

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

Judiciary Committee
January 30, 2009

[LB79 LB156 LB216]

The Committee on Judiciary met at 1:30 p.m. on Friday, January 30, 2009, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB156, LB79, and LB216. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Brenda Council; Scott Lautenbaugh; Amanda McGill; and Kent Rogert. Senators absent: None. [LB79]

SENATOR ASHFORD: Good afternoon, everyone. I think we'll get started. Welcome, Senator Kruse. Glad to have you here. We miss you. You know that though. Welcome to the Ernie Chambers Judiciary Hearing Room. I'd like to introduce my colleagues: Senator Coash from Lincoln; I'll go this way, Senator Rogert from north... []

SENATOR ROGERT: Tekamah. []

SENATOR ASHFORD: (Laugh) I'm just kidding you. Well, actually it's hard to find you in Tekamah, but I know you're there. (Laughter) No, I mean, you do go there. Senator Christensen from Imperial; Steve Lathrop from Ralston; Senator McGill from Lincoln; Senator Council from Omaha; Senator Lautenbaugh from Blair and northwest Omaha; Christina Case is the committee clerk; and Stacey Trout is the legal counsel for the committee. We have three bills today, LB79 introduced by Senator Pirsch. Is that right? Yeah. LB216 introduced by Senator Wallman, and LB156 introduced by Senator Lautenbaugh. But Senator Pirsch isn't here just quite yet, so...have we sent out an all points alarm for Senator Pirsch? (Laughter) Are your people here? []

SENATOR LAUTENBAUGH: In all fairness, I know some people who wanted to speak against this aren't here yet. []

SENATOR ASHFORD: Okay, okay, because if you didn't have any...a lot of people, we could do that. []

SENATOR LATHROP: Against which bill is that, Senator? (Laughter) Did you call (inaudible)? []

SENATOR LAUTENBAUGH: I believe it's the one that's making your brother drive so far this afternoon. []

SENATOR LATHROP: He's been forbidden to testify in any committee I'm serving on. []

SENATOR ASHFORD: Let me see, change when a county attorney files a...how many are here on LB79? You know, we could move right on pretty happily right here. []

SENATOR LATHROP: Well, we do have people here on the police chase and on the

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

Judiciary Committee
January 30, 2009

guest statute if you want to just take those. []

SENATOR ASHFORD: We do, but we don't have Senator Wallman. Unless somebody else wants to...that wouldn't be kosher. Let's go with yours, Scott, let's go with your bill. []

SENATOR LAUTENBAUGH: Good afternoon, Mr. Chairman, members of the body or committee, I should say. I'm here on LB156. My name is Scott Lautenbaugh. I introduced this bill. I'm looking at my own talking points, at my first talking point here says that this was brought at the request of the city of Omaha. That's not technically correct. This is a bill that I approached the city of Omaha about bringing. I did not understand the basis or the reason for us differing from the other 49 states as I understand it and having strict liability for police chases and I was a volunteer. So I'm sure the city appreciated me bringing this bill. I went to them and told them I was bringing it. It's very simple to follow the change. It basically eliminates strict liability. It is not designed to say that you cannot recover from the city of Omaha if you suffer damages or injuries from a police chase. It just restores the standard of having to show actual negligence to do so. Currently, I believe, Nebraska is the only state in the Union that holds the city strictly liable for such injuries to third parties in by-the-book police pursuits. There are individuals here who are more knowledgeable in this area. I've never been involved in a police pursuit, happily, and I've never been involved in litigation that followed one either. So I believe I'm being followed by the deputy city attorney Tom Mumgaard and Omaha deputy police chief Mark Sundermeier, as well as Jack Cheloha, I believe, from the city of Omaha. But I'd be happy to take any of your questions you might have on this. [LB156]

SENATOR ASHFORD: Any questions of Senator Lautenbaugh? Yes, Senator Council. [LB156]

SENATOR COUNCIL: Senator, what...in terms of the concern with the strict liability, aside from the fact that Nebraska may be one of the only states in the Union that provides for strict liability, what is it about providing that innocent third parties recover regardless of whether there's negligence or not when they've been injured as a result of a high-speed chase? [LB156]

SENATOR LAUTENBAUGH: From my perspective it's just a philosophical thing that we're requiring the taxpayers to cover it no matter what. And I just believe that there should be a showing that the city somehow when the city is fulfilling its duty, in this case law enforcement, and they have not done so negligently, we're requiring the taxpayers to bear the burden of that without anymore showing that there was somehow an improper pursuit or not a proper pursuit on the part of the city and negligence was involved. [LB156]

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

Judiciary Committee
January 30, 2009

SENATOR COUNCIL: So what is the recourse for the injured third party? [LB156]

SENATOR LAUTENBAUGH: You could still pursue the city, but you would have to show that there was some negligence in the pursuit. You could still pursue the third party, of course, no matter what. You can still pursue the governmental entity, I should say, but there would just be a showing of negligence as opposed to now just a showing of damages. [LB156]

SENATOR COUNCIL: Okay. And in terms of negligence, have you conducted any research to give the committee and members of the public any example in these other jurisdictions what's considered negligence? [LB156]

SENATOR LAUTENBAUGH: I'm probably going to have to defer to the witnesses that follow me on this. I personally don't have any. It would just be the normal standard. I can imagine a variety of scenarios where you would show police violated their own procedures, they were chasing someone for shoplifting in a high-speed chase, which you know is lack of proportionality, I mean something like that to show that there was actually a reason to hold the city liable or the governmental entity liable on that occasion. [LB156]

SENATOR COUNCIL: Okay. [LB156]

SENATOR ASHFORD: And I'm not going to ask a lot of questions, Scott, because I know we do have experts back here and Tom Mumgaard is one of them and Mark, but. And that's really the question--is it negligence to chase somebody for a shoplifting charge, and that is the question in my mind. And we had a chase through my neighborhood on 80th and Pacific three or four weeks ago. It was a chase of...right down my street. There are no sidewalks on the street, you know, it's just...they were chasing someone who had stolen a car and had been a potential witness in a homicide, I believe, is how it came down. So there was a very high 90 miles an hour on 80th Street where everybody's walking down the street with their dogs and, you know, there's a sharp curve. And at about a couple blocks from Shirley Street where I live and, you know, it's literally an L curve and they're going 90 miles an hour, the perpetrator or whatever and three or four police officers, you know, obviously I'm sure believing fully they're doing their job, going 90 miles an hour in that L-shaped and these cars are flying all over the place and there are people walking all over and it's just...I don't know if there's negligence there or not, but all I know is by the grace of God nobody was injured. I worry that that was...that's certainly a serious issue to snag a car or whatever, but how do you balance that against if somebody in the neighborhood had been, my son who's 11, playing basketball. You know, and we all have those issues. But we all have stories like that, but I'm telling you, it does give me pause. And that just kind of gives you my thoughts on it, but I appreciate your bringing the bill. Any other questions of Senator Lautenbaugh? Thanks, Scott. [LB156]

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

Judiciary Committee
January 30, 2009

SENATOR LAUTENBAUGH: Thank you. [LB156]

SENATOR ASHFORD: Tom, welcome. [LB156]

THOMAS MUMGAARD: (Exhibit 1) Thank you. Good afternoon. Chairman and members of the committee, my name is Tom Mumgaard. I'm the deputy city attorney for the city of Omaha. I'm one of the attorneys for Omaha who defends litigation arising out of police pursuits, and I probably have dealt with this statute and have more experience with police litigation than any lawyer in the state. I don't say that with pride, because that means I've lost more of these cases than any lawyer in the state. I speak today in favor of LB156. This pursuit law was first passed in 1981, and despite the opposition of many law enforcement agencies over that time, its basic concept has continued since then. The statute, as has been said, is unique in that it imposes strict liability and damages for injuries to a third party regardless of the wisdom or reasonableness of the pursuit. And under the previously existing common law, reasonableness was really the test of liability. Under this statute, reasonableness, carefulness, wisdom are not relevant. We don't litigate that. This statute has made pursuits a very expensive tool of law enforcement. Starting in the early 1990s, this statute has resulted in significant economic losses to the city of Omaha. I've passed out a summary that shows you that over that past 16 years, the city of Omaha has paid over \$10 million in judgments and settlements as a direct result of this statute, averaging about \$620,000 per year of taxpayer money. At any given time, there is about a million dollars in pursuit-related claims pending against the city of Omaha. We've seen that the public demands that pursuits be a tool available to police. You are not going to get rid of police pursuits. It is a tool that will be there forever. But this statute makes it an expensive tool. We suggest that any statute that imposes this significant of a cost on the taxpayers should be examined closely, regularly, and should be kept only as long as it is needed. We say this statute is no longer needed. In looking at the history of the statute, two goals seem to appear, (1) an attempt to force police to eliminate or minimize pursuits because they're expensive, and (2) to take care of people who happen to be at the wrong place at the wrong time and are injured by someone fleeing from police. I suggested these goals have, at least in the city of Omaha, been achieved over the last 27 years or they can be achieved in a more equitable manner. Despite having this statute in place for 27 years, Nebraska continues to be the only state in the nation that imposes strict liability for pursuits. If we are a leader in the field, nobody is following us. And I think that we should examine that and wonder why. Most states use the negligence standard. A few states either grant immunity from liability or require a gross negligence standard. Nebraska clearly requires payments by the taxpayers in many circumstances when no other state in the nation would require payment. I suggest that the goal of improving and minimizing pursuits, at least in Omaha, has been achieved, and deputy chief Sundermeier will testify later and explain how that has happened. The decreased number of pursuits and a slight decrease in the yearly average of what we pay out you

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

Judiciary Committee
January 30, 2009

can see. I suggest the goal of preventing unwise pursuits should be more effectively achieved by a statute such as 29-211 which mandates pursuit policies. That's the better way to improve pursuit activity by requiring law enforcement to follow the best practices, and then extending protections when they do. This statute singles out pursuits as a... [LB156]

SENATOR ASHFORD: Mark, I'm going ask you to...or Tom. Sorry, I was looking at Mark back there. Tom, would you just summarize because you'll get questions, so you can... [LB156]

THOMAS MUMGAARD: I will. This statute, it singles out pursuits as a unique tool of law enforcement when it really isn't. It's no different than a police officer who uses force in any other incidence in Nebraska law, and that instance tests the liability under the reasonableness standard. Why we choose to impose a standard of liability for pursuits that is different for when a police officer shoots at somebody I can't fathom. The second goal of taking care of people is a social... [LB156]

SENATOR ASHFORD: Tom, I'm going to ask you to stop. Do we have any questions of Tom? Senator Council. [LB156]

SENATOR COUNCIL: Tom, before my question, normally if an officer is shooting at someone it's generally a criminal involved. Here we're talking about innocent third parties. Of the number of claims that you have listed from 1993 to 2008, the 16-year total, are you representing to the committee that in each one of these cases there would have never been a determination of negligence involved? [LB156]

