Name of Preparer:
James C. Morrow
Firm:
Morrow Willnauer Klosterman Church LLC
City and State of Firm:
Kansas City, Missouri

Overview of the State of Kansas Court System

A. Trial Courts

1) District Court (Courts of General Jurisdiction)

a) Kansas District Courts are created by the Kansas Constitution and are divided into 31 districts; one for each county. See K.S.A. § 20-301. They are the trial courts of Kansas, with general original jurisdiction over all civil and criminal cases, including divorces and other domestic relations, damage suits, probate and administration of estates, guardianships, conservatorships, care of the mentally ill, juvenile matters, and small claims. Some districts have magistrate judges, who may or may not be lawyers, and whose jurisdiction is limited.

(1) Jury trials available except in small claims. Pursuant to K.S.A. § 60-247, there shall be 12 jurors in civil cases.

(2) Small claims courts maintain jurisdiction over claims up to $4,000. K.S.A. § 61-2703.

2) Municipal Courts (Courts of Limited Jurisdiction)

a) Municipal courts hear violations of city ordinances committed within the city limits. These cases usually involve traffic and other minor offenses. The judge hears the case without a jury. Anyone convicted in municipal court may appeal to the district court of the county in which the municipal court is located.

3) Arbitration

a) Because arbitration is highly favored, Kansas courts tend to read arbitration clauses liberally in favor of mandatory arbitration. However, under Kansas law, there can be no mandatory arbitration of an action sounding in tort. *See Williams v. Alumni Ass'n of Univ. of KS*, 189 P.3d. 580, (Kan.App. 2008).

B. Appellate Courts

1) Court of Appeals

The Kansas Court of Appeals is located in Topeka at the Kansas Judicial Center and is an intermediate appellate court. The Court of Appeals hears all appeals from orders of the state Corporation Commission, and all appeals from the district courts in both civil and criminal cases except those which may be appealed directly to the Supreme Court. See K.S.A. § 60-2102.

The Court of Appeals may hear appeals en banc, but the court usually sits in panels of three. The Court of Appeals may sit anywhere in the state as caseloads dictate. Hearings are scheduled regularly in Kansas City, Wichita, and Topeka. They also may be conducted in other cities as caseloads warrant to save time and money of litigants and their attorneys traveling to a regular hearing venue.

2) Supreme Court

The Kansas Supreme Court sits in Topeka in the Judicial Center and is the state court of last resort. See K.S.A. § 20-101, et seq. The Court is composed of seven justices. It hears direct appeals from the district courts in the most serious criminal cases and appeals in any case in which a Kansas statute has been held unconstitutional. It may review cases decided by the Court of Appeals and may transfer cases from that court to the Supreme Court. It also has original jurisdiction in several types of cases.

The Supreme Court, by constitutional mandate, has general administrative authority over all Kansas courts. Its rules govern appellate practice in the Supreme Court and Court of Appeals and procedures in the district court. Supreme Court rules also provide for the examination and admission of attorneys, set forth the code of professional responsibility, which governs the conduct of attorneys, and include the canons of judicial ethics which government the conduct of judges. Rules also provide for the examination and certification of court reporters.

All of the nonjudicial employees of the Kansas courts are under a personnel plan adopted and administered by the Supreme Court. Personnel and payroll records of all court employees throughout the state are maintained in the Office of Judicial Administration, the Court's administrative arm. The Supreme Court adopts and submits to the Kansas Legislature an annual budget for the entire judicial branch of state government.

3) Appellate Procedure

Appellate procedure is governed by K.S.A. § 60-2103. When appeal is permitted, the time within which an appeal may be taken shall be 30 days from the entry of judgment. § 60-2103(a). If an appellant seeks a stay of enforcement of judgment, the supersedeas bond shall be set at the full amount of the judgment unless the

appellant can prove that such a bond would result in undue hardship in which case the court can reduce the bond according to the provisions of K.S.A. § 60-2103(d)(2A).

Procedural

A. Venue

1) Real Property

K.S.A. § 60-601 provides the venue rules applicable to actions concerning real property. Eminent domain actions must be brought in the county in which the real estate is situated. § 60-601(a). The following actions also must be brought in the county in which the real estate is situated: (1) actions in ejectment; (2) actions for partition; (3) actions concerning the sale of real estate; (4) actions for specific performance of a real estate contract. § 60-601(b).

2) Actions Against Kansas Residents

Actions against a Kansas resident may be brought in the county: (1) in which the defendant resides; (2) in which the plaintiff resides if the defendant is served therein; (3) in which the cause of action arose; (4) in which the defendant has business or employment if defendant is served therein; (5) in which the estate of a deceased person is being probated if such deceased person was jointly liable with the defendant; and (6) in which there is located tangible personal property which is the subject of the action if the plaintiff is seeking immediate possession thereof. K.S.A. § 60-603.

3) Actions Against Corporations

An action against a corporation 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 the petition is filed, if the plaintiff is a resident of the county at the time the cause of action arose; (4) there is located tangible personal property which is the subject of the suit and the plaintiff is seeking immediate possession; (5) there is located equipment or facilities for use in the supply of transportation or communication services. K.S.A. § 60-604.

4) Actions Against Nonresidents and Nonqualified Corporations

The venue rules applicable to nonresidents and corporations not qualified to do business in Kansas mirror the venue rules applicable to actions against corporations, except that a plaintiff may file suit in the county in which the plaintiff resides. K.S.A. § 60-605.

5) Actions Against Common Carrier or Transportation System

Any action against a common carrier or transportation system may be brought in any county through which the defendant regularly operates. K.S.A. § 60-606(a). Cases for personal injury shall be brought in the county in which the injury occurred or in the county in which the plaintiff resided at the time of injury. § 60-606(b).

6) Actions Against Multiple Parties

If there are several plaintiffs and venue is determined by the residence of one of them, such plaintiff's claim must be a substantial part of the action. K.S.A. § 60-608.

