Approved: 3/21/97
Date

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR.

The meeting was called to order by Chairman Al Lane at 9:04 a.m. on February 24, 1997 in Room 526-S of the Capitol.

All members were present except: Rep. David Adkins - excused

Committee staff present: Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Bev Adams, Committee Secretary

Conferees appearing before the committee: Rep. Herman Dillon
Steve Rarrick, Deputy Attorney General
Rep. Mary Compton
Sandi Scott
Randall Fisher
Terry Leatherman, KCCI

Others attending: See attached list

A motion was made by Rep. Beggs to approve the minutes of February 4, 5, 6 and 7. It was seconded by Rep Crow. The motion passed.

Hearing on: HB 2462 - Consumer protection, three-day right to cancel in certain telemarketer business transactions.

Rep. Herman Dillon appeared as a proponent of the bill. He read a letter from a constituent who had been lured to a place of business by an offer of a free vacation but left the business after purchasing a much more expensive vacation package. The bill would create a three day cooling off period with the option to cancel the contract for certain types of purchases. (see Attachment 1) He ended his appearance by answering questions from the committee.

Steve Rarrick, Deputy Attorney General for Consumer Protection, appeared as a proponent of the bill on behalf of Attorney General Stovall. Consumers who make a purchase of goods or services, after being lured to a "showroom" or other place of business by a telephone call or a mail solicitation that offers a free gift, do not have the right to cancel these purchase contracts. The Attorney General's office receive many complaints about these operations. Many of the callers believe that they have the right to cancel these contracts if done within a certain time frame. (see Attachment 2) He concluded his testimony by answering questions.

No others were present to testify for or against the bill, and Chairman Lane closed the hearing.

Hearing on HB 2292 - Health care provider exception to the exclusive remedy rule.

Rep. Compton gave a short introduction of the bill. She introduced the bill at the request of Sandi Scott, one of her constituents.

Sandi Scott testified in support of the bill which would exclude physicians, physician's assistants, and other health care providers from the "exclusive remedy" protection. Her husband died of a heart attack on the job at the Wolf Creek Nuclear Power Plant. She feels that the health care professionals were negligent in not getting him to the hospital in time to be treated. She wants the law changed because she believes the law allows these medical providers to be cloaked with protection and immunity under the "exclusive remedy" provisions of the workers compensation statute. (see Attachment 3) She answered a few questions and referred others to her lawyer, Mr. Fisher.

Randall E. Fisher, appeared on behalf of the Kansas Trial Lawyers and Sandra Scott and her family. The bill is intended to reverse a decision of the Kansas Court of Appeals entitled *Scott v. Wolf Creek*. (see Attachment 4). He answered questions from the committee.

Terry Leatherman, Kansas Chamber of Commerce and Industry (KCCI), appeared to express KCCI's opposition to the passage of the bill. (see Attachment 5) He concluded by answering questions from the committee.

No others were present to testify for or against **HB 2292** and Chairman Lane closed the hearing on the bill. He also read the fiscal note on the bill. It would have no fiscal impact.

Chairman Lane adjourned the meeting at 9:41 a.m.

The next meeting is scheduled for February 25, 1997.

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST

DATE: February 24, 1997

NAME	REPRESENTING
Gloria Timmer	Hein & Weir
George Barbee	Barbee & Assoc
Jon Smith	KS BAR ASSOC
Steve Montgomery	MCI
Lori Callahan	Kammco
John Peterson	Wolf Creek
BRUCE GRAHAM	KEPCo
David Shufelt	KDHR - Div Work Comp
Philip Harness	KDHR - Div of Work Comp
BILL GRAHAM	KCCI

STATE OF KANSAS

HERMAN G. DILLON
REPRESENTATIVE, THIRTY-SECOND DISTRICT
WYANDOTTE COUNTY
611 S. COY
KANSAS CITY, KANSAS 66105-2011
(913) 342-4426 (HOME)
(913) 296-7656 (CAPITOL OFFICE)

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
RANKING MINORITY MEMBER:
TRANSPORTATION
SPECIAL CLAIMS AGAINST THE STATE
MEMBER: FINANCIAL INSTITUTIONS
GOVERNMENTAL ORGANIZATION AND
ELECTIONS

FEBRUARY 24, 1997

REPRESENTATIVE AL LANE & MEMBERS OF HOUSE BUSINESS COMMERCE AND LABOR COMMITTEE

HOUSE BILL 2462 IS A VERY SIMPLE CONSUMER BILL. SIMPLY STATED, IT

CREATES A 3 DAY COOLING OFF PERIOD FOR A PERSON WHO IS LURED INTO A

PLACE OF BUSINESS AND SOLD A VACATION PACKAGE THEY COULD NOT

AFFORD.