THOMAS MUMGAARD: No, I can't say that, and I think your questions earlier about negligence are appropriate. I have litigated cases, principally back in the mid to late nineties where the...brought under the statute, both brought under the statute and under negligence, and the judge found negligence. So we do have examples that we could point to where obviously police officers are human beings and they make mistakes. And so people could still recover under negligence theory if this statute wasn't existing. I estimate that that would probably be about at 10 percent. We would cut the cost about 90 percent, 85 to 90 percent, and that's just based upon my experience of how we've done with negligence. [LB156]

SENATOR COUNCIL: Okay. And with regard to the statement you made about the officers and negligence, in terms of the officers under a strict liability standard, they're not placed in the position of being identified as "being at fault" in terms of if you're trying a case involving negligence, there can ultimately be a determination that officer A and/or officers A and B were negligent, which is, you know, an indication of fault. Strict liability doesn't expose those officers to that kind of scrutiny in terms of whether they're responsible or not for having caused whatever injury. Isn't that correct? [LB156]

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

Judiciary Committee
January 30, 2009

THOMAS MUMGAARD: Well, that's accurate, but I would point out that there seems to be in my experience another spin-off of the strict liability that works a little bit differently. While the officer himself is not being examined in his conduct, because of my litigation, I've had the opportunity to take depositions of probably about 10 to 12 people who fled from police and a collision occurred, so we were examining why they were fleeing from police, etcetera. Many, if not all of them, have expressed the idea it wasn't their fault, that it was the fault of the police for chasing them, police weren't supposed to chase. The 27 years of this statute and the awareness that it has given to pursuits has given that perception in the communities among the criminals, among the people who want to flee from police, the idea that, well, if you have strict liability and you're not judging whether police did it right or wrong, they must have always done it wrong. That's a message that kind of has an unintended consequence, I'm sure of the statute, but in my experience it is there. I don't think that offsets police officers. A police officer should be accountable for his action. If he's...you know, I would find nothing wrong with the law as it does in many, many other instances, judging the police officer's actions, whether he did it right or wrong. The shooting example would be one. Certainly if a police officer has a reason to shoot at somebody, yeah, there's a criminal involved, but keep in mind there's always a criminal involved in the pursuit situation also. [LB156]

SENATOR ASHFORD: Thanks, Tom. We're going to just try to just...go ahead, Senator Council. [LB156]

SENATOR COUNCIL: Okay. Yeah. I don't think that...and I appreciate your testimony, Mr. Mumgaard. And for my colleagues who don't know, I was a member of the Omaha City Council and I did not support a negligent standard on police chase, and will remind Mr. Mumgaard that one of the rationales for that very expensive helicopter that was purchased was to reduce police chases. [LB156]

SENATOR ASHFORD: What...we'll go down the line, Senator Christensen. [LB156]

SENATOR CHRISTENSEN: Thank you, Chairman Ashford. Thank you for coming. You made a comment a little bit ago that your costs could be cut 80, 90 percent if this strict liability was gone. Does that mean 80 to 90 percent of the people hurt wouldn't have had claims or how does this all work? [LB156]

THOMAS MUMGAARD: It's an estimate of the cases that we've had how many of them would have resulted in a liability under the negligence standard. And I'm saying, okay, historically maybe two out of ten would have. The dollars involved depends on the outcome of the pursuit, obviously, and the injuries. Typically in...that would be tested...let's say, for example, a negligence standard we would be looking at basically time, place, reason for the pursuit, how the pursuit was conducted. A pursuit at 3:00 in the afternoon in front of a school is going to be judged differently than a pursuit at 3:00

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

Judiciary Committee
January 30, 2009

in the morning down deserted Dodge Street. So those are the factors that would be examined under the negligence theories; those are not examined now. So I'm saying, yes, we probably would have some liability and my experience says probably about two out of ten would tell you that. [LB156]

SENATOR CHRISTENSEN: I guess part of what I was asking is, could strict liability there, has that caused higher claims to be awarded or just less people to be able to collect on? [LB156]

THOMAS MUMGAARD: It results in a lot of claims being paid that would not otherwise be paid because when a police officer does it right, we still pay. [LB156]

SENATOR CHRISTENSEN: Okay. Thank you. [LB156]

SENATOR ASHFORD: Senator Lautenbaugh. [LB156]

SENATOR LAUTENBAUGH: Thank you, Senator Ashford. Thank you, Mr. Mumgaard. I want to make sure your point on the shooting was clear. You have a police officer in the line of duty shoots a criminal, let's say, and hits someone else, some innocent bystander. [LB156]

THOMAS MUMGAARD: Yes. [LB156]

SENATOR LAUTENBAUGH: The city is not liable. Is that your understanding? [LB156]

THOMAS MUMGAARD: Well, no... [LB156]

SENATOR LAUTENBAUGH: Unless he was negligent. [LB156]

THOMAS MUMGAARD: ...unless they're negligent. If a police officer shoots at somebody, hits an innocent bystander, that conduct is judged by negligence. I don't see any reason to judge a pursuit that ends up in a third party being hurt under a different standard than the shooting. []

SENATOR LAUTENBAUGH: You mentioned earlier when you were testifying you had a second goal that you wanted to allude to. What is that second goal? [LB156]

THOMAS MUMGAARD: Well, clearly there's been a social policy implemented here that people who get hurt by the effort to enforce the law should be paid and that they need to be compensated. That's a social services goal that might be very valid and I'm not going to debate it. I would certainly point out that should be handled in a different way with a broader economic base that pays for it. We have a lot of social service policies in Nebraska, in the health field particularly, that take care of people who need our help.

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

Judiciary Committee
January 30, 2009

But that's paid statewide, that's not paid by the local entity that is involved. And so if that's going to be your focus, I'd say, hey, broaden it. That's fine, might be a good purpose, but it's not proper to then tag the particular police department with the cost. [LB156]

SENATOR LAUTENBAUGH: Thank you. [LB156]

SENATOR ASHFORD: Senator Lathrop. [LB156]

SENATOR LATHROP: Maybe I'll start with right where you left off, and that is if it is...the statute as written basically makes the political subdivision who employed the police officer or the state who employ the state patrol responsible for paying the judgment under this bill. So in some sense what you've just suggested is Scottsbluff ought to chip in for the cost of paying for the police chases or the consequences of police chases in Omaha. And this bill or this statute as presently written basically makes Omaha's chases Omaha's problems, Douglas County's chases Douglas County's problems, and the state patrol chases everybody's problem. Isn't that the way it operates right now? [LB156]

THOMAS MUMGAARD: Yes, that's correct. [LB156]

SENATOR LATHROP: And essentially...and you and I've had a lot of conversations about this professionally and in private that the policy behind this is that if we're going to do something that benefits all the people of the city of Omaha as a police chase arguably does in the law enforcement context that all the people of Omaha who benefit from that police chase ought to pay for the consequences. And that we can agree whether you agree that that's a good policy or bad policy, that's the underlying idea. [LB156]

THOMAS MUMGAARD: Well, I would agree that that can be one of the ideas behind this, but I'd say that you've drawn your benefit scope too narrowly. When Omaha police chase and capture somebody with a stolen car, the people of Bellevue, Sarpy County, Douglas County, perhaps Lancaster County and Lincoln benefit to some extent because that person is not going to steal another car. [LB156]

SENATOR LATHROP: Okay. [LB156]

THOMAS MUMGAARD: So law enforcement benefit needs to be drawn broader. [LB156]

SENATOR LATHROP: All right. And so what you would do, absent this bill passing, would be to propose an amendment that would make it the state of Nebraska's responsibility to pay. And that isn't before us today, but you can agree that the idea is

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

Judiciary Committee
January 30, 2009

the public benefits, so the public ought to pay. [LB156]

THOMAS MUMGAARD: Well, I would still disagree that pursuits should be singled out as a police tool. [LB156]

SENATOR LATHROP: I understand that, but that would be the rationale behind this. [LB156]

THOMAS MUMGAARD: Yeah. If you're going to single it out, single it out in a more rational basis, I would say. [LB156]

SENATOR LATHROP: Okay. It's not unlike when we take...and the city wants to widen 90th Street or any other street, they have to pay the landowners because we're taking something from them and everybody benefits from it, so we pay the person whose property it is that we're taking to widen the road. [LB156]

THOMAS MUMGAARD: Well, I think the analogy between law enforcement and capturing criminals is different than the...you know, is different. [LB156]

SENATOR LATHROP: Well, you would agree that we benefit the people of the city of Omaha or arguably when we engage in police chases and they're the ones that bear the responsibility. [LB156]

THOMAS MUMGAARD: I think successful police chase...yes, I'll say... [LB156]

SENATOR LATHROP: Okay. [LB156]

THOMAS MUMGAARD: Well, I will say we benefit the citizens of Omaha and we also benefit other people. [LB156]

SENATOR LATHROP: Okay. You've been clear about your...the fact that you think more people than the folks in the city benefit from that. Right now because these claims are brought under the Political Subdivision Tort Claims Act, there's a \$1 million cap. [LB156]

THOMAS MUMGAARD: Yes. [LB156]

SENATOR LATHROP: So the most you're ever going to pay, even if a person has \$2 million in medical expenses and even if the officer is negligent, the most you're ever going to pay is \$1 million. [LB156]

THOMAS MUMGAARD: Well, you're going to pay \$1 million per person, \$5 million per occurrence. [LB156]

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

Judiciary Committee
January 30, 2009

SENATOR LATHROP: A million per person. [LB156]

THOMAS MUMGAARD: We've had pursuits that have paid... [LB156]

SENATOR LATHROP: The police that are involved in this, every police chase has law enforcement, they have a guy running from the police, and then they have somebody--at least in the case of an accident--they have somebody who's a bystander that gets hurt in the claims that you're handling. [LB156]

THOMAS MUMGAARD: Not always. We also have the situation where we have passengers in the fleeing car who are entitled to recover. [LB156]

SENATOR LATHROP: Okay. Let's talk about...(laugh) and that's a whole different policy question about how...and that's not in this bill, and that is, what do we call an innocent third party. You have a car...a typical situation is a guy is going through an intersection or driving down the street. He gets hit either by the cruiser or by the guy running from the cops. [LB156]

THOMAS MUMGAARD: Never by the cruiser, always by the guy running from the cops. (Laugh) [LB156]

SENATOR LATHROP: Okay. All right. Always? [LB156]

THOMAS MUMGAARD: Oh boy. [LB156]

SENATOR LATHROP: Okay. [LB156]

THOMAS MUMGAARD: Almost always. [LB156]

SENATOR LATHROP: Almost always. [LB156]

THOMAS MUMGAARD: It is extremely rare for the cruiser to hit the guy. [LB156]

