Approved February 9, 1987
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Robert S. Wunsch at
Chairperson

3:30 ~~a.m.~~/p.m. on January 27, 1987 in room 313-S of the Capitol.

All members were present except:
Representatives Crowell, Jenkins and Peterson who were excused

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Mary Jane Holt, Secretary

Conferees appearing before the committee:

Jim Clark, Kansas County and District Attorneys Association
Tom Whitaker, Kansas Motor Carriers
Brenda Braden, Deputy Attorney General
Bob Williams, Kansas Commission for Prevention of Child Abuse
T. C. Anderson, Executive Director, Kansas Society of Certified Public Accountants
Kevin Fowler, Attorney

Hearing on H.B. 2007-Crimes involving aiding runaways, Proposal No. 20

Jim Clark informed the Committee the Kansas County and District Attorneys Association supports passage of H.B. 2007.

Tom Whitaker stated that Mary Turkington, Executive Director, Kansas Motor Carriers Association testified before the Task Force and the interim Committee that any complaint against the trucking industry would be detrimental and they would stop helping with runaways.

Hearing on H.B. 2008-Furnishing alcohol and drugs to minors , penalties.

Jim Clark stated the Kansas County and District Attorneys Association also supports this bill.

Hearing on H.B. 2009-Prosecution of Crimes by Attorney General

Brenda Braden testified the Attorney General supports this bill. She said the bill came from the Attorney General's Task Force on Missing and Exploited Children and not from the Attorney General's office. The bill gives the Attorney General authority to prosecute criminal offenses only if the county or district attorney has failed or declined to prosecute. The Attorney General's office can only handle a certain amount of these cases due to lack of staff.

Bob Williams testified in support of H.B. 2009. He said they received complaints about county attorneys who are unwilling to prosecute child abuse cases. He recommended the bill be expanded to include a child in need of care action.

Jim Clark informed the Committee the Kansas County and District Attorneys Association continues to oppose a general grant of authority to the Attorney General to prosecute criminal offenses in local jurisdictions. He stated this bill would reduce the authority of local elected officials, (see Attachment I). In response to Committee questions, Mr. Clark agreed it would be more acceptable if upon application by affidavit to the District Judge, the District Judge could order prosecution and could direct or request the Attorney General to prosecute.

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY,

room 313-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on January 27, 1987

The Chairman announced the hearing on H.B. 2040 would not be held at this time.

Hearing on H.B. 2024-Application of comparative negligence and joint and several liability doctrines-Proposal No. 29

Staff explained this bill amends the comparative negligence statute and is intended to clarify existing law.

T. C. Anderson testified in support of H.B. 2024. He stated the bill would make it clear that pure dollars and cents losses are covered by comparative negligence. The bill also would seek to codify Kansas case law as to what claims fall under the doctrine of joint and several liability. He introduced Keven Flowler of the law firm of Frieden and Forbes to present the technical part of the testimony, (see Attachment II).

Kevin Fowler testified this bill would insure that the comparative negligence statute K.S.A. 60-258(a) and comparative fault principles would apply to every negligence action in Kansas regardless of the types of loss involved, and would protect negligent parties from the imposition of joint and several liability in cases involving both negligent and intentional wrongdoers. In FSLIC v. Huff the Kansas Supreme Court recently refused to apply K.S.A. 60-258(a) to an action involving allegations of intentional and negligent breach of fiduciary duty by certain officers and directors of a savings and loan association, at least in part, because the plaintiff suffered nothing more than economic loss.

Mr. Fowler stated by substituting the term "loss" for the phrase, death, personal injury or property damage, H.B. 2024 would eliminate the current uncertainty and clarify the legislature's intention to apply K.S.A. 60-258(a) to all negligent actions involving any kind of damage, injury or loss. He further stated sections (e) and (f) are designed to place all negligent defendants on equal footing and to give them equal benefit of comparative fault principles regardless of whether a co-defendant may be liable for fraud or other intentional wrongdoing, (see Attachment III).

