KANSAS ASSOCIATION FOR JUSTICE

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To: Representative Marvin Kleeb, Chairman
Members of the House Commerce, Labor, & Economic Development Committee

From: Michael J. Fleming, Kansas City
On behalf of the Kansas Association for Justice

Date: March 17, 2014

RE: SB 311 (Concerning the Collateral Source Rule, Expert Witness Evidence, Non-Economic Losses) OPPOSED

The Kansas Association for Justice (KsAJ) is a nonprofit professional association of trial attorneys that supports the right to trial by jury and fair courts. KsAJ is opposed to SB 311.

I. Introduction

My name is Mike Fleming and I am an attorney practicing at Wendt Goss P.C., in Kansas City, Missouri. I am a member of the Kansas Association for Justice and Co-Chair of the Legislative Committee. I am here today in opposition to SB 311.

II. Collateral Source Rule (§ 5 and 6).

A. The Collateral Source Rule is a Historic Rule of Procedure that Promotes Fairness.

The Collateral Source Rule is a common law rule that has been applied in Kansas courts for more than 100 years. The Collateral Source Rule holds a wrongdoer responsible for the damages he or she causes regardless of whether a victim receives benefits from a collateral, or independent, source for the injuries.

There are two parts to the Collateral Source Rule. First, there is a substantive rule that holds that a wrongdoer's liability is not reduced if the person they harm receives a benefit from a source independent of the wrongdoer. Second, there is the rule of evidence that flows from the substantive rule, i.e. because a collateral source benefit does not reduce a wrongdoer's liability, evidence of the collateral source benefit is not relevant and therefore, inadmissible at trial.

The most common scenario when the Collateral Source Rule applies is when a wrongdoer injures a victim with health insurance. Prior to any lawsuit or claim, the victim's health insurance generally pays the cost of medical treatment needed for injuries caused by the wrongdoer. The Collateral Source Rule dictates that the wrongdoer remains liable for the reasonable value of the services rendered, regardless of whether the victim's health insurance paid the medical bills. The following example demonstrates application of the Collateral Source Rule:

> "Bob" is 35 years old. Bob has been working since college. His health insurance, ACME Insurance, is purchased through his employer. He has been paying a bi-monthly insurance premium since he began working.
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> One morning, Bob is driving to work. At an intersection, "Art" runs a stop sign and collides with Bob. Bob suffers a head injury and is rendered disabled.
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> Following the collision, Bob is treated at various medical providers for his head injury. Each provider bills Bob and the bill is submitted to ACME. The bills are paid by ACME.
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> Bob files suit against Art. Whether Art was distracted by texting on his phone or is a truck-driver who had fallen asleep, the compensation Bob may recover under the law is the same. Bob is entitled to recover his economic damages, i.e. the reasonable value of care and treatment necessitated by the head injury and his lost income. Bob's non-economic damages are limited to $250,000 under current law.
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> Currently, when Bob's case against Art goes to trial, the Collateral Source Rule prevents Art from suggesting that his financial liability should be ignored or reduced because Bob purchased health care coverage from ACME. The Collateral Source Rule dictates that Art must pay for the reasonable value of the treatment provided regardless whether it was paid or not and regardless who paid for it.
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> However, under SB 311, Art gets to take advantage of Bob's foresight in having health insurance and present evidence of that insurance to the jury. Art gets to argue to the jury that he should not be held responsible for all of the damages he caused. Bob and his liability carrier (if he has one) benefit. Art and his health insurer lose.

Without the Collateral Source Rule, the wrongdoer reaps a direct financial benefit from the premiums paid by the injured person in the years prior to the injury. The policy behind the Collateral Source Rule is that the full cost of dangerous behavior is borne by the wrongdoer. If collateral sources reduce financial liability, wrongdoers will benefit if they injure victims who responsibly purchase health insurance.

In modern practice, the Collateral Source Rule applies in almost every case involving a person injured by the wrongful conduct of another. In addition to private healthcare coverage, collateral source benefits might be provided by government programs such as Medicaid, Medicare, or TriCare. Each of these programs has a right to be reimbursed out of any victim's recovery for the amounts they paid for medical expenses.

