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COMMITTEE ON JUDICIARY

February 10, 2006

LB 1260, 1163, 1072, 1149, 936, 905, 1040

The Committee on Judiciary met at 1:30 p.m. on Friday, February 10, 2006, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 1260, LB 1163, LB 1072, LB 1149, LB 936, LB 905, and LB 1040. Senators present: Patrick Bourne, Chairperson; Dwite Pedersen, Vice Chairperson; Ray Aguilar; Jeanne Combs; Mike Flood; Mike Foley; and Mike Friend. Senators absent: Ernie Chambers.

SENATOR BOURNE: Welcome to the Judiciary Committee. This is our tenth day of committee hearings. We have seven bills on this afternoon. I'm Pat Bourne from Omaha. To my left is Senator Friend, also from Omaha; Senator Aguilar from Grand Island; the committee clerk is Laurie Vollertsen; the committee's legal counsel is Michaela Kubat; and to my far right is Senator Dwite Pedersen from west Omaha.

SENATOR Dw. PEDERSEN: Elkhorn, thank you.

SENATOR BOURNE: I'll introduce the other members as they arrive. Please keep in mind that senators have duties that may require them to leave, come and go throughout the day. Please don't take offense to that. They're simply conducting other legislative business. If you plan to testify on a bill today, we ask that you sign in in advance at the on-deck area where the lady is signing in now. Please print your information so it's readable and can be entered accurately into the permanent record. Following the introduction of each bill, I'll ask for a show of hands to see how many people are here to testify on a particular measure. The senator will introduce the bill first, then we'll hear proponent testimony, then opponent testimony, and then if there are any neutral testifiers, we'll take them then, and then the senator will have the opportunity to close. When you come forward to testify at the table here, please clearly state and spell your name for the record. All of our hearings are transcribed, so your spelling of your name will help the transcribers immensely. Due to the large number of bills we hear here in the Judiciary Committee, we utilize the "Kermit Brashear Memorial Time Lighting System," which you see there on the testifiers table. Senators introducing bills get five minutes to open, three minutes to close if they choose to do so. All other

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 2

LB 1260

testifiers get three minutes, exclusive of any questions the committee may ask for you. The blue light goes on at three minutes. The yellow light comes on as a one-minute warning. When the light turns red, we ask that you stop testifying. The rules of the Legislature state that cell phones are not allowed, so if you have a cell phone, please disable the ringer. Also, reading someone else's testimony is not allowed. If you have a letter from an organization or another person and you want that submitted into the record, we'd be happy to submit that, but we'd prefer if you didn't read that into the record. We've been joined by Senator Flood from Norfolk and Senator Foley from Lincoln. With that, Senator Brashear will open on Legislative Bill 1260. Welcome. The proponents of this measure should be making their way forward and sign in and be in the front row. Welcome, Senator Brashear.

LB 1260

SENATOR BRASHEAR: Thank you, Chairman Bourne, members of the Judiciary Committee. My name is Kermit Brashear. I'm a citizen-legislator representing District 4, and I come in sponsorship and support of Legislative Bill 1260. LB 1260 would incorporate into our medical malpractice statute a concept that is currently applied in every other question of liability except medical malpractice. It is a general rule that where liability is clear and the damages will clearly exceed the limits of coverage of applicable insurance, the insurance company is obligated to negotiate in good faith with respect to a settlement at the coverage limit. If there is no good faith negotiation and the insurer insists upon a trial, then the court may disregard the limits of coverage stated in the policy and impose a judgment against the insurer for the entire amount of damages awarded. This rule is clearly in the interest of justice because the policy coverage limit always represented the maximum amount an insurer could be required to pay, then it would always go to trial. Why not roll the dice, see what happens, even where liability and damages are clear cut, because the insurer would never be at risk of having to pay out a larger amount regardless of the outcome of the trial. In every other case, we have adopted this rule as a means to ensure that the insured does not act in bad faith when a settlement ought to be reached within the amount of the policy limit

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 3

LB 1260

because the liability and the damages in excess of the limit are clear. In the area of medical malpractice, however, the existence of the Hospital Medical Liability Act and the absolute cap on the damages that it imposes makes the general rule inapplicable. As a result of the act, the rule that imposes a duty to negotiate in good faith in all other instances cannot be applied because the act prevents any award that is greater than the cap. Therefore, the incentive for the insured to negotiate that would apply, for example, in an automobile liability case or any other form of professional malpractice except medical malpractice does not exist in the area of medical malpractice claims. The sole intent of LB 1260 is to create that incentive. I believe that the bill ought to have minimal impact on the excess liability fund despite the fiscal note. First, there will only be rare cases in which liability is clear and the damages will obviously exceed that cap. These are the only cases in which the exception to the cap would apply. Second, the existence of the exception will create the duty, the obligation to negotiate, which will bring about settlements. In other words, the ability to exceed the cap would only happen in the very rare case in which the exception applied and the insurer did not, in fact, negotiate in good faith. When these cases arise now, they are ultimately being paid at the amount of the cap. With the adoption of LB 1260, they will still be paid at the amount of the cap. It will just happen in a more efficient and beneficial manner because of the duty to negotiate the settlement in good faith. It would only be in an extremely rare case that an actual payment exceeding the cap would be allowable. Therefore, the notion that the bill will result in a substantial increase in the surcharge premiums paid by participants is simply wrong. This bill is good public policy. The outcomes of these cases of malpractice will not change, but the means by which those who have suffered from malpractice can obtain their damages will be greatly enhanced by placing them on an equal footing by those victimized in other types of tortuous acts. I appreciate the consideration of the committee and the time of the committee. I urge your consideration and advancement of the bill. Thank you.

SENATOR BOURNE: Thank you. Are the questions for the Speaker? Speaker Brashear, do you have any specific stories as to why the bill is here or why you brought the bill? I

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 4

LB 1260

mean, is this a pattern? I've heard this in the context of counties and cities settling because of the cap that's on their conduct, and I've heard there are significant problems in that arena, but I've not heard about bad faith negotiation as it relates to malpractice. Is there?

SENATOR BRASHEAR: I have reference in my mind, generally, Senator Bourne, but I have not sufficiently focused in order to be able to relate for a public record...

SENATOR BOURNE: We can talk about that.

SENATOR BRASHEAR: ...the impressions.

SENATOR BOURNE: Certainly. So, if...

SENATOR BRASHEAR: This was suggested to me by a plaintiff's lawyer who works in the area.

SENATOR BOURNE: ...okay. Well, I guess that I have...

SENATOR BRASHEAR: And as I read the bill and prepared for the hearing today, I was more and more pleased that I had introduced it because, as we hurriedly prepare legislation, sometimes, we do what people suggest. The more I read of this, the more convinced I was this is good public policy.

SENATOR BOURNE: It seems pretty clear that if somebody negotiates in good faith that there is no downside to them. That's how I read this.

SENATOR BRASHEAR: That's right.

SENATOR BOURNE: Fair enough. Further questions for the Speaker?

SENATOR BRASHEAR: Because there would still be, if I may,...

SENATOR BOURNE: Please.

SENATOR BRASHEAR: ...there would still be the burden to prove that the negotiations were in bad faith. There's still a whole due process situation in which one would have an opportunity to defend against the claim for excess, but

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 5

LB 1260

at least we're putting in play, you know, you better be serious about it, rather than, you don't have to care because nothing can happen to you.

SENATOR BOURNE: Right.

SENATOR BRASHEAR: We don't trust that in other situations. Why here?

SENATOR BOURNE: Right. Are there further questions for the Speaker? Seeing none, thank you.

SENATOR BRASHEAR: Thank you. I'll waive closing, thank you.

SENATOR BOURNE: Thank you. First testifier in support. Okay, if we have proponents of the bill, have you signed in?

CHRISTOPHER WELSH: Yes.

SENATOR BOURNE: Okay. Are there other proponents in the audience? Okay, are there opponents to the bill? Okay, the opponents should be in the front row and have already signed in. We've got seven bills this afternoon, and I guess it's snowing in Omaha, so I don't want to be here until midnight. Welcome.

CHRISTOPHER WELSH: (Exhibit 1) Good afternoon. Christopher Welsh, W-e-l-s-h, and I'm speaking for the bill on behalf of NATA. I do also have a letter that I'd like to offer on behalf of LB 1163 and LB 1260 that I will submit after...

SENATOR BOURNE: Thank you. We'll enter that into the record.

CHRISTOPHER WELSH: The reason why this bill from, I'm a lawyer that practices personal injury and medical malpractice. Why this is a good bill, from a lawyer's standpoint who represents and deals with clients who have been a victim of malpractice, the reason why this is so good, because any time you take a brain damaged baby case, by the time the case even gets filed, you have exceeded the cap. It's bad enough we have caps on damages in this state, but with a brain damaged baby case, by the time you file a

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 6

LB 1260

lawsuit, you have exceeded the cap because of the economic damages with the medical bills and what the future care and treatment for that child is going to be. And then you have a situation where malpractice is clear, when it comes time to talk about negotiating a settlement, the defense attorney and the fund take the position that the worst we're ever going to get hit with is the cap. Even if a jury comes back in excess, we're only going to get hit with the cap, and therefore, when you go into settlement discussions, you start at the cap. That's where they want you to start at because the idea is, what can they save the fund? And in those rare cases where you do have damages that exceed the cap and liability is clear, it should be cut and dry, and those cases ought to be settled right away for the cap. And that's not happening. And there's not a lot of cases that are like that. It is rare, just like Speaker Brashear said. But in those rare instances, those cases should be handled efficiently and be taken care of right away. And they're not. It just doesn't happen because they take the position that the worst we're going to get hit with is the cap. And that's where things start, and you move down from a settlement standpoint. And it's very difficult to look at your clients, first of all, when they come in the door and they have a child like this and tell them, the max you'll ever get is \$1.75 million, and they already have medical bills in excess of that. And if the doctor and the doctor's lawyers are not, or the hospital and hospital lawyers are not going to act in good faith, and force the plaintiff to go to trial, and if they get a verdict in excess, they should be penalized for it. I see my time is up. Is there any questions?

SENATOR BOURNE: Thank you. Are there questions for Mr. Welsh? Seeing none, thank you.

CHRISTOPHER WELSH: Thank you.

SENATOR BOURNE: Are there other testifiers in support of this bill? Would the first opponent come forward? Welcome.

LESLIE SPRY: (Exhibit 2) Good afternoon. Senators and guests, my name is Les Spry of Lincoln, Nebraska, and I'm testifying in opposition to LB 1260. I have...

SENATOR BOURNE: Could you spell your last name for us, sir?

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 7

LB 1260

LESLIE SPRY: ...yes. S-p-r-y, and I have my statement here.

SENATOR BOURNE: Thank you.

LESLIE SPRY: I'm testifying in opposition to LB 1260 on behalf of the Nebraska Medical Association. Medical liability is a real hot-button issue, as you know, for most physicians, and it has been a subject of nationwide concern. Nebraska physicians and citizens of Nebraska have not had to endure the crisis of access that has been experienced in other regions of the country because of a healthy medical liability climate in the state of Nebraska. The Nebraska Unicameral has not had to deal with the malpractice crisis that has beset much of the rest of the nation because of forward-looking laws that protect patients and physicians while striking a balance for access versus care and protection of the injured patient. My main concern about LB 1260 deals with the definition of good faith. If I as a physician do not want to negotiate a settlement because I do not feel that malpractice has occurred, I do not want further jeopardy to result from my strongly held beliefs. We don't want the courts deciding in each case whether the failure to settle a claim was due to lack of good faith on the part of one party. The present system of judicial review is adequate for determination of good faith versus bad faith negotiations, I believe. The malpractice cap provides an element of certainty for liability insurers that allow insurance rates to be more predictable. Any mechanism that causes the cap to be breached will result in an increase in malpractice premiums, which are then passed on to the consumer. I believe, I recently read, that your state employee health insurance costs increased by 22 percent. Adding costs to healthcare in the state of Nebraska is not consumer friendly. Thank you for your attention. I'd be happy to answer any questions you may have.

SENATOR BOURNE: Thank you. Are there questions for Dr. Spry? The committee has been joined by Senator Combs from Milligan. Doctor, how many cases do we have annually where the damages exceed the, is it \$1.7 million?

LESLIE SPRY: \$1.75 million.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 8

LB 1260

SENATOR BOURNE: \$1.75 million?

LESLIE SPRY: I'm going to be recalling. I've attended some of these, and Sandy is here and might be able to get me a number for year.

SENATOR BOURNE: If you don't know, we can, we'll...

LESLIE SPRY: I really don't know. My sense is that it's less than ten, but...

SENATOR BOURNE: Okay, so a handful.

LESLIE SPRY: Yes.

SENATOR BOURNE: Okay. All right. Further questions for the Doctor? Seeing none, thank you.

LESLIE SPRY: Thank you.

SENATOR BOURNE: Appreciate your testimony. Next testifier in opposition.