SENATOR LATHROP: So in effect we have three people: the bad guy running, the person driving the car who might be going to the grocery store and it could be any one of us, and we have the police officer chasing him. When that accident happens and if it involves the police officer, he gets work comp benefits, doesn't he? [LB156]

THOMAS MUMGAARD: Yes. [LB156]

SENATOR LATHROP: So he can be hurt in this accident, and even though you're advocating that we repeal this and not take care of the innocent person driving down the

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

Judiciary Committee
January 30, 2009

street, the cop is going to get, the police officer...and I don't have a quarrel with that, but he's going to get work comp benefits that will pay all of his medical expenses, right? [LB156]

THOMAS MUMGAARD: Well, mostly, yes, yeah. [LB156]

SENATOR LATHROP: That's what work comp does and it pays him for his time off work and it pays him for his loss of earnings ability. [LB156]

THOMAS MUMGAARD: Sure, sure. Well, I would point that work comp is one of those social service policies that I've alluded to that, yeah, we've created a work comp system that pays broadly, that collects broadly and pays out regardless of fault. [LB156]

SENATOR LATHROP: A lot of these guys that are running from the police are also in stolen vehicles, are they not? [LB156]

THOMAS MUMGAARD: I don't know if you'd say a lot, but some, yes. [LB156]

SENATOR LATHROP: Okay. And when you're driving a stolen vehicle, that vehicle's insurance won't cover you because you're not a permissive driver. [LB156]

THOMAS MUMGAARD: Probably so. [LB156]

SENATOR LATHROP: So most of the time the police chase liability...not all the time, but most of the time the police chase statute provides the only remedy for the guy who's on his way from home to the grocery store, to church, or taking his kid to the basketball game. [LB156]

THOMAS MUMGAARD: Well, at least some of the time the injured person's uninsured motorist coverage would kick in. [LB156]

SENATOR LATHROP: Assuming they have it. And if we take...and just by way of an analogy or by way of an example rather, if our driver who's on his way to the grocery store minding his own business and he gets hit by the bad guy, if he doesn't have a health plan--and you and I've both seen this--a lot of these folks end up drawing Medicaid to pay their bill for their trauma care. Isn't that true? [LB156]

THOMAS MUMGAARD: That's true. And I'd say that's again one of those social service policies that serve a good purpose, and I would point out that the collection to pay for that is on a broader scope than just locally like this. [LB156]

SENATOR LATHROP: And that goes back to your philosophical belief that it's better to have people draw their money from Medicaid, which is a statewide program, than to

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

Judiciary Committee
January 30, 2009

have them draw their money from, in your case, the city of Omaha who initiated the police chase in the first place. [LB156]

THOMAS MUMGAARD: Well, I would say start with the philosophical disagreement that I don't think that pursuits need to be treated differently than other police activity. [LB156]

SENATOR LATHROP: You've been clear about that. [LB156]

THOMAS MUMGAARD: If you're going to treat them differently, yes, do it in a way that more closely matches who receives the benefit or spread the cost around as equitably as you can. [LB156]

SENATOR LATHROP: For those people who end up on Medicaid in the absence of a bill like this and they have their bills paid from Medicaid, and some of these...and you know, we're looking at the numbers here, some of them are very, very traumatic injuries, lifetime incapacitated injuries. Medicaid isn't going to compensate them for their loss of earnings though, is it? [LB156]

THOMAS MUMGAARD: No, I don't think it would. [LB156]

SENATOR LATHROP: So these folks who do not have enough coverage for the traumatic injuries that is the consequence of this police chase end up going to Medicaid without this bill, and they would end up not being compensated by any public resource for their loss of earnings ability. [LB156]

THOMAS MUMGAARD: Well, that's where I'm not going to draw a strict line and say yes or no. I'm going to say that, you know, if you want to single out pursuits, create a system, maybe a combination of workers' comp style, Medicaid style that might cover all of those things. I would say that perhaps that's a discussion that needs to be had, that the examination of pursuits and how we handle those, it's about 27-plus years old. I think we need to have that kind of a discussion. [LB156]

SENATOR LATHROP: Okay. I think I've asked all the questions I have. Thanks, Tom. [LB156]

SENATOR ASHFORD: Any other...Tom, following up with Senator Christensen and Senator Lathrop's questions just so we're clear, if 80 percent of the claims would not have been successful, we're talking about \$8 million since 1993 of citizens of Omaha who would not be compensated, who would get nothing, or maybe Medicaid, which is a very small...I mean, that's a pretty heavy price for the citizens of Omaha to pay, it seems to me. [LB156]

THOMAS MUMGAARD: Well, only if you think that pursuits create a class of injured

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

Judiciary Committee
January 30, 2009

people that are different than other police activity. [LB156]

SENATOR ASHFORD: Well, I think they do. But let me go further. It isn't about the police. I think the police are doing their job. That's the point of...I have always supported the, as has Senator Council, I have always supported this legislation and I did before, and the reason is that the police should not have to be involved in trying to prove whether they're...or disprove negligence. That should not be their concern. They should be pursuing, they should be stopping crime and in the best way they can. If that involves pursuit, it does. You know, to drag a police officer into a civil lawsuit trying to prove that he or she was not negligent to me is a waste of the officer's time. Anyway, that's just my... [LB156]

THOMAS MUMGAARD: Well, I would just point out that if you have a police department that doesn't care and doesn't care if they do it right... [LB156]

SENATOR ASHFORD: They do care. That's my point. (Laugh) [LB156]

THOMAS MUMGAARD: Well, I say if you have a department that doesn't care, the strict liability works against your public interest because it allows police to pursue willy-nilly because there is no benefit and no loss for doing it right. [LB156]

SENATOR ASHFORD: Oh, they don't do that though. They don't pursue willy-nilly. [LB156]

THOMAS MUMGAARD: I'm just saying that if you want to encourage them to do it right, give them a benefit from doing it right. [LB156]

SENATOR ASHFORD: Okay. I just think...we just...Tom, you are very good at this, and you serve your city very well. I just absolutely disagree with you. Okay. Thank you. [LB156]

THOMAS MUMGAARD: Thank you. [LB156]

SENATOR LATHROP: And thanks for taking it. We're glad you came down here. (Laughter) [LB156]

SENATOR ASHFORD: You're very good at what you do. Mark. [LB156]

MARK SUNDERMEIER: I feel like I'm going to be swimming uphill on this one. (Laughter) My name is Mark... [LB156]

SENATOR ASHFORD: I usually don't lead with my chin like that, but I just...all right, well, maybe I do. Go ahead, Mark. [LB156]

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

Judiciary Committee
January 30, 2009

MARK SUNDERMEIER: My name is Mark Sundermeier. I'm a deputy chief for the Omaha Police Department, and thank you for listening to us today. I'm also president of the Metro Chiefs Association and they've empowered me to speak on their behalf as well. For about nine of the last ten years, my professional duties have included reviewing pursuits at the management level. I've reviewed virtually all of the pursuits in the last three years. I've come to one conclusion that--and I guess we agree on that--pursuits are a necessary police activity. We live in a motoring society. Criminals are part of that motoring population, and pursuits are necessary because there are times we cannot let criminals get away. But having said that, we do everything in our power to reduce pursuits to the bare minimum, not only the number of pursuits, but the duration and the severity of pursuits. We do this and we're going to continue to do this regardless of the existence of the strict liability law because it's the right thing to do. We also pursue because it's the right thing to do, and we'd actually prefer not to have any pursuits if we had the choice, maybe if there were technology that would permit that. I think the strict liability law is time for review because since the strict liability law was created, police technology has improved. We've got cruiser cameras, tire deflation devices, in-service training, computerized driver simulators. We feel it's time to take a look at the newer technology and how it might apply to this strict liability law. For example, cruiser cameras are triggered at 80 miles an hour or when the cruiser lights go on. It's now possible for management after the fact or anybody else after the fact to parse a pursuit and determine negligence or compliance with the law or best practices in a way that was not possible in 1981. Because of this, we're able to manage pursuits in great detail and hold individuals accountable for violation of policy or bad decisions. This was not the case when the strict liability law was first written. And I think it's a simple matter of justice that when the employees of a municipality engage in perfect decision making and do everything exactly right, the strict liability law punishes that municipality for doing everything right. Fundamentally it's not a fair situation for local governments. The other thing I'd like to point out is that pursuits are only one to two minutes long on average, not like you see on television. Around 90 percent of all pursuits are terminated. We have refined policy and limited pursuits to the extent it's possible to do, and despite these risks there are times when pursuits actually increase public safety and we need to engage in them. We feel the legislation should reflect that reality. And thank you again for your time. [LB156]

SENATOR ASHFORD: Thanks, Mark, and thanks for all the work you do. Yes, Senator Council. [LB156]

SENATOR COUNCIL: Yes. Good afternoon, Deputy Chief. [LB156]

MARK SUNDERMEIER: Good afternoon. [LB156]

SENATOR COUNCIL: I'm going to preface my remarks by saying, needless to say my

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

Judiciary Committee
January 30, 2009

brother has never agreed with my position on this issue. But looking over the last three years based on the information that Mr. Mumgaard has provided, just looking at 2006, there's a payout of \$1.5 million. It indicates it's a total for two judgments. Would those two cases have been cases you reviewed under the chase policy that existed at the time? [LB156]

MARK SUNDERMEIER: I'd have to look at them, but it's possible I did. And as you know, the pipeline to get to courts is sometimes extremely long. [LB156]

SENATOR COUNCIL: So quite frankly the '06, '07, '08 figures that are reflected on the sheet that Mr. Mumgaard passed out may have related to chases that occurred years prior to that... [LB156]

MARK SUNDERMEIER: I believe so. [LB156]

SENATOR COUNCIL: ...and may not have reached court until...okay. So that clarifies it. But in terms of the three years that you've been responsible for reviewing chases that have occurred, what has been your experience in terms of the numbers that questions were raised as to whether what was in the existing pursuit policy was followed? [LB156]

MARK SUNDERMEIER: As to whether there were violations? [LB156]

SENATOR COUNCIL: Yes. [LB156]

MARK SUNDERMEIER: In a significant number of cases we found that the officers committed one or more small violations. And in a small number of cases we found that the officers committed gross violations. And by the way, we do not hesitate to hold the officers accountable and issue discipline for that. The union, if they were here to testify, would support that statement wholeheartedly. [LB156]

SENATOR COUNCIL: Now, I concur, Deputy Chief. I know that that issue has been pursued aggressively over I'd say the last eight to ten years in terms of...but I was just trying to get a feel for, you know, the instances. And clearly when you're in a court of law, the question degrees of negligence come into play, and as a trial lawyer that's one of the problems is that you're telling the public that they're going to go to a negligence, you could have, you know, de minimis amount of negligence. The question is whether you're going to get, you know, a judgment that holds responsibility based upon that percentage of negligence involved. And I just want to make it clear and I think...I hope you know that my concern here is with the innocent third parties. I appreciate the fact that there are times when the Omaha police need to conduct chases. But I would be less than forthright if I didn't say there have been occasions where I've questioned the chase, you know, particularly when the suspect is known to everybody on the planet. And the tools that we do have available you would just think that, well, okay, we know

