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Judiciary Committee  
February 07, 2014

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[LB821 LB878 LB881 LB964]

The Committee on Judiciary met at 1:30 p.m. on Friday, February 7, 2014, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB821, LB881, LB878, and LB964. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Mark Christensen; Colby Coash; and Amanda McGill. Senators absent: Al Davis and Les Seiler.

SENATOR ASHFORD: Well, let's see here. We have...we have enough of us, I think. Senator Lautenbaugh is here.

SENATOR LAUTENBAUGH: I'm just glad some of you came.

SENATOR ASHFORD: He's the most important one. What?

SENATOR LAUTENBAUGH: I'm just glad some of you came.

SENATOR ASHFORD: Well, thanks for...

SENATOR LAUTENBAUGH: I know I'm not a draw, but, gee.

SENATOR ASHFORD: (Laugh) We've had bigger crowds, but we've had fewer as well, I mean, so I don't...

SENATOR LAUTENBAUGH: One can't help but feel a little rejected.

SENATOR ASHFORD: (Laugh) Well, welcome. LB821. Senator Lautenbaugh, why don't you go ahead.

SENATOR LAUTENBAUGH: This is a very simple bill addressing a possible ambiguity or hole in our statutory scheme. A few years back, we had passed a law that prohibited, with a few exceptions, providing benefits to people here illegally. There seems to be a split of authority among the counties as to whether or not it's clear that the counties have authority to dispose of a body of a deceased person if they cannot determine citizenship. And, at the request of Douglas County, this is a clarifying bill that makes it clear that the county is authorized to provide that benefit, if you will, despite the general prohibition. There is someone here from Douglas County to try to expand upon that, but I'm not sure how you do. [LB821]

SENATOR CHAMBERS: And that's all? (Laughter) [LB821]

SENATOR LAUTENBAUGH: I said it was simple. [LB821]

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SENATOR ASHFORD: My goodness. Well, I don't see any questions, Scott. Feel free to stick around. [LB821]

SENATOR CHAMBERS: I did...I asked a question... [LB821]

SENATOR ASHFORD: You did, and... [LB821]

SENATOR CHAMBERS: ..."Is that all?" (Laugh) [LB821]

SENATOR LAUTENBAUGH: Yes, Senator Chambers, yes... [LB821]

SENATOR CHAMBERS: That's the only question. [LB821]

SENATOR LAUTENBAUGH: ...that is all, is my understanding. [LB821]

SENATOR CHAMBERS: Okay. [LB821]

SENATOR LAUTENBAUGH: There is a gentleman from Douglas County who may have more, like I said. But that is it. [LB821]

SENATOR ASHFORD: Thanks, Scott. Anyone here from Douglas County? Oh, there is. Or any other county, for that matter? [LB821]

MARCOS SAN MARTIN: (Exhibit 1) Chairman Ashford...Chairman Ashford... [LB821]

SENATOR ASHFORD: Yes, sir. Sorry, I was... [LB821]

MARCOS SAN MARTIN: ...members of the Judiciary Committee, my name is Marcos San Martin, it's M-a-r-c-o-s S-a-n M-a-r-t-i-n, Douglas County administration, labor and intergovernmental. I am speaking today in support of LB821 on behalf of the Douglas County Board of Commissioners. I would like to submit County Resolution 735, as I did with the clerk there. This county resolution is in direct support of the changes to Chapter 4 as proposed by LB821. I would also like to express the gratitude of the county board to Senator Lautenbaugh for sponsoring the item. As members of this committee we all know, both the state and counties are often the provider of last resort for services required by the neediest individuals in our communities. LB821 will revise 4-110 of our state statutes to expressly permit a county to bury or cremate an indigent's unclaimed body in the specific case that we are unable to evidence the lawful U.S. presence of the deceased. This revision will provide consistency in what counties are likely already doing. Therefore, on behalf of Douglas County, I respectfully request that this committee consider the revisions to Chapter 4 as proposed by Senator Lautenbaugh in order to permit the burial or cremation of an unclaimed body when the aftercare of the deceased has become the responsibility of the county pursuant to Chapter 38 and Chapter 71.

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[LB821]

SENATOR ASHFORD: "The aftercare" meaning the...at death. [LB821]

MARCOS SAN MARTIN: Sure, the...either the... [LB821]

SENATOR ASHFORD: What about prior? [LB821]

MARCOS SAN MARTIN: ...cremation or burial of... [LB821]

SENATOR ASHFORD: What about...? [LB821]

MARCOS SAN MARTIN: ...the body. [LB821]

SENATOR ASHFORD: Okay. What's an example of how this has happened? What is the...what are the situations where this...? [LB821]

MARCOS SAN MARTIN: Yes, sir, we had a...we had one example... [LB821]

SENATOR ASHFORD: I mean, it seems very straightforward; I just...go ahead. [LB821]

MARCOS SAN MARTIN: Yes, Senator, we had one example last year where the Douglas County General Assistance office was contacted because there was an indigent unclaimed, unmarried deceased that often falls to the county's responsibility. And the individual, unfortunately, the county could not verify their lawful presence within the United States, meaning a driver's license or a work history or something like that. And so, therefore, we had to make a decision whether or not to properly cremate or bury or, you know, take care of the remains. [LB821]

SENATOR ASHFORD: Okay. [LB821]

MARCOS SAN MARTIN: Does that answer...? [LB821]

SENATOR ASHFORD: So...and you keep some record of that, obviously, and then... [LB821]

MARCOS SAN MARTIN: Yes, Senator. [LB821]

SENATOR ASHFORD: But you have no name or identification generally? [LB821]

MARCOS SAN MARTIN: No, Senator, I mean, I... [LB821]

SENATOR ASHFORD: There's no ID at all, I mean, there's nothing to identify this

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person. I... [LB821]

MARCOS SAN MARTIN: No, no. No, let me be clear. I believe we do know who the person is; they just...no one claimed... [LB821]

SENATOR ASHFORD: Okay. [LB821]

MARCOS SAN MARTIN: ...the individual... [LB821]

SENATOR ASHFORD: Okay. [LB821]

MARCOS SAN MARTIN: ...unfortunately. [LB821]

SENATOR ASHFORD: Thank you. Thanks, Marcos. [LB821]

MARCOS SAN MARTIN: Yes, Senator. [LB821]

SENATOR ASHFORD: Any other proponent for the bill? [LB821]

ELAINE MENZEL: Chairman Ashford and members of the committee, my name is Elaine Menzel, it's M-e-n-z-e-l, from the Nebraska Association of County Officials. And I'm just here to record our support for this legislation today. And I will open it up to any questions, if there are any. [LB821]

SENATOR ASHFORD: Don't see any. Thank you. [LB821]

ELAINE MENZEL: Thank you. [LB821]

SENATOR ASHFORD: Anyone else? Anybody else for the bill? Opponents? Neutral? Boy, I, with some trepidation...I'm sorry, Senator Coash, to even say the word "neutral" anymore. But (laughter) thank you for...Scott. [LB821]

SENATOR LAUTENBAUGH: Simply put--oh, I'm sorry, I thought there was someone else coming up--it wouldn't necessarily be a case where the person is unknown, although it could be. But there's just no way to verify actual citizenship, is the issue. [LB821]

SENATOR ASHFORD: Right. [LB821]

SENATOR LAUTENBAUGH: I would like to point out, I did bring this at the behest of Douglas County, and yet they've still come out against my MUD bill last week. So I give and I give, and I get nothing in return, but (laughter)... [LB821]

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SENATOR ASHFORD: Well, nothing is... [LB821]

SENATOR LAUTENBAUGH: ...that is the... [LB821]

SENATOR ASHFORD: Nothing is fair, as far as I can tell. [LB821]

SENATOR LAUTENBAUGH: It really isn't. But, still, I would urge you to look favorably upon this and find a way to get it to the floor. I probably won't prioritize this, but it is something that needs to be addressed. So I hope you will. [LB821]

SENATOR ASHFORD: Thank you, Scott. [LB821]

SENATOR LAUTENBAUGH: Thank you. [LB821]

SENATOR ASHFORD: Have a good weekend, unless you're here later. No, you're not. [LB821]

SENATOR LAUTENBAUGH: No. [LB821]

SENATOR LATHROP: Douglas County came out against a bill of yours? [LB821]

SENATOR LAUTENBAUGH: I know. [LB821]

SENATOR LATHROP: How does that work? [LB821]

SENATOR LAUTENBAUGH: You think you know people. [LB821]

SENATOR LATHROP: Yeah, exactly. (Laughter) It's fair for you to say that, yeah. [LB821]

SENATOR ASHFORD: Senator Watermeier is here for LB881. [LB881]

SENATOR WATERMEIER: I was going to help you make your quorum. [LB881]

