Approved February 18, 1986
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./~~p.m.~~ on February 7, 1986 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Langworthy, Parrish and Winter.

Committee staff present:

Mary Sue Hack, Office of Revisor of Statutes
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Bill Sneed, Kansas Association of Defense Counsel
Richard Harmon, Kansas Association of Property and Casualty Insurance Companies
Mark Bennett, American Insurance Association
David Litwin, Kansas Chamber of Commerce and Industry

Senate Bill 414 - An act concerning civil procedure; relating to certain negligence actions.

Bill Sneed, Kansas Association of Defense Counsel, stated the association is opposed to the bill. He pointed out the areas of the bill where they have concern. A copy of his testimony is attached (See Attachment I).

Richard Harmon, Kansas Association of Property and Casualty Insurance Companies, testified they oppose an amendment that had been added to the bill concerning joint and several liability. They feel it is an anachronism to put joint and several liability in the loss. It is not in compliance with the act.

Mark Bennett, American Insurance Association, testified his association is very much concerned about reinstating joint and several liability even though it is but a minor reinstatement. They are opposed to that concept. He stated he was very happy with what the interim committee did in regard to the pure comparative negligence rejection and the rejection of joint and several liability and hope this committee will follow that. (A-II)

David Litwin, Kansas Chamber of Commerce and Industry, testified a lot of their members have expressed concern about this bill. They are concerned this bill may have the effect of establishing joint liability that does not exist under present law. He said if it is desirable to establish joint liability or pro-rata situation then let's have a bill that says that. There is a danger in creating a law by omission. Committee discussion was held with Mr. Litwin.

The meeting adjourned.

Copy of minutes is attached (See Attachment II).

Copy of testimony of the Kansas Hospital Association and the Kansas Medical Society is attached (See Attachment III).

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: Feb. 7, 1986

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Richard Harmon	Topeka	KS Assn. of Prop./Casualty Companies
M. Hawver	"	Cap-Jour.
William Sneed	Topeka	KS Assn of Defense Counsel
Lee Wright	MISSION	FIG
Ron Gaches	Wichita	BWAC
Mike Germann	Topeka	KS Railroad Ass'n
JANET STUBBS	"	HOME BUILDERS
Ron Smith	"	KBA
Jim Kaup	"	League of Municipalities
Tom Bell	Topeka	KHA
PAT BARNES	"	KS Motor Car Dealers Assn
Matt Lynch	"	Judicial Council
William [illegible]	Lawrence	Judicial Council
[illegible]	Topeka	KCCD
Bud Grant	"	"
Bill Henry	"	KS Engineering Society
Mark Bennett	Topeka	[illegible]
BUD GRANT	"	KCCI

2-7-86

GEHRT & ROBERTS, CHARTERED

ATTORNEYS AT LAW

3400 VAN BUREN STREET — P.O. BOX 5186

TOPEKA, KANSAS 66605

(913) 266-3650

ID # 48-0992424

FLOYD E. GEHRT
ROBERT L. ROBERTS
WILLIAM A. LARSON
WILLIAM W. SNEED
SHELDEN P. LE BRON

ASSOCIATED COUNSEL
HARLAND K. RIEGER

January 29, 1986

Honorable Robert G. Frey
Senator - 38th District
State Capitol Building
Topeka, Kansas 66612

Re: Kansas Association of Defense Counsel Position Paper on Senate Bill 414

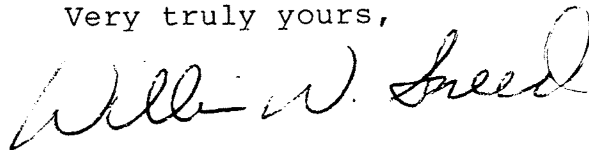
Dear Senator Frey:

In connection with the presentation that I made on behalf of the Kansas Association of Defense Counsel in front of the Senate Judiciary Committee on January 21, 1986, please accept this as the KADC's Position Paper in regards to Senate Bill 414.

I appreciate the opportunity to provide this material to you and to your committee and I will make myself available for additional comments at any future hearing dates.

Again, thank you for your time and if you have any further questions, please feel free to contact me.

Very truly yours,



William W. Sneed
Legislative Counsel
Kansas Association of
Defense Counsel

WWS:jb
cc: Wayne Stratton
Tim Brazil

S. Judiciary
2/7/86
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MEMORANDUM

TO : Senate Judiciary Committee

FROM : William W. Sneed, Legislative Counsel
Kansas Association of Defense Counsel

RE : Senate Bill 414

DATE : January 29, 1986

Senate Bill 414 was legislation derived from the summer interim committee's review of Senate Bill 35 which dealt with comparative fault. As you are aware, Senate Bill 414 attempts to take pieces of Senate Bill 35 and incorporate those items into the current Kansas comparative fault law.

