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TIMING IS EVERYTHING: RECENT AMENDMENTS TO THE FEDERAL RULES OF CIVIL AND APPELLATE PROCEDURE

Numerous amendments to the Federal appellate, civil, bankruptcy and criminal rules became effective on December 1, 2009. The vast majority of changes reflect the intent to simplify the computation of time periods through adoption of a "days are days" approach that involves inclusion of intermediate weekends and holidays in calculating deadlines.¹ The resulting amended rules are straightforward and consistent, replacing the often vague and confusing approach of the prior rules.²

The prior rules only counted intermediate weekend days and holidays in certain circumstances. The amended time computation and time limit rules automatically and uniformly include intermediate weekend days and holidays where necessary, making application of each time-computing method clearer and simpler.³ "To further simplify time counting, most periods shorter than 30

days have been changed to multiples of 7 days (7, 14, 21, or 28 days) so that deadlines will usually fall on weekdays."⁴ The amendments also address "forward and backward counting periods," and explain how concepts such as "inaccessibility of the clerk's office and when a day ends apply to electronic filing."⁵

This article seeks to aid litigators by summarizing in detail the amendments to Federal



Jasmine Jamal
Abou-Kassem
Polsinelli Shughart PC*

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THE CONTINUED NEED FOR SAFEGUARDS IN THE KANSAS CLASS CERTIFICATION PROCEDURE: AN OVERVIEW OF CRITCHFIELD PHYSICAL THERAPY V. THE TARANTO GROUP

On January 28, 2010, the Kansas Supreme Court heard oral arguments in *Critchfield Physical Therapy v. The Taranto Group, Inc.*¹ The case involves an appeal from an order of the Johnson County District Court, which certified a class of claimants under the Telephone Consumer Protection Act (TCPA).² The practical effect of this certification was to convert an individual private right of action for \$500 to \$1500 in statutory damages to a \$69 million, bet-the-company lawsuit. *Critchfield* is the first of the TCPA actions filed in this state to reach the state's highest court.

Due to the importance of preserving the safeguards for class certification previously set forth by Kansas Supreme Court in

Dragon v. Vanguard Industries, Inc. (Dragon I),³ the KADC filed a brief in *Critchfield* as *amicus curiae*, addressing various deficiencies in the district court's decision with regard to the class certification procedure. In particular, the KADC stressed that the district court's failure

to rigorously analyze all of the certification factors and the court's stated belief that the



Sarah Warner
Thompson Ramsdell
& Qualseth, P.A.*

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PRESIDENT'S MESSAGE: **DON'T BE A CHAMELEON**

I hate scary movies, which makes me wonder why I practice law because at times it can be so scary. For example, consider the Order on Plaintiff's Motion for Sanctions issued by U.S. District Judge Larry J. McKinney in *1100 West, LLC v. Red Spot Paint & Varnish Co., Inc.*, 1:05-cv-1670-LJM-JMS (S.D. Ind. June 5, 2009). Plaintiff alleged Defendant *and its attorneys* purposely withheld documents that were responsive to discovery requests and that Defendant's Rule 30(b)(6) witness as well as other employees and officers of Defendant lied or misrepresented the truth in regard to Defendant's use of particular chemicals and solvents.

Defendant denied the allegations and, among its contentions, stated that "it relied on its attorneys [] for advice in discovery; therefore, any error or failure to produce documents is the [attorneys'] responsibility." The law firm responded, claiming its attorneys were not aware of the 14 critical documents evidencing use of the chemicals and they did not know the extent to which or the time frame during which those chemicals were on the property. The law firm also contends that Defendant admitted the law firm relied on Defendant "to provide accurate, truthful and complete information, but [Defendant] did not do so." The law firm did not dispute that it had possession of some relevant and responsive documents but stated that once it found out about the misconduct of its attorneys, the attorneys were removed from the firm and it cooperated fully with Plaintiff. The law firm asked the court to focus on the failure of Defendant to be candid throughout the litigation about the use of the chemicals at issue.

No doubt the Defendant and the law firm no longer exchange Christmas cards, but what else happened? The Defendant had no opportunity to defend its case on the merits as the requested default judgment was granted. Two partners and one associate of the law firm lost their jobs and the law firm is subject to paying substantial sanctions. Pretty scary, don't you think?

Oh well, we can always learn something helpful from a scary movie. For example, you don't go downstairs when the lights won't work, no matter what you hear. And, fortunately, we can learn from the mistakes of our colleagues too.

First, let's set the stage:

Defendant had 68 boxes and 2 filing cabinets full of documents, which were unorganized and without any catalog, index or tabulation of documents. The corporate representative made nothing more than a cursory examination of the documents. Nevertheless, discovery responses were made in reliance on the representations of the corporate representative. Thereafter, defense counsel continued to make assertions in motions and other pleadings based on these representations.

Just before trial, Plaintiff obtained documents pursuant to a Freedom of Information Act request and learned that Defendant's

(Continued on page 10)



Tracy Cole
Gilliland & Hayes

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ACCOMPLISHED KANSAS LAWYER H.W. "BUD" FANNING RECEIVES WILLIAM KAHRS LIFETIME ACHIEVEMENT AWARD

By Amy E. Morgan, Polsinelli Shughart PC

At the 2009 KADC Annual Conference, our association conferred its highest award, the William Kahrs Lifetime Achievement Award, on H.W. "Bud" Fanning of Hite, Fanning & Honeyman LLP. The following is a biographical summary regarding Bud and his successful career.



Upon discharge from the Navy, Bud immediately started college at what was then regarded as Wichita University (now Wichita State University). After his freshman year, which he recalls was spent mostly learning how to be a "college boy (translated how to party, drink beer and still make passing grades)," Bud decided to try out for the baseball team. After

Native Kansan Bud Fanning has had a long and successful legal career, experiencing many military and civilian accomplishments throughout his professional life. His humble beginnings and hard work ethic served him well in each of the leadership positions he undertook in his career.

a lot of hard work, sweat and effort, he made the team and was the first string catcher. Bud modestly recalls, "obviously the team was not much good since I was able to make first string, but we did have one claim to fame when we beat the University of Nebraska team in a year when they were the Big Six champions..."

Bud was born in Valley Center, a small town north of Wichita, in 1929 – just in time for the Great Depression. His family moved to Wichita six years later and Bud attended public schools in Wichita through high school. Bud graduated from high school just as WWII ended and, "as was the popular and patriotic thing to do then, joined the Navy." After boot training in San Diego, he was shipped to the Subic Bay submarine base in the Philippine Islands. Bud was on a small ship that ran between Subic Bay and Manila on daily runs and, since he considered Manila to be a much better location than Subic Bay, asked for and received a transfer to the Naval base located on Manila Bay. Bud later transferred to the U.S. Naval Air Station at Sangley Point, P.I., where he served out his enlistment.

Bud reflects that he made "one fairly serious mistake" at Wichita University, when he enrolled in the Army ROTC program beginning his sophomore year. At that time, if you had been an enlisted man in the service you could immediately start in the advanced course in ROTC. This meant that you would start drawing \$0.90 a day while in school. Bud recalls: "This doesn't sound like much these days, but in 1949 it was pretty nice to receive a check for \$27.00 each month to supplement the G.I. Bill." So Bud, while leading "not too serious a life," took the course for two years and was commissioned a Second Lieutenant after his junior year. The only problem with this was that the

(Continued on page 32)

Native Kansan Bud Fanning has had a long and successful legal career, experiencing many military and civilian accomplishments throughout his professional life.



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KADC MOURNS LOSS OF JOHN HAYES, FOUNDING MEMBER AND PAST PRESIDENT

by Amy E. Moragn, Polsinelli Shughart

John Hayes, a prominent Kansas attorney and one of KADC's distinguished leaders, passed away in January. John one was of KADC's founding members and served as president in 1971-72. At the 2008 KADC Annual Conference, our association conferred on John its highest award, the William Kahrs Lifetime Achievement Award. John also was a member of the American Board of Trial Advocates and International Association of Defense Counsel and was a Fellow of the American College of Trial Lawyers, the Kansas Bar Foundation and the American Bar Foundation.



Republican Convention and later served six terms in the Kansas House of Representatives where he was chairman of the Insurance and Judiciary committees and was Majority Floor Leader from 1975-1977. He was credited with creating Sand Hills State Park, supporting passage of court unification and the state's no-fault insurance law, improving the Kansas State Fair and establish-

ing the Law Enforcement Training Center in Hutchinson. He was a long-time director of Central Bank & Trust, Hutchinson, and Waddell & Reed Group of Funds, Overland Park. He was listed in Who's Who in America for more than 40 years, a Life Member of the National Conference of Commissioners on Uniform State Laws serving for more than 30 years, and a Fellow of the American College of Trial Lawyers and the American Bar Foundation. He also served as president of the Hutchinson Chamber of Commerce, Hutchinson Rotary Club, Hutchinson Town Club and Prairie Dunes Country Club. He served as president of the Reno County Bar Association and the Kansas Association of Defense Counsel. He was a member of the American Bar Association, Kansas Bar Association and the Kansas Bar Foundation. Hayes also served as a director and district vice-president of the Kansas State Chamber of Commerce and vice-president of the Hutchinson Symphony. On August 10, 1950, he married Elizabeth Ireton. She survives. Other survivors include son, Carl of Joplin, MO; daughter and son-in-law, Chandler and John Moenius of Prairie Village, KS; and five grandchildren. In lieu of flowers, memorial gifts may be made to Washburn University Law School, 1700 College, Topeka, KS 66621.

On behalf of KADC, we honor John Hayes for his outstanding record of leadership and service. He will be missed. ▲

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Hayes for his
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A biographical piece regarding John appeared on the front page of the Winter 2009 issue of the *Kansas Defense Journal*, in an article by Sheryl F. French, CLA, Gilliland & Hayes, P.A., titled "John Hayes: Leadership By Example." The issue containing that article is available online under "Publications" at www.kadc.org. John's obituary, as it appears at www.legacy.com, is below.

John Hayes, 90, died January 14, 2010 at Promise Regional Medical Center, Hutchinson. He was born in Salina, KS on December 11, 1919, the only child of J. Frank and Helen Dye Hayes. Hayes graduated from Hutchinson High School, Hutchinson Community College, Washburn University and Washburn Law School. He was a member of Phi Delta Theta fraternity, where he and nine fraternity brothers formed Gnip Gnop, a group that met one weekend every year for more than 60 years for golf, tennis and friendship, and established a scholarship at Washburn Law School. Hayes served as Captain in the United States Army with service in New Hebrides Islands and the Philippines. Hayes was a founding partner of the Gilliland & Hayes law firm, which now has offices in Hutchinson, Wichita, Lawrence and Overland Park, KS. The firm celebrated its 50th anniversary on December 15, 2009. In 1952, Hayes served as a delegate to the National

RECAP OF 2009 KADC ANNUAL MEETING

A much anticipated event at KADC's 31st Annual Conference was the CLE presentation by Sean Carter, who is billed as the country's foremost "Humorist at Law." Even for a bleary-eyed, sleep deprived Friday morning crowd, Sean Carter lived up to his billing. During a fast-paced two hour program he lectured on the normally dry subjects of legal ethics and professionalism. If humor and its constant companion, laughter, is the best medicine for learning such things, the audience should be a learned group, because Mr. Carter administered a very strong dose. Later in the day, Mr. Carter added another heaping dose of humor as the after-dinner speaker at the "Opposing Parties Gala," a joint event with members of the Kansas Association for Justice which concluded with a dance featuring the swing band "The Grand Marquis" from Lawrence.

In an addition to the strong entertainment value of the conference, overall, KADC was once again treated to a cracker-jack program of speakers on topics which touch our everyday litigation practices:

- James Peter and Dr. Gary Heydinger of SEA, Ltd. on technology and trends in automotive litigation;
- Gaye Tibbets of Hite Fanning & Honeyman and Boyd Byers of Foulston Siefkin on recent Supreme Court decisions and federal legislation affecting employment litigation;
- Dr. Sondra Donaldson of FirmLogic LLC, on managing corporate image in litigation and jury selection;
- Mary Re Knack of Williams Kastner in Seattle on beating paths through the wilderness of law in the wake of the Medicare Secondary Payer Act and Section 11 of the Medicare, Medicaid and SCHIP Extension Act;
- Justice Dan Biles of the Kansas Supreme Court on the state of the judiciary and new appellate practice procedures;
- Steve Kerwick of Foulston Siefkin who delivered his always popular Kansas case law update;
- Honorable Tom Marten, United States District Court for Kansas; Honorable Karen Humphreys, United States District Court for Kansas; Mike Jones, Martin, Pringle, Oliver, Wallace and Bauer; Robert Kelso, Forensic Pursuit; Jack Moore RSI; and Scott Lefton, Midwest Litigation and Trial Service, on the future of e-discovery, admission of electronic evidence, and electronic presentation techniques in the courtroom;
- Honorable Tom Marten on making the most of voir dire; and
- Dave Rameden, and Zach Chaffee-McClure, both from Shook, Hardy & Bacon, on the future of litigation.



F. James Robinson
Hite, Fanning & Honeyman, LLP

The KADC is indebted to our vendors and sponsors whose advertisements appear in this publication. Without their financial support we could not present the caliber of program that you have come to expect. Please let them know you appreciate their support.

Today, our profession faces some of the most challenging practice and economic circumstances that many of us have seen in our lifetime. Now more than ever, it is crucial that KADC help prepare our members for the practice of the future. If we have fallen short of this mark please let a KADC Board member know that. The Board values your feedback. Personally, I am grateful to have the honor of serving as your program chair and working with the fine staff at the KADC.

See you and the Mid-Year Meeting in Wichita and the Annual Conference on The Plaza in Kansas City. Until next year . . . ▲

Even for a bleary-eyed, sleep deprived Friday morning crowd, Sean Carter lived up to his billing.

KADC AMICUS COMMITTEE REPORT

CAPS ON NON-ECONOMIC DAMAGES – OPINION ISSUED

The Court of Appeals issued an opinion in late January in the case *McGinnes, et al. v. Zayat, M.D.*, No. 99,896, one of two medical malpractice cases in which the KADC filed an Amicus brief addressing constitutional challenges to the K.S.A. 60-1903 and 60-19a02 caps on non-economic damages. The KADC's brief was authored by Tim Finnerty, of *Wallace, Saunders, Austin, Brown & Enochs, Chtd.*

The Court of Appeals upheld the constitutionality of the caps, stating that it was duty-bound to follow Kansas Supreme Court case law in *Samsel v. Wheeler Transport Services, Inc.* 246 Kan. 336, 361, 789 P.2d 541 (1990), and *Leiker v. Gafford*, 245 Kan. 325, Syl. ¶ 15, 778 P.2d 823 (1989), which found the caps to be constitutional. *Samsel* and *Leiker* remain good law and controlled as to the constitutional issues presented in the appeal.

In its opinion, the *McGinnes* court specifically noted that by enacting the damage caps, the Kansas Legislature acted within its powers to define the maximum amount of nonpecuniary damages recoverable in personal injury litigation. Thus, rejecting the plaintiffs' arguments, the court held that the caps do not violate the separation of powers or serve as a legislative remittitur of damages. This decision was based on *Samsel*, which held that the Legislature has the power to modify the right to a jury trial as long as the modification comports with Due Process. In the same way, the Court of Appeals in *McGinnes* noted that the damage caps are not an encroachment on judicial discretion or an interference with the Supreme Court's rulemaking powers. The Illinois Supreme Court recently came to the opposite conclusion on this point in *Lebron v. Gottlieb Memorial Hospital*, Case Nos. 105,741, 105,745 (decided February 4, 2010). The Illinois court held that caps on medical malpractice damages violate the separation of powers by acting as

an impermissible legislative remittitur on damages.

As to the other issues raised on appeal, the court held that the statutory damage caps are not an affirmative defense that must be pleaded or an avoidance that must be raised at a pretrial conference. The Court of Appeals denied the defendant's request for a new trial based on evidentiary challenges but reversed the district court's award of pre-judgment interest.