In response to Committee questions, Mr. Fowler said the language in (e) could be rewritten to make it clear that this legislation would not allow intentional wrongdoers to use the comparative negligence statute to reduce their own liability. He also responded adding economic loss to the terms death, personal injury or property damage would be acceptable.

The Chairman announced the Committee would continue the hearing on H.B. 2024 and H.B. 2025 on Thursday.

The meeting was adjourned at 4:55 p.m.

The next meeting will be Wednesday, January 28, 1987 at 3:30 p.m. in Room 519-S.

GUEST REGISTER

DATE January 27, 1987

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
Tom Palace	SLSI	Topeka
Lynn VanWalt	KCSI	Topeka
Janet Stubbs	KBAK	"
Kathy Marney	KCAK	" "
T Anderson	KSCPA	Topeka
Theresa Shultz	Kansas NARAL	Topeka
Norm Wilks	Ks Assoc School Boards	Topeka
John Kamp	League of Ks Municipalities	Topeka
Jan Vacek	KSCPA	Topeka
Jon Fay	KID	Topeka
Larry Magill	Indep. Ins. Agents of Ks.	Topeka
Jon Josserand	Wichita Chamber	Wichita
Tom Whitaker	Ks Motor Carriers Assn	Topeka
Glenn Cogswell	Alliance of Am. Insurers	Topeka

Kansas County & District Attorneys Association

827 S. Topeka Ave., 2nd Floor • Topeka, Kansas 66612 • (913) 357-6351

EXECUTIVE DIRECTOR • JAMES W. CLARK

HB 2009

The Kansas County and District Attorneys Association continues to oppose a general grant of authority to the Attorney General to prosecute criminal offenses in local jurisdictions, for the following reasons:

1. **Such authority reduces the authority of local elected officials.** Presently, local prosecutors, elected by the people of each county, are in a better position to weigh the evidence and exercise their prosecutorial discretion before filing charges. It is ironic that one objection to a district attorney plan is that it removes discretionary authority from the county level to the district level. This bill would, in effect, remove it even further.

2. **Such authority is unnecessary.** Presently, the Attorney General may initiate prosecution at the local level, either by request or acquiescence of the county or district attorney. If no such request or acquiescence is forthcoming, a district judge may, upon proper application, order the county attorney to institute criminal proceedings (K.S.A. 22-2301(b)). Further, in Kansas, any person may initiate a prosecution by filing a complaint (K.S.A. 22-2301(a)).

3. **Such authority may harm prosecution.** In many cases, it is necessary to delay initiation of prosecution either to secure a witness, or to complete the investigation. If the Attorney General has the authority given in HB 2009, and initiates prosecution before the case is ready, the time clock for speedy trial determination begins, and if a jury is selected, jeopardy attaches. If either occur prior to the completion of the investigation, the prosecution has been seriously, if not fatally, harmed.

4. **Such authority presents possibilities for abuse.** Historically, the Attorney General's office has been considered a stepping stone to higher office. It is too likely that an ambitious Attorney General may use the authority to "second guess" the discretion of the prosecutor, which this bill gives, simply for publicity or political purposes.

Attachment I
House Judiciary 1/27/87

Kansas Society of
Certified Public Accountants

FOUNDED OCTOBER 17, 1932

400 CROIX / P.O. BOX 5654 / TOPEKA, KANSAS 66605-0654 / 913-267-6460

KANSAS SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

HB 2024

January 27, 1987

Mr. Chairman and Members of the House Judiciary Committee. My name is T. C. Anderson. I am the Executive Director of the Kansas Society of Certified Public Accountants. I have asked Kevin Fowler of the Topeka law firm of Frieden and Forbes to present the technical part of our testimony.

First, however, I appreciate this opportunity to convey to this Committee the particular perspective on the importance of HB 2024 to the more than 2,000 CPAs belonging to our professional organization.

