

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on February 7, 2011, in Room 346-S.

All members were present except:
Representative Colloton
Representative Alford

Committee staff present:
Jill Wolters, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Tamera Lawrence, Office of the Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Representative Kleeb, Forty-Eighth District, Overland Park
Chris Appel, on behalf of American Tort Reform Association
Dan Murray, State Director, National Federation of Independent Business
John Donley, Kansas Livestock Association

Others Attending:
See attached list.

Chairman Kinzer advised today was the last day for introduction of new bills requests. Chairman Kinzer proposed the Committee adopt the following requests for bill introductions without objection unless a specific request for a motion/vote is made:

Chairman Kinzer requested the following bills:

- 1) Restoration of spouse's former name after divorce; if divorced in another state, the court shall restore name if copy of authenticated divorce decree provided.
- 2) Modification to the terms and qualifications of the State Board of Indigents' Defense Services.

Representative Patton requested the following bills:

- 1) Repeal regulations that state agency, KDHE, has until December, 2011, to regulate carbon emissions.
- 2) Reveal public funds used for lobbying for tax increases
- 3) On behalf of Representative Goodman, restrict how funds can be used to lobby as relates to increasing of public funds.

David Hutchings, Kansas Bureau of Investigation (KBI), requested a bill regarding sexual exploitation of a child; increasing the penalty for certain offenses.

The Hearing on **HB 2106 - Concerning trespass and liability; exceptions**, was opened.

Matt Sterling, Assistant Revisor of Statutes, provided the committee with an overview of the bill. (Attachment 1)

Representative Kleeb, Forty-Eighth District, Overland Park, appeared before the committee as a proponent, stating the Trespasser Responsibility Act takes a legislative proactive approach to help protect Kansas' farmers and ranchers, homeowners, and businesses from frivolous lawsuits, expensive legal costs, large settlements and higher insurance premiums that may result from the legal actions taken by trespassers, their attorneys, and judges. (Attachment 2)

Chris Appel, Esq., Shook, Hardy & Bacon L.L.P. From Washington, D.C., addressed the committee

CONTINUATION SHEET

Minutes of the House Judiciary Committee at 3:30 p.m. on February 7, 2011 in Room 346-S.

on behalf of American Tort Reform Association (ATRA) in support of the bill. He explained that ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. He concluded that Kansas' present law regarding the duty of land possessors to trespassers is fair, predictable, and has worked well for many decades, however, the new Restatement Third of Torts: Liability for Physical and Emotional Harm, calls on courts to dramatically expand trespassers' rights to sue and would impose costly burdens on property owners. He stated Kansas should enact this bill to prevent activist judges from giving the green light to lawsuits by intruders that would subject private homeowners and other land possessors to broad new liability.

Included in his written testimony, Mr. Appel, on behalf of ATRA, recommends that the Committee adopt an amendment to include language that appears to have been inadvertently omitted from the bill. A key element of the law in Kansas and elsewhere regarding attractive nuisance cases is that "the possessor knows, or in the exercise of ordinary care should know, that young children are likely to trespass upon the land." PIK-Civil 4th 126.40. HB 2106, 2(c)(2) should be amended to include this requirement as a new paragraph (A) with the existing paragraphs to follow. (Attachment 3)

Much discussion followed regarding the Restatement and the definition of "children".

Dan Murray, Kansas State Director, National Federation of Independent Business (NFIB), spoke before the committee in support of the bill. He stated this bill does two positive things for the small business sector; limits business owners' liability exposure and also supports the NFIB Mission, "to promote and protect the right of our members to own, operate and grow their businesses." (Attachment 4)

John Donley, Assistant Counsel for the Kansas Livestock Association, addressed the committee as a proponent and is supportive of the general concept proposed by the bill, however, he also requested the committee to review several issues before going forward, as stated in his written testimony. He specifically requested "livestock and wildlife" be included on the list of things a "possessor shall not be liable for" in section 2(d) of the bill. (Attachment 5)

The following proponents submitted "written only" testimony in support of the bill:

Eric Stafford, Senior Director of Government Affairs, The Kansas Chamber (Attachment 6)

Ron Seeber, Vice President of Government Affairs, Kansas Grain & Feed (KGFA) and Kansas Agribusiness Retailers Association (KARA) (Attachment 7)

Leslie Kaufman, President/CEO of the Kansas Cooperative Council (Attachment 8)

David Hanson, Kansas Association of Property and Casualty Insurance Companies (Attachment 9)

The hearing on **HB 2106** was closed.

The Hearing on **HB 2102 - Concerning open records; relating to nondisclosure of certain records,** was opened.

Matt Sterling, Assistant Revisor of Statutes, provided the committee with an overview of the bill that would amend the open records act and the list of records not subject to disclosure. (Attachment 10)

Representative Patton addressed the committee in support of this bill and attached a newspaper article from the Wichita Eagle reporting emails had been sent from two Sumner County school superintendents that included electronic attachments of a campaign advertisement. Although the Kansas Government Ethics Commission found no violations, this bill could be a possible solution to future situations. (Attachment 11)

There were no opponents.