No opinion has been issued since the Kansas Supreme Court heard oral arguments on October 29, 2009 in *Miller, et al. v. Johnson*, No. 99,818, the other medical malpractice case challenging the non-economic damages caps in which the KADC is *amici*.

AMICUS BRIEF FILED IN CLASS ACTION APPEAL

In late December, the KADC filed an Amicus brief in *Critchfield Physical Therapy v. Taranto Group, Inc.*, No. 101,949, an action brought under the Telephone Consumer Protection Act in the Johnson County District Court. The district court certified the class, and the defendant was granted an interlocutory appeal as well as transfer to the Supreme Court to challenge the certification order. Oral arguments were held before the Supreme Court on January 28, 2010. *Thompson Ramsdell & Qualseth, P.A.*, authored the KADC's Amicus brief. Sarah Warner, one of the authors of the brief, discusses the questions raised in the appeal in detail in an article on the front page of this issue of the *Kansas Defense Journal*.

If any member has a request for amicus support, please contact me by phone at (785) 841-4554, or via e-mail at

todd.thompson@trqlaw.com. ▲



Todd N. Thompson
*Thompson Ramsdell
& Qualseth, P.A.*

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DRI 2010 Seminars

March 4
Strictly Retail
Chicago, IL

March 17
Damages
Las Vegas, NV

March 18
**Toxic Torts and
Environmental Law**
New Orleans, LA

March 25
**Sharing Success: A Seminar
for Women Lawyers**
Scottsdale, AZ

April 7
Product Liability
Las Vegas, NV

April 14
**Insurance Coverage and
Claims Institute**
Chicago, IL

April 15
**Business Litigation and
Intellectual Property**
New York, NY

April 28
**Life, Health, Disability and
ERISA Claims**
Chicago, IL

May 5
Employment Law
Scottsdale, AZ

May 20
Drug and Medical Device
San Francisco, CA

Visit www.DRI.org for
additional information,

DRI REPORT

In the early 1960's, Great Bend trial lawyer Lee Turner was appointed "Director for Kansas" by the Defense Research Institute in the face of a deluge of pro-plaintiff public relations activities in the state sponsored by the plaintiff's bar. Through his association with DRI, Turner learned how strong and well-organized the plaintiff's bar was, in that it was engaged in similar activities in every other state.

In 1965, after returning to Kansas from a speaking engagement before the Texas Association of Defense Counsel, Turner began organizing the Kansas Association of Defense Counsel. "Within a matter of days," he reported to Tim Finnerty in an interview marking the organization's 35th anniversary in 2001, "I had commitments from over sixty lawyers, all influential statewide." KADC was born on January 22, 1966.

KADC's ties to DRI have remained strong, including the election of KADC member Bill Sampson to national president of DRI in 2003-2004.

Why belong to DRI? Because as a member you are a part of an international membership organization of attorneys defending the interests of business and individuals in civil litigation. DRI's leadership, through the support of over 22,000 members, works diligently to promote the interests of defense counsel like you.

DRI's CLE programs are without parallel and as a DRI member you attend these seminars at a reduced cost. In fact, if you qualify as a DRI "Young Lawyer" – attorneys who have been admitted to the bar five years or less – you are invited to attend your first seminar at no cost at all. I took of advantage of this offer 20 years ago and attended a Trial Tactics

seminar in Seattle, my introduction to outstanding DRI seminar offerings. I still have, and often refer to, those materials.

DRI also offers all of its members a subscription to its monthly magazine, "For The Defense," the only national magazine for defense practitioners. Rarely will you receive an issue that does not contain something helpful to your practice. In addition, DRI members are welcome to utilize The Expert Witness Database, which features information on more than 65,000 plaintiff and defense experts and includes over 1 million pages of transcripts.

And there are the networking opportunities. Take advantage of the 27 substantive law and practice committees at DRI. Become actively involved in one or more of these committees and you will expand exponentially your access to referrals by other defense lawyers from across the country.

Finally, there is the DRI Annual Meeting, the flagship event of DRI. Save the date for this year's meeting in San Diego, scheduled for October 20-24, 2010.

If your free membership is about to expire, be sure to renew so as not to lose the benefits offered by DRI. If you are not a member, sign up now by giving me a call (620.626.8565) or visiting the website at <http://www.dri.org>.

Since 1966, KADC and DRI have teamed together to offer the defense lawyer the tools, support and network to enhance his or her defense practice. Join the team.▲



Daniel Diepenbrock
DRI Representative



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EXECUTIVE DIRECTOR'S REPORT

The legislative session is upon us, which normally inspires me to whip up some fire and brimstone for this column about the importance of being politically engaged, contacting your legislators, etc. However, two recent events have me leaning towards something more introspective, tinged with a little warm nostalgia.

It was with great sadness that I recently heard of the passing of John Hayes. A founding partner of Gilliland & Hayes, John was the President of KADC in the early 1970s. I didn't know John well, but I had spoken with him several times at KADC conferences. I always found this man who was a legend in his field to be as approachable as the man on the street. Between this demeanor and the fact that KADC has named a midday libation break in his honor, I was completely sold on his merits from day one.

Earlier this week I received an e-mail from DRI (which is celebrating its 50th Anniversary this year) asking SLDOs to send in the date they were organized and some thoughts about the impact of DRI on their organizations. I combed through our files for something resembling a KADC birth certificate, and the closest thing I could find was a list of Past Presidents, starting with Williams Kahrs in 1966-67. I wanted to be sure the list was accurate and complete, so I picked a handful of seasoned KADC Past Presidents I hoped might help me verify the date. With that, I sent an e-mail to Don Patterson, Gene Balloun, Dick Hite, Wayne Stratton, and Bill Sampson. Hoping for a simple confirmation, what I ended up receiving was a wonderful history of KADC from the people who made it happen. Don Patterson, who frequently tells me that after his morning workouts he needs a cup of coffee just to remember where he parked his car, belied his self-effacing demeanor by producing details of years gone by with amazing clarity. The same can be said of all the others.

These two incidents, though unrelated, have me reflecting on the history of a proud organization that I've only been a part of for a few wonderful years. Reading the obituary for John Hayes was a lesson in humility. He served his country in the Army, served in the state legislature, and was involved with numerous philanthropic causes in addition to

his accomplishments in the field of law. It's not the first time I've felt that humility when reading or hearing the pedigrees of past KADC leaders.

Part of me sometimes wonders if it will be difficult to continue this tradition. Volunteer participation is waning in almost every non-profit organization. The sheer increase in the number of practicing attorneys makes it harder and harder to stand out as a true leader in the industry. Likewise, the increasingly competitive world in which our members work demands more and more of their time. And when talking to the Pattersons, Ballouns, Hites, Strattons and Sampsons of the world (just to name a few), it is sometimes hard to imagine those of us in the next generation filling their shoes.

Having said that, I am confident that someone in my chair twenty or thirty years from now will be saying the same thing about the volunteer leaders I work with today. It seems proper that we save our kindest accolades for those at or nearing the end of a career, and likewise proper not to be too awestruck by those who are still forming their legacy and whose work is still in the trenches. However, I can attest that there are certain attributes that are just as easily found in the leaders of today as the leaders of yesterday. A commitment to an independent and ethical judiciary, a willingness to sacrifice time and personal profit for the betterment of the profession, a steady and reasoned mind not easily swayed by the flavor of the moment. Perhaps most importantly, despite the fact that they may be competitors in any given moment, I see in both groups an awareness that their combined efforts on behalf of the profession will indeed be the tide that lifts all boats.

So, while I continue to be humbled by the accomplishments of those who came before, I am also comforted to know that I am working with the very individuals that will someday inspire humility in the one who will eventually take my place. And for that I am thankful. ▲

I can attest that there are certain attributes that are just as easily found in the leaders of today as the leaders of yesterday.



Scott Heidner
Executive Director

SUMMARY OF RECENT UNPUBLISHED APPELLATE OPINIONS

The following Kansas unpublished appellate opinions were summarized by Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C. To review summaries of unpublished opinions on a regular basis, simply open your weekly "KADC Court Opinions" email and click on the link listed on the Unpublished Opinions section: <http://www.kadc.org/Opinions.htm>. If you are not already receiving weekly emails with court opinions, contact KADC Membership Services Manager Amy Schlink at amy@kadc.org to be added to the distribution list.



Jackie Sexton
Foland, Wickens,
Eisfelder, Roper &
Hofer, P.C.

January 22, 2010

COURT OF APPEALS

Docket Number / Case Name / Judge / Disposition / County

[100.725](#) – Winning Streak, Inc., et al. v. Winning Streak Sports, et al. – Per Curiam – Affirmed – Johnson.

Winning Streak, Inc., and Christopher David v. Winning Streak Sports, L.L.C. and U.S. Hardwood Distributors, Inc. and Lauren Larson, Case No. 100,725 (Kan. App. January 22, 2010)

Hardwood and Larson appealed the \$600,000 jury verdict in favor of Davis for Larson's breach of fiduciary duty, arguing that a jury instruction on this issue and a verdict form were clearly erroneous. Davis cross-appealed the district court's declaratory judgment that he was only a .96% member of Winning Streak Sports, LLC (WSS).

Following the jury trial, the district court entered its declaratory judgment, finding that Hardwood had contributed capital of \$100,000 to WSS, Larson contributed \$1,020 and Davis contributed \$980. Based on these findings, the court declared that Davis had a .96% interest in WSS. Larson and Hardwood argued that Instruction 24 and the verdict form were clearly erroneous because they allowed Davis to recover personally for claims that were derivative in nature. On appeal, Larson and Hardwood claimed that the district court erred in instructing the jury on claims by Davis that belonged to WSS and could only be brought by Davis in a derivative action. They made no such objection at the instruction conference. The Court of Appeals determined that the evidence in support of Davis' breach of fiduciary duty claims, viewed in light more favoring Davis, the prevailing party, warranted the district court submitting these claims to the jury. The instruction contained a correct statement of the law and, as such, the district court did not err in submitting it to the jury.

Next, there was conflicting evidence submitted on Davis' ownership and status as a member of WSS. The Court of Appeals carefully reviewed this evidence. The district court considered the conflicting evidence and was persuaded by the evidence that Davis was not a member of WSS at its formation. The Court of Appeals noted it cannot reweigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact. Finding there was sufficient evidence to support the district court's finding of fact that Hardwood was the only member of WSS when it was formed, the Court of Appeals upheld that finding. Similarly, the Court of Appeals rejected Davis argument that the district court's finding that WSS had no operating agreement was not supported by substantial competent evidence. Finally, again, the Court of Appeals deferred to the district court on the credibility of witnesses and conflicting evidence, and determined the district court's determination that Davis was a .96% member was supported by substantial evidence.

[101.260](#) – Sander v. Liberal Animal Hospital – Per Curiam – Affirmed – Seward.

Shirley Sander v. Liberal Animal Hospital, P.A., Case NO. 101,260 (Kan. App. January 22, 2010)

Sander sued the Liberal Animal Hospital after her employment was terminated for having a

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President's Message*(Continued from pg 2)*

lawyers had requested the same information almost a year earlier. Even so, Defendant had failed to disclose the information to Plaintiff. Plaintiff requested an emergency hearing. The day before the hearing, defense counsel denied seeing the documents. At the hearing, defense counsel admitted they had requested documents but did not get the specific documents Plaintiff was worked up about, that when the documents came in the requesting attorney was in ill health and the documents had been "forgotten" and, finally, he dismissed the value of the documents Plaintiff had just obtained through its FOIA request. The next day, Defendant's lawyers requested another hearing because they had found the documents about which Plaintiff was concerned. At the hearing, defense counsel argued its failure to disclose the documents was an oversight, not intentional, and denied the file had been sanitized.

At this point, Plaintiff had had enough and filed its motion for sanctions, asking for a default judgment, for an order striking the defense experts and an award of attorneys' fees and costs. The court set a schedule and advised the Defendant to get separate counsel, as it appeared Defendant's interests and those of its attorneys were now at odds. (scary) The court subsequently found, based on *prima facie* evidence, that Defendant had committed discovery fraud and made misrepresentations to the court. As a result, the court ruled that Defendant "had waived the attorney-client and work-product privileges with respect to both the [FOIA] documents and the newly-discovered responsive documents." (very scary)

Of course, what followed was discovery, discovery, and more discovery. Primarily to find out who knew what when and to further explore the documents that had finally been produced. This included depositions of the defense attorneys, review of their e-mails and inquiry into discussions between the attorneys and Defendant.

Ultimately a hearing was conducted, including testimony by various representatives of the Defendant. The corporate representative testified that no one from the law firm helped her search for responsive documents. (I can't help but hear that horrible

soundtrack they always play when the murderer is jabbing the knife into the poor girl who went downstairs.) She never reviewed the documents page-by-page but just pulled out what she thought might be responsive and sent it to the lawyer. She said the lawyers never questioned her methods or offered to help her. She reviewed the discovery responses but relied on the attorneys to decide what satisfied the meaning of the requests. In fact, at one point in an e-mail regarding documents, the corporate representative said she "may have more." One of the defense attorneys passed this along to her colleagues stating, "Guys, this is a little bit scary." As a result, one of the attorneys visited Defendant and was shown to the basement storage room. (Yikes!) Whereupon the corporate representative said, "here they are" and left the attorney there unattended. (At this point the wide-eyed attorney should run screaming from the basement while she still can but she doesn't.)

After hearing the testimony, reviewing the evidence and hearing the arguments and statements of counsel, the court reminds us of the rules, identifies the failings and metes out the punishment:

1. Neither the defendant, the corporate representative nor defense counsel may decide what is relevant or what may lead to something relevant.
2. Neither the defendant, the corporate representative nor defense counsel may decide which witnesses are credible. Litigants cannot pick and choose between sets of facts within corporate knowledge. All facts must be revealed so they may be presented to the fact finder.
3. Attorneys are bound by rules of procedure, rules of evidence and rules of professional conduct, including a responsibility to be candid with the court.
4. Attorneys have the responsibility to objectively address a client's case and to objectively direct the client to abide by the rules of procedure, including the rules of discovery, and the rules of evidence.

The court is quite colorful in identifying the failings. Defendant's corporate representative is described as contumacious, obstructionist, and obstreperous. The court further finds that the corporate representative and

At the hearing, defense counsel argued its failure to disclose the documents was an oversight, not intentional, and denied the file had been sanitized.

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other employees never responded with candor. The defense attorneys were likened to chameleons.

The court uses the term chameleon to describe an attorney who becomes indistinguishable from his or her client. The attorneys were indistinguishable because they failed to use their own judgment. The court found that the defense attorneys had enough information to suspect the discovery responses were incomplete and likely incorrect but failed to follow-up or press its client. The defense attorneys also knew the documents were voluminous and completely unorganized. The defense attorneys had heard incomplete and evasive deposition testimony, were aware of conflicting information from former employees and had questioned the written discovery responses. All of this

The court uses the term chameleon to describe an attorney who becomes indistinguishable from his or her client. The attorneys were indistinguishable because they failed to use their own judgment.

was sufficient to require counsel to guide the Defendant to make complete disclosure. Instead, the defense attorneys persisted with the Defendant's strategy of denying use of the chemicals at issue. As a result, defense counsel failed to supplement discovery, failed to clarify deposition testimony and failed to make timely disclosures.

In doling out the consequences, the court noted that while the Defendant was primarily at fault, defense counsel missed every opportunity to correct the lack of compliance with the rules of procedure and evidence. The actions and omissions of Defendant and defense counsel resulted in a default judgment and the award of sanctions and attorneys' fees.

Moral of the story: "Being a zealous lawyer does not mean zealously believing your client in light of evidence to the contrary." ▲

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Significantly, however, strong deference as to timing requirements should be given to our Local Rules in the District of Kansas, as amended on December 1, 2009, which may modify the timing rules set forth by the Federal Rules.

