Approved: 3-29-07
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on March 5, 2007 in Room 313-S of the Capitol.

All members were present.

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Athena Andaya, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Duston Slinkard, Office of Revisor of Statutes
Cindy O'Neal, Committee Assistant

Conferees appearing before the committee:
Senator Phil Journey
John Peterson, Kansas Land Title Association
Mark Gleeson, Office of Judicial Administration
David Pierce, Professor at Washburn University
Sharolyn Dugger, CASA

The hearing on **SB 41 - negligence; ordinary care required when gun possession at issue in personal injury or wrongful death actions**, was opened

Senator Phil Journey appeared as the sponsor of the proposed bill. He stated that the bills intent is in response to Kansas Supreme Court Case *Wood v. Groh*, where the court ruled that firearms are inherently dangerous instruments and that the reasonable care required was that of the highest degree of care. The bill would have the burden to be met by ordinary standard of care. (Attachment 1)

The hearing on **SB 41** was closed.

The hearing on **SB 58 - conveying trust property**, was opened.

John Peterson, Kansas Land Title Association, appeared in support of the bill. Current law allows for a property titled in the trust name to be conveyed only in the trust name. The proposed bill would allow property titled in the trust name to be conveyed in the name of the trustee if the name of the trust is clearly specified in the conveyance. (Attachment 2)

Written testimony from the Kansas Bar Association in support of the bill was provided. (Attachment 3)

The hearing on **SB 58** was closed.

The hearing on **SB 118 - children in need of care, CASA reports**, was opened.

Mark Gleeson, Office of Judicial Administration, explained that the bill would allow for a presiding judge for a case under the Code of Care of Children to read reports prepared pursuant to the court's order for evaluation of development or needs of a child. The bill lists what type of reports it may order. It would also require the reports be filed with the court and made available to both counsel for all parties prior to any scheduling hearing. (Attachment 4)

David Pierce, Professor at Washburn University, explained that allowing judges to read and consider CASA's report would not limit the ability of any party to challenge the contents of the report or to cross-examine the authors of the report. (Attachment 5)

Sharolyn Dugger, CASA, appeared as a proponent to the bill. They supported judges having as much relevant information as possible in order to be able to make an objective ruling in complex cases. (Attachment 6)

The hearing on **SB 118** was closed.

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on March 5, 1007 in Room 313-S of the Capitol.

**SB 52 - regulating traffic; speed limit violations, open records**

Representative Colloton made the motion to report **SB 52** favorably for passage. Representative Whitham seconded the motion.

Representative Watkins provided the committee with a balloon that would state that the "maximum posted speed limit of 30 miles per hour or more but not exceeding 54 miles per hours, by not more than 6 miles per hour in excess of such maximum speed limit." (Attachment 7). He made the substitute motion to adopt the balloon. Representative Kinzer seconded the motion. The motion carried.

Representative Davis made the motion to report **SB 52** favorably for passage, as amended. Representative Watkins seconded the motion. The motion carried.

**SB 54 - criminal procedure; signing of arrest warrants**

It was the Senate's intent that lines 30-32 be stricken, but the amended version of the bill did not reflect that change. Representative Colloton made the motion to strike lines 30-32. Representative Pauls seconded the motion. The motion carried.

Representative Colloton made the motion to report **SB 54** favorably for passage, as amended. Representative Owens seconded the motion. The motion carried.

**SB 31 - jurisdiction of municipal courts**

Representative Colloton made the motion to report **SB 31** favorably for passage. Representative Ward seconded the motion.

Representative Davis made a substitute motion to add that the prosecutor has to certify that they checked the NCIC. Representative Kuether seconded the motion. The motion carried.

Representative Patton made the motion to include the provisions of **HB 2377** into the bill. Representative Watkins seconded the motion. The committee voiced its concern that these types of cases can currently be handled through CINC and questioned what other types of "crimes" would fall under the bill besides curfews. The motion failed. Chairman O'Neal announced that he would send **HB 2377** to the Kansas Judicial Council for further study.

Representative Pauls made the motion to strike on page 1, lines 40 & 41 and on page 2, lines 3 & 4. Representative Ward seconded the motion. The motion carried.

Representative Ward was concerned as to whether a case that wasn't filed in district court could then be amended to be brought in municipal court. Chairman O'Neal requested that he get with a revisor to work out language.

The committee meeting adjourned at 5:15 p.m. The next meeting was scheduled for March 6, 2007.

The committee minutes from February 1, 5, 7, 8, 12, & 19 were distributed by e-mail. With the notice that if no changes are requested March 9th they would stand approved.

STATE OF KANSAS

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TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS

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

CORRECTIONS AND JUVENILE JUSTICE OVERSIGHT (JOINT)

**Testimony Before the Kansas House Judiciary Committee**
**March 5th, 2007**
**in Support of Senate Bill 41**

Mr. Chairman, members of the Committee it is truly an honor to appear before your committee regarding Senate Bill 41. Senate Bill 41 is a response intended to clarify the holding in the Kansas Supreme Court case Wood v. Groh 269 Kan. 420. A copy of the opinion is attached for the convenience of the committee's review.

The facts as stated in the Kansas Supreme Court case are that on May 27th, 1995, Ed Groh, age 15, broke into a locked firearms storage facility, removed a handgun, loaded it with ammunition from the locked storage cabinet, took it to a friend's house where he drank some beer, discharged the firearm and then later that night went to a party that had no adult supervision. He arrived at the party around midnight, alcoholic beverages were consumed at the residence. Between 1:30 and 2:00 am, he left the party to drink more beer at another friend's house, returned to the party at approximately 2:30, the gun accidentally discharged striking a girl with the bullet. The parents at the home where the party occurred and where the alcoholic beverages were illegally consumed were dismissed through a summary judgment motion as defendants. The parents of Ed Groh specifically forbade their son from possession of the firearm without adult supervision. The father, Derry, was the only person with a key to the gun cabinet, and kept the key with him at all times. The Kansas Supreme Court held "this court determined in Long (v. Turk 265 Kan. 855) that firearms are inherently dangerous instrumentalities and commensurate with the dangerous character of such instrumentalities, the reasonable care required was the highest degree of care." Firearms are no more dangerous instrumentalities than automobiles and other machines that we deal within our everyday lives. To apply the same standard of care to parents to allow their children to operate motor vehicles would have catastrophic effects upon our society.

I would urge the committee to adopt Senate Bill 41 and place and ordinary standard of care as the appropriate burden of duty for all Kansans in the same manner as we do automobiles and other machines in our society.

Respectfully submitted,

Senator Phillip B. Journey
State Senator 26th District

House Judiciary
Date 3-5-07
Attachment # 1

WOOD v. GROH, 269 Kan. 420 (2000)
7 P.3d 1163
SARAH WOOD, LINDA WOOD, and WARREN WOOD, *Appellants/Cross-appellees*, v.
DERRY GROH and CHOON GROH, *Appellees/Cross-appellants*.
No. 81,826
Supreme Court of Kansas
Opinion filed June 9, 2000.

SYLLABUS BY THE COURT

1. TRIAL - *Jury Instructions - Appellate Review.*
The trial court is required to properly instruct the jury on a party's theory of the case. Errors regarding jury instructions will not demand reversal unless they result in prejudice to the appealing party. Instructions in any particular action are to be considered together and read as a whole, and where they fairly instruct the jury on the law governing the case, error in an isolated instruction may be disregarded as harmless. If the instructions are substantially correct and the jury could not reasonably have been misled by them, the instructions will be approved on appeal.

2. SAME - *Jury Instructions - Clearly Erroneous Instruction - Appellate Review.*
Reversal is required where the appellate court reaches a firm conviction that if an instructional error had not occurred, there is a real possibility that the jury would have returned a different verdict.

