

Report of the Special Committee on Judiciary to the 2020 Kansas Legislature

CHAIRPERSON: Senator Eric Rucker

VICE-CHAIRPERSON: Representative Fred Patton

OTHER MEMBERS: Senators Elaine Bowers, Julia Lynn, Vic Miller, and Rick Wilborn; Representatives John Carmichael, Pam Curtis, Nick Hoheisel, Bradley Ralph, and Kellie Warren

STUDY TOPIC

The Committee is directed to:

- Review the impact of recent Supreme Court decisions on the citizens of Kansas.

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Special Committee on Judiciary

REPORT

Conclusions and Recommendations

Legislative Response to *Hodes & Nausser, MDs, P.A. v. Schmidt*, No. 114,153

It is the recommendation of the Special Committee on Judiciary that Kansas voters be provided the opportunity to adopt a constitutional amendment that would reverse the holding of the Kansas Supreme Court in *Hodes & Nausser, MDs, P.A. v. Schmidt* regarding the existence of a right to an abortion under the *Kansas Constitution*.

Supreme Court Selection Process

It is the recommendation of the Special Committee on Judiciary that the Legislature continue to study the issue.

Legislative Response to *Hilburn v. Enerpipe Ltd.*, No. 112,765

It is the recommendation of the Special Committee on Judiciary that the Legislature continue to evaluate the ramifications of the *Hilburn* decision prior to determining what, if any, action to take.

Proposed Legislation: None

BACKGROUND

The charge to the Special Committee on Judiciary by the Legislative Coordinating Council (LCC) was to review the impact of recent Supreme Court decisions on the citizens of Kansas.

The LCC approved two meeting days for the Special Committee.

COMMITTEE ACTIVITIES

The Committee held meetings on October 1 and 2, 2019, at which it heard overviews from staff and testimony from conferees regarding the Kansas Supreme Court's decisions in *Hodes & Nausser, MDs, P.A. v. Schmidt*, 309 Kan. 610 (2019) and *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127 (2019), as well as the Supreme Court

selection process. [Note: Because the Committee considered each topic on both meeting days, the following summary is organized by topic, then by meeting day.]

Supreme Court Decision and Possible Legislative Response: *Hodes & Nausser, MDs, P.A. v. Schmidt*, No. 114,153

October 1

Staff from the Office of Revisor of Statutes provided an overview of the case history of *Hodes & Nausser MDs, P.A. v. Schmidt (Hodes)* and the Supreme Court's decision in the case, including the following information. The 2015 Legislature passed, and the Governor signed, SB 95, which prohibited dismemberment, or dilation and evacuation (D&E) method, abortions. The legislation was immediately challenged by the plaintiffs, who are doctors who performed

abortions using this method. The plaintiffs requested a temporary injunction to prevent enforcement of SB 95 pending the outcome of the lawsuit. The district court issued the requested injunction, and the State appealed to the Kansas Court of Appeals, which heard the case *en banc*. Due to a 7-7 split decision by the Court of Appeals, the injunction was upheld. The State then petitioned the Kansas Supreme Court (Supreme Court) for review, which granted the petition.

In April 2019, the Supreme Court issued its 6-1 decision concluding that section 1 of the *Kansas Constitution Bill of Rights* protects judicially enforceable rights, including a right to personal autonomy that includes the right to decide whether to continue a pregnancy. Turning to the question of the standard of review for the question of whether a statute infringes on a fundamental constitutional right, the Court concluded the undue burden standard used in federal cases is difficult to understand and apply, and therefore the strict scrutiny standard should be applied. Under this standard, the State must show the statute furthers a compelling government interest and is narrowly tailored to further that interest. The Supreme Court concluded the district court correctly ruled the plaintiffs were substantially likely to prevail on their claims and thus upheld the injunction. However, the Supreme Court instructed the district court on remand to conduct further proceedings in the case under the strict scrutiny standard. On remand, the State will now have the opportunity to present evidence of a compelling government interest and that SB 95's provisions are narrowly tailored to further that interest.

