Approved January 31, 1983
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Elwaine F. Pomeroy at
Chairperson

10:00 a.m./p.m. on January 28, 1983 in room 514-S of the Capitol.

All members were present except: Senators Pomeroy, Winter, Burke, Feleciano, Gaines, Hein, Mulich, Steineger and Werts.

Committee staff present: Mike Heim, Legislative Research Department
Mark Burghart, Legislative Research Department

Conferees appearing before the committee:

Howard Harper, Attorney, Junction City
John Brookens, Kansas Bar Association
Kathleen Sebelius, Kansas Trial Lawyers

Senate Bill 37 - Requirements for recovery of certain damages under automobile injury reparations act.

Howard Harper appeared before the committee and explained that he was representing himself, not an organization, his law firm or a company. He explained why he had requested the bill (See Attachment #1). He said he thought the law should be amended so that the threshold must be met prior to filing the lawsuit. The chairman referred the committee to the two handouts before them showing the two court cases Mr. Harper had referred to in his letter (See Attachments #2, #3).

John Brookens testified the bar association feels the no fault law was passed for the reasons that Mr. Harper stated. He stated they have no problem with the threshold of $500 prior to filing of the lawsuit, if it stays at five hundred dollars. He pointed out that Fletcher Bell, the Insurance Commissioner, requested a bill in the House Insurance Committee that changes the threshold to $2500. Last year, the House Insurance Committee passed out a bill that raised the threshold to $5000. He said our committee may want to take a close look at the bill since the threshold is substantially raised there would be problems. The chairman explained the Pretz v. LaMont decision to the committee.

Kathleen Sebelius testified the association felt in general agreement with the $500 threshold, and that it probably doesn't change things too much; nearly all cases meet this threshold. She testified the statute of limitations could run out before filing the suit, which could cause some problems; also, lawyers are seeing more cases because of the economic times, where the injury would meet the $500 threshold, but the health insurance has run out or they are unemployed, the people stop their treatment. She stated it would be a different situation if the threshold were raised substantially.

Senator Feleciano moved that the minutes of January 27, 1983, be approved; Senator Steineger seconded the motion, and the motion carried.

The meeting adjourned.

1-28-83

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Ed Johnson	Topeka	Kan Assoc PIC Ins. Cos
Dennis Brookens	Topeka	Kans Bar Assn
Howard Harper	Junction City	Private
Michael Fleer	Topeka	A A A
Mike Ditto	Topeka	Insurance Dept.
Larry Holmes	(Lawrence)	Stelleger

1-28-83

#1

Harper & Hornbaker, Chartered
Lawyers
715 North Washington Street
Junction City, Kansas 66441

Howard W. Harper
Lee Hornbaker
Steven Hornbaker
Charles W. Harper II
Michael D. Hepperly
Craig J. Altenhofen

Telephone
913 762-2100

Herington, Kansas Office
913 258-2100

November 9, 1982

Hon. Merrill Werts
State Senator
1228 Miller Drive
Junction City, Kansas 66441

In re: Proposed legislation

Dear Merrill:

Our statutory law includes what we know as the Automobile Injury Reparations Act cited as K.S.A. 1980 Supp. 40-3101, et seq. One of the stated purposes of this act was to eliminate what are called "penny ante" law suits which tend to clutter the court's docket and encumber the judges' time, etc. A section of that statute, 40-3117, requires that a plaintiff who commences suit for personal injuries must reach what is called the "threshold" of medical expenses in the amount of $500.00. I think if you will read that statute you will agree with me that it was the intent of the Legislature to use the threshold as a condition precedent to filing suit. However, our courts in their wisdom have gotten around to the point where the "threshold" is determined at the time of trial, and not before. In other words a person can have a cut on the inside of his mouth which requires one or two sutures to close and then have the stitches removed in thirty days at a total cost of $100.00 and a year, eleven months and twenty-nine days thereafter file suit claiming personal injuries only and the defendant has to answer, go through all the pre-trial procedures of discovery and pre-trial conferences, and come right up to the trial itself without any chance of getting the case dismissed. This is certainly not what the Legislature intended. It is simply another instance of the court legislating. This should not happen but frequently does happen. In order for this mischief to be corrected the Legislature is going to have to amend its present law to re-state its purpose and to put the kind of teeth in the statute that the court cannot touch. The section of the statute to be amended is 40-3117. It could be done by simply adding the following proviso at the end of the present statute:

"Provided, however, that the threshold medical expense of $500.00 must be met prior to filing any action for tort as above stated."

Merrill, would you be kind enough to take this up with the other members on the Judiciary Committee whenever it meets and let me

Atch. 1

know how they feel about it, and whether it can be introduced as a committee bill.

The last decision of the Kansas Supreme Court dealing with this subject is cited as

Cansler v. Harrington, 231 Kan. 66.

There are several cases cited in the annotations following the statute. The last Kansas Court of Appeals' case is

Pretz v. Lamont, 6 K.A.2d 31.

1-28-83

(626 P.2d 806)
No. 51,607

SIBYL L. PRETZ, *Appellant,* v. ROBERT J. LAMONT, *Appellee.*

Petition for review denied 229 Kan. 671.

