modernize the language, because again, maybe 20 or 30 years ago, not everybody was doing focus groups, but any reasonable law firm now before going to trial is doing it. Third, by putting it in here, we are encouraging settlements because again, you are going to remind folks that when you do a focus group, you are going to lay out the very probable outcome of a case. By doing that, you are going to encourage people to come to the table and reach a settlement before going to trial because the most expensive thing is going to trial. With that, if I could send over the presentation now to Las Vegas to our subject matter expert, Mr. Claggett.

Sean Claggett, Private Citizen, Las Vegas, Nevada:
I am an expert in this field. I have conducted over 800 live focus groups in my career, and I have also been part of about 400 big data focus groups. There is a difference between the two, which I will explain shortly. I will start out by talking about the statute, NRS 18.005. The last section that had been added to section 1 is now subsection 18, that talks about computerized legal research. Many years ago that had to be added as a recoverable cost because we started doing discovery or legal research on Westlaw and LexisNexis, and all these expenses were being incurred. Historically, lawyers did the research in books which did not cost anything, but then as it became more efficient, we added that language to the statute to allow for recoverable costs for online legal research.

The same is true with focus groups today. It is the standard of care for a trial lawyer to absolutely do focus groups. To have the jury be your first focus group is malpractice. It falls below the standard of care for your client, and no lawyer should engage in that very dangerous behavior. In Nevada, I know for a fact, because I own Paramount Focus Group as well, both the plaintiff and the defense bar utilize focus groups in basically every single case. Now, the plaintiff bar does use focus groups more regularly, and they can be done for as little as $1,000 for an hour focus group. It is not a huge cost.

One of the issues we have been pushing to get away from is the very large focus groups that historically—and when I am talking about historically, 20 years ago—was the way that focus groups were done for trial. Typically, you do one or two of these: you bring 40 or 50 people together, you have somebody play the plaintiff lawyer and put on the plaintiff's case, you have somebody play the defendant lawyer and put on the defense case, and then you break the 40 or 50 jurors into four or five juries and record their deliberations and see what they say to try to get some idea or data points of what was moving the needle and why they were doing what they were doing. The problem with those types of focus groups is it was not uncommon to be charged $50,000 to $100,000 for those focus groups. Those were certainly very expensive. The technology and the ability to recruit and the number of lawyers and law firms that now have mock courtrooms in their offices is substantial. It is not uncommon now for lawyers and law firms to have mock courtrooms where they are running their focus groups, which drives down the cost. We have also learned over the years that those big focus groups maybe do not drive the value that you are looking for out of them. There is a cheaper way to do it.

More importantly, it is important to do the focus groups early, because when you run your focus groups early, before you file the lawsuit, it avoids litigation both on the part of the plaintiff and the defense because the defense that runs an early focus group, as Senator Flores explained, may realize, We have a lot of exposure. We should do a big push to resolve this case before the plaintiff files a lawsuit. Same with the plaintiffs. I know there are lots of lawsuits that are not brought simply because lawyers do prelitigation focus groups. Now that cost does not get passed on to anybody, but it does save the system money. It does save time; it does save judicial resources; and it allows a person who believes they have a valid claim the ability to be told by their lawyer, who took the time to study the case, to tell them,

Look, this is the problem with your case. In fact, it is such a problem that I do not recommend moving forward with your case. It saves a lot of stress because litigation is stressful for both plaintiff and defendants. The focus groups can prevent that.

The other thing is that everybody is using focus groups now. Because it is the standard of care for lawyers to do focus groups, it makes sense to modify NRS 18.005 to include the language. I do a lot of jury trials in Nevada, and the judges in Nevada across the board, for the most part, are awarding the cost already because they understand that this is the standard of care. It is time that the statute catches up with the reality of the standard of care for lawyers, just as the standard of care for lawyers is to do electronic research and we allow for that recoverable cost. This is another part where we need to modernize NRS 18.005 to allow focus groups to be a specific itemized cost. I think it is also important to remember that the only time NRS 18.005 comes into play is if the case goes to trial and if a party prevails, then they are entitled for the judge to consider the reimbursement of costs. It is not as if this is something that every time a lawyer decides to do a focus group, they are going to be reimbursed.

In fact, when we presented this matter in front of the Senate Committee on Judiciary, one of the senators asked the question, Well, can you manipulate the focus group as the person conducting it? I said, Absolutely, you can, but why would you do that? It would not make any sense because you are the one that is trying to use the data to derive a resolution short of trial. The goal of every single case that we take on is a fair resolution. It is not looking to have a windfall. That is not the goal. The goal is simply to have a just resolution. What is the just resolution? A just resolution is what the average community member thinks the case is worth or if it is worth anything at all. You learn that through focus groups.

I talked about big data focus groups at the beginning. A big data focus group is different than a live focus group. In a live focus group, we typically do ten random community members at a time who will reflect what we believe the jury makeup will be for the given venue. Obviously, it is different in Elko County than it is in Clark County. We will make sure that the live focus groups very closely resemble the makeup of the community in which the trial is being conducted. I do quite a bit of trial work in Elko, and we do focus groups there. They are very helpful for us to understand what we call the "mores" or the "values" of that community so we understand what matters to them. A big data focus group, on the other hand, is not in person, it is done online. With big data focus groups, we are usually doing about 400 or 500 people who will go through an online presentation of the plaintiff and defense case without the lawyers advocating; it is simply the facts. What we are able to obtain is data points of a win rate on how likely it is that the plaintiff is going to win or lose and also the most likely value of the case.