The market for CPA professional liability insurance continues to be unstable because of the inability to predict risk and potential losses; as a result premiums continue to escalate and coverage is shrinking because of greater areas of exclusions being attached to the policies.

An example of premium history of one the 221 Kansas firms covered by the American Institute of CPA's Professional Liability Insurance Plan is as follows: In 1984, the Kansas CPA firm with 25 employees could obtain $1,000,000 worth of coverage with a $3,500 deductible per claim for a premium of $1,559 or about $64 per person. In 1986, the same amount of coverage but

with a $7,000 deductible carried with it a premium of $28,725 or about $1,160 per employee. This year we expect that premium to increase another 18 percent or another $5,000 yet the coverage will exclude the sale of computer hardware and software along with many aspects associated with personal financial planning.

As I have mentioned to many of you before Kansas CPAs participating in our nationally sponsored insurance program recorded a 10 year average of being a 35 percent loss state. That is, 35 cents of every premium dollar collected was paid out in claims or into claims reserves. Our neighbors to the east -- Missouri-- where the deep pocket rule of joint and several liability exists recorded a 1,038 percent loss in 1984. The 35 percent average for Kansas CPAs began in 1974 when Kansas adopted comparative negligence which all believed to include pure economic loss as well as losses resulting from death, personal injury and damage to personal property, as well as several liability.

However a recent Kansas Supreme Court case would indicate not all types of negligent actions are covered by comparative negligence and a question was raised as to whether pure economic loss also was covered by the statutes.

This case is Federal Savings & Loan Insurance Corporation v. Huff reported at 237 Kansas Reports beginning on page 873 (1985 Kansas Supreme Court).

Briefly HB 2024 would resolve two of the question marks raised in Huff by making it clear that pure dollars and cents losses are covered by comparative negligence and that a situation all to common to the accounting profession is

covered by several liability.

That situation resolves around a claim of negligence on the part of a CPA who fails to detect the fraudulent conduct of a client which results in a loss to the plaintiff.

The bill also would seek to codify current Kansas case law as to what claims fall under the doctrine of joint and several liability.

Mr. Chairman with your permission I would like for Mr. Fowler to detail FSLIC v. Huff and its major negative implications on the accounting profession in Kansas and our efforts to obtain reasonably priced liability insurance for our members.

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KANSAS SOCIETY OF CERTIFIED PUBLIC ACCOUNTANTS

HB 2024

January 27, 1987

Mr. Chairman and Members of the Committee, my name is Kevin Fowler. I am appearing before this Committee on behalf of the Kansas Society of Certified Public Accountants, which strongly endorses the enactment of HB 2024 and requests that you give this measure the favorable consideration it deserves.

The Kansas Society of Certified Public Accountants supports HB 2024 because it fulfills two fundamental objectives. First, the bill insures that the comparative negligence statute [K.S.A. 60-258(a)] and comparative fault principles will apply to every negligence action in this state regardless of the types of loss involved. Second, the measure protects negligent parties from the imposition of "joint and several liability" in cases involving both negligent and intentional wrongdoers.

When the legislature enacted the comparative negligence statute more than twelve years ago, it intended to eliminate various forms of injustice which had become ingrained in the negligence law of Kansas. Prior to the enactment of K.S.A. 60-258(a), any plaintiff in a negligence action who contributed to his or her own injury would be completely barred from any

Attachment III
House Judiciary 1/27/87

recovery against negligent wrongdoers under the defense of contributory negligence. Likewise, in negligence actions involving multiple wrongdoers, each individual defendant could be found liable for the full amount of a plaintiff's losses without regard to the proportionate degree of fault attributable to each defendant. The doctrine of "joint and several liability" therefore enabled successful plaintiffs to recover the full amount of their damages from those defendants whose fault or negligence may have played no more than a minimal role in the causation of the plaintiff's damages. The harsh and unequitable results which obtained under these common law rules prompted the leglislature to abolish the defense of contributory negligence and the concept of joint and several liability as they applied to civil actions involving negligence. Among other things, the enactment of K.S.A. 60-258(a) signaled a legislative policy decision that parties guilty of negligent wrongdoing should not be held liable for damages or loss in any amount exceeding their proportionate degrees of fault.

