SENATE FINANCE COMMITTEE
MINUTES OF MEETINGS
MARCH 5, 1973

The meeting was called to order at 8:35 a.m. Senator Lamb was in the chair.

PRESENT: Floyd R. Lamb, Chairman
Warren L. Monroe
B. Mahlon Brown
James I. Gibson
William J. Raggio
Clifton Young
Archie Pozzi

Earl Oliver, LCB Fiscal Analyst
Howard Barrett, Budget Director

William P. Proksch, Jr., Secretary, Public Service Commission
Noel A. Clark, Chairman, Public Service Commission
Evo A. Granata, Commissioner, "
Heber P. Hardy, " "
Robert Moss, "
Harry Galloway, Department of Agriculture
Fred Warren, "
Dr. John O'Hara, "
Mr. Bollew, "
Jessie Scott, NAACP
Mrs. Bertha Woodard, NAACP
Clinton Crawford, NAACP
Gray Presnell, Retirement Board
Jim Sullivan, "
Carl Shannon, "
Gary Sheerin, Public Defender

PUBLIC SERVICE COMMISSION:

The appropriation from other funds includes funds from the highway fund. See explanation on page 418.

With regard to new positions see explanation on page 419. They are requesting a staff counsel and will continue to use the deputy attorney general assigned to them. They request the staff counsel because they feel there is a definite conflict of interest in that the deputy attorney general is presently wearing two hats, representing staff before the commission and also the consumer. They feel the staff counselor should be working fully with the staff on rate increases and other matters. He would be a full-time employee. Mr. Clark felt there was no other agency where this type of comflict exists except perhaps the

Colorado River Commission. Senator Pozzi was concerned that once you establish the procedure of allowing private counsel that others would request this. Mr. Noel Clark pointed out that they would still be using the deputy attorney general, who would still represent the commission in the courts. He felt the staff counsel would bring about much better quality of regulation, also he expected the court cases to increase substantially next year. In 1972 they had 20 formal rate case proceedings, 56 suspensions which all require legal actions, and in their history they have only had two, four, or six rate cases per year. In 1972 they had some 300 tow car operators which require additional auditing and represents a substantial increase in commission involvement. They also have added railroad safety, gas safety engineering inspections.

The communications expense is for the total telephone and mail expenses.

Two certificates were issued for CATV (cable tv) for Las Vegas which will expire in August of this year if they don't initiate construction. This involves companies controlled by Mr. Greenspun and Mr. Reynolds.

The increases in contractual services and court and legal expense has been due to the fact that the commission had hoped to have an in-house employee to prepare technical data to support court cases. However, they found it was more economical and they were better prepared when they relied on testimony and information prepared by specialists in specific areas. For instance they hired a specialist to prepare technical material concerning the cost of money, and this requires that the individual keep up with the market. They won this case and were able to deny a utility request for a rate increase.

The Public Service Commission has proposed a bill to allow them to charge the costs of the difference between in-state and out-of-state travel to companies doing business in Nevada but located outside Nevada to those companies. Mr. Clark said he thought they were going to have to do more out of state audits, and this would help offset the costs of audits.

PLANT INDUSTRY FUND - Pages 482-484:

See explanation on page 484.

They were asked about the potatoe industry. Mr. Bollew stated that in Winnemucca they have had an outstanding success in quantity and quality. They are employing about sixty people and stored 1,300,000 tons of potatoes not counting those they shipped out. This involves 4,000 acres of potatoes, and the

processing plant in Caldwell, Idaho, told them that their potatoes had the highest specific gravity of any product sent to them, including Idaho potatoes.

They are requesting the replacement of two trucks and the purchase of more for $68,300 under a seperate supplemental appropriation. The trucks are used in scales and weights and are sixty to sixty-five thousand pound gross vehicle weight. Previously they had one unit in Las Vegas, a 1959 Ford, for which they can no longer purchase replacement parts. In Northern Nevada they used a highway department vehicle for which they had entered into an agreement and were reimbursed when the highway department used the vehicle. The highway department has entered into an austerity program and can't afford to replace this truck.