This is something I believe will greatly change the way in which we proceed with litigation in many cases because I know for a fact that we can reduce the number of trials. When the plaintiff and defense lawyers are presenting their cases to a mediator and the mediator takes

those statements and presents them to a big data company to run the data, that will end up resulting in less trials because there is going to be a known resolution point for everybody to work from.

Focus groups really are a way that we reduce the burden on the judicial system, reduce the number of cases that have to be filed, and then reduce the number of cases that are filed that have to go to trial. With this work though, if somebody is not willing to settle and the other side had to expend the money to do the focus groups—remember, the purpose of the focus group is to try to get resolution—but if they cannot resolve the case, because one side is not willing to resolve it, then the end result should be that the prevailing party is entitled to recover those costs because it is the standard of care that the lawyer engaged in the focus groups.

What we are really asking for and the reason why I am very proud of introducing this bill with Senator Flores is that it is modernizing a statute to reflect the standard of care for the legal profession. It is what each one of you sitting on this Committee, if you had a lawsuit, you would want your lawyer conducting focus groups for you. You would want that. Our retainer agreement mandates that the client agree that we be allowed to conduct focus groups because it is the standard of care. It is built into every one of our retainer agreements already.

In fact, I have not had a judge flat-out refuse to award any cost for focus groups. I have had some of them not award all of my costs for focus groups. But again, even by adding this provision—and the judge maintains that discretion completely—if the judge thinks that a party spent too much on focus groups, the judge can say, Well, I will reimburse you x but not y. It obviously stays within the discretion of the judge, which the judge is in the best position to understand the complexity of the case, the work that went into the case, and how much litigation was involved in the case when it comes time to award costs at the end of the case. Remember, this only happens if there is a verdict. I am happy to answer any questions that you may have.

Chair Miller:
Are there any questions from Committee members?

Assemblyman Yurek:
My question is actually a two-part question. It is in the bill in section 1, subsection 18. As an attorney, one of the things I hear, certainly, is the cost of litigation is just so expensive. As we look here, there are 18 that would be delineated here. It seems like, and even from what you have presented today, the catchall that is in subsection 18 that says any other reasonable costs would cover this. I hear what you are saying, that it is the standard of care so we need to add this in there. But if it is covered by this, I am just curious, are we going to continue to add to this list and then increase the cost of litigation over the course of time? Related to that, do we know of any other jurisdictions that perhaps have a catchall like this that are also now, because of this new standard of care, delineating this as an actual expense that should be reimbursable by the prevailing party?

Sean Claggett:
I will start with your last question first. I do not know the other jurisdictions around the country that have that; I have not looked at that so I cannot answer that. As far as adding cost, I do not believe so. If you look at all the expenses that are listed, the idea is to try to encourage resolution. The goal is to have less cases go to trial, and I imagine that there will be additional items that will be added as reimbursable costs. For example, there is going to be artificial intelligence that law firms are using that ultimately will probably greatly reduce the cost of litigation for everybody but will be a cost that should probably be added in as technology increases and changes the way we practice. That is what we are talking about here.

I understand there is this idea that when we presented in front of the Senate, we heard from the opposition, Well, this is just going to greatly increase the cost of litigation. No, it is not because your lawyers are already doing it. The litigants are already incurring this cost. The idea is to pass the cost on to a party who goes to trial and loses. Nevada is one of the greatest states in America when it comes to passing the risk of litigation onto the losing party. Why do we do that? Justice Hardesty recently authored the opinion in the *Capriati Construction Corp., Inc. v. Yahyavi* case, where attorney's fees under the offer of judgment on a contingency basis will be paid by the losing party if it goes to trial and there is an offer of judgment, and the plaintiff does better than that. The reason for this is, we want to encourage resolution. This cost is already being incurred by all litigants. This is the point. What we are saying is, because all litigants are incurring the cost, this should be an itemized cost under the statute so that all the parties know ahead of time that this is something that needs to be included when you are making a decision whether to settle or not because you are going to be on the hook if you do not for the other side's expenses and focus groups.

When we go to mediations, we know the other side has done their focus groups because they are usually presenting us with some of their findings and we are doing the same to the defense. What we are trying to do is really educate each other based on what we found and what you really find at the end of the day.

I am going to use Mr. D. Lee Roberts, Jr. as the example. I believe him to be one of the finest defense attorneys in the country and certainly in Nevada. Mr. Roberts does focus groups. He handles large cases, and Mr. Roberts and I talk all of the time. Mr. Roberts and I just had a case in Reno together and I was able to share my data with him, and we reached a resolution just before trial because we were able to share the data from the focus groups to show the risk and what was going on. Because I was able to do that, we prevented Judge Egan Walker from using his resources for the better part of a week and a half for a trial. That was the positive outcome, and guess who is not paying for my focus groups? The defense did not pay for my focus groups because we resolved the case.

