THE TOP 10 KANSAS CIVIL CASES FROM 2014

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Honorable Mention
Cases that Just Missed the Cut

In re Marriage of Traster, __ Kan. __, 339 P.3d 778 (Dec. 19, 2014)
(legal standards applying to separation/postnuptial agreements).

Garcia v. Ball, 50 Kan. App. 2d 197, 323 P.3d 872 (2014)*
(upholding $522,000 default judgment against an attorney in a malpractice action for failing to show "excusable neglect" in not responding to petition).

In re Protest of Lyerla, 50 Kan. App. 2d 1012, 336 P.3d 882 (2014)
(considering the jurisdiction of administrative bodies to hear and decide legal issues relating to the agency's jurisdiction or to statutory interpretation).

Smith v. Philip Morris Co., 50 Kan. App. 2d 535, 335 P.3d 644 (2014)*
(affirming grant of summary judgment in favor of cigarette manufacturers in price-fixing suit under the Kansas Restraint of Trade Act).

In re Hawver, 300 Kan. 1023, 339 P.3d 573 (2014)
(attorney discipline—possibly the most-watched argument before the Kansas Supreme Court in short history of video archiving of oral arguments).

* Petition for Review pending.

DQ:
Important Cases that Didn't Quite Meet the Criteria

Sprint Communications Co. v. Comcast Cable Communications, LLP
No. 11-2684-JWL, 2014 WL 545544 (D. Kan. Feb. 11, 2014)
(Judge O'Hara addressing whether blanket objections and then provision of documents in response to a request for production waives any objections thereto; answer—probably).

2015 Death Penalty Appeals (Carr Brothers & Gleason)

Sarah's Top 10 from 2014

#10: Bussman v. Safeco Ins. Co.

298 Kan. 700, 317 P.3d 70 (2014).
Authored by Justice Johnson.

Issue: Whether K.S.A. 40-908's attorney-fees provision applies only to cases involving property damage claims, or whether it applies to claims under any comprehensive policy with coverage for fire, hail, or tornado damage.

Syllabus by the Court:

1. In preparing its insurance policy contracts, an insurer has a duty to make the meaning clear to the insured, and if it fails to do so, the insurer and not the insured must suffer. Where the terms of a policy of insurance are ambiguous, obscure, or susceptible to more than one construction, the construction most favorable to the insured must prevail.

2. Under K.S.A. 60–216(a) and (c), the purpose of a pretrial conference is to eliminate the element of surprise from trials and to simplify the issues and procedure by effecting full disclosure to all parties of the anticipated evidence and the contested issues, both factual and legal, and to consider other matters that may aid in the disposition of the action. Generally, a trial court should not entertain an issue or claim that is omitted from the pretrial order. Rather, the pretrial order controls the course of the action unless modified to prevent manifest injustice pursuant to K.S.A. 60–216(e).

3. Except in a proceeding to determine costs, a defending party's rejected settlement offer to allow judgment to be taken against that defending party is not admissible evidence of the defending party's liability.

4. One of the exceptions to the requirement that an automobile liability insurance policy issued in Kansas must include uninsured motorist (UM) and underinsured motorist (UIM) coverage is the provision in K.S.A. 40–284(e)(4) that permits any insurer to provide for the exclusion or limitation of such UM or UIM coverage to the extent that workers compensation benefits apply. If a workers compensation claimant is permitted to apply for the reimbursement of future medical expenses through the workers compensation proceeding, then workers compensation benefits apply to those future medical expenses within the meaning of K.S.A. 40–284(e)(4), and any insurer may exclude or limit the recovery of those future medical expenses under its UM or UIM coverage.

5. **The language of K.S.A. 40–908 gives fair notice to any insurance company that issues any policy that insures any property in this state against fire, tornado, lightning, or hail that in all actions in which judgment is rendered against the insurance company on such a policy that the court shall allow the plaintiff reasonable attorney fees for services in such action, including proceedings upon appeal, and that those fees will be recovered and collected as a part of the costs of the action.** A claim by the plaintiff in the petition and in the pretrial order that the plaintiff is seeking court costs that are reimbursable by statute constitutes a claim for attorney fees under K.S.A. 40–908.

6. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language and it should refrain from reading something into the statute that is not readily found in its words. **Even where a court believes that the legislature has omitted a vital provision in a statute that precludes the intended result, if that omitted provision cannot be found under any reasonable interpretation of the language actually used, then the remedy lies solely with the legislature.**

7. Notwithstanding any public policy considerations and regardless of what one might speculate that the legislature meant to do, the plain language of K.S.A. 40–908 says that the trial court shall allow the plaintiff reasonable attorney fees as part of the costs in all actions in which judgment is rendered against any insurance company on any policy given to insure any property in this state against loss by fire, tornado, lightning, or hail. **If a loss is covered by a policy which includes coverage for any property against fire, tornado, lightning, or hail, then K.S.A. 40–908 applies regardless of which peril may have caused the covered loss and regardless of whether the covered loss resulted from a property damage claim or a bodily injury claim.**

#9: Golden Rule Ins. Co. v. Tomlinson

300 Kan. 944, 335 P.3d 1178 (2014).
Authored by Justice Beier.

Issue: What constitutes "substantial evidence viewed in light of the record as a whole" in cases appealed under the KJRA?

Syllabus by the Court:

1. The Kansas Judicial Review Act, K.S.A. 77–601 *et seq.,* establishes the standard of review for appeals from state administrative agency decisions, and

K.S.A.2013 Supp. 77–621(c) enumerates eight circumstances in which a court shall grant relief. On the facts of this case, two subsections of the statute are potentially relevant: that involving misinterpretation or misapplication of the law and **that involving lack of evidence to support factual determinations that is substantial when viewed in light of the record as a whole**. The party asserting the invalidity of an agency's action bears the burden of proving invalidity.

2. What constitutes agency and whether there is competent evidence reasonably tending to prove the relationship is a question of law. Resolution of conflicting evidence that might establish the existence of a principal-agent relationship is for the finder of fact. The province of an appellate court is to determine if the record reveals evidence on which a finding of agency could be based, not to decide whether, under proper instructions relating to the law of principal and agent, it existed as a matter of fact.

3. The nature and scope of an agent's authority and the inclusion within the scope of that authority of a particular act are ordinarily questions to be determined by the trier of facts in accordance with the evidence adduced in the particular case.

4. Statutory interpretation is subject to unlimited review on appeal. No deference is paid to an agency's statutory interpretation.

5. Agency is the fiduciary relationship that arises when one person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. A person manifests assent or intention through written or spoken words or other conduct.

6. The common law of agency recognizes three distinct bases on which the legal consequences of the agent's action are attributable to the principal—actual authority, apparent authority, and respondeat superior.

7. An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act. An agent's actual authority can either be express, *i.e.*, stated in very specific or detailed language, or implied, *i.e.*, actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent.

8. In this review of Kansas Insurance Department and district court decisions on whether a principal-agent relationship existed and whether the alleged agent could bind the alleged principal insurance company, we hold that the Court of Appeals erred by expanding the legal definition of soliciting agent, misapplying

the legal definition of broker, and failing to recognize that evidence to support the Department's factual determinations was substantial when viewed in light of the record as a whole. We therefore affirm the Department and the district court determinations that a principal-agent relationship existed and that the insurance company was bound by the action of its agent.

9. There was substantial evidence in this case, when viewed in light of the record as a whole, to support the Kansas Insurance Department's determination that the insurance company violated K.S.A.2013 Supp. 40–2404(9)(d) by refusing to pay claims without conducting a reasonable investigation based *1182 upon all available information. There was not substantial evidence in this case, when viewed in light of the record as a whole, to support the Department's determination that the insurance company violated K.S.A.2013 Supp. 40–2404(9)(f) by not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

10. The Kansas Insurance Department's remedy, affirmed by the district court, was authorized and appropriate under K.S.A. 40–2407(a)(3).

#8: MFA Enterprises, Inc. v. Delange

50 Kan. App. 2d 1049, 336 P.3d 891 (2014)
Authored by Judge Bruns (Panel included Judges Pierron and Powell).

Issue: Power of Negative Findings.

Syllabus by the Court:

1. Motions for directed verdict have been replaced by motions for judgment as a matter of law in jury trials and by motions for judgment on partial findings in nonjury trials.

2. On appeal from the granting of a motion for judgment on partial findings, we review the record to determine if the district court's findings of fact were supported by substantial competent evidence and if judgment as a matter of law was proper.

3. Courts may treat written agreements as being abandoned when one party acquiesces to the acts of another party that are inconsistent with the continued existence of the agreement.

4. When a tenant holds over his or her term with the express or implied consent of the landlord the law implies a continuation of the original tenancy upon the same term and conditions.

5. To gain title by adverse possession in Kansas, the claimant must have been in open, exclusive, and continuous possession of the property, either under a claim knowingly adverse to the titled owner or under a belief of ownership, for 15 years. K.S.A. 60–503.

