

THE TOP 10 KANSAS CIVIL CASES FROM 2015

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Honorable Mention
Cases that Just Missed the Cut

Hajda v. Univ. of Kansas Hosp. Auth., 51 Kan. App. 2d 761, 356 P.3d 1 (2015), *review denied* (Feb. 18, 2016) (relation back of amendments to parties and timeliness of action).

Kansas City Power & Light Co. v. Strong, 302 Kan. 712, 356 P.3d 1064 (2015) (giving judicial imprimatur to "development method" of valuation in condemnation proceedings).

Rodriguez v. U.S.D. No. 500 and Mutual of Omaha Ins. Co., 302 Kan. 134, 351 P.3d 1243 (2015) (finding coverage under school insurance policy of student athlete's injuries resulting from a traffic accident when he drove himself to a school soccer game).

In re Estate of Rickabaugh, 51 Kan. App. 2d 902, 358 P.3d 859 (2015), *review granted* (Feb. 18, 2016) (impermissible inference stacking does not create evidence).

State v. Buser, Case No. 105,982. Order issued July 1, 2015 (constitutionality of K.S.A. 20-3301, requiring all state court decisions to be issued within 180 days of submission).

In re Williams, 302 Kan. 990, 362 P.3d 816 (2015) (attorney discipline—what not to do, and how to turn a probable public censure case into a disbarment).

DQ:

Hugely Important Cases that Didn't Quite Meet the Criteria

2015 Death Penalty Appeals (Carr Brothers & Gleason)

Hodes & Nauser, MDs, P.A. v. Schmidt, Case No. 114,153, decided by the Shawnee County District Court (Hendricks, J.). *En banc*, equally divided Court of Appeals opinion issued January 22, 2016. Petitions for Review pending before the Kansas Supreme Court.

Sarah's Top 10 from 2015

#10: *Consolver v. Hotze (Pistotnik Affiliated Attorneys)*

51 Kan. App. 2d 286, 346 P.3d 1094 (2015), *review granted* (Jan. 25, 2016)

Authored by Judge Atcheson (with Judges Schroeder and Buser).

Issue: Reasonableness of attorney-fee lien in personal-injury case; calculation of reasonable attorney fees when based on contingency-fee agreement.

Syllabus by the Court:

1. Absent a contract term governing termination, a client discharging a lawyer retained on a contingent-fee basis typically must compensate the lawyer for the reasonable value of the services provided. The equitable doctrine of *quantum meruit* or unjust enrichment governs.

2. Under a *quantum meruit* theory, a party conferring a benefit on another party is entitled to recover the value of the benefit conferred if the recipient knew of the benefit and retention of the benefit without compensation would be inequitable under the circumstances.

3. A client has the right to terminate a contract for legal representation at any time with or without good cause.

4. Payment based on *quantum meruit* depends on the value or worth of the benefit to the recipient. The recipient ought to owe an amount roughly equivalent to what he or she might reasonably expect to pay on the open market for the goods or services constituting the benefit.

5. **A quantum meruit payment is fundamentally incompatible with a contingency fee for legal services.** By design, a contingency fee builds in a premium over and above the fair market value of the services provided to account for the risk of no recovery—and, thus, no payment—not only in that case but in other cases the lawyer considers or takes.

6. **The lodestar method of calculating attorney fees provides a sound foundation for determining a quantum meruit award. A court makes a lodestar fee calculation by determining a reasonable hourly rate for the legal services and multiplies that by the reasonable number of hours required to handle the litigation.** In addition, the court should take into account the criteria outlined in Kansas Rule of Professional Conduct (KRPC) 1.5(a) (2014 Kan. Ct. R. Annot. 515) for determining the reasonableness of a fee, excluding whether the fee is fixed or contingent. A lodestar computation, folding in the relevant KRPC 1.5 criteria, should generate a fee amount approximating the fair market value of the services a lawyer has provided to a client and, thus, the value of the benefit conferred for a *quantum meruit* award.

