

THE TOP 10 KANSAS CIVIL CASES FROM 2016

Presentation for the
Douglas County Bar Association
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In Memoriam

Taking Time to Recognize Infamous Moments from 2016

Darwin Awards.

Gould v. Wright Tree Service, Inc., Case No. 114, 482, 2016 WL 2811983 (Kan. App., decided May 13, 2016) (unpublished).

A Victory for Sperm Donors and/or LGBTQ Rights.

State of Kansas ex rel. DCF v. W.M., Shawnee County Case No. 12D 2686 (in weighing competing presumptions of parenthood, the court found the nonbiological mother of a now-dissolved same-sex partnership was the child's second parent, not the sperm donor).

April 22, 2016.

State v. Petersen-Beard, 304 Kan. 192, 377 P.3d 1127, cert. denied, 137 S. Ct. 226, 196 L. Ed. 2d 175 (2016) (lifetime registration requirement under KORA did not constitute punishment for purposes of applying Eighth Amendment prohibition against cruel and unusual punishment), overruling *State v. Redmond*, 304 Kan. 283, 371 P.3d 900 (2016), *State v. Buser*, 304 Kan. 181, 371 P.3d 886 (2016), and *Doe v. Thompson*, 304 Kan. 291, 373 P.3d 750 (2016) (all decided on the same day).

Judicial Retention.

In a year in which 5 Kansas Supreme Court justices and 6 Kansas Court of Appeals judges were up for retention election, with money pouring in from all sides, all Kansas judges were retained.

Gannon v. State of Kansas.

I give up.

Sarah's Top 10 from 2016

#10: *Ullery v. Othik*

304 Kan. 405, 372 P.3d 1135 (2016)

Authored by Justice Beier

Issue: Showing necessary to give rise to appellate jurisdiction under K.S.A. 60-254(b); nature of appellate jurisdiction under that statute.

Syllabus by the Court:

A certification of “no just reason for delay” may be made after summary judgment is granted to fewer than all parties or on fewer than all claims. **The filing date of the district court order or journal entry memorializing that certification starts the 30-day appeal clock, and a timely notice of appeal endows the appellate court with jurisdiction to determine the merits.** K.S.A. 2015 Supp. 60–254(b) explicitly allows revision of nonfinal judgments, and K.S.A. 2015 Supp. 60–258 prevents any judgment from becoming effective until it is memorialized in a journal entry and filed with the clerk.

#9: *Wiechman v. Huddleston*

304 Kan. 80, 370 P.3d 1194 (2016)

Authored by Justice Biles

Issue: Do Kansas courts have authority to create common-law exceptions to statutory appellate jurisdiction requirements?

Syllabus by the Court:

1. The right to appeal in a civil case is entirely statutory and not a right guaranteed by the United States Constitution or the Kansas Constitution. Kansas appellate courts have jurisdiction to entertain an appeal in a civil case only if that appeal is taken within the time limitations and in the manner prescribed by the applicable statutes.

2. **An appellate court has no authority to create an exception to statutory jurisdictional requirements to allow an appeal from an order setting aside a final judgment in a civil case. *Brown v. Fitzpatrick*, 224 Kan. 636, 585 P.2d 987 (1978), is overruled to the extent it created a common-law “jurisdictional exception” permitting appeals in civil cases not otherwise allowed by statute.**

#8: *Cain v. Jacox*

302 Kan. 431, 354 P.3d 1196 (2016)

Authored by Justice Stegall

Issue: Res Judicata in Out-of-State Enforcement Actions under the Uniform Interstate Family Support Act

Syllabus by the Court:

1. Whether a claim is barred by the doctrine of res judicata is a question of law over which appellate courts exercise unlimited review.

2. The doctrine of res judicata is a common-law rule of equity grounded in both notions of justice and in sound public policy, each of which demands that a party not be vexed with litigation twice on the same cause. Before the doctrine of res judicata will bar a successive suit, the following four elements must be met: (a) the same claim; (b) the same parties; (c) claims that were or could have been raised; and (d) a final judgment on the merits.