SENATOR ASHFORD: Good point, Senator. (Laughter) Don't tell anybody, okay? [LB881]

SENATOR WATERMEIER: (Exhibits 2 and 3) I won't, if that happens. All right. Chairman Ashford, members of the Judiciary Committee. I am Senator Dan Watermeier, spelled W-a-t-e-r-m-e-i-e-r, representing District Number 1 in the southeast corner of Nebraska. And I am here today to introduce LB881. Under both the Nebraska Political Subdivisions Tort Claims Act and the State Tort Claims Act, any public entity employing a law enforcement officer whose actions are the proximate cause of any

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death, injury, or property damage suffered by an innocent third party is strictly liable for and must pay for those damages, irrespective of any fault or negligence on the part of the officer. "Innocent third party" is not defined in statute, so the courts have judicially constructed a definition to mean any person who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel, and one who is not sought to be apprehended in the fleeing vehicle. Due to a recent lawsuit, Werner v. County of Platte, the judicial definition has now been extended by the Nebraska Supreme Court to even include a passenger injured in a fleeing vehicle who was drinking from an open container of beer in that vehicle and was ultimately found with methamphetamine and two methamphetamine pipes on his person, for which he was charged and pleaded guilty to a felony drug offense. The holding in Werner actually prompted Judge William Cassel of the Nebraska Supreme Court to issue a separate Opinion in that case, in which he stated: I doubt that most members of the Legislature, if asked, would characterize a passenger in a vehicle fleeing from law enforcement who has on his person methamphetamine and glass pipes for smoking it later that evening, and who possesses and is likely drinking from an open container of an alcoholic beverage when the pursuit begins, as an innocent third party. However, even Judge Cassel ultimately concurred with the final result, because, he said, the courts have previously defined "innocent third party" and the Legislature has not replaced the courts' definition with one of its own, and when that occurs, there is a presumption that the Legislature has acquiesced in the courts' determination of the Legislature's intent. He did emphasize, though, that the Legislature has the power to change the result in a future case and suggested that the Legislature could decide to narrow the definition of an innocent third party to exclude a person then engaged in the violation of a felony or misdemeanor offense, without regard to whether such person or his or her conduct was known to law enforcement officers before initiating the pursuit. LB881 seeks to codify the judicial definition of "innocent third party" in statute. It also seeks to build on that definition by recognizing that there are other limited circumstances when a person in a fleeing vehicle should not be considered an innocent third party, such as when evidence can be shown that the passenger is engaged in any illegal activity which would itself give rise to an arrest, or when the passenger enters into the vehicle, without coercion, knowing or with a reasonable belief that the driver of the vehicle is under the influence of alcoholic liquor or drugs. I realize the history of this issue goes back long before my time in the Legislature. But I think the recent court ruling in Werner v. County of Platte reiterates the need to revisit this issue. Nebraska is the only state in the country which imposes strict liability for a law enforcement motor vehicle pursuit on a law enforcement agency, even if the law enforcement agency is not in any way negligent in its pursuit, and even when it is the driver of the vehicle being pursued that causes injury to an innocent third party. Although some may think this is unfair, LB881 does not attempt to change our strict liability provision but only attempts to redefine "innocent third party" as recommended by the courts. Furthermore, the proposed language is limited in that it only addresses that definition in the context of those passengers in a fleeing vehicle. Third parties that are truly innocent will still be protected under this law. I urge the

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Judiciary Committee to advance LB881 to the floor of the Legislature. If there are any questions, I'd be glad to try to answer them, but there are people behind me that are going to be much more qualified in these lawsuits here to testify. I would like to submit a letter from the League of Nebraska Municipalities expressing their support of LB881. [LB881]

SENATOR ASHFORD: Senator Chambers. [LB881]

SENATOR CHAMBERS: Senator Watermeier, I'm the one who brought that bill, and it's just the way I intended it. Anybody who's not the driver is innocent. Nobody in the car is operating the steering wheel, the accelerator. And if society accepts, as a legitimate part of law enforcement, pursuits, even through residential areas, even during the busiest times of the day, then society bears the cost of harm that befalls any person not directly operating the vehicle being pursued. The police are able to break these chases off whenever they choose. They have tried to say that they contact a command officer, will describe what's happening, and will be told, "Break it off." That hasn't happened in Omaha. I have observed, with my eyes, high-speed...not just pursuit, high-speed pursuits through the community where I live. And when I was able to give the date, and in some cases I'd get the cruiser number, then they couldn't tell the usual story, because I know how the police try to say: Well, it doesn't happen the way you say. And in some instances there was not even a report of a chase having been undertaken. But they knew where the officer, they knew where the car was supposed to be. So if they're going to chase, there's going to be strict liability. And if the municipality which hires the officer, if the state with the State Patrol, if the county through the county sheriff is going to engage in these chases and they're not careful, they do not use good judgment, then there's going to be strict liability. I had tried to get restrictions on the chases, where and when they would occur. Well, the police and the cities were the ones who came in and said: No, we're not going to have any restriction on the chases; leave it up to the chief, or the one who's in charge, the chief, the sheriff, or the superintendent of the State Patrol. So I said then: If you have to pay out of your pocket, maybe you will put some restrictions in place. And, in a manner of speaking, they said, do whatever you think you can do, thinking I couldn't do anything. So the reason Nebraska is the only state with a law like that is because Nebraska is the only state with somebody like me, who not only will see a problem but do something about it. One other thing...no. You said there are people after you; I will do that. But are you aware of, or did anybody tell you who asked you to bring this bill, that I crafted legislation that would make officers who come into this state from other states, their state would be liable under this law? Did they tell you that? Okay, well... [LB881]

SENATOR WATERMEIER: We had discussions of actions across the river from Council Bluffs. And I remember even you had addressed that when we had a meeting in your office, I believe. [LB881]

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SENATOR CHAMBERS: But before I told you, nobody, I'm sure, had told you that. [LB881]

SENATOR WATERMEIER: I...I'm not so sure I didn't hear that; I may have. I'd hate to say. But I may have. [LB881]

SENATOR CHAMBERS: Okay, but I'll hold any other questions for those who are following you. But part of this was to allow them to prepare themselves to respond to what my concerns are and what my view is. [LB881]

SENATOR WATERMEIER: Um-hum. Well, Senator Chambers, can I just add this: I believe your bill has been effective; I believe your bill has done what you intended it...for it...to happen. How many years has it been? Twenty-eight or 30 years. I think it's worked, in that innocent third parties have been reduced and the accidents have been reduced. But when we're going over the line and you're seeing the extended liability that goes beyond that, then I just think common sense has to take over. But I'm not here to try to knock your bill down as far as, let's just take away all the liability. I think it's worked and is working. So I would defend it in that regard. [LB881]

SENATOR CHAMBERS: But there are issues that would complicate how the law works. And with all of these provisos that they're trying to put in here...and it comes from the cities, they don't want to pay at all. But I'll save that for the ones who follow you. [LB881]

SENATOR WATERMEIER: Well, they make it pretty clear that they're going to be willing to pay for the innocent third party, on how they're defined. [LB881]

SENATOR CHAMBERS: Yeah, because the law says they're going to. [LB881]

SENATOR WATERMEIER: Um-hum. [LB881]

SENATOR CHAMBERS: And as long as I'm here, they will. [LB881]

SENATOR WATERMEIER: Um-hum. [LB881]

SENATOR CHAMBERS: And so will those who chase in this state from an adjacent state. [LB881]

SENATOR ASHFORD: Thanks, Dan. [LB881]

SENATOR WATERMEIER: Certainly. [LB881]

SENATOR ASHFORD: I don't see any other questions. We'll go to the proponents. Vince, are you first? [LB881]