AGRICULTURE REGISTRATION & ENFORCEMENT FUND - Pages 485-486:

This is a non-reverting fund. See explanation on page 486. They have asked for a new position for agriculturist. The industry was in agreement with this request because of a substantial need for increased activity in this area. There is the capability for this fund to provide for the new position and it is needed to comply with federal pesticide laws recently passed. The state has three years to come up with a plan in this area.

INSECT ABATEMENT - Page 487:

This fund was established by law a number of years ago but there hasn't been any funds for it. They are asking for funds in case this problem with insects occurs again. Mr. Bollew also said they would like to see this changed by law to include weed abatement. Currently the counties are supposed to take care of weed abatement, but they lack personnel and funding. The department of agriculture currently treats halogeten in Paradise Valley on a stock trail because this is especially dangerous to the cattle, but they have given up fighting it in most other areas. They do most of their weed abatement in Reno, along interstate 80, and in northern Nevada working with the highway department and the counties.

APIARY INSPECTION FUND - Page 488:

There is a mistake in the explanation on this page. The current assessment, fixed by the state board of agriculture, is 25¢ per stand of bees, not $.025.

LIVESTOCK INSPECTION FUND - Pages 489-491:

The industry has supported the increase in brand inspection fees because of the need to reduce rustling. The fund is soluable. Since this fund operates totally from fees collected and not general fund monies, an increase was needed so they could add the brand inspector. They increased the fee to 20¢ per head, and when this is compared to surrounding states, it is still the lowest fee.

The livestock theft investigator who has worked for the last six months has arrested ten people for livestock theft which would compare with one arrest during the two prior years. With regard to rustling they receive so many complaints that they don't have the ability to follow through on all of them, so they just work on priorities. It would cost approximately $10,000 in salary for an investigator and another $10,000 for a car and travel, etc. to support the investigator.

Eight out of ten of these arrests occurred in Humboldt County where they got a breakthrough. The other two arrests occurred in Las Vegas where two drug addicts were shooting cattle in Clark, Nye, and Lincoln Counties, putting them in their pickup and taking them to an individual in Clark County.

A year ago the department estimated that $200,000 to $300,000 was lost per year due to rustling. However, this has increased in one year to $600,000 and involves about 200,000 head of cattle. One large ranch recently lost 150 head, and the problem is getting much worse.

Senator Raggio mentioned that Washoe County had sought the assistance of the department, but that the agriculture department lacked the manpower to assist although they were willing. He asked why they hadn't requested more investigators. Mr. Bollew stated that they started the investigator program in September and because they had prepared the budget earlier they didn't know whether or not this investigator program would be successful.

They now have about fifty ranchers who are deputy brand inspectors. In the past they used to pay brand inspectors 10¢ a head which they collected themselves and kept. This has changed, and brand inspectors are now salaried and the department collects the money. However, this has increased the workload of the accounting staff.

VETERINARY MEDICAL SERVICES - Pages 492-493:

This budget increase indicates only modest increases due to inflation. Dr. O'Hara indicated that the cost of operating supplies would be greater than the $4,000 the governor recommends. He stated they requested $9,000, and he felt they would need this.

A.B. 237:

Mrs. Bertha Woodard made a presentation to the committee (see attached). She also quoted from the Supreme Court opinion (see attached).

Senator Raggio said, "This case was tried and $400,000 was awarded. The Supreme Court said nothing about trial error or the facts of the case but referred to state liability of $25,000 each. The attorney general feels nothing would be served by trying the case. You say the state has nothing to lose but the state has several things to lose, its a question of how far sovereign immunity goes. Perhaps the state would not have sovereign immunity (if it were brought to trial again), and there is also the expense of trial involved. Certainly you are talking about the facts of the case aren't you?"

Mrs. Woodard replied, "An agreement has already been reached."