Timing is Everything (Continued from pg 1)

Rules of Civil Procedure 6, 12-15, 23, 27, 32, 38, 48, 50, 52-56, 59, 62, new rule 62.1, 65, 68, 71.1, 72, and 81, and Federal Rules of Appellate Procedure 4-6, 10, new rule 12.1, 15, 19, 25-28, 31, 39, and 41. When applicable, practitioners should also refer to our local rules (Rules of Practice of the United States District Court for the District of Kansas) for further instruction on computation of time, time limits, and deadlines.

I. Amendments To The Federal Rules Of Civil Procedure

Rule 6: Computing and Extending Time; Time for Motion Papers

Prior to amendment, Rule 6(a)(1) excluded intermediate weekend days when the period was less than 11 days.⁶ The amendment to this section of Rule 6 now requires counting all intermediate weekends and legal holidays.⁷ The last day of a period is also counted, unless it falls on a weekend day or legal holiday.⁸ If the last day is a weekend or legal holiday, the period continues to run to the end of the next day that is not a weekend or legal holiday.⁹ If the clerk's office is inaccessible on the last day, then the time for filing is extended to the first accessible day that is not a weekend or legal holiday.¹⁰

The amendment to Rule 6 also changes computation of periods stated in hours. For these periods, every hour is counted immediately on the occurrence of the event that triggered the period, including hours during intermediate weekend days and legal holidays.¹¹ If the last hour of the period ends on a weekend day or legal holiday, then the period is to run until the same time the next day that is not a weekend day or legal holiday.¹² If the clerk's office is inaccessible during the last hour for filing, then the time for filings is extended to the first accessible day that is not a weekend day or legal holiday.¹³

New sections also define "next day" and "last day" of a period, and add a definition for "legal holiday." The next day in a period measured after an event should be determined by continuing to count forward. The next day in a period measured before an event is determined by counting backward.¹⁴ How to determine the last day of a period is set out in amended Rule 6(a)(4)'s definition.

This part of the rule clarifies that, unless it is otherwise determined by statute, local rule, or court order, the last day of a period ends at midnight in the court's time zone, in the event of electronic filing, or when the clerk's office is scheduled to close, if filing by another method.¹⁵ The definition of a "legal holiday" for periods measured after an event has been amended to include any other day declared a holiday by the state where the district court is located.¹⁶

Although the amended rule still allows time extensions, it firmly precludes extensions under Rules 59(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). In contrast, previous Rule 6(b)(2) prohibited courts from extending time under these rules, "except as those rules allow[ed]."¹⁸

The last amendment to this rule addresses motions, notices of hearing, and affidavits. A motion and notice of hearing must now be served at least 14 days before the time specified for the hearing, rather than 5 days beforehand.¹⁹ Finally, any affidavit supporting a motion should be served at least 7 days before the hearing, instead of one day.²⁰

Rule 6(d) was not amended with regard to the "three-day rule" which tacks an additional three days onto a deadline under certain circumstances. Specifically, the unchanged rule provides:

When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

Thus, an additional three days is afforded under the above provision even if service is accomplished via "electronic means" pursuant to Rule 5(b)(2)(E).

Significantly, however, strong deference as to timing requirements should be given to our Local Rules in the District of Kansas, as amended on December 1, 2009, which may modify the timing rules set forth by the Federal Rules. For example, the current D. Kan. Rule 6.1(d) governing timing of response and reply briefs expressly provides: "These time periods include the additional 3-day period allowed under Fed. R. Civ. P. 6(d) and, therefore, apply regardless of the method of ser-

(Continued on page 13)

The amendment to Rule 12 now requires a defendant to serve an answer to a summons and complaint within 21 days of being served.

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vice.” Our Local Rules are subject to amendment in the near future, so be certain to regularly refer to the most recent version of the Local Rules when calculating deadlines.

Rule 12: Defenses and Objections

The amendment to Rule 12 now requires a defendant to serve an answer to a summons and complaint within 21 days of being served.²¹ Similarly, a party must now serve an answer to a counter or cross-claim within 21 days after being served, and should serve a reply to an answer within 21 days of being served with an order to reply.²²

Unless the court sets a different time, a responsive pleading to a motion denied or postponed by the court must be served within 14 days after notice of the court’s action, instead of 10 days.²³ If the court orders a motion for a more definite statement, the responsive pleading must be served within 14 days, instead of 10, after the more definite statement is served.²⁴ Orders for more definite statements should be complied with within 14 days after notice of the order, rather than 10 days, or within the time the court sets.²⁵ The time a court has to strike an insufficient defense or other material from a pleading based on a party’s motion where a response is not allowed has also changed from 20 days to 21.²⁶

Rule 13: Counterclaims and Cross-claims

Prior to amendment of Rule 13(f), a court could “permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect,” if justice so required.²⁷ Amended rule 13 abrogates subsection (f).²⁸

Rule 14: Third-Party Practice

Prior to Rule 14’s amendment, a third-party plaintiff had to obtain the court’s leave to file its third-party complaint by motion only if filing its complaint more than 10 days after serving its original answer.²⁹ A third-party plaintiff must now, by motion, obtain permission from the court if filing its third-party complaint more than 14 days after serving its original answer.³⁰

Rule 15: Amended and Supplemental Pleadings

The amendment to Rule 15 alters when a party may amend its pleading once, as a

matter of course. Under the previous rule, a party could amend once before being served with a responsive pleading, or “within 20 days after serving the pleading if a responsive pleading is not allowed and the action is not yet on the trial calendar.”³¹ The amended rule now allows a party to amend its pleading once as a matter of course within 21 days after serving, or

if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading, or 21 days of service of a motion asserting a defense under rule 12(b), a motion for a more definite statement, or a motion to strike.³²

The amendment further requires a response to an amended pleading to be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.³³

Rule 23: Class Actions

The amendment to Rule 23(f) extends the time a class can appeal from an order granting or denying class certification from 10 days to 14 days after entry of the order. A court of appeals may now permit an appeal from an order granting or denying class certification if a party files a petition for permission to appeal within 14 days after entry of the order.³⁴

Rule 27: Depositions to Perpetuate Testimony

The amendment to Rule 27(a)(2) changes the time limit to serve each expected adverse party with a copy of the petition and notice of the time and place of the hearing from 20 days to 21 days. Now, a petitioner should serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing at least 21 days before the hearing date.³⁵

Rule 32: Use of Depositions in Court Proceedings

Rule 32(a)(5) limits use of a deposition taken on short notice. Prior to amendment, that rule prohibited use of a deposition taken on short notice against a party who, having received less than 11 days’ notice of the deposition, promptly moves for a protective order under Rule 26(c)(1)(B).³⁶ The amended rule now prohibits the use of a

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The first amendment to Rule 50 changes the time that a party may file a renewed motion for judgment as a matter of law from no later than 10 days after entry of judgment, or discharge of the jury, to no later than 28 days thereafter.

Timing is Everything (Continued from pg 13)

deposition taken on short term notice against a party who has had less than 14 days' notice, and has moved for a protective order under Rule 26(c)(1)(B).³⁷

An amendment to Rule 32(d)(3)(C) now provides that an objection to a written recross-question is waived if not made within 7 days of service, instead of 5 days.³⁸

Rule 38: Right to a Jury Trial by Demand

The amendment to Rule 38(b)(1) requires a party demanding a jury trial on any issue to serve its written demand on other parties (which may be included in the pleading) no later than 14 days, instead of 10 days, after the last pleading directed to the issue is served.³⁹

Rule 48: Number of Jurors; Verdict; Polling

Amended Rule 48 retains subsection (a), setting out the number of requisite jurors, and adds two subsections on verdicts and polling. Subsection (b) addresses verdicts and requires a verdict to be unanimous and to be returned by a jury of at least 6 members, unless otherwise agreed by the parties.⁴⁰ Subsection (c), addressing jury polling, states that

[a]fter a verdict is returned but before the jury is discharged, the court must on a party's request or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.⁴¹

Rule 50: Judgment as A Matter of Law; Related Motion for a New Trial

The first amendment to Rule 50 changes the time that a party may file a renewed motion for judgment as a matter of law from no later than 10 days after entry of judgment, or discharge of the jury, to no later than 28 days thereafter.⁴² The second amendment states that a party against whom judgment a matter of law is filed must file a motion for new trial no later than 28 days after the entry of judgment, instead of 10 days thereafter.⁴³

Rule 52: Findings and Conclusions by the Court; Judgment on Partial Findings

Prior to amendment, pursuant to Rule 52(b), the court could amend its findings, or make additional findings when a party filed a motion requesting amended or additional findings no later than 10 days after the entry of judgment. The amended rule states that a court may only amend its findings or make additional findings where a party files its motion requesting additional or amended findings no later than 28 days after entry of judgment.⁴⁴

Rule 53: Masters

Prior to amendment, Rule 53(f)(2) allowed a party to file objections to a master's order, report, or recommendation, or a motion to adopt or modify the same no later than 20 days after a copy was served, unless the court set a different time.⁴⁵ The amendment gives parties an additional day to object or move to adopt or modify by extending the time for doing so to no longer than 21 days after a copy is served.⁴⁶

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SAVE THE DATE

May 14, 2010	KADC Mid-Year Meeting	Courtyard Marriott Wichita
April 30-May 1, 2010	DRI Mid Region Meeting	St. Louis
June 11, 2010	KADC Membership Breakfast	Hyatt Regency Wichita
September 10, 2010	KADC Membership Meeting	Salina
December 3-4, 2010	2010 KADC Annual Conference	Marriott Country Club Plaza Kansas City

A motion for a new trial may now be filed no later than 28 days after the entry of judgment, instead of the prior 10-day limit.

Timing is Everything (Continued from pg 14)

Rule 54: Judgment; Costs

Rule 54(d) addresses attorney's fees and costs. A prevailing party is entitled to costs, other than attorney's fees, absent a federal statute, the federal rules, or a court order providing otherwise.⁴⁷ Costs against the United States, or any of its officers or agencies may be imposed only to the extent allowed by law.⁴⁸ Under the prior rule, a clerk could tax costs on 1 days notice.⁴⁹ The court then could review the clerk's action on a motion served within the next 5 days.⁵⁰ The amended rule allows a clerk to tax costs on 14 days' notice, and a court to review the clerk's action on a motion served within 7 days from the clerk's action.⁵¹

Rule 55: Default Judgment

Under Rule 55(b)(2), a party may apply to the court for a default judgment. Prior to amendment, if the party against whom default judgment was sought made an appearance personally, or through a representative, then that party had to be served with written notice of the application for default judgment at least 3 days before the hearing.⁵² The amendment now requires a party making a personal appearance to be served with written notice of the default judgment application at least 7 days before the hearing.⁵³

Rule 56: Summary Judgment

The amendment to Rule 56 focuses on making the timing of filing motions for summary judgment and responses more uniform by adding a new section on timing. The first amendment removes subsections 56(a)(1)-(2), which previously allowed a party to file a summary judgment motion after only 20 days from commencement of the action had passed, or from the date on which the opposing party served a motion for summary judgment.⁵⁴

Prior to amendment, Rule 56(b) stated that a party against whom relief was sought could move *at any time*, with or without supporting affidavits, for summary judgment on all or part of the claim.⁵⁵ The amendment removes the words "at any time" from the rule's language.⁵⁶

The time frame for serving a motion has also changed considerably. Prior to amendment, Rule 56(c) had permitted a motion for sum-

mary judgment to be served at least 10 days before the day set for the hearing.⁵⁷ An opposing party could also serve opposing affidavits before the hearing day, and the judgment sought was rendered if the case file showed that there was no genuine issue of material fact, and that the movant was entitled to judgment as a matter of law.⁵⁸

Amended 56(c) now reads:

(c) Time for a Motion, Response, and Reply; Proceedings.

(1) These times apply unless a different time is set by local rule or the court orders otherwise:

(A) a party may move for summary judgment at any time until 30 days after the close of all discovery;

(B) a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later; and

(C) the movant may file a reply within 14 days after the response is served.

(2) The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.⁵⁹

Rule 59: New Trial; Altering or Amending a Judgment

A motion for a new trial may now be filed no later than 28 days after the entry of judgment, instead of the prior 10-day limit.⁶⁰ The amendment also provides that an opposing party has 14 days, instead of 10 days, after being served with a motion for new trial to file opposing affidavits.⁶¹ The amended rule no longer permits the court to grant the opposing party an extension of up to 20 days for good cause shown.⁶²

Courts may still permit reply affidavits.⁶³ A court granting a new trial of its own initiative must now do so no later than 28 days after

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The amendment to Rule 62(a) on automatic stays has extended the time for an extension issuing on the judgment, or any other proceedings to enforce the judgment, from 10 days after entry of a judgment to 14 days after entry.

Timing is Everything (Continued from pg 15)

the entry of judgment, instead of the prior 10-day limit.⁶⁴ Finally, a motion to alter or amend a judgment must now be filed no later than 28 days after the entry of judgment.⁶⁵

Rule 62: Stay of Proceedings to Enforce a Judgment

The amendment to Rule 62(a) on automatic stays has extended the time for an extension issuing on the judgment, or any other proceedings to enforce the judgment, from 10 days after entry of a judgment to 14 days after entry.⁶⁶

New Rule 62.1: Indicative Ruling on a Motion for Relief that is Barred by a Pending Appeal

This new rule provides a court several options for action when faced with a timely motion for relief that it otherwise lacks authority to grant because of a pending docketed appeal. The court may defer considering the motion, deny it, or state either that it would grant it if the court of appeals remands for that purpose, or that the motion raises a substantial issue.⁶⁷ If the district court states that it would grant the motion or that the motion raises a substantial issue, a movant is to promptly give notice to the circuit clerk under new Fed. R. App. P. 12.1.⁶⁸ "The district court may decide the motion if the court of appeals remands for that purpose."⁶⁹

Rule 68: Offer of Judgment

The amendment to this rule changes the 10-day time period before trial within which a defending party may make an offer of judgment to an opposing party to 14 days.⁷⁰ In addition, an opposing party that accepts the offer must file a written notice of acceptance within 14 days of being served, instead of 10 days.⁷¹

A party determined to be liable to another may make an offer of judgment, even if the extent of that liability remains to be determined by further proceedings.⁷² Prior to amendment, a party making this kind of offer had to do so within a reasonable time, but at least 10 days before the hearing date to determine the extent of liability.⁷³ Such an offer must now "be served within a reasonable

time but at least 14 days before a hearing to determine the extent of liability."⁷⁴

Rule 71.1: Condemning Real or Personal Property

Rule 71.1(d)(2)(v) requires a notice of real property condemnation to state, among other things, "that the defendant may serve an answer on the plaintiff's attorney within 20 days after being served with the notice . . ." ⁷⁵ The amendment to this subsection changes the 20-day limit to 21 days.⁷⁶

In addition, under the prior rule, a defendant that had an objection or defense to the taking of his real property had to serve an answer within 20 days after being served with notice.⁷⁷ Post amendment, a defendant objecting to the taking of his real property must serve an answer within 21 days after being served with notice.⁷⁸

Rule 72: Magistrate Judges: Pretrial Order

Prior to amendment, a party objecting to a written order of a magistrate judge's decision of a nondispositive matter had 10 days to serve and file objections after being served with a copy of the order.⁷⁹ Also, a party objecting to a magistrate's recommended disposition of a matter had to do so within 10 days of being served with a copy,⁸⁰ and a party responding to another party's objections had to do so within 10 days after being served with a copy.⁸¹ The amendments have changed each of these 10-day time periods to 14 days.⁸²

Rule 81: Applicability of the Rules in General; Removed Actions

Prior to amendment, a party who did not answer before removal of an action had to answer or present defenses or objections within the longest of

20 days after receiving a copy of the initial pleading for relief, or 20 days after being served with the summons for an initial pleading on file at the time of service, or 5 days after notice of removal is filed.⁸³

The amendment has changed each of the 20-day periods to 21 days, and the 5-day period to 7 days.⁸⁴

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Timing is Everything (Continued from pg 16)

Another amendment to this rule expands the definition of "State" under 81(d)(2) to include "the District of Columbia and any United States commonwealth or territory."⁸⁵ The term "Federal Statute" in the District of Columbia has also been defined under 81(d)(3) as "including any Act of Congress that applies locally to the District."⁸⁶