B. SB 311 Eliminates a Fair and Meaningful Collateral Source Rule.

The only purpose of introducing evidence of collateral source benefits at trial is to attempt to reduce the wrongdoer's financial liability for harm they cause to an innocent person. Those at greatest disadvantage are citizens that responsibly, and with foresight, purchase health insurance. Taxpayers are also hurt by the cost shift.

SB 311 states that in a case seeking damages for injuries or death, evidence that an injured person has received collateral source benefits, or evidence that an injured person will receive collateral source benefits in the future, "shall" be admissible. Evidence of the amount that the injured person paid for the collateral source benefit (such as the cost of insurance premiums) is specifically excluded from the bill. SB 311 creates some exceptions from the definition of "collateral source benefit" for charity care, life and disability benefit insurance, and amounts included as part of a criminal sentencing order or victims assistance.

Benefits for which a valid lien or subrogation interest exists are also excluded from the definition of "collateral source benefit." The language appears to exclude health insurance benefits, but as a practical matter, the exclusion will not apply to all health insurance contracts. It may also not exclude future benefits under some tax-payer funded government benefit plans such as Medicare.

C. Kansas Has Rejected Attempts To Eliminate The Collateral Source in the Legislature and the Courts.

The Kansas Legislature has made attempts to eliminate the common law Collateral Source Rule. While the reasoning behind these attempts varied in some form or fashion, they have always been found to be unconstitutional and repealed. In 2005, SB 102 was introduced. It amended KSA 60-3802 and 60-3804. . It was rejected by the Kansas House. In 2006, another attempt to change the Collateral Source Rule was made, but SB 335 was rejected by the Senate Judiciary Committee.

The Collateral Source Rule was first formally addressed by the courts of Kansas in 1918 and has remained the rule since with very, very few exceptions. In ***Zak v. Riffel***, 34 Kan. App. 2d 93

(2005), the Kansas Court of Appeals held:

> The collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. The purpose of the collateral source rule is to prevent the tortfeasor from escaping full liability resulting from his or her actions requiring the tortfeasor to compensate the injured party for all of the harm, not just the net loss. A benefit secured by the injured party either through insurance contracts, advantageous employment arrangements, or gratuity from family or friends should not benefit the tortfeasor by reducing his or her liability for damages. If there is to be a windfall, it should benefit the injured party rather than the tortfeasor.

D. "Double Recovery" Ignores That Plaintiffs Paid Premiums for Collateral Source Benefits.

Proponents of SB 311 suggest that eliminating the Collateral Source Rule is necessary to prevent "double recovery."[1] But proponents fail to explain that injured people have paid for their "collateral source benefit" when they buy insurance coverage and pay premiums to maintain it.

Proponents also cannot explain how wrongdoers are fully accountable when their financial liability is reduced. As Thomas C. Galligan, the Dean of the University of Tennessee Law School has explained, eliminating the Collateral Source Rule would punish plaintiffs and allow defendants to "benefit[] from the plaintiff's foresight and investment in insurance."[2] The Kentucky Supreme Court reasoned as follows:

> There is no legal reason why the tortfeasor or his liability insurance company should receive a "windfall" for benefits to which the plaintiff may be entitled by reason of his own foresight in paying the premium or as part of what he has earned in his employment, and benefits received are usually subject to subrogation so there is no "double recovery" by any stretch of the imagination.[3]

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[1] Proponents of bills that eliminate long-standing rules like the Collateral Source Rule frequently mention concerns about litigation. But in fact there is no "litigation crisis" in Kansas. According to the *Annual Report of the Courts of Kansas,* personal injury (tort) cases were only 1% of all civil and criminal cases in Kansas in FY 2013. Civil claims declined by 14.5% overall between FY 2004 and FY 2013. *Statistical History of Case Filings by Judicial District, FY 2004-FY 2013.*

[2] Thomas C. Galligan, Jr., DISAGGREGATING MORE-THAN-WHOLE DAMAGES IN PERSONAL INJURY LAW: DETERRENCE AND PUNISHMENT, 71 Tenn. L. Rev. 117, 123 (2004) (citing 1 Dan B. Dobbs, DOBBS LAW OF REMEDIES § 380, at 1058-59 (2d ed. 1993). *See* Prof. Nora J. Pasman-Green, *Who Is Winning the Collateral Source Rule War?*, 31 U. Tol. L. Rev. 425, 445 (2000).

