Approved _____
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS.

The meeting was called to order by Representative Robert H. Miller at
Chairperson

1:30 a.m./p.m. on March 14, 1984 in room 526S of the Capitol.

All members were present except:

Committee staff present:

Russ Mills, Research Department
Mary Torrence, Revisor's Office

Conferees appearing before the committee:

Chuck Simmons, Department of Corrections
Gary Rayl, Department of Corrections
Representative Ken Green
Representative Love
Representative Justice
Bill Green, Black Democrat Caucus of Kansas
Theodus Lockhard, Kansas Conference of Branches of NAACP
Michael Bailey, Civil Rights Commission
Onan Burnett
Charles Scott, NAACP
Roger Lovett, Civil Rights Commission
T.C. Anderson, Ks. Society of Certified Public Accountants
Representative Rex Hoy
John Brookens, Kansas Bar Association
Kathleen Sebelius, Kansas Trial Lawyers Association
Gary McAlister, Kansas Trial Lawyers Association

The meeting was called to order by Chairman Miller.

HB3100 - Honor camps

Chuck Simmons, Department of Corrections, gave testimony in support of the bill which would authorize the director of honor camps to permit honor camp inmates to work for governmental agencies and charitable organizations. See attachment A.

Gary Rayl, Department of Corrections, gave examples of why this bill is needed and told the committee of some of the projects being done by inmates. This bill would give them the authority to do these things.

Representative Ken Green gave testimony in support of the bill. He told the committee that this bill would allow them to do numerous things at the Eldorado Park. They plan to build a 2,000 seat amphi-theatre and would like to have the inmates do at least 95% of the work. Butler County has hired someone to do the supervision. He said that he felt these inmates could be utilized and that clarification of the statute is needed. He also suggested that the bill be amended to be in force after publication in the Kansas Register instead of the statute book in order for this work to begin.

Hearings were concluded.

HB2982 - Kansas act against discrimination, awards for additional damages.

Representative Love gave testimony in support of the bill which would correct and clarify the rule of the Kansas Civil Rights Commission in the awarding of pain, suffering, humiliation and punitive damage in employment, housing and public accomodation discrimination cases. See attachment B.

Representative Justice gave testimony in support of the bill and gave a history of pain and suffering damages under the Civil Rights laws of Kansas. When he asked for an attorney general's opinion in 1972 (Frizzell) he received a favorable opinion which would allow payment for pain and suffering. A supreme court decision says they cannot allow this payment. There is a conflict here and they need to know which way to go and are asking for continuation of monetary payment to those who would discriminate against someone for their color or some other reason.

Bill Green, Black Democrat Caucus of Kansas, gave testimony in support of the bill. See attachment C.

Theodus Lockhard, Kansas Conference of Branches of NAACP, gave testimony in support of the bill. Unlawful discrimination needs to be eliminated.

Michael Bailey, Director of the Kansas Commission of Civil Rights, gave testimony which strongly urged passage of HB2982. See attachment D.

Onan Burnett, a minority member of the State, told the committee that the shoe could be on the other foot and that the effects of discrimination doesn't really sink in until it happens to them.

Charles Scott, Hearing Examiner for the NAACP, gave his support of the bill.

Roger Lovett, Legal Council for the Civil Rights Commission, explained the particulars of the case of U.S.D. 259 vs. KCCR & Palmer discussed in Mr. Bailey's testimony.

Hearings were concluded on HB2982.

HCR1612 - Modifying and revoking certain rules and regulations of board of accountancy

T.C. Anderson, Kansas Society of Certified Public Accountants, explained the bill which has some clean up amendments. An additional amendment needs to be made on line 59 changing the date to May 1, 1984.

Hearings were concluded.

HB3008 - Regarding payment of attorney fees by insured person

Representative Peterson explained the bill to the committee. He stated that a reference to any court action which would allow the court to award attorney's fees was left out of the bill. He felt an amendment was needed in which the court would enforce any current agreement by the insurance company and the attorney based on equitable considerations.

Representative Hoy also explained the bill and answered questions from the committee.

John Brookens, Kansas Bar Association, gave testimony in opposition to the bill and explained problems with the bill. Attach E.

