IN THE SUPREME COURT

OF THE STATE OF NEVADA

Damaso S. Puente, individually and on behalf of the Estate of Damaso I. Puente; Maria Puente;
Daniel Malone; and Diane Malone, individually and on behalf of the Estate of Christa Puente,

Appellants/Cross-Respondents,
vs.

Dave & Buster's of Nevada, Inc., d/b/a Dave & Buster's,

Respondent/Cross Appellant.

Supreme Court No. 82554
Appeal of
District Court No. A813787

APPENDIX TO APPELLANTS' OPENING BRIEF

VOLUME 2

Part 1 of 2

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4	Reply in Support of Motion to Dismiss	6/24/2020	AA059-068
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#	Document	Date	Bates No.
9	(continued from Volume I) Opposition to Renewed Motion to Dismiss	9/2/2020	AA243-414
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11	Minutes of Hearing	9/16/2020	AA427-429
12	Transcript of Hearing 9/16/2020	10/21/2020	AA430-445
13	Answer to Amended Complaint	12/2/2020	AA446-452
14	Motion for Summary Judgment	12/3/2020	AA453-467
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VOLUME III

#	Document	Date	Bates No.
16	Opposition to Motion for Summary Judgment	12/17/2020	AA479-495
17	Reply re: Motion for Summary Jdmt	12/28/2020	AA496-501
18	Minutes of Hearing	1/13/2020	AA502-503
19	Order	1/26/2021	AA504-509
20	Notice of Appeal	2/24/2021	AA510-512
21	Transcript of Hearing 7/1/2020	8/9/2021	AA513-524
22	Transcript of Hearing 1/13/2021	8/9/2021	AA525-536

#9: Opposition to Renewed Motion to Dismiss (continued from Volume I)

B. TRAINING PROGRAM

1. EMPLOYEE AWARENESS

a. Posters and literature in Employee areas

b. On-going Communication

1. Property newsletters and employee communication bulletins

2. Payroll Stuffers

3. New Employee Orientation

c. Employees employed in gaming areas will be trained.

2. CUSTOMER, PLAYER AND GUEST AWARENESS

a. Signage in Gaming areas

b. Literature available in gaming areas

c. Information in Marketing newsletters

3. COMMUNITY AWARENESS

a. Public Service Announcements

b. Participation in Casino Properties Speakers Bureau

SB 498 - Sale of alcoholic beverages

No person who serves or sells alcoholic beverages to an adult is liable in a civil action based on the grounds that the service or sale was the proximate cause of injuries inflicted by an intoxicated person on himself ~~or another person~~.

(1) The violation of any statute, regulation or ordinance which regulates the sale or service of alcoholic beverages to ~~a minor or~~ an intoxicated person does not constitute negligence per se in any action brought against the server or seller for injuries inflicted by an intoxicated person upon himself ~~or another person~~.

This action becomes effective upon passage or approval.

EXHIBIT I

Remarks by Assemblyman Manendo.
Roll call on Senate Bill No. 358:

YEAS—41.
NAYS—None.
Absent—Carpenter.

Senate Bill No. 358 having received a constitutional majority, Mr. Speaker declared it passed.
Bill ordered transmitted to the Senate.

Senate Bill No. 468.
Bill read third time.
Remarks by Assemblyman Arberry.
Roll call on Senate Bill No. 468:

YEAS—40.
NAYS—Anderson.
Absent—Carpenter.

Senate Bill No. 468 having received a constitutional majority, Mr. Speaker declared it passed.
Bill ordered transmitted to the Senate.

Senate Bill No. 482.
Bill read third time.
Remarks by Assemblyman Sandoval.
Roll call on Senate Bill No. 482:

YEAS—41.
NAYS—None.
Absent—Carpenter.

Senate Bill No. 482 having received a constitutional majority, Mr. Speaker declared it passed.
Bill ordered transmitted to the Senate.

Senate Bill No. 497.
Bill read third time.
Remarks by Assemblymen Humke, Ernaut and Price.
Roll call on Senate Bill No. 497:

YEAS—39.
NAYS—None.
Absent—Carpenter.
Not voting—Tiffany, Mr. Speaker Dini—2.

Senate Bill No. 497 having received a constitutional majority, Mr. Speaker declared it passed.
Bill ordered transmitted to the Senate.

Senate Bill No. 498.
Bill read third time.
Remarks by Assemblymen Schneider and Batten.
Potential conflicts of interest declared by Assemblymen Stroth and Tiffany.

Roll call on Senate Bill No. 498:

YEAS—33.

NAYS—Bennett, Chowning, Close, Evans, Freeman, Harrington, Segerblom—7.

Absent—Carpenter.

Not voting—Mr. Speaker Dini.

Senate Bill No. 498 having received a constitutional majority, Mr. Speaker declared it passed.

Bill ordered transmitted to the Senate.

Senate Bill No. 571.

Bill read third time.

Remarks by Assemblyman Giunchigliani.

Roll call on Senate Bill No. 571:

YEAS—41.

NAYS—None.

Absent—Carpenter.

Senate Bill No. 571 having received a constitutional majority, Mr. Speaker declared it passed.

Bill ordered transmitted to the Senate.

Senate Bill No. 531.

Bill read third time.

The following amendment was proposed by Assemblyman Sandoval:

Amendment No. 1377.

Amend the bill as a whole by adding a new section designated sec. 6, following sec. 5, to read as follows:

"Sec. 6. A review committee or member of a review committee may not claim the privilege created pursuant to the provisions of sections 2 to 5, inclusive, of this act in a claim of medical malpractice which was filed with a screening panel pursuant to NRS 41A.039 before October 1, 1995.".

Assemblyman Sandoval moved the adoption of the amendment.

Remarks by Assemblyman Sandoval.

Potential conflict of interest declared by Assemblyman Braunlin.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Batten moved that the vote whereby Senate Bill No. 498 was passed be rescinded.

Motion carried.

GENERAL FILE AND THIRD READING

Senate Bill No. 171.

Bill read third time.

Remarks by Assemblymen Carpenter and Steel.

Roll call on Senate Bill No. 171:

YEAS—41.

NAYS—Steel.

[3.] *4.* The time for appealing a decision of a lower court invalidating those provisions expires without an appeal being taken.".

Amend the title of the bill, first line, after "laws;" by inserting: "authorizing the department of transportation to establish speed limits on certain highways; establishing a maximum rate of speed;".

Assemblyman Ernaut moved the adoption of the amendment.

Remarks by Assemblyman Ernaut.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 390.

Bill read third time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 1394.

Amend the bill as a whole by renumbering sections 3 through 7 as sections 4 through 8 and adding a new section designated sec. 3, following sec. 2, to read as follows:

"Sec. 3. Sections 9 and 11 of Assembly Bill No. 152 of this session are hereby amended to read as follows:

Sec. 9. NRS 38.250 is hereby amended to read as follows:

38.250 *Except as otherwise provided in section 3 of this act:*

1. All civil actions filed in district court for damages, if the cause of action arises in the State of Nevada and the amount in issue does not exceed $40,000 must be submitted to nonbinding arbitration in accordance with the provisions of NRS 38.253, 38.255 and 38.258.

2. A civil action for damages filed in justice's court may be submitted to arbitration if the parties agree, orally or in writing, to the submission.

Sec. 11. 1. This section, sections 1 to 8, inclusive, and 10 of this act become effective on January 1, 1996.

2. Section 9 of this act becomes effective at 12:01 a.m. on January 1, 1996.".

Assemblyman Humke moved the adoption of the amendment.

Remarks by Assemblyman Humke.

Amendment adopted.

Bill ordered reprinted, re-engrossed and to third reading.

Senate Bill No. 498.

Bill read third time.

Remarks by Assemblymen Humke and Harrington.

Roll call on Senate Bill No. 498:

YEAS—34.

NAYS—Batten, Bennett, Chowning, Close, Evans, Freeman, Harrington, Segerblom—8.

Senate Bill No. 498 having received a constitutional majority, Mr. Speaker declared it passed.

Bill ordered transmitted to the Senate.

Senate Bill No. 498—Committee on Judiciary

CHAPTER 690

AN ACT relating to civil actions; limiting by statute the civil liability of a person who sells or serves alcoholic beverages; and providing other matters properly relating thereto.

[Approved July 6, 1995]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:

1. No person who serves or sells alcoholic beverages is liable in a civil action based on the grounds that the service or sale was the proximate cause of injuries inflicted by an intoxicated person upon himself or another person.

2. The violation of any statute, regulation or ordinance which regulates the sale or service of alcoholic beverages to a minor or an intoxicated person does not constitute negligence per se in any action brought against the server or seller for injuries inflicted by an intoxicated person upon himself or another person.

Sec. 2. This act becomes effective upon passage and approval.

Senate Bill No. 474—Committee on Judiciary

CHAPTER 691

AN ACT relating to civil actions; revising provisions governing civil liability of employers; revising provisions governing civil liability of keepers of specified accommodations for the public; revising provisions relating to punitive damages; and providing other matters properly relating thereto.

[Approved July 6, 1995]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 41.085 is hereby amended to read as follows:

41.085 1. As used in this section, "heir" means a person who, under the laws of this state, would be entitled to succeed to the separate property of the decedent if he had died intestate.

2. When the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death, or if the wrongdoer is dead, against his personal representatives, whether the wrongdoer died before or after the death of the person he injured. If any other person is responsible for the wrongful act or neglect, or if the wrongdoer is employed by another person who is responsible for his conduct, the action may be maintained against that other person, or if he is dead against his personal representatives.

1995

SB 474 By Judiciary DAMAGES

Revises provisions governing civil liability for wrongful acts and revises provisions relating to punitive damages. (BDR 3-1965)

Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: No.

05/12	74	Read first time. Referred to Committee on Judiciary. To printer.
05/15	75	From printer. To committee.
05/15	75	Dates discussed in Committee: 5/18, 6/29 (CON)
05/30	86	From committee: Amend, and do pass as amended.
05/30	86	(Amendment number 680.)
05/31	87	Read second time. Amended. To printer.
06/01	88	From printer. To engrossment.
06/01	88	Engrossed. First reprint. Placed on General File.
06/01	88	Read third time.
06/01	88	Taken from General File. Placed on General File for next legislative day.
06/02	89	Read third time. Passed, as amended. Title approved. (15 Yeas, 2 Nays, 1 Absent, 0 Excused, 3 Not Voting.) Notice of reconsideration on next legislative day.
06/05	90	To Assembly.
06/06	91	In Assembly.
06/06	91	Read first time. Referred to Committee on Judiciary. To committee.
06/06	91	Dates discussed in committee: 6/10 (A&DP)
06/25	108	From committee: Amend, and do pass as amended.
06/25	108	(Amendment number 1278.)
06/25	108	Placed on Second Reading File.
06/25	108	Read second time. Amended. To printer.
06/26	109	From printer. To re-engrossment.
06/26	109	Re-engrossed. Second reprint.
06/26	109	Placed on General File.
06/26	109	Taken from General File. Placed on Chief Clerk's desk.
06/27	110	(Amendment number 1340.)
06/27	110	Taken from Chief Clerk's desk. Placed on General File.
06/27	110	Read third time. Amended. To printer.
06/28	111	From printer. To re-engrossment.
06/28	111	Re-engrossed. Third reprint.
06/28	111	Placed on General File.
06/28	111	Read third time. Passed, as amended. Title approved. (41 Yeas, 0 Nays, 1 Absent, 0 Excused, 0 Not Voting.) To Senate.
06/29	112	In Senate.
06/29	112	Assembly amendments concurred in. To enrollment.
07/01	114	Enrolled and delivered to Governor.
07/06	0	Approved by the Governor.
07/07	0	Chapter 691.
		Effective July 6, 1995.

Additional Committee Information
6/29-Amendment concurred in, Senate Judiciary.

(* = instrument from prior session)

S.B. 474 of the 68th Session

1995

CIVIL LIABILITY OF INNKEEPERS & EMPLOYERS

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NEVADA LEGISLATURE

SIXTY-EIGHTH SESSION

1995

SUMMARY OF LEGISLATION

PREPARED BY

RESEARCH DIVISION

LEGISLATIVE COUNSEL BUREAU

S.B. 474 (Chapter 691)

Senate Bill 474 revises certain provisions relating to civil liability and punitive damages. The measure allows punitive damages to be recovered by the estate of a decedent in a wrongful death action. In addition, an employer is not liable for punitive damages based on wrongful acts of an employee, unless the employer hired the employee knowing that the employee was unfit for the employment or expressly authorized or ratified the wrongful act. The employer may also be liable for punitive damages if he is personally guilty of oppression, fraud, or malice. Actions involving claims of bad faith against an insurer are exempt from these punitive damage limitations and must be resolved under existing common law and statutory provisions relating to punitive damages.

Senate Bill 474 stipulates that an innkeeper is not civilly liable for a death or injury on the innkeeper's premises caused by a person who is not an employee, unless the wrongful act which caused the death or injury was foreseeable and the evidence indicates that the innkeeper did not exercise due care for the safety of the patron or other person on the premises. The court must determine as a matter of law whether the act was foreseeable and whether the innkeeper had a duty to take reasonable precautions against the act. This measure expressly provides that a wrongful act is not foreseeable unless the innkeeper failed to exercise due care for the safety of the patron or other person, or prior incidents of similar wrongful acts occurred on the premises of which the innkeeper had notice or knowledge.

The measure also clarifies the liability of an innkeeper for a patron's property and authorizes insurers to insure against liability for punitive damages with certain exceptions.

Finally, the provisions of the act dealing with liability for death or injury and punitive damages are only applicable to actions filed after the effective date of the act. Actions filed before that date are to be decided in accordance with the statutes and common law that was in effect prior to approval of this bill.

SENATE BILL NO. 474—COMMITTEE ON JUDICIARY

MAY 12, 1995

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing civil liability for wrongful acts and revises provisions relating to punitive damages. (BDR 3-1965)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to civil actions; revising provisions governing civil liability of employers; revising provisions governing civil liability of keepers of specified accommodations for the public; revising provisions relating to punitive damages; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 41.085 is hereby amended to read as follows:

41.085 1. As used in this section, "heir" means a person who, under the laws of this state, would be entitled to succeed to the separate property of the decedent if he had died intestate.

2. When the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death, or if the wrongdoer is dead, against his personal representatives, whether the wrongdoer died before or after the death of the person he injured. If any other person is responsible for the wrongful act or neglect, or if the wrongdoer is employed by another person who is responsible for his conduct, the action may be maintained against that other person, or if he is dead against his personal representatives.

3. An action brought by the heirs of a decedent pursuant to subsection 2 and the cause of action of that decedent brought or maintained by his personal representatives which arose out of the same wrongful act or neglect may be joined.

4. The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for his grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are not liable for any debt of the decedent.

5. The damages recoverable by the personal representatives of a decedent on behalf of his estate include:

(a) Any special damages, such as medical expenses, which the decedent incurred or sustained before his death, and funeral expenses; and

(b) Any penalties , *including, but not limited to, exemplary or punitive damages,* that the decedent would have recovered if he had lived,

but do not include damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are liable for the debts of the decedent unless exempted by law.

Sec. 2. Chapter 42 of NRS is hereby amended by adding thereto the provisions set forth as sections 3 and 4 of this act.

Sec. 3. *As used in this chapter, unless the context otherwise requires:*

1. "Conscious disregard" means the knowledge of the probable dangerous consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.

2. "Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person.

3. "Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

4. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

Sec. 4. *In an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrongful act of his employee, the employer is not liable for the exemplary or punitive damages unless:*

1. The employer had advance notice or knowledge that the employee was incompetent or unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;

2. The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or

3. The employer is guilty of oppression, fraud or malice, express or implied.

If the employer is a corporation which is organized under the laws of this state, the employer is not liable for the exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.

Sec. 5. NRS 42.005 is hereby amended to read as follows:

42.005 1. **[**In**]** *Except as otherwise provided in section 4 of this act, in* an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:

(a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100.000 or more; or

(b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000.

2. The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 do not apply to an action brought against:

(a) A manufacturer, distributor or seller of a defective product;

(b) An insurer who acts in bad faith regarding its obligations to provide insurance coverage;

(c) A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations prescribed in subsection 1;

(d) A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or

(e) A person for defamation.

3. If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1.

4. Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of exemplary or punitive damages to be assessed.

Sec. 6. Chapter 651 of NRS is hereby amended by adding thereto the provisions set forth as sections 7 and 8 of this act.

Sec. 7. *As used in NRS 651.010 to 651.040, inclusive, this section and section 8 of this act, "premises" includes, but is not limited to, all buildings, improvements, equipment and facilities used or maintained in connection with a hotel, inn, motel, motor court, boardinghouse or lodginghouse.*

Sec. 8. *1. An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodginghouse is not civilly liable for the death or injury of a patron or other person on the premises caused by another person who is not an employee or under the control or supervision of the owner or keeper unless there is clear and convincing evidence that the owner or keeper failed to exercise ordinary care.*

2. If the death or injury incurred pursuant to subsection 1 is the result of a foreseeable wrongful act of the person causing the injury, an owner or keeper who is found to have failed to take reasonable precautions against the foreseeable wrongful act is civilly liable for the death or injury. The court shall determine as a matter of law whether the owner or keeper had a duty to take reasonable precautions against a foreseeable wrongful act of the person causing the death or injury. For the purposes of this section, a wrongful act is

not foreseeable unless prior incidents of similar wrongful acts occurred on the premises and the owner or keeper had notice or knowledge of those incidents.

Sec. 9. NRS 651.010 is hereby amended to read as follows:

651.010 1. An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodginghouse in this state is not civilly liable for the theft, loss, damage or destruction of any property [left in the room of any guest or left in a motor vehicle on the premises, including the parking facilities, of such an establishment] *brought by a patron upon the premises or left in a motor vehicle upon the premises* because of theft, burglary, fire or otherwise, in the absence of gross neglect by the owner or keeper [.

2. If an] *if:*

(a) The owner or keeper [of any hotel, inn, motel, motor court, boardinghouse or lodginghouse in this state] provides a fireproof safe or vault in which [guests] *patrons* may deposit property for safekeeping [, and notice] *; and*

(b) Notice of this service is personally given to [a] *the patron, or if the patron is a guest, notice is personally given to the* guest or posted in the office and the guest's room . [, the owner or keeper is not liable for the theft, loss, damage or destruction of any property which is not offered for deposit in the safe or vault by a guest unless the owner or keeper is grossly negligent.]

2. An owner or keeper is not obligated to receive property to deposit for safekeeping which exceeds $750 in value or is of a size which cannot easily fit within the safe or vault.

3. The liability of the owner or keeper [under this section] *for property deposited for safekeeping in a safe or vault* does not exceed the sum of $750 for any property of an individual [guest,] *patron,* unless the owner or keeper [receives the property for deposit for safekeeping and] consents to assume a liability greater than $750 for its theft, loss, damage [,] or destruction in a written agreement in which the [guest] *patron* specifies the value of the property.

Sec. 10. Chapter 681A of NRS is hereby amended by adding thereto a new section to read as follows:

An insurer may insure against legal liability for exemplary or punitive damages that do not arise from a wrongful act of the insured committed with the intent to cause injury to another.

Sec. 11. The provisions of sections 1, 3, 4, 5, 8 and 9 of this act are applicable to any action:

1. Filed before the effective date of this act in which final judgment, as defined in NRS 37.009, has not been entered.

2. Filed on or after the effective date of this act.

Sec. 12. This act becomes effective upon passage and approval.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Sixty-eighth Session
April 6, 1995

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 8:30 a.m., on Thursday, April 6, 1995, in Room 224 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Jon C. Porter, Vice Chairman
Senator Maurice Washington
Senator Mike McGinness
Senator Ernest E. Adler
Senator Dina Titus
Senator O. C. Lee

VISITING LEGISLATORS:

Assemblywoman Genie Ohrenschall

STAFF MEMBERS PRESENT:

Allison Combs, Senior Research Analyst
Lori M. Story, Committee Secretary

OTHERS PRESENT:

Harvey Whittemore, Lobbyist, Nevada Resort Association and RJ Reynolds Tobacco, USA
Donald Kwalick, M.D., Health Officer, State of Nevada
David Rice, Health Officer, Washoe County
Patricia Justice, Lobbyist, Clark County
C.O. Watson, Lobbyist, Nevada Association of Tobacco and Candy Wholesalers
Samuel P. McMullen, Lobbyist, Reno/Sparks Convention and Visitors Authority
Tom Skancke, Lobbyist, Las Vegas Convention/Visitors Authority
John (Jack) Jeffreys, Lobbyist, Tobacco Institute
Keith Loomis, Attorney, former Lyon County District Attorney

Ben Graham, Chief Deputy, Clark County District Attorney, Legislative Representative, Nevada District Attorneys Association
David Sarnowski, Chief Deputy Attorney General, Office of the Attorney General
Bill Cavagnaro, Lieutenant, Legislative Liaison, Las Vegas Metropolitan Police Department
Phil Galeoto, Lieutenant, Reno Police Department
Randy Harris, Youth Gang Specialist, Washoe County School District
John W. Riggs, Sr., Concerned Citizen
Victoria Riley, Lobbyist, Nevada Trial Lawyers Association

The chairman called Harvey Whittemore, Lobbyist, Nevada Resort Association, to the floor to make his presentation for a bill draft request (BDR). Mr. Whittemore explained his request is for authorization for drafting of a bill which would determine an appropriate standard for innkeepers' liability with respect to third parties, and would clarify when punitive or exemplary damages in actions involving wrongful death are justified. This standard has previously been outlined in case law, Mr. Whittemore reported, but has yet to be incorporated into statute.

Additionally, Mr. Whittemore asked the bill to allow the insurability of punitive damages, except in cases dealing with egregious conduct on the part of an individual. If such intentional conduct could be shown, the insurance should not be applicable, he declared. The bill would be the "codification of an existing Craigo standard, with respect to punitive damages," but most importantly it would "protect those individuals who really have not been...whose conduct has not been ratified, those corporations or those employers whose conduct of an employee they have not ratified to be precluded from having punitive damages imposed against them."

The Nevada Resort Association has worked very hard with the Nevada Trial Lawyers to come up with a plan which is a fair compromise, he reported. He asked for authorization of the bill draft as well as hearings on its merits.

The chairman called for questions; there were none. He called for a motion to draft the bill as requested.

SENATOR McGINNESS MOVED TO REQUEST THE BILL DRAFT AS OUTLINED.

SENATOR PORTER SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS WAS ABSENT FOR THE VOTE.)

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The chairman took an opportunity to thank Mr. Whittemore for his work on the compromise with the Nevada Trial Lawyers Association. He said he feels the bill addresses some important issues in the area of torts, noting it as an example of a cooperative effort between parties who might otherwise be at odds.

SENATE BILL 316: Revises provisions governing smoking of tobacco in public buildings.

The chairman moved next to open the hearing on Senate Bill (S.B.) 316. He called for the bill's proponents to take the floor. Donald Kwalick, M.D., State Health Officer, addressed the committee reading from a prepared statement (Exhibit C).

Chairman James asked the witness if he was able to estimate what fiscal impact there might be, especially with his proposed amendment. Dr. Kwalick speculated the fiscal impact might result from building owners or managers having to relocate smoking areas from an entryway to some other area of the building. The chairman and the witness briefly discussed the smoking areas in the Legislature Building. The chairman could not say where the smoking area is in the building and the witness replied it is in the stairwell and near the entryways. Dr. Kwalick stated he has encountered cigarette smoke many times upon entering the building.

Senator James summarized the bill's requirements as allowing only 10 percent of the building for smoking, to move smoking areas from entryways, and affirmatively disburse any smoke that might accumulate near an entryway. The witness added his proposal that it not be required to provide a smoking area, but to leave that to the discretion of the building manager.

Senator Porter noted for the record that the company he is employed by is owned by British American Tobacco Company. He noted Farmer's Insurance is a fully owned subsidy of the company, but "no benefits are reaped from the company." He asked the witness about page 2, line 44 of the bill which refers to "county fair or recreation board." He wondered why there is a need to include county fair and

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Sixty-eighth Session
May 18, 1995

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 3:35 p.m., on Thursday, May 18, 1995, in Room 224 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Jon C. Porter, Vice Chairman
Senator Maurice Washington
Senator Mike McGinness
Senator Ernest E. Adler
Senator Dina Titus
Senator O.C. Lee

STAFF MEMBERS PRESENT:

Allison Combs, Senior Research Analyst
Marilyn Hofmann, Committee Secretary

OTHERS PRESENT:

J. T. Watson, Jr., Officer in Charge, Reno Office, United States Department of Justice, Immigration and Naturalization Service
Richard E. Wyett, Chief, Division of Parole and Probation
Rick Eaton, Supervisory Special Agent, United States Department of Justice, Immigration and Naturalization Service
Paula Berkley, Lobbyist representing Alliance for Latinas in Action and Solidarity (ALAS)
Harvey Whittemore, Attorney at Law, Lobbyist representing the Nevada Resort Association.
Bill Bradley, Attorney at Law, Lobbyist representing the Nevada Trial Lawyers Association (NTLA)
Joseph Cronin, Attorney at Law
Bob Perry, Attorney at Law, Lobbyist representing the Nevada Trial Lawyers Association (NTLA)

Paula Berkeley, Lobbyist representing Alliance for Latinas in Action and Solidarity (ALAS)

Senator James opened the hearing on Senate Bill (S.B.) 475.

SENATE BILL 475: Provides for release of presentencing reports to Immigration and Naturalization Service of United States Department of Justice.

The first persons to appear were J. T. Watson, Jr., Officer in Charge, Reno Office, United States Department of Justice, Immigration and Naturalization Service (INS), Richard E. Wyett, Chief, Division of Parole and Probation, and Rick Eaton, Supervisory Special Agent, (INS). Mr. Wyett presented a videotape concerning criminals who are illegal aliens. Following the presentation, he presented an issue brief, which is attached hereto as Exhibit C. Mr. Wyett stated the Divisoin of Parole and Probation felt the bill was a "first step" to solving problems of communication between the INS and the division. He said many times the two agencies were "looking for the same individuals, but going in two different directions." Mr. Eaton stated the new unit involving the two agencies was activated only recently, and in one 9-day period, 71 fugitives were arrested, a large percentage of whom were violent criminals. He said the sharing of information led to the arrests. He said S.B. 475 would allow information to be placed before immigration judges "...to support an order of deportation." Mr. Watson added the success of the program would show what could be done when information is shared between state and federal agencies.

The next to appear was Paula Berkley, Lobbyist representing Alliance for Latinas in Action and Solidarity (ALAS). She stated ALAS was in support of the measure. Ms. Berkley said the organization has been very active in the Reno area in attempts to legalize immigrants. Senator Washington asked where the organization was located and how long it had been in existence. Ms. Berkley responded said ALAS has been active for "a couple of years," and the Coalition for Legal Immigration was organized after the law regarding services to immigrants (Proposition 187) was passed in California in anticipation of similar laws in Nevada. She said there was no official office location and added the organization is composed of "some very involved ladies."

There was no further testimony on S.B. 475. The chairman called for a motion to pass the legislation.

SENATOR ADLER MOVED TO DO PASS S.B. 475.

SENATOR WASHINGTON SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR TITUS WAS ABSENT FOR THE VOTE.)

* * * * *

Senator James referenced S. B. 474 and S.B. 482.

SENATE BILL 474: Revises provisions governing civil liability for wrongful acts and revises provisions relating to punitive damages.

SENATE BILL 482: Provides that attorney who unreasonably and vexatiously extends court proceeding may be required to pay additional costs, expenses and fees reasonably incurred because of such conduct.

The chairman stated he had requested the two pieces of legislation after numerous discussions with various persons "on all sides of the tort reform issue." He said he has worked on the policy behind the measures and the language of the bills, in order to try to develop "responsible measures that address the issues which are under so much discussion nationally and in our state...reform of the legal system." Senator James said the two bills "...try to reform the way in which we look at lawsuits and the damages that are available under them...the standards that are applicable in a court and presented to a jury...." He said he believed the two bills evidenced very responsible steps to develop a better legal system, while at the same time preserving one of the most important rights persons have in the country and state, i.e, "right to a trial by jury...the right to assert your constitutional rights...and have the court stand up for you if you are in the right...no matter how powerful or influential the force on the other side of the issue might be...." Senator James stated the two bills "do no violence to that very important right," while recognizing that abuses can occur in the system. He added the Legislature

must try to assure those abuses are not continued, "...so we have the best and most fair legal system possible."

Senator James stated in working through the bills, he had been requested by representatives of the Nevada Resort Association (NRA) to include some language in the two pieces of legislation, and he had accommodated those requests. He stated his law firm had from time to time represented hotels, and those persons who have sued hotels. The chairman said he had discussed the matter with his partners, and they did not indicate there was any pending litigation which would be impacted by passage of either S.B. 474 or S.B. 482. He stated, however:

> I will defer an actual vote on this bill today...look at all the parameters surrounding this, and insure there is no ethical problem with me voting either for or against S.B. 474...I don't anticipate any such problem. But it has been raised...I have been asked whether I would be able to do that, and in that caution, I will make sure that doesn't create any problems, and I don't anticipate that it will.

