MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

Held in Room 522, at the Statehouse at 3:30 P.M. a.m./p. m., on February 16, 1978.

All members were present except:
Representatives Foster, Hoagland and Hurley, who were excused

The next meeting of the Committee will be held at 3:30 a. m./p. m., on February 20, 1978.

These minutes of the meeting held on _____, 19____ were considered, corrected and approved.

Chairman

The conferees appearing before the Committee were:

Mr. Floyd Gehrt
Mr. Bill Webster, Lawrence, Kansas
Mr. Harold Burtzloff, Liberal, Kansas
Mr. Paul Lewis, Kansas Bankers' Association
Mr. Gene Olander, District Attorney
Mr. Erne Mosher, League of Kansas Municipalities
Representative Carlos Cooper
Mr. Rameriz, Bonner Springs
Mr. Fred Howard, Topeka Police Chief
Mr. Harry Felker, Topeka Park Commissioner
Mr. Leon Graves, Assistant City Attorney

The meeting was called to order by the Chairman, who introduced Mr. Floyd Gehrt who discussed House Bill 2612. Mr. Gehrt explained this bill would provide for a lein on mobil homes where there are unpaid charges, which lein would become effective after default and when the operator of a mobil home park posts notice upon the mobil home. After thirty days the operator would be allowed to move the home to a storage area. He stated these are the changes spoken to in section (a).

Representative Whitaker inquired how one determines default on rental payments. Mr. Gehrt explained it would be under the lease agreement, and Representative Whitaker inquired if it is a standard lease. Mr. Gehrt stated he believes there is a form but he is not sure everyone uses them, but never-the-less if there is no written lease they would follow statuatory provisions. Representative Roth expressed concern about the criminal penalties of up to thirty days in jail for civil remedies. Mr. Gehrt suggested that the mobil home operators would be in a better position to discuss this matter.

Mr. Bill Webster of Lawrence, Kansas who is an operator of a mobil park testified he has 425 spaces, and also deals in retail sales. He testified that this proposed bill would help them a great deal because often people will fail to pay

the rent on their space and there are problems where the banks don't know where the trailer home is. Further, he stated the people sometimes sneak their mobil homes out of the part in the night and they are unable to locate them. In addition, he stated sometimes the operator doesn't even know who owns the home, all of which makes it very difficult to collect the rent.

Representative Martin stated this would apparently apply to a home someone is living in and upon which they were making payments; and that a problem could arise if the operator of the park did some maintenance work for which he charged the tenant but for which the tenant refused to pay.

Mr. Harold Burtzloff of Liberal, Kansas testified that people, when they are unable to make payments either on their mobil home or on park rental will often abandon the homes, which homes then will be vacated for a long period of time before the operator is free to move such home legally. He explained this way they lose a great deal of money.

Mr. Paul Lewis of the Kansas Bankers Association testified they had not had time to examine the substitute bill but had contacted some of the bankers that deal with such loans, and those bankers had indicated the bill would be beneficial. He stated they could give tentative support to the substitute bill but would like to reserve their full support until further study.

The Chairman called for a discussion of House Bill 2633 and Mr. Gene Olander, District Attorney for Shawnee County appeared in support of the proposal. He stated he was speaking not only for himself but also for Johnson and Wyandotte counties. Representative Whitaker inquired if Mr. Olander would feel confortable if they lowered the salary in Sedgwick County, and Mr. Olander replied that it was not his concern. Representative Martin inquired if the District Attorneys presently receive a supplement above their salaries, and Mr. Olander explained that he receives no supplement, but understands the District Attorney in Johnson County does. He further explained that any supplement is entirely up to the County Commission. Representative Gastl suggested that if there was to be action on the bill, 1976 should be changed to 1977, and Mr. Griggs explained it would be just a change in the K.S.A. cite.

It was moved by Representative Gastl and seconded by Representative Frey that House Bill 2633 be recommended favorably. Representative Lorentz offered to substitute motion to amend the bill by striking all after the word "act" in line 21 and through line 25 through the word "shall". The substitute motion was seconded by Representative Heinemann. Representative Whitaker stated the court system is already costing enough and he opposed the substitute motion. After considerable discussion the motion carried by a majority with Representative

Whitaker voting in opposition. It was moved by Representative Gastl that the bill as amended be recommended favorably. The motion was seconded by Representative Roth and carried by a majority, with Representative Whitaker voting no.

Representative Cooper introduced Mr. Rameriz of Bonner Springs, Kansas. He testified there is presently a judgment of over $51,000.00 against the City of Bonner Springs for an occurrence at a recreational ficility where there had been damage to property and persons. Representative Augustine inquired if the city would still be liable if such legislation is passed, and Mr. Rameriz explained the bill only takes care of the future.

Topeka Police Chief Fred Howard testified the Association of Chief's of Police is unanimously in support of this proposal.

Mr. Harry Felker, Topeka Park Commissioner and Mr. Leon Graves, Assistant City Attorney of Topeka discussed mob action statues and stated they were in support of the proposal.

The Chairman asked Representative Heinemann to report on House Bill 2679 and Mr. Heinemann distributed a proposed balloon amendment which had been suggested by the Judicial Administrator. It was moved by Representative Heinemann that the amendments be adopted, which motion was seconded by Representative Augustine and carried without dissent. It was then moved by Representative Heinemann and seconded by Representative Augustine that the bill, as amended, be reported favorably. Representative Hayes noted there should be a change in the title as well as in line 15, and Representative Heinemann stated that this could be included in his previous motion. Upon vote, motion carried.

Representative Augustine offered a printed statement (See Exhibit) concerning House Bill 2950. He noted it is the recommendation of the sub-committee that the bill be reported adversely, and moved the suggestion. The motion was seconded by Representative Whitaker and carried without dissent.

It was moved by Representative Ferguson and seconded by Representative Martin that HB 3114 be recommended for passage. Motion carried.

The Chairman asked for action on House Bill 3121 dealing with signboards and Representative Stites stated there is language in lines 108 and 109 which he finds somewhat disturbing. Mr. Art Griggs stated that he had the impression the Lawrence ordinance reads that the existence of signs are illegal after a certain date, and Representative Stites suggested if they are unlawful after a certain date, they must order them removed somewhere along the line. After considerable disucssion, it was moved by Representative Stites and seconded by Representative Augustine that the bill be recommended for passage. Upon vote, the motion lost. Thereupon, it was moved by Representative

Miles and seconded by Representative Frey that the bill be reported adversely. It was recommended by Representative Martin that the bill be kept in committee so it might be considered at a later date. However, the question was called for and upon vote, motion carried by a majority.

It was moved by Representative Augustine that the hand-out as a substitute for House Bill 2612 be prepared in bill form for consideration by the committee, which motion was seconded by Representative Frey and upon vote, carried.

Representative Roth reported on House Bill 2958 explaining the bill deals with recall and would solve problems in some areas where there are attempts to remove all members of governing bodies. The Chairman called attention to proposed amendments on lines 63 and 88, and the further proposal that the bill be published in the official state paper. Representative Frey inquired about the urgency of publication, and Representative Roth explained a situation which had occurred in Parsons, Kansas where there was an attempt to recall the entire unit of a governing body, which would preclude any business being conducted in that city until the next election. Representative Roth moved the previous amendments, which motion was seconded by Representative Augustine, and upon vote, carried. It was then moved by Representative Roth and seconded by Representative Baker that House Bill 2958 as amended be recommended favorably. The motion carried.

The meeting was adjourned.

House Judiciary

Feb 16, 1978

Name	Address	Organization
Frank A Burr	112 W. 7th	League of Kansas Municipalities
V. W. Bagnall	Emporia	City Manager Emporia
[illegible]	Topeka	League of Ks Municipalities
Neil Shortlidge	Topeka	League of Ks. Municipalities
Fred Howard	Topeka	Ks Assn Chiefs of Police
HARRY FELKER	TOPEKA	CITY OF TOPEKA
Fred DeVictor	LAWRENCE	LAW. PARKS + RECREATION Dept. CITY OF LAWRENCE
Colt Knutson	Lawrence	City Atty
[illegible]	[illegible]	[illegible]
Carolyn Resh	Topeka	UPI
Wally Barnett	Topeka	AJC
Leon Drawer	Topeka	City of Topeka
Donald Bufkin	Osborne	KMHRVI
Tom D. Whiting	Topeka	KMHRVI
B. Webster	Lawrence	KMHRVI
[illegible] Smith	Newton	KMHRVI
Bill Gewecke	Russell	KMHRVI

3/24 - pdiz

2-16

Session of 1978

HOUSE BILL No. 2679

By Representative Heinemann

11-21

AN ACT concerning the procedure for changing judges to hear certain district court actions; amending K.S.A. 20-311d and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 20-311d is hereby amended to read as follows: 20-311d. (a) If either party to any action in a district court files an affidavit alleging any of the grounds specified in subsection (b), the administrative judge shall at once transfer the action to another ~~division of the court if there is more than one division,~~ *judge of the district court in the judicial district* ~~or shall request a judge of another judicial district be assigned to preside in such cause~~. If ~~an affidavit be filed in a district court in which there is but one division or judge, then~~ *the administrative judge* ~~desires to have a judge of the district court of another judicial district preside in the cause, such judge~~ shall at once notify the departmental justice for such district and request the appointment of another judge to hear such action.

such an affidavit is filed in the district court of a county in which there is only one judge having jurisdiction to hear the action, then

(b) Grounds which may be alleged as provided in subsection (a) for change of judge are:

(1) That the judge has been engaged as counsel in the action prior to the appointment or election as judge.

