Approved: 3/29/10
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

3/15

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on March 15, 2010, in Room 346-S of the Capitol.

All members were present except:
Representative Pat Colloton- excused
Representative John Grange- excused
Representative Jeff King- excused
Representative Marvin Kleeb- excused
Representative Kay Wolf- excused
Representative Kevin Yoder- excused

Committee staff present:
Jason Long, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Jill Wolters, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Lauren Douglass, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Sue McKenna, Kansas Judicial Council
Dan Murray, State Director of the National Federation of Independent Business-Kansas
Richard Tomlinson, Diebolt Lumber & Supply - LaHarpe, Kansas,
Senator Mike Peterson
Ed Klumpp, Kansas Association of Chiefs of Police & Kansas Peace Officers Association
Jordan Austin, National Rifle Association of America
Debbie Lindenmuth, Garnishment Supervisor for Tyson Foods, Inc.

Others attending:
See attached list.

The hearing on **SB 460 - Children; permanency and priority of orders** was opened and was a continuation from Thursday, March 11, 2010 due to not having enough time to complete the hearing before adjournment of the meeting.

Jason Long, Office of the Revisor of Statutes, provided an overview of the bill for the committee, which amends various statutes relating to judicial orders concerning the custody, residency and parenting of children. (Attachment 1)

Testimony was also provided last Thursday by Jayne Morris-Hardeman, a member of the Juvenile Offender and Child in Need of Care Committee, Kansas Judicial Council, as the proponent of this bill. She was not available to come back today and therefore Sue McKenna, on behalf of the Kansas Judicial Council, appeared before the committee for questions.

There were no opponents.

The hearing on **SB 460** was closed.

The hearing on **SB 381 - Criminal law; justified threat or use of force** was opened.

Jason Long, Office of the Revisor of Statutes, provided an overview of the bill for the committee, which contains many of the same amendments to the statutes relating to the justified use of force as **HB 2432**, which the committee heard earlier this session. He advised, like **HB 2432**, this bill addresses the Kansas Supreme Court decision, *State v. Hendrix,* where the Court held that a defendant cannot claim justified use of force unless the defendant used actual physical force. The bill amends the statutes relating to justified use of force to include the phrase "threat or," or similar language, wherever the term "force" is used. He also advised, the Senate Committee on Judiciary added a new section 1 to the bill to make its application retroactive, similar

to the provision in **HB 2432.** In addition, the Senate Committee added a provision to K.S.A. 21-3212 creating a rebuttable presumption that the threat of force was necessary to prevent or terminate the unlawful entry into or attack upon the person's dwelling or occupied vehicle. The same provision was also added to this section for the threat or use of deadly force. (Attachment 2)

Senator Mike Peterson, appeared before the committee in support of this bill and encouraged them to pass this bill to clarify a statute which the Supreme Court in October ruled that the meaning of the term "use of force" means actual force or physical contact. (Attachment 3)

Ed Klumpp, spoke as a proponent on behalf of the Kansas Association of Chiefs of Police and the Kansas Peace Officers Association, stating they support legislation to remedy the gap left in the "use of force" statutes after the Kansas Supreme Court's ruling in *State v. Hendrix*, decided in October 2009. Mr. Klumpp also provided a comparison of SB 381 and HB 2432 to identify the differences. (Attachment 4)

Jordan Austin, representing the National Rifle Association of America appeared in support of the bill with an amendment to add some of the language from HB 2432 which was passed out by this committee earlier in the session. (Attachment 5).

Chairman Kinzer advised Mr. Austin the amendment would need to be presented by Wednesday of next week.

Written testimony in support of the bill was provided by Thomas R. Stanton, Deputy Reno County District Attorney. (Attachment 6)

There were no opponents.

The hearing on **SB 381** was closed.

The hearing on **SB 360 - Removing limitation on number of small claims that may be filed in a calendar year** was opened.

Jill Wolters, Office of the Revisor of Statutes, provided an overview of the bill for the committee which amends the small claims procedure act. She explained currently, pursuant to K.S.A. 61-2704, a person can only file 20 small claims in the same court during any calendar year. This limitation would be repealed, allowing unlimited claims to be filed per year. She further explained K.S.A. 61-2703 defines a small claim as "a claim for the recovery of money or personal property, where the amount claimed or the value of the property sought does not exceed $4000, exclusive of interest, costs and any damages awarded." The act would take effect upon publication in the statute book, July 1, 2010. (Attachment 7)

Dan Murray, State Director of the National Federation of Independent Business-Kansas (NFIB-Kansas), spoke to the committee in support of the bill. He stated NFIB-Kansas is the leading small business association representing small and independent businesses and is a non-profit, non partisan organization founded in 1943 and represents the consensus views of it's 4,000 members in Kansas. He explained under the current law where a person or small business is limited to no more than 20 small claims in a calendar a year, it is in their opinion, a limitation on access to the justice system. Many small businesses rely on small claims court to resolve unpaid bills or bad checks and when they reach their cap of 20, they either forgo a court claim or must hire an attorney. He stated when many Kansas small businesses are hurting, this bill provides some relief to our essential job creators. (Attachment 8)

Richard Tomlinson, Accounts Receivable Manager for Diebolt Lumber & Supply - LaHarpe, Kansas, also spoke as a proponent of this bill and stated they feel that changing this law to raise the number of court filings would benefit all Kansans. (Attachment 9)

Written testimony in support of the bill was provided by Leslie Kaufman, Executive Director for the Kansas Cooperative Council. (Attachment 10)

Written testimony in opposition of the bill was provided by Ron Smith, Smith, Burnett & Larson, LLC of

Minutes of the House Judiciary Committee at 3:30 p.m. on March 15, 2010, in Room 346-S of the Capitol.

Larned, Kansas. (Attachment 11)

The hearing on **SB 360** was closed.

The hearing on **SB 234 - Civil procedure; garnishment** was opened.

Matt Sterling, Office of the Revisor of Statutes presented an overview of the bill which amends the existing law concerning garnishments, statutes K.S.A.60-740, 61-3507, 61-3510. (Attachment 12)

Debbie Lindenmuth, the Garnishment Supervisor with Tyson Foods, Inc., spoke to the committee asking them to support this bill. She also is the Chairperson of the Garnishment Subcommittee for the American Payroll Association (APA), a professional organization of payroll professionals whose primary purpose is to educate payroll professionals on all aspects of properly paying employees, as well as withholding and remitting taxes, healthcare benefits, child support, and other garnishments. The second purpose of APA is to work with federal, state, and local governments to reduce the administrative burden on employers while complying with all laws and achieving the goals set out by the government. They believe the changes in this bill will streamline the garnishment process for everyone involved and also reduce the amount of money debtors will pay to settle their debts. She stated the number of garnishments has been increasing with the downturn in the economy and now is the time to pass this bill which will benefit all parties involved. (Attachment 13)

There were no opponents.

Representative Brookens advised he has talked with Debbie Lindenmuth and is in the process of making some changes and will have a couple balloon amendments to clean up some technical language and substantial changes regarding chapter 60 to essentially put chapters 60 and 61 in conformity with each other.

The next meeting is scheduled for March 16, 2010.

The meeting was adjourned at 4:25 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: 03-15-10

NAME	REPRESENTING
Natalie Gibson	KS. Judicial Council
A.S. McKenna	SRS " "
Dan Murray	NFIB
Jamie Roy	KCSL
Patrick Vogelsberg	Kearney and Assoc.
Joseph McClain	KS BAR ASSN.
LWilks	Jud. Branch
Debbie Lindenmuth	TYSON FOODS, INC.
Doug Smith	KCA/KCAA
Kevin Berens	Capitol Lobby Corp, LLC.
Ed Klumpp	KACP/KPOA/KSA
MIKE PETERSON	28TH
John A. Fursman III	Diebolt lumber Co
RICHARD W TOMLINSON	DIEBOLT LBR & Supply.
Steven Anderson	Westar Energy
Bruce Frazier	Westar Energy
RJ Wilson	KOSE

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REVISOR OF STATUTES
JAMES A. WILSON III, ATTORNEY
FIRST ASSISTANT REVISOR
GORDON L. SELF, ATTORNEY
FIRST ASSISTANT REVISOR

OFFICE OF REVISOR OF STATUTES
KANSAS LEGISLATURE

Legal Consultation—
Legislative Committees and Legislators
Legislative Bill Drafting
Legislative Committee Staff
Secretary—
Legislative Coordinating Council
Kansas Commission on
Interstate Cooperation
Kansas Statutes Annotated
Editing and Publication
Legislative Information System

Brief on Senate Bill 460
Priority of Orders Concerning Children

Jason B. Long
Assistant Revisor
Office of Revisor of Statutes

March 11, 2010

SB 460 amends various statutes relating to judicial orders concerning the custody, residency and parenting of children. The primary amendments in the bill provide that custody or parenting time orders, or orders relating to the best interests of the child issued under the Revised Kansas Code for Care of Children or the Revised Kansas Juvenile Justice Code shall take precedence over any order issued under the adoption and relinquishment act or the guardianship and conservatorship act. Additionally, certain amendments in the bill provide that such custody and parenting orders take precedence over orders issued under the determination of parentage act, the divorce statutes in the civil code of procedure, and the protection from abuse act.