Senator Raggio said, "The issue was that the jury award exceeded the limits of the state's sovereign immunity law as set. That was really the only issue. The state was the one who appealed the case. I don't see the objection when the state appealed to get the award down from $400,000 to $50,000."

Senator Lamb said, "We have never had the state's sovereign immunity tested, and we might get stuck for $400,000." Mr. Scott said they had four attorneys give legal opinions and advice. Senator Monroe said, "I don't think there is any problem here. It is better to pay the $50,000 maximum rather than go back and go through a long, costly new trial. It happens all the time that attorneys get together and agree to a settlement--its very standard. All we are asked to do is fund this amount, we are not being asked to determine the legitimacy or settlement. This has been approved by the courts, we are just appropriating money in agreement to settlement."

Mr. Scott said that "based upon the last sentence (of the attached supreme court opinion) this case was reversed and was remanded for new trial. We are asking that the case be sent back to trial."

Senator Lamb said, "Just because we put $50,000 back in this, they could still go back to trial and perhaps get $20,000 in which case we would have a reversion of $30,000. It is up to the attorney general whether this goes back to court. If we didn't provide the money now the case would go on for another two years. In the first place, the courts have taken this out of our hands."

Mr. Scott suggested that the Board of Examiners had funds and could pay the settlement at a later date after it had gone to trial. However, Mr. Barrett disagreed saying, "The Board of Examiners can pay only up to $1,000 in each case. There is $100,000 or $150,000 available, but by law they can pay only $1,000 per instance.
Senator Raggio and Senator Young left at 10:00 a.m.

RETIREMENT ADMINISTRATION - Page 539-540:

Senator Lamb said, "I think it is really a waste to talk about this budget until the legislature decides upon the plans for this department. We should hear this budget at a later date after this has been firmed up."

Mr. Presnell said, "We find the difference in the expected cost of the computer and what we have on the budget is due to current work being done. Whoever made out this request did not take it into consideration. Instead of requesting $30,000 for the first year of the biennium this should be $72,000. In the second year it should not be $10,000, it should be $55,000."

Senator Gibson asked, "Is there a limit to fees you can charge for the retirement program? You show $1 per employee per month." Mr. Presnell said, "Yes, it can go above that. We are thinking about going to 10¢."

AB 180:

Senator Gibson moved to recommend do pass. Senator Pozzi seconded the motion, and it passed unanimously. (Senator Raggio and Young had left the meeting.)

SB 247:

SUMMARY: Makes appropriations from general fund for various purposes.

Senator Pozzi moved they recommend do pass. Senator Brown

said, "I still have reservations about the nursery deal and their selling trees for a lot less than what they cost. Do they give any thought to raising prices? They sell the trees for 30¢ and it costs more than this to produce them considering the equipment and personnel." Senator Lamb said, "I want them to charge more for these trees. I want to make them self-sustaining.

At 10:12 a.m. Senator Raggio and Senator Young came back in the meeting.

Senator Young said, "I certainly think they ought to be self-sustaining. Mr. Barrett said, "Most of the time in the past it has been subsidized for providing shelter to rural areas." Senator Lamb said, "I think the day of this has been over." Senator Gibson said, "The only comment I have on their recovering their costs is that there is some benefit to the state, all benefits don't just accrue to the property owners. Burned areas are planted free gratis."

Senator Pozzi said, "I can see supplemental appropriations, but just because we have a little cushion of $13 million, we can't go approve a flock of items. I take back my motion."

Senator Monroe said, "I have questions about this air plane. There are more mountains and canyons in Elko County and they don't use a lead plane, they get along with a single engine plane." Senator Lamb said, "I wouldn't ask anybody to get into a single engine plane. I had an experience with one and it taught me a lesson."

Senator Monroe said, "The secret of this thing is that they are using it for a state taxi. That's exactly what they want that kind of plane for is to haul people around in." Senator Lamb said, "I had an experience in a single engine plane, and it taught me a lesson."

