Approved: April 4, 2008
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:35 A.M. on February 14, 2008, in Room 123-S of the Capitol.

All members were present.

Committee staff present:
Bruce Kinzie, Office of Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Roger Werholtz, Secretary, Kansas Department of Corrections
Dale Goter, City of Wichita
William Fitzpatrick, Attorney, Independence, Kansas
Jeff Bottenberg, State Farm Insurance
Mike Dutton, State Farm Insurance
Terry Humphrey, Kansas Assocoation for Justice

Others attending:
See attached list.

The Chairman opened the hearing on **SB 517–Department of corrections, work projects involving repair of real estate.**

Roger Werholtz testified in support, indicating enactment of **SB 517** would allow the Secretary of Corrections to contract with private landlords to repair their rental property damaged by tenants under the department's release supervision (Attachment 1). The department would utilize inmate work crews on these projects, providing limited assistance in the repair of property damaged by released offenders and encourage rental to released offenders.

There being no further conferees, the hearing on **SB 517** was closed.

Chairman Vratil announced his intention if times allows, to work **SB 46, SB 481, SB 495, and SB 427** following the scheduled hearings so staff may retrieve any needed files.

The hearing on **SB 536–Prohibiting adoption and enforcing residency restrictions on registered offenders.**

Roger Werholtz appeared in support for continuation of K.S.A. 22-4913 which restricts cities and counties from adopting or enforcing residential restrictions for registered offenders (Attachment 2). Secretary Werholtz provided a proposed balloon amendment to accommodate Wichita's licensing of "Correctional Placement Residences". The Kansas Sex Offender Policy Board, created in 2006 by the Legislature, was directed to study the issue of residential restrictions. The 2007 reports states:

- There is no evidence to support the efficacy of general residential restrictions,
- the moratorium on residential restrictions should be permanent, and
- recommends **SB 536** with the proposed amendment be enacted.

Dale Goter agreed with the testimony of Secretary Werholtz and supports his recommended balloon amendment (Attachment 3).

There being no further conferees, the hearing on **SB 536** was closed.

The Chairman opened the hearing on **SB 537–Civil procedure, privileges, costs.**

William Fitzpatrick testified in support, stating this bill make several amendments to the civil code aimed at clarifying the protections inherent in the rules of discovery, recovery of some cost of litigation, and application to both property damage as well as personal injury claims (Attachment 4).

MINUTES OF THE Senate Judiciary Committee at 9:35 A.M. on February 14, 2008, in Room 123-S of the Capitol.

Jeff Bottenberg (Attachment 5) and Mike Dutton(Attachment 6) appeared in opposition. Mr. Bottenberg relayed concern the proposed legislation will increase the cost of litigation, consequently increasing the cost of automobile insurance without any direct benefit to policyholders. Mr. Dutton detailed the resulting consequences he foresees with enactment of this bill.

Terry Humphrey neutral testimony voicing concern on the unintented consequences that may result with enactment of **SB 537** and suggested the committee consider sending the issue to the Kansas Judicial Council for review (Attachment 7).

There being no further conferees, the hearing on **SB 537** was closed.

The Chairman called for final action on **SB 46–Defacing identification marks of a firearm, increase from class B nonperson misdemeanor to a severity level 10, nonperson felony.** The Chairman reviewed the bill.

Senator Bruce moved, Senator Lynn seconded, to recommend **SB 46** favorably for passage. Motion carried.

The Chairman called for final action on **SB 481– Controlled substance, schedule I. salvia and gypsum weed**. The Chairman reviewed the bill.

Senator Schmidt moved, Senator Donovan seconded, to recommend **SB 481** favorably for passage. Motion carried.

The Chairman called for final action on **SB 495–Restricting transfer of offenders to DOC with 10 or less days remaining on sentence.** The Chairman reviewed the bill. Following discussion regarding increasing the number of days, it was suggested the bill be included with those being addressed by the Judiciary sub-committee. It was decided to hold further action on the bill until a later date.

