Approved: August 3, 2005
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on February 15, 2005, in Room 123-S of the Capitol.

All members were present except:
Donald Betts- excused

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Nancy Lister, Committee Secretary

Conferees appearing before the committee:
Randy Hearrell, Kansas Judicial Council
Eric Kraft, Young Lawyers Section President of the Kansas Bar Association
Debbie Riggs
Brette S. Hart

Others attending:
See attached list.

Chairman Vratil opened the meeting and stated that Committee members have a proposed Senate Resolution which is addressed to the United States Supreme Court and generally urges the Supreme Court to accept the petition for *Writ of Certiorari* in the *Marsh* case and to overrule the Kansas Supreme Court decision in that case. The Chairman stated it would be taken up at the next meeting with the intention of passing it out of Committee. (Attachment 1)

Chairman Vratil announced that a camera crew was on hand from 60 Minutes and would be filming a portion of the meeting. The Chairman opened the hearing on **SB 258**.

SB 258–Statutory and legal forms to be created and provided by the judicial council

Proponent:
Randy Hearrell, Executive Director of the Kansas Judicial Council, testified that the Council has undertaken a project to remove legal forms from the statute books and make them available on the internet and in a publication entitled Kansas Legal Forms. The bill removes the forms from the Kansas Statutes Annotated and directs the Judicial Council to prepare the forms to become available on the internet. (Attachment 2)

Chairman Vratil closed the hearing on **SB 258** and opened the hearing on **SB 129**.

SB 129–Consumer protection; modification or limitation of warranties; workmanlike performance

Proponent:
Mr. Eric Kraft, representing the Young Lawyers Section of the Kansas Bar Association, testified in support of the bill. Mr. Kraft stated that this bill slightly modifies the Kansas Consumer Protection Act, enacted in 1973, to equate the implied warranties of service contracts to those implied in contracts for goods. (Attachment 3)

Chairman Vratil closed the hearing on **SB 129** and opened the hearing on **SB 224**.

SB 224–Judicial discretion for 120 day call back in certain situations

Proponent:
Senator Journey testified that the bill enhances the options available to District Court Judges across the State in dealing with issues of placement and disposition at the resolution of felony criminal cases in Kansas. The bill has two operative sections; the first section affects the sentencing portion of criminal cases, and the second section affects cases where the revocation of probation or assignment to community corrections has occurred.

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on February 15, 2005, in Room 123-S of the Capitol.

The bill gives the District Court Judge the final option of reinstating probation after the defendant has served up to 120 days in custody prior to the filing of the motion by either of the parties. This gives judges another tool to use in modifying the behavior of defendants. Senator Journey stated that the revisor is preparing a balloon amendment to the bill to address an issue brought up by the Department of Corrections regarding judges giving a defendant a county jail sentence before putting the individual on probation, and the option would only be available for presumptive prison cases and not for border box cases. (Attachment 4)

Neutral:
Mr. Tim Madden, representing the Secretary of the Department of Corrections, testified regarding the provisions of the bill. The bill, as currently written, does include "border box" offenders. Mr. Madden identified five factors that the Department of Corrections recommends the Committee consider regarding a 120 day modification for "border box" offenders and supervision violators. (Attachment 5)

Mr. Madden stated the Department wanted to refrain from making any other comments until it has had the opportunity to study impact estimates on admissions and bed capacity, and is able to do some analysis of the effect on workloads due to increased admissions and releases. Senator Goodwin stated that the Department of Corrections did a survey in the past year of how much jail space was available in the state. Senator Goodwin asked for this information to be supplied to the Committee and Mr. Madden stated he could provide this.

Chairman Vratil closed the hearing on **SB 224** but added that the Committee would look forward to receiving the fiscal impact note and bed space report from the Department of Corrections.

SB 144--Dram shop law; liquor licensee liability for minors and incapacitated persons; social host liability for minors

Proponents:
Debbie Riggs testified that on November 20, 2001, her 17 year old son, Paul, went to a party where alcohol was being served to underage kids. He left the party at 10 p.m. that evening and on the way home hit a tree and died three weeks later, never regaining consciousness. (Attachment 6)

Ms. Riggs stated that she did not want to open a series of frivolous lawsuits or a debate on dram shop. It was her hope that the bill would be designed as a civil action to aid victims when persons were convicted of the criminal law. Ms. Riggs stated that lines 26-32 of the bill are exactly what the bill should contain. She is looking for a civil law to specifically address a way to seek recovery from parents that have been convicted of the crime that was signed by Governor Sebelius. Ms. Riggs concluded by stating that K.S.A.21-3610c should not stand alone and asked for passage of the bill which would show the nation that Kansas is continuing to battle the problem of underage drinking on behalf of our youth, who are also our future.

Brette Hart, a third year law student at Washburn, provided some background on the current lack of dram shop legislation in Kansas, and cited several cases that set the precedent that subsequent courts have followed. (Attachment 7-9)

Chairman Vratil asked for a balloon amendment be drafted to eliminate the dram shop portion of the bills and specifically leave in the social hosting.

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for February 16, 2005.

CONTINUE TO ROUTE

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 2/15/05

NAME	REPRESENTING
JIM CLARK	KBA
ERIC KRAFT	self
Philip BRADLEY	KLBA
Whitney Damron	Distilled Spirits Council of the U.S
Neal Whitaker	KBWA
Rebecca Rice	Ks Clubs & Assoc.
Amy Campbell	Ks Association of Beverage Retailers
[illegible]	self
Dianne Gardik	CBS / 60 Minutes
Ken Smith	CBS / 60 Minutes
Tim Gurney	CBS / 60 Minutes
DAVID Klepper	KC STAR

COPY

2005 5rs085,

PROPOSED SENATE RESOLUTION NO. ____

By Submitted by Chairman Vratil

A RESOLUTION Requesting the United States supreme court to grant certiorari and reverse the Kansas supreme court's ruling in State v. Marsh.

WHEREAS, The current Kansas death penalty law was enacted in 1994 and was challenged in State v. Kleypas, 272 Kan. 894, decided by the Kansas supreme court December 28, 2001; and

WHEREAS, The Kansas supreme court unanimously affirmed Kleypas' conviction but set aside his death sentence because of a faulty jury verdict form; and

WHEREAS, The Kleypas court split 4-3 on a constitutional challenge to the death penalty statute based on the manner in which jurors were instructed to weigh aggravating and mitigating circumstances when deciding whether to impose a death sentence, but all seven Kansas justices in the Kleypas court found the Kansas death penalty law to be constitutional, either on its face or as construed; and

WHEREAS, The Kleypas majority, consisting of Justices Tyler C. Lockett, Donald L. Allegrucci, Fred N. Six, and Edward Larson, did not invalidate the Kansas death penalty statute, but held that the so-called "weighing equation," as applied, was unconstitutional: "Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise."; and

WHEREAS, The Kleypas dissent, written by Justice Davis and joined by Chief Justice McFarland and Justice Abbott, did not invalidate the Kansas death penalty statute because "the weighing equation was constitutional as written." The dissent further noted that the United States supreme court has held that as long as the weighing equation does not preclude the jury from considering relevant mitigating evidence, the specific method of balancing the aggravating and mitigating factors may be left up to the state; and

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WHEREAS, In reaching the decision, the court reasoned that the Kansas legislature intended to enact a constitutional death penalty law and thus concluded that K.S.A. 21-4624(e) is not void on its face, but only in its application. The majority held that by requiring the "tie" to go to the defendant, the intent of the legislature may be carried out in a constitutional manner: "By simply invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist, the defendant shall be sentenced to death, the intent of the legislature is carried out in a constitutional manner. So construed, we hold that K.S.A. 21-4624 does not violate the Eighth amendment prohibition against cruel and unusual punishment," the court concluded; and

WHEREAS, The Kleypas court held that the wording of a verdict form was confusing, misleading and inconsistent with Kansas law and improperly implied to a jury that the jury, in order to spare Kleypas' life, was required to be unanimous in its decisions against death. To cure that infirmity, the court provided substitute language for verdict forms to be used in all death penalty cases in Kansas. The revised verdict form, consistent with Kansas law, makes it clear that a single juror may block a death verdict; and

WHEREAS, After the Kleypas case was decided, both the senate judiciary committee and the house judiciary committee conducted hearings regarding the Kleypas decision and the Kansas death penalty law. In addition to hearings during the 2002 legislative session, the matter was studied further during interim committee hearings in the autumn of 2004. The focus of the hearings was to determine what legislative response, if any, was needed to ensure the constitutionality of the Kansas death penalty law in light of the Kleypas decision; and