Despite the clear legislative purpose to impose liability between and among negligent wrongdoers in proportion to their respective degrees of fault, the Kansas courts have refused to apply the comparative negligence statute and comparative fault principles in two categories of cases involving allegations of negligence. First, in FSLIC v. Huff, 237 Kan. 873, 878-79, 704 P.2d 372 (1985), the Kansas Supreme Court recently refused to apply K.S.A. 60-258(a) to an action involving allegations of intentional and negligent breach of fiduciary duty by certain

officers and directors of a savings and loan association, at least in part, because the plaintiff suffered nothing more than economic loss. Although the court would not completely rule out application of the comparative negligence statute and comparative negligence principles in every case involving only economic loss, the opinion in FSLIC v. Huff has created considerable uncertainty concerning future applications of K.S.A. 60-258(a) in cases involving purely economic or business losses. Since we believe the legislature originally intended the comparative negligence statute to apply to all negligence actions, regardless of the type or character of loss involved, this uncertainty should not exist. By substituting the term "loss" for the phrase "death, personal injury or property damage" HB 2024 will eliminate current uncertainty and clarify the legislature's intention to apply K.S.A. 60-258(a) to all negligence actions involving any kind of damage, injury or loss. Although the court would not completely rule out application of the comparative negligence statute and comparative negligence principles in every case involving nothing more than economic loss, the opinion in FSLIC v. Huff has created considerable uncertainty concerning future applications of K.S.A. 60-258(a) in cases involving purely economic or business losses. Since we believe the legislature originally intended the comparative negligence statute to apply to all negligence actions, regardless of the type or character of loss involved, this uncertainty should not exist. By substituting the term "loss" for the phrase "death, personal

injury or property damage" HB 2024 will eliminate current uncertainty and clarify the legislature's intention to apply K.S.A. 60-258(a) to all negligence actions involving any kind of damage, injury or loss. The second category of cases in which negligent defendants have not been given the benefit of the comparative negligence statute and comparative negligence principles is where the plaintiff sues one defendant for negligence and other defendants for intentional wrongdoing. A typical case of this nature is found in Lynn v. Taylor, 7 K.A.2d. 369, 642 P.2d 131, rev. denied, 231 Kan. 801 (1982), where the purchaser of a home with termite damage successfully sued a termite inspection company for negligence in failing to discover termite damage and two real estate agents who fraudulently concealed the existance of such damage from the plaintiff. In Lynn, the Court of Appeals upheld the imposition of joint and several liability upon all wrongdoers and refused to give the termite inspection company the benefit of comparative fault principles even though the only basis for liability was negligence. Relying upon the rule that the comparative fault principles do not apply unless a plaintiffs's contributory negligence would have been a defense under the old common law, the court in Lynn held that the absence of contributory negligence by the innocent purchaser prevented a comparison of fault and application of the comparative negligence statute. The apparent basis for this decision in Lynn v. Taylor was recently bolstered by an alternate holding of the Kansas Supreme Court in

FSLIC v. Huff that the absence of contributory negligence bars the application of comparative negligence principles. Although the Kansas Society of CPA's recognizes that intentional wrongdoers should not be able to employ the comparative negligence statute to dilute their liability, in our view, there is no logical reason in such cases to impose liability upon negligent defendants which exceeds their proportionate degrees of fault. Sections (e) and (f) of HB 2024 are designed to place all negligent defendants on equal footing and to give them equal benefit of comparative fault principles regardless of whether a co-defendant may be liable for fraud or other intentional wrongdoing.