IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK MILFORD PECK,

Appellant,

vs.

VALLEY HOSPTIAL MEDICAL CENTER; DAVID R. ZIPF, M.D.; AND MICHAEL D. BARNUM, M.D.,

Respondents.

Case No.: 68664

District Court No.: A-14-708447-C
Dept. No. III

APPEAL
From the Eighth Judicial District Court
The Honorable Douglas W. Herndon

RESPONDENT MICHAEL D. BARNUM, M.D.'S APPENDIX TO HIS ANSWERING BRIEF

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TABLE OF CONTENTS OF APPENDIX TO RESPONDENT'S ANSWERING BRIEF
(Alphabetical)

126 Nev. 741
Unpublished Disposition
Supreme Court of Nevada.

Richard David MORROW, Appellant,
v.
Howard SKOLNIK, Director, Nevada Department of Corrections; Dr. Bruce Bannister, Deputy Director of Medical Services, Nevada Department of Corrections; and Dr. John Scott, Director of Medical Services, Lovelock Correctional Center, Respondents.

No. 55416.
|
Dec. 9, 2010.

Attorneys and Law Firms

David L. Riddle & Associates

Christensen Law Offices, LLC

ORDER OF AFFIRMANCE

*1 This is a proper person appeal from a district court order dismissing the underlying action regarding appellant's medical treatment. Sixth Judicial District Court, Pershing County; Michael Montero, Judge.

Having considered the record and appellant's proper person appeal statement, we affirm the judgment of the district court. The district court properly dismissed appellant's complaint, as his claims were based on professional negligence, his claims did not involve res ipsa loquitur, and appellant failed to submit the statutorily required medical affidavit with his complaint.[1] NRS 41A.071 (setting forth the affidavit requirement for medical malpractice claims); NRS 41A.100 (enumerating exceptions to the affidavit requirement—known as the res ipsa loquitur doctrine); *Fierle v. Perez*, 125 Nev. ——, ——, 219 P.3d 906, 912 (2009) (holding that NRS 41A.071's affidavit requirement extends to professional negligence actions, with the exception of claims based on the res ipsa loquitur doctrine). Additionally, appellant's status as an inmate or indigent person does not excuse his failure to attach the requisite affidavit to his complaint. *See Perry v. Stanley*, 83 S.W.3d 819, 825 (Tex.App.2002) (holding that the requirement to file a medical affidavit with a complaint can properly be applied to inmates because they bear the burden of proof at trial, which requires expert testimony); *Gill v. Russo*, 39 S.W.3d 717, 718–19 (Tex.App.2001) (holding that a statute requiring an expert report to be filed within 180 days of an inmate's filing of a medical malpractice suit did not violate the open courts provision of the Texas Constitution, despite the inmate's arguments that he could not interview physicians from prison and did not have enough money to obtain the reports); *see also O'Hanrahan v. Moore*, 731 So.2d 95, 96–97 (Fla.Dist.Ct.App.1999) (rejecting a prisoner's request to declare unconstitutional a pre-suit requirement for a medical expert opinion to initiate his medical malpractice action); *Ledger v. Ohio Dept. of Rehab. & Corr.*, 80 Ohio App.3d 435, 609 N.E.2d 590, 593–95 (Ohio Ct.App.1992) (holding that an inmate's medical malpractice action was properly dismissed with prejudice for failure to meet that state's statutory affidavit requirement). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Farmers Insurance Exchange, Petitioner,

v.

The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark; and The Honorable Valorie Vega, District Judge, Respondents,

and

Ana Guayasamin, Real Party in Interest.

ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

This original petition for a writ of mandamus or prohibition challenges a district court order denying a motion for summary judgment in a declaratory relief action.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, see NRS 34.160, or to control a manifest abuse of discretion. *See Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). By contrast, a writ of prohibition may issue

to confine the district court to the proper exercise of its prescribed jurisdiction when the court has acted in excess of its jurisdiction. *See* NRS 34.320. Both mandamus and prohibition are extraordinary remedies, and it is within this court's discretion to determine if such petitions will be considered. *Smith v. District Court*, 107 Nev. 674, 818 P.2d 849 (1991). Generally, we will not exercise our discretion to consider writ petitions that challenge district court orders denying summary judgment motions unless no disputed factual issues remain and summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification. *Smith v. District Court*, 113 Nev. 1343, 950 P.2d 280 (1997). Instead, an appeal from any adverse final judgment generally provides an adequate legal remedy, precluding writ relief. *See Pan v. Dist. Ct.*, 120 Nev. 222, 88 P.3d 840 (2004).

*2 Having reviewed the petition and accompanying documents, we conclude that an appeal will provide an adequate remedy, and therefore, this court's extraordinary relief is not warranted at this time. *See Smith*, 113 Nev. 1343, 950 P.2d 280; Pan, 120 Nev. 222, 88 P.3d 840. Accordingly, we order the petition denied. NRAP 21(b)(1).

It is so ORDERED.

All Citations

126 Nev. 741, 367 P.3d 802 (Table), 2010 WL 5097872

Footnotes

1 Appellant further argues that his claim of professional negligence "is essentially parallel" to a deliberate indifference claim, the basis for which is found under the United States Constitution, and thus the district court should have provided a deliberate indifference analysis to his claim. We find this argument to be without merit, as appellant specifically maintained in his complaint that his claims were based on state law and that he was not raising a federal cause of action. Additionally, a claim of negligence in treating a medical condition is not sufficient to state a claim for deliberate indifference under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Furthermore, to the extent appellant is attempting to raise a state law deliberate indifference claim, appellant cites to no authority to support such a claim.

