

## MINUTES

### SPECIAL COMMITTEE ON JUDICIARY

November 3-4, 2005  
Room 514-S—Statehouse

#### Members Present

Senator John Vratil, Chairman  
Representative Mike O'Neal, Vice Chairman  
Senator Phil Journey  
Senator Kay O'Connor  
Senator Carolyn McGinn  
Representative Paul Davis  
Representative John Grange  
Representative Mitch Holmes  
Representative Patricia Kilpatrick  
Representative Ann Mah  
Representative Melody McCray-Miller  
Representative Jason Watkins

#### Staff Present

Jerry Ann Donaldson, Kansas Legislative Research Department  
Mike Heim, Kansas Legislative Research Department  
Jill Wolters, Kansas Revisor of Statutes Office  
Helen Pedigo, Kansas Revisor of Statutes Office

#### Conferees

Don Patterson, Attorney  
Mary Andreletia-Walker, Kansas University Policy Research Law Student  
Scott Nehrbass, Kansas Association of Defense Counsel  
Lew Ebert, Kansas Chamber of Commerce  
Jim Clark, Kansas Bar Association  
Rex Sharp, Attorney  
Steve Dickerson, Kansas Trial Lawyers Association  
John Campbell, Kansas Insurance Department  
Brad Smoot, Kansas Civil Law Forum  
Craig West, Foulston Siefkin, L.L.P  
Will Larson, Kansas Association of Insurance Agents  
Margaret Farley, Kansas Trial Lawyers Association  
Jacob Graybill, Graybill and Hazelwood, L.L.C.

Steve Lee, Wichita  
Douglas McComas, Wichita  
Tom Whittaker, Executive Director, Kansas Motor Carriers Association  
Ken Hoffman, Blackwell, Sanders, Peper, Martin, L.L.P.  
Richard Usher, Hill and Usher, Phoenix, Arizona  
Ed Cross, Kansas Independent Oil & Gas Association  
Ray Merz, Kansas Independent Oil & Gas Association  
Stan Jackson, Kansas Independent Oil & Gas Association  
Velma Lane, Van Gilder Insurance Corporation  
Mike Dunnaway, American Council of Engineering Companies of Kansas  
Larry Magill, Kansas Association of Insurance Agents

### Thursday, November 3 Morning Session

Chairman Vratil called the meeting to order at 10:00 a.m.

#### Topic No. 7—Expert Testimony

Don Patterson, Attorney, explained the differences in the standards for qualifying experts to provide expert testimony under the *Frye* and *Daubert* rules. The *Frye* rule is named for a federal district court case where the rule was first promulgated. *Daubert*, named for a U.S. Supreme Court case, requires an expert have “scientific, technical, or other specialized knowledge.” Experts must base their opinion on “sufficient facts and data that is reasonably relied upon.” Under the *Daubert* rule, it is possible that a pre-trial hearing might be ordered to qualify any expert witness testimony which may be offered. The *Frye* rule on the other hand, establishes a “general acceptance” test for the admission of expert testimony (Attachment 1).

Mary Andreletia-Walker, a Kansas University Policy Research law student, said that Kansas follows the *Frye* rule but SB 53 would adopt the *Daubert* rule. The national trend is moving towards adopting all or parts of *Daubert*. Plaintiff attorneys tend to favor the *Frye* rule and defense attorneys favor the *Daubert* rule.

There are three policy alternatives:

- Maintain the status quo and continue to use *Frye*’s general acceptance test to determine the reliability of expert testimony.
- Incorporate the *Daubert* standard into state law by adopting either SB 53 or a similar proposal.
- Adopt a standard that follows neither *Frye* nor *Daubert* in their entirety but incorporates aspects of both standards.

Ms. Walker said that no standards can determine perfectly the reliability of expert testimony. Therefore, it is important to consider how the failings of various standards help or hurt litigants.

She said that SB 53 was unclear because the bill uses both “may” and “must” when stating that a pretrial hearing be held (Attachment 2).

Scott Nehrbass, Kansas Association of Defense Counsel, supported SB 53. He said the bill was the best and most workable means of establishing clear rules for the admissibility of expert testimony. Cases show that under *Daubert*, it is more difficult to admit expert testimony. He said that passage of SB 53 would put an end to the manipulation and the use of misleading information provided by plaintiff attorneys and their experts and would reduce litigation costs in Kansas (Attachment 3).

