Approved: 3-25-05
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on March 15, 2005 in Room 313-S of the Capitol.

All members were present except:
Dean Newton - Excused
Michael Peterson - Excused
Tim Owens - Excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Judge Fred Lorentz, Chief Judge 31st Judicial District, Fredonia
Callie Denton, Kansas Trial Lawyers Association
L.J. Leatherman, Kansas Trial Lawyers Association
Eric Kraft, Kansas Bar Association, President, Young Lawyers Section

The hearing on **SB 161 - immunity from liability for entities for who offenders perform community service**, was opened.

Judge Fred Lorentz's pet project is ordering offenders to perform community service. He believes both the community and offender reap rewards from the service. If the offender performs community service for a governmental entity they are exempt under the Kansas Tort Claims Act, however, non profit organizations or business entities are not. This bill would extend immunity to any organization, business or individual who agrees to supervise offenders performing community service (Attachment 1). One problem with the bill is that it could be interpreted as being broader than what the intent was when drafted and therefore requested an amendment to clarify who the bill would actually apply to.

Callie Denton & L.J. Leatherman, Kansas Trial Lawyers Association, appeared as opponents of the bill. They believe that immunity already exists under the Tort Claims Act because the offenders are actually "employees" of the court. "Employees" are defined as "...persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation..." It also goes on to provided that no governmental entity or employee shall be liable for any claim for damages arising from the performance of community service work. (Attachment 2) They believe that the proposed bill in confusing and proposed amending the Tort Claims Act to clarify that non-profit organizations are exempt.

Judge Lorentz responded that the Tort Claims Act only applies to governmental entities and he want it to include non-profit organizations who use offenders. Offenders are not court employees but they are working at the direction of the judge. He suggested if the committee wants to amend the Tort Claims Act that they add in the first paragraph "or any persons performing community service at the direction of the court" and reference it in Subsection (s).

The hearing on **SB 161** was closed.

The hearing on **SB 129 - consumer protection; modification or limitation of warranties; workmanlike performance,** was opened.

Eric Kraft, Kansas Bar Association, President, Young Lawyers Section, stated that the proposed bill would close a large loophole in the umbrella of consumer protection in Kansas by prohibiting a supplier in a consumer transaction to exclude responsibility for the implied warranty of workmanlike performance. The bill would also define the term "implied warranty of workmanlike performance" to mean that in every written or oral contract for work the supplier of the work has a duty to perform the work diligently and in a manner consistent with that level of care, skill, practice and judgement exercised by other suppliers performing the same type of work (Attachment 3).

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on March 15, 2005 in Room 313-S of the Capitol.

Chairman O'Neal was concerned that the proposed bill had the potential of bringing in a lot of other causes of actions that are currently precluded under the statute.

The hearing on **SB 129** was closed.

HB 2485 - prohibited acts by notaries public related to services offered to non-English speaking persons

Representative Garcia made the motion to report **HB 2485** favorably for passage. Representative Crow seconded the motion.

Representative Garcia made the substitute motion to have those found guilt lose their notary public certificate for lifetime. Representative Crow seconded the motion. The motion carried.

Representative Colloton made the motion that upon being notified by the Attorney General's Office the Secretary of State shall revoke the notary public certificate for lifetime. Representative Loyd seconded the motion. The motion carried.

Representative Garcia made the motion to report **HB 2485** favorably for passage, as amended. Representative Colloton seconded the motion. The motion carried.

SB 5 - trade secret defined as in uniform trade secrets act

Representative Kinzer made the motion to report **SB 5** favorably for passage. Representative Loyd seconded the motion. The motion carried.

SB 50 - changing references to the soldiers and sailors civil relief act to the service members civil relief act

Representative Loyd made the motion to report **SB 50** favorably for passage and be placed on the consent calendar. Representative Crow seconded the motion. The motion carried.

SB 36 - the Supreme Court may require applicants to practice law to be fingerprinted & submit to a national criminal history record check

Representative Davis made the motion to report **SB 36** favorably for passage. Representative Jack seconded the motion.

Representative Davis made a substitute motion to strike Section 2. Representative Jack seconded the motion. The motion carried.

Representative Jack made the motion to report **SB 36** favorably for passage, as amended. Representative Davis seconded the motion. The motion carried.

SB 112 - material man's liens; property of claims; property under construction

Representative Jack made the motion to report **SB 112** favorably for passage. Representative Yoder seconded the motion.

Representative Loyd believed that the bill would not be the right fix to address the court ruling. Representative Pauls was concerned with financial institutions jumping ahead of others who have liens. Representative Kinzer reminded the committee that they had not received written testimony from the Associated General Contractors of Kansas and requested that the committee hold off any action until that was received.

