STATE OF KANSAS
COMPENDIUM OF LAW

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PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements/Prerequisites to Suit

A) **Municipality.** KAN. STAT. ANN. § 12-105b(d) governs the pre-suit notice requirement for claims against a municipality. That section provides that a claimant may not commence a claim until after the municipality notifies the claimant that it has denied the claim, or until after one hundred twenty (120) days has passed since the notice of claim was provided to the municipality, whichever occurs first. Additionally, if a claimant intends to bring suit under the Kansas Tort Claims Act, "a claimant shall have no less than ninety (90) days from the date the claim is denied or deemed denied in which to commence an action," even if this exceeds the statute of limitations under the Code of Civil Procedure.

B) **Medical Malpractice.** Kansas has a "health care stabilization fund," which may provide payment in excess of a health care provider's liability coverage in professional negligence cases brought against health care providers. In any suit brought for professional negligence against a health care provider who is covered by the fund, a claimant must serve the board of governors of the health care stabilization fund by registered mail within ten (10) days of filing the petition. KAN. STAT. ANN. § 40-3409.

C) **Mechanic's lien.** KAN. STAT. ANN. § 60-1103(c) requires pre-suit notice on an owner of the property before filing any action to foreclose on a mechanic's lien. When a mechanic's lien is filed the claimant must either: (1) personally serve an owner of the property with process, (2) serve the lien on an owner of the property by registered mail, or (3) if the owner's address is unknown and cannot be ascertained, post a copy of the lien statement in a conspicuous place on the premises.

D) **Sale of goods.** Kansas has adopted the U.C.C., which requires a buyer who has accepted goods to notify a seller within a reasonable time after discovery of any breach of a contract for the sale of goods. KAN. STAT. ANN. § 84-2-607(3) states:

> [w]here a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and (b) if the claim is one for infringement or the like (subsection (3) of section 84-2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

Relationship to the Federal Rules of Civil Procedure

The Kansas Rules of Civil Procedure begin at KAN. STAT. ANN. § 60-201. The Kansas Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. *Back-Wenzel v.*

Williams, 109 P.3d 1194, 1196 (Kan. 2005). Kansas Courts often look to federal case law interpreting the Rules of Civil Procedure for persuasive guidance. *Id*.

Description of the Organization of the State Court System

A) **Structure.** The Kansas court system consists of three courts: the Supreme Court, the Court of Appeals, and the District Court.

1) **Supreme Court.** The Supreme Court consists of 7 justices. The Supreme Court is the court of last jurisdiction. The justices are nominated by the Supreme Court Nominating Commission, which selects a panel of three which it submits to the Governor. The Governor then appoints one of the three nominees to the Supreme Court. The justices stand for retention election every 6 years.

2) **Court of Appeals.** There is one Court of Appeals, which is an intermediate appellate court. It consists of 14 judges who are appointed by the Governor and approved by the Senate. The Court of Appeals generally sits in panels of 3 judges, but may hear cases *en banc*. The Court of Appeals judges stand for retention election 4 years.

3) **District Courts.** There are 31 District Courts covering 105 counties. The number of counties per District varies by population. The District Courts are trial courts of general jurisdiction. In 17 Districts, district judges are nominated by a judicial nominating commission, which selects two or three nominees to submit to the Governor who then appoints the judge. District judges selected by the merit based system stand for retention election every 4 years. In 14 Districts, district judges are elected in partisan elections for 4 year terms.

Alternative dispute resolution

A) Kansas does not have a comprehensive statewide statute for all methods of alternative dispute resolution.

1) Pursuant to KAN. STAT. ANN. § 5-509(a), "[A] judge may order the parties to the case to participate in a settlement conference or a non-binding dispute resolution process."

Service of Summons

A) **Person.** In-state service on a person is governed by KAN. STAT. ANN. § 60-303. Service may be had by: (1) personal service; (2) residence service, which is leaving a copy of the process and petition, at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing therein; (3) if no person other than a minor or person under disability is at the dwelling, service

may had by leaving a copy of the process and petition, at the defendant's dwelling house or usual place of abode and mailing a notice that such copy has been left at such house or place of abode to the individual by first-class mail.

B) **Corporations, LLCs, Partnerships.** Service of summons upon corporations, limited liability companies and partnerships may be had by:

> (1) by serving an officer, manager, partner or a resident, managing or general agent, or (2) by leaving a copy of the summons and petition at any business office of the defendant with the person having charge thereof, or (3) by serving any agent authorized by appointment or required by law to receive service of process, and if the agent is one authorized by law to receive service and the law so requires, by also mailing a copy to the defendant. KAN. STAT. ANN. § 60-304(e).
>
> If such an entity (other than a partnership) fails to designate or maintain a resident agent in this state, or such a resident agent "cannot with reasonable diligence be found at the registered office in this state,' the secretary of state shall be irrevocably authorized as the agent and representative of the entity. KAN. STAT. ANN. § 60-304(f).

C) **Insurance Companies.** "Service of summons or other process on any insurance company or association, organized under the laws of this [Kansas], may also be made by serving the commissioner of insurance in the same manner as provided for service on foreign insurance companies or associations." KAN. STAT. ANN. § 60-304(g).

D) **Waiver.** A party waives service by "[a]n acknowledgment of service on the summons is equivalent to service. The voluntary appearance by a defendant is equivalent to service as of the date of appearance." KAN. STAT. ANN. § 60-303(e).

E) **Jurisdiction.** The Kansas long-arm statute is KAN. STAT. ANN. § 60-308(b)(1). It lists the specific acts that will subject a person to jurisdiction in Kansas with respect to causes of action arising from the doing of any of those acts. Additionally, a person who has substantial, continuous and systematic contact with Kansas may be subject to jurisdiction in Kansas for acts that occur outside the state. KAN. STAT. ANN. § 60-308(b)(2).

Statutes of Limitations

A) **Tort Claims.** In general tort claims must be brought within 2 years after the cause of action accrued. KAN. STAT. ANN. § 60-513(a). The following actions must be brought within two years.

1) Trespass upon real property.

2) Actions for taking, detaining or injuring personal property, including actions for the specific recovery thereof.

3) Fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.

4) Personal injury.

5) Wrongful death.

6) Professional negligence by a health care provider, not arising on contract.

B) **Inception.** Tort claims generally accrue when the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until sometime after the initial act, or becomes reasonably ascertainable to the injured party. KAN. STAT. ANN. § 60-513(b).

C) **Statute of Repose**. Kansas has a general 10 year statute of repose for tort actions. KAN. STAT. ANN. § 60-513(b). The statute of repose for professional negligence of health care providers is 4 years. KAN. STAT. ANN. § 60-513(c). The statute of repose for negligence actions by corporations against officers and directors if five years. KAN. STAT. ANN. § 60-513(d). The statute of repose for non-negligence actions by corporations against officers and directors is ten years. *Id.*

D) **Oral contracts.** Actions upon oral contracts must be brought within three (3) years after the cause of action accrued. KAN. STAT. ANN. § 60-512.