II. Amendments To The Federal Rules Of Appellate Procedure

Fed. R. App. P. 4: Appeals as of Right – When Taken in Civil and Criminal Cases

The first amendment to Fed. R. App. P. 4 affects a motion for extension of time to file a notice of appeal. Prior to amendment, Rule 4(a)(5)(C) did not permit extensions exceeding 30 days after the prescribed time, or 10 days after entry of the order granting the motion.⁸⁷ The amendment has changed the limit on extensions from 10 days after entry of the order granting the motion to 14 days.⁸⁸

The second amendment to this rule affects one of these conditions for reopening the time to file an appeal. Under the prior rule, one condition was that the motion be filed within 180 days after the judgment or order was entered or within 7 days after the moving party received notice under Fed. R. Civ. P. 77(d) of the entry, whichever was earlier.⁸⁹ The amendment to Rule 4(a)(6)(B) changes the 7-day time period to 14 days.⁹⁰

The amendment to Rule 4(b) affects appeals in a criminal case and changes the time period from 10 days to 14 days within which a defendant's notice of appeal must be filed.⁹¹ Under the prior rule, if a defendant made any notices for appeal under Rule 4(b)(3), the notice of appeal from judgment of conviction had to be filed within 10 days after the entry of order disposing of the last motion, or within 10 days after entry of the judgment of conviction, whichever came later.⁹² The amendment changes the 10-day time period within this part of the rule to 14 days.⁹³

Fed. R. App. P. 5: Appeal by Permission

A party filing an answer in opposition of a petition for permission to appeal or a cross-petition must now do so within 10 days after the petition is served, instead of the prior 7-day time limit.⁹⁴ An appellant must also now pay the district court all required fees and

file a cost bond if required under Rule 7 within 14 days after entry of the order granting permission to appeal.⁹⁵

Rule 6: Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court

Prior to amendment, this rule required an appellant, within 10 days after filing the notice of appeal, to file with the clerk processing the record, and serve on the appellee, "a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk."⁹⁶ Under the amended rule, appellant must now do so within 14 days.⁹⁷ The other amendment to this rule now requires an appellee who has been served with appellant's designation, and who believes that other parts of the record are necessary, to file with the clerk and serve on the appellant a designation of additional parts to be included within 14 days after being served, instead of the prior 10-day time limit.⁹⁸

Fed. R. App. P. 10: The Record on Appeal

Rule 10(b)(1) had required an appellant to follow certain steps to obtain the transcript of a proceeding within 10 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion.⁹⁹ The amendment changes the 10-day time limit to 14 days.¹⁰⁰

Rule 10(c) addresses statements of the evidence when the proceedings were not recorded, or when a transcript is unavailable.¹⁰¹ The pre-amended rule required an appellee that is served with a statement prepared by the appellant of the evidence or proceedings to serve objections or proposed amendments within 10 days of being served.¹⁰² The amended rule has changed that 10-day time limit to 14 days.¹⁰³

Fed. R. App. P. 12: Filing a Representation Statement

Prior to amendment of this rule, an attorney who filed a notice of appeal had to file a statement with the circuit clerk naming the parties that the attorney represents on appeal within 10 days after filing the notice.¹⁰⁴ According to the amendment, the attorney must now file the representation statement within 14 days after filing the notice of appeal.¹⁰⁵

According to the amendment, the attorney must now file the representation statement within 14 days after filing the notice of appeal.

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Computing time under Rule 26 has significantly changed. The amended rule now differentiates between periods stated in days, or a longer unit of time, and periods stated in hours.

Timing is Everything (Continued from pg 17)

New Fed. R. App. P. 12.1: Remand after Indicative Ruling by The District Court on a Motion for Relief that is Barred by a Pending Appeal

This rule is intended to operate in conjunction with new Fed. R. Civ. P. 62.1. It states:

- (a) **Notice to the Court of Appeals.** If a timely motion is made in the district court for relief that lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.
- (b) **Remand After An Indicative Ruling.** If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.¹⁰⁶

Fed. R. App. P. 15: Review or Enforcement of an Agency Order- application or Cross Application to Enforce an Order; Answer; Default

Prior to amendment, Rule 15(b)(2) required a respondent to serve on the applicant an answer to the application and file it with the clerk, within 20 days after the application for enforcement was filed.¹⁰⁷ The amended rule changes the 20-day time period to 21 days.¹⁰⁸

Fed. R. App. P. 19: Settlement of a Judgment Enforcing an Agency Order in Part

Prior to amendment, Rule 19 required a party who disagreed with an agency's proposed judgment to file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion within 7 days.¹⁰⁹ The amendment has extended the 7-day requirement to 10 days.¹¹⁰

Fed. R. App. P. 25: Filing and Service

The amendments to this rule are in accord with the "days are days" approach previously discussed. According to pre-amendment Rule 25(a)(2)(ii), a brief or appendix is timely filed if on or before the last day of filing it is "dispatched to a third party commercial carrier for delivery to the clerk within 3 calendar days."¹¹¹ The amendment removes the word "calendar" from the rule.¹¹² One of the manners of service in the pre-amended rule was "by a third-party commercial carrier for delivery within 3 calendar days."¹¹³ The amendment removes the word "calendar" from this part of the rule.

Fed. R. App. P. 26: Computing and Extending Time

Computing time under Rule 26 has significantly changed. The amended rule now differentiates between periods stated in days, or a longer unit of time, and periods stated in hours. For periods stated in days or a longer unit of time, the amended rule excludes the day of the event triggering the period, counts every day including intermediate weekends and legal holidays, and includes the last day of the period.¹¹⁴ If the last day of a period is a weekend day, or legal holiday, the period continues to run until the end of the next day that is not a weekend day, or legal holiday.¹¹⁵ For periods stated in hours, one

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Timing is Everything (Continued from pg 18)

must begin counting immediately on the occurrence of the event that triggers the period, and count every hour, including hours during intermediate weekend, and legal holidays.¹¹⁶ If a period stated in hours ends on a weekend day or legal holiday, the period continues to run until the same time on the next day that is not a weekend or legal holiday.¹¹⁷

A new section addressing inaccessibility of the clerk's office has also been added. If the clerk's office is inaccessible on the last day for filing under a period stated in days, or a longer unit of time, then the time for filing is extended to the first accessible day that is not a weekend day or legal holiday.¹¹⁸ If the clerk's office is inaccessible during the last hour for filing under a period stated in hours, then the time for filing is also extended to the first accessible day that is not a weekend day or legal holiday.¹¹⁹

A new section defines the "last day" of a period, unless a different time is set by statute, local rule, or court order. If filing electronically in district court or a court of appeals, the last day ends at midnight in the court's time zone, or the circuit court clerk's principal office, respectively.¹²⁰ If filing under Rules 4(c)(1), 25(a)(2)(B), 25(a)(2)(C), or if filing by mail under Rule 13(b), then the last day is the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system.¹²¹ When filing by other means, the last day is when the clerk's office is scheduled to close.¹²²

Under a new section, the "next day" is determined by "continuing to count forward when the period is measured after an event and

backward when measured before an event."¹²³

The definition of a "legal holiday" has been amended to include "for periods measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office."¹²⁴

A new section has been added to address extending time. Under this section, a court, for good cause shown, may extend the time prescribed in the rules, or by its order to perform an act, or may permit an act to be done after its time expires.¹²⁵ A court is prohibited from extending the time in which a party may file

- (1) a notice of appeal (except as authorized under Rule 4) or a petition for permission to appeal; or
- (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.¹²⁶

The final change in this rule removes the word "calendar" from subsection (c) on additional time after service so that the rule reads as follows,

When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the

(Continued on page 20)

A new section addressing inaccessibility of the clerk's office has also been added.

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The amendment to Rule 31 now requires an appellant's reply brief to be filed at least 7 days before argument, rather than 3 days before, unless the court shown allows a later filing.

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date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.¹²⁷

Fed. R. App. P. 27: Motions

Before amendment, a party's response to a motion had to be filed within 8 days after service of motion, unless the court shortened or extended the time,¹²⁸ and the party's reply to a response had to be filed within 5 days after service of the response.¹²⁹ The amendment now allows a party's response to a motion to be filed within 10 days after service of the motion, and a reply to a response to be filed within 7 days after service of the response.¹³⁰

Fed. R. App. P. 28.1: Cross-Appeals

Prior to amendment, this rule required an appellee's reply brief to be filed "within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing."¹³¹ The amendment has extended the 3-day time period to 7 days.¹³²

Fed. R. App. P. 30: Appendix to the Briefs

The amendment to Rule 30(b) extends the prior 10-day time period to 14 days in the following contexts

In absence of an agreement between the parties on the contents of the appendix, the appellant must, within 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to

include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may within 14 days after receiving the designation serve on the appellant a designation of additional parts to which it wishes to direct the court's attention.¹³³

Fed. R. App. P. 31: Serving and Filing Briefs

The amendment to this rule now requires an appellant's reply brief to be filed at least 7 days before argument, rather than 3 days before, unless the court for good cause shown allows a later filing.¹³⁴

Fed. R. App. P. 39: Costs

The amendment to this rule now allows objections to be filed within 14 days of service of the bill of costs, instead of the prior 10-day time limit, unless the court extends the time.¹³⁵

Fed. R. App. P. 41: Mandate Issuance

Prior to amendment, subsection (b) of this rule required a court's mandate to issue "7 calendar days after the time to file a petition for rehearing expired, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later."¹³⁶ The amendment omits the word "calendar" from the rule.¹³⁷ ▲

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1. *Summary of Proposed Amendments to the Federal Rules*, p. 1, Dec. 1, 2008 (summarizing Dec. 1, 2009 amendments to Federal Rules), available at <http://www.uscourts.gov/rules/2008-Supreme%20Court-summary.pdf>.
2. See *supra*, note 1.
3. See *supra*, note 1.
4. *Supra*, note 1.
5. See *supra*, note 1 (quotations omitted).
6. Former Fed. R. Civ. P. 6(a).
7. Rule 6(a)(1)(A)-(B) (effective Dec. 1, 2009).
8. Rule 6(a)(1)(C) (effective Dec. 1, 2009).
9. *Id.*
10. Rule 6(a)(3)(A) (effective Dec. 1, 2009).
11. Rule 6(a)(2)(A)-(B) (effective Dec. 1, 2009).
12. Rule 6(a)(2)(C) (effective Dec. 1, 2009).
13. Rule 6(a)(3)(B) (effective Dec. 1, 2009).
14. Rule 6(a)(5) (effective Dec. 1, 2009).
15. Rule 6(a)(4)(A)-(B) (effective Dec. 1, 2009).
16. Rule 6(a)(C) (effective Dec. 1, 2009).
17. Rule 6(b)(2) (effective Dec. 1, 2009).
18. Former Rule 6(b)(2).
19. See rule 6(c)(1) (effective Dec. 1, 2009).
20. See rule 6(c)(2) (effective Dec. 1, 2009).
21. Rule 12(a)(1)(A) (effective Dec. 1, 2009).
22. Rule 12(a)(1)(B)-(C) (effective Dec. 1, 2009).
23. See Rule 12(a)(4)(A) (effective Dec. 1, 2009).
24. See rule 12(a)(4)(B) (effective Dec. 1, 2009).
25. Rule 12(e) (effective Dec. 1, 2009).
26. Rule 12(f)(2) (effective Dec. 1, 2009).
27. Former Rule 13(f).
28. See rule 13 (effective Dec. 1, 2009).
29. Former Rule 14(a)(1).
30. Rule 14(a)(1) (effective Dec. 1, 2009).
31. Former Rule 15(a)(1)(A)-(B).
32. Rule 15(a)(1)(A)-(B) (effective Dec. 1, 2009).
33. Rule 15(a)(3) (effective Dec. 1, 2009).
34. Rule 23(f) (effective Dec. 1, 2009).
35. Rule 27(a)(2) (effective Dec. 1, 2009).
36. Former Rule 32(a)(5)(A).
37. Rule 32(a)(5)(A) (effective Dec. 1, 2009).
38. See Rule 32(d)(3)(C) (effective Dec. 1, 2009).
39. See Rule 38(b)(1) (effective Dec. 1, 2009).
40. See Rule 48(b) (effective Dec. 1, 2009).
41. Rule 48(c) (effective Dec. 1, 2009).
42. See Rule 50(b) (effective Dec. 1, 2009).
43. See Rule 50(d) (effective Dec. 1, 2009).

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44. Rule 52(b) (effective Dec. 1, 2009).
45. See Former Rule 53(f)(2).
46. See Rule 53(f)(2) (effective Dec. 1, 2009).
47. Rule 54(d) (effective Dec. 1, 2009).
48. *Id.*
49. Former Rule 54(d).
50. *Id.*
51. See Rule 54(d) (effective Dec. 1, 2009).
52. Former Rule 55(b)(2).
53. Rule 55(b)(2) (effective Dec. 1, 2009).
54. Rule 56(a) (effective Dec. 1, 2009).
55. Former Rule 56(b).
56. Rule 56(b) (effective Dec. 1, 2009).
57. Former Rule 56(c).
58. *Id.*
59. Rule 56(c) (effective Dec. 1, 2009).
60. Rule 59(b) (effective Dec. 1, 2009).
61. Rule 59(c)(effective Dec. 1, 2009).
62. *Id.*
63. *Id.*
64. Rule 59(d) (effective Dec. 1, 2009).
65. Rule 59(e) (effective Dec. 1, 2009).
66. Rule 62(a) (effective Dec. 1, 2009).
67. Rule 62.1(a)(1)-(3) (effective Dec. 1, 2009).
68. Rule 62.1(b) (effective Dec. 1, 2009).
69. Rule 62(c) (effective Dec. 1, 2009).
70. Rule 68(a) (effective Dec. 1, 2009).
71. *Id.*
72. Rule 68(c) (effective Dec. 1, 2009).
73. Former Rule 68(c).
74. Rule 68(c) (effective Dec. 1, 2009).
75. Rule 71.1(d)(2)(v) (effective Dec. 1, 2009).
76. Rule 71.1(d)(2)(v) (effective Dec. 1, 2009).
77. Former Rule 71.1(e)(2).
78. Rule 71.1(e)(2) (effective Dec. 1, 2009).
79. Former Rule 72(a).
80. Former Rule 72(b)(2).
81. *Id.*
82. Rule 72(a), (b)(1)-(2) (effective Dec. 1, 2009).
83. Former Rule 81(c)(2)(A)-(C).
84. Rule 81(c)(2)(A)-(C) (effective Dec. 1, 2009).
85. Rule 81(d)(2) (effective Dec. 1, 2009).
86. Rule 81(d)(3) (effective Dec. 1, 2009).
87. Former Fed. R. App. P. 4(a)(5)(C).
88. Fed. R. App. P. 4(a)(5)(C) (effective Dec, 1, 2009).
89. Former Fed. R. App. P. 4(a)(6)(B).
90. Fed. R. App. P. 4(a)(6)(B) (effective Dec. 1, 2009).
91. See Fed. R. App. P. 4(b)(1)(A) (effective Dec. 1, 2009).
92. Former Fed. R. App. P. 4(b)(3)(A).
93. Fed. R. App. P. 4(b)(3)(A) (effective Dec. 1, 2009).
94. See Fed. R. App. P. 5 (b)(2) (effective Dec. 1, 2009).
95. Former Fed. R. App. P. 6(d)(1).
96. Former Fed. R. App. P. 6(b)(2)(B)(i).
97. Fed. R. App. P. 6(b)(2)(B)(i) (effective Dec. 1, 2009).
98. See Fed. R. App. P. 6(b)(2)(B)(ii) (effective Dec. 1, 2009).
99. See Former Fed. R. App. P. 10(b)(1).