REPRESENTATIVE HERMAN G. DILLON

Business, Commerce
+ Labor Committee
2/24/97
Attachment 1

State of Kansas
Office of the Attorney General
CONSUMER PROTECTION DIVISION
301 S.W. 10TH, LOWER LEVEL, TOPEKA 66612-1597
PHONE: (913) 296-3751 FAX: 291-3699 TTY: 291-3767

CARLA J. STOVALL
ATTORNEY GENERAL

CONSUMER HOTLINE
1-800-432-2310

Testimony of
C. Steven Rarrick, Deputy Attorney General
Consumer Protection Division
Office of Attorney General Carla J. Stovall
Before the House Business, Commerce & Labor Committee
RE: HB 2462
February 24, 1997

Chairperson Lane and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of Attorney General Carla J. Stovall to testify in support of House Bill 2462. My name is Steve Rarrick and I am the Deputy Attorney General for Consumer Protection.

Attorney General Stovall supports this bill because it addresses an area in which our office receives numerous consumer complaints. These consumers receive telephone calls or make calls to 800 numbers in response to mail solicitations from companies inviting them to visit a "showroom" or other place of business to view a presentation for consumer goods or services (e.g., travel clubs, campground memberships, and timeshare promotions). Consumers are lured to these businesses with promises of free gifts, then subjected to high pressure sales tactics. Consumers often promptly attempt to cancel these contracts when they realize the extent of the monetary commitment they have made, only to learn they have no right to cancel. When consumers file complaints with our office, we are all too often unable to assist them, absent any overt deceptive act.

While supportive of the concept, the Attorney General proposes some technical amendments to the bill to mirror existing statutory language and to reflect current telemarketing practices. Much of today's telemarketing is performed by large telemarketing companies with call centers throughout the United States. These companies make outbound calls marketing products or services on behalf of other companies. For example, we concluded an investigation last year against a firm based in Iowa which, with recent expansion, will operate 62 call centers in 10 states.

The technical amendments we propose are attached to my written testimony. We propose changing the word "telemarketer" to "supplier" at: page 2, lines 25, 27, 29, and 39; p. 3, lines 20, 22, 26-29, 32-33, 40, and 42. In addition, to utilize the language of the Kansas Consumer Protection Act, we suggest terminology changes on page 4, lines 19, 27 and 32, and a new subsection (6) at page 4, line 36.

Business, Commerce
& Labor Committee
2/24/97
Attachment 2

We believe this bill, with our proposed amendments, will provide a reasonable "cooling off" period for consumers subjected to high pressure sales tactics by these businesses. On behalf of Attorney General Stovall, I urge your favorable consideration of HB 2462. Thank you.

Session of 1997

HOUSE BILL No. 2462

By Representatives Dillon, Adkins, Alldritt, Burroughs, Dean, Flaharty, Garner, Gilbert, Grant, Kirk, Klein, Kuether, Larkin, E.Peterson, Phelps, Reardon, Ruff, Sawyer, Toelkes and Welshimer

2-14

AN ACT concerning consumer protection; relating to telemarketers; amending K.S.A. 50-672 and 50-673 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 50-672 is hereby amended to read as follows: 50-672. (a) *(1)* Any verbal agreement made by a consumer to purchase any goods or services from a telemarketer shall not be considered valid and legally binding unless the telemarketer receives from the consumer a signed confirmation that discloses in full the terms of the sale agreed upon.

~~(b)~~ *(2)* The confirmation shall include, but is not limited to, the following information:

~~(1)~~ *(A)* The name of the telemarketer;

~~(2)~~ *(B)* the address and telephone number at which personal or voice contact with an employee or agent of the telemarketer can be made during normal business hours;

~~(3)~~ *(C)* a list of all prices or fees being requested, including any handling, shipping, delivery, or other charges;

~~(4)~~ *(D)* the date of the transaction;

~~(5)~~ *(E)* a detailed description of the goods or services being sold;

~~(6)~~ *(F)* a duplicate copy with the complete information as presented in the original confirmation, to be retained by the consumer as proof of the terms of the agreement to purchase; and

~~(7)~~ *(G)* in a type size of a minimum of twelve points, in a space immediately preceding the space allotted for the consumer signature, the following statement:

"YOU ARE NOT OBLIGATED TO PAY ANY MONEY UNLESS YOU SIGN THIS CONFIRMATION AND RETURN IT TO THE SELLER."

~~(c)~~ *(3)* A telemarketer may not make or submit any charge to the consumer's credit card account until the telemarketer has received from the consumer an original copy of a confirmation, signed by the consumer,

2-3

2-3

that complies with this section. Any merchandise sent or services provided without such written confirmation shall be considered as unsolicited goods subject to the provisions of K.S.A. 50-617 and amendments thereto.

~~(d)~~ *(4)* No consumer shall be held liable for payment for any good or service provided by a telemarketer unless such telemarketer has first received the written consent of the consumer in the form of a confirmation as defined in this section.