Kathleen Sebelius, Kansas Trial Lawyers Association, gave testimony in opposition to the bill and introduced the Association's legal council, Gary McAlister who told the committee there was no justification for the bill. The statute at present is satisfactory and works. He gave the committee secretary a copy of the court case involving Quesenbury vs. Coca-Cola for anyone wishing to look at it. See attachment F.

Hearings were concluded on HB3008.

HB2722 - Alternate members to state committees of political parties.

Representative Hensley explained the bill and why he felt the bill was needed.

There was discussion about whether existing law did not take care of the

problem Representative Hensley had with State committee members and their alternates. Representative Hensley said he would check into the matter further and get back to the committee.

Hearings were concluded.

SB561 - Filing of certain documents adopted by reference

Representative Matlack made a motion, seconded by Representative Eckert to report SB561 favorable for passage. The motion carried.

HB3100 - Honor camps

Representative Fuller made a motion to amend the effective date to publication in the Kansas register. Representative Roe seconded the motion. The motion carried.

Representative Fuller made a motion, seconded by Representative Aylward, that the bill be passed favorably as amended. The motion carried.

SR1612 - Modifying and revoking certain rules and regulations of Board of Accountancy

Representative Aylward made a motion, seconded by Representative Fuller, to amend the date on Line 59 to May 1, 1984. The motion carried.

Representative Fuller made a motion, seconded by Representative Aylward, to report SR1612 favorably as amended. The motion carried.

HB2982 - Kansas Act against discrimination

Representative Murphy made a motion, seconded by Representative Eckert, to report HB2982 favorable for passage. The motion carried.

SB585 - military status cause for denial of membership in class B club

Representative Murphy made a motion, seconded by Representative Ramirez, to report SB585 adversely.

Representative Roe made a substitute motion, seconded by Representative Ott, to table the bill. The substitute motion was withdrawn.

A vote was taken on the original motion. The motion carried.

Representative Ott made a motion, seconded by Representative Runnels, to approve the minutes of the March 12 meeting. The motion carried.

The meeting was adjourned.

A

KANSAS DEPARTMENT OF CORRECTIONS

JOHN CARLIN — GOVERNOR • • MICHAEL A. BARBARA — SECRETARY

JAYHAWK TOWERS • 700 JACKSON • TOPEKA, KANSAS • 66603
• 913-296-3317 •

TO: HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

FROM: MICHAEL A. BARBARA, SECRETARY OF CORRECTIONS

RE: HOUSE BILL 3100

DATE: March 14, 1984

BILL SUMMARY

The bill would authorize the director of honor camps, with the approval of the secretary of corrections, to permit honor camp inmates to work for governmental agencies and charitable organizations. These inmates would remain in the custody of the secretary of corrections but could be released to work without being accompanied by a correctional official.

BACKGROUND

Honor camp inmates currently work at state lakes. They are assigned to park employees who supervise them during the work day. They are not accompanied by a correctional official. No statutory authority for this arrangement exists.

Other agencies have requested honor camp inmates to assist them with their activities. The honor camps do not have sufficient correctional personnel to accompany the inmates on such work assignments. This means that the honor camps are not able to make inmates available to assist the requesting agencies.

DEPARTMENT POSITION

The Department supports H.B. 3100. This bill will give the director of honor camps the authority to provide manpower to assist governmental agencies with their activities. It will also provide statutory authority for the longstanding practice of permitting inmates to work for the State Park and Resources Authority.

MAB:CES/pa

Atch. A

Chuck Simmons

B

STATE OF KANSAS

CLARENCE C. LOVE
REPRESENTATIVE, THIRTY-FIFTH DISTRICT
WYANDOTTE COUNTY
2853 PARKVIEW
KANSAS CITY, KANSAS 66104
(913) 371 5625

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER COMMUNICATION, COMPUTERS AND TECHNOLOGY
GOVERNMENTAL ORGANIZATION
INTERSTATE COOPERATION
LOCAL GOVERNMENT

This bill was requested to correct and clarify the role of the Kansas Civil Rights Commission (KCCR) in the award of pain, suffering, humiliation and punitive damage in employment, housing and public accomodation discrimination cases.

In 1982 the Kansas Supreme Court in ruling on an employment discrimination case (Woods vs. Midwest Conveyor Company 231 Kan. 763 - 1982) stated that the KCCR did not have authority to award damages for pain, suffering and humiliation or punitive damage, although the KCCR had regulations in place addressing the awards for pain, suffering and humiliation or punitive damages, in all types of cases under their jurisdiction.