It is not increasing any cost, and everybody needs to dispel themselves with that idea. This cost will be incurred regardless. It is just, if it goes to trial, who should be responsible for paying the cost. It is our belief—and this goes both ways, by the way—this is not just the defendant having to pay the plaintiff's costs. If the defense runs a focus group and prevails, the plaintiff has to pay that cost, which again encourages resolution.

Chair Miller:
Assemblyman Yurek, was your question answered?

Assemblyman Yurek:
Yes, I think so.

Chair Miller:
We have a few other questions, and members are going to ask very concise questions and we would appreciate very concise responses, because everyone is really trying to see how this impracticality works and functions. If we could keep those responses very specific and concise.

Assemblywoman La Rue Hatch:
Like my colleague, I am trying to figure out why this policy is needed. I think we just heard this is already happening. Judges are already awarding these. I really would like to square up. Mr. Claggett, you have mentioned multiple times that the goal of this is to avoid trial. But you have also mentioned multiple times that this does not even go into effect if there is not a trial and a judgment. I would like to know how this bill actually helps at all to avoid trial when this bill is really only about posttrial awarding of fees.

Sean Claggett:
I will be brief with my answer. It is very simple. The cost should be passed on to the nonprevailing party, and we preclude that from happening by doing the focus groups early and both sides understanding the risks that go along with it. Again, all of the costs that you see enumerated in NRS 18.005 are costs that are necessarily incurred because the standard of care for lawyers requires you to do that to get a case to trial, same as focus groups. It is just adding on to that issue. It is not a cost that is not going to be incurred; it is going to be incurred, but resolution of a case prevents the other side from having to pay that. It is built into the settlement, obviously, that both sides figure out what their costs are and figure out what the number is to the client, and that will create a resolution that everybody can live with. I hope I answered your question.

Assemblywoman La Rue Hatch:
I guess what I am just looking for is why we need to change the statute. I do not think I heard that in the answer. If this is already happening, they are already being awarded, and what you are saying are the benefits do not even come into effect in this statute because it is posttrial, why do we need to change statute? That is my question.

Sean Claggett:
The purpose for changing the statute is to make it comply with the standard of care for lawyers and to make sure that all judges are consistent in considering focus groups. It is not a hundred percent consistent right now and we are wanting the judges to be consistent and have guidance. This statute provides guidance for judges, and by adding focus groups as an enumerated issue, it will require the judge to specifically consider it. There is a case from about 20 to 25 years ago that talks about reimbursement for costs for a focus group. At the time, the Supreme Court basically said, Look, at this time, focus groups are not commonly used. That has changed today. Everybody uses focus groups, and what we are trying to do is simply have the statute put into effect so that all the judges have a consistent position moving forward; that they at least need to consider it, and we are not relying on 25-year-old case law to be any form of a guidance for the judges because it is outdated and has not kept up with the reality of what is occurring for lawyers in the community on both sides of the aisle.

Assemblywoman Hardy:
I will not belabor the point of my other two colleagues in their previous questions. I agree. It was mentioned these are built into retainer agreements and so then, if it goes to trial, the judge can see the cost of these focus groups. Then in their discretion, if they felt it was an integral part of the case, they can reward them. My other question is, could you give me an idea of a focus group, what are they looking at, some examples of what you are getting together to go over? The statute mentions jury voir dire, but what are some other focus groups looking at and discussing? How many people are in these groups? What is the range of a low end and a high end of what these would cost? If you could give me some examples so I can understand what they are looking at.

Sean Claggett:
There are about 20 different types of focus groups that can be done depending on the type of case. If you have a product defect case, you may do a focus group on how to make the products safer, which is great for the whole community. You may have, as you get closer to trial, to do voir dire focus groups where you are practicing your jury selection and your opening statement so that you are prepared in front of the jury to make sure that those things are working. You may test out videos of your expert witnesses or of your own client to see if they have credibility. There are a lot of different types of focus groups that can be done. Typically, those focus groups are done in front of ten people. The average cost is between $750 and $1,000 per hour. It is pretty affordable.

The big data focus groups which are typically done once or twice on larger cases—say it is a case that has a value in excess of a million dollars—those types of cases will cost about $25,000 to $30,000, but that is going to include about 400 to 500 participants. The cost per participant is much lower and it allows you to get a lot more data to have a better decision. I also teach law practice management at the William S. Boyd School of Law, University of Nevada, Las Vegas. I teach my students that when you are doing contingency-based work or any type of work for a client, you should try to keep your costs at about 10 percent of the value of the case to stay in line with basic economics. That all goes into effect when you are determining what type of focus groups you are doing and how much you are spending.

If you have a personal injury case and you think it is worth $50,000, well, you cannot really spend a whole lot of money. You may only do one focus group for an hour. That is not a very big cost.

If it is a $10 million case because it is a catastrophic injury, obviously, you could spend quite a bit of money, and people do. Those are the ones with that type of exposure; everybody is running lots of focus groups—the defense, the plaintiff—because everybody needs to know what the true risk and exposure is. I would say that the least I spent for a focus group in a case that has gone to trial is $1,000. The most I have spent on focus groups that have gone to trial has been upwards of $70,000, but that also was a very large case.