3. NEGLIGENCE - *Dangerous Instrumentality Doctrine - Firearms Inherently Dangerous - Highest Degree of Reasonable Care.*
Those who deal with firearms are always required to use reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his or her act and is proportionate to it. The greater the danger, the greater the care which must be exercised. Firearms are inherently dangerous instrumentalities and commensurate with the dangerous character of such instrumentalities, the reasonable care required is the highest degree of care.

4. STATUTES - *Construction - Appellate Review.*
The interpretation of a statute is a question of law, and the appellate court's scope of review is unlimited.

5. COMPARATIVE NEGLIGENCE - *Joint Tortfeasors - Apportionment of Fault - Joint and Several Liability Not Applicable.*
Where joint tortfeasors are liable on a theory of negligence, their fault must be compared pursuant to K.S.A. 60-258a. The concept of joint and several liability between joint tortfeasors does not apply in comparative negligence actions.

6. CIVIL PROCEDURE - *Frivolous Claims, Motions, or Defenses - Sanctions Appellate review.*
The imposition of sanctions pursuant to K.S.A. 1999 Supp. 60-211 is discretionary with the trial court, and its ruling on sanctions will not be disturbed on appeal absent an abuse of discretion.

7. SAME - *Frivolous Claims, Motions, or Defenses - Sanctions - Attorney Fees as Sanctions.*
K.S.A. 1999 Supp. 60-211(c) requires that a district court shall
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impose a sanction when a violation of K.S.A. 1999 Supp. 60-211(b) is found. The statute does not require a sanction of attorney fees but allows courts to impose nonmonetary sanctions in the form of admonitions as well as monetary sanctions.

8. APPEAL AND ERROR - *Sufficiency of Evidence - Appellate Review.*
When a verdict is challenged for insufficiency of evidence or as being contrary to the evidence, the appellate court does not weigh

evidence or pass on the credibility of the witnesses. If the evidence, with all reasonable inferences to be drawn therefrom, when considered in the light most favorable to the prevailing party, supports the verdict, it will not be disturbed on appeal.

9. TORTS - *Negligence of Parent for Malicious Conduct of Child - Duty to Exercise Reasonable Care to Control Child.* A parent is under a duty to exercise reasonable care to control his or her minor child to prevent the child from intentionally harming others or from so conducting himself or herself as to create an unreasonable risk of bodily harm to others if the parent knows or has reason to know that he or she has the ability to control the child and knows or should know of the necessity and opportunity for exercising such control.

10. APPEAL AND ERROR - *Issues Not Raised before Trial Court Will Not Be Heard on Appeal.* Issues not raised before the trial court cannot be raised on appeal. A new legal theory may not be asserted for the first time on appeal or raised in a reply brief.

Appeal from Lyon district court, W. LEE FOWLER, judge. Opinion filed June 9, 2000. Reversed and remanded for further proceedings.

*David R. Cooper*, of Fisher, Patterson, Sayler & Smith, L.L.P., of Topeka, argued the cause, and *David P. Madden*, of the same firm, of Overland Park, and *Don C. Krueger*, of Krueger & Huth Law Office, of Emporia, were with him on the briefs for appellants/cross-appellees.

*Paul Hasty, Jr.*, of Wallace, Saunders, Austin, Brown & Enochs, Chtd., of Overland Park, argued the cause, and *Jeffrey W. Deane*, of the same firm, was with him on the briefs for appellees/cross-appellants.

The opinion of the court was delivered by

DAVIS, J.:

The primary question in this appeal involves the civil standard of care required of those persons having ownership or control of a firearm. The defendant parents kept a .22 caliber handgun in their home. Their minor son obtained the gun and later accidently shot the plaintiffs' minor daughter. In the plaintiffs' personal injury action against the parents, the jury was instructed that the standard of care required of the parents was that of reasonable



care. However, the standard of care required in this state is the highest degree of care. We reverse and remand for further proceedings.

On the afternoon of May 27, 1995, Ed Groh, age 15, used a screwdriver to open his father's locked gun cabinet and removed a .22 caliber handgun. The gun was not loaded; however, the loaded ammunition clip, as well as additional ammunition, was stored in the cabinet along with the gun. Ed took the gun and ammunition to a friend's house where he and some friends drank beer and practiced "target shooting with some cans." Later that night, Ed went to a party at the Archdekins' house. There were no adults present at the party. Ed carried the gun with him and showed it to others at the party. Sarah Wood, age 15, arrived at the party around midnight. Both Sarah and Ed consumed alcoholic beverages at the party.

At about 1:30 or 2 a.m., Ed left the party to drink more beer at another friend's house. He returned to the party and at approximately 2:30 a.m., as Sarah and Ed proceeded up the stairs at the Archdekins' house, the gun accidentally discharged, striking Sarah in the left buttock.

Sarah and her parents, Linda and Warren Wood, filed suit against Ed's parents, Derry and Choon Groh, alleging negligent parental supervision and negligent safeguarding of a gun. The Archdekins were also named defendants in the suit but were dismissed on summary judgment and are not

inv d in this appeal.

Trial testimony established that Derry Groh had taken his son target shooting with the gun five or six times. Derry specifically forbade Ed from using the gun without strict parental supervision. Ed knew that he was not to take any of the weapons from the cabinet without Derry's permission. Derry was the only person with a key to the gun cabinet and he kept the key on his personal key ring at all times.

Linda Wood testified, however, that Ed told her that Derry knew he had the gun and that Derry knew that he occasionally took the gun from the cabinet and shot it. Testimony also revealed that Ed had been arrested prior to the shooting for taking someone's car without permission and "joyriding." Under the terms of his
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probation from that incident, Ed was not to possess a firearm without the permission of his probation officer. Derry took Ed target shooting with the gun shortly after the joyriding incident. Ed had a curfew of 11 to 11:30 p.m. on weekends, which he violated by being at the party well past midnight on the night of the shooting. Neither of the Grohs knew where Ed was the night of the shooting.

A jury returned a verdict in favor of the Woods, finding the Grohs 10% at fault, Sarah 20% at fault, and Ed, who was not a party to the lawsuit, 70% at fault. The jury awarded $100,000 in damages to Sarah and $9,162.50 to her parents, Linda and Warren Wood. Judgment was, therefore, entered in favor of Sarah in the amount of $10,000 and in favor of Linda and Warren in the amount of $916.25.

The Woods raise two issues on appeal: (1) whether the district court erred in refusing to instruct the jury that the Grohs owed the highest degree of care in safeguarding a handgun; and (2) whether the district court erred by refusing to find the Grohs jointly and severally liable for the combined fault of themselves and their son. The Grohs raise three issues on cross-appeal: (1) whether the district court erred by refusing to impose sanctions for the Woods' post-trial filings; (2) whether the district court properly instructed the jury on the issue of negligent parental supervision of their son; and (3) whether the district court erred by instructing the jury that the Grohs could be found negligent for failing to prevent their son from breaking into a locked gun cabinet.

*(1) Whether the district court erred in refusing to instruct the jury that the Grohs owed the highest degree of care in safeguarding a handgun.*

*Standard of Review*

The trial court is required to properly instruct the jury on a party's theory of the case. Errors regarding jury instructions will not demand reversal unless they result in prejudice to the appealing party. Instructions in any particular action are to be considered together and read as a whole, and where they fairly instruct the jury on the law governing the case, error in an isolated instruction may be disregarded as harmless. If the instructions are substantially
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correct and the jury could not reasonably have been misled by them, the instructions will be approved on appeal. *Hawkinson v. Bennett*, 265 Kan. 564, 577-78, 962 P.2d 445 (1998). Where, however, the appellate court reaches a firm conviction that if the trial error had not occurred, there is a real possibility that the jury would have returned a different verdict, the appellate court must reverse and remand. *Jackson v. City of Kansas City*, 263 Kan. 143, 148, 947 P.2d 31 (1997).