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- 100.Fed. R. App. P. 10(b)(1) (effective Dec. 1, 2009).
- 101.Fed. R. App. P. 10(c) (effective Dec. 1, 2009).
- 102.Former Fed. R. App. P. 10(c).
- 103.Fed. R. App. P. 10(c) (effective Dec. 1, 2009).
- 104.Former Fed. R. App. P. 12(b).
- 105.Fed. R. App. P. 12(b) (effective Dec. 1, 2009).
- 106.Fed. R. App. P. 12.1(a)-(b) (effective Dec. 1, 2009).
- 107.Former Fed. R. App. P. 15(b)(2).
- 108.Fed. R. App. P. 15(b)(2) (effective Dec. 1, 2009).
- 109.See Former Fed. R. App. P. 19.
- 110.Fed. R. App. P. 19 (effective Dec. 1, 2009).
- 111.Former Fed. R. App. P. 25(a)(2)(ii).
- 112.Fed. R. App. P. 25(a)(2)(ii) (effective Dec. 1, 2009).
- 113.Fed. R. App. P. 25(c)(1)(C) (effective Dec. 1, 2009)
- 114.Fed. R. App. P. 26(a)(1)(A)-(B) (effective Dec. 1, 2009).
- 115.Fed. R. App. P. 26(a)(1)(C) (effective Dec. 1, 2009).
- 116.Fed. R. App. P. 26(a)(2)(A)-(B) (effective Dec. 1, 2009).
- 117.Fed. R. App. P. 26(a)(2)(C) (effective Dec. 1, 2009).
- 118.Fed. R. App. P. 26(a)(3)(A) (effective Dec. 1, 2009).
- 119.Fed. R. App. P. 26(a)(3)(B) (effective Dec. 1, 2009).
- 120.Fed. R. App. P. 26(a)(4)(A)-(B) (effective Dec. 1, 2009).
- 121.Fed. R. App. P. 26(a)(4)(C) (effective Dec. 1, 2009).
- 122.Fed. R. App. P. 26(a)(4)(D) (effective Dec. 1, 2009).
- 123.Fed. R. App. P. 26(a)(5) (effective Dec. 1, 2009).
- 124.Fed. R. App. P. 26(a)(5)(C) (effective Dec. 1, 2009).
- 125.Fed. R. App. P. 26(b) (effective Dec. 1, 2009).
- 126.Fed. R. App. P. 26(b)(1)-(2) (effective Dec. 1, 2009).
- 127.Fed. R. App. P. 26(c) (effective Dec. 1, 2009).
- 128.Former Fed. R. App. P. 27(a)(3)(A).
- 129.Former Fed. R. App. P. 27(a)(4).
- 130.Fed. R. App. P. 27 (a)(3)(A), (a)(4) (effective Dec. 1, 2009).
- 131.Former Fed. R. App. P. 28.1(f)(4).
- 132.Fed. R. App. P. 28(f)(4) (effective Dec. 1, 2009).
- 133.Fed. R. App. P. 30(b) (effective Dec. 1, 2009).
- 134.Fed. R. App. P. 31(a) (effective Dec. 1, 2009).
- 135.Fed. R. App. P. 39(d)(2) (effective Dec. 1, 2009).
- 136.Fed. R. App. P. 41(b) (effective Dec. 1, 2009).
- 137.Fed. R. App. P. 41(b) (effective Dec. 1, 2009).

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The Continued Need for Safeguards in the Kansas Class Certification Procedure

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plaintiff has only a light, prima facie burden to prove that each of those factors was satisfied were incompatible with the plain language of K.S.A. 60-223, the Kansas Supreme Court's case law, and the decisions of federal courts considering the same question. The KADC also pointed out that the district court failed to rigorously analyze the predominance, manageability, and superiority requirements of K.S.A. 60-223(b)(3), with the brief focusing on the individualized questions inherent in TCPA claim and the unwarranted settlement pressure inflicted on the defendant.

This article is the first of two installments discussing *Critchfield* and its impact on class actions in this state. This first installment summarizes the current law governing class certification in Kansas and highlights the important issues raised by the *Critchfield* appeal. The second installment, which will follow the court's release of its opinion in *Critchfield*, will discuss the court's analysis and its potential effect on future attempts to certify Kansas class actions.

KANSAS CERTIFICATION PROCEDURE AND DRAGON I

The class certification procedure in Kansas is defined in K.S.A. 60-223. This statute is patterned after Rule 23 of the Federal Rules of Civil Procedure, and although K.S.A. 60-223 is not identical to Rule 23,⁴ the Kansas Supreme Court has "traditionally followed the federal courts' interpretation" of the federal rule.⁵ K.S.A. 60-223(a) lists four threshold requirements that a party requesting certification must prove before a district court may certify a class: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. A party requesting certifi-

cation must also demonstrate that the action falls into one of the three categories defined by K.S.A. 60-223(b). In *Critchfield*, the Johnson County District Court certified the class under K.S.A. 60-223(b)(1)(A) (risk of incompatible standards of conduct)⁶ and K.S.A. 60-223(b)(3) (predominance of common questions and superiority of the class action).⁷

The Kansas Supreme Court considered K.S.A. 60-223's certification procedure in detail in *Dragon I*, decided in 2004.⁸ There, the defendants appealed from the certification of a nationwide class of property owners whose property allegedly contained defective polybutylene pipe. On appeal, the defendant claimed that the district court abused its discretion by "not fully considering disputes regarding facts relevant to the statutory prerequisites and choice-of-law problems." 277 Kan. at 777. The plaintiffs presented two primary arguments as to why the class certification should be upheld, including:

- That "Kansas law does not allow the consideration of evidence on a preliminary, procedural motion" because the language of K.S.A. 60-223 is slightly different from Federal Rule 23; and
- That "the trial court should make the certification decision solely on the basis of the allegations contained in the pleadings."

The Kansas Supreme Court explicitly rejected each of these contentions. The court first rebuffed the plaintiffs' argument that Kansas should apply a different analysis than federal courts due to differences between the Kansas statute and federal rule. It is true that K.S.A. 60-223 states that trial courts should consider certification "[a]s soon as practicable after the commencement and before the decision on the mer-

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This article is the first of two installments discussing Critchfield and its impact on class actions in this state.



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its,”¹¹ whereas the current federal rule states that cases should be certified “at an early practicable time.”¹² But the Kansas Supreme Court found “no reason to apply a different analysis to the Kansas statute” than that applied by the federal courts.¹³ Thus, *Dragon I* explained that a “trial court should make the certification decision as soon as practicable *after the parties have had an opportunity to develop and present the facts relevant to class certification.*”¹⁴

The court in *Dragon I* also disagreed with the plaintiffs’ second argument that certification decisions should be made solely on the face of the allegations in the pleadings, similar to a motion under K.S.A. 60-212. The court noted that, in contrast to a motion under K.S.A. 60-212, “an order certifying a class usually is the district judge’s last word on a subject; there is no later test of the decision’s factual premise (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional).”¹⁵ Thus, before a court grants certification, “a judge should make whatever factual and legal inquiries are necessary under Rule 23.”¹⁶ For these reasons, *Dragon I*

reject[ed] plaintiffs’ arguments and [found] that a trial court must give careful consideration to and conduct a rigorous analysis of the prerequisites imposed by K.S.A. 2003 Supp. 60-223 and, in doing so, should consider evidence when submitted by the parties and make those factual determinations necessary to a determination of whether the prerequisites for a class action are met.¹⁷

In its analysis, the Kansas Supreme Court noted that “the presence of individualized questions, while tending to diminish the weight of class facts, does not necessarily defeat a prima facie showing that the class prerequisites are satisfied.”¹⁸ But because “the trial court did not resolve those facts which were relevant to class certification and which were disputed” – including choice-of-law defenses and the potential individualized questions of causation and damages – *Dragon I* remanded and required the district

court to perform the requisite rigorous analysis under K.S.A. 60-223.¹⁹

In summary, *Dragon I* reached the following important conclusions concerning the class certification procedure in Kansas:

- Although a certification decision is reviewed for an abuse of discretion, discretion must be exercised within the correct legal framework. A district court does *not* have discretion to certify a class if the action fails to meet the requirements of K.S.A. 60-223.²⁰
- Even though there are slight differences between the language of K.S.A. 60-223 and Rule 23 of the Federal Rules of Civil Procedure, Kansas courts will follow the federal courts’ interpretation of that rule.
- To comply with the “rigorous analysis” requirement, a district court cannot merely “accept the class allegations as true.”²¹ Instead, a court facing a certification request must “give consideration to and conduct a rigorous analysis of the prerequisites” set forth in K.S.A. 60-223.²² This includes a duty to “consider evidence if requested by the parties *and weigh the evidence* in determining if the prerequisites [of K.S.A. 60-223] are met.”²³
- When an issue arises as to one of these certification factors, “the movant has the burden to show” that the certification would meet the requirements of K.S.A. 60-223.²⁴ This burden includes a burden on the party requesting certification to establish that defenses – even defenses that a defendant has the burden of establishing at trial – do not defeat the certification requirements²⁵ (such as commonality, predominance, and superiority).

These conclusions act as safeguards to preserve the integrity of the certification procedure and to protect defendants from unwarranted settlement pressures. Each of these holdings, however, though specifically decided in *Dragon I*, is turned on its head by the district court’s certification order in *Critchfield*. Thus, the Kansas Supreme Court is again faced with questions concerning critical procedural safeguards that protect defendants against abuse of the class action mechanism.²⁶

Each of these holdings, however, though specifically decided in Dragon I, is turned on its head by the district court’s certification order in Critchfield.

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THE TCPA CLASS CERTIFICATION IN CRITCHFIELD

Originally passed by Congress in 1991, the TCPA prohibits the sending of unsolicited advertisements via fax unless the recipient previously consented to receiving such faxes or the recipient had an established business relationship with the company sending the fax.²⁷ Although TCPA claims are generally enforced by the FCC or a state's attorney general, the TCPA also established a private right of action for those who suffer TCPA violations. Thus, "if otherwise permitted by the laws of rules of court of a State," a person or entity may bring an action for an injunction and/or an action for damages, which the TCPA defines as the greater of "actual monetary loss" or \$500.²⁸ The TCPA further states that upon a finding that the Act was willfully or knowingly violated, a court may increase the damage award up to three times the damages otherwise available.²⁹

The Taranto Group, Inc. (Taranto), located in Leawood, is a distributor and re-seller of aesthetic medical devices to physicians and other medical professionals. Taranto also provides training for the equipment it sells, as well as aesthetic medical consulting services. From March 2005 to March 2008, Taranto hired two outside vendors to send fax advertisements on its behalf. Taranto claims that both vendors assured Taranto that the fax lists used were obtained legally. According to the vendors' bills, roughly 120,000 fax advertisements were sent during that time. The vendors did not maintain any databases, fax numbers, or lists of the persons or business who may have received those faxes. In fact, the only available infor-

mation regarding the faxes is the number of faxes sent, the date of the fax, and the general geographic area that the faxes were targeting and/or the potential target group (e.g., Arkansas, dermatologists, etc.).

Critchfield received a fax advertisement sent on behalf of Taranto in June 2007. It subsequently brought a private action against Taranto under the TCPA. Critchfield then moved for certification under K.S.A. 60-223, claiming that it represented a class of 120,000 individuals with TCPA claims against Taranto (based on the total number of advertisements sent from 2005 to 2008). Interestingly, the only proof of receipt provided by Critchfield that any of these persons or entities received an unsolicited fax is the one fax Critchfield received. In other words, Critchfield requested certification of a 120,000-member class based on one physical fax advertisement.

Taranto opposed the certification request, arguing that individualized inquiries were required to determine whether the alleged class members (1) actually received faxes (2) without giving consent and (3) without an established business relationship. Taranto argued that these individual findings – which must be made regarding each potential class member – necessarily predominated over any common questions that might exist. Taranto further argued that the class was not ascertainable and that the district court must take into account the annihilating effect of a \$69 million class action against the alleged benefits of a class action.

The district court granted the plaintiff's request for certification,³⁰ defining the *Critchfield* class as: "The end users of the fax

Interestingly, the only proof of receipt provided by Critchfield that any of these persons or entities received an unsolicited fax is the one fax Critchfield received.

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numbers to which Defendant sent or caused to be sent, [sic] one or more facsimile transmissions advertising Defendant's products or seminars from March 1, 2005 to March 1, 2008."³¹ The court described the standard it applied to reach its decision in the following manner:

Rigorous analysis is not a burden of proof or a weighing of the facts, which must await discovery and determination by the trier of fact; rather it involves an analysis of each factor under K.S.A. 60-223. [Citation omitted.] The evidentiary burden of proof to show each class certification factor is on the Plaintiff, and since it comes before merits discovery is complete, *the burden is correspondingly light, sometimes called a prima facie showing. Only evidence from Defendant that is undisputed may be considered.* Thus, the court does not determine factual disputes, judge credibility, or resolve a battle of the experts.³²

Having certified the class action, the district court made the requisite findings to allow for Taranto's interlocutory appeal.³³ The Kansas Court of Appeals accepted jurisdiction, and the Kansas Supreme Court subsequently granted Taranto's request for transfer to that court under K.S.A. 20-3017.

ISSUES TO WATCH IN THE CRITCHFIELD APPEAL

Taranto's appeal raised several issues regarding the Johnson County District Court's certification order, including (1) that the district court applied an improper standard and burden of proof; (2) that the court failed to

adequately consider the individual questions that predominate in a TCPA action; (3) that a class action was not superior to other methods of adjudication; (4) that certification under K.S.A. 60-223(b)(1)(A) was improper; (5) that the class definition was impermissibly vague; (6) that the district court abused its discretion by making findings regarding the merits of Taranto's defenses; and (7) that the wholesale adoption of the plaintiff's proposed findings of fact and conclusions of law demonstrated that the court did not rigorously analyze the facts.

The KADC's brief, which was filed on December 31, 2009, and is available for viewing on the KADC's website at

<http://www.kadc.org/Amicus.htm>, focused on three issues with widespread significance for future certification requests in Kansas: (1) the burden of proof for the party requesting class certification and the appropriate standard for a court to apply when considering that request; (2) the predominance and manageability requirements of putative classes seeking certification under K.S.A. 60-223(b)(3); and (3) the requirement that a class action be superior to other methods of adjudication.

Both of these briefs emphasized that the district court's fundamental error was applying a burden of proof – a light, prima facie burden with no weighing of the evidence – that is antithetical to the holding in *Dragon I*. There, the Kansas Supreme Court held that a district court faced with a certification request must carefully “consider evidence when submitted by the parties” and “make those factual determinations necessary” for a rigorous analysis of the certification factors.³⁴ If the district court were correct that a plaintiff need make only a prima facie show-

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Having certified the class action, the district court made the requisite findings to allow for Taranto's interlocutory appeal.



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ing, there would be no rigorous analysis; a court would simply accept as true everything the plaintiff asserted and ignore all opposing evidence. In fact, that is exactly what the district court did in this case.

In response to this point, Critchfield argued that a heightened burden of proof – such as the preponderance-of-the-evidence burden adopted by federal courts³⁵ – was unwarranted at the certification stage in proceedings. Critchfield asserted that certifying the class was not permanent, as certification can always be undone, and a district court's certification decision says nothing about the merits of the pending case. But as the KADC pointed out in its *amicus* brief, the potential for unwarranted settlement pressure is a factor courts should “weigh in [their] certification calculus.”³⁶ Indeed, the Kansas Supreme Court recognized in *Dragon I* that significant settlement pressure arises out of class certification;³⁷ thus, the court held that a judge must “make whatever factual and legal inquiries are necessary” under K.S.A. 60-223 before making any decision regarding certification.³⁸

The district court's application of an incorrect, prima facie burden of proof and its subsequent failure to rigorously analyze the certification factors under K.S.A. 60-223 tainted its entire assessment of Critchfield's certification request. In particular, the district court:

- Granted certification under K.S.A. 60-223(b)(1)(A) even though the standards of conduct enforced in a TCPA action are entirely statutory and even though the proposed certification only included a request for monetary damages.³⁹
- Wholly adopted the plaintiff's definition of the class, including the references to “end users” and “phone numbers” without setting forth a definition of end users and without a list of telephone lines to which faxes were sent.
- Failed to consider the individualized issues relating to proof of receipt and Kansas's standing requirement, which demands that a claimant suffer an injury-in-fact before initiating suit.