Senator Raggio said he felt perhaps the item for laundry equipment for the state hospital was a necessary item.

The committee decided to take each item of this bill seperately.

SECTION 1 - Mr. Barrett said that they have not requested such equipment before but, "I don't think it is reasonable to send these people out in the kind of business they're in without radios in their cars." Senator Gibson moved to approve $16,000 for this item. Senator Brown seconded the motion, and it passed unanimously.

SECTION 2 - Senator Brown said, "They are leaving the Clark County equipment when they move and won't be able to use this equipment after the move. I move we pass this section." Senator Young seconded the motion, and it passed unanimously.

SECTION 3 - Senator Young moved they approve this section. Senator Monroe seconded the motion, and Senators Raggio and Pozzi voted no, the others voted yes, so it passed four to three.

SECTION 4 - Senator Gibson moved they approve this section. Senator Raggio seconded the motion, and it passed unanimously.

SECTION 5 - Senator Raggio moved they approve this section. Senator Pozzi seconded the motion, and the motion passed with only Senators Gibson and Monroe voting no.

SECTION 6 - all sections - Senator Gibson moved they approve this section. Senator Young seconded the motion. Senators Gibson, Young, and Brown voted for the motion, Senators Lamb, Pozzi, Monroe, and Raggio voted no, so the motion lost four to three.

Senator Monroe moved they amend the appropriation to $40,000, "With that I think he can buy a quality piece of equipment. I want to buy a single engine plane." Senator Lamb said, "You're not too far off on a single engine plane for $40,000." (The committee had been discussing whether the $40,000 would be enough to purchase a single-engine plane.) The $76,000 requested was for a twin-engine plane. Mr. Barrett said, "A twin engine plane would be better than a single engine plane because the pilot would be flying so low and there are so many updrafts at that altitude. A single engine plane would be less reliable at those altitudes. The present plane is almost always broken down, and because the maintenance costs have become so high, we felt this was a cheaper way to go."

Senator Lamb said, "I am going to change my vote." So the motion to approve this section passed four to three. (This would bring the tally to Senators Lamb, Gibson, Young, and Brown voting for the motion.)

SECTION 7 - Senator Brown said, "That looks like a lot of money for these two trucks." Senator Lamb said it costs a lot of money for that equipment. Senator Monroe agreed those things are expensive. Senator Gibson asked why they couldn't use some of the present equipment on the trucks for the new trucks. Senator Lamb said he wanted to go with one truck and give them another truck next year. Senator

Pozzi moved they allot $34,150 for this item. Senator Raggio seconded the motion, and Senators Lamb, Monroe, Brown, and Young voted no, so the motion lost. Senator Monroe moved they approve $68,300 for this section as requested, and it passed with only Senator Pozzi voting no.

SECTION 8 - Senator Gibson moved they approve this section. Senator Brown seconded the motion.

Senator Raggio said, "If you appropriate $50,000 for this you would meet their needs. I really question the need for this at this point. Senator Raggio moved they amend this to $50,000 and Senator Pozzi seconded the motion.

Senator Young asked how carefully do you (the budget division) go into these? Mr. Barrett said, "Most of this request is for repairs of old equipment or new equipment for vocational programs, and there is more emphasis on vocational programs so we felt it was necessary." Senator Lamb said that it was a lot of equipment. Senator Monroe said they should go through the equipment items and cut some. Senator Lamb felt that the warden should be the one to set priorities.

Senator Gibson said that, "My reason for supporting this is most of the equipment is in the area of rehabilitation. It looks like the hue and cry is that we aren't doing enough in this area." Senator Raggio said he thought we were doing a lot. He said they would not emasculate the program by cutting this. Senator Gibson said, "I understand we are augmenting the program." Senator Raggio said that "$21,000 is for replacement of equipment needed in Medium Security Prison. I have serious doubts that all items need replacement, there is $10,000 for a lift truck for instance."