Assemblywoman Summers-Armstrong:
By delineating this as standard of care, does this not encourage this type of focus group to be used in all cases, which would then, in turn, be another expense that would have to come out of the client's settlement if they won or lost? If they won, this is another thing on top of copies, calls, postage, and the whole attorney's fees and costs. We have added another thing that is going to reduce what is possible for your client to be able to take home after they have been injured. That is a real concern for me, and I would like to know what your thoughts are.

Sean Claggett:
That is a great question. Actually, it is going to put more money in the client's pocket because the biggest expense that a client will expend is the trial itself. When you have to put a trial on, you have the burden of proof with experts. The average cost for experts, which the statute says, is $1,500 per expert. The reality is the average cost per expert to get them to trial is $10,000 a day. With the limitations, the last trial I did, I had to bring four experts back on different days because we ran out of time. My cost to put on that trial was a quarter million dollars in expert fees between all the experts in a very complex medical malpractice case. The cost of my focus groups was exponentially less than that, so if the case would have settled, the client would have put way more money in their pocket. The idea that we can resolve the case short of trial will save the client tons of money. The most expensive part of any case is the trial because you are required to bring all of these experts to trial, and it is so expensive to put a trial on.

I would suggest to you that, in fact, doing focus groups early and often will save money. Now, if it goes to trial then, yeah, that is the idea of the prevailing party recovering their cost. That is the way it works, and it works currently.

Chair Miller:
Could you give us an example of when a client was rewarded so much more in a settlement because of this? How much more money were they given because of this?

Sean Claggett:
In every single one of my cases, my clients obtained more money. I could not give you specifics as my settlements are confidential.

Chair Miller:
We understand that. We are talking about focus groups and part of a focus group—I am coming from an evaluative world—is to quantify things. It is difficult when we hear every client, every time, all lawyers. Could you give us a specific example?

Sean Claggett:
I can use one example where I believe the value of the case was $2.5 million. We ran a big data focus group, and the value came back less than I believed it to be. I sat down and explained to the client, Look, here is the actual value, it is closer to a lower number. The client understood, and we were able to settle the case in lieu of going to trial. Did it result in the client getting more money? No, but it sure took all the risk away. Other times, like the case I just did up in Reno, we were able to get that case resolved in a very efficient manner just before trial. When I say efficient, I mean, we did not have to spend all that money on experts coming to trial. That was efficient from the client's standpoint. Lawyers are retained for their judgment, and judgment is obtained through knowledge, and you obtain that knowledge from focus groups because lawyers do not get a vote on how the case is going to end; regular folks in the community do. You need to know how that is going to play out and you want your lawyer to have that knowledge. That is why it is the standard of care now.

Assemblyman Orentlicher:
You have indicated how letting the prevailing plaintiff recover can be good for the plaintiff, but I am also wondering, as they are deciding whether to bring the suit or getting advice from their attorney, and now there is this additional cost if they lose because now the defense's focus group fees will be imposed on the plaintiff, that is going to raise the cost of bringing a suit. One of the things we hear a lot is how so many worthy plaintiffs do not get their lawsuits brought because of the high costs of litigation. What about that side of it? Is this going to deter some plaintiffs from bringing a worthy suit because you have now raised the cost of losing?

Sean Claggett:
Really what you are talking about is the offer of judgment statute, which shifts the attorney's fees to the prevailing party and gets their attorney fees paid. When you are talking about the cost of attorney's fees, attorney's fees far exceed any cost that the parties are going to incur for litigation. I would say that it is lawyers like myself and Senator Flores who take contingency cases that provide the key to the courthouse for almost all litigants. The cost of litigation, if you are to pay an attorney hourly, is not affordable; it is not even possible. We do not get paid unless we prevail on the case. From our standpoint, this is a way for us to be able to incur costs that at the end of the day, if we are forced to go to trial and prevail, puts more money in our client's pocket, which is a good thing. The risk of losing at trial is real in Nevada because of our offer of judgment loss. It is not the cost of litigation that is the scary part; it is the attorney's fees that get shifted to the nonprevailing party. The cost for experts will far exceed focus group costs. The cost as far as when you are talking about hierarchy of risk, it is attorney's fees, experts, probably depending on how much they are charging for the

legal research, and then you get to focus groups; it is probably in that type of category. It is much lower on the risk factor totem pole than attorney's fees and expert fees. I hope I answered your question there.

Assemblyman Orentlicher:
I appreciate that there are other fees that might be shifted that are more, but on the margin, you have added an additional cost. The marginal plaintiff who just gets, Okay, we think the odds of winning cover if we lose; here is our estimate. Now, you have added an additional cost to the losing plaintiff. Could that tip the balance on the margin because there are always going to be people at the margin?