The bill also makes amendments to provide for the consolidation of similar actions involving children that involve the same parties. In conjunction with these amendments there are also amendments clarifying the filing and certifying of orders in similar actions.

The bill amends various child in need of care statutes. These amendments include requiring an annual court hearing in any case referred to a citizen review board, authorizing greater disclosure of reports or records in such cases, limiting restrictions on out-of-home placement orders to only the initial order of the court, and requiring final adjudication or

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dismissal of a child in need of care petition within 60 days of filing the petition unless good cause is shown to continue the case.

Finally, the bill makes various amendments to the statutes regarding juvenile offenders. These amendments address the venue of hearings under those statutes and the conduct of permanency hearings when a juvenile offender is released.

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Brief on Senate Bill 381
Justified Use of Force

Jason B. Long
Assistant Revisor
Office of Revisor of Statutes

March 15, 2010

SB 381 contains many of the same amendments to the statutes relating to the justified use of force as HB 2432, which the committee heard earlier this session. Like HB 2432, the bill addresses the Kansas Supreme Court decision, *State v. Hendrix*, where the Court held that a defendant cannot claim justified use of force unless the defendant used actual physical force.

The bill amends the statutes relating to justified use of force to include the phrase "threat or," or similar language, wherever the term "force" is used. These amendments are identical to those in the version of HB 2432 that was introduced this session.

The Senate Committee on Judiciary added new section 1 to the bill to make its application retroactive. A similar provision was also in the version of HB 2432 that was passed by the House of Representatives.

The Senate Committee also added a provision to K.S.A. 21-3212 creating a rebuttable presumption that the threat or use of force was necessary to prevent or terminate the unlawful entry into or attack upon the person's dwelling or occupied vehicle. The same provision was also added to this section for the threat or use of deadly force.

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SENATOR MIKE PETERSEN

COMMITTEES
VICE CHAIR: UTILITIES
MEMBER: LOCAL GOVERNMENT
TRANSPORTATION
JOINT COMMITTEE ON
INFORMATION TECHNOLOGY

SB 381

March 15 2010

Chairman Kinzer, Members of the Committee. The purpose of SB 381 is to clarify a statute which the Supreme Court in October ruled that the meeting of the term "Use of Force" means actual force i.e. physical contact. The majority opinion also stated that "The Legislature rather than this court, is the body charged with study, consideration and adoption of any statutory change that might make [The Statute] more workable."

The absurdity of denying self defense to a defendant who can defuse a violent situation with the threat of force, then granting it to a person who actually uses physical force goes against any discussion of self defense I have heard in the Legislature. I have attached a copy of The supreme court opinion Including Chief Justice Davis's dissenting opinion beginning on Pg. 7 that contains a clear example of the practical result of the Courts decision.

Thank you for your consideration,

Mike Petersen

Senator Mike Petersen

House Judiciary
Date 3-15-10
Attachment # 3

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 97,323

STATE OF KANSAS,
Appellee,

v.

RODNEY MAURICE HENDRIX,
Appellant.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Jury Instructions—Defendant Entitled to Instructions on Law Applicable to Theory of Defense—Sufficiency of Evidence to Support Instruction.* A defendant is entitled to instructions on the law applicable to his or her theory of defense if there is evidence to support the theory. However, there must be evidence which, viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with the defendant's theory.

2. STATUTES—*Interpretation —Legislative Intent—Court's Duty When Interpreting Unambiguous Statute.* In interpreting a statute, the fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. The intent of the legislature is to be derived in the first place from the words used. In determining whether a statute is open to construction or in construing a statute, ordinary words are to be given their ordinary meaning and courts are not justified in disregarding the unambiguous language.

3. SAME—*Interpretation —Unambiguous Statute—Appellate Review.* When language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there.

3-2

4. SAME—*Presumption Legislature Does not Intend to enact Meaningless Legislation.* There is a presumption that the legislature does not intend to enact useless or meaningless legislation.

5. LEGISLATURE—*Declaration of Public Policy.* Declaration of public policy is normally the function of the legislative branch of government.

6. CRIMINAL LAW—*Self-defense—Jury Instruction—Instruction Not Warranted unless Defendant Use Physical Force.* Under the plain language of K.S.A. 21-3211 (Furse 1995), a jury instruction on self-defense is not warranted unless the defendant has used actual physical force.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 19, 2008 Appeal from Johnson district court; JACQUELYN E. ROKUSEK, judge pro tem. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed. Opinion filed October 23, 2009.

Matthew J. Edge, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Steven J. Obermeier, assistant district attorney, argued the cause, and *Elizabeth J. Dorsey*, legal intern, *Phill Kline*, district attorney, and *Steve Six*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

NUSS, J.: The issue presented is whether a defendant must use actual force to justify a jury instruction on self-defense. We answer this question "yes." Accordingly, the judgment of the Court of Appeals is affirmed.

FACTS

The facts necessary to our determination are straightforward. While visiting their mother in her hospital room, Rodney Maurice Hendrix and his sister, Charlotte Brown, had a heated

confrontation. According to Brown, her brother entered the room and angrily approached her. Hendrix "shoved" a piece of paper in her face so severely that when he pulled the paper away it showed traces of her makeup. Brown testified that Hendrix backed away, then again came toward her and pulled a knife. He then threatened to kill Brown if she returned to their mother's home where Hendrix lived and where Brown had been staying during her visit. According to Brown, Hendrix then left.

Hendrix's story was considerably different. According to him, he entered the hospital room and knelt by his mother while holding a piece of paper that he wanted to show her. He testified that Brown approached him and stuck her hand in his face while loudly cussing him. Hendrix claimed he was afraid that Brown would slap him. He testified that to get her to back away, he told her he would "break her neck." One fact the siblings do agree upon is the complete absence of physical force by either one.

Hendrix was charged with the crimes of criminal threat and aggravated assault. The trial court denied his request for a self-defense jury instruction on the basis of insufficient evidence. Specifically, it ruled that Hendrix did not have a reasonable belief that his conduct was necessary to defend himself against the use of imminent force by his sister. The jury then convicted Hendrix of making a criminal threat under K.S.A. 21-3419(a) ("any threat to . . . [1] [c]ommit violence communicated with intent to terrorize another, or . . . in reckless disregard of the risk of causing such terror") and misdemeanor assault under K.S.A. 21-3408 ("intentionally placing another person in reasonable apprehension of immediate bodily harm").

The Court of Appeals held that Hendrix was not entitled to a self-defense instruction as a matter of law because no physical force was actually used. *State v. Hendrix*, No. 97,323, unpublished opinion filed September 19, 2008. The panel cited the statute and the standard jury instruction on self-defense: K.S.A. 21-3211 (Furse 1995) and PIK Crim. 3d 54.17. Accordingly, its rationale eliminated the need to consider the trial court's determination of insufficient evidence of Hendrix's reasonable belief that his conduct was necessary to defend himself against the threat of imminent force.

We granted Hendrix's petition for review under K.S.A. 22-3602(e).

ANALYSIS

We recently set forth our standard of review for determining when a defendant is entitled to a jury instruction on his or her theory of defense in *State v. Anderson*, 287 Kan. 325, 334, 197 P.3d 409 (2008):

> "'A defendant is entitled to instructions on the law applicable to his or her theory of defense if there is evidence to support the theory. However, there must be evidence which, viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with the defendant's theory.'"

