Approved: 4-28-05
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 1:00 P.M. on March 31, 2005 in Room 423-S of the Capitol.

All members were present except:
Dean Newton- excused
Delia Garcia- excused
Jeff Jack- excused
Kasha Kelley- excused
Kevin Yoder- excused
Marti Crow- excused
Michael Peterson- excused
Pat Colloton- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes

Conferees appearing before the committee:
Gene Balloon, Attorney at Law, Shook, Hardy & Bacon
Mark Baldwin, Chief Financial Officer, Data Systems International
Marlee Carpenter, Kansas Chamber of Commerce
William Skepnek, Kansas Trial Lawyers Association

Chairman O'Neal announced that the meeting on **Senate Substitute for HB 2457 - dealing with appeals of judgements and supersedeas bonds** would be for informational purpose.

Gene Balloon, Attorney at Law, and Mark Baldwin, Data Systems International, spoke about a case that is currently on file in which the court awarded the plaintiff $6 million dollars. The company was not able to post a supersedeas bond. Most bonding companies write bonds for 20% of the net worth of a company. (Attachment 1)

Marlee Carpenter, Kansas Chamber of Commerce, appeared in support of limiting the amount of bond a defendant must post while appealing an adverse judgement. (Attachment 2)

William Skepnek, Kansas Trial Lawyers Association, appeared as an opponent to the bill. District Courts already have the ability to lower bonds that have been set. The proposed bill takes away that latitude. It's being proposed to address one case, which will be finished before the legislation is passed. (Attachment 3)

Committee meeting adjourned at 1:45 p.m.

Testimony of Mark L. Baldwin, Chief Financial Officer & General Counsel, Data Systems International, Inc., (headquartered in Overland Park, Kansas) before the Kansas House Judiciary Committee, in support of House Bill 2457.

(Civil Procedure)

Wednesday March 31, 2005

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today before your distinguished Committee in support of House Bill 2457.

BACKGROUND

By way of background, I am the Chief Financial Officer & General Counsel of Data Systems International, Inc., a software and technology company founded by Michael J. McGraw in 1979 and headquartered in Overland Park, Kansas. DSI employs over 200 people worldwide with a majority based in Kansas. I joined the company in July, 2000 shortly after the owner of the company had re-asserted operational control in light of a significant deterioration in the financial condition of the company. The President of the company was placed on paid administrative leave while the owner assessed the extent of the issues the company was facing. An employment agreement existed between DSI and the president that provided for acceleration of all amounts due under the agreement in the event his duties were substantially diminished. The President claimed that the act of placing him on paid administrative leave constituted termination under the agreement and filed suit demanding the immediate payment of approximately $4.5 million. The company aggressively disputed the claim contending that he had failed to perform under the agreement.

The case proceeded through initial phases of discovery and the company continued work on restoring its financial strength. Unfortunately, 9/11 and the collapse of the technology sector further compounded the challenges for the owner and the remaining management team. On April 15, 2002 the district court entered a summary judgment in favor of the plaintiff. The decision stunned management and legal counsel. In its weakened financial condition the company could not obtain a supersedeas bond to appeal this unfortunate

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Attachment 1

ruling nor did it have the ability to satisfy the judgment. The company's assets were pledged as collateral and lender's aggressively sought to minimize their risks in light of the summary judgment. The company was convinced that the ruling would be overturned on appeal, but without the ability to prevent the plaintiff from executing on the judgment and disrupting business operations, an appeal was pointless. The plaintiff aggressively pressed for satisfaction judgment, knowing full well the financial condition of the company was precarious. The company sought advice from legal experts in the bankruptcy field, although the owner was very concerned that a filing would be the demise of the company.

Legal counsel for the company offered one slim possibility, that being to seek permission from the district court to waive the supersedeas bond requirement pending appeal or to craft an alternative security arrangement under K.S.A. § 60-2103(d). The district court was reticent to exercise its authority since little guidance could be found under the statute or in Kansas case law. Extensive testimony was given as to the company's financial condition and the unfair result that would occur if the company was not allowed to pursue its appeal. The plaintiff sought compensation for the delay and ultimately agreed to $125,000 initially and $20,000 per month pending the appeal. Even it the appeal was successful, the amounts paid would be non-recoverable. By the time the appeal had been heard, reversed, appealed to the Kansas Supreme Court and denied further review, the company had paid $485,000 for the right to be heard in addition to costs and attorney's fees.