The first person to testify on S.B. 474 was Harvey Whittemore, Attorney at Law, Lobbyist representing the Nevada Resort Association (NRA). Mr. Whittemore thanked the chairman and the members of the committee for the "cooperative nature of the process which has been imposed on developing S.B. 474." He said the NRA, and that association's president, Richard Bunker, recommend passage of the bill. Mr. Whittemore then read from a prepared statement, which is attached hereto as Exhibit D.

Mr. Whittemore added comments regarding section 4 of the bill:

> However it is drafted, section 4 of the bill has several major defects which require the amendments we propose today, making clear that the amendments we propose are simply errors in bill drafting...while they are substantive, it is the intent of the language as we proposed it with Chairman James and the other participants in this process. As drafted now, section 4 only applies to Nevada corporations.

Mr. Whittemore referenced lines 34 and 35 (section 4), and indicated the language states, "...if the employer is a corporation which is organized under the laws of this state." He said that language should be bracketed, to delete "organized under the laws of this state," since it would create different punitive damage liability

standards for Nevada corporations than foreign corporations doing business in Nevada. Mr. Whittemore said the result would be "bad law," since it would create serious constitutional questions under the Equal Protection, Interstate Commerce and other clauses of the United States Constitution. He stated it was also bad policy, given the large number of foreign corporations which are vitally important to Nevada's economy and the welfare of its citizens. Mr. Whittemore added a comparable California statute makes no such distinction. He said section 4 of the bill should be further amended as follows: "Under subsection 1, line 27, the employer had advance [notice or]..., and on line 28, bracket [incompetent or]...." Mr. Whittemore said advance notice might make constructive knowledge sufficient, whereas the entire thrust of the bill is to require deliberate, i.e., knowing conduct. Similarly, he added, knowledge the employee was incompetent goes to inadvertent care, i.e., negligent wrongdoing, whereas the object of punitive damages is deliberately wrongful conduct. Mr. Whittemore stated, "Knowledge the employee is 'unfit' is sufficiently broad to accomplish liability where it is consistent with the objectives of punitive damages." He said the foregoing changes were necessary to again make the paragraph substantially similar to the California statute. Finally, Mr. Whittemore said, under section 4(3), before the word "guilty" on line 32, they have asked for addition of the word "personally," which was omitted from the draft. He added, "Again, the purpose of the bill is to eliminate vicarious liability for punitive damages." He stated if traditional principles of the employer-employee liability are applied to this paragraph as written, it could restore vicarious liability for punitive damages, thereby fully defeating the objectives.

Mr. Whittemore continued with his prepared statement (Exhibit D). He pointed out sections 6 through 8 of the bill are the portions being proposed by the NRA, and would clarify the liability of hotels, motels and other innkeepers when third parties cause personal injury to guests or other patrons.

With reference to section 8 of the bill, Mr. Whittemore said they would propose certain clarifying amendments to the bill, including amending the definition of "premises" on line 34. He said they also propose amending section 8 to make it clear that where the issue is liability for injuries caused by third parties, as opposed to injuries caused by innkeepers themselves, an innkeeper is not liable unless there is an absence of care for the safety of patrons and others on the premises by employees acting within the scope of their employment. Mr. Whittemore said at the end of line 41, section 8, the NRA would recommend the addition of the phrase, "...for the safety of patrons and other persons on the

premises," and bracketing the word "or" on line 39 and the word "ordinary" in line 41. He said with those changes, the bill would make innkeepers responsible for the acts of off-duty employees, and depending upon judicial interpretation of the words "control" and "supervision," perhaps independent contractors as well. He said inclusion of the word "ordinary" is inconsistent with the thrust of the bill, which is to reduce the scope of innkeepers' liability where injuries are caused by third parties, rather than their own conduct. Mr. Whittemore pointed out to the committee that there is significant disagreement between the NRA and the trial lawyers with respect to the standard which is expressed on line 40 of section 8, regarding the amount of evidence necessary to prove the case in section 8(1). He said he would like to bring the committee's attention to the phrase, "clear and convincing evidence." He said a representative of the Nevada Trial Lawyers Association (NTLA) would offer testimony with respect to that language. Mr. Whittemore said the NRA hoped the committee would agree, with respect to innkeepers, that this standard is appropriate in terms of the type of protection they were trying to provide to the industry. He said that is the only policy issue which he believes is substantive in terms of actual language.

Mr. Whittemore continued with a discussion of section 9 of the bill, as set forth on Exhibit D, page 6.

Mr. Whittemore called the committee's attention to section 10, lines 32 through 34, which allows, but does not mandate, an insurance company's coverage on punitive damages, except where the defendant intends to injure the plaintiff. He said this exception "...honors the frequently recognized public policy...that the trend will be to allow insurance with respect to punitive damages." He said states which have already enacted this policy include Arizona, Idaho, Montana, New Mexico, Oregon, Texas and Wyoming. Mr. Whittemore stressed all those states have allowed punitive damages to be insurable for non-willful wrongs.

Mr. Whittemore returned to his prepared statement, Exhibit D, page 7. Mr. Whittemore pointed out sections 11 and 12 of the bill make the bill "effective on passage and approval and further make the bill applicable to pending cases." However, he added, the bill as drafted lacks a severability provision, which they had requested. He suggested the following language:

> Should any provision or portion of a provision of this act or the application thereof to any person, thing or circumstance, be held unconstitutional or otherwise invalid in full or in part, that invalidity shall not affect the remaining provisions.

Mr. Whittemore stated, "This has been a very time-consuming and deliberative process that we have engaged in with members of this committee with respect to addressing the issue of punitive damages and liability...with respect to patrons injured by third parties."

Senator Adler asked a question pertaining to section 9, paragraph 3 of S.B. 474. He indicated liability would be limited for items deposited in safes and vaults. He said some hotels have signs up saying they are not responsible "unless items are placed into the safe or vault." Mr. Whittemore said the language with respect to limit of liability was already in the law, and all they were doing with respect to the changes in the section, "...is applying the protection which this Legislature already afforded to patrons...to the premises itself." Senator Adler said there should be a presumption that when items are placed in a safe or vault, they would not be taken. Mr. Whittemore agreed, and said they have never had a problem with respect to limitation as set forth in the section. He added, "You are asking to revisit a policy issue which has previous been decided." Mr. Whittemore said that provision has "always been limited to a $750 limitation," and there are signs posted in that regard, which are required by statute. He added, "If not, you turn the hotel into a guarantor for acts committed by a third party." Senator Adler responded, "Harvey, if I put something in a hotel vault, and it is stolen, I don't think it was stolen by a third party." Mr. Whittemore stressed there was no change in the bill with regard to this provision, and was a policy decision which had previously been addressed.

Senator Titus referenced section 11 of the bill and the language, "...filed before the effective date of this act in which final judgment as defined in Nevada Revised Statutes (NRS) 37.009 has not been entered." She said in examining the definition of "final judgment" in NRS 37.009 "...means a judgment which cannot be directly attacked by appeal, motion for a new trial or motion to vacate the judgment." Senator Titus asked if the reference to an effect on "pending cases" meant cases which are in progress and awaiting appeals which have been filed. Mr. Whittemore answered the language "was designed to impact all cases which are pending...but the question of whether it is going to have an impact on those is going to be decided by a court." He added there were cases which were

awaiting final decision by the Nevada Supreme Court, those which have gone to judgment and have yet to be appealed, and those which have been filed or in trial at this time. Senator Titus stated she was thinking of those cases where appeals are pending, and added, "That seems like you are changing the rules in the middle of the game." She then asked, "How would this affect Tailhook, for example?" Mr. Whittemore answered, "Section 11 potentially would have impact on a case such as Tailhook...whether or not it would, would depend upon whether the punitive damage award in that case was viewed as a procedural or substantive right." He continued, "The question of whether this bill would affect that, would be a matter for the court to decide as to the appropriateness of whether a substantive, i.e., a contract right, was impacted." Senator Titus responded, "Now, that is a lot of legal jargon...go back and tell me what you mean in regular language." Mr. Whittemore said section 11 is drafted as "broadly as possible" to impact all cases which are pending in any sense of the word. He added:

> I have tried to explain very clearly that this is as broadly written as possible. The policy issue which we are strongly recommending to this committee is that in clarifying and bringing predictability and certainty to this issue, it is an important enough policy decision that the courts be allowed to decide whether or not those matters which may be impacted by this bill are 'of a procedural or substantive right.'

Senator Titus asked for an explanation of the difference between a "procedural" and a "substantive" right. Mr. Whittemore explained:

> If we look to a contract right...a right which you and I enter into as a matter of contract...this states no party...can enter and require on an ex post facto basis that we change the contractual rights and obligations under that, so long as that contract is not void. That is a 'substantive right.' A 'procedural right' is one which the state allows a process to take place and a result to derive from that process, which may or may not occur. Punitive damages are a creation of statute...especially in this state, a creation of statute as modified by judicial decision.

Mr. Whittemore cited two Nevada Supreme Court opinions, as set forth on page 2 of Exhibit D, i.e., Craigo v. Circus-Circus Enterprises, Inc., 106 Nev. 1, 786 P.2d 22 (1990), and Granite Const. Co.v. Rhyne, 107 Nev. 651, 817 P.2d 711 (1991). He said the Craig decision, which was the subject of deep division at the court,

and the Rhyne case, which legal commentators have suggested modified the Craig decision, show, from a legal perspective, "...a deep misunderstanding as to where punitive damages are appropriately affixed." Mr. Whittemore stated S.B. 474 "...clears that matter up and does so in a way which we would strongly recommend." Senator Titus asked if the right to punitive damages was a "procedural" or "substantive" right. Mr. Whittemore answered, "That is the question I suggested to this committee should be addressed by a court." He went on to say he did not believe it was appropriate to "attempt to say it was a procedural right and therefore subject to the effect of this law. Senator Titus asked if that varied from case to case and continued: "Once we decide if it is one or the other, will that always apply?" Mr. Whittemore responded, "Once you have a final decision under Nevada law that says, 'We are interpreting this statute',...that would probably answer that question once and for all." Senator Titus then asked how Mr. Whittemore believed that would affect the pending Tailhook suit. Mr. Whittemore answered, "I would imagine that the attorneys who are representing both parties are going to argue that case in front of a judge who will determine whether or not this law is applicable to that matter." He continued to say he thought there were motions pending in that case for a new trial, and the question would then become, "Do they get the old law or do they get the new law. That is a matter which the courts will decide...we're not recommending to you that you impose any particular standard with respect to that particular matter."

Mr. Whittemore stated:

> The purpose of this law is to make very clear that the cases...based upon what I have read in the newspaper about Tailhook...those types of cases would not be appropriately filed and pursued in this state. I would assume that would, in fact, be one of the results of this type of legislation...because again, as I understand it, there was third party conduct which was responsible for the damages associated with the Tailhook case. But, this isn't a bill about the Tailhook case. This is a bill about three very substantive changes in our punitive damage law: (1) To make it clear that punitive damages arise in wrongful death; (2) To say in punitive damages that we have a standard that you say is appropriate, since it is a creation of statute and since we have such deep division on the court with respect to what is appropriate or not; and with respect to punitive damages, making it clear that employers don't have vicarious liability; and (3)

> With respect to innkeepers, that we are not responsible for the misconduct of third parties. Finally, from a policy decision, that you are making this effective upon passage and approval and saying that any cause or application which is constitutional, you want it to apply to constitutionally, not ex post facto...doesn't diminish a vested right...does not create a problem that is inappropriate. That is what this bill does.

Senator Washington asked Mr. Whittemore to explain the intent of section 8 of the bill. Mr. Whittemore answered under Nevada law, prior to a decision in Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1101, 864 P.2d 796, 799 (1993), the question of whether "...I owed a duty to you, as a patron," was a matter to be determined by the judge..."Do I have a legal duty to you to do something...or not to do something?" He stressed this was not a contract situation, but rather a duty of care, "...what every person in our society owes to another person...." Senator James indicated to Mr. Whittemore that he had "expanded the concept of duty way beyond what was intended." Mr. Whittemore responded, "The chairman appropriately corrects me." He added, "The duty we are talking about is that responsibility which one citizen has to another." Mr. Whittemore said with respect to section 8 of the bill, what they were attempting to do was to "codify what was the old law with respect to that issue."

Senator James reiterated the sections of the bill requested by the NRA related to opposing court cases, one which says there must be deliberate harm, and one which says if "you know something bad might happen" in a situation, a plaintiff could receive punitive damages. He said since there were two competing interpretations, "...we are essentially adopting one of them in the bill." The chairman added in the applications section of the legislation, it is set forth that "...we will allow the courts to go ahead and utilize that standard statutorily adopted, if they think that does not abridge somebody's vested right." He added, "All we are saying with the saving clause, is that if they decide it would be an unconstitutional application to apply a standard to a case in the pipeline, that the whole bill doesn't fail because of that." Mr. Whittemore agreed with Senator James' statement.

In response to a question posed by Senator Titus, Mr. Whittemore stated the severability provision of the bill is absolutely essential "...so you don't have one unconstitutional application causing a problem with respect to the entire act." Senator Titus asked: Is it the "retroactivity provision" which is "making you

worried that it might be unconstitutional...[which is] why the severability clause was [included]. Mr. Whittemore answered, "Absolutely not." Senator Titus stated, "That is what it sounded like the chairman just said." Mr. Whittemore answered the chairman only used that as an example. He added there were "other provisions which may cause problems with respect to unconstitutionality." Mr. Whittemore stated:

> Some good lawyer is going to argue that by defining certain conduct by statute in section 3, or the fact that certain employers do not have the same protection as others...the distinction between a corporate employer and a regular employer...that somehow through 'inartful drafting' there is some sort of unconstitutional or equal protection argument. We don't anticipate that, but being good lawyers, we are saying we don't want to risk that...we have spent way too much time to get this resolved.

Senator Porter asked for a clarification regarding the addition of the word "personal" in section 4(3) of the bill. Mr. Whittemore answered they wished to "make clear that the employer does not have vicarious liability...but has to be personally responsible of oppression, fraud or malice express or implied...unless it is ratified by the corporate employer." Senator Porter, with respect to section 8 of the bill, asked if the term "the court" specified a judge, and not a jury. Mr. Whittemore answered that was correct.

The next person to testify was Bill Bradley, Attorney at Law, Lobbyist representing the NTLA. Mr. Bradley indicated the NTLA has "done a lot of work trying to arrive at some compromises on this bill." He stated they were "extremely concerned to see the Nevada Supreme Court 2 years ago intimate that it wanted to indicate a policy in this state that punitive damages were not available in wrongful death cases." Mr. Bradley added, "What that really means is that it is cheaper to kill people that it is to maim them." He said that opinion "sent shock waves through the members of our organization, because it sets a very bad public policy." Mr. Bradley said as a consequence, they wish to do everything they can to make sure punitive damages are available in wrongful death cases. He said their major concern with S.B. 474 is with section 8 at line 40, having to do with burdens of proof in civil cases. Mr. Bradley said that language attempts to "increase the burden of proof in cases involving innkeepers from a "preponderance of the evidence" to "clear and convincing evidence." He stated the association was "strongly opposed to doing that kind of increase in the burden of proof." Mr.

Bradley said in every type of civil case in the State of Nevada where there is an allegation that someone was negligent, the burden of proof is to find "by a preponderance of the evidence." He said it is absolutely necessary to maintain consistency in the state in civil cases where negligence is a factor, such as the negligence of an innkeeper. Mr. Bradley stated there was "...absolutely no reason to increase the burden of proof against innkeepers to "clear and convincing evidence" when the rest of Nevada's grocery store owners and drug store owners, for example, are subject to a lower standard of care. Consequently, he said, the association would encourage the committee to strike the language "clear and convincing evidence," and replace it with "a preponderance of the evidence."

Mr. Bradley continued:

> For the committee's information, 'clear and convincing' is the standard we have to convince the judge of to even allow a jury to consider punitive damages. It is a very high standard...a very strict standard...and a very difficult standard to achieve. Consequently, 'clear and convincing' is an appropriate standard for punitive damages. It is an entirely inappropriate standard for defining negligent conduct.

Mr. Bradley said another concern related to page 4 of the bill, line 1, where the language, "...not foreseeable unless prior instances of similar wrongful acts." He said the association wants to make sure that the phrase "similar wrongful acts" is never interpreted as "identical" or "nearly identical" wrongful acts. He said the common notion is if a patron was assaulted on the premises, and 2 weeks later, another patron is raped on the premises, "...is the prior assault a sufficient, similar wrongful act, or does it take something more than an assault...what are the standards?" Mr. Bradley added what would drive the punitive damage consideration would be when there have been numerous criminal acts or sufficient criminal activity that any reasonable person should realize that they have a problem on their property, and they have to increase security. He indicated he wanted to insure that "similar wrongful acts" is not construed too narrowly. Mr. Bradley also stated he and Mr. Whittemore have attempted to work out the language, but still have differences as to the meaning of "similar."

Senator Washington asked if a person goes to a hotel or motel in a part of town that has a crime rate, the person knows of the area's reputation, and is a victim of a crime, is the victim or the innkeeper at fault? Mr. Bradley answered

theoretically it would put both at fault. He added the law already provides that if a person "voluntarily assumes a known risk" the case can be thrown out of court. Mr. Bradley also said if a person knows the area is a bad one, but does not have knowledge of a "known risk," he may fall under the "doctrine of comparative negligence." That doctrine, he explained, evaluates the person's acts and compares them with the acts of the innkeeper, and so long as the person's acts are not greater than 50 percent responsible for the problem, he or she is entitled to recovery.

Mr. Whittemore pointed out that the provisions of section 8 of the bill "...were only talking about those deaths or injuries caused by another person." He said the reason that standard was important was to indicate "...we should not be responsible for the third party conduct...unless it becomes our own." Mr. Whittemore stated the discussion between Mr. Bradley and Senator Washington "...really goes to whether I had a duty as the innkeeper directly to a patron and may not have an intervening criminal act."

Senator James suggested this is why hotels are safe, with the use of doors which shut automatically, with double locks, and why keys are changed all the time. He said liability would be imposed if the innkeepers fall below such safety standards.

Appearing in opposition to S.B. 474 was Joseph Cronin, Attorney at Law, Minden, Nevada. Mr. Cronin indicated he was involved in a number of cases mentioned in Mr. Whittemore's testimony, and stated he was one member of a team of lawyers who represented Paula Caughlin, plaintiff in the Tailhook case. He said he was also the lawyer representing Mr. Doud, in a case currently pending against the Las Vegas Hilton Corporation. (Doud, supra.) Mr. Cronin stated he wished to "dispel some of the things you have previously heard." First, he said, the United States District Court for the District of Nevada has denied all of the Hilton's motions in the Tailhook case, and the case is now before the Ninth Circuit Court of Appeals. Secondly, he stated:

> The effect of the retroactivity section of the proposed legislation, if it were to be found constitutional, would have the effect of nullifying that judgment, because the jury in that case was instructed that the burden of the plaintiff was by a preponderance of the evidence, and the plaintiff met that burden by a preponderance of the evidence.

Mr. Cronin referenced an article contained in the April 1995 issue of The Hotel-

Motel Security and Safety Management magazine. He said this magazine serves the hotel and motel industry, particularly safety and security concerns. Mr. Cronin said the article was directed to the Las Vegas Hilton, regarding the Tailhook matter, and was entitled, "What the Hotel Did Wrong." He quoted:

> They failed to provide adequate numbers of security personnel; there was a failure to adequately and properly train the security staff; a thorough analysis of this case has been conducted by...a security professional and an attorney who specializes in the areas of meetings, conventions and trade shows...he cites specific acts of negligence or omissions by the hotel, which were asserted by the plaintiff...it serves as an excellent point of reference for high-risk meeting preparation...failure to adequately and properly train the security staff or other hotel personnel to respond to the activities occurring on the third floor of the hotel...failure to summon the Las Vegas Metropolitan Police to stop the criminal activity...and to investigate and arrest those individuals committing criminal acts...permitting drunk and/or violent or dangerous convention attendees to loiter in the public hallway of the hotel's third floor, and allowing them to form the gauntlet...continuing to serve alcohol to Tailhook conventioneers, despite knowledge that members were causing damage and injury to hotel property and guests....

Senator Washington cited an example:

> I'm going to this party...knowing that there are festivities going on... is it the hotel's responsibility to provide adequate security and trained personnel above and beyond the call of duty...something is missing. Why is it the hotel's responsibility...why is it not the fault or the conduct the liability of those people at the party who are performing these acts?

Mr. Cronin answered he did not come to the hearing to discuss Tailhook, but would respond to the question. Senator James interjected: "I don't want to try that case here...this isn't a bill dealing with specifically that...I appreciate your perspective, but I would not like to try the facts of the case here." Senator Washington stated the question did not necessarily have to pertain to Tailhook, and said he was "trying to put the whole concept together." Mr. Cronin said the Tailhook case was an "inadequate security case." He said to make law dealing

with homicide cases based upon what is seen on television with regard to the O.J. Simpson case, would be just as inappropriate as making law for inadequate security litigation based upon the Tailhook case. Mr. Cronin indicated with respect to the Tailhook case, "...there was a 20-year history of violence in the common areas of the hotel." He said windows had been broken and "people had been held out windows by their ankles, eight stories above the payment...and people thought that was funny...and they continued to invite those people back." Mr. Cronin pointed out the acts complained of happened in the hallway, where 108 other people besides his client were assaulted.

Mr. Cronin indicated the reason the law should not be changed, is because "hotels are magnets for crime." Senator Porter asked if Mr. Cronin did not believe any of the law should be changed, as in S.B. 474. Mr. Cronin said he only was referencing "inadequate security litigation," such as set forth in sections 6 though 8, and section 11, the retroactivity provision. He indicated he would not speak with respect to punitive damages. Mr. Cronin stated the present law was good because the same standards apply to inadequate security litigation that apply to railroads, schools, hospitals, drivers, and airlines. He said hotel owners, "...just because they are in Nevada, shouldn't be treated differently...because people will be hurt and people will die." He added in response to a question from Senator Porter, "This bill effectively insulates hotels from inadequate security litigation." He said it places many barriers in the path of crime victims. Mr. Cronin stated, "Clear and convincing evidence is not the standard of care for torts...here or anyplace else. By making clear and convincing evidence the standard just to insulate the hotel industry is to put so many barriers before the crime victims, so as to make it impossible for a crime victim to recover." Senator Porter asked Mr. Cronin if he believed the standard should remain a "preponderance of the evidence." Mr. Cronin responded he believed the phrase should not even be included in the bill, because it is the same as any other tort action. He said there should also be an "affirmative judicial finding of duty." Mr. Cronin said this meant there would be an automatic judicial motion for summary judgment under Civil Rule 56, in every case. He said the plaintiff would be "...met with the burden of a judicial finding of duty before he can go anyplace else." Mr. Cronin said that exists in no other area of tort jurisprudence, including medical malpractice.

Mr. Cronin asked, "Are you committee members going to recommend to the full Senate and then to the entire Assembly that the hotel industry of this state has no duty to provide a safe and secure premises to its patrons." Senator James responded, "No, that is not what the bill does." Mr. Cronin said the language of

the bill states a case cannot go forward until and unless a judge makes an affirmative determination by clear and convincing evidence that the hotel had a duty to the patron. He said in all other areas of litigation and tort jurisprudence, it requires an affirmative showing by the defense that there was no duty. Senator James responded, "We would have to be a lot more specific than that to impose a duty for a judge to act sua sponte [of his or its own will or motion.]" Mr. Cronin reiterated he read the language to mean the judge must make the determination. Senator James responded he read it "the other way." Mr. Cronin said the language was ambiguous and Senator James responded if that was the case, "...they would look to legislative history...and there is no question in my mind that they would have to make a motion." Mr. Cronin asked if it was the chairman's position there would have to be a Rule 56 motion before that issue could be addressed. Senator James responded, "Yes."

Mr. Cronin said the third thing the legislation would do is require that prior similar crimes have occurred. He indicated in inadequate security jurisprudence this has been discredited in every jurisdiction which has taken it up. Senator Adler indicated the language does not indicate "crimes," but rather "prior incidents of wrongful acts." Mr. Cronin pointed out the bill "...calls for prior similar conduct (which is plural)...that means that the first person who has been attacked, brutalized, assaulted, stabbed, slashed or otherwise violated, will not have a cause of action, nor will the second, because it requires two or more prior similar acts." He said a clear line of cases, referencing Isaacs v. Huntington Memorial Hospital, 695 P.2d 653 (Ca. 1985), which was cited in Doud, supra, indicate that to say a second or third victim has a cause of action when the first one doesn't, is flawed. Finally, Mr. Cronin said, he interprets the section as "...saying the hotel must have actual knowledge of the prior similar bad conduct." He stated "actual knowledge of the prior similar bad conduct simply means that all they have to do is deny they ever knew it happened." Mr. Cronin said the law as it stands at this time states "if there were prior similar acts and that [they] knew or should have known that those acts occurred."

Senator Adler stated he believed "notice" was different than "knowledge." He said "knowledge" indicates "personal knowledge" while "notice" is something lesser. Mr. Cronin asked why the language did not say "know or should have known, which is the present standard." He added, "If they don't want to change the standard to actual knowledge, then why doesn't it say, know or should have known?" Senator Adler agreed the language was not "should have known," but stated "notice" denoted a lesser standard such as "third-hand reports." Mr.

Cronin stated, "I don't know what the problem is that this issue is being brought to remedy. If you are telling me there are frivolous lawsuits being filed on behalf of victims of crime...I don't know of any." He added, "Who wins? The hotel industry wins. Who loses? Victims of crime lose...because they have no civil remedy." Mr. Cronin stated when "preponderance of evidence" as a standard is taken away and "clear and convincing evidence" is added, "...you have raised the hurdles so high that people like me are not going to take those cases...and that is exactly what the hotel industry wants."

Mr. Cronin referenced an unpublished case titled King v. Trans Sterling/Stardust Hotel. He said in 1982, he received a call from an attorney in Chicago who represented a black woman who was raped at the Stardust Hotel in Las Vegas. Mr. Cronin said the lawyer told him, "Because she was black, it wasn't worth very much." He indicated he took over representation of the woman and received a favorable result. Mr. Cronin said during the investigation of the case, he found out that the Stardust Hotel was losing keys at the rate of 500 each week, and no doors in the hotel had ever been re-keyed in 27 years of operation. As a result, he stated, "there were over 700,000 keys unaccounted for." Mr. Cronin said the person who raped, assaulted and brutally sodomized his client, entered her room with a key. He said it was also discovered that in the hotel, "...in order to give people a false sense of security, they installed what appeared to be video cameras...we found there were never any video cameras in those boxes." Mr. Cronin indicated they were "dummy" cameras, and that "the entire criminal element knew about it." He said in the 3-year span between the rape and the verdict, "...nothing happened in Las Vegas...to change key control policies." However, he indicated, in the 6 months following the verdict, 20,000 hotel rooms in Las Vegas were re-keyed with state-of-the-art electronic locks on their doors.

Mr. Cronin read a portion of a memorandum, dated May 20, 1986, from the parent corporation of Hilton Hotels' security director to management of the Flamingo Hilton:

> Also in the survey of 1982, it had been recommended that a security officer be posted, preferably at a podium near the bank of elevators, simply to observe those individuals gaining access to the guestroom floors. This procedure would be similar to the post at each elevator bank at the Las Vegas Hilton.

He pointed out that hotel had been advised to enact such security measures in

1982, and it was necessary to do it again in 1986. Mr. Cronin concluded, "The last time I checked, that podium still isn't there...and my client was assaulted. He stated:

> Unless this Legislature is passing tough acts regulating security in casinos and in hotels, and enforcing those with an appropriate enforcement mechanism, I think it is appropriate that you leave the trial lawyers of this state to representing people who have been injured and damaged severely in cases where the hotel industry has failed miserably in their duty to protect them...I don't want you to take away the rights of victims to recover where it is appropriate.

There was no further testimony on S.B. 474, and the chairman closed the hearing on the bill. He then opened the hearing on S.B. 482.

SENATE BILL 482: Provides that attorney who unreasonably and vexatiously extends court proceeding may be required to pay additional costs, expenses and fees reasonably incurred because of such conduct.