The statute concerning Hendrix's theory of self-defense, K.S.A. 21-3211 (Furse 1995), in turn provided as follows:

> "A person is justified in the *use of force* against an aggressor when and to the extent it appears to him and he reasonably believes that such conduct is necessary to defend himself or another against such aggressor's use of unlawful force." (Emphasis added.)

We begin by acknowledging that the fundamental rule to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. *Steffes v. City of Lawrence*, 284 Kan. 380, Syl. ¶ 2, 160 P.3d 843 (2007). The intent of the legislature is to be derived in the first place from the words used. *Griffin v. Suzuki Motor Corp.*, 280 Kan. 447, 460, 124 P.3d 57 (2005). In determining whether a statute is open to construction or in construing a statute, ordinary words are to be given their ordinary meaning and courts are not justified in disregarding the unambiguous language. *Perry v. Board of Franklin County Comm'rs*, 281 Kan. 801, Syl. ¶ 8, 132 P.3d 1279 (2006); see *Schmidtlien Electric, Inc. v. Greathouse*, 278 Kan. 810, 822, 104 P.3d 378 (2005).

"When language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there." *Steffes*, 284 Kan. 380, Syl. ¶ 2.

We agree with the State and the Court of Appeals panel that the phrase "use of force" contained in K.S.A. 21-3211 (Furse 1995) should be given its ordinary meaning—and that means actual force. "Use of force" does not mean "threat of force" or "display of force" or "presentation of force" or any interpretations which similarly dilute the actual use of force, *i.e.*, physical contact.

Even if the statutory language were somehow ambiguous and we looked to canons of construction to assist in determining the meaning of "use of force," we note that the legislature has been clear in other contexts to distinguish between the actual use of force and diluted variations. For example, the legislature has explicitly defined robbery as the taking of property from the person or presence of another either "by *force* or by *threat* of bodily harm" to any person. (Emphasis added.) K.S.A. 21-3426. The legislature has made the same type of explicit distinctions in the crime of kidnapping. It defines kidnapping as a taking or confining of another person "accomplished by *force, threat* or deception." (Emphasis added.) K.S.A. 21-3420.

Finally the legislative distinction is again clearly made in K.S.A. 21-3213 which concerns defense of property other than a dwelling. It provides:

> "A person who is lawfully in possession of property other than a dwelling is justified *in the threat or use of force* against another for the purpose of preventing or terminating an unlawful interference with such property. Only such degree of *force or threat* thereof as a reasonable man would deem necessary to prevent or terminate the interference may intentionally be used." (Emphasis added.)

Hendrix's take on the statutes would make the language of clear distinction superfluous. In short, there would be no need for the legislature to discern, on the one hand, "threats" or implied force from actual "force" and "use of force" on the other. See *Hawley v. Kansas Department of Agriculture*, 281 Kan. 603, Syl. ¶ 9, 132 P.3d 870 (2006) (there is a presumption that the legislature does not intend to enact useless or meaningless legislation).

Hendrix relies upon language contained in another unpublished Court of Appeals decision, *State v. Kincade*, No. 94,657, filed August 4, 2006. There the panel stated:

> "In the present case, the defendant offered no evidence which, if believed, would have supported a reasonable belief the defendant or another person was in imminent danger of the use of unlawful force. The use of force *or the threat of force* to protect another person is a defense only when such force is necessary to protect the third party from an aggressor's imminent use of force. K.S.A. 21-3211. The evidence in this case provides no basis from which to conclude that any person, other than the victim, was placed in imminent danger of the use of unlawful force justifying the defendant's protective use of force in response. The record simply fails to support an instruction on self-defense or defense of another." (Emphasis added.) Slip Op. at 4.

The italicized words upon which Hendrix relies are contrary to the plain language of the statute. More specifically, the *Kincade* panel inappropriately read into the statute words not found there. *Steffes*, 284 Kan. 380, Syl. ¶ 2. To the extent that *Kincade* is inconsistent with the holding of the instant case, it is overruled.

Hendrix primarily argues policy considerations. Among other things, he points out the alleged absurdity in *denying* self-defense to a defendant (purportedly like himself) who can defuse a violent situation with the mere threat of force, but then in *granting* the defense to one who instead chooses to actually apply force. He argues the statute—or at least our interpretation of it—promotes violence because defendants wanting to ensure their entitlement to the defense will use actual force instead of words.

We agree with the worthy goal of promoting de-escalation, *e.g.*, defusing a violent episode with some well chosen words. However, policy making is the province of the legislature. See *Bland v. Scott*, 279 Kan. 962, 966, 112 P.3d 941 (2005) ("'declaration of public policy is normally the function of the legislative branch of government'"); see also *State v. Prine*, 287 Kan. 713, 737, 200 P.3d 1 (2009) ("Of course, the legislature, rather than this court, is the body charged with study, consideration, and adoption of any statutory change that might make [the statute] more workable."). It alone must decide whether to pursue this goal in the self-

defense statute. Consequently, it alone must decide to make the explicit distinctions there as it has in the other statutory enactments mentioned earlier.

Such an approach would also be consistent with the ones chosen by a number of other states in their self-defense statutes. See, *e.g.*, Ga. Code Ann. § 16-3-24.2 (2007) ("A person who uses threats or force . . . shall be immune from criminal prosecution therefor . . . ."); Tex. Penal Code Ann. § 9.04 (West 2003) ("The threat of force is justified when the use of force is justified by this chapter."); Wisc. Stat. § 939.48(1) (2005) ("A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what the person reasonably believes to be an unlawful interference with his or her person by such other person.").

For all of these reasons, the judgment of the Court of Appeals is affirmed.

* * *

DAVIS, C.J., dissenting: Under Kansas law, "[a] person is justified in the use of force against an aggressor when and to the extent it appears to him and he reasonably believes that such force is necessary to defend himself or another against such aggressor's imminent use of unlawful force." K.S.A. 21-3211(a) (Furse 1995); accord *State v. Shortey*, 256 Kan. 166, 173, 884 P.2d 426 (1994). The majority determines that the plain language "use of force" means only the exertion of physical force. Because I find the language of K.S.A. 21-3211 (Furse 1995) to be ambiguous and because I conclude that the legislature reasonably intended to incorporate both physical and constructive force within the self-defense statute, I cannot join in the majority opinion and must dissent.

Consider the following example. One evening, a large man approaches a woman in a menacing manner and threatens, "I'm going to hurt you!" Worried for her life, the woman takes a gun from her purse, points it at her assailant, and says, "Stay where you are!" The assailant turns and runs.

Assume for the sake of the example that the woman is subsequently charged with aggravated assault. While she successfully repelled her attacker with constructive force, she is not entitled to a self-defense instruction according to the majority opinion. Had she actually shot her assailant, she may very well have been entitled to that instruction under that same rationale. This bizarre result cannot have been intended by the legislature in its enactment of K.S.A. 21-3211 (Furse 1995).

Although the majority recognizes the incongruity in this outcome from a policy perspective, it finds that its interpretation of K.S.A. 21-3211 (Furse 1995) is demanded by the plain language of that statute. I disagree that the plain language dictates such a result.

K.S.A. 21-3211(a) (Furse 1995) provides that, in certain instances, the "use of force" is justified when defending oneself or others. The statute does not define the terms "use" or "force." In my opinion, the failure to define these terms creates an ambiguity in the statute that must be resolved through statutory construction.

Notably, the majority assumes that the term "force" includes only "physical force." See slip op. at 5-6 (indicating that the "ordinary meaning" of "force" is "actual [or physical] force"). This interpretation is not based on the plain language of the statute, as K.S.A. 21-3211 (Furse 1995) is silent as to the types of force it encompasses. The generic term "force" may include both "actual force"—that is, physical force—and "constructive force"—that is, the threat of actual force. See Black's Law Dictionary 717 (9th ed. 2009) (distinguishing *actual force* ["(f)orce consisting in a physical act"] from *constructive force* ["(t)hreats and intimidation to gain control or prevent resistance"]).