E) **Written contracts.** Actions upon a written contract, agreement, or promise shall be brought within five (5) years after the cause of action accrued. KAN. STAT. ANN. § 60-511.

F) **Statutory liability.** Actions upon a liability created by a statute other than a penalty or forfeiture shall be brought within three (3) years after the cause of action accrued. KAN. STAT. ANN. § 60-512.

G) **Others.** An action for relief, other than the recovery of real property, not specifically addressed by statute, shall be brought within five (5) years after the cause of action accrued. KAN. STAT. ANN. § 60-511.

H) **Tolling.** If a person is less than 18 years of age, incapacitated, or imprisoned, the statute of limitations is tolled until such disability is removed. An action must then be brought within 1 year after the removal of the disability. However, no action may be brought more than eight years after the time of the act giving rise to the cause of action. KAN. STAT. ANN. § 60-515(a).

Venue Rules

A) Venue in Kansas is governed by KAN. STAT. ANN. §§ 60-601 to -614.

B) **Actions against Kansas residents.** Venue in an action against residents of Kansas is governed by KAN. STAT. ANN. § 60-603. Unless venue is otherwise specifically prescribed by law, an action may be brought in the county:

1) In which the defendant resides, or
2) In which the plaintiff resides if the defendant is served therein, or
3) In which the cause of action arose, or
4) In which the defendant has a place of business or of employment if said defendant is served therein, or
5) In which the estate of a deceased person is being probated if such deceased person was jointly liable with the defendant and a demand to enforce such liability has been duly exhibited in the probate proceedings, or
6) In which there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with [KAN. STAT. ANN. §] 60-1005 at the time of the filing of the action.

C) **Domestic corporation.** Venue in an action against a domestic corporation, or against a foreign corporation which is qualified to do business in this state is prescribed in KAN. STAT. ANN. § 60-604. Unless venue is otherwise specifically prescribed by law, an action may be brought in the county in which:

1) Its registered office is located;
2) The cause of action arose;
3) The defendant is transacting business at the time of the filing of the petition, if the plaintiff is a resident of such county at the time the cause of action arose;
4) There is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with [KAN. STAT. ANN. §] 60-1005 and amendments thereto at the time of the filing of the action; or
5) Equipment or facilities for use in the supply of transportation services, or communication services, including, without limitation, telephonic communication services, are located, where the subject of such action relates to transportation services or communication services supplied or rendered, in whole or in part, using such equipment or facilities.

D) **Non-Residents**. Actions against nonresidents of Kansas, or against corporations not qualified to do business in Kansas may be brought in any county where:

1) The plaintiff resides; or if the plaintiff is a corporation, in the county of its registered office or in which it maintains a place of business; or if the plaintiff is a partnership, either general or limited, in the county of the residence of a partner, in the county of the registered office of a corporate partner or in the county in which the partnership maintains a place of business;
2) the defendant is served;
3) the cause of action arose;
4) the defendant is transacting business at the time of the filing of the petition;
5) there is property of the defendant, or debts owing to the defendant;
6) there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with K.S.A. 60-1005 and amendments thereto at the time of the filing of the action; or
7) equipment or facilities for use in the supply of transportation services, or communication services, including, without limitation, telephonic communication services, are located where the subject of such action relates to transportation services or communication services supplied or rendered, in whole or in part, using such equipment or facilities.

KAN. STAT. ANN. § 60-605.

E) ***Forum non conveniens.*** The Kansas Supreme Court has adopted the reasoning of the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) regarding *forum non conveniens.* Kansas courts have the discretion to decline jurisdiction based upon *forum non conveniens.* However, the power "should be exercised only in exceptional circumstances and when an adequate showing has been made that the interests of justice require a trial in a more convenient forum." *Gonzales v. Atchison T. & S. F. Ry. Co.* 371 P.2d 193, 199 (1962).

NEGLIGENCE

Comparative Negligence

A) If more than one party is responsible for an accident, comparative negligence allows a jury to apportion fault among those responsible for the accident, including those who are not parties to the litigation. This determines that amount of compensation to which the Plaintiff will be entitled,.

B) **Contributory negligence.** Kansas Courts define contributory negligence as "conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is the legally contributing cause, compared with the negligence of the defendant, in bringing about the plaintiff's harm. *Simmons v. Porter,* 312 P.3d 345, 351 (Kan. 2013) (quoting *Guerra v. Jaeger*, 204 Kan. 309, 313 (Kan. 1969)).

C) **Modified comparative fault.** Comparative fault can be assessed against both parties and non-parties. There is no joint and several liability. As such, a defendant is responsible only for the percentage of fault assessed against to it by the fact finder. Additionally, in order to recover any damages against a defendant, a plaintiff's fault must be less than the causal negligence of the party or parties against whom a claim is made. KAN. STAT. ANN. § 60-258a(a). This is sometimes referred to as the 49% rule. However, a party to the suit must request a comparing of the relative fault of non-parties. *Glenn v. Fleming*, 732 P.2d 750, 756 (Kan. 1987).

D) **Affirmative defense.** The plaintiff's contributory negligence must be pleaded as an affirmative defense, and the defendant has the burden of proving comparative negligence. KAN. STAT. ANN. § 60-208(c); *Horton v. Atchison, T. & S. F. Ry. Co.*, 168 P.2d 928, 939 (Kan. 1946). Negligence is required to "be proved by substantial competent evidence." *Yount v. Deibert*, 147 P.3d 1065, 1070 (Kan. 2006) (internal citations omitted).

1) **Strict liability.** Comparative negligence is applicable in strict liability cases. *Forsythe v. Coats Co., Inc.*, 639 P.2d 43, 44 (Kan. 1982).

E) Kansas Courts have also held that "the common-law assumption of risk doctrine is restricted to cases involving employer-employee relationships." *Tuley v. Kan. City Power & Light Co.*, 843 P.2d 248, 252 (Kan. 1992).(quoting *Smith v. Blakely, Administrator,* 213 Kan.91, 101 (Kan. 1973)).

Exclusive Remedy --Workers' Compensation Protections

A) In Kansas, workers' compensation protections are governed by the Kansas Workers' Compensation Act, which is codified at KAN. STAT. ANN. §§ 44-501 to -565.