WHEREAS, Based on testimony received during those hearings,

the legislature relied on the Kleypas court's decision and concluded that no amendment to statute was necessary because the Kleypas court has upheld the constitutionality of the death penalty statute and had cured the apparent flaw in the weighing equation by revising future jury instructions; and

WHEREAS, Only three years after deciding the Kleypas case the Kansas supreme court decided State v. Marsh, opinion number 81,135, on December 17, 2004; and

WHEREAS, In Marsh, the supreme court ruled 4-3 that the Kansas death penalty statute is unconstitutional because of its inclusion of the "weighing equation" - the same defect that the supreme court purported to cure with the prospective change in jury instructions it ordered in Kleypas; and

WHEREAS, In Marsh, the majority agrees with the four justices who decided in 2001's State v. Kleypas that the statute as written violated the eighth and fourteenth amendments but, unlike in Kleypas, the Marsh majority proceeded to invalidate the entire statute rather than severing the weighing equation provision from the remainder of the statute and allowing a change in jury instructions to cure the flaw; and

WHEREAS, The three justices who dissented in Marsh (Justice Davis, Chief Justice McFarland and Justice Nuss) continue to believe the death penalty statute, as written, is constitutional: "There seems to be a general feeling among the majority that the weighing equation which mandates death in the highly unlikely event that the jury finds the aggravating and mitigating factors to be exactly equal in weight is somehow 'unfair.' While it is certainly within the province of this court to interpret the eighth amendment, we cannot do so in a vacuum. We cannot simply rely on our inchoate feelings, but instead have a duty to examine, analyze, and apply the United States supreme court's jurisprudence on the matter."; and

WHEREAS, The Marsh majority states that the United States supreme court has never directly addressed the issue of the weighing equation presented in Kleypas and again in Marsh; and

WHEREAS, Chief Justice McFarland says in her separate dissent that legally the Court should follow the Kleypas precedent: "In Kleypas, in a 4 to 3 decision, all seven justices agreed the Kansas death penalty law was constitutional, either as construed in a very minor respect (majority) or as written (dissent). To now strike down the Kansas death penalty law, is, in my opinion, wholly inappropriate and unjustified."; and

WHEREAS, Justice Nuss also writes separately and says the United States supreme court has already implicitly approved of the death penalty sentencing scheme adopted in Kansas. In his opinion, an Arizona weighing equation "functionally identical" to the Kansas equation was approved by the United States supreme court in its 1990 Walton v. Arizona decision, and Walton therefore controls the result in Marsh; and

WHEREAS, It may be beyond the power of the legislature to amend the Kansas statute retroactively in order to apply a clearly constitutional death penalty law to the seven persons now on death row. Only a decision by the United States supreme court to overturn the Kansas supreme court's decision in Marsh is likely to result in the continued application of the death penalty law to those persons already sentenced to death; and

WHEREAS, The State of Kansas finds itself in this predicament not because of any change in the death penalty law but because of a change in the composition of the Kansas supreme court between the Kleypas and Marsh decisions; and

WHEREAS, Manifest injustice will result if the United States supreme court declines to review the Marsh case on appeal; and

WHEREAS, We believe that the Kansas death penalty law meets the requirements of the Kansas constitution and the United States constitution: Now, therefore,

Be it resolved by the Senate of the State of Kansas: That, based on the evidence presented, we do hereby acknowledge and affirm that the opinion of the Kansas senate is that the Kansas death penalty law as written is constitutional and that if any

single provision of that law is found to be unconstitutional that provision should be severed from the rest and other provisions of the statute upheld; and

Be it further resolved: That, the Kansas supreme court and the United States supreme court should be informed that the Kansas legislature relied on the Kansas supreme court's decision in State v. Kleypas in deciding not to amend the Kansas death penalty law to alter the weighing equation provisions during hearings in 2002 and 2004; and

Be it further resolved: That, the Kansas senate respectfully requests that United States supreme court grant certiorari to hear the Marsh case and find Kansas death penalty law constitutional as written or, in the alternative, as applied through the cure imposed by the Kansas supreme court in the Kleypas decision.

KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 262
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kscourts.org/council

MEMORANDUM

TO: **Senate Judiciary Committee**

FROM: **Kansas Judicial Council - Randy M. Hearrell**

DATE: **February 16, 2005**

RE: **2005 SB 258**

The Judicial Council has undertaken a project to remove legal forms from the statute books and make the forms available on the internet and include the forms in a publication entitled Kansas Legal Forms. Senate Bill 258 removes the legal forms from Volumes 4 and 4A of Kansas Statutes Annotated and directs the Judicial Council to prepare those forms and make them available.

The Council has recognized that legal forms which appear in the statute books are often not kept up to date and also present a difficult printing task for the Revisor of Statutes. The Council has experience preparing and making available forms as directed by statute. The Council currently prepares protection from stalking, protection from abuse and garnishment forms as directed by the respective statutes.

SB 258 is timely because the Revisor of Statutes will be republishing K.S.A. Volumes 4 and 4A in 2005 and SB 258 will prevent the reprinting of a number of forms in the new hardbound volumes.

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Testimony in Favor of

SENATE BILL NO. 129

Presented by Eric G. Kraft, Esq., of Duggan, Shadwick, Doerr & Kurlbaum, P.C.
to the
Senate Judiciary Committee, February 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)).

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[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 $200. 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).

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> 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 that seek to disclaim warranties that ensure 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.

STATE OF KANSAS

SENATOR PHILLIP B. JOURNEY
STATE SENATOR, 26TH DISTRICT
P.O. BOX 471
HAYSVILLE, KS 67060

STATE CAPITOL—136N
300 S.W. 10TH AVENUE
TOPEKA, KANSAS 66612-1504
(785) 296-7367
E-mail: journey@senate. state.ks.us

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
MEMBER: SPECIAL CLAIMS AGAINST THE STATE (JOINT), CHAIR
HEALTH CARE STRATEGIES
JUDICIARY
PUBLIC HEALTH AND WELFARE
TRANSPORTATION

CORRECTIONS AND JUVENILE JUSTICE OVERSIGHT (JOINT)

Testimony in Support of Senate Bill 224
Presented by State Senator Phillip B. Journey, 26th District

On February 15th, 2005, before the Kansas State Senate Judiciary Committee, the Honorable John Vratil, Chair.

Mr. Chairman, ladies and gentleman of the committee, it's my pleasure to be before you once again as a proponent of a piece of legislation that I believe will significantly enhance the criminal justice system in the State of Kansas. Senate Bill 224 enhances the options available to District Court Judges across the State in dealing with issues of placement and disposition at the resolution of felony criminal cases in the State of Kansas.

Prior to 1993 when Kansas enacted determinative sentencing, this procedure was used routinely by the Courts and is currently supported by many District Court Judges that I have had personal contact with. They believe universally that this measure would enhance their options and thereby the goal of behavior modification of those charged with criminal behavior in the State of Kansas. Prior to July 1st, 1993, District Court Judges upon the motion of either party, could assign a defendant to probation after sending them to prison. In 1993, the procedure required an evaluation be done by the Kansas Department of Corrections. That portion of the old law is not incorporated in this as Kansas Court Services have significantly improved their performance and the process of evaluation across the State of Kansas.

Senate Bill 224 has two operative sections; one, which affects the sentencing portion of criminal cases and the other which affects cases where the revocation of probation or assignment to community corrections has occurred. Senate Bill 224 gives the District Court Judge the final option of reinstating a probation after the defendant has served up to 120 days in custody prior to the filing of the motion by either of the parties. While this certainly will be used by criminal defense attorneys, it could also be used by the prosecution in many cases. For example, if new facts have arisen or circumstances that might motivate a District Attorney or County Attorney to change his recommendation in court or even in circumstances where it could be used as a carrot to obtain cooperation from the defendant.

This legislature since enactment of determinative sentencing in 1993, has modified the terms of that sentencing system in numerous ways including mandating treatment with Senate Bill 123 reducing sentences, modifying disposition with Senate Bill 323, implementing a system by which youthful offenders may be assigned to boot camp in lieu of hard time in the Department of Corrections and even authorizing the Kansas Department of Corrections to assign the prisoner to

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their residential parole facilities almost immediately upon intake in the Department of Corrections contrary to the orders of the Court. The Office of the Secretary of Corrections has contacted me regarding this legislation and suggested a modification be made that would limit the sentencing portion of the ability to modify that sentence to presumptive prison cases. Upon consideration of the concerns of this Secretary of Corrections, I believe that this is an appropriate and advantageous change to the legislation and would support the balloon which I have requested. While I have euphemistically referred to this legislation as boot camp for defendants over 30 years of age, I can speak from experience having worked over 60,000 criminal cases, a significant portion of them felony cases and practiced for 10 years under indeterminative sentencing with 120 day call back and now for 12 years with determinative sentencing without 120 day call back and I would concur with those in the judicial branch that I know served under both sentencing regimes that this is an effective tool that can be used in particular cases for behavior modification. Sometimes giving that recalcitrant drug abuser a taste of what's in store for them for 4 months out of their 60-month sentence can certainly help motivate them to comply with the court's requested terms of probation and treatment. For all of these reasons, I would ask the Committee to report the bill favorably with the proposed amendment.