The committee meeting adjourned at 5:00 p.m. The next meeting was scheduled for March 16, 2005 at 3:30 p.m. in room 313-S.

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on March 15, 2005 in Room 313-S of the Capitol.

Committee minutes from February 21, 22, March 2, 7, 8, and 9 were distributed vie e-mail with the notification that if no changes were requested by March 22, 2005 they would stand approved.

HOUSE JUDICIARY COMMITTEE
Hearing on SB 161
March 15, 2005, 3:30 PM, Old Supreme Court Chamber

Testimony of Judge C. Fred Lorentz
Chief Judge – 31st Judicial District
(Allen, Neosho, Wilson and Woodson Counties)
Fredonia, Kansas 66736
620-378-4361

K.S.A. 2004 Supp. 21-4610 provides for the conditions that may be imposed upon an adult who after conviction is subject to probation or assignment to community corrections. Subsection (c)(10) of that statute specifically allows the court to require that the defendant:

> ". . .perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community;"

Similar language is found regarding juvenile offenders at K.S.A. 38-1663(d).

Over the years, I have found that many entities that may qualify for community service workers pursuant to these sections are reluctant or simply refuse to allow adult or juvenile probationers or community corrections assignees to perform community service work for their organizations due to a fear of liability of lawsuit for injuries to the worker. The result is that a valuable tool is limited in its use. I call the tool valuable because it: 1) provides an appropriate punishment to the offender; 2) repays the community for actual damage caused or for the cost of the taxpayer supported system that has to deal with the offender; 3) when done in the "open" where citizens of the community can see them, it helps to give those citizens a feeling of satisfaction that the offender is being required to suffer the consequences for his or her crime; and 4) others who might find themselves in the same situation might think twice about committing a crime and having to suffer the embarrassment of performing community service where everyone can see them.

My original request to Senator Schmidt was conceptual in nature, and I realize there is some concern about the actual language in the proposal being too broad in terms of the entities being protected. I recommend that proposed SB 161 be amended in lines 15 to 17 to reflect the language describing the entities as set out in the cited language above as that is the actual description of the entities that are allowed to use community service workers.

An argument can be made that at least for governmental agencies, the Kansas Tort Claims Act provides protection. Although that may be true in some respects, it doesn't allay the fears of "lay" board members who are so concerned about lawsuits that they are reluctant or afraid to make use of community service workers. That act also doesn't cover non-profit organizations nor charitable or social service organizations. Further, the language in the Kansas Tort Claims Act, K.S.A. 2004 Supp. 75-6102 et. seq., doesn't make it clear that those persons performing the service cannot sue the governmental entity or organizations as opposed to third parties bringing suit.

Passage of this bill will allow courts to point to a specific statute to allay the fears and concerns of those entities we ask to make use of community service work.

Thank you for your consideration.

House Judiciary
3-15-05
Attachment 1

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Chairman O'Neal and Members of the House Judiciary Committee

FROM: L J Leatherman for the Kansas Trial Lawyers Association

DATE: March 15, 2005

RE: SB 161

Chairman O'Neal and Members of the Committee, my name is L J Leatherman and I appear before you today on behalf of the Kansas Trial Lawyers Association (KTLA). KTLA is a statewide, nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system. We appreciate the opportunity to present written and oral testimony on SB 161. KTLA is opposed to the underlying bill and is offering a substitute bill.

SB 161 provides immunity for governmental entities, nonprofit organizations, businesses, or individuals for harm to or acts and omissions of an offender performing community service, unless the governmental entity, nonprofit organization, business, or individual has acted with willful and wanton misconduct or intentionally tortious conduct. However, the immunity as proposed in SB 161 already exists in current law: K.S.A. 75-6102 of the Tort Claims Act defines "employee" to include: "...persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation..." In addition, K.S.A. 75-6104(s) provides that no governmental entity or employee shall be liable for "[a]ny claim for damages arising from the performance of community service work other than damages arising out of the operation of a motor vehicle as defined by K.S.A. 40-3103, and amendments thereto...".

KTLA believes that the provisions of SB 161 are current law, and consequently we do not support passing the underlying bill because it is duplicative and will create confusion for the courts and the private sector with regard to a not-for-profit organization's liability. However, KTLA was pleased to have the privilege of working with the proponent of SB 161, the Honorable Fred Lorentz, and understand his concerns that the current law is not clear. Therefore, we have drafted a substitute bill clarifying the current law to address the concerns of Judge Lorentz. I have attached to my testimony a balloon describing the proposed substitute.

