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Judiciary Committee  
December 15, 2009

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[LR226]

The Committee on Judiciary met at 9:00 a.m. on Tuesday, December 15, 2009, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR226. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Scott Lautenbaugh; and Kent Rogert. Senators absent: Brenda Council and Amanda McGill. []

SENATOR ASHFORD: Why don't we get started. Good morning, everyone. My name is Brad Ashford and you are here before the Judiciary Committee, and we have a hearing today on Senator Howard's bill or resolution, LR226. And I would ask Senator Howard to come up. Good morning. [LR226]

SENATOR HOWARD: Good morning. I have to thank all of you hardy folks that came out today. [LR226]

SENATOR ASHFORD: It is very cold out actually. [LR226]

SENATOR HOWARD: You deserve extra credit in class here (laugh). It is very cold. [LR226]

SENATOR ASHFORD: Yes. [LR226]

SENATOR HOWARD: And I'm going to make my opening brief. We have some folks that are going to give us more information. Thank you, Senator Ashford and members of the committee. I should say thank you, Chairman Ashford and members of the committee. For the record, I'm Senator Gwen Howard, H-o-w-a-r-d, and I represent District 9. LR226 was created to study the continuing liability of the Nebraska Hospital-Medical Liability Act. Introduced in 1976, the act was intended to prevent doctors and hospitals from liability for medical negligence. Included in the act were

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provisions restricting the damages available to patients harmed by medical mistakes. However, in the last three decades the Legislature has not paused to examine whether that Hospital-Medical Liability Act continues to serve in the best interest of Nebraskans and healthcare providers. My goal when LR226 was introduced was to begin a dialogue about the real world impact of the medical malpractice cap and the jury restriction. Essential to that discussion are questions of who bears the burden of costs of medical negligence and who should bear the burden as well as how the cap has kept pace with inflation and the impact the act has had on the business of insurance. I've spoken with parents, doctors, lawyers, and community leaders about this issue, and it is my hope that all of these citizens will be able to provide the committee and the Legislature with a clear picture of what this law means to our state. I'm going to give other folks the opportunity, folks that have had experience and have more legal knowledge certainly than I have to come up and speak to you. [LR226]

SENATOR ASHFORD: Thank you, Senator Howard. Any questions of Gwen? Seeing none, thank you. [LR226]

SENATOR HOWARD: All right. Thank you. Thank you. [LR226]

SENATOR ASHFORD: Mr. Lindsay. Before we get started, we normally have a light system that we use during the session, but we're not going to do that today. We would ask that you keep your testimony to around five or six minutes, but we won't be under any strict rules. John. [LR226]

JOHN LINDSAY: Chairman Ashford, members of the committee, for the record my name is John Lindsay, appearing as a registered lobbyist on behalf of the Nebraska Association of Trial Attorneys. I think as my friend David Buntain noted a little bit earlier, I may need the hook, Mr. Chairman, to get me off this once I get started talking. [LR226]

SENATOR ASHFORD: How long do you plan to talk (laugh)? [LR226]

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JOHN LINDSAY: The Nebraska Medical-Hospital Liability Act was passed in 1976. At the time it was passed, it was passed in response to a perceived crisis in obtaining medical malpractice insurance. Over the years, and it was passed within that environment of trying to react to premium levels, accessibility, those types of things. And it's been reviewed occasionally. Bills would come in to eliminate the cap that was included in that bill or to raise the cap that was included to make other changes. Most of the changes that have occurred over the years have been to add, make sure that different parties are covered by the act, whether that's employees of medical providers, those kinds of changes. When Senator Howard approached me about this with her idea that it should be looked at from...that we should look at the act from the perspective of the persons who have been harmed by medical errors, and it was I thought kind of a unique approach. While we've talked over the years about the impact the cap might have, I don't know that we've really looked at what the different parts of the act have upon those who have suffered from negligence of a medical provider. And that I think is a unique sort of approach. I'm just going to give you an overview of I think some of those areas. There will be others that will follow that will expound upon those, but the first thing that should be looked at is the limitation on damages and whether that has unfairly shifted the cost of medical negligence to other payers. Remember that if someone is badly injured by a medical mistake and that's going to result in future medical care that sometimes extends into the millions, the fact that we have a cap in place doesn't make that future medical care go away. That still exists. It simply becomes a question of who pays for it. And I think you'll hear from one of the witnesses to follow that who pays for that is the state. It gets shifted to Medicaid, at least in some circumstances, and the question is whether that is something that is state policy with which we agree. The second is that Senator Howard wanted to look at the impact on the lives of those whose damages exceeded the cap. And again, I'm not in a position to talk about that, but there are those here who can. The third issue is whether the cap on damages has kept pace with inflation and especially with medical inflation. We all know medical inflation, I think that's what all the yelling going on right now at the Capitol in