Lew Ebert, Kansas Chamber of Commerce, reported that the United States Chamber’s Harris survey ranks states’ legal climates. Since 2002, Kansas has dropped from 4<sup>th</sup> to 16<sup>th</sup>, in terms of favorable legal climate for business. He said that this was due to the adoption by other states of proactive tort reform measures. Kansas also was ranked in the bottom half of the states with regard to the “treatment of scientific and technical evidence, which includes the treatment of expert evidence.” Even though the *Daubert* rule imposes more stringent standards, it requires judges to be gatekeepers of expert evidence. He said that approximately 30 states have adopted some or all of the *Daubert* rule (Attachment 4).

Jim Clark, Kansas Bar Association (KBA), said that product liability cases would be the type of cases to benefit most from the *Daubert* rule. He said that the KBA opposed SB 53. He said that the Kansas Judicial Council was studying the issue of expert witness criteria. He said that this study needed to be completed before changes were considered to the rules of evidence (Attachment 5).

Rex Sharp, Attorney, said that the *Daubert* rule was about winning the case before it goes to trial. He questioned who should be deciding cases, a judge or jury (Attachment 6).

Steve Dickerson, Kansas Trial Lawyers Association, suggested that SB 53 was unwise, unneeded, and would create confusion in the courts. He reported that there was a trend among the states in moving away from *Daubert* (Attachment 7).

Representatives of the Kansas Medical Mutual Insurance Company and Kansas Cooperative Council did not appear before the Committee but requested that their testimony in support of the adoption of *Daubert* rule be included in the minutes (Attachments 8 and 9).

The Committee recessed for lunch and reconvened at 1:30 p.m.

## **Afternoon Session**

### **Topic No. 11—Attorney Fees and Insurance Policies**

John Campbell, Kansas Insurance Department, explained that since 1893, Kansas statutes have provided for the awarding of attorneys’ fees to insure attorneys will be paid when they obtain a judgement forcing insurance companies to pay a disputed claim. He said that KSA 40-908 provides that in “all actions in which judgement is rendered against any insurance company on any policy given to insure any property in the state against loss by fire, tornado, lightning or hail, the court shall allow the plaintiff a reasonable sum as an attorney’s fee for services.” A second statute, KSA

40-256, provides for attorneys' fees when the insurance company has refused, without just cause or excuse, to pay the full amount of such loss. Both statutes require that the judgement obtained must be larger than the offer made by the insurance company. He said that courts have ruled that KSA 40-908 is not restricted to disputes about losses by fire, tornado, lightning or hail. The courts have said the statute applies to any policy which covers those items, as well as other types of losses covered by the same policy. He said that both statutes are important tools in protecting consumers in Kansas. Without the reimbursement of attorneys' fees, the incentive for productive private negotiations would be greatly diminished ([Attachment 10](#)).

Brad Smoot, Kansas Civil Law Forum, expressed concern that the two statutes create different standards which cause confusion and unnecessary litigation ([Attachment 11](#)).

Craig West, Foulston Siefkin, L.L.P, stated that in the last three or four years, KSA 40-908 has been used in personal injury types of cases and attorneys fees have been awarded.

Will Larson, Kansas Association of Insurance Agents, said that the problem was that the court had interpreted KSA 40-908 incorrectly. The most recent case in which this happened was *Lee Builders v. Farm Bureau Mutual Ins. Company*, a 2005 case, decided by the Court of Appeals. He said that the Association believes that this ruling unfairly burdens the insurance industry by making attorneys' fees the rule, and not an exception. He said that there was sufficient statutory authority for the awarding of attorneys' fees under KSA 40-256. He suggested that KSA 40-908 should be clarified so it applies only to property losses including fire, tornado, lightning or hail, and not to any insurance policy which includes these types of losses among other coverages ([Attachment 12](#)).

Margaret Farley, Kansas Trial Lawyers Association, supported the preservation of the American rule of law regarding attorneys' fees where the winner pays his or her own attorney fees. The trial lawyers, however, oppose any changes to KSA 40-908 because this statute provides consumer protection and acts as a mechanism for insurance regulation ([Attachment 13](#)).

