

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.