

MEMORANDUM

TO: Kansas Judicial Council
FROM: Civil Code Advisory Committee
DATE: December 9, 2008
RE: 2008 SB 537

By letter dated February 25, 2008 Sen. John Vratil requested that the Judicial Council review 2008 SB 537, which deals with three civil procedure statutes. The Judicial Council, at its June 2008 meeting, assigned the study to the Civil Code Advisory Committee.

On September 5, 2008, the Committee considered the bill, as well as all written testimony submitted for the bill's February 14, 2008 hearing in the Senate Judiciary Committee. The bill and testimony are attached to this memorandum, followed by copies of all applicable statutes.

SB 537 is comprised of three sections, each of which amends a civil procedure statute: Section 1 amends K.S.A. 60-427, a statute dealing with physician-client privilege; Section 2 amends K.S.A. 60-2003, which lists items that may be included in the taxation of costs in a civil action; and Section 3 amends K.S.A. 60-2006, which deals with attorney fees taxed as costs in certain actions involving negligent motor vehicle operation. The amendments in this bill were proposed by William J. ("Bill") Fitzpatrick, an attorney in Independence, Kansas. Mr. Fitzpatrick's recommendations were sent to Sen. Derek Schmidt, who introduced SB 537 in the 2008 session.

The Committee reviewed and discussed each section. Summaries of the discussions, as well as the Committee's conclusions, are set forth below.

Section 1 - K.S.A. 60-427(d)

Section 1 of the bill involves a proposed amendment to K.S.A. 60-427, the statute that creates a physician-client privilege, held by the patient, concerning certain confidential communications between the patient and a physician. Subsection (d) of the statute currently provides that there is no privilege in an action where the condition of the patient is an element of the claim or defense of the patient or another party. SB 537 proposes the following amendment to subsection (d):

(d) Except for opinions dealing with medical standard of care and causation, there is no privilege under this section in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

In its discussion of this proposed amendment, the Committee reviewed some history of and philosophy underlying physician-client privilege. In the 1953 comment to Rule 427 by the Commissioners on the Uniform Rules of Evidence, the Commissioners expressed grave doubt whether it is in the public interest to silence the physician as a witness in an action where the patient's condition is a material issue. The Committee also noted there was no physician-client privilege under common law and no such privilege has ever been recognized under the federal rules. Where physician-client privileges exist at all, they are purely creations of state statute.

The Committee reviewed written testimony submitted to the Senate Judiciary Committee at the time of the February 14, 2008 hearing on this bill. Mr. Fitzpatrick appears to be most concerned about ex parte discussions between defense counsel and plaintiffs' doctors. He is troubled by the possibility that the defense would then hire the doctor as an expert to testify against the patient and "render opinions that had nothing to do with 'confidential information' in care and treatment." The Committee noted that opinions do not fall under the statutory definition of privileged "communications" and therefore would not be protected even if there were no waiver provision as is found in subsection (d). The proposed amendment would expand the nature of the privilege beyond its original intended scope.

The Committee agreed that subsection (d), as currently written, creates a logical and necessary exception to the privilege — where the patient brings an action in which his or her medical condition is an element of the claim or raises the issue in a defense, it is appropriate that any existing privilege would be waived. The Committee is opposed to the proposed amendment to K.S.A. 60-427(d) as set forth in Section 1 of SB 537.

Section 2 - K.S.A. 60-2003(5)

The second section of SB 537 involves a proposed addition to K.S.A. 60-2003, the statute that enumerates the items that can be included in the taxation of costs. The proposed amendment to subsection (5) is as follows:

(5) Reporter's or stenographic charges for the taking and transcribing original and copies of depositions used ~~as evidence~~, in whole or in part, at any stage of a civil proceeding.

As currently written, only the original expense of taking a deposition used as evidence can be taxed as costs. The proposed amendment would expand that to include transcription and copies and to depositions used at any stage of the proceeding.

It was noted that federal cases are inconsistent on this question. However, under Kansas law it is long settled that discovery depositions not used as evidence, and that "by their very nature fall within the realm of trial preparation," are not ordinarily taxable as costs. *Wood v. Gautier*, 201 Kan. 74, 439 P.2d 73 (1968). The *Wood* decision also makes clear that the court is always vested with discretion to apportion discovery expenses in the rare case where it might be warranted.