Jacob Graybill, Graybill and Hazelwood, L.L.C., suggested that if the Legislature decides that both statutes are not needed, there needs to be a law to cover all possible instances. He said that KSA 40-908 was more effective in encouraging insurance companies not to arbitrarily deny policyholders' claims for coverage ([Attachment 14](#)).

Steve Lee, a Wichita homebuilder, testified about three instances of mold growing between exterior and interior walls in homes he has built. His insurance company declined to pay the claims and he has filed lawsuits against the company. His attorney bills are around \$200,000. Had KSA 40-908 not been in place, he would not have been able to recover attorneys' fees and proceed with these claims ([Attachment 15](#)).

Douglas McComas, Wichita, relayed his experience with an insurance company when his vehicle was stolen and found in a floodway with flat tires, fire damage, and other damage. The insurance company denied his claim and suggested that he and his wife were responsible for the damages themselves. Because of KSA 40-908, they were able to hire an attorney and fight the insurance company and recoup attorneys' fees ([Attachment 16](#)).

Written testimony, in support of repealing KSA 40-908, was provided by Kansas Association of Property and Casualty Insurance Companies and Farmers Alliance ([Attachments 17 and 18](#)).

Chairman Vratil turned the Committee's attention towards Committee recommendations from last month.

### **Topic No. 3—Docket Fees**

Senator Vratil said that after last month's meeting, there was some concern about what the Committee had agreed to regarding the issue of docket fees and judges' salaries. Representative Mah explained that her intent was to make a motion to adopt the District Court Judges Association recommendation to increase docket fees to pay for salary increases for all judges and justices. Chairman Vratil noted that staff's notes did not reflect that was, in fact, the motion. He noted that he had repeated the motion for the Committee, and that it was his understanding that Representative Mah's motion applied only to district court and district magistrate judges' salary increases.

Representative O'Neal, who seconded the original Mah motion said that he had believed the motion also had included appellate court judges' salaries.

Staff informed members of the Committee that procedurally, when a member makes a motion and the motion is restated by the Chairman, and there is a conflict between the two, any discrepancy must be clarified at that time. Since no objection was made, the Chairman's interpretation is the last statement of the motion and would stand unless the Committee revisits the issue and clarifies what was intended.

Chairman Vratil stated that he would entertain a motion to reconsider the issue. No motion was made. Representative Mah expressed her displeasure that her motion was misstated and that the members currently in attendance were different from those in attendance at the time the motion was made.

*Representative Grange made the motion to approve the draft Committee report. Representative Kilpatrick seconded the motion. The motion carried.*

### **Topic No. 4—Supreme Court Justice Selection**

*Senator O'Connor made the motion to approve the draft committee report. Representative Watkins seconded the motion. The motion carried.*

### **Topic Number 2—Admissibility of Collateral Source Benefits in Actions for Personal Injury or Death**

*Representative O'Neal made the motion to approve a draft bill for introduction. Representative Watkins seconded the motion. The motion carried.*

The Committee meeting adjourned.

**Friday, November 4**

## Morning Session

Chairman Vratil called the meeting to order at 9:00 a.m..

### Topic No. 6—Indemnification

Tom Whittaker, Executive Director, Kansas Motor Carriers Association, appeared in support of legislation prohibiting indemnification clauses in motor carrier transportation contracts. The purpose of the legislation is to promote safety in the carriage of goods by motor carriers by eliminating clauses that shield shippers and others who perform their obligations negligently or wrongfully. He said that it was not the large motor carriers who are having problems, since they have attorneys on staff who can negotiate contracts with large shippers. It is the small truck operating companies who are having difficulties. In Kansas, 90 percent of the motor carriers operate 19 or fewer trucks ([Attachment 19](#)).

Ken Hoffman, Blackwell, Sanders, Peper, Martin, L.L.P., stated that some shippers and facility operators require carriers to indemnify them against a host of liabilities, even if the problem was caused partially or completely by the shipper or facility operator. He said that there was a need to eliminate the costs of insuring someone else's negligence ([Attachment 20](#)). He said that Texas, Oklahoma, and South Carolina have similar statutes which are specific to motor carriers dealing with indemnification.