End of Document

Journal

OF THE

SENATE OF THE STATE OF NEVADA

EIGHTEENTH SPECIAL SESSION

THE FIRST DAY

CARSON CITY (Monday), July 29, 2002

Senate called to order at 9:30 a.m.

President Hunt presiding.

President Hunt requested that her remarks be entered in the Journal.

We gather today for this Special Session because an issue of public health has become so critical —that it's impact on the people of Nevada can be devastating. It is an issue—where there is no consensus—and where there is only heated, and at times, contentious debate.

It is an issue—that has reached a point/where a wide impasse exists causing this body to be brought together.

It goes without saying that settling the issue—without a Special Session would have been preferable to us, to the people of Nevada and certainly to our Governor Kenny Guinn.

But there is a time when leadership must rise to the occasion and take over and that is exactly what Governor Guinn did. And that is exactly what he, and all Nevadans, is looking for us to do.

This is what we were elected to do. The voters didn't send us to the state legislature/to make the easy decisions.

We are the ones to whom they are looking for solution.

To whom they are looking for resolution.

To whom they are looking/to protect them and their families.

We are it folks.

Let's put politics aside and do the right thing for the people of Nevada.

Prayer by the Chaplain, Pastor Bruce Henderson.

Lord, here we are again. Although it's nice to be with friends and colleagues, we're not supposed to be here yet. But, a lot of things have happened since last we met-hard, gut-wrenching terror and knock your socks off economics. Please bless our nation and our state during these times, oh Lord.

So although by the calendar we're not supposed to be here yet, we realize that our timing is not the same as Yours. Be with us during this crucial time for which we meet, and please give us nothing less than Your wisdom which we so need right now. In Your holy and righteous Name.

AMEN.

Pledge of allegiance to the Flag.

MOTIONS, RESOLUTIONS AND NOTICES

Madam President requested Mrs. Claire J. Clift to serve as temporary Secretary of the Senate and Mr. Charles P. Welsh to serve as temporary Sergeant at Arms.

Madam President instructed the temporary Secretary to call the roll of the holdover Senators.

Roll called.

All holdover Senators present.

Madam President appointed Senators O'Connell, Rhoads and Shaffer as a temporary Committee on Credentials to examine the credentials of the newly-appointed Senators.

Madam President announced that if there were no objections the Senate would recess subject to the call of the Chair while credentials of the newly-appointed Senators were examined by the temporary Committee on Credentials.

Senate in recess at 9:34 a.m.

SENATE IN SESSION

At 9:35 a.m.

President Hunt presiding.

Quorum present.

REPORTS OF COMMITTEES

Madam President:

Your temporary Committee on Credentials, has had the credentials of the respective Senator-appointees under consideration and begs leave to report that the following persons have been and are duly appointed and are qualified members of the Senate of the Eighteenth Special Session of the Legislature of the

Senator Raggio requested that the remarks made during the Committee of the Whole be entered in the Journal.

SENATOR RAGGIO:

We are sitting as a Committee of the Whole to consider Senate Bill No. 2. As I noted this morning in the Senate, we have before us the Governor's proclamation detailing the issues we have been convened to address. We are constitutionally bound to restrict our transactions to those items. We will meet in the Committee of the Whole, morning, afternoon and evenings, for whatever time is necessary to hear all of the matters that come before us properly. I want to re-emphasize we will attempt to provide a reasonable opportunity for all positions to be heard, but it will be necessary to observe time limits so that we can conclude our work in a timely fashion. At a press conference, that was just convened, there is an indication that the parties that have been at opposite ends of these issues have come together in an accord, and that accord is, apparently, now reflected in Senate Bill No. 2. It may be that we will not have opponents on each one of these issues that are before us.

In any event, let me again mention the procedures we will be observing in the Committee of the Whole. After the Governor's presentation on the bill, we will focus on one specific topic at a time. Today, our attention will be on the portion of the bill dealing with the cap on noneconomic damages and any related item to caps on damages. Within a fixed amount of time, representatives of interested groups will testify, and we will provide equal time to address each topic without interruption. At the conclusion of these presentations, the members of the majority party and the members of the minority party will have an equal amount of time for questions and statements. We will observe time limits in this phase of our proceedings to accommodate efficiency.

Because of the constitutional limits on the subject matter, any discussions beyond the topics in the Governor's proclamation will be ruled out of order. After legislators have finished questions or statements, there also will be an opportunity for any additional public comment. It may not be necessary, now the sides have come together, but we will afford them that opportunity. We will have to observe some time limits as well if we are going to be able to conclude an orderly presentation and have the deliberations that are necessary. Following that, the Senate may vote on that specific agenda item. We will do so if we make a decision in this committee, and if there are any changes or amendments, then the bill drafters can prepare a final version of the bill. As I explained on the floor this morning, any amendment to the bill or any request for a bill draft will require a majority vote of the committee for that purpose. The process is going to be repeated, if necessary, for each agenda item until we consider the proposal before us in its entirety.

During these hearings, in the Committee of the Whole, the members of the committee as well as others will please turn off all pagers, cell phones and computers. This is not as formal as the Senate itself, although, we will observe the decorum that is usual in the Senate. If you want to remove your jackets or be more comfortable, please feel free to do so. Finally, at the end of each day, the Committee on the Whole will rise and return to the Senate Chambers to adjourn for the day. After the Governor and his staff's presentation, we will adopt some rules for the committee, and then proceed to our agenda.