(2) That the judge is otherwise interested in the action.

(3) That the judge is of kin of or related to either party to the action.

(4) That the judge is a material witness in the action.

(5) That the party filing the affidavit has cause to believe and does believe that ccount of the personal bias, prejudice, or interest of the judge ~~he~~ *such party* cannot obtain a fair and

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

2-16

Mr. Chairman and Members of the Committee:

Your Sub-Committee on House Bill 2950 met to discuss the purpose and the intent of the bill. The purpose of House Bill 2950 is to provide court review of the facts presented by both parties to a contract dispute and offer an impartial decision.

The Committee reviewed testimony presented to the House Judiciary Committee on February 11, 1978, by the National Education Association. The Sub-Committee also considered and discussed an alternative proposal to that which appears in House Bill 2950.

The Committee discussed the alternative of subjecting disputes on contracts to binding arbitration as opposed to a court review. Presently, disputes on contracts between school boards and one of their employees may be settled by binding arbitration if both parties agree to. The proposal presented to the Sub-Committee would have made the present law mandatory on school boards and the affecting party on the settling of disputes arising on a contract. The Sub-Committee rejected that alternative.

Discussion in regard to the intent of the bill took place and the Committee members felt that this would open up a door for possible expansion of the Professional Negotiations Law. Secondly, the Committee felt this could be used later down the line to

expand professional negotiations and it was the over all feeling that there should be no expansion allowed in KSA 72-5423. Even though the Sub-Committee does not dispute the application of the limited scope of review to due process cases, as was involved in Schultz vs. The Board of Education USD #58, the Committee feels that present law is adequate and provides the necessary avenues for remedy in disputes involving in regard to contract cases.

Respectfully your Sub-Committee on House Bill 2950 recommends to the House Judiciary Committee that the bill be reported adversely.

Patrick B. Augustine, Chr.

Phil Martin

Fred Lorentz

HOUSE SUBSTITUTE FOR HOUSE BILL No. 2612

By Committee on Judiciary

AN ACT relating to mobile homes; providing for a lien on certain mobile homes in favor of persons leasing space for a mobile home site; providing for notice of such lien; and providing for the disposition of such mobile home, under certain circumstances.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Any person leasing or renting space for a mobile home site shall have a lien upon any mobile home situated thereon for unpaid lease or rental payments and for other unpaid charges due such lessor under the terms and conditions of any lease or rental agreement with the lessee; such charges may include reasonable fees for movement and storage of the mobile home by the lessor as provided in this act. Such lien shall be effective after the lessee has defaulted in payments as provided in the rental or lease agreement with the lessor. Notice of such lien shall, upon lessee's default, be given by lessor causing to be posted conspicuously upon such mobile home, written notice of such lien.

(b) The lien provided by this act shall not extend to a person having a valid security interest in such mobile home unless such secured party shall have been given notice of default in lessee's obligations to lessor under the terms and conditions

of the lease or rental agreement between lessee and lessor. If such secured party has been given such notice by lessor, by certified mail, return receipt requested, the lien provided by this act shall extend to and be valid against the secured party to the extent of lease, rental, or other charges which accrue under the terms of the lease or rental agreement between lessee and lessor, on and after the date such notice shall have been received by the secured party. Such charges may also include reasonable fees for movement and storage of the mobile home by the lessor as provided in this act.

(c) Notice to the secured party of default by lessee, shall contain a description of the terms and consditions of the agreement between lessee and lessor, and shall be sufficient in detail to allow the secured party to identify the lessee and the mobile home.

Section 2. At any time after thirty (30) days beyond the date notice is given to the lessee, or in the event that there is a secured party, at any time after thirty (30) days beyond the date notice is given to the secured party, whichever is later, the lessor may remove the mobile home from the leased or rented site and may retain such possessor lien as is provided in Section 1 of this act. Upon such removal, reasonable charges for such removal and storage may be assessed against the said mobile home. The lessor, upon such removal and storage, shall be required only to exercise reasonable and ordinary care of such property.

Section 3. Said lien may be enforeced and foreclosed as security agreements are enforced under the providions of the Uniform Commercial Code.

Section 4. After such lien has been perfected by posting and notice as required in this act, it shall be unlawful for any person to remove the mobile home from the possession of the lessor without tendering the payments due pursuant to this act. Violation of this section shall constitute a Class C misdemeanor.

Section 5. This act shall be in force and effect from and after publication in the statute book.

112 WEST SEVENTH STREET
TOPEKA, KANSAS 66603
AREA 913 354-9565

League of Kansas Municipalities
Kansas Government Journal

2-16

TO: The House Committee on the Judiciary

BY: E. A. Mosher, Executive Director, League of Kansas Municipalities

RE: HB 2929 - Repeal of City Mob Liability Statute

DATE: February 16, 1978

The League of Kansas Municipalities supports passage of HB 2929. Indeed, prior to introduction of the bill by Representative Cooper, the Governing Body of the League had requested the League staff to attempt to secure sponsorship of a bill which would do precisely the same thing as HB 2929.

For your convenience, there are set forth below the statutes which would be repealed by the bill.

> 12-203. Mob action; city liability and defenses. A city shall be liable in damages for injuries to persons or property caused by the action of a mob within the corporate limits of the city if the city police or other proper authorities of the city have not exercised reasonable care or diligence in the prevention or suppression of such a mob. The city shall have all of the defenses in such action that are available to parties in tort actions. [L. 1967, ch. 80 § 1; July 1.]
>
> 12-204. Same; definition of "mob." As used in this act, the word "mob" shall mean an assemblage of ten (10) or more persons intent on unlawful violence either to persons or property. [L. 1967, ch. 80, § 2; July 1.]

The city of Bonner Springs was held liable under this statute and on appeal to the Kansas Court of Appeals the League filed a brief amicus curiae on behalf of our 503 member cities. Our particular interest in the case was to attempt to secure some ground rules by the court, which would be helpful to cities in determining their potential liability under the new mob law. A copy of the court opinion affirming a jury award against the city is attached to this letter.

The following is an analysis of the matter prepared by Frank A. Bien, Legal Counsel of the League, who filed the brief noted above.

"In 1967 the legislature repealed K. S. A. 12-201 and 12-202 which imposed absolute liability on cities for mob damage, and enacted in its place K. S. A. 12-203 and 12-204 which imposes liability for mob action only if a city fails to exercise "reasonable care or diligence" in the prevention or suppression of a mob.

"In a very recent case involving the new mob statute a jury determined that the city of Bonner Springs was negligent in failing to prevent mob action at a basketball game which was part of a city sponsored recreational program. (Jenkins v. City of Bonner Springs, 1 Kan. Court of Appeals 2d 727, decided 12-16-77). The facts of this case are such as to cause concern to cities in regard to their potential liability for mob action. The city had no direct notice that any mob action was threatened at the game. Trouble at the game began when a spectator, who was displeased with the rough play of one of the players shouted an obscenity at the player. Immediately after the game ended the player, McGee, went into the stands and challenged the spectator to a fight. Lynn Johnson, who was apparently trying to calm things down, came up behind McGee and tapped him on the shoulder whereupon McGee hit Johnson who landed on the basketball court. Spectators then converged on Johnson and attacked him. Plaintiff was injured when he attempted to rescue Johnson. To establish notice of probable mob action the district court permitted introduction of evidence that some of the basketball players were trouble-makers and had had previous difficulty with the police and that there had been fights and disturbances at other athletic events in the city, including little league baseball games. On the basis of this evidence, the jury was allowed to determine whether the city was negligent. Apparently the jury decided that because of the character of some of the players at the game the city should have known that mob action might occur and was therefore negligent in failing to take action to prevent such mob action. By permitting the case to go to the jury, the district court in effect held that a city is under a legal duty to provide police protection at an athletic event if any of the participants or spectators are what might be termed "trouble-makers" or "police characters." Cities are concerned about this decision because of the effect it will have on use of limited police resources and their operation of recreational programs. It places an impossible burden on cities because it will require cities to define who is a "trouble-maker" or "police character" and then monitor the attendance of such persons at all athletic events, or even church picnics held in their city, on the ground that such persons may incite mob action. It must be also noted that because of this case many cities may decide to limit or abandon city sponsored recreational programs such as basketball or baseball leagues.