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

Judiciary Committee
January 30, 2009

who it is, I'm not going to chase him at 90 miles an hour. He's going to show up somewhere where I can apprehend him in a much safer circumstance because unfortunately I've seen that happen. [LB156]

MARK SUNDERMEIER: And I think on a case-by-case basis you and I would find ourselves in close agreement. I think reasonable people reviewing each case find themselves in close agreement as to whether it was good or bad. [LB156]

SENATOR COUNCIL: Thank you. [LB156]

SENATOR ASHFORD: Senator. [LB156]

SENATOR COASH: Thanks, Senator Ashford. Deputy Chief, thank you for your testimony. I'm just curious if this bill were to pass, in your opinion do you think officer behavior would change? In other words, do you think officers would be more or less likely to use this as a tool knowing whether or not...do you think the liability question or I'm sorry, the negligence question would influence an officer's decision on whether or not to implement that tool? [LB156]

MARK SUNDERMEIER: I think what drives an officer's decision is the personal repercussions of discipline or the management decisions, and I can assure you that management of our pursuits would remain extremely tight and we would anticipate no changes in our pursuit policy or practices. [LB156]

SENATOR COASH: Thank you. [LB156]

SENATOR ASHFORD: Just the...and we don't know and obviously the \$1.5 million in claims in '06, when it occurred or what the circumstances were, but if you ignore that one for a moment, over the last five, six, seven years the amount paid out, though not insignificant, is less than it has been in prior years. And I think at the time that...at least we visited the statute when I was here on the committee before, the issue was this. I think certainly the city of Omaha has consistently wanted to apply a negligence standard. I agree with that. But they also indicated that there were a number of advancements, and this was going back 15 years ago, that were being contemplated that would influence liability and the necessity for chases. And it seems as if that's happened, I mean, that the liability is...the claims are for the most part less than they were 15 years ago. The amount of claims paid out are less, except for the one year. So it seems to me that in Omaha you're right, that you are focusing on the chase itself. You're not focusing on what happens in court later. And that's reflected in the numbers. That would be my conclusion from what's being presented here to us. So the other question for me is how do these numbers relate to other cities of similar size that are in our array, let's say, in our eight-city array that have negligence standards? How many claims do they have and how much do they pay out? I'll bet you ours are less--I don't

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

Judiciary Committee
January 30, 2009

know, I'm just guessing--because of what you've done internally. And that's the point. You've done internally what you do professionally. And though there was a chase through my neighborhood and it did seem like there was a lot going on, within seconds after this individual hit a tree across--you're probably I'm sure familiar with it--across Pacific Street, there were 18 cruisers there within two minutes. I mean, it was the most unbelievable response and professional response to what could have been a dangerous situation in our neighborhood. To me, that was amazing. So my conclusion from all this looking at the last several years and having voted for this bill in the past is that you've done exactly what you said you'd do. You've acted professionally. You've put in place procedures that have reduced claims, except for the one year, I'll grant you that. And that you deal internally with issues and that the negligence standard is not going to make much of a difference. And that's sort of the conclusion that I come to by looking at these numbers. But with that, I appreciate your testimony, Mark. [LB156]

MARK SUNDERMEIER: Thank you. [LB156]

SENATOR ASHFORD: Thank you. [LB156]

LYNN REX: Senator Ashford and members of the committee, my name is Lynn Rex representing the League of Nebraska Municipalities, and we do support this measure. I want to underscore a point that Tom Mumgaard made which is this, that there are times when there are collaborative relationships between and among law enforcement agencies, as you would expect, and that occurs on police pursuits as well. And so it is a broader social issue here because you can have the state patrol, and they've done it, where they've called on local law enforcement officers to come to their assistance. I can recall one case involving an abduction of a child, I believe a college student in Kearney, Nebraska. And that was involving law enforcement all across the state trying to locate that young lady. So I would just submit to you that there are reasons why it should have a broader social policy. And therefore all Nebraskans should help pay for this, not just the locality that's involved in this chase. And I do think, Senator Ashford, what you said to the prior witness is very important, which is I don't think that the police can or should be sitting in a police car thinking: strict liability negligence, strict liability negligence. I think their mission is to do the best job they can do and provide public safety. That is their mission. [LB156]

SENATOR ASHFORD: And I think they do that. [LB156]

LYNN REX: And I think they do that. I believe that's true. And I also know that the law enforcement training center has excellent work in training all of these important issues, and for that reason we think that it is time for the Legislature to revisit this issue and pass this legislation. I want to thank you for introducing the bill. [LB156]

SENATOR ASHFORD: Thank you. Seeing no questions, thank you. [LB156]

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

Judiciary Committee
January 30, 2009

LYNN REX: Thank you. [LB156]

SENATOR ASHFORD: Any other proponents? Opponents? [LB156]

ANDY SIBBERNSEN: Thank you, Chairman. Thank you, members of the committee. My name is Andy Sibbernsen. I'm an attorney in Omaha, Nebraska, here on behalf of the Nebraska Association of Trial Attorneys. I've got a couple of points I'd like to make of my own before I came in here. I've also got some rebuttal points that I would like to make based on the testimony we've heard thus far today. But first and foremost, Chairman, you had asked Mr. Mumgaard whether or not these chases create a class of individuals or a different class of people, and I guess our answer would be yes. I mean, it creates a class of paraplegics, quadriplegics, burn victims through no fault of their own that but for the police chase this class of people would have never been, would never been. Captain Sundermeier indicated that these chases are necessary, and if that's the position of these municipalities and political subdivisions, then I guess we need to look at this from a risk-benefit analysis. And that who benefits from these chases, and if it's in fact society, then society should share in the costs that are incurred as a result of these chases. And Captain Sundermeier indicated these are necessary. We by no means want to discourage municipalities from serving the public. We, in fact, want to encourage police officers and state patrolmen to do their job, but we want them to weigh the risks of their actions with the foreseeable damages that may result. We don't want them to begin a pursuit without weighing these risks. I think it's not too much to ask these officers to weigh the severity of the offense that they're going to begin pursuit on against these foreseeable risks. We don't want them chasing somebody who's ran a stoplight that may result in a police chase through a neighborhood. We'd just ask that they weigh those risks. The existing law as it is, is not about the people being chased. Okay? It's about the bystanders, the innocent bystanders that are injured. And like I said before, but for the chase, these innocent bystanders would never be injured. Mr. Mumgaard talked about the costs of these claims and how it's costing the city of Omaha. I guess my response or one of my responses would be municipalities, the states, they have protection afforded to them by the political subdivision act that if somebody is going to file a claim against the city, they've got to abide by those guidelines set forth in the act. They're stuck in a \$1 million cap that Senator Lathrop and Mr. Mumgaard agreed on. That cap protects the cities and municipalities in that they don't have to try these cases in front of a jury, so there are protections afforded to the municipalities. With regards to the cost that it costs the city an average of I think he said \$1 million per year to pay these claims, if society benefits from these claims, and I'm not a mathematician, but if you take \$1 million and divide it by the population of Omaha, I think...I don't know, is that \$1 per citizen a year? I don't think that's... [LB156]

SENATOR ASHFORD: Andy, I'm going to ask you just to sum up if you would. We got I think... [LB156]

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

Judiciary Committee
January 30, 2009

ANDY SIBBERNSEN: Okay. I guess in summation I'd just like to say we want the police to do their job. We want them to weigh the risks of these chases and pursuits before they get into them. These chases certainly benefit society, and as a result society should share in the costs that are incurred as a result of these chases. [LB156]

SENATOR ASHFORD: Thanks, Andy. Yes, Senator Council. [LB156]

SENATOR COUNCIL: Yes. Thanks, Andy. The question I have, if LB156 is passed and we resort back to a negligence standard, that passage would not have any effect, would it, on the Political Subdivision Tort Act? [LB156]

ANDY SIBBERNSEN: I don't know. It would not. They would still be afforded the protection of the political subdivision act, and that... [LB156]

SENATOR COUNCIL: And the protection of the political subdivision act is the \$1 million cap on recovery. [LB156]

ANDY SIBBERNSEN: Correct. [LB156]

SENATOR COUNCIL: So if LB156 is passed and the chase was determined to have been undertaken in a grossly negligent manner, and the individual suffered \$10 million in hospitalization costs, they'd still be limited to a \$1 million recovery, correct? [LB156]

ANDY SIBBERNSEN: Yeah, correct. And I would say also, Senator, that you know gross negligence is...that's a pretty high hurdle to clear. [LB156]

SENATOR COUNCIL: Standard, yes. Thank you. [LB156]

SENATOR ASHFORD: Yes, Senator Lautenbaugh. [LB156]

SENATOR LAUTENBAUGH: Do you read this as proposing a gross negligence standard? [LB156]

ANDY SIBBERNSEN: No, but the way I look at this is as we sit here today, the local police departments, they have strict policies and procedures for when a police officer can engage in a pursuit. Unfortunately, these police officers engage in pursuits that maybe don't necessarily warrant these pursuits. And with the cases as they are now under the law as it is, I mean, the negligence standard in and of itself is high. And if we change that I think the level of negligence that we have to show in order to recover on behalf of these innocent bystanders becomes that much higher. [LB156]

SENATOR LAUTENBAUGH: I'm not sure I understand your response. You can see that

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

Judiciary Committee
January 30, 2009

the police department has policies, and wouldn't a violation of the policies be evidence of negligence? [LB156]

ANDY SIBBERNSEN: If there was a gross violation of policies, yes. And I think we can go back and look at what Captain Sundermeier said that they're not going to change the way they do things, and he's reviewed all of these chases in the past, yet they're still paying out claims. [LB156]

SENATOR LAUTENBAUGH: And I want to be clear, gross negligence is different than negligence. Isn't that correct? [LB156]

ANDY SIBBERNSEN: Oh, yes, it is. [LB156]

SENATOR LAUTENBAUGH: You again used the word "gross." This would just say negligence if the word "strict" is stricken. Is that correct? [LB156]

ANDY SIBBERNSEN: Correct. [LB156]

SENATOR LAUTENBAUGH: So we're not establishing a gross negligence section with my bill in your interpretation. [LB156]

ANDY SIBBERNSEN: Not based on my interpretation, no, but it's a pretty high burden. [LB156]

SENATOR LAUTENBAUGH: And I do thank you for coming today, by the way. I know you feel passionately about this. I think you've been lobbying my neighbor at church on this issue. (Laughter) It didn't work, but... [LB156]

ANDY SIBBERNSEN: Well, in addition to that I've got a... [LB156]

SENATOR ASHFORD: Apparently not. [LB156]

SENATOR LATHROP: Thank you for trying. (Laughter) [LB156]