6. Possession of land under the terms of a lease is not hostile because the true owner is permitting the tenant to be on the property.

7. Ultimately, whether a party has acquired land by adverse possession is a question of fact, and the party asserting acquisition must establish each element by clear and convincing evidence.

8. When one seeks to obtain title to real property by adverse possession, there is a presumption in favor of the party holding legal title against the possessor so that mere possibilities do not deprive the legal owner of the property.

9. An offer to purchase land is an admission that the possessor's interest is inferior to that of the true owner, indicating that the possessor is not adversely holding the property.

#7: University of Kansas Hospital Authority v. Board of County Commissioners of Wabaunsee County

299 Kan. 942, 327 P.3d 430 (2014)
Authored by Justice Luckert.

Issue: When a county's duty to a detained person arises (in terms of duty to pay health care costs).

Syllabus by the Court:

1. Under K.S.A. 19–1910, a county is only obligated to pay for the medical care of an individual who has no resources to pay for his or her own care and who is a prisoner committed to or held in the county jail, meaning someone who has been sentenced to jail; has been arrested and is being detained in jail while awaiting trial; has been apprehended and arrested and would be detained in jail while awaiting trial but for his or her injuries; or has been otherwise committed to jail, such as in a civil commitment proceeding.

2. A county does not receive a benefit and is not unjustly enriched when a healthcare provider treats a person injured within the county's borders unless the county or one of its officers had a legal obligation to provide medical care to that person.

#6: Sanchez, ex rel. Sanchez v. Unified School District 469

50 Kan. App. 2d 1185, 339 P.3d 399 (2014) (Petition for Review pending)
Authored by Judge Standridge (Panel also included Judges Green and Atcheson).

Issue: Whether adoptive immunity under the Kansas Tort Claims Act prevents a school district from being held liable under respondeat superior for actions of teachers in failing to prevent bullying.

Syllabus by the Court:

1. When the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate.

2. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom a summary judgment ruling is sought.

3. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact.

4. Interpretation of a statute is a question of law over which appellate courts have unlimited review.

5. The Paul D. Coverdell Teacher Protection Act of 2001, 20 U.S.C. § 6731 (2012) *et seq.*, immunizes teachers from liability when they take reasonable actions to maintain order, discipline, and an appropriate educational environment.

6. "Teacher" is defined in the Paul D. Coverdell Teacher Protection Act to include a teacher, instructor, principal, administrator, educational employee who works in a school, or individual school board member. 20 U.S.C. § 6733(6) (2012).

7. The Paul D. Coverdell Teacher Protection Act provides that no teacher in a school shall be liable for harm caused by an act or omission of the teacher on behalf of the school if the teacher was acting within the scope of the teacher's employment or responsibilities to a school or governmental entity; the actions of the teacher were carried out in conformity with federal, state, and local laws (including rules and regulations) in furtherance of efforts to control, discipline, expel, or suspend a student or maintain order or control in the classroom or school; and the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the teacher. 20 U.S.C. § 6736(a)(1), (2), and (4).

8. The protection provided by the Paul D. Coverdell Teacher Protection Act extends only to individual teachers, administrators, and school board members and does not provide protection from liability to entities like a school board or a school district.

9. Under the doctrine of respondeat superior, an employer may be held liable to a third person for injuries caused by the negligence of an employee if the employee is acting within the scope of employment.

10. An employer is generally relieved of liability under a theory of respondeat superior when a legal or factual determination has been made that the employee did not act negligently.

11. **Statutory immunity from liability granted by the legislature to an employee is personal to the employee and, in the absence of a clear legislative statement to the contrary, does not shield the employer from liability under a theory of respondeat superior.**

12. The Kansas Tort Claims Act makes governmental liability the rule and immunity the exception. Under K.S.A. 2013 Supp. 75–6103(a), each governmental entity is liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state. Various exceptions to the general rule of liability are set forth in K.S.A. 2013 Supp. 75–6104. The burden is upon the defendant to establish immunity under one or more of the immunity exceptions.

13. A school district has a duty to reasonably protect elementary and secondary students in its custody during school hours.

14. The exception to government tort claim liability based on adoptive immunity as outlined in K.S.A. 2013 Supp. 75–6104(i) is discussed and applied to a school district in light of the Paul D. Coverdell Teacher Protection Act.

#5: Craig v. FedEx Ground Package System, Inc.

300 Kan. 788, 335 P.3d 66 (2014)
Per curiam.

Issue: Whether FedEx drivers were employers or independent contractors for purposes of the Kansas Wage Payment Act.