The committee went back to the original motion by Senator Gibson that they approve this section. Senators Young, Raggio, and Pozzi voted against this, Senators Brown, Monroe, Gibson and Lamb voted for it, so the motion passed.

SECTION 9 - Senator Brown moved that the committee approved this section. Senator Gibson seconded the motion. Senator Raggio said, "I think this is an effort to circumvent capital expenditures program at the university. It seems to me this is a device to get around the limitations on capital expenditures. I don't question the items, but I question the device."

Senator Lamb said they needed the landscaping in Las Vegas and regardless of circumvention he felt they needed it. Everyone voted for this section except Senators Raggio and Pozzi who voted no, so the motion passed.

SECTION 10 - Senator Brown moved they approve this section. Senator Gibson seconded the motion, and it passed unanimously.

Senator Monroe moved they pass this bill from committee. Senator Gibson seconded the motion, and it passed unanimously.

AB 237:

Senator Monroe moved they pass this bill. Senator Gibson seconded the motion, and it passed unanimously.

PUBLIC DEFENDER:

Senator Raggio and Senator Young left the meeting. Also see supplemental material #6

Mr. Sheerin mentioned that he had heard the committee had been critical of his use of public defender contractors. He said he preferred to use contractual services in small counties because he didn't have to pay them all the benefits of state employees such as retirement, sick leave, medical insurance, etc. He said the man in Elko wants to work under contract and there isn't enough work for a deputy, so its more economical under contract.

He said there were eight of the counties in the state where there were no attorneys, so they are forced to go to independent contractors.

He said their salaries were in fact justified. He pays one contractor $14,000 a year to handle 4 counties and he handled 6,000 cases.

One of his contractors spoke and said, "My law firm is retained and me and my partner handle this work. I don't believe I could handle it alone. I work in Mineral, Lincoln, Churchill, and Pershing Counties. I forgo criminal practice. In the last six month my office handled 53 criminal cases. For the previous six months the figures were relatively the same. Me and my partner spent 64 hours on the road in travel time in the month of February alone. The average cost for each case is a little less than $200 per case or $12.50 per hour.

Mr. Sheerin said he thought contractors were the best way to go because of the lack of attorneys in small counties and the money involved. He said they have had a very good success factor and this should be continued as the governor has recommended in his budget.

The meeting adjourned at 11:45 a.m.

Respectfully submitted,

Ellen Hocker

Ellen Hocker, Secretary

APPROVED:

Floyd R. Lamb

Floyd R. Lamb, Chairman

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, APPELLANT, v. DIANE SILVA AND FRED E. SILVA, RESPONDENTS.

No. 5998

December 28, 1970

Appeal from jury verdict and judgment of the Second Judicial District Court, Washoe County; Thomas O. Craven, Judge.

Reversed and remanded for a new trial.

Harvey Dickerson, Attorney General, and *Robert A. Groves,* Deputy Attorney General, of Carson City, for Appellant.

Echeverria and Osborne and *John T. Coffin,* of Reno, for Respondents.

Russell W. McDonald, of Carson City, Amicus Curiae.

Joseph P. Reynolds, of Reno, Amicus Curiae.

OPINION

By the Court, THOMPSON, J.:

Wife and husband brought suit against the State to recover damages incurred by reason of the forcible rape of the wife by an inmate of the Peavine Honor Camp, a state facility. At the close of the evidence the district court directed a verdict against the State on the issue of liability and allowed the jury to decide only the question of damages. The jury awarded damages of $300,000 and $100,000 to the wife and husband, respectively. Judgment was duly entered. The State moved for a new trial upon the ground of excessive damages, and, if unsuccessful, for a reduction of each damage award to the statutory limit of $25,000. The district court found the damages to be within permissible limits and declared the statutory limitation of damages unconstitutional. Accordingly, the State's motions were denied. The victors sought a post-judgment evidentiary hearing as to whether the State had purchased liability insurance in an amount greater than $25,000 for each person, and if so, whether such purchase waived the statutory limitation. That hearing, and other matters, were stayed by an order of this Court pending disposition of the State's appeal which had been filed.