Likewise, the majority opinion interprets the term "use" in K.S.A. 21-3211 (Furse 1995) to mean only *the exertion of physical force.* The majority reaches the blanket conclusion that "'[u]se of force' does not mean 'threat of force' or 'display of force' or 'presentation of force' or any interpretations which similarly dilute the actual use of force, *i.e.*, physical contact." Slip op. at 6. But contrary to the majority's interpretation, "use" is a general term that may include all of those other actions (threat, display, presentation, etc.). See Black's Law Dictionary 1681 (9th ed.

2009) (defining "use" in general terms as "[t]he application or employment of something" and listing 34 examples where "use" carries different meanings in the legal context).

It is a cardinal principle of statutory interpretation that a statute should not be read to add language that is not found in its text. *State v. Bryan*, 281 Kan. 157, 159, 130 P.3d 85 (2006). Absent a definition of the terms "use" and "force" in K.S.A. 21-3211 (Furse 1995), we are left with the task of ascertaining the intent of the legislature in its including those undefined terms in the statute. In order to reach the majority's conclusion that it may resolve the question before us under the statute's plain language, one must first *assume* that the legislature intended to exclude constructive force to limit "force" to "physical force" only. The same is true if one limits "use" to describe only the "exertion of physical force." Contrary to the majority's conclusion, the language used in K.S.A. 21-3211 (Furse 1995) is not necessarily clear and, without some assumptions on the part of the reader, does not exclude constructive force from the ambit of self-defense.

When the language of a statute leaves the reader generally uncertain as to which of two or more reasonable interpretations is proper—as is the case here—courts must resort to maxims of construction. See *Weber v. Tillman*, 259 Kan. 457, 476, 913 P.2d 84 (1996). Most importantly, when ascertaining legislative intent, courts must interpret statutes in a reasonable manner as long as such an interpretation is consistent with a statute's language. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P.3d 892 (2007).

The practical result of the majority's interpretation of "use of force" in K.S.A. 21-3211 (Furse 1995)—that a self-defense instruction is only warranted when actual physical force has been exerted—is to interpret the ambiguity in favor of physical violence. Instead of using words to deter harmful conduct, persons would be encouraged to escalate a situation by committing some kind of physical act that would justify acting in self-defense under the law. In the example described above, the woman would be encouraged to shoot her assailant instead of merely threatening him. As Hendrix argues in his petition for review, this result is truly "absurd."

The majority attempts to bolster its interpretation by turning to other examples in our statutes where the legislature has apparently differentiated between "threat" and "force." I do not find these distinctions persuasive in light of its unreasonable interpretation in favor of escalating already violent situations. Instead, I would resolve the ambiguity in favor of nonviolence and de-escalation.

I find the self-defense definition included in the Model Penal Code to be a particularly helpful example of a resolution of the question before us. Model Penal Code § 3.04(1) (1995) provides that "the *use of force upon or toward another person* is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." (Emphasis added.) Several states have adopted the exact language of the model code in their definition of self-defense. See Del. Code Ann. tit. 11, § 464 (2007); Guam Code Ann. tit. 9, § 7.84 (2008); Hawaii Rev. Stat. § 703-304 (2007); Neb. Rev. Stat. § 28-1409 (2003); N.J. Stat. Ann. § 2C:3-4 (West 2005); 18 Pa. Cons. Stat. Ann. § 505 (Purdon 1998).

Two important aspects of the model code are worth noting. First, the model code employs the same phrase—"use of force"—that is used in K.S.A. 21-3211 (Furse 1995). It does not distinguish between threats and physical force, nor does it specifically define "force" in that context. Second, the model code indicates that one may use force "upon or toward" another. In other words, the "use of force" does not necessarily require some physical force exerted on another; rather, it can involve force directed toward another to de-escalate a violent situation. Put simply, the Model Penal Code envisions self-defense to include constructive force.

The cases decided by the states employing the Model Penal Code definition are consistent with this interpretation. For example, in *Com. v. Rittle,* 285 Pa. Super. 522, 428 A.2d 168 (1981), the Pennsylvania Superior Court reversed and remanded an assault conviction for a new trial because the trial court failed to provide a self-defense instruction. In *Rittle,* the victim, who was much larger then the allegedly sickly defendant, approached the defendant's car and threatened to beat up the defendant. The defendant reached into his back seat, produced a gun, and pointed it at the victim; the victim walked away. No shots were fired. The trial court

refused to charge the jury on self-defense and the defendant was found guilty of simple assault. On appeal, however, the court held that the jury could have concluded that the victim was the initial aggressor who attempted to place the defendant in fear of imminent serious bodily injury and such could amount to simple assault. Therefore, the defendant was entitled to an instruction on the use of self-defense. 285 Pa. Super. at 525-26.

It is true that K.S.A. 21-3211 (Furse 1995) is not identical to the Model Penal Code's self-defense definition. Instead of stating that "the use of force *upon or toward* another person is justifiable" in limited circumstances (as Model Penal Code § 3.04[1] [1995] provides), K.S.A. 21-3211(a) (Furse 1995) states that "[a] person is justified in the use of force *against* an aggressor" when the other conditions of the statute are met. (Emphasis added.) I do not find this difference to be significant, however. The term "against" encompasses the same behavior that may be directed "upon or toward" another. Thus, it is consistent with the model code and likewise does not exclude from its ambit the use of constructive force in self-defense.

Statutes should be interpreted in a reasonable manner as long as such an interpretation is consistent with a statute's plain language. *Winnebago Tribe of Nebraska*, 283 Kan. at 77. Because it would be entirely consistent with the language of K.S.A. 21-3211 to interpret "use of force" to include both constructive and actual force, I would conclude that the legislature intended to include constructive force within its definition of self-defense. Thus, in the hypothetical example described above between the man and the woman, I would conclude that the woman's use of force to repel her assailant by pointing the gun fits the legislature's definition of self-defense.

LUCKERT, J., joins in the foregoing dissent.

Kansas Association of Chiefs of Police
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Kansas Peace Officers Association
PO Box 2592, Wichita, KS 67201 (316)722-8433

Testimony to the House Judiciary Committee In Support of SB381

March 15, 2010

Chairman Kinzer and committee members,

The Kansas Association of Chiefs of Police and the Kansas Peace Officers Association supports legislation to remedy the a gap left in the use of force statutes after the Kansas Supreme Court ruling in State vs. Hendrix, decided in October 2009.

As you know, this committee and the House passed an amended bill also proposing a fix to the Hendrix case, HB2432. Either bill accomplishes the needed fix for the statute. They each take a similar but slightly different approach to the Hendrix issue. They are further apart on some of the other amendments made to the statutes that have nothing to do with the Hendrix case. The Senate version creates a more general rebuttable presumption that use of force is justified in certain cases. The House solved those proposals with a different approach by creating more specific presumptions but not including "rebuttable". The House chose to add place of work and the Senate did not. Not a big issue either way for us, but an important policy issue the two chambers will have to resolve.

There are several different ways to effectively amend these statutes to cure the problems with the Hendrix decision. Both SB381 and HB2432 propose different methods of reaching that end. We are less concerned with which approach is used than we are that the legislative intent is clear. Our greatest concern is that legislation with the Hendrix fixes are ultimately passed by the legislature. Perhaps ultimately a combination of the two will be the best answer. I have attached a chart showing the differences in the two bills as we see them along with some comments.

We are aware of the past attempts by some to encourage changes to KSA 21-3217 and parts of KSA 21-3219 in regards to a person using force against law enforcement officers. Those proposals were rejected by both chambers in the bills they each passed. We encourage you to continue to not include such provisions.

Time is of the essence since the misguided case law will not be fixed until a bill actually becomes law. This is a matter the House recognized by amending their bill to be effective upon publication in the register. Regardless of which approach you choose in amending this bill, we urge you to ultimately recommend this bill favorably for passage with provisions to fix the Hendrix case issues.