The Committee considered Mr. Fitzpatrick's argument in favor of this amendment. His written testimony states: "Its [*sic*] not unusual for the prevailing party to have substantial expense for "copies" used in evidence, yet cannot recover those costs under the current wording of the statute." However, the Committee discussed that the amendment proposed by Mr. Fitzpatrick actually does a lot more than allow taxation as costs of deposition copies used in evidence. The addition of the words "in whole or in part, at any stage of a civil proceeding" clearly expands the statute to allow taxation of the expenses incurred in routine discovery depositions taken in the course of preparing for trial. The Committee is unanimously opposed to the proposed revision to K.S.A. 60-2003.

Section 3 - K.S.A. 60-2006(a)

The third section of SB 537 contains a proposed amendment to K.S.A. 60-2006(a), a statute that provides for recovery of attorney fees in certain motor vehicle damage cases. The proposed amendment is as follows:

~~(a) In actions brought for the recovery of property damages only of less than \$7,500 sustained and caused by the negligent operation of a motor vehicle~~ Subject to the provisions of K.S.A. 40-3117, and amendments thereto, in all actions brought for damages arising from the negligent operation of a motor vehicle, where the amount claimed is less than the minimum coverages required by K.S.A. 40-3107, and amendments thereto, the prevailing party shall be allowed reasonable attorney fees which shall be taxed as part of the costs of the action unless:

- (1) The prevailing party recovers no damages; or
- (2) a tender equal to or in excess of the amount recovered was made by the adverse party before the commencement of the action in which judgment is rendered.

The Committee began its discussion of this section by determining the content of the two chapter 40 statutes contained in the amendment. K.S.A. 40-3117 concerns conditions precedent to recovery of damages for pain and suffering in motor vehicle tort actions. Such recovery is allowed only if the injury requires medical treatment having a reasonable value of \$2,000 or more. K.S.A. 40-3107 contains the minimum insurance coverage amounts of \$25,000 for bodily injury or death and \$10,000 for property damage. Thus, as stated in the testimony of Mr. Fitzpatrick, this amendment would render K.S.A. 60-2006 applicable to property claims of \$10,000 or less and personal injury claims of \$2,000 to \$25,000.

The Committee discussed the purpose of the statute, which is to encourage settlement of claims in motor vehicle cases. The original wording of the statute was just "damages" and this was amended to "property damages only" in 1995. Personal injury claims are not amenable to quick settlement in the same manner as damages to a vehicle, and the Committee sees no reason to change it back at this time. At the conclusion of discussion, the Committee unanimously agreed that it is opposed to the idea of bringing personal injury claims back under the umbrella of K.S.A. 60-2006, and the Committee therefore would not support the proposed amendment.

The Committee also discussed Mr. Fitzpatrick's "Alternative Amendment" to increase the property damage amount in K.S.A. 60-2006(a) from \$7,500 to \$10,000. The last time the amount was changed was in 1990, when it was raised from \$3,000 to \$7,500. In light of the passage of almost 20 years and inflation, the Committee would support an amendment to raise the \$7,500 figure to whatever amount the legislature determined was appropriate.

The Judicial Council decided that the property damage amount in K.S.A. 60-2006(a) should be raised from \$7,500 to \$15,000, and an inflation adjustment provision should be added to the statute.

SENATE BILL No. 537

By Committee on Judiciary

2-4

9 AN ACT relating to civil procedure; concerning certain privileges; relat-
10 ing to certain costs; amending K.S.A. 60-427, 60-2003 and 60-2006
11 and repealing the existing sections.

12

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

14 Section 1. K.S.A. 60-427 is hereby amended to read as follows: 60-
15 427. (a) As used in this section:

16 (1) "Patient" means a person who, for the sole purpose of securing
17 preventive, palliative, or curative treatment, or a diagnosis preliminary to
18 such treatment, of such person's physical or mental condition, consults a
19 physician, or submits to an examination by a physician.

