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TO:	The Honorable Senator Jeff King, Chair And Members of the Senate Committee on Judiciary
FROM:	David R. Cooper Kansas Association of Defense Counsel
DATE:	March 19, 2015
RE:	KADC's support of HB 2246

Chairman King and members of the committee, on behalf of the Kansas Association of Defense Counsel, we thank you for this opportunity to submit written testimony supporting HB 2246.

KADC is a state-wide organization of lawyers admitted to practice law in Kansas who devote a substantial amount of their time to the defense of litigating civil cases. In addition to working to improve the skills of defense attorneys and elevating the standards of trial practice, our organization advocates for the administration of justice, because our clients depend on it.

KADC supports the amendment of K.S.A. 12-105a and K.S.A. 12-105b to require notice of claims against municipalities and their employees.

SYNOPSIS: K.S.A. 12-105a and K.S.A. 12-105b must be amended to include employees of municipalities in the required notices of claims. Otherwise, claims may be pursued, without notice, solely against employees of local governments while leaving local governments responsible for the defense and indemnity of the employee.

Absent amendment, the notice of claim requirements of K.S.A. 12-105b have been effectively nullified, leaving local governments responsible for the costs of lawsuits against employees without first requiring notice *before* the claim is commenced.

The Kansas Supreme Court held, in December 2014, that notice is not required for suits against municipal employees.

In *Whaley v. Sharp*, Appeal No. 107,776, 2014 WL 7331586 (Dec. 24, 2014), the Kansas Supreme Court held that a written 120-day notice of claim under K.S.A. 12-105b(d), as a prerequisite

to suit against a municipality, did not apply to suit against a municipal employee. In so doing, the Court overruled *King v. Pimentel*, 20 Kan.App.2d 579, 890 P.2d 1217 (1995).

In *King v. Pimentel*, the Kansas Court of Appeals had concluded:

> "The notice of claim requirement in K.S.A. 12–105b(d) affords a municipality an opportunity to review and investigate tort claims against it and to approve or deny such claims before having to litigate an action under the KTCA. Because a municipality faces significant liability, both in actions brought against it and actions brought against its employees under the KTCA, we conclude the legislature intended written notice of a claim under K.S.A. 12–105b(d) would be a prerequisite for bringing an action under the KTCA against municipal employees who cause injury or damages to another while acting within the scope of their employment."

20 Kan.App.2d at 590. In *Whaley*, the Supreme Court held the plain language of K.S.A. 12-105b(d) did not require a notice for claims solely against an employee of a municipality:

> The legislature's intent is the paramount guide to a statute's meaning. The fundamental rule for determining legislative intent is that the plain language selected by the legislature controls, unless that language is unclear or ambiguous.
>
> The statutory notice requirement in K.S.A.2013 Supp. 12– 105b(d) refers only to claims against a municipality and does not apply to claims made against a municipal employee.

Whaley, Syl. ¶¶ 2-3. The court applied the "plain language" rule of statutory interpretation to conclude that the express inclusion of a requirement for a notice against a municipality without the express requirement for a notice against employees meant no notice was required for claims solely against employees.

The notice requirement exists to give municipalities a chance to fully investigate claims, and settle claims as appropriate. Claimants may avoid the notice requirement entirely by electing to sue only the responsible employee(s).

The Supreme Court has described a "sufficient" as one that the municipality the information needed for a "full investigation and understanding of the merits of the claims advanced." *Continental Western Ins. Co. v. Shultz*, 297 Kan. 769, 775, 304 P.3d 1239 (2013). The purpose of the notice of claim statute is to advise the proper municipality of the time and place of the injury, to give that municipality an opportunity to ascertain the character and extent of the injury sustained, and to allow for the early investigation and resolution of claim disputes." *Sleeth v. Sedan City Hosp.*, 298 Kan. 853, 865, 317 P.3d 782 (2014) (Emphasis added).

A municipality should be able under the notice of claim statute to assess the validity of a claim and, where appropriate, write a check for the amount claimed and be fully resolved of all further liability arising from the incident.

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Without regard to notice, local governments still pay all litigation costs—defense, settlement and/or judgment.

Under the Kansas Tort Claims Act (KTCA), a governmental entity is liable for the negligent or wrongful acts or omissions of its employees, while acting within the scope of their employment. K.S.A. 75–6103. Furthermore, the governmental entity is required (except in rare circumstances where the employee acts with actual fraud or actual malice) to provide a defense for employees must indemnify its employees against damages for injury or damage caused by the employees while acting within the scope of their employment. K.S.A. 75–6108, K.S.A. 75–6109, and K.S.A. 75–6116.

In short, the governmental entity pays the bills and writes the checks whether the plaintiff sues the entity or chooses to sue only the employee. The *Whaley* decision leaves local governments with all the burdens of litigation with none of the important safeguards intended by K.S.A. 12-105b.

Conclusion.

On behalf of the Kansas Association of Defense Counsel, we appreciate the opportunity to be heard on this important matter. HB 2246 implements the logical and appropriate "fix" by amending K.S.A. 12-105a and 12-105b to expressly include municipal employees. The definition of "employee" is drawn directly from the KTCA and HB 2246 makes clear that the intent of the Legislature is to require notice of a claim against a municipality or its employees, to provide an opportunity to ascertain the character and extent of the injury sustained, and to allow for the early investigation and resolution of claim disputes.

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