

Approved: March 5, 1997
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Vice Chairperson Keith Schraad at 10:10 a.m. on February 18, 1997 in Room

514-S of the Capitol.

All members were present except: Senator Steffes (excused)

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Mary Blair, Committee Secretary

Conferees appearing before the committee: Kelly Kultala, City of Overland Park
George Pring, Prof. of Law, Univ. of Denver
Allen Shelton, Attorney, Oberlin, Ks.
Senator Stan Clark

Others attending: See attached list

SB 259 - Admissibility of reports of forensic examiners at preliminary hearing

Conferee Kultala appeared as a proponent of **SB 259** stating that this bill would authorize the Overland Park Police Department (OPPD) to introduce written forensic expert reports at preliminary examinations eliminating the need for lab technicians to appear in person at these hearings. Her written testimony states the history and function of the OPPD crime lab as well as the credentials of the officers in charge. (attachment 1) Senator Bond made a motion to pass the bill out favorably and place it on the consent calendar, Senator Goodwin seconded. Motion carried.

SB 287 - Expedited determination of strategic lawsuits against public participation actions; assessment of costs, fees and damages

Conferee Pring spoke in support of **SB 287** which he stated was a balanced and much-needed law that will protect all Kansas citizens and government processes from the modern litigation abuse called "SLAPPS" or "Strategic Lawsuits Against Public Participation" in government. He testified on the growing use of outrageous lawsuits to intimidate and silence citizens, businesses and organizations and keep them from communicating their views to government authorities and officials. He cited a 12+ year study on this issue the findings of which are published in a new book, SLAPPS: Getting Sued for Speaking Out. He also commented on the key provisions of **SB 287** (attachment 2)

Conferee Shelton spoke as a proponent of **SB 287** which he calls the "ANTI-SLAPP Act". He discussed his personal views and experiences with regard to a current SLAPP now pending in the United States District Court for the District of Kansas. The SLAPP involves Classic Communications, Inc., et. al., against nine (9) small NW Kansas cities, Rural Telephone Service Co., Inc, et. al. and Kenneth Clark. He stated that in his view the bill: will raise the consciousness of the courts about SLAPPs and help them recognize these types of cases and the danger they pose; facilitate the disposition of SLAPPs quickly and economically; and reduce or eliminate the filing of SLAPPs by facilitating "SLAPP-back" suits by citizens wronged by SLAPPs. (attachment 3)

Following discussion between conferees and committee members, Conferee Clark (no relationship to above mentioned Kenneth Clark) testified before committee in favor of **SB 287**. He testified about a constituent in his district who was a victim of SLAPPs. He stated that a SLAPP evolves in three (3) stages and described them. He then urged passage of the bill. (attachment 4)

No action was taken on **SB 287** at this time.

The Vice Chair adjourned the meeting at 11:03 a.m. The next meeting will be Thursday, February 20, 1997 .

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/18/97

NAME	REPRESENTING
Whitney Jamron	KS Bar Assn.
Ron Bacon	mid - Mr Lumbkiner
Ruth Clark	
Stan Clark	Senate
Allen Shelton	Attorney
George King	Professor of Law - Denver University
Kathryn Taylor	KBA
Madha Jean Smith	KMHA
Gail Bright	Attorney General
Paul Pratt	
Harriet Lange	Ks Assn B' Casters
Wood Plunkett	
Janis Clark	KCOAA
Paul Shelley	OJA
JAN PRISBERGER	BRAD SMOOT
John D. Pincus	Rural Telephone Co., Inc.
Ron Smith	Ks Bar Assn



City Hall • 8500 Santa Fe Drive
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TESTIMONY
SENATE JUDICIARY COMMITTEE
FEBRUARY 17, 1997
SEN. MIKE HARRIS - CHAIRMAN
RE: SB 259

The City of Overland Park would like to be added to the list of agencies authorized to introduce written forensic expert reports at preliminary examinations. This would eliminate the need for lab technicians to appear in person at these hearings.

The Overland Park Police Department (OPPD) has had an established, full-time, crime lab for over twenty years.