The hearing on **HB 2102** was closed.

CONTINUATION SHEET

Minutes of the House Judiciary Committee at 3:30 p.m. on February 7, 2011 in Room 346-S.

HB 2070 - Requiring plaintiff or plain attorney to notify defendants of payment of appraisers' award within 15 days.

Representative Kuether made the motion to report HB 2070 favorably for passage. Representative Bruchman seconded the motion. Motion carried.

HB 2071 - Inheritance rights; automatically.

Representative Bruchman made the motion to report HB 2071 favorably for passage. Representative Smith seconded the motion.

Representative Brookens made a substitute motion to amend the bill as follows: Page 2, line 17, insert a period, and delete Lines 18 and 19. Representative Meier seconded the motion. Motion failed.

Representative Brookens made a substitute motion to amend the bill, page 2, Line 40, after disclaimed, add "pursuant to K.S.A. 59-2291, or other lawful disclaimer." Representative Ward seconded the motion. Motion failed.

Back on the motion to report the bill for passage, motion carried.

The next meeting is scheduled for February 8, 2011.

The meeting was adjourned at 5:08 p.m.

JUDICIARY COMMITTEE GUEST LIST

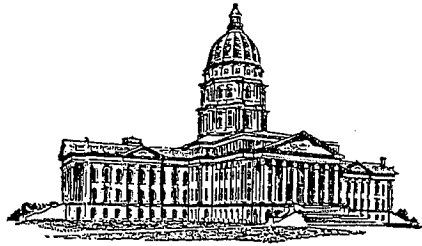
DATE: Feb. 07, 2011

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MARY ANN TORRENCE, ATTORNEY
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MEMORANDUM

To: Chairman Kinzer and members of the House Judiciary Committee
From: Matt Sterling, Assistant Revisor of Statutes
Date: February 7, 2011
Subject: House Bill 2106

HB 2106 concerns the liability of a property owner to a trespasser and would codify much of current common law in statute. The bill would impose no general liability on a property owner for trespassers. However, if the trespasser was intentionally injured by the owner or if the owner knew or should have known that trespasser's frequently trespassed on the owner's land and the trespasser was harmed by an artificial condition, the owner knew the condition was dangerous, the condition was unlikely to be discovered by the trespasser and the owner failed to exercise reasonable care to warn the trespasser of the condition and risk.

An owner would also be liable for injury to a child resulting from an artificial condition if the condition was one the owner knew was a danger to children, the child did not realize the risk involved in the condition, the value to the owner of keeping and the burden of eliminating the dangerous condition were minimal compared to the risk it posed to the child or the owner failed to exercise reasonable care to eliminate the danger or otherwise protect the child.

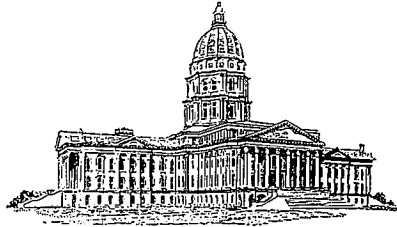
The bill also clarifies that the owner is not liable for natural conditions that exist on the property (such as caves), natural conditions that a reasonable person would view as dangerous (such as ice or snow), dangerous conditions (such as ladders or roofs) that a reasonable person would know were dangerous or an intentional failure of possessor to maintain or repair buildings or parking lots.

STATE OF KANSAS
HOUSE OF REPRESENTATIVE

COMMITTEE ASSIGNMENTS

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VICE CHAIRMAN: TAXATION
MEMBER: APPROPRIATIONS
MEMBER: COMMERCE & LABOR

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MARVIN G. KLEEB
48TH DISTRICT

February 7, 2011
Trespasser Responsibility Act HB 2106

Our American judicial system traditionally has been a respected branch of government. For the most part, our citizens could rely upon the federal and state courts to reasonably and fairly interpret the law and settle disputes.

For the past several decades, however, there have been decisions, findings and settlements that have defied common sense and reversed the course of well-grounded common law. Some of these have been due to judicial activism and others have reflected the impact that emotions surrounding particular cases have had upon juries and judges.

The Trespasser Responsibility Act takes a legislative proactive approach to help protect Kansas' farmers and ranchers, homeowners and businesses from frivolous lawsuits, expensive legal costs, large settlements and higher insurance premiums that may result from legal actions taken by trespassers, their attorneys or judges.

Regrettably, we cannot rely solely on common sense and common law in today's litigious society and activist courts. I would urge the Judiciary Committee to consider seriously this opportunity to help protect our citizens and businesses.