SENATOR ASHFORD: I have a question. [LB156]

ANDY SIBBERNSEN: Sure. [LB156]

SENATOR ASHFORD: How are you related to Terry? [LB156]

ANDY SIBBERNSEN: I'm his nephew. [LB156]

SENATOR ASHFORD: You're his nephew. [LB156]

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

Judiciary Committee
January 30, 2009

ANDY SIBBERNSEN: Yes. We practice together and I... [LB156]

SENATOR ASHFORD: Sort of the family business kind of deal. [LB156]

ANDY SIBBERNSEN: It has become a family business. [LB156]

SENATOR ASHFORD: Well, and it's worthwhile work you do, so I appreciate it. Thank you, Andy, very much. [LB156]

ANDY SIBBERNSEN: Thank you. [LB156]

SENATOR ASHFORD: Next testifier. [LB156]

JOSHUA McGRATH: Chairman, members, thank you very much for having me here. My name is Joshua McGrath. I was involved in a...I was a third-party victim in a police chase back in 2000. I was taking my friend home and I was t-boned by a car that was being chased by an officer, and my truck was split in half, bursting into flames. And me and my friend were burnt severely. I broke my ribs. I broke my neck, fractured my skull. I broke my pelvis in four spots. I was burnt 45 percent of my body. My friend was burnt 65 percent of his body. He was burnt way worse than me even though I was burnt very bad as well. He was in the hospital for five months before he got out of the hospital. And it pretty much ruined my whole life. Even though I'm very blessed to be alive, there is not a day that I don't think about that night. Thank you very much. [LB156]

SENATOR ASHFORD: Thank you, sir. Thank you. [LB156]

SENATOR LATHROP: Thanks for coming down. [LB156]

SENATOR ASHFORD: Next proponent...opponent, I'm sorry. (Laughter) [LB156]

ANN WILSON McGRATH: Thank you, thank you, thank you, all of you for taking the time to hear my voice. This is the first time I've gotten to speak. I'm a little nervous. I'm very nervous. [LB156]

SENATOR ASHFORD: Oh, no that's okay. What's your name first. [LB156]

ANN WILSON McGRATH: My name is Ann McGrath. I'm Josh's mom. [LB156]

SENATOR ASHFORD: Okay. [LB156]

ANN WILSON McGRATH: I identified myself by that for a lot of years. I'm Josh's mom. Josh was hurt horribly. His friend was hurt even worse. I had gotten off work and his

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

Judiciary Committee
January 30, 2009

dad was out fishing, and Josh had gone over to his friend's for dinner and out. I came home, the house was empty. It was a very surreal night. I came home, someone had hit a deer. It was one of those beautiful kind of nights, maybe like tonight. There was blood all over the highway or the interstate, so I was already a little edgy. Went to bed probably about 10:30. Probably about, I don't know, 1:30, 2:00 in the morning the phone is ringing. Well, we have of course the cordless, wireless phone. I'm running through the house looking for the phone, can't find the phone. It's in my son's room, and I get it finally and it's a woman asking if I'm Ann McGrath and my son's been in a horrible accident. And he's been burned severely and you need to come right away. So I then run back together in the house and try to get his dad up. I'm like, we got to go, we got to go. And fortunately we lived in the Florence area, so you're close. But it was a long, long ride. And I walked into that emergency room and they're coming out with Jimmy and his parents are screaming, and crying and they're flying him. Okay. They're going to fly him over to now Clarkson and leave there because he's so bad. I had no idea. You were just in this. The chain of events that happened from there are real in my mind, okay, and they are more real for my son because he also felt all these things. His burns were all over. He was fortunate he wore cotton. I would remind you all to wear cotton because...it's wrong. It's unnecessary. It's wrong. It's Hollywood. I don't need the pursuit. I knew it long before my son ever was involved in one and they just don't need to happen. There is no necessity in the city of the size that we have. We have helicopters out there to do it, watch it. It happens predominantly in certain areas of this city. It's not happening in the metro area. It happens where people are working hard, they struggle. Our son was taught. He paid his insurance from the time he ever drove. He changed his own oil. He worked part time through high school. And he's been punished severely, repeatedly, and I'm going into nine years now. I lost a marriage. I've lost a home. It needs to stop. Can I say one other thing? [LB156]

SENATOR ASHFORD: You can. [LB156]

ANN WILSON McGRATH: I know the police department, and I honor the police department. I loved Officer Tye Pratt--was our family. We shared birthdays, he and I. We lost Tye after this again because of what? He went after someone who's already been through the court system. If there's anything that I can do personally and any of you know anything that I can do on a day-to-day basis to stop this ever, ever happening again, let's do it. I don't know what else I...I mean, the cost alone...the cap, you're killed from the beginning. Josh had to...we had him cover his insurance. You don't have that, you know. Everybody says, oh, you'll have insurance. No, you don't. You don't have anything. Everything was out of our pocket. I had to leave our home, try to find strips of nonadhesive garments to change his burn pads because we had to shower and do this at home. You can't even get them from the hospital. A hospital doesn't send you home. Now, I couldn't even find them in the store. Now, we need dressing changes because you're going to get infected if you don't have dressing changes, and that is done constantly, seven times a day. Didn't have a wheelchair. We didn't have a wheelchair.

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

Judiciary Committee
January 30, 2009

I'm going to grandpa's to get an old wheelchair. He's got a fractured pelvis. He wasn't supposed to have his feet on the ground. When people say, oh, the Medicaid kicks in, no one kicks in, people. No one's there. It's your family and if you're fortunate and you got a couple of people that can do that, God bless. But trust me, he did not receive a compensation, nor did Jimmy, that would possibly even begin to justify what they suffered in that and what they continue to suffer from and what their kids now will endure, because it's a long rollout. We all know posttraumatic stress. Well, that's another thing that really doesn't get addressed. Thank you. [LB156]

SENATOR ASHFORD: Ann, Ann. No, listen, we're hearing you, and I just have to be...I'm the grouch who has to say it's time, we have to go on. But thanks for coming. [LB156]

ANN WILSON McGRATH: Thank you. [LB156]

SENATOR ASHFORD: Senator Kruse. [LB156]

LOWEN KRUSE: Hello, everyone. I am Lowen Kruse, L-o-w-e-n K-r-u-s-e, 5404 North 50th Avenue in Omaha. And I'm here representing you. You and I may be the innocent victims who are injured. This is a terrible bill, to quote one old-timer that some of us know. It has one basic premise: that you and I can afford to pay our hospital bills better than the city. That's all there is to it, that's all there is there. I'm not talking negligence. That's off the table, that's a whole nother ball game. I'm just talking risk. I, in fact, will be glad to stipulate that the police make no mistakes of any kind, and I really support them. If a business came to you with a heads-up description of what they do, but they say what we do is inherently dangerous, but we do everything right, we never make a mistake. So please exempt us from any liability that comes from the inherent danger of the operation that we're doing. They'd be hooted off the premises. But that's what's being offered to you here. I'd like to talk about our friend Roz. She was a nurse and she was hit in one of these chases. She was a nurse, ran down to the store to get some ice cream for a birthday party. A fellow came through a red light and she didn't get home for six months. And Ann has well described the trauma of the family. If you add to that that somebody is supposed to come in and tell you, well, it's your problem, not ours. Her bill is nearly \$3 million. If the city does not assume some liability, you and I aren't off the hook for paying that bill as has already been indicated. It goes to Medicaid. First we have to make that, put that family into poverty. And when they get into poverty, then we can give them Medicaid and so on, take care of that. It doesn't take care of the whole business. In all modesty I would say our son, you know is in the same kind of situation with the same bills, the bills are paid by the state of New Jersey in a much better system than ours. They want to make sure that he's not pushed into poverty. He pays tens of thousands of dollars in taxes. They're getting their money back. It's a much better operation, but that's often something else. We expect the hospital to be stiff, the family to be in poverty, and we're all going to pay the bill. Now, if the state can come up with

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

Judiciary Committee
January 30, 2009

something like New Jersey to spread it out, I'd have no objection. We hear something about insurance. Well, the Legislature determined that \$25,000 is the right amount. That wouldn't pay the first night's bill for Roz's in the hospital or for my son. And we've talked about that, and I was told that you can't have more than...well, a repeat offender can't afford to pay more than that. The fellow that hit her has over 40 convictions, DUI; 70 arrests, but 40 convictions. He's got cheap transportation set up. You know, that's part of the problem that comes up here. He buys a \$200 pickup, drives it until he runs into something. It's not insured, he doesn't have license, he doesn't have insurance, he doesn't have it titled or anything. He walks away from it and races to the closest bar so he cannot be arrested for DUI. [LB156]

SENATOR ASHFORD: Senator Kruse, I'm going to...this is again "grouch Brad" here. I have to... [LB156]

LOWEN KRUSE: Your time is valuable and I appreciate that. [LB156]

SENATOR ASHFORD: No, it's not, but yours is valuable, just as valuable. But I have to do it. Just give us a summary. [LB156]

LOWEN KRUSE: Yes. I've made my case. It's about the risk that the community has. Is this Roz's fault even remotely, even remotely or yours and mine? It seems to me the risk of the city should be assumed by the individuals. And I figured it out, it's 2 bucks a year for me. I'm ready to pay. [LB156]

SENATOR ASHFORD: Thank you, Senator Kruse. Any questions? Thank you, sir. Good to see you. [LB156]

SENATOR LATHROP: Good to see you, Lowen. [LB156]

JOHN LINDSAY: Thank you, Mr. Chairman, members of the committee. I needed to appear today...but my name is John Lindsay, L-i-n-d-s-a-y, I appear as a registered lobbyist on behalf of the Nebraska Association of Trial Attorneys. Had to appear in front of you today because there were a couple of people who couldn't be here today that were hoping to be here. And that would be Ann and Dan Sasich, one of our members or a couple of our members represented them. They wanted to be here to testify. They had indicated that they would be here to testify, but couldn't be here. Again, when you deal with people who have been victims of police chases, typically travel is not all that easy. Sometimes you're dealing with a wheelchair, sometimes you're dealing with a variety of things that are caused by the fact that they are victims of police chases. Ann, I am told, could not be here today because she had to work, couldn't get off work, her second job that she is still working because she is trying to piece, again, back together her life because of the leftover costs that remain from her son's accident. Dan, who suffered a brain injury as a result of a police chase, her son couldn't be here because he's in the