SYLLABUS BY THE COURT

1. TORTS—*Single Wrongful Act Causing Injury to Person and Property—Single Cause of Action.* Where a single wrongful act simultaneously causes injury to the person and property of one individual, that individual has only one cause of action against the perpetrator thereof.
2. SAME—*Splitting Cause of Action—Plaintiff Precluded from Separate Suits Based on Single Wrongful Act.* The rule against splitting a cause of action does not prevent a plaintiff from suing for a part of a single cause of action; it merely precludes the plaintiff from thereafter maintaining another action for the other portion.
3. SAME—*Splitting Cause of Action—Res Judicata—Application When Property Damage Action Brought by Joint Owners and Separate Personal Injury Action Brought by Single Plaintiff.* The rule against splitting causes of action and the doctrine of res judicata are not rendered inapplicable by virtue of the first action having been brought by the plaintiff and another individual for damages to their jointly owned automobile; whereas, the second action was brought by the plaintiff for personal injuries.
4. JUDGMENTS—*Res Judicata.* Requisite conditions for application of the doctrine of res judicata are stated and held present herein.
5. TORTS—*Automobile Personal Injury Action—Threshold Requirement—Not Condition Precedent to Filing Suit.* Attainment of the threshold amount of $500.00 in medical expenses pursuant to K.S.A. 1980 Supp. 40-3117 is not a condition precedent to filing suit and the fact the threshold had not been reached when the property damage action was filed does not render either the rule against splitting a cause of action or the doctrine of res judicata inapplicable.

Appeal from Wyandotte District Court, division No. 1; JAMES J. LYSAUGHT, JR., judge. Opinion filed April 17, 1981. Affirmed.

Laurence M. Jarvis, of Laurence M. Jarvis, Chartered, of Kansas City, for appellant.

Gerald L. Rushfelt, of Rushfelt, Mueller, Druten and Moran, of Overland Park, for appellee.

Before JUSTICE MCFARLAND, presiding, SPENCER, J., and RON ROGG, Associate District Judge, assigned.

MCFARLAND, J.: Plaintiff brought this action seeking recovery for personal injuries caused by an automobile accident. In a previous action arising out of the same collision, plaintiff had recovered her property damage from the defendant herein. The trial court dismissed the personal injury action on the ground the plaintiff had improperly split her cause of action and the present

Atch. 2

action was barred by the doctrine of res judicata. Plaintiff appeals from this determination.

On July 18, 1977, plaintiff Sibyl L. Pretz was operating a motor vehicle which collided with a motor vehicle operated by defendant Robert J. Lamont. Plaintiff's vehicle was titled in the names of plaintiff and her husband, Eugene A. Pretz, as joint tenants. On August 10, 1977, plaintiff and her husband filed an action against defendant for damage to their motor vehicle. On August 22, 1977, judgment by default was entered in said case in favor of plaintiffs in the amount of $882.39 plus costs. The judgment was satisfied in full on September 16, 1977. On the date the judgment was satisfied plaintiff filed the instant action against the same defendant seeking damages for personal injury, including lost wages and lost future earnings capacity and, in addition, compensatory damages on behalf of and for the benefit of her husband, for alleged impairment of her ability to perform services in the household and discharge her domestic duties, all claimed as a result of the accident of July 18, 1977.

Shortly thereafter, defendant moved for dismissal of the action on the basis of the rule against splitting causes of action and the doctrine of res judicata. The motion was initially denied by the then trial judge. Subsequently, the present trial judge took over the case and the motion was renewed and sustained. This appeal followed.

Before proceeding to the specific issues herein, discussion of the rule relative to splitting causes of action and the doctrine of res judicata is necessary.

In regard to splitting causes of action there is a majority rule and a minority rule. Basically, the majority rule holds that where a single wrongful act simultaneously causes harm to the person and property of one individual, that individual has only one cause of action against the perpetrator of the act. The minority view holds that the cause of action is the harmful result of the wrongful act and not the act itself; hence, each harmful result is a separate cause of action. For an in-depth discussion of the majority and minority views see Annotation at 62 A.L.R.2d 977.

Fiscus v. Kansas City Public Ser. Co., 153 Kan. 493, 112 P.2d 83 (1941), involved a plaintiff who suffered property damage and personal injury when her automobile collided with a streetcar. The plaintiff filed an action for property damage to her automo-

bile, and obtained a judgme
Subsequently, she brought an
to recover for her personal inj
whether the plaintiff had imp
The Kansas Supreme Court di
views and unequivocally adop
then held in Syl. ¶¶ 1-3:

"The rule against splitting causes of
delicto, the general rule being that a s
action for which only one action can
"Ordinarily a single tortious act whi
of the plaintiff constitutes a single ca
"The rule against splitting a cause
suing for a part of a single cause of act
maintaining another action for the ot

It is something of a misnom
minority views as rules again
precisely, the two views diffe
action. Neither view permits
The doctrine of res judicata
Co. v. Mentzer, 191 Kan. 57, 6

"The doctrine of *res judicata* is pl
this—that a cause of action once final
parties, on the merits, by a competent
new proceeding, either before the sa
"It is a general rule of law, indeed a
a lawsuit between litigants in thei
subsequent action on the same claim.
them which the parties may prope
incidental thereto which could have b
to the cause of action."