Marvin Kleeb, Representative
District 101

House Judiciary
Date 2-7-11
Attachment # 2

**WRITTEN TESTIMONY OF CHRISTOPHER E. APPEL, ESQ.
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**ON BEHALF OF THE
AMERICAN TORT REFORM ASSOCIATION**

**SUPPORTING H.B. 2106, AN ACT TO CODIFY KANSAS LAW
REGARDING THE LIABILITY OF LAND POSSESSORS TO TRESPASSERS**

**BEFORE THE KANSAS
HOUSE JUDICIARY COMMITTEE**

FEBRUARY 7, 2011

Mr. Chairman and Members of the Committee, I am appearing on behalf of the American Tort Reform Association ("ATRA") to express ATRA's support for H.B. 2106. Kansas has long maintained clear and sound rules regarding the liability of land possessors to those who trespass on their property. Like most states, Kansas provides that a land possessor owes no duty of care to a trespasser, except in a few narrow and well-defined circumstances. H.B. 2106 would codify these traditional common law rules to preempt a liberal provision in the new *Restatement Third of Torts: Liability for Physical and Emotional Harm* that calls on courts to dramatically expand trespassers' rights to sue and would impose costly burdens on property owners, potentially leading to higher homeowners' insurance premiums. H.B. 2106 is based on model legislation that was unanimously adopted by the American Legislative Exchange Council (ALEC) in 2010.

Background

I am an associate in Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. My work focuses primarily on tort law and civil justice system reform; it is generally divided among legislative efforts, appellate litigation, and academic writing. I received my J.D. from Wake Forest University School of Law and my B.S. from the University of Virginia's McIntire School of Commerce.

ATRA's Interest

Founded in 1986, ATRA is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA believes that the current law in Kansas relating to the liability of landowners is fair and should be protected. ATRA believes that H.B. 2106 is sound legislation which responds to the ALI's adoption of a broad new trespasser duty rule.

H.B. 2106 Would Protect Kansas' Longstanding Trespasser Liability Rules

Under the existing law in Kansas and most states, land possessors generally owe no duty of care to trespassers and are not liable for their injuries. There are a few special situations in which the law permits trespassers to recover, but these are narrowly circumscribed.

First, a land possessor cannot *intentionally* harm a trespasser, except in self-defense. Kansas Supreme Court cases discuss the duty to refrain from willfully or wantonly injuring trespassers. See *Frazee v. St. Louis-San Fran. Ry. Co.*, 549 P.2d 561 (Kan. 1976); Kansas Pattern Jury Instruction ("PIK- Civil 4th") 126.21. Law students often read a case in which a homeowner was held liable in battery for injuries caused to a trespasser as a result of the homeowner setting up a spring-gun "booby trap" in an abandoned house on his property.

Second, a land possessor has a duty to use reasonable care to prevent trespassers that *constantly* intrude upon a *limited* area from being harmed as result of an artificial condition on the land. For example, if residents of a neighborhood frequently cross a bridge (an artificial condition) on private property to access a shopping mall, the land owner must maintain the bridge so it is safe for crossing.

Third, land owners must use reasonable care to prevent harm to a child trespasser as a result of a highly dangerous artificial condition—commonly called an "*attractive nuisance*"—that the child did not appreciate but was known to the land owner. Law students frequently read about "turntable cases" as classic examples of application of the doctrine.

Beyond these very limited situations, the rule is that land possessors are not liable for harms to trespassers. Thus, there is generally no duty to protect the occasional trespasser, such as the person who goes onto another's land to ride a motorcycle, ATV, snowmobile, or horse and runs into barbed wire. There is also no duty to protect trespassers from harm from natural

conditions, such as a lake or a falling tree limb. These standards have been in place for a very long time and continue to be fair, workable, and predictable.

The new Restatement approved by the ALI upends the traditional rule. Section 51 of the Restatement Third begins by imposing on land possessors a duty to exercise reasonable care to *all* entrants, including unwanted trespassers. The only exception to the broad new duty rule would be for harms to “flagrant trespassers”—a concept that is not defined in the new Restatement and that appears in no state’s tort law. The flagrant trespasser concept will likely generate substantial litigation over its meaning. Ultimately, this exception may be sharply limited, barring recovery only for a very narrow category of trespassers, such as armed burglars.

Thus, instead of following the historical common law approach and providing that land possessors generally owe no duty to trespassers (subject to a few narrow exceptions), the new Restatement takes a “reformist” approach, imposing liability on land possessors for harm to *any* entrant except the “flagrant trespasser.”

The new Restatement, like other “Restatements of law” adopted by the ALI, does not have the force of law by itself. The Restatement is available as a resource to be adopted by a court the way a legislature may adopt a model bill. Once the Restatement is adopted by a court, it becomes the law of the state unless overturned or superseded by statute. ALI “Restatements of law” are highly influential with courts because the ALI is perceived to be objective. The ALI is composed of the nation’s top echelon judges, law professors, and practitioners.

In April 2010, Larry Stewart, a former president of the Association of Trial Lawyers of America (ATLA), now known as the American Association of Justice (AAJ), and the lead Reporter (or “author”) for the new Restatement, Wake Forest University School of Law Professor Michael Green, co-wrote an article in *TRIAL*, the monthly magazine of the trial bar,

calling the new Restatement a “powerful new tool” for “[t]rial lawyers handling tort cases.” They described the new Restatement as “a work that trial lawyers would be well advised to review and use.” In particular, they listed the new duty rule for land possessors as one of the “top 10” provisions in the new Restatement that will benefit trial lawyers. They characterized the new rule as “a major departure from the first and second restatements, which followed the historic approach....”