20 (2) "Physician" means a person licensed or reasonably believed by
21 the patient to be licensed to practice medicine or one of the healing arts
22 as defined in K.S.A. 65-2802, and amendments thereto, in the state or
23 jurisdiction in which the consultation or examination takes place.

24 (3) "Holder of the privilege" means the patient while alive and not
25 under guardianship or conservatorship or the guardian or conservator of
26 the patient, or the personal representative of a deceased patient.

27 (4) "Confidential communication between physician and patient"
28 means such information transmitted between physician and patient, in-
29 cluding information obtained by an examination of the patient, as is trans-
30 mitted in confidence and by a means which, so far as the patient is aware,
31 discloses the information to no third persons other than those reasonably
32 necessary for the transmission of the information or the accomplishment
33 of the purpose for which it is transmitted.

34 (b) Except as provided by subsections (c), (d), (e) and (f), a person,
35 whether or not a party, has a privilege in a civil action or in a prosecution
36 for a misdemeanor, other than a prosecution for a violation of K.S.A. 8-
37 1567, and amendments thereto, or an ordinance which prohibits the acts
38 prohibited by that statute, to refuse to disclose, and to prevent a witness
39 from disclosing, a communication, if the person claims the privilege and
40 the judge finds that: (1) The communication was a confidential commu-
41 nication between patient and physician; (2) the patient or the physician
42 reasonably believed the communication necessary or helpful to enable
43 the physician to make a diagnosis of the condition of the patient or to

1 prescribe or render treatment therefor; (3) the witness (i) is the holder
2 of the privilege, (ii) at the time of the communication was the physician
3 or a person to whom disclosure was made because reasonably necessary
4 for the transmission of the communication or for the accomplishment of
5 the purpose for which it was transmitted or (iii) is any other person who
6 obtained knowledge or possession of the communication as the result of
7 an intentional breach of the physician's duty of nondisclosure by the phy-
8 sician or the physician's agent or servant; and (4) the claimant is the holder
9 of the privilege or a person authorized to claim the privilege for the holder
10 of the privilege.

11 (c) There is no privilege under this section as to any relevant com-
12 munication between the patient and the patient's physician: (1) Upon an
13 issue of the patient's condition in an action to commit the patient or
14 otherwise place the patient under the control of another or others because
15 of alleged incapacity or mental illness, in an action in which the patient
16 seeks to establish the patient's competence or in an action to recover
17 damages on account of conduct of the patient which constitutes a criminal
18 offense other than a misdemeanor; (2) upon an issue as to the validity of
19 a document as a will of the patient; or (3) upon an issue between parties
20 claiming by testate or intestate succession from a deceased patient.

21 (d) *Except for opinions dealing with medical standard of care and*
22 *causation*, there is no privilege under this section in an action in which
23 the condition of the patient is an element or factor of the claim or defense
24 of the patient or of any party claiming through or under the patient or
25 claiming as a beneficiary of the patient through a contract to which the
26 patient is or was a party.

27 (e) There is no privilege under this section: (1) As to blood drawn at
28 the request of a law enforcement officer pursuant to K.S.A. 8-1001, and
29 amendments thereto; and (2) as to information which the physician or
30 the patient is required to report to a public official or as to information
31 required to be recorded in a public office, unless the statute requiring
32 the report or record specifically provides that the information shall not
33 be disclosed.

34 (f) No person has a privilege under this section if the judge finds that
35 sufficient evidence, aside from the communication has been introduced
36 to warrant a finding that the services of the physician were sought or
37 obtained to enable or aid anyone to commit or to plan to commit a crime
38 or a tort, or to escape detection or apprehension after the commission of
39 a crime or a tort.

40 (g) A privilege under this section as to a communication is terminated
41 if the judge finds that any person while a holder of the privilege has caused
42 the physician or any agent or servant of the physician to testify in any
43 action to any matter of which the physician or the physician's agent or

1 servant gained knowledge through the communication.

2 (h) Providing false information to a physician for the purpose of ob-
3 taining a prescription-only drug shall not be a confidential communication
4 between physician and patient and no person shall have a privilege in any
5 prosecution for obtaining a prescription-only drug by fraudulent means
6 under K.S.A. 21-4214, and amendments thereto.