B. Statute of Limitations

The following statutes of limitations are set forth in K.S.A. §§ 60-510, et seq.

Libel/Slander	1 yr
Personal Injury	2 yrs
Property Damage	2 yrs
Wrongful Death	2 yrs
Fraud	2 yrs
Written Contract	3 yrs
Oral Contract	3 yrs
Contract Under Seal	3 yrs
Breach of Warranty	3 yrs
Workers' Comp.	200 days

C. Time for Filing An Answer

Pursuant to K.S.A. § 60-212, an answer must be served within 21 days of service of a petition or not less than 41 days from the date of publication.

D. Dismissal Re-Filing of Suit

1) Voluntary Dismissal

Pursuant to K.S.A. § 60-241(a), a plaintiff may dismiss an action without a court order by filing: (1) notice of dismissal before the opposing party serves either an answer or motion for summary judgment; or (2) a stipulation of dismissal is signed by all parties who have appeared. Unless the notice states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal or state action including the same claim, a notice of dismissal operates as an adjudication on the merits. Any other action may be dismissed at the plaintiff's request only by court order.

2) Involuntary dismissal

A defendant may move to dismiss the action or claim against it where the plaintiff fails to prosecute or timely comply with a court order or the Kansas Rules of Civil Procedure. K.S.A. § 60-241(b).

3) Savings Statute

If any action is commenced within the applicable statute of limitations, and the plaintiff fails in such action otherwise than upon the merits, and the statute of limitations has expired, the plaintiff may commence a new action within six months after such failure. K.S.A. § 60-518.

Liability

A. Negligence

1) Common Law Negligence

Negligence consists of the following elements: a duty owed to the plaintiff, breach of that duty, that the breach of duty was the proximate cause of the plaintiff's injury, and that the plaintiff suffered damages. *P.W. v. Kansas Dept. of SRS*, 255 Kan. 827, 831, 877 P.2d 430 (1994).

The applicable standard of care is that which an ordinary person would exercise under all the circumstances. Under Kansas law, the duty owed by an occupier of land no longer depends on the status of the entrant; rather, the duty owed by the occupier of land is one of reasonable care under all the circumstances. *Jones v. Hansen,* 254 Kan. 499, 510, 867 P.2d 303 (1994). It is a generally recognized rule in Kansas that in the absence of a special relationship, a person has no duty to control the conduct of a third person to prevent harm to others. *See South ex rel. South v. McCarter*, 280 Kan. 85, 119 P.3d 1 (Kan. 2005).

"Proximate cause is that cause which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the injury would not have occurred, the injury being the natural and probable consequence of the wrongful act." *Davey v. Hedden,* 260 Kan. 413, 426, 920 P.2d 420 (1996).

2) Comparative Negligence

Comparative negligence is governed by K.S.A. § 60-258(a). Kansas recognizes a modified comparative fault system. This system has often been referred to as the "50 percent rule" because if a plaintiff is found to be 50 percent or more at fault, she cannot recover against the defendant(s). Thus, a plaintiff cannot recover unless her fault is determined to be 49 percent or less.

3) Negligence Per Se

For violation of a statute to establish negligence per se, the plaintiff must show that an individual cause of action for injury arising out of the violation was intended by the drafters. *Kerns ex rel. Kerns v. G.A.C., Inc.,* 255 Kan. 264 (1994). Whether a private right of action exists under a statute is a question of law. Courts generally will not infer a private cause of action where a statute provides criminal penalties but does not mention civil liability.

B. Negligence Defenses

1) Partial Comparative Negligence

Kansas adheres to the 49 percent system of determining comparative negligence. Under the Kansas statute, the plaintiff may recovery a percentage of his damages only if his fault was less than the defendant's fault. K.S.A. § 60-258(a).

2) Implied Assumption of Risk

Implied assumption of risk as a complete defense is limited in Kansas to cases involving an employer-employee relationship. *Smith v. Massey-Ferguson, Inc.,* 256 Kan. 90 (1994). All other situations are analyzed as comparative negligence.

3) One-Action Rule

The one-action rule bars lawsuits between joint tortfeasors when: (1) an injured party has previously sued one tortfeasor, but not others, (2) that tortfeasor has settled with the injured party, (3) the injured party has given a full release of all claims held by it, and (4) the settling tortfeasor claims the other tortfeasors caused all or part of the injured party's damages. *Dodge City Implement, Inc. v. Bd. of County Comm'rs*, 288 Kan. 619, 637 (2009). In other words, all negligent parties must be joined in one action. A tortfeasor cannot settle with the plaintiff and then file a second suit seeking to apportion liability among additional parties that were not involved in the original suit.

C. Gross Negligence, Recklessness, Willful and Wanton Conduct

Gross negligence or reckless conduct is something more than ordinary negligence but less than willful injury. "To constitute wantonness the act must indicate a realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act." *Vaughn v. Murray,* 214 Kan. 456, 460, 521 P.2d 262 (1974).

D. Negligent Hiring and Retention

In Kansas, in order to prevail in a claim of negligent retention and supervision the plaintiff must show that the employer had reason to believe that an undue risk of harm to others would exist as a result of the employment of the alleged tortfeasor. *Kan. State Bank & Trust v. Specialized Transp. Servs.,* 249 Kan. 348 (1991). The employer is subject to liability only for such harm as is within that risk. If, therefore, the risk exists because of the quality of the employee, there is liability only to the extent that the harm is caused by the quality of the employee that the employer had reason to believe would be likely to cause harm. *Id.* However, it is not necessary that the precise nature of the injury alleged by the third-party plaintiff would have been foreseen by the employer. *Id.* Whether risk of harm is reasonably foreseeable is a question to be determined by the trier of fact.