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Washington is talking about the increase in cost in medicine...in medical care, excuse me. And if that's the case, you have to look at whether those caps on damages have maintained pace. I will tell you that the cap has been increased from \$500,000 in 1984 to \$1 million; in 1992 to \$1.25 million; and in 2003 to \$1.75 million. So at least if we look at since '92 over the past 17 years it has been increased once. I suspect that medical cost inflation over the past 17 years has greatly exceeded the amount of that increase. And finally whether the limitation on damages provides an unfair negotiating leverage for the insurance carriers when dealing with those medical malpractice cases. If an individual who has been harmed has a case that is going to approach or exceed that \$1.75 million limit, the carrier has no downside in taking that to trial because even if damages were found to be millions, they're limited to \$1.75 million. That means that when you're negotiating settlements to try to keep cases from going to trial it gives additional leverage to the carrier in trying to do that. There's other aspects of the bill that I won't discuss that...of the act, excuse me, involving the fund, what the actual amount of insurance is, those types of things. But that's kind of an overview I think of what Senator Howard was looking at, and again, looking at it from the perspective of those who are being impacted by it. And I'd urge the committee to look for those types of things, those types of changes in the act that might...that even if the consensus of the Legislature is we need caps, we need a liability act, are there ways to make that act more fair to the citizens of Nebraska who have the unfortunate experience of being harmed? With that, I'd be happy to answer any questions. [LR226]

SENATOR ASHFORD: Any questions of John? Yes, Senator Coash. And I'd like to introduce my colleagues: Senator Coash from Lincoln; and Senator Christensen is here and Senator Lautenbaugh; Senator Rogert; Senator Lathrop; and I believe...I'm not sure whether Senator Council is coming later...no, she won't be here today. But with that, any questions of John? Yes, Senator Coash. [LR226]

SENATOR COASH: Thanks, John. Just a quick question. You didn't say in your opening who are you representing today? [LR226]

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JOHN LINDSAY: Nebraska Association of Trial Attorneys. [LR226]

SENATOR COASH: Okay, thank you. [LR226]

SENATOR ASHFORD: How many, John, just out of...and I could find this out myself I guess, but how many states have caps? Do you know? [LR226]

JOHN LINDSAY: It is limited. I believe less than five... [LR226]

SENATOR ASHFORD: Ten? [LR226]

JOHN LINDSAY: ...but I can get that. It's a very limited number. And there's some...when you talk about caps, ours is a cap on damages overall. There are states that have caps on noneconomic damages, which is a...well, actually a significantly different cap. And I don't have that number but I can get it. [LR226]

SENATOR ASHFORD: This is an overall...we have an overall limit or cap on what the award can be overall. [LR226]

JOHN LINDSAY: Right, right. [LR226]

SENATOR ASHFORD: And you're not sure how that fits into other states. [LR226]

JOHN LINDSAY: Well, I know Indiana had a similar...is a similar cap, but I don't know which states have overall caps. [LR226]

SENATOR ASHFORD: Okay. All right. Good. Okay. Thanks. Thanks, John. Any other...how many testifiers do we have, come on up, do we have today? Okay. [LR226]

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DAVID GEIER: My name is David Geier, G-e-i-e-r. My address is 1141 H here in Lincoln. I'm a lawyer, member of NATA. I guess I'm testifying on behalf of myself and also here as a representative of NATA. I've been representing plaintiffs, that is patients in medical malpractice cases for about 25 years. And I've had to work with this law basically the entire time. There are a few aspects of the law that I think are important for all of us to understand that would help with evaluation of the present issues. First of all, John Lindsay alluded to the fact that there is an interplay in Nebraska between the Excess Liability Fund and the insurance industry itself. Actually, we have two layers of coverage in Nebraska. Right now the first \$500,000 of insurance coverage for physicians and other covered providers comes from a private insurance company and then the next \$1,250,000 is provided by the Excess Liability Fund. Excess Liability Fund is what the state of Nebraska DAS calls a nonmajor enterprise fund in the annual financial reports. It's basically a trust fund that is administered by the Department of Insurance. That fund then provides the assets from which claims above \$500,000 are paid. Today that fund is administered by contract with a firm from Omaha. They're experienced insurance people and they administer the fund, and they work with claimants who have claims against the fund. I think they're trying to run it as if it is an insurance company. They're using an insurance model for administering the fund. That means they're trying to maintain a base of assets and properly evaluate claims and risks, try to run it in a sensible fashion instead of just a bank account from which checks are written. The financial statement of the state from '08, which is about a year ago--this year's financial report I don't think is out yet--this is dated December 24 of '08, looks as if the fund had about \$33 million of unrestricted assets, \$33 million in the bank unrestricted, meaning not reserved for potential claims, not set aside to pay some known claim or some unpaid bill. It's just money sitting in an investment account. Now that was before the market changed. They have a lot of money invested through the state investment funds and so the value of that may have been affected by the market change. But nevertheless, my point is the Excess Liability Fund has accumulated quite a bit of money. The fund gets its money from surcharges imposed on healthcare providers. So a physician buys an insurance policy from Midwest Medical Insurance,