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VINCE VALENTINO: (Exhibit 4) I'm first up, I guess. My name is Vince Valentino. I represent 80 counties in a self-insurance pool called the Nebraska Intergovernmental Risk Management Association. And I tried Werner v. County of Platte, actually. That was my case that the Supreme Court indicated that perhaps it was time for the Legislature to go ahead and define "innocent third party." And I'm aware of the legislative history that goes back to 1981 in this matter. And I'm also aware of the fact that there was really no discussion in the legislative debate when the amendment was made to I believe it was either LB76 or LB273 about what an innocent third party actually was. And as the courts have begun to develop what they thought would be a definition, which was really a legislative prerogative, and although I know, Senator Chambers, you've indicated that that's exactly what you meant, there's nothing in the legislative history that really says that. All the legislative history really indicated was, as I read it--and I read it here recently, just because I wanted to get myself fully immersed back into 1981 and 1983, when the legislation was kind of brewing at that point in time--was that it was really meant to try to compensate those individuals who were outside the vehicle, that were crashed into by individuals that were engaged in the pursuit, whether it was the driver of the vehicle that was being pursued or by police. And that's...and that's fair; I've never had a problem or an issue with that. As things have developed, however, particularly in light of the Werner case and some others that have kind of come along since 2002 and 2003, when the Supreme Court actually started deciding what the...their definition of "innocent third party" is, that it became fairly apparent that inside of that vehicle were different circumstances that were compelling people to want to flee and avoid the police. And, obviously, when people are being sought or they're engaged in criminal behavior, they don't want to be caught at it. That's a natural instinct; nobody wants to be caught committing some kind of crime. And some of the worst decisions are made when people are drinking, unfortunately, and driving. And those are the folks that we try to address, and those are the folks that we certainly look at. But in my particular cases that I've tried, the drug issues that have gone on within those vehicles have become a real great concern. The various things that are set forth...I would tell you that there's only (a), (b), and (e), of LB881, Section 5, that actually is what I would call new or different. And that is: that a person enters into the vehicle, without coercion, knowing, or with a reasonable belief, that the driver of the vehicle is under the influence of alcoholic liquor or drugs. The other one is: failing to take reasonable steps to persuade the driver of the fleeing vehicle to stop the vehicle. And the other one is: engaged in any illegal activity which would itself give rise to an arrest or otherwise be subject to an arrest. Those are the circumstances that, as I have looked at these various cases that have been tried or that I've tried, seem to be the issues that compel people, apparently, to want to flee and encourages the driver to want to do that. [LB881]

SENATOR ASHFORD: Vince, why don't we...hold...time-out for just a second. Why don't we just go to some questions and... [LB881]

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VINCE VALENTINO: Okay. And I'm certainly willing to do that. Senator Chambers, I'm sure you're first up. [LB881]

SENATOR CHAMBERS: Mr. Valentino, when you tried these cases, you were representing the... [LB881]

VINCE VALENTINO: Governmental entity. [LB881]

SENATOR CHAMBERS: ...entity that...right. And your job was to avoid having to pay, in any of the cases that you handled. [LB881]

VINCE VALENTINO: Well, I always try to look at it as trying to do justice. [LB881]

SENATOR CHAMBERS: But here's what your job...your job was not to see that the municipality, or whichever subdivision you represented, paid. Your job was to prevent them from having to pay. Isn't that true? [LB881]

VINCE VALENTINO: Yeah, in some cases, Senator, I don't think it's true, because I actually settled some of those cases that I know I'm not going to win under that definition. [LB881]

SENATOR CHAMBERS: That's because you knew you're going to lose. [LB881]

VINCE VALENTINO: Yeah, you got that right; when the strict liability is there, you absolutely are right. [LB881]

SENATOR CHAMBERS: But... [LB881]

VINCE VALENTINO: There's no wiggle room. You don't have a negligence defense. [LB881]

SENATOR CHAMBERS: But if that person hadn't had a good lawyer, you would have probably not settled, in my view, the way lawyers operate. [LB881]

VINCE VALENTINO: Well, strict... [LB881]

SENATOR CHAMBERS: How... [LB881]

VINCE VALENTINO: Strict liability isn't that hard to prove, sir. [LB881]

SENATOR CHAMBERS: Right. And that's the way I wanted it. [LB881]

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VINCE VALENTINO: I know you did. [LB881]

SENATOR CHAMBERS: So when you indicate that maybe I hadn't anticipated something...I know what strict liability means. [LB881]

VINCE VALENTINO: I know you did. [LB881]

SENATOR CHAMBERS: And when I went to law school, one of the first things we learned about was the strict liability on common carriers. So the notion of strict liability was not unknown to me. And when the court says what the Legislature ought to do or what we don't think, they need to talk to somebody in the Legislature before they say that. So Judge Cassel was just...just talking. But here's what I would ask you. And I'm going to look at the handout that we were given because it doesn't talk about these things in technical terms. [LB881]

VINCE VALENTINO: It does not. And that handout is mine, sir. [LB881]

SENATOR CHAMBERS: Say it again. [LB881]

VINCE VALENTINO: That handout is mine. [LB881]

SENATOR CHAMBERS: Right, and that's why I'm going to go to it, because you'd be familiar with it. All right, now, the pages are not numbered... [LB881]

VINCE VALENTINO: No, and I... [LB881]

SENATOR CHAMBERS: ...but it says, "promoted, provoked, or persuaded the driver to engage in flight." How are you going to prove that somebody in a car did these things, if the person denies it? [LB881]

VINCE VALENTINO: And that's a difficulty of these cases. That's the difficulty of those definitions. Everybody I've ever had in a trial, their lawyer walks them right down, "Did you promote this?" "No." "Did you provoke this?" "No." "Did you persuade the driver to flee?" "No, I did not." And unless we have other evidence to show that that's not true, or that the statements made at the scene were not true, or that they made some statements to an EMT in the heat of the moment when the accident happened that can rebut that, we're not. [LB881]

SENATOR CHAMBERS: How about if the person is an object of apprehension in the fleeing vehicle based on what is known to the officer before or during the chase? Officers lie. And the Nebraska Supreme Court said that when they are interrogating somebody, they can lie. The court has approved it. In their training--I've talked to officers--they're taught how and when to lie, at the academy. [LB881]

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VINCE VALENTINO: Well, I thought that when you... [LB881]

SENATOR CHAMBERS: I know officers. [LB881]

VINCE VALENTINO: ...when you adopted...I think it was...maybe you were behind the legislation that required all statements be taken and recorded? [LB881]

SENATOR CHAMBERS: And they... [LB881]

SENATOR LATHROP: It was me. [LB881]

SENATOR CHAMBERS: ...we never got anywhere. [LB881]

VINCE VALENTINO: Oh, that was you, Senator? [LB881]

SENATOR LATHROP: No, that was my bill. [LB881]

SENATOR CHAMBERS: And we supported it, but it never got anywhere. [LB881]

VINCE VALENTINO: Okay, and I don't have a problem with that. [LB881]

SENATOR CHAMBERS: But here's the thing: based on what is known to the officer. The only way you get that is by listening to the officer. And the officer's word is always taken over anybody else's. And I don't trust the police. They lie. [LB881]

VINCE VALENTINO: Actually, at night, when most of these things happen...they usually don't happen during the day; they generally happen at night. [LB881]

SENATOR CHAMBERS: But I'm going to go on. [LB881]

VINCE VALENTINO: Good. [LB881]

SENATOR CHAMBERS: You know what they were doing in Omaha? They were taking Wite-Out and putting it over the lens of the camera that is supposed to record what they did, and there was a story about it. And they park their cruisers so that it would...what they were going to do would be out of range of the camera. But here's what I want to ask you. How many chases are occurring where you thought that the person who was a passenger should not have been considered an innocent party? Maybe it's hard to give a number, because... [LB881]

VINCE VALENTINO: It would be. I mean, I...I would say, probably, maybe 20 percent to 25 percent of the cases that I've tried, maybe 30 percent, where I thought that they

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probably had been in there and it was just a happenstance. [LB881]

SENATOR CHAMBERS: Then there's quite a bit of chasing. If you want to...if you can, there's a book called Busting Bad Guys, or something, by Mark Langan, who was a member of the Omaha Police Department, and he was an undercover narcotics officer. And he and I didn't see eye to eye on things while he was on the police force, but we do now in his new role. But he had stated that he wanted, at all costs, to avoid pursuits, because he didn't want an officer or somebody else hurt because of trying to catch somebody who was dealing with amphetamine. Now, that is a drug. He didn't want chases. In Omaha, they chase if you have a taillight out. And they found out that there were people who took off when they hadn't even committed any violation of any kind, and it's because they were afraid of the police. So you've got a high hill to climb. But here's what I wanted to ask you: Are you aware of the legislation that was crafted to make officers who come into this state from an adjoining state, engage in a pursuit, and an innocent third party is hurt, that the state from which they came would be made liable? It was like the long-arm statute. That...the statute says specifically, activity of that kind, which is done pursuant to the laws of the state he or she came from--I'm paraphrasing--creates an adequate contact with the state of Nebraska to give jurisdiction. And that officer would be...that subdivision which hired that officer would be liable, just as they are in Nebraska. [LB881]

VINCE VALENTINO: Interesting...interesting law. I wonder if the Interstate Commerce Commission permits the legislation. [LB881]

SENATOR CHAMBERS: I wrote it. And I believe it will work, too, because... [LB881]

VINCE VALENTINO: Just curious. [LB881]

SENATOR CHAMBERS: ...because they have long-arm statutes despite interstate commerce. But anyway, I've asked and engaged you in all that I want to. So I don't have anything else, Mr. President... [LB881]

VINCE VALENTINO: Thank you... [LB881]

SENATOR CHAMBERS: ...I mean, Mr. Chair. [LB881]

VINCE VALENTINO: Thank you, Senator. [LB881]

SENATOR ASHFORD: Any other questions of Vince? Seeing none, thanks, Vince. [LB881]