E. Negligent Entrustment

A claim of negligent entrustment is based upon knowingly entrusting, lending, permitting, furnishing, or supplying an automobile to an incompetent or habitually careless driver. *Barber v. Rhoades,* 799 P.2d 1051 (Kan. App. 1990). An incompetent driver is one who, by reason of age, experience, physical or mental condition, or known habits of recklessness, is incapable of operating a vehicle with ordinary care. *Id.*

The liability of a defendant in a negligent entrustment case is not based upon the negligence of the driver. *Id.* The question involved is whether the defendant, or entrustor, knew or should have known he was entrusting his vehicle to an incompetent or habitually careless driver. *Id.*

F. Dram Shop

No redress exists under Kansas common law against persons selling or furnishing liquor when injuries or damages occur due to the acts of intoxicated persons. Furthermore, because Kansas does not have a dram shop act, Kansas does not recognize a civil cause of action in favor of those injured as a result of a violation of the liquor laws. See *Ling v. Jan's Liquors,* 237 Kan. 629 (1985).

G. Joint and Several Liability

Kansas' Comparative Fault statute effectively abolished contribution among joint tort-feasors and replaced it with proportionate liability. K.S.A. § 60-258a(d). Indemnification, on the other hand, still exists in a limited context. Contractual indemnification, both under express and implied theories, is a viable claim. However, the traditional concept of indemnification based on the dichotomy of active/passive negligence is no longer available. See *Nolde v. Hamm Asphalt, Inc.*, 202 F.Supp 2d 1257 (D. Kan. 2002).

However, joint and several liability is retained for intentional tortfeasors. *Sieben v. Sieben*, 231 Kan. 372 (1982).

H. Wrongful Death and/or Survival Actions

1) Wrongful Death Statutes

Wrongful death actions in Kansas are governed by K.S.A. § 60-1901 et seq. A wrongful death action can be maintained by any one of the heirs at law of the deceased. K.S.A. § 60-1902. (See below for damages in cases of wrongful death).

2) Joint Causes–Substantial Factor Test

Kansas uses the substantial factor test to allow a cause of action for "loss of chance" in a wrongful death action. A patient with a 50% or less chance of survival before medical treatment can recover if the doctor's malpractice substantially reduces the patient's chance of survival. *Pipe v. Hamilton*, 274 Kan. 905 (2002)(loss of 10% chance of survival sufficient to withstand summary judgment).

3) Survival of Tort Actions

In Kansas, tort actions for personal injury, injury to real or personal property, and fraud survive the death of either the plaintiff or defendant. K.S.A. § 60-7801. However, actions for libel, slander, malicious prosecution, and nuisance abate on the death of either party. K.S.A. § 60-1802.

4) Prenatal Injuries

A wrongful death action may be maintained in Kansas against a defendant whose negligence injured a viable fetus, causing it to be stillborn. *Hale v. Manion,* 189 Kan. 143 (1962).

I. Vicarious Liability

1) Agency

Kansas courts have consistently held the mere ownership of an automobile will not support an agency, and will not support liability. See *Felix v. Turner Unified Sch. Dist. No. 202,* 22 Kan. App. 2d 849 (1996). The rule in Kansas is that there is no "general presumption or assumption that one in possession of another's vehicle is the servant, employee or agent of the owner and acting for the owner." *Id.* The burden of establishing the agency is on the party asserting it, and

therefore, to recover, the plaintiff is required to offer some evidence of the defendant's responsibility for the driver's negligence. *Id.*

2) Respondeat Superior

Respondeat superior imposes vicarious liability on the employer for the negligent driving of the employee. *Id.* Under the doctrine of respondeat superior, the employer's liability is based on the acts of an agent or employee. *Id.*

3) Independent Contractors

Respondeat superior liability does not apply in the case of an independent contractor. In contrast to an "employee," an "independent contractor" is one who contracts to do certain work according to his own methods, without being subject to the control of his employer, except as to the result of his work. *Brillhart v. Sheier,* 243 Kan. 591, 593 (1988). An independent contractor therefore represents the will of his employer only in the result, and not as to the means in which it is accomplished. *Id.* Thus, one who hires such an individual is not liable for that party's negligence. *Id.*

4) Employer Liability for Tortious Acts of Employee

An employer is liable for the tortious acts of an employee only under special circumstances. *Smith v. Printup,* 254 Kan. 315, 336 (1993). Special circumstances exist when the employee is on the employer's premises, performing work for the employer, or using the employer's chattel; when the employer voluntarily assumes a duty to control the employee; or when the employer negligently retains a known incompetent or unfit employee. *Id.*

5) Parent for Child

By statute in Kansas, parents are liable for up to $5,000 in actual damages for any willful and malicious personal injury or damage to property by their minor children. If the injury or damage is the result of parental neglect, the $5,000 limit does not apply. Recovery for bodily injury is limited to actual medical expenses. K.S.A. § 38-120. Parental liability will be imposed when both the act and its harmful result were intended.

6) Automobile Owner for Driver

Kansas has never adopted the family car doctrine. See *Hartley v. Fisher,* 1 Kan. App. 2d 362, 364 (1977). Therefore, liability for a car accident does not attach to the owner of the car from the mere fact of ownership so as to impute the negligence of the driver to the owner as a matter of law. *Id.*

However, an owner of a vehicle who knowingly permits a minor under the age of

sixteen to drive on the highway is jointly and severally liable with the minor for damages caused by the minor's negligence. K.S.A. § 8-222.

J. Exclusivity of Workers' Compensation

1) Exclusive Remedy

An employer's liability for injury to an employee is limited exclusively to recovery under the Kansas Workers Compensation Act. K.S.A. § 44-501. The exclusive remedy provision of § 44-501(b) precludes an injured employee from maintaining a civil action against the employer. However, an employee can still bring an action against and recover damages from a negligent third party under K.S.A. § 44-504(a).