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one of the carriers. They buy a \$500,000 policy. Then they pay to the fund 35 percent surcharge on top of what they're paying to the insurance company. The fund then accumulates that money and that's where they have the funds that they have set aside for payment of claims. Near as I can tell from the latest report I can get my hands on, the fund is paying or contributing to the payment of about 25 claims a year in recent years. Now the question in my mind is whether or not the working of this law has been to the benefit of healthcare in Nebraska. That's really I think the issue. I think the idea behind a lid law in general is we want to be sure that we protect the ability of the public to be well served by health professionals. This law, in the early years, the fund reported payments on about 6, 8 claims per year. That's in the early years. In recent years, it's up to about 25 per year. In the early years, the claims for which the fund made payments averaged about \$200,000. That's how much the fund was contributing on top of what the insurance companies were paying. In recent years, the fund is contributing an average of about \$380,000. So the number of claims, despite this law, the number of claims has gone up nearly triple. The amount paid by the fund has nearly doubled. Now I don't know what this means. Part of the problem with understanding the workings of this law is we have such an absence of fact. We don't know what's going on behind the scenes. We don't really know how many times physicians are accused of committing malpractice, how many times the accusation is false or has no validity or is frivolous. We just don't know that because the information is not available to the public. Go back a step. When this law was enacted, it represents a trade-off between the public and the medical profession. And that is the public surrenders its right to have a fair jury trial to determine the true amount of damage that they may have suffered. They surrendered that right in exchange for what? There's a lid now. A jury could decide, as they did in the case you're going to hear about today, that the amount of damages that an individual suffered was many millions of dollars. But this law says, well, tough luck. You can only get this much. What did the public get in exchange for that? We don't know. Are we better served medically because of this law? Are physicians better off medically because of this law? It appears that the cost of insurance to physicians, hospitals has not been held down by this law, but it's hard to know that. We can't know for sure. The

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state of Missouri Insurance Department issues an annual report on medical malpractice, and I have a copy of it here. It's about 225 pages long. That's only on medical malpractice insurance. In Missouri, they enacted a lid law about five years ago. The premium for physicians dropped in the first two or three years after that law went into effect. The profits to the insurance companies skyrocketed. The insurance company profits doubled or tripled while insurance premiums dropped by about 10 percent in reaction to that law. The number of lawsuits, the number of claims in Missouri stayed about the same. There was a spike just before the law went into effect, but then afterwards it came right back down to where it was before. So the level of claims, the level of the number of patients believing that they were malserved and entitled to malpractice hasn't changed in Missouri. What's changed? Insurance company profits have gone way up. What's happened in Nebraska? We don't know because we don't have access to that information. What we have to do in Nebraska is deal with this two-step process. We have to negotiate a claim with an insurance company and then also with the Excess Liability Fund. Resolution of the claims is incredibly complex and results in some claimants not getting what one might objectively believe they should get. A second consequence of the law is that having the lid means that it automatically caps everybody's ambitions in these cases. No case is worth the lid or more. Every case is worth less than the lid no matter what happened. The insurance company, through their lawyers, will always take the position, look, if you think it's worth that much, go ahead. Take your chances in front of the jury. And most people aren't willing to do that. Once in a while a case comes along. But it's extremely rare that anybody has the courage to go face a jury when they're confronted with the risk of trial in these cases. So one consequence of the lid law has been that the resolution of claims has become more complicated and people have had to settle for much less than they believe objectively that they might have coming. That's about all I have in the way of prepared remarks. If anybody has any questions, I'll be happy to answer them. Otherwise, I'll get out of the way. [LR226]

SENATOR ASHFORD: Any questions? Yes, Senator Lathrop. [LR226]

