Approved _____
Date

MINUTES OF THE House COMMITTEE ON Federal & State Affairs.

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

1:30 a.m./p.m. on March 25, 1987 in room 526S of the Capitol.

All members were present except:

Representatives Aylward, Roe, & Hensley
Representative Grotewiel, Jenkins & Rolfs - E

Committee staff present:

Lynda Hutfles, Secretary
Mary Galligan, Research
Mary Torrance, Revisor's
Raney Gilliland, Research

Conferees appearing before the committee:

Ron Smith, Kansas Bar Association
Professor James Concannon, Washburn Law School
Clark Owen, Sedgwick County
Sgt. Bob Giffin, Kansas Highway Patrol
Jim Clark, Kansas County & District Attorney's Association
Tim Chambers, Reno County
Reverend Taylor, Kansan's for Life at its Best

The meeting was called to order by Chairman Miller.

Representative Walker made a motion, seconded by Representative Peterson, to introduce a bill requested by Representative Goosen concerning hospital District No. 1 in Marion County authorizing the hospital board to convey, without consideration, certain property. The motion carried.

Representative Long made a motion, seconded by Representative Sughrue, to approve the minutes of the March 23 meeting. The motion carried.

The Chairman pointed out that on next weeks agenda the bill that had been scheduled for last Tuesday would be heard on Monday of next week.

HB2475 - concerning civil procedure allowing the maintenance of a cause of action using fictitious names for certain purposes

Ron Smith, Kansas Bar Association, presented some introductory remarks on the bill and explained his reasons for introducing it. He said that John Lungstrum and James Concannon had worked with him in getting this legislation drafted. Mr. Smith introduced Mr. Concannon.

Professor James Concannon, Washburn Law School, gave testimony in support of the bill which would permit "John Doe" pleadings making persons parties to a lawsuit for some purposes, but not others. He suggested several amendments to the bill along with some technical amendments. See attachment A.

The question was raised as to whether this bill would allow for fishing expeditions and the committee was assured that this was taken care of under Sanction 6211. There was also question about the provision allowing "for purposes of discovery" language.

Hearings were concluded on HB2475.

HB2451 - Physician-patient privilege

Clark Owen, Sedgwick County District Attorney, gave testimony supporting the concept of the bill which makes it possible to get the results of blood tests from hospitals in DUI cases. Mr. owen referred to a case, State vs. Pitchford, and told the committee that the blood alcohol test which was taken as a result of medical treatment was not accessable at the time of the trial. This bill would allow us to subpoena these tests.

MINUTES OF THE House COMMITTEE ON Federal & State Affairs,

room 526S, Statehouse, at 1:30 a.m./p.m. on March 25, 1987

There was discussion on who determines whether a person can give consent to alcohol tests and whether this could be used as a way to get around consent.

Sgt. Bob Giffin, Kansas Highway Patrol, gave testimony in support of the bill. He explained experiences the patrol has had working accidents where the hospital refuses to draw blood for them and the officer never sees the patient to request the test.

Jim Clark, Kansas County & District Attorneys Association, gave testimony in support of the concept of HB2451. There is presently a problem in DUI enforcement where the driver is involved in an accident, and is injured. Many times the driver will have been removed from the vehicle, and taken to the hospital for treatment before the accident can be worked by law enforcement. In these cases, the blood sample taken by hospital personnel can not be used if a DUI case if brought. Mr. Clark had a suggested amendment. See attachment B.

Tim Chambers, Reno County Attorney, related first hand experiences he has had with requesting blood alcohol tests in the case of injury accidents. He supports amendments suggested by the District Attorney's Association.

Reverend Taylor, Kansan's for Life at its Best, gave testimony in support of the bill and encouraged the committee to tighten up the DUI laws. He also supported the suggested amendments.

Hearings were concluded on HB2451.

The meeting was adjourned.

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TESTIMONY BEFORE FEDERAL AND STATE AFFAIRS COMMITTEE ON HB 2475
PROFESSOR JAMES M. CONCANNON
WASHBURN LAW SCHOOL
MARCH 25, 1987

HB 2475 would permit "John Doe" pleadings making persons parties to a lawsuit for some purposes but not others.

It is aimed at the problem one sometimes faces when the expiration of statute of limitations is eminent. For example, a lawyer for a claimant may not have been able to determine the exact names of persons the lawyer believes are liable for the claim, e.g. the name of a foreign corporation that is not registered in Kansas. There may be persons the lawyer believes might be liable for the claim but the lawyer has not been able to determine in good faith whether liability exists, either because of an inability to conduct discovery or because the client contacted the lawyer too late. In one case with which I am familiar, the lawyer could not determine which of several companies manufactured a defective product that had no identifying markings.

A claimant in these case is in a quandary. If the claimant names persons to the action to guard against the limitations defense and it later turns out these persons are not liable, the action not only has been made more complex and costly than necessary but the claimant also risks the imposition of sanctions under K.S.A. 60-211 for filing unfounded claims. On the other hand, if the claimant omits a person from the action and it later turns out the person was liable, an attempt to add the person by amendment pursuant to K.S.A. 60-215(c)(2) will succeed only if the claimant shows that the person learned of the action before the limitations period expired [Schiavone v. Fortune a.k.a. Time, Inc., ____ U.S. ____, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)] and should have realized there was a mistake in naming parties. The same requirements must be met even to correct a mistake in naming or describing a party the lawyer actually sues.