[3] *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 576 (Ky. 1995).

As Dean Galligan and others have observed, "the collateral source rule leads to more efficient deterrence than nonrecovery of the loss because it forces defendants to take account of these reimbursed losses or costs before acting," with the result that abrogation of that rule would lead to under-deterrence of tortious conduct.[4]

E. SB 311 Ignores the Reality That Most Health Benefit Plans and Government Insurance Plans Recover Costs from Plaintiffs.

SB 311 will lead to the government or health insurance companies not receiving reimbursement. Most payers of medical expenses (private insurers, government benefit plans such as Medicaid and Medicare) are entitled to reimbursement if they pay for medical care for injuries caused by a wrongdoer. An injured plaintiff doesn't get a "double recovery;" instead, damages awarded for medical expenses are ultimately used to repay the plaintiff's insurance company, or the government. In the case of private insurance, the rights of reimbursement are contained in the insurance contract. For government benefits such as Medicaid, Medicare, or Tri-Care, the rights are statutory.

F. SB 311 Opens a Pandora's Box Regarding Collateral Source Benefits "Reasonably Expected to be Received in the Future."

SB 311 shifts costs. It allows introduction of benefits "reasonably expected to be received in the future." Under SB 311, the costs of future medical care will be paid for by taxpayers and not by those that caused the injuries. The problem is not solved by the exception in SB 311 for benefits for which a valid lien or subrogation interest exists.

SB 311 allows a wrongdoer to argue that a future Collateral Source Benefit—taxpayer-funded Medicaid or Medicare coverage—is "reasonably expected" to pick up the future bills of someone completely disabled by the wrongdoer's actions. In other words, SB 311 allows a wrongdoer to avoid the cost of their destructive actions and reduce their own financial liability by shifting the costs to taxpayers.

The provision will affect those most seriously injured who are known to have on-going medical needs even after a trial. Once a person is disabled, the person is often forced to turn to taxpayer-funded Medicaid or Medicare coverage. The injured persons who will be affected are those that, because of their serious, permanent injuries, can no longer work full-time or worse, are rendered completely disabled by the wrongdoer.

G. SB 311 Will Likely Increase the Cost of Litigation for Plaintiffs and Defendants.

SB 311 will almost surely increase the cost and length of lawsuits. Additional discovery will be needed to define the collateral sources that were available, the cost of the collateral sources,

[4] Galligan, 71 Tenn. L. Rev. at 123. *Accord* Linda Ross Meyer, *Just the Facts?,* 106 YALE L. J. 1269, 1279 (1997).

the likelihood of these sources being available in the future and their impact on the injured persons' claims.

For example, if an employer furnishes group insurance as an employee benefit, the value of the benefit must be developed so that the true picture of the benefit is available to the jury. Furthermore, in the case of future medical expenses, much of trial and discovery will focus on the likelihood that taxpayer-funded insurance will be available to pay for future expenses.

When a wrongdoer irresponsibly injures or kills, there are costs. The question is who bears the costs. The Collateral Source Rule has existed for more than a century to fairly place the responsibility on the wrongdoer who caused injury. SB 311 shifts the responsibility from the wrongdoer to the injured person and, in cases of the disabled, to taxpayers. The windfall of SB 311 goes to insurance companies, who are the true beneficiaries of the elimination of the Collateral Source Rule.