If the Committee decides to act on this issue, KTLA recommends the substitute bill because it clarifies that non-profit organizations, when performing quasi-judicial functions as a service to the state, are covered under the exceptions to the Kansas Tort Claims Act in K.S.A. 75-6104(s). As previously noted, it also avoids the confusion of a separate statute which we believe would be the result if SB 161 is passed as written.

Thank you for your consideration of the substitute bill, and on behalf of KTLA I urge its adoption.

Terry Humphrey, Executive Director

Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, Ks 66603-3715 • 785.232.7756 •

E-Mail: triallaw @ ink.org

House Judiciary
3-15-05
Attachment 2

Kansas Trial Lawyers Association

Substitute to SB 161

March 15, 2005

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

Section 1. K.S.A 75-6104 is hereby amended to read as follows: 75-6104. A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

(a) Legislative functions, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution;

(b) judicial function;

(c) enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, rule and regulation, ordinance or resolution;

(d) adoption or enforcement of, or failure to adopt or enforce, any written personnel policy which protects persons' health or safety unless a duty of care, independent of such policy, is owed to the specific individual injured, except that the finder of fact may consider the failure to comply with any written personnel policy in determining the question of negligence;

(e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved;

(f) the assessment or collection of taxes or special assessments;

(g) any claim by an employee of a governmental entity arising from the tortious conduct of another employee of the same governmental entity, if such claim is (1) compensable pursuant to the Kansas workers compensation act or (2) not compensable pursuant to the Kansas workers compensation act because the injured employee was a firemen's relief association member who was exempt from such act pursuant to K.S.A. 44-505d, and amendments thereto, at the time the claim arose;

(h) the malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction or removal. Nothing herein shall give rise to liability arising from the act or omission of any governmental entity in placing or removing any of the above signs, signals or warning devices when such placement or removal is the result of a discretionary act of the governmental entity;

(i) any claim which is limited or barred by any other law or which is

for injuries or property damage against an officer, employee or agent where the individual is immune from suit or damages;

(j) any claim based upon emergency management activities, except that governmental entities shall be liable for claims to the extent provided in article 9 of chapter 48 of the Kansas Statutes Annotated;

(k) the failure to make an inspection, or making an inadequate or negligent inspection, of any property other than the property of the governmental entity, to determine whether the property complies with or violates any law or rule and regulation or contains a hazard to public health or safety;

(l) snow or ice conditions or other temporary or natural conditions on any public way or other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of the governmental entity;

(m) the plan or design for the construction of or an improvement to public property, either in its original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval and if the plan or design was prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared;

(n) failure to provide, or the method of providing, police or fire protection;

(o) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury;

(p) the natural condition of any unimproved public property of the governmental entity;

(q) any claim for injuries resulting from the use or maintenance of a public cemetery owned and operated by a municipality or an abandoned cemetery, title to which has vested in a governmental entity pursuant to K.S.A. 17-1366 through 17-1368, and amendments thereto, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing the injury;

(r) the existence, in any condition, of a minimum maintenance road, after being properly so declared and signed as provided in K.S.A. 68-5,102, and amendments thereto;

(s) any claim for damages arising from the performance of community service work Λ other than damages arising from the operation of a motor vehicle as defined by K.S.A. 40-3103, and

for

, including a claim against any private corporation organized not for profit or charitable or social service organization for whom a court has authorized an offender to perform community service, or an employee of any such corporation or organization acting within the scope of the employee's employment,

amendments thereto;

(t) any claim for damages arising from the operation of vending machines authorized pursuant to K.S.A. 68-432 or K.S.A. 75-3343a, and amendments thereto;

(u) providing, distributing or selling information from geographic information systems which includes an entire formula, pattern, compilation, program, device, method, technique, process, digital database or system which electronically records, stores, reproduces and manipulates by computer geographic and factual information which has been developed internally or provided from other sources and compiled for use by a public agency, either alone or in cooperation with other public or private entities;

(v) any claim arising from providing a juvenile justice program to juvenile offenders, if such juvenile justice program has contracted with the commissioner of juvenile justice or with another nonprofit program that has contracted with the commissioner of juvenile justice;

(w) performance of, or failure to perform, any activity pursuant to K.S.A. 74-8922, and amendments thereto, including, but not limited to, issuance and enforcement of a consent decree agreement, oversight of contaminant remediation and taking title to any or all of the federal enclave described in such statute;