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

Judiciary Committee
January 30, 2009

hospital. There was another complication from his accident four or five years ago. His mistake was getting out of play practice at the wrong time, because if he had gotten out of play practice a little bit later, maybe that car being chased wouldn't have plowed into his car and changing his life forever. We've heard about the...and I think the theory that we're looking at is whether police chases are necessary or unnecessary is another policy decision, and it's a separate policy decision from what you're dealing with here. This is a question of when society benefits from something, society ought to bear that cost rather than transferring it to Ann and Josh, society should help bear that cost. Using the numbers I think I heard, \$10 million over 16 years, \$625,000 a year is what it's costing the city of Omaha. If we have 390,000 people, it's \$1.60. I defy you to find insurance that would be cheaper than that, and I think it's a heck of a protection to know that you're not going to be left destitute for \$1.60 a year. Mr. Sundermeier mentioned, I believe Captain Sundermeier or excuse me, Chief Sundermeier or Mr. Mumgaard mentioned chases only last a minute or two minutes long, but their effects last a lifetime. And I would ask you to talk to, if you don't believe that, talk to Roslyn Cappiello who sat here a few years ago in her wheelchair trying to tell her story about her mistake, went out for ice cream to get some for her husband. I would encourage you to indefinitely postpone... [LB156]

SENATOR ASHFORD: Thank you, John. Any questions of John? Just for the sake of the record, you know, last year this committee dealt with recreational liability on behalf of the city, and we did some parceling of liability and negligence based on choice. If an individual makes a choice to utilize inherently dangerous equipment, in this case skateboard tracks and that sort of thing, that we understood the city's...what they were arguing for in that case. So it's not as if this committee is unmindful of the risks involved in some of these kinds of things. But in this case, what I see to be a fundamental difference is that there is no choice in the matter. These people are being injured at no fault of their own and that, to me, is the significant difference. The other point is that the risk is being spread. I mean, with a cap of \$1 million...how long has it been since that cap has been raised? [LB156]

JOHN LINDSAY: I believe it was 1983. [LB156]

SENATOR ASHFORD: And it was raised from...was it raised from \$500? [LB156]

JOHN LINDSAY: No, it's never been raised. It was instituted, if I remember correctly, it was instituted in 1983 I believe in a special session to...at \$1 million. [LB156]

SENATOR ASHFORD: At a million. It's never been raised above \$1 million. [LB156]

JOHN LINDSAY: Right. Yes. [LB156]

SENATOR ASHFORD: So, again, I just look at the numbers submitted to me by the city,

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

Judiciary Committee
January 30, 2009

and as the year-on-year damages go down, the cap remains the same. So your profit margin, if you will, which is a very crass way of putting it, has gone up under the strict liability. There has not been an explosion of claims or...and I think Senator Council made an excellent point. The city has done a good job in finding alternatives to chasing. Wouldn't that be your... [LB156]

JOHN LINDSAY: Yes. Senator Ashford, I think you make an excellent point. That's actually...I had a couple more notes, but that was one of them. And that is in the advances of technology that I believe it was Chief Sundermeier that mentioned that they have technology that they can deploy now, I think they're called STOP STICKs, that deflate tires. They have infrared sensors and helicopters. They have just the technology that's advanced since 19...well, certainly since 1983 or since later than that when this policy first came into effect, that is reducing some of those. I might suggest that the fact that there is strict liability in a police pursuit encourages that technology to be purchased because it may be cheaper to buy that technology, stop the injury, and thus not be liable for it. So I think, Senator Ashford, you make a great point, and I think... [LB156]

SENATOR ASHFORD: Well, since you were chairman of the Judiciary Committee, the claims have gone significantly down. [LB156]

JOHN LINDSAY: It's because of the work we did. (Laughter) [LB156]

SENATOR ASHFORD: Right. I tried to ask that three ways and you finally got it. (Laughter) Thank you, John, for your testimony. Any other opponents? Neutral testifiers? Senator Lautenbaugh? [LB156]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman and members of the committee. You've heard compelling testimony, and there is no doubt that tragedies can result in a police chase. We've heard that today. What we really haven't heard in my mind is a reason that we treat these differently than a shooting where a third party is injured, and that point was made, I believe, eloquently by the assistant city attorney. Once again, the bill is simple. It simply requires proof of negligence as opposed to strict liability, and I think it is a warranted policy. I don't know that it would have changed the outcome in any of these cases that we've heard of today. But it just seems to be consistent. And I will leave it at that. [LB156]

SENATOR ASHFORD: Thank you, Scott. Any questions? Thank you very much. That concludes the hearing. We'll go now to the first bill on our agenda, Senator Pirsch. Senator Pirsch, LB79. [LB156]

SENATOR PIRSCH: Members of the Judiciary Committee, I am state Senator Pete Pirsch from Legislative District 4. I'm the sponsor of LB79. In 2007, the Legislature amended this area of law to allow child support modifications to be enacted by courts if

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

Judiciary Committee
January 30, 2009

the obligor's reduced income came about as result of incarceration. With this bill, LB79, if the obligor of child support is incarcerated as a result only of criminal victimization of the child in question with respect to the child support, he or she shall not be eligible to modify the child support order. I don't know that there's going to be a whole lot of testimony after me, and so I'll talk a little bit about the history of this bill. You may remember, those of you who are not new to the Legislature this year, Senator Wightman offered LB774 last year, I believe, 2007. And the provisions of that bill were not, I believe, were actually added to another bill that was on the floor for consideration through AM2175. The elements of Senator Wightman's bills were adopted into LB1014, Senator Ashford's bill, on March 7. What the...essentially for time immemorial with respect to individuals who ordered to pay child support in Nebraska, the law had always been you are not eligible to make a motion to a court to modify...or a court may not modify, reduce your child support based on the fact that you committed a crime and therefore went to prison as a result. And so that change in circumstances was not justifiable reason the courts had held for you to come before the courts and say, I need to have a child support payment reduced. The idea there was that equity demands...it's a court of equity and they demand that you come before equity with clean hands. And so that was the basis for courts denying any child support modifications based upon incarceration. The theory behind Senator Wightman's bill was that a lot of these prisoners owing child support went to prison, and that the child support would thereby pile on while that prisoner didn't have the capacity to make money and dig himself out of the child support arrears over a number of years. And so he successfully passed that law that said from now on you can...the mere fact that you've committed a crime and went to prison, that does allow a judge to review it and to modify your child support if you are thereby earning less money because you went to prison. That bill was debated last year. I think the result was wrong, but you know that's a bridge that's already been crossed and I'm not here to change that provision. I think the total extent of that is going to result to be that somewhere around \$6.5 million worth of child support payments to children and families that are...the costs are going to be borne by someone, whether it be if it's modified down to the prisoner, then he won't pay the cost. But that means that \$6.5 million less of child support is collected by the child. So I think that that was wrong. But that is, like I say, water under the bridge. This would carve out, this bill that we consider here today, LB79, a narrow exception to Senator Wightman's bill that I think, I hope was an unintended consequence that in the manner in which things were passed last year, not through a bill that was advanced by committee, but rather a motion that was put forward for amendment of an existing bill that was on the floor. I think that perhaps this wasn't fully realized that the results of that and that the law that we're under now would allow for an individual who is owing child support becoming imprisoned for no other reason that he victimized the child who is the very subject of the child support, and for no other reason that that prisoner's payments then would become...he could be essentially rewarded by having his child support modified, lowered by a court solely because he did victimize the child who's the subject of that child support. And so this bill closes that loophole, that narrow exception, and says

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

Judiciary Committee
January 30, 2009

essentially if the only reason that you went to jail is because you victimized the child who is the subject of your child support, then in that narrow instance you cannot have a child support modification by a court. And so by this exception if the reason I went to jail is I owed child support to a child, if I sexually assaulted or I physically, criminally abused a child and went to jail only for that reason, I cannot turn around later on and be rewarded by a court by having my child support lowered for that child. So that's the nature and extent of the bill, and if you have any questions, I'd be happy to answer them. [LB79]

SENATOR ASHFORD: Any questions of Senator Pirsch? Pete, you did bring this to me sometime this summer and I told you I thought it was a good idea. And I'm not sure it was necessarily an oversight, but it was something that was not thought about, and I appreciate you bringing it to the committee. I guess there's no other questions. Thank you. Do we have any proponents? Opponents? Neutral? Closing? [LB79]

SENATOR PIRSCH: I'll go ahead and waive. (Laugh) [LB79]

SENATOR ASHFORD: Okay. Thank you. Thanks, Senator Pirsch. That concludes the hearing on LB79. All right. LB216, Senator Wallman. [LB79 LB216]

SENATOR CHRISTENSEN: That was efficiency, Chairman. []

SENATOR ASHFORD: Thank you, Senator Christensen. We try where we can. []

SENATOR CHRISTENSEN: There's 100 percent opponents... []

SENATOR ASHFORD: What? (Laughter) []

SENATOR CHRISTENSEN: I keep wanting to say opponents. Everybody was in support of that last bill, 100 percent. []

SENATOR ASHFORD: We don't rarely get that, do we? []

SENATOR CHRISTENSEN: All supporters. []

SENATOR ASHFORD: Let's kill it. (Laughter) No, just kidding. Norm, welcome, Senator Wallman. Senator Wallman is here to introduce LB216. [LB216]

SENATOR WALLMAN: Welcome, Senator Ashford and members of the Judiciary, pleased to testify before you on this bill. And my name is Norm Wallman, W-a-l-l-m-a-n, representing the 30th Legislative District. So I'm representing that district in this bill. And prior to 1981, a passenger of a motor vehicle injured through the negligence of the driver could not recover damages for his or her injuries unless a driver was found to be

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

Judiciary Committee
January 30, 2009

guilty of gross negligence. This was known as a guest statute. In 1981, the Legislature passed LB54, which amended the guest statute so that it was applicable only to those related to the driver within the second degree by blood or marriage. At the time it was argued that rates would increase dramatically because of this change. In fact, in 20-some years there has not been a rate increase request based upon this change. LB216 would repeal this last vestige of the guest statute. There will be those following me who will give you some actual cases that resulted in unfair results. They should also be able to answer any technical questions for you. I would respectfully ask that the committee advance LB216 to debate to the floor. Thank you. [LB216]

SENATOR ASHFORD: Thank you, Senator Wallman. Any question of Norm? You've brought us a very interesting issue, Norm, so. [LB216]

SENATOR LATHROP: Pretty straightforward. Thanks, Senator. [LB216]

SENATOR ASHFORD: Thank you. Proponents? Mr. Sibbernsen. [LB216]