The effect of the decision of the Kansas Supreme Court resulted in the KCCR being powerless to handle or deter violations of the housing or public accomodations discrimination complaints as well as racial or sexual harassment complaints. Lines 0222 to 0225 address the awards for pain, suffering or humiliation or punitive damage. The amended section just mentioned goes one step further and places a ceiling on such awards by stating such awards "...shall in no event exceed... $2,000."

The use of the amount of $2,000 was selected because this is an amount that is used by several other states civil rights law and is considered to be reasonable and constitutional, as well as an effective limit for deterance of such violations.

The second concern addressed by this bill is to clarify for the KCCR people who are protected under the definition of "physical handicap." This amendment also stems from a 1982 court case that was denied review by the Kansas Court of Appeals. Since this denial the KCCR has been unable to understand just who is protected and who is not protected under the act. The significance of this definition being unclear affects the protection offered under the law to people having physical handicaps seeking employment, housing, and public accomodation.

The question of the need for protection of Kansas citizens who are of color and those having physical handicaps is an issue which has been debated and resolved by this legislative body during the 1960's. I would therefore hope it will not be necessary to re-debate this existing legislative policy of protecting these classes of people. The only concern I have is to correct the laws protecting these people in such a way that the enforcement agency is able to serve its function.

If you have any questions I will be pleased to attempt to answer them. If there are questions of a very technical nature I would like to refer those questions to the staff of the KCCR.

Atch. B

BLACK DEMOCRATS CAUCUS OF KANSAS

P.O. BOX 1396 TOPEKA, KANSAS 66601

STATEMENT PRESENTED ON H.B. 2982 TO THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS BY THE BLACK DEMOCRAT CAUCUS OF KANSAS ON MARCH 14, 1984

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I AM BILL GREEN, I APPEAR HERE TODAY REPRESENTING THE BLACK DEMOCRATS CAUCUS OF KANSAS. THE BLACK DEMOCRATS CAUCUS OF KANSAS SUPPORTS H.B. 2982 IN ITS PRESENT FORM.

IN WOODS VS. MIDWEST CONVEYOR CO. (1982) CASE, THE KANSAS SUPREME COURT HELD THAT THE KANSAS CIVIL RIGHTS COMMISSION (KCCR) HAD NO STATUTORY AUTHORITY TO AWARD DAMAGES FOR PAIN, SUFFERING AND HUMILIATION SUFFERED BY VICTIMS OF DISCRIMINATION. THE EFFECT OF THIS DECISION ELIMINATES THE KCCR'S ABILITY TO EFFECTIVE ENFORCE THE LAWS AGAINST ACTS OF DISCRIMINATION IN THE AREAS OF HOUSING, EMPLOYMENT AND PUBLIC ACCOMMODATION.

THE MEMBERSHIP OF THE CAUCUS IS CONCERNED THAT THIS CASE MAY BE A FIRST STEP IN WEAKENING THE CIVIL RIGHTS LAW THAT HAVE A DIRECT BEARING ON THIS ORGANIZATIONS MEMBERSHIP AS WELL AS OTHER ETHIC MINORITY GROUPS IN KANSAS.

Atch. e

WE FURTHER BELIEVE THAT THE MAXIMUM ALLOWABLE $2,000 LIMIT IN THE BILL IS A SIGNIFICANT ENOUGH DETERRENT TO ALLOW FOR EFFECTIVE ENFORCEMENT BY THE KCCR AND IS ALSO A LIMIT WHICH WILL STAND UP TO ANY JUDICIAL REVIEW.

REGARDING THE AMENDMENT TO THE PHYSICAL HANDICAP, WE SUPPORT A BROADER DEFINITION OF THIS TERM OVER THE NARROW INTERPRETATION USED BY THE KANSAS COURT OF APPEALS IN U.S.D. 259 VS. KCCR AND PALMER (1982). WE BELIEVE THE LEGISLATURE INTENDED A BROAD DEFINITION OF THE TERM PHYSICAL HANDICAP, OR OTHERWISE THEY WOULD HAVE NARROWLY DEFINED THE TERM WHEN THEY ORIGINALLY ENACTED THE STATUTE.