The meeting adjourned at 10:30 A.M. The next scheduled meeting is February 18, 2008.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: FEBRUARY 14, 2008

NAME	REPRESENTING
Roger Werholtz	KDOC
Tim Madden	KDOC
Dale Goter	City of Wichita
Chip Wheelen	HCSF
Michael J. Dutton	Wallace Saunders
Jeff Bottenberg	State Farm
Ed Klumpp	KACP/KPOA
Mark Gleeson	Judicial Branch
Becky Hellerman	TFI Family Services
Leslie Huss	SRS/DBHS
Brianna Landon	Sen Journey
David Kensinger	Penn National

KANSAS
DEPARTMENT OF CORRECTIONS

Kathleen Sebelius, Governor
Roger Werholtz, Secretary

www.dc.state.ks.us

Testimony on SB 517
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections
February 14, 2008

The Department of Corrections supports SB 517. This bill would amend K.S.A. 75-5275 (The Prison Made Goods Act) to allow the secretary to contract with private landlords to repair their rental property damaged by tenants under the department's release supervision. The department would utilize inmate work crews on these work projects. The department believes that the ability for the department to provide limited assistance in the repair of property damaged by released offenders would aid in released offenders obtaining suitable housing by providing an incentive to landlords to rent to released offenders.

The department urges favorable consideration of SB 517.

Senate Judiciary
2-14-08
Attachment 1

KANSAS
DEPARTMENT OF CORRECTIONS

Kathleen Sebelius, Governor
Roger Werholtz, Secretary

www.dc.state.ks.us

Testimony on SB 536
to
The Senate Judiciary Committee

By Roger Werholtz
Secretary
Kansas Department of Corrections
February 14, 2008

The Department of Corrections supports the continuation of K.S.A. 22-4913 which restricts cities and counties from adopting or enforcing residential restrictions for registered offenders. The Department, with the support of the City of Wichita, proposes that SB 536 be amended to accommodate Wichita's licensing of "Correctional Placement Residences". The proposed amendment would permit city and county regulation of placement residences whose clientele include persons receiving voluntary treatment services for alcohol or drug abuse. Currently, the scope of the residents of a "Correctional Placement Residence" is limited to persons under court or correctional supervision. A balloon amendment for this proposal is attached.

K.S.A. 22-4913 was enacted in 2006 to provide a two year moratorium on cities and counties from enforcing residential restrictions for registered offenders. At that same time, the Legislature created the Sex Offender Policy Board under the auspices of the Kansas Criminal Justice Coordinating Council. The Sex Offender Policy Board was directed to study the issue of residential restrictions for sex offenders. The Board's membership consisted of Donald Jordan, Secretary of Social and Rehabilitation Services and former Commissioner of the Juvenile Justice Authority; Roger Werholtz, Secretary of the Department of Corrections; Gary Daniels, former Secretary of Social and Rehabilitation Services; Larry Welch, Director of the Kansas Bureau of Investigation; Hon. Tyler Locket, Retired Justice of the Supreme Court; Scott Jackson, Executive Director of Family Life Center, Inc.; and Sandra Barnett, Executive Director Kansas Coalition Against Sexual and Domestic Violence. Russell Jennings, joined the Board upon his appointment as the Commissioner of the Juvenile Justice Authority and Mr. Daniels resigned from the Board upon his retirement. Robert Blecha, Director of the Kansas Bureau of Investigation succeeded Mr. Welch on the Board.

The Board's 2007 report set out its findings and conclusions regarding residential restrictions and those recommendations were republished in its 2008 report. The Sex Offender Policy Board concluded:

- There was no evidence to support the efficacy of general residential restrictions. Residency restrictions should be determined based on individually identified risk factors.

Senate Judiciary
2-14-08
Attachment 2

- The moratorium on residential restrictions should be made permanent. However, the moratorium should not be intended to interfere with a locality's ability to regulate through zoning the location of congregate dwellings for offenders such as group homes.