7 Sec. 2. K.S.A. 60-2003 is hereby amended to read as follows: 60-
8 2003. Items which may be included in the taxation of costs are:

9 (1) The docket fee as provided for by K.S.A. 60-2001, and amend-
10 ments thereto.

11 (2) The mileage, fees, and other allowable expenses of the sheriff,
12 other officer or private process server incurred in the service of process
13 or in effecting any of the provisional remedies authorized by this chapter.

14 (3) Publisher's charges in effecting any publication of notices author-
15 ized by law.

16 (4) Statutory fees and mileage of witnesses attending court or the
17 taking of depositions used as evidence.

18 (5) Reporter's or stenographic charges for the taking *and transcribing*
19 *original and copies* of depositions used ~~as evidence, in whole or in part,~~
20 *at any stage of a civil proceeding.*

21 (6) The postage fees incurred pursuant to K.S.A. 60-303 or subsec-
22 tion (e) of K.S.A. 60-308, and amendments thereto.

23 (7) Alternative dispute resolution fees shall include fees, expenses
24 and other costs arising from mediation, conciliation, arbitration, settle-
25 ment conferences or other alternative dispute resolution means, whether
26 or not such means were successful in resolving the matter or matters in
27 dispute, which the court shall have ordered or to which the parties have
28 agreed.

29 (8) Such other charges as are by statute authorized to be taxed as
30 costs.

31 Sec. 3. K.S.A. 60-2006 is hereby amended to read as follows: 60-
32 2006. (a) ~~In actions brought for the recovery of property damages only~~
33 ~~of less than \$7,500 sustained and caused by the negligent operation of a~~
34 ~~motor vehicle Subject to the provisions of K.S.A. 40-3117, and amend-~~
35 ~~ments thereto, in all actions brought for damages arising from the negli-~~
36 ~~gent operation of a motor vehicle, where the amount claimed is less than~~
37 ~~the minimum coverages required by K.S.A. 40-3107, and amendments~~
38 ~~thereto, the prevailing party shall be allowed reasonable attorney fees~~
39 ~~which shall be taxed as part of the costs of the action unless:~~

40 (1) The prevailing party recovers no damages; or

41 (2) a tender equal to or in excess of the amount recovered was made
42 by the adverse party before the commencement of the action in which
43 judgment is rendered.

1 (b) For the plaintiff to be awarded attorney fees for the prosecution
2 of such action, a written demand for the settlement of such claim con-
3 taining all of the claimed elements of property damage and the total
4 monetary amount demanded in the action shall have been made on the
5 adverse party at such party's last known address not less than 30 days
6 before the commencement of the action. For the defendant to be
7 awarded attorney fees, a written offer of settlement of such claim shall
8 have been made to the plaintiff at such plaintiff's last known address not
9 more than 30 days after the defendant filed the answer in the action.

10 (c) This section shall apply to actions brought pursuant to the code
11 of civil procedure and actions brought pursuant to the code of civil pro-
12 cedure for limited actions.

13 Sec. 4. K.S.A. 60-427, 60-2003 and 60-2006 are hereby repealed.

14 Sec. 5. This act shall take effect and be in force from and after its
15 publication in the statute book.

Wm "Bill" FITZPATRICK
PROP # 1

Senate Bill No. 537

Written Testimony of:

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

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

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

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

Rule 208. INTERVIEWING EXPERTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Polsinelli