ANDY SIBBERNSEN: Thanks, again. Again, Andy Sibbernsen here on behalf of the Nebraska Association of Trial Attorneys, and I've been asked to testify in support of this repeal of the guest statute as it stands today. If the intent of the guest statute is to prevent fraud and collusion, then it's not necessary. It's not the state's responsibility to serve as a watchdog for such claims. There's always a risk for fraud or collusion in any insurance claim that's brought, whether they're family members, friends, or unknown. Okay. It's the insurance company and their adjustors or reps that review these claims. It's their responsibility to ferret out the fraudulent claims and the collusion. And if that doesn't work, then our civil litigation system is there to ferret out these claims of fraud and collusion. You have the attorneys who represent the individuals, you have the jurors, and you have the courts themselves. In today's society common sense, I guess, tells us that there are more and more individuals who are living together that are not married. You have, you know, boyfriend/girlfriend situations that have children out of wedlock. The statute as it stands today prevents those individuals from bringing claims...it allows those individuals from bringing claims, whereas opposed to a husband and wife that get married. And the best way to show this to show how this archaic statute is unfair and unjust to individuals is to give you an example. One example may be if my wife and I were traveling down the road and I did something that was negligent and caused an accident that severely injured my wife and resulted in severe injuries, tens of thousands in medical bills, my wife as the statute stands today could not file a claim against me. On the other hand, if my next-door neighbor and his girlfriend who they've been living together for ten years, if they were to get in an auto accident, she could file a claim, she's not kin, she's not a family member. So I ask the members of the committee, you know, why does this statute...what's the difference between those relationships, between those...you know, me and my wife and my next-door neighbor and his girlfriend? Another example might be a mother who's taking her son and his

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

Judiciary Committee
January 30, 2009

friends to a soccer game or soccer practice, and let's say she does something that results in an auto accident and all the children get injured. The little boy could not file a claim to recover the medical bills and pay for the medical bills, but the other little boys or the other children in the car could. You know, that being said I guess the risk of fraud does not change whether you're family members or you're friends or you're just colleagues. And the statute itself does not serve the purpose that it's intended to, and that's to ferret out collusion and fraud. And in closing, I'd just say that the statute is just bad law, it's archaic, it doesn't serve its purpose, and I support LB216. [LB216]

SENATOR LATHROP: Thanks, Andy. I appreciate your testimony. Are there any questions for Mr. Sibbernson today? Seeing none... [LB216]

ANDY SIBBERNSEN: Thank you. [LB216]

SENATOR LATHROP: ...thanks for coming down today. [LB216]

ANDY SIBBERNSEN: Thank you. [LB216]

SENATOR LATHROP: Are there any other proponents from any other organizations? Seeing none, we'll go to opponents. [LB216]

REX REZAC: Good afternoon. My name is Rex Rezac, and I'm appearing on behalf of the Nebraska Defense Counsel Association in opposition to LB216. My organization is made up of attorneys who practice regularly in defending automobile negligence and other personal injury cases. I personally have been practicing in this area for 25 years and have probably handled hundreds of cases involving a passenger who is suing a driver in an automobile. Now, the guest statute that we're here to talk about today limits the availability of that sort of a suit between people who are related in a close family way. It doesn't do anything with people right now who are buddies, who are living together as Mr. Sibbernson said, the various other situations that can arise where somebody becomes a passenger in another vehicle. What I can testify to are the examples of collusion and the frequency of collusion and fraud in those sorts of situations. Probably the most glaring example that I was involved in involved a case that occurred actually up in South Dakota between married people. South Dakota at that time didn't have a guest statute, and so they were entitled to sue each other. They were driving along, husband was driving and hit a patch of ice and left the highway. He was thrown from the vehicle and hurt very badly. She was not hurt at all. As a result of their relationship and that fact that he obviously could not sue himself, they agreed to tell the police and everyone else that the wife was driving and therefore would be able to pursue a claim and collect under the insurance that was available on the car. Another example happened over by Yutan, Nebraska, where we had two, three kids who were high school friends who were playing around with their cars on a county road. One lost control because they were racing or whatever. They all agreed they didn't want their

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

Judiciary Committee
January 30, 2009

buddy to get in trouble, so they just tell everybody that a deer hopped out in front of them, and therefore have insurance to cover the injuries that occurred. Those are pretty extreme situations, but what we see more often is more prevalent and probably as much, if not bigger, problem are those subtle bits of cooperation or collusion between the parties: somebody who conveniently doesn't remember what color the street light was; somebody who doesn't have recollection, sadly, as to how fast he actually was going. Those are the sorts of things that can happen where you have a relationship between parties. The problem we have with the attempted repeal of this statute is that those problems are only magnified when you have a close familial relationship. I have three children myself. If one of them was injured in a car accident when I was driving, I would be in a very difficult position as, I'm sure most people would, to provide testimony in opposition to their claim. It simply is human nature. I would suggest to you that the guest statute as it's written and limiting claims between people in close familial relationships seeks to resolve that problem or at least to provide a reasonable balance between the conflicting claims of someone who is injured in a motor vehicle accident, and the equally important goal of avoiding fraud and collusion in these sorts of situations. For those reasons, we would suggest that the guest statute not be repealed and LB216 not be passed. [LB216]

SENATOR LATHROP: Thank you, Mr. Rezac, and Senator Christensen... [LB216]

REX REZAC: You're welcome, Mr. Lathrop. [LB216]

SENATOR LATHROP: Don't go anywhere. (Laugh) Senator Christensen has a question for you. [LB216]

SENATOR CHRISTENSEN: Thank you, Chairman Lathrop. Thank you for testifying. If there was...if the statute read differently so that medical expenses could be paid for family, but no liability because quite often it goes to hurt, suffering... [LB216]

REX REZAC: Sure. [LB216]

SENATOR CHRISTENSEN: ...it goes beyond. If it was to that extent, would that solve a lot of the problem? [LB216]

REX REZAC: Well, it would certainly "alleviate" sort of the problem. The situation is if you and I are brothers, I am never going to sue you for personal injury unless there's insurance available. [LB216]

SENATOR CHRISTENSEN: Right. [LB216]

REX REZAC: And the only reason that people are pursuing these claims and that the plaintiff's bar wants to ensure that these claims are available is because they know

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

Judiciary Committee
January 30, 2009

there's a deep pocket out there that's going to pay these claims. If you and I are brothers and I happen to be out in Imperial and get injured on the ranch and you don't have insurance, there isn't going to be a lawsuit. You know, the injuries, the health expenses and whatnot are going to be taken care of just like they would any other time. This is all about finding a way to make the insurance company pay, and to the extent that we can avoid insurance fraud, and there are lots of statutes and regulations that try to ensure that we don't have insurance fraud. If we can continue to promote that, find a proper balance, then I think that we're all better off for. [LB216]

SENATOR CHRISTENSEN: Thank you. [LB216]

SENATOR LATHROP: I have a few questions. Yeah. (Laughter) Just, you know...you do defense work as you said and so do the members of your association. [LB216]

REX REZAC: That's correct. [LB216]

SENATOR LATHROP: And typically the defense work that you do is defense work where you're retained by an insurance company to represent someone who's been in an accident and against whom a claim has been made. [LB216]

REX REZAC: That's typical. Obviously there are situations where people are self-insured... [LB216]

SENATOR LATHROP: Some self-insureds, but... [LB216]

REX REZAC: ...or don't have insurance. [LB216]

SENATOR LATHROP: Okay. But mostly, Fraser Stryker, your office, for example, you're doing defense work for insurance companies. [LB216]

REX REZAC: That's what I do. [LB216]

SENATOR LATHROP: And so we have a lot of situations where people are passengers in a vehicle, the driver is the one that's responsible, my own driver, the person's own driver is responsible for the accident. That can be at a left turn, they can be the person that rear-ends a car, they can be a person who passes and hits somebody head on. That happens all the time. [LB216]

REX REZAC: All the time. [LB216]

SENATOR LATHROP: So in that situation, and for the people who don't work in this area or haven't been through this before, the law requires that the passenger sue the driver and not sue State Farm directly, right? [LB216]

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

Judiciary Committee
January 30, 2009

REX REZAC: That's correct. There's no... [LB216]

SENATOR LATHROP: And so we go into court with this fiction that the passenger is suing the driver, and in reality what the passenger is doing is making a claim as the law requires against the driver, and all of it's going to be paid by State Farm or somebody like that. That's how it works. [LB216]

REX REZAC: I think the objective there is to do what we can to take out the concept of insurance so that we don't have jurors who are taking this same position that as long as there's an insurance company there to pay it, who cares what happens. [LB216]

SENATOR LATHROP: That's how it works? [LB216]

REX REZAC: That's the theory behind it. [LB216]

SENATOR LATHROP: I stated it correctly. [LB216]

REX REZAC: Correct. [LB216]

SENATOR LATHROP: That's how it works. Okay. And so when a person gets in an accident, they can sue whether it's the other driver or their own driver. What the guest statute does is said you can sue the other driver, you can sue your own driver unless you're a close family member. [LB216]

REX REZAC: Correct. [LB216]

SENATOR LATHROP: And in fact the guest statute says you can sue them if you're a close family member if you can establish gross negligence. [LB216]

REX REZAC: Right there it's... [LB216]

SENATOR LATHROP: Typically you have to show the person is driving in a reckless manner or that they're intoxicated and the intoxication led to the accident. [LB216]

REX REZAC: There's a lot of factual issues, as you know, as to what gross negligence means, but that's fair. [LB216]

SENATOR LATHROP: Okay. And your explanation for...originally there were two explanations back when we were in law school. One was we don't want to cause some strife in the family. That's long since gone. It's now down to the collusion. [LB216]

REX REZAC: I would disagree with that a little bit because there is still a concept out

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

Judiciary Committee
January 30, 2009

there in the law that a negligent tort feisor, the person who caused the accident shouldn't benefit from it. And in a...for example, a husband and wife situation, if the wife is able to sue the husband and collect from his insurance company, there's obviously a benefit to the family as a whole in that. [LB216]

SENATOR LATHROP: Okay. You're getting ahead of me on...okay. The biggest concern that you have, State Farm has, the defense lawyers have is that we're creating another class of people that can make a claim against the State Farms of the world. [LB216]

REX REZAC: The biggest problem we have is the basic concept of insurance fraud. And this, we believe, strikes an appropriate balance to deal with the potential and the very reasonable and prevalent... [LB216]

SENATOR LATHROP: Well, let's talk about insurance fraud for just a second. And the insurance fraud really can...the typical form is somebody is not really hurt and they say they are and the driving spouse backs them up. [LB216]

REX REZAC: Well, that's one example of it. We obviously... [LB216]

SENATOR LATHROP: Well, it might be, in terms of family, it might be the most significant example of when you would expect the insurance fraud. [LB216]

REX REZAC: Well, it can... [LB216]

SENATOR LATHROP: I mean, people are going lie about who was driving the car and that doesn't matter if they're family or not. [LB216]

REX REZAC: Well, that's true and I think that the problem here is that we've created a situation by allowing these family members to sue each other where they're both cooperating for the benefit of one. No longer do we have an adversarial judicial system, because instead of both of them in the court duking it out, we have both of them trying to make sure that the plaintiff wins. That is not the way that our system is set up. I mean, that's not the basic objective of our system of civil litigation. [LB216]

SENATOR LATHROP: That sort of assumes that the plaintiff shouldn't win in the first place though, doesn't it? [LB216]

REX REZAC: No, no, because the objective is... [LB216]

SENATOR LATHROP: Well, let me give you an example. Let's say that State Farm insures somebody for \$100,000. Husband and wife are driving down the road. The husband falls asleep at the wheel and hits a tree. Okay. Wife then goes through the