OPPD maintains on-site hard copy fingerprint data bases with excess of ten print cards. They handle all their own latent print and known ten print fingerprint identifications with two established full-time city employees qualified as fingerprint experts, Officer Gary Page and Detective Robert Leever. OPPD is an AFIS user, operating a satellite system in association with Kansas City, Missouri and Kansas City, Kansas.

Officer Page and Detective Leever are, both, court certified experts with the District Court of Johnson County, Kansas.

They have both received the "Fingerprint Classification" training with the FBI, the "Advanced Latent Fingerprint Techniques" training with the FBI and the "Advanced Palm Print Identification" training with the Mississippi State Crime Lab.

They are also in good standing with the International Association for Identification and the Kansas Division of the International Association for Identification.

Thank you for your consideration and ask for your support of SB 259.

Kelly Kultala
Lobbyist
City of Overland Park

Senate Judiciary
Attachment 1
2-18-97



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Before the Senate Judiciary Committee
Kansas Legislature

Testimony of

GEORGE W. PRING
Professor of Law
and Co-Director, Political Litigation Project / SLAPP Study
University of Denver College of Law

on

SENATE BILL 287

("The Citizen Participation in Government Act of 1997")

February 18, 1997

Thank you for the opportunity to speak in support of Senate Bill 287 - a balanced and much-needed law that will protect all Kansas citizens and government processes from the modern litigation abuse called "SLAPPs." SLAPPs stands for "Strategic Lawsuits Against Public Participation" in government, the growing use in recent years of outrageous lawsuits to intimidate and silence citizens, businesses, and organizations and keep them from communicating their views to you - their government authorities and officials.

At the University of Denver, we have been studying SLAPPs for over a dozen years, with sponsorship from the National Science Foundation, among others. We have examined hundreds of cases and interviewed nearly a thousand participants and published our findings in a new book, **Pring & Canan, SLAPPs: Getting Sued for Speaking Out (Temple University Press 1996)**. We found citizens in every state are being sued simply for:

*Senate Judiciary
attachment 2
2-18-97*

- ▶ collecting signatures on a petition
- ▶ writing a letter to the President of the United States about an appointment
- ▶ testifying before a legislature, just like this
- ▶ reporting violations of law to the police, health authorities, civil rights, sexual harassment, consumer agencies, and the like
- ▶ speaking up at a public zoning meeting
- ▶ lobbying for local, state, or federal legislation
- ▶ campaigning for a ballot issue, or
- ▶ just showing up at a public meeting and signing the attendance sheet.

The University of Denver study focuses on lawsuits where people are sued because of their communications to government. This is the most basic civil right in our democracy - the right to petition government for a redress of grievances, protected by the "Petition Clause" of the First Amendment and Section 3 of Kansas' Bill of Rights - the right of every citizen to be involved in, participate in, speak out to, and contribute to their governments. This is the only way to keep government "of the people, by the people, and for the people."

We conservatively estimate that thousands of SLAPPs have been filed in the last two decades, tens of thousands of Americans have been SLAPPED, and countless more have been "chilled" into silence by the threat of SLAPPs. We found that the legal system is not effective in controlling SLAPPs. We found SLAPPs hit the entire spectrum - young and old, Republicans and Democrats, liberals and conservatives, do-gooders and businesses, political novices and pros. We found SLAPPs almost never win in court - the majority are eventually dismissed - but they often win in the real world, devastating citizens and their families, destroying groups, cutting off government officials from their constituents, and threatening the future of democracy in our country.

Kansas is not immune. Less than three weeks ago, your federal court dismissed a "classic" SLAPP. Western Kansas citizens, businesses, towns, and government officials who publicly opposed and lobbied local governments against new telephone and cable licenses were sued in April by a telephone/cable conglomerate for money damages and a gag order. U.S. District Court Judge Saffels had this to say: "such conduct is precisely the type of petitioning activity...which the [constitution] was designed to protect." Classic Communications, Inc. v. Rural Telephone Service Co., Case No. 96-2166-DDS, Memorandum and Order, p. 8 (Jan. 30, 1997). Ask lawyers, watch the headlines, put a student at one of your fine Kansas law schools on the Westlaw computer, and I guarantee you will find more Kansas SLAPPs - more than you will want to find in a state that cherishes popular democracy.