Res judicata has many app
and no attempt will be made
See 46 Am. Jur. 2d, Judgme
treatise on the subject.

We turn now to the specific
not challenge the foregoing
causes of action and res judic
are inapplicable to her.

First, plaintiff argues the c
erty damage case was a joint
action in the case herein wa

bile, and obtained a judgment therefor which was satisfied. Subsequently, she brought an action against the same defendant to recover for her personal injuries. The issue was raised as to whether the plaintiff had improperly split her cause of action. The Kansas Supreme Court discussed the majority and minority views and unequivocally adopted the majority view. The court then held in Syl. ¶¶ 1-3:

"The rule against splitting causes of action applies to causes of action arising *ex delicto*, the general rule being that a single wrong gives rise to but one cause of action for which only one action can be maintained."

"Ordinarily a single tortious act which causes injury to the person and property of the plaintiff constitutes a single cause of action."

"The rule against splitting a cause of action does not prevent a plaintiff from suing for a part of a single cause of action; it merely precludes him from thereafter maintaining another action for the other portion."

It is something of a misnomer to characterize the majority and minority views as rules against splitting causes of action. More precisely, the two views differ as to what constitutes a cause of action. Neither view permits a cause of action to be split.

The doctrine of res judicata was stated in *Jayhawk Equipment Co. v. Mentzer,* 191 Kan. 57, 61, 379 P.2d 342 (1963), as follows:

"The doctrine of *res judicata* is plain and intelligible, and amounts simply to this—that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal cannot afterwards be litigated by a new proceeding, either before the same or any other tribunal.

"It is a general rule of law, indeed an elementary one in this jurisdiction, that in a lawsuit between litigants in their ordinary capacity, so far as relates to a subsequent action on the same claim, not only is everything adjudicated between them which the parties may properly choose to litigate, but also everything incidental thereto which could have been litigated under the facts which gave rise to the cause of action."

Res judicata has many applications in different circumstances and no attempt will be made herein to discuss its many aspects. See 46 Am. Jur. 2d, Judgments § 394 *et seq.*, for an exhaustive treatise on the subject.

We turn now to the specific issues raised herein. Plaintiff does not challenge the foregoing rules of law relative to splitting causes of action and res judicata. Instead she seeks to show they are inapplicable to her.

First, plaintiff argues the cause of action asserted in the property damage case was a joint cause of action, while the cause of action in the case herein was her personal individual cause of

action. In support thereof plaintiff notes K.S.A. 60-217(*a*), which requires every action to be prosecuted by the real party in interest, and K.S.A. 60-219(*a*), relative to joinder of parties having a joint interest. We agree that plaintiff's husband was a necessary party to the action for recovery of property damage to the automobile herein.

Plaintiff then urges our adoption of the following rule of law enunciated by the Missouri Supreme Court in *Lee v. Guettler,* 391 S.W.2d 311, 313 (Mo. 1965), as follows:

"[J]oint action of a husband and wife for damage to their jointly owned property is a separate and distinct action from the separate action each has a right to maintain for his or her own personal injuries."

This we cannot do. As set forth in *Fiscus v. Kansas City Public Ser. Co.,* 153 Kan. 493, plaintiff had one cause of action against defendant for injury to her person and property resulting from the single act of defendant. It matters not how many plaintiffs and defendants were involved in the first action. The stipulated facts herein clearly establish that plaintiff recovered her property damage arising from the automobile collision of July 18, 1977, in her earlier action against defendant. In the present action plaintiff is seeking recovery against this same defendant for her personal injuries arising from the same automobile collision. We conclude the rule against splitting causes of action and the doctrine of res judicata are not rendered inapplicable by virtue of the first action having been brought by the plaintiff and another individual for damages to their jointly owned automobile; whereas, the second action was brought by the plaintiff for personal injuries.

Plaintiff next argues that the doctrine of res judicata should not apply because of the lack of certain conditions. In *Adamson v. Hill,* 202 Kan. 482, 487, 449 P.2d 536 (1969), the court iterated the requisite conditions as follows:

"We have long followed the rule that an issue is res judicata only when there is a concurrence of four conditions, namely, (1) identity in the things sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made."

Plaintiff contends conditions (2), identity of the cause of action, and (4), identity in the quality of the persons for or against whom the claim is made, are absent. We do not agree. As previously demonstrated, this plaintiff and this defendant were adverse

parties in the earlier actior
against defendant and ele
earlier action. We concluc
plication of res judicata a

Although not essential
should be noted that the r
not solely effectuated by
judicata. As stated in 46
573-574:

"The law does not permit the
entire or indivisible demand, to
it the subject of several actions,
the cause or demand exists. A si
ples precluding relitigation of th
or their privies, where that doct
the first action. This doctrine
plaintiff is entitled is neither req
recovery in fact represents only
rule that if an action is brought
action precludes the plaintiff fr
claim."

Plaintiff next argues h
accrued when her proper
she relies on K.S.A. 19
relevant part:

"In any action for tort brou
motor vehicle . . ., a plainti
mental anguish, inconvenience
only in the event the injury requ
act as medical benefits, having a
more . . . ."