Staff responded to Committee questions regarding the differences between federal and Kansas standards of review for abortion restrictions; the potential effect, given the *Hodes* ruling, if the U.S. Supreme Court's ruling in *Roe v. Wade* were to be reversed; whether federal or Kansas courts have extended constitutional rights to unborn children; and whether unborn children are extended any protections under Kansas criminal law.

The Chief Deputy Attorney General reviewed the case history of *Hodes* and provided a summary of the Kansas Supreme Court's holding. He stated the use of the strict scrutiny standard in cases involving a suspect classification or fundamental

interest is critical, because it removes the presumption of constitutionality when examining a statute. This shifts the burden of proof onto the defendant to show the statute satisfies the strict scrutiny analysis.

In response to questions from the Committee, the Chief Deputy stated the rights in the *Kansas Constitution* stand independently of the *U.S. Constitution*, even though Kansas courts often look to interpretation of the *U.S. Constitution* in interpreting the *Kansas Constitution*; the standard of review articulated in *Hodes* will make it more difficult to defend statutes involving fundamental rights; various abortion-related legislation and regulations are likely to be subject to the strict scrutiny standard; and some of the more detailed arguments and issues involved were not made during the consideration of the temporary injunction, but will be raised and more fully fleshed out during the district court's consideration upon remand.

A representative of the Family Policy Alliance of Kansas stated her organization's concerns with the *Hodes* decision. She stated the Supreme Court replaced a historical understanding of the common law with its own understanding of the words and context in which the words were written; read malicious intent and prejudice into the actions of any governmental body if it disagreed with the outcome; and created great uncertainty rather than providing clarity. She stated the Supreme Court's conclusions regarding rights to personal autonomy or bodily integrity opens the door for anything imaginable. She urged the Legislature to work to reverse the *Hodes* ruling by passing a constitutional amendment and by reviewing the Supreme Court selection process.

In response to questions from Committee members, the Family Policy Alliance representative discussed some of the early criminal laws regarding abortion; stated suffrage in Kansas was enacted in 1919, but it was not until the cultural change of the 1950s or 1960s that liberalization of abortion laws became a possibility; and stated a lack of clear legal reasoning in the *Hodes* decision connecting the right to abortion to the common law right of personal autonomy opened the door to other rights.

A representative of Kansans for Life (KFL) stated her organization's belief that abortion is the ultimate exploitation of women contrasts with the Supreme Court's statement regarding personal autonomy. She provided information on KFL's pregnancy care centers and KFL's educational and legislative efforts, including various laws enacted in Kansas related to regulation of abortion facilities and procedures. She stated the majority of women serving in the 2015 Legislature supported SB 95, which received bipartisan support. She stated the remedy for the Supreme Court's ruling in *Hodes* was to reverse the ruling through a constitutional amendment, returning the power to enact pro-life laws to the people of Kansas through their elected representatives and senators. She also stated KFL's support for reforming the Supreme Court selection process to require Senate confirmation.

In response to questions from Committee members, the KFL representative stated she would provide the Committee with additional information regarding rates of sterility following multiple abortions and on legislation KFL has supported; addressed the use of the terms "unborn child" and "preborn child"; and stated KFL's goal through a constitutional amendment would be to allow the Legislature to continue considering legislation regulating abortion.

The Committee received written-only testimony from representatives of Concerned Women for America and the Kansas Catholic Conference criticizing the *Hodes* decision and supporting an amendment to the *Kansas Constitution* responding to the decision. A representative of the MainStream Coalition submitted written-only testimony opposing introduction of a constitutional amendment addressing abortion in response to the *Hodes* decision.