I ENCOURAGE YOU TO GIVE FAVORABLE CONSIDERATION TO H.B. 2982.

IF YOU HAVE ANY QUESTIONS I WILL ATTEMPT TO ANSWER THEM.

COMMISSION ON CIVIL RIGHTS
214 SOUTHWEST SIXTH AVENUE—1ST FLOOR
LIBERTY BUILDING
TOPEKA, KANSAS 66603-3780
PHONE (913) 296-3206

February 29, 1984

Members of the Kansas Legislature
State Capitol
Topeka, Kansas 66612

Dear Legislative Members:

The Kansas Commission on Civil Rights supports the passage of H.B. #2962 as a result of two (2) recent cases before the Kansas Appellate Courts which construed provisions of the Kansas Act Against Discrimination:

In the case of Woods v. Midwest Conveyor Co. (1982) the Kansas Supreme Court held that there is no statutory authority in the Kansas Act Against Discrimination which would allow the Kansas Commission to award damages for pain, suffering and humiliation suffered by victims of discrimination in housing, employment and public accommodations. This left the KCCR without the ability to make victims of discrimination "whole" and left the Kansas Act Against Discrimination without "teeth" in many cases. Although the law still allows recovery of out-of-pocket losses (such as lost wages in employment cases), no recovery is allowed for embarrassment and humiliation occasioned by discriminatory acts. For example, quite often in housing and public accommodations, there are no out-of-pocket losses. The damages which result are all intangible, in the nature of mental pain and suffering, humiliation and embarrassment. Therefore, in many cases there is really no remedy, and in other cases only a totally inadequate remedy, under the Kansas Act Against Discrimination.

The Supreme Court gave every indication in the Woods decision that if a limited award of these types of damages was put into the statute, the Court would uphold it. The proposed statutory change would authorize damages which would "make whole" many complainants before the KCCR and is probably the maximum which the Kansas Supreme Court would uphold. It would put sorely-needed enforcement powers into the Kansas Act Against Discrimination. As the enclosed dissenting opinions indicate, some members of the Supreme Court agree these changes are necessary.

In U.S.D. 259 v. KCCR & Palmer (1982), the Court of Appeals narrowly-construed the Kansas Act Against Discrimination's broadly-written definition of "physical handicap." As a result, apparently only people who have "traditional" physical handicaps are protected from discrimination under the Act. Meanwhile, for example, individuals who have less than "disabling" conditions, but who are denied employment based upon those

H.B.

conditions despite the fact that they can do the job applied for, are not covered by the Act.

These latter individuals seemingly were originally intended by the Legislature to be protected by the Kansas Act Against Discrimination since the Legislature broadly-defined physical handicap in the Kansas Act Against Discrimination. The only way to bring the Act back into compliance with the original interpretation at this point, is to amend the Act with the proposed broad language of this bill and clarify the intent underlying the Act. The amendment again gives individuals with physical conditions which are not "disabling" traditional "handicaps", who receive adverse actions due supposedly to their physical condition, the right to challenge what has been done to them, and to show that their condition is unrelated to the job they propose to do or the public accommodation they wish to enjoy. The amendment does not limit the rights presently possessed by those with "disabling" or "traditional physical handicaps" to proceed under the Act. It merely adjusts the coverage of the Act back to what it was before the Palmer decision.

The adoption of this piece of legislation would dramatically enhance the ability of the Commission to enforce the provisions of the Kansas Act Against Discrimination and we support its passage.

Sincerely,

Michael L. Bailey
Executive Director

MLB:nh

E

KANSAS BAR ASSOCIATION POSITION ON
HOUSE BILL No. 3008, AS AMENDED BY
HOUSE COMMITTEE ON INSURANCE

March 14, 1984

Under the current Automobile Injury Reparations Act, K.S.A. 40-3113a and its subparagraphs, an automobile insurance company has the right to recover the Personal Injury Protection (PIP) benefits it paid to its insured when the insured recovers damages by way of settlement or litigation from other parties, usually the driver of another automobile. This right of reimbursement or recovery is called the insurance subrogation right.

Some insurance companies contend that they can exercise their subrogation rights and recover the PIP benefits paid from the other insurance carrier without retaining an attorney and without the efforts of its insured's attorney.