2) Co-employee Immunity

In Kansas, mere co-employee status is not sufficient for immunity. *Servantez v. Shelton,* 32 Kan. App. 2d 305, 309 (2004). There must be some connection between a defendant's acts and his employment for immunity to attach. *Id.* The test to determine whether immunity applies is whether the co-employee would have been entitled to receive compensation had he been injured in the same accident. *Id.* Relevant factors include whether the co-employee was performing work that was forbidden, whether the co-employee was on the company premises, and whether the co-employee's actions were specifically related to his job duties. See *id.* However, any activity undertaken by the co-employee in good faith to advance the employer's interest is generally within the course of employment, and will entitle the co-employee to immunity. *Hoover v. Ehrsam Co.,* 218 Kan. 662, 666 (1976).

Damages

A. Statutory Caps on Damages

1) Personal Injury

Kansas imposes a cap of $250,000 on damages for noneconomic loss, such as pain and suffering; the cap does not apply to damages for economic loss. K.S.A. § 60-19a02.

2) Punitive Damages

By statute, punitive damages generally may not exceed the defendant's highest annual gross income during the past five years or $5 million, whichever is the lesser amount. K.S.A. § 60-3701(e).

3) State Governments and Municipalities–The Kansas Tort Claims Act

Under the Kansas Tort Claims Act, governmental liability is limited to $500,000 per occurrence except where there is excess insurance, in which case liability may exceed the $500,000 limit up to the amount of insurance coverage. K.S.A. § 75-6105.

B. Compensatory Damages for Bodily Injury

Under the Kansas Pattern Jury Instructions, specifically PIK Civ. 4th 171.02, a plaintiff's damages in a suit for personal injury include:

1) Medical Expenses:

Reasonable expenses necessary for medical care, hospitalization and treatment received to date, and the medical expenses plaintiff is reasonably expected to incur in the future (reduced to present value);

2) Economic Loss:

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

3) Noneconomic loss:

Noneconomic loss includes pain and suffering, disabilities, disfigurement and any accompanying mental anguish suffered as a result of plaintiff's injuries, and the noneconomic loss plaintiff is reasonably expected to suffer in the future.

Factors for the jury to consider include the plaintiff's age and health condition before and after the occurrence in question, and the nature, extent and duration of the plaintiff's injuries.

C. Collateral Source

In Kansas, in an action for personal injury or death, the trier of fact shall determine the net collateral source benefits received to date and those reasonably expected to be received in the future. K.S.A. § 60-3804. If the action is tried to a jury, the jury will be instructed to make such a determination by itemization of the verdict. § 60-3804.

Pursuant to K.S.A. § 60-3805, the court will reduce the judgment by the net amount of collateral source benefits received or expected to be received by the plaintiff, but only to the extent that such benefits exceed the aggregate amount by which: (1) such judgment was reduced by Kansas' comparative fault statute, K.S.A. § 60-258a; (2) the amount to which the plaintiff's ability to recover the judgment was limited by the defendant's insolvency, and (3) the award of damages has been reduced because of a statutory limit upon the recovery of damages. If none apply, the court will reduce the judgment by the full amount of the net collateral source benefits determined by the jury. § 60-3805.

D. Pre-Judgment/Post judgment Interest

1) Interest Generally

In Kansas, prejudgment and post judgment interest are controlled by K.S.A. § 16-201 which provides that creditors shall be allowed interest at the rate of 10%, when no other rate of interest is agreed upon, for any money after it becomes due. Judgment interest becomes due the date on which a claim becomes liquidated: when both the amount due and the date on which it is due are fixed and certain, or when they become ascertainable by mathematical computation. *Mitchell v. Liberty Mut. Ins. Co.,* 271 Kan. 684, 705 (Kan. 2001).

2) Applicability of Interest in Insurance Disputes

An insured may be entitled to prejudgment interest running from the date the benefits became "due," which is not until the insurer has sufficient information and reasonable time to determine that the insured is entitled to benefits. See *Hofer v. UNUM Life Ins. Co. of Am.,* 441 F.3d 872 (10th Cir. Kan. 2006). Where an insurance policy contains a supplemental provision obligating the insurer to pay interest on any judgment, the interest owed by the insurer is based on the entire liability judgment, not just the amount payable under the policy limits. *Mitchell,* 271 Kan. at 705.

E. Damages for Emotional Distress

Pursuant to K.S.A. § 60-19a01,the total amount recoverable by each party from all defendants for all non pecuniary claims for pain and suffering, disfigurement, etc. shall not exceed a sum total of $250,000.

F. Wrongful Death and/or Survival Action Damages

In Kansas, the wrongful death statute allows recovery of damages for economic loss without limitation and allows damages for noneconomic loss with a cap of $250,000 per decedent, regardless of the number of beneficiaries. K.S.A. § 60-1903. The $250,000 limit on noneconomic loss is applied after any deduction for the decedent's comparative fault. K.S.A. §§ 60-258, 60-1903. Damages are apportioned according to loss sustained by each of the heirs, and all heirs known to have sustained a loss shall share in such apportionment regardless of whether they joined or intervened in the action. K.S.A. § 60-1905.

A settlement with a defendant who might be held liable for a proportional share of the damages for wrongful death has no effect on the plaintiff's right to recover judgment as set out in K.S.A. § 60-1903(a).

G. Punitive Damages

Pursuant to K.S.A. § 60-3702, in any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded. Pursuant to K.S.A. § 60-3702(c), in any civil action where claims for exemplary or punitive damages are included, the plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial, that the defendant's conduct was willful, wanton, fraudulent or malicious.

In Kansas, an award of only nominal compensatory damages is not sufficient to justify an award of punitive damages. *Wilkinson v. Shoney's, Inc.,* 269 Kan. 194 (2000).