October 2

A representative of Planned Parenthood Great Plains Votes (PPGPV) expressed her organization's opposition to any constitutional amendment that would remove access to abortion. She stated that, contrary to what some supporters of a constitutional amendment asserted, the *Hodes* decision did not prohibit the Legislature from regulating abortion, and that while the right to personal autonomy is fundamental, it is not

absolute. Thus, any regulation would be subject to strict scrutiny and abortion could be regulated as any other medical procedure. She stated states have a compelling interest in protecting maternal health, but a number of laws regulating abortion do not address patient safety. She stated 90 percent of abortions in Kansas occur during the first trimester and, for later abortions, the D&E method at issue in *Hodes* is needed. The PPGPV representative stated any proposal to take away women's personal autonomy is unjust, but states are attempting to take away these rights in light of the new composition of the U.S. Supreme Court, and the past eight years in Kansas show what the Legislature might attempt in restricting abortion rights without state or federal constitutional protections against undue government intrusion into personal rights. She stated it is disheartening to observe attempts to amend the *Kansas Constitution* to remove, rather than protect, personal rights.

In response to questions from Committee members, the PPGPV representative stated the following:

- The *Hodes* decision is the first time the *Kansas Constitution* has been interpreted to include a natural right to personal autonomy; such rights primarily lie with the woman carrying the child; there should be federal guarantees for access to abortion; she does not believe the D&E prohibition from SB 95 will be upheld upon remand to the trial court;
- Planned Parenthood clinics are inspected by the Kansas Department of Health and Environment; the first abortion-restricting laws in Kansas, discussed in the *Hodes* decision, were passed by the "bogus legislature" and based on Missouri bills, and it had been expected these laws would be reviewed by a later Legislature;
- Planned Parenthood is exploring an option to open a health center in Wyandotte County, providing a full spectrum of care and attempting to fill a gap in care in that area;
- Planned Parenthood operates under strict medical standards and guidelines, and thus

has not seen a need to advocate for government regulation of its services;

- Recent polling data shows 54 percent of Kansans think abortion should be legal in all or most circumstances, but she agrees the divided Court of Appeals in *Hodes* could indicate some of the public might have been surprised by the Supreme Court's decision;
- There are professional organizations for abortion providers, including the National Abortion Federation and the American College of Obstetricians;
- The Planned Parenthood Federation of America and the National Abortion Federation both accredit providers; and
- 97 percent of Planned Parenthood's service is preventative in nature, and 3 percent is abortion service. She also outlined the organizational and funding structure for Planned Parenthood's federation and affiliates.

One of the co-counselors for plaintiffs in the *Hodes* case provided the Committee with a brief procedural overview of the case and the decisions by the trial court, Court of Appeals, and the Supreme Court. She noted all decisions to date had been with regard to the temporary injunction, and there has not been a final determination on the merits of the case. She stated no evidence was presented to the trial court other than affidavits provided by the plaintiffs and, because the case has been remanded, there will be the opportunity for additional evidence to be presented and arguments to be made regarding the merits of the case. She stated the Supreme Court performed a "natural rights" analysis based upon the language of section 1 of the *Kansas Constitution Bill of Rights*, finding these rights included a right to personal autonomy, including the right to choose whether to conclude a pregnancy. She noted that while the Court also examined the proper standard to apply, it did not hold that the State cannot regulate abortion. Rather, the State must show a compelling state interest, and that the statutes enacted regarding this interest are narrowly

tailored for that purpose. She stated this strict scrutiny standard applies because the Court found the right to personal autonomy is a fundamental right, and the case is returned to the trial court for further consideration under the standard articulated by the Supreme Court.

In response to questions from Committee members, plaintiffs' co-counsel stated the Supreme Court has not yet ruled on the constitutionality of SB 95; observing how courts apply the standard articulated by the Supreme Court in cases going forward could help inform the Legislature whether a constitutional amendment is needed; Tennessee has attempted to respond to a decision by the Tennessee Supreme Court regarding abortion with a constitutional amendment, but litigation continues; and the plaintiffs advocated for a strict scrutiny approach and a right to abortion under the *Kansas Constitution*, but not necessarily the personal rights approach taken by the Court.