#9: *Jahnke v. Blue Cross and Blue Shield of Kansas, Inc.*

51 Kan. App. 2d 678, 353 P.3d 455 (2015), *review denied* (Jan. 25, 2016)
Authored by Judge Gardner (with Chief Judge Malone and Judge Arnold-Burger).

Issue: Is there a private right of action under the Small Employer Health Care Act?

Syllabus by the Court:

1. **The issue of subject matter jurisdiction may be raised at any time, in any manner, before any court, even for the first time on appeal.**

2. The absence of a private right of action defeats the court's subject matter jurisdiction.

3. Kansas courts generally use a two-part test in determining whether a private right of action is created. First, the party must show that the statute was designed to protect a specific group of people rather than to protect the general public. Second, the court must review legislative history in order to determine whether a private right of action was intended.

4. The Kansas Small Employer Health Care Act, K.S.A. 40-2209b *et seq.*, does not provide a private right of action.

#8: *Hunter Health Clinic v. Wichita State University*

__ Kan. App. 2d __, 362 P.3d 10 (2015)
Authored by Judge Buser (with Judges Pierron and Powell)

Issue: Who has standing to bring a challenge under KORA?

Syllabus by the Court:

1. The issue of whether a party has standing to pursue a cause of action presents a question of law subject to unlimited review.

2. Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right.

3. To establish standing under the Kansas Open Records Act (KORA), K.S.A. 45-215 *et seq.*, a party must meet the traditional tests for standing and satisfy the statutory standing requirement.

4. **Any person whose request for public records has been denied or impeded has statutory standing to enforce the purposes of KORA by filing a**

cause of action in the district court of any county in which the records are located.

5. Under KORA, it is the public policy of the state that public records shall be open for inspection by any person unless otherwise provided by the act. KORA shall be liberally construed and applied to promote this public policy.

6. An injunction provides an equitable remedy to a party for a legal wrong that gives rise to a cause of action.

7. Under the facts of this case, the plaintiff did not have statutory standing to bring a cause of action under KORA seeking to enjoin the public agency from disclosing purportedly private records.

#7: *Yeasin v. University of Kansas*

51 Kan. App. 2d 939, 360 P.3d 423 (2015)

Authored by Judge Hill (with Judge Green and District Judge Lahey).

Issue: Expulsion of university student for off-campus tweets directed at another student.

Syllabus by the Court:

1. Parties in an agency action before the district court under the Kansas Judicial Review Act may appeal the district court's decision to the appellate courts, just as parties do in other civil cases. An appellate court then exercises the same statutorily limited review as though the petition for review had been directly filed in the appellate court.

2. **Appellate courts no longer apply the doctrine of operative construction or extend deference to an agency's or board's statutory interpretation.**

3. An appellate court exercises unlimited review on questions of statutory interpretation without deference to a university's interpretation of its student code.

#6: *Kaelter v. Sokol*

301 Kan. 247, 340 P.3d 1210 (2015)

Authored by Justice Biles.

Issue: What constitutes a final, appealable order in a paternity case?

Syllabus by the Court:

1. An appellate court exercises unlimited review over jurisdictional issues and has a duty to question jurisdiction on its own initiative. When the record discloses a lack of jurisdiction, the court must dismiss the appeal.

2. A final decision under K.S.A. 2013 Supp. 60-2102(a)(4) generally disposes of the entire merits of a case and leaves no further questions or the possibility of future directions or actions by the district court.

3. The term "final decision" in K.S.A. 2013 Supp. 60-2102(a)(4) is self-defining and refers to an order that definitely terminates a right or liability involved in an action or that grants or refuses a remedy as a terminal act in the case.

#5: *Cain v. Jacox*

302 Kan. 431, 354 P.3d 1196 (2015)

Authored by Justice Stegall.