Shalton | Flanigan | Suelthaus PC

Memorandum

TO: THE HONORABLE JOHN VRATIL, CHAIR
SENATE JUDICIARY COMMITTEE

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

RE: S.B. 537

DATE: FEBRUARY 14, 2008

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

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

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

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

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

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

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

Respectfully submitted,



Jeffery S. Bottenberg

JSB:kjb



Testimony of
Michael J. Dutton on SB 537
presented at hearing
February 14, 2008

OVERLAND PARK

MEMORANDUM

TO: The Honorable John Vratil, Chair
Senate Judiciary Committee

FROM: Michael J. Dutton

DATE: February 18, 2008

SUBJECT: Written Testimony regarding Senate Bill 537

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

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

SECTION 2 K.S.A. 60-2003

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

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

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

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

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

SECTION 3 K.S.A. 60-2006

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

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

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

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

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

Once the thirty (30) days have expired, the claimant attorney would be in a position to utilize the threat of recovering attorney fees against the insurer and tortfeasor. Essentially, this would increase the claimant's amount of recovery since they would no longer be responsible for their own attorney fees which is normally a contingency fee of one-third (1/3) or forty percent (40%). As a result, it would create more trials and reduce settlements through the use of mediation or Settlement Conferences as there would be no incentive on the part of the claimant attorney to settle without the insurer agreeing to pay his or her attorney fees. This could also lead to a potential conflict between the attorney and his or her client.

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

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

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

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

MJD:bgr

John Vratil - SB 537

From: "Kindling, Anne" <akindlin@stormontvail.org>
To: <vratil@senate.state.ks.us>, <bruce@senate.state.ks.us>, <allen@senate.state.ks.us>, <donovan@senate.state.ks.us>, <journey@senate.state.ks.us>, <lynn@senate.state.ks.us>, <schmidt@senate.state.ks.us>, <umbarger@senate.state.ks.us>, <goodwin@senate.state.ks.us>, <betts@senate.state.ks.us>, <haley@senate.state.ks.us>
Date: 2/21/2008 12:10 PM
Subject: SB 537
CC: "Scott Heidner (E-mail)" <ScottH@gbbaks.com>

MEMORANDUM

TO: Senate Judiciary Committee

FROM: Anne M. Kindling
President, Kansas Association of Defense Counsel

DATE: February 21, 2008

RE: SB 537
Scheduled for debate February 21, 2008

Chairman Vratil and Members of the Committee:

On behalf of the Kansas Association of Defense Counsel, I urge you to remove the provisions of Section 1, subsection (d) in SB 537.

The Kansas Association of Defense Counsel consists of more than 220 practicing attorneys who devote a substantial portion of their professional time to the defense of civil lawsuits. A substantial number of these lawsuits involve claims of personal injuries alleged to have been caused by the conduct of the defendant(s). These range from automobile accidents to medical negligence to products liability.

It has long been the standard in this state that the physician-patient privilege, codified in the Civil Rules of Evidence, does not apply when the condition of the patient is at issue in the matter, with respect to damages claimed by the plaintiff or defenses raised by a patient. The privilege is codified in K.S.A. 60-427, and subsection (d) is the provision specifically excepting from the privilege those actions in which the condition of the patient is at issue. Section 1 of SB 537 seeks to modify subsection (d) by carving out an exception to the exception for "opinions dealing with medical standard of care and causation."

As an exception to the exception to the rule, Section 1 of SB 537 would essentially reinstate the physician-patient privilege for "opinions dealing with medical standard of care and causation." In every medical malpractice case, both standard of care and causation are essential elements of a plaintiff's claim. In all other personal injury cases, including car accidents and products liability, causation is an element of the plaintiff's claim. Thus, Section 1 of SB 537 will affect virtually every personal injury claim. It should not be passed favorably without thorough scrutiny.

The KADC's concern with this provision is that it will thwart the very intent behind K.S.A. 60-427(d), which was to allow access to information that is relevant to the issues in the lawsuit. Essentially, this levels the playing field so that information regarding a plaintiff's medical condition is freely accessible to all parties to the litigation. The revision proposed in SB 537 appears to place control of the opinions of treating physicians in the hands of the plaintiff.

It is the KADC's position that "opinions" of standard of care or causation should not fall within the scope of the physician-patient privilege in any event. "Confidential communication between physician and patient" includes information transmitted between the physician and his or her patient, including the information obtained by the

physician during examination of the patient. The "opinions" of the physician would not be considered "confidential communication" in any event. Surely one individual cannot claim a privilege in the "opinions" of another person as these are thought processes, not communications.