TOM SHOMAKER: Good afternoon, everybody. My name is Tom Shomaker, S-h-o-m-a-k-e-r, and I'm an attorney that represents doctors and hospitals. I think I've represented more doctors and hospitals than anyone else in this state in the past 25 years. Our firm does this extensively, and we've been with you ever since the act changed from \$500,000 to \$1.2 million to \$1.7 million. I'm here to testify against this bill. I'm not representing anyone in particular other than myself. I was asked by the Nebraska Medical Association's attorney if I would read this bill, which I did, shared it with some of my friends that do this, and I think we've come to the conclusion that it's a unworkable thing and it's really not, I don't know how it's necessary. The testimony I've heard so far talks about, I think it's addressed more to, why don't we raise the cap. That's a whole another thing. This bill just says, you've either got to negotiate in good faith or there is no cap. Now here is what's wrong with this bill: What does good faith mean? What does that mean? It's not defined. Who's going to decide what good faith is? Is that going to be the judge in this case, or an arbitrator, or a mediator, some

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 9

LB 1260

other person, or another jury? Totally left alone there; have no idea what that means. This is a one-sided bill. It only talks about the situation where the mean defense attorney and the mean doctors and hospitals won't pay the money. What happens when the plaintiff brings a frivolous lawsuit? What relief do we have? Well, the answer to both of those questions is already contained in this act, and found at Section 44-2,834. This is a mechanism that's been in this act since 1976 when it was passed. If we are holding up things, if we are not giving the plaintiff their day in court, if we're withholding the money and not being fair and dealing in good faith, then the courts, upon application, I'm reading from Section 44-2,834, "in its discretion and in an amount determined in its discretion tax as costs...the reasonable costs of preparation and trial including...attorney's fees...loss of earnings...if the court finds that" there was really no reasonable successful defense that could be asserted. Now, I'm going to tell you from handling, I'm going to say, at least 500 of of these cases personally in my career, and have tried, I've got 86 jury verdicts, I think we're fair. The mechanism, if you don't think we're fair, is to take this case to trial. There's always going to be a question, who's being fair, who's operating with good faith? And my experience has been a very good one. I feel bad for these people that are hurt by somebody else's negligence. I feel a duty as an officer of the court to try and bring these things to a successful conclusion, and I'm proud of the record me and my brother and sister attorneys have in this area. To open things up like this in a wide-open kind of an environment is only going to invite some kind of problems later on down the road, and really not solve anything. What we maybe should be talking about is the cap or is it enough? But that's not what we're here for. This bill is a bad bill.

SENATOR BOURNE: Fair enough. Other questions for Mr. Shomaker. Senator Flood.

SENATOR FLOOD: Thank you, Senator Bourne. Mr. Shomaker, I appreciate your testimony. I guess...has the Supreme Court of Nebraska through its work ever defined what good faith is in the law with regard to this bill? I mean, hasn't the Supreme Court defined that?

TOM SHOMAKER: Well, in what, I'm no expert on that one.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 10

LB 1260

Okay? And yes, there have been plenty of judicial decisions about what good faith is. Senator Brashear said that this doesn't apply in medical practice, but it does in every other case. I'm not so certain about that. Good faith means a lot of things to a lot of different people. And as a practical matter, I represent physicians who may have a case on their hands where somebody has been very badly hurt. The Gourleys are here in court right now.

SENATOR FLOOD: Well actually, I'm interested in what the Supreme Court says about good faith, because we don't care what anybody else thinks. If they've laid out a definition, and maybe this is something we need to look at as a committee, if the Supreme Court has defined what good faith is, that's what applies. It doesn't matter what anybody else thinks, does it?

TOM SHOMAKER: Well, in the context of this bill, it sure might. If, yeah, the way it's written now, we don't know.

SENATOR FLOOD: How would you like us to define good faith?

TOM SHOMAKER: I don't want that even to be in there. I think you've got enough...

SENATOR FLOOD: But if it was in there, how would you like it to be defined?

TOM SHOMAKER: I'm not expert enough to give you give you that. I don't want to say something off the top of my head that would be incorrect. There's attorneys that know this stuff a lot better than I do when it comes to good faith. That's a whole another section of our office, so I don't know.

SENATOR FLOOD: If the chairman left the record open, would you...

TOM SHOMAKER: Certainly, I'd be happy to submit something if you wish, if that's allowable. I would go back and discuss this with the people in my office that are good faith experts, and there are two of them that deal with these issues and see what they say. But I know in general what good faith is in these other kinds of insurance law environments, but in this case, in this bill that you're

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 11

LB 1260

asking for here, it's really forcing the defendant to settle this case. And let me tell you, we settle those cases. We settle them for the cap if there is liability and very bad damages.

SENATOR FLOOD: Mr. Shomaker, I'm not asking this question because I am against your position. I'm just asking this because I think you make a valid point when you raise, what is good faith? And I'm interested in seeing what the court said about it, and I'm interested in maybe allowing you or whoever else to help what good faith is...

TOM SHOMAKER: I'd be happy.

SENATOR FLOOD: ...so that if we do move forward, we can communicate clearly, you know what I mean?

TOM SHOMAKER: Can I ask you another question, Senator, on that issue? Who's going to, remember, one of my points...

SENATOR FLOOD: I ask the questions. (Laughter) You answer the questions. I'm done with you. Thank you.

TOM SHOMAKER: That's my line, usually.

SENATOR FLOOD: Are there further questions? Senator Combs.

SENATOR COMBS: Hi. Thank you for coming today. And it's an interesting issue. Sorry I wasn't here for the opening. I'm going to talk about bad faith, I guess. I'm a nurse, and looking at description of behavior, and this is kind of a judgment call, good faith, like he talked about Supreme Court, you know, it's a judgment. What kind of behaviors have you seen adjudicated that were bad faith? Can you think of any specific examples that would describe bad faith? What's happened to people that you've seen.

TOM SHOMAKER: Well, you're going to think I'm just a lackey here or something. I don't think there is bad faith. That's why I'm so against this bill. I think that these cases are handled fairly for everybody, and the only real issue should be, if you don't think there's enough money, then maybe you've got to address that issue. But in my career, I think that we deal with these cases on the following basis: We look at the facts and decide, is there

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 12

LB 1260

malpractice here? And boy, is that subject to a lot of different opinions. The doctors may think there is no malpractice where the expert witness hired by the plaintiff thinks there is. We encounter that in every single case. Ultimately, after taking a bunch of depositions, and a lot of thinking and a lot of, you know, work on these things, we come to a conclusion, is there malpractice or not? Then the next thing is to overlay that on the idea of what are the damages that this person has suffered? And my subspecialty is obstetrical malpractice. I've handled I don't now how many dozens of cases of little children who are paralyzed or have some lifelong problem, and it's very, very difficult for those families. And I understand that. And I feel terrible for them. I want to help them. If they've got some money coming, I want to give them the money. And I think that the administrator of this excess liability fund that you have now, Mike Davlin, and his predecessor, Mike Ward, are both fair-minded individuals who feel the same way I do. And I really feel proud of the way these things are handled. It's frustrating for plaintiffs, of course, when there's a cap on damages and you've got the Gourleys are here in this committee today. I was in that case. I represented the Methodist Hospital. How about that one? Methodist Hospital won that jury trial. Was that bad faith because I said, no, I'm not going to pay any money. Under this bill here, I guess, Methodist Hospital might have been dragged into this \$5.5 million verdict some way because there wouldn't have been any limit to the cap.

SENATOR BOURNE: Are there...

TOM SHOMAKER: I really feel you're opening up a can of worms.

SENATOR BOURNE: ...hold on. Excuse me.

SENATOR COMBS: So, in answer to the question, you can't think of any specific examples where a judge has determined that bad faith had been exercised.

TOM SHOMAKER: In a medical malpractice case?

SENATOR COMBS: Well, any case that this statute applies to, because that's where we're sticking, the language.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 13

LB 1260

TOM SHOMAKER: No, because a judge does not get involved in a settlement other than to ratify it. This is between the parties. The plaintiffs said, you owe me the cap. The defendant says, no, I don't think this case is worth a cap. Then we go to a mediation, and maybe they accept something less than the cap, or they might get the cap. Every case is completely different. I guess a bad faith situation would be if I said, I don't think this case is worthy any money. I'm not going to give you a cent. If that's bad faith, they've already got a remedy. Go to court, try the case, and if it really is a good case, you'll get a verdict. And then, if again, you've had to expend this extra money because you've gone to all these great lengths, it's right here in your act that we've got that we've had for 30 years. You can apply to the court and say, this was an unreasonable defense. I want attorney fees. I want the cost of preparation for this case and whatever else the court thinks is fair. To my knowledge, that has never happened in any case anywhere in the state of Nebraska.

SENATOR BOURNE: Further questions? I have...

TOM SHOMAKER: Sorry for getting carried away.

SENATOR BOURNE: Well, it doesn't help your case to get carried away, I'll be honest with you. I do want to ask you this: You said you had 500 cases regarding malpractice.

TOM SHOMAKER: I think at least that.

SENATOR BOURNE: How many of those did you, was malpractice established...

TOM SHOMAKER: That mean, okay.

SENATOR BOURNE: ...and it was settled for under the cap? No matter the time, I know the cap is raised, so whether it was \$1 million, \$1.2 million, \$1.75 million, how of many of your cases, where malpractice is established, it's a given, it's stipulated to, agreed to, established in a court, whatever, how many times have you then gone on to settle for under the statutory cap?

TOM SHOMAKER: Well, a lot, because some cases aren't worth very much money.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 14

LB 1260

SENATOR BOURNE: Let me add one last little caveat: where the damages were in excess of the cap.

TOM SHOMAKER: There's two little floating concepts in what you just said.

SENATOR BOURNE: Okay.

TOM SHOMAKER: May I address them?

SENATOR BOURNE: Please.

TOM SHOMAKER: One is the value of the case. In every case that I've had where a child has, well, I can't answer that without telling you the context, Senator. We can go hire some economist to say that there's an \$11 million damage in a case, and then we ask the guy on the stand, how much money has been paid for this person so far for the last six years while we've been litigating this? Well, \$200. Okay, where did that \$11 million come from? It's whose concept is what the value of the case is, but I will agree with you there are cases that in my own opinion, and in the opinion of the defendants, exceeds the cap. Yes, there are those cases.

SENATOR BOURNE: Okay. You've mentioned the Gourleys several times. Their medical bills are in excess of the caps, and their particular situation, okay. So how many times do we have an established malpractice with medical bills in excess of the cap that it has been settled for under the cap? What you're trying to say is that you can extrapolate out these costs and they're not real, but what the...

TOM SHOMAKER: How about when they really are real?

SENATOR BOURNE: That's what I want to know.

TOM SHOMAKER: That's what you were saying.

SENATOR BOURNE: Yes, and the Speaker has indicated that there are people in your profession that have acted in bad faith as it relates to the settlement. We're ignoring that the fact they have \$2 million or \$3 million in hospital bills because the cap is at \$1.75 million, so you start

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 15

LB 1260

there. And I'm just asking the question, how many times, malpractice is established, the costs are higher than the cap, that all you forced these people to settle it at a lower amount. He said it. I'm asking you.

TOM SHOMAKER: Well, we don't force anybody to settle because they accept settlements. If they want a trial, they can have a trial. But I've paid the cap many, many times, the full value of the cap. Sometimes we don't because we think that there are issues, we disagree with the liability situation. You know, many of these cases are brought where the doctor made a judgment that someone else comes by and questions in retrospect, but that the doctor thinks at the time, I thought that was a reasonable judgment. But we pay those anyway, sometimes, because we're afraid to go into court and see a little child wheeled in in front of the jury, and everyone starts crying. And I've been there many, many times. And that skews it that way. You know, of course I can sit here and say I act in good faith, believe me, but I'm saying that.

SENATOR BOURNE: Well, don't you think if we had knowledge of a number, if 10 percent of the cases when the actual medical costs are exceeding the cap, 10 percent of the cases are settled for the cap, or 50 percent of the cases, isn't that relevant as it relates to putting some parameters on the bill as to whether or not the bill makes sense?

TOM SHOMAKER: I think that it would be insufficient, because I think that what's missing, and this is what's difficult about these cases, is understanding the whole liability picture. What is malpractice? I will grant you, if somebody gives the wrong drug or operates on the wrong leg or the wrong patient, those are cases of clear malpractice. But most of the cases I deal with are not black, they're not white, they're gray. And it's how gray are there? And that's the difficulty, and that's the art, and that's how we do all of this work. And we come together with the plaintiffs to try and achieve something that's fair for them. If they don't like it, they don't have to accept a settlement, Senator. They can go to trial. And if they win the trial and we've been unreasonable, they've already got a mechanism to get all of the extra work that they've done.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 16

LB 1260

SENATOR BOURNE: Okay. Senator Flood.

SENATOR FLOOD: Senator Bourne. Mr. Shomaker, I guess I just have one question. You have made the statement several times in your testimony that you are trying to do what's right for your, for the plaintiff, to do what's fair. But isn't it your obligation as an officer of the court to zealously represent the interest of your client? And if it is fair and right and just to give them money, if your client says, no money, you don't get to do what you think is fair, right, and just. You do what your client says, which is no money.

TOM SHOMAKER: I disagree with your statements.

SENATOR FLOOD: Who is your duty to? Is to your client,...

TOM SHOMAKER: I have...

SENATOR FLOOD: ...or is it to the plaintiff?

TOM SHOMAKER: My primary duty is to do justice. When I...

SENATOR FLOOD: No, it is not.

TOM SHOMAKER: ...well, when you take the oath to become a lawyer...

SENATOR FLOOD: I am a lawyer. I've taken the oath. But isn't your duty to zealously represent your client?

TOM SHOMAKER: Absolutely. Absolutely.

SENATOR FLOOD: And what part of the zealous representation, if your client says, I don't want them to get any money. You know in your mind they should get money. I mean, you want us to believe that you're trying to single-handedly make the process fair and just and right? Isn't that your testimony today?

TOM SHOMAKER: Well, I don't think so. I can tell you in my experience, if my client doesn't want to pay somebody some money, I don't know how many umpteen million times I've said, yeah, I think you should, and here's why. And ultimately...

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 17

LB 1260

SENATOR FLOOD: But if your client says, no, I do not want to do it, ultimately, what are you required to do on behalf of your client?

TOM SHOMAKER: Ultimately, I'm supposed to try that case. But Senator, will you believe me if I tell you I have never, ever, ever, not even one, had a case that I thought should be settled that my client did not ultimately tell me, go ahead and settle it. And I didn't twist his arm. I just put it out for him, put it out for him, put it out for him, and eventually, when it comes time, are you gentlemen ready to proceed? That's a pretty scary moment for a lawyer.

SENATOR FLOOD: Mr. Shomaker, you are lucky, because my clients aren't that nice. I have...

TOM SHOMAKER: Well, you know, to each his own, I guess.

SENATOR FLOOD: Yeah. Thank you.

SENATOR BOURNE: Further questions? Seeing none, thank you. Next testifier in opposition. If you just set it on the edge of the desk, Roger, we'll have them handed out.