Ed Klumpp

Ed Klumpp
Legislative Committee Chair
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Phone: (785) 235-5619
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House Judiciary
Date 3-15-10
Attachment # 4

4-2

Comparison of SB381 as amended by senate committee and HB2432 as amended by house committee
Use of Force

Topic	SB381	HB2432	Comments
Retroactive	Yes. Sec. 1	Yes. Sec. 1, lines 25-26	
Defines "Use of Force"	No	Yes. Sec. 1	
Includes all of the terms for describing force from case law (threat, display, or presentation of force; contructive force)	No	Yes	Using these terms will clarify the legislative intent that all of the possible use of force types listed in the case law are included.
Defines when use of force justification is presumed	Yes. Sec. 3 includes word "rebuttable"	Yes. Section 2	Section 2 (page 1, line 27 through page 2 line 18) and section 5 (page 3, lines 14-34) of HB2432 are duplicative and may create conflict.
Adds specific exemptions where presumption does not apply	No	Yes. Sec. 1, pg 1, line 42-pg 2, line 18	Not sure it is necessary. May depend on whether or not work place is included. I believe it comes from model code. House version is duplicative in sec 2 (page 1, line 27 through page 2 line 18) and sec 5 (page 3, lines 14-34).
Adds "place of work"	No	Yes. Sec. 3, pg 2, lines 39 and 42; pg 3, line 8	Not sure this is necessary, but House bill language is restrictive enough it probably causes no harm.
Addresses "threat" to use force	Yes. By adding "threat or" throughout	Yes. By definition	
Adds "upon or toward" concept from case law and Model Penal Code	No	Yes. In definition and throughout.	
Adds "death" to "great bodily harm" language in 21-3215	Yes. Page 3, line 1.	No	This is probably a good clarification.
Statutes amended	Does not include 21-3213	Includes 21-3213	Senate bill does not correct conflict caused by 21-3212 currently including occupied vehicle but not currently exempting occupied vehicle in 21-3213.
Uses portion of Model Penal Code as suggested in dissenting opinion.	Not sure.	Yes.	
Corrects gender language	Yes	Yes.	
Effective date	Statute	Register	

Prepared by Ed Klumpp 3/12/2010

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
11250 WAPLES MILL ROAD
FAIRFAX, VIRGINIA 22030-7400

Chairman Lance Kinzer
House Judiciary Committee
346-S
State Capitol
Topeka, KS 66612

Dear Chairman Kinzer,

March 15, 2010

My name is Jordan Austin and I am a registered lobbyist speaking on behalf of the National Rifle Association. I come before you today to express our concerns with SB 381. In 2006, the members of this legislature passed a bill known as the Castle Doctrine. This bill gave KS citizens the right to protect themselves in their homes, cars, and anywhere they have a legal right to be. This bill also made it clear that KS citizens have no "duty to retreat" when confronted by an attacker. Finally the bill provided protection from civil liability lawsuits from criminals or their families who are injured or killed.

SB 381was attempting to address a court ruling handed down by the Kansas Supreme Court. In State v. Hendrix, the court determined that the threat of force is not covered under the Castle Doctrine law and therefore, simply threatening to use force does not entitle you to a self defense jury instruction. The court's ruling states that, "the "use of force" contained in K.S.A. 21-3211 should be given its ordinary meaning—and that means actual force. "Use of force" does not mean "threat of force" or "display of force" or "presentation of force" or any interpretations which similarly dilute the actual use of force."

So, according to the court, if you shoot someone in self defense in your home you are protected under the law and get a self defense jury instruction. If you threaten some one in your home and tell them to leave or you will shoot them, you could be charged with criminal threat and aggravated assault and if/when you go to court, the jury would not be given a self defense jury instruction.

It was originally determined that SB 381 would sufficiently cover the problems caused by the Hendrix ruling, but upon a more thorough analysis of the Kansas statute concerning self defense, it was determined that a more comprehensive solution was necessary. The Senate Judiciary Committee made an attempt to address these concerns with the original draft, but the NRA believes that an approach similar to HB 2432 as passed by the House would more correctly deal with the problems associated with Hendrix.

The NRA is supporting an amendment to correct these concerns that exist in SB 381. This committee recognized these concerns when HB 2432 was passed out. While this amendment is slightly different that what was originally passed, we think these expanded definitions will only add clarity to statute and prevent another misguided ruling by the court. We again urge your support.

Sincerely,

Jordan A. Austin

Kansas State Lobbyist
NRA-ILA

House Judiciary
Date 3-15-10
Attachment # 5

Kansas County & District Attorneys Association
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Topeka, KS 66604
(785) 232-5822 Fax: (785) 234-2433
www.kcdaa.org

TO: Representative Lance Kinzer, Chair
The Honorable Representatives of the House Judiciary Committee

FROM: Thomas R. Stanton
Deputy Reno County District Attorney
Past President, KCDAA

RE: Written Testimony in Support of Senate Bill 381

DATE: March 15, 2010

Thank you for the opportunity to submit written testimony regarding Senate Bill 381. This legislation is in direct response to the Kansas Supreme Court decision in *State v. Hendrix*, ____ Kan. ____, 218 P.3d 40 (2009). In that Case, Justice Nuss, writing for a majority of the Court, ruled that, "Under the plain language of K.S.A. 21-3211 (Furse 1995), a jury instruction on self-defense is not warranted unless the defendant has used actual physical force." *Id.* at Syl ¶ 6. Justices Davis and Luckert dissented.

K.S.A. 21-3211 currently states as follows:

> "(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
> (b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.
> (c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person."

House Judiciary
Date 3-15-10
Attachment # 6

The statute references only the actual use of force as a defense to a perceived threat as being protected conduct. Although it appears that the Kansas Legislature appears to have made no distinction between the use of force and the threat of the use of force, such a distinction has been read into the law. Senate Bill 381 clarifies the law to reflect what we believe to have been the original intent of the law.

Hendrix would require that a person use actual force before the self-defense provisions of K.S.A. 21-3211 could apply. Such a result would lead to a situation in which the party defending himself or herself would be required to use the weapon being used in self-defense before the provisions of the statute could be applied. A person who lawfully carried a concealed firearm, and who pulled the firearm in defense of himself or another would be required to actually fire the weapon to be protected by K.S.A. 21-3211. Thus, the decision has the effect of promoting violence, even if such effect was not the intention of the Court. As Justice Davis stated in his dissenting opinion:

> "Consider the following example. One evening, a large man approaches a woman in a menacing manner and threatens, 'I'm going to hurt you!' Worried for her life, the woman takes a gun from her purse, points it at her assailant, and says, 'Stay where you are!' The assailant turns and runs.
> "Assume for the sake of the example that the woman is subsequently charged with aggravated assault. While she successfully repelled her attacker with constructive force, she is not entitled to a self-defense instruction according to the majority opinion. Had she actually shot her assailant, she may very well have been entitled to that instruction under that same rationale. This bizarre result cannot have been intended by the legislature in its enactment of K.S.A. 21-3211 (Furse 1995)."

We agree with Justice Davis that such a bizarre result was not the intention of this body when K.S.A. 21-3211 was originally enacted. The KCDAA therefore supports this legislation, and requests that the bill be favorably considered by this Committee.

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MEMORANDUM

To: Chairman Kinzer and members of the House Committee on Judiciary
From: Jill Ann Wolters, Senior Assistant Revisor
Date: 15 March, 2010
Subject: Senate Bill No. 360

Senate Bill No. 360 amends the small claims procedure act. Currently, pursuant to K.S.A. 61-2704, a person can only file 20 small claims in the same court during any calendar year. This limitation would be repealed, allowing unlimited claims to be filed per year. Section 2 and 3 are conforming amendments.

K.S.A. 61-2703 defines a small claim as "a claim for the recovery of money or personal property, where the amount claimed or the value of the property sought does not exceed $4,000, exclusive of interest, costs and any damages awarded."

The act would take effect upon publication in the statute book, July 1, 2010.

House Judiciary
Date 3-15-10
Attachment # 7

NFIB
The Voice of Small Business®

Senate Judiciary Committee
Daniel S. Murray: State Director, NFIB-Kansas
Testimony in Support of SB360
March 15, 2010

Mr. Chair, Members of the Committee: My name is Dan Murray and I am the State Director of the National Federation of Independent Business-Kansas. NFIB-KS is the leading small business association representing small and independent businesses. A nonprofit, nonpartisan organization founded in 1943, NFIB-KS represents the consensus views of its 4,000 members in Kansas. Thank you for the opportunity to comment on SB 360.