Respectfully submitted,

Phillip B. Journey
Kansas State Senator, 26th District

KANSAS

KANSAS DEPARTMENT OF CORRECTIONS
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on SB 224
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections

February 15, 2005

SB 224 amends the sentencing provisions of K.S.A. 21-4603d to provide for the modification of a sentence as initially imposed as well as upon the revocation of probation. SB 224 provides jurisdiction to the sentencing court to modify a sentence of incarceration if a motion for modification is filed within 120 days of the imposition of the sentence or revocation of probation or assignment to community corrections.

SB 224 is applicable to any offender sentenced to prison due to a presumptive disposition or whose probation or community corrections supervision is revoked. The Department raises for consideration by the Committee the issues of judicial sentencing discretion, the benefit of "shock incarceration", and the use of prison resources. The Department believes that inclusion of "border box" sentences for modification in SB 224 duplicates the judicial authority to impose a sentence disposition appropriate due to the specific nature of the crime committed and the characteristics of the offender currently available to courts but with the additional expenditure of prison resources. Additionally, current law already permits courts to use jails for incarceration as a condition of probation supervision.

Sentencing guidelines provides that the sentencing disposition for offenses that fall within a "border box" due to the severity of the offense and the offender's criminal history is presumptive imprisonment, however, the granting of probation is not a departure subject to appellate review. Likewise, the court's authority relative to its sanction for a violation of probation or community corrections supervision conditions in regard to imprisonment is discretionary. Therefore, the question arises as to whether a "safety valve" in the form of a 120 call back is necessary or appropriate to reverse a sentence of imprisonment for those offenders whose offense falls within a "border box" or who have violated the condition of their community supervision. Factors that the Department recommends that the Committee consider regarding a 120 day modification for "border box" offenders and supervision violators are:

900 SW Jackson – 4th Floor, Topeka, KS 66612-1284
Voice 785-296-3310 Fax 785-296-0014 http://www.dc.state.ks.us

- The discretionary authority of sentencing courts relative to the imprisonment of those offenders and the knowledge of the court relative to the specifics at the time of the crime and the characteristics of the offender at the time of the sentencing decision.
- The authority of the sentencing court to require those offenders to serve time in a jail as a condition of a non-prison sentence.
- The relatively short prison sentence for those offenders.
- The use of prison resources for those offenders, including prison capacity, evaluations, classification reviews, medical screenings, sentence computations, transportation costs, reentry and release planning, detainer queries prior to release, and a backlog for admissions into the Department's reception units.
- The unavailability of correctional programming within the correctional system for offenders who will be incarcerated for only 120 days and the disruption in the services available to the offender in the community.

The Department wishes to refrain from any other comments or recommendations regarding SB 224 until it has had the opportunity to study impact estimates on admissions and bed capacity, and is able to do some analysis of the effect on workloads due to increased admissions and releases.

Submitted by Debbie Riggs

Good morning committee members.

For those of you that do not know me, my name is Debbie Riggs. November 20, 2001 my then 17 year old son, Paul was drinking alcohol at a home where the parents were present. They chose to turn a blind eye to to the 35-40 kids coming and going with alcohol on their persons.

Leaving the party at 10:00 PM, Paul hit a tree head on and died 3 weeks later, never regaining consciousness. Paul made a choice and it cost him his life.

After 2 years of hard work, April 16, 2004 Kansas Governor, Kathleen Sebelius signed into law KSA-4102, new section 4. Simply put those who host parties for young persons shall be held criminally responsible for not supervising such gatherings and eliminate alcohol consumption by these young persons.

This law became effective July 1, 2004. Numerous police departments and prosecutors have seen dramatic results. The amount of arrests has shed light on how serious this problem has been.

The State of Kansas has attracted a wake up call across this nation, thanks to your hard work and persistence.

Now, we need stricter laws and stiffer deterrents for parents and procurers for this continued tolerance. Our youth are still finding themselves in situations where they or someone they know has been maimed, died, taken someone else's life, or forever only being allowed to finish their young lives in nursing homes.

Don't dismiss the fact the Kansas is on the map combating this serious problem.

We do not want to open a series of frivolous lawsuits or a debate on dram shop. SB, 144 should be designed as a civil action for the victims of persons convicted of the criminal law. If a person is convicted of the criminal law should they not be subject to civil liability on behalf of the victims in the extreme circumstances I have outlined?

Currently, jail shock time for offenders, misdeamor charge probation, a fine or mandatory classes, according to judicial discretion are 1 step we have successfully made.

If a parent, homeowner or procreant is found guilty of this crime, should they not be subject to civil liability on behalf of the victims?

It is beyond my comprehension that this is not available in our state, but under current law, there is no civil statute.

Paul's hospital bills exceeded 480, 00.00 dollars. His funeral and interment were 10.000. Dollars. There is no amount of money that can compensate for the loss of a child. Again, I will state there is no the current laws we have allow victims any recovery for out of pocket

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money. So, we get a loan, sell possessions, or maybe file bankruptcy to rid ourselves of the debts. Would you be mad? Would you ask your lawmakers why convicted criminal should not be held civilly responsible should they choose not to supervise young persons consuming alcohol?

I'm mad. Our family happened to be fortunate to have health insurance, a small savings account and minor compensation from auto insurance...

Should your child have a party, would you supervise these 13-17 year olds with the prospect of criminal conviction and God forbid, civil action in the event a child is injured? Don't kid yourselves if you think KSA 4102 cured it. There is no cure all. But, if you faced the possibility of losing that which you have worked so hard for would you the pay attention? Face it people, Money rules the minds of those who think that wealth is their ultimate claim in society.

I implore you to search within yourselves. Should SB144 pass thru this committee?

YES! KSA 4102 should not stand alone. Let us go one step further. Show our country that Kansas will continue to battle the problem of underage drinking, on behalf of our youth, our future. Parental approval is escalating and must stop.

Walter Heller states "Rise above principle and do what is right". We can not become what we need to be by remaining what we are.

TO: Honorable John Vratil
Chairman House Judiciary Committee

FROM: Brette S. Hart

DATE: February 15, 2005

SUBJECT: Senate Bill 144

Good Afternoon, Mr. Chairman and Members of the Committee:

My name is Brette Hart. I am a third-year law student at Washburn School of Law. As part of a writing class, I have done extensive research and writing on the status of dram shop legislation in Kansas. I focused specifically on the current lack of dram shop legislation in Kansas and the possibility that dram shop liability could be imposed by the Kansas Supreme Court rather than by the Legislature. Under current law, a person who is injured in Kansas by a tort committed by an intoxicated person cannot seek recovery against the purveyor of the alcohol.

Some twenty years ago, the Kansas Supreme Court decided *Ling v. Jan's Liquors*, which set the precedent subsequent courts have followed. In *Ling*, the Kansas Supreme Court refused to impose civil liability upon dram shop owners and social hosts. The Kansas Court of Appeals has several times issued opinions strenuously urging the Kansas Legislature to take action on this public policy issue. When no legislative action was taken, the Kansas Supreme Court declined to change the common law through judicial opinion.

In *Burton*, the Court of Appeals openly disagreed with the decision in *Ling*, which essentially gives immunity to anyone who sells alcohol, regardless of the consequences.

> If we were free to follow our collective consciences and to apply what we believe to be sound legal reasoning, this panel would unanimously reverse the decision of the trial court granting

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> summary judgment . . . We have no disagreement among us that *Ling* is an anachronism, is not good law, and should not be the law of this state. As we perceive our duty, however, we are not free to follow our consciences or our best legal judgment.

Burton v. Frahm & Budde's Restaurant, Inc., No. 66,840, slip op. at 5 (Kan. Ct. App. 1992).

The Court of Appeals went on to say, "It is difficult to imagine anyone who is not aware of the statistics which show the havoc wreaked on our roads by drunken drivers." *Id.* at 7. Showing its frustration with the Legislature's inaction on the dram shop issue, the Kansas Court of Appeals stated, "It has been seven years since *Ling* was decided, and the legislature has yet to act. We suggest it is now up to the courts to abolish the immunity granted by the *Ling* decision." *Burton v. Frahm & Budde's Restaurant, Inc.*, No. 66,840, slip op. at 7 (Kan. Ct. App. 1992).