B) KAN. STAT. ANN. § 44-508(f) sets forth the framework under which an injury is deemed to arise out of and in the course and scope of employment. It provides that an injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. Moreover, an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include: (i) injury which occurred as a result of the natural aging process or by the normal activities of day-

to-day living; (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character; (iii) accident or injury which arose out of a risk personal to the worker; or (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

An injury shall be deemed to arise out of employment only if: (i) there is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Repetitive Trauma. KAN. STAT. ANN. § 44-508(f)(2)(A) states that injury by injury by repetitive trauma shall be deemed to arise out of employment only if: (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life; (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

C) **Preexisting Injury**. Under the Workers' Compensation Act, an award of compensation for permanent partial impairment, work disability, or permanent total disability shall be reduced by the amount of functional impairment determined to be preexisting. Any such

reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

D) **Exclusivity.** The Workers' Compensation Act provides that a covered worker's remedy under the Act is exclusive. KAN. STAT. ANN. § 44–501(b). If the worker experiences a "personal injury by accident arising out of and in the course of employment," KAN. STAT. ANN. § 44–501(a), then the Act applies, and no separate civil suit in tort against the employer is permitted. K.S.A. 44–501(b). Under the exclusive remedy provision, "it is well established that a worker who recovers benefits for an on-the-job injury from an employer under the Act cannot maintain a civil action for damages against the employer or against a fellow employee." *Scott v. Hughes*, 132 P.3d 889, 893 (Kan. 2006).

Burden. If a party asserts in a civil action that the Workers' Compensation Act is the exclusive remedy, the "burden of proving employment falls" upon the employer as an affirmative defense. *Orr v. Holiday Inns, Inc.*, 627 P.2d 1193, 1195 (Kan. Ct. App. 1981).

Exception. Despite the "exclusive remedy" provision, an employee may bring a common law cause of action against the employer if the employer intentionally assaults the employee. *Stapp v. Overnite Transp. Co.*, 995 F. Supp. 1207, 1216 (D. Kan. 1998).

E) **Dual capacity doctrine.** Under the "dual capacity doctrine," "an employer who is generally immune from tort liability to an employee injured in a work-related accident may become liable to his employee as a third-party tortfeasor if he occupies, in addition to his capacity as an employer, a second capacity that confers upon him obligations independent of those imposed upon him as an employer. It is in this second capacity that liability to an employee may be imposed." *Kimzey v. Interpace Corp., Inc.*, 694 P.2d 907, 910 (Kan. Ct. App. 1985). However, it is limited to exceptional situations where the employer-employee relationship is not involved because the employer is acting as a second persona unrelated to his status as an employer, that confers upon him obligations independent of those imposed upon him as an employer. *Id*. at 912.

F) **Lien.** Under KAN. STAT. ANN. § 44-504, the employer and/or workers' compensation carrier that pays benefits to an employee has a lien on any recovery or settlement the employee makes against a negligent third party tortfeasor. The employer or workers' compensation carrier also has a right to bring suit based on the same circumstances against the negligent third party. The intent of K.S.A. 44–504(b) is two-fold: (1) to preserve injured workers' claims against third-party tortfeasors and (2) to prevent double recoveries by injured workers. *Loucks v. Gallagher Woodsmall, Inc.*, 272 Kan. 710, 715, 35 P.3d 782, 785 (Kan. 2001) (citing *Wishon v. Crossman*, 991 P.2d 415 (Kan. 1999)).

Indemnification

A) KAN. STAT. ANN. § 60-214(a) allows a defendant to bring a third-party petition against any person, not already a party to the action, who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The same is true of a plaintiff who is named is named as a defendant in a counterclaim.

B) **Comparative implied indemnity.** If a settlement has been made for all liability arising from an occurrence before a comparative negligence action has been filed, the settling tortfeasor may file an action against other tortfeasors seeking to have the damages apportioned among the tortfeasors.

Joint and Several Liability

A) Kansas does not have Joint and Several Liability. Rather, in Kansas, each defendant is responsible only for that defendant's percentage of fault.

B) A defendant may seek to compare the fault of non-parties to the action, including defendants who have already settled. *McCart v. Muir*, 641 P.2d 384, 388 (Kan. 1982).

Strict Liability

A) **Products liability.** The Kansas Product Liability Act is contained in KAN. STAT. ANN. §§ 60-3301 to -3308.

B) Kansas courts recognize strict liability under the following theories:

1) Unreasonably dangerous products, *Jenkins v. Amchem Products, Inc.*, 886 P.2d 869, 886 (Kan. 1994); and

2) Ultra hazardous activities or abnormally dangerous activities, *Pullen v. West*, 92 P.3d 584, 591 (Kan. 2004). Kansas has adopted Sections 519 and 520 of the RESTATEMENT (SECOND) OF TORTS to determine strict liability in tort for abnormally dangerous activities. *Williams v. Amoco Prod. Co.*, 734 P.2d 1113, 1123 (Kan. 1987).

C) **Abnormally dangerous.** In determining whether an activity is abnormally dangerous, the following factors are to be considered:

1) Existence of a high degree of risk of some harm to the person, land or chattels of others;
2) Likelihood that the harm that results from it will be great;
3) Inability to eliminate the risk by the exercise of reasonable care;
4) Extent to which the activity is not a matter of common usage;

5) Inappropriateness of the activity to the place where it is carried on; and
6) Extent to which its value to the community is outweighed by its dangerous attributes.

Williams, 734 P.2d at 1122.

D) **Defects.** KAN. STAT. ANN. § 60-3306(a) states:

> A product seller shall not be subject to liability in a product liability claim arising from an alleged defect in a product, if the product seller establishes that:
>
> 1) Such seller had no knowledge of the defect;
> 2) Such seller in the performance of any duties the seller performed, or was required to perform, could not have discovered the defect while exercising reasonable care;
> 3) The seller was not a manufacturer of the defective product or product component;
> 4) The manufacturer of the defective product or product component is subject to service of process either under the laws of the state of Kansas or the domicile of the person making the product liability claim; and
> 5) Any judgment against the manufacturer obtained by the person making the product liability claim would be reasonably certain of being satisfied.

E) **Participation in abnormally dangerous activity.** Under Kansas law, strict liability is not an available remedy for a person who participated in an abnormally dangerous activity. *Pullen v. West*, 92 P.3d 584, 593 (Kan. 2004) (stating "[w]hile [plaintiff] is not completely barred from recovery based on his participation in an abnormally dangerous activity, he is unable to obtain the benefit of the doctrine of strict liability because he participated in the abnormally dangerous activity").

F) **Unavoidably unsafe products.** Kansas follows the RESTATEMENT (SECOND) OF TORTS § 402A view regarding "unavoidably unsafe products" in that an unavoidably unsafe product, "when properly prepared [] and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous." This must be raised as an affirmative defense. *Jenkins v. Amchem Products, Inc.*, 886 P.2d 869, 887 (Kan. 1994).