SB 536 incorporates the recommendations of the Sex Offender Policy Board. The 2007 and 2008 Sex Offender Policy Board reports are at:

www.governor.ks.gov/grants/policies/docs/SOPBReport.pdf and
www.governor.ks.gov/grants/policies/docs/2008SOPBReport.pdf

In addition to the public meetings conducted by the Sex Offender Policy Board, a public meeting on residence restrictions was held with the Special Committee on Judiciary on November 15, 2006. The Board and the Special Committee on Judiciary had the privilege of hearing presentations from Dr. Jill Levenson of Lynn University (Florida), Dr. Jeffery Walker, University of Arkansas at Little Rock, Pamela Dettmann, of the Des Moines County (Iowa) Attorney's Office, Mary Richards of the Iowa Coalition Against Sexual Assault, Christopher Lobanov-Rostovsky of the Colorado Department of Public Safety/Division of Criminal Justice, Representative Nile Dillmore, Melissa Alley of Wichita, Kansas and Doug Vance of the Kansas Recreation and Parks Association.

Based upon the study conducted by the Sex Offender Policy Board, it is my recommendation that SB 536 as proposed to be amended be enacted. The Board found that there is no positive correlation between residency restrictions and preventing re-offending behavior. Of greater concern was the detrimental effect of residential restrictions upon public safety. The research and expertise presented to the Board indicated that residential restriction zones were detrimental to the treatment and supervision of sex offenders and to law enforcement efforts. The Board found that the,

> "[r]esearch and best practices in the field of corrections, law enforcement, sex offender treatment and more particularly, victims' advocacy groups, equally discount residence restrictions as a useful means to manage, supervise and treat sex offenders."

Further,

> "[w]ith regard to enforcement, the overwhelming experience of states such as Iowa that have been vocal enough to share their experiences in attempting to enforce residence restrictions underscores the theory that normally compliant offenders will take desperate measures to either comply with or circumvent residence restrictions. This increases the time law enforcement must spend on locating offenders, decreases the time they are able to spend on protecting the majority of potential child sexual abuse victims and subverts the usefulness of offender registries."

The value of focusing law enforcement resources in an effective manner is illustrated by the joint effort of the Department's parole services and the Wichita Police Department and Sedgwick County Sheriff's Department's Endangered and Missing Children Unit which provides forensic computer expertise in assisting parole officers in searching the computer hard drives of sex offenders. Arbitrarily imposed residency restrictions would be detrimental to such law enforcement efforts. Law enforcement resources would be diverted to merely locating those offenders who lost a stable residence or cease reporting, rather then being used to detect what those persons are actually doing. Most importantly, forcing relocation of released offenders from urban areas that have the resources to search computer information or where treatment programs are located to more rural areas where those resources are not available protects no one. Those relocated can easily travel back to the urban area.

Policies regarding the residence of released offenders should be based upon case management reflecting the individual characteristics of the offender, those persons co-habitating with the offender, stability of the residence, employment, and treatment as well as utilization of tailored supervision requirements and techniques. Policies that divert resources from the protection of the largest segment of sexually victimized children; the 80-90% who are victimized by people known to them do not serve public safety.

Finally, a prohibition on cities and counties regarding the adoption or enforcement of residential restrictions prevents localities from engaging in a competition of ever increasing residential barriers that do not serve public safety.

The Department urges favorable consideration of SB 536 as it proposes it be amended.

Session of 2008

SENATE BILL No. 536

By Committee on Judiciary

2-4

AN ACT concerning the Kansas offender registration act; prohibition from adopting and enforcing residency restrictions; amending K.S.A. 22-4913 and repealing the existing section.

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

Section 1. K.S.A. 22-4913 is hereby amended to read as follows: 22-4913. *(a) Except as provided in subsection (b),* on and after the effective date of this act, cities and counties shall be prohibited from adopting or enforcing any ordinance, resolution or regulation establishing residential restrictions for offenders as defined by K.S.A. 22-4902, and amendments thereto. ~~The provisions of this section shall expire on June 30, 2008.~~

(b) The prohibition in subsection (a), shall not apply to any city or county residential licensing or zoning program for correctional placement residences that includes regulations for the housing of such offenders.

(c) As used in this section, "correctional placement residence" means a facility that provides residential services for individuals or offenders who reside or have been placed in such facility due to any one of the following situations:

(1) Prior to, or instead of, being sentenced to prison;

(2) received a conditional release prior to a hearing;

(3) as a part of a sentence of confinement of not more than one year;

(4) a privately operated facility housing parolees;

(5) received a deferred sentence and placed in a facility operated by community corrections; ~~or~~

(6) required court-ordered treatment services for alcohol or drug abuse. ; or

(7) voluntary treatment services for alcohol or drug abuse.