Syllabus by the Court:

On certified question from the United States Court of Appeals for the Seventh Circuit, this court answers: **Given the undisputed facts presented to the district court in this case, the plaintiff drivers are employees of FedEx Ground Package System, Inc. as a matter of law under the Kansas Wage Payment Act, K.S.A. 44–313 *et seq.***, and a plaintiff driver does not lose his or her employee status by acquiring another route for which that plaintiff is not the driver.

#4: Whaley v. Sharp

___ Kan. ___, 343 P.3d 63 (Dec. 24, 2014)
Authored by Justice Biles.

Issue: Whether notice provisions applicable to municipalities under K.S.A. 12-105b(d) also apply to suits against municipal employees.

Syllabus by the Court:

1. K.S.A.2013 Supp. 12–105b(d) requires anyone bringing a claim against a municipality under the Kansas Tort Claims Act to provide that municipality with prior written notice setting out the specific facts and circumstances giving rise to the claim. Notice is a prerequisite to filing an action against a municipality.

2. The legislature's intent is the paramount guide to a statute's meaning. The fundamental rule for determining legislative intent is that the plain language selected by the legislature controls, unless that language is unclear or ambiguous.

3. **The statutory notice requirement in K.S.A.2013 Supp. 12–105b(d) refers only to claims against a municipality and does not apply to claims made against a municipal employee.**

#3: Taylor v. Kobach

300 Kan. 731, 731, 334 P.3d 306, 307 (2014)
Per curiam.

Issue: Whether Chad Taylor's statement that he was withdrawing his name from the ballot was sufficient under Kansas law (specifically K.S.A. 25-306b(b)).

Syllabus by the Court:

1. K.S.A. 25–306b(b) provides that no person nominated for any national, state, county, or township office may cause his or her name to be withdrawn from nomination after the primary election, except as provided by that statute.

2. K.S.A. 25–306b(b) provides one exception. It states that any person nominated for any national, state, county, or township office who declares that he or she is incapable of fulfilling the duties of office if elected may cause such person's name to be withdrawn from nomination by filing with the Secretary of State a written request signed by the person seeking to withdraw his or her nomination and acknowledged before an officer qualified to take acknowledgments of deeds.

3. K.S.A. 25–306b(b) further provides that no name withdrawn as provided by law shall be printed on the ballots for such office for the general election.

4. Based upon the challenge made in this case, a letter filed with the Secretary of State that recites "I, Chadwick J. Taylor, Democratic nominee for the United States Senate race, do hereby withdraw my nomination for election effective immediately and request my name be withdrawn from the ballot, pursuant to K.S.A. 25–306b(b)" complied with K.S.A. 25–306b(b). The Secretary of State thus has no discretion to refuse to remove Chadwick J. Taylor's name from the ballots, and mandamus is appropriate.

#2: State, ex rel. Schmidt v. Moriarty

Supreme Court Order, Case No. 112,590 (dated November 18, 2014)
Available at http://www.kscourts.org/State_v_Moriarty/112590Order111814.pdf
Signed by Chief Justice Nuss.

Issue: Propriety of Judge Moriarty's decision to issue same-sex marriages to couples in Johnson County.

Excerpt from Order (pages 4-5)**:**

In arguing that the temporary stay should be kept in place, the State contends first that Chief Judge Moriarty was without jurisdiction to make a determination whether a marriage license could be issued to a same-sex couple in light of the state's same-sex marriage ban. We disagree to the extent that K.S.A. 2013 Supp. 23-2505(a) directs that "[t]he clerks of the district court *or judges thereof*, when applied to for a marriage license by any person who is one of the parties to the proposed marriage and is *legally entitled to a marriage license*, shall issue a marriage license …." (Emphasis added.) So when Chief Judge Moriarty had a pending marriage license application before him, he was faced with deciding

whether the applicants were "legally entitled" to that license. In doing so, he considered the substantial federal authority existing at the time suggesting the Kansas ban violated the United States Constitution. Chief Judge Moriarty, as a district court judge, was within his jurisdiction to weigh these authorities and make a determination. See, *e.g.*, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.) *cert. denied* 135 S. Ct. 265 (2014) (Utah law violates federal constitution); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.) *cert denied* 135 S. Ct. 271 (2014) (Oklahoma law violates federal constitution).

We emphasize we are not concluding that Chief Judge Moriarty was correct in determining that the Kansas ban is unconstitutional and, therefore, that the same-sex applicants were legally entitled to a marriage license. But making that determination was within his jurisdiction … .