Overall, the new Restatement’s land possessor provisions are radical, would threaten to bring about fundamental changes that have little or no support in existing law, and would have a substantial adverse impact on land possessors, from the largest companies to the smallest individual homeowners, and their insurers. The new Restatement approach could result in higher insurance premiums for homeowners and businesses.

In August 2010, ALEC’s Civil Justice Task Force unanimously adopted model legislation to prevent the new trespasser duty rule in the new Restatement from wreaking havoc on land possessors. The model Trespasser Responsibility Act, which was approved by the ALEC Board of Directors in September 2010, would codify the historical common law approach and “freeze” the law of trespasser liability, preempting courts from adopting the approach found in the new Restatement. The approach found in the ALEC model is taken from the Restatement (Second) of Torts (1965) and finds additional support in the statutory laws of a number of states. H.B. 2106 is derived from this ALEC model legislation. It has been tailored to reflect Kansas law.

H.B. 2106 incorporates the definition of a trespasser as stated in numerous decisions by the Kansas Supreme Court, and as expressed in the state’s Pattern Jury Instructions. A trespasser is defined as a person who enters on the property of another without permission and without an

invitation, expressed or implied. *See Jones v. Hansen*, 867 P.2d 303, 310 (Kan. 1994); *Gerchberg v. Loney*, 576 P.2d 593, 596 (Kan. 1978); PIK- Civil 4th 126.01.

Next, the bill would codify the current, longstanding, and straight-forward rule that a land possessor owes no duty of care to a trespasser and is not liable for injury to a trespasser. This rule comes directly from Kansas Supreme Court case law. *See Jones*, 867 P.2d at 306; *Frazee*, 549 P.2d at 564; *see also* PIK-Civil 4th 126.21.

The bill then sets forth three exceptions where a land possessor may be subject to liability for harm to a trespasser:

(1) If the land possessor intentionally injures a trespasser, *see* PIK-Civil 4th 126.21 (land possessor has duty to refrain from willfully or wantonly injuring a trespasser).

(2) Under the doctrine of attractive nuisance for harm to a child trespasser (under age 17) injured by a dangerous artificial (man-made) condition on the land that the child did not appreciate but was known to the land owner, *see* PIK-Civil 4th 126.40; *Mozier v. Parsons*, 887 P.2d 692, 695 (Kan. 1995); *Gerchberg*, 576 P.2d at 596.¹

(3) If the trespasser is injured by a dangerous artificial condition on the land that the trespasser did not appreciate but was known to the land owner and the accident occurred in a

¹ Regarding the attractive nuisance exception, ATRA recommends that the Committee adopt an amendment to include language that appears to have been inadvertently omitted from the bill. A key element of the law in Kansas and elsewhere regarding attractive nuisance cases is that "the possessor knows, or in the exercise of ordinary care should know, that young children are likely to trespass upon the land." PIK-Civil 4th 126.40. H.B. 2106 § 2(c)(2) should be amended to include this requirement as a new paragraph (A) with the existing paragraphs to follow.

limited area where the land possessor knew or should have known that trespassers consistently intrude on the land.

Lastly, H.B. 2106 clarifies that land possessors are not liable to trespassers for injuries resulting from natural conditions, such as cliffs, holes, or natural situations, such as ice, snow, or rain. It further clarifies that land possessors are not liable for injuries to trespassers resulting from obvious or inherently dangerous conditions, such as roofs, equipment or steps. It also clarifies that land possessors are not responsible for harms caused by the unintentional failure to maintain or repair building or parking lots such as lighting, holes, or other natural degradations of the property.

Conclusion

Present Kansas law regarding the duty of land possessors to trespassers is fair, predictable, and has worked well for many decades. The new Restatement threatens these longstanding liability rules. Kansas should enact H.B. 2106 to promote trespasser responsibility and prevent activist judges from giving the green light to lawsuits by intruders that would subject private homeowners and other land possessors to broad new liability.



The Voice of Small Business®

Testimony by Mr. Daniel Murray
Kansas State Director, National Federation of Independent Business

House Judiciary Committee
Monday, February 7, 2011

Good afternoon, Chairman Kinzer and 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 organization representing small and independent businesses. A nonprofit, nonpartisan organization founded in 1943, NFIB/KS represents the consensus views of its over 4,100 members in Kansas. I am pleased to be here in support of HB 2106, the Trespasser Responsibility Act.

The Trespasser Responsibility Act codifies that land possessors owe no duty of care to trespassers and are not liable for harms to trespassers except in limited situations that are recognized in the bill and in other common law of Kansas.

The most recent NFIB Small Business Economic Trends edition, which measures the confidence of small business owners, states: "it appears that the small business sector remains in a 'rut', unable to find reasons to ramp up hiring and capital spending." HB2106 is a positive measure that supports hiring and capital investment.