Sean Claggett:
I do not know that that would happen. I do not know that there is any part in any litigant that would be like, Well, I am okay with all of the risk of litigation, including attorney's fees, expert fees, legal research, copies, all those other expenses, but if you add in focus groups, I think that is going to tilt me over the edge. All of those other expenses are real, but the focus group allows early and better decisions to be made based upon the facts that you have. It is the only tool that we have as lawyers to make better decisions earlier. All the experts and everything else—the way that the litigation works is you are incurring those expenses in all cases other than medical malpractice much later in the litigation. You are incurring those costs deeper in the litigation. What we are trying to do is use focus groups ahead of time. If they do not work out, then that is when we would have them shift. Again, I do not want to get too far afield and I respect your time here, but I do not believe it is going to cause a person that is on the fence to say, No, I am not going to litigate especially if the attorney that has taken the case says I need to do the focus group to understand your case.

Chair Miller:
Is there anyone who would like to testify in support? [There was no one.] Is there anyone who would like to testify in opposition?

Paul J. Moradkhan, Senior Vice President, Government Affairs, Vegas Chamber:
The Vegas Chamber is opposed to S.B. 252, and I want to clarify and share the Chamber's perspectives on this bill which is that these costs are already recoverable by discretion of the judge. That is in existing state law in our interpretation of the law. If you look at section 1, subsection 18 of the bill, it states, "Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research." We believe it is already allowed and believe this bill is unnecessary. From the Chamber's perspective, we believe this bill will add additional litigation costs. We do not believe it will reduce costs, and we do believe that this type of bill will further add to additional costs for plaintiffs and defendants and, of course, whoever may win or lose. But we do not believe this bill is necessary since the judges can already award this. We appreciate your time and happy to answer any questions.

Misty Grimmer, representing Nevada Resort Association:
We, too, are in opposition of this bill as we were on the Senate side for the same reasons that Mr. Moradkhan mentioned. As several members already mentioned, the judge does have the discretion to award these costs if they believe that these were an important part of the trial and were necessary for the resolution of the case. Even though the bill appears on its face that it is facially neutral, the fact is that the majority of the time private plaintiffs do not end up actually having to pay the costs of the prevailing party. We do feel like it is not necessarily a fair situation even though technically, it appears that way. The previous testifiers suggested that this is a standard of care. The feedback we have gotten from our members is that we actually do not necessarily use a focus group on every single case that we go to. It may be a standard of care from the plaintiff perspective, but from the defense perspective, not necessarily. We would appreciate if the Committee would just keep the law the way that it currently stands. Thank you.

Cheryl Blomstrom, representing Nevada Trucking Association:
As my colleagues have already stated, we also disagree with Senate Bill 252. If the standard of care is currently that you do a focus group, it appears to us that the judges would assume that that is a part of what they would allocate when they do a finding after trial. We think that it is unnecessary, and we think, as Assemblyman Orentlicher said, potentially at risk of raising costs. When you raise costs in a trial situation, insurance costs go up, and they do not just impact the person who is in the suit, they impact an entire industry. For that reason, we oppose Senate Bill 252.

Chair Miller:
Is there anyone else who would like to testify in opposition? [There was no one.] Is there anyone who would like to testify in the neutral position? [There was no one.] I would invite the presenter back to the table for any concluding remarks.

Senator Flores:
I wanted to thank the Committee for your questions, and I wanted to thank you for your time. I want to remind folks the point of costs, the reason we have 17 of them on there, we could eliminate every single line on here and just say "reasonable costs" period. We could make the argument of, Let us not have telecopies or photocopies, long distance travel. But over the course of Nevada history, we have come as a body and said, We want to make sure that we have a minimal standard that everyone is playing by. Over the years, we have added items onto this list because what is reasonable to one party may not be reasonable to a judge. What we are trying to do is to ensure that every single judge, when there is a verdict, every single judge, not just when certain attorneys are present, not just certain judges, but that every single judge take into consideration, because again, a judge has the discretion. We are simply saying because this is a standard of care now, because all of the firms are doing it, we want them to take these costs into consideration.

Second, I am of the mindset that the objective is not to go to trial. Remember, we are trying to make a person who has been harmed whole—that is what we are doing. We keep talking about the attorneys—and I get all that, because that is where the conversation is at—but

a human has been harmed. The sooner we find resolution, the better. In my opinion, if this list of costs had 1,000 things on it, that is a mechanism to ensure that people who are fighting over something are thinking about that and saying, How do I prevent myself from going down a hole that could potentially put me in a scenario where I have to pay for these 1,000 things? Creating this list is to prevent an individual from saying, I am going to just take it all the way because I would rather just not settle, not show good faith. An individual who has been harmed is trying to become whole. By having this list, by ensuring that we have these costs delineated, it ensures that individuals will say, Do we really want to expose ourselves or should we just settle?

By the way, the majority of cases are settled, and I think it is because we have this list. You want individuals to say, I do not want to possibly have to pay all this. That is what you want, because what that means is, I am not putting a human who has been harmed in front of a bunch of human beings; I am not making them retell their story; I am not making them incur all these costs and miss work. Trials are very complex. They are very exhausting, and remember, it is an individual who has been harmed.

The point of cost is to avoid going down that scenario of trial. I think we are benefiting individuals by having a very clear list and reminding folks that if we do go to trial, here is everything you are going to have to pay. It goes the other way really. That is why so often we have settlements. Most of the time attorneys will tell you we were able to settle this, and it is good for the party who has been harmed. That is the whole point, and that is why we came before you today with this bill. We appreciate everybody's time, and I really do appreciate this dialogue, and we will continue the dialogue offline. If there are any additional questions that may come up, both Mr. Claggett and myself will be available to you. Thank you, Madam Chair.