~~(e)~~ *(5)* In the event that the consumer sends payment to the telemarketer in the form of a personal check, cash money, or any other form of payment other than credit card without having included a signed copy of such confirmation, the consumer shall have the right to choose at any time to cancel the sale by notifying the telemarketer in writing, provided the consumer returns to the telemarketer the goods sold in substantially the same condition as when they were received by the consumer. A telemarketer that has received such notice to cancel from a consumer shall then, within 10 business days of the receipt of such notice:

~~(1)~~ *(A)* Refund all payments made, including any down payment made under the agreement;

~~(2)~~ *(B)* return any goods or property traded in to the seller on account of or in contemplation of the agreement, in substantially the same condition as when received by the telemarketer; and

~~(3)~~ *(C)* take any action necessary or appropriate to terminate promptly any security interest created in connection with the agreement.

(b) (1) Any consumer who is contacted by a telemarketer, asked to go to the telemarketer's business establishment in a fixed permanent location to listen to an offer for the sale of any goods or services from a telemarketer and promised in return a free gift or vacation for listening to such offer shall have the right to cancel any written agreement signed at the telemarketer's business establishment in a fixed permanent location until midnight of the third business day after the day on which the consumer signs an agreement or offer to purchase which includes the disclosures required by this section.

(2) In connection with any written agreement made the disclosure shall include, but is not limited to the following information:

(A) A fully completed receipt or copy of any agreement pertaining to such sale at the time of its execution, which is in the same language, Spanish for example, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the telemarketer, and in immediate proximity to the space reserved in the contract for the signature of the consumer or on the front page of the receipt if an agreement is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form:

"YOU THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY

and/or supplier

~~the telemarketer's~~ a supplier's

~~telemarketer~~ supplier

~~the telemarketer's~~ a supplier's

~~telemarketer~~ supplier

2-4

2-4

TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT."

For purposes of the required notices under this section, the term "buyer" shall have the same meaning as the term "consumer."

(B) A completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the agreement or receipt and be easily detachable, and which shall contain in 10-point boldface type the following information and statements in the same language, Spanish for example, as that used in the contract:

NOTICE OF CANCELLATION

_____

(Enter date of transaction)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE TELEMARKETER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE TELEMARKETER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY PROPERTY DELIVERED TO YOU UNDER THIS AGREEMENT OR SALE; OR YOU MAY, IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE TELEMARKETER REGARDING THE RETURN SHIPMENT OF THE PROPERTY AT THE TELEMARKETER'S EXPENSE AND RISK.

IF YOU DO MAKE THE PROPERTY AVAILABLE TO THE TELEMARKETER, AND IF THE TELEMARKETER DOES NOT PICK SUCH PROPERTY UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE PROPERTY WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE PROPERTY AVAILABLE TO THE TELEMARKETER, OR IF YOU AGREE TO RETURN THE PROPERTY TO THE TELEMARKETER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM,

TO _____

(Name of TELEMARKETER)

AT _____

(Address of TELEMARKETER's Place of Business)

~~*TELEMARKETER*~~ *SUPPLIER*

~~*TELEMARKETER*~~ *SUPPLIER*

~~*TELEMARKETER*~~ *SUPPLIER*

~~*TELEMARKETER*~~ *SUPPLIER*

~~*TELEMARKETER*~~ *SUPPLIER*

~~*TELEMARKETER*~~ *SUPPLIER*

~~*TELEMARKETER*~~ *SUPPLIER*

~~*TELEMARKETER*~~ *SUPPLIER*

~~*TELEMARKETER'S*~~ *SUPPLIER'S*

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NOT LATER THAN MIDNIGHT OF

_____

(Date)

I HEREBY CANCEL THIS TRANSACTION.

_____

(Date) *(Buyer's Signature)*

(C) Copies of the "notice of cancellation" to the consumer, to complete both copies by entering the name of the supplier, the address of the supplier's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the consumer may give notice of cancellation.

(D) Any confession of judgment or any waiver of any of the rights to which the consumer is entitled under this section including specifically such consumer's right to cancel the sale in accordance with the provisions of this section.

(E) Inform each consumer orally, at the time such consumer signs the contract or purchases the property or services, of such consumer's right to cancel.

(3) It shall be unlawful for any telemarketer to fail or refuse to honor any valid notice of cancellation by a consumer and within 10 business days after the receipt of such notice, to: (A) Refund all payments made under the contract or sale; (B) return any property traded in, in substantially as good condition as when received by the supplier; (C) cancel and return any negotiable instrument executed by the consumer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

~~*It shall be unlawful for any telemarketer to*~~ *A supplier shall not*

(4) It shall be unlawful for any telemarketer to negotiate, transfer, sell or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the property or services were purchased.

~~*It shall be unlawful for any telemarketer to*~~ *A supplier shall not*

(5) It shall be unlawful for any telemarketer to, within 10 business days of receipt of the consumer's notice of cancellation, fail to notify the consumer whether the supplier intends to repossess or to abandon any shipped or delivered property.

~~*It shall be unlawful for any telemarketer to*~~ *A supplier shall*

~~*fail to*~~

(6) Violations of subsections (b)(1) through (b)(5) shall be deemed deceptive acts and practices as defined by K.S.A. 50-626, and amendments thereto.