VINCE VALENTINO: Thank you. [LB881]

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SENATOR ASHFORD: Good to see you again. Next proponent. This debate right here has been going on for a while. (Laugh) [LB881]

TOM MUMGAARD: Good afternoon. My name is Tom Mumgaard. I'm a deputy city attorney for the city of Omaha, and I'm the primary lawyer for the city of Omaha that's handled pursuit cases. The cases that are cited by Mr. Valentino in the handout there, I think all of them are cases that I participated in. So I have the distinction of losing more pursuit cases than any lawyer in the state of Nebraska. I was the one who lost the case that led to the definition that the court imposed about innocent third parties and what passengers are innocent third parties. I read with interest the concurring opinion in Mr. Valentino's case. And that...we've reached the point where the court is expressly saying that the definition that it came up with does not fit reality. I have...in one discussion, I think, it was characterized as the judge saying: I can't believe the Legislature could be so stupid. Because what we have here is a couple things going on. Omaha has had seven pursuits in the last 20 years, with nine passengers; we average roughly two per year, it sounds like...or, no, I'm sorry, we average one every two years--the other way. And only once in those cases have we been able to fit a passenger within the court's definition and prevent recovery. There have been basically two primary problems, in practice and public policy, with what the definition does. First, as may have been suggested, the city has a real inability to prove "promotion," that the passenger promoted or didn't promote the flight. There's really only two people who know anything of what happened in that car, and both of those are interested in recovery and having the police pay. I've talked to many, many drivers who resulted in lawsuits, and, universally, they all say: Oh, no, my passenger was begging me to stop. Well, when the passenger is someone who has some reason himself to want the flight to succeed--such as when you're carrying methamphetamine, you know if the flight doesn't succeed you're going to jail--it's a little hard to believe that that passenger is pleading for you to stop so he can be arrested. And I think that that's what the court was saying in the Platte County case. And then, secondly, the word "innocent third party" suggests two things: one, that they didn't cause their own problem, they are there from no doing of their own; and, two, they're not going to benefit from the flight. Well, passengers who have gotten into that situation through their own misconduct or bad judgment don't fit either of those criteria. So the term "innocent third party" as applied to those passengers, as the court has indicated, just doesn't fit reality. So what we're doing here is we're really pretending that these kinds of passengers are innocent third parties. And I would say that's bad public policy to continue that. So we should...we support LB881. I know we're going to live with the third party strict liability for many, many years. It has some good points; it has some bad points. But this bill doesn't change either one of those good or bad points. I'd be glad to answer any questions. [LB881]

SENATOR ASHFORD: Senator Chambers. [LB881]

SENATOR CHAMBERS: Mr. Mumgaard, why doesn't Omaha do away with high-speed

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chases or pursuits, however they define them, since they've got a helicopter? Baltimore had done it. So I want to say that so you won't say, no city has ever done that before. [LB881]

TOM MUMGAARD: I can answer that question. We essentially did that several years back. We had what...I think, a three-block rule or something like that. The citizens of Omaha, people who, in number...many, many more than you represent, indicated to the leaders of Omaha that is not the way they want their police department to operate. So instead, the police department has a fairly restrictive pursuit policy. Many, many pursuits are cut off, under that policy. I've personally seen several of those. That is why Omaha continues to pursue, in appropriate circumstances and under restrictive guidelines imposed on the officers, because the citizens of Omaha want that. [LB881]

SENATOR CHAMBERS: Now, when you...you were mentioning--and I didn't get the context in which you made the statement--one pursuit a year was...did you say that? [LB881]

TOM MUMGAARD: No, I didn't do a good job of saying it. If you look at just the numbers, we've had seven passenger (sic) situations over 20 years, with nine passengers. So you're looking at roughly two to three...every two to three years, there's a passenger situation. [LB881]

SENATOR CHAMBERS: I thought you meant the number of pursuits that had occurred. So I misunderstood what you said. [LB881]

TOM MUMGAARD: No, this is just...you know, I can tell you: we're looking at roughly two strict liability pursuit cases pending at any given time. [LB881]

SENATOR CHAMBERS: So it's not even that serious a problem. It's not even that serious a problem, certainly not enough to change the law. But this is probably... [LB881]

TOM MUMGAARD: Well...well, I'll answer that question. If you just want to put it in monetary terms, I can't give you the amount we've paid to passengers, but I know that every passenger is a possible \$1 million. And so what you're talking about is--whether it's serious or not is for somebody who runs the money to decide--but what you're talking about is we are at risk, on average, of paying somebody \$1 million of taxpayers' money every two to three years. [LB881]

SENATOR CHAMBERS: And what you're willing to say is that, at the risk of paying \$1 million, we're going to tell these cops to chase. [LB881]

TOM MUMGAARD: Well, I don't... [LB881]

SENATOR CHAMBERS: But here...here...let me get to something else. [LB881]

TOM MUMGAARD: Here...here, I'll answer that. I would say that this bill, if it's adopted, will have no impact on whether police do or do not chase, because the greatest risk out there is not to a passenger, it's to the pedestrian or the other drivers. So the decision as to whether you do or don't chase has to continue to be made based on that risk, not the risk to the passenger. I can't conceive that a police officer is going to say, oh, gee--if this passes--oh, gee, there's a passenger there; I can pursue because he can't recover. That's not the thought process. [LB881]

SENATOR CHAMBERS: Right, because if they saw a child in the car, they'd chase it. So you're like me, the cops are insensitive. But here's what I want to ask you. And it's before your time. You're a youngster. [LB881]

TOM MUMGAARD: Probably not. [LB881]

SENATOR CHAMBERS: Omaha cops would shoot people who were running. And I needed to have the perfect case, because I would always jump them about this. There was a white guy, I don't know if he lived in east Omaha or if he stole some equipment or something in east Omaha, and he had it in the back of his pickup. And the cops caught him, so they were transporting him to the police station. And when they got to the station, he jumped out of the backseat and started running. They were downtown. A cop shot him in the back and killed him. And I made it a very public issue that the law said that an officer is not entitled to shoot a nonviolent, fleeing felon. And when I brought that to the then city attorney's attention, they changed the policy; they will no longer allow the shooting of a nonviolent, fleeing felon. And if you're going to establish police policy by what the people in Omaha said, they probably would have said, well, if a felony was committed and he's running, kill him anyway. I have to stop that. But I'm glad to know, from you, that their policies are modified by what the public says, because I'll get some people from my community to come down and talk to the chief about the ready infliction of violence on people by the Omaha police, even when they're caught on camera and they get away with it. But I'm saying all that to get around to this question. I had made a statement that the Nebraska Supreme Court has said that officers, when interrogating somebody, can lie, deliberately lie to the person being interrogated. Are you aware of such a decision? [LB881]

TOM MUMGAARD: Yes. [LB881]

SENATOR CHAMBERS: Okay. I just didn't want people to think I was going to lie on the Supreme Court while talking about lying. But that's all that I have to ask on this particular bill. [LB881]

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TOM MUMGAARD: Well, I...Senator...okay, I lost track of how many lawsuits I've done against police officers, many of which have been pursuits. And I'm not going to sit here and tell you that there's never been a police officer who's lied; of course there has. People lie. [LB881]

SENATOR CHAMBERS: Right. [LB881]

TOM MUMGAARD: Senators lie... [LB881]

SENATOR CHAMBERS: Right. [LB881]

TOM MUMGAARD: ...plaintiffs lie... [LB881]

SENATOR CHAMBERS: Right. [LB881]

TOM MUMGAARD: ...lawyers lie... [LB881]

SENATOR CHAMBERS: Preachers lie. [LB881]

TOM MUMGAARD: And preachers lie. [LB881]

SENATOR CHAMBERS: Right. [LB881]

TOM MUMGAARD: And so I don't think we should create law based upon some assumption that one particular type of person engaged in one particular occupation has to be kept from lying. [LB881]

SENATOR CHAMBERS: Well, when they have... [LB881]

TOM MUMGAARD: It ain't going to...it ain't going to work. [LB881]

SENATOR CHAMBERS: When they have what nobody else in this society, including judges of the Supreme Court, have, which is the discretionary power to take human life, then they are to be placed under closer scrutiny, and they are to be watched. And those people up on Seward, the cops immediately started destroying evidence and getting their lie together, as you know...you know that. And they tampered with the evidence, and they destroyed evidence. And they were caught immediately trying to put together the lie. Are you not aware of that? [LB881]

TOM MUMGAARD: Well, Senator, we're getting off the point, but I would say... [LB881]

SENATOR CHAMBERS: Well, you brought it up. [LB881]

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TOM MUMGAARD: I...yeah...well... [LB881]