Correctional placement residence shall not include a single or multi-family dwelling or commercial residential building that provides a residence to staff and persons other than those described in paragraphs (1) through ~~(6)~~ (7).

Sec. 2. K.S.A. 22-4913 is hereby repealed.

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

TESTIMONY

CITY OF WICHITA
Dale Goter
Government Relations Manager

City of Wichita
455 N Main, Wichita, KS. 67202
Wichita Phone: 316.268.4351
dgoter@wichita.gov

Senate Judiciary Committee
Testimony in support of SB 536
(Sex Offender Residency)
Feb. 14, 2008

The City of Wichita supports SB 536 (with the proposed amendment to be submitted at the Senate Judiciary Committee Hearing).

In 1996, Sedgwick County and the City of Wichita formed a task force to study the reintegration of offenders into the community in the form of "alternative correctional housing." This broad-based task force studied the concerns of neighborhoods and the judicial system as well as the needs of alternative correctional housing providers. The result was the creation of a system of regulation and audits and the formation of a board to oversee that regulation. After several years of operation, the ordinance and zoning code were further amended in 2000 and 2001 to specifically address the needs and concerns arising from the housing of sexual offenders. This program regulates and monitors residency, including that for sexual offenders, but facilitates rather than prohibits their reintegration into the community

In 2006, the Legislature amended KSA 22-4913 as part of broader considerations of sexual offenders. In preempting cities and counties from adopting or enforcing residential restrictions for "offenders," the legislation had the unfortunately effect of prohibiting the City of Wichita's successful Alternative Correctional Housing program.

The proposal in SB 536 would continue to preempt certain local regulation but would specifically allow such programs as exist in Wichita to continue. The bill as originally drafted, however, has one oversight, in applying only to programs that provide housing exclusively for defined offenders. Most, if not all Alternative Correctional Housing in Wichita have mixed populations. That is, they include residents who are voluntarily placed as well as court ordered. The additional proposed amendment that allows housing for residents who are there for "voluntary treatment services for alcohol or drug abuse" solves that problem and keeps the Wichita program viable.

The City of Wichita is pleased to be able to wholeheartedly support this bill.

Senate Judiciary
2-14-08
Attachment 3

Senate Bill No. 537

Written Testimony of:

W. J. Fitzpatrick
Attorney At Law
P.O. Box 785
Independence, KS. 67301
(620) 331-4710

Part One-Amendment to K.S.A. 60-427(d)

Public Policy: The Kansas legislature has long recognized the sanctity of the physician/patient relationship. [See K.S.A. 60-427] Patients should be content to seek treatment knowing that their physician will not betray them or violate the loyalty inherent in the relationship. While it is appropriate to recognize exceptions or "waivers" in the privilege, they should be worded carefully to prevent abuse.

The Need for Amendment to K.S.A. 60-427(d): Currently, many judicial districts in Kansas have adopted rules that allow defense attorneys in medical malpractice cases to confer with treating physicians without notice and free of the protections inherent in the discovery rules set forth in the Kansas Code of Civil Procedure. Rule 208(a) in the Eighteenth Judicial District (Sedgwick County) for example states:

Rule 208. INTERVIEWING EXPERTS

(a) Physician: Lawyers have a right to interview a treating physician once the physician-patient privilege is waived by the filing of a lawsuit, provided the physician is supplied with a written consent waiving the privilege by the person

holding the privilege or by order of the Court. A treating physician may be interviewed outside the presence of parties or other counsel provided the treating physician consents to the interview.