*Discussion and Analysis*

The Woods objected to jury Instruction No. 14, which stated:

"The plaintiffs, Sarah Wood, Warren Wood and Linda

W claim that they sustained damages due to the negligence of Ed Groh.

"The plaintiffs also claim that they sustained damages due to the fault of Derry Groh and Choon Groh as follows:

(a) *Derry Groh and Choon Groh failed to exercise reasonable care to prevent their son, Ed Groh, from gaining access to the gun;*

(b) Derry Groh and Choon Groh failed to exercise reasonable care to ascertain the whereabouts of their minor child, Ed Groh; and

(c) Derry Groh and Choon Groh failed to properly exercise reasonable care in the parental supervision over their minor child, Ed Groh." (Emphasis added.)

In place of Instruction 14, the Woods proposed the following instruction:

"The duty of one owning a handgun is that of the *highest degree of care* in safekeeping the handgun because a handgun is considered an inherently dangerous instrument. [Citations omitted.]" (Emphasis added.)

The proposed instruction was denied based upon the district court's conclusion that a handgun is "not a dangerous instrumentality when it's in an unloaded state."

Recently, in *Long v. Turk*, 265 Kan. 855, 962 P.2d 1093 (1998), this court addressed the standard of care required when dealing with a dangerous instrumentality. In *Long*, the defendant's minor son, Matthew, was driving his car when he encountered the plaintiff's minor son, Tony, driving a van. Matthew and Tony shouted at each other while the vehicles drove side-by-side for a few blocks. Matthew eventually reached under the floor mat and pulled out his father's .357 Magnum handgun and fired one shot out the
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passenger side window. The hollow point slug went through the window of Tony's van, killing him.

Matthew's father owned several guns which were kept in a locked safe, although Matthew knew where the keys were kept. A .357 Magnum and the hollow point bullets for the gun were kept in a gun cabinet. Testimony conflicted as to whether Matthew had permission to take the gun out of the locked cabinet. After depositions were taken of Matthew and his father, Matthew's father moved for summary judgment, asking the court to dismiss the case. The district court granted the motion for summary judgment.

On appeal, this court reversed the summary judgment, concluding that genuine issues of material fact existed. We concluded that the .357 Magnum handgun was a dangerous instrumentality requiring the highest degree of care. 265 Kan. at 860. We examined the history in this state regarding the standard of care required in dealing with a dangerous instrumentality. Quoting from an earlier opinion of *Wroth v. McKinney*, 190 Kan. 127, 373 P.2d 216 (1962), we stated:

"'Kansas has long followed the rule that the highest degree of care is required of all responsible persons having ownership or control of dangerous explosives such as dynamite *and firearms*. . . . [T]he degree of care has to be commensurate with the dangerous character of the instrumentality and a duty to exercise the highest degree of care never ceases.'" 265 Kan. at 861.

*Long* referred to and quoted from Comment b of the Restatement (Second) of Torts § 298 (1964):

> "'Care required. The care required is always reasonable care. This standard never varies, but the care which it is reasonable to require of the actor varies with the danger involved in his act, and is proportionate to it. The greater the danger, the greater the care which must be exercised.'
>
> "'. . .*Thus, those who deal with firearms . . . are required to exercise the closest attention and the most careful precautions, not only in preparing for their use but in using them.*'" 265 Kan. at 861-62.

This court determined in *Long* that firearms are inherently dangerous instrumentalities and commensurate with the dangerous character of such instrumentalities, the reasonable care required was the highest degree of care. *Long* had not been decided at the time this case was submitted to the jury. Nevertheless, consistent

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with *Long* and the cases cited therein, we conclude that the district court erred by not instructing the jury that the highest standard of care is required when dealing with a dangerous instrumentality.

The instructional error in this case goes to the heart of the controversy. The factual issue to be decided by the jury was whether the Grohs were negligent in storing the gun. There is a substantial difference between the two standards proposed: ordinary care or the highest degree of care. Other jurisdictions considering instructional errors concerning the standard of care to be applied by the jury in its evaluation of the defendant's conduct have concluded that such an error requires reversal. See *Ruth v. Rhodes*, 66 Ariz. 129, 137, 185 P.2d 304 (1947) (noting generally that failure to instruct on the proper standard of care to which a defendant should be held is usually reversible error, for it is improper that a jury should be allowed to hold against a party when it was given the wrong standard by which to measure the party's conduct); *Bailey v. Rose Care Center*, 307 Ark. 14, 19, 817 S.W.2d 412 (1991) (holding that reversal was required where the court instructed the jury on the wrong standard of care); *Wilson v. City & County of S. F.*, 174 Cal.App.2d 273, 277, 344 P.2d 828 (1959) (reversal required where jury instructions misled jury into applying ordinary care standard instead of heightened standard of care to carrier); *Blackwell's Adm'r v. Union Light, Heat & Power Co.*, 265 S.W.2d 462, 464-65 (Ky.App. 1953) (holding that instruction which erroneously defined the "highest degree of care" so as to mislead jury into believing that the defendant was held to standard of ordinary care was error requiring reversal); *Lindstrom v. Yellow Taxi Co.*, 289 Minn. 224, 230, 214 N.W.2d 672 (1974) (affirming the trial court's decision to grant a new trial where the trial court had erroneously instructed the jury in a way that led the jury to believe that the defendant was held to an ordinary care standard rather than the "highest degree of care" standard); *Urban v. Minneapolis Street Ry. Co.*, 256 Minn. 1, 6, 96 N.W.2d 698 (1959) (holding that the instructions were confusing as the jury was likely to evaluate the defendant's actions under an ordinary care standard rather than the "highest degree of care" standard); *Woods v. Chinn*, 224 S.W.2d 583, 587 (Mo.App. 1949) (giving of instruction which

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placed ordinary care standard on party rather than "highest degree of care" was erroneous, thereby requiring reversal); *Jones v. Port Authority*, 136 Pa. Commv. 445, 448-49, 583 A.2d 512 (1990) (noting that carriers owe a heightened duty of care to their fare paying passengers and holding that the trial court erred in instructing the jury in such a way as to mislead it into applying an ordinary care standard); *Magbuhat v. Kovarik*, 382 N.W.2d 43, 46 (S.D. 1986) (noting that it is prejudicial to instruct the jury on the wrong standard of care); and *Coyle v. Metro Seattle*, 32 Wn. App. 741, 747, 649 P.2d 652 (1982) (holding that instructions were confusing to jury and that jury could have been misled

int linking that the defendant only had a duty of ordinary care when jury should have evaluated defendant under a "highest degree of care" standard).

We have concluded that the parents in this case owed the highest duty to protect the public from the misuse of the gun, a dangerous instrumentality, stored in their home. The fact that the gun was not loaded is insignificant, for the ammunition was kept in the same locked cabinet as the gun. Once access to the gun was obtained, access to the ammunition immediately followed. Storage of the ammunition in the same location as the gun in this case resulted in the gun being easily loaded and made it a dangerous instrumentality.

The parents took significant steps to prevent their son from obtaining possession of the gun. The gun cabinet was locked at all times. Derry Groh was the only person with a key to the cabinet. The key was on his key ring and in his possession at all times. Their son was told and was aware that he was not to use the guns without parental supervision. Their son had attended and passed a hunter safety class. Their son, however, only had to use a screwdriver to gain access to the cabinet and was able to obtain possession of both the gun and the ammunition by doing so.

We conclude, under the facts of this case, that the instructional error did result in prejudice to the plaintiffs. There is a real possibility that the jury would have returned a different verdict had the correct standard been given to the jury in measuring the conduct of the parents. We, therefore, reverse and remand for further proceedings.
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*(2) Whether the district court erred by refusing to find the Grohs jointly and severally liable for the combined fault of themselves and their son.*

The Woods argue that the district court erred by refusing to find the Grohs jointly and severally liable for the acts of their son.