Senator James indicated the bill would simply state that in addition to the ethical and other standards which already exist under the Nevada Rules of Civil Procedure (NRCP) and otherwise, for the filing of frivolous claims, would be added that an attorney could be held personally liable to pay additional costs and expenses reasonably incurred because of such conduct. The chairman indicated the NTLA strongly supports the legislation, and would offer an amendment, attached as Exhibit E. The first person to testify on S.B. 482 was Bob Perry, Attorney at Law, representing Nevada Trial Lawyers Association (NTLA). Mr. Perry stated he believed all the members of their organization were "decent, honorable people," but there were some "unscrupulous lawyers." He said the main reason for needing tort reform, was "too many frivolous suits." Mr. Perry added: "Yet, no proposal we have heard to date has anything to do with effecting frivolous cases." He said a lawyer who files a "frivolous slip and fall case," will continue to file such cases, "day in and day out, because lawyers like that don't get the serious cases." Mr. Perry stated there will be "...hundreds of millions of dollars netted by the insurance companies as a windfall, if you abolish the collateral source rule...and those people who are truly responsible will not have to pay for those...." He added: "The measures that we have heard we believe are examples of

There was no further testimony offered on the bill, and Senator James called for a motion.

SENATOR ADLER MOVED TO AMEND AND DO PASS S.B. 482.

SENATOR TITUS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

Senator James opened the work session on S.B. 474.

Senator James indicated decisions would have to be made regarding certain amendments to the legislation, which had been discussed by both proponents and opponents. Senator Porter referenced the discussions regarding the "clear and convincing evidence" and "preponderance of the evidence" issue.

SENATOR PORTER MOVED TO AMEND AND DO PASS S.B. 474, WITH THE INCLUSION OF THE LANGUAGE, "CLEAR AND CONVINCING EVIDENCE."

SENATOR WASHINGTON SECONDED THE MOTION.

Senator James asked for discussion on the motion. Senator Adler stated: "I can't buy keeping 'clear and convincing evidence' on the innkeeper in this bill, distinguishing it from others." He continued, "If it is a small club...it is by a 'preponderance of the evidence,' but if I have a small club attached to a motel, it would be 'clear and convincing.'" Senator Adler reiterated he believed the same standard should apply as in any other negligence statute. Senator Lee stated he would like to "see everything remain the same for everybody." He said he had a problem with singling out one business versus another.

Senator Titus asked for an explanation of the difference between the two definitions. Mr. Bradley stated "clear and convincing evidence" is a much higher standard of evidence than "preponderance." He said it requires a much higher degree of proof, and more culpable conduct. Mr. Bradley indicated "clear and convincing evidence" was an "appropriate standard" when considering punitive damages. He added it was a "substantially higher burden to prove and a difficult standard to achieve.

Mr. Whittemore stated he would like to point out why the "clear and convincing" standard is set forth in the bill. He testified:

> In chapter 651 of NRS, the standard of neglect in the entire statute, except for this area, is gross neglect. If you will look at the rest of chapter 651 [of NRS], you have to find gross neglect on the part of the innkeeper before you attach liability. In determining the appropriate standard, i.e., exercise care, there were discussions as to the preponderance of evidence. While there was no agreement, the individuals involved in that discussion, i.e., those of us who represent the resorts, said '...fine, we will go away from a gross neglect standard to a more traditional...little bit higher negligence standard, which is the absence of care'. While it is important to us, we can understand there is a difficult policy issue here. I would hope that this committee could support keeping 'clear and convincing' in while the bill makes it way through the rest of the process. It is going to be a difficult process as it is. Again, I think there are strong policy reasons why, since we have already taken out the 'gross neglect' standard, we should be entitled to a 'clear and convincing' standard.

Senator James indicated it appeared there were three votes for "clear and convincing" and three votes for "preponderance."

Senator Adler cited an example:

> The Carson City Nugget owns a motel. So, if I walk out of the Nugget Motel and into the parking lot and something happens, it is 'clear and convincing'...the Horseshoe Club doesn't have a motel. So I walk out of there...it is a 'preponderance,' with the same event. How do I explain to the owner of the Horseshoe Club....

Mr. Whittemore answered, "We are only talking about why the reason this is narrowly drafted, was specifically to do that...because we are talking about innkeepers." He said the idea was they could agree that the standard, because there is an innkeepers' "bill or rights" in all other areas, "...was to craft additional rights and responsibilities under this act." Mr. Whittemore continued: "Yes, you create distinctions...that is the process we are engaged in."

Senator Lee stated:

> In light of what we just did...in relationship to the crime bill...in light of what we have done in all of those areas...that hopefully we are showing some concern for victims...I hear very, very little comment about victims in this legislation. I believe there is a reason why this language is here, and it is nothing more...no pun intended...it is to save money to the owners of properties. And when you save money for owners of properties, who does not get that money? It is the victims. That is why I am concerned about leaving it equal as it is. I can support the bill if we will take that out.

Senator James called for a vote on Senator Porter's motion to include the language, "clear and convincing." He stated he had been advised to abstain from the vote since his law firm had represented both hotels and persons suing hotels.

> THE MOTION FAILED. (SENATOR JAMES ABSTAINED FROM THE VOTE; SENATORS ADLER, LEE AND TITUS VOTED "NO.")

* * * * *

> SENATOR LEE MOVED TO AMEND AND DO PASS S.B. 474, WITH THE REMOVAL OF THE LANGUAGE, 'CLEAR AND CONVINCING'....
>
> SENATOR ADLER SECONDED THE MOTION.
>
> THE MOTION CARRIED. (SENATOR JAMES AND SENATOR WASHINGTON ABSTAINED FROM THE VOTE.)

* * * * *

Senator James referred to an earlier vote to amend and do pass Assembly Bill (A.B.) 133.

ASSEMBLY BILL 133: Makes various changes to provisions governing regulation of gaming.

The chairman indicated the amendment involved the definition of "debt security" to be applied throughout the NRS chapter, which was an error, and the language

TESTIMONY IN SUPPORT OF S.B. 474

INTRODUCTION

This Bill deals with punitive damages and the liability of innkeepers to patrons injured by third parties. By this Bill, punitive damages are extended to wrongful death cases but are restricted to the punishment and deterrence of deliberately wrongful conduct rather than mere errors of judgment.

In a like fashion, this Bill restricts the liability of innkeepers for the wrongful acts of third parties. The innkeeper should not be liable for the criminal acts of third parties unless the innkeeper has failed to exercise care by taking precautions against foreseeable wrongful acts by a third party.

SECTION 1

Section 1 of the Bill amends NRS 41.085, Nevada's wrongful death statute, to make it clear that a decedent's estate can recover punitive damages when the decedent could have recovered such damages if the decedent had survived. This provision rejects the contrary holding reached in Alsenz v. Clark County School District.[1] Punitive damages are to punish and deter wrongdoers, not to compensate the victim; consequently, unlike the death of the tortfeasor, the death of the victim should not prevent punitive damages, since the tortfeasor remains susceptible to punishment.

SECTIONS 2 THROUGH 5

These sections of the Bill amend Nevada's punitive damage and insurance statutes, in three significant respects.

Section 3 of the Bill adopts the California statutory standards for the imposition of punitive damages. The Nevada

[1] 109 Nev. 1062, 864 P.2d 285 (1993).

Supreme Court opinions in Craigo v. Circus-Circus Enterprises, Inc.,[2] and Granite Const. Co. v. Rhyne,[3] reveal deep divisions in the Court about the proper standards for punitive damages, and the Craigo plurality opinion expressly requests legislative action on this question. The Craigo opinions noted that Nevada originally adopted its punitive damage standards from California, but that neither Nevada nor California courts have consistently followed the standards adopted. Furthermore, as Craigo makes clear, the courts have often used the same words to describe significantly different mental states and thereby reached significantly different results. The resulting confusion not only violates the fundamental precept that punishment should only be imposed where statutes give clear notice of what conduct makes someone subject to punishment, but also it makes punitive damages a "wild card," significantly inhibiting the settlement of disputes, especially where public disclosure is required.

By adopting the California statutory standards, the Bill effectively adopts the standards advocated in both the plurality and concurring opinions in Craigo. The three statutory grounds for punitive damages -- fraud, oppression and malice -- each share the fundamental requirement that the defendant knowingly and deliberately engage in outrageously wrongful conduct with knowledge that injury will probably result. This separates the conduct that merits punitive damages from the negligent, grossly negligent and reckless conduct that does not. Bad judgment, even unconscionably irresponsible conduct, fully justifies compensating someone injured

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[2] 106 Nev. 1, 786 P.2d 22 (1990).

[3] 107 Nev. 651, 817 P.2d 711 (1991).

by that conduct, but such conduct does not reflect the evil mind or motive that both the American College of Trial Lawyers[4] and the Nevada Supreme Court[5] have viewed as being the proper object of punishment through punitive damages.

Sections 4 and 5 of the Bill set forth the circumstances under which employers will be liable for punitive damages for the deliberately wrongful conduct of their employees. Employers are properly punished when the employer itself engages in wrongful conduct with the requisite mental state for punitive damages. Increasingly, however, punitive damages have been sought from employers because of the conduct of lower level employees, when no responsible officer, director or other member of management intended for deliberately wrongful conduct to occur. That violates the fundamental reason for punitive damages -- the punishment and deterrence of wilful and deliberate wrongdoers.

Consequently, the Bill follows the approach adopted by statute in California, permitting punitive damages against an employer for acts of an employee:

> (1) when the employer knew the employee was unfit and consciously disregarded the rights or safety of others in employing him;
>
> (2) when the employer expressly authorized or ratified the wrongful conduct in question; or

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[4] American College of Trial Lawyers, Report on Punitive Damages of The Committee on Special Problems in the Administration of Justice (March 3, 1989), pp. 12-13.

[5] Nevada Credit Rating Bur. v. Williams, 88 Nev. 601, 610, 503 P.2d 9, 15 (1972).

(3) when the employer was guilty of oppression, fraud or malice.

If the employer is a corporation, these requirements must be satisfied by an officer, director or management person expressly empowered to authorize or ratify the employee's conduct. Express authorization or ratification is required to avoid situations such as Ramada Inns, Inc. v. Sharpe.[6] In that case, the Nevada Supreme Court held that authorization or ratification was satisfied simply because the employer gave its employees "wide latitude" in handling such situations. Obviously, giving employees broad discretion does not mean that the employer itself -- its officers, directors and management personnel -- possessed the requisite mental state to make punishment of the employer appropriate.

SECTIONS 6 THROUGH 9

Sections 6 through 8 of the Bill amend NRS Chapter 651, Nevada's innkeeper's statutes, to clarify the liability of hotels, motels and other innkeepers when third parties cause personal injury to guests or other patrons. It does not affect the liability of such entities -- or their employees acting within the scope of their employment -- when their own wrongful conduct causes personal injury.

Obviously, patrons are entitled to the exercise of care by innkeepers to prevent injuries. It is equally obvious that the exercise of care cannot amount to an absolute guaranty of the safety of guests. An innkeeper cannot guaranty a guest that an airplane won't fall out of the sky onto the hotel causing injury. Perhaps a better example is the relatively recent event involving

[6] 101 Nev. 824, 711 P.2d 1 (1985).

an outdoor championship boxing match hosted by a Las Vegas casino. Despite beefed up security and other extra precautions, a stranger calling himself "Fan Man" flew over the hotel and into the boxing arena with a gasoline powered parachute contraption. He landed in the ring and fell into the first rows of the audience, injuring people. The hotel had exercised appropriate care to protect its guests but it could not insure them against such unanticipated negligent or criminal acts of third parties. This Bill will make it clear that the innkeeper is not liable unless there was an absence of care to prevent a foreseeable wrongful act by a third party.

Section 8 also seeks to correct an aberration that threatens to radically alter the functions of judges and juries and effectively make innkeepers insurers of their patrons' safety. Traditionally, the question of whether one has a duty to protect others from injury by third parties has been decided by judges as a matter of law, with the jury deciding if there has been a breach of duty if a duty is found. In Dowd v. Las Vegas Hilton Corp.,[7] however, the Nevada Supreme Court followed interpretations of a California case to hold that whether the injury was foreseeable so as to create a duty was a question of fact for the jury and such foreseeability did not require prior similar incidents giving notice of the danger. The California result has been critiqued as unique in the nation.[8] Subsequent to Dowd, the California Supreme Court rejected that interpretation and reaffirmed that questions of duty

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[7] 109 Nev. 1096, 864 P.2d 796 (1993).

[8] Kaufman, When Crime Pays: Business Landlords' Duty to Protect Customers from Criminal Acts Committed on the Premises, 31 S.Tex. L.Rev. 89 (1990), pg. 97.

are questions of law for the trial judge to decide.[9] This Bill codifies that same view by providing that the judge, not a jury, is to determine the existence of a duty from the innkeeper's notice of the danger.

Section 9 of the Bill clarifies NRS 651.010, covering innkeeper liability for the theft, loss, damage or destruction of property, to make it clear its provisions apply to all property a guest or other patron brings onto the premises or leaves in a motor vehicle on the premises, not merely property left in a guest's room or in a motor vehicle on the premises.

SECTION 10

Section 10 of the Bill makes punitive damages insurable, except where the defendant actually intends to injure the plaintiff. The exception honors the frequently-recognized public policy prohibition against insurance coverage for intentional torts. However, California courts have held, and the Nevada Supreme Court has suggested, that punitive damages are not insurable in any case, because it would shift the burden of the punishment from the wrongdoer to the insurance company.[10] Conversely, courts in Arizona, Idaho, Montana, New Mexico, Oregon, Texas, Wyoming and other states have allowed punitive damages to be insurable for non-wilful wrongs.[11]

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[9] Ann M. v. Pacific Plaza Shopping Center, 863 P.2d 207, 214-216 (Cal. 1993).

[10] See Siggelkow v. Phoenix Ins. Co., 109 Nev. 42, 846 P.2d 303 (1993); Peterson v. Superior Court of Ventura County, 642 P.2d 1305, 1310-1311 (Cal. 1982).

[11] Price v. Hartford Acc. & Indem. Co., 502 P.2d 522 (Ariz. 1972); Abbie Uriguen Olds, Buick, Inc. v. United States F.I. Co., 511 P.2d 783 (Idaho 1973); First Bank (N.A.)-Billings v. Transamerica Ins. Co., 679 P.2d 1217 (Mont. 1984); Baker v. Armstrong,

In reality, the "burden" of substantial punitive damage awards is nearly always "shifted" (at least in part) to innocent parties, whether they be stockholders of the defendant, consumers (through higher prices), employees (through lower wages and benefits), creditors (through bankruptcy), associates and family members, or plaintiffs and their counsel (should the award be uncollectible). Making such awards insurable allows the "burden" of such awards to be assessed and allocated in sound actuarial terms, taking into account both the susceptibility of the industry to such awards and the history and circumstances of the particular person or entity seeking coverage, thereby at least keeping the "burden" within the business in question. Indeed, in a competitive marketplace, the potential unavailability of such insurance to particular persons and entities, or the premium for it, could be a more effective punishment and deterrent to deliberately wrongful conduct than isolated punitive damage awards.

SECTIONS 11 AND 12

Sections 11 and 12 of the Bill make it effective upon passage and approval and further make the Bill applicable to pending cases.

It must be emphasized that S.B. 474 does not insulate innkeepers from liability for their own wrongful conduct. This bill only affects the liability of hotels and motels for failing to prevent injuries by others. The Nevada Supreme Court has repeatedly stated that a landowner is not an insurer of a visitor's

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744 P.2d 170 (N.M. 1987); Harrell v. Travelers Indem. Co., 567 P.2d 1013 (Oregon 1977); American Home Assur. Co. v. Safeway Steel Products Co., 743 S.W.2d 693 (Tex. App. 1987) (error denied); Sinclair Oil Corp. v. Columbia Cas. Co., 682 P.2d 975 (Wyo. 1984).

safety.[12] However, recent cases -- many still in litigation -- have seriously eroded this principle and threaten to effectively make landowners insurers for injuries caused by the wrongful conduct of others.

For example, a recent California case[13] dealt with a woman who was attacked by two career criminals in the parking garage of her apartment building. She was threatened with a knife, raped and otherwise abused. The attackers were later caught by the police. She did not sue the attackers. They were not only broke but were going to be in prison for a long time. The landlord, on the other hand, was a deep pocket. The victim sued the landlord, alleging that the attack occurred because the lighting in the garage was inadequate and doors to the outside might not have been locked. The jury came back with a $1.2 million award which was allocated 95% against the landlord and only 5% against the assailants. Obviously, the present confused state of the law leaves gaps through which jury awards can be pushed to turn landowners into insurers of a visitor's safety.

The federal courts have long recognized the importance of the hospitality industry to Nevada and its citizens. They have concluded that the unique relationship between innkeepers and the great majority of visitors to our State justifies addressing the

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[12] See Dowd v. Las Vegas Hilton Corp., 109 Nev. 1096, 1101, 864 P.2d 796, 799 (1993); Early v. N.L.V. Casino Corp., 100 Nev. 200, 203, 678 P.2d 683, 684 (1984), citing RESTATEMENT (SECOND) OF TORTS § 344, Comment f.

[13] Pamela B. v. Hayden, 31 Cal. Rptr.2d 147 (Cal. App. 2 Dist. 1994), review granted, 880 P.2d 112 (Cal. 1994), review dism'd and cause remanded, 889 P.2d 539 (Cal. 1995).

problem in the special context of innkeepers' liability.[14] Thus, perhaps a more pertinent example is the widely publicized "Tailhook" incident which involved alleged assaults by members of a Naval aviator's association occurring on the premises of a large hotel/casino. One Tailhook plaintiff, herself a Naval officer, settled with the association whose members allegedly assaulted her for $400,000. She then won a jury verdict against the hotel/casino for more than 15 times the amount of the settlement. The $6.7 million verdict was apparently awarded because the hotel security guards did not prevent what the jury later found to be a non-consensual assault amidst a great deal of consensual (but socially controversial) conduct among hotel guests and patrons. Nonetheless, the hotel, the party with the deep pockets, suffered a verdict many times larger than the settlement made with the association whose members allegedly abused the plaintiff.

In the public domain, society assigns responsibility for preventing criminal attacks to law enforcement personnel and generally cloaks such personnel with immunity unless their wrongful conduct "affirmatively caused the harm."[15] S.B. 474 similarly distinguishes between causing harm and failing to prevent harm by others, but it does not seek immunity for hotel and motel owners and operators. The resort industry recognizes that innkeepers have a duty to exercise care for the safety and welfare of their patrons, and where care is not exercised, liability is appropriate. However, where

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[14] See Morris v. Hotel Riviera, Inc., 704 F.2d 1113 (9th cir. 1983).

[15] See NRS 41.0336; Coty v. Washoe County, 108 Nev. 757, 839 P.2d 97 (1992); Bruttomesso v. Las Vegas Met. Police, 95 Nev. 151, 591 P.2d 254 (1979).

care is exercised, S.B. 474 provides similar protections, recognizing innkeepers face many of the same problems in trying to prevent harm by third parties to their guests and patrons. As the California courts have recognized in cases since the decisions upon which the Nevada Supreme Court's Dowd decision was based, "random, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any locale open to the public where the occurrence of violent crime seems improbable. . . . 'No one really knows why people commit crime, hence no one really knows what is "adequate" deterrence in any given situation.'"[16]

Furthermore, because of the immediacy of this problem, S.B. 474 makes its protections and policies applicable to pending cases. The courts -- including the Nevada Supreme Court -- have long recognized that a plaintiff does not have a right to punitive damages.[17] For a plaintiff, such damages are a windfall that society tolerates to punish and deter deliberate wrongdoers. Consequently, when the legislature clarifies the circumstances under which punishment and deterrence is appropriate, but does not expand those circumstances, then the legislative changes should be applicable to pending cases.

Similar valid reasons support making the changes in innkeeper liability applicable to pending cases. The courts have long recognized that a landowner is not an insurer of a visitor's safety. As the cases discussed previously illustrate, however, the problem

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[16] Ann M. v. Pacific Plaza Shopping Center, 863 P.2d 207, 215 (Cal. 1993); see, e.g., Pamela W. v. Millsom, 30 Cal. Rptr.2d 690 (Cal. App. 4 Dist. 1994).

[17] See, e.g., Bader v. Cerri, 96 Nev. 352, 358-359, 609 P.2d 314, 318-319 (1980).

is with the workings of the judicial system as much as its standards. Juries are awarding damages based on who can pay for injuries rather than who has caused them. The issue here is not liability for an innkeeper's own wrongful conduct, but for failing to prevent injury by others. There is little reason to forbid such liability in the future but permit it today when the effect of such liability is to make innkeepers insurers of injuries that are in fact caused by the wrongful conduct of others.

CONCLUSION

The present state of Nevada law on punitive damages and innkeepers' liability is confused, uncertain and often inequitable. This Bill, with the amendments we propose, would go a long way towards harmonizing Nevada law with leading jurisdictions and with present commercial realities. This legislation is responsive to the public demand for tort reform while, at the same time, preserving access to the courts and the availability of punitive damages for injured parties where punitive damages would appropriately punish and deter deliberately wrongful conduct.

"Sec. 4.5. Section 6 of chapter 96, Statutes of Nevada 1993, at page 153, is hereby amended to read as follows:

Sec. 6. Chapter [106] *40* of NRS is hereby amended by adding thereto the provisions set forth as sections 7 to 17, inclusive, of this act.".

Senator James moved the adoption of the amendment.

Remarks by Senator James.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Senate Bill No. 474.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 680.

Amend sec. 4, page 2, by deleting lines 27 through 38 and inserting:

"*1. The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;*

2. The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or

3. The employer is personally guilty of oppression, fraud or malice, express or implied.

If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of subsection 1, 2 or 3 are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.".

Amend sec. 7, page 3, line 34, after "*facilities*" by inserting: ", *including any parking lot, recreational facility or other land,*".

Amend sec. 8, page 3, by deleting lines 39 through 41 and inserting: "*an employee under the control or supervision of the owner or keeper unless there is a preponderance of evidence that the owner or keeper failed to exercise due care for the safety of the patron or other person on the premises.*".

Amend sec. 11, page 4, by deleting lines 35 through 39 and inserting:

"Sec. 11. 1. The provisions of sections 1 to 9, inclusive, of this act are applicable to any action:

(a) Filed before the effective date of this act in which final judgment, as defined in NRS 37.009, has not been entered; or

(b) Filed on or after the effective date of this act.

2. If any provision of this section, or the application thereof to any person, thing or circumstance is held invalid, the invalidity of that provision does not affect the provisions or applicability of this section or sections 1 to 10, inclusive, of this act which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable. The provisions of this subsection do not affect the operation or applicability of NRS 0.020 to the provisions of sections 1 to 10, inclusive, of this act.".

Senator James moved the adoption of the amendment.
Remarks by Senators James, Neal and Raggio.
Amendment adopted.
Bill ordered reprinted, engrossed and to third reading.

MOTIONS, RESOLUTIONS AND NOTICES

Senator Raggio moved that Senate Bills Nos. 68, 135, 215, 295, 333, 366, 377, 389, 390, 445, 468, 476, 481; Assembly Bills Nos. 92, 151, 158, 281, 396, 431 be taken from the General File and placed on the General File for the next legislative day.
Remarks by Senator Raggio.
Motion carried.

UNFINISHED BUSINESS

Signing of Bills and Resolutions

There being no objections, the President and Secretary signed Senate Bills Nos. 178, 348; Assembly Bills Nos. 40, 106, 302, 362.

GUESTS EXTENDED PRIVILEGE OF SENATE FLOOR

On request of Senator Adler, the privilege of the floor of the Senate Chamber for this day was extended to Guy Pence.

On request of Senator Coffin, the privilege of the floor of the Senate Chamber for this day was extended to Jocelyn Biro.

On request of Senator Lowden, the privilege of the floor of the Senate Chamber for this day was extended to Mary Kaye Cashman and Jimmy Cashman, IV.

On request of Senator McGinness, the privilege of the floor of the Senate Chamber for this day was extended to Constance Walters.

On request of Senator Neal, the privilege of the floor of the Senate Chamber for this day was extended to Virgie Fitzgerald, Jasmine Hill, Patrice Bozakins, Ray Green, Shanell Bagley and Mrs. Shirley Barbara.

On request of Senator Raggio, the privilege of the floor of the Senate Chamber for this day was extended to Mr. and Mrs. James Cashman, Jr., Mr. and Mrs. Timothy Cashman, Rhonda Evans, Neil Evans and former Senator Keith Ashworth.

On request of Senator Rawson, the privilege of the floor of the Senate Chamber for this day was extended to Leah Benjamin and Mike Benjamin.

On request of Senator Titus, the privilege of the floor of the Senate Chamber for this day was extended to Bill Van Bruggen.

Senator Rawson moved that the Senate adjourn until Thursday, June 1, 1995 at 10 a.m.
Motion carried.

SENATE BILL NO. 474—COMMITTEE ON JUDICIARY

MAY 12, 1995

Referred to Committee on Judiciary

SUMMARY—Revises provisions governing civil liability for wrongful acts and revises provisions relating to punitive damages. (BDR 3-1965)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to civil actions; revising provisions governing civil liability of employers; revising provisions governing civil liability of keepers of specified accommodations for the public; revising provisions relating to punitive damages; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 41.085 is hereby amended to read as follows:

41.085 1. As used in this section, "heir" means a person who, under the laws of this state, would be entitled to succeed to the separate property of the decedent if he had died intestate.

2. When the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death, or if the wrongdoer is dead, against his personal representatives, whether the wrongdoer died before or after the death of the person he injured. If any other person is responsible for the wrongful act or neglect, or if the wrongdoer is employed by another person who is responsible for his conduct, the action may be maintained against that other person, or if he is dead against his personal representatives.

3. An action brought by the heirs of a decedent pursuant to subsection 2 and the cause of action of that decedent brought or maintained by his personal representatives which arose out of the same wrongful act or neglect may be joined.

4. The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for his grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are not liable for any debt of the decedent.

5. The damages recoverable by the personal representatives of a decedent on behalf of his estate include:

(a) Any special damages, such as medical expenses, which the decedent incurred or sustained before his death, and funeral expenses; and

(b) Any penalties , *including, but not limited to, exemplary or punitive damages*, that the decedent would have recovered if he had lived,

but do not include damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are liable for the debts of the decedent unless exempted by law.

Sec. 2. Chapter 42 of NRS is hereby amended by adding thereto the provisions set forth as sections 3 and 4 of this act.

Sec. 3. *As used in this chapter, unless the context otherwise requires:*

1. "Conscious disregard" means the knowledge of the probable dangerous consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.

2. "Fraud" means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person.

3. "Malice, express or implied" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others.

4. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person.

Sec. 4. *In an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrongful act of his employee, the employer is not liable for the exemplary or punitive damages unless:*

1. The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;

2. The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or

3. The employer is personally guilty of oppression, fraud or malice, express or implied.

If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of subsection 1, 2 or 3 are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.

Sec. 5. NRS 42.005 is hereby amended to read as follows:

42.005 1. **[**In**]** *Except as otherwise provided in section 4 of this act, in* an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. Except as otherwise provided in this

section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed:

(a) Three times the amount of compensatory damages awarded to the plaintiff if the amount of compensatory damages is $100,000 or more; or

(b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than $100,000.

2. The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 do not apply to an action brought against:

(a) A manufacturer, distributor or seller of a defective product;

(b) An insurer who acts in bad faith regarding its obligations to provide insurance coverage;

(c) A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations prescribed in subsection 1;

(d) A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or

(e) A person for defamation.

3. If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1.

4. Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of exemplary or punitive damages to be assessed.

Sec. 6. Chapter 651 of NRS is hereby amended by adding thereto the provisions set forth as sections 7 and 8 of this act.

Sec. 7. *As used in NRS 651.010 to 651.040, inclusive, this section and section 8 of this act, "premises" includes, but is not limited to, all buildings, improvements, equipment and facilities, including any parking lot, recreational facility or other land, used or maintained in connection with a hotel, inn, motel, motor court, boardinghouse or lodginghouse.*

Sec. 8. *1. An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodginghouse is not civilly liable for the death or injury of a patron or other person on the premises caused by another person who is not an employee under the control or supervision of the owner or keeper unless there is a preponderance of evidence that the owner or keeper failed to exercise due care for the safety of the patron or other person on the premises.*

2. If the death or injury incurred pursuant to subsection 1 is the result of a foreseeable wrongful act of the person causing the injury, an owner or keeper who is found to have failed to take reasonable precautions against the foreseeable wrongful act is civilly liable for the death or injury. The court shall

determine as a matter of law whether the owner or keeper had a duty to take reasonable precautions against a foreseeable wrongful act of the person causing the death or injury. For the purposes of this section, a wrongful act is not foreseeable unless prior incidents of similar wrongful acts occurred on the premises and the owner or keeper had notice or knowledge of those incidents.

Sec. 9. NRS 651.010 is hereby amended to read as follows:

651.010 1. An owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodginghouse in this state is not civilly liable for the theft, loss, damage or destruction of any property **[**left in the room of any guest or left in a motor vehicle on the premises, including the parking facilities, of such an establishment**]** *brought by a patron upon the premises or left in a motor vehicle upon the premises* because of theft, burglary, fire or otherwise, in the absence of gross neglect by the owner or keeper **[**.