(x) any claim arising from the making of a donation of used or excess fire control, fire rescue, or emergency medical services equipment to a fire department, fire district, volunteer fire department, medical emergency response team or the Kansas forest service if at the time of making the donation the donor believes that the equipment is serviceable or may be made serviceable. This subsection also applies to equipment that is acquired through the Federal Excess Personal Property Program established by the Federal Property and Administrative Services Act of 1949 (P.L. 81-152; 63 stat. 377; 40 United States Code Section 483). This subsection shall apply to any breathing apparatus or any mechanical or electrical device which functions to monitor, evaluate, or restore basic life functions, only if it is recertified to the manufacturer's specifications by a technician certified by the manufacturer; or

(y) any claim arising from the acceptance of a donation of fire control, fire rescue or emergency medical services equipment, if at the time of the donation the donee reasonably believes that the equipment is serviceable or may be made serviceable and if after placing the donated equipment into service, the donee maintains the donated equipment in a safe and serviceable manner.

The enumeration of exceptions to liability in this section shall not be construed to be exclusive nor as legislative intent to waive immunity from liability in the performance or failure to perform any other act or function of a discretionary nature.

Sec. 2. K.S.A. 75-6104 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

Testimony in Favor of

SENATE BILL NO. 129

Presented by Eric G. Kraft, Esq., of Duggan, Shadwick, Doerr & Kurlbaum, P.C.
to the
House Judiciary Committee, March 15, 2005

Let me begin by voicing my firm support of Senate Bill 129, which will close a large hole in the umbrella of consumer protection in Kansas.

The Kansas Consumer Protection Act was enacted in 1973 to replace the 1968 Buyer Protection Act. The stated intent of the Act was to broaden the protection of consumers, to include the sale of services and real estate as well as merchandise.[1] These revisions also enacted prohibitions against warranty disclaimers, but only extended that specific prohibition to warranties of fitness for a particular purpose and of merchantability.[2] That limitation notwithstanding, the Act expressly states that one of its chief purposes is to "protect consumers from unbargained for warranty disclaimers."[3] Unfortunately, the Act has been interpreted to allow suppliers to broadly disclaim any liability associated with the negligent performance of services, thus exposing the consumer to substantial risk and also failing to fulfill the purposes of the Act.

There is no doubt that the Act protects consumers from suppliers who act unconscionably or with deception when performing services. Kansas courts have repeatedly upheld this purpose of the act, stating that the Act must be "liberally construed in favor of the consumer."[4] In this liberal construction, Kansas Courts have applied the Act to mortgage transactions,[5] home fire alarm systems,[6] engineering services,[7] and other service-oriented contracts. However, this broad construction fails to protect consumers from suppliers who disclaim their implied warranty of workmanlike performance.[8]

All contracts for services in Kansas imply that the service will be performed according to the contract and in a non-negligent manner:

> Under Kansas law, there is implied in every contract for work or services a duty to perform it skillfully, carefully, diligently and in a workmanlike manner. Kansas liberally imposes an implied warranty of workmanlike performance in agreements calling for the performance of work or skill.[9]

Generally, this warranty cannot be easily disclaimed or limited. The disclaimer of one's own negligence in the performance of contractual duties is "not favored by the law and

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[1] K.S.A. 60-623, Kansas Comment.
[2] *Id. See also* K.S.A. 50-639.
[3] K.S.A. 60-623(c).
[4] *Coral v. Rollins Protective Services Co.*, 240 Kan. 678, 694, 732 P.2d 1260 (1987).
[5] *Stephan v. Brotherhood Bank and Trust Co.*, 8 Kan. App. 2d 57, 649 P.2d 419 (1982).
[6] *Coral*, 240 Kan. 678.
[7] *Moore v. Bird Engineering Co., P.A.*,
[8] *Moeler v. Meizer*, 24 Kan. App. 2d 76, 942 P.2d 643 (1997).
[9] *Enfield v. Pitman Mfg.*, 923 F. Supp. 187, 188 (D. Kan. 1996) (citing *Zenda Grain & Supply Co. v. Farmland Ind., Inc.*, 20 Kan. App. 2d 728, 738-39, 894 P.2d 881 (1995)).