Supreme Court Selection Process

October 1

Staff from the Kansas Legislative Research Department provided an overview of the current judicial selection methods for the Kansas Court of Appeals and the Kansas Supreme Court and recent legislative efforts to amend the selection process. Since 1958, under the *Kansas Constitution*, Supreme Court vacancies are filled by the Governor's appointment of one of three candidates nominated by the Supreme Court Nominating Commission (Commission). The Commission has nine members: a chairperson who is an attorney chosen by members of the Kansas bar (attorneys licensed to practice law in Kansas), an attorney member from each congressional district chosen by members of the Kansas bar who reside in that district, and one non-attorney member from each congressional district appointed by the Governor.

The process for filling vacancies on the Kansas Court of Appeals is governed by statute amended in 2013 (KSA 2019 Supp. 20-3020) to allow the Governor, with the consent of the Senate, to appoint a qualified person to fill a vacancy. The statute sets out time frames within which a vote to consent must be held by the Senate.

Supreme Court justices and Court of Appeals judges are both subject to retention elections following their first full year in office and at the end of each term (six-year terms for justices and four-year terms for judges).

Because Supreme Court selection is governed by the *Kansas Constitution*, a constitutional amendment is required to modify the process. During the 2013, 2015, and 2016 Sessions, concurrent resolutions to modify the process were considered. The resolutions that progressed the furthest in the legislative process would have applied the current Court of Appeals selection method to the Supreme Court, but no resolution progressed further than adoption by the House Committee on Judiciary (in 2013 and 2015). In 2019, SCR 1610, containing similar provisions, was introduced and initially referred to the Senate Committee on Judiciary. On May 29, the Senate voted to withdraw the concurrent resolution from the Judiciary Committee and refer it to the Senate Committee of the Whole, but no further action was taken on the resolution.

In 2016, House Sub. for SB 128 added a variety of requirements related to the selection of attorney members of the Commission and information that must be provided by licensed attorneys to participate in Commission elections. The bill also adjusted Kansas Open Records Act and Kansas Open Meetings Act (KOMA) provisions related to Commission proceedings and required the Governor to make public the name and city of residence of each applicant to the Court of Appeals. Legislation introduced in 2017 and 2019 would have eliminated many of the changes made by this bill and restored previous law in those areas.

A law professor from the University of Kansas (KU) School of Law, speaking on his own behalf, stated the current Supreme Court selection process is undemocratic, extreme, and secretive. He noted that various judicial selection systems use different methods and combinations for initial selection and retention of judges. He stated such methods should be chosen while acknowledging that the political leanings of judges influence the direction of the law through making the common law and by filling gaps left in constitutions and statutes. He stated Kansas has the most undemocratic method of Supreme Court selection among the states. He

noted a majority of the members of the Commission are selected through elections open to only about 10,000 people, the members of the Kansas bar, and Kansas is the only state that provides members of the bar majority control of its nominating commission. The KU law professor stated the Supreme Court selection process should be reformed and reform options could include reducing the number of members of the Commission selected by the Kansas bar, adding Senate confirmation to the current process, or replacing the Commission with a Senate confirmation process.

In response to questions from Committee members, the KU law professor stated some states with less bar involvement in their nominating commissions provide various elected officials with authority to appoint members; acknowledged the federal selection model could lead to difficulty in successfully confirming appointees, as has occurred recently in New Jersey, but stated that confirmation votes in most states using a form of the federal model tend to be unanimous or near-unanimous, with compromise and consensus; and stated removing Kansas bar control of a majority of the Commission membership would satisfy many of his concerns, although he would prefer a system analogous to the federal process.