3. When applying the res judicata rule, courts must be mindful of the equitable principles animating the doctrine. Thus, courts must consider the substance of both the first and subsequent action and not merely their procedural form. The doctrine may be liberally applied, but it requires a flexible and common-sense construction in order to vindicate the fundamental goals embedded in the requirements of justice and sound public policy. This framework neither favors nor disfavors the application of the rule in any particular case. It merely requires that before the doctrine is either invoked or rejected, a court must conduct a case-by-case analysis that moves beyond a rigid and technical application to consider the fundamental purposes of the rule in light of the real substance of the case at hand.

4. Parties are the same for res judicata purposes when they are in privity with one another. There is no generally prevailing definition of privity which can be automatically applied to all cases. A determination of the question as to who are privies requires careful examination of the circumstances of each case as it arises.

5. As with the res judicata doctrine of which it is a part, privity is an equitable determination grounded in principles of fundamental fairness and sound public policy. Before privity can be invoked to satisfy the same party element of res judicata, there must be a showing that the parties in the two actions are really and substantially in interest the same.

#7: *Watco Companies v. Campbell*

52 Kan. App. 2d 602, 371 P.3d 360 (2016)

Authored by Chief Judge Arnold-Burger (with Judges Hill and McAnany)

Petition for Review pending (since May)

Issue: Nature of “Mary Carter” Settlements and the One Action Rule

Syllabus by the Court:

1. Documents obtained through a request for production of documents may, in the court’s discretion, be relied upon as authentic for purposes of a summary judgment motion because the method in which they are obtained lends them credibility.

2. Where there is no factual dispute, appellate review of an order regarding summary judgment is de novo.

3. The district court’s reasons for granting or denying summary judgment are immaterial if the ruling was correct for any reason.

4. Comparative implied indemnity or, as it is more accurately termed, postsettlement contribution describes the cause of action initiated by a tortfeasor in a negligence lawsuit to recover from a joint tortfeasor the share of the damages proportional to the joint tortfeasor’s fault.

5. When total damages have not been fixed by judicial proceeding but by compromise and settlement between the plaintiff and a defendant, the amount the defendant has paid in full settlement for all damages is the maximum amount subject to be apportioned among joint tortfeasors.

6. A carrier against whom suit is brought under the Federal Employers’ Liability Act (FELA) for injuries sustained by an employee within Kansas has a right of contribution or comparative implied indemnity against a third-party tortfeasor if

(1) the third party’s negligence partially caused or contributed to the injury or damages, (2) the carrier had some causal negligence, and (3) the injured employee’s causal negligence is less than 50%.

7. In order for a tortfeasor to pursue a claim of contribution or comparative implied indemnity against a joint tortfeasor who was not sued by the plaintiff, the tortfeasor must join the joint tortfeasor as a third party under K.S.A. 2015 Supp. 60–258a(c) and assert a timely claim against the joint tortfeasor.

8. Although the comparison of fault of all wrongdoers should be effected in the original action, there is an exception when there has been no judicial determination of comparative fault in the first action.

9. Comparative implied indemnity, or postsettlement contribution, is an equitable remedy.

10. The clean hands doctrine bars a party from obtaining relief in equity with respect to a transaction in which the party has been guilty of inequitable conduct.

11. When a sliding-scale or “Mary Carter” settlement agreement is entered which calls for the settling defendant to remain in the litigation, the existence and terms of the agreement must be disclosed to the court and remaining litigants.

#6: *Platt v. Kansas State University*
305 Kan. 122, 379 P.3d 362 (2016)
Authored by Chief Justice Nuss

Issue: Do retaliatory discharge claims fall under the Kansas Judicial Review Act?

Syllabus by the Court:

1. When a district court has granted a motion to dismiss, an appellate court must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn therefrom.

2. Retaliatory discharge is an actionable tort recognized by the common law of Kansas.

3. The elements of a prima facie claim for the tort of retaliatory discharge in the workers compensation context are: (1) The plaintiff filed a claim for workers compensation benefits or sustained an injury for which he or she might assert a future claim for such benefits; (2) the employer had knowledge of the plaintiff's workers compensation claim injury; (3) the employer terminated the plaintiff's employment; and (4) a causal connection existed between the protected activity or injury and the termination.