- Failed to consider the predominance and manageability requirements of K.S.A. 60-223(b)(3).
- Failed to give due weight to the annihilating potential for a \$69 million judgment and the unwarranted settlement pressure caused by such a number.
- Failed to consider the superiority requirement of K.S.A. 60-223(b)(3) in light of the legislative history of the TCPA itself, whose sponsor specifically indicated that small claims court was the preferred forum for adjudicating private TCPA claims.⁴⁰

Another point of emphasis in the briefs was the appropriate standard of review for a certification request. *Dragon I* clearly stated that although a district court's certification decision is reviewed for an abuse of discretion, a district court abuses its discretion when it “has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination.”⁴¹ In short, a “court's discretion must have been exercised in light of a correct understanding of the applicable law.”⁴² Thus, a district court does not have discretion to grant certification that fails to meet the requirements of K.S.A. 60-223.⁴³

Despite the fact that this standard of review was discussed in detail in *Dragon I*, counsel for Critchfield continually argued that the abuse-of-discretion standard is “whether ‘no reasonable person would take the view adopted by the trial court.’”⁴⁴ Critchfield relied on the court's recent decision in *Harsch v. Miller*⁴⁵ as the source of this standard. *Harsch*, however, involved an appeal from a district court's denial of a motion to stay eminent domain proceedings, not a class certification request. There are significant differences in the amount of discretion that a district court may exercise in scheduling its own docket as opposed to the requirement that a court rigorously analyze the statutory certification factors in K.S.A. 60-223.⁴⁶

During oral argument on January 28, the court's questions focused primarily on the following four issues:

1. The appropriate burden of proof

Thus, a district court does not have discretion to grant certification that fails to meet the requirements of K.S.A. 60-223.

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Critchfield is not a case about preventing an injured plaintiff from getting his or her day in court; it is an attempt to conflate the receipt of one unsolicited fax to assert a multi-million dollar class action.

for plaintiffs requesting class certification (prima facie showing, preponderance of the evidence, or something in between).

2. Whether receipt of a fax was a necessary element of a private right of action under the TCPA (including the interplay between the TCPA and Kansas's standing requirement, which necessitates that a claimant have an "injury in fact" before bringing an action in state court).
3. The definition of the class (particularly the vagueness of the "end user" phrase and the practical considerations as to whether the class was ascertainable).
4. The proportionality of the class damages to the actual harm inflicted by the alleged TCPA violations.

From the defense perspective, the justices appeared to struggle most with the notion that a defendant would be able to "escape" liability under the TCPA by maintaining incomplete fax logs (as the outside vendors appear to have done in *Critchfield*). Taranto's counsel responded to these concerns by emphasizing that even in the case where there are holes in fax logs, a recipient of an unsolicited fax could still recover under the TCPA by bringing a physical copy of the fax into small claims court and suing the sender there. *Critchfield* is not a case about preventing an injured plaintiff from getting his or her day in court; it is an attempt to conflate

the receipt of one unsolicited fax to assert a multi-million dollar class action.

In summary, *Critchfield* presents the Kansas Supreme Court with an opportunity to reaffirm its discussion in *Dragon I* concerning the class certification procedure under K.S.A. 60-223. The oral argument in the case highlighted a number of areas in need of clarification, including the plaintiff's burden of proof at the certification stage and the need to clearly define an ascertainable class. In light of the court's current opinion backlog, as well as the grave budgetary shortfall facing the Judicial Branch this spring, it will likely be several months before the court issues an opinion in *Critchfield*. Whatever the outcome of the case, *Critchfield* should remain on the radar of any attorney defending against class certification in this state.

As with other cases in which the KADC has filed *amicus* briefs, the KADC's Amicus Committee will keep you updated as to the Kansas Supreme Court's decision in *Critchfield*. In the meantime, anyone interested can access the oral argument from *Critchfield* (or any other case heard by the Kansas Supreme Court since January 2004) on the Kansas Judicial Branch's website at <http://www.kscourts.org/kansas-courts/supreme-court/archived-arguments.asp>. ▲

*Before joining the firm of Thompson Ramsdell & Qualseth, P.A., in November 2009, Ms. Warner worked for 3 1/2 years as chambers counsel to Chief Justice Robert E. Davis of the Kansas Supreme Court. She co-authored the amicus brief in *Critchfield* with Todd N. Thompson, of the same firm.

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1. *Critchfield Physical Therapy v. The Taranto Group*, Supreme Court Case No. 101,949.
2. 47 U.S.C. § 227.
3. *Dragon v. Vanguard Industries, Inc. (Dragon I)*, 277 Kan. 776, 89 P.3d 908 (2004). The second “*Dragon*” decision was decided in 2006 and did not alter the framework set forth in *Dragon I*, except to clarify that a district court abuses its discretion when it fails to rigorously analyze each of the factors necessary for its decision, and when “the method of the trial court’s analysis of the certification factors itself is flawed.” *Dragon v. Vanguard (Dragon II)*, 282 Kan 349, 360, 144 P3d 1279 (2006).
4. E.g., compare K.S.A. 60-223(c)(1) (class should be certified “as soon as practicable”) with Fed. R. Civ. Proc. 23(c)(1)(A) (certification order should be issued “at an early practicable time”). It should also be noted that the Class Action Fairness Act, and in particular 28 U.S.C. § 1332(d) (amending the requirements for diversity jurisdiction in federal courts), relates to federal jurisdiction and thus has clearly not been adopted in Kansas.
5. *Dragon I*, 277 Kan. at 778.
6. Certification under K.S.A. 60-223(b)(1)(A) requires a showing that “[t]he prosecution of separate actions by or against individual members of the class would create a risk of . . . inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.”
7. Certification may be granted under K.S.A. 60-223(b)(3) when “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.”
8. See James P. Muehlberger and Andrew D. Carpenter, *Kansas Supreme Court Clarifies Class Certification Standards*, KADC Legal Letter, No. 3, at 13 (Summer 2004).
9. *Dragon I*, 277 Kan. at 781-82.
10. *Id.* at 780, 782.
11. K.S.A. 60-223(c)(1).
12. Fed. R. Civ. Proc. 23(c)(1)(A).
13. *Dragon I*, 277 Kan. at 783.
14. *Id.* at 783 (emphasis added).
15. *Id.* at 782-83 (quoting *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 [7th Cir.], cert. denied 534 U.S. 951 [2001]).
16. *Id.*
17. *Id.* at 783. Although the Kansas Legislature amended K.S.A. 60-223 in 2004, the amendments do not alter the requirement for a rigorous analysis of the certification factors or the factors themselves. See L. 2004, ch. 21, § 1.
18. *Id.* at 793 (emphasis added). Of course, the use of the hedge “necessarily” here clearly indicates a recognition that individualized questions may defeat a request for certification. This notion is codified in K.S.A. 60-223’s commonality and predominance factors.
19. *Id.* at 784.
20. *Id.* at 783.
21. *Id.* at 780-81.
22. *Id.*, Syl. ¶ 2.
23. *Id.* (emphasis added).
24. *Id.* at 792.
25. *Id.* at 791-92. The *Dragon I* court held that even though under Kansas’s choice-of-law approach, a defendant claiming that a different state’s law has the burden of demonstrating that the foreign law should apply, this was not the case in the context of a motion for certification. There, “the movant has the burden to show that there are no significant differences in the various states’ law or, if there are variations, that they can be managed by the trial court.” *Id.* at 792.
26. Although *Dragon I* was decided in 2004, the last six years have seen substantial changes in the composition of the Kansas Supreme

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- Court. In particular, Justices Rosen, Johnson, and Biles have all joined the court in the years since *Dragon I* was decided. While a majority of the justices currently on the court were also members of the *Dragon I* court, that majority is only slight.
27. See 47 U.S.C. § 227(b)(1)(C).
 28. 47 U.S.C. § 227(b)(3).
 29. *Id.* Under the trebling provision, statutory damages may total \$1,500 for each unsolicited fax willfully or knowingly sent.
 30. The district court's certification order consisted of a wholesale adoption of the plaintiff's proposed findings of fact and conclusions of law—complete with reference to the findings of a special master (when there was no special master appointed in this case).
 31. Certification Order, at 14. This class definition was proposed verbatim by Critchfield.
 32. *Id.* at 3 n. 7 (emphasis added).
 33. *Id.* at 14.
 34. *Dragon I*, 277 Kan. at 783.
 35. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316-20 (3d Cir. 2009) (rejecting “threshold showing” standard employed by trial court and requiring proof by a preponderance of the evidence); *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267-69 (5th Cir. 2007) (requiring proof by a preponderance of the evidence and recognizing that certification “often bestows upon plaintiffs extraordinary leverage, and its bite should dictate the process that precedes it”).
 36. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168 n. 8 (3d Cir. 2001).
 37. *Dragon I*, 277 Kan. at 782-83 (quoting *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-76 [7th Cir. 2001]).
 38. *Dragon I*, 277 Kan. at 782-83 (quoting *Szabo*, 249 F.3d at 675-76).
 39. See, e.g., *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1193-95 (9th Cir. 2001) (“Certification under Rule 23(b)(1)(A) is therefore not appropriate in an action for damages”). Critchfield's Petition included a request for an injunction and a claim for conversion, but neither of these claims is addressed in the certification order.
 40. See 137 Cong. Rec. S. 16,205 (daily ed. Nov. 7, 1991) (statement of Senator Hollings, sponsor of the TCPA, stating that a private action under the TCPA would be brought “preferably in small claims court” because small claims court “would allow the consumer to appear before the court without an attorney” and “[t]he amount of damages in this legislation is set to be fair to both the consumer and the telemarketer”).
 41. *Dragon I*, 277 Kan. at 779 (quoting Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 59 [2000]).
 42. *State v. Brown*, 285 Kan. 261, 294, 173 P.3d 612 (2007).
 43. *Dragon I*, 277 Kan. at 780, 783.
 44. Critchfield's Response to KADC's Amicus Brief, at 3 (quoting *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 [2009]).
 45. *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009).
 46. As the Kansas Supreme Court noted in *Harsch*, “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants.” 288 Kan. at 293 (quoting *Landis v. North American Co.*, 299 U.S. 248, 254, 81 L. Ed. 153, 57 S. Ct. 163 [1936]).

H.W. "Bud" Fanning Receives Kahrs Lifetime Achievement Award (Continued from pg 3)

Korean War broke out a few months before he received his commission. Three months later, Bud was ordered to active duty as an infantry platoon leader. By this time, Bud had become fairly serious with his girlfriend, Marguerite Wadsworth, and he had asked her to marry him. When Bud got orders to active duty, he "suggested that they wait to get married because she was too young to be a war widow." Nevertheless, she did not want to wait, so on May 31, 1951, Bud and Marguerite were married. Just ten days after their wedding, Bud reported to Fort Riley for active duty. The marriage "turned out to be a very good move," in Bud's wise estimation, since they are still married 58 years later and have three fine children.

After some training at Fort Riley, Bud received orders to report to the receiving center in Korea with a short refresher course at Fort Benning, Georgia, before going overseas. Bud assumed that at Fort Benning "they would be taught how to dodge North Korean bullets," but he was pleasantly wrong, as the training he received was quite good. When Bud arrived at the receiving center, he was assigned as a platoon leader in a heavy weapons company in the 24th Infantry Division. After a very short time, he was promoted to company commander when the present company commander left. As Bud recalls, "This was really ironic! Just imagine, an ex-sailor as a company commander in an Army heavy weapons company."

After Bud's discharge from the Army, he resumed his college education at Wichita University for one semester. That summer a good friend of Bud's told him what a great job he had as an insurance adjuster. Knowing he would be looking for a job after graduation in one more year, Bud interviewed with his company and temporarily abandoned his college education to be an insurance adjuster. Bud's initial office was in Pratt, where he stayed for two years. The company provided him with a lot of training in contracts and tort law, since he would be dealing with attorneys representing clients with personal injury claims. After two years of negotiating claims with the attorneys in that area, Bud realized that he knew as much about contract and tort law as most of the attorneys, "but was making a lot less

money." So, he decided to join them in the law business. He was transferred to Topeka with the approval of his company to attend Washburn Law School while still adjusting insurance claims in the Topeka area on a part-time basis. In those days Washburn awarded combined degrees – that is you could attend law school before receiving your undergraduate degree. Bud was the only one in his law school class that drove a new company car each year along with a good paying part-time job.

Bud knew that he wanted to practice law in Wichita, so he interviewed with Wichita firms during his senior year of law school. Bud sent resumes to ten law firms in Wichita and on two separate occasions he interviewed with seven of these firms. His last interview of the second day was at the Kahrs and Nelson firm. One of the reasons for Bud interviewing with the firm was that Pat Kelly (later U.S. District Judge Kelly) was one of his old high school friends and college fraternity brothers and he thought it would be great to practice law with him. Bud was very impressed with both Bill Kahrs and Bob Nelson, so when they offered Bud a job at the conclusion of the interview, he immediately accepted it. Bud started with the firm in August. In November, Pat Kelly advised Bud that he was leaving the firm to practice with John Frank, one of the leading plaintiff's lawyers of that time.

Immediately upon the departure of Pat Kelly from the law firm, the firm hired Dick Hite. Dick Hite and Bud have now practiced law together for more than 50 years. Early in their practice, they were primarily an insurance defense firm, although Bob Nelson was the premier zoning and real estate attorney in Wichita. The firm grew to a maximum of thirty-two lawyers over the years but several of the attorneys decided to practice on their own or with smaller firms. Consequently, the firm has, for the most part, been a mid-sized firm for Kansas. Bud's personal practice transitioned from auto liability cases to medical malpractice defense, which he did for more than 20 years. After Bob Nelson, Bill Kahrs and Darrell Kellogg passed away, Bud decided to "smell the roses" before it was too late, so he has been of counsel and "semi-retired" for the past 14 years.

Bud recalls a unique experience in his law practice which few practitioners may encour-

Bud was very impressed with both Bill Kahrs and Bob Nelson, so when they offered Bud a job at the conclusion of the interview, he immediately accepted it.

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Bud recalls that Judge Sirica's autograph was the one and only autograph he ever asked for, and he still values it highly because of his admiration for the Judge.

H.W. Bud Fanning Receives Kahrs Lifetime Achievement Award (Continued from pg 32)

ter. His law practice started before the Kansas Code of Civil Procedure was in place; therefore attorneys did not have the right to take discovery depositions in state court. John Frank filed a motion in a significant personal injury case to take the discovery deposition of the plaintiff and the trial judge denied it. However, the judge allowed an interim appeal on this significant issue. Bill Kahrs called Bud into his office and told him to go argue the case before the Supreme Court but he was to do his best to lose the appeal because everyone wanted the right to take discovery depositions. Bud recollects the odd feeling he had to stand before the highest court in the state and hope you do your best to lose.

Bud was elected as secretary of the Wichita Bar Association in 1963. Bud recalls that in contrast with practice today, at that time there were fewer than 400 lawyers in Wichita and, since it was his obligation as secretary to sign every member's membership card, he knew every lawyer in the association by their first name. Now, with more than one thousand lawyers in the association, it is difficult to know more than 10-20% of the members. Bud was elected President of the Wichita Bar Association in 1978, an honor that brought with it much hard work.

Bud was inducted into Fellowship of the American College of Trial Lawyers in 1975. At his induction ceremonies, Bud approached the head table and obtained an autograph from Judge John Sirica. Sirica was the Chief Judge for the U.S. District Court for the District of Columbia, where he rose to prominence after ordering President Nixon to turn over his recordings of White House conversations during the Watergate scandal. Bud recalls that Judge Sirica's autograph was the one and only autograph he ever asked for, and he still values it highly because of his admiration for the Judge.

The Kansas Supreme Court appointed Bud to the Board of Law Examiners in 1986 and he served on that Board for nine years. His experience on the Board proved a rewarding and interesting part of his career, both from writing questions for each examination and from participating in the hearings which were held regarding the individual's qualifications to take the bar exam.