Plaintiff avers she had n
time her property damag
been determined adverse
Kan. App. 2d 505, 506,
(1979), wherein this cou

"The statute does not require t
precedent to filing suit thereu
damages which may be recove

This conclusion was re

parties in the earlier action. Plaintiff had but one cause of action against defendant and elected to litigate only a part of it in the earlier action. We conclude the requisite conditions for the application of res judicata are present herein.

Although not essential to the issues raised herein, perhaps it should be noted that the rule against splitting causes of action is not solely effectuated by the application of the doctrine of res judicata. As stated in 46 Am. Jur. 2d, Judgments § 405, pp. 573-574:

"The law does not permit the owner of a single or entire cause of action, or an entire or indivisible demand, to divide or split that cause or demand so as to make it the subject of several actions, without the consent of the person against whom the cause or demand exists. A similar result is reached under res judicata principles precluding relitigation of the same cause of action between the same parties or their privies, where that doctrine is applied to a plaintiff who is successful in the first action. This doctrine prevails although all of the relief to which the plaintiff is entitled is neither requested nor granted in such action, and the former recovery in fact represents only a part of the damages he suffered; it is the general rule that if an action is brought for a part of a claim, a judgment obtained in the action precludes the plaintiff from bringing a second action for the residue of the claim."

Plaintiff next argues her personal injury action had not yet accrued when her property action was filed. In support thereof, she relies on K.S.A. 1980 Supp. 40-3117, which provides in relevant part:

"In any action for tort brought against the . . . operator . . . of a motor vehicle . . ., a plaintiff may recover damages in tort for pain, suffering, mental anguish, inconvenience and other non-pecuniary loss because of injury only in the event the injury requires medical treatment of a kind described in this act as medical benefits, having a reasonable value of five hundred dollars ($500) or more . . . ."

Plaintiff avers she had not reached the $500.00 threshold at the time her property damage action was commenced. This issue has been determined adversely to the plaintiff in *Dinesen v. Towle*, 3 Kan. App. 2d 505, 506, 597 P.2d 264, *rev. denied* 226 Kan. 792 (1979), wherein this court held:

"The statute does not require the attainment of the $500 threshold as a condition precedent to filing suit thereunder. What the statute does is restrict the type of damages which may be recovered, not the time when suit may be filed."

This conclusion was reaffirmed in *Key v. Clegg*, 4 Kan. App. 2d

267, 273, 604 P.2d 1212, *rev. denied* 227 Kan. 927 (1980), wherein this court stated:

"We have by implication adopted that line of reasoning in *Dinesen v. Towle*, 3 Kan. App. 2d 505, 597 P.2d 264, *rev. denied* 226 Kan. 792 (1979). Without restating the well-settled rules of statutory construction, when the applicable rules are applied we are convinced it was the legislature's intent when it drafted 1978 Supp. 40-3117 that the monetary threshold must be met not later than the date of trial or the date the cause of action is barred by the statute of limitations, whichever first occurs."

We conclude attainment of the threshold amount of $500.00 in medical expenses pursuant to K.S.A. 1980 Supp. 40-3117 is not a condition precedent to filing suit and the fact the threshold had not been reached when the property damage action was filed does not render either the rule against splitting a cause of action or the doctrine of res judicata inapplicable.

Plaintiff had no legal impediment to asserting her entire cause of action in the first proceeding. The fact plaintiff did not foresee the legal consequence of splitting her cause of action has no bearing on the issues or the result herein. See 46 Am. Jur. 2d, Judgments §§ 474-476.

Generally speaking, the justification for the long-standing rule against splitting causes of action and the doctrine of res judicata is the avoidance of multiplicity of suits, both as a benefit to the defendant and as a matter of public policy. The introduction of comparative negligence into Kansas, at the very least, has not diminished this justification.

The judgment is affirmed.

WILLIAM M. HALSEY, *App*
TERNATIONAL ASSOCIAT
WORKERS, DISTRICT 70,

SYL

1. LABOR—*Unfair Labor Prac*
tion for Union Dues Check-
attempted revocation of a un
unfair labor practice and is su
Labor Relations Board, regard
or damages.

2. COURTS—*Federal Preempti*
the federal preemption doctri
to entertain such an action.

Appeal from Sedgwick district
April 17, 1981. Reversed and re

Phil Unruh, of Danville, for a

John C. Frank, of Wichita, and
for appellees.

Before REES, J., presiding
District Judge, assigned.

FLOOD, J.: Plaintiff Will
the defendant on the ple
determining that a union
was unambiguous and in
the first payroll deductio
and for return of dues d

Plaintiff was an emplo
November 13, 1978, he a
tional Association of Mac
70, Cessna Lodge (herei
Deduction Authorization
contains the following cl

"This assignment and authori
from the date of the first payroll
the termination date of any ap
ever occurs sooner, and shall au
ment and authorization for suc
agreement periods thereafter, w
revocation to the Cessna Aircra

1-28-83

#3

No. 52,160

BONNIE S. CANSLER, *Appellee*, v. ALLEN D. HARRINGTON, and DENNIS W. BARTKOSKI, *Appellants*.