SENATOR CHAMBERS: You said: Don't look at one particular group of people who might be lying. And I said: I told you why I'm selecting the police, because of the powers they have, the circumstances under which they lie, and they usually get away with it. [LB881]

TOM MUMGAARD: Well, if we're talking about a strict liability situation, which is what a pursuit liability is, there's very few lies that can be told that would be worthwhile. You're either chasing or you're not; and it's either an innocent third party or they're not. And there's very few things that a police officer can say that will change the outcome of that. So if this bill is the focus, whether police officers have been known to lie or not, I don't think will make any difference in the long run, even if this is adopted. [LB881]

SENATOR CHAMBERS: According to Mr. Valentino's handout, if the change were to be made that he wants, in talking about a passenger...I wish the pages were numbered. But anyway, it's in red lettering, "Supreme Court definition: Any claimant is an 'innocent third party' unless"...the second bullet point, "'is an object of apprehension in the fleeing vehicle,' based on what is known to the officer before or during the chase." And the officer is going to tell what was known by that officer before the chase. And that's where I say the lying will come in; I don't trust them. [LB881]

TOM MUMGAARD: Well, I can give you an example of how that...when that has come into play. I had a case when there were a driver and three passengers, and they were in a stolen car, 2:00 in the morning. And the testimony was that when you're trying to stop a stolen car, everybody in that car is a subject of apprehension, because car thieves tend to travel together; it's a necessary part of stealing cars at 2:00 in the morning. And so the officer was able to testify that...and several other police personnel backed this up, in that everybody in that car was an object of apprehension. Now, in that situation, it's going to fit within the Supreme Court's definition. In many, many other pursuits, looking at the reason for the pursuit, you're not going to have that ability to do that. If it's a traffic offense, for example, I don't care what the officer says, he can lie ten days to Tuesday, and it's not going to change the fact that the only person in that car subject to apprehension is the driver. So there's all these factual...objective, factual circumstances that will change whether you fit within that or not, and what the officer says has very little to do. [LB881]

SENATOR CHAMBERS: Officers know and prosecutors know--and this has been established all over the country, and there are studies on it--that a jury will take the word of an officer even if the objective circumstances indicate that the officer is not telling the truth. And since you use the computer and I don't, I'll try to find you some examples of that and where articles have been written about it, and how the cops will tell lies even when under ordinary circumstances nobody would accept it as true. But the fact that an

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officer said it, they take it, because they take the word of the cop over everybody else. But anyway, back to the bill, I will do all I can to keep this bill from being modified in the way that is being attempted. But at some other point, you and I can have a discussion, and maybe we can see something differently. And when we do, you'll come over to my side. [LB881]

TOM MUMGAARD: Well, I would just kind of end by saying that, well, Mr. Valentino's case, I think, has pointed out that occasionally you're going to have a situation where somebody who desperately wants his friend to get away from police--he's a passenger in the car and his buddy is driving--and they desperately want their buddy to succeed in that flight, and the car crashes, and that person gets \$1 million worth of taxpayers' money. And I think the concurring judge in that case got it right, that the people of Nebraska are going to say, that's crazy. [LB881]

SENATOR CHAMBERS: When...because we're making a record, are you aware that before the law was changed, a woman who alleged she had been raped could not even get into court without corroborating evidence? Her word alone was not enough to get her into court to have that trial. Yeah, because we had to change the law to say no corroboration is necessary to get into court. Also, a woman had to establish that she had fought against her attacker. That also was changed. There are things that were in the law and in court decisions that people now say, well, no, it couldn't have been that way. But it was that way. I've been around a long time, and I've seen these things. And I'm going to bring them up to show why I will fight against the law. The cops have everything their way. When it was found that they were deliberately positioning these cruisers so that what they did would be out of the range of the camera, there was no disciplinary action imposed. There was nothing done. And you saw where one of the cops who was involved in that incident on Seward Street, by way of an arbitrator's decision, got back on the force, overturning the chief's decision to fire him. Well, now, here is the chief, who I don't think anybody could say is anti-law-enforcement-officer, looked at all of the facts of the situation and said, based on the standards that are to be met and so forth--you know what would have to be met--this officer should be fired. Well, they've got an arbitrator who gives them what they want. And he got his job back. And what this has done in my community is to say, this is why the cops shouldn't be trusted. And you know what I've done, I've explained to people--and I'm supposed to be anti-cop--this was not done by the chief; the chief did all that he could do. This was an arbitrator, somebody from outside of the city. They say, well, how can that be? I say, well, that's what they got in their contract. So there are a lot of problems created by the police for somebody like me, who may try to explain something that makes it look like I'm for the police, against people in the community. But when they misunderstand what is happening in those issues, I explain it, even though it puts me in a position of being for the cops and being for this guy getting his job back, because that's all they see: he got his job back. You don't have to deal with that. The chief doesn't have to deal with it. I live in that community. And people expect a certain level of conduct from me, to be for

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the community, to protect the community. But I have to try to explain to very angry, disillusioned people that you can't blame the chief for this. But they don't...they don't think anybody should be able to override the chief. And I say there's a difference between the way things should be and the way they are. You all have no idea of the pressure that I'm under daily in my community because of the way the police have gotten away with things and will continue to get away with things. So we see the world through glasses that have different lenses. [LB881]

TOM MUMGAARD: We do; I...and, as a trial lawyer, I live in a world of reality. I take the facts as they come on what I can prove or can't prove. And, you know, the Supreme Court judge said: This is crazy; but if the Legislature wants it to be crazy, so be it. And that will be the position of the city of Omaha: if the Legislature wants meth-carrying passengers to receive \$1 million because now they lie and say, "Oh, yeah, I was begging to let police arrest me," so be it; we'll accept it as reality. [LB881]

SENATOR CHAMBERS: Those three words, "so be it," quoting you, in a different context... [LB881]

TOM MUMGAARD: (Laugh) Now you're outside my expertise. [LB881]

SENATOR CHAMBERS: When you're no longer the city attorney, you're not going to feel the way you do now. You would not come here as a private citizen and say what you're saying now. No private citizen comes here and says what you and other prosecutors say. And you do it only because it's your job. [LB881]

TOM MUMGAARD: You know, it's gets a little off point, but, no, it's not entirely true. You know, Senator, I can say that in my experience in the many, many times I've delivered a check to people, I have been very happy to deliver taxpayers' money to somebody who, through bad luck, got hurt as a result of a police pursuit, and thought, that's the cost of doing business; I'm glad this person is being taken care of. And if that's, you know, from that standpoint, if that's going to be the public policy of Nebraska, I think there's a lot of good value in it. And it has pleased me at times to be able to deliver the check, because we do pay, the vast majority of all the pursuit cases. [LB881]

SENATOR CHAMBERS: And I can see... [LB881]

TOM MUMGAARD: I can't say that when I deliver the check to the person in this kind of a situation. [LB881]

SENATOR CHAMBERS: I can see that you're a good man; I know that I'm a good man. And these two good men have agreed to disagree. [LB881]

TOM MUMGAARD: Yes. [LB881]

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SENATOR CHAMBERS: Okay. [LB881]

SENATOR ASHFORD: Thanks, Tom. [LB881]

TOM MUMGAARD: Thank you. [LB881]

SENATOR ASHFORD: Any other proponents? [LB881]

ELAINE MENZEL: Chairman Ashford and members of the Judiciary Committee, for the record again, my name is Elaine Menzel, it's M-e-n-z-e-l, appearing on behalf of the Nebraska Association of County Officials. And this will be another short testimony. I just want to record our support and ask you to consider the issues that have been presented to you today and, hopefully, favorably vote this legislation. Thank you for your consideration. [LB881]

SENATOR ASHFORD: Thanks, Elaine. Any other proponents? Anyone against the bill; any opponents? [LB881]

JASON AUSMAN: Chairman Ashford and members of the committee, my name is Jason Ausman. I am here on behalf of the Nebraska Association of Trial Attorneys, and I'm going to be brief in what I have to say. There's been a lot of discussion here. I think this bill was borne out of the case of Werner v. County of Platte, which we've heard already. I think the trial court and the Supreme Court did a very good job analyzing the case through the intent of the Legislature when this bill...or when this statute was initially drafted. Taken directly from the case, regarding the phrase, "innocent third party," the Legislature is concerned with the actions of the third party relative to the fleeing driver. The court held that a third party is innocent if he played no role in causing the chase. And when I look at the amendments that have been offered to this bill, it seems to me that we're taking a look in hindsight, as opposed to a prospective view, in terms of what the officer thought and knew before the chase ensued. When I look at subparagraph (a): One is not an innocent third party if they enter into a vehicle, without coercion, knowing, or with a reasonable belief, that the driver had been drinking or was under the influence. Again, I think that that defeats the intent behind the statute as it was drafted. I'm not sure that entering into a vehicle, knowing or having a reasonable belief that somebody was under the influence, gives rise to a presumption that a chase is going to necessarily ensue thereafter. The fact that...going to subparagraph (e): if one is engaged in any illegal activity which would itself give rise to arrest; again, in this particular case, the discovery of contraband after the chase had ensued had no relevance, had no bearing to the start of the chase. It misplaces the focus on the passenger's conduct in terms of whether he actually caused that chase. So I would just state that, going back to the intent of the statute as it was originally drafted, what we need to be focused on is what the officer knew or suspected before the chase ensued,