In nearly all cases, however, the insurance carrier does not recover its PIP benefits except through the efforts of its insured's attorney. The insurance carrier for the negligent driver refuses to settle, forcing litigation, and when recovery is finally made by the insured, his insurance carrier demands payment of its PIP benefits. It cannot reasonably be said that the insurance company did not benefit from the time, efforts, and expenses incurred by its insured and the insured's attorney expended in pursuing the claim against the other driver and its insurance carrier.

The Kansas Bar Association believes that the current law found at K.S.A. 40-3113a(e) which provides that the attorney fees shall be paid proportionately by the insurance company and the injured person in amounts determined by the court is fair to all parties. This statute provides that the insurance carrier merely pays its proportion of the attorney's fee based upon its recovery.

Atch. E

Thus, the injured insured is not forced to pay the attorney fees for recovery of the PIP benefits which are returned to the insurance company.

The proposed amendment in original H.B. 3008 would have provided that the attorney fees shall be fixed by agreement between the insurer and the attorney, or fixed by the court "under equitable considerations." The Bar Association believes this would also be fair to all parties. There may be some cases where the same insurance carrier insures both cars, and it is really just moving money from one pocket to another when recovery of the PIP benefits occurs. Under these circumstances, it might be that no benefit accrued to the insurance company and the attorney may not be entitled to a fee under equitable circumstances. If this is the case, it is thought that the insurance carrier could notify all parties early on that PIP reimbursement was not being sought, and should not be claimed in the lawsuit.

However, the most recent version of H.B. 3008 is not fair to all parties. It merely provides that the insurance company must notify the attorney either that it does not want the attorney's representation, or reach an agreement as to a fee basis with the attorney. If it does neither of these things, the attorney is entitled to compensation on the same basis as his fee arrangement with his client. We expect that if this bill is passed all insurance carriers will immediately send a letter to their insured's attorney saying they do not wish representation. At the same time they will <u>not</u> be able to obtain immediate reimbursement of their PIP lien from the other carrier. They will continue to have a PIP subrogation lien on the recovery made by the insured, and will exercise their lien and demand reimbursement when the insured makes recovery. Thus, they will get a "free ride" on the efforts of the insured's attorney and the insured. The Kansas Bar Association opposes H.B. 3008 as amended for these

reasons. If the efforts of the insured's attorney result in a fund through which the insurance company recovers its PIP benefits, the insurance company should be required to pay the attorney for his time and efforts in some fashion. H.B. 3008 specifically repeals any consideration of payment in a proportional amount, or using any equitable consideration to determine whether there should be an attorney fee and the amount of such fee.

If the injured party's insurance company has been able to recover the PIP benefits paid from the other insurance company, without an attorney, it can notify the insured's attorney of this fact so that he will know from the beginning that there will be no recovery for PIP benefits.

The Bar does not object to the insurance company exercising its right to employ its own attorney to recover the PIP benefits paid to its insured. Indeed, it should have this right and we believe that it does have this right. However, the provisions of H.B. 3008 as amended would permit the insurance carrier to incur no expense whatsoever in recovering its PIP benefits, and require its insured's lawyer to work for it without reimbursement, or force the attorney to charge the insured for the benefits conferred on the insurance company. As stated, this is unfair to all parties.

Respectfully submitted,

John W. Brookens
Legislative Counsel
Kansas Bar Association

and [*h*][1]) and under the unusual circumstances of these cases, we find there has been substantial compliance with the requirements for service of process as contemplated by K.S.A. 60-204.

The judgment is affirmed as to all three cases and they are remanded for further proceedings.

No. 52,166

RUBY IRENE QUESENBURY, GREG FELDMAN and CINDY FELDMAN, *Appellees,* v. WICHITA COCA COLA BOTTLING COMPANY, INC.; RICHARD D. COX, and AMERICAN INSURANCE COMPANY, *Appellees,* and TRINITY UNIVERSAL INSURANCE COMPANY, *Intervenor-Appellant.*

(625 P.2d 1129)

SYLLABUS BY THE COURT

1. ATTORNEY FEES—*General Rules—Statutory Exceptions.* Ordinarily, the right of an attorney to compensation for his services depends upon a contract of employment, express or implied. Statutory exceptions to this general rule are discussed.
2. SAME—*Equitable Considerations—Fee Not Result of Contract or Statute.* An exception not arising from the statute is recognized where an attorney for an insured through services to his client recovers a fund from the tort-feasor in which the insurer will share. The allowance of an attorney fee in such circumstances arises from equitable considerations which are discussed and delineated in the opinion.
3. SAME—*Insurance—Allowance of Fee from Insurer's Subrogated Portion of Recovery from Tort-feasor.* In a dispute between an insured plaintiffs' attorney and the insurer as to whether said attorney should be allowed a fee from the insurer's subrogated portion of the fund recovered from the tort-feasor for property damage, the record is examined and it is *held:* The court erred in allowing the attorney a fee from the insurer's share of the fund, all as is more fully set forth in the opinion.