2. If an**]** *if:*

(a) The owner or keeper **[**of any hotel, inn, motel, motor court, boarding-house or lodginghouse in this state**]** provides a fireproof safe or vault in which **[**guests**]** *patrons* may deposit property for safekeeping **[**, and notice**]** *; and*

(b) Notice of this service is personally given to **[**a**]** *the patron, or if the patron is a guest, notice is personally given to the* guest or posted in the office and the guest's room . **[**, the owner or keeper is not liable for the theft, loss, damage or destruction of any property which is not offered for deposit in the safe or vault by a guest unless the owner or keeper is grossly negligent.**]**

2. An owner or keeper is not obligated to receive property to deposit for safekeeping which exceeds $750 in value or is of a size which cannot easily fit within the safe or vault.

3. The liability of the owner or keeper **[**under this section**]** *for property deposited for safekeeping in a safe or vault* does not exceed the sum of $750 for any property of an individual **[**guest,**]** *patron,* unless the owner or keeper **[**receives the property for deposit for safekeeping and**]** consents to assume a liability greater than $750 for its theft, loss, damage **[**,**]** or destruction in a written agreement in which the **[**guest**]** *patron* specifies the value of the property.

Sec. 10. Chapter 681A of NRS is hereby amended by adding thereto a new section to read as follows:

An insurer may insure against legal liability for exemplary or punitive damages that do not arise from a wrongful act of the insured committed with the intent to cause injury to another.

Sec. 11. 1. The provisions of sections 1 to 9, inclusive, of this act are applicable to any action:

(a) Filed before the effective date of this act in which final judgment, as defined in NRS 37.009, has not been entered; or

(b) Filed on or after the effective date of this act.

2. If any provision of this section, or the application thereof to any person, thing or circumstance is held invalid, the invalidity of that provision does not affect the provisions or applicability of this section or sections 1 to 10, inclusive, of this act which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

The provisions of this subsection do not affect the operation or applicability of NRS 0.020 to the provisions of sections 1 to 10, inclusive, of this act.

Sec. 12. This act becomes effective upon passage and approval.

Assembly Bill No. 535 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to the Assembly.

Assembly Joint Resolution No. 17.

Resolution read third time.

Roll call on Assembly Joint Resolution No. 17:

YEAS—21.

NAYS—None.

Assembly Joint Resolution No. 17 having received a constitutional majority, Mr. President declared it passed.

Resolution ordered transmitted to the Assembly.

Assembly Bill No. 147.

Bill read third time.

Roll call on Assembly Bill No. 147:

YEAS—21.

NAYS—None.

Assembly Bill No. 147 having received a constitutional majority, Mr. President declared it passed.

Bill ordered transmitted to the Assembly.

Senate Bill No. 474.

Bill read third time.

The following amendment was proposed by Senator Coffin:

Amendment No. 744.

Amend sec. 11, page 4, by deleting lines 39 through 42 and inserting: "applicable to any action filed on or after the effective date of this act.".

Senator Coffin moved the adoption of the amendment.

Remarks by Senators Coffin and James.

Senator James requested that the following remarks be entered in the Journal.

SENATOR COFFIN:

Yes, Mr. President. In discussing a one line amendment that affects a substantive portion of a bill, it might be necessary to address certain portions of the bill or make reference to the bill. I would ask your forbearance on those occasions if I stray into the bill. I will certainly adhere to your request if you feel I have gone too far. I could then go to Order of Business 16. I would appreciate your assistance there.

Amendment No. 744 would remove the retroactivity portions of the legislation which apply to all cases presently pending and would change that to language indicating that the legislation would be applicable to any actions filed on or after the effective date of this act. This act has what you would call a rather sudden effective date in that it is effective upon passage and approval which frequently should be cause for notice in this body as something needing prompt attention. It certainly is a "red flag" in my eyes. When we have legislation which contains language which also says that it is going to be retroactive in an unlimited fashion, we should also be concerned. That is two red flags. Coincidentally "Red Flag" is a flyer's term relating to folks in the military who in the southern Nevada desert hone their military skills by flying their airplanes in close combat. I might stick with an allusion to the military in that this has reference to the outcome of another military exercise in the southern Nevada desert.

Let me ask first of all why the bill is here? Hotels are targets for all kinds of lawsuits. They are a special industry. It is our major industry, the breadwinner for nearly every

Nevadan. Unfortunately they are targets of lawsuits, another sign of the times in a litigious society. Sometimes we enact special legislation which helps that certain industry. We do that to help and to prevent them from being cheated and being the victims of scams. In return the state guarantees something to the players and visitors, it guarantees them a fair game, a fair count, an honest game. There is an old Nevada term I learned as a kid growing up here with the sons and daughters of the people who own these casinos today, at least the oldtimers, the ones who played by the old rules. It was, "he's got gamble." That means if you are in the business, you've got the guts to book a bet and stand by it. Now, it looks like there is a new term to retroactively take out the gamble: you lose a bet, let's go to the courts. Let's go to the legislature. Let's reverse it. Let's turn the tables and change the odds against a player. It is regrettable that I have to offer an amendment like this to a bill which may, in many people's opinions, be necessary. But it is an unfair clause in the bill which forces me to offer this amendment.

The bill applies to all actions filed before the act becomes effective and on which final judgment has not been entered. How long could that possibly go back? It could go back many, many years. The bill applies to all cases against hotels that are on appeal, one particularly, known as the "Tailhook Scandal." It is currently on appeal and in front of the Ninth Circuit Court. On appeal, hotel owners can argue that all cases involving punitive damages must be retried under this law's new standards if this amendment is not enacted. The bill creates a special exception in the punitive damage statutes for corporations.

No one knows how many judgments are now up on appeal and thus are not final. Who knows how many cases would have to be retried if this bill is passed without this amendment. What will the expense be to the crime victim litigants?

In the Tailhook Case, which somehow or other seems to be connected with this bill, the litigants had hundreds of thousands of dollars in damages in costs on each side. It was a two-month trial; judgment was declared. A jury of citizens rendered a verdict. Yet the bill, unless it is amended, will send a strong signal to the citizens who have made a judgment. Unamended, that bill will say there is no real justice system here. It will say that even if you win a trial by jury before your citizens, that special interests will use their muscle and take that away from you. The particular incident that I have reference to is one that has drawn national attention. Now, unfortunately, because of the poor choice of the proponents of this legislation to put this language into this bill, the entire country is now watching the Nevada Legislature. Here is the message that will now resound through the country if retroactivity is included. Nevada took a stand on behalf of a certain hotel and against a certain plaintiff and all other women who are victims of sexual assaults because that is what the jury said. The plaintiff in that case was a victim of sexual assault.

I know that I am not an attorney. I am not on the Judiciary Committee. I am at a bit of a disadvantage. Sometimes I have to ask questions of the committee members on why they do things. Most of the time, the answers are satisfactory and I will support the committee's actions. But, I need some answers to some questions on this amendment and why it is necessary. If I could ask the chairman of the committee to give me some answers, I would very much appreciate it. I have several here. I would like to know if the committee had any testimony on how many cases there are that have currently been tried, had punitive damages awarded and are now up on appeal? Do you know of any other case, other than the Hilton Case? Is the retroactivity portion specifically designed to protect one single hotel from the judgment obtained by that plaintiff? What happens to the cases up on appeal that are covered by the retroactivity provision? Must they all be retried under the new standards? What about cases in federal court? What will that cost the crime victims? What will it cost the judicial system? Has anybody done an economic analysis of the cost? What impact will the bill, if not amended, have on people's willingness to serve as jurors if their results can be negated by a new law that changes the rules after the game is played? Why should a plaintiff have a heavier burden when suing a corporation by having to prove that an officer, director or agent expressly authorized the conduct? Didn't the legislature consider and reject retroactivity provisions in 1989 in punitive damages and tort reform? The proposal was brought forward, I know, but fortunately the Nevada Senate had the good sense, the common sense and decency not to put it in a bill. Yet, retroactivity has now found its way into Senate Bill No. 474. For that reason, because it is unfair, I urge

you to vote against the bill and I urge you to support the amendment. Now I ask the committee chairman to do his best to answer the questions that I have asked of him.

SENATOR JAMES:

Thank you, Mr. President. In accordance with Section 281.501 I will indicate as I have many times this session that my law firm represents one or two hotels in this state. They also represent, from time to time, people who sue hotels for negligence and security cases. Legislative counsel indicates that that gives me the right to make that declaration and to vote on this legislation.

First of all, let me assure the members of this body that what we are doing with this bill is nothing new. We consider legislative changes, whether or not they are going to apply prospectively or retroactively from time to time and we make decisions based on what we think is the appropriate public policy in this state.

First of all beginning in 1883, the Nevada Supreme Court expressly indicated that there is nothing unconstitutional about applying legislative changes retroactively. Those cases have never been overruled. They have been affirmed many, many times. The reason they have been affirmed many, many times is because this legislature has made retroactive changes many, many times.

Let me first address why this change is subject to the retroactivity clause in the end of the bill. This bill deals with a very arcane, a very difficult, a very controversial area of the law. Because of that, it has been subject to judicial interpretation over the years, both the liability of those who make accommodations to the public and those who are subject to punitive damages has been interpreted by our Supreme Court many times. Specifically, with regard to punitive damages, our Supreme Court in a case called Craigo v. Circus Circus said that you have to intend to harm somebody. That as a corporation you have to expressly ratify the conduct of an employee or subordinate in order to have punitive damages awarded in this state. In subsequent decisions, specifically Granite Construction v. Rhine, the court called that into question with some of its language. I am a lawyer and talk to other lawyers from time to time and out in the legal community and in the courts among the judiciary, there is a lot of difficulty making sense of the standard that exists for punitive damages. You have an intent to harm standard out there from Craigo, and the one in the Granite Construction (also known as the "bull in the road" case) that might say punitive damages would be applied in cases of recklessness. When we make a change and we clarify that the legislature adopts an existing standard that the courts have already recognized, it is very common for us to adopt it retroactively. And to say for all the cases in the pipeline where you haven't entered a final judgment, you haven't made a final decision, whether trial court or on appeal, we are going to apply this new clarified standard, a standard arrived at by having public hearings and a legislative process where those who are affected and interested have a chance to come in and testify and the legislature as a policy matter adopts the appropriate standard. That is why the Judiciary Committee decided to approve this bill with a retroactivity clause in it.

Make no mistake, Mr. President, if anybody out there has a vested right and it would deprive somebody of substantive due process or equal protection or procedural due process of the laws, whether under our constitution or that of the United States, retroactivity cannot apply. Nothing we do here can abridge someone's personal constitutional right. If a jury verdict in a case that is entered and has not been finally decided on appeal is a constitutional right, this is not going to affect it.

I said earlier, Mr. President, that there have been many, many times when we have adopted statutes with retroactivity in them. The members of this body are well familiar with them. What is different about this statute, Mr. President? I know what I think is different about it. I think it is one that somehow, someone believes specifically involves or is specifically aimed at a very high-profile case. It provides a great forum, Mr. President, to make those kinds of headlines that are associated with that kind of a case. That is why we are having this big debate today about something we never debate when we do it other times.

For example, in the 1993 session on Senate Bill No. 403 sponsored by Senators Titus, Callister, Glomb and Brown, which won unanimous approval in this house. I just thought I would check the roll call vote on that bill. It passed unanimously. What did the bill do?

"Relating to actions concerning persons; providing immunity from civil action for communication made in good faith to a governmental entity, including a legislative committee." What did that do? It said that if you have a case for defamation or slander or libel and the predicate for that is a statement made in a judicial proceeding or before the legislature, you don't have a case anymore. Now let me just read you the effective clause of this. Section 8: "this act becomes effective on passage and approval . . ."—just like the one we are acting on today, passage and approval—". . . and applies to actions commenced before the effective date of this act, if a final judgment has not been entered in the action." I suppose the Legislative Counsel Bureau probably could have just gone and gotten that bill that won unanimous approval in this house last session and used that as a model for drafting this clause that is before us today, Mr. President.

We have done it so many times that I don't want to take the time of the Senate to go through all of them. Again in 1993, Assembly Bill No. 60 which related to actions regarding loans secured by real property. That bill was effective retroactively to all actions that were commenced before or after the effective date of the act. I just kept looking, Mr. President, and I kept finding these laws we have passed with retroactive effect, until I got back to 1989 and Senate Bill No. 11, sponsored by Senators Smith, Coffin, etc., which repealed NRS 125.161. What did that statute do? Well, it provided the former spouse of a member of the military the ability to bring an action for a portion of retirement benefits in a divorce decree. The effective provision of the act said that this act applies to "terminate the jurisdiction of the district court over any action brought pursuant to NRS 125.161 that is pending on the effective date of this act." I suppose that could be pending in the trial court level or on appeal, Mr. President. There are certain exceptions, but it applies just about across the board.

I think, Mr. President, we do a disservice to the process. I think we do a disservice to the people of the State of Nevada and their interest in the legislative process when we take something like a bill that is designed to provide across the board tort reform—this doesn't just apply to hotels; it applies to everybody involved in substantive damage suits—and use it by misinterpreting what it does deliberately for some other purpose.

I was asked a whole number of questions, Mr. President. Let me just say that I did not have to look very far to find retroactive provisions in bills that give immunity or curtail actions because we just voted on one this morning. It won unanimous approval, Mr. President. It is Senate Bill No. 369 which sits on the board right there. If you look at the last section of that bill, it says Section 8: "Section 3 of this act applies retroactively to January 1, 1990." If you look at Section 3, that is what grants the absolute immunity from suit. How many civil actions are pending that that will affect that was unanimously voted upon in this house?

I have no problem, Mr. President, standing here as the chairman of Judiciary Committee which often hears very controversial bills, very complex bills and those which can affect the rights and obligations and duties of the citizens of our state to one another and the civil justice system and the criminal justice system and defending them on their merits. I do object to having to stand up and to defend something from an attack which does not go to the substance of it, which is based on, I think, a mischaracterization of what the law really does.

Now let me address these questions, did we hear how many cases this would affect. Do we know if it would affect any more than this one case that was mentioned. I never even thought about that case as the chairman of that committee until it was raised by one of the members and it was discussed and the media did a little report on it. I assisted in the development of this bill because I thought it was very important that we clarify the punitive damages statute. It was very important that we clarify the definitions that exist in our law and take this nebulous standard out of the law and put in a defined standard that lets people know when they are going to be subject to this very, very harsh remedy, which is saying that you have to pay a certain amount of money to punish you and make an example of you for some conduct you engaged in.

The Trial Lawyers' Association which vehemently opposes legislation which you could characterize as tort reform stood side-by-side with me and those who supported this

legislation in the committee. They have no objections to it and in fact they testified in support of it in our committee.

How many cases does it deal with? We don't know anymore than, I suppose, we knew in 1993 how many cases we were obliterating with that retroactive immunity provision that was unanimously approved in this house.

What is the economic effect on the judicial system? What is the economic effect upon the judicial system of continuing to have to litigate over an unclear standard of the liability of an employer vicariously for the acts of an employee for punitive damages or other kinds of liability? This lays it out very carefully. As I said, the Constitution is going to protect somebody's vested right. If you do not have a vested right, if you do not have a Constitutional right that can be affected by this, then it should be subject to revisiting under this bill. If they do, then it won't. It is that clear, Mr. President. I urge the Senate to vote against this amendment and let's get on with passing the bill.

SENATOR COFFIN:

I would like to thank the Chairman of Judiciary for attempting to answer some of those questions. That was a long list of questions. It is probably not necessary to ask you to try to answer all of the questions that I asked. I think you did your best. I thank the chairman for removing the fig leaf that has been guarding the private parts of this legislation and saying that it is for all corporations, all businesses and not just hotels as it has been billed. I would also like to thank the chairman for reminding us that back in 1883 something happened when we passed a bill with a retroactive provision. I also would like to thank the chairman for reminding us of that time because that was at least 40 years before women had the right to vote and when sexual assault was not a crime. I would like to thank the chairman for reminding us of the 1993 whistleblower legislation which contained a retroactivity provision so that we could protect those employees of government who came to us with their concerns. The 1991 assault on the plaintiff resulting in the conviction and judgment against one of the key players in this legislation really comes out of the fact that she was a whistleblower. If she had kept her mouth shut and not talked about what happened, her military career would have continued. Did our 1993 legislation protect her? The chairman says he does not understand why this has become such an important issue. I would like to ask him, why if it is not so important in this case, why is it that the interested parties are fighting so hard to keep it in. Because if it doesn't affect the Tailhook Case, why don't we just take it out and support the amendment?

SENATOR JAMES:

I just want to add that I did answer the last question that the senator asked as to why we need the retroactivity. I want it to be clear that there is not a question left hanging that wasn't answered here.

Conflict of interest declared by Senators Raggio, O'Connell and Lowden.

Amendment lost.

Remarks by Senators Coffin, James, Neal and Adler.

Senator Neal requested that the following remarks be entered in the Journal.

Senator Coffin requested that a letter from Ms. Paula A. Coughlin be entered in the Journal.

SENATOR COFFIN:

Thank you, Mr. President. May we have an explanation of the bill?

SENATOR JAMES:

Thank you, Mr. President. As I alluded to, in the debate over the amendment, this bill deals with various aspects of civil liability in the civil justice system. First of all, it sets forth that in an action for wrongful death you can still get punitive damages. There was a question in our law and we thought it was appropriate that damages recoverable by a decedent's estate in a wrongful death case would include punitive damages under the appropriate circumstances. We therefore and thereby are expanding the circumstances

under which you can receive punitive damages in a case in the State of Nevada. Since that was in question, it was appropriate that be applied retroactively as well pursuant to the provisions of the act.

Sections 3 and 4 go into detail in explaining the punitive damages standard. To define the terms: conscious disregard, fraud, malice and oppression which are by themselves nebulous terms, subject to definition. The bill adopts the standard which is closely analogous to the Craigo standard which was adopted by our Supreme Court some years ago.

Secondly, the following sections set forth the circumstances and also the procedural manner in which someone can be held liable who makes accommodations available to the public for the wrongful acts of a third party who is not an employee under the direct supervision and control of the person making the accommodations. Here again, we are not departing substantially from existing law. We are making it clear that you have to have notice. The negligence law says that you can not be held liable for something unless you had a duty. You can't have a duty unless there is some foreseeable harm out there. If you don't have any reason to know because you have been informed by virtue of it happening before or some other type of notice then you haven't got a duty to protect somebody from the wrongful acts of somebody else. That other person, that third party, is still liable for their own wrongful intentional acts. Someone who holds out accommodations to the public are not liable for those unforeseeable acts, only for those foreseeable acts. You have to take reasonable precautions and exercise due care. The bill sets that out pretty specifically. The bill clarifies the level of liability of a maker of accommodations, an innkeeper for the personal property of a guest which is entrusted to a safe on the property.

Finally, Mr. President, we have actually left in the law punitive damages liability for wrong that is not actual intent to harm. That still exists. You can still get punitive damages for cases in which there is not actual intent to harm under the conscious disregard definition and under the oppression definition if your conduct is despicable enough, which is the word that we use.

For those kinds of cases where there is not intent to harm somebody you can insure against that kind of liability. The reason is it is not bad public policy to allow someone to insure against what might be a major financial hit on them if it is something they did not intend. If they don't intend to harm, they can't say, well I will go ahead and harm this person because I have insurance against it. That is the policy involved here. But, under this legislation, if you intend to harm someone, you cannot insure for that. That comports with the public policy that underlies the old common law rule that you can't insure for punitive damage liability. It bifurcates those two kinds of punitive damages liability and makes an appropriate public policy distinction.

I would just conclude by saying, even though I had not intended to speak on the bill today, that we have heard a lot about tort reform this session and we have heard about different kinds of ways we can limit what people see as problems with the legal system. I, personally, have tried to support those measures which look to the process and look to the standards that are applied to people's conduct in the court process and make sure that those standards are both understandable and fair. This bill does both of those things. That is why I supported it. That is why I ask the members of the Senate to vote for it today.

SENATOR NEAL:

Thank you, Mr. President, through you to the members of the Senate. I am going to be voting against this bill. The bill we have before us, Senate Bill No. 474, first reprint, is a bill which is going to bring untold bad publicity upon the gaming industry of this state. Irrespective of what the chairman of the committee which brought this bill before this body has said, the bill is clearly aimed at restricting the master service relationship. It wreaked havoc upon those agency relationships as they exist between any employer and his employees. When you attempt to build a wall between the acts of the employees who find themselves in the employment of an employer and that person fails to act in his or her capacity as being an employee for the employer, that employer should be and must be held responsible for those actions. It has been spoken here this morning that this may have something to do with what has been called the "Tailhook Scandal." Since that case is now

on appeal, as has been indicated, this bill as written would affect that case. It may not affect it to the extent that it would totally eliminate whatever damages were sought, but certainly would cause that case to be drawn out because someone would have to appeal it if action were taken that in some way affected the substantive rights of that individual. As I look at this bill, it talks about "conscious disregard" and gives you a definition of that. It states that it means: "knowledge of probable danger of consequences for wrongful act or deliberate failure to act to avoid those consequences." It talks about malice expressly implied. It goes on to say that malice means "conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights of others!" A conscious disregard of the rights of others. Conscious disregard means the knowledge of a probable danger. Over in another section of the bill, Section 8 talks about an owner or a keeper of any hotel, motel, motor court, boarding house or lodginghouse is not civilly liable for the death or injury of the patron on other persons on the premises caused by another person who is an employee under the control or supervision of the owner or keeper unless there is a preponderance of evidence that the owner or the keeper failed to exercise "due care" for the safety of the patrons or other persons on the premises. When I look at Subsection 2 of Section 8, it is very interesting where it says "if the death or injury incurred pursuant to subsection 1 is the result of foreseeable wrongful act of the person causing the injury, an owner or keeper who is found to have failed to take reasonable precautions against a foreseeable wrongful act is still liable for the death of the individual." On the last line it says that the courts shall determine the matter of law as to whether or not the owner or innkeeper has a duty to take reasonable precautions against foreseeable, wrongful act of a person causing the injury or death. The last line is the kicker. It says for the purpose of this section, "a wrongful act is not foreseeable unless prior incidents—similar to a similar wrongful act occur on the premise and the owner or keeper had knowledge of those incidents." What this is saying is that you can have a wrongful act committed as long as the top guy does not know about that. The entire establishment is supposed to be exempt.

This bill is wrong. It says to the nation that we are not in control up here. That is what it says. It says to the nation that this legislature is not in control. It says that we do not make the policies. It says that any time a large hotel happens to have a problem, if they come to the legislature, we will fix it. Ladies and gentlemen, that is corruption at its highest order. We should not be engaged in that type of corruption. I happen to have been in this legislature going on 24 years and I have seen lawyers bring bills into this legislature for the purpose of taking care of problems which they have in their law firms. We used to call those bills "full employment for the lawyers." This is another one of those bills where some law firm is handling this particular issue and they want to bring it before this legislature in order to solve their problem rather than let that problem go through the courts as it should. As I indicated, I have been here going on 24 years. Some of you might not have been here when the "YOBO Scam" came through this legislature. The Majority Leader was here. I was here. That was when money interests were corrupting this legislature and people in this body were holding out their hands to do certain bidding for big business interests. One guy used to stand up here and pray a lot. When he was indicted, he obtained the services of a lawyer.

The point I am trying to make to you is that somewhere in this process we have to say, irrespective of the fact that you contributed to my campaign, that this is wrong. I cannot walk that road. I cannot afford to have you, because of your self interests, to besmirch an entire industry nationwide. This is what this is doing because Nevada's gaming establishments invite people to come here. That is why we have our convention authorities which work in both the northern and southern parts of the state. That is why we send ads and have people working in New York, Chicago, Washington, D.C. and San Francisco to encourage people to come to this state. Now, you are saying that if we brought people here, they happened to be injured or killed, if the management of a hotel did not know that, they have no cause of action. That is wrong to do that. It is also wrong to allow, as the Senator just said, a retroactive provision to remain in this statute.

We are not supposed to pass laws that are ex post facto in this legislature. Irrespective of what the young gentleman from the Judiciary Committee might say, it is wrong to do

that. It is wrong to try to correct an act and make it right in terms of a person who might be receiving some benefit to try to cut that benefit off by an ex post facto law. You cannot damage the substantive rights of individuals by passing a retroactive provision. This is what this measure attempts to do. We, in this legislature, have to say that it is just as bad to have the monied interests which seem to be pervasive in this session control this process as it would be to have the mob. It would be the same thing. It is just as bad. If we are going to be right in our obligation to the people of this state, who elect us, to the people who work in these establishments, then we should not pass such a bill which might affect that interest and affect people coming here. That is what this bill would do.

I don't know about all of you, but the people of my district sent me here. Of course, I receive contributions to my campaign fund from hotels just as others do. But, I have to tell them in no uncertain terms when it comes to my conviction that I can't go along with them just because they happened to hand me a campaign check. We have to be much stronger than to fall for that type of weakness.

We have not had dumb people in this legislature. When I first came here, we had nine lawyers. I helped to run most of them out of here because of this type of legislation, for their trying to take care of their clients with the passage of bills. That was wrong. But, ladies and gentlemen, think about what this bill does. Think beyond the interests. Think about the people of this state. Think about the image that you want to display and not let it be said that in this legislature and this Senate that big monied interests cannot come here and determine just how this process is going to work. So far, in this session, I have seen where there is money interests against money interests that there is always a tie. But, when money interests are against employees the employees lose. When big business is against small business, the small business loses. So far, that is the image that we have displayed in this body. Let's not continue that. Let's not be weakened by those who want to control this process for their own benefit.

I don't happen to see the lobbyist sitting in the back who usually pushes this type of legislation through, but one of the things we will have to understand and know and do is that there is a larger group of people out there that we call the voters who bring us here. Let's consider their interests. They do not want to lose their jobs because people stop coming to this area because we have been perceived as being controlled by the money interests of this state. In 1981 when we had fires at the Hilton and the MGM hotels, I had to fight to get that legislation on the books, but it so happened that we had a rule that when you introduce a bill you are supposed to put it on the desk. Following the fire at the MGM, the same night the bill went on the desk there was a fire at the Hilton. Only one Senator in this body signed on that bill with me. After the fire at the Hilton, I would not let another Senator sign on the bill. I told them to stay off, that I did not need them because the bill is going to travel by itself. We had to fight to even put that fire safety mechanism into law. Now, we are down to where people are being sued. There is nothing wrong with adding security guards to the hotel staff for the protection of their patrons. In talking about the "Tailhook Scandal," I saw the movie about it the other night and if that was a true indication as to what went on, I think the hotel should be held responsible. Sometimes we have the tendency to give in to the "good old boy" concept which gets us into trouble. We are trying to correct that concept by passing legislation which is going to prevent individuals from suing these establishments or make it so difficult that they cannot bring a cause of action. This is what this measure is doing. It does not clarify anything in terms of the victim. It clarifies a whole lot in terms of the owner of the establishment. It says that if he did not know what his employees were doing, then he is not held responsible. Think about that. If he did not know what his employees were doing, he is not held responsible. Every establishment, every employer I know has to be responsible for the actions of his or her employees as long as they are functioning within the scope of their employment. That has always been the standard rule of agencies, but now this bill wants to tinker with that and say that that should not be the common law of the State of Nevada. You have all seen these hotels. Where does the owner sit? He sits way up there and usually has about 2500 employees working for him. He has to have responsibility since that is where the orders come from. That is where the directions and procedures needed to do the jobs come from. And we want to put into the law the term "only if he had knowledge of the act occurring

or that he was able to foresee." We also place in the measure the definition of foreseeable which is "that the act must have occurred before and that he was knowledgeable about it, but on the second time the person was able to sue." What kind of law is that? What is in this bill does not make sense. It is wrong that we should have to entertain this particular measure. It says to me that if we vote upon this and pass this bill, it is going to send a message throughout the nation that this legislature, this Senate, is controlled by monied interests and that we dance to their tune. I can't afford to have that happen. I have children and grandchildren who reside in this state. I do not want them to read the record sometime in the future which says that their father or grandfather sold out to special interests. This is what this bill does and it should not be before this body. We should let the common law take its course. If we have a court case, let the judge handle it. I'd like to reiterate that I will be voting against the bill.

SENATOR JAMES:

Thank you, Mr. President pro Tempore. While sitting here listening to this debate, something occurred to me which was said by our assistant majority leader last session on a bill which sparked a great deal of emotional debate. The body was divided over the issue. Before he made his remarks he said "this debate is perhaps the most disappointing day in my career in the legislature." That came back to me just now because that is exactly how I feel. This is only my second session, chairing the Judiciary Committee and debating these very difficult bills which come out of this committee, but I looked up the rule in *Mason's Manual* on what would come within a question of personal privilege. I guess after the last speaker, every member of this body would have been able to stand up and ask the Senator to yield on a question of personal privilege. The integrity of this body, the integrity of every member of it, not just me, has been called into question. Frankly, that is really, really sad.