A representative of the Kansas Bar Association (KBA) stated the American judiciary was established to provide insulation from the political branches of government, and decisions such as *Brown v. Board of Education* show the value of such insulation. He stated states began using merit selection systems because of concerns regarding increasing political influence under executive appointment-based systems. Judicial elections were the initial response to these concerns, until political scandals led reformers to propose merit selection systems. Kansas was the second state to adopt such a system, following Missouri, following the “Triple Play” in 1956, in which a defeated governor arranged to be appointed as Chief Justice of the Kansas Supreme Court. He noted that currently 34 states and the District of Columbia use nominating commissions in some form, and no state has moved away from the use of a commission. New Jersey is the purest form of a federal model selection system used by a state, and it has encountered a ten-year-long struggle to have nominees successfully confirmed.

The KBA representative stated a 2015 poll of likely Kansas voters showed 53 percent favored merit selection, 27 percent favored a change, and 20 percent were undecided. Additionally, 76 percent opposed a constitutional amendment to a model similar to the federal model. He briefly summarized a 2012 study regarding judicial merit selection systems and a 2019 study regarding judicial nominating commissions. He stated the current Supreme Court selection process is more transparent than either the federal model or the current process used for the Court of Appeals.

In response to questions from Committee members, the KBA representative stated the “Kansas bar,” in the context of judicial selection, means licensed lawyers in Kansas’ congressional districts eligible to vote in nominating commission elections, whereas the KBA is a voluntary association of Kansas attorneys with no role in the judicial selection process; Senate confirmation would add another political layer to the selection of judges; while the current selection system does not mean no politics in the process, it does minimize the impact of politics; the *Kansas Constitution* should be amended only in extraordinary circumstances, and while many of the current citizens of Kansas did not vote to implement the Commission, the polling data cited suggests there is not public clamoring for a change; and while there is not polling data regarding public perception of the Commission, the data indicate the public views courts as fair and impartial, which is also supported by retention election results.

A representative of the Kansas Trial Lawyers Association (KTLA) stated he had served twice as the chair of the Commission and the KTLA supports the current Supreme Court selection process. He noted recent chairpersons of the Commission had come from different political parties and areas of legal practice. He stated he does not want to have to be concerned about the political persuasion of the judges or justices before whom he argues. He noted judges make common law, which can be modified by the Legislature, within the bounds of the *U.S.* and *Kansas Constitutions*. He stated he does not support the Governor having free reign to appoint anyone the Governor chooses to the Supreme Court, regardless of the Governor’s political affiliation, and the integrity and independence of the Supreme

Court must be protected. He commended the written materials provided by the KBA to the Committee. He stated a rule of the Commission while he served was that political party affiliation (of both Commission members and nominees) was never discussed, and that other past chairs of the Commission have told him this remained the practice until recently.

In response to questions from Committee members, the KTLA representative reviewed the party affiliations of the current Commission members that have been disclosed, as well as the party affiliation of recent Commission nominees sent to the Governor; stated justices and judges do not have to recuse themselves when attorney members of the Commission who were involved in their selection appear before their court; and noted Johnson County voters have voted overwhelmingly multiple times to retain merit selection for their district court judges.

A representative of the Kansas Association of Defense Counsel (KADC) stated his organization’s support for the Kansas nonpartisan merit selection system. He stated attorneys want fair judges and the judges and justices deciding *Hodes* and *Hilburn* were fair and impartial. He said he believes Kansas judges do what they think is right, fair, and just.

In response to questions from Committee members, the KADC representative clarified his organization’s membership is primarily civil defense attorneys, rather than criminal defense attorneys; stated the level of attorney involvement in the current selection process is appropriate because attorneys provide valuable input regarding the value of the judicial candidate as an attorney; expressed concern regarding the issues surrounding campaign contributions in judicial elections; and agreed the discussion of adopting a federal-type system for Kansas had not included adoption of lifetime appointments.

A representative of the MainStream Coalition (MainStream) stated his organization’s concern that injecting additional politics into the judicial selection system would lessen the quality of judges and would cause the citizenry to see everything in government as political. MainStream believes the current system avoids this and is the least political of the various options under

discussion. He stated it is important for citizens to leave court with a sense that justice has been provided, and a more political selection process could diminish that sense. He noted most cases before the Supreme Court are not political matters.