[is] strictly construed against the party relying on them."[10] As a result, Kansas has long disfavored a person's attempt to contractually limit their own negligence.[11]

Even with this disfavor, Kansas courts will enforce the terms and conditions of a contract, including a waiver of liability for negligence, which is freely entered-into between two parties.[12] One exception to this rule is if the contract imposes conditions which are illegal or contrary to public policy.[13] In those instances, "[n]o action may be maintained, either at law or in equity, to enforce a contract or agreement made in contravention of law."[14]

The public policy of a state is embodied in its constitution, statutory enactments and judicial decisions.[15] If a contract is found to contravene the state's public policy, "the law will not aid either party" to that agreement.[16] Ultimately, if the contract requires a party to do something opposed to the public policy of the state, that agreement is "illegal and absolutely void."[17]

Even though the policy of the Act expressly intends to protect consumers from unbargained for warranty disclaimers, and contractually disclaiming liability for negligence is disfavored by the courts, these warranties are routinely disclaimed in Kansas consumer contracts. What is more, courts allow this type of disclaimer and have found that it is not adverse to the Act. In one case, a home inspector who had disclaimed its warranty of workmanlike performance was nearly completely exempted from liability for the negligent performance of its duties, leaving the new homeowner with substantial costs associated with the repair of defects in the home.[18] The only liability the inspector faced was the cost of the inspection itself. This left the consumer with a completely worthless contract.

As another example of the effects of this type of disclaimer, you hire a mechanic to align your vehicle and the mechanic negligently performs the alignment. As a result of this negligence, you lose control of your vehicle, which causes you and others serious injury. After reviewing the fine print on the work order for the alignment, however, you discover that the mechanic limited his warranty of workmanlike performance to the cost of the services performed. If the mechanic did not commit a grossly negligent act, the mechanic may well have limited his liability to that of the cost of the alignment itself, usually less than two hundred dollars ($200.00). Under the law of *Moeler v. Meizer,* this is not a far-fetched result.

The Texas Supreme Court, when interpreting its own, similar, consumer protection act, recognized the need to prohibit the disclaimer of warranties of workmanlike performance, stating:

> It would be incongruous if public policy required the creation of an implied warranty, yet allowed the warranty to be disclaimed and its

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[10] *Hunter*, 189 Kan. 617; *Zenda Grain & Supply Co.,* 20 Kan. App. 2d at 732.
[11] *Id.*
[12] *Hill v. Perrone*, 30 Kan. App. 2d 432, Syl. ¶ 1, 42 P.3d 210, (2002).
[13] *Id.*
[14] *Hunter v. American Rentals, Inc.*, 189 Kan. 615, Syl. ¶ 2, 371 P.2d 131 (1962).
[15] *Cont. Western Ins. Co. v. KFS, Inc.*, 30 Kan App. 2d 1262, 1269, 59 P.3d 1 (2002).
[16] *Hunter*, 189 Kan. at 618.
[17] *Id.*
[18] *Moeler v. Meizer*, 24 Kan. App. 2d 76, 942 P.2d 643 (1997).

> protection eliminated by a pre-printed standard form disclaimer or an unintelligible merger clause.
>
> When disclaimers are permitted, adhesion contracts—standardized contract forms offered to consumers of goods and services on an essentially "take it or leave it" basis which limit the duties and liabilities of the stronger party—become commonplace. [citations omitted] The consumer continues to expect that the service will be performed in a good and workmanlike manner regardless of the small print in the contract. A disclaimer allows the service provider to circumvent this expectation and encourages shoddy workmanship.[19]

This logic applies in Kansas as well. In fact, Kansas Courts have previously recognized the public policy of the state disallows the avoidance of negligent actions by contract.[20] In doing so, our Supreme Court recognized the same reality addressed in Texas: "If construction [of the contract] were allowed, plaintiff paid to place himself at the mercy of and subject to the negligence and carelessness of the defendant's agent . . . ."[21] Therefore, the Court ruled that the clause limiting the actor's liability for its negligent acts was void and unenforceable as being in contravention to the public policy of the state.[22]

As stated in the Act, there is a need to protect consumers from suppliers which seek to disclaim warranties that ensure that the consumer receives the goods or services for which they paid.[23] Disclaiming warranties of merchantability takes the "teeth" away from this guarantee of non-negligent performance and provides an incentive to the supplier to provide a less-than-quality service. Although the Act specifically discourages this type of activity by prohibiting the disclaimer of these warranties in contracts for goods, it conspicuously omits that same protection to service contracts.

To correct this glaring omission, SB 129 proposes slightly modify the Act to equate the implied warranties of service contracts to those implied in contracts for goods. It will not materially change the purpose or structure of the Act, but, in fact, will enhance and fulfill its stated purpose to protect consumers from unbargained for warranty disclaimers.

For these reasons, I am in favor of this bill and would encourage your support and favorable vote as well. Again, I appreciate the committee's interest in this legislation and in my testimony today.

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[19] *Melody Home Mfg Co. v. Barnes,* 741 S.W.2d 349, 355 (Tex. 1987) (emphasis added)
[20] *Hunter v. American Rentals, Inc.* 189 Kan. 615, 371 P.2d 131 (9162).
[21] *Id.* at 619.
[22] *Id.*
[23] K.S.A. 50-623.