G) **Learned intermediary doctrine.** The learned intermediary doctrine is followed in Kansas, specifically that "[t]he ethical drug manufacturer is . . . subject to a duty to warn the medical profession[al] of untoward effects which the manufacturer knows, or has reason to know, are inherent in the use of its drug." *Wooderson v. Ortho Pharm. Corp.*,

681 P.2d 1038, 1051 (Kan. 1984). Thus, drug manufacturers have no duty to directly warn consumers of these effects or risks.

Willful and Wanton Conduct

In order to recover punitive damages, a plaintiff must prove to the trier of fact, by clear and convincing evidence, that the defendant acted with willful or wanton conduct, fraud or malice. *Reeves v. Carlson*, 969 P.2d 252, 255 (Kan. 1998). Wanton conduct is an act performed with a realization of the imminence of danger and a reckless disregard or complete indifference to the probable consequences of the act. *Id*. at 256. A wanton act is more than ordinary negligence but less than a willful act. *Id*. It is established "by the mental attitude of the wrongdoer rather than by . . . particular negligent acts." *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244 (10th Cir. 2009) (quoting *Robinson v. State*, 43 P.3d 821, 824 (Kan. Ct. App. 2002)).

DISCOVERY

Electronic Discovery Rules

KAN. STAT. ANN. § 60-226 (b)(1) sets forth the general scope of discovery. Specifically, absent a court order, the parties may obtain discovery regarding any non-privileged matter that is relevant to the subject matter involved in the action, whether it relates to any party's claim or defense, including the existence, description, nature, custody, condition and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to discovery of admissible evidence.

KAN. STAT. ANN. § 60-226 (b)(2)(B) provides that a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or costs. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause. The court may specify conditions for the discovery.

KAN. STAT. ANN. § 60-234(a)(1)(A) provides that a party may serve on any other party a request to produce any designated documents or electronically stored information, including images and other data compilations, stored in any medium from which information can be obtained either directly, or if necessary, after translation by the responding party into a reasonably useable form. Requests for production may specify the form in which electronically stored information is produced. KAN. STAT. ANN. § 60-234(b)(1)(C).

When responding to a request for production, the party may state an objection to a requested form for producing electronically stored information. If the responding party objects

to a requested form, or if no form was specified in the request, the party must state the form or forms it intends to use. K.S.A. 60-234(b)(2)(D).

When producing electronically stored information, the party must produce it in a form in which it is ordinarily maintained or any reasonable form, if the request does not specify a form. Additionally, a party does not need to produce the same electronically stored information in more than one form. KAN. STAT. ANN. § 60-234(b)(2)(E).

Pursuant to KAN. STAT. ANN. § 60-234(c), non-parties may be compelled to produce electronically stored information.

Expert Witnesses

A) Expert witnesses are governed by KAN. STAT. ANN. §§ 60-456 to -458. KAN. STAT. ANN. § 60-456(b) provides:

> If scientific, technical or specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is based on the product of reliable principals and methods; and (3) the witnesses reliably applied the principals and methods to the facts of the case.

B) **Disclosures.** Under K.S.A. § 60-226(b)(6), parties shall disclose the identity of any expert witnesses who may be used at trial to present expert testimony. This disclosure should include (unless otherwise directed by the Court) "the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." KAN. STAT. ANN. § 60-226(b)(6)(B).

Non-Party Discovery

A) Subpoenas are governed by KAN. STAT. ANN. § 60-245. The statute provides that every subpoena issued by court must be issued by the clerk under the seal of the court or by a judge. The court must issue a subpoena, signed but otherwise in blank to a party that requests it. The blank subpoena must bear the seal of the court and the clerk's signature. The party to whom a blank subpoena is issued must fill it in before service. Every subpoena must command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information or tangible things in that persons possession, custody or control; or permit the inspection of premises.

B) **Deposition.** "A subpoena for attendance at a deposition shall issue from the district court in which the action is pending or the officer before whom the deposition is to be taken or, if the deposition is to be taken outside the state, from an officer authorized by the law of the other state to issue the subpoena." KAN. STAT. ANN. § 60-245(a)(2)(B).

C) **Service.** Service of a subpoena within the state of Kansas shall be made in accordance with K.S.A. § 60-303, which regulates standards for service of process. If the person's appearance is commanded, the subpoena shall be served with fees for one day's attendance and the mileage allowed by law. KAN. STAT. ANN. § 60-245(b).

D) **Time and geographical restrictions.** Upon a timely motion by a person upon whom a subpoena has been served, the court shall quash or modify a subpoena if it fails to allow reasonable time for compliance, or if it causes a person to travel over 100 miles. KAN. STAT. ANN. § 60-245(c)(3)(A)(i–ii).

1) **Exception.** However, if

> the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

KAN. STAT. ANN. § 60-245(c)(3)(C).

E) **Depositions for use in foreign jurisdictions**. KAN. STAT. ANN. § 60-228a is Kansas' version of The Uniform Interstate Depositions and Discovery Act. KAN. STAT. ANN. § 60-228a(c) provides that:

> (1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state and pay the docket fee as required by K.S.A. 60-2001, and amendments thereto. A request for the issuance of a subpoena in this state under this act does not constitute an appearance in the courts of this state.
>
> (2) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, must:
> (A) Promptly issue a subpoena for service on the person to which the foreign subpoena is directed; and
> (B) assign the subpoena a case file number and enter it on the docket as a civil action pursuant to K.S.A. 60-2601, and amendments thereto.

(3) A subpoena under subsection (c)(2) must:

(A) Incorporate the terms used in the foreign subpoena; and

(B) contain or be accompanied by the names, addresses and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

It is necessary to consult the Local Rules of the District in which the person to be subpoenaed resides and is to be served. Some Districts have notification requirements and a waiting period from the date of the issuance of the subpoena to the date of the deposition to allow opposing parties to file any motions regarding the deposition.

Privileges

A) **Attorney-client privilege.** This privilege is governed by KAN. STAT. ANN. § 60-426(a), which provides:

> Communications found by the judge to have been between lawyer and his or her client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (1) if he or she is the witness to refuse to disclose any such communication, and (2) to prevent his or her lawyer from disclosing it, and (3) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated by the client, or (iii) as a result of a breach of the lawyer-client relationship. The privilege may be claimed by the client in person or by his or her lawyer, or if an incapacitated person, by either his or her guardian or conservator, or if deceased, by his or her personal representative.

If documents otherwise discoverable are withheld from production, the court may require a privilege log. *Cypress Media, Inc. v. City of Overland Park*, 997 P.2d 681, 694 (Kan. 2000); KAN. STAT. ANN. § 60-226(b)(7).

1) **Exceptions.** Five exceptions to the rule are listed in KAN. STAT. ANN. § 60-426(b).