"The scope of the legal duty which has been imposed by the court on cities to prevent mob action under the new mob law is so broad as to place an unwarranted and socially undesirable burden on cities and for that reason the law should be repealed."

We think the apparent obligation placed on cities by the existing statute as applied by the court is unreasonable. We should also point out that if cities are to be held liable, why shouldn't counties or townships also be held liable for mob action? We urge the committee to favorably report HB 2929.

No. 48,995

ROBERT E. JENKINS, *Appellee*, v. CITY OF BONNER SPRINGS, KANSAS, a Municipal Corporation, *Appellant*.

SYLLABUS BY THE COURT

1. CITIES AND MUNICIPALITIES—*Mob Action—Liability of City for Negligence in Preventing or Suppressing Mob.* Recovery under K.S.A. 12-203 requires that three things be established: (a) The injury to persons or property must have been caused by the action of a mob; (b) the injury must have occurred within the corporate limits of the city; and (c) the city police, or other authorities of the city, did not exercise reasonable care and diligence in the prevention or suppression of such a mob.
2. SAME—*Mob Action—Liability for Negligence.* Under K.S.A. 12-203, cities are liable for negligence, which necessarily encompasses the issue of foreseeability or notice.
3. SAME—*Mob Action—Reasonable Care in Suppressing Mob.* In an action against a city for damages for injuries caused by a mob, it is *held:* (a) The trial court properly submitted to the jury the issue as to whether the defendant exercised reasonable care and diligence in preventing or suppressing a mob; (b) the court did not err in admitting testimony of specific acts of prior conduct; and (c) taken as a whole the instructions to the jury were adequate and proper.

Appeal from Wyandotte district court, division No. 2; WILLIAM M. COOK, judge. Opinion filed December 16, 1977. Affirmed.

Donald H. Corson, Jr., and *Thomas E. Osborn*, of Kansas City, for the appellant.

D. Gary Hunter, of Williamson, Cubbison, Hardy & Hunter, of Kansas City, for the appellee.

Frank Bien, of Topeka, was on the brief *amicus curiae*, for the League of Kansas Municipalities.

Before ABBOTT, P.J., SPENCER and PARKS, JJ.

PARKS, J.: This is an action for damages resulting from personal injuries caused by a mob. The jury awarded a $2,500 judgment in favor of the plaintiff, Robert E. Jenkins. The city appeals.

Plaintiff, in the company of his teammates (the Barristers) and their scorekeeper, Murray Rhodes, were seated in the bleachers of the Bonner Springs Junior High School watching a basketball game between the Ghetto Gang and the Five. When one of the players on the Ghetto Gang threw an opposing player into the wall, Rhodes shouted, "Get that son of a bitch off the court." A few minutes later the game was over and the offending player, Rodney McGee, and another player went over to Rhodes, threatened him and challenged him to a fight. Lynn Johnson, a Barrister player, attempted to calm things down. However, when he tapped McGee on the shoulder, McGee either pushed or hit Johnson

causing him to land on the basketball court. A number of persons in the bleachers left their seats, converged upon the floor and attacked Johnson. Robert Jenkins went to Johnson's rescue and the crowd turned on him. Jenkins was knocked down and 25 to 35 persons began hitting him, kicking him and tearing his clothes. By the time a Bonner Springs police officer, two Edwardsville reserve officers and two sheriff's patrol cars arrived, the fracas was over. Jenkins was taken to a hospital where he was X-rayed and six to eight stitches were taken to repair a cut in his mouth. Other injuries included body bruises, damaged teeth and an apparent concussion or loss of consciousness.

Whether there was a mob as contemplated by K.S.A. 12-204 is not at issue before this court.

K.S.A. 12-203, which governs this case, reads:

"A city shall be liable in damages for injuries to persons or property caused by the action of a mob within the corporate limits of the city if the city police or other proper authorities of the city have not exercised reasonable care or diligence in the prevention or suppression of such a mob. The city shall have all of the defenses in such action that are available to parties in tort actions."

Recovery under K.S.A. 12-203 requires that three things be established. First, the injury to persons or property must have been caused by the action of a mob. Second, the injury must have occurred within the corporate limits of the city. Third, it must be established that the city police, or other proper authorities of the city, did not exercise reasonable care and diligence in the prevention or suppression of such a mob. These three factors were sufficiently shown by the evidence.

The trial court was correct in identifying the controlling question as being whether the action or lack of action on the part of the city of Bonner Springs was reasonable. Defendant's counsel agree but question whether the plaintiff sustained the burden of showing that the city did not act reasonably.

Relevant evidence is evidence having any tendency in reason to prove any material fact [K.S.A. 60-401(*b*)]. In the instant case, the relevant evidence included evidence which would prove or disprove the reasonableness of the city's actions under the circumstances. The plaintiff presented testimony regarding previous conduct of the Ghetto Gang team members to establish that the city was aware of their behavior and habit of creating disturbances. Such testimony was properly admitted and goes to the

question of whether the city used reasonable care and diligence under the circumstances.

The controlling statute clearly imposes liability upon the city for negligence, which necessarily encompasses the issue of foreseeability or prior notice. We hold it was proper to submit to the jury the factual issues as to whether the city exercised reasonable care and diligence in preventing or suppressing a mob. Here, the jury in its province resolved that question in favor of the plaintiff.

Another issue presented concerns the instructions to the jury. Defendant alleges that the trial court erroneously instructed the jury as to the applicable law and refused to give several of defendant's requested instructions. Read as a whole, as well as individually, the trial court properly instructed the jury as to the applicable law.

Essentially, the city has argued the issue of foreseeability in three different aspects: sufficiency of evidence, admissibility of evidence, and propriety of instructions. We conclude that under the facts and circumstances of this case, no error which would warrant disturbing the judgment has been shown.

Judgment is affirmed.

NO. 48,995

IN THE
SUPREME COURT OF THE STATE OF KANSAS

ROBERT E. JENKINS

Plaintiff Respondent

vs.

CITY OF BONNER SPRINGS, KANSAS
A MUNICIPAL CORPORATION

Defendant Petitioner

2-16

PETITION FOR REVIEW OF A COURT OF APPEALS DECISION

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Legal Printing Co., 520 E. 4th St., Tonganoxie, Ks., 913/845-3388

I N D E X

TABLE OF AUTHORITIES

CASES CITED

TEXT BOOKS CITED

STATUTES CITED

No. 48,995

IN THE

SUPREME COURT OF THE STATE OF KANSAS

ROBERT E. JENKINS

Plaintiff Respondent

vs.

CITY OF BONNER SPRINGS, KANSAS
A MUNICIPAL CORPORATION

Defendant Petitioner

PETITION FOR REVIEW OF A COURT OF APPEALS DECISION

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE KANSAS SUPREME COURT:

The petitioner, City of Bonner Springs, Kansas, a municipal corporation, by and through D. H. Corson, Jr. and Thomas E. Osborn, attorneys for said City of Bonner Springs, prays for a review by the Kansas Supreme Court of a Court of Appeals decision No. 48,995 filed on December 16, 1977, which affirmed the judgment against said City of Bonner Springs in the District Court.

STATEMENT OF ISSUES

1. Does the mob statute, K.S.A. 12-203 establish common law negligence as the standard of care and are all rules of common law applicable to a common law negligence action applicable in determining liability?

2. Is the duty issue as an element of actionable negligence a matter for the court or jury to decide?

3. The mob in this case occurred at an adult league basketball game where there had been no previous mob activity and no notice to the police or proper authorities of the City having a duty to control mobs of probable mob activity. Is the City liable for the prevention of a mob that are mere possibilities and are not foreseeable, probable or predictable and cannot be anticipated by a person of ordinary intelligence and prudence?

4. Did the Court err in admitting testimony of instances of disturbances, not riots, at places in Bonner Springs other than the Bonner Springs Junior High School to prove the probability of a mob at the adult league games at the Junior High School?

5. Did the Court err in admitting testimony of specific instances of conduct of members of "The Ghetto Gang" basketball team other than evidence of the conviction of a crime?

