

**Testimony before Senate Judiciary Committee
Substitute for House Bill 2106- Trespasser liability
Presented by Eric Stafford, Senior Director of Government Affairs**



Tuesday, March 6, 2012

Mister Chairman and members of the committee:

We appreciate the opportunity to provide testimony in support of Substitute for 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 Sub HB 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 legislative agenda, the Kansas Chamber supports efforts to improve the legal climate in Kansas by reducing incentives for litigation.

The Restatement Third of Torts approved by the American Law Institute (ALI) advocates removal 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. 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.

The reaction from the trial bar to this new Restatement is concerning. In a national magazine, the American Association of Justice called the Restatement a "powerful new tool for trial lawyers." Judges in Kansas and elsewhere often turn to ALI Restatements for guidance in their decisions and could turn to the new Restatement for direction. It is essential that this legislature take the necessary steps to protect land owners, residential and commercial, from being exposed to liabilities which have not existed in our state.

The passage of Sub HB 2106 would secure through statute Kansas' position of not holding property owners responsible for injuries to trespassers, with exceptions as listed in Sub HB 2106.

Thank you for the opportunity to speak in support of Substitute for 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.

H.B. 2106, Trespasser Responsibility Legislation, Protects Longstanding Liability Rules in Kansas

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 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 a model bill that was unanimously adopted by the American Legislative Exchange Council (ALEC) in 2010. State-specific trespasser responsibility laws have been enacted with substantial bipartisan support in Texas, Oklahoma, North Dakota, North Carolina, South Dakota, and Wisconsin.

Why H.B. 2106 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 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.

An example is the Restatement (Second) of Torts § 402A (1965), which helped launch the doctrine of strict products liability. At the time the ALI approved § 402A, California was the only state to recognize strict products liability. Nevertheless, the ALI chose to include it in the Restatement (Second). Within around a decade, the doctrine of strict product liability set forth in § 402A was adopted by most states and generally became the "law of the land." The Kansas Supreme Court adopted § 402A in *Brooks v. Dietz*, 545 P.2d 1104, 1108 (Kan. 1976).

There are numerous other examples where Kansas courts have adopted or relied upon provisions of ALI Restatements for authority in reaching its decisions. For example:

- *Fidelity Bank v. King*, 136 P.3d 465, 468 (Kan. 2006) (“In this statutory vacuum, we look to the Restatement (Third) of Property: Mortgages § 7.4 (1996). . . .”).
- *ARY Jewelers, L.L.C. v. Krigel*, 85 P.3d 1151, 1161 (Kan. 2004) (“When addressing choice of law issues, Kansas appellate courts still follow the Restatement (First) of Conflict of Laws (1934).”).
- *Mahler v. Keenan Real Estate, Inc.*, 876 P.2d 609, 616 (Kan. 1994) (“We find § 552 to be a fair statement of law and persuasive authority, and we adopt the Restatement (Second) of Torts § 552.”).
- *Wilcox v. Gentry*, 867 P.2d 281, 285 (Kan. 1994) (“We adopt Restatement (Second) of Trusts § 155(2) and find it determinative of this issue.”).
- *Williams v. Amoco Prod. Co.*, 734 P.2d 1113, 1123 (Kan. 1987) (“[W]e hereby adopt Sections 519 and 520 of Restatement (Second) of Torts and utilize its provisions...”).
- *Cansler v. State*, 675 P.2d 57, 66 (Kan. 1984) (“We adopt the rule set forth in Restatement (Second) of Torts § 319 (1964) as the law of this state governing the duty of those in charge of persons having dangerous propensities.”).
- *Circle Land & Cattle Corp. v. Amoco Oil Co.*, 657 P.2d 532, 538 (Kan. 1983) (“[W]e adopt Restatement (Second) of Torts § 323 as a correct statement of the law of this state and hold the rule of that section to be applicable to the case now before us.”).
- *North Country Villas Homeowners Ass’n v. Kokenge*, 163 P.3d 1247, 1250 (Kan. App. 2007) (“we adopt Restatement (Third) of Property: Servitudes § 6.21 (1998). . . .”).