The company prevailed in overturning the initial summary judgment and "earned" the right to have the case heard before the citizens of the Great State of Kansas. The price paid was dear and the trial on the merits is still to come, but the outcome was right. The company was extremely fortunate to have the skills of a uniquely talented lawyer and a district court judge who was willing to exercise his authority without legal precedent, even though he believed that he had made the right legal decision in the entry of the summary judgment. Without this unusual combination of skills, fortitude and ability to make payments, it is quite likely that I would not be addressing you today.

The concepts of due process and fairness require an open discussion of what the appropriate public policy should be in requiring the posting of a supersedeas bond for the right to have your case reviewed by a higher court. The traditional argument that the requirement of posting a bond guarantees payment prevents the losing party from wasting assets during the pendency of the appeal can be addressed simply by the courts. The non-appealing party can petition the court in the event that such conduct occurs. In our facts, the plaintiff was no more or less secure by the "financial arrangement" that was approved in lieu of a bond. Rather, the plaintiff received a windfall. Many states are re-examining their bonding statutes, most with an eye towards capping the amount of the bond at $25 million to $100 million. That type of relief is of no value to the smaller appellant or company such as DSI.

CONCLUSION

Most insurance and bonding companies will not issue a bond in excess of 20% of a company's net worth. In today's litigious environment and large jury awards, this limit is often exceeded, making it impossible for the small business to obtain an appeal bond. [For example, a company with a net worth of $500,000 typically could not get a bond in excess of $100,000.] K.S.A. § 60-2103(d), starts down the right path in acknowledging that a supersedeas bond is not an absolute requirement for appeal and that the district court does have the requisite authority to fashion alternative security. However, further guidance from the Kansas legislature is essential to creating a fair and equitable process for citizens and businesses in Kansas to be fairly heard. I believe that adequate safeguards already exist with the courts to address situations where the appellant has bad motives for seeking an appeal. Alternatively, I would like to see the courts provided with a clear guideline of the circumstances that allow for waiver of the supersedeas bonding requirement. Thank you.

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

KENNETH L. SAATHOFF Plaintiff, v. DATA SYSTEMS INTERNATIONAL, INC. Defendant.	)	Case No. 00 CV 07216 Division 18

ORDER STAYING EXECUTION OF THE JUDGMENT PENDING APPEAL AND APPROVING ALTERNATIVE SECURITY

COMES NOW on this 17th day of December, 2002, the Motion for Stay and Approving of Alternative Security of Defendant Data Systems International, Inc. ("DSI"). Plaintiff is represented by his counsel Michael G. Norris of Norris, Keplinger & Herman, L.L.C., and DSI is represented by its counsel J. Eugene Balloun of Shook, Hardy & Bacon, L.L.P. DSI brings its motion pursuant to K.S.A. 60-262(d) and 60-2103(d). On November 14, 2002, the Court entered its Interim Order in this matter. By mutual agreement of the parties, the Court hereby vacates its Interim Order and enters in its place the following:

IT IS THEREFORE BY THE COURT ORDERED that DSI's Motion for Stay and Approving of Alternative Security is granted in accordance with the parties' agreement and as set forth below. A stay of execution pending final disposition of DSI's appeal is hereby granted on the judgment previously entered by this Court on October 24, 2002, on the condition that within five (5) business days of this Order DSI pay Plaintiff the sum of $125,000.00. In addition, DSI shall on or before the 1st of every month, beginning January 1, 2003, pay Plaintiff an additional $20,000.00. The monthly payments shall continue throughout the term of this stay.

By agreement of the parties, DSI is not entitled to, and waives any claim for, a credit, offset, or reimbursement of these monies that it pays to the plaintiff regardless of the outcome of the appeal.

The stay of execution granted herein shall be effective until a final order has been rendered by the appellate courts under the following additional conditions:

(1) DSI shall not pay a bonus or dividend to Mr. McGraw or any member of his family except ordinary bonuses (not to exceed $200,000 in the aggregate in any one fiscal year) granted to Mr. McGraw's sons in their capacity as DSI employees (this condition does allow DSI to continue its quarterly payments of $250,000 to Mr. McGraw, on the condition such payments are credited against the loan by Mr. McGraw to DSI, and are applied by Mr. McGraw to his loan from American Sterling Bank);

(2) DSI shall not redeem any of Mr. McGraw's shares of stock;

(3) Mr. McGraw shall not transfer any stock;

(4) DSI shall not increase Mr. McGraw's compensation;

(5) DSI shall not close a contract of sale or transfer of any of its assets, or transfer ownership of its proprietary software, except in the ordinary course of business;

(6) DSI shall make no new financial commitments or expenditures for capital improvements or additions in connection with its business in excess of $500,000, without this Court's approval;

(7) DSI shall not pay any debts in whole or part except to trade creditors in the ordinary course of business and debt obligations as set forth on the financial statements furnished to Plaintiff;

(8) DSI shall provide Plaintiff with complete and accurate financial statements, including audited statements, detailing DSI's performance as such statements become available; and

(9) These conditions shall remain in effect during the term of the stay, and violation of any of the conditions will be grounds for Plaintiff moving for dissolution of the stay.