Before we hear from the Governor, are there any questions or comments from members of the committee? Are there any comments from the staff?

If not, we are pleased, today, to have with us Governor Kenny Guinn. We appreciate your efforts in calling forth this session to deal with this crisis, and we welcome your appearance before this committee.

GOVERNOR GUINN:

Good afternoon. Before I begin my testimony, I want to be sure everyone understands that my testimony is not all-inclusive of the bill. You have a copy of the bill. It is in great detail. It is incumbent of me, as a Governor to make sure that I produce testimony that will be a formal record as we move forward in this process. In many cases I will read the testimony because it is important for us to stay on track and to indicate the support on the basis of which we make these recommendations to you through this law. I would like to thank my staff; Marybel Batjer, Chief of Staff; Mike Hillerbee, Deputy; and Keith Monroe, Legal Counsel. Also, I want to thank Brenda Erdoes, Kim Morgan and the other Legal staff members. I do not know how they work as many hours as they do without sleep. Without them, we could not have brought you this law in this time period. I want to thank them publicly. Without them, we would not be here today. They have all done a tremendous amount of work.

I have convened this special session, today, because Nevada is in a health care crisis. The cost of medical liability insurance has risen to unacceptable levels. The inability of doctors to obtain their insurance at reasonable rates is endangering the health of our citizens. Therefore, I believe immediate change in our laws is necessary to address this health care crisis.

The events leading up to this crisis began late last year, when, as many of you know, the St. Paul Insurance Company announced its decision to stop providing medical liability insurance to over 60 percent of Las Vegas doctors. St. Paul's decision was based upon an estimate that it was losing several million dollars annually because of lawsuits and claims against Nevada doctors.

As Governor, it was my duty to address this crisis head on. On Wednesday, January 23, I met with over 30 Las Vegas area doctors. At this meeting the doctors told me that medical liability insurance had become unavailable to them, and as a result, doctors were going to have to turn patients away, limit their services, or in the worst case, close their practices. At this meeting, I also learned that some insurers were quoting premium increases of 300 to 500 percent, citing the high number of medical malpractice lawsuits in Nevada, and the lack of a "cap" on noneconomic damages. To illustrate this concern, the doctors told me that medical malpractice cases in Clark County more than doubled over the past six years, with $21 million in jury awards last year alone.

Concerned that a lack of medical liability insurance was affecting access to medical care, on February 4, only eight days after my first meeting with the doctors, I directed the Insurance Commissioner to issue a Notice of Hearing. I wanted each and every medical liability insurance carrier authorized to do business in Nevada to provide testimony regarding their market intentions and conduct, practices in rating and underwriting, their premium payment plans, including "tail coverage," and their loss experience in Nevada. The hearing was scheduled for March 4, the first possible day for holding the hearing under Nevada legal notice requirements.

At the hearing, representatives from 13 insurance companies were present and testified on medical liability insurance coverage in the State. Also present and testifying were several medical representatives and associations, individual physicians and surgeons, insurance agents and brokers, representatives of the Nevada Trial Lawyers Association, and a representative from the Reinsurance Association. The record of the hearing also remained open for an additional week to allow all parties the opportunity to submit testimony. At the close of the administrative record, on March 12, the Insurance Commissioner determined that the unavailability of medical malpractice insurance had reached a critical stage.

The Commissioner found, and I quote, "There is overwhelming evidence that medical malpractice insurance is unavailable for medical practitioners in the State of Nevada. It is essential that services provided to Nevada citizens by the medical community not be curtailed. There is evidence that, in particular, certain medical specialties are affected by the unavailability of medical malpractice insurance, including, but not limited to, those physicians in OB/GYN, emergency trauma, radiology, surgery and ophthalmology, and there is evidence that, of the insurers present at the hearing, two companies are leaving the State of Nevada, and of the remaining insurers offering medical malpractice insurance in Nevada, most would not offer it to those doctors in the specialty areas of OB/GYN, emergency trauma, radiology, surgery and ophthalmology."

After reviewing the evidence and findings, I knew Nevada was indeed in a health care crisis of great magnitude. It became abundantly clear to me that the State needed to intervene with a short-term solution to prevent doctors from limiting their services, and, at the very worst, closing their doors. I am responsible for the health and safety of all citizens of Nevada. I am compelled to ensure that pregnant women and those in distress receive adequate medical care. Therefore, I took an extraordinary step, I directed the Insurance Commissioner to establish the Nevada Essential Insurance Association, now the Medical Liability Association of Nevada, to provide medical liability insurance to Nevada doctors so that our citizens could continue to receive medical care from experienced and competent doctors, doctors they know and trust. The Association was established by emergency regulations on March 15, 2002.

On March 26, the State Board Of Examiners approved spending $250,000 to create and initially fund the Association. The Association was able to begin accepting applications from Nevada doctors on April 15, just one month after the Insurance Commissioner declared that Nevada was in a health care crisis. Initially, the Association's coverage was "claims-made" with coverage provided on a "go forward" basis from the inception date of the policy. There was no coverage for acts committed prior to the inception date of a policy issued by the Association. Because insurance companies pulled out of Nevada, doctors were forced to pay tens of thousands of dollars, and in some cases more, for "prior acts" or "tail coverage" in addition to increased cost of premiums.