4. The nature of a claim is determined from the pleadings and from the real nature and substance of the facts alleged therein.

5. The Kansas Judicial Review Act, K.S.A. 77–601 *et seq.* (KJRA), does not apply to the civil tort of retaliatory discharge against an administrative agency.

#5: *Alain Ellis Living Trust v. Harvey D. Ellis Living Trust*

___ Kan. App. 2d ___, 385 P.3d 533 (2016)

Authored by Judge Malone (with Judge Standridge and Senior Judge Hebert)

Petition for Review pending (since December)

Issue: Are punitive damages available after a wrongdoer has died?

Syllabus by the Court:

1. Generally, the decision to permit amended pleadings to assert a claim for punitive damages is discretionary and the standard of review on appeal is abuse of discretion. But when the district court denies a party's claim for punitive damages as a matter of law, an appellate court has unlimited review of the district court's legal conclusions.

2. In the absence of statutory authority in Kansas, a claim for punitive damages does not survive the death of the wrongdoer.

3. A claim for double damages under K.S.A. 58a-1002(a)(3) against a trustee who embezzles or knowingly converts trust property to the trustee's own use is punitive in nature and does not survive the death of a malfeasant trustee.

4. K.S.A. 58a-1004 grants the district court the authority to award attorney fees in a judicial proceeding involving the administration of a trust as justice and equity may require. The district court may order that the attorney fees be paid by another party or from the trust that is the subject of the controversy.

#4: *Smart v. BNSF Railway*

52 Kan. App. 2d 486, 369 P.3d 966 (2016)

Authored by Judge Gardner (with Judges Hill and Powell)

Issue: Qualifications of Experts under Kansas's new *Daubert* standard

Syllabus by the Court:

1. To recover under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.* (2012), a plaintiff has the burden to prove the traditional common law elements of negligence. These include duty, breach of a duty, foreseeability of injury, and causation.

2. In FELA cases, causation is established if it is shown that the railroad's negligence played any part in bringing about the injury.

3. In FELA cases, the admission of expert testimony is controlled by the relevant rules of evidence and the decision of the United States Supreme Court in

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

4. The district court must perform its gatekeeping role for all expert testimony, not just for scientific expert testimony.

5. We review de novo whether the district court actually performed its gatekeeper role under *Daubert* and whether the district court applied the proper standard in admitting expert testimony.

6. We review the district court's decision to admit or exclude expert testimony under *Daubert* for an abuse of discretion when the district court properly performed its gatekeeper role and applied the proper legal standard.

7. K.S.A. 2015 Supp. 60–456(b) requires the district court to make two fundamental decisions: (1) whether the expert is qualified by knowledge, skill, experience, training, or education to render an opinion; and (2) whether the proposed expert testimony is reliable and relevant, in that it will assist the trier of fact.

8. Under *Daubert*, the district court determines the reliability of proposed scientific testimony by looking to factors such as: (1) whether the theory has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error associated with the theory; and (4) whether the theory has attained widespread or general acceptance.

9. To the extent an expert witness is relying primarily on experience rather than on scientific methodology, he or she must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.

#3: *State ex rel. Schmidt v. City of Wichita*

303 Kan. 650, 367 P.3d 282 (2016)

Authored by Chief Justice Nuss (Justice Biles and Justice Johnson, each concurring and dissenting)

Issue: Efforts by Municipalities to Decriminalize Marijuana

Syllabus by the Court:

1. Quo warranto is an appropriate means of attacking the validity of a municipal ordinance.

2. An appellate court may properly entertain an action in quo warranto if it decides the issues raised are of sufficient public concern.

3. Appellate courts generally avoid making unnecessary constitutional decisions. Thus, where there is a valid alternative ground for relief, an appellate court need not reach a constitutional challenge.

4. The fundamental rule of statutory interpretation to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. Its intent is to be derived in the first place from the words used. When statutory language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there.