B) **Work product doctrine.** KAN. STAT. ANN. § 60-226(b)(4) provides that ordinarily a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer or agent. "[A] party shall not require a deponent to produce, or submit for inspection, any writing prepared by, or under

the supervision of, an attorney in preparation for trial." However, the work product rule is not an absolute privilege but rather is a limitation on discovery. *Alseike v. Miller*, 412 P.2d 1007, 1016 (Kan. 1966). "The work product limitation on discovery may be overcome by a showing of undue hardship" under K.S.A. § 60-226(b)(1). *Wichita Eagle & Beacon Pub. Co., Inc. v. Simmons*, 274 Kan. 194, 50 P.3d 66, 84 (Kan. 2002).

1) **Insurance.** "The initial investigation of a potential claim made by an insurance company prior to the commencement of litigation, and not requested by or made under the guidance of counsel, is made in the ordinary course of business of the insurance company, and not 'in anticipation of litigation or for trial'" is discoverable. *Henry Enterprises., Inc. v. Smith*, 592 P.2d 915, 921 (Kan. 1979).

C) **Self-critical analysis.** Also known as the "Self-Critical Analysis Privilege." On this topic, the Kansas Supreme Court has held as follows:

> [i]n *Berst*, we stated four conditions necessary to establish a qualified privilege against disclosure of confidential communications: 1) the communications must originate in a confidence they will not be disclosed; (2) the element of confidentiality must be essential to the maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury caused by disclosure must be greater than the benefit gained for the correct disposal of litigation.

Kan. Gas & Elec. v. Eye, 789 P.2d 1161, 1167 (Kan. 1990) (internal quotations omitted).

D) **Other privileges.** Kansas statutes provide for several other forms of privileged communications, including:

1) K.S.A. § 60-427: physician-patient privilege;
2) K.S.A. § 60-428: marital privilege, confidential communications;
3) K.S.A. § 60-429: penitential communication privilege;
4) K.S.A. § 60-430: religious belief;
5) K.S.A. § 60-431: political vote;
6) K.S.A. § 60-432: trade secret;
7) K.S.A. § 60-433: secret of state;
8) K.S.A. § 60-434: official information;
9) K.S.A. § 60-435: communication to grand jury;
10) K.S.A. § 60-436: identity of informer.

Requests to Admit

KAN. STAT. ANN. § 60-236 governs requests to admit. A party may propound requests to admit upon a party for purposes of the pending action only. *Id.* Requests to admit must relate to: (a)

Facts, the application of law to fact or opinions about either; and (b) the genuineness of any described documents. A matter is admitted unless an answer or objection is served upon the propounding party within thirty days of the service of the requests. *Id*.

Unique State Issues

A) For the purposes of the Statute of Limitations, an action is commenced at the time the petition is filed, if service of process is obtained within ninety days after the petition is filed. The court may extend this period an additional thirty days upon the showing of good cause. KAN. STAT. ANN. § 60-203(a).

B) Punitive damages may only be added by leave of court an in an amended petition. *See "Punitive Damages" Section*.

C) Kansas allows the jury to assess fault against non-parties. *See "Comparative Negligence" Section.*

D) An insurance or company claim file is discoverable unless it is prepared at the direction of counsel in anticipation of the commencement of a lawsuit. *See "Privileges" Section*.

EVIDENCE, PROOF & TRIAL ISSUES

Accident Reconstruction

KAN. STAT. ANN. § 60-456(b), (d) govern the admission of expert testimony:

> (b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case.
>
> (d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact."
>
> "Expert opinion testimony is admissible if it will be of special help to the jury on technical subjects [with] which the jury is not familiar or if such testimony [will] assist the jury in arriving at a reasonable factual conclusion from the evidence." *Sterba v. Jay,* 816 P.2d 379, 388 (Kan. 1991). "The basis for the admission of expert testimony is *necessity,* arising out of the particular circumstances of the case." *Falls v. Scott*, 815 P.2d 1104, 1111–12 (Kan. 1991)

(Emphasis added). "[If] the normal experience and qualifications of jurors permit them to draw proper conclusions from [the] given facts and circumstances, expert conclusions or opinions are not necessary." Sterba, 816 P.2d at 389.

Although the Kansas Supreme Court does allow the testimony of accident reconstructionists as expert witnesses, the Court has observed that the opinions of experts may be helpful to a court or jury in motor vehicle cases *particularly where there are no eyewitnesses to a collision and* that such opinions must be based on reasonably accurate data available at the scene. Lollis v. Superior Sales Co., Inc., 224 Kan. 251, 258 (1978) (emphasis added).

Appeal

A) To Court of Appeals as a matter of right:

(1) *Appeal to court of appeals as matter of right.* Except for any order or final decision of a district magistrate judge who is not regularly admitted to practice law in Kansas, the appellate jurisdiction of the court of appeals may be invoked by appeal as a matter of right from:

(a) An order that discharges, vacates or modifies a provisional remedy.

(b) An order that grants, continues, modifies, refuses or dissolves an injunction, or an order that grants or refuses relief in the form of mandamus, quo warranto or habeas corpus.

(c) An order that appoints a receiver or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or an order involving the tax or revenue laws, the title to real estate, the constitution of this state or the constitution, laws or treaties of the United States.

(d) A final decision in any action, except in an action where a direct appeal to the supreme court is required by law. In any appeal or cross appeal from a final decision, any act or ruling from the beginning of the proceedings shall be reviewable.

KAN. STAT. ANN. § 60-2102(a).

B) To Supreme Court as matter of right:

(1) *Appeal to supreme court as matter of right.* The appellate jurisdiction of the supreme court may be invoked by appeal as a matter of right from:

(a) A preliminary or final decision in which a statute of this state has been held unconstitutional as a violation of Article 6 of the constitution of the state of Kansas pursuant to K.S.A. 72-64b03, and amendments thereto. Any appeal filed pursuant to this

> subsection (b)(1) shall be filed within 30 days of the date the preliminary or final decision is filed.
>
> (b) A final decision of the district court in any action challenging the constitutionality of or arising out of any provision of the Kansas expanded lottery act, any lottery gaming facility management contract or any racetrack gaming facility management contract entered into pursuant to the Kansas expanded lottery act.

KAN. STAT. ANN. § 60-2102(b).

C) Permissive Appeals

> (1) *Other appeals.* When a district judge, or a district magistrate judge who is regularly admitted to practice law in Kansas, in making in a civil action an order not otherwise appealable under this section, is of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the judge shall so state in writing in such order. The court of appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within 14 days after the entry of the order under such terms and conditions as the supreme court fixes by rule. Application for an appeal pursuant to this subsection shall not stay proceedings in the district court unless the judge of the district court or an appellate court or a judge thereof so orders.

KAN. STAT. ANN. § 60-2102(c).