Whether a dram shop owner should be held civilly liable for the injuries caused by a minor or already intoxicated individual who has been served by that alcohol vendor is clearly an issue of public policy. The Legislature has been charged with the duty of setting public policy, of protecting and ensuring the safety of Kansas citizens. The lack of dram shop legislation in this state shows a lack of public policy concern. Drunk driving has steadily increased over the years. The lives and dollars that are spent to pay for the irresponsibility of intoxicated drivers and those who negligently supply them with alcohol have risen too high.

At last count, the laws of 43 states and the District of Columbia impose some measure of liability on licensees who dispense alcohol in violation of state law when their actions are found to have been a contributing cause to another's injury or death. Some of these laws were enacted by state legislatures. Some were judicially imposed as part of the common law of the state and then adopted by the legislature. Such strong public policy concerns have convinced the majority of states, over the years, that imposing civil liability on purveyors of alcohol is the best way to protect the majority of citizens. Dram shop liability, in some form, is both needed and inevitable

in Kansas. The only question that remains is, "Who will be the ones to make the law?" Either the Kansas Legislature can enact dram shop legislation that will protect public policy in the manner it sees fit, or the Kansas Supreme Court will exercise its authority to decide the issue by changing the common law of the state.

The Kansas Supreme Court recently heard arguments in the case of *Bland, et al. v. Scott, et al.* (Docket # 89773), a social host liability case. The court has not yet released its opinion in this case. In the absence of a statute enacted by the Legislature effecting liability for dram shop owners, a judicial opinion by the Kansas Supreme Court imposing common law liability can have the same legal effect. The make-up of the Kansas Supreme Court has changed since its holding in *Ling v. Jan's Liquors*. There are four new sitting justices. In fact, one of the judges who authored the Court of Appeals' opinion in *Burton v. Frahm & Budde's Restaurant* is now a member of the Kansas Supreme Court. If the Kansas Supreme Court decides in *Bland* to hold social hosts liable, the Legislature will have effectively delegated its authority to the courts on this very important public policy issue.

Dram shop legislation discourages negligence on the part of retailers and encourages them to act responsibly with regard to whom they serve intoxicating beverages. The Kansas Legislature needs to take this opportunity to sculpt dram shop liability in the manner you believe will best serve the citizens of Kansas. It is the Legislature's responsibility – not the Kansas Supreme Court's -- to decide how best to protect Kansas citizens from the consequences of serving liquor to Kansas drivers.

Thank you for allowing me to testify today. I will yield for questions.

CARRY NATION NO MORE: PUBLIC POLICY REQUIRES THE KANSAS SUPREME COURT TO BECOME AN ACTIVIST COURT.

Brette S. Hart

In the summer of 1985, the Kansas Supreme Court set a precedent with *Ling v. Jan's Liquors*[1] which has continued unchanged, although often questioned. In its decision that year, the Kansas Supreme Court while acknowledging its power to change the state's common law addressing civil liquor liability, emphasized that this is an issue of public policy which the Legislature is best equipped to handle.[2] Seven years later, in the absence of any action taken by the Kansas Legislature to address the issue, the Kansas Court of Appeals urged the Kansas Supreme Court to abolish the immunity granted by the *Ling* decision.[3] Once more, and perhaps more ardently than ever, the Kansas Court of Appeals has pleaded with the highest court of this state to take action in the recent case of *Noone v. Chalet of Wichita*.[4] Whether the Kansas Supreme Court will take up the *Noone* case for review will not be known until December 15, 2004 at the earliest.[5]

This state enacted a dram shop act in its early years of statehood[6] during the time of Carry Nation, but it was repealed in 1949.[7] Since 1985, the highest courts of Kansas have repeatedly urged the Legislature to enact such legislation. Civil liability should be placed on servers of alcoholic drinks. If the Kansas Legislature continues to refuse to enact dram shop legislation, then the burden must fall on the shoulders of the Kansas Supreme Court to change

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[1] 703 P.2d 731 (Kan. 1985).
[2] Ling v. Jan's Liquors, 703 P.2d 731, 739 (Kan. 1985).
[3] Burton v. Frahm & Budde's Restaurant, Inc., No. 66,840, slip op. at 7 (Kan. Ct. App. 1992).
[4] 96 P.3d 674 (Kan. Ct. App. 2004).
[5] *Id.*
[5] Noone v. Chalet of Wichita, 96 P.3d 674, 676 (Kan. Ct. App. 2004) (citing Compiled Laws of Kansas 1862, ch. 35, sec. 10; G.S. 1868, ch. 35, sec. 10; G.S. 1949, 41-1106).
[7] Repealed by Article 15, § 10 of the State of Kansas Constitution (approved November 2, 1948).

precedent and create a new cause of action in this state. While some may criticize the Kansas Supreme Court for being an "activist court" by taking the initiative to change the common law in this state, it needs to be done. If the Legislature cannot or will not get it done, then the Kansas Supreme Court must do the job.

DRAM SHOP LIABILITY 101

"Dram shop liability" refers to the civil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer. [8]

> The typical factual scenario involves a patron who is served past the point of obvious or apparent intoxication, attempts to operate a motor vehicle, and soon after causes a crash with other vehicles on the highway. The innocent victim may be able to recover damages from the intoxicated party as well as the licensed establishment which provided the alcohol."[9]

The common law rule was that a tavern owner could not be held liable for injuries to third persons which were caused by an intoxicated patron. The reason most commonly given was that the injuries were proximately caused by the "imbibing of the intoxicating liquor by the patron" and not by the sale of such intoxicating beverage.[10] The concept of dram shop liability originated in English common law, which imposed the responsibility of supporting the children of a habitual drunkard on the tavern keeper who served the parent.[11]

Dram shop liability may be based on common law or statutory law. The common law rule in Kansas, in the absence of legislation, provides that suppliers of alcohol are not liable to

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[8] Black's Law Dictionary 509 (7th ed. 1999).
[9] James F. Mosher, J.D., Prevention Research: The Model Dram Shop Act of 1985, 4, Legal Studies Unit, Prevention Research Center, 1985 (used by the House Judiciary Committee in studying dram shop liability and the possible need for such legislation in Kansas in the hearing on H.B. 2785 during the 1994 Regular Session of the Kansas House of Representatives).
[10] See, e.g., Carver v. Schafer, 647 S.W.2d 570, 572 (Mo. Ct. App. 1983).
[11] Dram Shop Act: Hearing on H.B. 2150 Before the House Committee on Federal & State Affairs, 1983 Regular Session of Kansas House of Representatives (letter from Robert H. Miller, State Representative, sent in support of H.B. 2150, 1983) [hereinafter cited as 1983 Report].

the victims of an intoxicated tortfeasor.[12] The Kansas common law rule can be changed if the Kansas Legislature enacts a statute ***or*** if the highest court in Kansas sets case precedent establishing liability on a tavern owner. Thus, in the absence of a statute enacted by the Legislature effecting liability for dram shop owners, a judicial opinion by the Kansas Supreme Court can have the same legal effect. Under current law, however, when a person who is injured in Kansas by a tort committed by an intoxicated person seeks recovery against the purveyor of the alcohol, such third-party liability does not exist in this state.

KANSAS HISTORY OF DRAM SHOP LIABILITY

Kansas is the former torchbearer of the temperance movement and the home state of Carry Nation. Now, in the 21st century, the Kansas Legislature is reluctant to modernize its liquor laws to keep pace with the majority of the nation.[13] During the 19th century, seventy percent of all those who immigrated to Kansas were from Puritan states.[14] This explains some of the early temperance actions in this state. Women were prohibited from the earliest saloons, and men were rarely home at night. The booming success of saloons in the Kansas frontier began to pose a serious threat to family values.[15]

The temperance movement was so strong in Kansas that serious consideration was given to proposing a constitutional amendment. If not for fear that Congress would reject its petition for statehood, such a provision would have been included in the state's constitution.[16] The territorial legislature in Kansas enacted a dram shop act in 1859.[17] The 1859 law included a civil damage statute, which provided a cause of action against "the seller, barterer or giver of

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[12] Ling v. Jan's Liquors, 703 P.2d 731, 739 (Kan. 1985).
[13] Kevin Wendell Swain, Liquor By the Book in Kansas, 35 Washburn L.J. 322, 326-331 (1996).
[14] *Id.*
[15] *Id.*
[16] *Id.* at 326.
[17] Noone v. Chalet of Wichita, 96 P.3d 674, 676 (Kan. Ct. App. 2004) (citing Compiled Laws of Kansas 1862, ch. 35, sec. 10; G.S. 1868, ch. 35, sec. 10; G.S. 1949, 41-1106).

intoxicating liquors for damage or injury caused 'by any intoxicated person or in consequence of intoxication.'"[18]

Kansas led the Prohibition movement with a state constitutional amendment in 1881. "All eyes were upon Kansas as the state prepared to vote on the Union's first constitutional prohibition."[19] The amendment forever prohibited the manufacture and sale of intoxicating liquors in Kansas "except for medical, scientific and mechanical purposes."[20] Kansas' first dram shop act was enacted in 1881, twenty years after the state was admitted into the Union.