The main issue is immunity from suit and the extent to which the State waived immunity by the enactment of NRS 41.031 et seq. Several subordinate questions must be resolved if we rule that the State does not enjoy immunity in the circumstances disclosed. We turn first to relate the relevant facts bearing on this issue.

1. In 1965 the State waived its immunity from liability and consented to civil actions, except those civil actions based upon the exercise or performance or the failure to exercise or perform discretionary functions or duties; as to these, immunity from liability was retained.[1] The Peavine Honor Camp was established by the Board of Prison Commissioners pursuant to the authority of NRS 209.475 for the housing of prisoners assigned to state conservation and rehabilitation work. Prisoners so assigned are thought to be good risks for work away from the confinement of the state prison. The thrust of the honor camp program is rehabilitation rather than punishment.

The State contends that the entire honor camp program involves the exercise of discretion within the contemplation of NRS 41.031(2). The decision to establish the camp was discretionary with the Board of Commissioners; the selection of inmates to be housed there was discretionary with the warden and his screening committee; and the method of operating the camp was discretionary with those charged with the duty of supervision. Accordingly, the State is immune from this action. Heavy reliance is placed upon the Washington case of Evangelical United Breth. Church of Adna v. State, 407 P.2d 440 (1966). On the other hand, the respondents urge that the supervision and control of the honor camp was and is an operational function imposing upon the State the duty to exercise ordinary care, and for the breach of which

[1]NRS 41.031: "The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against individuals and corporations, except as otherwise provided in NRS 41.032 . . . ."

NRS 41.032: "No action may be brought under NRS 41.031 or against the employee which is:

"1. . . . .

"2. Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the state or any of its agencies or political subdivisions or of any employee of any of these, whether or not the discretion involved is abused."

ability may be found. Cf. Harrigan v. City of Reno, 86 Nev. ....., 475 P.2d 94 (1970). The distinction between discretionary and operational functions is obscure. The supervision and control of a state facility involves the exercise of some discretion. To rule, however, that the presence of discretion in the operation of a state facility creates an immunity within the intendment of NRS 41.032(2) would annihilate the waiver of immunity declared in NRS 41.031. In our judgment, this was not the legislative purpose.

Before the enactment of the statutory waiver of immunity, Nevada case law on the viability of the doctrine of sovereign immunity was uncertain and in flux. Walsh v. Clark Co. School Dist., 82 Nev. 414, 419 P.2d 774 (1966); Hardgrave v. State ex rel. Hwy. Dep't, 80 Nev. 74, 389 P.2d 249 (1964); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963). The trend was toward the judicial abolition of that doctrine. Rice v. Clark County, supra. It is only fair to assume that the 19[redacted] Legislature reacted to that trend, and elected to waive immunity within limits and impose a ceiling upon the recovery allowable to a claimant, rather than await further judicial action upon the subject. The apparent legislative thrust was to waive immunity and, correlatively, to strictly construe limitations upon that waiver.

With the legislative purpose in mind, our task becomes easier. In a close case we must favor a waiver of immunity and accommodate the legislative scheme. Only when we conclude that discretion alone is involved may we find immunity from suit. Although the selection of inmates for honor camp service may primarily be a discretionary act, the manner in which the camp is supervised and controlled is mainly operational in nature. Indeed, the very fact that such inmates are not released from prison to roam at will, but remain under state control for work assignment and honor camp living, establishes state recognition that control and supervision is essential. We hold, therefore, that the State is not immune from this suit.