Bud was particularly honored to receive the William Kahrs Lifetime Achievement Award, bestowed by KADC at the 2009 Annual Meeting. As Bud mentioned during his remarks at the KADC luncheon, the award is especially meaningful to him because of his own personal and professional relationship with Bill Kahrs, whom Bud felt was the best trial lawyer he has ever seen. Congratulations Bud, on an honor well deserved! ▲

CONGRATULATIONS TO OUR 2009 AWARD RECIPIENTS

H.W. "Bud" Fanning
Kahrs Award for Lifetime Achievement

Scott C. Nehrbass
Distinguished Service Award

F. James Robinson
Silver Helmet Award

Thomas R. Buchanan
Benedict Arnold Award

Congratulations to all these deserving recipients!

Summary of Unpublished Opinions*(Continued from pg 9)*

poor attitude. The district court granted the Liberal Animal Hospital's motion for summary judgment, which argued no implied contract for employment existed. Sander appealed. In Kansas, an employer may dismiss an employee for good cause, for no cause, or even for wrong cause without being subject to liability, unless an express or implied-in-fact contract restricts the employer's right to terminate the employee at will. Sanders claimed the Employee Handbook created an implied-in-fact contract and that the hospital breached that contract when it failed to follow the progressive discipline procedures set forth in the handbook. However, Sander signed an acknowledgement stating she understood the contents of the handbook and also testified that, based on her reading of the handbook, she understood she could be fired for any reason. The handbook also included numerous provisions that characterized the employment relationship as at-will and disclaimed the existence of an employment contract.

The Court of Appeals held the Employee Handbook was not an implied-in-fact contract and the hospital could fire Sander at will. It noted that the mere existence of a progressive discipline policy is insufficient to overcome clear language affirming an at-will employment relationship. An employer can prevail on summary judgment if the employee only presents evidence of his or her unilateral expectations of continued employment. The Court of Appeals also rejected Sander's argument that the district court erred because it did not give her an opportunity for oral argument. Supreme Court Rule 133 provides an adverse party can request oral argument within 5 days of service of the motion. Sander did not request oral argument until she filed her response to the hospital's motion. With her request untimely, the trial court was not required to set the motion for oral argument.

The trial court also ruled that because continued employment was a condition for vacation time under the Employee Handbook, Sander was not eligible for accumulated vacation pay. Whether vacation time constitutes an earned wage is determined by the employment contract and policies. The Court of Appeals held Sander had no legal basis to claim a right to vacation pay unless

it could be found in a contract for employment. After looking to the Employee Handbook, the Court of Appeals concluded Sander was not entitled to vacation pay. Affirmed.

[101.455](#) – In the Matter of the Marriage of Giesick and Berning – Per Curiam – Affirmed – Sedgwick.

In the Matter of the Marriage of Tim W. Giesick and Carol A. Berning, Case No. 101,455 (Kan. App. January 22, 2010)

Berning appealed the order of the court denying reinstatement of maintenance after her divorce from Giesick. The divorce was entered in September 2003 and ordered maintenance to Berning for five years. In March 2008, Carol filed for reinstatement of maintenance. The trial court concluded that Berning overextended herself after the divorce and relied upon an income source that had a termination date. It held Giesick had no legal obligation to bail her out of a situation she created.

Berning argued the trial court erred by considering the circumstances at the time of the divorce. The Court of Appeals determined the plain statutory language regarding maintenance does not limit the district court's consideration to only those circumstances temporally present on the day of the reinstatement hearing. District courts have wide discretion in setting maintenance. The district court heard evidence that Giesick accepted the financial realities of the divorce by taking Chapter 7 bankruptcy, living with his parents, living in low-income housing, and then working his way back to financial independence. Further, Berning's acquisition of new debt was uncontroverted. The record showed Berning borrowed for her daughter's benefit, for nonessential trips and entertainment, and spent a tax refund on a vacation. While she needed to replace an aging motor vehicle, she chose to purchase a new vehicle which resulted in considerable debt. Considering she was living rent free in a small town on about \$21,000 annual income, a reasonable person could conclude it was fair, just and equitable for her to bear the costs of her own maintenance rather than to continue relying on Giesick. Affirmed.

[101.739](#) – Ireland v. Byrne, et al. – Leben, J. – Reversed – Miami.

Kimberly Ireland v. Edward V. Byrne, Kevin*(Continued on page 35)*

Summary of Unpublished Opinions*(Continued from pg 34)***Ireland, James Ireland, and Allyson R. Reed, Case No. 101,739 (Kan. App. January 22, 2010)**

Kimberly and Kevin were involved in a bitter divorce that began in March 2007. Kimberly filed a separate suit in 2008 against Kevin, his attorney, and several others, alleging invasion of privacy, defamation, negligent infliction of emotional distress, blackmail, and civil conspiracy. Kevin and Bryne filed a motion to dismiss on the ground that none of Kimberly's claims had even facial validity. The day before the scheduled hearing on the defendants' motion, Kimberly filed a Motion to Dismiss Without Prejudice. The district court proceeded with a hearing on the defendants' motion and granted the motion, concluding Kimberly had admitted all of its allegations since she had not filed a written response. The court dismissed Kimberly's claims with prejudice. The court ordered the defendants to prepare the order of dismissal. Kimberly's attorney did not agree with the form of the order and the judge scheduled a further hearing to resolve that dispute. At that hearing, the district court adopted a journal entry mostly matching the proposed entry prepared by defense counsel. The district court granted sanctions against Kimberly, finding her objections had not been appropriate. Kimberly appealed the sanctions order.

Under K.S.A. 60-241, Kimberly had the right to dismiss her suit without needing the approval of the court of the defendants prior to the defendants filing of an answer or motion for summary judgment. Here, the defendants did not file an answer but a motion to dismiss. Kimberly responded by filing a motion to dismiss her action without prejudice. The Court of Appeals recognized prior case

precedent which held when a document seeking dismissal is filed within the time frame set out in K.S.A. 60-241(a)(1), it will operate as an automatic dismissal of the action upon filing even though it may be labeled a "motion to dismiss" rather than a "notice to dismiss." The Court of Appeals ultimately found no good reason that the caption of Kimberly's pleading should control over its content. As such, it should have been dismissed upon her filing of the Motion to Dismiss.

Regarding Kimberly's appeal of the subsequent sanction order, the Court of Appeals found no authority for the district court to enter sanctions against Kimberly over a dispute that arose regarding how to document the district court's rulings about other matters over which the district court had lost its authority because Kimberly had already properly dismissed her action. The sanction order, entered without authority, was a void judgment. Reversed.

[101,917](#) – In the Matter of the Marriage of Stevens – Per Curiam – Affirmed – Lyon.

In the Matter of the Marriage of Denise Gray Stevens and Timothy Stevens, Case No. 101,917 (Kan. App. January 22, 2010)

The mother appealed from the district court's order related to a motion for change of residential placement of her minor son filed by her ex-husband, the father. She claimed the court erred in changing residential placement to the father and by ordering her to prepay the father's expenses as a condition of scheduling a rehearing, in denying her motion for a continuance, and in calculating her child support payments.

There were four change of placement motions filed before the instant motion. The

(Continued on page 36)

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Summary of Unpublished Opinions

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father filed his motion and served the mother with a copy. He then mailed a notice of hearing to the mother at a wrong address. She learned of the hearing only a few days before its scheduled date. At the hearing, she requested an extension and the court denied her request. The mother and father testified and the court spoke privately with the child. The court found a material change in circumstances, noting the child's falling grades and rising school absences, the disruption in the mother's home, and the contrasting stability in the father's home. The court changed primary residential placement to the father. The mother moved for a rehearing based on the improper notice of hearing. The court granted the rehearing but held the mother failed to request a continuance when she had ample opportunity to do so before the hearing. As such, the father incurred expenses for him and his witnesses to travel from Kentucky to the hearing. The court conditioned the rehearing on the mother's reimbursement of the father for his travel expenses for the initial hearing. The mother paid the court-ordered travel expenses and a rehearing was held. The court again determined that the change in circumstances warranted a change in residential placement.

On appeal, the Court of Appeals determined that conditioning rehearing on the payment of the father's expenses was within the court's sound discretion. Local rules required the request for continuance to be filed at least 72 hours prior to the scheduled hearing. The court noted the mother could have sought a continuance consistent with the local rules, but failed to do so. Once she learned about the hearing, she failed to notify the court of the father's counsel of her need for a continuance; rather, she waited until the day of the hearing, knowing the father would be traveling from Kentucky. With respect to the mother's appeal of the denial of the continuance, the Court of Appeals determined this issue was moot because she ultimately requested and was granted a rehearing, where she had the opportunity to cross-examine the father and his witnesses and to present her own evidence to oppose the father's motion. The mother also claimed the district court erred as a matter of law in establishing her child support obli-

gation because it denied her request for an adjustment based on her extended summer parenting time with the child and the interstate pay differential. While the average weekly wage in Kentucky was \$6 less than Kansas, the Court of Appeals determined the mother did not calculate how this minor difference in the cost of living would affect her child support. On this point, the mother failed to demonstrate any abuse of discretion. Finally, the Court of Appeals determined that the district court did not abuse its discretion when it decided to change residential placement to the father as there was substantial evidence to support the district court's findings in this regard.

[102.136/102.137](#) – In the Matter of the Adoption of J.R.M. and Z.T.M. – Per Curiam – Affirmed – Johnson.

In the Matter of the Adoption of J.R.M. and Z.T.M., Case Nos. 102, 136 and 102,137 (Kan. App. January 22, 2010)

Father had two children. He and Mother never married. Mother later married Stepfather. Stepfather filed a petition to adopt the two children. Father did not consent to the adoption. The district court granted the petition over objection of Father, finding he failed in his obligations as a parent for the 2 years prior to the filing of the petition. Father was disabled and receiving social security payments (SSA) for his disability. The children also received SSA payments as a result of Father's disability. The primary issue was whether the SSA payments satisfied Father's obligation to provide financial support such that his consent is required before Stepfather can adopt.

The Court of Appeals determined the SSA payments did not satisfy Father's obligation to provide financial support. The SSA benefit was \$66 per child per month. The district court indicated that Father's relationship with his sons had been largely non-existent since March or April of 2004. The court concluded that Father's relationship with the children was affected by both his mental disabilities and his violent temperament, including his convictions of criminal threats in 2006 against Stepfather and Mother, and the stalking charges in 2007. The court concluded Father failed the test of demonstrating love and affection for his children and is an unfit parent. Father argued the court erred in not considering the SSA payments.

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The court must evaluate whether a natural parent failed to assume both the duty of financial support of a child and the duty of a parent to show affection, care, and interest toward their children. Unless the parent has failed on both sides of the ledger for the 2 consecutive years preceding the filing of the adoption petition, the parent's consent is necessary for the adoption. Father's primary argument is that the district court erred in finding he failed on the financial side of the ledger test.

The record was devoid of any action Father took to provide his children with any additional amounts over their \$66 per month SSA benefit. The court noted the father was incarcerated for a significant portion of the two prior years, yet he kept his entire SSA monthly check of \$680 per month despite the fact he was living rent free. The Court of Appeals determined that the SSA payment was incidental and wholly inadequate for the proper physical, mental, and emotional development of his children. The Court of Appeals agreed with the district court that Father utterly failed on both sides of the ledger so that his consent to Stepfather's adoption was unnecessary. The Court of Appeals further found the district court did not err in determining that Father was unfit and that it was in the best interests of the children to grant the adoption.

[102,287](#) – In the Matter of the Adoption of Baby Girl P. – Leben, J. – Affirmed – Johnson.

In the Matter of the Adoption of Baby Girl P., Case No. 102,287 (Kan. App. January 22, 2010)

Lauren and Devon had a relationship. Lauren became pregnant and ended the rela-

tionship during the early months of the pregnancy. She subsequently sent Devon a text message saying she had a miscarriage and asked that he have no further contact with her. Baby Girl P was born in June 2008. Lauren waived her parental rights and placed the child with an adoption agency. Lauren gave the adoption agency an incorrect last name for Devon and told it that he lived in Florida. Devon learned about Baby Girl P's birth when an investigator called his mother in August 2008. Devon immediately met with an attorney to initiate legal proceedings to assert his parental rights. The prospective adoptive parents filed an adoption action in July 2008. Devon filed an answer in that case asking for custody in early September.

Devon sent a letter to the adoptive parents, expressing joy at meeting his daughter and offering his support. He and his mother then delivered some gifts to the adoption agency in December. The district court found Devon failed to support the child after learning of her birth and that the child's best interests would be served by terminating his parental rights. The court noted he had not brought a separate paternity lawsuit, which could have established an order of support he would have been required to pay. With respect to the child's best interests, the court noted Devon failed to timely discover the child's birth even though he was living in the same county as Lauren. The Court of Appeals agreed with the district court's finding Devon failed to provide financial support, rejecting his vague offer of "something, anything" that might be needed without specifics. Otherwise, he provided a few gifts in December: a quilt, some shirts, and two bibs. Kansas case law has held that neither general offers of support nor inconsequential or incidental provisions are sufficient. It is insufficient for

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a father to merely stand ready. The father must take affirmative action to provide support upon learning of the child's birth rather than waiting to see what the court might eventually order. The Court of Appeals also found the district court's conclusion regarding the child's best interests was also supported by the evidence, finding Devon did not use all means at his disposal to investigate Lauren's claim of miscarriage. Affirmed.

[102,762](#) – In the Interest of J.J. – Per Curiam – Vacated and remanded – Shawnee.

In the Interest of J.J., Case No. 102,762 (Kan. App. January 22, 2010)

The natural mother appealed from the district court's termination of her parental rights. She argued the State failed to prove by clear and convincing evidence that she was an unfit parent or that she was unlikely to change in the foreseeable future. Because it was not apparent from the record that the district court applied the clear and convincing evidence standard, the Court of Appeals reversed and remanded.

[102,922](#) – In the Interest of K.B.J. and B.J.J. – Per Curiam – Affirmed – Sumner.

In the Interest of K.B.J. and B.J.J., Case No. 102,922 (Kan. App. January 22, 2010)

Father appealed the district court's order terminating his parental rights to his daughters. Father raised a due process issue and two evidentiary issues. The father claimed he was denied due process and denied the right to counsel during the adjudicatory stages of the CINC proceedings. He did not dispute that he was personally served, had the assistance of court appointed counsel, and was able to fully participate in the challenged termination proceedings. The Court of Appeals found the only aspect of the proceeding before it was the finding of unfitness and the resulting termination of parental rights. Thus, no due process violations were properly before the court on review. Father next argued the trial court erred by admitting evidence that adoption was a viable option for the children, claiming that evidence was not relevant to the threshold determination of his fitness. The Court of Appeals held the father's fitness was considered at the same time as the termination of his parental

rights. The journal entry showed that the court considered the father's fitness to parent at length without any reference to the potential adoption. Finally, the father argued the district court erred when it allowed the Court Services Officer to testify regarding information she learned about his criminal history by consulting the Department of Correction's Kansas Adult Supervised Population Electronic Repository (KASPER). The Court of Appeals agreed the district court erred in taking judicial notice of information the CSO learned from KASPER. The Department of Corrections explicitly states it does not guarantee the accuracy of the information contained in KASPER. Based on the disclaimer, the Court of Appeals held it was not subject to judicial notice; however, the Court of Appeals held this error was harmless. Affirmed.