III. Expert Evidence (*Daubert* Standard) (§2, 3, and 4).

Every jurisdiction, including every state and the federal judiciary has its own codes (or rules) of procedure and evidence. These codes govern the filing, processing, trial and appeal of all legal actions. Although each state's codes deal with topics and issues common to every state, these codes vary, sometimes significantly, from jurisdiction to jurisdiction.

Kansas enacted its code of civil procedure in 1963, and its code of criminal procedure in 1969. Our evidence code, which broadly applies to both civil and criminal cases, was enacted in 1963 with the new code of civil procedure.

K.S.A. 60-456, the Kansas evidence rule for expert and other opinion testimony, was enacted in 1963 as part of our evidence code. This rule of evidence has very capably performed for 50 years, and literally stood the test of time with flying colors. It has never been amended because no amendment was or is necessary. Since its enactment we now have over 150 case decisions, mostly Supreme Court decisions, that have construed the rule and fine-tuned its application in Kansas trials.

Some years before our evidence code was enacted the Kansas Supreme Court, like many other state supreme courts, adopted the so-called *Frye* standard for the admission of scientific evidence. See *State v. Lowry,* 163 Kan. 622, 629, 185 P.2d 147 (1947). The standard emanated from the federal case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which dealt with the admissibility of opinions derived from the use of the precursor to the polygraph.

In *Frye*, the court adopted a relatively rigorous and specific test that excluded all scientific evidence except that which had achieved "general acceptance" in the field of which it is a part. If a new scientific technique's validity generally has not been accepted as reliable or is only regarded as an experimental technique, then expert testimony based on its results should not be admitted into evidence under *Frye*. The *Frye* standard continues to apply in Kansas and other states.

In 1975 the federal rules of evidence were enacted into law and became the "evidence code" for federal courts. The federal rules of evidence are not applicable or controlling in state courts, although some states have modeled their evidence codes after the federal rules of evidence.

In 1993 the U. S. Supreme Court announced its controversial decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which dealt with the admissibility of expert testimony under Rule 702 of the federal rules of evidence. Bear in mind that the federal rules of evidence are inapplicable in Kansas state courts, and that federal case law construing these federal rules (like *Daubert*) is similarly inapplicable to Kansas.

In *Daubert*, the court held that Rule 702 had superseded *Frye* and that *Frye* was no longer controlling in the federal courts. More specifically, the court determined that scientific evidence should now be subject to a reliability analysis that was different from the "general acceptance" test set forth in *Frye*.

After *Daubert*, the U. S. Supreme Court decided two other cases that variously, and sometimes described as excessively, elaborated on the *Daubert* decision. See *General Electric Co. v. Joiner,* 522 U. S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U. S. 137 (1999). These three cases, *Daubert, Joiner* and *Kumho*, are widely referred to as the *Daubert* trilogy of cases.

Since the decision was announced, legal commentators and scholars have been harshly critical of *Daubert's* rigid and excessively mechanical formula; the difficult, even unrealistic burdens it places on trial judges; and the complex, expensive hearings that inevitably result. See, for example, 68 Mo. L. Rev. 1 (2003) (*Daubert* has left the law of expert witnesses confused and in a state of dysfunction). Also see Harvard L. Rev. 123:2021 (questioning whether so-called *Daubert* scientific standards lead to more universal or disinterested case results).

A. <u>The *Daubert* Scheme is Flawed and Should Be Rejected for Kansas.</u>

K.S.A. 60-456, and related Kansas case law, have become a fundamental part of the jurisprudence of this state. Judges and lawyers alike know and understand the rule, and our judges routinely and responsibly make preliminary decisions concerning the qualifications of experts to testify and the proper scope of their testimony.

Whenever such a longstanding, sound, stable feature of the law like K.S.A. 60-456 is gutted and rewritten, as SB 311 seeks to do, it is a momentous development that will inevitably create confusion and turmoil in our courts and trials. No such development should be initiated thoughtlessly or to accommodate special interests.

There are many compelling reasons why this bill should never be enacted and they include the following:

1. "<u>If It Isn't Broken, Don't Fix It</u>."