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SENATOR LATHROP: I might just ask a few, and I appreciate the fact that you're here because you have some familiarity with the topic obviously. The one thing that you didn't discuss, and I appreciate the background on the fact that the docs buy the insurance to cover the first \$500,000 and then there's a surcharge into this \$33 million fund that the balance is paid from. It probably makes insurance a little more affordable for the doctors I would presume with the cap. But the consequence to the state, I'd like to talk about that. If a case...and we'll take a young person, a very young person, maybe even a birth injury where there is an event that has left the child brain injured. Those medical bills...the medical bills alone, not general damages or pain and suffering or loss of enjoyment of life, but the medical bills can be in the millions. Am I right? [LR226]

DAVID GEIER: No doubt. And that's really one of the issues that this law doesn't address. [LR226]

SENATOR LATHROP: In fact, when you cap damages, you don't discourage frivolous claims because small claims fall within the cap and they're paid, whether they're...if they're frivolous, they can go away. But if they are small claims, small claims get paid 100 percent. It's the significant claims involving brain injuries, spinal cord injuries, things that are catastrophic injuries to the patient are only partially compensated. [LR226]

DAVID GEIER: That's right. And as a matter of fact, you could say that that's kind of a perverse effect is that those who are injured the worst are the most adversely affected by this law. So the law says, well, too bad. Really that's what this Legislature has said to these people--too bad. [LR226]

SENATOR LATHROP: The consequence has been the advent of Medicaid set asides. Am I right? Or a special needs trust. [LR226]

DAVID GEIER: We're heading there. We're heading toward Medicare/Medicaid set

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asides. In this area, that's coming. That is some of the money has to be set aside and preserved for future medical bills. [LR226]

SENATOR LATHROP: And just for the benefit of people who don't do this work so that they understand who picks up the difference in those cases where the medical expenses exceed \$1.7 million, and they are the most catastrophic injuries, essentially what happens is if a case resolves for the cap, that money is set into a trust to cover the expenses that aren't covered by Medicaid, and then Medicaid starts picking up the bills. Do they not? [LR226]

DAVID GEIER: Yes, that's right. And what we're using now is what's called a special needs trust. In a case of somebody who is totally disabled, a special needs trust then sets the money aside and then upon the death of that person, if any money is left over, the state gets it back. But in the meantime, the taxpayers are paying the bills. [LR226]

SENATOR LATHROP: And that really is who picks up because if you have Blue Cross and there's a million-dollar lifetime cap, for example, they exhaust the million dollars and families have no place to turn to but Medicaid. [LR226]

DAVID GEIER: That's right. [LR226]

SENATOR LATHROP: And so to the extent that we have people whose damages exceed \$1.7 million whose medical care exceeds \$1.7 million, essentially what we've said in this bargain that you've talked about with this legislation is the people of the state of Nebraska are going to subsidize the careless doctors in the cases of the most catastrophic injury. [LR226]

DAVID GEIER: That's exactly what's happening. And I can show you examples in Nebraska legal history of situations where people who were injured otherwise, in other circumstances were fully compensated. This past summer a jury in Platte County, not

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one of the more liberal counties in Nebraska, awarded a farmer a little over \$4 million. He was injured because of the failure of a piece of machinery. Ammonia caused him to be legally blind, lung damage, totally disabled. Now that farmer lost earning capacity, income, medical expenses. That jury in Platte County decided that his losses, which were those economic elements in his losses, he should be awarded \$4 million. If that farmer had been injured by a physician in surgery with the same consequences, that farmer would have been entitled to recover no more than \$1,750,000. Because it was a machinery accident, he was awarded...because a jury decided, he was awarded the full amount of his damages. In other words, the people of the state voting in the jury box decided to do this, not a political decision, but a decision based upon the law and the rules that apply to that injured man. Now that's the trade-off that has been negotiated in this body and that is juries can't do this anymore. We've made a political decision. This is what it shall be. And the consequence then is the taxpayers pay the bill, period.