It appears that this provision of SB 537 could allow plaintiffs to control what a physician's opinions are and if and when they can be disclosed, even with the facts of treatment are not privileged. In other words, if the patient did not waive the privilege, then the patient could prevent the treating physician from giving an opinion about the standard of care or causation in an injury case. Thus, when the physician's opinions are favorable, the patient could waive the privilege, but if the opinions are unfavorable, the patient can unilaterally prevent the jury from learning of these opinions even if the treating physician testifies about the facts of treatment. This flips the purpose of the privilege on its head and give the patient a potential weapon to manipulate the evidence in his favor.

Whether this is the legislative intent of Section 1 of SB 537 or whether this is simply a possible reading with which the courts may ultimately disagree, it is certainly a risk and for this reason the KADC urges the Committee to strike Section 1 from SB 537.

We were unable to present these comments in advance of the hearing on this bill. Thank you for the opportunity to present these concerns at this time.

Anne Kindling

President, Kansas Association of Defense Counsel

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60-427**Chapter 60.--PROCEDURE, CIVIL
Article 4.--RULES OF EVIDENCE****60-427. Physician-patient privilege.** (a) As used in this section:

(1) "Patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of such person's physical or mental condition, consults a physician, or submits to an examination by a physician.

(2) "Physician" means a person licensed or reasonably believed by the patient to be licensed to practice medicine or one of the healing arts as defined in K.S.A. 65-2802 and amendments thereto in the state or jurisdiction in which the consultation or examination takes place.

(3) "Holder of the privilege" means the patient while alive and not under guardianship or conservatorship or the guardian or conservator of the patient, or the personal representative of a deceased patient.

(4) "Confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

(b) Except as provided by subsections (c), (d), (e) and (f), a person, whether or not a party, has a privilege in a civil action or in a prosecution for a misdemeanor, other than a prosecution for a violation of K.S.A. 8-1567 and amendments thereto or an ordinance which prohibits the acts prohibited by that statute, to refuse to disclose, and to prevent a witness from disclosing, a communication, if the person claims the privilege and the judge finds that: (1) The communication was a confidential communication between patient and physician; (2) the patient or the physician reasonably believed the communication necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor; (3) the witness (i) is the holder of the privilege, (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or the physician's agent or servant; and (4) the claimant is the holder of the privilege or a person authorized to claim the privilege for the holder of the privilege.

(c) There is no privilege under this section as to any relevant communication between the patient and the patient's physician: (1) Upon an issue of the patient's condition in an action to commit the patient or otherwise place the patient under the control of another or others because of alleged incapacity or mental illness, in an action in which the patient seeks to establish the patient's competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor; (2) upon an issue as to the validity of a document as a will of the patient; or (3) upon an issue between parties claiming by testate or intestate succession from a deceased patient.

(d) There is no privilege under this section in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party.

(e) There is no privilege under this section: (1) As to blood drawn at the request of a law enforcement officer pursuant to K.S.A. 8-1001 and amendments thereto; and (2) as to information which the physician or the patient is required to report to a public official or as to information required to be recorded in a public office, unless the statute requiring the report or record specifically provides that the information shall not be disclosed.

(f) No person has a privilege under this section if the judge finds that sufficient evidence, aside from the communication has been introduced to warrant a finding that the services of the physician were sought or obtained to enable or aid anyone to commit or to plan to commit a crime or a tort, or to escape detection or apprehension after the commission of a crime or a tort.

(g) A privilege under this section as to a communication is terminated if the judge finds that any person while a holder of the privilege has caused the physician or any agent or servant of the physician to testify in any action to any matter of which the physician or the physician's agent or servant gained knowledge through the communication.

(h) Providing false information to a physician for the purpose of obtaining a prescription-only drug shall not be a confidential communication between physician and patient and no person shall have a privilege in any prosecution for obtaining a prescription-only drug by fraudulent means under K.S.A. 21-4214 and amendments thereto.

History: L. 1963, ch. 303, 60-427; L. 1965, ch. 354, § 8; L. 1988, ch. 210, § 1; L. 1992, ch. 99, § 2; July 1.