Under current law, no persons – or small businesses – may file more than 20 small claims in a calendar year. SB360 removes this arbitrary limitation.

NFIB/KS supports SB360 for the following reasons:

- First, an arbitrary limitation on one's ability to bring actions to court is, in our opinion, is a limitation on access to the justice system.

- Second, and more importantly, many small businesses rely on small claims court to resolve unpaid bills or bad checks. Often, small businesses' only recourse for bad checks or overdue bills is small claims court. A cap of 20 claims is burdensome and can lead to costly legal expenses. If a small business reaches the cap of 20 claims, they either forgo a court claim or must hire an attorney. Both options will likely result in unexpected costs and lost revenue.

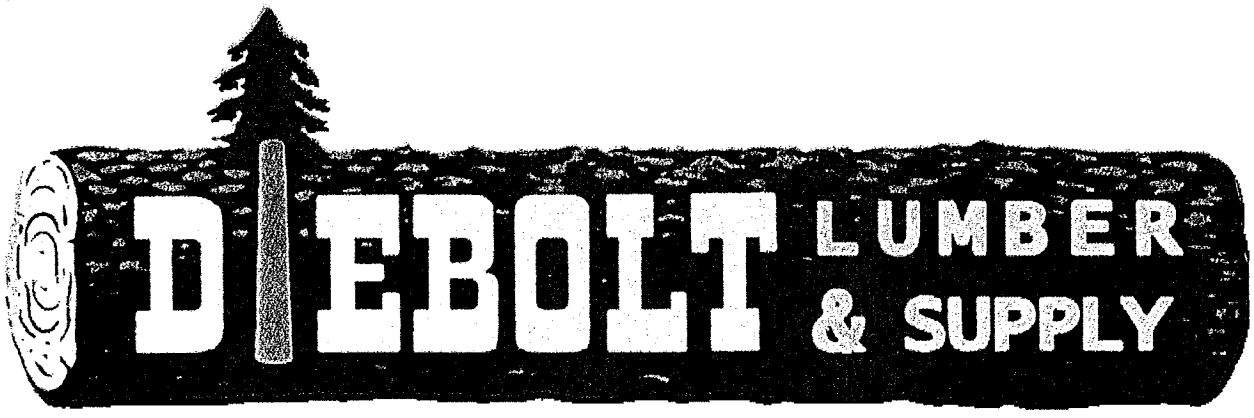
At a time when many Kansas small businesses are hurting, SB360 provides some relief to our essential job creators.

Small Business Isn't Small

Collectively, small business isn't small. It provides employment to 54.7% of the non-farm private work force in Kansas. It generates more than 50% of the gross domestic product. It possesses half of the business wealth in the U.S. In the past decade, it has annually provided 60% to 80% of net new jobs. It has been giving 67% of workers their first job. It hires a larger proportion of women, younger workers, older workers, and part-time workers than does big business. – Data Compiled in the 2010 Guide to Kansas Small Business Issues.

National Federation of Independent Business – KANSAS
5625 Nall Ave., Roeland Park, KS 66202 • 785-217-3442 • Fax – 785-232-1703 •

House Judiciary
Date 3-15-10
Attachment # 8



Testimony in support of Senate Bill 360
Presented to the House Judiciary Committee
By Richard Tomlinson, Accounts Receivable Manager

March 15, 2010

Mr. Chairman and members of the committee, thank you for hearing Senate Bill 360. My name is Richard Tomlinson and I am the Accounts Receivable Manager for Diebolt Lumber and Supply of LaHarpe, Kansas.

Diebolt Lumber does a large amount of business of which 80 percent is on credit. With that in mind there is always a large amount of deficient timely payments. Therefore, a business doing over $9 million per year, we can expect 2 percent of our sales to be placed for collection. These accounts can range in amount from $500.00 to $4,000.00.

A cap of 20 small claims per year will allow us to only reach one half of our collectables at best. We feel that changing this law to raise the number of court filings will benefit all Kansans.

Thank you for your consideration.

Dick Tomlinson

House Judiciary
Date 3-15-10
Attachment # 9

Kansas Cooperative Council
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The Mission of the Kansas Cooperative Council is to promote, support and advance the interests and understanding of agricultural, utility, credit and consumer cooperatives and their members through legislation and regulatory efforts, education and public relations.

House Judiciary Committee
March 15, 2010

SB 360 - Removing the Annual Limit on Small Claims Court Filings

Chairman Kinzer and members of the House Judiciary Committee, thank you for the opportunity to comment on behalf of the Kansas Cooperative Council (Council/KCC) in support of SB 360. I am Leslie Kaufman, Executive Director for the Council. The KCC is a voluntary trade association representing cooperative structured business entities across Kansas.

As you know, SB 360 removes the limit on the number of cases one can file in small claims court in any given year. Over the past few years, there has been a lot of interest within our membership in increasing the dollar amount for which remedy can be sought in small claims court and increasing the number of claims per year one can file in this court. As such, our association has supported bills in the recent past that did just that. SB 360 continues the trend of opening-up small claims court even further and our members truly appreciate this change.

Our members try to implement reasonable and prudent credit policies within their businesses. There are times, though, when accounts become delinquent. Recovery through small claims court is one tool our members, particularly our ag co-op members, can utilize to collect on debts.

It may not have been cost effective for a cooperative to hire an attorney and seek recovery through a regular district court case or to hire a debt collection agent to garner repayment, but small claims court can be a cost-effective tool for recovering what is owned the co-op. As such, we do support removal of an annual limit on the number of cases one entity may file in small claims court and we encourage favorable action on this bill.

If you have any questions regarding our testimony or position on this bill, please feel free to contact me at 785-220-4068.

Thank you.

House Judiciary
Date 3-15-10
Attachment # 10

Legislative Testimony on SB 360
Of
Ron Smith

Smith, Burnett & Larson, LLC
PO Box 360
111 East 8th Street
Larned, KS 67550
620-285-3157

Mr. Chairman, and members of the House Judiciary Committee.

I was a staff member for a Speaker of this house back in the 1970s. Back then, the unwritten rule was that if the Senate passed a bill with a big vote, then the House committees were to <u>really</u> study it closely.

SB 360 passed the Senate 40-0. Look at it closely!

I practice law in Larned. Our firm has a general civil practice handles all types of business collections except bankruptcy. Rarely do I represent debtors in a collections action When I do it is usually family members of long-time clients in the farm community.

Long serving members of the Legislature, such as Speaker O'Neal or Senator Vratil, may suggest I am playing Don Quixote again, renting his mule and tilting at windmills. From 20 years of prior lobbying experience, you and I know the average consumers are the <u>least</u> well-represented persons in this place. Just because someone is steamrolled in the legislative process by well-heeled lobbies doesn't mean the consumer is wrong. It just means the fight is unequal.

The best thing you can do for the citizens of Kansas is take the small claims act out behind the barn and hit it with an ax.

I propose you use SB 360 to repeal the entire act, or limit participants in the small claims court system to individual plaintiffs and individual defendants. No one else.

I.

History. Small collection matters in Chapter 61 court – under "limited actions" or in small claims court itself, along with traffic matters, represent the vast number of cases filed in district courts. Their filing fees are your primary revenue raisers in the judicial branch. A $500 claim in small claims court has the same filing fee as in "limited actions" court.

The 1973 small claims act resulted from an interim committee effort to provide a forum where sole proprietor businesses and individuals could litigate small claims inexpensively without attorneys. It was intended that a few cases a year would use the process. *Small Claims court was never intended for use by the large volume business community as a mass collection forum.* Yet the business community did not want locked out of that forum. The original compromise allowed claims up to $300.00, no attorneys, a de novo appeal, attorney's fees on failed appeals, and there was a limit of 10 cases per year. Now, attorneys can (and do) appear, and the claim limit is $4000.

Under SB 360 the limit on claims filed per year is repealed, and with that act you have entirely reversed the 1973 purpose of the small claims act.

In 1994, I wrote an article for the Washburn Law Review on corporate use and abuse of small claims courts.[1] The basis of the article was that corporations were using unlicensed nonlawyers to handle SC claims and thus were engaged in the unauthorized practice of law. The legislature changed the law in 1997 to allow unauthorized practice of law in small claims courts, and the Kansas Supreme Court later upheld the change.[2] However, the legislative change and judicial action did not stop small claims abuses that were shown in the article.