H. Diminution in Value of Damaged Vehicle

1) Damaged Vehicle

The basic formula for measuring damages for destruction of or injury to a motor vehicle is fair, reasonable, and adequate compensation for the injury, or, in other words, for the loss sustained as a proximate result of the defendant's wrongful or negligent act. *Peterson v. Bachar,* 193 Kan. 161, 163-164 (1964). The plaintiff may elect to recover either: (1) the difference in the value of the motor vehicle before and after the collision; or (2) the reasonable cost of repairs, plus the reasonable value of the use of the vehicle while it is being repaired with ordinary diligence–but the damages cannot exceed the value of the vehicle before the injury. *Id.* If the plaintiff elects to recover the difference in the vehicle's value before and after the collision, he cannot recover in addition the cost of repair or damages from lost use. *Id.*

2) Destroyed Vehicle

In the case of complete destruction of a motor vehicle, the measure of damages is the reasonable market value thereof immediately before the destruction. *Id.*

I. Loss of Use of Motor Vehicle

1) Loss of Profits and Earnings

Lost profits and earnings from the destruction of a vehicle may be recovered where it is shown that the vehicle has been specially constructed for a particular use and a substitute vehicle cannot be obtained without delay. *Peterson v. Bachar,* 193 Kan. 161, 163-164 (1964).

2) Loss of use

Damages for lost use of a vehicle cannot be considered unless the computation can be made with reasonable certainty. *Id.* They cannot be recovered where such loss is speculative or problematic. *Id.*

Evidentiary Issues

A. Preventability Determination

Kansas law is unclear in regards to whether an employer's post-accident preventability determination is admissible into evidence. However, the policy behind similar, well-accepted evidentiary rules, like the rule precluding evidence of subsequent remedial measures, may apply to suggest that evidence of a preventability determination should be excluded as a matter of public policy. By Kansas statute, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct. K.S.A. § 60-451.

B. Traffic Citation from Accident

1) Effect of Plea

A plea of guilty to a traffic charge arising out of an accident is an admission of the acts which were the basis of the charge, and the guilty plea may be shown in a civil action arising out of the same accident as an admission of the acts charged. *Scogin v. Nugen,* 204 Kan. 568, 572 (1970). On the other hand, a plea of nolo contendre or a finding of guilt is not an admission of the act charged and cannot, therefore, be used as an admission in a subsequent civil case. *Patrons Mut. Ins. Assc. v. Harmon*, 240 Kan. 707, 711 (1987).

C. Failure to Wear a Seat Belt

Evidence of a plaintiff's failure to use a seat belt is not admissible for the purpose of determining comparative negligence or mitigation of damages. K.S.A. § 8-2504(c). However, it is admissible for other purposes, such as to establish causation. *Floyd v. General Motors Corp.,* 25 Kan. App. 2d 71 (1998)(nonuse of seat belt admissible to show that force of body on impact caused steering mechanism to break rather than failure of steering mechanism being cause of accident).

D. Failure of Motorcyclist to Wear a Helmet

1) Kansas Helmet Statute

Pursuant to K.S.A. § 8-1598, no person under the age of 18 shall operate or ride on a motorcycle without a helmet. Adult riders, on the other hand, are not required to wear a helmet.

2) Evidence of Failure to Wear Helmet

Because an adult motorcycle rider is not legally mandated to wear a protective helmet, evidence that the rider was not wearing a helmet at the time of the accident is generally inadmissible. See *Eli v. Board of County Comm'rs,* 1989 Kan. App. LEXIS 338, *3 (Kan. Ct. App. May 12, 1989).

E. Evidence of Alcohol or Drug Intoxication

1) Relevance

Whether evidence of intoxication is admissible is a question of relevance. Evidence of intoxication may be excluded if the court determines, under K.S.A. § 60-445, that the evidence would be more prejudicial than probative. *Ratterree v. Bartlett,* 238 Kan. 11, 17 (1985). In *Ratterree,* the trial court did not err in excluding the testimony of two highway patrol officers concerning the smell of alcohol on the defendant's breath because the officers specifically stated that they did not consider alcohol to be a contributing factor to the accident and did not test the defendant for intoxication. *Id.* Under the circumstances, such evidence was more prejudicial than probative. *Id.*

Trial courts are afforded broad discretion in determining the admissibility of evidence of intoxication. *State v. Betts,* 214 Kan. 271, 277 (1974). Competent evidence may include breath tests, blood tests, testimony that the defendant exercised a lack of control of his vehicle prior to the accident or that he had been seen drinking prior to the accident, and other such relevant testimony. See *id.*

2) Workers' Compensation

To defeat a workers compensation claim based on the worker's intoxication, an

employer must prove not only that the worker was intoxicated, but also that such intoxication was the substantial cause of the injury. *Kindel v. Ferco Rental,* 258 Kan. 272, 285 (1995). The presumption of intoxication provided for under the Kansas criminal statute is inapplicable in workers compensation cases. *Id.* Evidence of the blood alcohol concentration of a workers compensation claimant is relevant to the issue of the cause of the accident in which the claimant is injured, but does not give rise to a presumption of intoxication. *Id.*

F. Testimony of Investigating Police Officer

Opinion evidence by investigating police officers concerning physical factors of an accident is admissible when a proper foundation for such conclusions is presented and the conclusions are the proper subject of expert testimony. *Ratterree v. Bartlett,* 238 Kan. 11 (1985).

In *Morlan v. Smith*, 191 Kan. 218, 380 P.2d 312 (1963), the Kansas Supreme Court held an officer's statement that "no improper driving indicated" was a pure conclusion of the investigating officer concerning the very question of negligence, which only the jury was allowed to decide. In *McGrath v. Mance*, 194 Kan. 640, 642, 400 P.2d 1013 (1965), the Court found an officer's notation that the plaintiff was guilty of "inattention" and an "improper start from parked position" was nothing more than his opinion regarding a question which was for the jury to decide: whether the defendant was negligent.

G. Expert Testimony

1) Subject Matter Must Be Appropriate for Expert Testimony

The *Daubert* test for the admissibility of expert opinion testimony does not apply in Kansas; rather, the *Frye* general acceptance test governs–requiring that expert opinion testimony be based on scientific principles or tests generally accepted as reliable within the expert's particular field. *State v. Graham,* 275 Kan. 176 (2003).