There is no credible basis to argue or conclude that Kansas district courts are experiencing any problems in considering or admitting expert or other opinion testimony in civil or criminal trials. Similarly, it would border on absurd to claim that our Kansas trial judges are irresponsibly admitting expert testimony or that flawed expert testimony is undermining the integrity of trials in our state courts. It is not happening and there is no legitimate outcry that it is.

To the contrary, judges and lawyers are familiar with K.S.A. 60-456 and there are few, if any, problems in interpreting and applying the rule at trial. Absent compelling indications that 60-456 is flawed or not working, it would be foolhardy to scrap the rule. Again, I respectfully submit that there are no such indications and no sense of the Kansas judiciary or bar that 60-456 is broken.

2. Making Piecemeal Changes To An Integrated Code Carries Risks.

Kansas adopted its present evidence code in 1963, and modeled it after a uniform code of evidence. Kansas has never expressed any inclination to adopt the federal rules of evidence, and, of course, has not done so. The Kansas evidence code is an integrated system. That is, our rules of evidence are designed to work together to insure the fair, orderly presentation of evidence at every trial.

SB 311 aims to piecemeal graft one or more of the federal rules of evidence onto the Kansas evidence code. The adage that "everything affects everything else" comes to mind. The piecemeal, selective adoption of new or different rules onto our established, integrated evidence code risks disturbing the balance and uniformity of the code itself. This tangible risk of an unintended consequence should be vigilantly guarded against. Rejection of SB 311 entirely neutralizes this risk.

3. The North Carolina Experience Spurning *Daubert*.

The earlier experience in North Carolina helpfully reinforces our perspective. The decision by the North Carolina Supreme Court in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004), emphatically made the point that North Carolina is not a *Daubert* state and does not want to be a *Daubert* state. The following quotes from the *Howerton* opinion are both pertinent and enlightening:

> "This case initially presents us with the question of whether North Carolina has adopted the federal standard under *Daubert v. Merrell Dow Pharmaceuticals* for ruling on the admissibility of expert testimony under North Carolina Rule of Evidence 702. The Court of Appeals held that we have impliedly done so and Arai argues that we should now expressly do so. For the reasons stated below, we reject both of these contentions."
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> " . . . we are not satisfied that the federal approach offers the most workable solution to the intractable challenge of separating reliable expert opinions from their unreliable counterparts, of distinguishing science from pseudoscience, or of

discerning where in this 'twilight zone' a 'scientific principle or discovery crosses the line between the experimental and demonstrable stages.'"

* * *

". . . our challenge is to define a standard of admissibility that does not create more problems than it solves and that does not raise more questions than it answers."

* * *

"One of the most troublesome aspects of the *Daubert* 'gatekeeping' approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion. We have great confidence in the skillfulness of the trial courts of this state. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under *Daubert*."

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" . . . we are concerned that trial courts asserting sweeping pre-trial 'gatekeeping' authority under *Daubert* may unnecessarily encroach upon the constitutionally mandated function of the jury to decide issues of fact and to assess the weight of the evidence."

* * *

" . . . given the serious implications of these concerns, we believe that on balance the North Carolina law . . . establishes a more workable framework for ruling on the admissibility of expert testimony under North Carolina Rule of Evidence 702. Long before *Daubert* was decided, North Carolina had in place a flexible system of assessing the foundational reliability of expert testimony, the practicability of which is evidenced by the case law. Within this system, our trial courts are already vested with broad discretion to limit the admissibility of expert testimony as necessitated by the demands of each case. Requiring a more complicated and demanding rule of law is unnecessary to assist North Carolina trial courts in a procedure which we do not perceive as in need of repair. We therefore expressly reject the federal *Daubert* standard upon which both the trial court and the Court of Appeals erroneously based their respective rulings. North Carolina is not, nor has it ever been, a *Daubert* jurisdiction."

The reasoning and rationale of the highest court in North Carolina are compelling and persuasive. Like North Carolina, Kansas should painstakingly steer clear of the *Daubert* quagmire.

