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TO: Senator Rick Wilborn, Chairman
Senator Julia Lynn, Vice-Chairman
Senator David Haley, Ranking Minority Member
Members of the Senate Judiciary Committee

FROM: Blake A. Shuart, Hutton & Hutton Law Firm, L.L.C., Wichita
Individually and on behalf of the Kansas Trial Lawyers Association

DATE: February 6, 2018

RE: SB 296: An act concerning the safety belt use act; relating to evidence of failure to use a safety belt and admissibility in other actions; amending K.S.A. 2017 Supp. 8-2504 and repealing the existing section (**OPPOSE**)

My name is Blake Shuart, and I am an attorney at Hutton & Hutton Law Firm, L.L.C., based in Wichita. I am also a member of the Kansas Trial Lawyers Association. I have represented hundreds of injured Kansans in motor vehicle negligence cases, have tried several of these cases to juries in counties across the state, and previously defended such cases for one of the nation's largest auto insurers. I am very familiar with the legal and evidentiary framework upon which these cases are prosecuted and defended. I write in opposition of SB 296, which will be heard in Committee on February 7th.

Motor vehicle negligence cases are tried daily in courtrooms across this state, and these matters are decided fully and fairly by juries without the issue of safety belt usage ever being inserted into the case. If SB 296 is passed into law, however, K.S.A. 8-2504(c) will be amended to read as follows:

(c) Evidence of failure of any person to use a safety belt *may be considered by the trier of fact* in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages.

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The proposed amendment could be most aptly characterized as a solution in search of a problem. In fact, passage of the proposed bill would create a major problem in our civil courts where

one does not currently exist. To understand why evidence of failure of any person to use a safety belt should **never** be considered by the trier of fact for the purpose of determining any aspect of comparative negligence **or** mitigation of damages, it is important to first step back and review the definition of "relevant evidence" as defined under K.S.A. 60-401(b):

(b) "Relevant evidence" means evidence having any tendency in reason to prove any material fact.

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It is further necessary to review the Kansas Civil Pattern Jury Instruction relative to comparative negligence. Under Kansas' fault-based system, when claims of comparative fault are raised by defendants, our courts will often use PIK Civil (4th) 105.01 – Comparative Fault Theory and Effect. This instruction reads, in relevant part:

You must decide this case by comparing the fault of the parties. In doing so, you will need to know the meaning of the terms "negligence" and "fault."

Negligence is the lack of reasonable care. It is the failure of a person to do something that a reasonable person would do, or it is doing something that a reasonable person would not do, under the same circumstances.

A party is at fault when he or she is negligent and that negligence caused or contributed to the event which brought about the claim(s) for damages.

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Lastly, it is necessary to review the Kansas Civil Pattern Jury Instruction relative to mitigation of damages, found at PIK Civil (4th) 171.42 – Duty to Mitigate Damages:

In determining the amount of damages sustained by the plaintiff, you should not include any loss which plaintiff could have prevented by reasonable care and diligence exercised by plaintiff after the loss occurred.

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Having examined these three key items, we can now analyze a fairly basic hypothetical fact pattern which arises daily in litigation across this state, in order to determine whether evidence of the failure to wear a safety belt would be of evidentiary value.

Assume that a middle-aged lady was driving her vehicle without a safety belt when she was T-boned in an intersection by a man who ran the stop sign, resulting in neck and back injuries to the lady.

Under the proposed amendment to K.S.A. 8-2504(c), the lady's failure to wear a safety belt could be introduced into evidence by the defense to advance its claims of comparative negligence (fault) and failure to mitigate damages.

QUESTION ONE: Does evidence of the lady's failure to wear a safety belt have any tendency to prove that her negligence in failing to do so caused or contributed to the car wreck ("the event which brought about the claim(s) for damages")?

ANSWER: Clearly, the lady's failure to wear a safety belt did not play any role in causing the car wreck. This evidence has no value whatsoever in proving whether the lady has comparative negligence (fault).

QUESTION TWO: Does evidence of the lady's failure to wear a safety belt have any tendency to prove that any part of her losses could have been prevented by exercising reasonable care and diligence after the loss occurred?

ANSWER: The "loss" typically means the "injury" sustained. The failure to wear a safety belt would have no role in preventing the lady's damages after she already sustained the injury, so again, there would be zero evidentiary value attached to this fact.

However, even if the controlling issue in Question Two (mitigation of damages) related to whether the lady's injuries could have been prevented through usage of a safety belt, answering this inquiry would require nothing more than rank speculation, and experts would likely become necessary to provide legal validation. Here is what this Committee can expect if this bill passes, the statute is amended, and civil defendants are able to argue that a plaintiff failed to mitigate damages by failing to wear a safety belt:

The costs of litigation – even in otherwise simple, straightforward cases – would skyrocket. "Safety belt experts" would become a cottage industry in Kansas. Certain physicians, engineers, or both, would hold themselves out as experts related to the impact of safety belts on avoiding injuries, and they would charge a high price for their services. A simple case involving standard injuries and uncomplicated liability facts, which could typically be litigated and brought to trial without significant time or expense, would suddenly become significantly more complicated and costly. Juries would be confronted with competing "safety belt experts" and forced to weigh this complicated testimony in the context of the other evidence presented.

Neither side would benefit from this costly development. Litigation costs would increase for both consumers and insurance carriers, and the carriers would face increased defense costs as well. Many of these cases would be appealed, which would further increase the costs of litigation and make the wheels of justice turn more slowly.

Insurance carriers would also see a marked increase in the number of claims presented. A child not properly belted or harnessed would now have a claim against both the at-fault driver *and* his or her own parent. These increased costs to insurers would inevitably impact the overall cost of auto insurance for Kansas consumers.

There is a reason that a majority of states are aligned with Kansas in keeping this evidence out of courtrooms – the negative effects of admissibility far outweigh the evidentiary value, which is essentially zero. If Kansas changes course and decides to interject safety belt usage into civil litigation, there will be longer trials, more litigation costs, more appeals and more insurance claims, but the quality of our civil justice system will not improve.

The Legislature has already determined that only relevant evidence has a place in our state's courtrooms, and having already made this proper determination, this body should not endeavor to pass a bill which allows for the introduction of evidence which has no relevance, and thus no evidentiary value.

There are also no prevailing policy considerations that would render this bill useful in improving the lives and safety of Kansans. The Centers for Disease Control and Prevention report that Kansas was at 80% compliance in seat belt use for drivers and front seat passengers as of 2012, which places Kansas in good stead among the 50 states. *See* https://www.cdc.gov/motorvehiclesafety/seatbelts/states-data-tables.html (last accessed on February 5, 2018).

On behalf of injured consumers across this state and the attorneys who represent them, I would respectfully request that this Committee vote down SB 296.