You could probably tell from my tone, when I first spoke on the amendment, that I was a little taken aback that an amendment would be brought forward, an argument would be made and an attempt would be made to try to mutate a bill—that does nothing of the kind—into an assault on women's rights, into a corrupt subservience to the monied interests of this state. A bill, I remind you that the trial lawyers, of which I am a member and who are some of the most ardent lobbyists of their cause to preserve the right to trial by jury and to preserve the right to go to court to get damages when you have been wronged, came into the committee and said that they support this bill. They said that it is good law. When you stand and say "corruption" and you shout it into your microphone and accuse every member of this body of corruption, you should think long and hard before you do that. Was it corruption when every member of this body including the last speaker voted to retroactively eliminate the right to go to court in a "whistleblower" type of case? I guess the explanation offered is that situation is different. Now we have litigants who are entitled to different substantive and procedural rights in this state. Some can go to court and are entitled not to be affected by what we do in this body on a retroactive basis while others are.

I wonder where the sentiments about corruption and untoward influence on the voting members of this body were in the mind of the last speaker when he, like every member of this body on Senate Bill No. 369, voted to adopt retroactive immunity for the judicial discipline commission. How many high profile cases would that affect? That was not called the "Whitehead bill." We have shamed this process and brought it down to the basest level, and we have given an example as to why the people of this country and this state despise government. We pick things up, drag them through the mud for political gain. Nothing about Senate Bill No. 474 is corrupt. Nothing in it is a major change in the law which is going to take away anyone's constitutional right to a jury trial or anything else. The characterizations made by the last speaker of what this bill will do are frankly wrong from a legal standpoint or any other standpoint. The owner or keeper, as defined at the top of page 3, includes everyone in that organization. Notice or knowledge of prior incidents means that there was a security report which said there was a rape on this property, you now have knowledge and you had jolly well better put out security guards to protect against those kinds of things happening in the future or you will be liable. It

doesn't restrict that at all. Actions of employees, it does not restrict that at all either. It simply defines the circumstances under which that vicarious liability exists. The only limitation is that it says that the person who is at the top position of the corporation has to know about something for punitive damages to be assessed. You know what you are doing? You are punishing that top level person for something they did wrong. If they are being punished for something wrong, then they had better have done something wrong. For example: ratifying the wrongful conduct of a subordinate, intentionally putting into place a policy that would be a wrong to people who come into the hotel. I remind you that the punitive damages limitations do not just apply to hotels alone. They apply to everyone including members of this body or any voters who might be sued in a case and have punitive damages sought against them.

Let me say that, in all of this debate and in all of this long session, we have dealt with issues which have torn at our very hearts. These have given rise to controversy and none more than tort reform gives rise to controversy. I have been in the center of the storm, so to speak, with crime, tort reform. The gaming industry came through and had their bills, one of which we had a little while ago which created some controversy. Each time I have attempted to make sure that I keep being a lawyer. That is what I really am. This is a citizen legislature and I am a lawyer. We go into court and represent the interests of our clients. By using that analogy in my mind when I come in here every day to debate these bills, I can be effective. They say that someone who is his own lawyer has a fool for a client. I try not to get emotionally involved in these issues. I try to keep it detached, explain the issue before the committee, tell the members of the body what the policy questions are and what the choices are that they have to make. That becomes impossible, Mr. President, when a member of this body who has been here for many, many years, one who I personally during my career have held in the highest esteem, would stand and accuse us of doing something here today that is untoward or corrupt, that we are acting on the basis of campaign checks given to us. That is "besmirching" something. What I think we have besmirched, is not the industry, but this process and this legislature. Those who write will write tomorrow what they write. What kind of image of this legislature will be conveyed to the public? Not one that has passed hundreds upon hundreds of pieces of legislation to try to deal with terrible crises existing in our state; the crime crisis, the crisis in our workman's compensation system, the crisis which exists in our civil justice system, that is not the image which will be conveyed. The image which will be conveyed is that of a bunch of greedy people supposedly pushing through special interest legislation for big monied interests. Baloney! I have only been here for two sessions. I have talked with the members in the Assembly and in this body. I have heard them discuss with me and struggle over doing the right thing and ask me what the policy is here. Until now, on judiciary bills, I have been trusted to stand up here and tell them why it is a good idea. I would say that over 95 percent of the time they agree with my judgment and that of the other members of the Judiciary Committee. Now you have the image of us, in committee, rubbing our hands together. I am not sure what we are going to get out of it. I would say, on the point of personal privilege, that we have not gotten anything out of it. I want to make that clear in the record.

I wish we could unsay a lot of what has been said here today. I wish I did not have to become my own lawyer and the lawyer for all the other members of this body who have been accused of wrongdoing in dealing with a perfectly legitimate piece of legislation which clarifies an existing standard. It adopts a standard which the courts can understand which protects the rights of people to still sue, recover damages and get on with their lives. That is all that we have done here today. I hope someone will write that along with all of the other stuff that was said. That is all I have to say.

SENATOR ADLER:

Thank you, Mr. President pro Tempore. First of all, I would like to clarify the record. I have had time to research NRS 402.005, which is the provision that relates to punitive damages. It references cases where there is no contract. All conventions, to my knowledge, have contracts with the hotel where the convention is held. These specific exemptions would not apply in my estimation to conventions.

In terms of this bill, having read through it, in committee I did not believe I had a conflict, but now I realize that NRS 402.005 has general application. I have a fairly high level personal injury case pending in Federal court in which the punitive damages award is a main issue. Therefore, I am declaring a conflict on this bill. Although I do not believe the punitive damage clause applies to conventions, it definitely does apply to the case I am involved in.

SENATOR COFFIN:

Thank you, Mr. President pro Tempore. I was going to be asked to be recognized earlier to see if anyone would stand up and refute what was said by Senator Neal. Fortunately, for the side which is opposed to this bill, the chairman of the Judiciary Committee did. There is a lot of pressure on this legislation. I don't particularly think the process is very clean in this legislation despite the sincere, urgent denials of the chairman. On the other hand, I do not think it is dirty. I think it is just about normal. The lobbyists for this legislation, as on previous occasions, have called my largest client and asked that person to talk to me and try to persuade me to vote "right" on this bill. My largest client is a hotel. I do declare that, but I will be voting "no" on the bill. In 1987, somehow they found my largest client in Baja, California in the middle of an off-road race. They asked him to call me. That pertained to the big bankers at that time and some of the same players are involved in this issue. I had a long talk with my client and I voted to do what I thought was right. It happened a couple of years later and it has now happened again. Lobbyists have called my clients and asked them to please talk to me to try to get me to do the right thing. This time the lobbyists even called their bosses and asked them to call my client, my friend. I won't name any of those lobbyists nor the client. That is pressure my fine Judiciary chairman. I do not know who your clients are nor do I care. Like Senator Neal, I have children and am proud to say that I have an 18-month-old daughter and a 7-year-old son. I do not think they would like to see their daddy lose his income. On the other hand, I have lost clients before, while I served in this house, based on my votes. It might happen again. Like Senator Neal, I would not want one of my children to read later, perhaps after my death, that I had done the wrong thing even if it meant protecting my income to preserve their lives. There is pressure. Some call it corruption. I do not call that kind of pressure corruption, but it is here. It is in the house. I don't know how many of you members also have received similar phone calls. Since my friend and client and I have a lifelong friendship, the friendship will continue. However, my respect for the lobbyists diminishes even more every day.

I think Senator Neal has very well expressed what is in the bill even more than I could possibly add. I want to read into the record a letter from a victim of crime who is the subject of this bill. This letter is addressed to our Governor.

HONORABLE ROBERT J. MILLER, *Governor*, State of Nevada, Capitol Complex, Carson City, Nevada 89710

RE: Veto of Nevada Senate Bill No. 474

DEAR GOVERNOR MILLER:

I was a victim of a violent crime in a hotel in Las Vegas in 1991. For that reason, I am writing to call your attention to Nevada Senate Bill No. 474 and to urge you to veto this bill should it be passed by the legislature. Passage of the bill would send a message to the nation that Nevada does not care about the safety of guests in its hotels and motels. In particular, the bill would penalize women travelers who seek safety in Nevada's hotels and motels and are often victims of crime.

S.B. 474 was recently introduced and is currently awaiting action on the floor of the Senate. This bill would make it virtually impossible for crime victims to sue hotels and motels for failure to provide adequate security which resulted in injury or death. The bill would do this by requiring that a court conduct a "mini-trial" on the evidence before permitting a plaintiff to bring his or her case before a jury of Nevada citizens. The bill unfairly requires a plaintiff to meet an extremely difficult burden of proof by showing what knowledge the owner of a hotel had of prior similar criminal incidents. It seems exceedingly odd that the bill would place this burden on plaintiffs who had been victims of criminal assaults and other crimes, while holding plaintiffs

in other negligence cases, such as slips and falls, to a lower standard of proof. Especially troubling about S.B. 474 is that it purports to have a retroactive effect, including a retroactive application to cases which have already been tried and decided by juries.

I obtained judgment against the Las Vegas Hilton and Hilton Hotels Corporation in the fall of 1994. The retroactivity provisions in S.B. 474 seems to me to be mean-spirited and, if, in fact, directed specifically at my case, a gross example of special interest politics.

My case arose out of the now infamous Tailhook Convention at the Las Vegas Hilton in September 1991 and you are probably at least somewhat familiar with the events of that convention and its aftermath. Although my civil case for negligence against the Las Vegas Hilton Corporation and Hilton Hotels Corporation has received a lot of recent publicity, there were certain specific facts in my case of which you should be aware when considering Senate Bill No. 474.

I was sexually assaulted by a "gauntlet" of drunken men in the third floor *public hallway* of the Las Vegas Hilton hotel and casino on the evening of September 7, 1991. During a seven and a half week jury trial in 1994 in the United States District Court in Las Vegas, the evidence overwhelmingly established that the Hilton's security procedures were lax in the face of demonstrated criminal behaviors against members of the public. I will briefly note for you the most serious points of evidence against the Hilton in this matter.

Hilton's security department records documented at least one attack similar to the one on me at a prior convention; during that previous convention, the Hilton's security department used the term "gauntlet" to describe the conventioneers' conduct in assaulting women in the same third floor hallway where I was attacked.

Hilton security personnel also testified that at both prior Tailhook Conventions and the 1991 convention where I was attacked the hotel's own written policies about ejecting trespassers and other persons who posed a danger to guests were deliberately not enforced with respect to those attending the Tailhook Convention.

Sadly for me, and for the other women who were assaulted at the 1991 and previous conventions, the Hilton placed the safety of its own female personnel above that of its guests and the general public. During my trial, one security officer stated that it was known by Hilton personnel that the third floor was "not safe" during Tailhook Conventions. This same officer also testified that female housekeeping employees were not allowed to enter the third floor during the convention unless accompanied by male hotel security guards. There was testimony that Hilton deliberately did not assign any female security guard to the third floor. One female security officer testified she was told not to go up to the third floor alone. This same officer testified that she had verbally reported "gauntlet" activity, involving grabbing, fondling, and jostling of women, at a prior convention. Despite her report, Hilton management refused to allow her to make a written report of her observations. Had the Hilton been as concerned about its guest and the general public as it was about its own female employees, the attack on me probably would have been prevented.

Las Vegas has had a tragic history of hotel fires and you should be aware that on the night I was assaulted Hilton had disarmed the smoke detection system on the third floor. Security personnel testified that the hotel's smoke detection system on the third floor was turned off during the Tailhook Convention. Hilton employees testified that in 1991 and prior years Tailhook conventioneers there lit firecrackers and ignited alcohol in their mouths, causing obvious fire hazards on the third floor. However, rather than attempting to stop these behaviors, the Hilton chose to shut down the automatic smoke detectors on the third floor during the duration of the convention.

Most egregiously, there was tremendous evidence that the Hilton was aware of attacks against other women, on the night that I was assaulted. Another female Navy officer testified that she was assaulted in a "gauntlet" nearly two hours before the attack on me. As she entered the third floor hallway, she observed two Hilton security guards watching a group of men lining the hallway. After she passed the

guards and entered the group of men, she was attacked, held and groped against her will. No security guards came to her aid.

One hour before the gauntlet attack on me, Hilton security guards were seen standing by and observing (but not intervening) during an attack on an extremely intoxicated underaged girl. These guards did nothing while this girl was surrounded by a gauntlet of men who raised her above their heads and passed her from hand to hand while stripping her of her clothing below the waist. This girl's clothing, including her underwear, was thrown in the general direction of the security guards, who only took action after the crowd had left the girl on the floor of the hallway. At this point, the Hilton took no steps to shut down the activities in the third floor hallway, identify the men who had assaulted this young girl, or contact the local police. Instead, the girl's mother was called by telephone and asked to come for her daughter. The mother testified that she was not told that her daughter had been assaulted and had been found unconscious and semi-naked, nor did they tell her about the conditions on the third floor. Hilton's official report of this assault stated: "female juvenile was asleep or passed out while sitting on the floor in hallway between room 303 or 305."

Had the Hilton's staff reacted appropriately after even one of these incidents preceding the attack on me, I would not have been assaulted and had my personal life and my Navy career ruined.

During the trial in my case, a jury of eight ordinary Nevada citizens heard from over eighty witnesses regarding the evidence discussed above and other evidence concerning Hilton's negligence. The jury heard from both my attorneys and those for the Hilton, who had the opportunity to present all of the Hilton's arguments and defenses. At the close of the case, the jury awarded me a judgment against the Hilton for negligence and for punitive damages because of what the jury found to be Hilton's oppressive and malicious conduct towards me in disregarding my safety rights. Hilton had a fair day in court and lost. The judgment against Hilton was upheld by the federal district court judge who heard Hilton's three separate post-trial motions in which Hilton argued that the jury's verdict was improper and should be set aside.

If S.B. 474 is, in fact, designed to retroactively negate my judgment against the Hilton then it is the worst kind of unjust and unwarranted special legislation, designed to prefer one citizen over another. The goal of such a retroactive statute would be to allow the Hilton to escape the consequences of its gross neglect toward me, a neglect that resulted in preventable criminal sexual attacks against me and other women. Moreover, if truly designed to be retroactive in my case, then S.B. 474 strikes at the integrity of the jury system in Nevada, essentially telling all the members of the public who are potential jurors that their proper decision based on the facts (and the law in force at the time of the trial) can be ignored whenever it suits the whim of a legislature beholden to corporate special interests.

If S.B. 474 is applied only prospectively, it would still work a tremendous injustice for crime victims in Nevada because it would allow hotels, motels, and other innkeepers to turn a blind eye toward the safety of their guests and public. In addition, by requiring "knowledge of prior similar acts" as a test of liability, S.B. 474 would discourage the prompt and full reporting of crimes by hotels and motels to Nevada law enforcement authorities.

Governor Miller, I would be happy to answer any questions you might have about my case and to supply you with any information you might wish to substantiate events I have described in this letter. You can contact me through my attorneys, Dennis Schoville and Nancy Stagg at Gray, Cary, Ware and Freidenrich in San Diego, California, at 619-699-2700, or Joseph Cronin in Minden, Nevada, at 702-782-8171.

I am aware that you have consistently supported law and order issues and crime victims' rights, and it is my hope for those reasons you will veto Nevada Senate Bill No. 474 should it be passed.

Very truly yours,

PAULA A. COUGHLIN

SENATOR COFFIN:

Ladies and gentlemen of the Senate, members, my colleagues and my president, I urge you not to send this bill to the Governor. I urge you not to send it to the Assembly. I urge you to defeat it.

SENATOR JAMES:

Thank you, Mr. President. Frankly, I think I have addressed everything that the letter raised and everything raised by the senator who just spoke. I want to point out where the letter is wrong. It was noted that we are changing the law by requiring a judge to conduct a mini trial on the issue of duty. This is a flat misstatement of the law. The question of duty, as every lawyer in this body knows, is a question of law for the court always. Like all the other provisions of this bill, we are stating in the statute much of what is already out there in the common law. The question of duty has to be decided by a judge on a motion for summary judgment or otherwise. If there is not duty, then you should not have a trial because there is no potential for liability in that trial. We make those motions all the time now under the law. That is all this is going to allow you to do, not require the conduct of a mini trial. Secondly, the notion of proving notice of knowledge. This bill is going to require you to prove notice or knowledge to have a predicate for liability. We already have to prove that. You have to prove notice or knowledge in every case involving negligence. You have to have knowledge there is a problem or you do not have a duty. Let us say lastly, Mr. President, that case you just heard detailed is going to be decided not here in this body, but in the courts, in accordance with the principles of the law which are applicable out there already and these we announced today. These are consistent with our common law. They do not take away anyone's substantive rights. They do not obliterate anyone's right to a jury trial. They simply state the requirements you have to have to give a basis for liability for this particular type of a wrong. I would like it to be clear that the courts will have to decide, not only whether these provisions apply, but also whether they would affect some substantive right which would deprive a litigant of due process, whether the litigant referred to or anyone else who is in the system. I am sure there are others. I have done my best to try to prevent this bill from being mutated into a bill to deal with just a single case. It never was that and never will be that except in the minds of a very few. I would, with that, urge the Senate to look at this bill, understand that we are making broad statements of policy which are applicable throughout our state to be consistent with what we have done in the past. We are stating that the retroactivity set forth in the statute is consistent with what we have done and which every member of this body has voted for this very day on prior bills. I urge passage of this measure.

Conflict of interest declared by Senators Raggio, O'Connell, Lowden and Adler.

Senators Jacobsen, Townsend and Rawson moved the previous question.

Motion carried.

The question being on the passage of Senate Bill No. 474.

Roll call on Senate Bill No. 474:

YEAS—15.

NAYS—Coffin, Neal—2.

Absent—Raggio.

Not voting—Adler, Lowden, O'Connell—3.

Senate Bill No. 474 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

MOTIONS, RESOLUTIONS AND NOTICES

Senator Titus gave notice that on the next legislative day she would move to reconsider the vote whereby Senate Bill No. 474 was this day passed.

Senator O'Donnell moved the adoption of the amendment.

Remarks by Senators O'Donnell, Regan, James and McGinness.

Senator James moved that Assembly Bill No. 92 with Amendment No. 754 be taken from the General File and placed on the Secretary's desk.

Remarks by Senator James.

Motion carried.

UNFINISHED BUSINESS

SIGNING OF BILLS AND RESOLUTIONS

There being no objections, the President and Secretary signed Senate Bills Nos. 100, 228; Senate Concurrent Resolution No. 43; Senate Joint Resolution No. 6; Assembly Bills Nos. 151, 281, 396, 431.

REMARKS FROM THE FLOOR

Senator Titus requested that her remarks be entered in the Journal.

Thank you, Mr. President pro Tempore. On Friday, I gave notice that I would move today to reconsider S.B. 474. Well, as it turns out, I don't have the votes, so I am not going to make that motion; but I do want to make a few remarks and have them entered into the Journal.

Friday's debate on S.B. 474 was the most emotional, dramatic display I've ever witnessed in this chamber. Those in favor of the bill were accused of being corrupt waterboys for gaming who will do anything to further their political careers, while those opposed were lambasted as political opportunists seizing upon a newsworthy court case to stage a cheap publicity stunt. While I'm sure these charges were levied with all sincerity, I consider myself to fit neither of these extreme characterizations.

Furthermore, I do not have a gaming license; I do not represent any clients with business before this legislature; I do not sit on the boards of directors of casinos, banks, or HMOs; so I cannot conveniently declare a conflict of interest in order to avoid difficult decisions. Therefore, when I come into this chamber, I try to be as reasoned as possible. When considering bills, I weigh each one individually on its own merits before I cast a vote. I try to be fair and open-minded, balanced and pragmatic, as nonpartisan and nonparochial as possible without abandoning the basic principles that guide me in life.

My vote on S.B. 474 was no different. I recognize the need to protect gaming, the largest industry in our state which provides 65 percent of the jobs and 60 percent of the tax dollars and without which Nevadans would not, indeed could not, enjoy the standard of living and low personal taxes we have today. At the same time, we cannot let gaming dictate state policy and ride roughshod over those who have worked so hard to help make the industry the success it is today. Accordingly, my voting record on gaming issues is mixed. For example, I supported S.B. 399 giving gaming a tax break for promotional expenses, but I opposed S.B. 400 which could take us back to the days of blacklisting. Similarly, I oppose the Majority Whip's licensing scheme to bankrupt and dismantle the Culinary Union, but I also oppose the dram shop bill, making gaming establishments liable for DUI accidents caused by their patrons.

My approach to S.B. 474 has also been balanced. I, along with my fellow Democrats on the Judiciary Committee, pushed to amend the bill to lower its extremely difficult standard of proof from "clear and convincing evidence" to "preponderance of the evidence." Also, I originally brought up the "Tailhook" issue in committee and on Friday voted for Senator Coffin's amendment to take out the retroactivity clause. Upon its failure, however, I voted for the bill. Why? I am not an attorney but I feel we are all better off when the statutes are as clear as possible on what constitutes liability for punitive damages. Besides, the Assembly has yet to hear this bill and can continue to address the retroactivity issue down the hall where, hopefully, a compromise can be reached. Finally, I trust the courts to do their job of protecting an individual's constitutional rights when they review the applicability of this statute to any pending cases.

In these final days of the 1995 session, let us remember that the Founding Fathers intended the legislature to be the people's branch of government. And it is up to us on every decision we make to see that it remains so, that it serves the interests of all Nevadans, in a fair and equitable fashion, not the interests of just a select and powerful few.

Senator James requested that his remarks be entered in the Journal.

Thank you, Mr. President pro Tempore. I want to tell you how disconcerting it is to see that we are going to reopen debate on S.B. 474 after last Friday. I will not engage in that whatsoever. We have these bills come through the house, we debate them and we make our decision. We should not stand up then and go through and recharacterize all of the debate. I do want to correct a couple of things to make sure that the record is very clear. First of all, the amendments to S.B. 474 which came out of the Judiciary Committee were not just worked on by Senate Democrats. They were worked on by the entire committee. The clear and convincing evidence standard was unanimously removed from that bill and was replaced with the preponderance of evidence standard.

Secondly, Mr. President, I rose to say something now because I feel it is important that it be said. It has become very obvious to me, during the debates in the last few weeks, mainly on some of these gaming bills, that it is really simple to change the entire meaning of a bill in the perception of the public by standing up and characterizing it as something else. You stand up and say that S.B. 400 is a blacklisting bill. It doesn't matter that right in the bill it says blacklisting is against the law and you commit a crime if you do it. Never mind what the bill really says. What matters is that one of the senators stands up in here and says that it is a blacklisting bill. It gets repeated in the press and soon gets repeated around. Then you receive phone calls asking why you are supporting a blacklisting bill. Some of those in this body know that is exactly what happens. It is very simple to stand up and say that something does something, never mind that it is completely opposite of what the black and white letters printed on the bill say.

The same thing applies to S.B. 474. All you have to do is say that it is a "Tailhook" bill. It doesn't matter that the bill doesn't refer to a particular case. It does not even necessarily apply to that case. It won't even necessarily change anything which has been done in regard to that case. It is all to be decided by the courts as it is presently. It merely matters that someone stands up on this floor and says it and the public has that perception. The perception is exalted over the reality. In response to the Monday morning quarterbacking we now have on the debate over S.B. 474, I just want everybody to know that, as an example, S.B. 400 and S.B. 474 are good policy. They were well thought out and supported largely unanimously and in a bipartisan way out of the committee, came to the floor and then transformed into something else in the perception of the public. I think that is dangerous. I think that cuts against the credibility of this body as a whole because it looks as if we are passing things that are terrible, special interest legislation which has not been thought out and is not balanced which we are all supporting. This is not reality, Mr. President, and I want to stand today to correct that.

SENATOR TITUS:

Thank you, Mr. President pro Tempore. I never mind if someone disagrees with me on my opinion. That is what we are here for, but when you accuse me of being incorrect on the facts, I think you need to check your own facts. I would remind the Chairman of the Judiciary Committee of how S.B. 474 came out of committee in terms of the amendment on clear and convincing evidence. That vote was three to three with one abstention; you can check the minutes. Voting in favor were Adler, Lee and Titus. Voting against were Porter, McGinness and Washington. You, Mr. Chairman, abstained. We took a second vote and the second vote showed Adler, Lee, Titus, Porter and McGinness in favor. You and Senator Washington again abstained. I don't think my statement that the Democrats pushed for the amendment is a misrepresentation on my part.

SENATOR JAMES:

Thank you, Mr. President pro Tempore. I just have to rise in order to make sure that the record is correct. By giving half the facts, you can create a misimpression. I will remind the Minority Leader that, at the time of my abstention on that vote, I was waiting for an

opinion from the Legislative Counsel as to whether or not I could vote. When I received that opinion, I am the person who handled the amendment on the floor. I supported the amendment for this body and explained it. The amendment was passed unanimously, so that is the full record.

Senator Raggio requested that his remarks be entered in the Journal.

Thank you, Mr. President pro Tempore. I would like to indicate that John McCloskey, Chief of the Legislative Counsel Accounting Division, is undergoing double by-pass heart surgery today. He has been the Chief Accountant for LCB for the last nine years. During that time, our annual audits have always been clean. The accounting unit of LCB has been a model of professionalism. I would like to have us join together today to wish John successful surgery, a very speedy recovery and let him know our thoughts are with him today.

GUESTS EXTENDED PRIVILEGE OF SENATE FLOOR

On request of Senator Jacobsen, the privilege of the floor of the Senate Chamber for this day was extended to teachers Terese Sidebottom and Audrey Ellbogen; chaperones Marci Walling, Regina Erb, Cheryl Bell, Julie Davis, Lisa Giroud, Jodie Ruana and Nick Ruana and the following students from Gardnerville Elementary School: Jacob Barnett, Ashley Brune, Remy Chonez, Alana Coogan, Jeffrey Cotton, Tyler Creel, Blake Davis, Jessica Dimitriadis, Brianna Giroud, Angela Gloner, Erica Hall, Stephanie Hill, Wesley Hill, Danielle Kahler, Blake Lister, Nathan Minasian, Fermin Rodriguez, Viviana Rodriguez, Jacob Ruana, Benjamin Schuler, Talon Scofield, Joseph Spencer, Nicole Steele, Michael Stoeffler, Rebecca Swift, Kristen Trumpower, James Vanderlinden, Megan Vickers, Matthew Williams, Susan Zamboni, Heidi Agorastos, Joshua Allan, Skyler Ashdown, Daphne Bateman, Devon Bateman, Drew Bateman, Scott Bates, Jordan Beam, Kelly Bell, Leslie Birmingham, Stacy Brakebill, John Budden, David Cruz, Denise Erb, Nathan Fonger, Kelcy Forster, Megan Gunsten, Tracey Hawks, Jamie Hill, Sherry Liles, Krystal Moore, Victoria Ortega, Ryan Pierce, Kerri Ruby, Trevor Tholen, Marc Walling, Rebecca Wallstrum, Cody Witt and Kristen Zufelt.

On request of Senator Neal, the privilege of the floor of the Senate Chamber for this day was extended to Marzett Lewis and Linda Howard.

Senator Raggio moved that the Senate adjourn until Tuesday, June 6, 1995 at 10:30 a.m.

Motion carried.

Senate adjourned at 11:41 a.m.

Approved: LAWRENCE E. JACOBSEN
President pro Tempore of the Senate

Attest: JANICE L. THOMAS
Secretary of the Senate

MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-eighth Session
June 10, 1995

The Committee on Judiciary was called to order at 8:20 a.m., on Saturday, June 10, 1995, Chairman Humke presiding in Room 332 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. David E. Humke, Chairman
Ms. Barbara E. Buckley, Vice Chairman
Mr. Brian Sandoval, Vice Chairman
Mr. Thomas Batten
Mr. John C. Carpenter
Mr. David Goldwater
Mr. Mark Manendo
Mrs. Jan Monaghan
Ms. Genie Ohrenschall
Mr. Richard Perkins
Mr. Michael A. (Mike) Schneider
Ms. Dianne Steel
Ms. Jeannine Stroth

STAFF MEMBERS PRESENT:

Dennis Neilander, Research Analyst
Joi Davis, Committee Secretary

OTHERS PRESENT:

Robert D. Faiss, Attorney at Law
Marc H. Rubinstein, Vice President, General Counsel, Caesars Palace
Mark Lerner, General Counsel, Becker Gaming, Inc.
William A. Bible, Chairman, State of Nevada Gaming Control Board
C. Brian Harris, Board Member, Gaming Control Board
Roger S. Trounday, Executive Vice President, John Ascuaga Nugget
Patrick M. Thorne, Director Administrative Services, Station Casinos

Sydney H. Wickliffe, C.P.A. State of Nevada Gaming Control Board
Linda Bernstein, Manager, Hilton Gaming Corporation
Carolyn Ellsworth, Asst. General Counsel, Mirage Resorts
William Thistle, Associate General Counsel, MGM Grand
Sandra McHenry, Employment Manager, The Mirage
David Sisk, Controller, Casino Operations, Caesars Palace
Andrew Barbano, Deciding Factors
Ken Braunstein, President, Forensic Science Consultants
Nancy L. Stagg, Attorney at Law
Paul E. Larsen, Attorney at Law
Kathleen Stoneburner, private citizen
Mark Fiorentino, Nevada Resort Association
Harvey Whittemore, Nevada Resort Association
William Vassiliadis, Nevada Resort Association
Danny Thompson, Nevada AFL-CIO
Bill Bradley, Nevada Trial Lawyers Association
Victoria Riley, Nevada Trial Lawyers Association
Valerie Cooney, Nevada Trial Lawyers Association
Ben Graham, Nevada District Attorneys Association
Joe Cronin, Attorney at Law
Paula Coughlin, private citizen
Judy Jacoboni, Mothers Against Drunk Driving
Amy M. Meedel, Nevada National Organization for Women
Mary Sanada, Nevada National Organization for Women
Diane Loper, Nevada Women's Lobby
George Glanville, Family of Murder Victims
Florence McClure, Rape Crisis Center
Bill Hornbrook, Family of Murder Victims
Eva Collenberger, Family of Murder Victims

Chairman Humke announced the bills would be heard in the following order: Senate Bill 432, Senate Bill 496, Senate Bill 474, Senate Bill 399, Senate Bill 513, Senate Bill 375. Additionally, the proponents of Senate Bill 400 asked the bill be pulled from the agenda and be re-posted at a later date. In that regard, Chairman Humke recognized an opponent of Senate Bill 400 wished to make a statement.