While doctors were first confronted with a lack of available insurance, the crisis of availability had now also turned into a crisis of affordability. In the case of OB/GYNs, doctors were receiving insurance quotes that limited them to 125 births per year. With the requirement that if they went beyond 125 births they would have to pay an additional $20,000. This came at a time when doctors had been delivering an average of 240 babies annually. This made the crisis greater. As one doctor said "It's a terrible day for the entire community when a doctor cannot afford to deliver a baby."

On May 29, I announced that the Association would make upgrades to the plan. The plan would offer prior-acts' coverage to all physicians, would reduce rates for surgical OB/GYNs by 18 percent, approximately $16,000, and would eliminate tiered premiums on deliveries, no longer discouraging OB/GYNs from delivering more than 125 babies a year. I felt the upgraded plan offered by the State would help to provide necessary medical care in emergency rooms

Excerpts from the Senate Journal
Remarks and testimony
-- selections by Research Library staff

THE SECOND DAY

CARSON CITY(Tuesday), July 30, 2002

Senator Raggio moved that the Senate resolve itself into a Committee of the Whole for the purpose of considering Senate Bill No. 2.

Motion carried.

IN COMMITTEE OF THE WHOLE

At 8:11 a.m.

Senator Raggio presiding.

Senate Bill No. 2 considered.

The Committee of the Whole was addressed by Senator Raggio; Governor Kenny Guinn; Jan Needham, Principal Deputy Legislative Counsel; Bradley A. Wilkinson, Principal Deputy Legislative Counsel; Scott Young, Principal Research Analyst; Maury Astley, Executive Director, Nevada Dental Association; Robert Byrd, Chairman, Medical Liability Association of Nevada; J. R. Crockett, Jr., Nevada Trial Lawyers Association; Michael Daubs, M.D., Concerned Physicians of Nevada, Nevada Orthopedic Society; Denise Selleck Davis, Executive Director, Nevada Osteopathic Medical Association; Gus W. Flangas, Attorney, Physicians Task Force; Gerald Gillock, Nevada Trail Lawyers Association; David P. Haefner, Nevada Association of Nurse Anesthetists; Lonnie Hammergren, M.D., Neurosurgical Associates of Nevada; Ron Kendall, Patient, Carson City; Richard J. Logarza, General Counsel, Nevada State Board of Medical Examiners; Larry E. Lessly, Executive Director, Nevada State Board of Medical Examiners; Dan McBride, M.D., Nevada Mutual Liability Company; Robert McBeath, M.D., Nevada Medical Liability Physicians Task Force; Alice Molaky-Arman, Commission of Insurance; Jerry. H. Mowbray, Attorney; Nancy Peverini, Legislative Counsel, Consumer Attorneys of California; Janice Pine, Saint Mary's Health Network; Jim Wadhams, American Insurance Association; Charles (Chip) Wallace, Nevada Mutual Insurance Company, Communications Director/cofounder; Bill M. Welch, President, CEO, Nevada Hospital Association.

Senator Raggio requested that all remarks on Senate Bill No. 2 be entered in the Journal.

SENATOR RAGGIO:

This committee will come to order. This is the Committee of the Whole, all Senate members participating, and today, the committee will continue its deliberations on Senate Bill No. 2. Our first order of business is to complete our discussion of sections 3, 4 and 5 addressing the caps on

MR. GILLOCK:
The way I recall how this language came down, was that the defendants and the plaintiffs representatives worked diligently on subsection 3 and subsection 3, paragraph (b) to make certain that they reflected a situation where the court would have the authority in the right cases to issue the bond and the surety. That was one of the requirements that the medical group really wanted in there. It would give the court the discretion to let the defendant and his insurer out of this equation. Once they were satisfied, there would be payment.

SENATOR O'DONNELL:
All right.

SENATOR RAGGIO:
Any other questions or comments. Any public testimony on this portion of the bill? Any amendments required on section 13? If not, I will accept a motion. Motion was made by Senator Rawson to adopt the language in section 13. Is there discussion on that motion? All in favor indicate by saying, aye; any opposed.
Motion is carried unanimously.
We will address the one word change in section 16 in the existing law. This is on the issue of making it mandatory for an attorney to personally pay additional costs, expenses and fees if there is unreasonable conduct defined as "unreasonably and vexatiously extending a civil action" that is existing law: Presently, the court may do this. This change as we understand it, "would mandate the court to require an attorney to pay that upon a finding that the filing of an action is not well grounded in fact, is not warranted or made in good faith or is unreasonable and vexatious in extending a civil action." That is existing language. As I understand it, what this does is that instead of giving the court discretion, if the court makes that finding and the court would have to make that finding, then it would be mandatory as a sanction against that attorney. Is that the understanding?

MR. GILLOCK:
Mr. Chairman, it is my understanding that this could be called the "frivolous law-suit provision." The only thing different is that you will notice in subsection 1 it says, "files, maintained or defended a civil action" because it has been found over time that in many instances there may be a great deal of expense that was unnecessary and has accrued as a result of vexatious actions by a defendant or defendant's council. This is language that was agreed upon by the parties and applies both ways.

SENATOR RAGGIO:
As I would understand this, I want to be careful how I phrase this, there can be attorneys who over the course of time and I think they become known to their colleagues and we have had screening panels for example that file cases whether or not there has been any finding, and probably some of their own colleagues feel that a lot of those cases are vexatious or frivolous and are not brought in good faith or, for that matter, defended in good faith. That is existing language. Is that what we are after?

