



To: Special Committee on Judiciary

From: Kurt Scott, CEO

Date: October 2, 2019

Re: *Hilburn v Enerpipe, Ltd.*

Kansas Medical Mutual Insurance Company (“KAMMCO”) is pleased to provide testimony about the recent decision by the Kansas Supreme Court in Hilburn v. Enerpipe, LTD., and its potential effect on the medical professional liability insurance market, as well as access to health care, in Kansas.

On June 14, 2019, the Kansas Supreme Court (“the Court”) issued its opinion in Hilburn v. Enerpipe LTD., Opinion No. 112,765. In the Hilburn decision, the Court struck down the statutory Cap on non-economic damages in an automobile personal injury case set forth in K.S.A. 60-19a02 (“the Cap”). Significantly, Hilburn was a “split” decision. That is, four justices (“the Hilburn Court”) ruled the Cap violates the right to trial by jury in Section 5 of the Kansas Constitution Bill of Rights. Section 5 states, “[t]he right of trial by jury shall be inviolate.” One of those four justices wrote his own rationale for joining in the decision. Two justices dissented, *i.e.*, did not agree with the “majority’s” position. One justice did not participate in the decision. Interestingly, in a June 14, 2019, Kansas Courts News Release from the Office of Judicial Administration (attached), the Public Information Director for the Kansas Courts stated that the Court struck down the Cap, “....in personal injury cases other than medical malpractice actions....”

Briefly stated, Section 5 preserves the right to a jury trial in those causes of action that were triable to a jury under the common law that existed when the Kansas Constitution was ratified in 1859. However, as recently as 2012, in Miller v. Johnson, 295 Kan. 636, 289 P.3d 1098 (2012), the Court upheld the application of the Cap to a jury’s award in a medical malpractice lawsuit in spite of plaintiff’s constitutional challenges under Section 5 and Section 18 of the Kansas Constitution Bill of Rights.

The Miller Court applied the *quid pro quo* test in reaching the 2012 decision in analyzing both the challenge under Section 5 and the challenge under Section 18. Under the *quid pro quo* test, the Legislature can modify a common-law right so long as (1) the modification is necessary in the public interest to promote the public welfare; and, (2) the Legislature has substituted an adequate statutory remedy for the modification of the rights at issue. The Miller Court reasoned that the construct of the Kansas Health Care Provider Insurance Availability Act (K.S.A. 40-3401 et seq.), with provisions such as mandatory liability insurance, was an “adequate and viable substitute” for the Cap’s modification of the Section 5 right to trial by jury and the right to remedy under Section 18.

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Hilburn v Enerpipe, Ltd.

The Hilburn Court, in an auto-truck accident case, changed course from its earlier decision in Miller. The Hilburn Court refused to apply the doctrine of “stare decisis.” Under the doctrine of stare decisis, courts use prior rulings as a guide in deciding similar issues that come before the court later. Discounting the applicability of stare decisis, the Hilburn Court ruled that the quid pro quo test did not apply when evaluating Section 5 constitutional challenges to legislation, even though it had arrived at the opposite conclusion in Miller. The Hilburn Court essentially “abandon[ed] the quid pro quo test for analyzing whether the noneconomic damages cap is unconstitutional under Section 5 of the Kansas Constitution Bill of Rights.”

According to the Hilburn Court, the Cap “necessarily infringes on the constitutional right” in Section 5. The Cap substitutes “juries’ factual determinations of actual damages with an across-the-board legislative determination of the maximum conceivable amount of” noneconomic damages. The Hilburn Court stated that “[t]he [C]ap’s effect is to disturb the jury’s finding of fact on the amount of the award. Allowing this substitutes the Legislature’s nonspecific judgment for the jury’s specific judgment. The people deprived the Legislature of that power when they made the right to trial by jury inviolate.”

First in 1986, and again in 1988, the Kansas Legislature enacted caps on non-economic damages in an effort to provide stability and predictability to the medical professional liability environment in Kansas. At the time, testimony indicated that there would be few, if any, physicians able to deliver babies west of Highway 81, absent Legislative relief in the form of tort reform. Caps on non-economic damages are the foundation of those reforms. As a result of passage of caps on non-economic damages, Kansas’ litigation environment went from being in the lowest, or worst, quartile in states to being in the highest and best quartile. In fact, prior to the Hilburn decision, Kansas recently ranked as one of the best states in the nation to practice medicine. Kansas’ litigation environment affects many aspects of healthcare delivery, such as the ability to recruit and retain physicians and the cost of professional liability insurance, all of which contribute to ensuring access to quality healthcare for Kansans. Now, that environment faces some tough questions if the precedents established in numerous court decisions affirming the Cap over the years are, in fact, reversed by Hilburn.