*Standard of Review*

The interpretation of K.S.A. 60-258a is a question of law and, thus, this court's scope of review is unlimited. See *Hamilton v. State Farm Fire & Cas. Co.*, 263 Kan. 875, 879, 953 P.2d 1027 (1998) (noting that our review is unlimited where the issue is interpretation of a statute).

*Discussion and Analysis*

The Woods objected to submission of this case on a theory of comparative fault pursuant to K.S.A. 60-258a. They argue that the Grohs should be jointly and severally liable for the 70% fault found on the part of their minor son, Ed. They rely on several cases dealing with the duty to control one who intentionally injures another. See *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 374-76, 819 P.2d 587 (1991) (imposing joint liability upon those whose duty is to prevent third parties from inflicting injury); *Gould v. Taco Bell*, 239 Kan. 564, 571, 722 P.2d 511 (1986) (intentional acts of a third party cannot be compared with the negligent acts of a defendant whose duty it was to protect the plaintiff from the intentional acts committed by the third party); *M. Bruenger & Co. v. Dodge City Truck Stop, Inc.*, 234 Kan. 682, 686-87, 675 P.2d 864 (1984) (holding the district court should not have permitted the fault of the negligent bailee to be compared with that of the intentional act of the thief).

The above-cited cases provide no support for the plaintiffs' argument. The shooting in this case was accidental. The record confirms this and provides no evidence otherwise. Where joint tortfeasors are liable on a theory of negligence, their fault must be compared pursuant to K.S.A. 60-258a. The concept of joint and several liability between joint tortfeasors does not apply in comparative negligence actions. *Brown v. Keill*, 224 Kan. 195, Syl. ¶ 5, 580 P.2d 867 (1978).

*Cross-petition: (1) Whether the district court erred by refusing to impose sanctions for the Woods' post-trial filings.*

Following the trial, the Woods filed a motion to amend to conform to the evidence, a motion to substitute parties, and an objection to the entry of judgment. The thrust of the Woods' motions was to attempt to make the Grohs responsible for the fault of Ed, as the jury had apportioned his fault at 70% and apportioned only 10% fault on the Grohs. A hearing was held and the district court denied the motion to amend and motion to substitute parties. The district court overruled the objection to the entry of judgment. The district court found that the motions "were unnecessary enough to what I consider, without mincing words, garbage. I think they were not appropriate . . . ." The court further noted that it was "convinced that some of the documents filed in this case are an attempt to backdoor judgment against a party [Ed] who has been denied his due process rights." The court also noted that the motions filed by the Woods "rise to the level of legal garbage." Although the court found that the three post-trial filings violated K.S.A. 1999 Supp. 60-211(b), the court chose to verbally admonish the Woods' counsel instead of awarding attorney fees as the Grohs had requested.

*Standard of Review*

The imposition of sanctions pursuant to K.S.A. 1999 Supp. 60-211 is discretionary with the trial court, and its ruling on sanctions will not be disturbed on appeal absent an abuse of discretion. *Summers v. Montgomery Elevator Co.*, 243 Kan. 393, 399, 757 P.2d 1255 (1988); *Cornett v. Roth*, 233 Kan. 936, 945, 666 P.2d 1182 (1983). Judicial discretion is abused only where no reasonable person would take the view adopted by the trial court. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Stayton v. Stayton*, 211 Kan. 560, 562, 506 P.2d 1172 (1973).

The Grohs argue that because the court made a finding that K.S.A. 60-211(b) was violated, the statute requires that the court "shall" award sanctions. Because this is a question involving the
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interpretation of 60-211, the standard of review is unlimited, as the interpretation of a statute is a question of law. *Smith v. Printup*, 262 Kan. 587, 603-04, 938 P.2d 1261 (1997).

*Discussion and Analysis*

The Grohs argue that because the district court found that the Woods' post-trial filings were "unnecessary" and "not appropriate," the court was required to award sanctions in the form of attorney fees.

K.S.A. 1999 Supp. 60-211 provides in pertinent part:

> "(c) . . . If a pleading, motion or other paper provided for by this article is signed in violation of this section, the court, upon motion or upon its own initiative upon notice and after opportunity to be heard, *shall impose* upon the person who signed it or a represented party, or both, an appropriate sanction, which *may include* an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including reasonable attorney fees." (Emphasis added).

The plain wording of K.S.A. 1999 Supp. 60-211(c) requires that a district court "shall impose" a sanction when a violation of K.S.A. 1999 Supp. 60-211(b) is found, as in this case. The statute, however, does not specifically require a sanction of attorney fees, as it gives the district

co[illegible]he discretion to apply "an appropriate sanction." Further, the statute indicates that the sanction "may include" attorney fees. The statute does not require a district court to award monetary sanctions for a violation of 60-211(b). The word "sanction" does not require courts to award "fees" as the Grohs argue.

Kansas courts often look to the case law on the federal rules as guidance for interpretation of our own rules, as the Kansas rules of civil procedure were patterned after the federal rules. See *Stock v. Nordhus*, 216 Kan. 779, 782, 533 P.2d 1324 (1975) (noting that the Kansas courts have traditionally followed the interpretation of federal procedural rules and that the federal case law is highly persuasive). Although Fed.R.Civ.Proc. 11 is not identical to K.S.A. 1999 Supp. 60-211, the intent behind the rules is the same. The purpose of both rules is to deter "repetition of improper conduct." *Waltz v. County of Lycoming*, 974 F.2d 387, 390 (3d Cir.
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1992). An award of attorney fees "should not automatically be the sanction of choice." 974 F.2d at 390.

Courts should take the following factors into consideration when determining whether to sanction a party and what kind of sanction to impose:

(1) whether the improper conduct was willful or negligent;

(2) whether it was part of a pattern of activity or an isolated event;

(3) whether it infected the entire pleading or only one particular count or defense;

(4) whether the person has engaged in similar conduct in other litigation;

(5) whether it was intended to injure;

(6) what effect it had on the litigation process in time or expense;

(7) whether the responsible person is trained in the law;

(8) what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and

(9) what amount is needed to deter similar activity by other litigants.

Fed.R.Civ.Proc. 11, Advisory Committee notes 1993.

We hold that the plain meaning of K.S.A. 1999 Supp. 60-211(c), coupled with the legislative intent of the statute, allows courts to impose nonmonetary sanctions in the form of admonitions, as well as monetary sanctions. Courts are not required to award attorney fees when a violation of K.S.A. 1999 Supp. 60-211(b) is found. The district court has the discretion to determine what type of sanctions are appropriate in a given case. The district court did not abuse its discretion in admonishing the Woods for the filing of the three post-trial motions.

*(2) Whether the district court properly instructed the jury on the issue of negligent parental supervision.*

The Grohs, in their cross-appeal, argue that there was insufficient evidence to justify a jury instruction on the issue of negligent parental supervision. Although the Grohs frame this issue as one

of an incorrect jury instruction, the argument actually concerns a sufficiency of evidence question.

*Standard of Review*

> "[W]hen a verdict is challenged for insufficiency of evidence or as being contrary to the evidence, [the appellate court] does not weigh the evidence or pass on the credibility of the witnesses. `If the evidence, with all reasonable inferences to be drawn therefrom, when considered in the light most favorable to the prevailing party, supports the verdict, it will not be disturbed on appeal.'" *Brown v. United Methodist Homes for the Aged*, 249 Kan. 124, 127, 815 P.2d 72 (1991).

*Analysis and Discussion*

The Restatement (Second) of Torts § 316 (1964) sets forth the tort of negligent parental supervision and states:

> "A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from conducting itself as to create an unreasonable risk of bodily harm to them, if the parent
>
> (a) knows or has reason to know that he has the ability to control his child, and
>
> (b) knows or should know of the necessity and opportunity for exercising such control."