MR. BRADLEY:
Senator Raggio, because I was involved, I know the word was changed from "may" to "shall" to take away the discretion of the judge. If the judge feels that there was that type of conduct, he must require an attorney to pay.

SENATOR RAGGIO:
Isn't that what I said? I think that is what I understand. I wanted to make certain all the members of the committee had that same impression. Is there any need to change this language? Is there any public testimony on this matter?

SENATOR CARLTON:
Could you give me an example, as a lay person, as to what vexatious may be.

MR. GILLOCK:
Mr. Chairman, in response to that question, it would be actions that are used to receive some type of revenge or to take some type of action that is not warranted under the circumstances. It runs up the

litigation expenses causing the parties to expend funds that would not be necessary to spend. For example, suppose you file a lawsuit and someone decides they want to make it difficult for you. You had a grade-school teacher in New York, and you had a high-school teacher in Los Angeles. Because they had questions about how well you might do in the future and because you said in your moving papers that you intend to become rehabilitated and that you were going to obtain further education, the attorney would go to New York and take the deposition of your grade-school teacher, and go to California to take the deposition of your high-school teacher. All of this could be deemed by the court to be unnecessary and very expensive. That would be the type of conduct we would be trying to prevent.

MR. COTTON:
We find that in both sides of the issue, whether plaintiffs and defendants, that you do have cases that periodically come up that are truly spite cases on one side or the other. They are "I- don't-like-that-person" cases, and they will go forward. Some of those are fairly obvious. On the whole, most of the cases are not going to be in that situation. I have had panel cases where there were 16 or more defendants, and when we came out of the panel, there were only two doctors who were actually sued. Now, that the panel is being eliminated, sending a case direct to litigation, our intent was to make certain we do not end up with this grab-bag of every doctor who happens to appear on a record end up in district court. Someone must do their homework before they file a lawsuit. It was our intent, in looking at this, that there would be some teeth in the law that would serve the same purpose as the screening panel.

SENATOR RAGGIO:
Mr. Echeverria, is this peculiar to Nevada, or do they have this in California, also?

MR. ECHEVERRIA:
Fortunately, I have not had experience with this section in California.

SENATOR RAGGIO:
Does California have anything similar to this?

MR. ECHEVERRIA:
Not that I am aware of. There is something in California similar to our Rule 11.

SENATOR RAGGIO:
This is existing language. It will still require a finding by the judge if that exists and if he does make that finding then it is mandatory.

SENATOR CARE:
Thank you, Mr. Chairman. I was not here in 1995 when the current statute was enacted, but I think I have heard discussion of this when it came out of the Senate Judiciary Committee. This is one subject the chairman of the committee, Senator James, and I have always agreed on. Give more discretion to the court, but now we are taking discretion away from the court. We always hear about the frivolous lawsuit, and I always say the frivolous lawsuit is any time you get sued. That is a frivolous lawsuit. A lawsuit with merit is when you sue the other person. That is a good lawsuit.

Have any of you or your colleagues ever filed a motion for sanctions under the existing statute. If you did what happened? Were you denied the sanctions and why? If you got the sanctions, I would like to know who were the other attorneys. Does anyone really use this thing? There are no case annotations in this statute. There is also rule 11 under discovery. There is already a mechanism in place. Mr. Gillock, you have talked about going to New York for a deposition, but the discovery commissioner can handle that. You have a protective order. You can seek sanctions.

MR. GILLOCK:
I have sought sanctions in many cases, and I have also, though not under this rule or this statute, sought sanctions under Rule 11 and had the court grant sanctions and grant substantial fees in instances where the discovery was propounded and the depositions were deemed not to have been warranted. But, I think that one of the reasons that this language is requested by the defense when we started these negotiations was because we do not really have a track record on this. The doctors have been saying in

the press, "frivolous, frivolous, frivolous," so we said if there are frivolous lawsuits, then we are going to give you a tool to help us take care of that problem.

MR. BRADLEY:
In response to Senator Care's question, I brought this statute to the attention of two prominent medical-malpractice defense lawyers within the last 30 days because of this discussion. Neither one of them were aware that the statue existed. They are both planning on using them in cases, and we offered, on behalf of our organization, to provide experts in their cases.

SENATOR RAGGIO:
Any other testimony? I will accept a motion by Senator Townsend to adopt the language in section 16. Any discussion? All in favor indicate, aye; any opposed?
Motion is carried unanimously.

Section 8 is new language where an action is brought and filed in district court for malpractice, the court must dismiss the action without prejudice. That means, it can be brought, again, before the court if the action is filed without an affidavit supporting the allegations contained in the action, which is submitted by, a medical expert practicing in an area substantially similar to the type of practice engaged in at the time of the alleged malpractice. May we have your comments on this change? The change was agreed to in the negotiations. Is that correct?

MR. BRADLEY:
Yes, that is right Mr. Chairman. This was introduced because of the abolition of the screening panel. The screening panel files are required and the expert affidavit is subject to dismissal. We want to make certain that when there was a complaint filed that it is filed in good faith. The way to do that is with a summary affidavit from an expert in a substantially similar area indicating that the expert has reviewed the record.

SENATOR RAGGIO:
If there were an action against an orthopedic surgeon, you would expect that an affidavit would be required from someone who was an orthopedic surgeon.

MR. BRADLEY:
That is correct.

SENATOR RAGGIO:
Or some similar doctor, if there is one. It could not be a general practitioner.