KAMMCO, in concert with the Kansas Medical Society and the Kansas Hospital Association, is studying the Hilburn decision to determine its application to medical malpractice actions and its implications for health delivery and access to quality care for Kansans. The first, and most important question, is whether Hilburn even applies to medical malpractice cases. The Supreme Court’s press release on the day the opinion was issued reported that it did not apply to medical malpractice cases. Additionally, the Miller case was a medical malpractice case in which the Supreme Court found that due to the special statutory scheme associated with medical malpractice, the caps were (and we believe still are) constitutional. Because Hilburn was not a medical malpractice case and Miller was a medical malpractice case, it is KAMMCO’s position that the caps survive for medical malpractice causes of action.

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Even if Hilburn does apply to medical malpractice causes of action, a careful reading of the “majority” opinion raises legal questions which need clarification before a path to fixing the issues created by Hilburn can be addressed by Legislative action in the future. Because Hilburn was decided by a plurality of the court with one additional justice (Justice Stegall), concurring in the decision, deference in interpreting the decision must be given to Justice Stegall’s “concurring” opinion. Without getting too far into the weeds of Justice Stegall’s opinion, KAMMCO believes that language contained in K.S.A. 60-19a02(d), which Justice Stegall found troubling about notice to the jury of the existence of the caps could be “severed” by the Court (an argument that was not made in Hilburn), in which case Justice Stegall may have reached a different conclusion in his concurrence. However, modifying the statute now, before the Court has an opportunity to weigh in on these issues, may create other unintended consequences. Because of this, KAMMCO urges a cautious and deliberate approach much as the Hippocratic Oath directs our member physicians to “first do no harm.”

Again, KAMMCO appreciates the opportunity to provide testimony and input to this Special Committee on Judiciary, and will be actively engaged in finding a solution which protects Kansas patients and ensures access to quality health care to Kansans.

The Kansas Supreme Court released four published decisions today. Links to the decisions follow.

[Access this email online](#)



FOR IMMEDIATE RELEASE

June 14, 2019

Contact:

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The Kansas Supreme Court released the following published decisions today:

[Appeal No. 113,267: Luke Gannon, et al v. State of Kansas](#)

[Archived oral argument video](#)

[Gannon v State case page](#)

The Supreme Court, in the public school finance case of *Gannon v. State*, held the State has shown that the 2019 Legislature's scheduled base aid increases are in substantial compliance with the court's June 25, 2018, mandate. This is the court's seventh decision in the *Gannon* litigation.

In 2018 the court had held that despite legislation enacted in 2017 and 2018, the State still had not met its burden of complying with the adequacy requirements of Article 6, section 6(b) of the Constitution of the people of Kansas. That section obligates the Legislature to "make suitable provision for finance of the educational interests of the state."

But even though the State had not met its burden, the court acknowledged in 2018 the State had expressed an intent to comply with the education adequacy threshold discussed in a 2006 school finance case, *Montoy v. State*. In what it referred to as its "*Montoy* safe harbor" plan, the State reasoned that if it returned to the basic funding formula approved in *Montoy* for school year 2009-10 and fully funded that formula—including accounting for years of inflation—it would again reach a constitutionally adequate funding level.

After careful analysis, the 2018 court accepted the State's *Montoy* safe harbor approach. But it held that to satisfactorily address the remaining concerns with adequacy, the State needed to make timely financial adjustments in response to two specific inflation problems. The court stayed the issuance of the mandate more than one year—until June 30, 2019—or further order of the court for the State to resolve the identified inflation problems with its plan.

In response, the 2019 Legislature passed House Substitute for Senate Bill 16 (S.B. 16) in an effort to cover inflation with additional funding and thus complete its *Montoy* safe harbor remediation plan. On April 6, 2019, Governor Kelly signed S.B. 16 into law. The court today held that through S.B. 16's additional funding of the State's safe harbor plan—specifically the annual increases to base aid in the amount of about \$90 million per year for four years—the State has substantially complied with the court's 2018 mandate. Although holding that S.B. 16's schedule for additional funding substantially complies with the mandate, the court retains jurisdiction to ensure continued implementation of the plan.