Sec. 2. K.S.A. 50-673 is hereby amended to read as follows: 50-673. *(a)* The provisions of K.S.A. 50-671 through 50-674 and amendments thereto do not apply to a transaction:

~~(a) That has been made in accordance with prior negotiations in the course of a visit by the consumer to a merchant operating a business establishment that has a fixed permanent location and where consumer goods or services are displayed or offered for sale on a continuing basis;~~

~~(b)~~ *(1)* In which the business establishment making the solicitation

2-4

2-6

has made a prior sale to the consumer, is establishing a business to business relationship or has a clear, preexisting business relationship with the consumer, provided that relationship resulted in the consumer becoming aware of the full name, business address and phone number of the establishment;

~~(c) in which the consumer purchases goods or services pursuant to an examination of a television, radio, or print advertisement or a sample, brochure, catalogue, or other mailing material of the telemarketer that contains:~~

~~(1) The name, address, and telephone number of the telemarketer;~~

~~(2) a full description of the goods or services being sold along with a list of all prices or fees being requested, including any handling, shipping, or delivery charges; and~~

~~(3) any limitations or restrictions that apply to the offer;~~ or

~~(d)~~ *(2) except as provided in subsection (b) of K.S.A. 50-672, and amendments thereto,* in which the consumer may obtain a full refund for the return of undamaged and unused goods or a cancellation of services notice to the seller within seven days after receipt by the consumer, and the seller will process the refund within 30 days after receipt of the returned merchandise by the consumer or the refund for any services not performed or a pro rata refund for any services not yet performed for the consumer. The return and refund privilege shall be disclosed to the consumer orally by telephone or in writing with advertising, promotional material or with delivery of the product or service. The words "satisfaction guaranteed," "free inspection," "no risk guarantee" or similar words and phrases meet the requirements of this act.

~~(e)~~ *(b)* Any telemarketer who, pursuant to this section, is exempted from K.S.A. 50-671 through 50-674 and amendments thereto, impliedly warrants the goods or property to be satisfactory to the consumer to the extent that the consumer shall have the right to choose at any time within the seven-day refund period, to cancel the sale by notifying the telemarketer in writing, provided the consumer returns to the telemarketer the goods sold in substantially the same condition as when they were received by the consumer. A telemarketer that has received such notice to cancel from a consumer shall then, within 30 business days of the receipt of such notice:

(1) Refund all payments made, including any down payment made under the agreement;

(2) return any goods or property traded in to the seller on account of or in contemplation of the agreement, in substantially the same condition as when received by the telemarketer; and

(3) take any action necessary or appropriate to terminate promptly any security interest created in connection with the agreement.

2-7

2-7

Sec. 3. K.S.A. 50-672 and 50-673 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

2-8

2-8

Sandi Scott
R.R. 4
Yates Center, Ks. 66783
316-625-3271

February 24, 1997

I'm here to ask for your support in the passing of House Bill No. 2292. This bill would exclude physicians, physician's assistants, and other health care providers from the "exclusive remedy" protection.

My husband, Gary, died July 13, 1992, at the age of 42. He was working at the Wolf Creek Nuclear Power Plant when he became ill at three o'clock in the afternoon. His co-worker entered Gary's office and found Gary lying across his desk. Mike, his co-worker, called for the Physicians Assistances to come to the scene.

Two P.A.'s and at least one EMT found Gary lying across his desk, green in color, sweating profusely, clammy to the touch, complaining of indigestion and a tightness in his throat. His vitals were taken and recorded as ***poor***. He was then taken in a chair stretcher to the infirmary.

After arriving at the infirmary, his vitals were again taken and recorded as ***improving***. He complained of back pain and asked if someone would call me to come after him. I was called at 3:20 p.m. and told that "Gee" had gotten a little over-heated and wanted me to come after him. I said I would be there as soon as possible.

His vitals were again taken and also an EKG was given. The EKG had the word ***abnormal*** printed at the top of it. They continued to let him lie there until he turned purple and coded at approximately 4:30. ***Then*** they called the ambulance from Coffey County Hospital to transport him there where he was pronounced dead at 5:20. p.m. I never got to see Gary, I did not make it in time.

I am a state licensed EMT and when I read the reports I was sickened by the negligent actions of the licensed P.A.'s. Anyone that has ever taken training knows; heart burn/indigestion, green in color, sweating profusely, poor vitals, tightness in the throat, back pain, and denial are all significant signs of a heart attack.

Business, Commerce & Labor Committee
2/24/97
Attachment 3

After being in litigation for over four years, I find there is a law in our state statutes that allows these medical providers to be cloaked with protection and immunity under the "exclusive remedy" provisions of the workers compensation statute. Notwithstanding that the Kansas law requires P.A.'s to maintain their own malpractice insurance, the workers compensation act allows them to act negligently without liability because they are employees of Wolf Creek Nuclear Power Plant. I believe this loophole is outrageous and provides an open door for medical negligence in this type of setting. During one of the court hearings it was brought out that if Gary had been a visitor at Wolf Creek, not an employee and the same situation took place, there would not have been any question about whether or not it was negligence. It was ***his*** misfortune that he was an employee.