SYLLABUS BY THE COURT

1. INSURANCE—*Automobiles—Medical Treatment Threshold Requirement—Time Limitation for Meeting Requirement.* In a timely filed action for non-pecuniary loss arising out of an automobile accident, the $500 medical treatment threshold in K.S.A. 40-3117 must be met by the date of trial.
2. TRIAL—*Reopening of Case after Party Rests—Trial Court Discretion—Appellate Review.* The decision to allow a party to reopen a case after having rested is within the sound discretion of the trial court and will not be reversed in the absence of a showing of abuse.
3. INSURANCE—*Automobile—Medical Treatment Threshold Requirement—Jury Questions.* In establishing the $500 medical treatment threshold under K.S.A. 40-3117, the reasonableness and necessity of medical bills are questions for the jury.
4. GARNISHMENT—*Supersedeas Bond Posted by Garnishee to Stay Action.* A garnishee may stay a garnishment action against it by posting a supersedeas bond in the amount of its liability plus costs and interest.

Appeal from Johnson district court; PHILLIP L. WOODWORTH, judge. Opinion filed April 3, 1982. Affirmed in part and reversed in part.

Barry W. McCormick, of Payne & Jones, Chartered, of Olathe, argued the cause and was on the brief for the appellants.

Charles D. Kugler, of Kugler and Dickerson, of Kansas City, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

HERD, J.: This is an action for damages arising out of a May 31, 1974, automobile-truck collision between Bonnie S. Cansler, appellee, and appellant, Dennis Bartkoski. Allen Harrington, owner of the truck, was joined as a party defendant-appellant. At trial in February 1980, appellee obtained a $25,000 judgment against Bartkoski, who appeals after denial of his motion for a new trial. Appellee obtained an order of garnishment against Bartkoski's insurance carrier, Farmers Insurance Company, in the absence of a stay. Farmers appeals that order.

The first issue on appeal is whether the threshold requirement of $500 medical treatment expense provided for in K.S.A. 40-3117 must be met within the period for filing actions under the statute of limitations in order for appellee to recover non-pecuniary losses. K.S.A. 40-3117 states:

"In any action for tort brought against the owner, operator or occupant of a

Atch. 3

...tor vehicle or against any person legally resp... ...h owner, operator or occupant, a plaintiff ma... ...ffering, mental anguish, inconvenience and o... ...ury only in the event the injury requires me... ...n this act as medical benefits, having a reason... $500 or more, or the injury consists in whole... ...ent, a fracture to a weight-bearing bone, a cor... ...compressed fracture, loss of a body member, p... ...edical probability, permanent loss of a bod... ...who is entitled to receive free medical and su... ...compliance with the requirements of this secti... ...treatment received has an equivalent value of ... Any person receiving ordinary and necessary ... nurse, from a relative or a member of his house... ...easonable value of such services in meeting t... the purpose of this section, the charges ac... ...expenses shall not be conclusive as to their ... ...easonable value thereof was an amount ... ...charged shall be admissible in all actions t...

Appellant relies on *Key v. Clegg*, ... 1212 (1980). There, unlike the pre... within the two-year period of limita... had to have accrued medical treatm... trial to meet the threshold, the cou...

"Without restating the well-settled rules ... applicable rules are applied we are convince... ...t drafted 1978 Supp. 40-3117 that the mon... ...than the date of trial or the date the cause ... ...limitations, whichever first occurs." p. 273

In the present case the trial cou... language from *Key v. Clegg* obse...

"If one construes the language 'or the dat... statute of limitations,' to be equivalent to ... action would have been barred by the sta... would indeed have visited this case. As i... against plaintiff's cause of action, her reme... her case, and the only result of continu... ultimate measure of damages."

The trial court interpreted the la... the cause of action is actually bar... filed within the limitations perio... comes irrelevant, leaving only the... amount be met before the date

motor vehicle or against any person legally responsible for the acts or omissions of such owner, operator or occupant, a plaintiff may recover damages in tort for pain, suffering, mental anguish, inconvenience and other non-pecuniary loss because of injury only in the event the injury requires medical treatment of a kind described in this act as medical benefits, having a reasonable value of five hundred dollars ($500) or more, or the injury consists in whole or in part of permanent disfigurement, a fracture to a weight-bearing bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of a bodily function or death. Any person who is entitled to receive free medical and surgical benefits shall be deemed in compliance with the requirements of this section upon a showing that the medical treatment received has an equivalent value of at least five hundred dollars ($500). Any person receiving ordinary and necessary services, normally performed by a nurse, from a relative or a member of his household shall be entitled to include the reasonable value of such services in meeting the requirements of this section. For the purpose of this section, the charges actually made for medical treatment expenses shall not be conclusive as to their reasonable value. Evidence that the reasonable value thereof was an amount different than the amount actually charged shall be admissible in all actions to which this subsection applies."

Appellant relies on *Key v. Clegg,* 4 Kan. App. 2d 267, 604 P.2d 1212 (1980). There, unlike the present case, the trial was held within the two-year period of limitation. In holding the plaintiff had to have accrued medical treatment of $500 or more by date of trial to meet the threshold, the court stated:

"Without restating the well-settled rules of statutory construction, when the applicable rules are applied we are convinced it was the legislature's intent when it drafted 1978 Supp. 40-3117 that the monetary threshold must be met not later than the date of trial or the date the cause of action is barred by the statute of limitations, whichever first occurs." p. 273.