[Appeal No. 112,765: Diana K. Hilburn v Enerpipe Ltd.](#)

[Archived oral argument video](#)

The Supreme Court struck down the statutory noneconomic damages cap in personal injury cases other than medical malpractice actions in *Hilburn v. Enerpipe Ltd.*, ruling that the cap violates the right to trial by jury set out in section 5 of the Kansas Constitution Bill of Rights.

A plurality of four justices held in favor of Hilburn, who was injured in a car-truck accident and whose jury award had been reduced by the cap under K.S.A. 60-19a02. The justices agreed that the cap improperly intruded upon the jury's determination of the compensation owed personal injury plaintiffs such as Hilburn to redress their injuries. The language of section 5 states that the right of trial by jury "shall be inviolate."

Justice Carol A. Beier wrote the lead opinion for the plurality. She was joined by Justices Eric S. Rosen and Lee A. Johnson. Justice Caleb Stegall concurred in the plurality judgment and in part of the lead opinion's reasoning. Justices Marla Luckert and Dan Biles dissented. Chief Justice Lawton Nuss did not participate in the decision.

The lead opinion departed from the reasoning of the Supreme Court's 2012 decision in *Miller v. Johnson*, which dealt with a noneconomic damages cap on a medical malpractice jury award. The justices said that the *Miller* application of a specific legal test to analyze section 5 was erroneous. It "overlooked long-standing limitations on the Legislature's power to modify the common law; overestimated the persuasive force of prior Kansas cases; and shortcut the necessary cost-benefit evaluation necessary when examining whether to keep or jettison originally erroneous precedent." Although the plurality acknowledged that it is within the power of the Legislature to modify common law, "what may have been a mere common-law right to jury trial on the day before ratification of section 5 was no longer a mere common-law right from ratification onward."

Justice Stegall's concurrence agreed that the legal test applied to analyze section 5 in *Miller* should be forsaken. He viewed the cap's invasion of the "historic province of the jury to decide a contested matter" as a "close call" but ultimately concluded that the Legislature had run afoul of the plain and original public meaning of section 5.

Justice Luckert, writing for herself and Justice Biles, would have upheld the cap by applying the legal test from *Miller*. In their view, various statutes and regulations

mandating motor carrier liability insurance and K.S.A. 60-19a02 were “reasonably necessary in the public interest to promote the public welfare” and the Legislature had “substituted an adequate statutory remedy for Hilburn's right to have a jury determine her damages.” The dissenters also expressed concern that their colleagues downplayed the consequences of overruling *Miller* and that the decision “upends caselaw addressing jury trial limitations imposed in workers compensation, medical malpractice, no fault insurance, and general tort litigation.”

[Appeal No. 113,472: *State of Kansas v. Robert M. Weber*](#)

[Archived oral argument video](#)

The Supreme Court rejected Weber's challenge of his sentence resulting from a 2007 attempted robbery conviction. Weber claimed the district court improperly considered a 1976 Michigan conviction when sentencing him for the Kansas crime. The court said Weber's sentence was legal at the time it was imposed and more recent Kansas caselaw had not changed that.

[Case No. 115,352: *Kelly Casper v. Kansas Department of Revenue*](#)

[Archived oral argument video](#)

The Kansas Department of Revenue suspended Casper's driving privileges after she was arrested and she refused to take a blood alcohol test. At an administrative hearing, KDOR affirmed the administrative action, concluding that law enforcement had reasonable grounds to believe she was operating a vehicle while under the influence of alcohol and was lawfully in custody. On appeal to the Sedgwick County District Court, the judge disagreed with the conclusion that the arresting officer had reasonable grounds to believe that she had been under the influence of alcohol and reinstated her driving privileges. The Court of Appeals disagreed and held that the district court abused its discretion and based its decision on findings that the evidence did not support. On review of that decision, Justice Eric Rosen, writing for a unanimous Supreme Court, reversed the Court of Appeals. The court noted that appellate courts do not reweigh the evidence and concluded that substantial

evidence supported the district court's factual findings, which, in turn, led to correct legal determinations.

[Kansas Court of Appeals decisions released today](#)

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