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40-3107**Chapter 40.--INSURANCE****Article 31.--KANSAS AUTOMOBILE INJURY REPARATIONS ACT**

40-3107. Motor vehicle liability insurance policies; required contents; exclusions of coverage. Every policy of motor vehicle liability insurance issued by an insurer to an owner residing in this state shall:

(a) Designate by explicit description or by appropriate reference of all vehicles with respect to which coverage is to be granted;

(b) insure the person named and any other person, as insured, using any such vehicle with the expressed or implied consent of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of any such vehicle within the United States of America or the Dominion of Canada, subject to the limits stated in such policy;

(c) state the name and address of the named insured, the coverage afforded by the policy, the premium charged and the policy period;

(d) contain an agreement or be endorsed that insurance is provided in accordance with the coverage required by this act;

(e) contain stated limits of liability, exclusive of interest and costs, with respect to each vehicle for which coverage is granted, not less than \$25,000 because of bodily injury to, or death of, one person in any one accident and, subject to the limit for one person, to a limit of not less than \$50,000 because of bodily injury to, or death of, two or more persons in any one accident, and to a limit of not less than \$10,000 because of harm to or destruction of property of others in any one accident;

(f) include personal injury protection benefits to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a motor vehicle, not exceeding the limits prescribed for each of such benefits, for loss sustained by any such person as a result of injury. The owner of a motorcycle, as defined by K.S.A. 8-1438 and amendments thereto or motor-driven cycle, defined by K.S.A. 8-1439 and amendments thereto, who is the named insured, shall have the right to reject in writing insurance coverage including such benefits for injury to a person which occurs while the named insured is operating or is a passenger on such motorcycle or motor-driven cycle; and unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy when the named insured has rejected the coverage in connection with a policy previously issued by the same insurer. The fact that the insured has rejected such coverage shall not cause such motorcycle or motor-driven cycle to be an uninsured motor vehicle;

(g) notwithstanding any omitted or inconsistent language, any contract of insurance which an insurer represents as or which purports to be a motor vehicle liability insurance policy meeting the requirements of this act shall be construed to obligate the insurer to meet all the mandatory requirements and obligations of this act;

(h) notwithstanding any other provision contained in this section, any insurer may exclude coverage required by subsections (a), (b), (c) and (d) of this section while any insured vehicles are:

(1) Rented to others or used to carry persons for a charge, however, such exclusion shall not apply to the use of a private passenger car on a share the expense basis;

(2) being repaired, serviced or used by any person employed or engaged in any way in the automobile business. This does not apply to the named insured, spouse or relative residents; or the agents, employers, employees or partners of the named insured, spouse or resident relative; and

(i) in addition to the provisions of subsection (h) and notwithstanding any other provision contained in subsections (a), (b), (c) and (d) of this section, any insurer may exclude coverage:

(1) For any damages for which the United States government might be liable for the insured's use of the vehicle;

(2) for any damages to property owned by, rented to, or in charge of or transported by an insured, however, this exclusion shall not apply to coverage for a rented residence or rented private garage;

(3) for any obligation of an insured, or the insured's insurer under any type of workers' compensation or disability or similar law;

(4) for liability assumed by an insured under any contract or agreement;

(5) if two or more vehicle liability policies apply to the same accident, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability;

- (6) for any damages arising from an intentional act;
- (7) for any damages to any person who would be covered for such damages under a nuclear energy liability policy;
- (8) for any obligation of the insured to indemnify another for damages resulting from bodily injury to the insured's employee by accident arising out of and in the course of such employee's employment;
- (9) for bodily injury to any fellow employee of the insured arising out of and in the course of such employee's employment;
- (10) for bodily injury or property damage resulting from the handling of property:
 - (A) Before it is moved from the place where it is accepted by the insured for movement into or onto the covered auto; or
 - (B) after it is moved from the covered auto to the place where it is finally delivered by the insured;
- (11) for bodily injury or property damage resulting from the movement of property by a mechanical device, other than a hand truck, not attached to the covered auto; and
- (12) for bodily injury or property damage caused by the dumping, discharge or escape of irritants, pollutants or contaminants; however, this exclusion does not apply if the discharge is sudden and accidental.

History: L. 1974, ch. 193, § 7; L. 1981, ch. 191, § 2; L. 1984, ch. 167, § 2; L. 1984, ch. 175, § 1; July 1.