2. As noted, the district court directed a verdict against the State on the issue of liability believing that reasonable minds could not differ on the point.[2] Proof of negligence was not that certain. The record may be read to show that state personnel supervise the inmates during their working hours

[2]The complaint alleges gross negligence. Why, we do not know since ordinary negligence is sufficient and NRS 41.035(1) does not a[redacted] punitive damages. In any event, the court ruled that the State was grossly negligent as a matter of law. For reasons stated in the body of the opinion we think that even ordinary negligence was a jury question in this case.

and at night when they were at the honor camp. Bed checks were to be made every two hours during the nighttime. The honor camp area was fenced and the gates sometimes locked. The gates were open on the night the rapist escaped because of the movement of fire crews and equipment engaged in fighting a forest fire. An expert witness testified favorably to the State with regard to the reasonableness of its security at the honor camp. The record may also be read to show a lack of due care in the security arrangements at the honor camp.

Moreover, there is a problem of foreseeability. The State earnestly contends that the independent depravation of the rapist was not foreseeable and that liability should not rest with the State where a third person is assaulted by one who elopes from the honor camp. Indeed, the State suggests that the court should have directed a verdict in its favor for this reason alone.

Was the risk of harm one reasonably to be perceived? Honor camp inmates are under the supervision and control of the State and are paid for their work. The rapist was thought by prison authorities to be a nocturnal prowler since he had been charged with several counts of burglary before his incarceration at the prison. He was in prison about seven months before his release for honor camp service. Female companionship is denied prison inmates and the consequences of this denial is a matter of concern to prison authorities. The honor camp was located near a populated subdivision in the City of Reno. On the other hand, the rapist was not known to be a sex-offender. His conduct at the prison had been exemplary.

In our view reasonable minds could reach different conclusions and the jury should have been allowed to decide liability. Neither side was entitled to a directed verdict. Accordingly, we must set aside the verdicts and remand for a new trial. However, there remain questions of importance to be resolved for retrial.

3. The district court declared the statutory damage limit of $25,000 for each claimant [NRS 41.035(1)] unconstitutional upon the ground that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. art. XIV, § 1. The argument is this. Although it may be permissible for the State to place a ceiling upon the amount of damages recoverable, that ceiling must be expressed in terms of a percentage of the total damages sustained; otherwise, claimants are not treated equally insofar as the opportunity to be made whole is concerned. For example, any claimant whose damages do not exceed $25,000 has the opportunity to obtain a full recovery, whereas one whose damages exceed that amount has only the opportunity

to recover a percentage of his loss. Thus, a dollar limitation upon recovery discriminates between injured claimants, whereas a percentage limitation would treat all claimants equally and not violate equal protection.

We do not see a constitutional problem here. The fault with the argument is the failure to distinguish between the right to recover and the amount of recovery. All persons injured through the negligence of the State have been granted the right to bring suit (except where immunity is retained), and this right is granted equally and without discrimination on any basis whatsoever. It seems to us quite impossible to devise a scheme of equality in the awards of damages. The "total damages sustained" by a claimant is an uncertain amount in any case. That amount is what negotiation or trial declares it to be, and the variation in result for substantially similar injuries is remarkable. A percentage of the "total damages sustained" is equally uncertain. In the nature of things, equality of treatment as to the amount of damages cannot be achieved, and in our view, the equal protection clause has no bearing upon the subject. Cf. Dandridge v. Williams, 397 U.S. 471 (1970). It was within the legislative power to limit recovery.

The respondents urge that the State may have waived the statutory limit upon recovery by purchasing liability insurance with limits in excess of the statutory amount. They did not plead waiver. By post-judgment motion they sought to discover the existence of insurance and the limits thereof. That hearing was never held because of the pendency of this appeal. Since this case must be tried anew we anticipate that the district court will allow pleading amendments to present this issue. We should, therefore, express our view, and do so upon the assumption that the State has purchased liability insurance with limits in excess of the statutory ceiling upon recovery.

The legislature authorized the State to "insure itself against any liability arising under NRS 41.031." NRS 41.038. If liability is found in this case it is a liability under NRS 41.031, and the limit upon the recovery of any claimant for such liability is $25,000. NRS 41.035(1). In reading these sections together, 41.031, 41.038 and 41.035(1), we are compelled to conclude that the legislative authorization to insure was to the extent of $25,000 for each claimant, and no more. The purchasing of insurance with higher limits was not authorized and, if done, cannot be considered as a legislative waiver of the statutory limit.