2) Witness Must Be Qualified as an Expert

Expert witnesses must be qualified as an expert. This rule applies not only to experts in the strictest sense, *e.g.*, doctors and architects, but also to "skilled" witnesses, *e.g.*, bankers or landowners testifying to land values.

3) Opinion Must Be Supported by Proper Factual Basis–Facts Made Known to Expert Outside Court

In Kansas, an expert opinion must be based on admissible evidence. K.S.A. § 60-456(b); *In re Care & Treatment of Foster*, 280 Kan. 845 (2006).

4) Opinion May Embrace Ultimate Issue

The general rule in Kansas is that expert testimony in the form of opinions otherwise admissible is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact. *Lollis v. Superior Sales Co.,* 224 Kan. 251, 262 (1978). However, "in an automobile negligence case, an expert witness, whether an investigating police officer or another expert, may not state his opinion as to what actions of the parties, if any, contributed to the collision or as to who was at fault in causing the collision." *Id.* at 263.

H. Collateral Source

1) Collateral Source Benefits Act, K.S.A. § 60-3801 et seq.

By statute, the Kansas Legislature has modified/overridden the common law collateral source rule. In any action for personal injury in which the plaintiff claims damages in excess of $150,000, evidence of collateral source benefits received or reasonably expected to be received in the future is admissible. K.S.A. § 60-3802. If a plaintiff originally claims damages in excess of $150,000, but later amends his petition to an amount less than $150,000, the defendant is not entitled to present evidence of collateral source benefits. *Helm v. Carter*, 1991 Kan. App. LEXIS 1067.

2) Health Insurance Payments and Write-Offs.

In a personal injury suit involving private health insurance write-offs, the collateral source rule does not apply to 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, regardless of the source of payment. However, evidence of the source itself is inadmissible under the collateral source rule. Evidence of the amount originally billed and the reduced amount accepted in full satisfaction are relevant to prove the reasonable value of the medical treatment, which is a question for the finder of fact. *See Martinez v. Milburn Enterprises, Inc.*, 290 Kan. 572, 233 P.3d 205 (Kan. 2010).

I. Recorded Statements

1) Past Recollection Recorded

While the Federal rules allow for past recollections recorded only to be read to the jury, Kansas permits the admission of past recollections recorded as an exhibit. *State v. Kelly,* 19 Kan. App. 2d 625 (1994).

2) Prior Statements by Witness–Prior Inconsistent Statements

Prior inconsistent statements of current witnesses are admissible as substantive

evidence. There is no requirement in Kansas that the statements have been made under oath at a prior proceeding or deposition as required by the Federal Rules. K.S.A. § 60-460(a).

J. Prior Convictions

1) Prior Convictions

Pursuant to K.S.A. § 60-455, "Other Crimes or Civil Wrongs," and subject to K.S.A. § 60-447, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as a basis for an inference that the person committed another crime or civil wrong at another specified occasion, but, subject to K.S.A. §§ 60-445 and 60-448, such evidenced is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident. *See* State v. Prince, 287 Kan. 713 200 P.3d 1 (Kan. 2000).

2) Character Evidence

a) Means of Proving Character

While the Federal Rules of Evidence limit affirmative proof of character to opinion or reputation evidence, Kansas additionally permits prior convictions to be admitted. K.S.A. § 60-447.

b) Generally Admissible in Civil Cases

In Kansas, character evidence is admissible in civil cases, as well as criminal cases, to prove conduct in accord with character, except when the trait is for care or skill offered to prove that the person was not negligent on the occasion subject to the litigation. K.S.A. §§ 60-447, 60-448.

3) Specific Acts of Misconduct–Admissible if Independently Relevant

Kansas has extended the exceptions of the Federal Rules to admit evidence of prior acts if they are relevant to proving a material fact other than propensity. In other words, Kansas courts will consider prior acts for purposes other than just motive, opportunity, intent, plan, preparation, knowledge, identity, and absence of mistake or accident. Courts typically must give the jury a limiting instruction explaining the specific purpose for admission. *State v. Gunby,* 282 Kan. 39 (2006).

K. Driving History

"In general, evidence of prior driving violations is clearly not admissible to show that the driver was negligent in the accident in question. . . . However, evidence of prior violations would be admissible in a proper factual setting if they impacted on the question of negligent entrustment." *Barber v. Rhoades,* 799 P.2d 1051 (Kan. App. 1990).

L. Fatigue

Evidence of fatigue due to an hours of service violation is admissible upon a finding that the safety violation caused on contributed to cause the accident. *Smith v. Printup,* 254 Kan. 315, 345 (1993). In an action against the driver's employer, evidence of the employer's safety programs and procedures may be admissible to show that the employer knew or had reason to know that the driver was violating safety regulations. See *id.*

M. Spoliation

The tort of spoliation of evidence is not recognized in Kansas absent an independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties. *Superior Boiler Works, Inc. v. Kimball,* 292 Kan. 885 (2011). The common elements of intentional spoliation of evidence are: (1) existence of a potential civil action, (2) defendant's knowledge of a potential civil action, (3) destruction of that evidence, (4) intent, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. *Foster v. Lawrence Memorial Hosp.,* 809 F.Supp. 831, 836 (1992). Negligent spoliation of evidence is similar except that a legal or contractual duty to preserve evidence must exist before liability for the evidence's loss will be imposed. *Id.*

Settlement

A. Offer of Judgment

Offers of judgment are governed by K.S.A. § 60-2002(b). At any time more than 21 days before trial begins, a party may serve upon the adverse party an offer to allow judgment. An offer not accepted within 14 days after service is deemed withdrawn. If the judgment finally obtained is less than the offer, the offeree must pay the costs incurred after making the offer.