The jury was given Instruction No. 14A, which states:

> "A parent is under a duty to exercise reasonable care to control their minor child as to prevent said child from intentionally harming others or from so conducting themselves as to create an unreasonable risk of bodily harm to others, if the parents know or have reason to know that they have the ability to control their child and know or should know of the necessity and opportunity for exercising such control."

Contrary to the Grohs' argument, Instruction No. 14A is a correct statement of the tort of negligent parental supervision. The instruction given is consistent with the Restatement (Second)of Torts and with the Court of Appeals' decision in *Mitchell v. Wiltfong*, 4 Kan. App. 2d 231, 604 P.2d 79 (1979), and properly framed the question raised by the evidence.

*(3) Whether the district court erred by instructing the jury that the Grohs could be found negligent for failing to prevent Ed from breaking into a locked gun cabinet to obtain the .22 caliber handgun.*
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The Grohs make an additional argument concerning Instruction No. 14A. They argue that there was insufficient evidence adduced at trial to support Instruction No. 14A. The only real issue concerns the second element of the tort concerning the question of whether the Grohs "knew or should have known of the necessity and opportunity for exercising such control."

Although the evidence at trial revealed that Ed had only one previous run-in with the law, the Grohs knew that Ed had a curfew and that it was a violation of his probation to possess a gun without the permission of his probation officer. Linda Wood testified that at the hospital after

the incident, she asked Ed if Derry Groh knew he had the gun, and that Ed told her, "[H]e knows I take it sometimes and shoot it." The evidence, with all reasonable inferences to be drawn therefrom, when considered in the light most favorable to the prevailing party, was sufficient to support the giving of Instruction 14A. See *Brown v. United Methodist Homes for the Aged*, 249 Kan. at 127.

The Grohs argue that the "case should never have been submitted to the jury and a judgment should have been entered in favor of Defendants and against Plaintiffs on all counts." The Grohs further suggest that this court "remand the case to the Trial Court with instructions to enter judgment in favor of Defendants and against Plaintiffs on all counts as the case was improperly submitted to the jury when, in fact, it was a question of law to be resolved in Defendant's favor by the Trial Court." The Grohs claim that there was insufficient evidence adduced at trial to show that the Grohs breached a duty of ordinary care in the safeguarding of the gun and, therefore, the case should have been dismissed.

A review of the record reveals that the Grohs did not raise this issue in the district court. An objection was made to Instruction No. 14 in which the Grohs argued that the evidence did not show they breached any duty of care in the safekeeping of the gun, but no motion was made to dismiss the case. Their trial objection related solely to the language used in the instruction. They did not move for dismissal, nor did they seek summary judgment on this issue. Issues not raised before the trial court cannot be raised for the first time on appeal. *Ripley v. Tolbert*, 260 Kan. 491, 513,
Page 434
921 P.2d 1210 (1996). A new legal theory may not be asserted for the first time on appeal or raised in a reply brief. *Jarboe v. Board of Sedgwick County Comm'rs*, 262 Kan. 615, 622, 938 P.2d 1293 (1997).

The Grohs further argue that the issue of negligence in the safekeeping of the gun was improperly before the jury because they cannot be negligent in keeping a gun locked in a cabinet where the only way to access the cabinet was by breaking into it with a screwdriver. In other words, the Grohs argue that they cannot be negligent for locking a gun in a gun cabinet. The Grohs correctly note that owners of firearms are not strictly liable for their misuse.

However, although the gun was kept in a locked cabinet, the gun was taken from the cabinet when Ed used a screwdriver to easily break into the cabinet. Even though the ammunition was stored in a separate compartment within the cabinet, it was still accessible by breaking into the cabinet with a screwdriver. It was a simple process for their minor child to break into the cabinet and load the ammunition clip into the gun once the cabinet was open. The question to be resolved is whether the parents used the highest degree of care is storing the gun their son used in accidentally injuring the plaintiff. There are sufficient disputed facts in this case to require that the matter be resolved by the jury on appropriate instruction.

Reversed and remanded.

ABBOTT, J., dissenting:

As I read the record, Linda Wood asked whether Derry Groh knew Ed Groh had the gun and Ed replied, "[H]e knows I take it sometimes and shoot it." The testimony was consistent throughout that Ed only shot the gun when Derry was along and supervising. I find nothing in the briefs which indicate that Derry ever allowed Ed to have the gun unsupervised. Ed's comment that he occasionally took the gun from the cabinet and shot it can only be interpreted as having the gun when he was with his father.

Here, the gun was under lock and key, and Derry kept control of the key. The majority, in my opinion, makes it almost absolute
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li[illegible]ty to own a gun. What more can a gun owner do than lock up an unloaded gun and keep control of the key.

I would hold the Grohs were not negligent as a matter of law.

McFARLAND, C.J., joins in the foregoing dissenting opinion.
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**TESTIMONY OF**
**JOHN C. PETERSON**
**KANSAS LAND TITLE ASSOCIATION**
**SENATE BILL 58**
**HOUSE JUDICIARY COMMITTEE**
**MARCH 5, 2007**

Mr. Chairman and Members of the Committee:

My name is John Peterson and I am pleased to present testimony this morning in support of HB 58 on behalf of the Kansas Land Title Association.

Several years ago the legislature passed KSA 58a-810(e), which permits a deed to name the trust as a grantee, with no reference to the trustee(s) of the trust (i.e. The John Doe Revocable Trust, dated 1/1/06).

Prior to that legislative enactment, a trust was not recognized as legal entity, and a conveyance had to be to the trustee(s) of the trust (i.e. John Doe, Trustee of The John Doe Revocable Trust, dated 1/106). However, many lawyers did not follow this rule and many deeds were made directly to the trust with the validity of those deeds always in question. 58a-801(e) has made a trust a legal entity, like a corporation or a limited liability company, at least for the purpose of taking title to and conveying real estate.

The problem with the new 58a-810(e) is that it requires a property titled in the trust name to be conveyed only in the trust name. It is a little unclear what the legislative intent was, but taken literally, a conveyance to The John Doe Revocable Trust, dated 1/1/06, means that a conveyance from that trust must show the grantor as The John Doe Revocable Trust, dated 1/1/06, and then signed by the trustee(s). Showing the grantor as John Doe, Trustee of The John Doe Revocable Trust, dated 1/1/06, would be an incorrect and possibly an invalid transfer, since the conveyance is from the trustee rather than from the trust.

In order to resolve confusion and any question concerning the validity of deeds from trusts, the Kansas Land Title Association would urge you to support SB 58 to amend 810(e) to read as follows: "Property titled in the trust name may be conveyed in the trust name or in the name of the trustee of that trust, provided that the trust name is clearly set forth in the conveyance".

We are pleased that the Judicial Council has had the opportunity to review this proposal over the past few weeks, and that they are supportive of this change.

House Judiciary
Date 3-5-07
Attachment # 2

KANSAS BAR ASSOCIATION

Testimony in Support of
**Senate Bill No. 58**

Presented to the House Judiciary Committee
March 5, 2007

The Kansas Bar Association is a voluntary, professional association of over 6,700 members dedicated to serving Kansas lawyers, their clients, and the people of Kansas.

The KBA is in support of Senate Bill No. 58 because it simplifies the method of transferring trust property and reduces the perceived need to revisit transfer of property prior to 2004, when the current language was enacted.

The current language was enacted in the 2004 Session with passage of HB 2556. While that bill initially dealt with UTC amendments, it later included medical recovery provisions, and, eventually, the language of SB 424, a KBA requested bill that gave protection of title insurance and homestead exemption to residential property transferred to an *inter vivos* trust. Because the Conference Committee Report is silent on the change involving KSA 58a-810, we are unclear how the language in KSA 58a-810 got changed. With the passage of SB 58, the pre-2004 language is restored.