Issue: Res judicata in multistate child support enforcement actions.

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.

#4: *In re Marriage of Larimore*

___ Kan. App. 2d ___, 362 P.3d 843 (2015) (Petition for Review pending)
Authored by Judge Buser (with Judges Pierron and Powell).

Issue: Dormancy of divorce decree in the absence of a QDRO.

Syllabus by the Court:

1. The Kansas dormancy statute, K.S.A.2014 Supp. 60-2403, governs when a judgment becomes dormant and establishes the circumstances under which a district judge must release the judgment of record. **Because any judgment of any court of record in this state is subject to dormancy, K.S.A.2014 Supp. 60-2403(a)(1) is not limited to monetary judgments.**

2. **A district court's division of a party's retirement accounts in a divorce decree constitutes a judgment subject to dormancy under K.S.A.2014 Supp. 60-2403 when the division qualifies as a final determination of the parties' interests in the marital estate.**

3. A party may execute on a judgment in a divorce decree that divides a party's retirement accounts governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2012) *et seq.*, by filing a qualified domestic relations order with the retirement plan administrator for each retirement account.

4. Under the tolling provision of K.S.A.2014 Supp. 60-2403(c), the dormancy period does not run "during any period in which the enforcement of the judgment by legal process is stayed or prohibited."

5. Under the facts of this case, although retirement benefits were not yet payable, K.S.A.2014 Supp. 2403(c) did not toll the running of the dormancy period for a judgment in a divorce decree that divided a party's retirement accounts governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2012) et seq., because the legal process for enforcing the judgment, the filing of a qualified domestic relations order, was not stayed or prohibited.

#3: *Mashaney v. Board of Indigents' Defense Services*

302 Kan. 635, 355 P.3d 667 (2015)

Authored by Justice Beier. Concurring opinion by Justice Stegall.

Issue: Whether a criminal defendant may bring a civil legal malpractice lawsuit against defense counsel without first demonstrating actual innocence.

Syllabus by the Court:

1. The Board of Indigents' Defense Services is not subject to suit in a civil legal malpractice action brought by a criminal defendant after relief from a conviction because of ineffective assistance of counsel provided by a BIDS lawyer.

2. A criminal defendant who brings a civil legal malpractice lawsuit against allegedly negligent defense counsel within 2 years of the date on which the defendant receives relief from his or her conviction because of ineffective assistance of counsel has timely filed the civil case.

3. Accrual of a civil cause of action for legal malpractice occurs on the date on which a criminal defendant receives relief from his or her conviction because of ineffective assistance of counsel. The fact that a criminal prosecution against the defendant may be continued or revived does not alter the accrual date.

4. **A criminal defendant, whose conviction has been reversed in a K.S.A. 60-1507 proceeding because of ineffective assistance of counsel may pursue a civil legal malpractice claim against criminal defense counsel without first demonstrating the defendant's actual innocence of the charges leading to the conviction.**

#2: *Hoesli v. Triplett, Inc.*

__ Kan. __, 361 P.3d 504 (2015)

Authored by Justice Biles.

Issue: Interpretation of offset statute (K.S.A. 44-501(h)), which requires reduction in workers compensation by social security benefits received by claimant.

Syllabus by the Court:

1. **When a statute is plain and unambiguous, the court must give effect to its express language, rather than determine what the law should or should not be. A court determines legislative intent by first applying the meaning of the statute's text to a specific situation at issue. A court does not read into the statute words not readily found there.**

2. When the language of a statute is unclear or ambiguous a court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain the statute's meaning.

3. The doctrine of stare decisis instructs that points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised.

4. The doctrine of stare decisis is not unyielding. A court of last resort can overrule prior caselaw when: (a) it is clearly convinced a rule of law established in its earlier cases was originally erroneous or is no longer sound because of changing conditions; and (b) more good than harm will come by departing from precedent.