[LR226]

SENATOR LATHROP: Do you have any idea how many claims are paid each year that would exceed the cap if we had no cap? [LR226]

DAVID GEIER: No. No way to find that out. That information is proprietary with insurance carriers. The state Insurance Department probably has some access to some information, but they don't publish it, unlike Missouri where you can find out virtually anything--number of claims, nature of claims, profitability of the insurance lines, everything. Everything is all out on the table in Missouri in that 225-page report. But we can't find out anything here. And it's not me; it's not the public; it's you. Lawmakers are making these laws without any facts to go on. [LR226]

SENATOR LATHROP: Thank you. [LR226]

SENATOR ASHFORD: I'd like to follow up just a bit on this information gathering issue. And I think it is an important issue. I think in Minnesota also the public has access to

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records regarding claims and amounts. And I would guess there are other states as well that have that. I'm not sure which ones. [LR226]

DAVID GEIER: Yeah. I found out about Missouri by accident. [LR226]

SENATOR ASHFORD: Okay. Well, I think in Minnesota there is information made available, and I think that it goes to the issue of choice of physicians, too, there. I mean it's the idea that it's a consumer protection issue in Minnesota. And actually was I believe, I may be wrong, but part of Governor Pawlenty's idea was is the more information that's out there on medical care to the public, the public will make informed decisions about their own care and that that was an overriding public policy consideration. And I assume you would agree with that. [LR226]

DAVID GEIER: Oh, I agree totally with that. And again, I think that it's the more information the public has and especially again the more information this body has the more intelligent decisions can be made. Now in defense of physicians, there are a lot of misunderstandings. There are a lot of things that are not clear. A lot of bad things happen that are nobody's fault. So you got to be careful about this. But nevertheless... [LR226]

SENATOR ASHFORD: Right. But it's worth the discussion because my...a lot of what we're talking about in Washington today is about consumer choice and the ability of individuals to make informed decisions about their own healthcare and cost. And those sorts of issues, public disclosure, disclosure of information is, I mean generally in my view, relatively helpful in making those kinds of. [LR226]

DAVID GEIER: We all make better decisions if we know what we're doing. [LR226]

SENATOR ASHFORD: Right. [LR226]

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DAVID GEIER: You know, you can choose which loaf of bread to buy because you know how much it costs and what the ingredients are on the label. You have no idea what you're buying when it comes to healthcare. Now, and again, I'm going to go back to the responsibility of this body. This body set up this law that said there shall be a \$500,000 private insurance coverage and then \$1,250,000 covered by the Excess Liability Fund. Does this body have any idea what the Excess Liability Fund is doing with that money, that \$30 million sitting in the bank over there? Does this body have any idea how this plan should be administered? That's... [LR226]

SENATOR ASHFORD: You're telling us we don't so maybe we probably don't. But, no, don't go away. I want to ask you a couple more questions because it's in intriguing issue. On the healthcare reform front, for example, the cost of insurance or the cost of healthcare, underlying costs involved in obtaining healthcare is obviously one of the big issues we're debating in Congress. But...and the cost of a premium to...I understand and Senator Lathrop mentioned that physicians may pay a lower premium here. I don't know that. They may. I assume that caps have something to do with premiums. I don't...someone may talk to that issue, but from the standpoint of the citizen who buys a health insurance policy or an employer who purchases health insurance policy for their employees, I wonder what the relationship is between that cost and the lid laws in various states. For example, I mean the cost of insurance here I wonder if it varies at all because we have a lid law regarding or caps regarding medical malpractice. [LR226]

DAVID GEIER: It's not just the cost but also accessibility, availability. Nebraska still has a lot of underserved areas. Has the lid law then brought us service? [LR226]

SENATOR ASHFORD: But what I'm getting at is I wonder, I mean that's why we have a cap law, I guess, is because of...is cost. [LR226]

DAVID GEIER: We thought it would hold down cost. We thought it would give us better care. [LR226]

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SENATOR ASHFORD: But I wonder if it holds down the cost of a health insurance policy that I would purchase. [LR226]

DAVID GEIER: Yeah, somebody may have. I don't have that information, Senator--somebody might have. [LR226]

SENATOR ASHFORD: Because my guess would be it doesn't. [LR226]

DAVID GEIER: Sure. I think that's... [LR226]

SENATOR ASHFORD: My guess would be that the cost of an insurance policy here in Nebraska is very similar to the cost of an insurance policy in Iowa or Minnesota. [LR226]

DAVID GEIER: The one statistic I know about is this: That if you look at...figure it this way. Malpractice insurance is a form of casualty insurance. Year in, year out over long periods of time the actual cost of claims and the premium dollars tend to kind of come together if there's a real competitive market. So you know how much is being paid out in claims is roughly equal to how much they're collecting in premiums. And they hope to make up the difference with their investment income. So if you look at national statistics, malpractice insurance across the board, doctors, hospitals, everybody in the nation is 1 or 2 percent of the total healthcare bill in America. That's it--1 or 2 percent for the premiums of the insurance. Now is it likely that your Blue Cross coverage is going to be materially lower if the malpractice insurance premium is reduced somewhat below that because of a lid law? No. It's not likely at all. [LR226]