The Kansas Bar Association respectfully requests that the Committee recommend the bill favorably for passage.

James W. Clark
KBA Legislative Counsel

* * *

House Judiciary
Date 3-5-07
Attachment # 3

State of Kansas
Office of Judicial Administration
Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612-1507
(785) 296-2256

**House Judiciary Committee**
**Senate Bill 118**

**March 5, 2007**

**Prepared and submitted by Mark Gleeson**
**Family and Children Program Coordinator**
**Office of Judicial Administration**

Thank you for the opportunity to testify in support of Senate Bill 118 as amended by the Senate. The current Code for the Care of Children prohibits judges from reading reports until such time as the report is admitted into evidence. Senate Bill 118 cleans up confusing language in K.S.A. 38-2219 and K.S.A. 38-2249, improves access to reports, and clarifies the ability to cross examine persons preparing the reports. Most importantly, SB 118 allows judges to read reports prior to a hearing thereby avoiding unnecessary delays in returning children to their homes or, when that is not possible, to other permanent families.

Senate Bill 118 as amended by the Senate Committee has two sections. Section 1 was the only section in the original bill authored by Judge Creitz, 31st Judicial District, and Professor David Pierce, Washburn School of Law. This first version struck the word "read" found on page 1, line 22, and inserted language intended to allow the court to read reports from Court Appointed Special Advocates. Their interest in adding the special CASA provision was to fix a problem of getting reports to the judge when a person preparing the report is not an official party to the case, such as a CASA volunteer. Because CASA volunteers are not represented by an attorney, it is possible for their report to not be offered as evidence and therefore the report could not be considered by the court.

Striking the word "read" in section 1 fixes a very significant problem. Judges receive multiple reports describing psychological, medical, and educational status of parents and children before each hearing. Judge Kathleen Sloan, Johnson County, wrote to me indicating she has between 80 and 100 review hearings each week. Almost always, these reports are read prior to the hearing. Reading reports prior to the hearing is necessary at all stages of the proceeding but it is particularly helpful when the parties stipulate to the petition and the judge is able to hold the disposition hearing immediately following the adjudication. The ability to read reports prior to the hearing avoids delays of 30 to 90 days when these hearings have to be set at different times. CINC cases are often open for one to three years. Despite our best efforts to obtain permanency for the child as soon as possible, too often they are open for more than three years.

Judges continue to hold review hearings at least every six months even those are no longer required by statute. Permanency hearings are required every 12 months following the removal of the child. Delays are highly probable at every proceeding if judges are not permitted to read reports prior to the report being admitted into evidence. Every delay is a significant delay to the child or parent waiting to be reunified or for a child waiting for a permanent family.

The issue has been raised regarding judges' ability to disregard information contained in a report if the report is not admitted into evidence. Judges, and juries for that matter, routinely disregard testimony when objections are raised and sustained. SB 118 assures the parties access to all reports and enables the party to put the person preparing the report on the stand for the purpose of examining that individual under oath. Judges are very capable of disregarding information that should not be used as a basis for an order.

Section 2 protects parents, children, and interested parties by requiring all reports filed with the court be made accessible to counsel for the parties. When a party is not represented by counsel, the report is made available to the party. Although judges may read the report, the judge cannot use information from the report as a basis for an order until the report is admitted into evidence. Section (2) (e) (2) adds additional protections to parents, children, and other parities by requiring that when the judge has a report that has not been offered into evidence, the judge must inquire whether there is an objection to admitting the report. If there is no objection, the court may admit the report into evidence following an opportunity for the parties to examine, under oath, the person making the report.

Senate Bill 118, as amended by the Senate, significantly reduces unnecessary delays in the court process, reduces expenses to parents and to the county by avoiding additional hearings, and it strengthens the due process protections for parents, children, and interested parties. Senate Bill 118, as amended by the Senate, has the support of Judge Creitz and Professor Pierce, the original authors of this bill, as well as the Kansas Judicial Council, the Kansas Department of Social and Rehabilitation Services, the Kansas Supreme Court Permanency Planning Task Force, judges across the state, and the Kansas CASA Association. SB 118 is effective on publication in the Kansas Register. I urge your support and quick passage of SB 118 and will stand for questions at the appropriate time.

# SENATE BILL NO. 118
# SUMMARY OF TESTIMONY OF PROPONENT DAVID E. PIERCE

## I. THE PROBLEM

K.S.A. § 38-2249(b) of the Revised Kansas Code for Care of Children states:

**"The judge presiding at all hearings under this code shall not consider, read or rely upon any report not properly admitted according to the rules of evidence . . . ."**

- Original language enacted in 1982 as K.S.A. § 38-1554(b).
- Concerned with reports filed by "interested parties" in the proceedings; the guardian *ad litem*.
- When enacted in 1982 the court appointed special advocate (CASA) concept had not been statutorily recognized in Kansas.
- In 1985 K.S.A. § 38-1505a was adopted providing for court appointment of "a volunteer special advocate for the child . . . whose primary duties shall be to advocate the best interests of the child and assist the child in obtaining permanent, safe and homelike placement."
- *In re D.D.P.* (1991) Kansas Supreme Court holds the CASA is not an interested party in the proceedings, is not entitled to legal representation, and discharges its duties by filing reports with the court.
- Supreme Court Rule 110 provides "A CASA volunteer . . . should . . . Submit a written report to the court prior to each regularly scheduled court hearing involving the child . . . ."
- The CASA volunteer communicates with the court through the report.
- K.S.A. § 38-2249(b) unnecessarily impairs the court's ability to read, consider, and rely upon the CASA report.

## II. THE SOLUTION

Amend K.S.A. § 38-2219 and § 38-2249 so CASA reports can be read by the court at any stage of a proceeding under the Kansas Code for Care of Children. The rights of all parties to the proceeding are protected by: (1) making the reports available to all parties in a timely manner; and (2) prohibiting the court from using information contained in the report to support its order unless the report is admitted into evidence following an opportunity by the parties to examine the person preparing the report.

The current version of Senate Bill No. 118 treats CASA reports, reports prepared through the Secretary of Social and Rehabilitation Services (as defined by K.S.A. § 38-2202(aa)), and reports authorized by K.S.A. § 38-2219, in a similar manner. This will allow the judge and parties to read these reports prior to any proceeding and then use court time to address any issues they may raise.

(Detailed Discussion of the Issues Attached)

House Judiciary
Date 3-5-07
Attachment # 5

# BEFORE THE KANSAS HOUSE JUDICIARY COMMITTEE
# TESTIMONY OF DAVID E. PIERCE
## *IN SUPPORT OF:*

## SENATE BILL NO. 118

I am David Pierce. I am employed as a Professor of Law at Washburn University School of Law where I am an associate with Washburn's Children and Family Law Center. I also serve *pro bono* as the program attorney for CASA of the 31st Judicial District, the court appointed special advocate program for children in the courts of Allen, Neosho, Wilson, and Woodson Counties, Kansas. I appear here today on behalf of CASA of the 31st Judicial District to support Senate Bill No. 118.

### I. INTRODUCTION: THE PROBLEM

As part of my work with CASA of the 31st Judicial District I have studied what has been codified as K.S.A. § 38-2249 of the Revised Kansas Code for Care of Children, which was passed by the Legislature in 2006. 2006 Kan. Sess. Laws ch. 200, § 44 at p. 1517. I also focused on these changes for a continuing legal education presentation made September 25, 2006 to the Allen County Bar Association in Iola, Kansas titled: "Professional Responsibility Demands When Representing the Kansas Child." From my discussions with judges responsible for the administration of child-in-need-of-care ("CINC") proceedings, discussions with attorneys representing participants in CINC proceedings, discussions with Jane Brophy, the Executive Director of CASA of the 31st Judicial District, and my own independent study, it is apparent that K.S.A. § 38-2249(b) creates serious problems for the proper administration of CINC and related proceedings where a court-appointed special advocate is involved.