SENATE BILL 400 - **Limits civil liability of gaming licensee, its affiliate and employer for certain communications regarding employee, former employee or applicant for employment.**

Brenda Erdoes, Legal Counsel, LCB, continued that S.B. 496 was a reviser's bill which differs from the ratification bill in that these changes have not already been made to the NRS but are suggested to the committee by authority of the LCB. An example of the items to be revised is the name change by the federal government of the Veterans Administration to the Department of Veterans Affairs. Ms. Erdoes set forth more changes to the bill.

Ms. Erdoes pointed out one section in particular was Section 34 which amends NRS 281.501 which is a voting standard for legislators. There have been many questions regarding subsection 4 which requests clarification. Ms. Erdoes explained this section in furtherance explaining the research LCB has reviewed in this regard. In addition, LCB has made an amendment which has been discussed with the Speakers of the House and that would be to make the effective date October, 1995 even though traditionally revisers' bills become effective upon passage and approval. However, because of the potential for this section to affect the way legislators vote this session they recommend the October effective date. A further explanation of S.B. 496 is attached hereto as (Exhibit D).

SENATE BILL 474 - Revises provisions governing civil liability for wrongful acts and revises provisions relating to punitive damages.

At the request of the co-chairmen the testimony pertaining to S.B. 474 has been prepared verbatim, with minor language clean-up.

William "Billy" Vassiliadis, Nevada Resort Association: "As you all know this past week much has been written and much has been said about the intent of this legislation and about the intent of the proponents. An issue this complicated, an issue that seeks this kind of change, an issue that affects so many different people from so many walks of life, it is often the case that perceptions take on a life of their own. That has clearly happened this week. Our intent in seeking this legislation is to seek tort reform. We think we are representing the mood of the country and the mood of this state. I think you all know from speaking to your constituents, from reading accounts of what has gone on in Congress, and in other states, clearly people want to see an end to frivolous, needless and irresponsible legislation.

One of the misperceptions that has been formed this week is somehow this resort industry seeks to avoid and shirk its responsibility and seeks to avoid liability. That is not the case. What we seek to do and what we urge you to do is place

responsibility where it belongs. We do not feel that any business, not just the gaming industry, should be held accountable for the criminal actions of others. We also feel no business nor any person should be held accountable when something so totally unforeseen happens. We accept the responsibility for protecting our citizens and employees. We know one of the primary concerns of tourists and visitors is their safety and we very deeply feel the obligation to keep them safe while they are here. Not only is it the responsible thing to do, but it is just good business. However, we do not feel we should be held accountable because some nut straps a propeller on his back and lands in the middle of a fight. We will do our part. We will meet our obligations. We will uphold our responsibilities. We will do everything we can to insure the safety of our visitors. While there are incidents here like anywhere else, I think Nevada has a pretty good record considering 40 to 50 million people visit this state every year."

Harvey Whittemore, partner with the law firm Lionel, Sawyer & Collins, appearing on behalf of Nevada Resort Association: "With me today in support of S.B. 474 are Richard Bunker, President, Nevada Resort Association; Mark Rubenstein, Vice President General Counsel and Secretary, Caesars Palace; Roger Troundy, Executive Vice President, John Ascuaga's Nugget; Mark Lerner, General Counsel, Becker Gaming, Inc.; Sandra McHenry, Mirage Resorts; Carolyn Ellsworth, Assistant General Counsel and Vice President General Counsel,, Mirage Resorts; Pat Thorne, Station Casinos, Inc.; David Belding, past chairman, Nevada Resort Association, Principal, Circus Circus; Linda Bernstein; William Thistle, MGM Grand Hotel; Bruce Agulara, Vice President General Counsel, Mirage Resorts; and Marilyn Sade, Tropicana.

Also members from my firm present today are Bob Faiss, expert in gaming law; Paul Larsen and Mark Fiorentino. With that, I would like to personally thank the chairmen of this committee for their extraordinary efforts in scheduling NRA's legislative package for your review today. In respect to this bill, I would like to thank each member of the committee for your extraordinary efforts on behalf of the citizens of this state. It goes unsaid but when I have the opportunity on behalf of the NRA lobbying team to meet with people as early as 6:30 a.m. and as late as 8:30 p.m., on legislation of this type, the public is well served.

S.B. 474 deals with punitive damages and the liability of innkeepers to patrons injured by third parties. By this bill, punitive damages are extended to wrongful death cases but are restricted to the punishment and deterrence of deliberately wrongful conduct rather than mere errors of judgment. In a like fashion, this bill

restricts the liability of innkeepers for the wrongful acts of third parties. The innkeeper should not be liable for the criminal acts of third parties unless the innkeeper has failed to exercise care by taking precautions against foreseeable wrongful acts by a third party.

Section 1 of this bill amends NRS 41.085, Nevada's wrongful death statute, to make it clear that a decedent's estate can recover punitive damages when the decedent could have recovered such damages if the decedent had survived. This provision rejects the contrary holding reached in Alsenz v. Clark County School District, 109 Nev. 1062, 864 P.2d 285 (1993). Punitive damages are to punish and deter wrongdoers, not to compensate the victims. Consequently, unlike the death of the tort feasor, the death of the victim should not prevent punitive damages since the tort feasor remains susceptible to punishment. This provision was sought by the trial lawyers and we agree with the policy that is expressed herein. Sections 2 through 5 of the bill--these sections amend Nevada's punitive damages statute and insurance statutes in three significant respects. Section 3 of the bill adopts in large part the California statutory standards for the imposition of punitive damages. Let there be no mistake about this. What we are doing is unique to Nevada but not unique to this country. The suggestion that somehow Nevada is unwilling to take care of its citizens and do something different is an unfair characterization.

The Nevada Supreme Court opinions in Craigo v. Circus-Circus Enterprises, 106 Nev. 1, 786 P.2d 22 (1990) and Granite Construction v. Rhyne, 107 Nev. 651, 817 P.2d 711 (1991) reveal deep divisions in the court about the proper standards for punitive damages in this state and the Craigo plurality opinion expressly requests legislative action on this issue. The Craigo opinions noted Nevada originally adopted its punitive damage standards from California but neither Nevada or California courts have consistently followed the standards adopted. Furthermore, as Craigo makes clear, the courts have often used the same words to describe significantly different mental states and thereby reach significantly different results. The resulting confusion not only violates the fundamental precept that punishment should only be imposed when statutes give clear notice of what conduct makes someone subject to such punishment. It also makes punitive damages a wild card, significantly inhibiting the settlements of disputes. By adopting the California statutory standards, the bill effectively adopts the standards advocated in both the plurality and concurring opinions in Craigo.

The three statutory grounds for punitive damages are fraud; oppression; and

malice. Each of these standards share a fundamental requirement that wrongful conduct with knowledge of the injury will probably result. This separates the conduct that makes punitive damages from the negligent, grossly negligent, and reckless conduct that does not. Bad judgment, even unconscionably irresponsible conduct fully justifies compensating someone injured by that conduct. But such conduct does not reflect the evil mind or motive that both the American College of Trial Lawyers and the Nevada Supreme Court have viewed as being the proper object of punishment through punitive damages. Sections 4 and 5 of the bill sets for the circumstances under which employers will be liable for punitive damages for the deliberately wrongful conduct of their employees. Employers are properly punished when the employer itself engages in wrongful conduct with the requisite mental state for punitive damages.

If I can refer you to Sections 3 and 4 you will notice we have provided definitions for separate terms: conscious disregard; fraud; malice (express or implied); and oppression. The existing standard is set forth in Section 5 that talks about, on line 45 of the bill, that under existing Nevada Law you must have the above standards. The use of the terms are identical to existing case law. What we are doing is providing definitions which adopt the California standards and the Craigo plurality opinion standards in Section 3. I want to make that very clear so you can see the inter-relationship between Sections 3 and 5.

As I have indicated, employers are properly punished when the employer itself engages in wrongful conduct with the requisite mental state for punitive damages. Increasingly, however, punitive damages have been sought from employers because of the conduct of lower level employees when no responsible officer, director, or other member of management intended for deliberately wrongful conduct to occur. That violates the fundamental reason for punitive damages. The punishment and deterrence of willful and deliberate wrongdoers. Consequently, the bill follows the adopted standards in California by permitting punitive damages against an employer for acts of an employee. Section 4 follows and tracks that California standard. One, when the employer knew the employee was unfit and consciously disregarded the rights of safety of others in employing him. Two, when the employer expressly ratifies or authorized the wrongful act and three, when the employer was personally guilty of oppression, fraud or malice. If the employer is a corporation, these requirements must be satisfied by an officer, a director, or management person expressly empowered to authorize or ratify the employee's conduct. Why do we need that standard? Express authorization or ratification is required to avoid situations such as those that existed in Ramada Inns, Inc. v. Sharp, 101 Nev. 824,

711 P.2d 1 (1985). In that case, the Nevada Supreme Court held that authorization or ratification was satisfied simply because the employer gave its employee wide latitude in handling such situations. Obviously, giving employees broad discretion does not mean the employer itself, its officers, its directors, and management personnel, possess the requisite mental state to make punishment of the employer appropriate.

Sections 6 through 8 of the bill amend NRS Chapter 651, Nevada's innkeeper's statutes to clarify the liability of motels, hotels, and other innkeepers when third parties cause personal injury to guests or other patrons. It does not affect the liability of such entities or their employees acting within the scope of their employment when their own wrongful conduct causes personal injury. Let me restate that, if we're negligent or our employees are negligent to a guest or patron, this statute has absolutely no application and that has been the huge misperception within the press and within the community that does not follow this language closely enough to understand what the intent of the legislation was. Obviously, we believe the patrons are entitled to the exercise of care by innkeepers to prevent injuries. It is equally obvious that the exercise of care cannot amount to an absolute guarantee of the safety of guests. An innkeeper cannot guarantee a guest that an airplane will not fall out of the sky onto the hotel causing injury. Perhaps a better example would be the relatively recent event involving an outdoor championship boxing match hosted by a Las Vegas casino. Despite beefed-up security and other extra precautions, a stranger calling himself 'fanman' flew over the hotel and into the boxing arena with a gasoline powered contraption. He landed on the ring, fell into the first rows of the audience injuring people. The hotel had exercised appropriate care to protect its guests but it could not insure them against such unanticipated, negligent or criminal acts of third parties. This bill will make it clear that the innkeeper is not liable unless there was an absence of care or the providing of care to prevent a foreseeable, wrongful act by a third party.

Under this bill and amendments we are going to propose today, foreseeability will be found when a) the owner failed to exercise any care for a patron's safety; or b) the owner had actual knowledge of prior similar incidences on the owner's premises. Under the first standard, any wrongful acts by a third party will be deemed foreseeable if the owner or keeper has failed to exercise any care whatsoever for its patrons' safety. This puts obvious pressure on our industry and any other industry that has substandard properties to address patrons' safety. Under the second standard, foreseeability will be found if the owner or keeper had notice or knowledge of prior incidents of similar wrongful acts occurring on the

premises. To use a current example, if the 'tailhook' convention returned to the Hilton and the same allegedly wrongful acts occurred then those acts would be clearly foreseeable to the Hilton under this bill.

Section 8 also seeks to correct an aberration that seeks to radically alter the functions of judges and juries and effectively making innkeepers insurers of their patrons' safety. Traditionally, the question of whether one has the duty to protect others from injury from third parties has been decided by judges as a matter of law. When the jury deciding if there has been a breach of duty. In Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 864 P.2d 796 (1993), the Nevada Supreme Court followed interpretations of a California case to hold that whether the injury was foreseeable so as to create a duty was a question of fact for the jury and such foreseeability did not require prior similar instances. So in Section 8 of this bill we are taking care of a situation and making sure the judge decides those questions. The Doud case has been frequently criticized by a number of commentators. More importantly, the Doud case, which was following a California decision, that earlier California decision, was in fact reversed so the body of law which the Nevada court relied, has in fact been reversed and this section addresses that.

Section 9 of the bill deals with innkeeper liability. The bill came out from bill drafters in a way that was not consistent with how we had presented it. I would suggest to you the intent of the bill is simply to include property brought on the premises by a patron to make it subject to the same liability standards in existing law under 651.010 and that language would be as follows: "that an owner or keeper is not civilly liable for the theft, loss, damage, or destruction of any property of a guest left in a guest room if the owner/keeper provides a safe." Again, the way this came out it suggests an opposite. It is not clear to follow the intent originally requested in the bill so we do have an amendment we can discuss.

Section 10 of the bill makes punitive damages insurable. A number of courts in a number of states allow insurability of punitive damages: Arizona, Idaho, Montana, New Mexico, Oregon, Texas, Wyoming are states that have this provision. We would suggest to you that the policy expressed by this section is appropriate. In all cases, punitive damages are shifted to someone. They are either shifted to the shareholder, they are shifted to the consumer, to the employees in lower wages, they are shifted to creditors in bankruptcy, or they are shifted to plaintiffs and their lawyers through non-payment. There is nobody that pays punitive damages except collectively all of us. Therefore, this bill makes a very large policy statement that insurability of punitive damages in certain instances are appropriate and that is

where there is no wrongful and intentional act committed with the intent to cause injury to another. Only those cases falling within a certain class of punitive damages would be insurable but if there was an intent to cause injury you certainly could not insure that because then you would not have the deterrence effect we are trying to have both through punitive damages and the fact of insurability.

I want to make a point here with respect to Sections 11 and 12 of this bill. Section 12 of this bill makes the act effective upon passage and approval. Section 11(a) of the bill is written in such a way that this would have application to cases which were pending. We have engaged in discussions through the auspices of leadership of both Houses, the chairmen of this committee, as well as through the fine efforts of Assemblywoman Buckley and Senator James, to try and come up with a resolution with respect to subsection (a), lines 41-42. I know it is the chairmens' intent to speak to this immediately. To make the record clear, if this committee decides to go forward with the processing of this bill, it is fully our understanding that particular provision will be taken out and we will accept the judgment of this committee that that is an appropriate thing to do.

We did not intend, I want to make this clear, to retroactively impact any vested right of any plaintiff whatsoever. We attempted to craft this language broadly enough so if there were procedural matters pending in cases they would be covered but it was not our intent to impact unconstitutionally the vested rights of any party in a pending case in this state. I want to make that very, very clear. We said it on the record in the Senate. We said it on the record with conversations with anybody we talked with.

In response to a question I was asked by one senator if this could have the possibility of impacting the Coughlin v. Hilton Hotel Corp., 879 F.Supp 1047 (D.Nev. 1995) case, I said that it could, not that it would, I said that it could. I tried to do so in a way that was honest and in a way that expressed some concern that indeed this was a broad policy issue for you to face. It is our desire that this bill could be processed and not have any impact on anybody who thinks it would be an untoward decision for this body to take and apply this retroactively. I want to make that very clear. I would be happy to answer questions with respect to any matter. We have a number of amendments I would like to go through generically with the committee at this time if I could Mr. Chairman."

Ms. Buckley: "There has been a lot of press this week concerning this bill indicating that the casinos wanted immunity for all that happens to their guests regardless of

whether or not they are at fault. I just wanted to comment for the record that I feel that is not true. I believe the intent of this bill, especially Section 8, was to immunize casinos from liability for the unforeseeable acts of a third party. The reason I feel sure of this intent is because I had a concern about Section 8. My reading of the bill was that a casino might be immunized where they failed to exercise due care but where there had not been any criminal act. I wanted to insure that a casino had to exercise due care for their guests regardless of whether or not there had been prior incidents. When I voiced this concern that this might be the intent of the bill, I was assured that it was not. The industry worked on a revised section of the bill because they told me that was not the intent and they wanted to insure that security was still provided as it is now and only to insure they would be immunized where an act was unforeseeable. I wanted to state, before Mr. Whittemore goes over the specific amendment of Section 8, that I think this is an appropriate balance to protect anyone in our state from unforeseeable acts of third parties while protecting victims and insuring security is still met in our state."

Chairman Humke: "Thank you very much Ms. Buckley. I should have stated this at the outset. It is the chair's intent to limit the time for proponents and opponents of the bill. Mr. Whittemore, the co-chairmen have discussed various time limits and it would appear reasonable to offer one hour for each side. Does that appear appropriate to you?"

Mr. Whittemore: "That is more than adequate from our side. As we go through the amendments and answer questions, I am sure we will be done in the next 15 minutes."

Chairman Humke: "In anticipation of your amendments as spoken to by Ms. Buckley, I expect the amendments you offer in a moment will allay some of the fears of many of the opponents so one hour appears to be reasonable. The time will be recorded by co-chairmen Anderson and that time will be reckoned exclusive of committee questions and answers. It is also the chairs' intent to accept a motion at the appropriate time which deletes section 11(a), the retroactivity provision, as alluded to. It is anticipated the committee will not have a problem with that part of the motion."

Mr. Anderson: "The only part I wish to note for the record and maybe on behalf of the committee for some have approached me with concerns about this particular bill. Maybe the peculiar nature of this state is often portrayed in the media

nationally and locally that the tourism industry which is obviously a major part of the engine that operates the fiscal nature of this state, that it stands in a peculiar spot. Oftentimes the unusual nature of Nevada gaming gathers a great deal of national attention and people living in this state are often criticized because of the uncommon industries we have here. The Legislature has a legitimate concern over making sure people who come to this state are treated fairly by the hotels and gaming establishments. By and large, we would like to assure the public they will be treated . . . we believe that is the legitimate business of the Legislature and we applaud the efforts of the gaming industry in making this a hospitable ground. At times we become somewhat resentful of how the Legislature and other bodies are portrayed because of the nature of the gaming industry in our state. I want to make sure we all know what I am talking about--Nevada gaming is controlled by the state Legislature and I want that clearly understood. We have sitting here a chairman of the gaming control board who does an excellent job of making sure the circumstances of that business is clearly regulated in a fair and equitable way. I want to make sure we are concerned not only with the gaming industry, but also the hotel industry that often supports it and that is our legitimate concern and we will deal with it."

Mr. Whittemore: "If I might conceptually go through the areas of amendments and I would like to point out the areas I believe will require further review when it comes back from bill drafting if this committee decides to process the bill to make sure the language meets with everyone's approval. On behalf of our industry, I would recommend the following changes. With respect to page two, lines 13-14, take out the word "dangerous" and put in "harmful" because the original definition the characterization was that under the definition of "conscious disregard" the use of "dangerous" may limit the application of the term to things that might be inappropriate and substitute probable harmful consequences of a wrongful act.

With respect to Section 9, leaving Section 8 for a moment, Section 9 the language which I read into the record earlier would apply regarding property patrons and guests bring to the entire property not just their rooms or their cars. Last year we added cars and now we are going to try to cover the entire premises. The language posted attempts to do that but there is some problem with the language.

If we could turn our attention to Section 8. The intent of Section 8(1) is to provide a standard that if you did not exercise due care that every property . . . it simply says 'we are not civilly liable for the death or injury of a patron or other person caused by another person unless there is preponderance of evidence that shows

the death or injury was foreseeable and that we [the industry] did not exercise due care.' If we did not exercise due care, we are liable. That is the point Ms. Buckley made with respect to this section and we agree with that intent.

Section 2 of the bill, there was some confusion as to the application of the phrase 'incurred pursuant to subsection 1 on line 44'. The use of this phrase is a reference to the fact that what we are referring to is third party liability cases. Therefore, in an attempt to make sure Section 2 is limited to those sections, we had recommended that you repeat the language in subsection 1 that this applies to an owner or keeper of any hotel in Motel Motorcourt Boarding House and that you repeat that phrase and then carry forward the language in subsection 2 with the addition of the following very important phrase, 'the owner or keeper failed to exercise due care for the safety of the patron or other person on the premises.' This was the language which was so important that Assemblywoman Buckley and I and various members of our legal counsel from the various properties worked out in discussions yesterday. We believe that appropriately addresses, in subsection 2 the concerns she had expressed. Again, the language is read from a version we would be happy to provide in more detail to the bill drafter. As early as this morning we were working out final details.

Those are the amendments we have suggested. There are other parties supporting the bill who have other amendments which we do not oppose but will allow them to propose them to you. With that, we would be happy to answer any questions generally regarding the intent of the bill and specifics to the language as best I can provide."

Mr. Carpenter: "I have a question on page 2, Section 4(1), lines 29-31, where it says the employer has advanced knowledge that the employee was unfit for the purpose of employment and employed him with a conscious disregard as to the rights of safety of others. How would that work in the real world?"

Mr. Whittemore: "I can give you an example. Someone in human resources takes a look at an individual's application and notes there have been some potential past examples where incidents of sexual abuse have occurred. Immediately upon hiring this individual, they put him in charge of a childrens' summer water program. You have then consciously disregarded the rights and safeties of others by hiring an individual who is unfit for the purposes for which you hired him. Here is an individual who has a past which indicates to the employer that this person may not be appropriate to be placed in that type of a situation. In the real world, someone

should be held responsible for the conduct of your employee. That language is taken from a long line of cases . . . from California statutory language as well as a number of other cases discussing what responsibilities an employer has to make sure you hire appropriate personnel."

Mr. Carpenter: "Under most instances if we knew the facts like the example given, you would not do that would you?"

Mr. Whittemore: "Of course not. The point is that if you did and you saw someone who said I'm simply willing to take that chance. That would be conscious disregard. That is a willful act. It is highly unlikely but you asked for an example that may indicate where a person would be particularly unfit for that particular employment. Another example would be in the construction industry when you put someone on a crane and say how many hours of training do you have, and they say they have ten hours, and then you immediately put them in charge of a job where they are coming into exposure of a number of individuals. In the real world, you would hope employers do not do that but if they do then that employer is responsible. This bill is about personal responsibility. This bill is about assuming responsibility for your own conduct. If a corporation or a personal employer makes that kind of mistake they should be subjected to those types of damages associated with punitive or exemplary."

Ms. Buckley: "I just wanted to note for the record the changes outlined by Mr. Whittemore are those that we discussed for hours yesterday. I think it accomplishes the very delicate balance of meaningful tort reform and protecting victims. I also wanted to pass on for the committees' information, Senator James reviewed these changes, does agree with them, and thinks they accomplish a balance. Also, Senator James wanted to pass on that he indeed supports the elimination of "retroactivity." I would like to thank the resort association for working out these very fair changes to the bill."

Chairman Humke asked if Mr. Whittemore or Vissiliadis had any concluding remarks. Mr. Whittemore thanked the entire committee on behalf of the Nevada Resort Association. Chairman Humke recognized Bill Bradley and others from Nevada Trial Lawyers Association (NTLA) in support of the bill.

"My name is Valerie Cooney. I am here this morning on behalf of Nevada Trial Lawyers Association. We are here today in support of S.B. 474. I have with me the Executive Director of NTLA, Mrs. Victoria Riley. I also have Mr. Bill Bradley,

a member of the board of NTLA. Mr. Bradley will present to you today NTLA's position on this bill."

"Good morning chairmen, members of the committee, my name is Bill Bradley. We are in support of S.B. 474. You heard earlier the term 'tort reform' and if tort reform means acting safely for the consumers and citizens of Nevada then this bill does that. We had expanded in one of the most important aspects of this bill which we are very pleased to see, is the expansion of punitive damages in the area of wrongful death cases. To use an example, 10-15 years ago, when Ford Pintos were being rear-ended and burning people, normally those people would die because of the burns. Under the existing laws, the Supreme Court said approximately one year ago, anybody that died as a result of that defective design had a right to punitive damages against Ford Motor Company. As we all know, Ford Motor Company made a conscious decision to burn people as opposed to fixing the cars. We had that law and about a year ago, the Nevada Supreme Court said that was no longer the law and people who are killed as a result of conscious disregard of their rights, have no right of punitive damages. That was a surprise and shock to see come out of our court.

Consequently, when this bill was first discussed and the discussion centered around expanding punitive damages to include those actions arising out of wrongful death, that is an expansion of the current tort liability and an appropriate public policy for this Legislature to embody. We support that very strongly.

Mr. Whittemore mentioned the definitions that give rise to punitive damage conduct and we agree with those comments regarding the uncertainty in the Nevada Supreme Court opinions regarding malice, oppression, and fraud. We do support the amendment Mr. Whittemore mentioned at lines 13-14 because the word 'dangerous' could possibly only apply to where people are physically injured. There are cases where people are mentally, financially, and psychologically injured that are not necessarily 'dangerous' but are certainly harmful. It is a positive step to amend that to take out the word 'dangerous' and use the word 'harmful.'

In Section 4, I know the intent is there but I want to make sure attachment of liability to the superior officers . . . Sections 1, 2, and 3 are in the disjunctive. In other words, perhaps it could be clarified if LCB agrees, that there be an 'or' placed after the number 1 to make sure it indicates each one stands on its own as opposed to conjunctive.

We are also proposing an amendment to this bill that will protect Nevada consumers from the bad faith conduct of insurance companies. Currently, Nevada law has gone to great extent to protect Nevada consumers from the bad faith, deliberate, willful and conscious disregard actions of insurance companies. In 1989, when this bill was last visited by the Legislature, there was an exception created for insurance companies from the cap of three times compensatory damages on punitive damages. One of the exceptions to that rule was insurance companies. We think it is a very strong public policy statement and in total reliance with Supreme Court opinions that actions involving bad faith be exempted from Sections 3 and 4 of the bill. That is a strong statement to make sure Nevadans who are egregiously treated by insurance companies who are deprived benefits who are strung out when they need those benefits desperately, will not go away unpunished by the concept of punitive damages.

The Nevada Supreme Court is continually recognized in the area of insurance law that there truly exists a special relationship between consumers and insurance companies based on trust and reliance. Because of that special relationship, insurance companies must take appropriate actions to protect Nevada consumers. We think it is imperative to include an amendment which we have proposed language that will exempt out from Sections 3 and 4 such bad faith conduct on behalf of insurance companies.

There has been a great deal of press that indicates asking for the term 'preponderance of the evidence' the industry and on the other side of the trial lawyers the industry is boiling us over and trial lawyers are bound by the fact we are allowing the concept of 'preponderance of the evidence' to rule in the burden of proof that must be proven against a hotel in a negligent security case. That also is a misstatement by the press of current Nevada law. Preponderance of the evidence is the standard in all civil cases. It is the standard we are used to accomplishing in all civil cases and it is language we support as a clear restatement of current Nevada law.

At Section 8 of page four, line 4, much has been said about the term, 'prior, similar wrongful acts' and we want to make sure the legislative history is clear on what is meant by 'similar wrongful acts.' That is, if there is unfortunately a murder at a hotel, 'prior, similar' does not mean that a casino is responsible only if there has been a prior murder. So, 'similar' should never be interpreted as being 'identical.' Similar should be defined and construed as such activity that gives rise to the notice of criminal activity afoot on the premises. We want to make sure 'similar'

is defined broadly under this statute and not narrowly. If there have been prior assault, assaults and batteries, armed robberies, that is sufficient to give an operator sufficient knowledge that criminal activity exists on the property and additional steps have to be taken to protect the patrons of that particular property.

Finally, we have always been concerned with the retroactivity clause. However, to set the record straight, this was never a retroactive portion. We are talking specifically about paragraph 11(a). This was an intent on the behalf of the trial lawyers as well as the industry to allow the decision whether this would be applied retroactively up to the courts. Although, we are extremely pleased to see that section has been withdrawn and we are in support of that section and urge this committee to follow the suggestion to withdraw that section from the bill. That is the end of our presentation."