Appeal from Meade district court; DON C. SMITH, judge. Opinion filed March 25, 1981. Reversed and remanded with directions.

Christopher Randall, of Turner and Boisseau, Chartered, of Wichita, argued the cause and was on the brief for intervenor-appellant Trinity Universal Insurance Company.

Harold K. Greenleaf, Jr., of Smith, Greenleaf & Brooks, of Liberal, argued the cause, and *Steven L. Brooks,* of the same firm, was on the brief for the appellees.

The opinion of the court was delivered by

McFARLAND, J.: This appeal is a dispute between plaintiffs' attorney and plaintiffs' insurer as to whether the attorney is entitled to a fee on the insurer's subrogated portion of settlement proceeds recovered from the defendant tort-feasor for property damage. The trial court held in favor of the attorney, and the insurer appeals.

The basic facts are as follows. On November 7, 1978, a Wichita Coca Cola Bottling Company truck struck the residence of Ruby Irene Quesenbury. The cause of the accident was the employ truck driver's failure to set the brake before leaving the vehicle to make a delivery. Ms. Quesenbury had a homeowners policy with

Atch. F

the intervenor, Trinity Universal Insurance Company (Trinity). On March 5, 1979, Ms. Quesenbury settled with Trinity for $10,572.18 and entered into a subrogation agreement with her insurer.

On December 4, 1979, Ms. Quesenbury and two residents of the home filed the action herein against the Coca Cola Bottling Company, its employee driver, and its insurance carrier, seeking recovery in the amount of $20,165.48 for damage done to the home and its contents. On February 12, 1980, Trinity filed a motion to intervene as a third party plaintiff, and a third party petition. The hearing on the motion and a discovery conference were scheduled for March 4, 1980.

No transcript of the proceedings of March 4, 1980, has been presented, but the order filed March 17, 1980, relative thereto, states that three attorneys appeared, representing plaintiffs, defendants, and the intervenor (Trinity), respectively, and announced the case had been settled. The only remaining issue was the distribution of the settlement proceeds.

On April 7, 1980, the question of distribution of the fund was heard by the court. The only matter in controversy was whether plaintiffs' attorney was entitled to a fee from Trinity's $10,572.18 share of the settlement. No evidence was presented by plaintiffs' attorney or Trinity. The court allowed plaintiffs' attorney one-third of Trinity's share of the proceeds. Trinity appeals from that determination. Additional facts will be stated as needed relative to particular aspects of the opinion herein.

Ordinarily, the right of an attorney to compensation for his services depends upon a contract of employment, express or implied. There is no claim herein that plaintiffs' attorney was ever employed by Trinity to represent it in this action.

There are, however, two exceptions to the above-stated general rule. The first category of exceptions are those instances where express statutory provisions permit one party to recover attorney fees from another party. Illustrative of such statutes are: (1) K.S.A. 40-256, which allows an insured, upon successfully maintaining a policy action against his insurer, to recover his reasonable attorney fees if the court finds the insurer refused to pay the claim "without just cause or excuse"; and (2) K.S.A. 1980 Supp. 60-1610(*g*), which permits allowance of attorney fees to either party in a divorce case "as justice and equity may require." In Kansas

attorney fees of the prevailing party in litigation are not recoverable from the defeated party in the absence of clear and specific statutory provision therefore. *Newton v. Hornblower, Inc.*, 224 Kan. 506, 582 P.2d 1136 (1978).

This category of exceptions does not apply to the case before us for a variety of reasons, not the least of which is the lack of an applicable statute. Additionally, no party herein is seeking to recover his attorney fee expenses of litigation—rather, a party's attorney is seeking additional fees from the proceeds of the suit which do not belong to his client.