The "interview" permitted by this rule is **unlimited**. Defense counsel can solicit opinions from the treating physician concerning matters that had nothing to do with treatment of the patient. If those opinions are favorable to his client, he can retain the treating physician as a defense expert. While many physicians are loath to cross the line, many do. This destroys the physician/patient relationship and defies public policy embodied in K.S.A. 60-427. An excellent discussion concerning the consequences in allowing treating physicians to engage in ex parte discussions with defense counsel and testifying as retained experts against their patients appears in ***Manion v. N.P.W. Medical Center,*** 676 F. Supp. 585 (M.D.Pa. 1987); ***Rios v. Tx. Dept. Men. Hlth,*** 58 SW3d 167 (Tex.App.-SA [4th Dist.] 2001)

K.S.A. 60-427(d) is subject to misinterpretation because it states "there is no privilege under this section....." That suggests an "absolute" waiver of the physician/patient privilege. That was not the intent of the legislature. The statute was intended to allow an adverse party to obtain medical records relevant to "the condition of the patient...." It was never intended to allow private interviews without notice by those whose interests are adverse to the patient, nor was it intended to allow the physician to voice opinions that had nothing at all to do with care and treatment.

The other problem with the wording of K.S.A. 60-427(d), has to do with the "method" adopted by the district courts to discover "waived" information. Most jurisdictions confine the "method" to rules of discovery established by state legislatures in the Code of Civil Procedure. As earlier stated, Kansas District Courts are using their rule making powers to define the "method," and the choice has been to allow private interviews without notice. That is a violation of the doctrine of Separation of Powers. While courts are certainly free to adopt local rules, [Sup. Ct. Rule 105] they cannot intrude upon the constitutional powers of the legislature, or adopt rules that conflict with state law. Allowing private interviews is not a method of

discovery recognized in our Code of Civil Procedure. Amending K.S.A. 60-427(d) consistent with Senate Bill 537 will restrict "waiver" to care and treatment and at the same time, indirectly confirm the legislature's exclusive powers over methods of discovery in the Kansas Code of Civil Procedure.

Part Two-Amendment to K.S.A. 60-2003

Purpose of Statute: This statute is designed to allow the prevailing party in a civil lawsuit to recover some, but not all of the costs of litigation.

Reason for Amendment: The proposed amendment to this statute is very narrow and addresses only the cost of copies of depositions taken in civil cases. The current statute only allows recovery of original costs. When a deposition is taken, the party who notices the deposition pays for the original transcript. The original is sent to the party who noticed the deposition and paid the original cost. The opposing party (s) must purchase a copy. Depositions are used extensively in civil litigation, and it is quite common that the prevailing party not only paid for the originals he (or she) took, but also copies of those taken by the opponent. Original costs can be recovered if the deposition is used in pretrial or trial proceedings [***Frederking v. Frederking,*** 26 Kan.App.2d 614, 992 P.2d 1255 (1999)] but not the cost of copies. Its not unusual for the prevailing party to have substantial expense for "copies" used in evidence, yet cannot recover those costs under the current wording of the statute.

Part Three-Amendment to K.S.A. 60-2006

Current Statute: K.S.A. 60-2006 is an enormously important statute. It applies only to property damage claims sustained by the negligent operation of a motor vehicle. It allows for recovery of attorney fees if the non-prevailing party rejects an offer of settlement below $7,500. Where liability is clear, carriers are prompt in paying property damage yet just as prompt to deny liability if the claimant sustained personal injury. Payment of property damage cannot be used as an admission of liability.

Need for Amendment: Senate Bill No. 537 would amend K.S.A. 60-2006 to apply to property damage as well as personal injury claims that do not exceed minimum coverage mandated by KAIRA. [K.S.A. 40-3107] This amendment would end the practice of many liability carriers who promptly pay for property damage, [knowing their insureds are 100% at fault] yet deny liability for personal injury.

This amendment would exclude any claim for personal injury that did not meet threshold under K.S.A. 40-3107. So the amendment would apply to property claims of $10,000 or less, and/or personal injury claims of $25,000 or less where threshold is met.

One of the benefits of this amendment is that it would discourage exaggerated claims. To recover attorney fees, a claimant must make a written offer at least thirty (30) days in advance of filing the lawsuit. The right to recover attorney fees on these types of claims would create a huge incentive for both parties to settle and avoid litigation. If the claimant insists on exaggerating the claim, the liability carrier has the right to make an offer after suit is filed and recover its attorney fees should plaintiff's recovery be less than its offer.

Alternative Amendment: If the amendment to expand the statute to cover both property and personal injury claims below mandated coverage is rejected, at minimum, the statute should be amended to increase the property claim to $10,000. The statute was last amended in 1995, and the cost for repair of motor vehicle damage has increased substantially.