Chair Miller:
I will close the hearing on Senate Bill 252. Our next bill, also sponsored by Senator Flores, is Senate Bill 401. I will now open the hearing on Senate Bill 401. Senator Flores, please begin when you are ready.

Senate Bill 401: Revises provisions relating to punitive damages. (BDR 3-686)

Senator Edgar Flores, Senate District No. 2:
I have with me today Mr. Jamie Cogburn, to whom I will hand over the presentation momentarily, but I wanted to provide some context. *Nevada Revised Statutes* (NRS) 42.010 addresses, in part, exemplary and punitive damages, something that all of you are very familiar with now. I am sure you have had this conversation through other bills. When we talk about punitive damages, it is really covered under NRS 42.005. Most of that is there, but in this context, we are talking about exemplary and punitive damages, when a party who is either under the influence of alcohol or a controlled substance decides to drive a vehicle and, as a proximate cause to that, causes an injury to Party B—the issue we have presently is that under NRS 42.010, there is the possibility of an absurd argument or defense to be made.

Let me go back to that same hypothetical. Party A gets drunk out of their mind or is under the influence of a controlled substance, after that jumps in a vehicle, and causes harm to Party B. Party A in that scenario, under NRS 42.010, could make the argument of saying, Although I was drunk, I did not formulate the intent to drive prior to driving, and because I was blacked-out drunk, I could not formulate the intent of driving after. While that individual may have said they got really drunk and could say, Yes, I drove, there was no intent to do that because I could not maintain intent when I was so drunk or under the influence of a controlled substance, and I did not intend to drive prior. They could make that absurd argument and say, I am not going to be exposed to punitive and exemplary damages, and that is what we are trying to clear up.

I did some legislative history research and went all the way back to 1981 and 1967—Senate Bill 84 of the 61st Session and Senate Bill 157 of the 54th Session. [Bills later correctly identified as Senate Bill 83 of the 61st Session and Senate Bill 198 of the 54th Session]. The reason I went all the way back is because that is the last time we looked at the statute. Senate Bill 84 of the 61st Session specifically dealt in death with DUIs. At the time, there was a shift in the entire country, and as a country, we were in this movement of saying, we really want to punish individuals who are irresponsible and are driving under the influence. At the time, if you go back and read that legislative history in 1981, they were all over the place. They were even talking about forcing folks who were driving under the influence into labor, and they started talking about, Well, wait a minute, are we talking about slavery? There are all these conversations happening about whether or not we can do this and do that.

I mentioned that because the conversation got absorbed into a very complex criminal conversation. What are the penalties? How are we going to address this as a society? In my opinion, NRS 42.010 was overlooked. A very minimal conversation went into it, and I think that is why we have this odd loophole, in my opinion, that we need to clean up. I want to make it abundantly clear that under NRS Chapter 484C, a lot of the criminal conversation is in there. I am not touching any of that. We are not changing anything on the criminal side. We are also not changing anything on the punitive side of NRS 42.005. We are strictly focusing in a very narrow lens on a loophole that I think goes all the way back to 1981 that we want to correct. We, as a society, have agreed that an individual who is drunk and harms somebody else, that irresponsible conduct should be treated differently, that it is not just exposing themselves to the typical damages that we are talking about, but that we really want to make an example out of that person. Not only do we want to punish that person for doing that conduct, we want to make an example out of that person so nobody else takes that same conduct, which is what triggers exemplary and punitive damages.

What I want to do with this bill is to make the language broader and eliminate that loophole by saying an individual who is under the influence of a controlled substance or alcohol, who causes harm to another person after getting in a vehicle, should be exposed to punitive and exemplary damages, period, without ever giving them the opportunity to say, Well, I did not intend to drive. It really is an absurd argument, because if anybody here or a family member of yours was injured by an individual who was under the influence of any substance, and

then that person said, Well, I did not intend to drive though, I think all of you would find that absurd. But it is a loophole that is there now. We want to clean that up. I would like to hand it over to Mr. Cogburn.

Jamie S. Cogburn, President, Nevada Justice Association:
Senator Flores is correct. It is a bizarre loophole in the law. Nevada has the highest percentage of drunk driving deaths in the nation per capita. From 2017 to 2021, there were 406 deaths. This amendment strictly relates to DUI, whether it is alcohol or drug related. As a society, we all agree you should not get behind the wheel of a car and drive, especially nowadays. There are so many taxis, Uber, and Lyft, there really is no excuse. The purpose of striking this specific language, as Senator Flores indicated, is it does not matter what your intent was before you started drinking. The fact is once you start, once you get behind the wheel and you are intoxicated, you are responsible for your actions.

In order to get punitive damages, the court has to allow you to proceed forward with punitive damages. They have to be allowed. Then a jury must award you punitive damages. They must find that you acted with such reckless disregard and that they should set an example for the community that you are hit with punitive damages as a defendant. After that, the trial court must affirm and say, Yes, I still think it is appropriate to have punitive damages. Just because you have the opportunity to get punitive damages does not mean you automatically get them; a jury and a judge will have to approve those. Based upon all those factors, we think this little clarification in the law would benefit Nevada and get us back to going the Nevada way. Thank you.