The second exception to the rule involves situations where an attorney has, through his services to his client, created a fund in which more than his client will share. The attorney's right to receive an attorney's fee on nonclients' interests in such fund may arise by specific statutory provision. Illustrative of such a statute is K.S.A. 1980 Supp. 40-3113a (*e*), which deals with funds arising from actions against tort-feasors wherein personal injury protection benefits have previously been paid to the injured insured. The various cases construing this statute and its predecessor have no application to the case before us, as personal injury protection benefits are not involved. There is no statute authorizing plaintiffs' attorney to collect fees from the subrogated insurer's portion of the fund herein.

A number of jurisdictions permit an attorney to collect a fee on the fund in the absence of express statutory authorization, based on equitable considerations. As heretofore determined, there is no express statutory authorization for the trial court's allowance of an attorney fee against Trinity's share of the fund. Accordingly, the only basis for the fee herein would have to be under said equitable principles.

The precise issue before us apparently is one of first impression in Kansas. The two cases closest in point, but distinguishable, are *Insurance Co. v. Cosgrove*, 85 Kan. 296, 116 Pac. 819 (1911), *aff'd on rehearing* 86 Kan. 374, 121 Pac. 488 (1912); and *Western Fire Ins. Co. v. Phelan*, 179 Kan. 327, 295 P.2d 675 (1956). In *Cosgrove* an insured successfully recovered against the tort-feasor after having settled with his own insurer. Subsequently, the insurer sued its insured for recoupment of what it had paid. There was apparently no subrogation agreement involved and the insurer did not participate in the action against the tort-feasor. T[illegible]

Cosgrove case offers little in the way of assistance to the issue before us, as it involves whether the insured can deduct his attorney fees from the original case.

The *Phelan* case again involved a recovery by an insured against a tort-feasor, with the insured pocketing the insurer's part of the proceeds. The action on appeal was brought by the insurer against the insured to obtain its money. In *Phelan,* however, the insurer had a contract with plaintiff's counsel to represent it in regard to its subrogated interest. Accordingly, the *Phelan* case does not involve the issue before us.

Whether a subrogated property insurer is obligated, absent a contract, to pay a fee to the insured's attorney who recovers damages from a third party tort-feasor is the subject of an annotation in 2 A.L.R.3d 1441. Where such compensation has been allowed, it is generally on the basis that it is unfair and inequitable to permit an insurance company to sit back, do nothing, and have its subrogated interest collected without cost to the company. The logic is persuasive. Were it otherwise, the insured and insurer would each try to outwait the other in bringing the action against the tort-feasor. The one waiting the longer time would pay no attorney fees in the event of recovery from the tort-feasor. We conclude that an attorney under appropriate circumstances may be allowed a fee from a portion of a fund recovered through his efforts based upon equitable considerations.

In determining whether such fees should be allowed the court should consider each case on its facts and determine whether equity should be invoked. Consistent with the theory of equitable relief, the person seeking equity has the burden of establishing the propriety of its invocation. Accordingly, the insured's attorney herein had the burden of establishing sufficient facts to justify the allowance under equitable considerations.

What then does an attorney need to establish in order to be allowed fees in such circumstances? In reviewing cases from other jurisdictions, a factor high on the list is whether the insurer participated in the action on its own behalf. Our research reveals no case where fees were allowed to the insured's counsel when the insurer entered the lawsuit on its own behalf to litigate its claim.

No complete list of matters to be considered in making equitable determinations is possible. By its very nature equity is flexible and adaptable to the needs of the particular set of facts within certain general principles. Matters which might well be considered by the court include the following: Did the insured's attorney in good faith seek employment by the insurer on the subrogated portion of the claim? Was the attorney's overture turned down or just ignored? Did the insurer acquiesce in the representation after suit was filed? Was the subrogated interest severable from the insured's claim? What role did the attorney play in the recovery; that is, was the litigation complex or the recovery doubtful, either of which made his services highly valuable to the insurer? In viewing the totality of the circumstances involved, would it be inequitable to let the insurer take the subrogated proceeds free of attorney fees?