ROGER KEETLE: (Exhibit 3) Good afternoon. For the record, my name is Roger Keetle, K-e-e-t-l-e. I'm a registered lobbyist for the Nebraska Hospital Association. On behalf of the association, we wish to oppose LB 1260. Our reason for opposition is we don't know that good faith means and we think it depends on the facts and circumstances of every case, which means every case would have to be litigated, which means we have uncertainty in the law, which means the cap doesn't apply, which means our insurance rates go up. I think that's kind of the logic of where we're at. The other thing that I think becomes clear in Senator Brashear's testimony is, is when is liability clear? And that's another issue which would depend on the facts and circumstances of every case, which would also lead us into a situation where we'd have litigation in almost every instance. And representing the hospitals, we know that without a cap in Nebraska, we wouldn't have liability insurance that would be affordable, and we know in rural Nebraska that we need physicians that are able to do small surgeries, are able to deliver babies, and serve-staff the

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 18

LB 1260

emergency room, all three of the highest categories for medical malpractice liability insurance in the country. So we need to have a stable market if we're going to have insurance coverage for our physicians and our hospitals in this state, and that's why the cap is so important and why we need to have certainty. So, with that, I think you will find the testimony that follows me neutral from the insurance department informative, and I urge you to listen. We've had a chance to talk in the hallway, and I think perhaps you'll find some facts that might lead you to believe that maybe things are going pretty well. With that, I'd take any questions.

SENATOR BOURNE: Thank you. Are there questions for Mr. Keetle? Okay, just for clarity, okay, I don't believe that this takes away the cap. So, and you indicate in your testimony there has to be a cap, and I don't think anybody is advocating eliminating the cap. It's setting some parameters on how a person involved in the settlement must conduct him or herself, but it doesn't take away the cap. Would you agree to that?

ROGER KEETLE: The question becomes, we're going to have to define good faith, and what's clear liability. And that will come down to an individual case by case determination. And that's what costs the money for litigation. As you've heard, if there's somebody, the law has a provision for people that don't proceed properly, and that is the penalty of fees and expenses.

SENATOR BOURNE: Fair enough.

ROGER KEETLE: And I think that's the comeback to that issue.

SENATOR BOURNE: Okay. Further questions for Mr. Keetle? Seeing none, thank you.

ROGER KEETLE: Thank you.

SENATOR BOURNE: Appreciate it. Other testifiers in opposition? Testifier neutral?

MIKE GOURLEY: Good afternoon.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 19

LB 1260

SENATOR BOURNE: Welcome.

MIKE GOURLEY: My name is Mike Gourley. That's G-o-u-r-l-e-y. I didn't come down here today prepared to say anything, but after hearing testimony from the other gentleman, I felt compelled to come up here and talk to you. I'm not a very articulate person, so I'm going to try to get through this.

SENATOR BOURNE: Welcome to the club.

MIKE GOURLEY: I'm neutral on this bill because what's proposed in the bill would help the plaintiffs, I think. In my son's case, Colin Gourley, where there was, the medical malpractice was established and his costs were well-over the cap, they never talked about settlement. They never even once brought up, talking about settling that case. They were going to try it from day one. And so that, and it took several, several years to get in the court. So this bill, in that aspect, is, I support it. But overall, if you look at the big picture of this thing, it's a band-aid, really, if you ask me to the medical malpractice liability act that we have right now. If you really want to, as Mr. Brashear said, if you really want to promote the settlement talks and you want to tell the insurance companies, look, you better be serious when these, you know, to look at this and talk about settlement, and you want to be fair to the plaintiffs or the victims, like my son, the way I think to handle this is to rewrite the liabilities act to remove the cap on economic damages. It's a simple, fair way to do it. And that's what, all across the country, except Nebraska and two other states, that's the way their caps are set up. You can cap noneconomic damages. Great, fine. I don't really care about that. My son's medical bills, proposed medical bills, projected conservatively for his lifetime--he's going to live until he's 70; he's got a full life expectancy--was over \$12 million. So, and we got a fair settlement from a jury in trial of just over \$6 million, which was reduced, you know, in economics reduced to present day value so that would be fair. And then the cap steps in and takes away 80 percent of that. And now we're left with a child who we have to raise who has an uncertain future. What happens if my wife and I, something happens to my wife and I? What happens to him? What happens, all this talk about Medicaid now, and Medicare being cut back and it rolled back? What

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 20

LB 1260

happens to that? That's his safety net. That's what the state set up as his safety net to take care of him for the rest of his life. So, this bill, I will somewhat support it, if that's all you're willing to do. But if you really want to fix the problem, you need to take, rewrite the liability act the way it is right now and remove the cap on economic damages. Thank you.

SENATOR BOURNE: Questions for Mr. Gourley? Mr. Gourley, so run us through your case. Now, was malpractice disputed, or was that acknowledged? I mean...

MIKE GOURLEY: It was disputed.

SENATOR BOURNE: ...okay. It was disputed and you ended up going to trial.

MIKE GOURLEY: Correct.

SENATOR BOURNE: And you settled, or not settled, the jury awarded you, it was like \$6 million or?

MIKE GOURLEY: \$6.25 million awarded to my son, yes.

SENATOR BOURNE: And then it was scaled back, and it was a previous level, right? The cap wasn't...

MIKE GOURLEY: Well, the district court judge, we argued that the cap was unconstitutional. The district court judge, Judge McGill, ruled that it was unconstitutional. And so then, of course, the defense took that straight to the Supreme Court.

SENATOR BOURNE: So because there was a dispute as to whether malpractice actually occurred, that's why it went to trial? Or that's why there was no settlement?

MIKE GOURLEY: Well, yeah. The defense obviously thought that there was no malpractice, and so they never even talked about settling. But it was proven in court that there actually was malpractice.

SENATOR BOURNE: Okay. Further questions for Mr. Gourley? Seeing none, thank you.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 21

LB 1260

MIKE GOURLEY: Thank you.

SENATOR BOURNE: Other testifiers neutral? Welcome.

LISA GOURLEY: (Exhibit 10) Hi. My name is Lisa Gourley and I can see the intent of LB 1260 to encourage settlement of the medical malpractice cases. I can't really say I fully endorse or oppose this bill. Certainly, under the medical malpractice cap on liability current in force in Nebraska, hospitals, doctors, and their insurance carriers have no incentive to settle cases since they know the maximum that they will be required to pay if the case goes to a verdict. In catastrophic cases like our family's where the damages far exceed the statutory cap on liability whether the case is decided by a jury or settled for less than the maximum allowed by the cap, the family and the taxpayers still pay the bulk of the cost for the victim's care. Taxpayers and families get stuck with the bill, not because the cases do not settle, but because the caps on liability insulate those responsible from having to pay for the consequences of their acts. And as long as the taxpayers are required to assume the costs of malpractice damages, doctors and their insurance carriers have little incentive to monitor or discipline doctors whose negligence caused the harm. Lack of incentive to settle cases is not the problem. The problem is the lack of incentive to make doctors better because they are not held accountable. My big concern is the Medicaid, which basically, we have a primary insurance carrier, but Medicaid is our backup. And with all the talk of all the cuts at the federal and state levels, that's really been Colin's safety net. We've capped out a lot of our coverages with our primary coverage. And I feel that, and I agree with my husband on where a lot of the costs are economic, and the taxpayers of this state are paying for a lot of this where they shouldn't be. There's \$60 million-plus in that fund that is there to take care of these victims. It's not the doctors' money, which I have been, you know, they talk about it as their money. Well, it's really there set up for the victims. And I feel that they really need to be more fair about this, and especially with the cuts right now. I mean, where are these kids going to be?

SENATOR BOURNE: Thank you. Are there questions for Ms. Gourley? Seeing none, thank you. Appreciate your

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 22

LB 1260

testimony. Next testifier in a neutral capacity.

THEODORE KESSNER: I'll be very brief, Mr. Chairman. My name is Theodore Kessner, K-e-s-s-n-e-r. I'm a lawyer, and I'm special counsel to the Excess Liability Fund administered by the Director of Insurance of the state of Nebraska. The obligation of the fund is to provide excess coverage to medical healthcare providers, hospitals and doctors. Doctors are required to have a primary insurance, currently under the existing law \$500,000, and the fund then has liability for the balance up to \$1.75 million. The issue that we have in administering the fund with an amendment like this is we have no concept of what the liabilities are. The fund liability provisions say the doctor is liable for \$500,000 unless there is bad faith, and then that \$500,000 is gone. The fund is not liable for any amount until the amounts paid by the healthcare providers are first paid. So, in establishing the relationship between the primary and the excess, this becomes a very problematical issue. And the other witnesses talked about what is good faith and when does it occur, and who is guilty of it. The primary insurer, who Mr. Shomaker represents, are in charge of the defense. And if it is determined at some point in the proceedings that the primary insurer is guilty of lack of good faith, does that then impose liability on the fund? If it's later determined at some point in the process the administrator, who is a state agent, Director of Insurance, is guilty of bad faith or lack of good faith, does that impose liability upon the fund? Or does it potentially impose, that's liability on the state. All of these issues make it problematic. The purpose of the cap is to make healthcare insurance available and affordable so that we have the providers in the state. One further point is, you've asked several questions, Senator Bourne, about the processes, how many cases, and so on. We are disposing of more cases than are being filed. We're ahead of the curve, and that's part of the act. We're supposed to be prompt and efficient in administering the claims. We're doing that. Your question, to my knowledge, there has not been a verdict in excess of the cap in at least five years. The Gourley case was the last one. Mediation is a prominent part of this process. It's done at the request of the plaintiff. In 2004, there were 18 mediated cases, all of them resulted in a mutually acceptable resolution. In 2005, there were 19. Sixteen of them resulted in an acceptable

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 23

LB 1260

solution, and three that did not are being resubmitted to mediation next month.

SENATOR BOURNE: Thank you. Questions for Mr. Kessner?
Senator Combs.

SENATOR COMBS: Thank you, Mr. Kessner. If you followed my question earlier, I just wondered, in your experience with the Excess Liability Fund, have you seen any behavior that would be described as bad faith efforts to move towards settlements? Anything that you would label that way?

THEODORE KESSNER: No, I have not. Obviously, conduct is judged by the beholder. And if I'm dealing with you and you think I'm being unfair, you think I'm being unfair where the circumstances that I'm proposing from my perspective might be fair. But I don't think that there is any evidence, absolutely no evidence, that the primary insurers or the Excess Liability Fund or the healthcare providers themselves are saying to plaintiffs that have a justifiable claims, you don't get any money just because we don't like you. And, by the way, I think there are many cases that are decided favorably on the issue of liability for the healthcare provider.

SENATOR COMBS: Thank you. That makes it even more of a mystery about how we got this bill, to me. Thank you.

SENATOR BOURNE: I do have one other quick question.

THEODORE KESSNER: Certainly.

SENATOR BOURNE: When do you become, as a, you represent the state, the Department of Insurance.

THEODORE KESSNER: Well, it's not a state fund. It is a fund administered by the state. The fund is collected as premium from the healthcare providers who participate, and not all have to participate.

SENATOR BOURNE: When do you become involved? Say there's an allegation or assertion of malpractice. Do you become involved when they settle for the \$500,000? When do you become involved?

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 24

LB 1260

THEODORE KESSNER: Earlier than that, Senator. It's kind of a parallel path. The primary insurer has the principle duty of defense, and we're notified of the existence of the claim. And I advise on the administration, not the claims. I do not do the claims work. The name Mike Davlin was mentioned a minute ago. Mr. Davlin is primarily responsible for that.

SENATOR BOURNE: What's his title and who is he?

THEODORE KESSNER: He is an employee of Nebraska Insurance Services, and Nebraska Insurance Services has a contract with the administrator of the Excess Liability Fund to do their claims work.

SENATOR BOURNE: And the administrator is Tim Wagner?

THEODORE KESSNER: That's correct.

SENATOR BOURNE: Okay.

THEODORE KESSNER: By statute.

SENATOR BOURNE: So Commissioner Wagner subcontracts to this entity.

THEODORE KESSNER: Yes. 'Used to have a staff person, who died, and because of the availability of people, he's contracted this out. But the department people still are involved, their actuaries and so on.

SENATOR BOURNE: Understand. I was just getting a sense of how it works. So at the time the claim is filed, you are notified, and it's like a dual track.

THEODORE KESSNER: The fund is notified. We rely primarily upon the primary insurer to do the investigation, the evaluation. We do, with the actuaries, when I say we, it's the fund, sets up reserves if we believe that it encroaches upon our excess amounts. And most of the mediations in where the amount encroaches upon the excess amount representative of the fund is present at the mediation so that the matters can be resolved.

SENATOR BOURNE: Okay. Thank you. Appreciate your

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 25

LB 1163, 1260

testimony.

THEODORE KESSNER: Thank you.

SENATOR BOURNE: Other neutral testifiers? Senator Brashear has waived closing. That will conclude the hearing on Legislative Bill 1260. (See also Exhibits 7 and 10) Senator Stuthman is here to open on Legislative Bill 1163. As he makes his way forward, can I have a show of hands of those folks here wishing to testify in support of this next bill? I see three. Those in opposition? I see two. So the proponents of the bill should make their way forward to the on-deck area and sign in. With that, Senator Stuthman, welcome. Thanks for waiting so patiently.

LB 1163

SENATOR STUTHMAN: Thank you. Good afternoon, Senator Bourne and members of the Judiciary Committee. For the record, I am Arnie Stuthman, representing the 22nd Legislative District. LB 1163 changes the statute of repose on medical malpractice suits. It extends the period for which an injured patient can file suit from ten to twenty years when the alleged act has not been previously discovered. This bill does not affect the statute of limitations. The statute of limitations requires a patient who files suit within two years of the date of the alleged act. But, if the act of malpractice is not discovered within the two-year time period, then the suit must be filed within one year of the discovery of the act. The statute of repose then says, but a suit cannot be filed for any reason after ten years since the act was committed. We would like to see that changed to 20 years, or better yet, removed from the statute altogether. I'm going to show you a very short video about Yolanda Jacobsen. She is the reason I introduced this bill, and because of her condition, she cannot be with us today. In the video, they mention that Senator Jensen was considering introducing this bill, but then he decided that he would not be able to. I want to make it clear that there are no hard feelings whatsoever, and I think we can appreciate having a full plate this session. So with that, I am going to present you the video.