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not what turned up after the fact. So with that, I thank you, and I'd be happy to answer any questions. [LB881]

SENATOR ASHFORD: Jason, would you just read what the--prior to your discussion about the bill--would you read the sentence from the decision again. [LB881]

JASON AUSMAN: Yes, Senator Ashford, I think that what you are referring to is regarding the phrase "innocent third party." And this is... [LB881]

SENATOR ASHFORD: Can you just...can you just... [LB881]

JASON AUSMAN: Yes. [LB881]

SENATOR ASHFORD: ...repeat the court's language. [LB881]

JASON AUSMAN: Yes. And this, again, was from Werner v. County of Platte, regarding the phrase "innocent third party," the Legislature is concerned with the actions of the third party relative to the fleeing driver. It goes on... [LB881]

SENATOR ASHFORD: Is that the...that's the point you're making, is it not? [LB881]

JASON AUSMAN: Yes. [LB881]

SENATOR ASHFORD: So, I mean, there's still...let me just ask it this way. [LB881]

JASON AUSMAN: You bet. [LB881]

SENATOR ASHFORD: There...I mean, one could still establish that if the actions were relative to the fleeing driver, that they would be precluded from recovery, correct? [LB881]

JASON AUSMAN: Absolutely. [LB881]

SENATOR ASHFORD: So if...what we're trying to get...I've been here for many of these discussions, and with ol' Tom and Vince on many occasions. But what I...I think what we're trying to address here is the...the public policy is to avoid these chases, which when we first...years ago when I was involved in these bills, there were some pretty horrendous cases that came before the Judiciary Committee. So we were...and we also...there was quite a bit of testimony, in those days, about how public safety is not necessarily enhanced by having a chase, that there are other ways of apprehending a... [LB881]

JASON AUSMAN: Sure. [LB881]

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SENATOR ASHFORD: ...particular offender. So the chase is one way, but there are many, many other...and that testimony came from law enforcement people as well. [LB881]

JASON AUSMAN: Sure. [LB881]

SENATOR ASHFORD: So just so we're all together on this, it's not impossible to preclude a third-party passenger plaintiff from recovering, correct? [LB881]

JASON AUSMAN: That is correct. And there are Supreme Court cases that I've got... [LB881]

SENATOR ASHFORD: Right. [LB881]

JASON AUSMAN: ...right here that found the... [LB881]

SENATOR ASHFORD: So we're not...so this... [LB881]

JASON AUSMAN: ...the passenger to be not...or, guilty. [LB881]

SENATOR ASHFORD: By supporting this bill, as I have done on many, many occasions in my life here... [LB881]

JASON AUSMAN: Sure. [LB881]

SENATOR ASHFORD: ...there's never any thought, on my part certainly, that we are somehow promoting million-dollar, which is the cap on tort claims acts against a municipality, that somehow we are encouraging or somehow complicit in people recovering \$1 million from the taxpayers of the city of Omaha. I think the city also has some kind of a fund set aside for this. But I realize...and Tom was very...Mumgaard was very up-front about this, that there are cases where this is good policy, and he acknowledges that, and he always has done. So I guess...but the point that somehow we're complicit in crime or the expansion of criminal activity because of this law...that isn't what the law was passed for and that's why we...I voted, for many years, to continue with the law. It was because it seemed to have very positive results, you know, for the general population. [LB881]

JASON AUSMAN: Right. [LB881]

SENATOR ASHFORD: And certainly if you ask...if you ask...if you put a...send out a questionnaire to all the voters or all the citizens of the city of Omaha, you know: Do you want your...you know, these criminals are running around the streets and police aren't

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allowed to chase them, what do you think about that? They're probably going to say: That's terrible. But anyway, my point being that there is an opportunity for a plaintiff to be prevented from recovering. [LB881]

JASON AUSMAN: Absolutely. If they're complicit in the chase or bringing about the chase, they are not innocent, and they don't recover. And our Supreme Court... [LB881]

SENATOR ASHFORD: Right, it has to be something involved with the actual chase... [LB881]

JASON AUSMAN: Absolutely. [LB881]

SENATOR ASHFORD: ...which is what the policy is designed to address. [LB881]

JASON AUSMAN: That's absolutely right. [LB881]

SENATOR ASHFORD: And I'm probably stating or restating or triple-stating the obvious. And Senator Chambers has, obviously, asked the same kinds of questions. But I just, having voted for this many, many times, I have always been persuaded by people on both sides of the issue who have...this does...it is a safer policy. We still apprehend offenders when a crime has been committed, in a variety of different ways, in our city or throughout the state. So thanks, Jason. [LB881]

JASON AUSMAN: You bet. Thank you. Anyone else? Thank you. [LB881]

SENATOR ASHFORD: Anyone else want to testify against the bill? Neutral? Dan? [LB881]

SENATOR WATERMEIER: I think I'll waive. [LB881]

SENATOR ASHFORD: Okay. Thanks for coming over today, though. Senator Seiler, is he here today? [LB878]

ASHLEY McGRAIN: He's not. You've got me today. [LB878]

SENATOR ASHFORD: Okay. [LB878]

ASHLEY McGRAIN: Can I start? [LB878]

SENATOR ASHFORD: Yes, you can. [LB878]

ASHLEY McGRAIN: Okay. Chairman Ashford and members of the Judiciary Committee, my name is Ashley McGrain, that's A-s-h-l-e-y M-c-G-r-a-i-n, and I am

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Senator Seiler's legislative aide. And, obviously, Senator Seiler is unable to be here today, so on his behalf I am here to introduce LB878. Society has evolved since the adoption of our current wrongful death statute. More people are in relationships which involve helping to raise the children of their spouses. A New York Times article from 1989 stated: The number of children under 18 years of age living with a stepparent jumped 11.6 percent between 1980 and 1985. U.S. Census Bureau figures show that the percentage of children living with stepparents grew from 6.9 percent in 1996 to 7.5 percent in 2009. In Nebraska, even though a stepparent may be the significant provider for a child, recovery is not allowed because a stepchild is not the widow or widower or next of kin. Society has also evolved in that more children are being raised by persons who are related but are not a parent. For example, Mom abandons a child, so the child is being raised by a grandmother or an aunt. If Mom is still alive, Mom is next of kin, not Grandmother or the aunt; thus, even though the child relied upon Grandmother for all necessities of life, the child has no cause of action. LB878 would recognize the changes in society by expanding the definition of persons who are entitled to bring an action for wrongful death to include persons who are actually dependent upon the decedent. There will be others who will follow me who are much better able to answer the legal questions you may have, but I would be happy to attempt to answer any question you might have. [LB878]

SENATOR ASHFORD: Thanks, Ashley. Yeah, Senator Lathrop has a question. [LB878]

SENATOR LATHROP: I do have a question, and that is: Is the attempt to expand the people that can make a claim? [LB878]

ASHLEY McGRAIN: Yes. [LB878]

SENATOR LATHROP: And I'm wondering, the way it's written--I'll just throw this out there--the way it's written it sounds like it's "next of kin that are actually dependent." And I'm wondering if it shouldn't say "next of kin, comma, and those actually dependent"? [LB878]

ASHLEY McGRAIN: Perhaps. [LB878]

SENATOR LATHROP: So that it...that we're...you're growing the class but not limiting... [LB878]

ASHLEY McGRAIN: Limiting it? [LB878]

SENATOR LATHROP: ...the next of kin to those who are actually dependent. [LB878]

ASHLEY McGRAIN: Okay. [LB878]

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SENATOR CHAMBERS: You're right. [LB878]

SENATOR ASHFORD: Thanks, Ashley. [LB878]

ASHLEY McGRAIN: Okay, thank you. [LB878]

SENATOR ASHFORD: Proponents. We've had this before. [LB878]

SENATOR LATHROP: I don't know if we've seen this before. [LB878]

SENATOR MCGILL: I haven't...I don't remember it. [LB878]

SENATOR ASHFORD: Haven't we, Senator Chambers? Have you...this bill? I think we've had it before. Go ahead, Jason. [LB878]

JASON AUSMAN: You bet. Thank you. To dovetail on what was said earlier... [LB878]

SENATOR ASHFORD: Give us your name again... [LB878]

JASON AUSMAN: Yes. Jason Ausman... [LB878]

SENATOR ASHFORD: ...even though I know who you are, but... [LB878]