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40-3117**Chapter 40.--INSURANCE****Article 31.--KANSAS AUTOMOBILE INJURY REPARATIONS ACT**

40-3117. Tort actions; conditions precedent to recovery of damages for pain and suffering. In any action for tort brought against the owner, operator or occupant of a motor vehicle or against any person legally responsible for the acts or omissions of such owner, operator or occupant, a plaintiff may recover damages in tort for pain, suffering, mental anguish, inconvenience and other non-pecuniary loss because of injury only in the event the injury requires medical treatment of a kind described in this act as medical benefits, having a reasonable value of \$2,000 or more, or the injury consists in whole or in part of permanent disfigurement, a fracture to a weightbearing bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of a bodily function or death. Any person who is entitled to receive free medical and surgical benefits shall be deemed in compliance with the requirements of this section upon a showing that the medical treatment received has an equivalent value of at least \$2,000. Any person receiving ordinary and necessary services, normally performed by a nurse, from a relative or a member of such person's household shall be entitled to include the reasonable value of such services in meeting the requirements of this section. For the purpose of this section, the charges actually made for medical treatment expenses shall not be conclusive as to their reasonable value. Evidence that the reasonable value thereof was an amount different from the amount actually charged shall be admissible in all actions to which this subsection applies.

History: L. 1974, ch. 193, § 17; L. 1987, ch. 173, § 7; Jan. 1, 1988.

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60-2003**Chapter 60.--PROCEDURE, CIVIL****Article 20.--COSTS**

60-2003. Items allowable as costs. Items which may be included in the taxation of costs are:

- (1) The docket fee as provided for by K.S.A. 60-2001, and amendments thereto.
- (2) The mileage, fees, and other allowable expenses of the sheriff, other officer or private process server incurred in the service of process or in effecting any of the provisional remedies authorized by this chapter.
- (3) Publisher's charges in effecting any publication of notices authorized by law.
- (4) Statutory fees and mileage of witnesses attending court or the taking of depositions used as evidence.
- (5) Reporter's or stenographic charges for the taking of depositions used as evidence.
- (6) The postage fees incurred pursuant to K.S.A. 60-303 or subsection (e) of K.S.A. 60-308, and amendments thereto.
- (7) Alternative dispute resolution fees shall include fees, expenses and other costs arising from mediation, conciliation, arbitration, settlement conferences or other alternative dispute resolution means, whether or not such means were successful in resolving the matter or matters in dispute, which the court shall have ordered or to which the parties have agreed.
- (8) Such other charges as are by statute authorized to be taxed as costs.

History: L. 1963, ch. 303, 60-2003; L. 1974, ch. 168, § 5; L. 1990, ch. 202, § 13; L. 1991, ch. 173, § 3; L. 1998, ch. 100, § 2; L. 2004, ch. 118, § 7; July 1.

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60-2006**Chapter 60.--PROCEDURE, CIVIL****Article 20.--COSTS**

60-2006. Attorney fees taxed as costs in certain actions involving negligent motor vehicle operation. (a) In actions brought for the recovery of property damages only of less than \$7,500 sustained and caused by the negligent operation of a motor vehicle, the prevailing party shall be allowed reasonable attorney fees which shall be taxed as part of the costs of the action unless:

- (1) The prevailing party recovers no damages; or
 - (2) a tender equal to or in excess of the amount recovered was made by the adverse party before the commencement of the action in which judgment is rendered.
- (b) For the plaintiff to be awarded attorney fees for the prosecution of such action, a written demand for the settlement of such claim containing all of the claimed elements of property damage and the total monetary amount demanded in the action shall have been made on the adverse party at such party's last known address not less than 30 days before the commencement of the action. For the defendant to be awarded attorney fees, a written offer of settlement of such claim shall have been made to the plaintiff at such plaintiff's last known address not more than 30 days after the defendant filed the answer in the action.

(c) This section shall apply to actions brought pursuant to the code of civil procedure and actions brought pursuant to the code of civil procedure for limited actions.

History: L. 1969, ch. 288, § 1; L. 1976, ch. 251, § 28; L. 1977, ch. 205, § 1; L. 1982, ch. 249, § 1; L. 1990, ch. 206, § 1; L. 1995, ch. 240, § 1; July 1.