5. K.S.A.2010 Supp. 44-501(h) unambiguously provides that workers compensation is subject to offset when the injured worker is simultaneously receiving social security retirement benefits. The contrary holdings in *Dickens v. Pizza Co., Inc.*, 266 Kan. 1066, 1071, 974 P.2d 601 (1999), and subsequent cases, which carved out exceptions to the statute's plain language, are overruled.

6. A court must construe a statute as constitutionally valid if there is any reasonable way to do so. But this rule cannot be relied upon to change the meaning of unambiguous statutory language.

7. K.S.A.2010 Supp. 44-501(h) does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The statute's purpose is to avoid duplication of wage-loss benefits and its provisions satisfy the applicable rational basis test.

#1: *Solomon v. State of Kansas*

__ Kan. __, 364 P.3d 536 (2015)

Authored by Justice Rosen. Concurring opinion by Justice Stegall.

Issue: Constitutionality of legislative enactments changing the selection and duties of chief judges of the Kansas district courts.

Syllabus by the Court:

1. Whether a party has standing to pursue a declaratory judgment action is a question of law subject to unlimited review on appeal.

2. In order to establish standing, a plaintiff must show that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.

3. In order to establish a cognizable injury, a party must show that he or she has a personal interest in the outcome of a case and personally suffers some actual or threatened injury as a result of the challenged conduct.

4. A judge with conflicting official duties imposed by law has a justiciable interest in obtaining a judicial resolution of the conflict.

5. **The history and context of the 1972 amendment to Article 3, § 1 of the Kansas Constitution show that the Supreme Court's general administrative authority includes the power to make rules for process, practice, and procedure at all levels of the unified court system.**

6. The written Constitution of Kansas is paramount law because it emanates directly from the people.

7. As a general rule, the legislature may enact statutes to facilitate or assist in the operation of a constitutional provision, but such legislation must be in harmony with and not in derogation of the constitution.

8. The doctrine of independent governmental branches is firmly entrenched in United States and Kansas constitutional law.

9. The powers entrusted to government are divided into three branches—the executive, the legislative, and the judicial—and the persons entrusted with power in any one of these branches may not encroach upon the powers conferred by the people upon the others.

10. The doctrine of separation of powers is an inherent and integral element of the republican form of government and is expressly guaranteed to the states by the federal Constitution.

11. **The Kansas Supreme Court has the authority and duty to preserve the constitutional division of powers against disruptive intrusion by one branch of government into the sphere of a coordinate branch of government. In order for the interference by one department with the operations of another department to be unconstitutional, the intrusion must be significant.**

12. In reviewing whether one branch of government has significantly interfered with the operations of another branch to the point of violating the doctrine of separation of powers, courts consider four factors: (1) the essential nature of the power being exercised; (2) the degree of control by one branch over another; (3) the objective sought to be attained; and (4) the practical result of blending powers as shown by actual experience over a period of time.

13. **The Kansas Supreme Court's general administrative authority includes the power to promulgate and enforce reasonable rules regulating judicial administration and court procedure as necessary for the administration of justice.**

2016 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, argued in September 2014. Not yet docketed for argument

Issue: Constitutionality of Kansas Offender Registration Act under the *Ex Post Facto* Clause.

State of Kansas v. W.M., Shawnee County Case No. 12D 2686.

Issue: Whether the State may assess child-support payments from donors in nontraditional artificial-insemination cases, and whether a parent may waive parental rights by agreement.

Hodes & Nauser, MDs, P.A. v. Schmidt, Case No. 114,153, decided by the Shawnee County District Court (Hendricks, J.). *En banc*, equally divided Court of Appeals opinion issued January 22, 2016. Petitions for Review pending before the Kansas Supreme Court.

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 by the Shawnee County District Court (Hendricks, J.). Transferred on motion to the Kansas Supreme Court, briefing concluded in February 2016. Not yet docketed (as of March 22, 2016).

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.