Also within a month after Gary's death, Wolf Creek issued a statement saying if anything happened like that again, they were to transport to the nearest medical facility within fifteen minutes.

I need your help in changing this law, or the part of it that does not hold a ***licensed*** medical provider responsible for his actions. There are many of us who have family and friends working in an environment this type of situation exists. We need this changed in order to protect our loved ones.

I cannot express to you enough how frustrating and upsetting this situation has been for my sons and myself. First, to try and explain to them why their dad was not taken to the Coffey County Hospital at the first sign of his heart attack and given life saving drugs to change his chances for survival and secondly, why these health care professionals are not being held accountable for their blatantly negligent actions.

I sincerely hope you seriously consider House Bill No. 2292. I would not want another family to have to go through this plight.

Thank you.

HOUSE BILL NO. 2292

I am Randall E. Fisher, appearing here today on behalf of the Kansas Trial Lawyers. I also appear on behalf of Sandra Scott and her family.

House Bill No. 2292 is intended to reverse a recent decision of the Kansas Court of Appeals entitled *Scott v. Wolf Creek*, a copy of which is attached hereto. In that case, the Kansas Court of Appeals held that a company-employed health care provider was immune from a civil action for medical malpractice committed on a fellow employee even though the health care provider is required to carry medical malpractice insurance as a licensed health care provider.

It makes no sense to immunize a health care provider for his own negligence under the workers compensation act when he injures a fellow worker by committing medical malpractice, an act which under Kansas law is not considered one which arises out of and in the course and scope of his employment. Further, in the *Scott* case, the condition from which the medical malpractice arose did not itself even arise out of and in the course and scope of Mr. Scott's employment.

Removing the immunity conferred on company-employed health care providers will have no impact on those health care providers as they are already required to carry medical malpractice insurance. The irony for company-employed health care providers is that no claims will ever be made against them when they commit medical malpractice on the company's employees because of the *Scott* decision.

Business, Commerce
& Labor Committee
2/24/97
Attachment 4

Sandra L. SCOTT and John Wayne Scott, Individually; Sandra L. Scott, Natural Mother and Next Friend of Thomas Richard Scott, the Heirs-at-Law of Gary R. Scott, Deceased; and Sandra L. Scott, Administratrix of the Estate of Gary R. Scott, Deceased, Appellants,

v.

WOLF CREEK NUCLEAR OPERATING CORP., Stephen E. Hoch, P.A., Keith W. Clements, P.A., and Nelson P. White, M.D., Appellees.

No. 74310.

Court of Appeals of Kansas.

Dec. 13, 1996.

Estate and heirs of deceased employee brought medical malpractice action against employer and coemployees, claiming that employee lost chance of surviving heart attack he had suffered at work due to negligent treatment he received from coemployees. The Woodson District Court, C. Fred Lorentz, J., granted summary judgment in favor of employer and coemployees. Estate and heirs appealed. The Court of Appeals, Elliott, P.J., held that: (1) heart amendment to Workers' Compensation Act did not bar workers' compensation claim based on allegation that employee suffered loss of chance of survival of heart attack due to employer's or coemployee's negligence; (2) employee's lost chance of survival resulting from coemployees' alleged negligent treatment arose out of and in course of employee's employment; and (3) dual capacity doctrine did not apply to confer tort liability upon employer and coemployees.

Affirmed.

[1] WORKERS' COMPENSATION⊜ 2084
413k2084
Under exclusive remedy provision of Workers' Compensation Act, if employee can recover workers' compensation for injury, he or she is barred from bringing negligence suit for damages against employer or coemployee. K.S.A. 44-501(b).

[2] WORKERS' COMPENSATION⊜ 604
413k604
In order to recover workers' compensation, claimant must show that he or she suffered personal injury by accident arising out of and in course of employment. K.S.A. 44-501(a).

[3] WORKERS' COMPENSATION⊜ 571
413k571
Heart amendment to Workers' Compensation Act, under which coverage is denied for coronary or coronary artery disease unless caused by unusual exertion at work, does not bar workers' compensation claim based on allegation that employee suffered loss of chance of surviving heart attack at workplace due to employer's or coemployee's negligence. K.S.A. 44-501(e).

[4] WORKERS' COMPENSATION⊜ 2084
413k2084
Employee's lost chance of survival resulting from alleged negligent treatment he received from coemployees after suffering heart attack at workplace arose out of and in course of his employment, and therefore exclusive remedy provision of Workers' Compensation Act barred medical malpractice action brought against employer and coemployees by employee's estate and heirs, though employee's heart attack was not causally connected to his exertion at work; job of coemployees, as physician's assistants, was to provide medical treatment to employees for both occupational and nonoccupational diseases and injuries. K.S.A. 44-501(a, b).

[5] WORKERS' COMPENSATION⊜ 957
413k957
Where employee is negligently treated for non-work-related injury by employer or coemployee whose job is to provide medical treatment to employees, there is sufficient causal connection to make any aggravation of injury or additional injury arising from that treatment compensable under Workers' Compensation Act. K.S.A. 44-501(a).