Do I think that HB 2106 will *cause* small businesses to begin hiring and investing in capital? Not necessarily. But, I do think the bill does two positive things for the small business sector. First and foremost, by limiting small business owners' liability exposure, the bill supports the NFIB Mission: "to promote and protect the right of our members to own, operate and grow their businesses."

Second, the Trespasser Responsibility Act sends a crystal clear signal to small businesses in Kansas and across the nation that our state's laws and business climate support job creators, not law-breakers. In a time of unusually high unemployment, weak sales, and low capital investment, Kansas should be doing everything it can to retain and grow jobs. Business expansion and capital investment will seek out areas that have a favorable tax climate and laws and regulations that support job growth.

NFIB wholeheartedly supports the Trespasser Responsibility Act and urge you to pass the measure out favorably.

Small Business Isn't Small

Collectively, small business isn't small. It represents over 97 percent of all employer firms and provides employment to 54.7% of the non-farm private work force in Kansas. It pays 44 percent of total U.S. private payroll. In the past fifteen years, it has annually generated 64% of net new jobs. It generates more than 50% of the gross domestic product. It possesses half of the business wealth in the U.S.



Since 1894

TESTIMONY

To: House Judiciary Committee
Representative Lance Kinzer, Chairman

From: John Donley, Assistant Counsel, Kansas Livestock Association

Date: February 7, 2011

Re: HB 2106 – Concerning trespass and liability, exceptions

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 5,000 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, dairy production, grazing land management and diversified farming operations.

Good afternoon Mr. Chairman and members of the committee. My name is John Donley, and I am assistant counsel for the Kansas Livestock Association. I appreciate the opportunity to provide testimony as a proponent of House Bill 2106. KLA supports the concepts that are included in the bill; however, it is our belief that the exceptions in section 2(c) need to be closely analyzed before moving forward. Due to time constraints, we have not been able to conduct a thorough analysis of the exceptions and would encourage the committee to thoroughly deliberate on these points.

Traditionally, a possessor of land owes no duty of care to a trespasser. Admittedly, there are exceptions that are considered in both the common law and the Restatement (Second) of Torts. However, without conducting thorough research, we are not aware which of those exceptions have been adopted by Kansas courts at this time.

In regards to the exceptions as drafted in the bill, we have many questions. First, is 17 the appropriate age to trigger the attractive nuisance doctrine set out in section 2(c)(2)? While the courts currently have maximum flexibility in interpreting common law doctrines, would it be appropriate to be more specific in the language of the exception when we are codifying such common law doctrines?

We also have concerns regarding the exception for the consistently intruding trespasser in section 2(c)(3). Portions of this exception may be too broad when codifying the Restatement (Second) approach. For example, should possessors of land be liable to a person who they have known is consistently trespassing even if they have done everything in their means to notify the

trespasser that their presence is not allowed on the property? We are unsure whether this situation as well as others is adequately protected by the wording of the bill as drafted.

Additionally, we think that it may be appropriate to include livestock and wildlife on the list of things a "possessor shall not be liable for" in section 2(d) of the bill. Naturally, our members have many animals on their property, and they should owe no duty of care to a trespasser who is potentially injured by an animal on the property. ||

Finally, it would be appropriate to ensure that the bill is consistent with the recreational use statutes found at K.S.A. 58-3201 et. seq. The recreational use statutes provide protection for landowners who allow individuals to use their land for recreational purposes. It is necessary that these protections be considered and ensure that they will continue to provide the protection of landowner liability necessary in those situations if this bill is enacted. ||

Once again, KLA is supportive of the general concept proposed by this bill and understands the logical need to take action on this issue. However, we also believe that the legislature needs to conduct a thorough analysis of the issue when attempting to codify an issue such as civil trespass. We are committed to continuing to work with the committee to ensure that the bill is drafted properly. Consequently, it is our belief that a thorough analysis of our concerns and other concerns that may arise should be addressed before enacting this legislation.

Thank you and I would be happy to address questions at the appropriate time.

**Testimony before the House Judiciary Committee
HB 2106 – Trespasser Responsibility Act
Presented by Eric Stafford, Senior Director of Government Affairs**



Monday, February 7, 2011

Chairman Kinzer and members of the Committee:

We appreciate the opportunity to provide testimony in support of House Bill 2106. My name is Eric Stafford. I am the Senior Director of Government Affairs for the Kansas Chamber.

The Kansas Chamber is pleased to support House Bill 2106, which codifies the historical common law approach maintaining the law as it stands today when dealing with the liability of property owners to trespassers. As stated in our 2011 legislative agenda, the Kansas Chamber supports efforts to improve the legal climate in Kansas by reducing incentives for litigation.

A new Restatement of the Law of Torts approved by the American Law Institute (ALI) advocates reversal of traditional common law duty rules such that a property owner would now generally owe a duty of reasonable care to trespassers. The law of Kansas has always been that property owners are not liable for injuries to trespassers, except in a few very specific circumstances such as where an attractive nuisance exists for trespassing children. The ALI's new Restatement, therefore, imposes a broad new duty upon land possessors, which is unsound and does not reflect the law of any state.