In the present case the trial court in examining the pertinent language from *Key v. Clegg* observed:

"If one construes the language 'or the date the cause of action is barred by the statute of limitations,' to be equivalent to the language, 'or the date the cause of action would have been barred by the statute of limitations,' a serious problem would indeed have visited this case. As it is, no statute of limitations ever ran against plaintiff's cause of action, her remedy did not change nor did the theory of her case, and the only result of continued medical expense was to alter the ultimate measure of damages."

The trial court interpreted the language in *Key* to mean the date the cause of action is actually barred controls; thus, if the case is filed within the limitations period the statute of limitations becomes irrelevant, leaving only the requirement that the threshold amount be met before the date of trial. If the case is not filed

within the limitation period, the entire cause of action is barred. In effect the trial court adopted the trial date as the controlling date for meeting the threshold damage issue.

We think the trial court's reasoning is sound and consistent with *Key v. Clegg.* Further, *Cappadona v. Eckelmann,* 159 N.J. Super. 352, 388 A.2d 239 (1978), the case relied on in *Key,* consistently refers to plaintiff meeting the threshold amount *by the time of trial.* 159 N.J. Super. at 356-57. One of the purposes of the automobile injury reparations act is to limit actions for losses from pain and suffering to those actions where "the injury requires medical treatment of a kind described in this act as medical benefits, having a reasonable value of five hundred dollars ($500) or more . . . ." K.S.A. 40-3117. See *Manzanares v. Bell,* 214 Kan. 589, 599, 522 P.2d 1291 (1974); *Dineson v. Towle,* 3 Kan. App. 2d 505, 507, 597 P.2d 264, *rev. denied* 226 Kan. 792 (1979). *Key* accomplishes that purpose. We so hold. Appellant's first issue is without merit.

Next appellant urges the trial court erred in permitting appellee to reopen her case and offer documentary evidence of medical expenses. At the conclusion of appellee's case in chief, appellant moved for a directed verdict because appellee had failed to offer evidence of medical treatment reaching the threshold amount under K.S.A. 40-3117. Up to that time appellee had offered evidence of total medical bills of only $431. Upon appellee's motion for leave to reopen which was sustained, she introduced appellee's exhibits 8, 10, 11 and 12 which showed additional medical treatment in the amount of $714.84.

The parties agreed the decision to allow a party to reopen a case after having rested is within the sound discretion of the trial court and will not be reversed in the absence of a showing of abuse. *Westamerica Securities, Inc. v. Cornelius,* 214 Kan. 301, 306, 520 P.2d 1262 (1974). Here, there is no showing of abuse. Appellant's real argument lies in his claim it was error to admit the exhibits without having laid a proper foundation as to the reasonableness or necessity for the treatment. In *Anderson v. Berg,* 202 Kan. 659, 661, 451 P.2d 248 (1969), we held:

"The fact that a case is reopened for admission of additional evidence in the form of an exhibit furnishes no basis for the abandonment of the necessary preliminary proof to make it admissible."

The issue, then, is what sort of foundation evidence is necessary

preliminary to the admission of
threshold amount under K.S.A.
specifically addressed in Kansas
at 274, the Court of Appeals to

"It is not mandatory that the services be
include the reasonable value of them
requirement. Plaintiff was not required
$500 or more; he was only required
treatment with a value of at least $50

This statement of the court, ho
the issue we are addressing. It i
be laid establishing the compe
all evidence prior to admissio
no evidence of reasonableness
was offered. An examination
tified voluntarily and in detail
and the doctors she saw as a re
bills for medical treatment of i
She merely overlooked offeri
resting her case. Appellant's
admitted exhibits were not re
ing of reasonableness and ne
torily defined as evidence hav
any material fact. K.S.A. 60-40
relevant evidence is admissi
hibits clearly tended to prove
As such, the evidence was p
reasonableness and need for
the jury which they resolved
medical care exceeded the t
pellee, Dr. Brooks and Dr. W
treatment was needed, supp
sumed in a case such as this
D. Bolin v. Grider, 580 S.W.
right to challenge the reasona
with vigor. The jury believe
merit.

The final issue comes be
consolidation under Suprer
and the subsequent garnish

preliminary to the admission of medical bills offered to prove the threshold amount under K.S.A. 40-3117. This issue has not been specifically addressed in Kansas. In *Key v. Clegg*, 4 Kan. App. 2d at 274, the Court of Appeals touched on the problem:

"It is not mandatory that the services be recoverable as damages for the plaintiff to include the reasonable value of them in order to meet the monetary threshold requirement. Plaintiff was not required to prove accrued recoverable damages of $500 or more; he was only required to prove that he had received medical treatment with a value of at least $500 . . . ."