SENATOR ASHFORD: Well, that's...I don't think I would... [LR226]

DAVID GEIER: Blue Cross is going to (inaudible). [LR226]

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SENATOR ASHFORD: Maybe someone...that's the question I have: How does just the average citizen who has an insurance policy, I wonder if this has much impact. [LR226]

DAVID GEIER: It's unlikely it has any impact at all, but healthcare economists might have the answer. But to me, just based on statistics that we get, no, it has no effect whatsoever. The cost of health insurance is driven by other factors, not malpractice premiums. That's just plain and simple, at least that's my conclusion from what I can figure. [LR226]

SENATOR ASHFORD: So the reason for the law in the first place I think was to accessibility of physicians. Wasn't that the major, and cost. [LR226]

DAVID GEIER: Cost, yeah. We want to protect healthcare. [LR226]

SENATOR ASHFORD: But we still have underserved areas of the state. [LR226]

DAVID GEIER: We have underserved areas and high-cost health insurance. [LR226]

SENATOR ASHFORD: So what is the... [LR226]

DAVID GEIER: And \$30 million in the excess bank account. [LR226]

SENATOR ASHFORD: So what is the reason for the lid law? [LR226]

DAVID GEIER: What have we accomplished? We've got somebody who is... [LR226]

SENATOR ASHFORD: Is that what you're asking--what is the reason for the lid law then? [LR226]

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DAVID GEIER: Well, we've got somebody who is horribly injured who cannot recover what a jury thinks they should get and is instead having their bills paid by the taxpayers. [LR226]

SENATOR ASHFORD: Right, right. Do you know how many states have...don't have a lid law? [LR226]

DAVID GEIER: No, I don't. I haven't done a nationwide search on that. I do know that a number of courts have said these laws are unconstitutional. Some other courts have said it's okay. There's a lot of variation around the country. Nebraska's hard cap is one of the few and that is...we call it a hard cap because it caps everything. So if you have \$10 million of medical expenses and nothing else, you're still... [LR226]

SENATOR ASHFORD: Okay. And I guess my last question is mainly because of this debate in Washington and what's being said is that this bill or whatever the Senate bill or the House bill is inadequate because it doesn't have tort reform in it. And your suggestion is that that has so very little to do with any of the issues they're discussing that it really...there's no reason to have...it shouldn't be in. What effect does it have on our general healthcare coverage? [LR226]

DAVID GEIER: Well, again, this is me personally now. I haven't, you know... [LR226]

SENATOR ASHFORD: Yeah. You're the only guy up here. [LR226]

DAVID GEIER: (Laugh) No, I think it has zero impact. I think it's strictly for the purpose of appeasing some people who have an interest in it. It's not going to change the cost of healthcare. We hear about physicians saying that they perform a lot of unnecessary tests because they're afraid of being sued. If in fact the objective is to eliminate all unnecessary testing, then I suppose we should just say there shall be no lawsuits for malpractice, period. If that's the case, then, you know, because then we would eliminate

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that risk and that fear. I don't think anybody wants to go that far. But the fact is, and here again we delve into this area where there's no facts to go on. We hear these anecdotes. Well, I ordered a test that I didn't think was necessary. Well, physicians being scientists don't perform a scientific study of this topic. There's no science behind it. There's no real data behind it. It's just anecdote. Well, I heard somebody say that. Does that mean they all do it? I don't think Blue Cross willingly pays for unnecessary tests. [LR226]

SENATOR ASHFORD: Okay. I appreciate your comments. Thanks. Any other testifiers? Yes, ma'am. [LR226]

LISA GOURLEY: (Exhibit 1) Hi. My name is Lisa Gourley, G-o-u-r-l-e-y, and I'm here today on behalf of my son Colin Gourley. [LR226]

SENATOR ASHFORD: Sometimes these hearings are a little too formal. We're not anywhere near as formal as we look. So take your time and... [LR226]

LISA GOURLEY: My son Colin suffered severe brain damage at birth due to medical malpractice. After a three-week trial, a jury found the doctor and her group negligent of medical malpractice and awarded Colin compensation for \$5.6 million. After a ten-year legal battle, the verdict was reduced 80 percent by the Nebraska Supreme Court because of a hard cap in Nebraska, leaving Colin with less than 10 percent of what he would need to care for him over a lifetime. Colin's projected life care plan would cost \$12.4 million. And I can submit that into evidence for you. The neurological damage Colin suffered continues to impact every aspect of his life. Despite eight painful orthopedic surgeries and years of physical and occupational therapy sessions, he still cannot walk independently. Colin is mainstreamed in the 10th grade at our local public school in Elkhorn, although he currently learns at a preschool to kindergarten level. Despite eye muscle surgery to address permanent optical nerve damage, he remains visually impaired, just short of being legally blind and has little likelihood of ever being able to see better than he is now. When Colin was five days old, the doctors initially told