IT IS THEREFORE BY THE COURT FURTHER ORDERED that all monies in the interest bearing escrow account established by this Court's November 14, 2002 Interim Order shall be paid by the Clerk of the District Court to DSI as quickly as possible.

BY THE COURT IT IS SO ORDERED.

John P. Bennett

JOHN P. BENNETT, DISTRICT JUDGE

APPROVAL:

Michael G. Norris
Norris, Keplinger & Herman, L.L.C.
ATTORNEY FOR PLAINTIFF

J. Eugene Balloun
Shook, Hardy & Bacon L.L.P.
ATTORNEY FOR DEFENDANT

NOT DESIGNATED FOR PUBLICATION

No. 89,890

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KENNETH L. SAATHOFF,
Appellee,

v.

DATA SYSTEMS INTERNATIONAL, INC.,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; JOHN P. BENNETT, judge. Opinion filed February 13, 2004. Reversed and remanded.

J. Eugene Balloun and *Michael S. Cargnel*, of Shook, Hardy & Bacon, L.L.P., of Overland Park, for appellant.

James D. Oliver, of Foulston Siefkin LLP, of Overland Park, and *Michael G. Norris* and *Donald R. Whitney*, of Norris, Keplinger & Hillman, L.L.C., of Overland Park, for appellee.

Before GREEN, P.J., MARQUARDT and MALONE, JJ.

Per Curiam: This case arises from a breach of an employment agreement. Data Systems International, Inc. (DSI) appeals the district court's order granting summary judgment in favor of its former president, Kenneth L. Saathoff. DSI claims that summary judgment should have been denied based upon material issues of fact.

DSI is a computer software company which was founded in 1979 by Michael J. McGraw. McGraw became the sole shareholder of DSI in 1989. Saathoff began working at DSI in 1986 and eventually was named president of the company in 1993. In June 1995, Saathoff and DSI entered into an employment agreement. A "phantom stock" interest was incorporated into the agreement to the effect that Saathoff would receive 25% of the net sale proceeds if DSI was ever sold.

In 1998, a company called "Percon" presented an offer to purchase DSI for $54 million. Had the sale gone through, Saathoff stood to make $13.5 million due to his 25% phantom stock interest in DSI. McGraw, who was the only actual shareholder at the time, prevented the sale to Percon.

Following the failed sale to Percon, McGraw decided to buy out Saathoff's 25% interest in DSI and a new employment agreement was entered into in 1999. This is the employment agreement at issue. At the same time, a separate agreement was entered into

whereby the 1995 employment agreement was terminated upon payment of $7.5 million from DSI to Saathoff. This "termination of employment agreement" was signed by all parties, and Saathoff does not dispute that he received $7.5 million as a buy out of the 1995 agreement. It is DSI's contention that the $7.5 million payment fully redeemed the phantom shares.

Section 5 of the 1999 employment agreement provided for the payment of $6 million to Saathoff, structured as a series of "retention bonuses," with $2 million to be paid to Saathoff for each year he stayed on as president until May 31, 2002. Saathoff claimed on summary judgment that the $6 million in retention bonuses, *plus* the $7.5 million, was the actual buy out of the phantom stock.

Much of the current dispute revolves around the district court's interpretation of Section 10 of the 1999 employment agreement. Section 10 is entitled "Termination of Employment." Under Section 10.a, "Termination for Cause" was defined as:

> "(i) any act of personal dishonesty taken by Saathoff in connection with his responsibilities as President of DSI that is intended to result in substantial personal enrichment of Saathoff; (ii) the conviction of a felony committed with the intent of injuring DSI's reputation; or (iii) habitual failure to come to work, other than for customarily excused absences, for personal illness or other reasonable causes."

Section 10.d of the agreement defined DSI's obligations in the case of a "Termination Not for Cause." If DSI terminated the agreement without cause, DSI agreed to the following terms:

> "(i) DSI will pay Saathoff's base compensation for the remainder of the term of this agreement in monthly installments, and DSI will pay $240,000 to Saathoff in lieu of Saathoff's base compensation under the Supplemental Employment Agreement.
>
> (ii) DSI will pay Saathoff's accrued but unpaid incentive compensation through the termination date.
>
> (iii) *DSI will pay Saathoff any unpaid retention bonus amounts set forth in Section 5 hereof on the termination date.*" (Emphasis added.)