Mr. Schneider: "I would like you to go over 'similar' again because it appears you want it as legislative intent a very broad definition."

Mr. Bradley: "If I said 'overly broad' I do not think that is right. I think that is ultimately a decision that will be left up to the judge under this law which is also the current existing law. A judge is going to determine whether prior similar acts are similar enough to determine foreseeability. Consequently, if you have a car burglary on the outside part of the premise, the parking lot, would that put an operator on notice that there is a murder--I don't think so. But if you have armed robberies in the elevator, on the floor, or in a bathroom, that may very well give rise to the fact that additional steps need to be taken. The intent here is to make sure 'similar' is interpreted reasonably."

Mr. Manendo: "I wanted to make a statement earlier and then I do have a question. Along the same lines that there has been a lot of publicity on these particular pieces of legislation, I have had numerous constituents call me regarding articles in the paper that these hotel bills are directly related to the amount of campaign contributions we receive. I promised a constituent for the record it be noted that I feel as an individual and as an elected official I have a responsibility to look at each piece of legislation on those merits regardless of the amount of campaign contributions received. I did not accept one penny from the hotel industry in this last campaign. My question is, in Section 8, talking about civil liability, and I am not an attorney, but in my house, if I have a guest in my home and at that time someone breaks through the window and hurts my guest, am I liable for the actions that occurred."

Mr. Bradley: "I am sure everyone on this committee would like a simple yes/no answer and having appeared before this committee many times, you know that lawyers never give that kind of answer. If you had prior guests at your home and prior break-ins where your guests were injured and you have failed to warn your guests and you have failed to take adequate precautions to protect your guests because now you are on notice that you have prior problems, you could be held liable. But if this is a first-time occurrence, you will not be held liable."

Mr. Manendo: "If no other incident happened, then they cannot turn around and sue me?"

Mr. Bradley: "I do not think so. Although, let's say you live in a very bad part of town and every other home around you has double locks on the doors, bars on the windows, and you are a free-living, fun-loving guy, and you do not have any of those things, then you could be criticized because you should have been on notice that you were in a bad area and you did not take any reasonable precautions to protect that guest and you may be held liable. That is exactly what Ms. Buckley, our organization, and the casino industry, have been trying to address so under both scenarios lack of due care and foreseeable deeds are taken care of and people in this state are protected under those circumstances."

Mr. Manendo: "There is so much going on with people suing people because they looked at me wrong, let alone if you are injured. There are so many frivolous lawsuits happening and I wanted to have an understanding how that would relate to someone who is a guest at a hotel or someone who is a guest at a home or apartment."

Mr. Bradley: "As you know, Mr. Manendo, we have introduced a bill that will hold lawyers personally liable for filing frivolous cases. It is a very responsible bill and a bill we are extremely proud of. I have not met one person that does not think it is a great bill. It is something that should get the attention of the press so people in this state know the trial lawyers, this Legislature, and everyone is concerned in doing something about frivolous lawsuits."

Mr. Goldwater: "In Section 10, why do we need 'express authorization' in the statutes to offer that sort of an insurance policy? And, what are the pitfalls, if any."

Mr. Bradley: "There are no pitfalls to that. I think there are certain instances Mr.

Whittemore related where someone acts in conscious disregard of another's rights. That does not reach the standard of intent to harm someone. Under those conscious disregard cases, there should be insurance to cover those punitive damages because we are still short of intent. But where there is a pure intent to injure, you should not insure because that takes away the deterrent effect of punitive damages."

Mr. Anderson: "In Section 8, page 4, line 4 of the bill it talks about 'similar, wrongful acts.' The phrase concerns me. Would a rape incident be considered to be similar to a mugging or a robbery? What are we talking about with 'similar, wrongful acts?' Rape is an assault . . ."

Mr. Bradley: "I think the concern here is to make sure that whenever you have sufficient activity . . . and I'm not a judge but if I were a judge, I would think that an aggravated assault on a property would give the operator sufficient notice that there is a criminal activity afoot and precautions need to be taken to protect the patrons from such activities. But a break-in on a car on the outside of the property may not be. I think it is going to be interpreted by the judge, which is appropriate, on a case-by-case basis and I think that is what is important. Both sides would be given the opportunity to argue you had three prior bad acts at a particular property or one extremely bad act at a property, does the judge in his or her opinion feel that was sufficient to make it foreseeable that another bad act had occurred. Chairman Anderson, I do not think that can be defined within the statute but it certainly, with the legislative history, will give judges proper direction that reasonable interpretation of prior, similar acts is the goal."

Mr. Batten: "Mr. Bradley, on page two, line 32 the word 'expressly' and again on line 38, 'expressly' the word is used. In your opinion, does that place an unfair or high burden on the victim?"

Mr. Bradley: "It does Mr. Batten, and I believe that the intent of punitive damages has always been . . . I mean punitive damages I don't agree are awarded as frequently as we are told in the newspapers. But you are going to have to prove that there was express ratification or express authorization by hierarchy in the corporation or property or casino. I believe it is going to increase the standard but I do not necessarily believe it is going to destroy in any way a person's right to seek punitive damages when the conduct is appropriate."

Mr. Batten: "So that word does not bother you at all?"

Mr. Bradley: "Well certainly it bothers me. Every word in this section has always bothered us but I believe overall the bill is appropriate and I believe we can live within the language of that bill.

Ms. Cooney: "I simply want to stress that should the committee be of a mind to pass this bill, that they seriously consider the removal of section 11(a) the retroactivity provision and would ask the committee seriously consider the admission or inclusion within the provision and the exclusion excluding bad faith actions. I simply wanted to stress again those issues."

Chairman Humke announced the time left for persons wishing to testify on the bill and announced there were four persons in Las Vegas wishing to testify on the bill and a determination was being made as to whether those persons are for or against the bill. Chairman Humke asked if anyone else in Carson City wished to testify in favor of the bill. Noting no raised hands, Chairman Humke stated he would go to those persons wishing to testify against the bill, excluding one more question from Mr. Batten.

Mr. Batten: "In Section 8, line 48, 'the court shall determine as a matter of law whether the owner or keeper had any duty to take reasonable caution . . .,' in that instance would the court, referring to the judge I'm sure, him making that determination, does that take anything away from the jury?"

Mr. Bradley, NTLA: "No that has been another misconception in the press that we disagree with. Whether duty exists in the law has always been a question for the judge. So, consequently all we believe this language does is say what all the case law says that when there is a question of duty, that is interpreted by the judge. Once the judge makes that decision, if the judge decides that a duty exists, the case goes forward and the jury decides whether the duty was breached and whether someone was harmed as a result of that breach of duty. If the judge decides there is no duty, then the case ends at that point."

Mr. Whittemore, NRA: "If I can respond and add something to Mr. Bradley's explanation, the entire reason that is in the bill is to restate what is an aberration under Nevada law which people are suggesting under the Doud case would have reversed the roles that Mr. Bradley accurately reflected is the appropriate statement of who should decide the question of duty. In Doud v. Las Vegas Hilton Corp., the court suggested they would follow a California case which had reversed those roles as you will recall in my opening, that case in California was reversed but we are left

with the Doud v. Las Vegas Hilton Corp., case which suggested the jury would decide the question of foreseeability and duty and somehow the judge would not be involved in those questions. This makes it clear that the initial question will in fact be answered by the judge."

Mr. Batten: "So this is not a 'mini trial' first and then on to the jury, second."

Mr. Bradley: "It's called a Motion for Summary Judgment and they are filed for this . . . and during the medical malpractice hearings we talked about all those motions and one of those is a Motion for Summary Judgment questioning whether or not a duty to take affirmative action exists. They have been filed before this bill and they are going to be filed after this bill."

Chairman Humke thanked the witnesses, reiterated the time remaining for proponents of the will and announced the committee would go to persons wishing to testify in opposition to the bill, taking into consideration the four persons in Las Vegas wishing to testify.

Ken Braunstein, Associate Professor, Criminal Justice, University of Nevada, Reno: "Many of the people in front of me and behind me are my former students some of whom have suggested that I not speak in opposition to this bill but they know me far better than that. My opposition to the bill has waned significantly during the past hour. I was very much opposed to certain portions of the bill and many of those have been addressed by amendments that take away the sting. I need to give you a couple moments of background so you understand what I am talking about. I am the only Nevada licensed professional security consultant. I am licensed by the Attorney General's Office and there are no other people so licensed. I have been a security consultant for more than a decade. I practice consulting security on a national basis and serve on the national board of directors of the International Association Professional Security Consultants. In that capacity, I serve on a committee that is working with HESM to devise national minimum security standards. In addition to that, I serve on the national lodging security advisory board of the American Society for Industrial Security. I have testified as an expert witness in security cases in six states and in five federal district courts. With that background, I think I am well qualified to talk about Section 8 of this bill.

I am concerned only with 'prior, similar acts' and 'foreseeability' and some of you are confused by that. In that regard, I would like to assist you. Mr. Whittemore has spoken repeatedly about the California case on which Doud is based. The case

he refers to is Issacs v. Huntington Memorial Hospital, 38 Cal.3d 112, 695 P.2d 653, 211 Cal.Rptr. 356 (1985); Issacs v. Huntington Memorial Hospital, 158 Cal.App.3d 487, 240 CalRptr. 765 (1984). At the time it was written, more than a decade ago, the opinion was written by then chief justice Roseburd and it was a unanimous opinion of the California Supreme Court. Part of that decision said that to be a first victim and to be denied the ability to seek compensation is to deny the fourteenth amendment right of equal protection under the law. Although Issacs has in fact been overturned, that question about the denial of the rights under the fourteenth amendment has been upheld by several other states. With Doud we have adopted the totality of the circumstances as opposed to prior similar acts of foreseeability. It is a good move we made when we did that, in my opinion. Nationwide, we, as professional security consultants, are almost unanimous in that the test is to become the totality of the circumstances. Certainly, prior similar acts has not done well for either side. The meaning of 'prior, similar acts' is different in everybody's mind. The comments made by Mr. Bradley, and I agree with him completely, are that prior similar acts should be broad in its scope. In fact, in security consulting, we use the Uniform Crime Reporting of the Federal Bureau of Investigation violent and nonviolent crimes as prior similar acts. Violent crimes include murder, felonious assault, rape, and robbery. Consequently, as was previously answered, if a number of robberies or assaults occur, is that prior similar act for a rape occurring. Our answer would be yes it is without any question whatsoever. However, nonviolent acts are not predictors of violent acts to follow.

Mr. Carpenter asked a question that was answered by Mr. Whittemore that in the real world we would have an individual who had a prior sexual assault against a child working with a child's program. A more realistic answer to that is in cases where casino hotels do not run background investigations on the security officers they hire, as high as 33% of them have prior felony convictions that are not known at the time they are hired. That is a realistic example for you Mr. Carpenter. It has been asked of me by proponents of the bill what relationship I have to Joe Cronin. My relationship to Joe Cronin is I have worked with him on one case. He was plaintiff's counsel, I was defense expert."

Mr. Manendo: "I was curious, about 33% of the security guards having priors, could you . . ."

Mr. Braunstein: "Yes, in an example where no background investigations were done on security guards hired by a particular casino, investigations determined that

almost 33% of them had prior felony convictions. We do not run background investigations. . . it is not required on our security guards in casinos."

Mr. Manendo: "Could you provide something in writing on that?"

Andrew Barbano: "Good morning chairmen. My name is Andrew Barbano. I am a 26-year Nevadan living in Reno for 24 years and two years in Las Vegas. I am a union member and radio/television/newspaper commentator and I work for organized labor doing media advertising. I am an old politician as some of you may know. I come before you this morning wearing my media hat as well as my Nevadan's hat. Look at me as just another citizen but one that is concerned for the state.

This bill is beneath this body. No matter what amendments have been proposed, no matter how you may try and cure its defects, much damage has already been done. A message has been sent. A message that our principle industry cares less for its guests than it should.

During testimony on the 'tailhook' case in Las Vegas, it was brought forth that fire alarms, or fire sprinklers, or smoke detectors, excuse me, were turned off during the 'tailhook' incident. This, at a hotel which in 1980 had about 8-13 people die weeks after the MGM fire in which about 90 persons died. Don't get yourselves into a position where you will have to do a job over because it was not done right the first time. The MGM Grand in Las Vegas was built non-fire safe after 100 people died. The Legislature had to enact legislation to enforce retroactive sprinklers. Don't put yourself in that position here.

The bill in question reminds me of 1989 when Hilton lost a case, 38 million dollars to 38 male casino dealers who alleged and won on age discrimination. That award grew to 50 million in interest and Hilton came before this body in 1989 to cap punitive damages and it had an impact on that case which was up on appeal and the dealers ended up splitting 4 or 5 million dollars, Hilton saved a lot of money, punitive damages were capped, age discrimination was basically legalized in the state of Nevada because it made it pretty nonproductive to sue unless you were already rich. Do yourselves a favor, do Nevada a favor, kill this thing."

Paula Coughlin: "I come from Virginia Beach, Virginia and I thank both co-chairs and vice-chairs of this committee for allowing me to speak to you this morning and for allowing me to express my concerns about S.B. 474. This has been a difficult

week for me and I guess it has been a difficult week for this legislative body in that it was a fact-finding week for everyone including the proponents of this bill. I am relieved and ready to go home. Now that I have seen the process work and that this body has taken a viewpoint of adopting a fair law for victims and a fair law for its industry and I encourage you to adopt the bill with that in mind. Any other changes that this body makes I cannot expect to make an impact on, but I just appreciate that you all have taken the time to look at the far-reaching effects that S.B. 474 would have not just on me, not just on victims of crime, but for anyone who travels and you have made a step to preserve the laws that are good for the country as a whole and I commend you, especially, Assemblywoman Buckley, thank you very much for taking the time and the effort to make this a palatable bill. Thank you all."

Chairman Humke: "I would state that you did an effective job in lobbying and I would go beyond that to say that you did as good a job as any professional lobbyist I have ever seen and that is intended as a compliment for your professional approach. I know that when we talked in my office you described your naval career and I know that your leaving the Navy must be a bittersweet experience but I would like to thank you for your service to our country."

Ms. Coughlin: "Thank you very much and you all have a good day."

Judy Jacoboni: "I am the chapter president of Mothers Against Drunk Driving (MADD), Lyon County Chapter. I am a level one victim advocate for our chapter working as a trained volunteer. Most of my work with MADD involves injury and fatal victims and their families toward recovery. Today I am speaking against S.B. 474 as it would adversely effect the victims of crime to win damages in civil court. S.B. 474 will effectively insulate businesses from damages by granting exclusion from liability for the harmful acts of their employees and it is my duty as an advocate for victims of crime to oppose any measure which would restrict or limit the rights of victims to seek and win damages."

Ms. Jacoboni's prepared testimony and letter from the National Victim Center is attached hereto as (Exhibit E). Ms. Jacoboni concluded the bill is bad public policy.

Joe Cronin, Esq.: "I am a lawyer in Minden, Nevada. I have provided you with two separate packets of written materials. The first packet was about 15 days ago and the other was provided this morning which includes a proposed amendment. [The handouts so referenced are attached hereto as (Exhibit F)]. I was very pleased to

hear about the proposed amendment articulated by Mr. Whittemore that Ms. Buckley was working on tirelessly. When I heard the language read, I heard 'owner failed to exercise due care for the safety of patrons or others' it was not clear to me whether preceding that there was the word 'and' or 'or' and I am now told the word is 'or' and I would like the record to reflect that whomever has the authority has to make that . . . I guess it was Mr. Whittemore that suggested 'or' be placed before that language. Let the record reflect the word is 'or.'

I would like to say the process works. The crucible is not anything more than a hunk of metal unless there is a lot of heat and what comes out of it is something precious after the heat is applied. There was an example of this 'fanman' and I saw this on television as well as everyone else and 'fanman' is not what I came here to talk about. I was asked by members of this committee to bring in my crime victims then one of the members of this committee told me that you heard from a lot of crime victims and that member was very sincere and I agreed with that member that you did not need to hear from any more. All victims suffer from psychological damage. The re-telling of the horror is almost too painful to bear so I made the judgment to not bring them here but they can be here through me because they are all my clients. I just want to tell you a sentence or two about some real people not the 'fanman.' Darwin Doud, the man after whom this case is named is a farmer from Nebraska who came to Las Vegas two or three times per year in his motor home to play in the Sportsbook at the Las Vegas Hilton. It was his joy. He thought the parking lot at the Sportsbook was as protected as the Sportsbook itself. He entered his motor home one night and was beaten with a hammer by an assailant who had a hammer in one hand and a handgun in the other. He screamed and fought for ten to twelve minutes. Ten to twelve minutes is the time it takes to fight an Olympic boxing match. He screamed so loud he attracted a crowd. No one in that crowd was a security officer. That was because that parking lot was not being patrolled.

April, I won't use her last name, another client and the property involved is the Flamingo Hilton. April returned from a show to go to her room and she was in one of the upper floors. She walked into her room, the door closed behind her, she went to make a telephone call because the message light was on. The door burst open, a guy came in, and no telling what it was he wanted to do. It was clear from his actions that he wanted to substantially harm her, or kill her, or rape her, because he got on top of her and beat her. April, although slight but tough, drove him off. The reason that man was able to get up on that floor is because the Flamingo Hilton does not have a policy to restrict access to the upper room and

floors to persons who have business there. Caesars Tahoe does and has for the past decade. They put it into place as a result of a security audit that Ken Braunstein did. I did not hear that from Ken Braunstein but heard it from executives of Caesars hears ago. Caesars Tahoe does not have those types of crime, the Flamingo Hilton does. The Flamingo Hilton had their own internal audit performed in 1982 and 1984 suggesting there be a security podium at the elevator bank to restrict access to the upper room floors to people with a room key or persons with business to be there--a reasonable inexpensive preventative measure that works. Nonetheless, April was assaulted and has permanent psychological damage as a result of that beating.

The amendment I propose (Exhibit F) is language taken directly from the Doud case and it requires the court making the determination of duty based on prior conduct together with the totality of the circumstances. The Doud case never stated the judge does not make the determination as to duty any more. It stated the judge does make that ruling and makes that ruling considering the totality of the circumstances rather than the very narrow test of prior, similar misconduct. With that, I will respond to any questions anyone may have. I thank you for your attention."

Mr. Carpenter: "What is your interpretation of Section 4, lines 29-31?"

Mr. Cronin: "I have restricted my comments from the very beginning to the narrower portion of the bill that deals with the restriction of crime victims' access to the civil justice system in cases involving hotels and motels. I have not studied the bill with regard to punitive damage measures and did not come here to testify in opposition to the punitive damage measures. I understand there are others that are going to speak to that."

Amy Meedel: "I am Amy Meedel, state president of the National Organization for Women and we are here to testify in opposition of S.B. 474. I would like to introduce one of my officers who will provide testimony, Mary Sanada."

Mary Sanada: "First of all, I would like to say we are quite impressed with the amendments that have been suggested here compared to the testimony we heard on the floor of the Senate a week ago where apparently this bill was so good there was no need to process any of these types of amendments. However, we still have certain concerns about this bill. As Mr. Batten pointed out, the words in Section 4 saying that punitive damages are only going to be allowed when the

employer expressly authorizes or ratifies an act . . . the word 'expressly' seems a bit too strong and difficult to prove. There can be ways that employers can give tacit approval to what their employees are doing simply by not directing them and by ignoring the actions and there would be no way that a victim could prove that the employer had 'expressly' authorized the act and yet simply by not doing anything to correct the act, he is not 'expressly' authorizing it but he is giving tacit approval to it. The law has always recognized that an employee is an agent of his employer and that the employer is responsible for his acts. We are concerned with such language that narrows the time when an employer can be held liable. Employers have a duty to properly train and supervise their employees. If they do not do that, they can be authorizing those acts by neglect rather than by 'expressly' so we would like to see the language of 'expressly' removed from Section 4.

I would also like to talk about Section 8. I am very concerned about the language starting on page 3, line 4, 'a wrongful act is not foreseeable unless prior incidents of a similar wrongful act have occurred on the premises.' Now that is a pretty tough standard and I know there has been some amendment language but I ask, why do we need language in there that says they cannot be held liable unless it is not considered foreseeable unless there have been prior incidences. Instead of the word 'not' say that for purposes of this section a wrongful act is considered foreseeable when prior incidences of a similar wrongful act have occurred. I have a real objection to 'on the premises' as pointed out by the last witness. Under these standards, the Hilton could not have foreseen the attack on that woman. So I would like to see the language removed from the bill that requires those acts to have been commited on the premises of that particular hotel."

Chairman Humke stated the committee would now go to the witnesses in Las Vegas and a reallocation of the remaining time would be allocated pro rata. The testimony of Las Vegas witnesses has not been transcribed verbatim.

George Glanville, past president and assistant executive director of Families of Murder Victims stated S.B. 474 if passed, would allow employers to escape responsibility to provide safety and security to the citizens of Nevada and visitors to this state. Employers must be required to make reasonable efforts to prevent acts of violence against the citizens who frequent their establishment. When citizens enter a place of business such as a hotel or casino, they should expect no less protection by the management of this business.

Mr. Glanville stated it was his understanding the bill, if passed, will degrade security which is already, in his opinion, in bad shape. He concluded by urging the committee to vote no on S.B. 474.

Florence McClure, a 29-year resident of Las Vegas stated in 1973 she co-founded the rape crisis center and she has been active ever since. When the center was started, rapes were occurring in hotels and hospitals. Back then, the few lawyers in Las Vegas would not handle these types of cases. Ms. McClure stated finally a woman who was raped at a strip motel brought a lawsuit in Nevada but she brought her lawyer in from Chicago to handle the case because no lawyers would handle the case. Ms. McClure redirected her testimony to state her work history would indicate background checks are not performed. Ms. McClure went on to state the reason she wanted to speak on S.B. 474 was because the retroactive clause in the bill brought forth much anger on CNN broadcasting and the LA Times so Nevada is hurting itself by telling people we will not be watching out for you when you come to visit Nevada. Ms. McClure stated that was just not right and she would like to see the bill killed and we should beef up security and take care of the people who visit this state.

Bill Hornbrook testified he was a relative of a murder victim in Las Vegas. Mr. Hornbrook asked how can you limit the liability on life and how can a value be placed on life. Why can not the owners be held responsible for the well-being of their customers. If they were held responsible, more care would be taken. Mr. Hornbrook stated Las Vegas advertises to get persons to town and then neglect their safety in that the cameras are there to protect the casino's assets, not to protect the customers.

Eva Collenberger, Executive Director, Family of Murder Victims, testified although they are based in Clark County, they offer their services to out-of-state families who have had a family member murdered by visiting the Las Vegas area.

Ms. Collenberger stated they support every measure that would prevent murder and make life safer for visitors and residents of Nevada. Ms. Collenberger stated S.B. 474 does not support this effort and they therefore oppose the same. Ms. Collenberger said many murders could be labeled 'unforeseeable.' In 1994 eight murders were committed in different establishments in Clark County, including hotel casinos, restaurants, bars, hotel parking garages. This does not take into consideration the patrons that survived an attack at these same locations. She then read a letter from Linda Craffone, the wife of a murder victim, murdered in a

local casino while visiting from Michigan. Ms. Collenberger's prepared testimony and the letter are attached hereto as (Exhibit G).

Chairman Humke announced a reallocation of the remaining time pursuant to Mr. Anderson's calculations, announcing the opponents have 11 minutes remaining in testimony as desired. A show of hands indicated persons wishing to utilize that time. Chairman Humke noted no one in Las Vegas wished to testify further on the bill and recognized three persons wishing to testify further on the bill within the 11 minute time frame. The following testimony is again prepared verbatim at the request of the co-chairmen.

Joe Cronin: "My thanks to the committee for additional time. I have lodged with the secretary an article from the ATLA Advocate dated March, 1987 entitled, "Cases that made a Difference: I. The Key to Hotel Safety" [attached hereto as (Exhibit H)]. The lawyer Ms. McClure referred to was me although I had moved from Chicago to Minden by that time and that was the first inadequate security case I took. The significance of it is the technology of key card locks other than hardware locks was available although it was not widely being purchased by hotels and motels before that case. After the plaintiff was brutally raped and suffered irreparable permanent damage nothing happened for two or three years while that case pended. When the jury spoke and awarded her $750,000 in compensatory damages and $500,000 in punitive damages the hotel industry took notice and, according to the key manufacturers and their representatives in Las Vegas, within the six months following that verdict, not the crime, 15,000 to 20,000 hotel rooms in Las Vegas were up-graded to state of the art key technology and that is now the standard in the industry. All of that has had a change in the industry about ten years ago when plans were made in Las Vegas and now Reno a more family-oriented town. For 30+ years the Disney Corporation has been doing this and their security is a hallmark in the industry and they do it better than anybody else. If we are going to compete with them for those tourist dollars, we have to do it at least as well as they do. If that is the message that is sent from these hearings and the body as a whole then we will all be well served."

Diane Loper: "I am here to represent the Nevada Women's Lobby and we thank this committee for removing the retroactive clause. However, we have the same concerns voiced by Mary Sanada about the foreseeable acts on the premises and we feel Ken Braunstein has some very important points to make about the standard of totality of the circumstances and I think you should take his comments very seriously."

Ken Braunstein: "When I previously spoke I was going to give you some examples and I would like to do that now in response to what is 'similar' circumstances. I refer you to two cases, Maxi v. Summa Corporation, dba Frontier, filed November 30, 1987, wherein a woman was murdered on the 12th floor of the hotel. In its request for summary judgment, counsel for Frontier indicated that there had never before been a murder on the 12th floor therefore there was no foreseeability. This is a narrow view of what foreseeable and prior circumstances are.

Likewise, when a lawyer's Mercedes was stolen from the valet parking lot of a Las Vegas casino, the casino sought summary judgment by stating that a Mercedes had never been stolen from valet parking before. The suggestion that the definition be broad, is one that is extremely important you understand. The narrowness of these kinds of defenses are ludicrous and I use them for their degree of lack of common sense. The cases we read about in the paper are the common, ordinary ones but we do not often hear the details of the cases.

Two pending cases have facts that include things like this: as the husband is ripped from the car in the parking lot by two young thugs and kicked in the head into submission and his wife yells at the two armed security guards to assist, one of them replies 'we're here to protect property ma'am' and a second, as the woman is unconscious from drunkenness on the floor of a casino and the security guards are tending to her well-being, a man approaches and says, I'm sorry about the condition of my wife, would you assist me in returning her to our hotel room which the two security officers do. They carry her to the car, drive to the hotel and place her on the bed in the room. Unfortunately, after they left she was raped by the stranger who duped the security guards into taking the woman victim to the bed of the rapist. These are the kinds of cases that should inflame the public. These are the kinds of cases that should not be limited in how many dollars should be used to teach the industry that it needs correction sometimes.

Following Craigo, better security occurred throughout the state of Nevada. Following the case of Shoji v. Sands, a 1992 case filed in the federal district court of Hawaii, and the 1.25 million dollar judgment against the Sands, better security throughout the state was the result. If you limit the punitive damages the way the bill suggests, you will not find that security improves in the future, in fact, it will go backwards."

Mr. Goldwater: "Exclusive of this bill, the intent is to limit the civil liabilities for unforeseeable acts. In your opinion, do you feel this is a worthwhile intent under

our statutes. Is this something that needs to be done, exclusive of S.B. 474?"

Mr. Braunstein: "Yes I certainly do."

Chairman Humke asked the proponents if they wished to utilize the remaining 14 minutes. Mr. Whittemore and Mr. Vassiliadis, NRA, came forward.

Mr. Perkins: "As this issue developed in the other house of the Legislature, it became apparent that it would be a complex and difficult issue and one that would attract a lot of attention, thus complicating it further. As Speaker Dini stated earlier on another issue, we are here to make difficult decisions because anyone can make the easy ones. Our responsibility as legislators is to develop public policy that strikes a balance between the rights and interests of all parties and as we know so well, this is not always the easiest thing to do. I believe this bill, as amended today, strikes that balance. No one questions the importance of the gaming industry in this state and its importance to our economy. No one questions the need to make sure that tourists feel safe in coming to Nevada and staying in our hotels. No one questions the need to cut down on frivolous lawsuits plaguing our society today and no one questions the need to protect every individual's legal and constitutional rights.

I commend all the parties who have worked so hard on the language to strike this balance. In closing, Mr. Chairman, I would like to address an issue brought earlier that is about campaign contributions. The gaming industry is important to our state and it is entirely appropriate that that industry, like thousands of other credible industries in this state, be involved in campaigns via support in the form of contributions or other resources. I know that it was not the implication made, and I hope it is not the inference drawn that anyone on this committee, either democrat or republican, is acting unethically or otherwise without integrity regarding this or any other piece of legislation. Thank you Mr. Chairman."

