KANSAS MEDICAL SOCIETY
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To: Special Committee on Financial Institutions and Insurance

From: Rachelle Colombo
Director of Government Affairs

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Subject: *Hilburn v Enerpipe Ltd*; impact on medical professional liability coverage and access to health care

The Kansas Medical Society appreciates the opportunity to submit the following comments related *Hilburn v Enerpipe Ltd.*, and its impact on medical professional liability coverage and overall access to health care. To properly evaluate the impact of the *Hilburn* decision, it is imperative to first understand the genesis and importance of the cap on non-economic damages and subsequent rulings and legislative efforts to preserve its constitutionality.

History of professional medical liability climate in Kansas
Since 1976, Kansas has had a unique insurance arrangement governing professional liability insurance for physicians, hospitals and several other categories of health care providers. In response to a nearly complete collapse of the private insurance markets caused by a growing medical malpractice crisis in the 1970's, the legislature enacted the health care provider insurance availability act (KSA 40-3401 *et seq*.) which was bolstered by a tort reform package aimed at restoring and improving access to care for Kansans.

The Act created a structure that combined insurance coverage from private markets with a state-operated insurance facility called the Health Care Stabilization Fund (the Fund). Health care providers are required to purchase liability insurance from this structure in order to render professional services in Kansas. The Fund is supported by the insurance premiums paid by the covered health care providers. The Fund serves two very important purposes – providing a source of liability insurance for health care providers, and ensuring that there is a source of recovery for patients who are injured as a result of medical malpractice. This system has worked exceedingly well for four decades, and it has provided tremendous benefit to both patients and providers.

Following the establishment of the Fund and the mandate that all health care providers participate in purchasing professional liability coverage through it, the legislature enacted a cap on non-economic damages in 1988. While the Fund was necessary to ensure that medical malpractice coverage was available, establishment of the cap on non-economic damages was essential in stabilizing the medical malpractice climate. By limiting the non-economic damages through the cap and providing a mechanism for all providers to purchase professional liability insurance, the legislature effectively ensured that Kansas

patients were not denied access to care or protection due to prohibitive malpractice premiums.

While the evolution of our malpractice environment in response to these two legislative actions is evidence of their effectiveness, their combined importance was made pointedly clear when the constitutionality of the cap was challenged and upheld in the medical malpractice case, *Miller v Johnson*.

***Miller v Johnson* and SB 311**

In October 2012 the Kansas Supreme Court in *Miller* upheld the constitutionality of the $250,000 cap on non economic damages which had been in place for 25 years.

With the decision in the *Miller* case, the Court affirmed that the legislature is empowered to adopt changes to the common law so long as it is done for legitimate objectives that are rationally related to those goals, are reasonably necessary for the benefit of the public interest, and so long as it provides an adequate substitute remedy for a right limited.

The Miller Court's opinion could also be read to suggest that the cap's relationship to the insurance structure represented by the Health Care Provider Insurance Availability Act (KSA 40-3401, *et seq*.) and the Health Care Stabilization Fund was an important element in its decision, suggesting that participation in the Fund, because of the explicit "*quid pro quo*," represented by that structure, could be a necessary condition for the application of the cap in the future. That is certainly an important element in the Court's decision in *Miller*.

In 2014, the Kansas Medical Society along with the Kansas Hospital Association, others in the health care community, and the Kansas Chamber, requested legislation to increase the cap on non-economic damages in order to respond to the concerns expressed by the Court in the *Miller* decision – specifically that the cap had not been adjusted upward since its implementation. While non-economic damages (pain and suffering) are by their nature subjective and not able to be measured in strictly financial terms, we felt we needed to be responsive to the Court's suggestion that while the existing cap was constitutional, it needed to be adjusted in order to remain constitutional. SB 311, which increased the cap from $250,000 to $350,000 in three increments over an eight year span, was subsequently enacted and is the reason the cap now sits at $325,000 for non economic damages arising from personal injury claims, including medical malpractice claims.

Hilburn

Even a cursory reading of the Court's response to *Hilburn* yields a number of significant facts. First and foremost, the appeal to overturn the cap on non-economic damages was evaluated differently in this motor vehicle personal injury case than it was by the *Miller*

court when considering that medical malpractice case. The court states plainly that it was "reversing course" from *Miller* in the specific case before it, but stopped short of explicitly overturning their ruling as it pertained to *Miller*.

The apparent basis for their rationale in *Hilburn* rests on different sections of the Kansas constitution than the decision in *Miller.* Specifically, they assert that a strict adherence to section 5 of the constitution which guarantees an inviolate right to trial by jury does not allow for consideration of other sections (i.e Section 18) which were foundational for the *Miller* case.

While most of the majority opinion focuses on arguments pertaining to section 5 and how these arguments distinguish this case from *Miller*, they also indicated in their public summary which was released along with the opinion, that the decision does not affect the cap on noneconomic damages as it pertains to medical malpractice claims.

This leaves a number of questions about how the Court (notably not the same Court that considered either *Miller* or *Hilburn*) will view and apply the cap in medical malpractice cases moving forward. Until such time as the Court explicitly overturns *Miller*, ruling the cap on non economic damages unconstitutional for medical malpractice claims, it is our belief that *Miller* is controlling, and the cap remains in place for medical malpractice.

Depending on subsequent action from the Court, the legislature may receive guidance on which aspects must be preserved, strengthened or discarded to protect the constitutionality of the cap. But, acting in advance of clear direction from the Court could change the calculus for the Court's distinction based on the law as it currently stands.

In light of this, the Kansas Medical Society, in conjunction with KAMMCO and the Kansas Hospital Association is carefully evaluating this decision and particularly, what weight it is given in future actions before recommending a legislative response as it pertains to medical malpractice.

Until such time as it is clear if and what legislative action is needed, it is our continued goal to protect the Fund and the Cap, the cornerstones of the stable malpractice environment that protects access to physicians for patients throughout Kansas.