On June 14, 2000, McGraw informed Saathoff that McGraw was resuming operational control of DSI, and McGraw testified that Saathoff was forced to take a "paid leave of absence." DSI argues on appeal that this move was taken due to "Saathoff's lack of diligent performance." DSI provided the district court with evidence that Saathoff had performed his duties in an inadequate manner following the 1999 employment agreement. Some of DSI's allegations included charges that Saathoff habitually failed to come to work; failed to devote all of his business time, attention, skill, and efforts to the diligent performance of his duties; allowed DSI to suffer a significant deterioration of financial stability between February 1999 and June 2000; and inappropriately sought and received

reimbursement from DSI for personal expenses. Despite the fact that Saathoff was suspended on June 14, 2000, the first $2 million retention bonus, due on June 15, 2000, was paid in full to Saathoff.

On July 26, 2000, about 6 weeks after being placed on paid leave of absence, Saathoff wrote a letter to McGraw giving notice of his voluntary termination under Section 10.e of the 1999 employment agreement. This section stated:

> "*Voluntary Termination.* Saathoff may voluntarily terminate employment under this Agreement upon 60 days' written notice to DSI; *provided, however, that notwithstanding any other provision of this agreement, if DSI materially alters Saathoff's duties or responsibilities without his prior consent, a termination by Saathoff then shall be deemed to be a termination not for cause by DSI and the provisions of paragraph 10.d above shall apply . . . .*" (Emphasis added.)

According to Saathoff, his paid leave of absence "materially altered" his job duties and responsibilities without his consent. Thus, pursuant to Section 10.e, Saathoff claimed that his voluntary termination was a termination not for cause, which entitled Saathoff to full and immediate payment of his unpaid retention bonuses.

This lawsuit was initiated on November 17, 2000, when DSI failed to pay Saathoff the nearly $5 million which would have been due pursuant to Section 10.d of the

employment agreement. On February 23, 2001, 3 months after the lawsuit was filed, DSI sent a letter to Saathoff which claimed to terminate Saathoff "for cause, based on [Saathoff's] habitual failure to come to work and other reasonable causes."

Saathoff filed a motion for summary judgment, claiming the evidence was undisputed that his job duties and responsibilities had been materially altered by DSI and, pursuant to Section 10.e of the employment agreement, Saathoff was entitled to voluntarily terminate his employment and still receive the unpaid retention bonuses. The district court granted Saathoff's motion and awarded Saathoff $4 million for the retention bonuses, $690,000 for base compensation, and $180,360.85 for attorney fees and costs. After judgment was entered, DSI filed a motion to alter or amend in order to add counterclaims against Saathoff. DSI's motion was denied.

This timely appeal follows.

> "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact.

> In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citation omitted.]'" *Mitchell v. City of Wichita*, 270 Kan. 56, 59, 12 P.3d 402 (2000) (quoting *Bergstrom v. Noah*, 266 Kan. 847, 871-72, 974 P.2d 531 [1999]).

Since this case involves a written employment agreement, some general rules of contract construction should be considered. The primary rule when interpreting a written contract is to ascertain the intent of the parties. *Marquis v. State Farm Fire & Cas. Co.*, 265 Kan. 317, 324, 961 P.2d 1213 (1998).

> "An interpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing and considering the entire instrument from its four corners. The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided. [Citation omitted.]" *Johnson County Bank v. Ross*, 28 Kan. App. 2d 8, 10-11, 13 P.3d 351 (2000).

DSI initially claims that the district court erred in granting summary judgment when issues of fact existed on whether Saathoff committed a "first in time material breach" of the employment agreement, thereby excusing performance by DSI. DSI has

compiled an extensive list of allegations which purport to show that Saathoff breached his duties under the employment agreement prior to June 14, 2000. These "first in time material breaches" are the essence of DSI's claim that Saathoff cannot enforce the "voluntary termination" provision of the employment agreement.

The district court's order granting summary judgment acknowledged that DSI had "presented controverted facts alleging that Mr. Saathoff breached the agreement prior to June 14, 2000." However, the district court concluded that "none of these controverted facts are material." The district court determined that Saathoff had voluntarily terminated the agreement pursuant to Section 10.e before DSI asserted the "for cause" justification. Under a strict reading of the employment agreement, the district court concluded that Saathoff was entitled to the unpaid retention bonuses, even though DSI may have had grounds to terminate Saathoff for cause.