Richard Usher, Hill and Usher, Phoenix, Arizona, commented that the construction industry has been dealing with the unfair risk transfer issue for over 30 years. There are fewer than ten states which do not have specific construction indemnification laws ([Attachment 21](#)).

Ed Cross, Kansas Independent Oil & Gas Association, introduced Ray Merz, representing the Association. Mr. Merz said that in the last ten to 15 years, changes in contracts often have put one party in an unequal bargaining position, by seeking to transfer another parties entire liability exposure to the contractors who are hired to drill or service oil and gas wells ([Attachment 22](#)).

Stan Jackson, Kansas Independent Oil & Gas Association, recommended legislation to make void and unenforceable all contractual provisions within the oil and gas industry that require an indemnitor to indemnify the indemnitee for the indemnitee's negligence, and to enact a provision that requires all disputes to be adjudicated and settled under Kansas law.

Velma Lane, Van Gilder Insurance Corporation, appeared on behalf of architects and engineers. She supported an indemnification law in which architects and engineers are only responsible to indemnify their clients for damages, to the extent the damages are caused by an error, omission, or negligent act of the architect or engineer ([Attachment 23](#)).

Mike Dunnaway, American Council of Engineering Companies of Kansas, supported HB 2154 and requested that engineers be included in the bill ([Attachment 24](#)).

Larry Magill, Kansas Association of Insurance Agents, supported the use of reciprocal indemnification clauses, where each party protects the other from the results of their own negligence. General liability policies exclude liability for claims of employees and contractual liability. Some carriers are using specific employer liability exclusions and attaching these to general liability policies. He requested that the Committee amend HB 2154 to apply to all contracts ([Attachment 25](#)).

## **Topic No 5—Burden of Proof and School Finance Litigation**

Chairman Vratil said that the Committee will need to approve a conceptual bill draft. The bill would indicate that whenever the State Board of Education determines that a school has failed to meet the accreditation requirements, established by rules and regulations, or standards, adopted by the State Board of Education, or is not providing the courses in areas of instruction required by state law, the State Board shall notify the school district in which the school is located. In such event, the State Board shall specify the areas of instruction in which the school is deficient. Upon receipt of such notification, the board of education of the school district shall allocate sufficient money to remedy the deficiencies identified by the State Board from programs and services that are not required for accreditation.

*Representative Watkins made the motion to approve a conceptual bill draft, as explained by Chairman Vratil, and introduced in the House. Representative Holmes seconded the motion. The motion carried.*

Chairman Vratil directed staff to draft a bill and to mail it to Committee members.

## **Topic No. 6—Indemnification**

*Representative Davis made the motion to have a bill drafted and introduced in the Senate which would cover contracts involving oil and gas, architects and engineers, motor carriers, and the construction industry to prohibit indemnification provisions in these contracts, whereby, one party is required to indemnify another party for the other party's negligence or wrongful acts or omissions. The bill would also prohibit contract provisions requiring a party be added as an additional insured to an insurance policy if the result would be to protect that party from that party's own negligence or wrongful acts or omissions. The effective date would be July 1, 2006. Representative Grange seconded the motion. The motion carried.*

Chairman Vratil directed staff to draft a bill and to mail it to Committee members.

## **Topic No. 7—Expert Testimony**

Committee members expressed concern about making a recommendation on the topic while the Kansas Judicial Council is studying the issue.

*Representative Watkins made the motion to recommend the passage of SB 53. Representative Grange seconded the motion. The motion failed 4-4 with the Chairman voting no.*

*Representative Davis made the motion that the Committee make no recommendation on the topic until a study on the topic currently in progress is completed by the Kansas Judicial Council. Further, the Kansas Judicial Council is requested to study and make a recommendation on the Kuhn v. Sandoz Pharmaceutical decision. Senator Journey seconded the motion. The motion carried 5-3.*

## **Topic No. 11—Attorney Fees and Insurance Policies**

Committee members agreed that clarification was needed in regard to KSA 40-908 and KSA 40-256.

*Representative Davis made the motion to refer the topic to the Kansas Judicial Council for further study and recommendation. Representative Watkins seconded the motion. The motion carried.*

The Committee meeting adjourned.

Prepared by Cindy O'Neal  
Edited by Mike Heim

Approved by Committee on:

January 18, 2006  
(date)