[6] WORKERS' COMPENSATION⊜ 610
413k610
For injury to "arise out of" employment for workers' compensation purposes, there must be some causal connection between injury and employment. K.S.A. 44- 501(a).
See publication Words and Phrases for other judicial constructions and definitions.

[7] WORKERS' COMPENSATION⊜ 610
413k610
Injury arises out of employment, for workers' compensation purposes, where it arises out of nature, conditions and incidents of employment and does not arise from hazard to which worker would have been equally exposed apart from employment.

[8] WORKERS' COMPENSATION⊜ 2162
413k2162
Dual capacity doctrine, under which employer who is generally immune under Workers' Compensation Act from tort liability to employee injured in work-related accident may become liable to employee if employer occupies second capacity that confers independent obligations, does not apply to confer tort liability upon employer or coemployee who negligently treats employee for non- work-related injury. K.S.A. 44-501(b).

[9] ESTOPPEL⊜ 83(1)
156k83(1)
In medical malpractice action brought against employer and coemployees by estate and heir of deceased employee, employer and coemployees were not estopped from asserting exclusive remedy provision of Workers' Compensation Act as defense by virtue of employer's previous representation to employee's widow that workers' compensation benefits were not available for employee's death. K.S.A. 44-501(b).

***110** Syllabus by the Court

1. Under the exclusive remedy provision of the Workers Compensation Act, if an employee can recover workers compensation for an injury, he or she is barred from bringing a negligence suit for damages against an employer or coemployee. K.S.A. 44-501(b).

2. To recover workers compensation, an employee must show that he or she suffered personal injury by accident arising out of and in the course of employment. K.S.A. 44-501(a).

3. The heart amendment, K.S.A. 44-501(e), does not bar an employee's claim that he or she suffered a loss of chance of surviving a heart attack due to an employer's or coemployee's negligence.

4. For an employee's injury to arise "out of" employment, there must be some causal connection between the employee's injury and the employment. An injury arises out of employment where it does not arise from a hazard to which the employee would have been equally exposed apart from the employment.

5. Where an employee is negligently treated for a nonwork-related injury by an employer or coemployee whose job is to provide medical treatment to employees, there is a sufficient causal connection to make any aggravation of the injury or additional injury arising from that treatment compensable under the Workers Compensation Act.

6. The dual capacity doctrine does not apply to confer tort liability upon an employer or coemployee who negligently treats an employee for a nonwork-related injury.

Randall E. Fisher, of Law Offices of Randall E. Fisher, and Christopher P. Christian and Derek S. Casey, of Hutton & Hutton, Wichita, for appellants.

Richard C. Hite and F. James Robinson, Jr., of Kahrs, Nelson, Fanning, Hite & Kellogg, Wichita, for appellees.

Before ELLIOTT, P.J., and PIERRON, J., and MARLA J. LUCKERT, District Judge, assigned.

ELLIOTT, Presiding Judge:

At issue in this case is whether the exclusive remedy provision of the Workers Compensation Act bars a civil suit against an employer and coemployees for the negligent treatment of a heart attack, even though the heart attack itself is not compensable under workers compensation. The district court found that workers compensation was the exclusive remedy, and we affirm.

Gary Scott suffered a heart attack while working at Wolf Creek Nuclear Power Plant (Wolf Creek) and died a short time later. Before his death, Scott was treated by Stephen Hoch and Keith Clements, physician's assistants who were employed by Wolf Creek to provide first aid and other immediate care to Wolf Creek employees for both occupational and nonoccupational illnesses and injuries arising during the workday.

***111** Scott's estate and heirs filed a medical

malpractice action against Wolf Creek, Hoch, Clements, and their supervising physician, Nelson White, M.D., alleging that Scott lost a chance of surviving the heart attack because of the negligent treatment he received from Hoch and Clements. White was later dismissed from the suit without prejudice by stipulation of the parties. The district court granted summary judgment in favor of the remaining defendants, ruling that plaintiffs' suit was barred by the exclusive remedy provision of the Workers Compensation Act.

On appeal, plaintiffs argue that the district court erred in granting summary judgment (1) because the original injury was noncompensable under K.S.A. 44-501(e), commonly referred to as the heart amendment; (2) because, under a dual capacity theory, defendants were not acting in their capacities as employer and coemployees but were acting as health care providers; therefore, they were not immune from tort liability; and (3) because defendants were estopped from claiming that workers compensation was plaintiffs' exclusive remedy when Wolf Creek previously told Scott's widow that she was not entitled to workers compensation benefits for her husband's death.

[1][2] Under the exclusive remedy provision of the Workers Compensation Act, if an employee can recover workers compensation for an injury, he or she is barred from bringing a negligence suit for damages against an employer or coemployee. K.S.A. 44-501(b). Thus, the pivotal question to be resolved is whether plaintiffs' claim is compensable under the Act. In order to recover workers compensation, a claimant must show that he or she suffered "personal injury by accident arising out of and in the course of employment." K.S.A. 44-501(a). The heart amendment, however, specifically precludes coverage for "coronary or coronary artery disease" unless caused by exertion which was "more than the employee's usual work in the course of the employee's regular employment." K.S.A. 44-501(e).