VIDEO PRESENTATION: (Inaudible)

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 26

LB 1163

SENATOR BOURNE: Does that conclude your opening, Senator?

SENATOR STUTHMAN: I would just like to make a final comment. I want to thank you for allowing me to use this video, and I want you, members of the committee, to keep in mind the video when you hear the testimony of the daughter here, if you would. I plan to be back for closing, but I not be. I might have to waive closing. I need to be in another committee.

SENATOR BOURNE: Okay. Thank you. Are there questions for Senator Stuthman? Seeing none, thank you. If you're here when we close, you'll have a close. Otherwise, I'll consider it waived.

SENATOR STUTHMAN: Yes.

SENATOR BOURNE: Okay.

SENATOR STUTHMAN: Thank you.

SENATOR BOURNE: First testifier in support. Welcome.

MARLENE JACOBSEN: (Exhibits 4, 5, 6) Hello. My name is Marlene Jacobsen, J-a-c-o-b-s-e-n, and I'm here on behalf of my mother, victim of medical negligence. On October 26, 1999, my mother was diagnosed with an inoperable brain tumor. MRI scans revealed a large brain stem meningioma. Unfortunately, this tumor was very much evident on a previous MRI in 1987, misdiagnosed by Omaha radiologist James Johnson. For 12 years following the misdiagnosis, my mother consulted with a number of physicians all specializing in guesswork. When the correct diagnosis was finally determined in 1999, my mother underwent gamma knife radiosurgery. However, the tumor was at the maximum treatment size limit, and at best may only be arrested. Gamma knife is a treatment of choice for small, unresectable tumors. Medical experts have confirmed treatment of this tumor in 1987 would have been highly successful and totally alleviated her symptoms. Several physicians including the radiologist were named in a malpractice lawsuit. Our attempt to seek justice in the court system failed with respect to the radiologist. The case against him was dismissed due to the ten year statute of repose. Sadly, it

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 27

LB 1163

took 12 years to uncover the truth. My mother's life has been shattered, physically, emotionally, and financially because of the negligence of doctors. She has endured years of pain, suffering, unnecessary surgery, and various useless treatments. Today, she suffers from double, blurred, and distorted vision. She has severe headaches. She has extreme unsteadiness and vertigo. She is a stroke risk given the size and location of this dangerous tumor. Incredibly, her cognitive function remains intact. She is all too aware of the future disappointments to come. In addition to my mother's deteriorating health, her financial stability is affected as well. She has exhausted what little funds she received from her lawsuit. Her current out-of-pocket medical expenses have left her bankrupt. Had the ten year statute of repose not excluded the radiologist from the lawsuit, at the very least, her medical expenses would have been covered. The two-year discovery statute is more than adequate to bring finality of lawsuits. The ten-year statute of repose only serves to restrict unknowing victims their legal right to hold negligent medical providers accountable. This arbitrary statute needs to be eliminated. Thank you for your consideration, and I do have some handouts.

SENATOR BOURNE: Okay. If you just sit them there, the page will get them.

MARLENE JACOBSEN: Okay.

SENATOR BOURNE: Are there questions for Ms. Jacobsen? Senator Foley.

SENATOR FOLEY: Thank you, Chairman Bourne. Thank you, Ms. Jacobsen, for your testimony. After the passage of time, when the second MRI was conducted, I assume they went back and looked at the previous films. Were those available at that time?

MARLENE JACOBSEN: Yes. The original, I did get ahold of the original films, and it was very clear that there was a tumor evident on those 1987 films.

SENATOR FOLEY: The second group of radiologists, did they have access to those? Could you present, did you have a chance to present those to them?

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 28

LB 1163

MARLENE JACOBSEN: As far as...

SENATOR FOLEY: The original films, for lack of a better word. Were you able to get those and show them to...

MARLENE JACOBSEN: Oh, the other physicians?

SENATOR FOLEY: Right.

MARLENE JACOBSEN: They did have access to those films. Why they...

SENATOR FOLEY: Did they instantly say, oh, my goodness, they should have seen this? Or what was their...

MARLENE JACOBSEN: No. From 1987 until 1999, no doctor took the time to look at those films. It wasn't until 1999 when my mother's current physician ordered another MRI because of her tumor symptoms.

SENATOR FOLEY: And when the second MRI was conducted, it was quite large at that point.

MARLENE JACOBSEN: Yes. It grew. In 3-D measurement, it grew about nine times in size.

SENATOR FOLEY: One of the issues I think we're going to be hearing a little bit later on this bill is that the technology has advanced quite a bit, and that the quality of the MRI back in, which year was it again? Nineteen...

MARLENE JACOBSEN: 1987.

SENATOR FOLEY: 1987.

MARLENE JACOBSEN: And that, I can tell you, I don't agree with. And medical experts have confirmed, and in fact, I can produce all of that information that substantiates my claim. And if you look at the handouts, you can see how clear the 1987 film was and how very obvious that tumor was. The doctor responsible for this was 100 percent negligent and incompetent. And the pictures speak for themselves.

SENATOR FOLEY: So the ten-year limitation that prohibited

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 29

LB 1163

you from going into court...

MARLENE JACOBSEN: Yes.

SENATOR FOLEY: ...and getting a judgment against him.

MARLENE JACOBSEN: When we discovered negligence, it was in 1999. And we did file a lawsuit against that doctor and a few other physicians. We did it within one year, and I believe there's a two-year statute of limitations, meaning "upon discovery." So we discovered in 1999, and we filed a lawsuit under a year's time. But I believe we had two years to do that. So it's the statute of limitation from the date of discovery. But the statute of repose is like a ten-year overall blanket. So, in the unfortunate case of my mother, we didn't discover there was negligence until 12 years later.

SENATOR FOLEY: In your research of all of this, did you uncover any other indications of problems with that particular doctor?

MARLENE JACOBSEN: I'm not quite sure. He was involved with a lawsuit, and I'm not sure of the particulars, so I can't say with 100 percent certainty. So, I'm not sure.

SENATOR FOLEY: Okay. Thank you very much, again.

MARLENE JACOBSEN: Thank you.

SENATOR BOURNE: Further questions? Senator Combs.

SENATOR COMBS: Yes, thank you for testifying today. I'm very sorry about your...

MARLENE JACOBSEN: Thank you. I appreciate it. Thank you.

SENATOR COMBS: What films were lost at BryanLGH? Which set of films? I'm just reading your...

MARLENE JACOBSEN: Oh, you have that. Okay. After the lawsuit was dismissed, the films that I submitted, I filed a complaint with the state against the doctor, and I submitted the 1987 films, the 1999 films, and several professional opinions that were used at trial. And the films that were

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 30

LB 1163

lost were the 1987 films. Everything else returned to the sender intact, so I'm not sure what happened there.

SENATOR COMBS: There was no signed chain of custody for you to track back on, or...

MARLENE JACOBSEN: I called the film library at Bryan Memorial Hospital, and I was told that after review by the state's expert, meaning a radiologist at Bryan Memorial, after he reviewed the films, they were discarded. And the person I talked to in the film library said that if films of unknown origin were at the library, that they would probably contact the sender, or the radiologist that had the films, to see where, in fact, they need to be sent. So, I'm not sure how that mishap occurred. But it just bolsters my claim that, you know, that he didn't take the time to find out. He probably carelessly discarded those without a second thought, that it was a matter of investigation.

SENATOR COMBS: One more question was, were you aware of any other claims against this physician? I mean, has he continued to practice and done unsafe, or are you not familiar with...

MARLENE JACOBSEN: I don't know. The state doesn't disclose that information.

SENATOR COMBS: Okay. Well, I just wondered if there was a threat to public safety due to the failure of the statute of repose to cover this act.

MARLENE JACOBSEN: I'm not quite sure about that, but I feel the fact that he missed a very obvious tumor is reason enough in this case.

SENATOR COMBS: Okay. Thanks.

MARLENE JACOBSEN: Thank you.

SENATOR BOURNE: Thank you. Senator Flood.

SENATOR FLOOD: Thank you, Senator Bourne. Thank you for your testimony today. I guess I'm just trying to understand. The first MRI was done in 1987?

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 31

LB 1163

MARLENE JACOBSEN: Correct.

SENATOR FLOOD: And was reviewed by a radiologist at that time?

MARLENE JACOBSEN: Correct.

SENATOR FLOOD: When was the next MRI taken?

MARLENE JACOBSEN: 1999. After the initial misdiagnosis, my mother went to several doctors throughout the years. Nobody thought to re-image her brain until 1999 when she found a new doctor, and his initial reaction when she presented with her symptoms, immediately, was to have an MRI. Why these other doctors chose not to do it is beyond me.

SENATOR FLOOD: How many other doctors did she go to between 1987 and 1999, between the two MRIs?

MARLENE JACOBSEN: Nine.

SENATOR FLOOD: And none of them...

MARLENE JACOBSEN: The ninth doctor is the doctor who had the good sense to re-image her. And we didn't know. We listened to the doctors. That was our mistake. The people that she went to to get help violated the standard of care until 1999.

SENATOR FLOOD: Did you ever have an action, did you ever file an action against any of those doctors?

MARLENE JACOBSEN: Yes, yes. There was a settlement, and the final doctor left in the lawsuit, we lost that because the defense attorney pointed the finger at the radiologist. And the defense experts in the trial pointed the finger at the radiologist.

SENATOR FLOOD: Thank you very much.

MARLENE JACOBSEN: Thank you.

SENATOR BOURNE: Further questions? Ms. Jacobsen, where is Nebraska relative to other states as it relates to the ten years?

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 32

LB 1163

MARLENE JACOBSEN: I'm not sure of that.

SENATOR BOURNE: Okay. Further questions? Seeing none, thank you.

MARLENE JACOBSEN: Thank you.

SENATOR BOURNE: Appreciate your testimony.

MARLENE JACOBSEN: Thank you.

SENATOR BOURNE: Next testifier in support.

MARIE LOSOLE: My name is Marie Losole, L-o-s-o-l-e. I am here on behalf of, I'm Ms. Jacobsen's sister, on behalf of my mother, and to support the bill and I'd like to read to you a direct page from the Center for Justice and Democracy briefing book. Medical malpractice litigation is not frivolous. Despite the amount of malpractice, few victims sue. In a major study released in 1999, a National Academy of Science Institute of Medicine found that up to 98,000 people are killed each year by medical errors in hospitals, far more than die from car accidents, breast cancer, and AIDS. Yet only one in eight patients who are injured by medical malpractice ever files a claim, and only one in sixteen patients who suffers injuries receives any compensation. The contingency fee system discourages attorneys from taking clients with frivolous claims. Because contingent fee attorneys only get paid upon winning, they can only afford to bring their strongest cases. Along these same lines, the high cost of preparing medical malpractice cases serves as an incentive to avoid frivolous cases. Plaintiffs drop ten times more claims than are actually taken to court. Now, on behalf of my mother, when the case against the radiologist was dismissed due to the ten-year statute of repose, my sister filed a complaint against him with the Nebraska Health and Human Service Board of Medicine and Surgery. After a lengthy, two-year investigation, the Nebraska Health and Human Service System informed her without explanation no disciplinary action would be taken against the radiologist. In addition to that disappointing news, she was informed the films provided to the state as evidence were lost after review by an independent radiologist retained by the state. Please refer

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 33

LB 1163

to your documents. This case is a prime example of the state's failure to discipline physicians. The state rarely disciplines doctors, if so, only for the most egregious negligence or misconduct. The majority of mistakes are largely dismissed such as misdiagnosis, incorrect treatment, medication mix-up, misinterpreted radiology and pathology studies, incompetence, and carelessness. The current system is in a desperate need of reform. Victims of medical negligence have no choice. The only option available is the legal system. The statute of repose is wrong. Denying innocent victims their legal rights only victimizes them once again. Why is the medical community allowed far more leniency than any other profession regarding disciplinary actions? Physicians should be held to a higher standard given the fact their negligence results in bodily injury and-or death. If physician peer view protects patients instead of physicians, malpractice lawsuits would be drastically reduced. Unfortunately, the medical code of silence is alive and well. Not only did the medical community fail my mother miserably, the state did, as well. While I know it is too late to find justice in my mother's case, it is my sincere wish you support this bill. Thank you for your time.

SENATOR BOURNE: Thank you. Are there questions? Seeing none, thank you.

MARIE LOSOLE: You're welcome.

SENATOR BOURNE: Appreciate your testimony. Next testifier in support.

CHRISTOPHER WELSH: Christopher Welsh, W-e-l-s-h, testifying on behalf of my clients and on behalf of NATA. I'd like to give the Judiciary Committee an example of the current state of the law. Represent two clients. Let's talk about Client A. She has been complaining for the last ten years of abdominal pain, and finally, her general practitioner decides to do an x-ray. And what does he discover? A hemostat from a previous surgery. He says, you should go see an attorney. She comes into our office and guess what? She's two months too late because of the ten-year statute of repose. Let's talk about Client B. Had a surgery over ten years ago, almost ten years ago, and she went from doctor to doctor to doctor. She had had shoulder surgery,

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 34

LB 1163

and she had all kinds of problems with her right arm. They thought she had lupus. They thought she had some sort of autoimmunodeficiency. All kinds of problems. And finally a doctor discovered that there were particles of the saw that was used in her surgery that was left inside of her. She was lucky. She came in two months before the statute of repose. There is no reason why there should be a statute of repose. And one thing that has been brought up, this is not just about medical malpractice. This bill, LB 1163, does not limit itself to doctors. It applies to all professionals. It applies to lawyers. It applies to accountants, engineers, everybody. This is not just about malpractice. But it certainly is the malpractice cases where victims have been harmed. The current state of the bill, ten years, you just don't know. There shouldn't be a repose to cut off when a doctor has committed malpractice or when a lawyer has committed malpractice or an accountant, and because, for whatever reason, the victim does not uncover it, they should not be precluded from bringing a valid claim. Any questions?