HB 2475 permits the claimant to commence the action for statute of limitations purposes by using a fictitious name in the pleading and filing a separate statement that identifies the person and explains the reason he or she should be involved in the action. These documents then are to be mailed to the person. The person's identity would not be disclosed in public unless the person later is made a full party to the action. This procedure would fully satisfy the policies of the statute of limitations

Attachment A

which are to insure that a defendant is on notice to preserve evidence to defend the claim and to protect courts from the burden of litigating a stale claim. This procedure not only would eliminate embarrassment to the person but presumably would prevent the pendency of the action from operating as a lien upon the person's realty pursuant to K.S.A. 60-2202 before the person is made a full party to the action. This latter point probably should be made explicit in the bill, perhaps by adding the following sentence at line 72: "The date on which the amended pleading is filed shall be deemed 'the time at which the petition stating the claim' against the person is filed for purposes of K.S.A. 60-2202(a)."

Subsection (b) also makes the person a party for purposes of discovery. Thus, all discovery devices could be directed to the person, not just the deposition, the subpoena for documents in connection with a deposition, and subpoena for business records that are currently available for non-parties. The main advantage would be the ability to serve interrogatories upon the person and simple requests for production of non-business records. The party "for purposes of discovery" language might be broad enough to permit use against a person who later is made a full party to the action of depositions taken before the person was made a full party but of which the person was given notice. See K.S.A. 60-232. Such a result would save costs of having to re-do depositions after the person is made a party, but it would have the disadvantage of effectively forcing the person to bear the cost of being represented by counsel at the deposition even though he or she may never become a full party. You might decide to limit subsection (b) at lines 45-6 and 50-51 so these persons are parties not "for purposes of discovery" but only "for purposes of responding to requests for discovery."

OTHER TECHNICAL SUGGESTIONS FOR DRAFTING HB 2475

Line 33: "it difficult for **the party or** the party's attorney, **after independent review of the facts and the law,** to determine if a cause of action"

Line 36-7: "ments thereto or (3) ~~after the party's attorney's independent review of the facts and the law,~~ such person has been uncoo-"

Line 42: "interest that such person has in the claim ~~in the action.~~"

Line 47: ~~"shall cause service of a copy of the pleading on such person and"~~

Line 51-4: "discovery. ~~A copy of such pleading and statement shall be served upon the person by restricted mail.~~ Such statement shall specify, to the best of the knowledge, information or belief of the party or attorney filing the pleading, ~~the information~~

~~or belief~~ formed after reasonable inquiry, the"

Line 60-65: "upon order of the court for good cause shown. **A copy of such pleading and statement shall be served upon the person by restricted mail.** The filing ~~service~~ of a ~~copy of the~~ pleading pursuant to this ~~sub~~section shall constitute ~~notice of suit and~~ commencement of the civil action **against the person** pursuant to K.S.A. 60-203 and amendments thereto **solely** for purposes of determining whether an action is timely filed under the applicable statute of limitations **if a copy of the pleading and statement are served upon the person pursuant to this subsection within the time specified in K.S.A. 60-203, and amendments thereto, for service of process.**"

Line 66: "(c) At any time, any party to the action may move (1) **to dismiss or** for"

Line 69: "fictitiously-named person a party to the action whose identity is"

Line 75-6: "action under this section shall either move (1) ~~for summary judgment~~ **to** dismiss~~ing~~ such person as a party to the action or (2) to"

B

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EXECUTIVE DIRECTOR • JAMES W. CLARK

Testimony in Support of

House Bill 2451

The Kansas County and District Attorneys Association appears in support of the concept of **HB 2451**, although the bill needs amending. There is presently a problem in DUI enforcement where the driver is involved in an accident, and is injured. Many times, especially in the rural areas, the driver will have been removed from the vehicle, and taken to a hospital for treatment before the accident can be worked by law enforcement. In these cases, the blood sample taken by hospital personnel **can not** be used if a DUI case is brought.

While K.S.A. 8-1001 has been frequently amended to allow collection of blood alcohol evidence in nearly every situation, it does not apply to the kinds of cases mentioned above unless the test is requested by a law enforcement officer. State v. Pitchford, 10 Kan. App. 2d 293. In that case, officers responding to a report of a one-car accident, discovered the defendant walking in a pasture some 70 yards from the vehicle, bleeding badly. He attempted to run from the officers, and when he was finally stopped, he fought off all efforts at medical assistance. At the hospital, the he violently resisted any attempt to treat his wounds, so the doctor ordered a blood test to determine what was making him so combative. The test indicated a blood alcohol content of 0.226 percent. The Butler County District Court suppressed this evidence and the Court of Appeals upheld the decision, holding that 8-1001 is inapplicable because the officer did not request the test, and that K.S.A. 60-427, the physician-patient privilege, applied. The Court of Appeals made a similar ruling in State v. Ridgway, an unpublished opinion issued October 30, 1986, holding that the 1985 amendments to 8-1001 which allow a blood alcohol test where an accident involving property damage or injury has occurred, still requires a request by a law enforcement officer. As a result, an officer must request an **additional test**, in spite of the nature of the suspect's injuries, or the work-load of hospital personnel. Such a test is inconvenient, possibly injurious, and, more importantly, less accurate than the test taken at a time more contemporaneous with the accident. Such a test is necessary, because due to the injuries, any field testing (walking a straight line, finger to nose, etc.) is unavailable.

This proposal is not a change in legislative policy regarding suspected drunk driver who happen to have been injured in an accident. The policy decision to treat drivers involved in accidents differently has already been made. For example, the diversion statutes, K.S.A. 22-2908, specifically exclude diversion where the driver was involved in an accident involving personal injury or death. This proposal simply closes a loop-hole that presently exists.

SUGGESTED AMENDMENT

At line 47 of HB 2451, insert ", **or a violation of K.S.A. 8-1567,**" after the word "**misdemeanor**".

Attachment B