Here, the parties stipulated that Scott's heart attack was not causally connected to his exertion at work. Plaintiffs argue that their claim is noncompensable under the heart amendment; therefore, the exclusive remedy provision does not apply. Defendants respond that the heart amendment does not apply because plaintiffs' claim involved the loss of chance of survival, not the heart attack itself.

[3] We agree with defendants that there is an important distinction between a claim based upon a heart attack and a claim based upon a loss of chance of surviving a heart attack due to negligent treatment. Had plaintiffs sought compensation for the heart attack itself, the heart amendment would likely have barred their claim. Instead, plaintiffs' petition claimed that defendants' negligence caused or contributed to Scott's death by reducing his chance of surviving the heart attack. This type of claim is not barred by the heart amendment.

[4][5][6][7] The next issue, then, is whether the negligent treatment of Scott's heart attack arose out of and in the course of his employment with Wolf Creek. To arise "out of" employment, there must be some causal connection between the injury and the employment. An injury arises out of employment where it arises out of the nature, conditions, and incidents of employment and does not arise from a hazard to which the worker would have been equally exposed apart from the employment. Martin v. U.S.D. No. 233, 5 Kan.App.2d 298, 299, 615 P.2d 168 (1980).

Defendants cite two recent decisions of this court in support of their argument that Scott's loss of chance of survival arose out of his employment. In Bennett v. Wichita Fence Co., 16 Kan.App.2d 458, 824 P.2d 1001, rev. denied 250 Kan. 804 (1992), the claimant was injured when he suffered an epileptic seizure while driving a company vehicle to make a delivery and ran into a tree. We held that the conditions of the claimant's employment placed him in a position of increased risk which created the necessary causal connection between the injury and the employment; therefore, the injury arose out of claimant's employment and was covered by workers compensation. 16 Kan.App.2d at 460, 824 P.2d 1001.

We cited Bennett in deciding Baggett v. B & G Construction, 21 Kan.App.2d 347, 900 ***112** P.2d 857 (1995). Baggett involved a claimant who was injured when he was assaulted by a coemployee and fell into an open hole on the job site. The Baggett court noted that in Bennett, we looked at the injury and whether it was exacerbated by employment conditions. The Baggett court held that because the concurrence of the assault and the employment

hazard caused claimant's injury, the injury was compensable. 21 Kan.App.2d at 350, 900 P.2d 857. In discussing the causal connection between the injury and the employment, we stated:

"[T]his assault was clearly not precipitated by a work-related matter. However, like Bennett, Baggett's injury was partly the result of work-related circumstances. Bennett may not have crashed into a tree during an epileptic seizure had he not been working. Likewise, Baggett would not have sustained a serious head injury and broken clavicle during a pushing match had he not been on the job site, which contained an open hole." 21 Kan.App.2d at 350, 900 P.2d 857.

We hold that there is a causal connection between Scott's employment at Wolf Creek and his receiving negligent medical treatment. Even though the treatment was for a nonwork-related injury, Scott received treatment because he was an employee of Wolf Creek. The physician's assistants who treated Scott were employees of Wolf Creek whose purpose was to provide medical treatment to Wolf Creek employees for both occupational and nonoccupational diseases and injuries. In other words, Scott would not have been equally exposed to the risk of negligent medical treatment by Wolf Creek physician's assistants apart from his employment at Wolf Creek. His injury, the loss of chance of survival, might not have occurred had he not been at work and treated by Wolf Creek physician's assistants.

Our decision is also supported by Professor Larson's workers compensation treatise. He states:

"[W]hen the employer's participation in the episode goes beyond mere examination and extends to some kind of active conduct or attempted treatment by the employer or his employees aggravating the noncompensable condition, this has usually been held to be sufficient to endow the matter with compensable character and hence bar a damage suit." 2A Larson's Workmen's Compensation Law § 68.35 (1996).

We are not persuaded by plaintiffs' analysis of Wright v. United States, 717 F.2d 254 (6th Cir.1983), and other federal cases. Wright involved a secretary at a hospital who suffered a ruptured tubal pregnancy while performing her duties. Although she was not entitled to treatment, the hospital undertook to treat her. The Sixth Circuit Court of Appeals ruled that Wright's later civil suit against the hospital for negligent treatment was not barred because there was no causal connection between her tubal pregnancy and her employment as a secretary; thus, her claim was not compensable under the Federal Employees Compensation Act. 717 F.2d at 258-59.

Plaintiffs contend that the dispositive factor in Wright, and cases like it, is that claimant's original injury was not work related. We find the distinguishing fact to be that Wright's employer was a health care provider who undertook to treat her on the same terms as any other private patient. Again, Professor Larson's treatise supports this view. He explains that where an employer undertakes to treat an employee as a private patient and "the case involves a purely private relation with no employment involvement, suit is usually not barred." The result may be different, however, where "it is the employer's policy to provide first aid or other care for even nonoccupational illnesses appearing during the workday." 2A Larson, § 72.88.