Kansas law has long recognized that a claimant must demonstrate his or her own performance (or willingness to perform) under a contract to present a viable claim for breach of contract. See PIK Civ. 3d 124.01-A (defining "plaintiff's performance or willingness to perform in compliance with the contract" as an essential element to a beach of contract claim). See also *Commercial Credit Corp. v. Harris*, 212 Kan. 310, 313, 510 P.2d 1322 (1973) (establishing performance of claimant as a prima facie element for breach of contract claim); *In re Estate of Johnson*, 202 Kan. 684, 692, 452 P.2d 286

(1969) (noting each party "'must perform the terms and conditions of that agreement before he or she can claim the benefits to be derived therefrom'").

No Kansas case is directly on point to our facts. In *Gassman v. Evangelical Lutheran Good Samaritan Society, Inc.*, 261 Kan. 725, 933 P.2d 743 (1997), the plaintiff claimed she was wrongfully terminated by her employer. During discovery, the employer uncovered evidence, a theft committed by the plaintiff, which would have justified her termination pursuant to the employment handbook. Based upon this evidence, the district court granted summary judgment in favor of the employer. The Kansas Supreme Court held that an employee is not entitled to any relief in a wrongful termination case if the employer can establish "after-acquired evidence" sufficient for termination. 261 Kan. 725, Syl. ¶ 1. If the court finds that there is no issue of material fact as to the evidence, then the court may rule upon the defense as a matter of law. Otherwise the issue should be submitted to the jury. See 261 Kan. at 730-32.

Gassman is distinguishable from the facts of this case. However, the case is instructive because it stands for the proposition that in an employment termination case, an employee is not entitled to recover if evidence establishes that the employee committed acts, prior to termination, which would have otherwise justified termination. It does not even matter when these acts are discovered. A factual dispute on this evidence should be resolved by the jury.

In *Stroud v. Cessna Aircraft Co., Inc.*, 1995 WL 333124 (D. Kan. 1995) (unpublished opinion), the federal district court addressed the issue of whether sales commissions were recoverable on sales which were finalized after Stroud left the employment of Cessna. Cessna claimed that the commissions were not recoverable due to Stroud's breach of his duty of loyalty resulting from his decision to start up a competing business. The federal court determined that summary judgment could not be granted to Cessna as a result of Stroud's alleged breach of his employment contract. The court held: "[W]hether Stroud's [decision to start a competing business] is so material a breach of his employment contract that it justifies Cessna's withholding of his sales commissions is surely a matter for the jury to determine." *Stroud* at *8. Likewise, other states have noted that an employee's material breach of his or her employment contract can excuse an employer from further performance under the contract. See *Healey v. Mutual Life Ins. Co.*, 2001 WL 533759 at *3 (Mass. App. 2001) (unpublished opinion).

Here, DSI presented evidence that Saathoff habitually failed to come to work for the last year he was on the job. Saathoff disputed this evidence. Had this fact issue been resolved in favor of DSI, it would have been justified to terminate Saathoff for cause, which would have relieved DSI from paying further retention bonuses. According to the district court, this did not matter because Saathoff had voluntarily terminated the agreement after his duties were "materially altered."

The fundamental problem in upholding the district court's grant of summary judgment is its potentially unjust result. By construing the voluntary termination provision separate from the rest of the agreement, the district court has potentially rewarded an individual for his breach of contract and punished a company which decided to conduct an investigation prior to terminating the employment of its president.

Consider the following hypothetical. Saathoff is accused of embezzling from the company. The board of directors launches an internal investigation and suspends Saathoff with pay until the investigation is completed. Saathoff immediately writes a letter of voluntary termination, claiming that his duties have been materially altered, and demands his unpaid retention bonuses. Pursuant to the district court's ruling, Saathoff would be eligible to receive nearly $5 million in compensation, even though issues of fact existed on whether Saathoff committed embezzlement.

Section 10.e of the employment agreement must be construed with the rest of the agreement to avoid an unreasonable result. It should have been left to the factfinder to determine which party initially breached the contract. "Whether a contracting party's refusal to perform was because of a genuine claim that a condition precedent failed is a question for the finder of fact . . . . [Citation omitted.]" *Source Direct, Inc. v. Mantell,* 19 Kan. App. 2d 399,407, 870 P.2d 686 (1994). Since evidence was presented that Saathoff committed a first in time material breach of the agreement, DSI should have been allowed

to convince the factfinder that its refusal to make the Section 10.d payments was due to Saathoff's breach of the agreement as a whole. Accordingly, the district court erred in granting summary judgment in favor of Saathoff.