> Every person who shall, by the sale, barter or gift of intoxicating liquors, cause the intoxication of any other person or persons, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and five dollars per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, to be recovered by civil action in any court having jurisdiction.[21]

On November 2, 1948, the citizens of Kansas voted to amend Article 15 of the Constitution of the State of Kansas.[22] The result was that only the open saloon was prohibited in Kansas: "The sale of intoxicating liquor by the individual drink in public places is prohibited, except that the legislature may permit, regulate, license and tax the sale of intoxicating liquor by the drink in public places in a county where the qualified electors of the county approve . . . ."[23] Additionally, "[t]he new constitutional provision gave the legislature the power to regulate, license, and tax the manufacture and sale of intoxicating liquors and to regulate the possession

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[18] Ling v. Jan's Liquors, 703 P.2d 731, 736 (Kan. 1985) (quoting 1859 statute)..
[19] Swain, *supra* note 9, at 329.
[20] Article 15, § 10 of the Kansas Constitution (approved November 2, 1880).
[21] K.S.A. § 21-2117 (Repealed, L. 1949, ch. 242, § 115)
[22] Ling v. Jan's Liquors, 703 P.2d 731, 737 (Kan. 1985).
[23] Article 15, § 10 of the Kansas Constitution (approved November 2, 1948).

and transportation of intoxicating liquors."[24] Likely, this is also the time when the liquor lobby began to set roots for its future stronghold in Kansas politics.

In 1949, the Kansas Legislature used its power conferred by the amended Article 15 to enact the Kansas Liquor Control Act.[25] "The Act was a comprehensive plan to regulate alcohol from the time of its manufacturer within the state or importation into the state until it was ultimately sold by a licensed retailer for use or consumption."[26] The Act also included criminal penalties for the sale of intoxicating beverages to minors or already intoxicated or incapacitated persons.[27] Noticeably absent from this new legislation, however, were the civil penalties imposed by the prior dram shop provision.

Very little written information has been maintained about why the Kansas Liquor Control Act was enacted without a dram shop section. There is, however, a 1947 report discussing the dram shop act, entitled "State Regulation of Alcoholic Beverages." This report, prepared by the Research Department of the Kansas Legislative Council, examined the seventeen states whose constitutions then contained provisions relating to the regulation of the manufacture and sale of alcoholic beverages.[28] Of those seventeen, only six constitutional provisions were determined to be particularly significant in the 1947 debates on whether to repeal the state constitutional amendment which provided a cause of action against the seller, barterer, or giver of intoxicating alcohol for injury or damage caused by the intoxicated person. [29] The State of Kansas, at that time, was considering the repeal of a constitutional amendment rather than a statute, which was unique. The 1947 report identified the difference between policies set forth in statutes and those

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[24] *Id.*
[25] K.S.A. § 21-3610; K.S.A. § 41-715.
[26] Ling v. Jan's Liquors, 703 P.2d 731, 737 (Kan. 1985).
[27] K.S.A. § 41-715 and K.S.A. § 21-3610
[28] State Regulation of Alcoholic Beverages, Research Department Kansas Legislative Council, Publication No. 148, January 1947 (used by the 52nd Regular Session of the Kansas Legislature in discussing whether Kansas needs a Dram Shop Act).
[29] *Id.*

in constitutions, noting that statutes can be changed at any time by the legislature, while constitutional amendments can only be repealed or enacted by popular vote.[30]

RECENT ATTEMPTS TO ENACT DRAM SHOP LEGISLATION

The Kansas Legislature has made the control of drunk drivers a priority in recent years. Numerous pieces of legislation have been proposed to tighten the laws dealing with drunk drivers and those who provide alcohol to minors and already incapacitated persons. Unfortunately, none of the legislative proposals with any weight has ever been enacted. From 1953 to 1994, eight dram shop proposals were introduced in either the House or Senate, but all were killed.

In 1983, a bill was introduced in the Kansas House of Representatives. As proposed, House Bill 2150 was intended to give rights to victims of accidents resulting from alcohol. Parties both opposing and supporting the bill attended the hearing by the House Committee on Federal and State Affairs and gave arguments for their respective positions. The Executive Director of the Kansas Trial Lawyers Association (KTLA), Kathleen Gillian Sebelius,[31] appeared at the hearing in support of H.B. 2150. Mrs. Sebelius provided the Committee members a list of the states that then had dram shop legislation.[32] Dan Lykins, Vice-President of KTLA, appeared and stated that "[p]resently liquor store owners have no incentive not to sell to minors. With this act the store owner could be held responsible."[33] Mr. Lykins continued by pointing out that the bill was not meant to punish those shop owners who operated in a legal, honest manner, but, rather attempted to provide a cause of action to the innocent victims.[34]

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[30] *Id.*
[31] Kathleen Gillian Sebelius later became Governor of Kansas. She was elected on November 5, 2002.
[32] 1983 Report (Committee Minutes).
[33] *Id.*
[34] *Id.*

Bob W. Storey, representing the Kansas Beer Retailers Association, appeared in opposition to H.B. 2150. He argued that the act would be unenforceable because no statutory definition of "intoxicated person" existed.[35] Joe Burger, Manager of the Topeka Moose Lodge, argued that the bill would unfairly create a "tremendous hardship on the small units in small communities."[36] Mr. Burger stated that since twenty percent of the alcohol sold in Kansas was sold to private clubs, the remaining eighty percent was sold to individuals. His concern with H.B. 2150 was that it addressed itself only to the clubs, but there were "four times more drunks in the private sector."[37] One tavern owner appeared before the Committee. Ace Johnson, owner of the Sanctuary in Lawrence, Kansas, stated that the bill was "discriminatory and would cause tremendous insurance problems."[38]

Two weeks prior to the hearing on H.B. 2150, the Missouri Court of Appeals had ruled that a tavern owner was liable for damages when a policeman was run down by a drunk driver.[39] The driver had left the tavern earlier in the evening.[40] At the time, Missouri did not have a law similar to the one proposed in H.B. 2150. In support of H.B. 2150, Representative Robert H. Miller quoted from the Missouri Court of Appeals opinion:

> One would have to be a hermit to be unaware of the carnage caused by drunken motorists. The problem was aptly described nearly twenty years ago. Our highway safety problems have been greatly increased. Death and destruction stalk our roads. The peaceful Sunday afternoon family drive through the hills has been abandoned by many as a result of brushes with near death at the hands of half-baked morons drunkenly weaving in and out of the traffic at 80 or 90 miles per hour.[41]

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[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] See Carver v. Schafer, 647 S.W.2d 570 (Mo. Ct. App. 1983).
[40] 1983 Report (Letter from Robert H. Miller, State Representative, sent in support of H.B. 2150, quoting Carver v. Schafer, 647 S.W.2d 570 (Mo. Ct. App. 1983)).
[41] *Carver*, 647 S.W.2d at 573.

The Missouri Court of Appeals sought to emphasize in the case of *Carver v. Schafer* that if an intoxicated driver was financially irresponsible and the tavern owner was immunized from liability, the innocent victim, a party completely without fault, would have to bear the burden.[42] Missouri's appellate court had urged, as has the Kansas Court of Appeals, that the state's legislature act on the basis that dram shop liability is a public policy decision and therefore clearly in the realm of legislative action.[43]

In the House Committee hearing on H.B. 2150, Representative Miller sought to have the bill considered under the umbrella of the public policy the Kansas Legislature was charged with protecting. Representative Miller, in fact, implored his fellow legislators to take action: "The question before you is, should this policy be set by the Legislature or be left up to the courts?"[44] He felt that leaving a decision concerning public policy up to the courts would be tantamount to neglect of legislators' sworn duties. "The lives and dollars that are lost at the hands of a drunk can be tallied on paper and the totals in both columns are astounding."[45]

In 1983, at the time H.B. 2150 was introduced, nineteen states had some form of dram shop legislation. Fourteen additional states had court decisions either imposing liability or leaving that option open for future cases.[46] Nevertheless, H.B. 2150 ended the same as many of the other dram shop bills had – it died before ever coming up for a vote. The opponents of the bill had once again won with the idea that liability should be on the consumer of intoxicating beverages, not the seller.