Chair Miller:
Are there any questions from Committee members?

Assemblyman Orentlicher:
We will have to make this Senator Flores Day in Assembly Committee on Judiciary. I am wondering if it is fair to characterize this as a loophole because you mentioned the baseline, exemplary and punitive damages, is NRS 42.005 in which you have to show some egregious misconduct. But we have singled out DUIs for a lower standard, in fact. If I am driving and I am on my cellphone and injure somebody, no exemplary or punitive damages. If I am speeding, run a stop sign, unless I get into NRS 42.005, no punitive damages. We have actually singled this out for a lower threshold. I do not see it necessarily as a loophole, but just limiting the special singling out. Does that make sense?

Senator Flores:
I appreciate that comment. I do agree with what you are saying, that we have lowered the threshold, because we very much understand that, as a society, no individual prior to taking any controlled substance or drinking is oblivious to the reality that that could lead to reckless conduct. Why I want to eliminate this language is, every single individual should have a plan prior. Any responsible human being who knows that they are about to engage in conduct where they will lose control, that they will be incoherent, that they cannot operate a vehicle, that they cannot do XYZ—everybody does this. I do not know a single individual who does

not make a plan if you have children. I am going to drink. What is my plan with my kids? What is my plan with my friends? What is my plan with getting home? In my opinion, we have agreed to all that, and we have made a whole host of rules on that.

I still believe that this was a loophole even in reducing that standard. I really do believe that it is a loophole because I cannot justify—and this may be a theoretical legal argument that we could go back and forth with—but I do not believe that we should allow for an individual to have that basis of a defense. I never intended to get drunk; that is what happened, and I injured somebody. I do not believe that we should allow for that defense to exist. Now, we may disagree. This room may say no, we do want people to make that argument, but I am posing to you that it is a loophole because I do not think anybody, not in 1981 and I do not think right now, intends for somebody to be able to make that argument particularly right now. Now you may disagree with that. If that is the case, then obviously, we will flesh that out. But I do not think anybody agrees with that, and if you do, then we can engage in that conversation.

Assemblyman Gray:
A technical question you may or may not be able to answer is, the effective date is July of 2023. Will this apply to cases filed or settled after 2023?

Senator Flores:
My understanding is after. It would be after that day, and it is not retroactive, but Legal Counsel can clarify that if I am wrong.

Bradley A. Wilkinson, Committee Counsel:
Section 2 of the bill states that the mandatory provisions of the act apply to all actions pending or filed on or after July 1, 2023.

Assemblywoman Cohen:
I am not familiar with exemplary damages. Can you give us some other examples of where we do have those available in the law?

Jamie Cogburn:
An example of punitive damages could be a DUI case. You have regular compensatory damages which are, Hey, you got hurt in a car crash and the jury awards you $20 because of your medical bills and your pain and suffering. Punitive damages or exemplary damages are purely to punish and send a message to society and to that individual or corporation—Hey, we do not tolerate this as a society. You should be punished for these types of behaviors. You will see it in really bad acts; sometimes you will see it in what they call, defective drug cases, which is where a drug is made by a drug company, and come to find out they knew the drug was defective and would cause some type of injury but they did not tell people, and the jury has the right to then punish that company for not telling someone. One of the big ones right now that just happened is the Dominion and Fox News case. That is punitive because it is defamation. You did an intentional act, and you can be hit with punitive damages.

Assemblywoman Cohen:
To make sure I understand, when we talk about exemplary and punitive damages, are they always the same?

Jamie Cogburn:
Yes.

Chair Miller:
Section 1, subsection 1 says "using alcohol or another substance," and I do not think there is anyone here that questions the effects of alcohol or a certain level of alcohol on driving. However, when it says, "or another substance," that is where it becomes very broad and very gray. We all appreciate that pretty much on every prescription bottle, whatever the prescription is, there is the comment about it causing sleepiness if you are going to be driving or operating big machinery or equipment. When we look at another substance and we know that some of those are what people would identify as illicit or illegal substances, and some of those could also be prescribed and medical substances, where is the line? That prescription may be fine 99 percent of the time, but there is that one morning you did not have breakfast, your blood sugar was low, your blood pressure was low, you did not sleep, and just all kinds of things have occurred—I will also say hormonally there are changes—and then all of a sudden that one day, that one prescription, impacts us and impairs an individual in a different way. Could you speak to that, please?

Senator Flores:
As I said, we may disagree. In the hypothetical you posed, somebody takes medication, they then get in a vehicle, and they cause harm. In that hypothetical, they would argue, I did not realize I was going to drive, it was never my intent, I caused this harm, and that defense would work. You may agree that that is fine. My sincere position is that I do not believe they should have that loophole available to them. Any individual who takes medication—and I think all of us have at some point, maybe because we were hurt, injured, or because we are taking medication now—understands that there is a sincere risk. Either it may have a horrible side effect, or it might make me very drowsy. There is a whole host of side effects to medication and we, as a society, understand that that is the risk we are taking when we take some medication.