JASON AUSMAN: ...A-u-s-m-a-n, here in support of LB878. The purpose, the impetus behind the amendments is to reflect, I guess, a more modern family. For example, the current statute does not allow for a stepchild to recover in a wrongful death action. And as we all know, and as I know from my own personal experience, I grew up primarily with my stepfather and with my father being absent, and I think that there's a lot of situations out there today that reflect my background. And just a couple more examples outside of stepchildren. I've got a colleague who had a case: a middle-aged gentleman passed away; he did not leave behind a spouse, he did not leave behind any children. He did leave behind a disabled sister that lived with him, and he was the primary caretaker of his disabled sister; at the time of his passing, as a matter of fact, I believe that she lived with him. And he also left behind a very elderly father. And the way the wrongful death statute is currently written, because he did not have a surviving spouse and because he did not have any children, the person who would step in and assert a claim, under those circumstances, would be his very elderly father, who he still had a relationship with. But it would seem to me that the sister, who he actually provided care for, and who actually depended on him, would have a better claim or a more pertinent claim if we had the statutes amended as we're seeking here today. Senator Lathrop, I think that, to answer your question as to how the statute should read, just to give you a little bit of background as to where we got this language--and I'm sure you're aware of this--the term "actually dependent persons" is found in the Nebraska workers'

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compensation statutes. It is defined in the Nebraska workers' compensation statutes specifically at 48-124. The court has defined this term to include stepchildren in situations where the stepchild lives with the deceased employee at the time of his death and the stepchild receives more than half of their financial support from the deceased employee and where the...primarily dependent on the decedent's support for day-to-day necessities. So I think that the language is not just expanding for the sake of expanding; the language that we have chosen is designed to protect those folks who are actually dependent and who are actually deriving more than half of their support from the decedent, even though they might not fit the definition of surviving spouse or next of kin. [LB878]

SENATOR LATHROP: Got it. [LB878]

JASON AUSMAN: So... [LB878]

SENATOR LATHROP: Okay, any questions for Mr. Ausman? I don't see any. [LB878]

JASON AUSMAN: All right. [LB878]

SENATOR LATHROP: Thanks for your testimony. [LB878]

JASON AUSMAN: Thank you. [LB878]

SENATOR LATHROP: Anyone else here in support of LB878? [LB878]

SENATOR MCGILL: Oh, she's just... [LB878]

SENATOR LATHROP: I was waiting for you to walk up here, Korby. Okay, maybe not. How about those here in opposition? [LB878]

SENATOR MCGILL: Oh, not quite yet. [LB878]

SENATOR COASH: We're still on the other bill. [LB878]

KORBY GILBERTSON: (Laughter) Unless you want to testify... [LB878]

SENATOR LATHROP: Unless you want to oppose LB878. [LB878]

SENATOR MCGILL: Oh, it's a wonderful piece of legislation... [LB878]

SENATOR LATHROP: In case... [LB878]

SENATOR MCGILL: ...by Senator Seiler. [LB878]

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KORBY GILBERTSON: Good afternoon, Senator Lathrop, members of the committee. For the record, my name is Korby Gilbertson; it's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n. I'm appearing today as a registered lobbyist on behalf of the Property Casualty Insurers Association of America. Senator Lathrop's comments took me back to the first time I read this bill because we couldn't decide if the bill was trying to narrow the scope or widen the scope. I have had conversations with Ashley, from Senator Seiler's office, and in our initial conversations it was explained to me that it was...the purpose of the bill was to help stepchildren. Clearly, the intent is broader than that. And so our opposition will probably not go away because this greatly changes the law in Nebraska and would make Nebraska very unlike any other state in the Union. This is very rare across the country to allow stepchildren who aren't actually adopted be able to have wrongful death claims. Another question and concern that we had when talking about it was that there's a possibility in this bill that you're creating a right of a dependent for someone who didn't actually assume the obligation of providing for them. And I am not a family law lawyer, but I think that causes some concern and questions about what the actual intent of this bill would be. [LB878]

SENATOR LATHROP: Okay. Your opposition is noted. [LB878]

KORBY GILBERTSON: Thank you. [LB878]

SENATOR LATHROP: And it doesn't look like there's any questions. [LB878]

KORBY GILBERTSON: Okay. Thanks. [LB878]

SENATOR LATHROP: Thanks, Korby. Next opponent, if any. [LB878]

BOB LANNIN: Good afternoon, Senator Lathrop and other members of the committee. My name is Bob Lannin. I am an attorney here in Lincoln; I am president of the Nebraska Defense Counsel Association. I am not a paid lobbyist. I have read the bill, and I think it's a laudable goal that we expand, in light of changing society...that shouldn't just limit it to next of kin, as we do right now, that stepchildren cohabitation situations, there can be an actual, tangible loss when someone unexpectedly dies, and we should compensate them in this situation. My problems with the bill are the terms "dependents" and "support," because I think we could read the bill, as presently written, to embody things that we really don't anticipate. And I'll try to give three examples that came to mind. For example, roommates. If I'm in college and I have a roommate and we split our rent and down the road I would lose my job and they decide to take on the utilities and other things like that, I'm now dependent upon that person for support; and therefore I think I could potentially make a claim that would cut against the lawful heirs' recovering. If there was an addition of some financial component, I think that wouldn't even address that concern. Ex-spouses, for example. I think an ex-spouse--if they are

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under a spouse order, alimony order--could come in and say: I am dependent upon this person; and therefore a second spouse or children's share of that estate could be depleted, with the bill as presently written. So while I believe that the bill attempts to correct and rectify a laudable situation with stepchildren--I'm a stepchild; I had a stepmother and a stepfather--I don't think the terminology used at present is correct, and we should do a better job of trying to define just what sort of situations we're looking at. [LB878]

SENATOR LATHROP: That's an interesting observation, because if you broaden the class and have a policy limit claim--there's \$100,000 for wrongful death claim--now you've broadened the class and more people to split the proceeds with. [LB878]

BOB LANNIN: It's a limited fund, so... [LB878]

SENATOR LATHROP: Okay. Well, I appreciate your comments, and I think I get it. [LB878]

BOB LANNIN: All right. [LB878]

SENATOR LATHROP: And I don't see any other questions. Thanks. [LB878]

BOB LANNIN: Thank you, Senator. [LB878]

SENATOR LATHROP: Good to see you. Anyone else here in opposition? Anyone here in a neutral capacity on LB878? Seeing none, Ashley waives closing, so that will close our hearing on LB878 and take us to Senator Brasch and LB964. Welcome to the Judiciary Committee. [LB878]

SENATOR BRASCH: (Exhibit 5) Thank you. Thank you, Senator Lathrop. And also, good afternoon, members of the Judiciary Committee. I am Lydia Brasch, L-y-d-i-a B-r-a-s-c-h, and I represent the 16th District in the Nebraska Legislature. I am here today to introduce LB964, which I have brought at the request of attorneys who practice bankruptcy law in Nebraska to address the concerns of an outdated set of bankruptcy exemptions in the state. Specifically, LB964 addresses the inequality that exists with regard to Nebraska's bankruptcy homestead exemption. I believe it is necessary for me to be clear that this bill does not address the similarly named Nebraska homestead tax exemption. My office has received a few communications from individuals concerned that this bill will negatively affect their property tax exemption. It does not. There will not be any fiscal impact from this bill, and it has no effect on taxation. The bankruptcy homestead exemption simply allows one who files for bankruptcy, known as the claimant, protection for the equity in his or her home. To briefly review, Section 40-101 of the Nebraska Revised Statutes allows the claimant to exempt up to \$60,000 in the equity of the claimant's homestead. For example, if a claimant owns a \$120,000 house