As an alternative issue, DSI claims that the district court erred in granting summary judgment when a material issue of fact existed regarding whether Saathoff's duties were "materially altered" as a result of the suspension.

Section 10.e of the employment agreement provided that "if DSI *materially alters* Saathoff's duties or responsibilities without his prior consent," then Saathoff may voluntarily terminate the employment agreement and still be entitled to receive his unpaid retention bonuses. The agreement provided no definition for the term "materially alters."

DSI contends that a "temporary suspension pending an investigation" was never intended by the parties to justify Saathoff's voluntary termination or to trigger the Section 10.d payments. The record contains evidence that Saathoff's compensation, benefits, and rank were not altered while he was suspended. In fact, as of January 1, 2001, Saathoff was still listed as president of DSI.

On the other hand, McGraw acknowledged that Saathoff's duties had been "entirely taken away" and Saathoff could exercise none of his responsibilities as president. However, McGraw insisted in his deposition that he had always hoped to bring Saathoff back if the investigation exonerated Saathoff of wrongdoing. Saathoff challenges the sincerity of McGraw's testimony, but on summary judgment the evidence must be viewed in favor of the party defending the motion.

Saathoff's job duties were clearly altered as a result of the suspension. However, the suspension was considered *temporary*. The temporary paid leave of absence may or may not have been seen by the factfinder as a material alteration of duties and responsibilities, especially since this term is not defined in the agreement. Since reasonable minds could differ as to whether Saathoff's duties and responsibilities were materially altered, summary judgment should have been denied for this reason as well.

The final issue is whether the district court abused its discretion when it denied DSI's motion to alter or amend its answer after summary judgment was granted.

> "'A trial court is given broad discretionary power under K.S.A. 60-215 to permit or deny the amendment of pleadings, and its actions will not constitute reversible error unless it affirmatively appears that the amendment allowed or denied is so material it affects the substantial rights

of the adverse party.'" *Clevenger v. Catholic Social Service of the Archdiocese of Kansas City*, 21 Kan. App. 2d 521, 524, 901 P.2d 529 (1995) (quoting *Rowland v. Val-Agri, Inc.*, 13 Kan. App. 2d 149, Syl. ¶ 1, 766 P.2d 819 [1988]).

"[A]bsent a clear abuse of discretion, the trial court's order will not be disturbed on appeal. [Citations omitted.]" *Kinell v. N.W. Dible Co.*, 240 Kan. 439, 444, 731 P. 2d 245 (1987).

Final judgment was entered on October 24, 2002. On October 28, 2002, DSI filed a motion for leave to amend its pleadings in order to bring two counterclaims against Saathoff for breach of contract and breach of his fiduciary duty. Under the circumstances, the district court did not abuse its discretion by denying DSI's motion. However, since this case is being remanded for further proceedings, DSI may renew its motion, if it so desires, to be considered by the district court on its merits.

Reversed and remanded for further proceedings.

Legislative Testimony

HB 2457

March 31, 2005

Testimony before the Kansas House Judiciary Committee
By Marlee Carpenter, Vice President of Government Affairs

THE KANSAS CHAMBER

The Force for Business

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Mr. Chairman and members of the committee:

I am Marlee Carpenter with the Kansas Chamber of Commerce. We are here in support of HB 2457, appeal bond waivers which passed the Senate last week. This bill protects both consumers and businesses that may be involved in lawsuits in the state.

HB 2457 was amended to allow appeal bond waivers for all businesses in Kansas. Currently, there is an appeal bond waiver provision on the books for signatures of the master tobacco settlement. We would like all businesses to have the ability to take advantage of this provision, especially small Kansas businesses.

HB 2457 proposes to change current law regarding appeal bonds by limiting the amount of bond a defendant must post while appealing an adverse judgment. This bill, which I have attached to my testimony, requires a defendant to post an appeal bond in the amount of $1 million if the judgment rendered exceeds $1 million but is less than $100 million, and a bond not to exceed $25 million if the judgment is more than $100 million.

In addition there are several provisions that allow the court discretion for requiring different appeal bond amounts that will protect the judgment creditor. Enacting HB 2457 and extending the appeal bond provisions would allow businesses to appeal decisions and be guaranteed their right to due process.

Thank you for your time and I will be happy to answer any questions.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

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

From: William Skepnek on behalf of the Kansas Trial Lawyers Association

Date: March 31, 2005

Re: HB 2457

Thank you for the opportunity to offer my testimony on this proposed legislation. I speak on behalf of the Kansas Trial Lawyers Association, of which I am a member, but more importantly, I speak on behalf of the interests of the people of Kansas, as I have come to understand them, during my 28 years in the practice of law. My law practice is split between plaintiffs and defendants. My experience has been divided, and continues to be divided between prosecuting and defending civil suits.