I still believe that a responsible human being has a plan, and I did this with my grandparents, who have since passed away. They take medication, sometimes certain things happen, they fall asleep all the time, whatever it was. We, as a family, had a plan. I recognize that not everybody has that opportunity to do that. But my point is, responsible conduct happens prior to you taking the medication, happens prior to you drinking, happens prior to you taking an illegal substance, whatever it is. That is when the responsible conduct occurs. You are supposed to plan for that. Personally, that is my argument. You may agree that in that scenario, you think they should have this defense of saying, I did not intend to drive, I did it, and unfortunately caused a lot of harm, I should not be exposed to this. You may agree with that. Again, we are saying we do not agree with that.

Jamie Cogburn:
I want to add to something Senator Flores is saying. I understand your concern. I think I understand it if they are taking a medication. This statute also says you have to be in violation of the criminal statute, which is for illegal substances. When you reference these other statutes, it is vehicular homicide. You now have to be found guilty of vehicular homicide via DUI, so they went through that whole criminal process. You basically will have a criminal conviction before you get to the punitive damages. In your example, I do not think that is actually contemplated or covered, although I guess it could be, dependent on the circumstances—if you are criminally charged and convicted, then it would be—but I think that is a little different scenario than under most criminal cases that are brought for the DUI violations.

Chair Miller:
I do not want us to get away from the reality that there are people that are on maintenance medication for anxiety or depression, and we are not just talking cholesterol or blood pressure or insulin, and those medications can have a different impact on people. I do not want to put you all on trial right now, but when we say "being responsible," sometimes these are medications that people are using to function and to manage and to be what they would consider responsible with themselves. I want to make sure, because "substance" is a very large and gray area. "Alcohol" is specific and we understand that, but "substance" is pretty large and gray. Maybe I can have Legal jump in here. When we say "substances," which substances would be included or excluded?

Brad Wilkinson:
Basically, it is the substances that are listed in the DUI statute. That would be a controlled substance, alcohol, chemical poison, solvents; that is basically it.

Chair Miller:
Controlled substance, meaning prescribed controlled substances?

Brad Wilkinson:
Yes, that could be a prescription drug or an illegal drug.

Chair Miller:
Thank you. That is what I was getting at, that controlled substances are also prescribed under certain instances.

Jamie Cogburn:
Under NRS 484C.110, it does list the controlled substances as amphetamine, cocaine, cocaine metabolite, heroin, and all the illegal substances we talked about. Then there would be controlled substances that would be covered such as certain painkillers and other things. But you have to reach a certain level, also. There is a certain testing level, whether it is called a metabolite or whatever that level—as we all know for alcohol it is 0.08—for each drug it is different based upon the blood testing that is done. You would have to be over that limit. If you are taking, for example an oxycontin regularly for pain because of your

condition, I think you do have to be aware that, Hey, maybe I should not drive or operate machinery or do different things because I am going to be over the legal limit where I know that I am impaired. I hope that helps clarify some of it.

Chair Miller:
Sure, and amphetamines also are in a lot of prescriptions as well.

Assemblywoman Hardy:
I do not know if you mentioned it, but could you provide the Senate bill number from 1981, if you have that? I was just curious. I do not know if you can answer, but in 42 years, we have not looked at the statute or changed the language. I am just wondering if you know why are we looking now or why it has never been addressed before.

Senator Flores:
I believe it is Senate Bill 84 of the 61st Session [Senate Bill 83 of the 61st Session] from 1981. Before that, I believe it is Senate Bill 157 of the 54th Session [Senate Bill 198 of the 54th Session] from 1967. I also have the minutes that I can forward to the Committee so that you can just look at them. It is a very fascinating read, but you will see that a lot of it focuses so heavily on the criminal context of DUI and not so much on the civil side. In answer to the second question of why we are looking at it now, quite frankly, I had an opportunity to meet with attorneys in the legal community and I personally reached out and said, Is there something I can address, something I can help with? They brought up what we consider a loophole again—some disagree that it is that—and that is really how that conversation happened. It was not necessarily driven by a specific scenario. Other than just anecdotally speaking with attorneys and saying, Look, somebody brought up this defense, it is frustrating, it is a headache.

Obviously, there are a lot of stakeholders in the community, Mothers Against Drunk Driving, et cetera, that we have all had an opportunity to work with, who obviously have a very different perspective and probably agree with us. But my point to that is, it was not driven by one specific case and/or hypothetical that I can give you. It was more of an anecdotal, We have this here, we think it is an issue, we should clean it up.

Chair Miller:
Is there anyone who would like to testify in support? [There was no one.] Is there anyone who would like to testify in opposition? [There was no one.] Is there anyone who would like to testify in the neutral position? [There was no one.]

Senator Flores has waived his final comments. I will close the hearing on Senate Bill 401. I will open it for public comment. [There was none.] Thank you, members, and I will see you all back at 9 a.m. tomorrow morning. This meeting is adjourned [at 10:22 a.m.].

RESPECTFULLY SUBMITTED:

Traci Dory
Committee Secretary

APPROVED BY:

Assemblywoman Brittney Miller, Chair

DATE:

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.