The Kansas Association of Defense Counsel is opposed to Senate Bill 414. Please accept the following as our rationale for this opposition.

Since 1974, when Kansas made the change from contributory negligence to the current 49% comparative negligence law, the Kansas Supreme Court has reviewed close to 100 cases which has judicially defined that piece of legislation. Thus, over the course of the last ten years, the comparative fault law in Kansas has evolved into a state where the vast majority of the statutes have been judicially reviewed and as such, created a well settled piece of law. The use of case law provides continuity and stability to any piece of legislation. Thus, it is our contention that the enactment of Senate Bill 414 would create additional litigation on various issues because the prior case law may not be held applicable to the current proposed set of statutes. It is our contention that in today's society, the public is looking for more continuity and consistency in regards to their liability under the tort system. Thus, assuming arguendo, that Senate Bill 414 does correct some inconsistencies in our current law, on balance, the public's need for a consistent set of rules under the tort system requires the legislature to hold fast on our current set of laws.

The proponents of Senate Bill 414 ascertain that the majority of what is in Senate Bill 414 simply codifies existing case law. It is the position of the KADC that this is not correct. Although many sections illuminated in the Bill do, in fact, restate the current case law, it is our contention that by virtue of intertwining this codification of case law with the

other new sections found within the Bill do, in fact, create a variance in our current case law. As stated earlier, this will undoubtedly cause extensive new litigation. For instance, in sections 1 and 2 in regards to phantom parties, current case law allows for phantom parties to be involved in the case in regards to the comparison of fault. By enumerating by statute the only types of phantom parties available, the practical problem arises as to those situations which an unknown party does not fit into one of the listed categories. The whole concept of the Kansas Comparative Fault Act is to provide that a person be responsible for only his or her degree of fault. Thus, if you have eliminated certain phantom parties to be included in the lawsuit, you have reinstituted a form of joint and several liability on those parties which are known.

We understand the proponent's concern for those plaintiffs which are unable to gain relief from phantom parties. But at the same time, and which has been justified by current case law, the unavailability of a party should not be transposed to a defendant because the defendant is not the one bringing the lawsuit. Further, this Bill would provide that ordinary defendants would then become responsible for more than their degree of negligence.

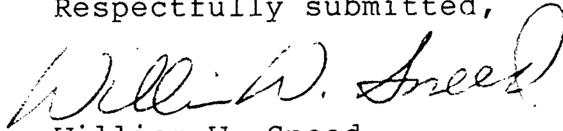
In reference with section 4 which deals with implied comparative indemnity, it is our position that it does not restate Kansas case law. Although implied comparative indemnity does exist in Kansas case law, it does on a very limited basis. The Position Paper of the Kansas Bar Association goes into detail in regards to this proposition. We will not expand on those points already raised by the Kansas Bar Association. We do wish to point out that the conjecture that this section will encourage settlements is somewhat misleading. It may in fact encourage, in some situations, settlements between a particular defendant and a plaintiff. However, by virtue of the language found in section 4, it will not cut off the litigation. It will simply encourage more litigation between the multiple defendant parties. In addition, the litigation between the defendants will be even more extensive in as much as those items incurred between the settling parties will once again come under litigation by the defendant parties. For instance, was the amount of settlement excessive. Again, when attempting to balance the interest of those plaintiffs who might benefit from such a situation to that of the public policy of curtailing litigation, it is our position that the general public not only will not benefit, but will be incurring more expense and harm by the passage of this section.

Finally, we believe that the increase in the statute of limitations is not needed. Statutes of limitations, by their very nature, are arbitrary. The proponents of this Bill can demonstrate some situation where the current statute of limita-

tions created an undue hardship. Assuming arguendo, that the statute of limitations found in Senate Bill 414 was extended, I am sure after its effective date that a plaintiff could show a situation where it was adversely effected even with the extension. As stated earlier, statutes of limitations are arbitrary but they have a public policy reason for their institution. Public policy requires statutes of limitations for continuity and finality of litigation. No statute of limitation is perfect. It is the position of the Kansas Association of Defense Counsel that current case law provides adequate time frames for the vast majority of plaintiffs in this state. Again, by providing an expansion in this particular area will only encourage more litigation and, as such, provide additional costs to society.