B. Liens

1) Medical Liens

Pursuant to K.S.A. § 65-406 every hospital which furnishes medical or other service to a patient by reason of an accident not covered by the workers compensation act shall have a lien upon any recovery collected by the patient or

on the patient's behalf. Notice requirements are contained in K.S.A. § 65-407.

2) Workers' Compensation Lien

Under K.S.A. § 44-504, in the event that an injured worker recovers damages from third party, the employer is subrogated to the extent of the compensation provided by the employer to date and shall have a lien against the entire amount of such recovery, excluding any portion determined to be loss of consortium or loss of services to a spouse.

There is no requirement under K.S.A. § 44-504 that a potential subrogation lienholder in a workers' compensation matter be informed of the nature of the damages sought in the civil action against third parties, but the insurer may intervene in the action to protect its interest. *Smith v. Russell*, 274 Kan. 1076 (2002). The right to intervene is not absolute. *Id.* In the event that the injured worker fails to file suit within the one year period required by § 44-504 (18 months if prosecuted by the worker's dependents or personal representatives), such failure operates as an assignment of the worker's claim to the employer.

C. Minor Settlement

Settlements involving minors must be court approved. Moreover, a minor is not bound by a settlement until court approval has been obtained. Even then, the minor may not be bound if the review hearing was inadequate to protect his or her interest. See *White v. Allied Mut. Ins. Co*., 29 Kan.App. 2d 797, 31 P.3d 328 (Kan.App. 2001).

D. Negotiating Directly With Attorneys

The author has found no authority to suggest that a claims professional may not negotiate directly with an attorney. Judicial interpretations of the Kansas rule prohibiting the unauthorized practice of law (KRPC 5.5) do not appear to prohibit this type of negotiation.

E. Confidentiality Agreements

1) Settlement Agreements Involving Fewer than All Defendants

When a settlement agreement is entered into between a plaintiff and one or more, but not all, alleged tortfeasors, the court and the other parties must be advised of the terms of the agreement. If the case is tried to a jury and a defendant who is a party to the settlement agreement remains in the case to prosecute cross-claims, the court must, upon motion of a party, disclose the existence and content of the agreement to the jury. See *Lytle v. Stearns,* 250 Kan. 783 (1992).

2) Disclosure Limitations

Disclosure is not required if the court finds that disclosure will create a substantial danger of unfair prejudice, confusing the issues, or misleading the jury. The disclosure of the settlement agreement to the jury must be limited to those facts necessary to apprise the jury of the essential nature of the agreement and the possibility that the agreement may bias the testimony of the parties who entered into the agreement. While the jury must be advised in general terms of the financial interest in the outcome of the case of any defendant who is a party to the agreement, the amount of the settlement or any specific contingencies are not to be disclosed. *Lytle v. Stearns,* 250 Kan. 783 (1992).

*NOTE: Settlement Offers–Negotiations Not Admissible at Trial

While the Federal Rules of evidence exclude not only the offer to compromise but also any conduct or statement made in the course of negotiations, in Kansas, only the offer to compromise is excluded. Express admissions of liability and statements of fact made during negotiations will be admissible. K.S.A. § 60-452.

F. Releases

1) Effect of Release of One Joint Tortfeasor

Under the Kansas system of proportionate liability, each tortfeasor is liable for his share of the total damages, and the plaintiff's release of one tortfeasor does not affect the liability of other tortfeasors. *Geier v. Wikel*, 4 Kan. App. 2d 188, 190 (1979). One exception is that a release of an agent, who is an actual tortfeasor, will also release the principal who is merely vicariously liable. *Atkinson v. Wichita Clinic, P.A.,* 243 Kan. 705, 707 (1988). This exception does not apply to cases where the principal was independently at fault. *York v. InTrust Bank,* 265 Kan. 271 (1998).

2) Effect of General Release

Regardless of the breadth of the release language, under Kansas law, there exists a rebuttable presumption that a general release affects only the parties specifically identified in the release. *Luther v. Danner,* 268 Kan. 343 (2000). Thus, a general release is unlikely to release from liability a joint tortfeasor who is not a party to the release

G. Voidable Releases

Pursuant to K.S.A. § 60-2801(a), any settlement or release obtained from an injured person, hospitalized under doctor's care, within 14 days of the injury causing

occurrence is voidable by disavowal; however, no separate cause of action based on the statute is available. *Trayler v. Wachter,* 3 Kan. App. 2d 536 (1979).

Transportation Law

A. State DOT Regulatory Requirements

In Kansas, each motor carrier and driver must comply with the following: (1) the FMCSR; (2) Kansas traffic laws as provided in K.S.A. 8-222 et seq; (3) the uniform act regulating traffic and the size, weight and load of vehicles established in K.S.A. § 8-1901 et seq.; and (4) Kansas regulations pertaining to the driving of commercial motor vehicles as adopted in K.A.R. 82-4-3h. (K.A.R. 82-4-6a).

B. State Speed Limits

Kansas has adopted the Uniform Act Regulating Traffic. K.S.A. 8-1401 et seq. The maximum lawful speed limits are as follows:

(1) In any urban district, 30 miles per hour;

(2) on any separated multilane highway, as designated and posted by the secretary of transportation, 75 miles per hour;

(3) on any county or township highway, 55 miles per hour; and

(4) on all other highways, 65 miles per hour.

These maximum speed limits may be altered as authorized by K.S.A. §§ 8-1559 and 8-1560.

C. Overview of State CDL Requirements

Kansas has adopted the Uniform Commercial Drivers' License Act. K.S.A. 8-2,125 – 8-2,142. The purpose of the act is to implement the Federal Commercial Motor Vehicle Safety Act of 1986 (Title XII of public law 99-570).