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[42] *Id.* at 575.
[43] *Id.*
[44] 1983 Report (Letter from Robert H. Miller, State Representative, sent in support of H.B. 2150, 1983)
[45] *Id.*
[45] 1983 Report (Committee Minutes)

In 1984, a limited dram shop bill (H.B. 2661) was introduced.[47] As proposed, the bill imposed "liability on any person negligently selling or furnishing alcoholic beverages to a minor where the minor, under the influence thereof, caused death, personal injury or property damage to another."[48] Although it survived Committee deliberations, the bill died on General Orders in the House.[49]

THE CASE THAT SET THE PRECEDENT: LING V. JAN'S LIQUORS

Around 1:00 a.m. on Sunday, February 3, 1980, Lyllis Ling was driving east through Johnson County, Kansas, when her car stalled. Ling got out of her car and was standing beside it when she was struck by Richard Shirley, a nineteen-year-old with a blood alcohol concentration of .30. On the night of February 2, 1980, Richard Shirley had been consuming alcohol purchased from Jan's Liquors, a retail liquor establishment. Ling filed a petition naming Jan's Liquors as defendant. She sought damages for the injuries she received, which resulted in the amputation of both her legs. The district court granted the defendant's motion to dismiss on the basis that "there is no liquor vendor liability in Kansas and there is no indication that the Kansas Supreme Court will impose the same."[50]

From the 1949 repeal of the Kansas statute imposing civil liability on a liquor retailer to the 1985 *Ling* case, there had been no reported Kansas case asserting liability to third persons on the part of one selling or furnishing liquor.[51] In *Ling*, the Kansas Supreme Court looked to the common law in the absence of a statute addressing the issue of civil liability of a liquor retailer. The court stated, "Although empowered to change the common law in light of changed

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[47] Ling v. Jan's Liquors, 703 P.2d 731, 735 (Kan. 1985).
[48] *Id.*
[49] Conversation with Rita Hailey, Kansas State Library.
[50] Ling v. Jan's Liquors, 703 P.2d 731, 733 (Kan. 1985).
[51] *Id.* at 738.

conditions, this court recognizes that declaration of public policy is normally the function of the legislative branch of government."[52] Further skirting the issue of creating a new cause of action through case law, the Kansas Supreme Court said that the decision of whether to abandon common law and "align itself with the new trend of cases which impose civil liability" upon alcohol vendors "depends ultimately upon what best serves the societal interest and need," which are matters of public policy that the legislature is best equipped to handle.[53]

The court in *Ling* noted two Kansas statutes that imposed criminal penalties for the sale of alcohol to a minor[54] and the sale of alcohol to an incapacitated or intoxicated person.[55] However, a violation of either statute does not constitute negligence per se, thereby eliminating any civil liability by dram shop owners for any resulting harm caused to third parties.[56] Justice Holmes, in his plurality opinion in *Ling*, pointed out that when the Legislature repealed K.S.A. § 21-2150, "it would appear obvious that it intended the common law to prevail."[57] On numerous occasions, Justice Holmes continued, the Legislature had revised Kansas liquor control laws but failed to re-enact dram shop liability. He noted that it was not the duty of the Kansas Supreme Court to fill in where the Legislature had neglected to act.[58]

Since the 1949 repeal of dram shop liability in Kansas, the Legislature, although it has considered it, has not recreated a civil cause of action in favor of those injured as a result of a violation of the liquor laws. The concurring justices in *Ling* believed that if the Kansas Legislature had intended to authorize a civil cause of action on such grounds, it would have

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[52] *Id.* at 739.
[53] *Id.*
[54] K.S.A. § 21-3610.
[55] K.S.A. § 41-715.
[56] *Noone*, 96 P.3d at 676.
[57] *Ling*, 703 P.2d at 739.
[58] *Id.*

enacted such a law.[59] They noted that K.S.A. § 41-715 prohibits the dispensing of intoxicating liquors to certain classes of persons and is a comprehensive act to regulate the manufacture, sale, and distribution of alcoholic liquors. However, the concurring justices concluded, "The legislature did not intend for it to be interpreted to impose civil liability."[60]

"Questions of Public Policy, It is Said, are Better Left to the Legislative Branch of Government."[61]

The Kansas Supreme Court refused to change common law dram shop liability in *Ling*, and the highest court in this state has stood firm ever since, despite the Kansas Court of Appeals' multiple urgings to change its stance. The court stated in *Ling v. Jan's Liquors*, "In the final analysis, we find the decision should be left to the legislature."[62] Though the common law remains in force in Kansas when the Constitution is silent or the Legislature has not acted, it is subject to modification by judicial decision in light of "changing conditions or increased knowledge where the Kansas Supreme Court finds that it is a vestige of the past, no longer suitable to the circumstances of the people of this state."[63]

THE PERFECT TIME, THE PERFECT CASE

In *Noone v. Chalet of Wichita*,[64] the trial court refused to dismiss Brenda Noone's suit seeking to recover damages from Chalet for the death of her child by an intoxicated driver who had been over-served at the bar.[65] On appeal, forced by the doctrine of precedent, the Kansas Court of Appeals reversed the trial court and granted Chalet's motion to dismiss.[66] The record showed that James Segraves had consumed four 32-ounce beers at the Chalet. Segraves became

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[59] Id. at 740 (Holmes, J., concurring in part and dissenting in part joined by McFarland and Herd, JJ. Lockett, J., concurring in part and dissenting in part, joined by Prager and Miller, JJ.).
[60] *Id.*
[61] *Carver*, 647 S.W.2d at 575.
[62] *Ling*, 703 P.2d at 739.
[63] *Id.*
[64] Noone v. Chalet of Wichita, 96 P.3d 674 (Kan. Ct. App. 2004).
[65] *Id.* at 675.
[66] *Id.* at 678.

intoxicated, and Chalet continued to serve him in spite of his obviously intoxicated state. Around midnight, Segraves left the Chalet, drove at a high rate of speed, and eventually collided with a vehicle in which James Noone was a passenger. Both vehicles burst into flames. James Noone and his driver died as a result of their injuries, while Segraves was not seriously injured.[67]

Just as it had done previously, the Court of Appeals urged the Kansas Supreme Court to finally act where the Legislature has not. The Court of Appeals echoed the tradition that a "declaration of public policy is normally the function of the legislative branch of government."[68] In order for the Supreme Court of Kansas to change common law, it must have a case before it on which to rule. *Noone v. Chalet or Wichita* is the perfect case, and now is the perfect time for the Kansas Supreme Court to grant review and impose civil liability on tavern owners, thereby overruling the state's common law.

THE PERFECT CASE THAT PASSED THE KANSAS SUPREME COURT BY: BURTON V. FRAHM & BUDDE'S RESTAURANT, INC.

Noone v. Chalet of Wichita is not the first case in which the Kansas Court of Appeals showed obvious reluctance to follow the precedent of *Ling*.[69] In *Burton v. Frahm & Budde's Restaurant, Inc.*,[70] a minor who was knowingly sold alcohol at a bar drove intoxicated and caused serious injuries to Burton, who was lawfully entering the same intersection Frahm was speeding through.[71] The Kansas Court of Appeals stated that if the judges were free to follow their collective consciences and apply what they believed to be sound legal reasoning, the panel would have unanimously reversed the summary judgment granted by the trial court to Budde's.[72]

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[67] *Id.* at 674.
[68] *Id.* at 676.
[69] *Id.*
[70] Burton v. Frahm & Budde's Restaurant, Inc., No. 66,840, slip op. at 4 (Kan. Ct. App. 1992).
[71] *Id.*
[72] *Id.* at 5.

The court continued, "We have no disagreement among us that *Ling* is . . . not good law, and should not be the law of this state."[73] However, in its unpublished opinion the Kansas Court of Appeals did not again set forth its plea to the Legislature to change the law. This time, the Court of Appeals put the burden on the Kansas Supreme Court by saying, "It has been seven years since Ling was decided, and the legislature has yet to act. We suggest it is now up to the courts to abolish the immunity granted by the Ling decision."[74]

The Kansas Court of Appeals deliberately wrote *Burton v. Frahm & Budde's Restaurant, Inc.* to entice review by the Kansas Supreme Court. Seven years had passed since the decision in *Ling v. Jan's Liquors, Inc.*, in which the court surreptitiously urged the Kansas Legislature to enact some type of dram shop law regardless of the specifics.[75] In *Burton*, the Court of Appeals appeared to have given up on the Kansas Legislature ever following through with a statute imposing dram shop liability. Instead, the intermediate appellate court told the Kansas Supreme Court it was its duty to take over where the Kansas Legislature had faltered, and to take action on behalf of the citizens of this fine state.[76] However, neither party to the *Burton* case filed a petition seeking review by the Kansas Supreme Court.