MR. BRADLEY:
Agreed. For example, spinal surgery, both orthopedic and neurosurgeons do the same type of surgery, someone who is familiar with the same standard of care.

SENATOR CARE:
Thank you, Mr. Chairman. If you file a lawsuit and if there is no screening panel, the clerk is not going to know, who, then, makes the determination that this expert is the expert required under this section. When is that determination made? As I read this phrase, "medical expert who practices," I wonder about the medical school professor who does not practice or the recently retired doctor who is not practicing. Can he not be an expert witness?

MR. BRADLEY:
Those are both good points. We have tried to work on this a bit, but we have not had much progress. A recently retired, or someone in a medical school setting, if they meet the other qualifications, we believe would be appropriate for an expert.

MR. COTTON:
Mr. Gillock and I were just discussing that if we change the word on page 4, line 34, it will make more sense.

SENATOR RAGGIO:
What would you suggest.

SENATOR CARE:
How is the determination of whether this medical expert is indeed an expert is made. If I have an expert who files an affidavit attached to the complaint, does that mean I can use him as an expert in the trial. Are there different standards for that? Who says, "Yes, this is an expert?"

MR. COTTON:
The judge almost always has to make that determination even at the time of trial. They always determine whether or not someone qualifies to testify as an expert in a medical malpractice case. Today, they have to do that. The standards have been established for that in a lot of different cases and decisions. They will be familiar with the standard, which has to apply whether they did it at the beginning with the filing of the complaint or five minutes after they have been on the witness stand. Either way, they have to make that determination on a fairly well defined standard recognized by the judges.

SENATOR RAGGIO:
Section 12 concerns the medical expert testimony. Is that same issue involved here? Expert medical testimony in a trial, is that right, "may only be given by a provider of medical care who practices in an area substantially similar." Should that have that change in it?

MR. GILLOCK:
Mr. Chairman, yes. Section 12 is the existing law with the adding of "expert." I think we need to make that change again on line 44, "who practiced or who practices."

SENATOR RAGGIO:
Can we take care of that too, Mr. Cotton?

MR. COTTON:
I think that will be appropriate.

SENATOR COFFIN:
How much does it cost to get someone to do the action in section 8 since it is a little different from what we are presently doing? Now you are talking about finding someone who is going against one of his/her colleagues perhaps in this community or in the community in which the action took place.

MR. BRADLEY:
It is important that this discussion takes place. If you go to a full-blown affidavit, it is a $3,000 to $5,000 minimum cost. The problem is the only thing that is available is the medical record. This was one of the shortcomings of the screening panel. We believe it is unfair to require a full-blown affidavit because there is such limited information available in the record without the ability to ask anyone what happened and why was there not any records for this past day. We would like to see more of a summary affidavit. This is meant to serve, along with the lawyer pays, as a deterrent to just filing an action to extort or do something that is not done in good faith. To go too far would defeat it. I hope it is the intent of this body not to turn this into a war at the beginning of a case as to whether this expert was qualified or not.

SENATOR COFFIN:
It worries me a bit because you are either going to have to spend a lot of money or you are going to have to find a character out of a John Grisham novel to fill this role.

MR. BRADLEY:
I will tell you, we are finding younger physicians in specialties are more willing to get involved. However, at the same time, you are seeing universities sending out protocols that their physicians are no longer allowed to serve as experts. It is a challenge to get a good expert. If you have good contacts and you are respected on both sides, as Mr. Cotton is and as we are, you can get them. It is expensive. Again, let us not turn it into a battle on the front end.

SENATOR COFFIN:
This does not compel that the person had to have examined all of the documents.

MR. BRADLEY:

This affidavit should say that they have reviewed the medical records, and based on that limited information, it is that expert's opinion that there is a meritorious case.

MR. COTTON:
Our position is not that.

The panel is removed. The panel was perceived by this Legislature as an impediment to frivolous litigation. Our position is they need a substantive affidavit from an expert. That money does have to be expended on the front end in a meaningful fashion with an affidavit supporting their allegations of negligence. Not just an "I-think-this-person-committed-malpractice affidavit." This is going to turn us backward on what we are attempting to do by removing the panel. We are going to experience high-volume filings if they can get by with a $500, one-line affidavit.

SENATOR COFFIN:
What does it cost now to file?

MR. COTTON:
The screening panel has a true-thought process where they are trying to persuade two lawyers and three doctors to rule in their favor so they can get a favorable finding. So am I. It is the same thing in that situation. Practically speaking, a one-line affidavit is not going to be particularly successful. Our position is that this is the same substantive type of affidavit that will be required at the panel in order to pass muster on this dismissal.

SENATOR COFFIN:
Is this going to wrap up the cost for the initial entry into the legal system?

MR. COTTON:
Much the same way it wraps up the costs of the screening panel that was part of the intent of the screening panel that they did have to have expert affidavits. It was a requirement that they would have accompaniment of an affidavit by an expert, and the practical impact of not having one would be a result of finding a no reasonable probability of malpractice. This is basically the only guard we have against a jacking up of filings and cases. If there is no impediment at all on the front end of these cases, there are a number of lawyers out there who file a lot of claims if they can get by cheap to get it on file and to see if they can move the case in that direction. That is something we were very intent about trying to avoid. If we are not going to have the panel, then it had to be substantive at that point. The reality is, they can find experts. That happens on a regular basis on a meritorious case.

SENATOR COFFIN:
This is the equivalent of a huge filing fee.

MR. COTTON:
It is the equivalent of the screening panel costs that they incurred anyway.