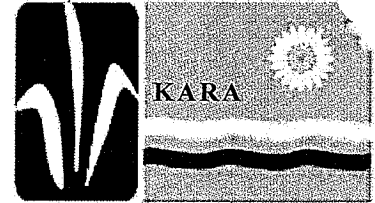
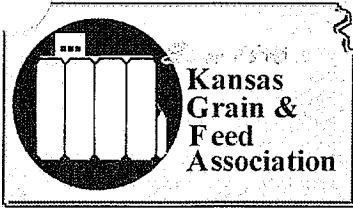
Because judges often turn to ALI Restatements for guidance in their decision making, it is important to act proactively to prevent such a broad expansion of liability. The passage of HB 2106 would secure through statute Kansas' position of not holding property owners responsible for injuries to trespassers, with exceptions as listed in HB 2106.

Thank you for the opportunity to support House Bill 2106.

The Kansas Chamber, with headquarters in Topeka, is the leading statewide pro-business advocacy group moving Kansas towards becoming the best state in America to do business. The Chamber represents small, medium and large employers all across Kansas.



835 SW Topeka Blvd. Topeka, KS 66612 785.357.6321



**Written Statement of the Kansas Grain and Feed Association and Kansas Agribusiness
Retailers Association in Support of House Bill 2106**

Presented to the House Judiciary Committee on February 7, 2011

Representative Lance Kinzer, Chair

Chairman Kinzer and members of the Judiciary Committee, I am Ron Seeber, Vice President of Government Affairs of the Kansas Grain and Feed Association (KGFA) and the Kansas Agribusiness Retailers Association (KARA).

The KGFA is a voluntary state association with a membership encompassing the entire spectrum of the grain receiving, storage, processing and shipping industry in the state of Kansas. KGFA's membership includes over 950 Kansas business locations and represents 99% of the commercially licensed grain storage in the state. KARA's membership includes over 700 agribusiness firms that are primarily retail facilities which supply fertilizers, crop protection chemicals, seed, petroleum products and agronomic expertise to Kansas farmers. KARA's membership base also includes ag-chemical and equipment manufacturing firms, distribution firms and various other businesses associated with the retail crop production industry.

KGFA and KARA are supportive of House Bill 2106. This bill codifies the common law approach maintaining the law as it stands today when dealing with liability of property owners and trespassers. KGFA and KARA are in support of legislation that clarifies the liability issues surrounding private property. We believe such clarification could help eliminate unnecessary litigation in the courts and protects the right of law abiding property owners. Our members and the producers we serve deserve fair treatment under the law and this bill will help secure that outcome.

Thank you for this opportunity to testify on this important legislation.

KGFA & KARA MEMBERS ADVOCATE PUBLIC POLICIES THAT ADVANCE A SOUND ECONOMIC CLIMATE FOR AGRIBUSINESS TO GROW AND PROSPER SO THEY MAY CONTINUE THEIR INTEGRAL ROLE IN PROVIDING KANSANS AND THE WORLD THE SAFEST, MOST ABUNDANT FOOD SUPPLY.



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House Judiciary Committee Feb. 7, 2011

HB 2106 - trespasser responsibility act.

Chairman Kinzer and members of the House Judiciary Committee, thank you for the opportunity to comment in support of HB 2106, the trespasser responsibility act. I am Leslie Kaufman and I serve as President/CEO of the Kansas Cooperative Council.

The Kansas Cooperative Council (KCC) is a voluntary, statewide trade association representing all forms of cooperative businesses across the state -- agricultural, utility, credit, financial, refining and consumer cooperatives. As you can tell by that list, a variety of businesses are covered under the co-op umbrella. Their places of operation are as varied as a traditional office setting, to a crop field, to a refinery, and then some.

KCC members take pride in their facilities and many concerns arise when someone enters a site without permission. Thus, laws regarding trespass and liability are of real interest to them.

As we understand it, HB 2106 will codify and clarify important aspects of our state's approach regarding the duty of care owed a trespasser. Our association sees value from a public policy standpoint in having a statutory declaration on trespass liability. Our members have had policy for several years that expresses their desire to see a greater degree of governance through statute as opposed to rule and regulation or court decree. As such, we ask for your favorable consideration of HB 2106.

Thank you again for this opportunity to provide comments on this measure. If you have any questions regarding our testimony, please feel free to contact me.

Leslie Kaufman, President/CEO
Kansas Cooperative Council
785-220-4068

House Judiciary
Date 2-7-11
Attachment # 8

GLENN, CORNISH, HANSON & KARNS, CHARTERED

800 SW Jackson - Suite 900

Topeka, Kansas 66612

785-232-0545

TESTIMONY ON HB 2106

February 7, 2011

TO: House Judiciary Committee

RE: House Bill No. 2106

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to present information to the Committee in support of HB 2106 on behalf of the Kansas Association of Property and Casualty Insurance Companies, whose members are domestic insurance companies in Kansas, and also on behalf of PCI, the Property Casualty Insurers Association of America, with over 1,000 member companies across the country writing about 40% of the property-casualty market.