We highly recommend adoption of "anti-SLAPP laws," like S.B. 287, as the very best cure for the SLAPP problem and devote Chapter 10 of the book to a detailed look at them. Chapter 10 includes a "model" act, from which S.B. 287 is drawn, and the

model has been carefully drafted given 10 years of experience with these laws and extensively reviewed by experts - lawyers, legislators, constitutional scholars, litigation experts, and others. At least 10 other states already have versions on the books that are working well - California, Delaware, Georgia, Massachusetts, Minnesota, Nebraska, Nevada, New York, Rhode Island, and Washington.

Following are comments on the key provisions of S.B. 287 (all of which are supported by the research and findings in our book SLAPPs: Getting Sued for Speaking Out):

Section 1 - Title: The Act can have any title, but this variation on the Minnesota and New York acts says it all.

Section 2(a) - Findings: Spelling out the legislative intent, need, and reasons for the law is not an absolute requirement in Kansas and many states, but California, New York, and other states have used them to advantage, chiefly to enhance public understanding and guide court interpretation of the law:

- (1) Citizen participation in government is an inalienable right and is essential to the survival of democracy;
- (2) citizen input is essential for good government decisionmaking, for the protection of public health, safety, and welfare, for effective law enforcement, for government programs to work efficiently, for the government to have credibility with and the trust of its citizens, and ultimately for the survival of America's republican form of democracy;
- (3) SLAPPs are very definitely happening;
- (4) they may typically be dismissed but not without severe impacts;
- (5) they have increased significantly since 1970;
- (6) they abuse the judicial process and eliminating their chill would be a major contribution to lawsuit reform;
- (7) our NSF national survey proved scientifically that SLAPPs significantly diminish public participation in government, in public issues, and in volunteer service (see Appendix to SLAPPs: Getting Sued for Speaking Out);
- (8) court protection has not been uniform or consistent; and
- (9) while there will always be citizen communications to government that are incorrect, unwise, malicious, or bad faith, the U.S. Supreme Court cases say it is necessary and appropriate to protect even these, if directed toward government action, in order to fully protect good faith petitioning, in effect saying, let government do its job and separate the good from the bad, rather than have courts act as censors.

Section 2(b) - Purposes: Clearly laying out the intended purposes or goals of the law is not required, but has the same advantages:

- (1) The law is designed to protect and to encourage citizen involvement in government;
- (2) it will strike a necessary balance between people's unfettered power to file lawsuits and people's right to be heard by their governments;
- (3) it will support and continue representative government in Kansas;
- (4) it will set up a process for speedy adjudication of SLAPPs; and
- (5) it will provide clearcut financial relief and remedies for victims of SLAPPs.

Section 3 - The Protection: This is the "heart" of the act. It describes the immunity or protection from civil lawsuits people will have if they are communicating their views to government. On the other hand, it makes clear that there is no protection unless they are seeking actual government or electoral action. This language is based directly on the U.S. Supreme Court's Noerr-Pennington petitioner-protection cases, particularly City of Columbia v. Omni Outdoor Advertising Inc., 499 U.S. 365 (1991). The Minnesota law uses similar language.

Section 4 - The Trigger: The protection process is started by the victims' filing of a motion to dismiss invoking the act. New York, California, Minnesota, and others use this approach.

Section 5 - The Process: These are the all-important procedural safeguards. or rules for courts to follow in dealing with a SLAPP, drawing on the Minnesota, New York, and California laws. When the motion is filed, this section provides:

- (a) Summary (expedited) decision or appeal - critically important to stop the chill;
- (b) suspension of discovery - to stop that further harassment of victims;
- (c) putting the burden of proof squarely on the filer of the lawsuit - where it should be - they filed the lawsuit and they should have to justify its legitimacy (why the immunity should not apply to political speech);
- (d) the judge's decision is to be made on the papers filed - a trial-type hearing is just another way to extend the chill and expense;
- (e) evidence of no immunity must be clear and convincing to allow the lawsuit to continue - an important safeguard, since it is so easy for courts to let lawsuits slide and continue festering on;
- (f) intervention by the Attorney General or the government body involved is allowed - government should be permitted to defend its interests in keeping citizen communication open;
- (g) attorney fees and other actual litigation costs for the victims and sanctions the filers, including their attorneys - this is essential if you want to deter future SLAPPs; and
- (h) a specific countersuit (or "SLAPPback") for victims - while Kansas law already provides a malicious prosecution action, it is good deterrence to make it clear that a SLAPP qualifies as malicious prosecution - to warn the bar and guide the courts.