SENATOR RAGGIO:
It was required in a screening process?

MR. COTTON:
They had to have an affidavit of an expert for the screening panel. Not only, an affidavit, but one that would prove to six people that they had a case. They had to run that cost up already.

SENATOR RAGGIO:
I would think as a practical matter unless a claimant could get some kind of testimony like that in affidavit form, I do not think many cases would be able to proceed. There would have to be something like that. Wouldn't there?

MR. BRADLEY:
Yes, however, realizing that only the medical records are available when that large affidavit comes in, now, you have something that has the ability to be subject to impeachment because the records were not thorough. There are problems produced by this, and I am trying to avoid that huge battle. If you have

two or three defendants and you need to bring in an orthopedic surgeon, a trauma surgeon and a specialized nurse, you can spend $3000 to $5,000. It becomes very expensive.

MR. COTTON:

The practical matter is, the medical records were all that they had available at the screening panel. They needed to submit a substantive affidavit in order to prevail. Those costs have been present in the system since 1985 or whenever that act took place and are a barrier to frivolous litigation in the medical malpractice field. It is something perceived strongly, not just by the doctors but by the panel, as keeping the numbers of claims down when the frequency rating is calculated on these things. This is an essential issue. If we are going to drop the panel and then turn around and increase the frequency, we are defeating the whole purpose of trying to cut down on litigation. In my opinion, it is a serious mistake to not have both sides. Eliminate the panel, but require a substantive affidavit. If someone is going to pursue a case anyway, they are going to have to get an expert who is going to review all the records and substantively come up with legitimate opinions as opposed to a one-page affidavit saying, "I think there is reasonable probability of malpractice." Then 16 months later, they come in with a different expert that now has a substantive affidavit as opposed to knowing in good faith in a strong affidavit from an expert that they had a legitimate case from the time that they filed.

SENATOR CARE:

Because the statute does not impose the limitation, I am assuming the expert can be outside the jurisdiction or from outside the State. We all understand that this expert can then be called to trial by the defense if they chose to do so. Is that correct?

MR. BRADLEY:

No, if I bring an expert in and he is from out of state, there is no way Mr. Cotton can bring him in also.

SENATOR CARE:

Let us say there is a jurisdictional issue with another county, perhaps. If I file a lawsuit and I list an affidavit expert, the opposing party may want to depose him to testify at trial.

MR. BRADLEY:

If I continue to use him as an expert through the course of the trial and disclose him, but Mr. Cotton is correct. At the screening panel, we have to file an affidavit and so did the defense. If we are going to be required to file one along the lines that Mr. Cotton says, then what is good for the goose is good for the gander.

SENATOR CARE:

What are you going to do on the case where you have multiple causes of action? Malpractice is one of, say, five causes of action. That complaint still has to have the affidavit?

MR. BRADLEY:

No, the question in the case is whether the care of the defendant was below the standard of care. That is the determining factor. You are looking at the potential of who may be in a case. There could be a loss of consortia claim, or there could be many children who are asking for a wrongful death claim, but those are separate causes of action. You do not need experts on those. You need experts to look at the standard of care of the defendants involved.

SENATOR O'CONNELL:

Would this language prevent one side or the other from having the expert be a person who does nothing but make their living traveling around being an expert witness.

MR. BRADLEY:

There are those experts, and they are available to both sides. Mr. Cotton is smart enough not to bring any professional witness into his cases, and most of us are smart enough not to bring them in, because they do not withstand cross-examination very well. If you show that out of their income tax return of $180,000 a year, $170,000 was made testifying across the country. It is not a wise decision to bring in that kind of a witness.

SENATOR MILBURN:
On the question of verbiage on section 8, you said, "practiced or is practicing." That still does not negate the doctor who practiced 20 years ago and who is not practicing now. What about "recently" practiced?

MR. COTTON:
The tail end of that is "at the time of the alleged malpractice."

SENATOR MILBURN:
Clarified, thank you.

SENATOR RAGGIO:
Is there any other public testimony on either section 8 or section 12? Any amendments required on either of those sections? I will accept a motion from Senator Rawson to approve the language as amended in section 8 and section 12. Add the words "practiced or practices or is practicing." All in favor indicate, aye; any opposed? Senator Coffin voted "no."
The motion carried.
The last item we are going to look at is the settlement-conference language in section 9, page 4, of the bill. This is entirely new language. Gentlemen, please explain this section.

MR. GILLOCK:
Mr. Chairman, under section 9, under the new rules, we will have a mandatory settlement conference. At that point; the settlement conference would be of no benefit to anyone if the party was allowed to attend without their insurance company representative. That is the rule. What we want to do is add "all the defendants representatives" because the language on line 38 failed to put in "a hospital's," and opposed to saying "hospital or doctor," we should say "all the parties should attend and all defendants insurance companies."

SENATOR RAGGIO:
Are you suggesting some additional language?

MR. COTTON:
On line 38 where it says "physicians of dentists insurer" if we just said "defendant(s) insurer" that would encompass all of the defendants.

SENATOR RAGGIO:
That would cover any medical provider. If it were a hospital, their insurer also would have to attend.

MR. COTTON:
I think as a practical matter even outside of those cases with hospital, doctor or dentist, there may be entities that are not necessarily healthcare providers. When there is a problem with having a settlement conference and you do not make all of the defendants show up, it ends up being somewhat meaningless. I think we should say "defendant's insurer."