It is proposed the supersedeas bond statute will be changed to provide that the trial verdict, the jury verdict, will not be enforced, over the arbitrary amount of $1,000,000.00, until the conclusion of the appeal process, unless the: "appellee proves by a preponderance of the evidence that the appellant bringing the appeal is purposefully dissipating or diverting assets outside the ordinary course of business for the purpose of avoiding the ultimate payment of the judgment." You will have noticed how I phrased that. Supersedeas bonds come into play, only after a verdict, usually a jury verdict, by twelve fairly conservative Kansans. The law has been that jury verdicts have the power of fairly immediate enforcement, absent a supersedeas bond. Under this proposal that order of things will be radically changed.

I'd like to start with the notion of a cap. Why a cap of $1,000,000.00? Why not $50,000.00, or $5,000,000.00? Are we simply picking a number out of the sky? It sort of feels like the *Austin Power* movie a few years ago, when Dr. Evil comes back to the 21st Century, but he's out of date, and he still thinks $1,000,000.00 is a lot of money. "We'll blow up New York, unless you pay us, $1,000,000.00." A million dollars has no meaning in a vacuum, it has meaning only in relation to the issues in the litigation.

Are we simply saying, by this statute, that $1,000,000.00 ought to be enough for anyone, to cover any damage, any cost? Well, we know that's not true. You, of all people, know that's not true. It'll cover most cases, heck, there aren't that many judgments over a million dollars. But, go find out what it will cost to care for someone, who is quadraplegic, for 20 years. It won't sound like much then. How about when leaking natural gas destroys a significant business or factory. Property damage goes over a million in a hurry, without even thinking about the claims for lost business. A million won't cover that either. Whether a million is a lot of money depends on what is at stake. But, this is a one size fits all statute. Those are rarely very useful.

Terry Humphrey, Executive Director

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But be careful what you ask for, you just might get it. Do you really want to make the appellant and appellee partners in the business of the appellant?

Say you enact this legislation; to prove what the statute requires, the appellee will need access to the proof. He will necessarily have a right to obtain the information necessary to carry his burden of proof. He now has no such right during the primary litigation. Will this statute be used as a way of seeking this information during the primary litigation? There is a good argument for it, and it might succeed. But if he can't get it then, he'll have to be able to get after his judgment. So will we have prolonged and detailed post judgment discovery procedures? He will need access to the customer lists, the business activities, and financial statements, including detailed records concerning the assets of the owner, or the company. He'll need access to bank records, including the personal financial records of owners, principal officers, and shareholders who have controlling interests. The definition of each of these issues, and judicial determinations of the level of proof, what is a preponderance, what is meant by "purposeful", "divert", "dissipate", "ordinary course", "purpose of avoiding" will spawn litigation every time this statute is relied upon. This is the sort legislation that lawyers who are paid by the hour dream of.

If I were a lawyer representing an appellee it would be my ethical, and professional duty to stay on top of the activities of the business. What if, at the time the bond is posted, there is not sufficient evidence of "dissipation" or "diversion"? That's probably how it would look. Who would expect the appellant to dissipate before there is a judgment. So, dissipation, if it takes place, will probably occur after the appeal has commenced, after the bond has been set. Then, later when the verdict is affirmed, the money is gone? My client will want to know what I did to protect his judgment. What if during the several years of appeal the assets were dissipated, or diverted, and I did nothing to stop it? Surely this statute must mean that during the appeal, 2 months, 3 months, 6 months later, the appellee will have the right to bring in its accounting firm to investigate the conduct of the defendant and his business. And who will pay for the cost of all this? Will it be taxed as costs in the case? How often will it be reasonable for the appellee to seek discovery, and how deeply will he be allowed to go? At what point will the appellant claim that the appellee is interfering with his business, spooking his customers, defaming his reputation?

What this legislation is about is a frontal attack on the checks and balances in our system. It is about a lack of trust. Existing law already enables an aggrieved litigant to come to the court and ask for relief from the posting of a bond which might be ruinous. So, just in case a judge might not give that person relief, the legislature is being asked to fill in all of the blanks, in advance. You are being asked to enact a piece of legislation which will solve a very specific problem. But, that is not what laws should be about. Laws should establish the general principles and leave it to the executive and the judiciary to fill in the blanks. I could come up with as many anecdotal stories of judgments that would not be paid if sufficient supersedeas were not available. Neither story answers the question.