Mr. Schneider: "I need some clarification for myself and for the record on 'similar.' Now, I felt real comfortable after Mr. Bradley gave his description of similar. Then we hear from a security expert and Mr. Cronin and Ms. Sanada. 'Similar', I guess to Mr. Cronin is a hotel 500 miles away in Lake Tahoe being compared to a hotel in Las Vegas. To me, that is not similar. They are not similar in the way they handle security. If we are going to do that, we could say a hotel in downtown Detroit is similar to a hotel in Las Vegas. I am really having problems with that. I was thinking about the Frontier Hotel in Las Vegas who has had pickets out there

and a history of some violence on that picket line and they have security out there 24-hours per day along with cameras and everything else. So, they have a history of violence and they have taken precautions. They are a low-end to a middle-range casino right across the street is the Desert Inn which is high-end casino and they do not have security so if something happens in their lot, to me that still is not similar because they do not have a history of that. Some of the testimony today would indicate that would be similar."

Mr. Whittemore: "In response to Assemblyman Schneider's comments, again the concerns he has expressed with respect to reading this too broadly I think are appropriate for inclusion in the record. If I might make the following point. The word 'similar' modifies 'wrongful acts.' It does not modify anything else and the comments made by Mr. Bradley that 'similar' not be read as 'identical' are those which I think should guide the committee in its deliberations with respect to the use of the term. When we crafted this language we used the term 'similar' for purposes associated with its common usage. That is, letting the judge decide whether in fact the particular wrongful act was similar to another wrongful act. We specifically chose not to use 'identical' but the comments about proximity between hotels I think the points you made are very important ones and I commend you for making them. Again, the bottom line is that what Mr. Bradley said with respect to 'similar' is that which we have agreed in terms of the legislative record that it is not to be turned on its head. Black is not white, white is not black, similar is not identical. The phrase we used was chosen very specifically to allow the judge to have some leeway to make the determination as to whether they were alike and that is the way the bill was drafted."

Mr. Carpenter: "After the passage of S.B. 474 as amended with your amendments, will the industry let down on their security efforts?"

Mr. Vassiliadis: "No, Mr. Carpenter as I stated before it would be terrible business. If people are getting hurt in our hotels and in our resort areas, then I got to come back, it is as simple as that. Right now, in Clark County and in Washoe County, there is extensive work being done in police departments with the District Attorney's offices, the hotels have linked among themselves with facsimile and other communication methods between security chiefs and they meet on a very regular basis. They meet with their respective chiefs of police on a very regular basis. They meet with prosecutors and inform each other of problems that may be occurring either in hotels on the streets. The police warn the industry or hotels whenever there are incidents or things to be concerned about. I believe Las Vegas

and Reno have been exemplary in their resort areas. You see what has happened in Florida and other areas. In fact, there have been national news stories on that and I think we have been fortunate to some extent but I also think we have been very diligent. Both the police departments and the security services that the casinos provide have had a lot to do with that. We are going to continue to do nothing but improve in those areas."

Mr. Whittemore: "I would just simply like to confirm for the record one more time. This bill has to do with two very important concepts. One, when punitive damages are awarded, the standard under which they are awarded and two, when employers are responsible for the conduct of employees and their own activities. Another piece of this is Section 8 which goes to premises liability but read as a total, the bottom line is the industry certainly is not going to change its behavior to make Nevada a less friendly or less safe place to come visit. It would be stupid business and it is not the policy of this industry to do things that are stupid. It is the policy to engage in very creative and meaningful ways to make this the preeminent resort state and area in the world, not anything less."

Mr. Carpenter: "I think that is very important and I want to get that on the record because most of the witnesses that I heard testify against this bill, that was their prime motivation. It would seem to me that the hammer is going to be on you now because you came here and testified to this and it is actually down in writing and there are some standards and they are going to be able to come at you if you don't live up to those standards."

Mr. Batten: "I still have a problem with that word, 'expressly' and I think it places too much of a burden on the victim. Also, when you turn to page three and limit the punitive damages, I tend to agree with the professor. Sometimes you can't lock somebody up and you can't go in their pocketbook . . . I think you can wake them up. I have a problem with those two areas in the bill. My other questions have been answered and I am pretty well satisfied. Just the word 'expressly' and I do not know what other word could be used but I would sure like to see some different language."

Ms. Buckley: "I wanted to make a comment on Mr. Batten's observation. I too examined the 'expressly' language at great length yesterday and I wanted to point out that 'expressly' on line 32 is just one option and you can also go to paragraph three which holds an employer liable if there is oppression, fraud, or malice, which are defined in Section 3 not to just be limited to 'express' circumstances but

'implied' as well. The 'expressly' on line 38 is not referring to the wrongful act they expressly authorized because that is not likely to happen. But it is referring to were they expressly responsible for the employee's conduct. I think I would agree with Mr. Batten if number two was all we had but because there are other standards set forth in the bill, I think it strikes a fair balance."

Upon Mr. Humke's request, Mr. Neilander went over the proposed amendments. There are no changes to Sections 1 or 2 of the bill. In Section 3 of the bill, it has been suggested at lines 13-14 the word "harmful" be substituted in place of the word "dangerous." Also, Sections 3 and 4 of the bill, NTLA has suggested the exclusion of bad faith by insurance companies. Mr. Neilander set forth particular language in that regard. Also, in Section 4, add the word "or" on line 31 although statutorily constructed it is probably already provided.

Mr. Neilander continued to Sections 5, 6, and 7 wherein no amendments were suggested therein. Section 9 includes an amendment to dealing with property brought onto the property by a patron adding language regarding "similar, wrongful acts", "due care", and prior knowledge. No amendments were proposed to Section 10. Section 11(a) would be deleted in its entirety regarding the retroactivity issue. Lastly there were amendments proposed by Mr. Cronin regarding Section 8 and from NOW to take out "express" on page two and clarify on page nine the term "premises."

ASSEMBLYMAN STEEL MOVED TO AMEND & DO PASS S.B. 474 AS SET FORTH BY MR. NEILANDER EXCEPT FOR THOSE AMENDMENTS PROPOSED BY MR. CRONIN AND THE NOW ORGANIZATION.

ASSEMBLYMAN BUCKLEY SECONDED THE MOTION.

Mr. Carpenter stated most of the testimony has centered around Las Vegas and Reno but in the "cow counties" there is a substantial gaming interest as well. He believes this bill will hopefully put people on the record of what their responsibilities are and it should go a long way to help statewide situations.

Mr. Goldwater stated his district, Assembly District 10, encompasses part of the strip in the Hilton area. He knows many persons who frequent the casinos in this area and he would never do anything to compromise their security and S.B. 474 does not in any way compromise that. He concluded he will be voting for the bill

because it is needed and does not compromise the security of the people.

Ms. Ohrenschall echoed Mr. Goldwater's concerns stating there is a casino in Assembly District 12 that caters primarily to senior citizens of Nevada and her concerns are similar in that she would not want to compromise the safety of those persons or other visitors to the state.

Mr. Manendo concurred that in Assembly District 18, the casinos cater to locals, especially senior citizens, and he believes the bill does not sacrifice their safety. He commended both parties for working out this bill as the casino industry is so vital to our state.

Chairman Humke brought the motion back to the floor for a vote adding the amendments to the bill would be brought to the committee for their final approval prior to bringing the bill to the Assembly Floor.

THE MOTION CARRIED UNANIMOUSLY.

SENATE BILL 399 - **Clarifies term "gross revenue" for purposes of gaming statutes.**

Bob Faiss, Esq., Lionel, Sawyer & Collins, counsel for the Nevada Resort Association (NRA) stated their panel was present today as introduced by Harvey Whittemore under S.B. 474. Briefly, Mr. Faiss reflected on Mr. Anderson's comments on the peculiar nature of the state of Nevada and gaming and commented further on the history of gaming in the state. Today, approximately 20 other states have discovered gaming should be accorded equal status in the business community to be utilized as economic development. However, those states and others in the industry have determined Nevada has the best form of gaming control. Mr. Faiss' prepared testimony is attached hereto as (Exhibit I). The law maintained in Nevada pertaining to gaming is comprehensive and tough and many states are modeling their standards in the same fashion. He concluded S.B. 399 would affirm that a gaming licensee must pay a gross revenue license fee when winning cash. That is legislative policy consistently upheld by the Legislature over the past 50 years.

Marc Rubinstein, Vice President General Counsel, Caesars Palace, stated S.B. 399 is intended to clarify existing law to insure gaming licensees do not pay a license fee in specific circumstances where they have not received cash as winnings.

MADD

Mothers Against Drunk Driving

P.O. Box 1354 • Dayton, Nevada 89403 • (702) 246-7522 • FAX (702) 246-3687 • TAX ID #: EIN-94-270-7273
Lyon County Chapter

June 7, 1995

To: Chairmen Anderson and Humke and Members of the Assembly Judiciary Committee:

Re: Senate Bill 474 decreases crime victims' rights and remedies--MADD opposes

Dear Chairmen and Committee Members:

As I may be unable to attend the hearing for S.B. 474 when scheduled, please enter this letter into the record and review it before a vote on this bill. My position as a volunteer with Mothers Against Drunk Driving for the last nearly five years has been that of victim advocate. I work closely with DUI victims and their families, helping them to deal with the many changes in their lives and hopefully to assist them toward recovery. Recovery takes many forms -- financial, physical, emotional, etc. This can be a lengthy, costly process.

S.B. 474 would seriously hamper victims' ability to obtain justice in civil court. This bill effectively removes legal responsibility for those who fail to prevent crimes against innocent victims. The removal of paths to civil liability also removes a powerful incentive for businesses to do the "right" thing, by keeping their patrons and guests safe through crime prevention. A breach of duty currently may result in civil damages being awarded to victims they have a duty to protect. Please help keep public safety and civil liability for those who breach their duty in place.

This week, a hearing was held in Senate Judiciary on S.B. 498, which would hold negligent alcohol servers civilly liable for injuries or damages caused by intoxicated persons whom they had negligently served. After the hearing, Senator James was quoted as stating that the bill appeared to be a 'convenient means for finding a deep pocket'. This insensitive remark causes me great concern about the focus of the legislature during the next few weeks. To date, I have been very pleased with this committee's support for victim's issues, as evidenced by amendments to bills you have supported in the area of victim notification. I am concerned however, that even though this committee has demonstrated much empathy for the plight of victims, perhaps as the session draws to a close empathy may give way to insensitivity toward victims of crime and "fast-tracking" or expediency to process bills quickly may confuse and cloud issues that are genuine.

Vote "NO" on S.B. 474.

Yours truly,

Judy Jacoboni

Judy Jacoboni, President
MADD, Lyon County Chapter

EXHIBIT E

National Victim Center

...nd resource center
...in honor of Sunny Von Bulow

2111 Wilson Boulevard
Suite 30
Arlington, VA 2220
Tel. 703 / 276 288
Fax 703 / 276 288

Dear Representative:

June 1, 1995

The Board of Directors and staff of the National Victim Center would like to express our grave concerns about S.B. 474 currently under consideration by the Nevada Assembly. If passed, this measure would not only insulate parties responsible for injuries and wrongful death of victims of violent crime from civil liability, it would make Nevada a more dangerous place to live and visit. Furthermore, this legislation would set a bad precedent for the nation and puts Nevada at risk of being labeled an opponent of crime victims' rights and remedies.

The National Victim Center is a non-profit organization that works with more than 8,000 victim and law enforcement agencies, and legal experts nationwide. The Center has assisted thousands of victims whose lives have been shattered -- physically, emotionally and financially -- by violence. The Center has advocated for their rights in the criminal justice system and assisted them in seeking restorative justice in the civil court system.

Damages for victims through civil justice are most appropriate because these cases involve maliciousness as well as negligence. Literally millions of Americans and hundreds of thousands of Nevada citizens have fallen prey to violent criminals. These victims suffer from more than just the original act of violence. All too often, they are left with expenses for medical procedures, physical rehabilitation and psychological counseling, not to mention lost wages and impaired earning ability. In a very real sense, compensation becomes a prerequisite for recovery for many crime victims.

No plaintiffs are more deserving of full compensation than victims of intentional acts of violence. More than 11 million violent crimes are committed each year. Yet only a very small percentage of crime victims ever file civil suits. Such statistics argue in favor of new laws which encourage *even more* suits by crime victims, *not fewer*.

The current version of S.B. 474 will adversely affect crime victims' abilities to obtain restorative justice. The Center is deeply concerned that this measure will have a tremendous "chilling effect" on victim-plaintiffs, despite the fact that their cases are among the most meritorious. S.B. 474 seriously sabotages incentives for businesses to engage in simple measures to prevent crime. For example, security guards on college campuses, card key locks and peepholes on hotel room doors and security lighting at highway rest stops all make our lives safer, and all were the direct result of litigation by crime victims. The Center tracks thousands of these safety-related cases every year. Removing the legal responsibility of those who have enabled criminal perpetrators to commit acts of violence against innocent victims is not only manifestly unfair, but would seriously hamstring efforts to prevent crime.

Yet, it is not just individual victims who have a stake in the outcome of the current debate over S.B. 474. Statistics indicate that five of six Nevada citizens will be victims of violent crime at least once in their lifetime. Therefore, virtually all Nevada residents have a stake in opposing passage of this bill. For thousands of crime victims, our civil justice system represents their only road to recovery and their only hope for justice.

Sincerely,

David Beatty
Director of Public Policy

Law Offices of
Joseph I. Cronin

P.O. Box 335
Minden, Nevada 89423
(702) 782-8171

Carson City or Reno
(702) 885-8260
Fax (702) 782-7018

June 9, 1995

Assemblyman Michael A. Schneider
Legislative Building
Capitol Complex
Carson City, NV 89710

RE: S.B. 474

Dear Assemblyman Schneider:

I again write to you in opposition to Senate Bill 474.

I urge you to vote "no" on SB 474.

If a form of the bill must be reported to the floor of the Assembly, then I urge you to adopt the amendments I propose.

That which is reported out of this Committee and acted upon by the full body of this Legislature is being watched by millions. The very life-blood of our economy are our conventions, meetings, shows, and tourism. Among the organizations following this bill very carefully are:

Professional Convention Managers Association
Birmingham, AL

American Society of Association Executives
Washington, D.C.

Meetings Planners International
Dallas, TX

Trade papers read regularly by professional meeting planners and convention executives, which are following the actions of this Legislature carefully are:

Meetings & Conventions Magazine
Convene Magazine
Meetings News
Hospitality Law Newsletter
Premises Liability Report

EXHIBIT F

What message will this body send to the world? You may say to all of those who would come to our fair State to recreate that we are committed to the safety of our visitors while they are with us or we may say, "Welcome to Las Vegas, stay at your own risk." The message that will be sent is literally in your hands.

Crime victims must not be brutalized again by being locked out of the civil justice system. Such a policy is unjust and bad politics. Please read the following carefully:

> **Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.**

What you have just read is the position of the Nevada Supreme Court with respect to hotels, innkeepers, landowners and other occupiers' responsibility to their guests while on the premises. The Nevada Supreme Court's present position is identical to the present position of a majority of states in this country. It is a measured position. It imposes no liability upon the landowner, hotel or otherwise, absent a duty. Furthermore, the duty to protect arises only where there is actual foreseeability.

The Judiciary Committee of this Assembly has the opportunity before it today to codify this position. Such an action would make Nevada a state that welcomes its guests and promises to its visitors that the innkeepers of this State will take such steps as are necessary to provide adequate security to protect these visitors from the foreseeable risk of harm caused by the criminal misconduct of others.

The Nevada Resort Association urges you to adopt language which would codify the "prior similar acts" rule, which would have the effect of foreclosing virtually every crime victim's lawsuit against a hotel or innkeeper where the hotel or innkeeper is guilty of negligence which proximately caused the death or injury to the guest. The "prior similar acts" rule has been abandoned in all but two or three states and was never

adopted by our Supreme Court, although various hotels have urged its adoption before our high court. (See Exhibit A, which is a paper briefly and succinctly describing the difference between the "totality of the circumstances" and "prior similar incidents" as the test of foreseeability.)

In meetings with members of this Committee, I am told that the retroactive application of SB 474, as sent to you from the Senate, will not be adopted and that this bill will apply only prospectively and have application to actions filed on or after the date of enactment. I commend this committee for taking this firm stand against such an injustice and will say nothing further with regard to this aspect of the bill.

I sincerely believe that this body will act in such a manner as to preserve justice and ensure continued access to the civil justice for our citizens and others who visit our state.

Sincerely,

Joseph J. Cronin, Esq.

JIC:taw
Enclosure

DEATH OF THE PRIOR SIMILAR INCIDENTS RULE IN INADEQUATE SECURITY LITIGATION

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I. INTRODUCTION

In the context of protecting individuals from criminal assaults, a growing area of tort law has involved hotels, apartment complexes, shopping malls, parking ramps, and other public premises. Although the premises owner is not an insurer of an invitee's safety, the law recognizes the obligation of the premises owner to take reasonable steps to protect invitees from criminal assaults. A failure to provide adequate security can render a premises owner liable to an invitee for damages when the invitee is criminally assaulted by a third party, if the assault could have been prevented or deterred by adequate security precautions.

II. EARLY CASES

In the development of inadequate security case law, the courts created a limitation on a premise owner's duty to provide adequate security based on the concept of foreseeability. These early cases stood for the proposition that a premises owner had a duty to take reasonable steps to protect invitees only from harm -- including harm of criminal assault -- that was "foreseeable." *See, e.g.*, Genovay v. Fox, 15 N.J. Super. 538, 143 A.2d 229 (1958); Comprobst v. Sloan, 528 S.W.2d 188 (Tenn. 1975); Shipes v. Piggly Wiggly St. Andrew's, Inc., 369 S.C. 479, 239 S.E.2d 167 (1977). The touchstone of foreseeability, in the earlier cases, was whether there had been prior similar incidents. Id. Without actual experience of at least one prior similar incident, early cases held that a particular type of incident was simply not foreseeable as a matter of law, and therefore, no duty arose. Thus, it was not uncommon for defendants to obtain summary judgment when a plaintiff was unable to uncover evidence of prior similar incidents.

III. PRIOR SIMILAR INCIDENTS RULE

For a variety of reasons, the "prior similar incidents rule," and its harsh impact on plaintiffs, has received widespread criticism. In recent years, in every corner of the country, its death bell has rung. As the Supreme Court of Idaho noted recently, "[t]he solid and growing national trend has been toward the rejection of the 'prior similar incidents rule.'" Sharp v. W.H. Moore, Inc., 118 Idaho 297, 796 P.2d 506, 510 (1990).

One of the most thorough analyses of the prior similar incidents rule came from the California case of Isaacs v. Huntington Memorial Hospital, 695 P.2d 653 (Cal. 1985), perhaps the most heavily cited and quoted case addressing the issue.

Numerous courts throughout the country have followed Isaacs and many have gone on to find additional reasons for severe criticism of the prior similar incidents rule. *See e.g.*, Moody v. Cawdrey & Assoc., Inc., 721 P.2d 708 (Haw. App. 1986), rev'd on other grounds, 721 P.2d 707 (Haw. 1986) (no duty owed to non-guests); Patterson v. Deeb, 472 So.2d 1210 (Fla. Dist. Ct. App. 1985); Brock v. Watts Realty Co., Inc., 582 So.2d 538 (Ala. 1991); Small v. McKennan Hospital, 437 N.W.2d 194, 201 (S.D. 1987), citations omitted; Garner v. McGinty, 771 S.W.2d 242 (Tex. Ct. App. 1989); Reitz v. May Co. Dept. Stores, 583 N.E.2d 1071 (Ohio Ct. App. 1990).

The list of state and federal cases that have similarly rejected the prior similar incidents rule is long and growing. *See, e.g.*, Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 160-61 (4th Cir. 1988); MacQuarrie v. Howard Johnson Co., 877 F.2d 126, 130 (1st Cir. 1989); Van Blargen v. Williams Hospitality Corp., 759 F. Supp. 940, 943 (D.P.R. 1991); Antrum v. Church's Fried Chicken, Inc., 499 A.2d 807, 810 (Conn. Super. Ct. 1985); Shea v. Preservation Chicago, Inc., 565 N.E.2d 20, 24-25 (Ill. App. Ct. 1991); Rowe v. State Bank of Lombard, 531 N.E.2d 1358, 1369 (Ill. 1988); Aaron v. Havens, 758 S.W.2d 446, 447-48 (Mo. 1988); Dick v. Great South Bay Co., 436 N.Y.S.2d. 240, 242 (N.Y. Civ. Ct. 1981), modified as to damage award, 442 N.Y.S.2d 348 (N.Y. Sup. Ct. 1981); Virginia D. v. Medesco Inv. Corp., 648 S.W.2d 881, 887 (Mo. 1983); Jardel Co., Inc. v. Hughes, 523 A.2d 518, 525 (Del. 1987); Trentacost v. Brussel, 412 A.2d 436, 440 (N.J. 1980); Graham v. M&J Corp., 424 A.2d 103, 105 (D.C. 1980); Murphy v. Penn Fruit Co., 418 A.2d 480, 483-84, (Pa. Super. Ct. 1980); Roettger v. United Hospitals, 380 N.W.2d 856, 860 (Minn. Ct. App. 1986). *See also* Torres v. U.S. Nat. Bank, 670 P.2d 230, 235 (Or. App. 1983); Murrow v. Daniels, 355 S.E.2d 204, 207-209 (N.C. App. 1987); Sawyer v. Carter, 322 S.E.2d 813, 816-817 (N.C. App. 1984); Peters v. Holiday Inns., Inc., 278 N.W.2d 208, 212 (Wis. 1979 ; Mitchell v. Pearson Ent., 697 P.2d 240, 243 (Utah 1985); Kvergas v. Scottish Inns, Inc., 733 F.2d 409, 412-413 (6th Cir. 1984); Meyers v. Ramada Hotel Operating Co., Inc., 833 F.2d 1521, 1523 (11th Cir. 1987); Willie v. America Casualty Co., 547 So.2d 1075, 1082-83 (La. App. 1989); Taco Bell, Inc. v. Lannon, 744 P.2d 43, 48-49 (Colo. 1987).

In stark contrast to the overwhelming number of jurisdictions that have expressly and eloquently discarded the prior similar incidents rule, it appears that only a handful of states still cling to any vestige of it. In Wright v. Webb, 362 S.E.2d 919 (Va. 1987), the court ruled that evidence of crimes against property does not create a duty for a business invitor to guard against assaults against the person, "offenses involving a substantially different kind of criminal behavior." Id. The court expressly rejected Isaacs and other similar cases. *See also* Tolbert v. Captain Joe's Seafood, Inc., 170 Ga. App. 26, 316 S.E. 2d 11 (1984) (single incident of property crime does not create issue of foreseeability of rape); Daniel v. Days Inn of America, Inc., 356 S.E.2d 129, 134 (S.C. App. 1987) (Goolsby, J., dissenting); Royal v. Days Inns of America, Inc., 708 S.W.2d 411, 414 (Tenn. App. 1985).

IV. CONCLUSION

It is clear that the overwhelming trend of American jurisprudence has been to reject the "prior similar incidents rule" in favor of a "totality of the circumstances" test in inadequate security litigation. The widespread and well-reasoned rejection of the prior similar incidents rule demonstrates that, excepting all but the tiniest minority of jurisdictions, the "prior similar incidents rule" is dead and relegated to the dust bins of tort history.

PROPOSED AMENDMENTS TO
SENATE BILL 474

1. To Section 8, paragraph 2 delete [the court shall determine as a matter of law whether the owner or keeper had a duty to take reasonable precautions against foreseeable wrongful act of the person causing the death or injury. For the purposes of this section, a wrongful act is not foreseeable unless prior incidents of similar wrongful acts occurred on the premises and the owner or keeper had notice or knowledge of those incidents.] Substitute **upon any motion to dismiss or for summary judgment where the court determines as a matter of law whether the owner or keeper had a duty to take reasonable precautions against a foreseeable wrongful act of the person causing the death or injury, a wrongful act will be deemed foreseeable where, under the totality of the circumstances in existence at the time of the occurrence, the owner or keeper had reasonable cause to anticipate such acts and the probability of injury resulting therefrom.**

2. To Section 11, subsection 1(a) delete as written. Substitute therefor **filed on or after the effective date of this act.**

Submitted by: Joseph I. Cronin, Esq., a solo practitioner in Minden, Nevada, who has represented victims of violent crime for twelve years.

NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE®

1757 Park Road, N.W.
Washington, D.C. 20010
(202) 232-6682 Fax: 462-2255

June 8, 1995

The Honorable David E. Humke
Co-Chair
Committee on Judiciary
Nevada State Assembly
Legislative Building
Capitol Complex
Carson City, Nevada 89710

The Honorable Bernie Anderson
Co-Chair
Committee on Judiciary
Nevada State Assembly
Legislative Building
Capitol Complex
Carson City, Nevada 89710

Dear Assemblymen Humke and Anderson,

I write to express our distress at the provisions of S.B. 474, which I understand will soon be considered by your committee.

Reducing the level of civil accountability that businesses owe to their victimized patrons seems, on its face, a regressive policy. Then, exempting a particular kind of business from the same accountability to crime victims that others have traditionally shouldered — and will continue to shoulder — seems, on its face, inequitable. Finally, making such a policy change retroactive, for the benefit of one negligent company, seems unconscionable.

That is how we read the proposal now before you. That it is being considered at all by the Nevada legislature has, for me, a ring of sad irony.

For the very first project the National Organization for Victim Assistance performed for the U. Department of Justice brought us to Las Vegas in 1980. There, thanks to the help of District Attorney Bob Miller, we conducted a seminar designed to bring victim issues to the business community. Much of the discussion by the participants (who were, naturally, largely from the hotel industry) turned on how to prevent victimization of their staff and patrons, and how to respond appropriately to those who fell victim to crime. None of those positive and stimulating discussions touched on ways to escape or lessen their responsibilities when their negligence helped cause the victimization of others.

That is the picture of Nevada's hotel industry I prefer to recall — and, with your help, it will remain my more lasting impression.

Sincerely,

Marlene

Marlene A. Young, Ph.D., J.D.
Executive Director

cc: Members of the Assembly
The Honorable Bob Miller

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Submitted by: Joseph I. Cronin, Esq., a solo practitioner in Minden, Nevada, who has represented victims of violent crime for twelve years.

FAMILIES OF MURDER VICTIMS

2375 E. Tropicana Ave.
Suite 213
Las Vegas. Nevada 89119
(702)564-5919 / 566-0295 / 565-8693
FAX (702)564-1941

June 9, 1995

Mr. Chairman, Committee Members,

My name is Eva Collenberger, I am the executive director of Families of Murder Victims. Our organization is based in Clark County, Nevada, but we offer our services also to out of state families who had a family member murdered while visiting the Las Vegas area. Although our main function is to provide support to those who suffer the devastating after effects of homicide, we support every measure that could prevent murder and would make life safer for Nevada residents as well as visitors. Several bills, which were passed during this legislative session have been directed at the reduction and prevention of violent crime. Unfortunately, SB 474 does not seem to support this effort, and we urge you to vote no on this bill.

During 1994, 8 murders were committed in different establishments in Clark County, including hotel/casinos, restaurant/bars, a hotel parking garage, a hotel RV park. The common motive was robbery. I was not able, during the limited time available, to obtain information on how many hotel patrons were victims who survived robberies, assaults, or murder attempts. I was able, however, to receive information from CAAR, the local Rape Crisis Center, that they had been contacted by 34 victims, who had been sexually assaulted in local hotels during 1994. These numbers clearly show, that **more** security is needed to ensure the safety of visitors to our town - visitors on whom the economy of our state depends. If the legislature allows for less responsibility by owners of hotels and other establishments, it does not seem likely that protective measures will be improved and increased. This would defeat the goal of crime reduction at a time, when the fight against crime is the primary concern of the voters.

With your permission, I would like to conclude by reading a letter by Linda Ciaffone, whose husband was murdered in a local casino while visiting here from his home state of Michigan in October 1992.

Thank you for the opportunity to speak before this committee.

Eva M. Collenberger

EXHIBIT G

As a victim and an eye witness to a senseless, vicious murder, inside a Nevada casino, I feel my words should be heard at this hearing.

My husband, Joseph Caffone, was shot in the head, while sitting at a nickel video poker machine, inside the Skyline Casino, Henderson, Nevada. He were tourists, looking for retirement property, in a comfortable community.

My husband's murderer was allowed to walk through a parking lot with a gun and holster on, in full view, enter a casino, and shoot a patron. After exiting the casino, a family member had to capture him. A total lack of security!

Who is responsible for such an act? Through 2 1/2 years of investigations, I have found that the most concentrated security is on monies and cheating. The patron's safety and well being is secondary

not at the bottom of a long list.

If you allow the non-responsibility of casinos, of actions taken on their premises, crime will multiply because of the attitude "we can't help it or foresee it happening." Human life, patron security and total safety is the responsibility of owners and operators of casinos. They must be held liable.

No amount of compensation can bring my husband back to his family. He will suffer endlessly but taking away compensation and responsibility from proprietors will only allow a lack of making establishments safer.

Linda Cafone