Polsinelli

Shalton | Flanigan | Suelthaus PC

Memorandum

TO: THE HONORABLE JOHN VRATIL, CHAIR
SENATE JUDICIARY COMMITTEE

FROM: JEFFERY S. BOTTENBERG, LEGISLATIVE COUNSEL
THE STATE FARM INSURANCE COMPANIES

RE: S.B. 537

DATE: FEBRUARY 14, 2008

Mr. Chairman, Members of the Committee: My name is Jeff Bottenberg and I am Legislative Counsel for the State Farm Insurance Companies. State Farm is the largest insurer of homes and automobiles in Kansas. State Farm insures one out of every three cars and one out of every four homes in the United States. We appreciate the opportunity to share with the Committee our thoughts regarding S.B. 537.

With me today is Mike Dutton, an attorney in private practice, whose main practice is comprised of automobile litigation. Mr. Dutton will be speaking on State Farm's behalf this morning.

Mr. Dutton will explain in detail our client's concerns regarding this proposal. Generally speaking, we believe this proposal will increase the cost of litigation, and consequently may increase the cost of automobile insurance, without any direct benefit for the policyholders.

The first issue with this proposal is the change on page three, lines 18-20. As we read this, the cost of all depositions, whether or not utilized at trial, will be included in the total costs of the litigation. Typically there are a variety of depositions taken that are never utilized at trial. By opening up this statute in this way, plaintiffs' counsel would have no real impetus to limit the taking of depositions. We believe current law adequately provides for the complete review of a case and its appropriate costs.

The second change is to K.S.A. 60-2006, which starts on page three, line 31. This is an attempt to expand the ability to gain attorneys' fees in property cases in the same way that attorneys' fees for bodily injury claims are handled. Again, we see no real rational for this change, and again, it would simply increase the costs of litigation and potentially increase the cost of insurance.

555 S. Kansas Ave
Topeka, Kans
Telephone: (
Fax: (

As I stated, Mr. Dutton will go through the bill and provide the Committee with some practical examples of our concerns.

Thank you for allowing us to testify, and we urge the Committee to act disfavorably on S.B. 537. We are available for questions at your convenience.

Respectfully submitted,

Jeffery S. Bottenberg

JSB:kjb

WALLACE
SAUNDERS
AUSTIN
BROWN
ENOCHS

OVERLAND PARK

MEMORANDUM

TO: **The Honorable John Vratil, Chair**
Senate Judiciary Committee

FROM: **Michael J. Dutton**

DATE: **February 18, 2008**

SUBJECT: **Written Testimony regarding Senate Bill 537**

On February 14, 2008, I had the honor of appearing before your committee at the request of State Farm Mutual Automobile Insurance Company to testify and answer questions regarding my opposition to Senate Bill 537. It has been brought to my attention that due to a mechanical error, the testimony was not recorded and preserved. Therefore, I am providing you with these comments in writing regarding my thoughts and opinions in opposition to Section 2 and Section 3 of Senate Bill 537. It is my belief that if Section 2 and Section 3 are enacted, it will lead to an increase in litigation and could increase the cost of insurance for Kansas policyholders.

As background, I wish to advise that I was employed as a law clerk and staff attorney at the Kansas Insurance Department from 1977 through 1984. I left the Department and joined the law firm of Wallace, Saunders, Austin, Brown & Enochs, Chtd., in Overland Park, Kansas in 1984. Since joining the firm, I have conducted a civil litigation practice specializing in motor vehicle liability litigation. I have had practical experience with K.S.A. 60-2003 and K.S.A. 60-2006.

SECTION 2 K.S.A. 60-2003

Senate Bill 537 proposes to amend Subparagraph No. 5 of K.S.A. 60-2003. In its present form, Subparagraph No. 5 allows court reporter or stenographic charges for depositions used as evidence to be assessed as costs to the prevailing party at trial. The proposed amendment would substantially broaden what is currently provided by allowing costs to be assessed for "transcribing original and copies of depositions used, in whole or in part, at any stage of a civil proceeding."