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us most of the children with this severe injury die within the first year of life due to complications. Colin has definitely beaten the odds and it's because of the special care he has received. It didn't come easy and we have had to fight for many services along the way. Colin will always require full-time care for the rest of his life and will not be able to financially support himself. He has been denied medical coverage because of his preexisting condition and relies on governmental programs like Medicaid and the medically handicap children's program or children's waiver for services. Unfortunately, each year that goes by more and more of the needed services have been cut from respite care to medical services and medical equipment. We are very concerned with the future and how he will be affected, especially when we're gone. He has come so far and will only regress without the needed services and programs. I don't believe the Nebraska taxpayers would have agreed to sign on to this \$12.4 million price tag had they known that the Nebraska Medical Liability Fund, the Excess Fund, had over \$60 million in it to pay the claim at the time of our case. The financial responsibility should fall on the negligent party, not on the Nebraska taxpayer and our family. There was enough money in the Excess Fund to pay for the damages. But because of the Nebraska medical malpractice cap, they were let off the hook. There have only been three cases in 33 years since the Nebraska Medical Liabilities Act was enacted to receive verdicts over the cap. Nebraska has very conservative juries. It's also important for everyone to realize that a large percentage of any money recovered in a medical malpractice case, especially catastrophic cases like Colin's, the money recovered is recirculated right back to the medical community in forms of surgeries, walkers, wheelchairs, rehabilitation, equipment, monitors, braces, and ongoing specialized care. By having a total cap on damages, you are taking away their ability to receive needed medical care and affecting their quality of life. In my eyes, this is unconstitutional. And you had asked the question on what states have a hard cap. There are three states in the country: Nebraska, Indiana, and Virginia are the only three states that have this hard cap. I would also like to submit a few items, excerpts from the briefs on the constitutionality of the cap that were used in our case. And it goes over, you know, some of the issues of, you know, taking away your right through jury trial and just some

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of the different issues on constitutionality. Do you have any other questions? [LR226]

SENATOR ASHFORD: Well, I'm not sure. We might. Do we have any questions? The \$12 million, was that the medical care, anticipated medical care, projected care? [LR226]

LISA GOURLEY: It was medical care and on services. And this didn't even address... [LR226]

SENATOR ASHFORD: The other issues. This was just the... [LR226]

LISA GOURLEY: ...the noneconomic issues. [LR226]

SENATOR ASHFORD: So the \$12 million was economic. [LR226]

LISA GOURLEY: Right. [LR226]

SENATOR ASHFORD: Okay. Thanks. Thanks for coming. [LR226]

LISA GOURLEY: All right. Thank you. [LR226]

SENATOR ASHFORD: And we will take the information that you have so. Any other testifiers? [LR226]

MICHAEL GOURLEY: Good morning. My name is Mike Gourley, Colin's father. Just I've got some prepared comments and some other comments I'd like to make. Five years ago the Supreme Court here in Nebraska condemned my son Colin to a life of poverty and struggle. (Crying) This is kind of hard. His only offense is cerebral palsy caused by medical malpractice. At the time, the Omaha World-Herald called halfheartedly to reform our heinous system which locked medical malpractice victims to subsidized