Section 6 - Definitions: These definitions of key words are those Minnesota and other states use to avoid misinterpretation.

Section 7 - General Provisions: These are useful provisions to guide future court interpretation of the act.

Section 8 - Effective Date: This is the standard Kansas language putting the act into effect.

In summary, I highly recommend adoption of this critically important law to protect Kansas citizens and Kansas governments. It is an easy choice - a choice between supporting more and more abusive litigation or supporting our republican form of democracy. Thank you.

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REMARKS TO KANSAS SENATE COMMITTEE
REGARDING SENATE BILL NO. 287
by Allen Shelton, Oberlin, Kansas

My name is Allen Shelton. I am an attorney and have practiced law in Hill City and Oberlin since 1968. I am here to urge to you, passage of Senate Bill No. 287, which I call the "ANTI-SLAPP Act."

My understanding is that Professor of Law George W. Pring has, or will, testify before you today. He has much more experience and knowledge than I do regarding SLAPPs. Indeed, what I know about SLAPPs in general has been gleaned from reading the book he co-authored with Professor Penelope Canan entitled, SLAPPs: Getting Sued for Speaking Out. Therefore, I will devote my time to discussing with you my personal experiences and views with regard to a current SLAPP now pending in the United States District Court for the District of Kansas.

That action was filed by Classic Communications, Inc., and its two (2) subsidiaries, Classic Telephone, Inc. and Classic Cable, Inc., on April 8, 1996. Classic sued nine (9) small cities in Northwest Kansas, among them Hill City and Bogue, as well as Rural Telephone Service Co., Inc. (and its subsidiary, Vision Plus, Inc.), ten (10) of Rural's officers and directors, and my client, Kenneth Clark. Some of you have seen newspaper articles pertaining to this lawsuit. I will not recite the detailed history leading up to the filing of this action. Suffice it to say that the case stems from Classic's unsuccessful efforts to obtain either cable or telephone franchises from these cities. Mr. Clark was not involved with the "cable cities", and thus I will not discuss the cable franchise claims.

In their Complaint and Amended Complaint, Classic attempted to assert several claims against Mr. Clark. First, that he "conspired" with Rural and some of the cities to violate the Federal and State anti-trust laws. Second, that he said things which injured Classic's business reputation. The latter is essentially a defamation claim. Classic claimed that it had been damaged to the tune of \$20,000,000, and that it was entitled to treble damages, or \$60,000,000.

Kenneth Clark is a 76 year old attorney from Hill City. He has practiced law there for over 40 years. Mr. Clark fought for better telephone service in Hill City for more than 30 years, and has been instrumental in organizing other citizens in carrying on that fight. He has been the city attorney for Bogue for approximately 40 years. Hill City and Bogue are located in Graham County approximately 8 miles apart. They are on the same telephone exchange.

When United Telephone's franchise was about to expire in Hill City, Mr. Clark was among the leaders who wanted a franchise granted to Rural Telephone for a state-of-the-art telephone system. Bogue's city council naturally wanted to know how this would affect them and whether they could also obtain service from Rural. Mr. Clark discovered that United Telephone never had a franchise in Bogue, and Bogue promptly granted Rural a franchise. He represented Bogue in proceedings before the KCC and in a court action filed by United, in which he took a strong, aggressive stance.

Bogue is a small city with approximately 200 inhabitants. Mr. Clark recognized from the beginning that Bogue could not afford to pay him for his services. He has never been paid any fee for his services in this "telephone fight", by Bogue or anyone else. This was

not unusual for Kenneth Clark, and I speak from personal experience. I was his associate and partner for 25 years.