D) Notice of Appeal

A party may appeal from a judgment by filing with the clerk of the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this chapter, or when no remedy is specified, for such action as the appellate court having jurisdiction over the appeal deems appropriate, which may include dismissal of the appeal. If the record on appeal has not been filed with the appellate court, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in the district court, or that court may dismiss the appeal upon motion and notice by the appellant.
The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from, and shall name the appellate court to which the appeal is taken. The appealing party shall cause notice of the appeal to be served upon all other parties to the judgment as provided in K.S.A. § 60-205, and amendments thereto, but such party's failure so to do does not affect the validity of the appeal.

KAN. STAT. ANN. § 60-213(a), (b).

Collateral Source Rule

The collateral source rule permits an injured party to recover full compensatory damages from a tortfeasor irrespective of the payment of any element of those damages by a source independent of the tortfeasor. The rule also precludes admission of evidence of benefits paid by a collateral source, except where such evidence clearly carries probative value on an issue not inherently related to measurement of damages. *Wentling v. Medical Anesthesia Services*, 701 P.2d 939, 949 (Kan. 1985) (internal citations omitted).

The collateral source rule in Kansas, which is consistent with the Restatement (Second) of Torts § 920A, is stated as follows:

"At common law, the collateral source rule prevented the jury from hearing evidence of payments made to an injured person by a source *independent of the tortfeasor* as a result of the occurrence upon which the personal injury action is based. The court has stated the rule as follows: 'Under the "collateral source rule," 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.' *Farley v. Engelken,* 241 Kan. 663, Syl. ¶ 1, 740 P.2d 1058 (1987). (Emphasis added.)" *Rose v. Via Christi Health Sys., Inc.*, 113 P.3d 241, 245–246 (Kan.2005) (quoting *Thompson v. KFB Ins. Co.*, 850 P.2d 773 (1993)).

Convictions

According to KAN. STAT. ANN. § 60-420, which is subject to KAN. STAT. ANN. §§ 60-421, -422, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence concerning any conduct by him or her and any other matter relevant upon the issues of credibility.

KAN. STAT. ANN. § 60-421 states that evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his or her credibility. If the witness be the accused in a criminal proceeding, no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility.

KAN. STAT. ANN. § 60-422 addresses the credibility of a witness for purposes of the admissibility of his/her testimony. As affecting the credibility of a witness (a) in examining the witness as to a statement made by him or her in writing inconsistent with any part of his or her testimony it shall not be necessary to show or read to the witness any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; (b) extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him or her an opportunity to identify, explain or deny the statement; (c) evidence of traits of his or her character other than honesty or

veracity or their opposites, shall be inadmissible; (d) evidence of specific instances of his or her conduct relevant only as tending to prove a trait of his or her character, shall be inadmissible.

Day in the Life Videos

There is no rule with regard to the admissibility of day in the life videos. Rather, it is necessary to rely on KAN. STAT. ANN. § 60-445, which states:

Except as in this article otherwise provided, the judge may in his or her discretion exclude evidence if he or she finds that its probative value is substantially outweighed by the risk that its admission will unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

Dead Man's Statute

"A witness may testify as to conversations between a decedent and a third person." *In re Estate of Carrell*, 327 P.2d 883, 886 (Kan. 1958).

Medical Bills

In *Martinez v. Milburn Enters, Inc.*, 233 P.3d 205 (Kan. 2010)., the Kansas Supreme Court held that the:

> (1) collateral source rule did not bar evidence of the amount originally billed by the health care provider for plaintiff's medical treatment or the reduced amount accepted by the provider in full satisfaction of the amount billed;
> (2) reasonable value of medical services was a question for the jury; and
> (3) evidence of the amount billed and the reduced amount accepted in full satisfaction were relevant to prove the reasonable value of medical treatment.

"Evidence relevant to determining the reasonable value of an injured plaintiff's medical expenses may include the amount actually billed by the health care provider. The evidence may also include write-offs or other acknowledgments that something less than the charged amount has satisfied, or will satisfy, the amount billed. Accordingly, neither the amount billed nor the amount actually accepted after a write-off conclusively establishes the reasonable value of medical services." *Id.* at Syl. ¶ 6.

"When a finder of fact is determining the reasonable value of medical services, the collateral source rule bars admission of evidence stating that the expenses were paid by a collateral source. However, the rule does not address, much less bar, the admission of evidence indicating that something less than the charged amount has satisfied, or will satisfy, the amount billed." *Id.* at Syl. ¶ 7.

Medicare

The Supreme Court concluded that under the facts of *Rose v. Via Christi Health Sys., Inc./St. Francis Campus*, "specifically where the Medicare provider, Via Christi, is the defendant and also the health care provider of the services which form the basis of the economic damages claim, the trial court did not err in allowing a setoff or credit against the portion of the economic loss attributable to medical expenses in the amount of the Medicare write off, an amount not paid by the plaintiff, Medicare, or any third party, and which reflected a cost incurred by the defendant." *Rose v. Via Christi Health Sys., Inc.,* 113 P.3d 241, 248 (Kan. 2005).

Medicaid

Evidence regarding medical bills at trial is limited to the actual amounts paid by Medicaid after the write-offs. An injured plaintiff cannot apply the collateral source rule to include in a claim for economic damages amounts that have been written off by the health care provider in conjunction with a Medicaid contract. "The appropriate measure of damages is the amount actually paid by Medicaid on the injured plaintiff's behalf." *Bates v. Hogg*, 921 P.2d 249, Syl. ¶ 5 (Kan. Ct. App. 1996) (overruled on other grounds).

Offers of Judgment

(b) *Offer of judgment.* At any time more than 21 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against such party for the money or property or to the effect specified in such party's offer, with costs then accrued. If within 14 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time prior to the commencement of proceedings to determine the amount or extent of liability.

KAN. STAT. ANN. § 60-2002(b).

Prior Accidents

"In a civil case, the admission of evidence of prior acts or occurrences is committed to the sound discretion of the trial court and will be overturned on appeal only upon a showing of abuse. The admission of such evidence will always carry a potential for prejudice. Where the prior accident

evidence was admitted to prove foreseeability, exact similarity of prior accidents with the accident in question is not necessary as long as the prior accident was one which would have warned the defendant."

Folks v. Kan. Power & Light Co., 755 P.2d 1319, 1328 (Kan. 1988) (overruled on other grounds).

Evidence of prior accidents to prove foreseeability must involve substantially the same circumstances as the case at issue. *Powers v. Kansas Power & Light Co.*, 671 P.2d 491, 499 (Kan. 1983) (internal citations omitted).

Relationship to the Federal Rules of Evidence

The Kansas rules of evidence follow closely the Uniform Rules of Evidence, promulgated by the National Conference of Commissioners on Uniform State Laws in 1953. However, Kansas was the only state that adopted the 1953 Uniform Rules, and the Uniform Commissioners rescinded its approval of them and promulgated a superseding set of Uniform Rules of Evidence in 1974. The 1974 Uniform Rules are nearly identical to the Federal Rules of Evidence, enacted by Congress and effective in 1975. Some thirty-five states have now essentially adopted the 1974 Uniform Rules. Kansas remains the only state adhering to the 1953 Uniform Rules.