What is the purpose of a supesedeas bond? When court and jury have decided one way, or the other, the equities shift. Under our system that judgment is presumptively valid. Indeed, that is

how Kansas appellate courts have always viewed it. Few, if any, jury verdicts are ever overturned by Kansas appellate courts. At that point, if the loser wants to keep the money or property the jury has said should not be his, he has to provide security, a bond. Otherwise, he must pay. But, if he wants to appeal, and delay payment, a delay which almost always is no more than that, mere delay, he has to look at his hole card, decide whether the expense is justified, and post the bond, the appeal won't be free, and the appellee won't be at risk. Because at that point, under our system, the property justly belongs to the other person, and the appeal is no new trial, or retrial, it is merely a review of the propriety of the proceedings before the trial court. When the jury speaks, their verdict is entitled to respect and enforcement.

If its not broke, don't fix it. Its not broke. This change will only make money for lawyers, further clog up dockets of courts, and force litigants into a defacto partnership during the time of appeal. But, most importantly, it ignores the balance of the system, it reaches too far into the realm of the judiciary, and shows, by far, too little trust of our judges to handle these matters appropriately under existing law. When the jury speaks, its verdict should be enforced. A supesedeas bond in an amount to cover the full judgment is nothing more than enforcement of the jury's verdict. Let's keep it that way.

I respectfully request your opposition to HB 2457.

Of the States that have appeal bonds –
NONE have appeal bond caps as inadequate as proposed in amendments to HB2457!
Most states with an appeal bond cap start at $25 million.

Arkansas	$25 million
California	$150 million
Colorado	$25 million
Florida	Punitive damages –lesser of $100 million or 10% of defendant's net worth - $100 million for Tobacco MSA
Georgia	$25 million
Hawaii	$150 million – Tobacco MSA limit
Idaho	First $1million – punitive damages only – No Appeal bond limitations
Indiana	$25 million
Iowa	$100 million
Kansas	$25 million – Tobacco MSA limit
Kentucky	$100 million
Louisiana	Court may set limit – only when judgment exceed $150 million - $50 million – Tobacco MSA limit
Michigan	$25 million
Minnesota	$100 million
Mississippi	$100 million – Court imposed on Tobacco MSA limit
Missouri	$50 million
Nebraska	$50 million or 50% of appellant net worth
Nevada	$50 million – Tobacco MSA limit
New England	$50 million
New Jersey	$50 million – Tobacco MSA limit
N. Carolina	$25 million
Ohio	$50 million
Oklahoma	$25 million – Applicable as part of Tobacco MSA
Oregon	$150 million – Tobacco MSA limit
Pennsylvania	$100 – Tobacco MSA limit
S. Dakota	$25 million limit- Supreme Court Rule
Tennessee	$75 million
Texas	Lesser of the two – 50% of judgment debtor's net worth or $25 million
Virginia	$25 million limit all;
West Virginia	$200 million – Tobacco MSA; $100 million compensatory; $100 million punitive
Wisconsin	$100 million

APPEAL BOND CAP BREAKDOWN

Appeal Bond Caps – General – Up to $25 million

- Arkansas - $25 million
- Colorado - $25 million
- Georgia - $25 million
- Idaho – First $1 million for punitive only – No other appeal bond
- Indiana - $25 million
- Michigan - $25 million
- N. Carolina - $25 million
- S. Dakota - $25 million – Supreme Court Rule
- Texas – Lesser of two 50% of net worth or $25 million
- Virginia - $25 million

Appeal Bond Caps – General - Between $50 - $99 million

- Louisiana – Court set limit only when judgment exceeds $150 million
- Missouri - $50 million
- Nebraska - $50 million or 50% of appellant net worth
- New England - $50 million
- Ohio - $50 million
- Tennessee - $75 million

Appeal Bond Caps – General - $100 million and up

- California - $150 million
- Florida – Punitive Damages – Whichever is less $100 million or 10% of defendants net worth
- Iowa - $100 million
- Kentucky - $100 million
- Minnesota - $100 million
- West Virginia - $100 million compensatory; $100 million punitive
- Wisconsin - $100 million

Appeal Bond Caps – Tobacco MSA - All

- Florida - $100 million
- Hawaii - $150 million (MSA Only)
- Kansas - $25 million (MSA Only)
- Louisiana - $50 million
- Mississippi - $100 million (Imposed by Court rule) (MSA Only)
- Nevada - $50 million (MSA Only)
- New Jersey - $50 million (MSA Only)
- Oklahoma - $25 million (MSA Only)
- Oregon - $150 million (MSA Only)
- Pennsylvania - $100 million (MSA Only)
- West Virginia - $200 million