This statement of the court, however, is not extremely helpful on the issue we are addressing. It is axiomatic that a foundation must be laid establishing the competency, materiality and relevancy of all evidence prior to admission. Here, however, appellant urges no evidence of reasonableness or necessity of the medical bills was offered. An examination of the record shows appellee testified voluntarily and in detail about her injuries, hospitalization and the doctors she saw as a result of the accident. She discussed bills for medical treatment of injuries resulting from the accident. She merely overlooked offering the identified exhibits prior to resting her case. Appellant's argument essentially is that the admitted exhibits were not relevant because there was no showing of reasonableness and necessity. Relevant evidence is statutorily defined as evidence having any tendency in reason to prove any material fact. K.S.A. 60-401(*b*). Unless provided otherwise, all relevant evidence is admissible. K.S.A. 60-407(*f*). Here the exhibits clearly tended to prove the threshold amount had been met. As such, the evidence was properly admitted. The questions of reasonableness and need for the medical care were questions for the jury which they resolved by finding appellee had proven her medical care exceeded the threshold amount of $500. The appellee, Dr. Brooks and Dr. Whitehead all testified the appellee's treatment was needed, supporting the jury's verdict. It is presumed in a case such as this a doctor's charge is reasonable. See *D. Bolin v. Grider*, 580 S.W.2d 490 (Ky. 1979). Appellant has the right to challenge the reasonableness of the charges, which he did with vigor. The jury believed the appellee. This issue is without merit.

The final issue comes before this court as the result of the consolidation under Supreme Court Rule No. 2.06 of this case and the subsequent garnishment action. The facts are compli-

cated and are herewith set out in detail. The jury rendered a $25,000 verdict against Bartkoski on February 14, 1980. Bartkoski appealed but was unable to post a supersedeas bond. Appellee commenced collection proceedings against Bartkoski and filed a garnishment action against Farmers Insurance Company. Farmers had issued a liability insurance policy to appellant Harrington which covered Bartkoski as a permissive user of Harrington's vehicle. The liability limit of the insurance policy was $15,000. This presented a dilemma to Farmers. The trial court set the supersedeas bond at $25,000, the amount of the judgment. Had Farmers posted the bond, it would have been placing an additional $10,000 at risk, dependent on the outcome of the appeal. The bond is required to pay appellee's judgment if the appeal is unsuccessful and is available for that purpose regardless of the issue between appellant and his insurance carrier. Farmers answered on July 11, 1980, stating it was holding the $15,000 limit of its liability, on behalf of Bartkoski. On July 24, 1980, appellee obtained an ex parte order directing Farmers to pay the funds into court where the clerk was to deduct the court costs and remit the balance to plaintiff and her attorney. On July 29, 1980, Farmers filed a motion to alter or amend the ex parte order. It was overruled. In the meantime the appeal was docketed in the Court of Appeals making it jurisdictionally necessary to request it for a supersedeas bond. On August 21, 1980, the Court of Appeals entered its order directing the trial court to set a supersedeas bond. Farmers then filed a motion with the trial court requesting the bond be set at $15,000 plus interest and costs rather than at the entire amount of the judgment or alternatively that the proceedings be stayed under K.S.A. 60-720(*b*). The trial court denied the motion and offered Farmers the choice of posting a $25,000 bond, paying the garnished funds into court within one week, or being restrained from doing business in Kansas. Under threat of contempt and the restraining order, Farmers paid $15,638.00 to the court on September 17, 1980. It also filed a notice of appeal in the garnishment action and a motion to set a supersedeas bond in this second appeal. In the meantime, on September 18, 1980, the trial court ordered the Clerk of the Court to endorse Farmers draft to appellee's counsel without recourse. On September 29, 1980, the trial court ordered Farmers to post a $25,000 supersedeas bond on the second appeal.

On September 30, 1980, Far
in the Alternative, to set Supe
peals ordered counsel for appe
funds received from the garn
court. On November 6, 1980,

"Further proceedings in garnishme
garnishee-appellant now in the hands
court of September 30, 1980, are to be
to be held in an interest-bearing ac
appeal."

The case was transferred t
Since appellant has, with s
execution pending appeal, the
the facts illustrate a problem
court clarification. We will co

First, policy implications sh
to require an insurance comp
bond to stay a garnishment
$15,000. Further, the fairness
ment to appellee of the $15,0
questionable. On the other ha
the jury awarded appellee $25
a procedural circus. Let us pr
safeguards for judgment cred
ble appellate stay procedure

Kansas statutes relevant to
K.S.A. 60-2103(*d*). K.S.A. 60-

"When an appeal is taken the ap
obtain a stay subject to the exceptio
The bond may be given at or after th
is effective when the supersedeas b

K.S.A. 60-2103(*d*) provides

"Whenever an appellant entitled t
present to the district court for its ap
such surety or sureties as the court re
satisfaction of the judgment in full t
delay, if for any reason the appeal is
to satisfy in full such modificatio
damages as the appellate court may

These statutes point to th
companies. The company is

On September 30, 1980, Farmers filed its "Motion for stay, or, in the Alternative, to set Supersedeas Bond." The Court of Appeals ordered counsel for appellee to retain in his possession all funds received from the garnishment until further order of the court. On November 6, 1980, the Court of Appeals ordered:

"Further proceedings in garnishment are stayed. Funds paid into court by garnishee-appellant now in the hands of counsel for plaintiff per the order of this court of September 30, 1980, are to be repaid to the clerk of the district court and to be held in an interest-bearing account pending final determination of this appeal."

The case was transferred to this court on January 19, 1982.

Since appellant has, with some difficulty, obtained a stay of execution pending appeal, the issue is essentially moot. However, the facts illustrate a problem of sufficient magnitude to justify court clarification. We will consider the issue.