Seat Belt and Helmet Use Admissibility

Evidence of failure of any person to use a safety belt shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages. KAN. STAT. ANN. § 8-2504(c).

(a) No person under the age of 18 years shall operate or ride upon a motorcycle or a motorized bicycle, unless wearing a helmet which complies with minimum guidelines established by the national highway traffic safety administration pursuant to the national traffic and motor vehicle safety act of 1966 for helmets designed for use by motorcyclists and other motor vehicle users.

(b) No person shall allow or permit any person under the age of 18 years to: (1) Operate a motorcycle or motorized bicycle or to ride as a passenger upon a motorcycle or motorized bicycle without being in compliance with the provisions of subsection (a); or (2) operate a motorcycle or to ride as a passenger upon a motorcycle without being in compliance with the provisions of subsection (c).

(c) (1) No person shall operate a motorcycle unless such person is wearing an eye-protective device which shall consist of protective glasses, goggles or transparent face shields which are shatter proof and impact resistant, except when the motorcycle is equipped with a windscreen which has a minimum height of 10 inches measured from the center of the handlebars.

(2) No person under the age of 18 years shall ride as a passenger on a motorcycle unless such person is wearing an eye-protective device which shall consist of protective glasses, goggles or transparent face shields which are shatter proof and impact resistant.

KAN. STAT. ANN. § 8-1598.

Spoliation

In addressing whether Kansas would recognize a common law tort for spoliation of evidence, the Kansas Supreme Court held that held that in absence of an independent tort, contract, agreement, voluntary assumption of duty or special relationship of the parties, tort of intentional interference with prospective civil action by spoliation of evidence would not be recognized. *Koplin v. Rosel Well Perforators, Inc.*, 734 P.2d 1177 (Kan. 1987).

Subsequent Remedial Conduct

When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.

KAN. STAT. ANN. § 60-451.

Use of Photographs

"Photographs which illustrate the nature and extent of the wounds sustained by the [plaintiff] . . . are admissible in evidence, even though they may be gruesome." *Merando v. Atchison, T & S.F. Ry. Co.*, 656 P.2d 154, 160 (Kan. 1982) (internal citations omitted).

The question of admissibility of photographic evidence rests within the sound discretion of the trial judge. *Landrum v. Taylor*, 535 P.2d 406, 412 (Kan. 1975). Generally, before a photograph may be admitted into evidence its accuracy or correctness must be proved. The verification of a photograph preliminary to its admission contemplates proof that it accurately represents the person, place or thing photographed.

DAMAGES

Caps on Damages

A) **Personal injury.** There are certain statutory caps on damages in Kansas that limit the recovery available in particular causes of action. Pursuant to KAN. STAT. ANN. § 60-19a02(b), "[i]n any personal injury action, the total amount recoverable by each party from all defendants for all claims for non-economic loss shall not exceed a sum total of: (1) $250,000 for causes of action accruing on or after July 1, 1988, and before July 1,

2014; (2) $300,000 for causes of action accruing on or after July 1, 2014, and before July 1, 2018; (3) $325,000 for causes of action accruing on or after July 1, 2018, and before July 1, 2022; or (4) $350,000 for causes of action accruing on or after July 1, 2022."

KAN. STAT. ANN. § 60-1903(a) contains a similar limitation for wrongful death actions, limiting a plaintiff's non-pecuniary losses to $250,000 and costs.

Calculation of Damages

A) **Personal injury.** A personal injury plaintiff is entitled to the amount of money that will reasonably compensate his or her injuries and losses resulting from the occurrence in question. KANSAS PATTERN INSTRUCTIONS, § 171.02 (2015). Compensation may include:

1) **Medical Expenses.** Medical expenses include the reasonable expenses of necessary medical care, hospitalization and treatment received as a result of plaintiff's injuries to date (and the medical expenses plaintiff is reasonably expected to incur in the future) [reduced to present value]. PIK Civ. 4th 171.02.

2) **Economic loss.** Economic loss includes loss of time or income and losses other than medical expenses incurred as a result of a plaintiff's injuries to date (and the economic loss plaintiff is reasonably expected to incur in the future) [reduced to present value]. *Id.*

3) **Non-economic loss.** Non-economic loss includes pain, suffering, disabilities, disfigurement and any accompanying mental anguish suffered as a result of plaintiff's injuries to date (and the noneconomic loss plaintiff is reasonably expected to suffer in the future) [reduced to present value]. *Id.* Wherever a plaintiff establishes they suffered an injury and more than minimal discomfort resulted, the plaintiff is entitled to compensation for pain and suffering. Calculating non-economic damages rests in the sound discretion of the fact finder. *Id.*

When determining the amount of a plaintiff's damages, the fact finder considers the plaintiff's age, health and the nature, extent and duration of the injuries involved. *Id.*

B) **Wrongful death.** In an action for the wrongful death of a spouse, three potential types of damages exist: the expenses for the care of the deceased, economic damages and non-economic damages. ***Economic damages*** include: (1) loss of marital care, attention, advice, counsel, or protection; (2) loss of earnings the finder of fact determines the deceased would have provided; (3) expenses for the care of the deceased caused by the injury; and (4) reasonable funeral expenses. ***Non-economic damages*** include: (1) mental anguish, suffering, or bereavement; and (2) loss of society, loss of comfort, or loss of companionship. PIK Civ. 4th 171.30.

Expenses for the care of the deceased which resulted from the wrongful act may also be recovered by any one of the heirs who paid or became liable for them where no probate administration for the estate of the deceased has been commenced. KAN. STAT. ANN. § 60-1904(b). Those expenses and any amount recovered for funeral expenses are not included in the $250,000 limitation in KAN. STAT. ANN. § 60-1903.

Lost Opportunity Doctrine

A) **Generally.** Where a patient fails to survive and the loss suffered is the lost chance of surviving a preexisting injury or illness or at least a lost chance of a substantial increase in the length of such survival, "lost opportunity" or "loss of chance" damages may be available. Such damages are available in two types of actions in Kansas: where the chance lost was a "better recovery" and where the chance lost was "survival." The choice of which of these two types of action applies depends upon whether or not the plaintiff survived the alleged wrongdoing.

B) **Test.** The lost opportunity doctrine test in Kansas provides that:

> "[t]he 'loss of chance' rule is an exception to the normal requirement of proving causation." . . . the 'loss of chance' cause of action applies when a doctor's negligence eliminates or substantially reduces a patient's chance of survival. The court held that the substantial factor test rather than the but for test is the proper test for causation."