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

Judiciary Committee
January 30, 2009

windshield, has a spinal fracture, and \$200,000 in medical expenses. Okay. No one...there's no opportunity for fraud. There's no opportunity to create a claim greater than the policy limits. What's the harm? [LB216]

REX REZAC: Well, the harm, again, is that everyone that...I'm not saying that there is a harm in that situation. What I'm saying is that the guest statute strives to create a balance between the conflicting claims of your person who has got a right to be compensated in this accident and the rights of the defendant and the insurers to be free of collusion and fraud. [LB216]

SENATOR LATHROP: And you did talk... [LB216]

REX REZAC: And I'm just saying that somewhere there's got to be a balance there. [LB216]

SENATOR LATHROP: You did talk about the fact that we don't have an adversarial situation when the husband is the defendant, the plaintiff is the wife. The problem is created by the fact that we perpetuate this fiction that actually we're not suing the spouse, we're suing State Farm. If we did away with the requirement and allowed first-party claims against State Farm, we'd have plenty of adversarial situations, wouldn't we? We would say husband and wife v. State Farm... [LB216]

REX REZAC: We could make strict liability for everything. [LB216]

SENATOR LATHROP: This isn't about strict liability though. It's about the fact that... [LB216]

REX REZAC: Or we could bail everybody out. [LB216]

SENATOR LATHROP: It's not strict liability nor a bailout. It's the fact that it appears to be collusion only because we insist on the husband suing the wife, but if we've permitted claims with spouses to be a direct action against the liability carrier, in that instance there wouldn't be any problem with the adversarial nature of the proceeding, would there? [LB216]

REX REZAC: Well, of course there would... [LB216]

SENATOR LATHROP: And people would know... [LB216]

REX REZAC: ...because the insured, the husband still has an obligation to cooperate with his insurance company. Otherwise you just move the problem over one step. You still have... [LB216]

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

Judiciary Committee
January 30, 2009

SENATOR LATHROP: But if you find the husband isn't cooperating with the insurance company, you can void his coverage under your State Farm policy. Am I right? [LB216]

REX REZAC: You can if that is in fact what happens. You're right. [LB216]

SENATOR LATHROP: Okay. I think that's all the questions I have for you though. Senator Rogert. [LB216]

SENATOR ROBERT: Mr. Rezac, just listening to your conversation with Mr. Lathrop and you mentioned collusion fraud quite often. Oftentimes a few spoil it for the others, and an attempt...an opportunity for recovery is often lost due to our attempt to protect the many. What is or is there an example of a necessity of a type of suit that this bill is seeking to allow? [LB216]

REX REZAC: A necessity for the type of suit that this... [LB216]

SENATOR ROBERT: By removing this limitation, what are they seeking to do by removing this? Is there an example of a recovery that they're trying to get by removal of this that is not fraud or collusion? [LB216]

REX REZAC: Sure. And as Senator Lathrop presented his situation where there would have been an unfair denial of compensation to someone, yes. Is this a perfect system? Absolutely not, but few are. My position is that what this seeks to do is to balance those conflicting claims. And, yes, you are going to have a lawsuit or two, maybe more, where there is a sad result. You also are going to avoid lawsuits in which an unjust result would have obtained because of a fraudulent situation. Like most regulatory statutes, this one tries to strike a balance. [LB216]

SENATOR ROBERT: So you're ascertaining that it's outweighed...the problems that you'll come up with by removing this from what we're actually protecting. [LB216]

REX REZAC: Well, you know, that's an interesting question because this is one tool that's available. Most states, or at least a large minority of states, allow what's called a household exclusion, which is a provision in the insurance policy itself which plays a similar role in preventing fraud and collusion involving people who are family members. Nebraska doesn't allow a household exclusion, so that tool is not available. There are a multitude of ways that I suppose you could address this same situation. The one that we have chosen and the one that we have had since whenever has been the guest statute. [LB216]

SENATOR ROBERT: Okay. Thank you. I'm done. [LB216]

SENATOR LATHROP: Senator Lautenbaugh. [LB216]

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

Judiciary Committee
January 30, 2009

SENATOR LAUTENBAUGH: I want to rephrase one of Senator Lathrop's questions as I understood. If you assume a case doesn't involve fraud and collusion, then there is no fraud and collusion in that case, right? [LB216]

REX REZAC: Okay. [LB216]

SENATOR LAUTENBAUGH: But isn't that the problem? You're being... [LB216]

REX REZAC: You don't know. [LB216]

SENATOR LAUTENBAUGH: Exactly, and isn't that the basis for this statute or the reason for this statute? [LB216]

REX REZAC: Well, sure. I mean, I give you some examples of situations where we've found out that there were problems. In the case of the wife and husband who'd switched places it just so happened that we were able to obtain a blood sample from the window where the husband flew out the window. And so we were able to establish that the husband was the guy who was in fact driving. How many of these cases occur where we never find out? And don't get me wrong, it's not like these people are telling plaintiff's lawyers, their own lawyers that this stuff has happened, they're pulling the wool over everybody's eyes. [LB216]

SENATOR LAUTENBAUGH: Thank you. [LB216]

SENATOR LATHROP: In those rare instances where it happens. [LB216]

REX REZAC: In those...not that very instance. [LB216]

SENATOR LATHROP: And we should say, just to give the other side of it, is that State Farm gets to hire guys like you to turn every stone, go through every medical record since birth to make sure the person has never been hurt in the same area of their body previously. And you do it everyday. [LB216]

REX REZAC: And thank you for that to the extent that that's a compliment, Senator. (Laughter) [LB216]

SENATOR LATHROP: Well, after I got you to agree to it, I was going to compliment you on how well you and those of you at Fraser Stryker do. It's a quality law firm. [LB216]

SENATOR ROBERT: Is this a courtroom? (Laughter) What's going on? [LB216]

SENATOR LATHROP: We're done with this witness. [LB216]

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

Judiciary Committee
January 30, 2009

REX REZAC: Anything further? [LB216]

SENATOR LATHROP: Rex, it's always good to see you. [LB216]

REX REZAC: You, too, Senator. [LB216]

SENATOR LAUTENBAUGH: Isn't that the circle of life, Senator Lathrop? (Laughter)
[LB216]

SENATOR LATHROP: That's the circle of my life (inaudible). Ms. Nielsen. [LB216]

COLEEN NIELSEN: Senator Lathrop, members of the Judiciary Committee, my name is Coleen Nielsen, spelled C-o-l-e-e-n N-i-e-l-s-e-n, and I'm the registered lobbyist for the Nebraska Insurance Information Service. The Nebraska Insurance Information Service is a local trade organization of property casualty insurance companies doing business in Nebraska. And I'm testifying in opposition to LB216. And the import of my testimony is basically on the expected impact if the guest passenger statute was repealed, because we expect there would be an increase in the number of claims and an increase in litigation. These increases all lead to higher insurance costs in Nebraska. One of the natural consequences or risk of higher insurance cost is the increase of the percentage of Nebraska drivers that are uninsured. According to the January 21, 2009 Insurance Research Council news release, the recent economic downturn is expected to trigger a sharp rise in uninsured motorist rates, and approximately one in six drivers across the U.S. may be driving uninsured by 2010. So for Nebraska, a repeal of this statute in addition to the economic downturn would only increase the likelihood that persons would go without insurance coverage. A further result would be that the responsible drivers who purchase the insurance would end up paying for the injuries caused by the uninsured drivers. Currently, it's estimated that 8 percent of Nebraska drivers are uninsured, and with an estimated uninsured rate of 8 percent, Nebraska trails behind only seven other states that benefit from lower percentages of uninsured drivers. The existence of statute such as the guest passenger statute enables insurers to continue to offer Nebraska low, affordable insurance rates. So the bottom line is that the repeal of the guest passenger statute mandates the expansion of liability coverage under our compulsory insurance law, and that expansion would result in more claims, more costs, and higher insurance rates. And so for these reasons we ask that you vote against LB216. [LB216]

SENATOR LATHROP: Senator Christensen. [LB216]

SENATOR CHRISTENSEN: Thank you, Senator Lathrop. Thank you, Coleen. Have you run the number of what would it increase premiums if this was passed? [LB216]

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

Judiciary Committee
January 30, 2009

COLEEN NIELSEN: I expected that question, and I have to tell you that I could not run numbers because the rates are based on claims frequency. And because we don't have numbers with the repeal of the statute in place, we wouldn't know for a period of time. And in addition to that, you couldn't tell specifically from the repeal of this statute whether the increase in frequency or severity of claims was due specifically to this statute or not because when they rate, when they do rate making, they include all sorts of factors. So I couldn't tell you what that increase might be. [LB216]

SENATOR CHRISTENSEN: No other state to compare it to then? [LB216]

COLEEN NIELSEN: Not really because as the previous witness talked about, other states have household exclusion, but Nebraska is a bit different. They have a guest passenger statute instead. So the guest passenger statute does allow for certain kinds of lawsuits. [LB216]

SENATOR CHRISTENSEN: Is the household exemption, is that a way of taking care of the marriage penalty in this case? Well, because if you live together... [LB216]

COLEEN NIELSEN: Right. [LB216]

SENATOR CHRISTENSEN: ...you can sue your partner; if you're married you can't. If it's got a household exemption, does that mean if they're living at the same address then they can't sue one another? What's a household exemption? [LB216]

COLEEN NIELSEN: I don't remember what the household exclusion...as I recall, it excludes family members from making those sorts of claims, and I'm not sure about that other situation, I'm not. But I can get that information for you. [LB216]

SENATOR CHRISTENSEN: Okay. Thank you. [LB216]

SENATOR LATHROP: Just a couple of questions. The household exclusion is actually a policy exclusion that Nebraska doesn't permit. So you could sue the person you live with, you just can't collect on their policy as opposed to a bar to a cause of action. [LB216]

COLEEN NIELSEN: Right. That's correct. [LB216]

SENATOR LATHROP: And I think I'm okay. I don't have any other questions. Seeing none, thank you for your testimony. [LB216]

COLEEN NIELSEN: Thanks. [LB216]

SENATOR LATHROP: Anyone else in opposition? Anyone in a neutral capacity? I've

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

Judiciary Committee
January 30, 2009

taken over your job, Senator Ashford. (Laughter) [LB216]

SENATOR ASHFORD: I'm relaxed. [LB216]

SENATOR CHRISTENSEN: And he's good at it. [LB216]

SENATOR ASHFORD: What! (Laughter) [LB216]

SENATOR LATHROP: And Senator Wallman waives close? Senator Wallman waives close, so we're done. [LB216]

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

Judiciary Committee
January 30, 2009

Disposition of Bills:

LB79 - Held in committee.

LB156 - Indefinitely postponed.

LB216 - Placed on General File.

Chairperson

Committee Clerk