The provision at issue is subsection (b) of 38-2249 which provides:

> The judge presiding at all hearings under this code shall not consider, read or rely upon any report not properly admitted according to the rules of evidence, except as provided by K.S.A. 38-2219, and amendments thereto.

The exception "as provided by K.S.A. 38-2219" refers to court-ordered evaluations of the psychological or emotional development needs of the child and does not address the problems that are the focus of this proposal.

The problem is that K.S.A. § 38-2249 is being interpreted to include reports prepared by the court appointed special advocate ("CASA") as one of the reports that cannot be read or relied upon until it has been "properly admitted according to the rules of evidence . . . ." Prior to this enactment, judges routinely read the CASA report before each hearing; the CASA was available at the hearing in the event the judge or any of the parties wished to examine the CASA concerning their report.

## II. ORIGIN OF K.S.A. § 38-2249(b)

The origin of K.S.A. § 38-2249(b) comes from identical language that was previously codified at K.S.A. § 38-1554(b). The history of this statute reveals that it was first enacted in 1982 when the guardian *ad litem* for the child routinely filed a "report" with the court recommending how the court should proceed. The guardian *ad litem* is an attorney and an interested party in CINC proceedings and therefore it is reasonable to require that they offer their reports into evidence like any other party to the proceeding.

It is particularly revealing that in 1982, when the term "any report" was used in the statute, *the CASA concept did not exist in Kansas*. It was not until 1985 that K.S.A. § 38-1505a was passed providing:

> In addition to the guardian *ad litem* appointed pursuant to K.S.A. 38-1505 and amendments thereto, the court at any stage of a proceeding pursuant to this code may appoint a volunteer special advocate for the child who shall serve until discharged by the court and whose primary duties shall be to advocate the best interests of the child and assist the child in obtaining a permanent, safe and homelike placement. . . .

Therefore, the "report" referenced in K.S.A. §38-1554 could not have been referring to reports prepared by the CASA. However, when the 2006 Legislature re-enacted § 38-1554, which is now found at § 38-2249(a) & (b), it is now unclear whether the same "any report" language is intended to encompass the CASA report.

Although the original 1982 law was directed at the guardian *ad litem*'s report, the Kansas Supreme Court, in 1995, changed its guidelines to prohibit guardians *ad litem* from filing "reports." Supreme Court Administrative Order No. 100, Guidelines for Guardians *Ad Litem* ("A guardian *ad litem* should: . . . (4) *Not submit reports* and recommendations to the court . . . . The guardian *ad litem* should submit the results of his or her investigation and the conclusion regarding the child's best interest in the same manner as any other lawyer presents a case on behalf of a client: by calling, examining and cross-examining witnesses, submitting and responding to other evidence, and making oral and written arguments based on the evidence that has been or is expected to be presented.") (emphasis added).

The reason the Legislature enacted the original 1982 law, and the reason the Supreme Court eliminated the guardian *ad litem*'s report, is that the guardian *ad litem* is an attorney representing a statutory interest in the case and therefore should be treated like any other party to the proceeding. In Kansas the guardian *ad litem* must be an attorney. K.S.A. § 38-2205(a) ("Upon the filing of a petition, the court *shall appoint an attorney* to serve as guardian *ad litem* for a child . . . .") (emphasis added).

## III. THE UNIQUE LEGAL STATUS OF THE CASA IN KANSAS

The guardian *ad litem* rationale cannot be applied to the CASA because the Kansas Supreme Court has made it clear, and the Revised Kansas Code for the Care of Children supports the Court's position, that the CASA is *not* an interested party in the CINC proceeding. It is also clear the CASA is *not* entitled to legal representation to do the sorts of things a lawyer would do for their client in a CINC proceeding: such as "calling, examining and cross-examining witnesses, submitting and responding to other evidence, and making oral and written arguments based on the evidence that has been or is expected to be presented." Instead of acting like a party litigant, the CASA serves as a statutorily authorized non-party fact finder that communicates their findings to the court and all parties involved. The CASA's sole means of communication is the report that is expressly required by Supreme Court Rule 110, which states, in relevant part:

> Court-appointed special advocate (CASA) volunteer programs shall embrace the following:
>
> (a) . . . . A CASA volunteer, additionally, should:
> . . . .
>
> (5) Submit a written report to the court *prior to each regularly scheduled court hearing* involving the child; . . . .

(Emphasis added).

Supreme Court Rule 110 should be given special emphasis because it was in effect prior to the 2006 Legislature adopting K.S.A. §38-2206 of the Revised Code, which states: "The court-appointed special advocate shall . . . perform such specific duties and responsibilities *as prescribed by rule of the supreme court.*" (Emphasis added). As noted above, the Supreme Court Rule requires the CASA to submit their written report "to the court prior to each regularly scheduled court hearing . . . ."

Section 38-2249(b) of the Revised Code creates the anomalous situation where a report must be filed with the court prior to the hearing, but the report cannot be considered by the judge unless, and until, it is admitted into evidence. This requirement is wholly unworkable when the precise role of the CASA, as it has been defined by the Kansas Supreme Court, is fully understood.

The Kansas Supreme Court defines the role of the CASA in *In the Interest of D.D.P., Jr., T.P., and B.J.P.*, 249 Kan. 529, 819 P.2d 1212 (1991). In discussing the CASA interested party issue, the Supreme Court provides useful guidance for what a CASA is, and is not:

(1) The CASA is intended to serve the role of "advocate for the child, and advisor to the court" and is not a litigant. 249 Kan. at 537, 819 P.2d at 1219.

(2) The CASA fulfills its advisory role to the court by filing written reports.

(3) Supreme Court Rule 110(a)(5) expressly authorizes and directs the CASA to file reports with the court:

> "A CASA volunteer . . . should: . . . (5) Submit a written report to the court prior to each regularly scheduled court hearing involving the child . . . ."

(4) This reporting function is relied upon by the Supreme Court as a major distinguishing factor in defining the CASA as a non-party assistant to the court:

> "The whole concept of filing a written report with the judge prior to a hearing is inconsistent with, and alien to, party litigant status. If one is a party litigant, there is no reason for written reports relative to what has transpired among the various parties and agencies since the last hearing. Litigants file memorandums and briefs–they do not file *ex parte* reports with the judge on how other litigants and involved agency personnel have been performing their respective roles. The value of the written report is that of an aid to the court in evaluating what has transpired, keeping the case moving, and in arriving at a proper disposition or modifying a prior order."

249 Kan. at 537-38, 819 P.2d at 1219.

(5) As the Supreme Court observes: "Under our concept of the CASA program, the CASA role is that of serving as an aide to the court in making an appropriate resolution of the proceedings." 249 Kan. at 538, 819 P.2d at 1219.

## IV. CONCEPTUAL AND PRACTICAL PROBLEMS DUE TO THE CASA's UNIQUE LEGAL STATUS

If the CASA report cannot be considered unless it is in evidence, who will offer the report into evidence? The Supreme Court established in the *D.D.P.* case that because the CASA is not an interested party there is no right to be represented by counsel in the litigation. There may be cases, such as the *D.D.P.* case, where the parties are aligned against the CASA and unwilling to sponsor the CASA report into evidence. In those cases applying K.S.A. § 38-2249 to the CASA report may prevent the court and the parties from having the benefit of the CASA's work.

As a practical matter most CINC proceedings are not adversary proceedings. If the judge cannot read the report before it is submitted at the hearing, the judge will either have to continue the hearing to read the report, or proceed without having the opportunity to read and reflect on the contents of the CASA's report. This same problem exists for the other reports judges routinely have available prior to a hearing, such as reports prepared through the Secretary of Social and Rehabilitation Services.