6. Did the Court err in admitting testimony of specific acts of conduct of certain members of "The Ghetto Gang" basketball team for the purpose of establishing inclinations, attitudes and tendencies and for no other purpose and not for the purpose of proving one or more of the material factors of proof stated in K.S.A. 60-455?

7. Did the Court err in denying the defendant City all of the defenses available in a negligence action since negligence is a tort and the City has all the defenses available in a tort (negligence) action?

8. Is it the duty of the City to furnish police protection for all athletic events or social gatherings within the corporate limits of the City which are attended or might be attended by persons who are known to have violated traffic ordinances and other ordinances of the City?

9. Is it the duty of the City to police every athletic event, social gathering and all other events where crowds congregate including those where the City had no notice of previous disturbances on the theory that there might be a possibility of a mob and not the probability of a mob occurring at such events?

STATEMENT OF RELEVANT FACTS

The facts stated in the Court of Appeals decision as to the mob are as testified to by the plaintiffs and will not be repeated here.

The factual issue as defined by the Court was whether the City had a duty to supervise a City sponsored activity where a basketball team played, containing several police characters, including Rhodney McGee, who had a disposition toward violence and disturbance of the peace (T-167-168).

The team referred to was known as "The Ghetto Gang". Ex-Chief of Police, Dunkle, stated that he knew most of the members of "The Ghetto Gang" team, but testified to having minor problems with only one member of "The Ghetto Gang", to-wit: Rhodney McGee (T-14-15). Ex-Police officer, Boddy, stated he had arrested Kelly and the McGee boys for racial disturbances and general disturbances (T--147). The City Manager, Randy Gustafson, stated that Rhodney McGee got into fights (T-235) and had traffic violations (T-240). The most serious charge against "The Ghetto Gang" members was made by the City Manager against Arthur Bolton and Larry Roark who had criminal related problems with investigative situations which were later not tried (T-241) and they might have been in fights and had traffic violations (T-241). The City Manager knew of no previous activities of any of "The Ghetto Gang" that were connected with a riot or a mob (T-271).

There was no testimony that prior to January 29, 1974, the date of the alleged riot, that any member of "The Ghetto Gang" had been convicted of a criminal offense. The only testimony of a bad reputation involved Rhodney McGee (T-15) and Larry Roark (T-241). There was no testimony that Rhodney McGee intended to start a riot on January 29, 1974,or that he was a party to the riot after pushing Lynn Johnson. There was no testimony that any member of "The Ghetto Gang" had been involved in any acts of violence at adult league basketball games except for the pushing of Johnson by McGee on the night of the alleged riot.

As to calls to the Police Department prior to January 29, 1974, because of disturbances at the adult league basketball games at the Bonner Springs Junior High School the testimony was as follows: Ex-Chief of Police, Dunkle, stated that he never received any calls for any reason to go to the adult league basketball games and had never heard of any violence at the games (T-20-21). Nicholas Paris stated he never knew of the police being called (T-258). Thomas Boan, night custodian at the Junior High School, stated that the police had never

been called to an adult league game (T-189). Richard Bliss, manager of the adult league basketball games, stated that nothing had ever happened prior to January 29, 1974, that made it necessary for him to call the City authorities or the police (T-211). Robert Kroh, Chief of Police of Bonner Springs, stated that he had not had any complaints from any source (T-153-154). Randy Gustafson, City Manager of Bonner Springs, stated that he received no complaints from anybody about violence occurring at the adult league basketball games(T-226).

Thomas Boan, night custodian at the Bonner Springs Junior High School, testified that he had set up the gym for adult league basketball games since 1969 (T-189). He had heard about a player getting hit by another player during a game (T-190-191) and two or three years before a player hit a referee and was thrown out of the league (T-189). He had never witnessed a member of the audience coming out on the floor and hurting anyone (T-189). No games had been stopped because of violence and all games had been played to their conclusion (T-190).

Overruling the objections of the defendant City (T-9-14-15) the Court permitted testimony of an incident at Lions Park which did not involve members of "The Ghetto Gang" when the players and audience at a girls' softball game got into a fight (T-10). No police report was made of the incident (T-11). Also testimony was allowed over objection as to incidents at High School games which were stopped before violence occurred (T-13).

ARGUMENT AND AUTHORITIES

I.
THE COURT ERRED IN SUBMITTING THE DUTY ISSUE AS A FACTUAL ISSUE TO THE JURY AND NOT RULING ON SAME AS A MATTER OF LAW.

This case primarily involves the construction of the mob law, K.S.A. 12-203, and primarily two sentences from the law. The first sentence states, "A city shall be liable in damages for injuries to persons or property caused by the action of a mob within the corporate limits of the city if the city police or other proper authorities of the City have not exercised reasonable care and diligence in the prevention or suppression of such a mob." The next sentence states that "The City shall have all of the defenses in such action that are available to parties in tort actions."

Because of the following statement by the trial Court at the motion for directed verdict at the conclusion of the plaintiff's testimony, it is the City's position that the suppression of a mob was not an issue in this case.

The trial court stated:

> "From the evidence in this case it is quite apparent the City had no knowledge of the situation that existed at the Junior High School on the night in question. What knowledge they acquired was not sufficient for them to have prevented the injuries to this plaintiff. They acted after having acquired actual notice, they acted with due diligence and they could not have prevented the injuries suffered by plaintiff." (T-165)
>
> "However," the Court continued, "there are some factual issues in this case. We had a basketball team, containing several 'police characters' including Rhodney McGee who had a disposition toward violence and disturbance of the peace (T-167), and a City sponsored activity and I believe it is a factual question for the jury to decide whether the city owed a duty to supervise a city sponsored activity where a large crowd congregates (T-167) and this is a jury question." (T-168)

In CLEGHORN v. THOMPSON, 62 Kan.727, 64 Pac. 605, the Supreme Court reversed a judgment for plaintiff and stated at Page 732 of the decision:

> "We may say, then, that negligence, to be actionable, must result in damage to someone, which result, under all the circumstances, might have been reasonably foreseen by a man of ordinary intelligence and prudence and have been the probable result of the initial act."

The Court stated further on Page 734 of the decision:

> "Before the court can submit the question to the jury, the evidence must affirmatively establish circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the defendant ought to have taken. (HAYES v. MICHIGAN CENTRAL R.R.CO.,111U.S.228,4 Sup.369, 28 L.Ed. 410)."

It is not for the jury to determine whether there is a duty devolving upon a defendant' this is the function of the Court. After that determination is reached, the jury must then decide whether that duty has been breached.

Here by allowing the matter to be decided by the jury, the trial Court erroneously submitted the duty issue for the jury to decide as to whether the city owed such a duty to supervise the activity in the adult league basketball games. (See also amicus brief filed in the Court of Appeals on this issue).

II.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN THE DEFENDANT'S MOTION FOR DIRECTED VERDICT AT CLOSE OF PLAINTIFF'S CASE.

It is also submitted if the trial Court, by submitting the matter to the jury, ruled that there was a duty on the City under the facts and circumstances of this record, that such a ruling was likewise erroneously made by the trial Court.

The plaintiff offered no testimony of the police officers or proper authorities of the City having law enforcement duties being called or notified of any instances of violence or mob violence at any of the adult league basketball games prior to January 29, 1974.

The question involved is the duty of the City to anticipate the probability of a mob at a basketball game participated in by individuals who have violated certain city ordinances in the past although no convictions were shown, and where there had been no previous police calls or other complaints to the City police or other proper authorities of the City about any violence at the games.

In the absence of proof that the City police or other proper City officials had any notice or complaints about previous violence at the Adult League basketball games or any complaints about the activities of "The Ghetto Gang" at the basketball games the City is of the opinion that the City had no reason to anticipate a probable mob at the basketball games and should not be held liable because some of the players in the games were individuals who had previously violated City ordinances for which no convictions were shown.

In BELDON v. HOOPER, 115 Kan.678, 224 Pac.34 at Pages 682 and 683, the Court stated:

> "In an excerpt from STONE v. BOSTON & ALBANY RAILROAD, 171 Mass.536,quoted in CLARK v.POWDER CO., 94 Kan. 268,273,274, 146 Pac.320, it was said:
>
> 'The question is not whether it was a possible consequence but whether it was probable, that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility applicable to a case like this has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so.'"