In conclusion, it is the position of the Kansas Association of Defense Counsel that on balance there is very little benefit to be derived by the majority of the public by passage of Senate Bill 414. We further contend that there has not been a showing of some overwhelming public need for the changes enumerated in Senate Bill 414. Thus, for all of the foregoing, the Kansas Association of Defense Counsel recommends that Senate Bill 414 be reported adversely.

Respectfully submitted,



William W. Sneed
Legislative Counsel
Kansas Association of
Defense Counsel

WWS:jb

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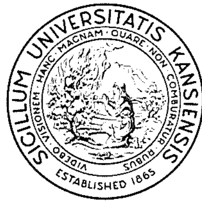

THE UNIVERSITY OF KANSAS

School of Law
Lawrence, Kansas 66045
(913) 864-4550

February 18, 1986

The Honorable Robert H. Frey
Chairperson, Senate Committee
on Judiciary
The State Senate
Statehouse
Topeka, Kansas 66612

RE: Senate Bill 414

Dear Senator Frey:

I just received a copy of Mark Bennett's letter of February 8, 1986 recommending the deletion of Section 1(b) because of a perceived problem with workers compensation cases. The advice received from Charles Coakley, Senior Counsel for the American Insurance Association, appears to be based on a misunderstanding of the current interpretation of the existing comparative negligence statute in Kansas.

Under the existing comparative negligence statute an employer may be joined solely for the purpose of comparing fault with the actual defendant in an action. This joinder operates to reduce the actual defendant's liability and does not expose the employer to any liability (other than the workers compensation obligation that he would have in any event). Section 1(b) in Senate Bill 414 preserves that situation. If Section 1(b) were deleted pursuant to Mr. Coakley's suggestion, the actual defendant in such an action would again be liable for the entire amount of damages. This would in essence constitute a reintroduction of joint and several liability in Kansas, a result that Mr. Coakley undoubtedly does not favor.

Mr. Coakley is correct that in some states consideration of an employer's fault in such cases has operated to add to the employer's financial burden. But those states have very different comparative fault systems. For an explanation of the operation of the current comparative fault system in Kansas, I would refer Mr. Bennett and Mr. Coakley to Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978)(general authority for joinder of immune parties in order to abolish joint and several liability), Negley v. Massey-Ferguson, Inc., 229 Kan.

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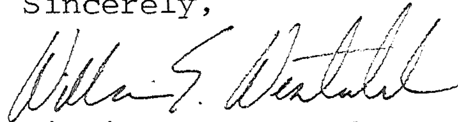
465, 625 P.2d 472 (1981)(application of Brown to workers compensation), and Pape v. Kansas Power & Light Co., 231 Kan. 441, 647 P.2d 320 (1982).

I believe that the Senate Committee on Judiciary already understands the point that I have made here. However, if either Mr. Bennett or Mr. Coakley or any other representative of the insurance industry wishes a further explanation, I would be pleased to discuss the point with them. I have not agreed with the insurance industry on most issues in the comparative fault area, but on this specific point our interests are identical.

Sincerely,



William E. Westerbeke
Professor of Law

cc: Mr. Mark L. Bennett

February 7, 1986

TO: Senate Judiciary Committee

FROM: Kansas Hospital Association
Kansas Medical Society

SUBJECT: **SENATE BILL 414**

The Kansas Hospital Association and the Kansas Medical Society oppose Senate Bill 414. In our opinion, the bill will do little to provide guidance to attorneys and litigants. It will, however, have the effect of causing new litigation. We would like to address three sections of the bill in particular.

Section 1(b) limits the joinder of phantom parties to six specific categories. Those phantom parties not falling within one of these categories could not be joined for the purpose of comparing their fault. The net effect of this is that a health care provider could be responsible for the negligence of others who cannot be joined in the lawsuit. This flies in the face of the legislative intent upon which the Comparative Fault Act was based, that being each person should be responsible for his degree of fault.

Section 3 extends the statute of limitations by one year for any situation in which a party is added after the original filing. It is our position that current law provides an adequate statute of limitations. Extending the time period is not justified by public policy and will only act to increase litigation.

Section 5 would require litigation of all issues in the instant action. This could work to the detriment of defendants in a situation where the employee and employer would like to present a unified front, but would not be able to under the provisions of this section. As the law presently exists, any derivative liability could be tried at a later date.

In short, the Kansas Hospital Association and the Kansas Medical Society believe Senate Bill 414 would not serve the public interest. Presently, our tort system encourages patients who have an adverse outcome from medical treatment, as some will inevitably have, to take their chances at recovering from a health care provider. As a result, more money is being spent today determining liability than compensating the injured. Senate Bill 414 would do nothing to reverse this trend. In fact, it would create more litigation and consequently add even more unpredictability to the current professional liability insurance environment.

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