SENATOR BOURNE: Thank you. Are there questions? Senator Flood.

SENATOR FLOOD: Thank you, Senator Bourne. Is it Mr. Walsh or Welsh?

CHRISTOPHER WELSH: Welsh.

SENATOR FLOOD: Sorry, Mr. Welsh. You make interesting statements about, you know, the ten years and the people falling above and below it. I guess, if we move this to 20 years, what's to stop somebody coming in with a very similar story to say, 20 years and two days after, you know, my MRI, it was determined that this had occurred. I mean, can we set this date at anything other than 100 years, you know, exceeding the life cycle of somebody to make sure that this doesn't happen? What is the right date? I mean, why 20 years?

CHRISTOPHER WELSH: I don't think there should be a date, period.

SENATOR FLOOD: No statute of repose?

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 35

LB 1163

CHRISTOPHER WELSH: No.

SENATOR FLOOD: Then, I guess, then I can see where you're coming from. But I guess the public policy reasons for a statute of repose would be to preserve evidence, to be able to litigate the matter before the court, you know, in a way that allows both sides to present evidence and preserve evidence. How do you respond to that argument that others have?

CHRISTOPHER WELSH: Well, I think it's quite simple. In any case, whether you're talking about something that just happened two years ago or five years ago, you still have to put on evidence and bring forth the evidence. It certainly is going to make it more difficult for a plaintiff to bring an action against a doctor, against another lawyer, or against an accountant that happened 20 years ago. But that's going to have to be the decision of the lawyer that's going to represent that client. But at least give them a chance. Don't cut it off. A repose cuts it off. You could have somebody that has all the evidence in the world, and because of that statute of repose, they're out of luck. And that's why a repose is bad.

SENATOR FLOOD: We have a statute of repose for the same reason we have a statute of limitations, to preserve evidence and to make sure that, you know, you can actually litigate the matter in front of the court and have both sides of equal footing. Do we run the risk of all sorts of claims in our courts from years and years ago without adequate evidence if we eliminate the statute of repose? And I think I know your answer, but I'm interested in it.

CHRISTOPHER WELSH: I don't think you run the risk of that because, again, lawyers that take on these cases take it on a contingent fee. And to gather the information, it's coming out of the lawyer's pocket. They don't get paid unless they're successful. They're not going to bring a case that they can't prove because it makes no sense. It costs too much money to go to trial, and if you don't have the evidence, it makes no sense.

SENATOR FLOOD: Thank you.

CHRISTOPHER WELSH: You're welcome.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 36

LB 1163

SENATOR BOURNE: Senator Combs.

SENATOR COMBS: Thank you, Mr. Welsh. I was wondering, how do we compare with other states as far as the length of our statute of repose compared to, let's say, the 50 states or surrounding states, or what is the average length of time, and how many of them have ten and more or less?

CHRISTOPHER WELSH: Well, I'm not familiar with what all the different states have. There are states that don't have any statute of repose at all. Some states have statute of repose that just apply to products liability cases. For instance, if you get rear ended and your gas tank explodes, but that vehicle is over 15 years old, you can't bring a claim against General Motors or Ford. Other states don't have a statute of repose. I'm not familiar in enough to talk about the other states. But I would be more than happy to submit something to the committee if the committee would like.

SENATOR COMBS: Yeah, either that or maybe someone else who's going to testify may have that information. I just am curious to see how much of an anomaly Nebraska is with their ten-year statute compared to other states. Thanks.

CHRISTOPHER WELSH: You're welcome.

SENATOR BOURNE: Further questions? Senator Foley?

SENATOR FOLEY: No, thanks.

SENATOR BOURNE: No? Seeing none, thank you.

CHRISTOPHER WELSH: Thank you.

SENATOR BOURNE: Other testifiers in support? First testifier in opposition.

LES SPRY: (Exhibit 9) My name is Les Spry, S-p-r-y, and first of all, I'd like to have a letter from the Nebraska chapter of American College of Emergency Physicians that he asked me to bring this and distribute that to the committee if I could.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 37

LB 1163

SENATOR BOURNE: We'll make that part of the record as well.

LES SPRY: I'm not going to reiterate the previous statement that I made in regards to the malpractice climate within Nebraska, but it's been my observation that the forward-looking laws that you have in this state already have been striking a balance for access versus care and protection of the injured patient. Now come legislative bills that threaten the healthy climate of malpractice within Nebraska, and one of those is LB 1163. The statute of repose serves to encourage claimants to bring possible claims and to guard against stale claims. I think that's already been mentioned. Such statutes compel the assertion of a right of action within a reasonable time so that the opposing party, in this case, physicians and hospitals, has a fair opportunity to defend that particular issue. As time passes, it is more difficult to gather evidence, to locate witnesses. This can lead to evidence that is either forgotten or manufactured. In the medical malpractice area, there is also a major problem with stale claims because of advances in technology. The issue in this case is whether the physician or the hospital met the standard of care at the time of the alleged malpractice. With the rapid changes that are occurring today in medical technology, it is often hard to so-called turn the clock back to show what level of care was available in those previous years. If it gets longer than ten years, it becomes exceedingly difficult. When asking juries to ignore more recent developments in technical areas such as monitoring devices, intervention techniques, and things that we just learn as time goes on, it's difficult to relate state of the art now versus state of the art then. A statute of repose also promotes the important public goal of achieving finality and protecting defendants from the protracted fear of litigation. They compel presentation and settlement of claims within a reasonable period after their origin, and while the evidence remains fresh in the memory of witnesses. Thank you for your attention. I would be happy to answer any questions that you may have.

SENATOR BOURNE: Thank you. Are there questions for Dr. Spry? Seeing none, thank you. Next testifier in opposition.

ROGER KEETLE: Good afternoon. For the record, my name is

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 38

LB 1163

Roger Keetle, K-e-e-t-l-e. I'm a registered lobbyist for the Nebraska Hospital Association. We also oppose LB 1163. Previous testifier did a good job of covering my testimony, so mine will sound substantially similar, and that is the purpose of the statute of repose is to make sure that we have good evidence, that past ten years, people's memories fade, records are gone, and the possibility of fraud increases as there's the absence of witnesses to defend cases as well as present them. The other issue particularly in the medical area is the rapid advance of technology, and what is the standard of care that is supplied ten years later to cases. Particularly in the medical imaging area, technology and the pictures that we're taking have advanced substantially in a relatively short period of time, frankly. And certainly ten years is time when there's still a problem to search other doctors, I think as you've heard today. The only other point I would make here is is that we do, as hospitals, try to monitor our medical staffs. We've worked with this committee on a Patient Safety Act to develop reporting across all of healthcare providers. And, as hospitals, we do monitor our medical staffs through peer review processes. And, unfortunately, mistakes happen. And sometimes, they happen and there is no negligence. And other times, there is and we try and deal with it as best we can, and try and do as institutions to protect the public, and then, if there's issues, refer them to the state, which has another process, which mandates us to report issues with physicians. So, this is not an area that is unregulated. It is not an area where we do not strive to do the best we can for our patients.

SENATOR BOURNE: Thank you. Are there questions for Mr. Keetle? Seeing none, thank you.

ROGER KEETLE: Thank you.

SENATOR BOURNE: Next testifier in opposition.

DAVID BUNTAIN: (Exhibit 8) Senator Bourne, members of the committee, my name is David Buntain, B-u-n-t-a-i-n. I am the registered lobbyist for the Nebraska Medical Association, and I want to just touch on one point that was made in the proponent testimony, and that is the scope of LB 1163. LB 1163 deals only with the statute of repose that's in the Medical Liability Act. And there is a more

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 39

LB 1072, 1163

general statute of repose that applies to all actions for professional negligence, and I don't have the statutory cite with me, but it's in the code of civil procedure. And it is a ten-year statute of repose. It's two years after the negligence, but if it's discovered after the two years, then it's within one year, but in no event more than ten years afterwards. And that applies to accounting, architectural, legal, any kind of professional negligence, including medical. That is not affected by this. There would, if this were passed, you'd still have a ten-year statute of repose for those claims. This, then, would apply only to those providers that are under the Hospital Medical Liability Act, which would be most physicians and a fraction of the hospitals. The remaining hospitals, for example, would still have a ten-year statute of repose. We also have a ten-year statute of repose for products liability cases for many of the same reasons that you've heard that support this statute of repose. And we are opposed to this. I think the reasons have been explained. There have been several questions about where we stand as far as comparison to other states. We do not have that data, but I think we have access to it, and we will provide that information to the committee.

SENATOR BOURNE: Okay. Questions for Mr. Buntain? Seeing none, thank you.

DAVID BUNTAIN: Thank you.

SENATOR BOURNE: Other testifiers in opposition? Are there testifiers neutral? Senator Stuthman has waived closing. That will conclude the hearing on Legislative Bill 1163. (See also Exhibits 1 and 7) Senator Cornett to open on Legislative Bill 1072. Would the proponents of this next bill make their way forward and we'll make use of the on-deck area in the front row there? Sign in. And again, cell phones aren't allowed in the hearing room, so if you have a cell phone, please disable it. If you want to wait just a second until the room kind of clears. All right, with that, Senator Cornett. Welcome.

LB 1072

SENATOR CORNETT: Welcome. Thank you for having me again.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 40

LB 1072

It seems like I'm spending a lot of time in front of your committee this year.

SENATOR BOURNE: We like to have you.

SENATOR CORNETT: My name is Abbie Cornett and I represent the 45th Legislative District. LB 1072 is a bill that would allow fire departments to donate equipment from one department to another. The reason behind this is many small or rural volunteer fire departments have difficulty providing their members with adequate fire equipment to protect their communities. The people who volunteer their time for their communities are to be commended. LB 1072 would allow a person other than a manufacturer or vendor to donate equipment to a volunteer department or political subdivision for use by its volunteer department without being held liable for civil damages or for personal injury, property damage, or loss caused by the fire control or rescue equipment after donation. There are several people here to testify, which will be able to help better describe how the bill will help them. I'm going to give you a little anecdotal story. My husband was a volunteer fireman for 17 years, 17-and-a-half years, and they have more equipment or more means to purchase equipment. And when it comes time to dispose of good equipment when they have new, they literally set it aside outside, and the other departments, because they can't call and say, can I donate this equipment to you. They just set it aside and then the other departments, or smaller departments from the area, come and kind of scavenge through the pile. We have worked with the lobbyist for the trial attorneys on this bill to work on language that would not affect the strict liability law. And you have a copy of the bill. I will allow the other people following me to testify a little bit more in-depth on the need for this. And will be available for questions afterwards.

SENATOR BOURNE: Thank you. Are there questions for Senator Cornett? Seeing none, thank you. First testifier in support.

BUCK BASSETT: (Exhibit 12) Good afternoon. My name is Buck Bassett. I'm the fire chief in Ogallala and past-president and board member of the Nebraska Fire Chiefs Association. Today, I'm speaking for the Fire Chiefs

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 41

LB 1072

Association. There are departments throughout the state of Nebraska that have surplus fire equipment, personal protective equipment, different tools, and apparatus. At the same time, there are probably an equal number of departments that have very small budgets and a desperate need for all kinds of fire equipment. Yet the way the current law is written, equipment cannot be passed from one department to another without a great deal of liability going with it. This has curtailed some departments getting the equipment they needed. Common sense tells us if a department has something sitting in the storeroom not being used, and a department down the road has a desperate need for that same equipment, you ought to be able to give it to them to help them out. Maybe it doesn't meet the current National Fire Protection Association standards, but if it is better than what they have or is something they don't have at all, then it definitely should be passed on. What good is something sitting in a storeroom rotting or rusting away and eventually being thrown away when it could be used by someone else. It is the mission of the fire departments in the state of Nebraska to help others. And this is a way that we can help our own. In the past, the Ogallala Volunteer Fire Department has donated personal protective equipment to Southeast Community College. When the students in the fire program didn't have the protection they needed to fight fires for training. We have also donated personal protective equipment to a small department in the Sand Hills that didn't have enough equipment to cover all of their firefighters, or in some cases, didn't have the right sizes. The Ogallala Volunteer Fire Department tries to change out their personal protective equipment on a regular basis, and some of it is worn out and some of it isn't. Equipment that is worn out is thrown away, and the other is kept for a period of time, hoping that someone can get some good use out of it. In conclusion, the Nebraska Fire Chiefs Association urges the senators to pass LB 1072. If you have any questions, I would be happy to answer them.

SENATOR BOURNE: Thank you. Are there questions for Chief Bassett? Chief, I have a quick question. I've read through the statute, the existing statute, and it's Section 35-801, and I don't see anywhere in there where you or, who's the closest nonvolunteer fire department to you? In say, North Platte?

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 42

LB 1072

BUCK BASSETT: North Platte.

SENATOR BOURNE: So, I don't see anything in here, I'm just wanting some clarity, I don't see anything in here that if, say they have a three-year-old ladder and they bought a newer one that was taller or whatever, I don't see anything in here that would prohibit North Platte from calling you and say, hey, we have this ladder, come and get it. I don't, where do you see that, the prohibition?

BUCK BASSETT: I think it says it in the current statute that it has to meet current NFPA regulations. And NFPA, that's National Fire Protection Association, changes their regulations over a, every once in a while, you know. It depends on how often they get together. They have committees that do that. And they don't change so often on vehicles as they do on personal protective equipment, the bunker equipment, the boots, the pants, the coats, the helmets. They change those standards constantly. And, well, right now, they're changing the standard on coats, that they have to have some way in the back of the coat so a person can grab hold of it and drag a person out. Now, I've been buying new bunker equipment. I bought three new sets this year and five last year, and none of those have that in there. So, next year, when I buy bunker equipment, it'll have it in there that they have to have a means in the back to the coat for a person to grab hold and drag a firefighter out.

SENATOR BOURNE: Okay. Just for clarity, so, what--you're adding an exclusion from liability from the transferer, the North Platte, so they wouldn't have any liability. And you're also changing the existing section of statute where it says no person shall knowingly transfer to no vendor or manufacturer, so I'm a little confused, though. Obviously, North Platte is not a vendor or a manufacturer.

BUCK BASSETT: Right.