The trial bar certainly sees the lawsuit-generating possibilities of the new Restatement’s broad trespasser duty rules. 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 personal injury lawyer magazine 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....” (TRIAL, Apr. 2010).

What H.B. 2106 Would Accomplish

H.B. 2016 would freeze current Kansas law and preempt courts from adopting the radical approach proposed by the new Restatement that would subject landowners to broad new liability. The following is a section-by-section breakdown of the bill:

- **Section 1(a)** provides a standard definition for the term “trespasser.”
 - ✓ See Kansas Pattern Jury Instruction (“PIK- Civil 4th”) 126.01 (“A trespasser is a person who enters or remains upon land in the possession of another without the possessor’s express or implied consent.”); *Mozier v. Parsons*, 887 P.2d 692, 694 (Kan. 1995) (“a trespasser is one who enters on the property of another without any right, lawful authority, or an express or implied invitation or license”) (quoting *Gerchberg v. Loney*, 576 P.2d 593, 596 (Kan. 1978));

Jones v. Hansen, 867 P.2d 303, 306 (Kan. 1994) (same); *Frazee v. St. Louis-San Francisco Ry. Co.*, 549 P.2d 561, 563 (Kan. 1976) (same).

- **Section 1(b)** codifies the longstanding and straight-forward rule that a land possessor owes no duty of care to a trespasser except to refrain from causing willful or wanton injury.

See PIK-Civil 4th 126.21 (“The duty owed by an owner or occupant of premises to trespasser is to refrain from willfully or wantonly injuring (*him*) (*her*).”); *Mozier*, 887 P.2d at 694 (possessor’s duty was merely to refrain from willful or wanton injuring trespasser); *Gerchberg*, 576 P.2d at 596 (same); *see also Jones*, 867 P.2d at 310 (abolishing common law distinctions between the duties owed to invitees and licensees, while retaining the common law rules regarding trespassers generally, because “the status of a trespasser retains significance in our contemporary society.”).

A land possessor may continue to use justifiable force to repel a criminal trespasser.

- **Section 1(c)** codifies current Kansas law which provides that a possessor of real property may be subject to liability to a child trespasser injured by a dangerous artificial condition on the land that the child did not appreciate but was known or should have been known to the possessor. This rule is often referred to as the “attractive nuisance” doctrine.

- ✓ *See* PIK-Civil 4th 126.40 (“A possessor of land that maintains (*an object*) (*a condition*) that causes bodily harm to children who are trespassing on the land is liable for that bodily harm if: (a) the possessor knows, or in the exercise of ordinary care should know, that young children are likely to trespass upon the land, and (b) the possessor knows, or in the exercise of ordinary care should know, that (*the object is on the premises*) (*the condition exists*) and that it involves an unreasonable risk of bodily harm to young children, and (c) the children because of their youth either do not discover the (*object*) (*condition*) or understand the danger involved (*in meddling with it*) (*in coming into the dangerous area*), and (d) one using ordinary care would not have maintained the (*object*) (*condition*) when taking into consideration the usefulness of the (*object*) (*condition*) and whether or not the expense or inconvenience to the defendant in remedying the condition would be slight in comparison to the risk of harm to children.”); *Mozier*, 887 P.2d at 695 (same); *Gerchberg*, 576 P.2d at 596 (same); *Carter v. Skelly Oil Co.*, 382 P.2d 277, 281 (Kan. 1963) (under the attractive nuisance doctrine, “[a] distinction has been made between natural conditions, such as a steep bluff, and artificial conditions created by man.”); *see also* Restatement (Second) of Torts § 339 (1965).

- **Section 2** clarifies that the legislation does not create or increase the liability of any possessor of real property and does not affect any immunities from or defenses to liability established by another section of the Kansas Statutes (e.g., use of land and water recreational areas, Kan. Stat. §§ 58-3201 to 58-3225) or available at common law to which a possessor of real property may be entitled under circumstances not covered by the legislation.