4. Kansas Does Not Need *Daubert* Mini-Trials.

If you are not a judge, lawyer or court worker regularly dealing with civil or criminal trials, you may not have a good appreciation for the burdens on the judiciary that this bill creates and the North Carolina Supreme Court alluded to. Section 4(b) of the bill allows a litigant to request that the court conduct a pretrial hearing to rule on the qualifications of expert witnesses and the admissibility of their testimony.

The reality is that since the *Daubert* case was decided in 1993 a cottage industry has blossomed in the federal courts over *Daubert* issues. The testimony of most expert witnesses is challenged by the opposing party and the federal district judges regularly engage in so-called *Daubert* hearings.

These hearings are typically accompanied by voluminous briefing materials and literally turn into elaborate mini-trials, which can last days or weeks. There are now lawyers who specialize in this exercise. There are also "experts on experts" who specialize in testifying at *Daubert* mini-trials on whether contested expert evidence should be admitted. There are now even providers of legal support services whose business is dedicated to trying to keep track of the ever-increasing accumulation of often divergent *Daubert* decisions, most of which are generated by federal courts. Appeals in the federal system are no less driven and consumed by *Daubert*-related issues.

These *Daubert* proceedings are time-consuming and a monumental drain on everyone's time and resources. It makes little sense to subject our state judges and litigants, and the precious, finite resources of our state courts, to these enormous burdens and expenses. Doing so would fly in the face of the express purpose of the Kansas code of civil procedure "to secure the just, speedy and inexpensive determination of every action or proceeding." See K.S.A. 60-102.

5. <u>The Kansas Judicial Council Previously Rejected *Daubert* for Kansas</u>.

SB 53, which aimed to amend the Kansas evidence code to replace the *Frye* test with the *Daubert* test for determining the admissibility of expert and opinion testimony, was introduced in the 2005 legislative session. In February, 2005 the Senate Judiciary Committee requested the Kansas Judicial Council to study SB 53 and make a recommendation on its merits.

The Judicial Council Civil Code Advisory Committee accepted the assignment, carefully studied the bill, and later unanimously reported:

> The Committee has carefully considered the amendments proposed in 2005 SB 53 and recommends that this legislation not be enacted. There is no evidence of a problem with the application and operation of the current statutes that needs to be solved, and ample evidence that the proposed amendments would instead create significant problems if enacted.

The Judicial Council specifically found that existing rules have “worked well in Kansas for decades, and there is no compelling reason for the proposed amendments;” the legislation “would needlessly impose upon Kansas courts an unacceptable and perhaps insurmountable

burden;" and Kansas juries "are adept at determining the credibility of expert testimony, and it is the jury's constitutionally mandated function to decide fact issues and weigh evidence."

The Judicial Council's analysis of SB 53 was sound in 2005. Nothing has changed in the interim to alter its unequivocal recommendation against the legislation. Similarly, nothing has changed in the interim to make *Daubert* more palatable for Kansas.

The present Kansas rule insures that scientific evidence meets a minimum, acceptable level of reliability without placing an impossible burden on state trial judges and state judicial resources. The Kansas approach is firmly rooted in sound law, balanced and capable of being sensibly and efficiently applied at trial. It has well-served the interests of justice in this and many other states for decades.

The changes mandated by SB 311 are unneeded and unwise. Kansas should stand firm with many other states and refuse to adopt the controversial *Daubert* scheme.

IV. Statutory Limits on Non-Economic Losses Awarded by a Jury (§1)

SB 311 maintains a statutory limit on noneconomic losses that a jury may decide to grant to Kansans. Kansas has had a $250,000 limit or "cap" on noneconomic loss in personal injury cases for over twenty years. "Noneconomic losses" or "noneconomic damages" are the intangible harms caused by a wrongdoer. They are "quality of life" losses someone might experience if they were severely, permanently injured or disfigured. In 2012, the Kansas Supreme Court upheld the constitutionality of the cap in the case, *Miller v. Johnson*. KsAJ respectfully disagreed with the Court's decision in *Miller* because KsAJ members believe that caps impair the constitutional right to trial by jury.