SENATOR BOURNE: So North Platte could transfer to you a piece of equipment that is substandard...

BUCK BASSETT: Right.

SENATOR BOURNE: ...and they would have no, so they transfer

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 43

LB 1072

to you a ladder that doesn't meet the National Fire Protection Association guidelines in effect at the time, and if your guy gets hurt on that ladder, North Platte has no...

BUCK BASSETT: No liability unless they've done it intentionally, and they wouldn't, so they have no liability on that. That's right. But in the case of a ladder, there are standards to test those ladders. And certainly, if somebody is going to give you a ladder truck, you ought to have it tested to make sure it's...

SENATOR BOURNE: Let me ask you this. What if Senator Friend has a fire equipment manufacturing company and he makes, what's that hook they use to pull the ceiling down?

BUCK BASSETT: Pike pole.

SENATOR BOURNE: Bipole?

BUCK BASSETT: Pike.

SENATOR BOURNE: Pike pole. He makes pike poles, and he's a nefarious character, and makes them so they don't comply with the National Fire Protection Association. I'm looking to make a dollar. I buy those from him, and I sell them to you, and they don't meet the guidelines. That's, I wouldn't be prohibited from doing that if this statute passed.

BUCK BASSETT: And I'm not positive about that, but I was thinking something in here says that it doesn't have anything to do with the selling of, by an individual. It's the giving.

SENATOR BOURNE: But I could be considered a vendor if I do that...

BUCK BASSETT: If you were selling it.

SENATOR BOURNE: ...if I do that in the regular course of business?

BUCK BASSETT: Yes.

SENATOR BOURNE: Okay. Further questions for the chief? Seeing none, thank you.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 44

LB 1072

BUCK BASSETT: Thank you.

SENATOR BOURNE: Did you come all the way from Ogallala...

BUCK BASSETT: Yes.

SENATOR BOURNE: ...for this bill?

BUCK BASSETT: Yes.

SENATOR BOURNE: Wow. That's a long way to travel.

BUCK BASSETT: Four hours down the interstate.

SENATOR BOURNE: Thanks for coming.

BUCK BASSETT: You welcome.

SENATOR BOURNE: Next testifier in support.

DALE TEDDER: Thank you, Senator. My name is Dale Tedder and I serve as the fire chief of the Bellevue Volunteer Fire and Rescue Department. In...

SENATOR BOURNE: Could you spell your last name?

DALE TEDDER: Oh, I'm sorry. Tedder, T-e-d-d-e-r. In 2005, the Bellevue Volunteer Fire Department responded to 2,192 medical emergencies or rescue calls and 484 fire calls. The city of Bellevue and the Bellevue Volunteer Fire Department has initiated a preventive maintenance and equipment replacement program. The city and the department constantly are upgrading fire and EMS equipment as our personnel's training and adequate skills and responding to technical advances in the fire and EMS science changes. As a result of the volume of calls and our preventive maintenance and equipment replacement program, we are able, fire and ambulance equipment available for the fire department and ambulance services (inaudible) and the need of such equipment. Nebraska's fire and ambulance service could provide their fire and ambulance capabilities statewide if fire departments and ambulance service could donate new and used working equipment and supplies with limited liability. Programs already exist for receiving

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 45

LB 1072

equipment that Nebraska Forest Service acquires used military vehicles and transfers ownership to the departments willing to rehab and customize these vehicles. Many of the rural departments have acquired these vehicles and to use them as off-road situations including forest, prairie, and wild fires. Imagine this success story in the cooperation with the department or municipality can donate a working fire truck or ambulance to their neighboring communities. When communities that are unable to acquire the \$70,000 to \$150,000 or more needed to purchase a new or used vehicle. Considering the department being able to donate its bunker gear or PAS devices to another department. Also consisting department hospitals or clinics donating the used suction pump, spine board, or child restraint system for an ambulance service. Releasing the equipment with limited liability is a first step to making this program operational. However, along with the donation should be some simple solutions. Equipment must be in working order and easily repairable. Any known defects or repairs need to be identified and recorded before transferred. Ambulances and medical equipment must meet the ambulance inspection standards and be inspected and approved by a physician or their medical director. Vehicles titles to be registered, and donated vehicles and equipment, help the fire department and of the ambulance service in pride their ability to meet the guidelines of the National Fire Protection Association and the standards of the Nebraska Emergency Medical Service program. Thank you for your time.

SENATOR BOURNE: Thank you. Are there questions, is it Chief Tedder?

DALE TEDDER: Chief Tedder.

SENATOR BOURNE: Chief Tedder. I'm sorry. Are there questions for Chief Tedder? Seeing none, thank you. Next testifier in support.

MICHAEL DWYER: (Exhibit 13) Good afternoon. My name is Michael Dwyer, D-w-y-e-r, and I'm a member of the Nebraska State Volunteer Firefighters Association legislative committee and a 23-year member of the Arlington Volunteer Fire Department. I'm here today to testify in support of LB 1072, an bill that would reduce the liability of civil damages for individuals who donate fire suppression and-or

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 46

LB 1072

rescue equipment to volunteer fire departments. Currently, over 75 percent of Nebraska is covered by volunteer fire and rescue services. While some are supported by tax districts, many others are either underfunded or have no source of tax funding at all. For these departments, they must not only find the time to train and to respond, but they must also spend tons of time raising funds to purchase rescue, protection, and fire suppression equipment. In small communities, pancake feeds, dances, and, God forbid, a Vegas night raise trickles of money. On the other hand, whether it's a structure fire in Omaha, a car accident near Ord, or a prairie fire in western Nebraska, the goals and the risks are the same. The difference is that for small departments, it simply doesn't have, small departments simply don't have the financial options that larger, tax supported departments do. Currently, Nebraska law contains early 1990 language that holds any person, i.e., an individual firefighter or department liable for the transfer of equipment between departments unless it meets current NFPA, National Fire Protection Association, standards. LB 1072 would remove that liability except in cases of intentional or reckless conduct or gross negligence. In a practical sense, this would allow departments to donate or to sell much-needed equipment to smaller departments without having to prove that that equipment meets or exceeds current NFPA standards. The changes called for LB 1072 would not apply to vendors or manufacturers, only to individuals. Many small departments just don't have the resources to purchase new equipment or to have old equipment recertified. In many cases, it's the choice between donated equipment or no equipment at all. LB 1072 doesn't reduce the standards for equipment, and no department wants gear that is unsafe for its members. LB 1072 does allow those departments that will actually use the gear to make that decision and reduces the liability for volunteers to protect Nebraska's rural communities. Thank you, and I would welcome any questions.

SENATOR BOURNE: Thank you. Are there questions for Mr. Dwyer? Seeing none, thank you.

MICHAEL DWYER: Thank you.

SENATOR BOURNE: Next testifier in support.

JERRY STILMOCK: (Exhibit 14) Good afternoon, Senators. My

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 47

LB 1072

name is Jerry Stilmock, S-t-i-l-m-o-c-k, lobbyist on behalf of the Nebraska State Volunteer Firefighters Association testifying in support of LB 1072. I want to take a moment to explain that part of existing Statute 35-801 and why that was brought into play and why we're seeking to amend it in this situation. Back in the late '80s and early 1990s, manufacturers were entering into Nebraska, selling their gear and equipment to fire departments, and that equipment was substandard. It was coming in new and it was substandard. I'm not aware of any firefighters that were injured because of that substandard equipment, but one of the things that was brought to the Legislature before my involvement with the association was to bringing in the law that sits as Statute 35-801 now to prohibit a manufacturer, actually as it states now, any person to come in and be able to sell equipment that was not up to standards, was not up to code, that code being the NFPA. We saw the overbreadth of what happened in having Statute 35-801 apply to everybody, and that's why in the language that Senator Cornett has introduced, that it would limit it only to those that were actually causing the problem, the vendors and the manufacturers back in the 1990s. So that's the reason for asking for the change in the existing law. As to the new law and having some type of limited liability, or better said, limited grant of immunity except for that of gross and intentional or reckless conduct, was because, as we've seen other states do, Nebraska is trying to get in line with what Texas has started and other states have taken on in order to grant this immunity protection for equipment that's passed on. As Senator Cornett said, she and I were able to meet earlier with the Nebraska Trial Attorneys Association to conform the language in the bill, which is before you today, that we're able to have some agreement before coming to you this afternoon, and on behalf of the association, urge your advancement to general file with this bill. Thank you. I have testimony.

SENATOR BOURNE: Thank you. Are there questions for Mr. Stilmock? Jerry, I'm still a little unclear. Okay, "person" would encompass the current, the way the law currently is written, "person" would encompass anybody--vendors, manufacturers, me and my situation with Senator Friend.

JERRY STILMOCK: Yes.

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 48

LB 1072

SENATOR BOURNE: It would encompass everybody. But now you've narrowed it down to vendors or manufacturers have to sell equipment that meets or exceeds the NFPA.

JERRY STILMOCK: Yes, sir.

SENATOR BOURNE: I don't understand that, why you would narrow that down rather than leave it broad. Because again, the way it's worded today, nobody could sell substandard equipment. With your proposed language, someone, anyone other than a vendor or manufacturer could sell substandard equipment. I don't understand.

JERRY STILMOCK: I guess I looked at the category of a vendor or a manufacturer as being universal, and I didn't think it would include a subcategory, if I'm selling it, that puts me in the category of a vendor.

SENATOR BOURNE: Okay. We'll have to look at it. I'm sure there's a definition of, I'm just saying I'm wondering why we're, you know, you're making this really narrow, and maybe that's appropriate. I'm just questioning. It just seems kind of contrary, almost.

JERRY STILMOCK: If, and I'll take you up on your invitation to keep things moving when you suggest maybe we could visit later, but the word "transfer" in the existing language of Statute 35-801 causes me concern to say, okay, if I'm North Platte and I'm transferring to Ogallala, boom, I'm hit, and I'm prohibited from doing that unless it's NFPA approved.

SENATOR BOURNE: See, and I would read this to say that North Platte could do it even if it wasn't, now. And that wouldn't change because they wouldn't be a vendor or a manufacturer.

JERRY STILMOCK: Okay. But they would be "any person."

SENATOR BOURNE: Today?

JERRY STILMOCK: Yes.

SENATOR BOURNE: I'm not sure a person is an entity?

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 49

LB 1072

JERRY STILMOCK: And, yeah, okay.

SENATOR BOURNE: And, I mean, we're trying to accomplish the same, I see what you want. I mean, you want to be able to have decent equipment, rather than being thrown in the dumpster, be utilized.

JERRY STILMOCK: Yes, sir.

SENATOR BOURNE: And I understand exactly what you're...

JERRY STILMOCK: Okay.

SENATOR BOURNE: ...okay. Would there be anything that would prevent a political subdivision from, North Platte, okay, we've got these 20 ladders, or, I don't even know what kind of equipment you'd give over, from making Ogallala sign an agreement saying there's no liability whatsoever for this equipment? I mean, is there anything that would prohibit that today?

JERRY STILMOCK: No. No.

SENATOR BOURNE: Does that occur?

JERRY STILMOCK: You know, I don't believe anybody's signing limitations of liability agreements now.

SENATOR BOURNE: Okay.

JERRY STILMOCK: And I think that's why the statutory change is being requested.

SENATOR BOURNE: Well, it makes sense what you're trying to do. I just, I need to, I guess, digest the rest of the bill. Further questions? Senator Foley.

SENATOR FOLEY: Jerry, I'm just wondering as I think further about this bill, isn't it possible that there might be a piece of equipment somewhere out there where people with knowledge might dispute as to whether or not it is dangerous or safe. And a department, a volunteer department that's really hurting financially might say, look, we'll take it, we need it badly, and despite the fact that there's a

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 50

LB 1072

dispute as to whether or not it's even a safe piece of equipment. Do you have any concerns about that?

JERRY STILMOCK: And then continue on with your thought, if I would continue on with your thought, then, is if that item of equipment did cause an injury...

SENATOR FOLEY: Under today's law, I presume that the volunteer department wouldn't take the equipment because...

JERRY STILMOCK: ...because of the dire situation of some fire departments, they in fact are taking it.

SENATOR FOLEY: ...because the department that's unloading it...

JERRY STILMOCK: Yes.

SENATOR FOLEY: ...isn't going to want to give it up and be exposed to some liability.

JERRY STILMOCK: That is the paramount concern, yes. But behind the scenes, what is happening is departments, whether it's volunteer or a paid career department, I believe, are transitioning their equipment out and setting it out and notifying the have-nots that here it is, come and get it, but with a blind eye. And that's the part that, call a spade a spade, and let's provide some limitation of immunity so that this can happen at the front door instead of the back door, I guess.

SENATOR FOLEY: All right. Thank you.

SENATOR BOURNE: Further questions? Seeing none, thank you.

JERRY STILMOCK: Thank you, Senators.

SENATOR BOURNE: Next testifier in support.

ERIC RASMUSSEN: My name is Eric Rasmussen, R-a-s-m-u-s-s-e-n. I serve as the training officer for the Southeast Rural Fire District and I'm also the vice president of the Nebraska Fire Chiefs Association, and we're in support of LB 1072. Southeast Rural has had the good fortune to have equipment to donate. We always look into

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 51

LB 1072

that equipment and check it, and would never donate something that didn't work, that was liable, that would provide liability or injury to one of our fellow firefighters. As such, we take that as a responsibility on us. But should we, we would hope that the liability wouldn't come back to haunt on us, should we have the misfortune of making an error in judgment. By the same token, small districts have the responsibility also to look at that equipment and say, look, this isn't good enough, it doesn't meet standards, and we won't accept it. And that is in the bill so that it's a dual responsibility, from the "donee" to the donator, to the recipient, and we would hope that that would work the way it is supposed to. We have done it before. It works with well. We have the small departments that have some very, very real needs out there. And to be able to do these things would be a great benefit to the service of this state. Any questions?

SENATOR BOURNE: Questions for Mr. Rasmussen? Seeing none, thank you. Other testifiers in support? Testifiers in opposition? Testifiers neutral? Senator Cornett to close.