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medical malpractice premiums. If it is just for the state to subsidize malpractice premiums, why don't we all pay for it? Why is the subsidy paid only by the persons who have been hurt the worst? A jury found that \$5 million would be needed for Colin's needs. That does not include any amount for pain and suffering or so-called soft or noneconomic damages. He received only about a quarter of that amount. Our family has already spent more and with insurance much more than that on his care and he's now 16. We Nebraskans are careful with hard-earned money. Since 1977 there have only been three cases in which the jurors have awarded amounts greater than the cap in medical malpractice act. In Colin's case, we asked the Supreme Court to leave in place the part of the act that protected doctors from having to pay higher premiums, but to strike down the part that prohibited awarding what a jury thought was right. The evidence showed that if this were done premiums would stay low and victims would be fully compensated. The Supreme Court said no. What happens to victims doesn't matter. If only Colin had been a bank, he might have been better off. In the Depression, the Legislature passed a statute limiting the ability of banks to foreclose on family farms. The banks complained. In a 1938 case, the Supreme Court held the statute unconstitutional because it limited the ability of the banks to get a full remedy. When the Supreme Court ruled that it was right for the Legislature to preclude Colin from getting a full remedy, it didn't even mention that 1938 case with the banks. Pardon me if I feel that the content of Colin's pocket was more important than the justice of his cause. Effectively Colin will be taxed over \$4 million to buy any benefits that the Medical Malpractice Act secures. The evidence in his case showed that the same benefit could be bought by adding about 17 cents to the cost of an average visit to the doctor. We can and should trust ourselves as jurors to award amounts that are fair. We can and should insist that those amounts be paid in full. We need to end this system in which victims are not made whole. If we feel the need to subsidize malpractice premiums, we each should pay for it. We should not tolerate a system in which Colin pays for everyone. And with that, I'd like to go into a little bit, having read the legislative history when the bill was passed, the bill was put on...was written up and put into committees, as it should be, and it went through the Health and Human Services Committee. And they took the bill

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back and said, no, you can't put this law into effect. You cannot cap economic damages. The senator that proposed the bill did not update and change the bill. He took his original bill and put it on the back of a meat retailing bill and through procedure got it voted on without it being argued on the floor. So your previous legislative body never really discussed this cap that we have or the act that we have in place now and never debated it. And it was put into law and then the effects of that are evident in our case, in Colin's case. Having said, you know, with that, I think it's bad law. I don't think intelligent people ever discussed it. And the people that did look at it said it shouldn't be put into effect the way it is in effect currently. Another issue that I thought of when you were asking questions of the gentleman, the lawyer, was the ability for citizens to be informed and to be able to go and research doctors and see what, you know, what are good doctors, you know, has this doctor had any problems? Should I go see this doctor? Should I see this doctor? At the conclusion of Colin's case after the Supreme Court made their ruling, we went down to the Health and Human Services Department to file a complaint against the doctor. She was obviously found negligent and that was upheld by the Supreme Court that she was negligent. And we thought that there should be something on her license that said she's committed malpractice before and (inaudible) file a complaint with the Health and Human Services Department. They reviewed that, all the information. We took all the court information and they essentially just threw it out. If you look at her public record today, there is no mark. There is nothing on her record that says that she was ever disciplined, that she's ever had a problem. The other thing, while that was pending in the Health and Human Services Department, she was appointed to a medical review board while her license was under review, which I think is very wrong. Something is wrong with this system where a doctor has obviously committed medical malpractice, it's proven, it's upheld, and there's no way for the public to go see that she has...that there's any problem. That's all I have. [LR226]

SENATOR ASHFORD: Thanks, Mr. Gourley. Any questions of Mr. Gourley? [LR226]

SENATOR LATHROP: Maybe just one clarification if I can. You testified about the

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verdict your son received and that was in the Douglas County District Court. And your case challenged the constitutionality of the cap and when you say the Supreme Court took something away from you, what the Supreme Court did was sustain the constitutionality of the cap... [LR226]

MICHAEL GOURLEY: Right, the district court judge. [LR226]

SENATOR LATHROP: ...after the lawyers, your lawyers, competent lawyers and a number of lawyer organizations went to the Supreme Court and argued that it was unconstitutional. And the finding of the Supreme Court was that it's constitutional. If there needs to be a change to it, it has to happen here. [LR226]

MICHAEL GOURLEY: Correct, correct in their opinion. And the district court judge, Judge McGill, actually did rule the act unconstitutional and then, of course, the defense appealed that to the Supreme Court and they overturned the lower court's ruling. [LR226]

SENATOR ASHFORD: Thanks, Mr. Gourley. [LR226]

MICHAEL GOURLEY: Thank you. [LR226]

SENATOR ASHFORD: Do we have any other testifiers today at all? None. Senator Howard. [LR226]

SENATOR HOWARD: Interesting that the medical community is mum today. I don't know what I could add that's any more eloquent or moving than what's been stated by a heartbroken family. Medical malpractice impacts everyone--patients, doctors, taxpayers, and users of the healthcare system. I ask that you carefully consider what has been presented here today and make sure that all of us, all of us who are affected by these laws have laws in place that also work for us. I ask for your assistance in working to

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address this issue. Thank you. [LR226]

SENATOR ASHFORD: Thanks, Gwen. And thank you, Mr. and Mrs. Gourley, for coming down and everyone else. Thank you. And that will conclude the hearing. [LR226]