In response to questions from Committee members, the MainStream representative stated he considers his organization purposely bipartisan, rather than nonpartisan, and the decision to take a position on this issue is made by the complete board of the organization.

The Committee received written-only testimony from a representative of the Greater Kansas City Chamber of Commerce supporting the current Supreme Court selection process. A representative of the Kansas Catholic Conference submitted written-only testimony urging the Committee to explore reform of the selection process.

October 2

In response to a Committee question from the previous day, staff from the Office of Revisor of Statutes outlined KOMA requirements for the Commission. KOMA requires meetings be open to the public, and the Commission may take no binding action by secret ballot. Further, the Commission is prohibited from taking binding action during executive session. The Commission has further restrictions on executive session than are provided generally in KOMA. Because the duty of the Commission is to make nominations and certify those to the Governor, this duty would constitute the binding action that must be done in a public meeting by the Commission, by means other than secret ballot.

A law professor from the Washburn University (Washburn) School of Law presented his views on Kansas' judicial selection process compared to various alternatives. He stated improvements could be made to Kansas' current system, but overall it is better than the federal system or partisan election options. He noted Kansas' current system is at one end of the spectrum of commission-based systems, due to the number of members selected by the Kansas bar. Indiana and Alaska have similar systems. Addressing the drawbacks of the federal system, the professor stated it was the result of a compromise due to the

demands of federalism, demands not present in a state such as Kansas. The federal system is subject to political maneuvering and can reduce diversity. He noted the similar educational backgrounds of the first two appointments to the Kansas Court of Appeals after a model similar to the federal system was implemented for that court. He concluded by stating that while the current Kansas system works well, if changes were needed, he would suggest studying ways to balance the attorney representation with those tied to the political process and to include minority party representation.

In response to questions from Committee members, the Washburn law professor stated representativeness is a key principle of the judicial system, but it must be balanced with other key principles, such as judicial independence; most citizen education that exists with regard to Supreme Court justices occurs during the judicial retention process, rather than during the selection process; any changes to the current selection system should be made through a deliberate process with stakeholder involvement; structural changes to the current system would require a constitutional amendment, although some procedural changes relating to transparency or open meetings could be made statutorily; and, to his knowledge, Kansas courts have historically ranked well on surveys by chambers of commerce and business organizations.

Senator Masterson next addressed the Committee, noting all the supporters of the current Supreme Court selection system who had addressed the Committee were attorneys. He stated the Kansas bar is a small select group of individuals when compared to the citizens of the state, and nearly half of the members of the Kansas Senate were attorneys when the current selection system was adopted. He stated that no proponents of changing the selection system had suggested using a partisan election system, and he noted the U. S. Supreme Court, using the federal selection process, appears to have more diversity than the current Kansas Supreme Court. He stated a nominated judge about whom controversy became known would have been on the Kansas Court of Appeals if not for the Senate confirmation process, and the nomination and confirmation process for a second nominee went smoothly.

In response to questions from Committee members, Senator Masterson reaffirmed he was not advocating for partisan elections; stated court decisions should be made according to the law and should not be created out of thin air; and stated that while he favored the federal model of selection, if the will of the Legislature is to retain the Commission in some form, then the organization of the Commission should be changed.

Supreme Court Decision and Possible Legislative Response: *Hilburn v. Enerpipe Ltd.*, No. 112,765

October 1

The Chief Deputy Attorney General presented an informational briefing regarding the Supreme Court's decision in *Hilburn v. Enerpipe Ltd.* (*Hilburn*), including the following information.