Insurance Issues

A. State Minimum Limits of Financial Responsibility

Kansas law mandates that every automobile insurance policy sold in the state must have these minimum coverages:

1) Liability coverage

a. $25,000/person for bodily injury

b. $50,000/accident for bodily injury

c. $10,000/accident for property damage

2) Personal injury protection (PIP or No Fault)

a. Minimum amount required by law:

i. $4,500/person for medical expenses

ii. $900/month for one year for disability/loss of income

iii. $25/day for in-home services

iv. $2,000 for funeral, burial or cremation expense

v. $4,500 for rehabilitation expense

b. Survivor Benefits: Disability/loss of income up to $900/month for one year

c. In-home services up to $25/day for one year

3) Uninsured/Underinsured

a. $25,000/person

b. $50,000/accident

K.S.A. § 40-3107.

B. Uninsured Motorist Coverage

1) Stacking

K.S.A. § 40-284(d) limits underinsured motorist coverage to the policy with the highest limits. It clearly expresses the legislature's intent to prohibit stacking uninsured/underinsured motorist coverage from separate policies. *Eidemiller v. State Farm Mut. Auto. Ins. Co.,* 261 Kan. 711, 723 (1997).

2) Exclusions and Limitations

Any insurer may provide for the exclusion or limitation of coverage:

(1) When the insured is occupying or struck by an uninsured automobile or trailer owned or provided for the insured's regular use;

(2) when the uninsured automobile is owned by a self-insurer or any governmental entity;

(3) when there is no evidence of physical contact with the uninsured motor vehicle and when there is no reliable competent evidence to prove the facts of the accident from a disinterested witness not making claim under the policy;

(4) to the extent that workers' compensation benefits apply;

(5) when suit is filed against the uninsured motorist without notice to the insurance carrier; and

(6) to the extent that personal injury protection benefits apply.

K.S.A. § 40-284(e).

3) Settlement

An underinsured motorist coverage insurer has subrogation rights under K.S.A. § 40-287. If a tentative agreement to settle for liability limits has been reached with an underinsured tortfeasor, written notice must be given by certified mail to the underinsured motorist coverage insurer by its insured. Within 60 days of receipt of this written notice, the underinsured motorist coverage insurer may substitute its payments to the insured for the tentative settlement amount. The underinsured motorist coverage insurer is then subrogated to the insured's right of recovery to the extent of such payment and any settlement under the underinsured motorist coverage. If the underinsured motorist coverage insurer fails to pay the insured the amount of the tentative tort settlement within 60 days, the underinsured motorist coverage insurer has no right of subrogation for any amount paid under the underinsured motorist coverage.

C. No Fault Insurance

1) PIP Coverage Required

Kansas has adopted the “no-fault” approach to insurance claims. K.S.A. § 40-3101 et seq. Thus, personal injury protection (PIP) insurance is mandatory,

requiring every owner of a motor vehicle to obtain first party coverage of PIP benefits payable by his own insurance company regardless of fault. *Easom v. Farmers Ins. Co.,* 221 Kan. 415 (1977).

2) Failure to Maintain Mandatory PIP Coverage—No Recovery for Non-Economic Damages

Under K.S.A. § 40-3130, any person who, at the time of an accident, fails to maintain mandatory PIP coverage shall have no cause of action for recovery of noneconomic loss sustained as a result of the accident.

D. Disclosure of Limits and Layers of Coverage

Insurance policy information is generally discoverable under the Kansas Rules of Civil Procedure. See K.S.A. §§ 60-233 and 60-226.

E. Unfair Claims Practices

The Kansas unfair claims settlement practices statute, K.S.A. § 40-2409, does not authorize a private cause of action. *Bonnel v. Bank of America,* 284 F.Supp.2d 1284, 1289 (D. Kan. 2003). Under the Act, the commissioner of insurance has the exclusive power of enforcement. *Id.*

F. Bad Faith Claims

1) First Party Claims

Kansas does not recognize the tort of bad faith for first party claims. *Spencer v. Aetna Life & Cas. Ins. Co.,* 227 Kan. 914 (1980). In *Spencer*, the Kansas Supreme Court concluded that existing remedies, including breach of contract claims, provisions for attorney fees, and the insurance commissioner's ability to sanction companies for unfair claims practices, provide adequate relief for first-party insurance disputes. *Id.*

2) Third Party Claims

In regards to third party claims, Kansas has long recognized an insured's action for negligence or bad faith against his or her insurer. See *Bollinger v. Nuss*, 202 Kan. 326, (1969)(liability may be imposed against insurer for negligence or bad faith in defending, setting claim against insured); *Bennett v. Conrady*, 180 Kan. 485, (1957)(insurer on liability or indemnity policy liable for full amount of insured's loss, including excess, for negligence or bad faith in defending, settling action against insured); *Anderson v. Surety Co.*, 107 Kan. 375, (1921) (insurer liable for full amount of insured's loss, irrespective of policy limits, if negligent in

conducting defense for insured).

In third party claims, an insurer, in defending and settling claims against its insured, owes a duty to the insured to act in good faith and to act without negligence. *Associated Wholesale Grocers v. Americold Corp.,* 261 Kan. 806 (1997).

G. Coverage – Duty of Insured

1) Duty to Cooperate

Contractual provisions which require the insured to cooperate with his insurer are valid and enforceable. *Associated Wholesale Grocers v. Americold Corp.,* 261 Kan. 806, 821 (1997). An insurer bears the burden of proof to establish noncooperation. *Watson v. Jones,* 227 Kan. 862 (1980). The insurer must prove it acted in good faith and attempted to secure the cooperation of its insured and that the insured intentionally refused to cooperate, despite timely and diligent efforts by the insurer. See *Id.*

2) Duty to Provide Notice

Where an insured fails to give to its insurer timely notice of a lawsuit against the insured, the insurer is required to show that it was prejudiced by such failure in order to escape liability under the policy. *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co.,* 275 Kan. 698, 759 (2003).

H. Fellow Employee Exclusions

K.S.A. § 40-3107 provides that an insurer may exclude coverage "for bodily injury to any fellow employee of the insured arising out of and in the course of such employee's employment."