Spurred on by the opinion in *Burton*, and perhaps fearful that the court would make Kansas common law in this area inconsistent with the Legislature's views, the Kansas House Judiciary Committee took up the issue of dram shop legislation in 1993 House Bill 2785. Sub. H.B. 2785 would have established a limited form of dram shop legislation:

> The bill allows for a cause of action against licensees, such as shopkeepers who sell liquor or cereal malt beverages, when there is a violation of the laws prohibiting the sale of liquor or cereal malt beverages to a minor and a finding that: (1) the minor

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[73] *Id.*
[74] *Id.* at 7.
[75] Ling v. Jan's Liquors, 703 P.2d 731, 739 (Kan. 1985).
[76] Burton v. Frahm & Budde's Restaurant, Inc., No. 66,840, slip op. at 7 (Kan. Ct. App. 1992).

> consumed the beverages sold by the licensee on the premises; (2) the consumption was a proximate cause of harm to the injured party; and (3) the harm was a foreseeable consequence of the negligent service.[77]

Sub. H.B. 2785 followed its predecessors in failing, but did so uniquely as a result of being stricken from the House Calendar.[78]

In addition to the Committee members present, several other representatives of special interests were on hand for the hearing on Sub. H.B. 2785, including: Kansans for Life at its Best, Kansas Trial Lawyers Association, Kansas Wine & Spirits Wholesalers Association, Kansas Retail Liquor Association, Kansas Beer Wholesalers Association, and State Farm Insurance. Advocates of the bill argued that retail licensees should be held accountable for furnishing any underage person alcoholic liquor or cereal malt beverages.[79] Don Bird, of Kansans for Life at its Best, stated that they favored extending the bill not only to underage individuals but also to adults.[80] Steve Dickerson, Kansas Trial Lawyers Association, had been one of the attorneys in *Ling v. Jan's Liquors, Inc.* He stated that the goal of the legislation was to reduce injuries and save lives. He also supported expanding the bill to include K.S.A. § 41-715 dealing with obviously intoxicated adults.[81]

Tuck Duncan, of the Kansas Wine & Spirits Wholesalers Association, stated that the Association would not oppose a dram shop bill if it tied liability to comparative fault for licensees who made an intentional, unlawful sale to a minor or already intoxicated or incapacitated person.[82] He argued, for example, that a vendor should have a cause of action if a

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[77] Dram Shop Liability: Hearing on H.B. 2785 Before House Judiciary Committee, 1994 Regular Session of the Kansas House of Representatives (Committee Minutes) [hereinafter cited as 1994 Minutes].
[78] Conversation with Rita Hailey, Kansas State Library.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

minor intentionally used fake identification to purchase alcohol.[83] Finally, Mr. Duncan advocated the inclusion of a server training program into the bill.[84] A representative of Kansas Beer Wholesalers Association argued that the bill would send the wrong message to individuals who buy alcohol at bars, by suggesting that they were not responsible for their own actions and instead placing the responsibility on others.[85]

Opponents of H.B. 2785, such as the Kansas Retail Liquor Association and State Farm Insurance, stated that their major objection was that liability insurance premiums would increase for bar owners.[86] The Kansas Retail Liquor Association opposed legislation increasing liquor dealers' liability for the acts of another over whom they would have no control. The opponents argued that it was illogical to assume that the bill would make retailers more careful about selling to minors or already intoxicated individuals.[87] The Kansas Retail Liquor Association stated that the Kansas Legislature was being hypocritical and inconsistent in the rhetoric regarding attempts to increase individual responsibility for individual acts. "We do not see a corresponding effort on the part of legislators to hold other manufacturers and retailers responsible for the legal products they sell which are frequently misused by the purchaser, i.e. guns, automobiles, etc."[88]

George Puckett, Kansas Restaurant & Hospitality Association, appeared before the Committee as an opponent and stated that current laws were adequate to deter vendors from serving liquor or cereal malt beverages to minors. Mr. Puckett argued that the right to sue and collect appropriate damages already existed if a server of alcoholic beverages demonstrated gross

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] 1994 Minutes (Statement made by Rebecca Rice on behalf of the Kansas Retail Liquor Association).

negligence leading to property destruction or harm to an individual.[89] He concluded that with the passage of a dram shop act, insurance premiums would be extremely high. Mr. Puckett offered that the current legal system in Kansas worked, and that the true offenders were convicted if guilty without endangering the livelihood of many small businesses.[90] Chairman O'Neal questioned Mr. Puckett whether he believed that the server in *Burton v. Frahm & Budde's Restaurant, Inc.* should have shouldered some of the liability. Mr. Puckett responded that there were already laws that would penalize the server. The Chairman informed Mr. Puckett that ***only*** HB 2785 as proposed would compensate innocent victims and place liability on the servers of liquor. Finally, Mr. Puckett, on behalf of the Kansas Restaurant and Hospitality Association, argued that the nationwide public will sought to reduce unnecessary litigation, and that because H.B. 2785 would increase litigation, it therefore contradicted the public will.[91]

The Kansas Trial Lawyers Association's argument in support of H.B. 2785 relied on a paper written by Dr. James F. Mosher, J.D., Legal Studies Unit of the Prevention Research Center.[92] Dr. Mosher stated that the expansion of court-imposed liability had caused legislatures to protect licensees. He believed that this trend stemmed from two major factors: (1) the casualty insurance "crisis," and (2) the powerful lobbying forces of the retail alcoholic beverage industry.[93] He noted that the need to obtain liquor liability insurance was a burden to bars as well as many other businesses. In response to alcohol retailers and their lobbying efforts, a few

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[89] 1994 Minutes (Letter from George Puckett on behalf of the Kansas Restaurant and Hospitality Association, in opposition of H.B. 2785).
[90] *Id.*
[91] *Id.*
[92] James F. Mosher, J.D., Prevention Research: The Model Dram Shop Act of 1985, Legal Studies Unit, Prevention Research Center, 1985 (used by the House Judiciary Committee in studying dram shop liability and the possible need for such legislation in Kansas in the hearing for H.B. 2785 during the 1994 Regular Session of the Kansas House of Representatives).
[93] *Id.* at 5.

state legislatures were limiting, eliminating, or choosing not to enact dram shop liability.[94] The result was that state legislatures were being pulled by two conflicting, yet equally strong interests: the alcohol beverage industry on one side of the issue and trial lawyers on the other.

When finalized, the liability imposed by H.B. 2785 was limited to licensees only; social hosts were not included. As proposed in the bill, an aggrieved party would have had a cause of action against a licensee for breach of the duties imposed by the statutes barring alcohol sales to minors and apparently intoxicated individuals.[95] Liability would have been established under H.B. 2785 only if the jury found all of the following facts: (1) the purchaser consumed the alcoholic beverages sold by the licensee on the premises of the licensee (thus precluding package liquor stores from liability), (2) the consumption of the alcohol or cereal malt beverage was a proximate cause of the harm sustained by the aggrieved party, and (3) harm was a foreseeable consequence of the negligent service of alcohol or cereal malt beverage by the licensee. All three elements would have had to be established in order to prove liability. It was not simply the sale itself that would have triggered liability. Although the server training proposal was included in proposed H.B. 2785, the groundbreaking bill did not survive to a vote.[96]

CONCERN FOR THE PUBLIC WELFARE SHOULD TRUMP ALL OTHER INTERESTS

An awareness of the serious effects of alcohol needs to penetrate not only our society's morals and disciplines but, on a fundamental level, it needs to perforate the thoughts of our decision makers in the legislature. At the time *Ling v. Jan's Liquors* was decided in 1985, six states that had not enacted dram shop laws also refused to impose liability judicially. These jurisdictions had considered but declined to follow the emerging trend of cases on the basis that

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[94] Id. at 6.
[95] 1994 Minutes.
[96] *Id.*

the issue was one of public policy and thus best left to the legislative body.[97] But what should happen when a state's legislature refuses to do its job by enacting laws that reflect the public policy interests of the state? In 2004, a strong liquor lobby has left the Kansas Legislature in limbo on the issue of dram shop legislation. Eight times dram shop legislation has been proposed in either the Kansas House or Senate, and eight times the bill has died before it could be enacted.