[8] Plaintiffs' next argument is that, under the dual capacity doctrine, an employer or coemployee who provides medical treatment to an employee should not be immune from tort liability because that employer or coemployee is acting in a second capacity as a health care provider.

Kansas first recognized the dual capacity doctrine in Kimzey v. Interpace Corp., 10 Kan.App.2d 165, 167, 694 P.2d 907, rev. denied 237 Kan. 887 (1985):

*113 "According to the dual capacity doctrine, an employer who is generally immune from tort liability to an employee injured in a work-related accident may become liable to his employee as a third-party tortfeasor if he occupies, in addition to his capacity as an employer, a second capacity that confers upon him obligations independent of those imposed upon him as an employer. It is in this second capacity that liability to an employee may be imposed."

In Kimzey, an employee was injured while operating a pyramid roll machine in the course of his employment with Interpace. The machine was designed and manufactured by Lock Joint. Lock Joint later dissolved and eventually merged into

Interpace. As part of the merger agreement, Interpace agreed to assume all of Lock Joint's obligations and liabilities. The injured employee brought a products liability suit against Interpace, alleging that Interpace, as corporate successor to Lock Joint, was liable for product defects and negligence. 10 Kan.App.2d at 165-66, 694 P.2d 907.

The trial court granted summary judgment in favor of Interpace on the ground that plaintiff's exclusive remedy was workers compensation. This court reversed. The Kimzey court discussed the dual capacity doctrine and found that it applied to the facts of that case. The court noted:

"The doctrine should not be used for the purpose of simply evading the exclusivity provision of the Workmen's Compensation Act. When properly applied, it will be limited to those exceptional situations where the employer- employee relationship is not involved because the employer is acting as a second persona unrelated to his status as an employer, that confers upon him obligations independent of those imposed upon him as an employer." 10 Kan.App.2d at 170, 694 P.2d 907.

Utilizing the dual capacity doctrine, the court held that Interpace had stepped into the shoes of Lock Joint with respect to the liability question; therefore, the suit was not barred by the exclusive remedy provision of the Workers Compensation Act. 10 Kan.App.2d at 170, 694 P.2d 907.

Kansas courts have not yet extended the dual capacity doctrine to factual situations other than the one described in Kimzey. Plaintiffs argue that the doctrine should be applied to the instant factual situation.

There appears to be a split of authority on the issue of whether the dual capacity doctrine should apply where a company doctor treats a fellow employee. The majority of states which have considered the issue have concluded that a malpractice action against a company doctor is barred by the coemployee immunity provisions of workers compensation statutes. 73 A.L.R.4th 115. Again, Professor Larson agrees with the majority view, as do we. Larson explains:

"The fallacy ... is simply that the company doctor does not have two capacities. He has only one: company doctor. That is the entire extent of his relation to his coemployees. All he does, all day long, is perform in this single capacity in relation to his coemployees. By contrast, the employer-physician has the entire array of employer-employee duties and obligations, which are utterly unrelated to his medical activities, and which quantitatively are a thousand times as great." 2A Larson, § 72.61(b).

We decline to extend the dual capacity doctrine beyond the factual situation described in Kimzey.

[9] Plaintiffs' final argument on appeal is that defendants were estopped from asserting the exclusive remedy provision of the Workers Compensation Act because Wolf Creek previously told Scott's widow that workers compensation benefits were not available for her husband's death. The district court ruled that estoppel would be available to plaintiffs in workers compensation proceedings and the issue should be resolved in that forum. We agree. Furthermore, any determination by the workers compensation hearing officer and appeals board regarding plaintiffs' estoppel argument will be subject to appeal.

Affirmed.

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LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

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HB 2292

February 24, 1997

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Committee on Business, Commerce and Labor

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Mr. Chairman and members of the Committee:

My name is Terry Leatherman. I am the Executive Director of the Kansas Industrial Council, a division of the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to express KCCI's opposition to passage of HB 2292.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 47% of KCCI's members having less than 25 employees, and 77% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The bedrock of the Kansas Workers Compensation Act is the theory that the system makes care and compensation available to an injured worker without questions of how employee negligence might have contributed to an accident. In exchange for this system, the employer is assured workers compensation is the only liability they will face regarding a work place injury. Because HB 2292

Business, Commerce & Labor Comm.
2/24/97
Attachment 5

uld disturb this core principle to workers compensation, the Kansas Chamber would urge the legislation be rejected.

Besides this fundamental opposition, KCCI would have two more observations on the effect HB 2292 would have, if approved. First, the legislation would force employers to seriously consider elimination of any programs in their business to provide care for workers, due to the liability exposure. Second, slicing away this element of the exclusive remedy provision would undoubtedly lead to other legislation in this area. If employer medical care does not deserve exclusive remedy protection, what would be different about exposing employers to other legal challenges.

Mr. Chairman, thank you for the opportunity for this brief explanation of why KCCI opposes HB 2292. I would be happy to respond to any questions.

5-2