First, policy implications should be discussed. It is inequitable to require an insurance company to post a $25,000 supersedeas bond to stay a garnishment when its policy limits are only $15,000. Further, the fairness of allowing garnishment and payment to appellee of the $15,000 before the appeal is decided is questionable. On the other hand, it has now been two years since the jury awarded appellee $25,000 and she has been the victim of a procedural circus. Let us proceed to establish a procedure with safeguards for judgment creditors which also provides an equitable appellate stay procedure for judgment debtors.

Kansas statutes relevant to the issue include K.S.A. 60-262 and K.S.A. 60-2103(*d*). K.S.A. 60-262(*d*) states:

"When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subsection (*a*) of this section. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court."

K.S.A. 60-2103(*d*) provides in part:

"Whenever an appellant entitled thereto desires a stay on appeal, he or she may present to the district court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment such costs, interest, and damages as the appellate court may adjudge and award."

These statutes point to the dilemma facing many insurance companies. The company is usually not the actual appellant, yet

if it does not step in appellant's shoes and file a supersedeas bond pursuant to K.S.A. 60-2103(*d*), it is subject to garnishment. The language of K.S.A. 60-2103(*d*) is, however, clear and unambiguous. If a supersedeas bond is filed it shall be for the amount of the judgment in full. The real question, then, is whether garnishment proceedings pending appeal are premature when an insurance company refuses to file a supersedeas bond in excess of its obligation to the insured.

One Kansas case has discussed this issue. In *Lechleitner v. Cummings,* 160 Kan. 453, 163 P.2d 423 (1945), plaintiff obtained a judgment for $5,629.17. The insurance company had insured defendant for up to $5,000. The trial court gave the garnishee insurance company the same choice as it did in the case at bar — file a bond for the entire judgment or pay plaintiff the $5,000. The Supreme Court, acknowledging a split of authority, held the garnishment proceedings were premature, seemingly because the judgment against defendant was not "final" and as such the insurance company did not yet owe defendant anything. 160 Kan. at 460. Thus, despite appellee's protestations to the contrary, it appears *Lechleitner* could be controlling authority.

Appellee correctly notes, however, the Illinois decision relied on by the Kansas court in *Lechleitner, Ancateau v. Commercial Cas. Ins. Co.*, 318 Ill. App. 553, 48 N.E.2d 440 (1943), has since been rejected by Illinois courts. In *Cuttone v. Peters*, 67 Ill. App. 2d 1, 214 N.E.2d 499 (1966), a case similar factually to the one at bar, the court stated:

"After careful consideration, we feel that in this matter the interests of a plaintiff in a speedy and sure remedy must come before the interests of the insurance company. Should the underlying judgment be set aside the insurance company surely has a right of action against a plaintiff for recovery of any money it has paid. We must conclude that the opinion in the Ancateau case, supra, [318 Ill. App. 553.] no longer represents the better law." 67 Ill. App. 2d at 6.

Colon v. Marzec, 116 Ill. App. 2d 278, 253 N.E.2d 544 (1969), reaffirmed the rule that a plaintiff's suit is proper even though an appeal is pending from the underlying judgment. The court commented:

"We agree that garnishee's liability was limited and that it had no obligation to post a supersedeas bond for its insured. Indeed, any application of Illinois law that might compel garnishee to pay any money it did not owe, or to do anything it did not undertake in its contract of insurance, would raise serious constitutional questions. On the other hand, unless a supersedeas bond secured payment of the

underlying judgment plaintiff could ins
282.

See also *Long v. Duggan-Karas*
323 N.E.2d 56 (1974).

The Kansas statutory scheme
tion. A judgment is the final
parties in an action. K.S.A. 60-
tive when it is entered pursu
then, a judgment is "effective"
garnishment is an "aid of exec
the execution of a judgment
262(*d*) and K.S.A. 60-2103(*d*).
be assumed appellee's judgr
there would be no need for sta
the act of appealing the judgm
hold the garnishment was no

However, appellant seeks
against it to the extent of its li
does not attempt to stay app
Bartkoski. Thus, we hold the
action against it by posting a
its liability plus costs and i

The judgment is affirmed i
with this opinion.

underlying judgment plaintiff could insist on its enforcement." 116 Ill. App. 2d at 282.

See also *Long v. Duggan-Karasik Constr. Co.*, 25 Ill. App. 3d 236, 323 N.E.2d 56 (1974).

The Kansas statutory scheme seems to support appellee's position. A judgment is the final determination of the rights of the parties in an action. K.S.A. 60-254(*a*). A judgment becomes effective when it is entered pursuant to K.S.A. 60-258. Obviously, then, a judgment is "effective" before appeal. K.S.A. 60-714 states garnishment is an "aid of execution." Definite procedures to stay the execution of a judgment are provided for. *E.g.*, K.S.A. 60-262(*d*) and K.S.A. 60-2103(*d*). In the absence of such a stay it must be assumed appellee's judgment will be enforced. Otherwise there would be no need for statutory procedures to stay execution; the act of appealing the judgment would be an automatic stay. We hold the garnishment was not prematurely brought.

However, appellant seeks only to stay the garnishment action against it to the extent of its liability under its policy of $15,000. It does not attempt to stay appellee's action against the appellant Bartkoski. Thus, we hold the garnishee may stay a garnishment action against it by posting a supersedeas bond in the amount of its liability plus costs and interest.

The judgment is affirmed in part and reversed in part consistent with this opinion.