SENATOR RAGGIO:
If we enact this, does the court have the right to compel the attendance of the insurer and the attorneys who are not parties to the action? Would this language suffice?

MR. BRADLEY:
We think that is a good recommendation. We would encourage that. We would also suggest that on page 5, subsection 4, the sentence read "the failure of any party, his insurer or his attorney" without getting into the issue of bad faith. This is not intent.

SENATOR RAGGIO:
Mr. Cotton, do you agree to that?

MR. COTTON:
I think that would be appropriate.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Eighth Session
March 26, 2015

The Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:05 p.m. on Thursday, March 26, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

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

COMMITTEE MEMBERS ABSENT:

Senator Tick Segerblom (Excused)

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

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

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

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

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

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

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

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

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

Testimony for Senate Bill 292, Senate Judiciary Committee March 26, 2015

Mr. Chairman and Committee Members,

For the record, I am Dr. Rudy Manthei, a Las Vegas ophthalmologist and chairman of Keep Our Doctors in Nevada, commonly known as KODIN. Thank you for allowing me the opportunity to appear before you today to testify in support of Senate Bill 292.

In 2003, Nevada was experiencing a healthcare crisis. The insurance rates were skyrocketing and doctors were leaving Nevada. The Las Vegas Trauma Center was forced to shut its doors and expectants mothers were forced to search for doctors out of state to deliver their babies.

A group of physicians, hospitals, and business leaders understood the consequences of allowing a growing problem to continue. They understood that without a solution to our problem and our states existing access to healthcare challenges would be exacerbated through the departure of healthcare providers, the early retirement of physicians, and through increased costs to those who could get care. They also understood that without access to quality, affordable healthcare, Nevada businesses would struggle to recruit and maintain top employees.

This group became Keep Our Doctors in Nevada (KODIN), a group that is now compromised of doctors, business leaders, and volunteers from throughout the state. We worked with Governor Guinn and members of the legislature in 2002 to make some important reforms to our state and medical liability laws during a special legislative session, and then continued fighting for even more important forms with the 2004 ballot question, known as Keep Our Doctors in Nevada Initiative.

The KODIN initiative passed with nearly 60% of the popular vote. It passed because the people in Nevada saw doctors leaving our state. They paid attention and were concerned when the trauma center actually closed its doors and understood the long term implications of expectant mothers forced to look out of state for doctors to deliver their babies.

The reforms have stabilized Nevada's Medical Liability Insurance climate. Well respected Stanford economist, Dr. William Hamm released a study showing empirical evidence demonstrating that the reforms are working. Insurance rates have dropped in Nevada on average more than 30%. One example is the Independent Nevada Doctors Insurance Exchange, which lowers Nevada premiums for internists and surgeons in 2007 by more than 20% according to the medical liability monitor rate survey.

We are recruiting doctors to the state and Nevada residents are saving more than $380 million each year as a result of these reforms, largely due to the reductions in the practice of defensive medicine - where unnecessary tests and treatments are performed by physicians on the basis of protecting themselves from claims of malpractice.

The Policy Research Perspective (PRP) presents information on changes in medical professional liability insurance (PLI) premiums from the Annual Rate Survey Issues of the Medical Liability Monitor (MLM). Considered the most comprehensive source for a national perspective on PLI premiums.

The latest data shows the premiums were largely stable in 2014. 65% of premiums reported on the MLM (Medical Liability Monitor) were unchanged from the previous year. In 2014, close to 23% reported premiums were lower than they were in 2013. MLM (Medical Liability Monitor) data suggests that the medical liability for physicians stabilized over 2005 to 2014.

While the overall liability has stabilized the prospects for short term remain uncertain. One reason is there is disagreement among actuaries about how the Affordable Care Act will affect premiums. The PRP found, as in previous years that most claims that closed in 2013 were dropped, dismissed, or withdrawn (65.3%). Almost a quarter of the claims were settled (24.4%) and 7.6% were decided by trial verdict. Of these, the vast majority (91.9%) were won by the defendant. Expenses incurred on PLI claims have been stable since 2009, but this was preceded by a sharp growth between 2005 and 2009. As a result expenses rose by almost 67% between 2004 and 2013. The total expense incurred on all closed claims has been rising much faster than the total indemnity payment. In 2013 total indemnity payments were three times higher than they were in 1985. In contrast, the increases in total expenses were sevenfold of that period. Consequently, the share of total cost incurred on expenses increased from 19% to 35% between 1985 and 2013.

Most claims continue to be dropped, dismissed, or withdrawn. Nonetheless, although the average expense for those claims is much lower than for settled and tried claims, dropped claims account for 37.9% of total expenses because of their prevalence.

In conclusion, an overview of the MLM premium data suggests that the medical liability climate for physicians stabilized over the 2005 to 2014 period. First, 65% of the premiums reported in 2014 did not change from the previous year. This continues a trend of general stability in premiums - which began in 2006. Second, where premiums did change, most of the changes were small. Finally, 37.9% of the total expense is for dropped claims.

While the overall liability has stabilized for physicians, the prospects for the short term remain uncertain. While the premiums have been more likely to fall than rise since 2007, most decreases have been small. Moreover, there is an uncertainty among actuaries about how the medical liability market will be affected by the Affordable Care Act. They note that large increase in the insured population will strain an already stressed system which could lead to more patients seeking care, more misadventures, and thus more liability claims.

Thank you for your time. I am available to answer any questions you may have throughout today's discussion.

Rudy Manthei, D.O.

RM:AML/cp