Let us now look at the circumstances involved herein. In so doing we must rely on the record. Matters not before the trial court will not be considered. No testimony or documentary evidence was presented to the trial court as to what had transpired between the insured's attorney and Trinity. The insured's attorney made the following statement at the April 7, 1980, hearing:

"Our file reflects we started on this matter sometime in the middle of September of 1979 and proceeded from there concerning the action against Coca Cola. And I think prior to that time there was some problem as to our insurance carrier, being Trinity, and they didn't seem to see fit to want to pay any attorneys fees or were interested in Mrs. Quesenbury collecting any more monies than what we have already paid. And they didn't want to cooperate in any way in the lawsuit itself. And we filed it, to my knowledge, and the only thing Trinity has done to aid Mrs. Quesenbury to get any money besides what they paid her is file an intervenor and that wasn't on her behalf, but was filed as a result of the notice. And they filed an intervening petition so their subrogation rights would be protected."

Later in the hearing the same attorney indicated that he had represented Ms. Quesenbury in her negotiations with Trinity which resulted in the settlement of her claim on the policy. The record is bare of other references to the relationship between the attorney and Trinity except a general statement indicating long-standing hostility between the two relative to the case.

The insured's attorney denies Trinity was ever permitted to intervene. The order reflecting the March 17, 1980, proceeding shows Trinity participating as a party and being a party to the settlement. We must conclude Trinity was a party to the action. We note also that Trinity's motion to intervene on its own behalf came just two months after suit was filed and, as acknowledge

open court by the insured's attorney, was the result of the insurer receiving notice of suit. We do not know when such notice was received, but no delay in responding thereto was claimed or shown.

We further note that an action to recover for Trinity was not a legally challenging matter, inasmuch as the facts indicate clear liability on the part of an apparently financially responsible defendant who can be readily served with summons.

On the basis of the meager record in this case we have no hesitancy in concluding that there were insufficient facts presented to the court to warrant an allowance of a fee on equitable considerations to plaintiffs' attorney from Trinity's subrogated share of the settlement proceeds. The record indicates that the attorney fee in dispute herein has been disbursed to plaintiffs' attorney.

The judgment is reversed and the case is remanded with directions to enter an order for the return of the erroneously disbursed funds and their subsequent disbursement to Trinity Universal Insurance Company.

No. 52,169

THE CITY OF GARNETT, KANSAS, *Appellant,* v. KENDALL K. ZWIENER, *Appellee.*

No. 52,170

THE CITY OF GARNETT, KANSAS, *Appellant,* v. ADOLPH H. MILLER, *Appellee.*

No. 52,171

THE CITY OF GARNETT, KANSAS, *Appellant,* v. PAUL L. CHILSON, *Appellee.*

No. 52,172

THE CITY OF GARNETT, KANSAS, *Appellant,* v. CLAUDE ANDERSON, III, *Appellee.*

No. 52,173

THE CITY OF GARNETT, KANSAS, *Appellant,* v. DANNY C. MILLER, *Appellee.*

(625 P.2d 491)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Appeal from Municipal Court—Failure of Municipal Court Officer to Certify Necessary Papers to District Court—Effect.* Under K.S.A. 1980 Supp. 22-3609 governing appeals from municipal courts, once a proper notice of appeal has been filed, the failure of the judge whose judgment is appealed from, or the clerk of such court, to certify the complaint, warrant and appearance bond to the district court will not defeat a review proceeding.
2. SAME—*Appeal from Municipal Court—Statutory Procedures for Court Officer Are Directory Not Mandatory—Speedy Trial Considerations.* The provision in K.S.A. 1980 Supp. 22-3609(3), governing appeals from municipal courts, directing that the complaint, warrant and any appearance bond be certified to the district court within a stated time is directory rather than mandatory, and in the absence of delay amounting to infringement of a defendant's right to a speedy trial, the city should be allowed to cure such oversight.
3. SAME—*Appeal from Municipal Court—Speedy Trial—Accrual of Time Limitations.* In district court cases involving appeals from municipal courts, the time limitations on speedy trials provided for in K.S.A. 1980 Supp. 22-3402 shall commence to run from the date the appeal is docketed in the district court or at the expiration of the time the appeal should have been docketed under the time schedule set forth in K.S.A. 1980 Supp. 22-3609(3), whichever comes first.

Appeal from Anderson district court, JAMES J. SMITH, associate judge. Opinion filed March 25, 1981. Reversed and remanded with directions.

Terry Jay Solander, city attorney, argued the cause and was on the brief for the appellants.