SENATOR CORNETT: Thank your time and consideration on this bill. Senator Foley, you brought up a good point. Currently, this equipment is being transferred. And what the testifiers stated is true. It's being done in a backdoor fashion. A lot of times, it's put in dumpsters, and then you make calls to the surrounding fire departments and say, we're cleaning our closets today. And then you see men digging through dumpsters for this equipment because they are so desperate for it. A lot of you are fortunate enough, as myself, to live in a metro area where you either have a paid fire department or a large, more affluent volunteer department like Bellevue. A lot of the rural areas have no equipment. I was speaking to a senator on the floor that's one of the cosponsors of this bill. His fire department has coats that are being held together with duct tape. His comment was, if something catches on fire in his district, it burns because they don't have equipment. This is a means of transferring reliable equipment that is checked out before it is donated to help fire departments that do not have money to sustain themselves, and will lead to less loss of property and life, and injury to the firemen. We would be happy to work with the language with you, Senator Bourne, if there's anything we can do to

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 52

LB 1072

clarify those points. Again, we spent quite a bit of time, Mr. Stilmock and the representatives of the trial attorneys, making sure that we did not tamper with the strict liability law. So the wording was very careful, but we will be happy to sit down with you as a group and go through that and reword it if we need to in a manner that's acceptable for all parties.

SENATOR BOURNE: Thank you. And I just want you to think about, I'm kind of saying this for Mr. Stilmock, the attorney, about a person versus vendor or manufacturer. And then also, if there is a situation where, say a firefighter is using a piece of donated equipment and there was an agreement between the giver and the receiver, you know, say North Platte made them sign something, there still would be a lawsuit by the individual firefighter that was injured. And what I want Mr. Stilmock to think about is whether or not that agreement between the two firefighting entities would protect the donor...

SENATOR CORNETT: The firefighter.

SENATOR BOURNE: ...from an individual lawsuit from the individual that was hurt,...

SENATOR CORNETT: Okay.

SENATOR BOURNE: ...so, I see where you're going with this. It makes a lot of sense.

SENATOR CORNETT: It's just a means of trying of trying to provide equipment to areas that have no means of their own.

SENATOR BOURNE: I agree with the concept.

SENATOR CORNETT: Yes. We just need to work out the language.

SENATOR BOURNE: Perfect. Further questions for the Senator? Seeing none, thank you. That will conclude the hearing on Legislative Bill 1072. (See also Exhibit 11) Senator Cornett to open on LB 1149. As Senator Cornett gets ready to testify, can I have a show of hands of those folks here wishing to testify in support of this bill? I see four. Those in opposition? I see no opponents. So,

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 53

LB 1149

Senator Beutler, if you're listening, there's four proponents before the next bill.

LB 1149

SENATOR CORNETT: Kind of saved the best for last here. It's a little bit more in-depth of a bill, and the opening is going to take a little bit of time. As we all know, Nebraska today is one of the nation's fastest growing new immigrant destinations. Nebraska now has children living here who are foreign nationals from countries as varied as Guatemala, the Sudan, Bosnia, Indonesia, and Russia. The significant majority, of course, are from Mexico. Immigrants often arrive as families, complete with young children and old. Or they, of course, have children after they arrive. According to the U.S. census, almost 20 percent of children residing in the United States have at least one foreign-born parent. Almost 2.5 million children living in the United States are not American citizens. To complicate matters, 85 percent of immigrant families with children are mixed-legal status families where at least one parent is a noncitizen and one child is a citizen. The noncitizen may, as often as not, be undocumented. These demographics are seen through Nebraska today. Inevitably, some of their children will become part of our state foster care system due to either a parent's death, the child's removal from the family on the basis of abuse or neglect, or enforcement of immigration law against the parent. When a child comes into state custody, the first priority is to place the child with the closest living relative. If the child cannot successfully be placed with a parent, Nebraska child welfare officials are supposed to look to other relatives such as grandparents or aunts who are willing to take custody of the child, either temporarily or permanently. The difficulty in cases concerning children of immigrants is, often the closest living relative lives in another country. Unfortunately, Nebraska's underfunded foster care system has not been well set up to deal with these transitional placements. There have been many examples where placements have failed or not even been attempted, leaving children in a country to which they may have little or no connection. These children may then stagnate in Nebraska's foster care system, placed in institutional homes or adopted away to strangers from a

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 54

LB 1149

different culture. There are many challenges for Nebraska's foster care system in this circumstance, not the least of which is to try and manage the transitional relationship with relatives seeking custody. These inevitably lead to challenges and obstacles that include communication barriers, information disadvantages, financial limitations, culture differences, and the involvement of many different judicial systems. Fortunately, the Nebraska Department of Health and Human Services and the consulate of Mexico based in Omaha in June 2005 entered a memorandum of understanding to protect the rights of Mexican children in the state custody in Nebraska. This agreement provides for early notification and involvement by the consulate and provides direction to child welfare workers as to how to serve children and families who are Mexican nationals. For example, the consulate is able to help with placement studies, communication, transportation, and other necessities so that a Mexican child may be reliably and safely placed. This agreement has proven effective, and has helped families understand their rights, and placed children with relatives in a more timely manner. I am sponsoring LB 1149 to ensure that all foreign national children, as well as citizen children with foreign relatives, are provided the most family friendly, appropriate, and safe foster care services. In LB 1149 requires early notification to the consulate of foreign nationals, already a requirement under the international agreements, but difficult to accomplish without firm state guidance. I believe this is in the best interest of Nebraska's children, which include those from immigrant families, and should be considered a helpful reform to our children's welfare system. Others to follow with experience in this area will be able to elaborate on the matter further, including the Mexican consulate of Nebraska. Just a quick "outlier," there was a case a few years ago that actually went all the way to the Nebraska Supreme Court in regards the placement of two children whose mother had been deported. This and other cases led to the memorandum of understanding, but it is only with the Mexican government. There are children from many other cultures here that we do not have an agreement with and that do not have an agreement with Health and Human Services. The problem with a memorandum of understanding rather than legislation is it can be terminated at will by either side, which means that with a change of administration, with a change of consulate, these children are left without

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 55

LB 1149

protection. By legislating the matter, we will be able to provide protection or a guideline for protecting children of foreign nationals and children with dual citizenship.

SENATOR BOURNE: Thank you for that clarification. We do have a letter from Nancy Montanez (Exhibit 15), director of Department of Health and Human Services, saying...

SENATOR CORNETT: Saying, I believe I have a copy of that letter, that says that they don't feel this necessary because they have the memorandum of understanding in place. But that is only with the Mexican consulate.

SENATOR BOURNE: I'm saying I appreciate you pointing that out.

SENATOR CORNETT: Yeah.

SENATOR BOURNE: I was trying to get the distinction. Questions for Senator Cornett? Seeing none, thank you. Appreciate it. First testifier in support. Welcome.

JOSE CUEVAS: (Exhibit 17) Thank you. Good afternoon. Good afternoon. My name is Jose Cuevas. I'm the consul of Mexico in Omaha, Nebraska, and I'm here to sponsor the legislation that's been introduced today by Senator Cornett. This legislation has been a long time in the process of making, and basically why? Because we see a lot of children that are just being left in limbo. Independently, that there was an international, or there is a convention on the rights of the child. It's an international convention on the rights of the child. We thought that it was necessary since we were finding so much problem within the state of Nebraska to be able to sign a memorandum of understanding. However, what Senator Cornett today introduces goes beyond that. It gives us the opportunity to legislate it, to, in the event of a change of the administration, as you well mentioned, that nothing will change. Everything will continue, and the rights of the children will be protected. The memorandum of understanding that was signed between the Mexican government and the state of Nebraska does specifically clarify children of multiple nationalities. That is, Mexican nationals who were born in Mexico or who one of their two parents are Mexican nationals, those are children of multiple nationalities. These children are also

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 56

LB 1149

included within the framework of the memorandum of understanding. It has worked very well. The consulate has been able to take back children up to...we've been in charge of all of their transportation. We've transport them back to Mexico. We've handed them over to their families in Mexico, and it has worked very well. The memorandum itself is working very well. People that will follow me today that will provide you with testimony, important testimony that you will be able to base this on, will give you a lot more information than I can right now. But please, do consider it. It's something very serious. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Mr. Cuevas? Seeing none, thank you.

JOSE CUEVAS: Thank you very much.

SENATOR BOURNE: Appreciate your testimony. Next testifier in support of this bill. Welcome.

IONA NAVARRETE: Hi. Vice Consul Iona Navarrete from the Mexican Consulate. I work for the Protection Department. And...

SENATOR BOURNE: Ma'am, could you spell your name, please?

IONA NAVARRETE: Yes.

SENATOR BOURNE: Thank you.

IONA NAVARRETE: N-a-v-a-r-r-e-t-e.

SENATOR BOURNE: Thank you.

IONA NAVARRETE: The Protection Department is in charge, exactly, of making sure that the memorandum of understanding works with the Department of Health and Human Services. What we try to do is help them understand the cultural differences between Mexicans and U.S. citizens. Sometimes, the cultural differences will make it difficult to give the services that are needed by the people that the department is trying to service, and also, to the child, to make the caseworkers that are taking these cases understand that the child, for us, is also a Mexican national, sometimes even born here in the U.S. with Mexican parents. If we can try

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 57

LB 1149

and help this department with their work, and if they can use us as a tool to better do our jobs in getting those children into their homes, even if it's not with the parents--it could be with a family member, even if it's in another country, as long as they have the same culture that they have been brought up in. Cultural differences are a huge thing here in Nebraska, especially because there are not enough adoptive homes with the same culture. So we're talking about placing sometimes children in homes where they don't even speak Spanish. So we're trying to help in that way, and I believe that making it a law would help us disseminate the information that we are there to help. And I'm talking about the Mexican nationals, of course. I'm sure our colleagues from other countries would also believe the same, that it would be in the better service of their children. Also, one of the things I always try to tell them, if you're in a foreign country, wouldn't you like your consulate to be available to you? Thank you.

SENATOR BOURNE: Absolutely. Are there questions? Seeing none, thank you. Appreciate your testimony. Next testifier in support.

ANN EBSEN: Good afternoon. My name is Ann Ebsen. It's E-b-s-e-n. I'm an attorney in private practice in Papillion, and I hold a contract with Sarpy County to do juvenile defense work. There are three law firms or lawyers who hold these contracts, and as a case comes into the juvenile court, they rotate through and we're appointed to represent the mother, the father, the child, or any other family members who have standing to be represented. So, I'd like to speak to you about the practicalities of this bill. As a guardian ad litem, I'm notified that a child has been placed in state custody. It's been a couple of days at least since that child has been placed. So I get this notification that I have to track down the caseworker and find out whether or not they have, if it's a child with a Hispanic surname, does this child speak English? Does this child speak Spanish? Is this child placed with family members? Is this child placed in a foster home where no one speaks Spanish and the child only speaks Spanish? The next hearing that we have is a detention hearing, and at that hearing, the parents will be appointed an attorney. So a child can be removed. They can be in foster care for weeks before their parents have the opportunity to get an

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 58

LB 1149

attorney. Then, if I'm representing the parents, I don't speak Spanish, so if I don't speak their language, I can't talk to them and explain to them that I am not part of the state system that took their child. I am their advocate. And so if I'm trying to use a court interpreter for five minutes to be able to explain this, I'm not getting anywhere. Since we've been working in Sarpy County with the consulate, it has helped immensely in explaining cultural differences that were misunderstood at the time the child was removed, and helping to explain the relationship between the family members, issues that have come up, being able to facilitate communication, being able to facilitate visitation. And as an attorney, it's a huge relief to me to be able to talk to my client and be able to explain to them, this is how this system works. It's not, we just take your children and keep them and don't tell you what's going on. So I would support this bill. Thank you.

SENATOR BOURNE: Thank you. Are there questions? Seeing none, thank you.

ANN EBSEN: Thank you.

SENATOR BOURNE: Next testifier in support.

MILO MUMGAARD: (Exhibits 18, 19) Good afternoon, Mr. Chairman and committee. My name is Milo Mumgaard. That's spelled M-u-m-g-a-a-r-d. I'm the executive director and a practicing attorney with the Nebraska Appleseed Center for Law in the Public Interest. I am mostly here primarily to emphasize the importance of the application of, or the actual import of the bill you have in front of you, that is to require the state Department of Health and Human Services to be engaged with consulates and to be engaged with looking for the best possible placements for foreign national children or children who have relatives where the closest relatives that happen to be in a foreign country. The first document that I've handed out is, in fact, the court decision from the Nebraska Supreme Court written by Judge Hendry back in 2004 that Nebraska Appleseed litigated that Senator Cornett referenced a few minutes ago. And that is the decision about a Guatemalan family, a case out of the Grand Island area, in which the state department really failed across the board to recognize the rights of the child and the family to interact with their family members, to

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 59

LB 1149

actually be, to have significant amount of work put in to locate the best possible placements. In a nutshell, the constitutional rights of this family was violated in many different aspects, and this decision validated the fact that this family deserved to have a lot of opportunity that it didn't otherwise get, including the contact with the consulates, including information in their own language, information given to them at appropriate times, and so on, all of which the consulates could have helped with, the Guatemalan Consulate in particulate could have helped with, if, in fact, notified earlier. The nice part of this case is the family has been reunited as a result of this Supreme Court decision. But on the other hand, we still see recurring problems within the child welfare system of the sort that's been described here today. That is, the state department not actually working with families who have mixed status, foreign national, non-English speaking members, in a way that adequately protects their needs and that actually goes to the question of, is the best possible placement, perhaps, with a relative in Mexico, or perhaps with a relative who is not a citizen or even documented, and so on, and have they looked into that? So that leads to the second document I've given you, which is a summary of the class action lawsuit that Nebraska Appleseed has filed against the entire child welfare system, which is pending in federal district court today, an aspect of which is this particular area that we're talking about right now. What kind of services are being delivered to non-English speaking, noncitizen children and their families, and to what degree is the state complying with constitutional and statutory requirements. We would argue, of course, that at this juncture, they're not, and that's why it's necessary to have the class action suit. Getting back to the bill before you, it does a very, I think, a relatively mild but yet significant step in the right direction of requiring the state to actually have this policy in place to work with the consulates so that children and families are better served when they are brought into the child welfare system. Unfortunately, too many kids are brought into the child welfare system. That's an issue not to be discussed today, but when they are brought into the system, how are we helping them and their families? This is a good way to do it. So I'd be happy to answer any questions you might have.