and has paid off \$40,000 of the \$120,000 mortgage that was used to purchase the house, meaning they have \$40,000 of equity, that claimant will only be able to claim a \$40,000 homestead exemption. Now, if the claimant has an \$80,000 equity, he or she will only be able to claim a \$60,000 exemption, which is the current homestead exemption limitation set in place by Section 40-101. This exemption had been limited to \$12,500 for ten years before it was recently amended in 2007 with LB237. This bill does not change the amount of the homestead exemption; it only changes who may claim it. A homestead is defined as the dwelling house in which the claimant resides and includes the land on which it is situated, as well as all the rights, privileges, and improvements that property contains. And for the sake of simplicity, this entails the claimant's real property. There are some additional specifications and limitations in the statutes, but those are not germane to the discussion here today because this bill will not change those specifics. Rather, LB964 changes who may claim this exemption during a bankruptcy case. In 2010, LB907, introduced by our colleague Senator Conrad, amended Section 40-102 to include single individuals 65 and older in the homestead exemption. While this certainly was a right step in the right direction, I believe there still is inequality that must be addressed. As it stands now, a claimant can get a homestead exemption on his or her personal residence if he or she lived in that house with any dependent or a spouse. Under LB907, if the claimant is 65 or older, the exemption is also allowed. It is difficult to understand why a never-married person does not qualify for this exemption. A person could live in a house for a day with his or her spouse and get this exemption or, likewise, have a child live there for a short time and 30 years later get an exemption. But a single individual who lives in the same house for 64 years would not, at least not until the age 65. Interestingly, LB907 did not clear up the patriarchal language in Section 40-102(1), which says, "If the claimant is married, the homestead may be selected from the separate property of the husband or with the consent of the wife from her separate property." This language has been the same in law since it was initially created in 1879. And it draws a distinction between husband and wife, instead of treating them equally. My bill allows for this portion to be updated. This is a minor cleanup, but I believe it is a justifiable one. Quite simply, it does make this law gender-neutral, not patriarchal. Members of the Judiciary Committee, I have introduced LB964 because it addresses an oversight in Nebraska law. It allows for equal protection under the law. Present homestead exemption law in Nebraska rightly favors individuals 65 and older and those either married or once married. Single people are singled out. Truly, they work just as hard as those who qualify for the exemption. They have dreams of owning and keeping a home, just as those who currently qualify. They may make poor financial decisions similar to those who are married, once married, or over 65. But they should not be treated differently because of their age or marital status. They should be equally afforded the protection that bankruptcy allows. Our laws do not allow employers to discriminate based on age or marital status, nor should they in bankruptcy laws. Proponents of LB964 will follow me today and discuss why it should be passed into law. Unfortunately, the recent snowstorm has prevented many of the proponents from attending, but I have encouraged them to submit letters of support for this bill. You

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may have already received the e-mails and letters to that effect. Those who brought me this bill are intimately acquainted with the bankruptcy process because they represent claimants on a regular basis, sometimes daily. For some of these attorneys, bankruptcy is all they practice. Each of these proponents understands, however, that there exists a discrepancy that must be corrected. The discrepancy results in unequal protection. Like LB907 from 2010, this bill addresses a group of individuals who are excluded from protection. But LB964 is also much different than LB907. The amendments of LB907 became law because an interested party, an elderly woman, was looking for a homestead exemption and found it unfair that the law excluded her. The proponents of LB964 do not have a personal stake in its outcome. Rather, the proponents are uninterested third parties who do not receive a benefit for a change in this law. It is questionable, at best, for a bankruptcy attorney to charge a contingency fee based upon the outcome of the case. After all, upon what contingency would the attorney base the fee? Whether or not the bankruptcy is accepted by the creditors? Rather, bankruptcy attorneys generally receive a flat fee for their services; therefore, they do not stand to benefit financially from this added protection. The only thing they gain is the satisfaction from helping their clients protect themselves. These are proponents who simply recognize an unfair law when they see one. LB964 corrects this unfairness. And, colleagues, I do encourage you to pass LB964 out of committee to move through to General File. Thank you for your time and consideration. I am happy to answer questions you may have; however, there are attorneys that will follow me. [LB964]

SENATOR ASHFORD: Thank you, Senator Brasch. Any questions of Senator Brasch? [LB964]

SENATOR LATHROP: None. [LB964]

SENATOR ASHFORD: I don't see any. Thank you. First proponent. [LB964]

GREGG NEUHAUS: Chairman Ashford and members of the committee, my name is Gregg Neuhaus, and I'm an attorney in Grand Island, Nebraska, with the Neuhaus Law Office. I've got about 34 years of experience. I represent bankruptcy clients, and I've represented hundreds. I probably average over 100 bankruptcies per year. And I'm here to support LB964. I know that you now understand what Chapter 40 does, the homestead exemption. And the problem that I see fairly frequently is that to qualify, you must either be 65 or the head of a family, within the meaning of 40-115. And 40-115...frankly, if LB964 becomes law and 40-102 is amended, 40-115 should be repealed because it will have no further effect. Our Supreme Court says that, "Once acquired, the homestead character continues so long as residence is on the premises." And that comes from a 1902 case and a 1905 case. And in conjunction with Chapter 40, then, anyone that ever lived for any period of time in a homestead, as defined, will qualify for the homestead exemption. And the effect, then, is that if you lived with a spouse for a week or a day in a house, or a child for a week or a day in a house, or a

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mother or a grandfather that you supported, you qualify. And I've had cases where that has happened, where they've had a grandmother or a grandfather live with them for a very short period of time, and they qualify. The unfairness is to the people that have no spouse, have never had a spouse, and have had no dependents but they've worked hard to build their homestead, their American dream, you know, of homeownership, and they don't get this exemption. I'll give you one example, if I may. I represented a 63-year-old man I'll call "George" that had been married and raised a family in a house. His children grew and graduated and left the house. His wife divorced him. And after the divorce, he sold the house and moved into a smaller house. And he became ill. He had devastating medical expenses, and he had to file bankruptcy. He lost his house in the bankruptcy because he didn't qualify. He had lived for decades in a house that did qualify, but the new house did not. The same exact time I was representing George, I was representing a gentleman by the name of "Steve" who was in his early 40s. And Steve had never been married, had no dependents, and...but I questioned him, "Has anyone ever lived with you that you supported?" He said, "Well, my grandmother lived with me for about three weeks before she died; and I bought her food, and I cared...and I took her to the doctor." And I said, "Okay, you qualify." We saved Steve's house. Now, why does Steve qualify and George not? And it was the exact same month that I represented both of these two gentlemen. I had a client, married; she and her husband lived in a house for ten years and paid for it, had it, you know; then they divorced. He kept the house and paid her her equity; she took that equity, bought another house. His house qualifies for the homestead exemption; hers does not, even though it's the same money that she put into the original house. So what this bill is about is equality under our laws. And I think our constitution, our state constitution, would force us, if we really fought this to the Supreme Court, would force us to amend this law. But, of course, my clients don't have that kind of money. We don't have the kind of money to go to the Supreme Court and appeal this. But I think that the Legislature can right this wrong. [LB964]

SENATOR ASHFORD: Thanks, Gregg. [LB964]

GREGG NEUHAUS: Thank you. [LB964]

SENATOR ASHFORD: You know, funny this hasn't come up before in a proposal. It seems pretty straightforward, unless I'm missing something. [LB964]

GREGG NEUHAUS: You know, it does seem odd that it hasn't come up before. [LB964]

SENATOR ASHFORD: Yeah. [LB964]

GREGG NEUHAUS: I think the change, when they changed it--the 65 and older--kind of brought my attention to it. I think originally it was to protect a family's homestead. And we had this state's interest in having a family... [LB964]

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SENATOR ASHFORD: Okay. [LB964]

GREGG NEUHAUS: ...and so forth. [LB964]

SENATOR ASHFORD: Okay, that makes sense to me. We just never did... [LB964]

GREGG NEUHAUS: But I don't think that exists... [LB964]

SENATOR ASHFORD: We just never... [LB964]

GREGG NEUHAUS: ...under today's society. [LB964]

SENATOR ASHFORD: We just never extended it beyond...okay. I don't see any more questions. Thanks, Gregg. [LB964]

GREGG NEUHAUS: Thank you. [LB964]

SENATOR ASHFORD: Any other proponents? [LB964]

MATT JENKINS: Hi, my name is Matt Jenkins, M-a-t-t J-e-n-k-i-n-s. I am an attorney here in Lincoln. About 30 percent of my practice is devoted to bankruptcy, working for the claimants. Well, I think that the ground has already been well covered by this point as to why this is a fair bill. And I think that this is probably long overdue. I just wanted to add that this is...this kind of reminds me of marital status discrimination, in which Nebraska has already told employers: you can't do that. And I believe it's Statute 48-1104. So for the state of Nebraska to do this and to have been doing this for decades, I think is...well, it's just not fair. And I'm hopeful that this bill continues and would put an end to that. So that's all I wanted to say. [LB964]

SENATOR ASHFORD: Oh, I remember when we extended this to sixty thousand... [LB964]

SENATOR LATHROP: So do I. [LB964]

SENATOR ASHFORD: ...dollars. [LB964]

SENATOR LATHROP: It's one of the first things... [LB964]

SENATOR ASHFORD: Yeah. [LB964]

SENATOR LATHROP: ...we did. [LB964]

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SENATOR ASHFORD: Senator Conrad's bill... [LB964]

SENATOR LATHROP: Yeah. [LB964]

SENATOR ASHFORD: ...I think. Yeah, you mentioned that, Senator Brasch. So, yeah, I do remember that part. Okay. Yeah. Thanks. [LB964]

MATT JENKINS: All right. Thank you. [LB964]

SENATOR ASHFORD: Any other proponents? Opponents...any opponents? Neutral? Senator Brasch waives. My goodness. Well, good afternoon. (Laugh) [LB964]