In the decision in ROWELL v. CITY OF WICHITA, 162 Kan.294, 176 P.2d 590 at Page 302 the Court states:

> "A rule often stated is that the test of proximate cause is that which determines an injury to be the proximate result of negligence only where the injury is the natural and probable consequence of the wrongful act, an additional condition sometimes stated being that it must appear the injury was anticipated or that it reasonably should have been foreseen by the person sought to be charged with liability. (See SCHWARZSCHILD v. WEEKS, 72 Kan.190, 83 Pac.406, 4 L.R.A.315; STEPHENSON v. CORDER, supra; CLEGHORN v. THOMPSON,supra). In LIGHT CO. v. KOEPP, 64 Kan. 735, 68 Pac.608, it was said that the proximate cause of an injury is that which naturally leads to, and which might have been expected to be directly instrumental in, producing the result. Natural

> and probable consequences are those which human foresight can anticipate because they happen so frequently they may be expected to recur, while possible consequences are those which happen so infrequently that they are not expected to happen again."

In HARPER v. CITY OF TOPEKA, 92 Kan.11, 139 Pac.1018 the Court stated on Page 16 of the decision:

> "Ordinary care requires only that means to be taken to avoid such dangers as are reasonably to be apprehended probable dangers, not possible dangers. The imminence of the danger is ordinarily the measure of care to be taken to avoid it." (Emphasis supplied)

In applying the statements in HARPER v. CITY OF TOPEKA, 92 Kan.11 to this case the degree of care and diligence to prevent or suppress a mob depends on whether the danger is known or can reasonably be anticipated and applies to probable dangers not possible dangers.

In SHIDELER v. HABIGER, 172 Kan.718, 243 P.2d 211, the Court referred to the opinion in HAGGARD v. LOWDER, 156 Kan. 522 and stated on Page 722 of the decision:

> "In the opinion may be found definition of proximate cause, and as to what are natural and probable consequences of negligence, quotations being made approvingly from 38 Am.Jur. 705, 712, that it is not enough that the injury be a natural consequence of the negligence, but also a probable one,(Section 57), and that it has been said that natural and probable consequences are those which human foresight can anticipate because they happen so frequently that they may be expected to happen again, and that negligence carries with it liability for consequences which in the light of attendant circumstances could reasonably have been anticipated by a prudent man, but not for casualties, which, although possible, were wholly improbable." (Section 61)

AMERICAN STATE OF HILL CITY v. MOLLIE RICHARDSON, 140 Kan.555, 38 P.2d 96 states at Page 555:

> "There is no dispute as to an acceptable definition of reasonable diligence. It is generally defined as due diligence or that diligence which ordinary or prudent persons would exercise under like or similar circumstances."

It is the position of the City of Bonner Springs, Kansas, and as suggested by the trial Court, that the City had no reason to anticipate a probable mob on January 29, 1974, at the adult league basketball game, and had no reason to take action to prevent a mob where there was no mob, or evidence of a potential mob on any previous occasion, and as shown by the testimony of Thomas Boan only two instances of violence occurred since 1969, which had not been of sufficient severity to report to the police, and which occurred only between players on the basketball floor of the game, and not with the spectators.

III.

THE COURT ERRED IN FAILING TO GRANT DEFENDANT ALL THE DEFENSES AVAILABLE IN A TORT ACTION, INCLUDING APPROPRIATE INSTRUCTIONS.

The trial Court did not agree with the position of the City that the City had available to it all of the defenses that are available to parties in a tort action.

The defendant City requested the trial Court give defendant's proposed Instruction No. 10, which stated:

> "10. You are instructed that in the exercise of reasonable care and diligence in the prevention of a mob, the City had the right to assume that others would obey the law, and the City had a right to rely and act upon that assumption until such time as the City was informed of knowledge to the contrary, such as being informed of mob activity or information as would cause a reasonably prudent person to believe that a mob was probable or predictable at a certain place at a certain time."

Upon the refusal of the Court to give defendant's proposed Instruction No. 10 the following statements were made by the Court and the attorneys for the City on Pages 271, 272 and 273 of the transcript:

> "Mr.Corson: This is a real defense. This is a defense to a tort action.
>
> The Court: I concede it is a defense to a negligence action.
>
> Mr. Corson: But this is what we have here.

The Court: This is not a negligence action. This is where you and I differ. This is a statutory action, an action based upon a specific statute which places the burden upon the community when a wrong or loss is occasioned as a result of a mob action.

Mr.Barnes: The court overlooks the fact that the statute provides we 'shall have all the defenses that are available in a tort action.'

The Court: Mr. Barnes, if we were in a simple negligence action and it was necessary for the city to have knowledge or notice of either the existence of a mob or a situation that would put the city on notice that a mob was about to come into existence, then there would have been no need for the mob law statute because the plaintiff could have sued and recovered under a pure negligence case. Any time the city has knowledge of a riotous situation, has knowledge of the existence of a mob or has knowledge of circumstances that would lead a reasonable person to believe that a mob was about to be organized and about to take action and the city did not use due care and diligence to prevent that action, then under pure negligence the plaintiff would have a cause of action and would be able to recover.

Mr.Barnes: May I remind the court that in the absence of that there would be no cause of action on the part of plaintiff?

The Court: Yes, without the statute.

Mr.Barnes: Without the statute there would be no cause of action on the part of the plaintiff.

The Court: Without the statute I would direct a verdict in favor of the defendant in this case.

Mr.Barnes: That's right.

The Court: I concede the evidence in this case is not such that the city was put on notice that there was an actual mob in existence on the night in question and did not have sufficient time after they were notified of the actual existence of mob action to have prevented same.

Mr. Barnes: Carrying this a step further, then we think the statute which creates the liability as far as the city is concerned also sets out the defenses available to the City, and tort is negligence."

and, again on Page 274:

"Mr. Barnes: To be negligent you have to have been to a point where you anticipate a situation will occur. We don't have that situation."

and, again on Page 282:

"The Court: I don't believe under the Mob Statute Law it is the burden of the proof to show the city had actual knowledge or notice of creation of a mob or that it is the burden of plaintiff to show that the city had proximate cause to believe that a mob was going to be created. Again I think it is basically different."

57 AM. JUR. 2d, NEGLIGENCE §68 at Page 419 states:

"The standard by which the conduct of a person in a particular situation is judged in determining whether he was negligent is the care which an ordinarily prudent person would exercise under like circumstances. As has been said, negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable an would not do. Concisely stated, the test of due care is the suppositious course of an ordinarily prudent and careful person under the same circumstances."

It was on this point that there was a direct dispute between the Court and the defendant's attorney as to the construction of K.S.A. 12-203. The defendant's attorney claiming that the words in the statute that "the city shall have all of the defenses in such action that are available to parties in a tort action" gave the city the right to present all defenses that are available in a negligence action, including foreseeability.

The Court held that the duty of the City in a mob law case is much, much greater than the duty of a city in an ordinary negligence case. (T-272, 273, 275, 276, 282, 283, 284, 285).

Construing the statute as it is worded, and the law, while all torts do not involve negligence, all negligence actions are tort actions and the city has available as a defense all of the defenses available in a tort action, which were not afforded the defendant City in this matter.

In addition to defendant's requested Instruction No.10, the Court submitted the Court's Instruction No. 10, to which defendant objected. In the Court's instruction No. 10, the element of proximate cause was omitted. The Court's instruction merely required findings by the jury that on the date and time in question the plaintiff (a) was assaulted by a mob; (b) that he was injured by the mob; and (c) that the City did not use reasonable care and diligence in the prevention or suppression of the mob.

By virtue of that instruction there is no requirement upon the jury to find that the failure to use such reasonable care and diligence on the part of the City must have been the proximate cause of plaintiff's injuries.

In 57 Am.Jur. 2d NEGLIGENCE, §163, at Page 526, it is stated:

> "Where the foreseeability test is recognized, the element of foreseeability is properly included in the definition or test of proximate cause, and an instruction on proximate cause which omits to give the essential element of foreseeability of injury has been held to constitute fatal error."

IV.

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE SPECIFIC INSTANCES OF MISCONDUCT, OVER DEFENDANT'S OBJECTION, CONTRA THE STATUTE.

The Appellate Court decision states "The plaintiff presented testimony regarding previous conduct of "The Ghetto Gang" team members to establish that the City was aware of their behavior and habit of creating disturbances. Such testimony was properly admitted to establish the City was aware of their behavior and habit of creating disturbances."

With that statement the defendant City disagrees and at the time of the trial made a continuing objection to testimony of any previous incidents involving "The Ghetto Gang".

K.S.A. 60-446 states:

> "When a person's character or a trait of his or her character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject, however, to the limitations of K.S.A.60-447 and 60-448."

K.S.A.60-447 states:

> "Subject to K.S.A.448 when a trait of a person's character is relevant as tending to prove conduct on a specified occasion, such trait may be proved in the same manner as provided by K.S.A.60-446, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible."

While K.S.A.60-446 refers to evidence of specific instances, the words are subject to the limitations of 60-447.