So why was Kenneth Clark, of all of the attorneys, citizens and councilpersons involved in "telephone fight", targeted as a defendant by Classic? From my first reading of the Complaint, it was apparent to me that the suit was not filed against Mr. Clark for its ostensible purposes. That is, Classic could not have seriously believed they were going to collect \$60,000,000 from Mr. Clark. The action was filed to silence him, and to deprive their opposition of their most determined, able and aggressive voice, and, by example, to mute the voices of other opponents.

And it almost worked! Shortly after the filing of the action, Mr. Clark called and directed me "to get me out of this lawsuit any way you can." He told me to call Classic's attorneys and inform them he would withdraw from all pending cases and proceedings, and would not oppose them further, if they would dismiss him from the suit. This did not sound like the man I knew. I waited a few days, and then went to see him to discuss the case further. Before the conversation was over, his old fire was back and he was determined to fight. Remember, though, this is an extraordinarily tough man, very familiar with litigation and public issue fights. You can imagine how a lay person involved in their first public issue would have reacted to being sued for \$60,000,000!

The specifics in Classic's Complaint and Amended Complaint were few and far between, but the few specifics are interesting. They are interesting because each involves Mr. Clark's alleged attempts to persuade governmental bodies and agencies.

Classic complained because Mr. Clark appeared before the Hill City council, along with Bogue's mayor, to oppose the granting of a telephone franchise to Classic. Remember, Bogue was, and is, on the same telephone exchange with Hill City, and so has a vital interest in what Hill City does with respect to a telephone franchise. Further, Mr. Clark is a citizen of Hill City. Doesn't he have the right to appear before the council and speak his mind? Classic further alleged, "upon information and belief", that Mr. Clark made false statements about Classic and its reputation. Think about that. It is conceivable that Classic could have information that Mr. Clark said bad things about them, without knowing specifically what he said. But how could Classic possibly form the belief that the statements were false without knowing precisely what he said? And shouldn't they and their attorneys have investigated to determine what he said before filing the suit and alleging falsity? After all, there were many people at that meeting, including their own representatives and supporters.

Classic further alleged, again "upon information and belief", that Mr. Clark "circulated" a petition in WaKeeney to force a vote on the decision of that city's council to grant Classic a telephone franchise. A little background is necessary here. Under Kansas law, when a city governing body grants any franchise, the electors of that city have the right to circulate and file a petition for an election as to whether the franchise should be granted. Of course, since Mr. Clark was not an elector in WaKeeney, it would have been impossible for him to have "circulated" the petition there. In fact, he prepared the petition at the request of some of the citizens of that city. Classic further claimed, "upon information and belief", that Mr. Clark made false and malicious statements about Classic in connection with that petition effort. Again, how could Classic form a belief that the statements

were false and malicious without knowing precisely what Mr. Clark supposedly said? This claim is particularly ludicrous in light of the fact Classic won the election!

Finally, in answer to some interrogatories, Classic complained about remarks Mr. Clark made while testifying, about this time last year, before a committee of the Kansas House of Representatives. Mr. Clark testified in opposition to a bill supported by Classic and other utilities which would have stripped the cities of their franchising authority. Should a citizen have to fear being sued for views stated to the Legislature? If so, will anyone dare speak to this body in opposition to legislation supported by powerful interests? And if citizens are afraid to express their views to the Legislature, isn't the public the loser?

All of the defendants in the Classic lawsuit filed motions to dismiss shortly after the action was filed. In state court, the judge would normally rule on those motions before discovery proceeded. But in federal court, it doesn't work that way. The process grinds on while the judge ponders the motions. Planning conferences, scheduling conferences, depositions, interrogatories, production of documents, etc., proceed as though the judge had denied the motions. Judge Saffels, on January 30, 1997, granted Mr. Clark's motion to dismiss. Professor Pring would tell you this is a very speedy resolution, by SLAPP standards. And we are very grateful to Judge Saffels. Hooray, we won!, right? Except Mr. Clark incurred attorney fees and costs of approximately \$21,000, not to mention time lost from his practice and his life, sleepless nights, etc. Those fees would be approximately twice that amount were it not for the assistance of attorneys representing other defendants, who kindly shared their research and experience with me. And its not really over, because, as long as there are any claims remaining in the lawsuit, the decision dismissing Mr. Clark is not final. Only when all of the claims are resolved does Classic's time to appeal start to run.