The case of Taylor v. State and Univ., 73 Nev. 151, 311 P.2d 733 (1957), is not apposite. The court there discussed

waiver of immunity by the purchasing of insurance. We are not here concerned with waiver of immunity. That was accomplished by legislative act in 1965 and a limit placed upon recovery. That limitation is constitutionally permissible and may not be enlarged except by the legislature.

Reversed and remanded for a new trial.

ZENOFF, BATJER, and MOWBRAY, JJ., and YOUNG, D. J. concur.

NOTE—These printed advance opinions are mailed out immediately as a service to members of the bench and bar. They are subject to modification or withdrawal possibly resulting from petitions for rehearing. Any such action taken by the court will be noted on subsequent advance sheets.

This opinion is subject to formal revision before publication in the preliminary print of the Pacific Reports. Readers are requested to notify the Clerk, Supreme Court of Nevada, Carson City, Nevada 89701, of any typographical or other formal errors in order that corrections may be made before the preliminary print goes to press.

C. R. DAVENPORT, *Clerk.*

SPO, CARSON CITY, NEVADA, 1970

National Association For The Advancement Of Colored People

Reno-Sparks Branch

P. O. BOX 7757

RENO, NEVADA 89502

March 5, 1973

PRESENTATION TO - SENATE FINANCE COMMITTEE

We appear before you in opposition to A B 237. The Supreme Court Decision December 28, 1970, reversed this case and demanded a new trial, making it clear that the judge and jury were wrong.

This is special legislation for Attorney Pete Echerveria, former State Senator, and his client. This is an invasion of the courts by legislation. You are pre-empting the court by taking this case away from them.

This case was scheduled for trial January 10, 1972, pulled off the calender, reset for February 28, 1972, for a two-week trial, pulled off again, stating an agreement for settlement was in process. This case has not been scheduled on calender since. This case could have been settled over a year ago, if they had preceeded with the courts. Obviously, they were waiting for the Legislature to meet and try the case here.

The bill is mis-leading the Legislators and the public by saying , if the Attorney General recommends and if the Board of Examiners allow this amount. According to Mr. Echeveria, the attorney for the plaintiff in a press release Reno Gazette February 15, 1973.(See attach.)

I ask - Who is kidding who? It appears that the Legislators are kidding the public by passing this bill. It is very clear that this matter has been handled behind closed doors in smoke filled rooms, in handling public funds. The legislature is being used to make it look legitimate.

There is no judgement against the state in this case and it seems to me that this is a special grant in the absence of a judgement.

The Supreme Court has upheld the limit of $25,000.00 per claimant, and by going through the courts, the state has nothing to lose, but stands to gain, especially where the man is getting equal damages as the woman.

National Association For The Advancement Of Colored People

Reno-Sparks Branch

P. O. BOX 7757 RENO, NEVADA 89502

SENATE FINANCE COMMITTEE

March 5, 1973

It appears to me if you wanted to be fair, you would pass a uniform law, so all attorneys could try their cases in the Legislature, rather than the priviledge one, Mr. Echeveria.

We have had legal advise on this matter and we have been told that this bill is unconstitutional and is an invasion of the courts, that this is special legislation and the Supreme Court has made it crystal clear how this case should be handled, that is through a new trial.

We urge you to vote against A B 237. If you pass this bill out of committee and the Senate passes this bill, the National Association for the Advancement of Colored People (NAACP) will bring legal action to enjoin the Governor, Comptroller, State Treasurer, Board of Examiners and all appropriate authorities from disbursing the money. We will pursue this case if necessary, back to the Supreme Court,, because we firmly believe this bill is unconstitutional.

For further information:

Bertha S. Woodard, President
1562 Prospect Avenue
Sparks, Nevada 89431

Phone 358-5420