The defendant City admits that the character or traits of Rhodney McGee (T-15) , Benny Roark (T-239) and Larry Roark (T-241) were proven by evidence of reputation in the community. However, in addition to the evidence of reputation of these three individuals, evidence of specific instances of alleged misconduct on their part and other members of"The Ghetto Gang" was admitted into the evidence by the Court.

There was evidence of racial disturbances by Rhodney McGee and Lawrence Kelly, and arrests for the disturbances (T-146,147). Rhodney McGee was arrested for disturbing the peace and traffic violations (T-151,T-247). Arthur Bolton and Larry Roark had criminal problems which were investigative situations which were subsequently not brought to trial (T-241) and they might have been in fights and had traffic violations (T-241). None of the activities of "The Ghetto Gang" was connected with a mob or riot (T-271) and "The Ghetto Gang" had caused no trouble at the basketball games (T-151).

More significant is the fact that no record of conviction was shown in any Court and the record is silent on convictions. K.S.A.60-447 provides in substance that evidence of specific instances of conduct other than evidence of convictions shall be inadmissible.

STATE v. MASON, 208 Kan.39 ,490 P.2d 418 at Page 41 states:

> "There is no doubt that where a colorable claim of self-defense is made, evidence of the turbulent character of the deceased is proper and may be shown by evidence of his general reputation in the community. (Citing cases) Here, however, the evidence offered did not go to general reputation; what appellant sought to introduce was the testimony of a police juvenile officer showing a record of Calhoun's juvenile arrests, none of which resulted in a conviction or adjudication of miscreancy or delinquency, K.S.A. 60-446 has doubtless broadened the scope of evidence by which character may be proved by permitting proof of specific instances of a person's conduct, but that section is expressly subject to the limitation of 60-447. The latter in turn provides that 'where a character trait is relevant, evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible....' The upshot of it is that appellant could prove Calhoun's claimed violent character either by general reputation or by evidence of convictions. The offered evidence was neither, and was therefore properly rejected."

V.

THE COURT ERRED IN ADMITTING EVIDENCE TO SHOW INCLINATION, ATTITUDE AND TENDENCIES AND NOT FOR THE PURPOSES STATED IN K.S.A.60-455.

K.S.A.60-455 states:

> "Subject to K.S.A.60-447 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A.60-445 and 60-448 such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

However, the testimony of the acts of the various members of "The Ghetto Gang" referred to in the evidence could not have been used to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. There is no testimony that they intended to start a riot or planned a riot or participated in the riot. As to Rhodney McGee, the testimony is that he caused Lynn Johnson to fall from the stands to the floor. There is no testimony McGee intended to start a riot or that he was even a party to the riot itself.

The testimony relative to previous conduct of "The Ghetto Gang" members referred to in the evidence was not to prove any one or more of the eight material factors of proof stated in K.S.A.60-455 but the evidence was offered to establish inclination, attitude and tendencies and for no other purpose.

On that point the Supreme Court stated in the case of STATE v. CLARK, 214 Kan.293, 521 P.2d 298 at Page 299:

> "On several occasions we have discussed the provisions of K.S.A.60-455. So far as pertinent here the statute provides in substance that evidence that a person committed a crime on a specified occasion is not admissible to prove his disposition to commit a crime as a basis for inferring that he committed another crime on another occasion, but that such evidence is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or knowledge. However, the trial Court deviated from the language of the statute and instructed that the evidence was to be considered only as circumstances bearing on the question of 'the defendant's motive, inclination or tendencies, disposition or absence of mistake or accident.'"

"In the case of STATE v. CLINGERMAN, 213 Kan. 525, 516 P. 2d 1022, we had occasion to examine an instruction very much like the one given here. In the opinion at Page 527, the Court stated:

'Evidence of prior crimes cannot be used under K.S.A.60-455 to establish "inclination, attitude or tendencies." The statute does not include these within the eight possible factors of proof. K.S.A.60-455 expressly excludes evidence of prior crime if its only purpose is to show a disposition to commit crime, i.e., inclination, attitude or tendency.' "

For reasons previously stated in this petition all of the evidence offered about "The Ghetto Gang" members was incompetent except the evidence as to the reputation in the community of Rhodney McGee and Larry Roark, and admission of such evidence by the trial Court was prejudicial error because of its effect on the jury.

VI.

THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF UNRELATED INSTANCES AT OTHER ATHLETIC EVENTS IN OTHER PARTS OF THE CITY.

The plaintiff by direct and cross examination introduced into the evidence of this case, over the continuing objection of the defendant (T-9-14-15) other instances at other athletic events, some involving violence and others not involving violence, occurring in the City of Bonner Springs. All of these other instances occurred other than at the Junior High School, where the adult leage games were played and where the injury in this case occurred.

To a general question about riots or disturbances within the City of Bonner Springs, Ex-Police Chief Albert Dunkle stated he had a few disturbances (T-3). The only one of any magnitude was at the Lions Park where players and spectators got into a fight (T-10 and no police report was made (T-11). That other instances were at the High School games which were stopped before violence occurred (T-11, 12). He testified he had never had a call to the Junior High School where the Adult League games were played, and where the injury in this case occurred (T-13).

Randy Gustafson, the City Manager of the City of Bonner Springs, Kansas, testified that there were disturbances involving one to four persons at High School games and he put Reserve Officers there (T-231). That he had problems at the Park and playgrounds and generally with regard to the players in Little League games, and an officer was put at the park during the games (T-232). But that he had never received a complaint about violence occurring during the Adult League games where the injury in this case occurred (T-226).

The introduction of this evidence was very material in this case because of the trial Court's position, in that "The Ghetto Gang" basketball team contained several police characters (T-167) and it was a City sponsored activity, and the trial Court chose to make these matters a factual question for the jury to decide as to whether the City owed a duty to supervise a City sponsored activity where a large crowd gathered (T-168), covered elsewhere in this petition.

This position of the trial Court in allowing such evidence as to the fact that police officers were at other places in the City parks and High School where disturbances occurred undoubtedly caused the jury to believe that police officers should have been at the Adult League games. The fact that there had been no trouble at the Adult League games and no complaints, and the City had no reason to believe that there would be a possible riot at the games ceased to be the issue in this case. The issue became whether the City in the absence of notice of any violence still owed a duty to have a police officer at the Adult League games, where the injury in this case occurred.

The fact that there was violence or instances indicating violence at other athletic events in the City, of which the City had notice, and police officers were placed at those places does not indicate or require the City to place police officers at places where there were no complaints or notice to the City of instances of violence or possible violence.

In ATCHISON,TOPEKA AND SANTA FE v. AYNES, Oklahoma 271 P. 2d 313, 46 A.L.R. 2d 930, the Court stated on Page 934 of the A.L.R. decision:

> "We think it clear the admission in evidence of this testimony respecting the operating failure of a crossing signal at a different location, and at an indefinite time, was seriously prejudicial to defendant's case."

The Court further stated on Pages 934 and 935 of the decision:

> "The defendant was charged with negligence in certain particulars at a specified point. In whatever respects defendant might have been guilty of negligence at other places and times, it remained for plaintiff to recover upon the strength of his evidence as concerned the particular event. Evidence of unrelated incidents could not establish plaintiff's case, and no justification appears for requiring defendant to defend against them."

And the duty of the City to supervise an activity where large crowds congregate is not limited to City sponsored activities. It applies to any large crowd where the City has information or reason to believe that there would be violence, unlawful assemblies, mobs or riots. COMMERCIAL UNION INSURANCE CO. v. WICHITA, 217 Kan.44, 536 P. 2d 54.

If the trial Court's theory is to prevail, then the question is whether the City is required to police and supervise every crowd gathering regardless of whether the City had any previous notice or information of violence, because the question then becomes not that the City should act upon information and notice where problems are foreseeable, but should supervise every crowd, because in that crowd there might be a person who had received a traffic violation or may have violated a City ordinance or harbored a bad disposition from which no conviction was proven.

Appellant-Defendant, City of Bonner Springs, Kansas, submits that because of the failure of the Court of Appeals to address most, if not all, of the issues raised in this petition, and because this matter is one of great public importance, both to this appellant-defendant, to all municipalities in Kansas, and others, justice demands this petition for review be granted and the matter set down for argument in the Supreme Court.

Set forth hereinafter is the entire opinion of the Court of Appeals in this matter.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

No. 48,995

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ROBERT E. JENKINS,
Appellee,

v.

CITY OF BONNER SPRINGS, KANSAS
a Municipal Corporation
Appellant.