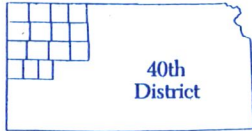
It is vital that you understand that it is not important or even relevant whether Mr. Clark's statements were false, malicious and defamatory. What is important and relevant is that they were made in an effort to influence governmental bodies to act, or refrain from acting, in a certain manner. Statements made in further of such efforts are protected under the petition clauses contained in the Bill of Rights of both the Federal and State Constitutions. This Bill now before you will immeasurably strengthen this right, a right vital to the functioning of our government and democracy. If a citizen must litigate whether his or her statements and complaints to his or her government are true, malicious, etc., then the right to petition, while available in theory, will in practice be exercised little, if any.

My view is that this Bill will: (1) raise the consciousness of the courts about SLAPPs and help them recognize this type of case and the dangers they pose; (2) facilitate the disposition of SLAPPs quickly and as economically as possible; and (3) reduce or eliminate the filing of SLAPPs by facilitating "SLAPP-back" suits by citizens wronged by SLAPPs. When the SLAPPers are SLAPPED back, and hard, they will begin to hesitate to use the courts for improper purposes. I can think of no measure you could adopt that would promote justice more than enactment of this Bill.

2/18 5:55 PM 2/18/97

STATE OF KANSAS

STAN CLARK
STATE SENATOR



TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
VICE CHAIR: ELECTIONS
MEMBER: AGRICULTURE
ASSESSMENT AND TAXATION
FINANCIAL INSTITUTIONS
AND INSURANCE

**TESTIMONY BEFORE THE
SENATE JUDICIARY COMMITTEE**

**SENATE BILL NO. 287
FEBRUARY 18, 1997**

Mr. Chairman and members of the committee:

The foundation of our political process relies on people's participation. Last session 19 individuals from my legislative district on bills before this legislature and in my visits around the district I encourage their participation. Yesterday one of my constituents testified in the Senate Public Health Committee, today Mr. Shelton is testifying in this committee and tomorrow I have constituents testifying in the Elections and Local Government Committee.

Last year one of my constituents testified in the House Select Committee on Telecommunications. He testified immediately following my testimony and just preceding several of my constituents in the audience behind me today. A \$60 million lawsuit was filed against him because he spoke out for retaining current law regarding city franchises and for participating in public debate before a city council and the Kansas Corporation Commission.

Whether you agree with his point of view or not is immaterial, his right to bring his views to the Legislature and his city council are far more important. The real value in protecting his right and others is, quite simply, whether our state will continue to encourage, to protect, and to be a government "of, by, and for the people." If we don't provide this protection the use of litigation will continue to expand to achieve political intimidation. The fallout is the withdrawal of citizens from the public arena. Individuals will not volunteer their time, talents or money and we will all suffer for this loss.

A SLAPP typically evolves in 3 stages:

*Senate Judiciary
Attachment #4
2-18-97*

1. Citizens develop a position about some public concern and communicate their views to some government decision-maker. In communicating a position, the citizens are opposing someone else's interests or plans, and that opposition makes enemies.
2. In the second stage, the enemies reach a point where they have had enough opposition and file a suit that targets defendants precisely because of their political, 1st amendment petition-clause protected activity. This suit transforms the dispute from a political controversy into a legal one by claiming libel, business interference or conspiracy. The forum is changed from a public forum where it can be politically resolved into a private judicial one where only the technicalities can be redressed. Finally, the issue is transformed from a citizen's perceived injuries to the filer's claimed injuries.
3. The third stage is the disposition of the case and section 5 of this bill outlines the procedures to be taken. If this doesn't occur, the target enters the judicial arena where they are subject to the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purposes are simple retribution for past activism, to discourage future activism, to frighten people into silence, to drain resources, to win the 'real-world' political fight and though it happens rarely, to win in court.

We need to pass this legislation, not only to protect the individuals that become involved and communicate with our political process but also to provide government with an 'early warning system' or 'safety valve' against voter dissatisfaction, civil unrest and potential revolt. I would be glad to stand for questions.