We support the provisions of House Bill 2106 as the proposed language would adopt by statute the current law in Kansas as developed by our courts through the years limiting the level of duties owed and liabilities that may be imposed on owners or possessors of land to those who trespass on the land. Adoption of these provisions in our statutes will not only provide clarification, but stability to this area of our law and maintain current standards. Attached is a position paper developed by PCI providing further explanation on this matter. We are not aware of problems that would warrant any significant change. Instead, we believe the existing provisions have been working well and are supported by a number of court rulings.

We appreciate your consideration of our position and would urge your support of this Bill.

Respectfully,



David A. Hanson

H.B. 2106 Would Protect Kansas' Longstanding Trespasser Liability Rules

Kansas has long maintained clear and sound rules regarding the liability of land possessors to those who trespass on their property. Kansas, like most other states, provides that a land possessor owes no duty of care to a trespasser, except in a few narrow and well-defined circumstances. H.B. 2106 would codify these traditional common law rules to preempt courts from adopting a liberal provision in the new *Restatement Third of Torts: Liability for Physical and Emotional Harm* that would dramatically expand trespassers' rights to sue landowners and impose costly burdens on property owners, potentially leading to higher homeowners' insurance premiums. Giving trespassers new rights to sue is bad public policy. H.B. 2106 is based on ALEC model legislation that was unanimously adopted by ALEC's Civil Justice Task Force in 2010.

Why Legislation Is Necessary At This Time

In Kansas and most other states, land possessors generally owe no duty of care to trespassers and are not liable for their injuries. These rules have existed for decades, usually as part of the common (court-made) law, but also sometimes in the statutory law (e.g., landowner immunity for recreational uses of the land). They are based on the principle that land possessors are entitled to the free enjoyment of their land.

The American Law Institute's (ALI) latest *Restatement Third of Torts* (§ 51) seeks to upend the traditional approach by recommending that courts should impose a broad new duty on land possessors to exercise reasonable care for all entrants on their land, including unwanted trespassers. The only exception to the proposed new duty rule would be for harms to so-called "flagrant trespassers"—a concept that will lead to litigation over its meaning because the term is not defined in the Restatement and does not exist in any state's tort law.

Thus, instead of following the historical common law approach found in Kansas, and providing that land possessors generally owe no duty to trespassers (subject to a few narrow exceptions), the new Restatement takes a "reformist" approach, imposing liability on land possessors for harm to any entrant except the "flagrant trespasser." The new duty requirement would particularly impact owners and renters of residential property.

The new Restatement does not have the force of law by itself, but courts often look to ALI "Restatements" when developing legal rules. The ALI is highly influential with courts because the ALI is perceived to be objective and is composed of the nation's top echelon judges, law professors, and practitioners.

In 2010, a former president of the Association of Trial Lawyers of America (ATLA), now known as the American Association of Justice (AAJ), teamed up with an author of the new Restatement on an article for a national lawyer magazine (TRIAL, Apr. 2010) which publicly characterized the new Restatement as a "powerful new tool" for "[t]rial lawyers handling tort cases." They described the new Restatement as "a work that trial lawyers would be well advised to review and use" — and specifically listed the new duty rule for land possessors as one of the "top 10" provisions in the new Restatement that will benefit trial lawyers. They candidly acknowledged that the new rule is "a major departure from the first and second restatements, which followed the historic approach...."

What the Legislation Would Accomplish

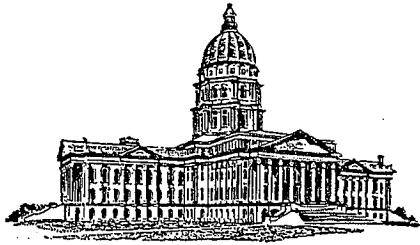
H.B. 2106 would freeze current Kansas law and preempt courts from adopting the radical approach proposed by the new Restatement and subjecting land owners to broad new liability. The following is a section-by-section breakdown of the bill:

- **Section 2(a)** defines a trespasser as a person who enters on the property of another without permission and without an invitation, expressed or implied.
 - ✓ This definition is explicit in Kansas Supreme Court case law, *see Jones v. Hansen*, 867 P.2d 303, 310 (Kan. 1994); *Gerchberg v. Loney*, 576 P.2d 593 (Kan. 1978), and is found in Kansas Pattern Jury Instruction ("PIK- Civil 4th") 126.01.
- **Section 2(b)** codifies the current, longstanding, and straight-forward rule that a land possessor owes no duty of care to a trespasser and is not liable for injury to a trespasser.
 - ✓ This rule comes from Kansas Supreme Court law, *see Jones*, 867 P.2d at 306; *Frazee v. St. Louis-San Fran. Ry. Co.*, 549 P.2d 561, 564 (Kan. 1976), and PIK-Civil 4th 126.21.
- **Section 2(c)** sets forth the three exceptions where a land possessor may be subject to liability for harm to a trespasser:
 - 1) If the land possessor acts intentionally to injure a trespasser, *see* PIK-Civil 4th 126.21 (land possessor has duty to refrain from willfully or wantonly injuring a trespasser).
 - 2) Under the doctrine of attractive nuisance for harm to a child trespasser (under age 17) injured by a dangerous artificial (man-made) condition on the land that the child did appreciate but was known to the land owner. – *see* PIK-Civil 4th 126.40; *Mozier v. Parsons*, 887 P.2d 692, 695 (Kan. 1995); *Gerchberg*, 576 P.2d at 596.
 - 3) If the trespasser is injured by a dangerous artificial condition on the land that the trespasser did not appreciate but was known to the land owner and the accident occurred in a limited area where the land possessor knew or should have known that trespassers consistently intrude on the land.
- **Section 2(d)** clarifies that land possessors are not liable to trespassers for injuries resulting from natural conditions, such as cliffs, holes, or natural situations, such as ice, snow, or rain. This subsection further clarifies that land possessors are not liable for injuries to trespassers resulting from obvious or inherently dangerous conditions, such as roofs, equipment or steps. It also clarifies that land possessors also are not responsible for harms caused by the unintentional failure to maintain or repair building or parking lots such as lighting, holes, or other natural degradations of the property.

MARY ANN TORRENCE, ATTORNEY
REVISOR OF STATUTES

JAMES A. WILSON III, ATTORNEY
FIRST ASSISTANT REVISOR

GORDON L. SELF, ATTORNEY
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OFFICE OF REVISOR OF STATUTES
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Kansas Commission on
Interstate Cooperation
Kansas Statutes Annotated
Editing and Publication
Legislative Information System

MEMORANDUM

To: Chairman Kinzer and members of the House Judiciary Committee
From: Matt Sterling, Assistant Revisor of Statutes
Date: February 7, 2011
Subject: House Bill 2102

HB 2102 would amend the open records act and the list of records not subject to disclosure. One of the exceptions to disclosure that was added last year was for an individual's e-mail address, cell phone number and other contact information which had been given to a public agency for the purpose of public agency notifications or communications which are widely distributed to the public. The bill would exclude from this exception any contact information used by the public agency to promote or oppose any action or nonaction by the legislature, the adoption or nonadoption of any rules and regulations by a state agency or the expressed advocacy for the nomination, election or defeat of an identified candidate.

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TOPEKA

HOUSE OF
REPRESENTATIVES

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JOINT COMMITTEE FOR ADMINISTRATIVE RULES
AND REGULATIONS

Mr. Chairman and members of the committee:

I appreciate the opportunity to speak in favor of HB 2102

This bill is one possible solution to the problem discussed in the attached newspaper article.

I would appreciate your support of HB 2102.

Thank you,

House Judiciary
Date 2-7-11
Attachment # 11

Official: Sumner superintendents' e-mails didn't violate campaign law

BY TIM POTTER

The Wichita Eagle

WICHITA — The staff of the Kansas Governmental Ethics Commission has found no violations in election-related e-mails sent by two Sumner County school superintendents, an official said today.

The finding came after Ellen Janoski, a Republican candidate for a state House seat, complained that the Argonia and Wellington superintendents used school e-mail addresses in the days before Tuesday's election to forward e-mails that included an electronic attachment with her opponent's campaign advertisement.

Janoski still contends that it violates a state campaign law because it constitutes an official using government supplies and time to advocate for a candidate.

Carol Williams, director of the Kansas Governmental Ethics Commission, said the commission staff found that the e-mails and the accompanying Vincent Wetta ad did "not expressly advocate" for anyone and therefore don't violate the law.

"Expressly" is a key word, Williams said. The e-mails and attachment did not contain any of the "magic words" such as "vote for," "vote against," "support so-and-so" or "cast your ballot for..." "that would meet express advocacy, Williams said.

Wellington superintendent Rick Weiss said today, "I am relieved there is no violation.

"I never intended to violate anything," Weiss said. "I didn't look at it as a personal vendetta against one candidate or for another one."

Argonia superintendent Julie Dolley said she found it "unsettling" to be publicly accused by Janoski of violating the campaign law. Dolley said she has always felt that she was only passing on information about Wetta's stances but not advocating for him.

"My reputation means a lot to me as a small town superintendent and it really bothers me to have people think that I did something wrong and not have the chance to know the truth," Dolley wrote in an e-mail.

Dolley and Weiss said they know of no policy in their school districts prohibiting them from forwarding such e-mails.

Wetta, the incumbent, won the District 80 race by about 200 votes. He declined to comment today.

District 80 covers most of Sumner County and the southern half of Harper County.

Janoski, Wetta's opponent, disagreed with the commission staff finding, saying, "I think it's quite apparent that they (the superintendents' e-mails) were advocating for a particular" candidate.

"I believe it's unethical for a public official, when the salaries were coming from taxpayers ... they forwarded an e-mail that had a paid-for advertisement for the Democratic candidate and did not have any campaign information for the other candidate. That is clearly advocating for their candidate."

With "how much influence superintendents have, that could make or break an election," Janoski said.