The rights of all interested parties can be fully protected by making the report available to counsel for all parties at the same time it is filed with the court. This means the judge will have the same opportunity to study the contents of the report that the other parties to the proceeding enjoy. The parties can review the report in advance of the hearing and prepare, if necessary, to challenge the report. The CASA who prepared the report will be available for questions and cross examination at the hearing.

## V. SENATE BILL NO. 118 OFFERS A SIMPLE SOLUTION

Senate Bill No. 118 solves these problems by amending K.S.A. **§ 38-2249(b)** to delete the word "read" **[New § (b)]** and then using the existing structure of K.S.A. **§ 38-2219** to include "reports prepared by a court-appointed special advocate or by the secretary." **[New § (d)]**

This is followed by procedural language to ensure: (1) all parties have equal access to reports filed with the court **[New § (e)(1)]**; and (2) that although the court can "read" submitted reports, "no fact or conclusion derived from a report shall be used as the basis for an order of the court unless the information has been admitted into evidence following an opportunity for the parties to examine, under oath, the person who prepared the report." **[New § (e)(2)]**

## VI. THE PROCEDURAL RIGHTS OF PARTIES TO CINC PROCEEDINGS WILL NOT BE ADVERSELY AFFECTED BY THIS CHANGE

Whenever procedures are being addressed, the Legislature must be attuned to the rights of all parties involved in the matter. For example, the Kansas Supreme Court has made it clear that "child custody is a fundamental right of a parent, protected by the due process clause of the Fourteenth Amendment." *In the Interest of M.M.L.*, 258 Kan. 254, 267, 900 P.2d 813, 821 (1995). Therefore, the procedures applied in CINC hearings must treat all parties fairly as the court seeks to ascertain and pursue the best interests of the child.

One concern that has been raised by the Kansas Supreme Court is the use of hearsay evidence. The Court in *In re Johnson*, 214 Kan.780, 522 P.2d 330 (1974), found it was improper, as a matter of statutory law, to consider evidence that is not encompassed by an exception to K.S.A. § 60-460, the basic hearsay statute. K.S.A. § 60-460 provides, in part: "Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay and inadmissible except [when it comes within 31 categorical exceptions to the rule]."

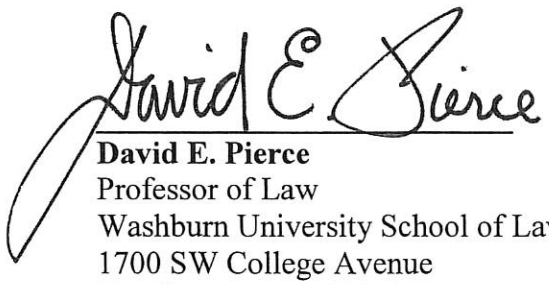
The issues involved in *In re Johnson* were not addressed as a matter of constitutional law but rather as a matter of statutory law: the psychiatrist's report and the social welfare worker's report were not covered by any exception to the hearsay rule. However, the real issue of concern in the case was the parents' inability to cross examine the persons making the reports because they were out of state.

Allowing judges to read and consider the CASA's report, or other reports encompassed by Senate Bill No. 118, will not limit the ability of any party to challenge the contents of the report or cross-examine the authors of a report. Senate Bill No. 118 actually provides greater protection to parties interested in a CINC proceeding by ensuring timely access to reports filed with the court, defining how reports can be used, and stating the right to examine, under oath, the parties making reports.

In the vast majority of cases there will be no objection to the CASA's report, and other reports encompassed by Senate Bill No. 118, and the parties will use the information, in conjunction with all other available information, to try and arrive at a solution that will best serve the interests of the child. Senate Bill 118 provides a fair and workable process by which the full benefits of these reports can be fully utilized by the court.

This concludes my testimony. Thank-you for giving this matter your attention.

**Submitted March 5, 2007.**



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CASA
Court Appointed Special Advocates
FOR CHILDREN

**Testimony on SB 118**
**House Judiciary Committee**
**Re: Children in Need of Care – Access to reports**
**Presented by: The Kansas CASA Association**
**March 5th, 2007**

Good Afternoon Mr. Chairman and Members of the Committee

Thank you Mr. Chairman for the opportunity to speak on behalf of SB 118. As a member of the Kansas CASA Association, I am here to express our support for the passage of this bill. SB 118 allows information valuable to the disposition of a case involving a child and his or her family to be accessible in a timely fashion to the judge. We believe that as soon as critical information is available it should be accessible, thereby expediting actions and decisions that positively impact the lives of children.

CASA representatives worked closely with Judge Creitz, Professor David Pierce, OJA our local judges, and SRS counsel to review language and build consensus on how best to preserve the integrity of the system while assisting judges in addressing the growing volume of cases. We support the testimony provided by the Office of Judicial Administration which sets out the changes we addressed.

It is CASA's experience that the earlier a CASA volunteer is appointed to a case and that the information obtained is presented to the court, the potential for finding a permanent solution *sooner* for the child increases. Consequently, it could potentially reduce social service provider costs and the trauma to children who must be placed in temporary care outside of their home. We believe judges need to hear as much relevant information as soon as possible to aid in developing an objective view of often very difficult and complex cases in order to help make the best ruling possible on behalf of the child. Again, being able to read reports prior to the adjudication hearing increases the potential of reducing the time a child spends out of their home at great expense to the child and to the taxpayers supporting the system of care.

Clearly, we believe that this bill promotes a positive policy regarding how critical information can be used, by whom, and when. Court Appointed Special Advocate volunteers provide an invaluable role as part of the range of resources that ensure children, in particular, have a voice in the judicial process. We hope that the committee understands this value in a way that allows them to lend their support to a bill that would reinforce how important information from all venues is in determining the future for children and their families.

Respectfully submitted,
Sharolyn Dugger, Co-Chair
Kansas CASA Association Legislative Committee

House Judiciary
Date 3-5-07
Attachment # 6

*As Amended by Senate Committee*

*Session of 2007*

# SENATE BILL No. 52

By Committee on Judiciary

1-10

AN ACT regulating traffic; relating to certain violations of maximum speed limits; amending K.S.A. 8-1560d and repealing the existing section.

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

Section 1. K.S.A. 8-1560d is hereby amended to read as follows: 8-1560d. ~~(a)~~ Convictions for violating a maximum posted speed limit of 55 miles per hour or more but not exceeding 70 miles per hour, by not more than 10 miles per hour in excess of such maximum speed limit, ~~shall not be a part of the public record and~~ ***shall not be reported by the division and*** shall not be considered by any insurance company in determining the rate charged for any automobile liability insurance policy or whether to cancel any such policy under the provisions of subsection (4)(c)(7) of K.S.A. 40-277, and amendments thereto.

Sec. ~~2.~~ K.S.A. 8-1560d ~~is~~ hereby repealed.

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

Proposed Amendment
Representative Watkins
March 5, 2007

8-1560c and

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K.S.A. 8-1560c is hereby amended to read as follows:
8-1560c. (a) Any conviction or forfeiture of bail or bond for violating a maximum posted or authorized speed limit of 30 miles per hour or more but not exceeding 54 miles per hour on any highway, by not more than 6 miles per hour, shall not be construed as a moving traffic violation for the purpose of K.S.A. 8-255, and amendments thereto.
(b) Any conviction or forfeiture of bail or bond for violating the maximum posted or authorized speed limit of 55 miles per hour or more but not exceeding 70 miles per hour on any highway, by not more than 10 miles per hour, shall not be construed as a moving traffic violation for the purpose of K.S.A. 8-255, and amendments thereto.
Sec. 2

or a maximum posted speed limit of 30 miles per hour or more but not exceeding 54 miles per hour, by not more than 6 miles per hour in excess of such maximum speed limit,

3.

4.

8-1560c and

are

House Judiciary
Date 3-5-07
Attachment # 7