In *Hilburn*, a jury awarded the plaintiff \$355,000.00, including \$301,509.14 in noneconomic damages, for injuries from a car accident. Applying the noneconomic damages cap (cap) in KSA 60-19a02, the district court reduced the noneconomic damage award to \$250,000.00. The plaintiff appealed, challenging the constitutionality of the cap under sections 5 (right to trial by jury) and 18 (right to remedy by due course of law) of the *Kansas Constitution Bill of Rights*. The Court of Appeals upheld the statute based on the *quid pro quo* analysis applied by the Kansas Supreme Court in *Miller v. Johnson*, 295 Kan. 636 (2012), which upheld the constitutionality of the damages cap in a medical malpractice action.

The Supreme Court granted review and refused to extend its holding in *Miller*. Instead, it held the *quid pro quo* test does not apply to challenges based on the section 5 right to trial by jury. The Chief Deputy noted the four-justice majority was made up of a three-justice plurality opinion and a concurring opinion that expressed disagreement with some of the plurality's analysis. While he agreed the statute as written was unconstitutional, the concurring opinion suggested the Legislature may be able to limit noneconomic damages by modifying the substantive cause of action. Two dissenting justices would have applied the *quid pro quo* test from *Miller* to uphold the cap's constitutionality.

The Chief Deputy noted the concurring opinion appears to be the controlling opinion and that the Chief Justice recused himself, but that no other judge was assigned to serve in his place. Thus, the case was decided by a six-member Court.

In response to questions from Committee members, the Chief Deputy outlined circumstances under which a judge or justice might recuse; provided detail regarding the elements of the *quid pro quo* test; and noted uncertainty regarding whether the *Hilburn* holding would apply in medical malpractice cases or in other scenarios such as workers compensation. He noted a withdrawn Judicial Branch press release stating the *Hilburn* decision did not apply to medical malpractice actions, as well as the dissenting justices' apparent understanding that the majority was overruling *Miller*.

October 2

Staff from the Office of Revisor of Statutes provided a summary of the factual and procedural background in *Hilburn* and the Supreme Court's decision, noting the Supreme Court's statement that it recently held the presumption of constitutionality of a statute does not apply in cases dealing with "fundamental interests" protected by the *Kansas Constitution*, such as the right protected by section 5. Staff stated the Legislature may want to keep this new standard in mind with regard to future legislative actions. Staff reviewed the history of Kansas' noneconomic damages caps, which have existed in some form since 1986. The current cap structure was established by the Legislature in 1988, and the Legislature added phased-in increases to the cap in 2014, responding to the opinion in *Miller*.

A representative of the Kansas Medical Mutual Insurance Company (KAMMCO) noted Kansas has had caps for more than 30 years, creating a stable tort environment for the medical care community while allowing injured patients to be fairly compensated. He stated the *Hilburn* decision has raised questions about the applicability of the caps in medical malpractice cases. He pointed the Committee to a press release issued by the Kansas courts the morning of the *Hilburn* decision stating the decision "struck down the statutory noneconomic damages cap in personal injury cases other than medical

malpractice actions.” He stated striking the caps for medical malpractice actions will create upward pressure on system costs. At this stage, KAMMCO believes there is a reasonable argument to be made that the *Hilburn* decision does not apply to medical malpractice decisions, as the decision is careful not to say it “reverses” *Miller*. He noted the concern expressed in the concurring opinion with lack of jury notification of the caps and focus on procedural versus substantive measures. Because of the uncertainty, he stated it is difficult at this time to make a recommendation to the Legislature as to the best way to proceed.

In response to questions from Committee members, the KAMMCO representative stated plaintiffs’ attorneys in current district court cases are refiling their damages requests in medical malpractice cases to increase their requests while arguing *Hilburn* has eliminated the caps in such cases; KAMMCO was not asking for anything from the Committee, but is awaiting more clarity regarding the application of the *Hilburn* decision; KAMMCO currently writes about 38 percent of the medical malpractice insurance premiums in the state and is the largest medical malpractice insurance provider in the state; 75 percent to 80 percent of cases covered by KAMMCO are dismissed with no payment to the plaintiff, with payments made in about 20 percent of the cases, mostly through negotiated settlements; it is anticipated elimination of the caps would increase upward pressure on settlement amounts and frequency of claims; and the medical malpractice environment in Kansas is unique due to the Health Care Stabilization Fund, which is operated as a state agency.