II.

SB 360 removes the 20-case limit on filing small claims matters. That gives new incentives to corporate plaintiffs. The Kansas small business community says they want

[1] Smith, "*Unauthorized Corporate Law Practices in Small Claims Court: Should Anybody Care?*", 33 Washburn L.J. 345 (1994).
[2] *Babe Houser Motor Co. v. Tetreault*, 270 Kan. 502 (2000).

SB 360. The background information on this bill indicated conferees in the Senate were from a lumber and supply store, the National Federation of Independent Businesses, and the Kansas Cooperative Council.

A few small businesses will use the small claims act. However, the real users of small claims courts will become the volume filers -- **out of state companies, credit card companies, collection agencies filing in their own name (thus alleging they are collecting "their own" debt so the Fair Debt Collection Practice does not apply), and companies that have a lot of bad check litigation.**

III.

So, why even have a small claims court?

Two forums now exist within Chapter 61 to collect bills – "limited actions" and small claims. Businesses are the primary users of both collection courts. Limited jurisdiction judges preside over both forums.[3] However, the procedure rules are different.

1. In Chapter 61 "limited actions," attorneys usually represent a business (although pro se plaintiffs and defendants are not uncommon), and both sides can conduct limited discovery. Both can use attorneys (although many defendants do not). In chapter 61, either side may appeal to the court of appeals. Absent a frivolous pleading being filed, each side pays their own attorney (if any). Further, in Chapter 61, a successful plaintiff has a judgment entered and when the appeal time runs, the judgment creditor can file a motion and seek a debtor's exam to learn what assets and employment the debtor possesses.

2. In small claims courts, neither side can use attorneys nor do they conduct discovery without moving the case to Chapter 61 (an additional cost). Most consumers do not know they can consult attorneys about defending a small claim action, and thus do

[3] Absent an appeal, magistrates preside in rural counties and often district judges pro tem preside in the larger judicial districts.

not learn they can force the case into Chapter 61 or 60, to hire an attorney or engage in discovery. Asking for certain background documents on the claims sometimes runs off the unscrupulous plaintiff. In Small Claims, there is a de novo appeal from small claims to the district court, but if the loser at the lower level loses on appeal, the other side gets additional mandatory attorneys fees. However, if the appealing party from lower court wins the district court appeal, there is no attorney fee add-on.[4] KSA 61-2707(b) requires the Clerk to force the small claims judgment debtor to comply with a statutory court-imposed debtor's exam. In short, *judicial branch employees are the plaintiff's initial collection enforcement agent of the plaintiff.* This latter unfairness was justified in 1973 if the plaintiff was an individual unskilled in the collection of a debt – the original purpose of the small claims act. It is inappropriate in 2010 when the plaintiff-judgment-creditor is a corporation.

IV.

This uneven playing field for small claims defendants can be important if you enact SB 360 and we see a flood of new litigation.[5]

Illustration. In one of the counties in the 24th Judicial District, I represented a client who was a state employee. She was sued in "limited actions" (Chapter 61) court on an overdue credit card bill. The identity of the plaintiff made me believe the account was sold at a hefty discount to a third party collection company who filed their own collection suits. The amount was for $3500. The case was filed by a big St. Louis law firm with branches in Kansas City. In collection law, in order to proceed, the plaintiff must prove they have a valid debt, and the defendant owes the money. At trial, they would be required to make this proof. Most ordinary persons defending a lawsuit do not know that.

My client thought that since the suit was about a credit card bill, the credit card company was suing her. Not so.

[4] *Frost v. Cook*, 30 Kan. App. 2d 1270, §10, 58 P.3d 112 (2002)
[5] The Kansas Judicial Branch told the Senate the courts anticipate more SC litigation with SB 360, but it is hard to quantify.

I filed an answer alleging a statute of limitations defense, and using Chapter 61 limited discovery, I requested plaintiff produce signed documents showing the plaintiff company actually "bought" the account from the card company. *One would think that such information was available to the plaintiff before suit was filed.*

Plaintiff Company couldn't make the showing, and the lawsuit was dismissed for failure to comply with discovery.[6]

That same company could have used small claims court and my client would not have had a lawyer. Nor could she have inquired into the bogus factual foundation of the suit and the judgment entered would have gone on my client's credit record.

V.

The one sided attorney's fee "add-on" nature in small claims court can have important consequences on the fairness issue. With SB 360 allowing unlimited use of small claims court by sham plaintiffs, the injustice levels rise.

Assume my credit card client is sued in small claims court by an out of state company that could not show it had validly purchased the debt. Assume she opposed it without attorney but judgment was rendered against her. If she then appeals and we ask for the same documentation which they cannot provide, the suit is dismissed but she gets no attorneys fees for her effort in defending against a sham lawsuit. If there is a trial and she loses again on appeal, she pays not only their attorneys fees, but also costs. Case law indicates those fees must be awarded if otherwise a reasonable amount.

Such are the injustices of the one-sided attorney's fee found in small claims courts. Such fee injustice is not present in Chapter 61 Limited Actions courts, where each side pays their own attorney unless one party files a frivolous pleading.[7]

[6] Based on the harassment of the defendant by the plaintiff company, which was actually a collection agency, my client also had a separate action for Fair Debt Collection Practices Act violations, but she elected not to pursue it.
[7] K.S.A. 61-2709.

VI.

It is easy to game the system's limitations if there is no limit on claims. A volume practice allows you to file 100 claims and if two are objected to, dismiss them, keep the other 98 judgments, and begin garnishments and executions. In those few cases where the debtor requests a trial, the plaintiff can decide whether to pursue the claim. If you buy the cases for pennies on the dollar, you can throw out a few and still be profitable.

SB 360 changes the dynamics so that out of state credit card companies can file hundreds of cases all over Kansas, and seek default judgments.

If trial is required, the out of state plaintiff can appear through any "full time employee or officer" have appeared by filing a small claims petition using a full time employee, which could be corporate in-house counsel who may not be licensed to practice law in Kansas. In any other action in Kansas, out of state attorneys appearing in our courts without local counsel (*pro hac vice*) is engaged in the unauthorized practice of law. Not so in small claims court.[8] That full time "status" is easily manufactured. The small claims act is not limited to domestic Kansas corporations, hence, out of state corporations can use it with out-of-state employees operating the system. It is a simple matter of training them in Kansas procedure.

Nobody is there to police the abuses in the small claims system except judges or Clerks and they don't have the time or the statutory mandate.

SOLUTION

If you want some judicial reform, use SB 360 to repeal small claims statutes altogether in Kansas.

1. The distinctive reason for the SC court is eliminated with SB 360.

2. Repeal of small claims does not harm the process. The small and large-volume creditor can file Chapter 61 limited actions cases to collect debts. There are no case limits and the jurisdictional limits are minimal in Chapter 61.

[8] KSA 61-2707(a).

3. The growth of pro se representation in our courts is seen in even divorce and custody matters. Expanding small claims court usage will not solve the growing pro se problem. Using the Chapter 61 system for everyone will not add to the pro se problem in our courts, either. Most defendants in small claims and Chapter 61 courts are already unrepresented.

4. Both small claims and Chapter 61 "limited actions" allow parties to appeal to the district court. No change if we repeal the small claims limits.

Thank you.

Ronald D. Smith

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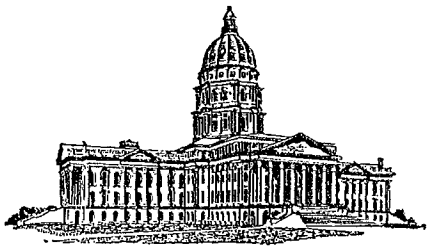

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MEMORANDUM

To: Chairman Kinzer and members of the House Committee on Judiciary
From: Matt Sterling, Assistant Revisor of Statutes
Date: March 15, 2010
Subject: Senate Bill No. 234

SB 234 would amend K.S.A. 60-740, 61-3507 and 61-3510, concerning earnings garnishments of a judgment debtor. Section 1 of the bill amends K.S.A. 60-740. Under current law, if there is not a response to the garnishee's answer within 10 days, a garnishee is to pay out the withheld earnings to the debtor's creditors in the amount indicated in the answer. If a judgment creditor receives more than they are entitled to, the creditor is to distribute the excess pro rata to the other creditors. Section 1 of the bill would enable the garnishee to continue to pay out the earnings to the creditors, as they are withheld and would require the creditor to return any excess to the garnishee to be distributed pro rata to the other creditors.