#1: Gannon v. State of Kansas

298 Kan. 1107, 319 P.3d 1196 (2014)
Per curiam.

Shawnee County Case No. 10C 1569
Still going ... District Court: Before Judges Theis, Fleming, and Burr (retired).

Issue: Constitutionality of the school finance funding formula.

Syllabus by the Court:

1. The Kansas Constitution is the work of the people. In their constitution, the people have distributed governmental power among three departments or branches, *i.e.*, the Executive, Legislative, and Judicial. Under this separation of powers, the judiciary interprets, explains, and applies the law to actual controversies. It is the judiciary's obligation to interpret the constitution and safeguard the basic rights reserved to the people. Determining whether an act of the legislature is invalid under the people's constitution is solely the duty of the judiciary. The judiciary is not at liberty to surrender, ignore, or waive this duty.

2. Under the separation of powers doctrine embodied in the Kansas Constitution, Kansas courts do not issue advisory opinions but decide actual cases or controversies, *i.e.*, the claims must be justiciable. If the claims are not justiciable, the case must be dismissed.

3. Whether a claim is nonjusticiable because it may be a political question is solely for the courts to decide as a matter of law by applying the factors identified in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

4. **Under the facts of this case, the school districts' claims arising under Article 6 of the Kansas Constitution present a justiciable case or controversy because they are not political questions.**

5. Because constitutions are the work of the people, the best rule for ascertaining their intention is to abide by the language they have used. It is reasonable to presume that every word in the constitution has been carefully weighed, and that none are inserted, and none omitted, without a design for so doing.

6. Through the constitutional assignment of different roles to different entities, the people of Kansas have ensured that the education of public school children is not entirely dependent upon political influence or the constant vigilance of voters.

7. Through Article 6, the education provision of the Kansas Constitution, the people expressly assigned duties to the Kansas Legislature that both empower and obligate. Under this article, the legislature must perform its duties in compliance with the requirements the people have established.

8. The Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duties under Article 6. But the judiciary is the final authority to determine adherence to constitutional standards. The people's constitutional standards must always prevail over the legislature's statutory standards should the latter be lower.

9. Article 6 of the Kansas Constitution contains at least two components: adequacy and equity.

10. To determine compliance with the adequacy requirement in Article 6 of the Kansas Constitution, Kansas courts apply the test from *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky.1989), which establishes minimal standards for providing adequate education. More specifically, the adequacy requirement is met when the public education financing system provided by the legislature for grades K–12—through structure and implementation—is reasonably calculated to have all Kansas public education students meet or exceed the standards set out in *Rose* and presently codified in K.S.A.2013 Supp. 72-1127.

11. **Under the facts of this case, the district court panel did not apply the correct test to determine whether the State met its duty to provide adequacy in K–12 public education as required under Article 6 of the Kansas Constitution.** Therefore partial reversal and remand is required for the panel to make an adequacy determination, complete with findings, after applying the correct test to the facts.

12. **Regardless of the source or amount of funding, total spending is not the touchstone for adequacy in education required by Article 6 of the Kansas Constitution.**

13. To determine compliance with the equity requirement in Article 6 of the Kansas Constitution, Kansas courts do not require adherence to precise equality standards. Instead, school districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.

14. Under the facts of this case, the district court panel correctly held the State established unconstitutional, wealth-based disparities by withholding all capital outlay state aid payments to which certain school districts were otherwise entitled under K.S.A.2012 Supp. 72-8814(c).

15. Under the facts of this case, the district court panel correctly held the State established unconstitutional, wealth-based disparities by prorating and reducing supplemental general state aid payments to which certain school districts were otherwise entitled under K.S.A.2012 Supp. 72-6434 for their local option budgets.

16. Under the facts of this case, the district court panel correctly refused to order payment of capital outlay state aid to which districts were otherwise entitled for fiscal year 2010 and correctly refused to order payment of plaintiffs' attorney fees.

2015 Watch List
Cases to Watch in the Coming Months

Doe v. Thompson, Case No. 110,318, decided by the Shawnee County District Court (Hendricks, J.); briefed to the Kansas Supreme Court (briefing concluded in September 2014). Not yet docketed for argument (constitutionality of Kansas Offender Registration Act under the *Ex Post Facto* Clause).

State of Kansas v. W.M., Shawnee County Case No. 12D 2686 (whether the State may assess child-support payments from donors in artificial insemination cases, and whether a parent may waive parental rights by agreement).

Gannon v. State of Kansas, like the Energizer Bunny, this case keeps going and going and going …