SENATOR BOURNE: Thank you. Are there questions for

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 60

LB 1149

Mr. Mumgaard? Seeing none...

MILO MUMGAARD: Thank you very much.

SENATOR BOURNE: ...thank you. Thanks for what you do, too, Milo. Next testifier in support.

BILL MUELLER: Chairman Bourne, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of the Nebraska State Bar Association in support of LB 1149. We do believe it is important that the Legislature pass this particular piece of legislation. We do believe that it is very important to involve the minor child's consulate in matters such as these. And as the father of a daughter who lived in Argentina for six months, I certainly would want the American Consulate to be involved in a matter concerning her. Be happy to answer questions you may have.

SENATOR BOURNE: Thank you. Questions for Mr. Mueller? Seeing none, thanks.

BILL MUELLER: Thank you.

SENATOR BOURNE: Other testifiers in support? Are there testifiers in opposition? Are there testifiers neutral? Senator Cornett. Senator Cornett to close.

SENATOR CORNETT: Thank you for your time today in listening to this matter. There are really two points that I want to address in closing. One, Nebraska, like the rest of the United States, has got to basically wake up and realize that we face a growing problem in regards to how we're dealing with our immigrant population, particularly the Mexican nationals because we have so many of them in the state. And they are being overlooked and sliding through the cracks at this point, the children are. And it's not just the Mexican nationals. The woman from Guatemala is a good example. And part of the problem is our Health and Human Service Department is so overburdened at this point. But we do need to provide some type of legislative direction on how children of foreign nationals are dealt with. The other point that I need to bring up, and it was a drafting error on my part. The original memorandum of understanding says children of foreign nationals or children with dual citizenship, that is, if they're born in this country but

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 61

LB 1149

their parents are not U.S. citizens. I seem to have left out that one, dual citizenship, so I will be offering an amendment to this bill in regards to that. And that does follow the actual memorandum of understanding that we have with Health and Human Services.

SENATOR BOURNE: Okay. Questions? Just so, additional clarity, so our Department of Health and Human Services has a letter of understanding with the Mexican government...

SENATOR CORNETT: Mexican Consulate, yes.

SENATOR BOURNE: ...and they are, are they...

SENATOR CORNETT: They're following all of...

SENATOR BOURNE: ...and they are involved in...

SENATOR CORNETT: ...they are working now, since the memorandum of understanding.

SENATOR BOURNE: ...okay.

SENATOR CORNETT: The issue we have is more...

SENATOR BOURNE: Right.

SENATOR CORNETT: ...is actually kind of two-fold, that, (1) we only have this with the Mexican government. Omaha, Sarpy County, particularly have a growing population of Sudanese...

SENATOR BOURNE: But just HHS is...

SENATOR CORNETT: Yes.

SENATOR BOURNE: ...living up to the letter...

SENATOR CORNETT: You would have to speak to Mr. Mumgaard in regards to how well it is working, but from what I understand, it is working considerably better than before when they had the understanding.

SENATOR BOURNE: The reason I ask that is, you know, not to take away anything from Ms. Montanez, because I think she's

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 62

LB 1149, 905

a welcome addition to HHS, but we've had probably ten or 12 hearings so far this year that indicates there's still problems with HHS...

SENATOR CORNETT: Well, I believe there are still...

SENATOR BOURNE: ...and I just wondered how their performance was here.

SENATOR CORNETT: ...I believe there are still problems, and that is the reason that I was originally approached on this bill, and then studied the issue. There are two issues: (1) It is only with the Mexican government, and (2) Health and Human Services is basically a bureaucracy and, or administrative. We do not know when this memorandum could be terminated or for what reasons. And we feel that it is necessary that it becomes legislation to protect the children, basically. Because it is a branch of the government and government has its whims sometimes.

SENATOR BOURNE: I agree. Further questions? Seeing none, thank you. That will conclude the hearing on Legislative Bill 1149. (See also Exhibit 16) The committee will stand at ease for about three minutes.

(RECESS)

SENATOR BOURNE: Okay, I think we're going to go ahead and reconvene. We're going to take, since Senator Baker is here, we're going to open, Senator Baker is here to open on Legislative Bill 905.

LB 905

SENATOR BAKER: Thank you, Chairman Bourne, members of the Judiciary Committee. It's kind of nice to back in front you, I think. I am Tom Baker, represent District 44 in the legislative district. I am here today to introduce LB 905. The intent of this bill is to prohibit certain exculpatory clauses in the motor carrier transportation contracts. A contract provision that would require a motor carrier transporter to indemnify a "promisee" for negligence or intentional acts or omissions by the "promisee" is unenforceable. The "promisee," for example, a shipper,

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 63

LB 905

pressures a motor carrier to provide motor transportation under contracts in which the motor carrier agrees to indemnify and hold harmless the shipper for the shipper's failure to meet its duties or responsibilities. In essence, the motor carrier becomes the insurer for the shipper. The bill does not affect contractual provisions in which a motor carrier indemnifies the shipper for the motor carrier's own negligence or intentional acts or omissions. I've received some suggestions for amendments to the bill. One suggestion is to amend the bill on page 3, line 14, after "America," by inserting "or other agreements providing for the interchange, use, or possession of intermodal chassis, contrains, or other intermodal equipment." In addition, the Public Service Commission has recommended that on page 2, line 23, we strike "passengers or" since the contracts we're referring to typically deal with transport of goods and not people. I would ask that you advance LB 905 to the floor, and would be glad to answer any questions. I do have people more versed in this issue than me to testify, I believe. So I would try to answer questions, but I do think people behind me would probably be more appropriate.

SENATOR BOURNE: Okay. Thank you. Questions for Senator Baker? Seeing none, thank you.

SENATOR BAKER: Thank you, Senator Bourne, for letting me introduce this.

SENATOR BOURNE: You bet. First testifier in support. Are there other individuals in the audience that want to testify in support of the bill? Go ahead and sign in. If you haven't signed in, would you go ahead and do so afterwards?

LARRY JOHNSON: Gotcha.

SENATOR BOURNE: Thank you. I'm sorry for juggling the agenda, but here we are. Welcome.

LARRY JOHNSON: Good afternoon, Senator Bourne. Are you ready?

SENATOR BOURNE: I'm ready when you are.

LARRY JOHNSON: Okay. Senator Bourne, committee members, I'm Larry Johnson, the president of the Nebraska Trucking

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 64

LB 905

Association. That's J-o-h-n-s-o-n. And I'm here to offer testimony for the bill. From a transportation perspective, we feel like this is one for the smaller guys out there in that there are transportation contracts out there that have the indemnity clauses in there. These folks with the smaller truck lines don't have the ability or legal counsel to always follow through on them. So it's not an issue of limiting our liability, much more our exposure to a liability. Some of the effect that it's had on us is that it does raise insurance rates for the trucking industry and creates open exposure for small, well actually any carrier, but particularly for those carriers that can't cross out or have the ability to not take that freight. So with that, any questions?

SENATOR BOURNE: Are there questions for Mr. Johnson? Seeing none, thank you.

LARRY JOHNSON: Thank you.

SENATOR BOURNE: Next testifier in support.

DONALD SWERCZEK: Thank you, Mr. Chairman, Senators. My name is Donald F. Swerczek. I live in Omaha, Nebraska, and I'm president of Wynne Transport Service, Inc., in Omaha. We are...

SENATOR BOURNE: Could you spell your last name for us, sir?

DONALD SWERCZEK: S-w-e-r-c-z-e-k.

SENATOR BOURNE: Thank you.

DONALD SWERCZEK: We are a trading company of primarily hazardous materials, bulk liquids, throughout the United States into Canada and also interlying into Mexico. We've been faced with these contracts that are being presented to us primarily on access to terminals where we load or unload, it depends. But I might explain a little bit about it, the situation we ran into in a couple of instances. We were going into a refinery out in Colorado. We had signed one of these contracts, and our driver went in and was unloading hazardous materials, toluene, and due to some malfunctions of the refinery, he was drenched in this product. There was no one there to help him in the beginning, and the end

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 65

LB 905

result was he ended up in the hospital with some burns. He was taken care of under the workmen's compensation laws, and our insurance company took care of that part of it. But he felt there was negligence on the refinery's part, and so he filed suit against the refinery. The end result was that he got a judgment against the refinery. The refinery then referred to our contract, and we ended up paying \$100,000 of that loss. We actually had no control over the environment that he was working in. All we're asking is that we are on a level playing field. In most instances, we, of course, we have the right to either sign the contract or not sign the contract, but if we didn't sign the contract, we'd probably lose about 60 percent of our business. We have to get into these facilities. Another situation in Omaha where our driver was waiting to load asphalt and he was sent to the driver's room because the load wasn't quite ready. As he was sitting in the driver's room, the electrical box on the wall exploded and he was burned, not severely. They took him to the hospital and it was a minor situation, but the end result, I think the doctor bill was about \$500. The people from the facility sent us a letter along with a check to take care of the medical expenses, but made sure that we understood that had this been somewhat different that we would have been held responsible. It would have been our, they would have looked at our insurance company for compensation. We just think that if we can control the environment, we have no problem with the liability. But when we cannot control the environment, then we don't think we should be held responsible. And with that, if anyone has any questions, I'd be glad to answer it.

SENATOR BOURNE: Thank you. Are there questions? Seeing none, thank you.

DONALD SWERCZEK: Thank you.

SENATOR BOURNE: Next testifier in support.

RICK GEORGE: My name is Rick George. I work for ITL Tank Lines in Omaha, Nebraska. I'm their safety director.

SENATOR BOURNE: Could you spell your last name for us?

RICK GEORGE: G-e-o-r-g-e. And it's late Friday, I don't want to spend a lot of the committee's time, but I have

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 66

LB 905, 936

stories similar to Mr. Swerczek's that just testified, and I just wanted to come up here and say that I am in support of the bill.

SENATOR BOURNE: Okay. Are there questions for Mr. George? Seeing none, thank you. Other testifiers in support? Are there testifiers in opposition? Testifiers neutral? Senator Baker waives closing. That will conclude the hearing on Legislative Bill 905. (See Exhibits 20, 21) Senator Beutler is here to open on Legislative Bill 936. Senator Beutler, I apologize. I didn't realize you were out there, so I'm sorry.

LB 936

SENATOR BEUTLER: Oh no, that's fine. And I'm going to make short work of this for you, Mr. Chairman, members of the committee. This bill is simple in its basic concept. It basically suggests that negligence will be the, or that the title standards of the Bar Association shall be the negligence standards with respect to title insurers. And I intended to take you through the long history of lawyers opinions and abstractors and how that evolved into title insurance and what the title standards are and how they relate to everything. But the fact of the matter of the matter is that within the title insurance industry, they haven't come to an agreement as we thought they would with respect to what language should be used to define this exactly and move forward with the bill. So basically, I'm just going to ask you to hold the bill.

SENATOR BOURNE: We can do that. That's an easy one.

SENATOR BEUTLER: You like that, huh?

SENATOR BOURNE: Any questions for Senator Beutler? Seeing none, thank you.

SENATOR BEUTLER: You bet.

SENATOR BOURNE: Testifiers in support?

SENATOR BEUTLER: Of holding?

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 67

LB 936, 1040

SENATOR BOURNE: Of holding? Some on the committee.

BILL MUELLER: Mr. Chairman, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of both the Nebraska State Bar Association and the Nebraska Land Title Association in support of LB 936, and we certainly would ask the committee also to hold the bill. I was going to give a three-minute exhaustive lecture on the Nebraska real estate title standards, of which your counsel is holding a copy. But in view of our asking you to hold the bill, we do thank Senator Beutler. This is a serious subject. We are trying to work on language that's acceptable both to the title insurance companies and the title insurance agents, and that's a complicating factor here. Be happy to answer any questions you may have.

SENATOR BOURNE: Thank you. Are there questions for Mr. Mueller? Seeing none, thank you. Other testifiers in support? Testifiers in opposition? Testifiers neutral. Closing is waived. That will conclude the hearing on Legislative Bill 936.

LB 1040

SENATOR Dw. PEDERSEN: We will now open the hearing on LB 1040. Senator Bourne. Counsel will present the...

SENATOR BOURNE: Thank you, Senator Pedersen, members of the committee. My name is Pat Bourne. I represent the 8th Legislative District in Omaha, here today to introduce Legislative Bill 1040. It's a very simple technical bill, and my introduction will be very brief. LB 1040 revises a reference in the statutes with respect to the Nebraska Rules of Professional Conduct adopted by the Supreme Court. This is the only section in statute that refers to these rules, and this bill would amend that section to reflect the official title of this code of professional conduct.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Any questions from the committee? Thank you. Anybody here to testify in favor of the bill?

BILL MUELLER: Mr. Chairman, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on

Transcript Prepared by the Clerk of the Legislature
Transcriber's Office

Committee on Judiciary
February 10, 2006
Page 68

LB 1040

behalf of the Nebraska State Bar Association in support of LB 1040. As Chairman Bourne testified, there is one reference in statute to the code of professional responsibility. When our Supreme Court adopted the current code of ethics for lawyers, that are now called the Nebraska Rules of Professional Conduct, it became necessary to change this one reference in statute. We ask the committee to advance the bill. I'd be happy to answer questions you may have.

SENATOR Dw. PEDERSEN: Thank you, Mr. Mueller. Any question from the committee? Seeing none, thank you.

BILL MUELLER: Thank you.

SENATOR Dw. PEDERSEN: Seeing no other testifiers in the room, I will turn the committee back...Senator Bourne to close.

SENATOR BOURNE: I'll waive closing, thank you.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. I'll turn the committee back to you.

SENATOR BOURNE: That will conclude the hearing on Legislative Bill 1040 and the hearings for this afternoon.