The aforementioned amendment is unnecessary and would substantially increase the cost of litigation in civil cases because it would encourage the taking of unnecessary depositions. Now

Senate Judiciary
2-14-08
Attachment 6

many fact witnesses are interviewed and asked to sign statements instead of going to the cost and expense of depositions. However, if a party believes they will be able to prevail at trial, they may take these depositions if they are confident these costs can be assessed to the other party. Other depositions which would be assessed as costs include standard records depositions and depositions of foundation witnesses. There is no compelling reason or rationale basis for the proposed amendment.

However, in its current form, the statute does have a rationale basis. It is appropriate if a party prevails at trial to allow them to have the cost of the deposition used as evidence to be assessed to the other side. The reason for this is the testimony in the deposition constitutes evidence from an absent or unavailable witness. My experience with the statute is that courts are allowing not only the reporter or stenographic charges but the actual costs of the original deposition as well.

In conclusion, therefore, since I believe this proposed amendment would lead to the taking of unnecessary depositions thereby increasing the cost of litigation, the Legislature should reject the amendment.

SECTION 3 K.S.A. 60-2006

Section 3 of Senate Bill 537 propose to amend K.S.A. 60-2006 which currently allows a prevailing party in a property-damage claim for less than $7,500.00 to recover reasonable attorney fees if a written demand has been made within thirty (30) days prior to the commencement of the action. The proposed amendment would create a substantial change in Kansas law as it would allow for the recovery of attorney fees in "all actions brought for damages arising from the negligent operation of a motor vehicle, where the amount claimed is less than the minimum coverage required by K.S.A. 40-3107," i.e., $25,000 per accident and $10,000 in property damage. The proposed amendment is contrary to the express purpose of the Kansas Automobile Injury Reparations Act and, if enacted, would result in an increase in trials, would lead to congestion in the courts, and, in the end, could result in an increase in the cots of insurance in Kansas.

Currently, K.S.A. 60-2006 involves only property-damage claims which can be quickly and easily evaluated. If an individual's vehicle is damaged in an accident, the question of value depends on the cost of repair or whether the vehicle has damages in excess of the total value. Disputes regarding the damage and total loss are usually resolved through estimates from independent automobile repair businesses. K.S.A. 60-2006 is not often utilized due to the fact that there are very few real-world disagreements that cannot be resolved. However, if such disagreements are not resolved, it is reasonable for the claimant to make a demand to which a response can be provided within thirty (30) days by the insurance company. If the claimant is then forced into litigation, there is a rational basis for an award of attorney fees.

While the rationale makes sense in property-damage cases, it does not make any sense in bodily/injury cases. This was recognized by the Kansas Legislature in 1974 when it enacted the

Kansas Automobile Injury Reparations Act ("The No-Fault Law," K.S.A. 40-3101, *et seq.*). Acknowledging that liability cases for bodily injury could not be quickly handled by insurance companies, the legislature enacted the no-fault law which requires the injured party to seek recovery of first-party benefits, i.e., medical, disability, rehabilitation, and substitution benefits, from their own insurance company (K.S.A. 40-3109). Payments of these claims are to be made within thirty (30) days from the filing of such a claim. In fact, the purpose of the Kansas Automobile Injury Reparations Act is set forth in K.S.A. 40-3102, as a "means of compensating persons promptly for accidental bodily injury arising out of the ownership, operation, maintenance or use of motor vehicles in lieu of liability for damages...." This prompt compensation allows the injured party to receive benefits while recovering from injury. The injured party can then pursue a liability action if desired (K.S.A. 40-3117). The legislature recognized that bodily-injury claims cannot be handled quickly, even though the legislature had previously authorized advance payment of liability benefits, which is still available under K.S.A. 40-275.