Section 2 of the bill amends K.S.A. 61-3507 by removing the requirement that the garnishee provide the judgment debtor with a written explanation of the garnishee's computations for each paycheck from which earnings are withheld and replaces it with the option for a party or the court to request a written explanation of the garnishee's computations, to be submitted within 15 days of the request. Section 2 of the bill would also require the party requesting the garnishment, at the time the order of garnishment is issued, to provide the garnishee the amount of the unsatisfied balance of the judgment. Section 2 would also provide that if the garnishee requests a payoff balance from the judgment creditor, but does not receive one within 10 days of the written request, the garnishee would be able to submit a written statement to the judgment creditors with the intent to release the garnishment order 10 days after the written statement, unless a written notice of objection is received from the judgment creditor.

Section 3 of the bill amends K.S.A. 61-3510 by requiring the garnishee to complete the answer once, within 15 days of date of service upon a garnishee of an initial order of garnishment, instead of completing the answer every month. A party or the court may request a written explanation of the garnishee's computations of earnings withheld during any pay period and the explanation must be submitted within 15 days of the request.

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House Judiciary
Date 3-15-10
Attachment # 12

STATEMENT
American Payroll Association
Debbie Lindenmuth

Good afternoon, Mr. Chairman. My name is Debbie Lindenmuth. I am the Garnishment Supervisor with Tyson Foods, Inc. I am also a native of rural Kansas.

A you may know, Tyson has plants in Holcomb, Hutchinson, and Emporia, and a distribution center in Johnson County. We currently have approximately 4900 team members in the state of Kansas.

I am the chairperson of the Garnishment Subcommittee for the American Payroll Association, a professional organization of 23,000 payroll professionals. The primary purpose of the APA is to educate payroll professionals on all aspects of properly paying employees as well as withholding and remitting taxes, healthcare benefits, child support, and other garnishments.

The secondary purpose of the APA is to work with federal, state, and local governments to reduce the administrative burden on employers while complying with all laws and achieving the goals set out by the government.

I appreciate the opportunity to be here today to support Senate Bill 234. After many hours of working in partnership with Kansas attorneys, the American Payroll Association would like to recommend the following changes to state law, which will streamline the garnishment process for everyone involved and also reduce the amount of money debtors will pay to settle their debts. The number of garnishments have been increasing with the downturn in the economy and we believe now is the time to pass this bill, which will benefit all parties involved.

House Judiciary
Date 3-15-10
Attachment # 13

SB234 addresses the following issues.

Timely remittances:

Currently, employers withhold money from debtor-employees' paychecks and remit the funds once a month to the creditor. Under SB 234, employers will remit the earnings withheld each payday. This serves three purposes:

1. It reduces the recordkeeping burden on employers,
2. It reduces the amount of interest that accumulates on the the unpaid balance, thus benefiting the employee, and
3. Creditors and attorneys receive their money faster.

Over withholding:

Currently, over withholding – that is, withholding more than the amount actually owed – is common because garnishees are not aware of the actual amount owed and are required to continue to withhold until the order is released. Over withholding causes an unnecessary stress on our employees, which can affect their productivity and cause problems for their employers. SB 234 calls for the creditor to inform the garnishee of the unsatisfied balance of the judgment at the time the order is issued.

Employers have mechanisms by which they can track the balance owed and so will know that the debt is expected to be paid in full in a certain pay period. If the employer has not received a timely release, it may choose to either contact the creditor or court itself or notify the employee to do so.

Administrative burden:

Currently, garnishees are required to submit an answer to the creditor each month detailing computation of the nonexempt portion of the judgment debtor's wages for the pay period or periods covered. This places an unnecessary paperwork burden on employers and creditors' attorneys. SB 234 eliminates the need for garnishees to send regular notices to the creditor once it acknowledges receipt of the order.

Since the attorneys will only receive one answer per writ, this will eliminate many hours of costly post-garnishment work.

In conclusion, Mr. Chairman, I believe passage of this bill will benefit all involved.

Thank you, Mr. Chairman, members of the Committee for your attention. I will be happy to answer any questions you may have.

Company name	City
Accenture	Wichita
Allen, Gibbs & Houlik, LC	Wichita
AVI Systems, Inc.	Lenexa
Benton County Community College	Great Bend
BG Products, Inc.	Wichita
Big Lakes Development Center Inc.	Manhattan
Black & Veatch Corp	Overland Park
Blue Cross Blue Shield of Kansas	Topeka
BNSF Railway	Topeka
Board of Pulic Utilities	Kansas City
Boilemakers National Funds	Kansas City
Bukaty Business & People Mgt Services	Leawood
Bukaty Companies	Leawood
CBIZ Acct Tax & Advisory	Topeka
CBIZ Inc	Leawood
CGF Industries, Inc.	Wichita
City of Topeka	Topeka
City of Topeka Fin Services	Topeka
City of Valley Center	Valley Center
Clara Barton Hospital	Hoisington
Community Healthcare System, Inc.	Onaga
Compass Minerals International, Inc.	Overland Park
Corefirst Bank & Trust	Topeka
County of Douglas Kansas	Lawrence
CPI Qualified Plan Consultants, Inc.	Great Bend
Danisco USA Inc.	New Century
DCCCA Inc	Lawrence
DEMDACO	Leawood
DPRA Incorporated	Manhattan
Ellsworth County Medical Center	Ellsworth
Exacta Aerospace, Inc.	Wichita
Friends University	Wichita
Geiger Ready-Mix Co	Leavenworth
Golf Course Superintendents Association	Lawrence
Great Bend Recreation Commission	Great Bend
Greg C Huseth, CPA PA	Topeka
Hawker Beechcraft Corporation	Wichita
Health Mgmt of Kansas	Coffeyville
Hills Pet Nutrition	Topeka
Hutchinson Clinic PA	Hutchinson
Hutchinson Comm College	Hutchinson
ICM, Inc.	Colwich
Intrust Bank	Wichita
Johnson County Community College	Overland Park
Johnson County KS Government	Olathe
Kidron Bethel Retirement Services	North Newton
Koch Business Solutinons LP	Wichita
Kramer & Associates CPAs, LLC	Leavenworth

Kroger	Hutchinson
KSU Foundation	Manhattan
Lakemary Center Inc.	Paola
Lewis Hooper & Dick LLC	Garden City
McCormick-Armstrong	Wichita
Medical Admin Svcs of KUMED	Westwood
Meritrust Credit Union	Wichita
Miami County	Paola
Mize Houser & Co	Topeka
Morton County	Elkhart
Newman Regional Health	Emporia
Newton Medical Center	Newton
Paycor, Inc.	Lenexa
Payless Shoesource Inc.	Topeka
Payroll Plus of Kansas	Montezuma
Penton Media	Overland Park
Performance Contracting, Inc.	Lenexa
Pratt Regional Medical Center	Pratt
Pro Pay LLC	Overland Park
Protection One Alarm Monitoring	Lawrence
Q Services Company	Overland Park
Renzenberger, Inc.	Lenexa
Security Benefit	Topeka
Sedgwick County	Wichita
Silpada Designs	Lenexa
Sprint	Overland Park
SPX Cooling Technologies	Overland Park
ST&T Telephone Coop Assn	Brewster
Stanton Wholesale Electric Co	Pratt
Sunflower Bank NA	Salina
Syndeo Payroll Solutions	Wichita
TECT Aerospace	Wellington
The Coleman Company Inc.	Wichita
Tri-County Telephone	Council Grove
Tri-County Telephone	
U.S. Central	Lenexa
University of Kansas	Lawrence
US AgBank FCB	Wichita
USD 259	Wichita
Via Christi Health System, Inc.	Wichita
Wachter Management Company	Lenexa
Waddell & Reed Inc.	Shawnee Mission
Wallace Saunders Austin Brown & Enoch	Overland Park
Westar Energy	Topeka
Westlake Hardware	Lenexa