With the Court's holding in *Miller*, the Legislature remains empowered to establish a cap on noneconomic losses. While SB 311 increases the dollar amount of the current cap on noneconomic loss, it does not address many fundamental problems of caps. Instead, SB 311 perpetuates them.

SB 311 is the latest in a long line of legislation attempting to place a cap on noneconomic damages that can be recovered by those harmed by destructive behavior. Like previous legislation, the caps portion of SB 311 is likely unconstitutional, represents a government-imposed solution in search of a problem, and allows negligent defendants to avoid full responsibility for the harm they cause.

The Kansas Senate and Judiciary Committee have a duty to reject bills that are unconstitutional. Under the Kansas Supreme Court's reasoning in *Miller*, SB 311's new cap will likely be struck down as unconstitutional.

In *Miller*, the Court held the Legislature must provide something to injured persons in exchange for limiting the jury's ability to award full damages. In medical negligence cases like *Miller*, the Legislature provided injured persons with a requirement that "health care providers" (defined in statute) maintain liability insurance coverage. For other personal injury cases, the Legislature has not provided injured persons with anything in return.

So that the damage cap passes constitutional scrutiny as established in *Miller*, any new caps legislation must provide all injured persons with something in return for limiting their right to recovery. Changing the dollar amount of the cap appears irrelevant under the ruling in *Miller*.

SB 311's cap is heavy-handed government intrusion into our state's longstanding tradition of dispute resolution by a jury of our peers. Trial by jury represents a most basic Kansas value: Kansas citizens know much better than the government how to resolve our disputes. As a further governmental restriction, SB 311 does not allow jurors to know that a cap exists when considering the facts of a case. Jurors might think they are fully compensating an injured person and holding a wrongdoer fully responsible, only to be told after the trial that a statute limited the jury's authority. A government-imposed cap damages destroys Kansans' right to a full and fair trial by jury and erodes citizen confidence in democracy.

SB 311's cap on damage is a governmental overreach to fix a problem that doesn't exist. Calls for "tort reform" and warnings of an "insurance crisis" are nothing new. They've been bandied about for 30 years and prompted Kansas' current cap on non-economic damages. But just as Kansas' first damage cap did in 1986, SB 311's new, increased cap targets a miniscule portion of our court system's caseload.

- **Personal injury cases are only 1% of all civil and criminal cases in Kansas.** Of the total number of civil and criminal cases filed in Kansas courts in fiscal year 2013, tort cases made up only 1 percent—2,466 tort cases out of 212,440 total cases. *Annual Report of the Courts of Kansas, Fiscal Year 2013, July 1, 2012 –June 30, 2013.*

- **Civil claims overall are declining in Kansas.** From FY 2004 to FY 2013, civil actions, including tort claims, decreased 14.5 percent. *Statistical History of Case Filings by Judicial District, FY 2004-FY 2013.*

Tort claims make up a tiny and decreasing portion of our courts' caseload. The compromises of SB 311 do not merit sacrificing Kansas' traditional values of an independent citizenry and limited government.

Finally, SB 311 conflicts with another basic Kansas value: holding people responsible for their actions. As jurors, Kansas citizens are entrusted with the task of determining responsibility and assessing the economic and noneconomic costs of an injured person's injuries. The jury's duties involve holding wrongdoers responsible for their negligence. SB 311 would negate a jury's decision that a defendant should be fully responsible for the injuries he or she caused. SB 311 allows a defendant to escape his or her responsibility under the law and under a rule that Kansans have always lived by: you fix what you break.

As attorneys who represent people who are hurt by the negligent acts of others and through no fault of their own, we ask you to uphold the traditional Kansas values of allowing citizen juries to resolve disputes and to hold wrongdoers fully responsible for their actions.

On behalf of the members of the Kansas Association for Justice and their clients, I respectfully request that the House Commerce, Labor, & Economic Development Committee oppose SB 311.