5. K.S.A. 12–3013(a) provides that an ordinance proposed through the initiative and referendum process shall be filed with the city clerk along with a petition requesting that the governing body either pass the proposed ordinance or submit it to the electorate for a vote.

6. Under the facts of this case, the supporters of a proposed ordinance failed both absolutely, and substantially, to comply with K.S.A. 12–3013(a) when they did not file the proposed ordinance with the city clerk.

#2: *Hillburn v. Enerpipe, Inc.*

52 Kan. App. 2d 546, 370 P.3d 428 (2016)

*Authored by Chief Judge Arnold-Burger (with Judges Green and Standridge)
Petition for Review pending (since April)*

Issue: Constitutionality of Noneconomic Damages Cap in Automobile Accidents

Syllabus by the Court:

1. Because the jury’s role at common law included the calculation of damages, the limitation on damages contained in K.S.A. 60–19a02 encroaches on the right to a trial by jury guaranteed by Section 5 of the Kansas Constitution. This encroachment alone does not necessarily render K.S.A. 60–19a02 unconstitutional. The legislature may modify the common law in limited circumstances without violating Section 5 of the Kansas Constitution.

2. The correct test to use to determine whether the legislature has overstepped its constitutional authority by encroaching on the right to a trial by jury guaranteed by Section 5 of the Kansas Constitution or the right to a remedy by due course of law guaranteed by Section 18 of the Kansas Constitution by imposing statutory caps on noneconomic damage recovery is the quid pro quo test outlined in *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012).

3. The quid pro quo test involves two steps. First, the court must decide whether modification to the common-law remedy or right to jury trial is reasonably necessary in the public interest to promote the public welfare. Second, the court must determine whether the legislature substituted an adequate statutory remedy for the modification to the individual right.

4. Similar to the medical malpractice insurance discussed in *Miller*, Kansas requires that drivers maintain a certain minimum level of automobile liability insurance under the Kansas Automobile Injury Reparations Act (KAIRA), K.S.A. 40–3101 *et seq.* In addition, motor carriers operating in the state are required to maintain minimum levels of liability insurance pursuant to both state and federal law. Both statutory schemes have the purpose of protecting the interests of the public by providing a means of quickly compensating persons for injury resulting from the negligent operation of motor vehicles in the state.

5. Because the damages cap at K.S.A. 60–19a02 operates in a broader scheme of mandatory insurance and the State maintains an interest in that insurance remaining available and affordable to compensate motor vehicle accident victims, the first step of the *Miller* quid pro quo test is satisfied.

6. Because the statutory motor vehicle and motor carrier insurance schemes adopted in Kansas provide an adequate remedy for damages arising from personal injury, the second step of the *Miller* quid pro quo test is satisfied.

7. K.S.A. 60–19a02, establishing caps on recovery for noneconomic damages in personal injury actions, is constitutional as applied to personal injuries resulting from collisions between motor carriers and motor vehicles.

#1: *Hodes & Nauser, MDs, P.A. v. Schmidt*

52 Kan. App. 2d 274, 368 P.3d 667 (2016), *review granted* Apr. 11, 2016, *argued* Mar. 16, 2017.

Heard en banc. Judgment of the court by Judge Leben (6 judges); Concurring opinion by Judge Atcheson; Dissenting opinion by Judge Malone (7 judges).

Issue: Interpretation of Sections 1 and 2 of the Kansas Constitution Bill of Rights (and specifically whether these sections include unenumerated rights, including an independent, state-law right to abortion).

No syllabus by the court (presumably because no controlling opinion).

2017 Watch List

Cases to Watch in the Coming Months

Hodes & Nauser, MDs, P.A. v. Schmidt, Case No. 114,153, argued before the Kansas Supreme Court on March 16, 2017.

Issue: Constitutionality of ban on particular abortion procedures; whether the Kansas Constitution includes a separate right to abortion distinct from the federal right.

Kansas National Education Association v. State of Kansas, Case No. 114,135, decided in January 2017 (involving a facial challenge under the single subject rule), but more cases to come involving as-applied challenges.

Issue: Constitutionality of 2014 changes in teacher removal procedure.

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

Issue: So many issues.