Whether dram shop liability is imposed by the Kansas Supreme Court or the Kansas Legislature, now is the time to act. If it be the Kansas Supreme Court, then now is the perfect time to act, and *Noone* is the perfect vehicle. K.S.A. § 60-1901 states, "If the death of a person is caused by the wrongful act or omission of another, an action may be maintained for the damages resulting therefrom . . . against the wrongdoer." Kansas courts have uniformly applied this statute to all defendants except liquor vendors in situations like *Ling* and *Noone*.

The Kansas judiciary, bound to follow the common law no-liability dram shop rule, has not only set out an exception to civil liability but in fact has effectively given judicial ***immunity*** to liquor retailers. Surely this immunity is a public policy statement in itself. It is as though our Supreme Court is saying that "those who dispense liquor are a unique, special and protected group which . . . is entitled to be exempt from a law of universal application."[98] As noted in the dissent in *Ling*, the Kansas Legislature has already stated public policy by criminalizing the sale of alcoholic liquor to any person who is physically or mentally incapacitated by the consumption of liquor[99] and to any minor.[100] It is at odds with public policy, then, for the judiciary to await

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[97] *Ling*, 705 P.2d at 736.
[98] *Noone*, 56 P.3d at 679.
[99] K.S.A. § 41-715
[100] K.S.A. § 21-3610

enactment of a specific statute declaring civil liability for the same acts. It is an anomaly that such conduct would carry criminal liability but not civil liability.[101]

Twenty-one years has passed since 1983, when *Ling* was decided. At that time, nineteen states had statutes providing for dram shop liability, and another fourteen states either had court-imposed liability or had left open that possibility. Kansas is now one of only ***six*** states that still do not recognize civil liability under these circumstances. It would not be unprecedented for the Kansas Supreme Court to change the state's common law. As of 2000, forty-four states had some form of dram shop liability in place. Of those forty-four, thirteen states had imposed dram shop liability as a result of judicial action.[102] Some states' statutory language leaves open the possibility of recovery even by the intoxicated person, not just the victim injured by the intoxicated driver.[103]

Ling v. Jan's Liquor is simply bad public policy. "A recent NHTSA [National Highway Traffic Safety Administration] study lists Kansas as No. 10 among states for drinking-related deaths per mile driven."[104] Thirty-nine percent of all Kansas traffic deaths in 1991 were caused by drunk drivers.[105] In 2001 alone, drunk drivers caused 200 deaths and over 5,100 injuries in Kansas.[106] "NHTSA has determined that if Kansas would enforce its laws prohibiting the sale of alcohol to minors or obviously intoxicated persons, there would be an eleven percent decrease in the number of alcohol related fatalities annually."[107] Enacting a law imposing civil liability upon liquor retailers would further reduce the number of alcohol-related deaths in Kansas. "Given these startling statistics and the judiciary's unique vantage point in seeing the civil and criminal

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[101] *Noone*, 96 P.3d at 674.
[102] Richard Smith, A Comparative Analysis of Dramshop Liability and a Proposal for Uniform Legislation, 25 J. Corp. L. 553, 556 (2000).
[103] *Id.* at 556.
[104] *Noone*, 96 P.3d at 679.
[105] *Id.*
[106] *Id.*
[107] *Id.*

prosecutions arising from this carnage, the courts should be sensitive to any remedies that may reduce these tragedies."[108] The ultimate remedy, when we have a legislature that refuses to enact a dram shop statute and protect public safety, is for the Kansas Supreme Court to change the state's common law through a case such as *Noone v. Chalet of Wichita*.

BETTING ON WHO WILL ACT FIRST: KANSAS LEGISLATURE V. KANSAS SUPREME COURT

A petition for review has been filed with the Kansas Supreme Court seeking review of *Noone v. Chalet of Wichita*. It is unknown at this time whether the court will decide to take up this case for review. The Supreme Court of Kansas, in an action unique to this state but not to the nation, will be deciding whether to take up the charge where the Kansas Legislature has failed. If the court is willing to hold Chalet of Wichita liable for injuries caused by its intoxicated patron, the court will have to overrule *Ling v. Jan's Liquors* and establish a new common law cause of action in this state. In doing so, the Supreme Court of Kansas would become, at least in one sense, an "activist court" – a court that steps outside its normal duties.

In order to grant a petition for review of *Noone*, the vote of three justices is required. The Kansas Supreme Court needs to grant review of *Noone* whether it decides to change the common law or reaffirm *Ling*. There is a great deal of debate and lobbying both in favor of and in opposition to dram shop civil liability in Kansas. If the Kansas Supreme Court reaffirms *Ling*, it will in effect send a message to the Kansas Legislature that the court is not willing to step outside of its traditional role, and the legislature will have to address the issue. The court could grant review of *Noone* in the hope that the Kansas Legislature will take action in the upcoming session. If the legislature does not take up the issue, the Kansas Supreme Court could then hear arguments in *Noone* and decide the issue itself.

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[108] *Id.*

But perhaps the Kansas Legislature will recognize the unique, yet difficult, position the Kansas Supreme Court is in and will decide to quickly enact the long overdue dram shop act before *Noone* comes before the court. In order for dram shop legislation to make it through the Kansas Legislature, it will likely need to include comparative fault, include a mandatory seller and server training program, and apply to both underage minors and already intoxicated or incapacitated adults. It is important and long overdue legislation, and its overriding benefits to the citizens of Kansas outweigh any extraordinary costs to the retail liquor owners. When tavern owners are civilly liable for the actions of their intoxicated patrons, citizens can be sure that their public safety has finally been made a priority – either by the hand of the Kansas Supreme Court or by the Kansas Legislature, whichever acts first.

TO: Representative Mike O'Neal

FROM: Brette Hart

DATE: February 5, 2005

RE: James Bland et al. vs. Sean Scott et al.

Factual Statement of the Case:

On September 16, 2000, a motor vehicle accident occurred involving a vehicle operated by Sean Scott and a vehicle operated by Lisa Bland. Sean Scott, 16-years-old at the time of the accident, was visiting his brother Mike Scott at the Phi Gamma Delta house at the University of Kansas on September 16, 2000. Plaintiffs claim that Sean Scott was provided substantial amounts of alcohol at the Phi Gamma Delta house and earlier by Scott's parents at The Wheel. Plaintiffs claim Sean Scott's car keys were taken away from him because of Sean's level of intoxication, but Sean later regained possession of the car keys. Sean Scott traveled east on Highway K-10, swerving in and out of the eastbound lanes, and reaching speeds up to 100 miles per hour before he lost control of the car. When Sean Scott lost control of the car, he crossed the highway into the westbound lanes of K-10, struck Lisa Bland's car, and killed her. Sean Scott's blood alcohol level was .15 after the accident.

The trial court dismissed the Defendants because the Plaintiffs had failed to state a claim. Plaintiffs appealed.

Arguments:

The legal question is whether the Plaintiffs can state a cause of action against the Defendants and extend civil liability beyond the drunk driver. Plaintiffs argue that the District Court erred in dismissing their petition because they stated a claim for negligence under theories

of assumption of duty, negligence and negligence per se. Defendants rely on precedent to argue that Plaintiffs have failed to state a claim. The Kansas Supreme Court has made the decision to preclude civil liability for injury caused by an intoxicated minor to a third person. This decision was based on public policy, and the Court has held that if public policy were to be changed, the Legislature would have to do it. The Plaintiffs attempt to distinguish this case from the established common law in Kansas. Plaintiffs rely on language in Ling v. Jan's Liquors, 237 Kan. 629 (1985):

> "However, the common law is not static. It is subject to modification by judicial decision in light of changing conditions or increased knowledge where this court finds that it is a vestige of the past, no longer suitable to the circumstances of the people of this state. Indeed, we have not hesitated to adopt a new cause of action by judicial decision where we have determined that course was compelled by changing circumstances."

Plaintiffs claim Ling is not similar to the facts in Bland since there is no question as to proximate cause whether the supplier (here, Phi Gamma Delta) knew or should have known that the adult was already intoxicated. Additionally, Plaintiffs argue that Justice Lockett's dissent in Ling applies, stating: "The common law grows as it is applied to new situations or as a need arises. The common law is judge-made and judge-applied. It is not to be followed blindly and can be changed when the conditions and circumstances require if the prior law is unjust or has become bad public policy." Plaintiffs argue that the holdings in Ling should, thus, not be applied.

Additionally, Plaintiffs claim that the Kansas Liquor Control Act is unconstitutional pursuant to Section 18 of the Kansas Bill or Rights to the extent that it denies Plaintiffs a remedy for their injuries. Plaintiffs claim it is the duty of the courts to safeguard the declaration of right and remedy guaranteed by constitutional provisions for all injuries. The Kansas Liquor Control Act is unconstitutional to the extent that it abrogates a common law remedy of person injured by violations of the act.