The proposed amendment is unworkable and unfair to an insurer because it would allow the plaintiff to be awarded attorney fees once they have made a demand upon the tortfeasor not less than thirty (30) days prior to the commencement of the action. It would cause plaintiff attorneys to make a demand promptly and once a response is not received, encourage them to file suit. Under Subparagraph (b) there is no requirement that the plaintiff attorney provide any documentation for the bodily-injury claim or for the damages being sought. Instead, it requires only that the written settlement demand contain elements of the property-damage claim and the total monetary amount being sought. There is no provision contained in the statute, or anywhere else, requiring the claimant to submit to the tortfeasor and/or insurer, medical records, and authorizations, employment records and authorizations, prior medical records or any other documentation which would be necessary to review in order to fully and completely analyze the legitimacy and validity of a bodily-injury claim. Thus, it would be impossible for an insurer to investigate and evaluate in good faith on behalf of their insured the legitimacy of the claim within the thirty-day (30) period. Failure to require the claimant to submit appropriate and necessary documentation to the insurer to allow them to investigate a claim would be inconsistent with other current insurance statutes, including the filing of claims for personal injury protection benefits under the no-fault statute (K.S.A. 40-3110) and *Miner v. Farm Bureau*, 17 Kan. App. 2d 598, 841 P.2d 1093 (1992) and for making a claim for underinsured motorist benefits under K.S.A. 40-284(f).

Once the thirty (30) days have expired, the claimant attorney would be in a position to utilize the threat of recovering attorney fees against the insurer and tortfeasor. Essentially, this would increase the claimant's amount of recovery since they would no longer be responsible for their own attorney fees which is normally a contingency fee of one-third (⅓) or forty percent (40%). As a result, it would create more trials and reduce settlements through the use of mediation or Settlement Conferences as there would be no incentive on the part of the claimant attorney to settle without the insurer agreeing to pay his or her attorney fees. This could also lead to a potential conflict between the attorney and his or her client.

It should also be noted that the amendment contains certain ambiguous provisions. Under proposed Subsection (a) it provides "subject to the provisions of K.S.A. 40-3117 and amendments thereto." Does this provision mean the statute applies only to cases which meet the Kansas Tort Threshold? Does it apply to property-damage cases?

Section "a(2)" states that a recovery of prevailing attorney fees will not be allowed if a tender was made equal to or in excess of the amount recovered by the adverse party "before the commencement of the action in which the judgment is rendered." In other words, this means that the insurance carrier (or tortfeasor) would be required to have made a tender before the commencement of the action. However, Subparagraph (b) provides that the defendant can be awarded attorney fees if a written offer of settlement is made not more than thirty (30) days after defendant filed the answer in the action. Obviously, these two (2) provisions are inconsistent.

In effect, the tortfeasor would rarely have the opportunity to recover attorney fees as the prevailing party due to these confusing and conflicting time restrictions. And, even if the suit were filed, the tortfeasor would not be in a position to make a meaningful offer thirty (30) days after the filing of the answer because under the Kansas Rules of Civil Procedure, even if Interrogatories and Request for Production of Documents were filed with the Answer, the plaintiff would have thirty (30) days, plus three (3) days for mailing, in which to respond. In other words, the tortfeasor (or insurer) would have no possibility of having the opportunity to obtain the information needed to investigate and evaluate the claim within the thirty (30) days.

In conclusion, if the amendments were enacted, it is believed that they would lead to an increase in litigation and trials, cause court congestion and ultimately, an increase in insurance costs for Kansas policyholders. It is for these reasons I am in opposition to Senate Bill 537.

MJD:bgr

KANSAS ASSOCIATION FOR JUSTICE

719 SW Van Buren St., Ste. 100, Topeka, KS 66603
PHONE: 785-232-7756
FAX: 785-232-7730
www.ksaj.org

Your rights. Our mission.

To: Senator John Vratil, Chairman
Members of the Senate Judiciary Committee

From: Terry Humphrey
Kansas Association for Justice

Date: February 14, 2008

Re: SB 537 Code of Civil Procedure—**NEUTRAL**

The Kansas Association for Justice is a statewide, nonprofit organization of attorneys who serve Kansans seeking justice. We appreciate the opportunity to submit written comments on the amendments to Chapter 60 that are proposed in SB 537. KsAJ is neutral on SB 537.

KsAJ strongly supports the civil justice system as a "level playing field" for all parties to a dispute. KsAJ is concerned, in general, with changes to current law that may have the unintended consequence of favoring one party in litigation over another. We recommend that the Committee consider requesting that the Kansas Judicial Council review SB 537 to determine the need for the bill as well as whether or not the bill's amendments would result in any unintended consequences.

Thank you for permitting us to provide you with our comments.

Senate Judiciary
2-14-08
Attachment 7