SYLLABUS BY THE COURT

1. Recovery under K.S.A. 12-203 requires that three things be established: (a) The injury to persons or property must have been caused by the action of a mob; (b) the injury must have occurred within the corporate limits of the city; and (c) the city police, or other authorities of the city, did not exercise reasonable care and diligence in the prevention or suppression of such a mob.

2. Under K.S.A. 12-203, cities are liable for negligence, which necessarily encompasses the issue of foreseeability or notice.

3. In an action against a city for damages for injuries by a mob, it is held: (a) The trial court properly submitted to the jury the issue as to whether the defendant exercised reasonable care and diligence in preventing or suppressing a mob; (b) the court did not err in admitting testimony of specific acts of prior conduct; and (c) taken as a whole the instructions to the jury were adequate and proper.

Appeal from Wyandotte district court, division No. 2; WILLIAM M. COOK, judge. Opinion filed December 16, 1977. Affirmed.

Donald H. Corson, Jr. and Thomas E. Osborn, of Kansas City, for the appellant.

D. Gary Hunter, of Williamson, Cubbison, Hardy & Hunter, of Kansas City, for the appellee.

Frank Bien, of Topeka, was on the brief amicus curiae, for the League of Kansas Municipalities.

Before ABBOTT, P.J., SPENCER and PARKS, JJ.

PARKS, J.: This is an action for damages resulting from personal injuries caused by a mob. The jury awarded a $2,500 judgment in favor of the plaintiff, Robert E. Jenkins. The city appeals.

Plaintiff, in the company of his teammates (the Barristers) and their scorekeeper, Murray Rhodes, were seated in the bleachers of the Bonner Springs Junior High School watching a basketball game between the Ghetto Gang and the Five. When one of the players on the Ghetto Gang threw an opposing player into the wall, Rhodes shouted, "Get that son of a bitch off the court." A few minutes later the game was over and the offending player, Rodney McGee, and another player went over to Rhodes, threatened him and challenged him to a fight. Lynn Johnson, a Barrister player, attempted to calm things down. However, when he tapped McGee on the shoulder, McGee either pushed or hit Johnson causing him to land on the basketball court. A number of persons in the bleachers left their seats, converged upon the floor and attacked Johnson. Robert Jenkins went to Johnson's rescue and the crowd turned on him. Jenkins was knocked down and 25 to 35 persons began hitting him, kicking him and tearing his clothes. By the time a Bonner Springs police officer, two Edwardsville reserve officers and two sheriff's patrol cars arrived, the fracas was over. Jenkins was taken to a hospital where he was X-rayed and six to eight stitches were taken to repair a cut in his mouth. Other injuries included body bruises, damaged teeth and an apparent concussion or loss of consciousness.

Whether there was a mob as contemplated by K.S.A.12-204 is not at issue before this court.

K.S.A. 12-203, which governs this case, reads:

> "A city shall be liable in damages for injuries to persons or property caused by the action of a mob within the corporate limits of the city if the city police or other proper authorities of the city have not exercised reasonable care or diligence in the prevention or suppression of such a mob. The city shall have all of the defenses in such action that are available to parties in tort actions."

Recovery under K.S.A. 12-203 requires that three things be established. First, the injury to persons or property must have been caused by the action of a mob. Second, the injury must have occurred within the corporate limits of the city. Third, it must be established that the city police, or other proper authorities of the city, did not exercise reasonable care and diligence in the prevention or suppression of such a mob. These three factors were sufficiently shown by the evidence.

The trial court was correct in identifying the controlling question as being whether the action or lack of action on the part of the city of Bonner Springs was reasonable. Defendant's counsel agree but question whether the plaintiff sustained the burden of showing that the city did not act reasonably.

Relevant evidence is evidence having any tendency in reason to prove any material fact [K.S.A.60-401(b)]. In the instant case, the relevant evidence included evidence which would prove or disprove the reasonableness of the city's actions under the circumstances. The plaintiff presented testimony regarding previous conduct of the Ghetto Gang team members to establish that the city was aware of their behavior and habit of creating disturbances. Such testimony was properly admitted and goes to the question of whether the city used reasonable care and diligence under the circumstances.

The controlling statute clearly imposes liability upon the city for negligence, which necessarily encompasses the issue of foreseeability or prior notice. We hold it was proper to submit to the jury the factual issues as to whether the city exercised reasonable care and diligence in preventing or suppressing a mob. Here, the jury in its province resolved that question in favor of the plaintiff.

Another issue presented concerns the instructions to the jury. Defendant alleges that the trial court erroneously instructed the jury as to the applicable law and refused to give several of defendant's requested instructions. Read as a whole, as well as individually, the trial court properly instructed the jury as to the applicable law.

Essentially, the city has argued the issue of foreseeability in three different aspects: sufficiency of evidence, admissibility of evidence, and propriety of instructions. We conclude that under the facts and circumstances of this case, no error which would warrant disturbing the judgment has been shown.

Judgment is affirmed.

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KANSAS ASSOCIATION OF CHIEFS OF POLICE

112 West Seventh Street, Topeka, Kansas 66603

TO: Chairman Brewster and members of the House Judiciary Committee

RE: HB 2929--Mob Liability

The Board of Directors of the Kansas Association of Chiefs of Police met today, February 16, 1978, discussing various legislative matters including HB 2929, repealing the mob liability law.

Following an in-depth discussion of HB 2929, and the problems that we have experienced throughout the state and particularly in light of the case of Jenkins v. City of Bonner Springs, The Kansas Association of Chiefs of Police Board of Directors, unanimously support the repeal of K. S. A. 12-203 and 204.

Respectfully submitted,

Kansas Association of Chiefs of Police
Board of Directors

Les Neussen, Chief of Police, Emporia
Victor Marshall, Director of Public Safety, El Dorado
Steve Shaffer, Chief of Police, Augusta
Harlin Nikkel, Chief of Police, Hesston
Myron Scafe, Chief of Police, Overland Park
Fred Howard, Chief of Police, Topeka
Bob Eiden, Chief of Police, Westwood

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KANSAS CITY, KANSAS 66101

February 14, 1978

2-16

Mr. Robert Evans
City Manager
City Hall
Bonner Springs, Kansas 66012

RE: MOB STATUTE

Dear Bob:

You asked that I prepare a letter relating to the Mob Statute, the factual situation that Bonner Springs was confronted with and the problems that we can foresee based on our experience with the two mob lawsuits that we just concluded.

I am attaching as Exhibit "A" a copy of our brief to the Supreme Court petitioning for Review -- which petition was denied.

With respect to the facts of what did occur in Bonner Springs, prior to the mob, it's important to keep a few things in mind: (1) the basketball players who seemed to spark or trigger the mob were not themsleves (as nearly as we can determine, nor from the evidence was it so disclosed) a part of the mob. The mob was solely composed of people in the stands who were watching the basketball games; (2) While there was evidence and testimony to the effect that over the years the games were getting a lot"rougher" there was no evidence of prior disturbances from people in the stands; (3) There was no evidence of any mob ever occurring in Bonner Springs, Kansas. There was some limited evidence with relation to a racial type disturbance at a girls' softball game in a City park and there was some evidence of fights and disturbances (but not mobs) at high school games; (4) While the referree or timekeeper testified that he "knew something was going to happen sometime" he also indicated that he had not relayed that information to the Police Department or City Manager.

The other things I think you should keep in mind, which do not necessarily relate to the facts, are as follows: (1) for a number of years under the old mob statute (which was amended in 1967) the city was an absolute insuror, by that I mean it did not make any difference whether the city had notice there was going to be a mob or not, it made no difference as to the liability of the city what attempts the city took to suppress or prevent a mob if there was a mob. If someone was injured the city was liable. The

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attempts to suppress and/or prevent mobs were merely matters in mitigation of the amount of the damages. (2) That there apparently was some thought by the Legislature when they made the 1967 changes that cities should not be absolute insurors or at least their degree of liability should be lessened. We believe their intent was that the duty of the city should be reduced to one of ordinary care. Undoubtedly this change was aparked by the nationwide racial disturbances of the 1967 era. (3) That the lawyers and judges who are attempting to interpret the new law may understandably still be laboring under the impression that cities are absolute insurors but they might get off the hook if they did try to prevent or suppress a mob. The tendency here being to very closely and strictly construe the legislative change with a tendency still toward absolute liability (perhaps an extension of the theory that you can't teach an old dog new tricks--at least very easily).

At the time of the trial and at the time of the argument on the Appeal to the Court of Appeals the city repeatedly asked that it be given guidelines for the benefit of not only our city but of all cities as to just what the liability and responsibility of cities was so that we might know how to properly conduct ourselves in the future. It is interesting to note that the trial court found that the city had no notice that a mob was going to occur, that even had a police officer been there at the time the mob erupted he would not have been able to stop it and further that once we did know that a mob was in existence we acted properly and did all we could to suppress it. The Court of Appeals asked plaintiff's counsel's opinion as to whether or not, if a police officer had been present, it would have made any difference.

