



*Lawyers  
Representing  
Consumers*

KANSAS TRIAL LAWYERS ASSOCIATION

719 SW Van Buren  
Topeka, Kansas 66603  
785-232-7756  
785-232-7730 FAX

March 18, 2004

TO: Members of the House Health and Human Services Committee

FROM: Margaret Farley  
Kansas Trial Lawyers

RE: SB 430

In its original form, the Kansas Trial Lawyers Association opposed SB 430 for the same reasons we opposed HB 2306. However, the Senate Judiciary Committee amended SB 430 to allow judges the discretion necessary to determine on a case-by-case basis whether information in the nursing home survey report is relevant.

KTLA supports SB 430, as amended and passed by the Senate. The federal and state nursing home inspection/survey system checks the owners' and operators' substantial compliance with, respectively, federal and state certification and licensure laws and regulations. The state licensure system was set up to protect the health, safety and welfare of our frail elders and disabled adults who reside in licensed nursing care facilities (also known as "adult care homes" in Kansas). The federal certification system was set up to do the same, and to assure minimal contractor compliance because Medicaid and Medicare are major payers for nursing facility care. There is only one survey for both purposes. The survey system is the back-bone of the certification and licensure systems. Taxpayers pay for a substantial part of all nursing facility care.

The nursing facility industry often attacks the survey system as unfair, subjective and inconsistent, but a regulated industry often complains about its government oversight. The survey system was the subject of a Legislative Post Audit Study within the last three or four years and found to be reasonably adequate and consistent. Further, nursing facilities have the right to contest cited deficiencies through informal dispute resolution and can dispute more serious deficiencies, which could result in enforcement actions, through the administrative appeals process, and beyond.

In any civil case, the trial judge is the arbiter of questions of admissibility of evidence and judicial rulings on such issues are based upon long-established Kansas case law and Kansas statutes. SB 430 as amended permits admissibility of nursing home inspection reports if they are determined by the trial judge to be otherwise relevant and admissible. This is entirely reasonable.

Even if a survey report is admissible that does not mean that the nursing home can't dispute the survey findings. Trial lawyers for the nursing home defendants can attack the survey report evidence through cross-examination, expert witness testimony and arguments to the jury. The arguments to the jury will most likely be similar to the arguments that the industry is making to the public and their fellow legislators on this and related bills: that is, the survey is not fair; the surveyor was too subjective; the surveyor was nitpicking and cited the home for an ice cube on the floor; the regulatory violation is unrelated to the plaintiff's claim, et cetera. Advancing opposing arguments is, after all, the purpose of a jury trial.

Some persons are misrepresenting the issue by saying that "Doctors and hospitals already have these protections in Kansas". This may be a reference to the statutorily protected peer review process, which is an internal review process NOT a public survey. It may also be a reference to the refusal of the Joint Commission on Accreditation of Health Care Organizations (JCAHCO) to make its reports public. JCAHCO is a private entity which contracts with hospitals for quality assurance purposes. Public survey/inspection reports are clearly distinguishable from internally-generated quality assurance, JCAHCO and peer review documents.

The argument has been made by the industry that medical records will still be available even if the surveys are not. However, a key problem with medical records is that they are documents created by the defendant nursing homes. Aside from being a clearly biased representation of, for example, the home's steps to prevent bed sores or the circumstances of an unexplained fracture, many nursing home records are actually falsified.

Very often the survey report is the only objective documentation of regulatory compliance and quality of care, and derives from, among other things, surveyor onsite observation, review of medical records and staff, and resident and family interviews. As such it is a unique piece of contemporary evidence, and will be determined by the trial court to be either relevant and admissible or not, for that or other legal grounds, on a case by case basis.

We urge you not to be swayed by arguments that keeping the surveys out of the courtroom will reduce either insurance costs or litigation costs. Please ask for the industry to show proof of such claims. There is no basis whatsoever for either allegation. Insurance issues are real but should be addressed directly and not through a back-door attempt to keep public surveys away from the eyes and ears of the jury.

These surveys are already in the public domain. JCAHCO documents and private peer review documents are not. The survey report is conducted by the government, and the survey results, by federal and state law, are public, posted in every facility in the state. Protection of the interests and rights of consumers of nursing facility care should and must be paramount to the protection of the self-interest of the nursing home industry, even if your fellow legislators are a part of that industry. **KTLA respectfully urges passage of SB 430, as amended because it is fair to both parties and it leaves the relevancy and admissibility of all nursing home inspections to the trial court.**