Donnini v. Ouano, 810 P.2d 1163, 1167 (Kan. Ct. App. 1991) (internal citations omitted). The "substantial" chance referred to above "is one which is capable of being estimated, weighed, judged or recognized by a reasonable mind… a "substantial factor" must be distinguished from a factor which had a merely negligible effect. PIK Civ. 4th 123.21, 123.22.

It is important to note that where the jury finds a patient would have had a greater than fifty percent chance of surviving had he received proper medical treatment, traditional negligence rules apply, not the loss of chance rule. *Donnini,* 810 P.2d at 1163, Syl. ¶ 4.

Mitigation

A) **Generally.** Where physically injury results from the fault of another, a plaintiff has a duty to prevent any loss which could have been prevented by his or her reasonable care and diligence after the alleged loss occurred. *Merrick v. Mo.-Kan.-Tex. R.R. Co.*, 42 P.2d 950, 953 (Kan. 1935); PIK Civ. 4th 171.42.

B) **Limitation.** While generally one must use reasonable diligence to mitigate one's damages once a risk is known, one is not required to anticipate negligence and guard

against damages which might ensue if such negligence should occur. *Hampton v. State Highway Comm'n*, 498 P.2d 236, 249 (Kan. 1972) (internal citations omitted). "The duty to mitigate damages is not an unlimited one; an injured party is bound only to exert reasonable efforts to avoid damage; his duty is limited by the rules of common sense." *Steele v. J. I. Case Co.*, 419 P.2d 902, 911 (Kan. 1966) (internal citations omitted).

Punitive Damages

A) **Burden.** In any action seeking punitive damages, plaintiff "shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice." KAN. STAT. ANN. § 60-3702(c).

B) **Requirements.** A punitive damage award is incident to and dependent upon an independent cause of action. *Smith v. Printup*, 866 P.2d 985, 992 (1993); *Golconda Screw, Inc. v. West Bottoms Ltd.*, 894 P.2d 260 (Kan. Ct. App. 1995). In Kansas, no petition may include a claim for punitive damages. Instead, a plaintiff seeking punitive damages must petition the Court to file an amended pleading that includes a claim for punitive damages. KAN. STAT. ANN. § 60-3703. This motion must be filed before the pre-trial conference or sufficiently in advance of trial to avoid prejudice to the defendant. *Id.; Gates v. Goodyear*, 155 P.3d 1196, 1201 (Kan. 2007). The motion must also demonstrate through affidavits that there is a probability that the plaintiff will prevail on the claim for punitive damages. KAN. STAT. ANN. § 60-3703.

C) **Factors.** At a proceeding to determine the amount of exemplary or punitive damages, the court may consider:

1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
2) The degree of the defendant's awareness of that likelihood;
3) The profitability of the defendant's misconduct;
4) The duration of the misconduct and any intentional concealment of it;
5) The attitude and conduct of the defendant upon discovery of the misconduct;
6) The financial condition of the defendant; and
7) The total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected.

KAN. STAT. ANN. § 60-3702(b).

D) **Limitations.** Generally, punitive damages cannot exceed the lesser of (1) the annual gross income earned by the defendant; or (2) five million dollars. KAN. STAT. ANN. § 60-3701(e). However, if a court finds the profitability of the defendant's misconduct exceeds these caps, the court may award one-and-one-half times the profit the defendant is expected to gain as a result of their misdeed. KAN. STAT. ANN. § 60-3701(f).

E) **Separate proceedings.** By statute, Kansas law requires that a separate proceeding be held by the Court to determine the amount of punitive damages to be awarded if the trier of fact determines that punitive damages should be awarded. KAN. STAT. ANN. § 60-3701(a).

F) **Wrongful Death.** Kansas Courts have held that because the wrongful death cause of action is purely a creature of statute, the only damages available are those expressly allowed by the wrongful death statute, i.e. compensatory damages. *Smith v. Printup*, 866 P.2d 985, 999 (1993). Punitive damages are not recoverable in a wrongful death action, but are recoverable in a survival action. *Id.*

H) **Due process.** Whether an award of punitive damages violates due process depends on: (1) the degree of reprehensibility of defendant's conduct; (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases. *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 442–43 (Kan. 2006) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

Judgment Interest

A) **Pre-judgment interest.** In Kansas, pre-judgment interest is generally allowable on liquidated claims. *Blair Const., Inc. v. McBeth*, 44 P.3d 1244, 1251 (2002) (internal citations omitted). A claim is liquidated when both the amount due and the date on which such amount is due are fixed and certain or are definitely ascertainable by mathematical calculation. *Id.* A good-faith controversy as to whether the party is liable for the money does not preclude a grant of prejudgment interest. *Id.*

B) **Post-judgment interest.** Post-judgment interest is available on all Kansas judgments. KAN. STAT. ANN. § 16-204. Through June 30, 2017, the applicable judgment rate is 5%.

Recovery of Attorneys' Fees

A) **Requirements.** Attorneys' fees are not recoverable unless authorized by statute or agreement of the parties. *University of Kansas v. Sinks*, 2009 WL 3191707 (U.S. Dist. Kan. 2009); *Dickinson, Inc. v. Balcor Income Props. Ltd--II*, 745 P.2d 1120, 1123 (Kan. Ct. App. 1987) (internal citations omitted).

B) **Standard of review.** The trial court's discretion has discretion to determine the amount of attorneys' fees to be awarded and will only be reversed if no reasonable person would have taken the same position as the trial court. *Evans v. Provident Life & Acc. Ins. Co.*, 815 P.2d 550, 561 (Kan. 1991).

Settlement Involving Minors

When a minor has a representative, the representative may sue or defend on behalf of the minor or incapacitated person. If a minor does not have a duly appointed representative the minor may sue by the minor's next friend or by a guardian ad litem. KAN. STAT. ANN. § 60-217(c).

Taxation of Costs

A) Generally, costs shall be allowed to the party in whose favor judgment is rendered unless otherwise ordered. KAN. STAT. ANN. § 60-2002(a). Taxable items include (1) docket fees; (2) service fees; (3) publication charges for service of process; (4) statutory and mileage fees for witnesses; (5) deposition reporter fees; (6) any postage used for service of process; (7) alternative dispute resolution fees; (8) convenience charge fees; and (9) other charges statutes authorize. KAN. STAT. ANN. § 60-2003.

Expert testimony

A qualified expert is entitled to express his or her opinion as to damages. The factors on which that opinion is based go only to the weight of the testimony and not to its admissibility. The testimony should be stricken only if the factors used by the expert go beyond his or her knowledge and expertise. *Marshall v. Heartland Park Topeka*, 49 P.3d 501, 505 (Kan. 2002) (quoting *Horsch v. Terminix Int'l Co.*, 865 P.2d 1044 (Kan. Ct. App. 1993)).

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or

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