The only element of guidance which the Court of Appeals provided in its opinion, as we view it, is that this is a negligence type action. This adds to our quandary.

PROXIMATE CAUSE. The statute provides that the City shall have all the defenses in such action that are available to the parties in tort actions. Proximate cause, of course, is one of the required elements in an action based on negligence. Proximate cause, however, was left out of the trial court's instructions, so that the thrust of the instructions to the jury was aimed more along the lines of the old absolute liability than along the lines of ordinary care.

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NOTICE. Nowhere in the evidence and/or instructions was the problem of notice to the city adequately addressed. If a city has a defense that it did exercise reasonable care and diligence, in order to exercise that care we must at some point in time be put on notice that there was a mob which would be in existence and/or probably be in existence; notice of the type that a reasonable person would be required to act upon. There was no evidence that the city had any notice except testimony by the referree (of a city league) that these games were getting rougher and rougher and he just knew something was going to happen sooner or later. He also testified, of course, that he had made no report to the Police Department.

One of the problems, therefore, is a definition of what kind of notice and/or notice the city should have; is proof the city did have notice required by the plaintiff to sustain his case; and whether or not proximate cause (which is an indispensable element of a regular action for negligence) is an element in an action under the mob statute.

OTHER PROPER AUTHORITIES. The statute provides that the city is liable "if the city police or other proper authorities of the city have not exercised reasonable care or diligence..." Who are other proper authorities? The tendency of the trial court, and, by inference, the Court of Appeals was that a referree of a city recreation league was within the definition of "other proper authorities". Obviously this is a question of agency, but, of course, you could conceivably, under this theory, argue that a common laborer, street sweeper and/or trash picker, being an employee of the city, would impute such agency. It would seem to us that the "other proper authorities of the city" should be more properly confined to those authorities charged by the statutes with law enforcement responsibilities (in our case, the Mayor and Council, the City Manager, and, of course, all the members of the Police Department).

POLICE CHARACTERS. It was interesting to note that the trial court permitted testimony to the effect that the members of the "Ghetto Gang" basketball team (who were all black) were "known police characters". Testimony indicated they had been ticketed for traffic violations, that they had been involved in some fights and other disturbances (not mob actions), that they had been involved in some racial disturbances, and that they didn't get along with the policemen, when a policeman might stop them for some reason. There was no testimony concerning conviction of felonies (except in the one case of Rhodney McGee, who pled guilty to a charge of inciting to riot as a result of this particular incident.) This case seems to say to cities that a city is on notice that wherever these "known police characters" might be there might be a mob situation. This, of course, is ridiculously extended to churches,

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bowling alleys, movie picture theaters, parks, playgrounds and convention halls; anywhere, as a matter of fact, that there may be 10 or more people present. If one of these known police characters should be at or participate in one of these functions a reasonable extension of the trial court and the Court of Appeals theory is that we are liable if a mob occurs and someone is hurt. Even assuming that's not true and assuming that a city has had fights, disturbances of major proportions, perhaps not mob actions, but at least major fights at various and sundry recreational activities, such as basketball games, parks, playgrounds, etc., the problem, then, seems to be that if a city is put on notice as indicated above, the city must protect itself by having policemen there to deal with the situation. If this is the case, then how many policemen do you have? If you anticipate 100 people are you required to have one policeman, or two, or eight? If you anticipate 100 and there are 200, how many more do you add, or do you call out the National Guard? The question here, of course, is in the area of reasonable care and diligence of preventing or suppressing a mob but, of course, no one knows the answer nor do we have any guidelines. There are no cases to refer to which would answer that question. In one New Jersey case the court found that the Mayor of the town that did not have a separate police force should have organized a vigilante force to suppress the mob. How far do you go?

It appears that it was the obvious intent of the legislature to reduce the absolute liability down to one of ordinary care. Why not say so? Why should not the degree of liability be more explicitly stated in the statute?

At so-called private or privately organized functions, or profit making functions (such as churches, bowling alleys, etc. or even family reunions at a park) why is the city liable for mob actions or should the city be immune from mob liability for these types of functions and the responsibility placed upon the private or profit making organization to secure its own security forces to handle problems that they might reasonably expect to occur.

Manhattan raised the question last year why a city should be liable where there was a separate governmental entity responsible for police protection. That makes a lot of sense to me because if you are going to be liable then it should be liability for failure to carry out a responsibility or duty and/or failure to carry it out in a proper manner. The law of negligence speaks of a duty which in some fashion is violated, but if you have a county-wide law enforcement agency then what is the duty that the cities within that county have?

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The effect of the two lawsuits against Bonner Springs, as you know, was to immediately discontinue all of the Adult League Basketball games and probably other recreational activites. The monetary effect, of course, was tremendous, with the discovery cost of an estimated $3,000 to $5,000, one lawsuit praying for $25,000 in damages and another praying for $500,000. The city, in one instance, had a judgment rendered against it for $2,500, and in the other was able to settle out for $44,500. We are going to have to issue General Obligation Bonds for $51,000,just to pay the judgments, interest and the costs (not including the discovery costs mentioned above). I haven't set out the attorneys' fees because no specific fees were charged nor records kept involving the time required to take the several depositions, prepare for trial and to carry the matter forward on appeal to the Court of Appeals and to petition the Supreme Court to review the matter. (The petition was summarily denied).

The Council, not long ago, asked the question as to where we are now and what we should do to protect ourselves in the future. Of course, without proper guidelines my answer had to be "I don't know". If any of the functions I mentioned above occur the only advice that I could render would be that you flood the place with policemen. A city of our size, of course, is severely limited by the number of policemen that we have, and, of course, by a severe budget limitation. I recall a few years ago that an association of people who were interested in vans held a meeting of two or three days duration at the Cutty Camp Grounds in the City. We expected 300 or 400 people to be present but we were not quite sure how many people would actually be there. On that occasion, where we did have reason to believe there might be trouble we did coordinate law enforcement efforts with the County Sheriff's Department, with the City of Kansas City, Kansas, with the City of Edwardsville and with the Kansas Highway Patrol. As you know, nothing happened but the ever present question of "what do we do now" was answered in that instance simply by doing everything that we could think of short of calling out the National Guard. The inference remaining after the mob lawsuits, trials and appeals, is that, in order to be fully protected, we must take these elaborate precautions for a great variety of "every day" type events.

I don't believe this was the intent of the legislature. This "cure" is almost as bad as the "disease".

There remains the question of what changes might be made in our present statute. It's difficult to forecast the numerous factual occurrences which might occur and the different ways they might occur so that you are in a position to consider all the "facts". The probabilities of some problems likely to occur in Bonner Springs might be mere "possibilities" in Wichita, and vice versa.

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Certainly the mob law statute should specifically declare the "duty" of the city to be one of ordinary care; should specifically label the action as an ordinary "negligence" action; should place the burden of proof as to notice and acting reasonably on the plaintiff; should require proximate cause to be shown, i.e., that the injuries suffered by the plaintiff were the direct and proximate result of the violation of some duty owed by the city; and should define"other proper authorities" as now used in the statute.

Consideration might be given to limit the liability to city functions or to grant immunity from private or private profit making functions.

The best answer as far as the City is concerned is to repeal the statute and thus grant the cities complete immunity. While I would have no hesitation to recommend this in view of Bonner's fine Police Department, other less conscientious departments could become sloppy (perhaps more so than some are now) and place the citizens in danger.

I realize there is a nationwide tendency to reduce or limit governmental immunity; and to recognize that running a city is not a great deal different from running any other "big business" (thus requiring it to be well run or suffer the consequences). I am not altogether satisfied, in my own mind, that this is not a good "tendency" overall. We should recognize, however, that cities, large or small, are looked upon as prime targets for lawsuits since they have the power to tax and the burden may be spread over a larger base (the "deep pocket" doctrine). Thus care should be taken to define the terms of liability and not to place cities in any greater or worse position than any other big business.

Finally, I must conclude, that the overall effect of the instructions in our case, as they were given by the Trial Court, and from the failure of the Court of Appeals to determine the issues we feel were squarely presented, was to place the city in the "old" position of an absolute insuror, the same place we would have been under the "old" law, K.S.A.12-201 and K.S.A.12-202.

If you have any questions please let me know.

Sincerely,

D. H. Corson, Jr.

DHCjr:mc
encl.
cc-Frank Bien
Ernie Moser
Kansas League of Municipalities
w/encl.