A representative of the Kansas Medical Society (KMS) noted medical malpractice law is a separate subset of personal injury law. She stated KMS asks the Legislature to wait to respond to the *Hilburn* decision to avoid a possible negative impact on medical malpractice causes of action. She noted her written testimony contains a history of professional medical liability in Kansas, and the noneconomic damages cap has helped provide a stable medical malpractice environment in Kansas. KMS believes the court intentionally specified its decision in *Hilburn* was a personal injury case, not a medical malpractice cap, so that the noneconomic damages caps potentially still apply in medical malpractice cases.

In response to questions from Committee members, the KMS representative stated KMS wants to continue to examine whether the effect of *Hilburn* on personal injury caps can be addressed without affecting medical malpractice cases, and KMS was not requesting a constitutional amendment or other legislative remedy to address *Hilburn*.

A representative of the Kansas Chamber stated the Chamber wants a “fix” for the *Hilburn* decision, but is not yet certain what the fix should be. He stated the Chamber has assembled a working group to continue examining the issue. He noted Kansas had dropped from number 18 to number 32 in the latest liability legal climate rankings by the U.S. Chamber Institute for Legal Reform. He drew attention to a report commissioned by the Chamber and produced by fellows of the Kansas Chamber of Commerce Foundation to examine the history of Kansas’ noneconomic damages caps, the economic impact of the decision, likelihood of future litigation, and impact on the cost of medical malpractice.

In response to questions from Committee members, the Chamber representative stated the Chamber would make a request to the Legislature once it had determined an appropriate course of action.

A representative of the KTLA stated the most important aspect of the *Hilburn* decision was that it found there was a fundamental right under the *Kansas Constitution* to a trial by jury. He outlined the history of the Seventh Amendment to the *U.S. Constitution* and section 5 of the *Kansas Constitution Bill of Rights*. He noted various questions that are left to a jury and stated juries should similarly be trusted and allowed to decide the full measure of damages in a civil case. He stated Kansas’ largest drop in the 2019 U.S. Chamber Institute for Legal Reform’s rankings was in the category called “treatment of class actions and mass consolidation lawsuits.”

In response to questions from Committee members, the KTLA representative stated his organization’s view that the *Hilburn* decision was clear that the noneconomic damages caps are unconstitutional as to all cases, including medical malpractice; it will likely take years, rather than months, before another appellate case is decided

applying the *Hilburn* decision in the medical malpractice context; products liability and some medical malpractice cases may require \$80,000-\$100,000 in capital to pursue for a plaintiff; noneconomic damages caps limit the ability to achieve the objectives of tort litigation, which include justice, making plaintiffs whole, promoting good behavior, and discouraging bad behavior; and liability may be avoided by not being negligent.

The Committee received written-only testimony from a representative of the Kansas Hospital Association summarizing the *Hilburn* decision and stating the Association would continue to monitor any impact the decision has on future insurance rates and jury awards. Representatives of Kansas Advocates for Better Care, the law firm of Bretz & Young (on behalf of two clients), and the Disability Rights Center of Kansas submitted written-only testimony supporting the *Hilburn* decision and opposing caps on noneconomic damages.

CONCLUSIONS AND RECOMMENDATIONS

At the end of its October 2 meeting, following discussion, the Committee adopted the following recommendations.

Legislative Response to *Hodes & Nausser, MDs, P.A. v. Schmidt*, No. 114,153

It is the recommendation of the Special Committee on Judiciary that Kansas voters be provided the opportunity to adopt a constitutional amendment that would reverse the holding of the Kansas Supreme Court in *Hodes & Nausser, MDs, P.A. v. Schmidt* regarding the existence of a right to an abortion under the Kansas Constitution.

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It is the recommendation of the Special Committee on Judiciary that the Legislature continue to study the issue.

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