[102,946](#) – In the Interest of A.B. and M.B. – Per Curiam – Affirmed – Sumner

In the Interest of A.B. and M.B., Case No. 102,946 (Kan. App. January 22, 2010)

Mother appealed the district court's orders granting temporary custody of her two daughters to SRS, claiming the evidence was insufficient to support a finding of probable cause to believe an emergency existed that threatened her children's safety. The district court affirmed the magistrate's order of temporary custody, reasoning, in part, that exposure of the children to illegal controlled substances and her prescription drug use had lowered Mother's capacity to care for her children to the point of placing them in danger. The Court of Appeals held that in making a probable cause finding under K.S.A. 38-2243(i)(1)(B), the magistrate had to make a practical, common-sense determination of whether, under the totality of the circumstances, there was a substantial basis for a reasonably prudent person to believe an emergency existed that threatened the children's safety. The Court applied a more deferential standard of review to determine whether the evidence provided the magistrate with a substantial basis for finding that an emergency existed which threatened the children's safety. The Mother's abuse of prescription drugs, together with the children's exposure to Father's illegal drugs and paraphernalia was enough to convince the court that there was a substantial basis for a reasonably prudent person to believe an emer-

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gency existed that threatened the children's safety, notwithstanding Mother's attempts to remedy the situations prior to the magistrate's hearing. Affirmed.

January 15, 2010**COURT OF APPEALS****Docket Number / Case Name / Judge / Disposition / County**

[100.502](#) – Cooper v. Nexlearn – Per Curiam – Affirmed in part, reversed in part, and remanded with directions – Sedgwick.

Michael Cooper v. NexLearn, LLC, Case No. 100,502 (Kan. App. January 15, 2010) (48 page opinion)

NexLearn employed Cooper as its president. After it terminated Cooper's employment, Cooper filed a lawsuit for breach of employment contract, among other claims. Following several motions for summary judgment by both parties and a jury trial, the district court entered judgment in favor of Cooper. Both sides appealed. On appeal, NexLearn argued the district court erred when it denied its motion for summary judgment on Cooper's claim that he had an implied employment agreement. In absence of an employment contract, employment in Kansas is at will. There are two recognized exceptions to this general rule in Kansas. First, under an implied contract theory, the employment contract is interpreted more broadly. It recognizes an implied obligation on the employer to not terminate an employee arbitrarily where a policy or program of the employer, either express or implied, restricts the employer's right of termination at will. Employee manual guidelines that set out grounds and procedures for discharge are viewed as part of the employment contract and bar the employer from violating its own policies in discharging an employee. The second exception is for lawsuits in tort for retaliatory discharge based on the theory that dismissal of employees for reasons that violate a particular public policy are actionable. Where it is alleged an employment contract is implied in fact, the understanding and intent of the parties is to be ascertained from several factors, including written or oral negotiations, the conduct of the parties from the commencement of the employment rela-

tionship, the usage of the business, the situation and objective of the parties giving rise to the relationship, the nature of employment, and any other circumstances surrounding the employment relationship which would tend to explain or make clear the intention of the parties at the time the employment commenced. The determination of the intent of the parties is generally a question of fact. After a review of the evidence presented, the Court of Appeals agreed with the district court that questions of fact precluded it from granting summary judgment.

Next, NexLearn raised an argument that the trial court made inconsistent rulings by granting NexLearn's motion for summary judgment regarding the purchase of Cooper's units in the company and then submitting the value of the units to the jury as an element of damages. The Court of Appeals held the district court granted summary judgment in favor of NexLearn on the unit-value claim and that judgment was binding on the trial court. The Court of Appeals accepted NexLearn's argument and determined the trial judge should not have instructed the jury to consider the value of the units assigned to Cooper as an element of damages in connection with his claim for breach of an implied employment agreement. As such, the Court of Appeals set aside the jury verdict in the amount of \$11,017 for the value of Cooper's units.

NexLearn argued the district court also erred when it denied its motion for judgment notwithstanding the verdict and allowing the jury to award damages of its failure to pay Cooper vacation pay and the cost of health insurance premiums after his termination. After a careful review of the evidence admitted at trial and resolving all facts and inferences reasonably drawn therefrom in favor of Cooper, the Court of Appeals found Cooper's own testimony supported a claim of \$3,600 for vacation pay; however, there was also undisputed evidence that NexLearn paid Cooper an extra \$2,122.08 over and above his salary. While these payments were not designated as vacation pay, the Court of Appeals held there was no other explanation to account for the additional sums paid by NexLearn. The Court of Appeals concluded Cooper was only entitled to the difference between these two figures and adjusted the award of vacation pay to \$1,477.92. On the

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health insurance premiums issue, NexLearn's employee handbook provided a general health insurance plan covering all employees. Viewing the evidence in the light most favorable to Cooper, the Court of Appeals held there was sufficient evidence to support the award for the cost of health insurance premiums.

The trial court found at a post-trial hearing the NexLearn had willfully failed to pay Cooper for unused vacation pay and health insurance premiums that constituted wages under Sec. 44-315(b) and awarded him a 100% penalty. NexLearn appealed. The trial judge did not make any specific findings on this issue. The Kansas Court of Appeals has defined "willful" in the context of K.S.A. 44-315(b) by stating: "A willful act is one indicating a design, purpose, or intent on the part of a person to do wrong or to cause an injury to another." The Court of Appeals found there was no evidence that NexLearn's conduct indicated a design, purpose or intent to cause injury to Cooper and concluded the decision to award the penalty was not supported by the evidence.

NexLearn's last point on appeal argued Cooper's attorney fees were not caused by NexLearn's breach of employment agreement and, further, that the fees awarded (approx. \$59,000) were not reasonable. The district court found that both the operating agreement and the employment agreement provided for recovery of attorney fees; however, the district court did not make any findings on how it segregated the attorney fee award between the two agreements and Cooper's various claims. The Court of Appeals found Cooper was only entitled to attorney fees caused by any breach of the employment

agreement. In the end, NexLearn and the other defendants were granted summary judgment on almost all of Cooper's claims, including his claim that NexLearn wrongfully purchased his ownership interest in the company. The only claim presented to the jury was for the breach of the implied employment agreement. On this claim, NexLearn had already paid Cooper's entire salary and the only actual damages were the costs for vacation pay and health insurance premiums. The Court of Appeals held, in light of the substantial reduction in Cooper's damages being affirmed on appeal, it was appropriate to remand the award of attorneys fees to the district court for reconsideration.

Cooper also raised several issues relating the district court's summary judgment rulings. After careful consideration of each of the issues raised, the Court of Appeals affirmed all issues appealed by Cooper, including issues related to mediation, a motion to compel, his claimed attorney fees and request for punitive damages, the adoption of a business plan, a power of attorney, the change of control of the company, and an alleged breach of fiduciary duty.

[102,076](#) – In the Matter of the Marriage of Godfrey – Per Curiam – Affirmed – Meade.

Jennifer Godfrey v. Michael Godfrey, Case No. 102,076 (Kan. App. January 15, 2010)
After a divorce in 2005, the couple's children lived mainly with the mother, Jennifer, in Meade, Kansas. When Jennifer moved from Meade to McPherson (182 miles away) in 2008, Michael wanted the children to stay with him in Meade. The district court granted residential custody to Michael in Meade, Kansas. Jennifer appealed. When a party appeals a district court's grant of a

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motion to modify custody, the Court of Appeals reviews for an abuse of discretion. First, the Court of Appeals found the district court appropriately found that Jennifer's move constituted a material change in circumstances. After a review of the record, the Court of Appeals determined that the district court considered the factors set forth in K.S.A. 60-1620(c) and K.S.A. 60-1610(a)(3)(B). The Court of Appeals noted that K.S.A. 60-1610(a)(3)(B)(vi) does not specify that the district court must consider how the children have adjusted to the new location. Here, the district court considered the children's home, school, and community situation in Meade. Jennifer also argued Michael's motion to modify was not timely. She argued that she gave a 30-day notice; however, Michael only responded with a motion to modify parenting time and did not object to the move. She contended Michael should have filed a motion to modify custody once he learned of the move, arguing the purpose of the 30-day notice is to allow the nonresidential custodial parent a time in which he can file a motion to modify custody if he objects to the move. The Court of Appeals rejected this argument and pointed out that K.S.A. 60-1620(c) does not set forth a deadline for the filing of such a motion. The Court noted, if it accepted Jennifer's argument, it would be rewarding a parent for ignoring an upcoming court hearing and moving away from the jurisdiction of the court.

SUPREME COURT

Docket Number / Case Name / Judge / Disposition / County

[102,230](#) – In the Matter of the Suhr Trust – Per Curiam – Affirmed – Sedgwick.

In the Matter of the Paul F. Suhr Trust, Case No. 102,230 (Kan. January 15, 2010)

This was an appeal to the Kansas Supreme Court from a district court judgment reforming a 1999 non-charitable trust established by Paul F. Suhr. Reformation was based on K.S.A. 58a-416 of the Kansas Uniform Trust Code (KUTC) for the purpose of accomplishing the settlor's original intent to reduce or eliminate federal estate taxes in his spouse's estate by passing on part of her life interest in his estate to children and grandchildren. Paul's revocable living trust provided for the creation of a credit shelter trust if his wife survived him. After Paul's death, Helen was informed that the trust as drafted, due to a scrivener's error, did not fully use Paul's applicable exclusion credit, and therefore did not accomplish his goals of reducing or eliminating federal estate taxes and transferring wealth to his lineal descendants tax free. Helen, as trustee, filed a petition to modify the trust pursuant to K.S.A. 58a-410(b), which permits a trustee to seek and obtain the court's approval of a proposed modification of a trust. K.S.A. 58a-416 provided the court may retroactively modify a trust to achieve the grantor's tax objectives in a manner that is not contrary to the grantor's probable intentions. All beneficiaries were notified of the filing of the petition; however, the IRS was not so notified. The Kansas Supreme Court noted that the lack of notice to the IRS was not problematic as the IRS does not have standing to object to the proceedings because the taxing event had not yet occurred. Based on the uncontested evidence presented, the district court adopted modifications to the trust retroactive to the date of creation. Helen appealed. The Kansas Supreme Court transferred her appeal to itself based upon the holding of *Commissioner v. Estate of Bosch*, 387 U.S. 456, 18

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L.Ed. 2d 886, 87 S. Ct. 1776 (1967). Here, the Court had jurisdiction under the Declaratory Judgments Act to review the propriety of the trustee's reformation of the trust at issue. The trustee was asking the Kansas Supreme Court to affirm the district court's approval of the retroactive reformation of Paul's trust. The trust created a general power of appointment in Helen, because it had given her the right to appoint assets to anyone. The Kansas Supreme Court noted the result of such an appointment is that the assets subject to the power will be included in the powerholder's estate at death and thus will be taxable to the powerholder. The Supreme Court noted that clearly was not what the Suhrs had intended. So, unless modifications were permitted, the assets of the "Marital Trust" originally intended to be able to pass estate tax free to take full advantage of Paul's unified credit, would be less than originally intended and would be unintentionally taxed upon Helen's death. The district court's retroactive reformation fixed these problems to achieve the settlor's tax objectives. The Kansas Supreme Court concluded that the changes made by the district court were in accord with the probable intent of Paul and Helen and were, thus, authorized by K.S.A. 58a-416. Affirmed.

January 8, 2010**COURT OF APPEALS****Docket Number / Case Name / Judge / Disposition / County**

[101,442](#) – Staffing Kansas City, Inc. v. R.J. Dutton Inc. – Per Curiam – Reversed and remanded with directions – Johnson.

Staffing Kansas City, Inc. v. R.J. Dutton Incorporated, Case No. 101,442 (Kan. App. January 8, 2010)

Staffing appealed the district court's ruling that there was no contract between Staffing and Dutton, with regards to the permanent placement of an employee. Staffing provided a temporary employee to Dutton. One day after the temporary period ended, Dutton hired the employee full-time. While the employee was a "temp," Dutton was responsible for signing a weekly time sheet for Staffing. After the signature on the form, the weekly time sheet included a provision that provided if the employer wanted to employ the employee on a full time basis within one year from the date the time sheet was signed, the employer would have to pay Staffing a fee. Staffing learned about the subsequent employment and billed Dutton a permanent placement fee of approximately \$6,000. Staffing brought a limited action matter and was successful. Dutton appealed and the district court ruled in favor of Dutton, finding, in part, the weekly time sheets do not constitute written contracts with respect to any of the language contained below the defendant's signature. The Court of Appeals held the district court erred in ruling that Dutton could not be bound as a matter of law by anything below its signature. The general rule in determining the enforceability of such contract provisions is whether the clauses are conspicuous. After a careful review of the time sheets at issue, the Court of Appeals found, based on the applicable law, it was likely Dutton might be bound by the language of the front of the time sheets but not the language on the back. By signing the time sheets on multiple occasions and continuing to request help from Staffing, the Court of Appeals held Dutton entered into this contract with Staffing and then breached

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it by hiring the employee within 1 year of her temporary contract. The Court of Appeals held the time sheets should be construed together with the parties' initial staffing agreement, forming a binding contract with respect to the terms of the standard recruiting fee. The Court of Appeals did determine, however, that there was an ambiguity with respect to whether the fee was 16% of the actual salary of the employee or the expected salary. The Court of Appeals found the district court should have limited damages to 16% of the actual salary of the employee. The time sheet also had an inconspicuous reference to the payment of attorneys fees. Staffing was ultimately awarded 16% of the totally salary earned by the employee of approximately \$800.00 and its request for attorneys fees were denied. Reversed and remanded. (Concurring and Dissenting Opinions).

[101,544](#) – Bedard v. Scottsdale Insurance, et al. – Per Curiam – Affirmed – Stafford.

James Bedard v. Scottsdale Insurance and National Casualty Company, Case No. 101,544 (Kan. App. January 8, 2010)

The issue on appeal: whether, under the uncontroverted facts, there was a valid written rejection of underinsured motorist coverage by Bedard's employer, Roush Trucking? Bedard was driving a vehicle owned by his employer when he was hit by a car who failed to stop at a Stop sign. He settled with the other driver's insurance company for policy limits and then filed suit against his employer's carrier, claiming he was an insured under the policy and entitled to \$1,000,000 coverage to pay his underinsured motorist claim as provided in K.S.A. 40-284(a). National filed a motion for summary judgment asserting there was a written coverage rejection under K.S.A. 40-284(c) that limited underinsured motorist coverage to \$60,000. Based on the uncontroverted facts, the trial court granted National's motion. Bedard appealed. After considering the trial court's Memorandum and Order granting summary judgment, the Court of Appeals held the trial court's order was a proper disposition of the litigation and the court's findings of fact and conclusions of law adequately explain the decision. Affirmed. The decision is further supported by the Court of Appeals' published decision

Ochs v. Federated Mut. Ins. Co., (No. 101,562), decided this same day.

[103,125](#) – In the Interest of J.L.C., M.L.C., L.J.C., and G.L.C. – Per Curiam – Affirmed in part under Supreme Court Rule 7.042(d) and (e) and dismissed in part – Sumner.

December 31, 2009**COURT OF APPEALS****Docket Number / Case Name / Judge / Disposition / County**

[100,262](#) – Scarrow v. Johnson – Per Curiam – Affirmed – Dickinson.

Marcellyn Scarrow v. Rodney Johnson, Case No. 100,262 (Kan. App. December 31, 2009)

Johnson appealed the trial court's judgment in favor of Scarrow in the amount of approximately \$70,000 after the parties ended their 4-year cohabitation. The judgment represented half of the value of the new home built by the parties. Scarrow filed a cross-appeal arguing the judgment should have included the value of the real estate upon which the home set and that she was not responsible for half of Johnson's mortgage on the real estate. The district court held that it had broad equitable powers to divide the jointly accumulated property of parties who are no longer cohabitating. The issue before the trial court was the equitable division of property jointly accumulated with the intent that each would have an interest. Prior to the relationship, Johnson acquired 72 acres of property. Once the parties became a couple, they decide to put a mobile home on the property and to renovate it. Then, they decided to construct a home on the property for their use. The Court of Appeals noted the trial court found the parties contributed approximately equal amounts of money and labor to the construction of the parties' home and the property should be divided. The Court held this finding was supported by the evidence and there was no abuse of the trial court's discretion. With respect to the division of the real property upon which the home set, the Court of Appeals concluded Johnson owned the real estate prior to his relationship with Scarrow and, based on the controlling law, the property was not divisible once the cohabitation terminated. Scarrow also objected to being assigned half of the

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sum of the outstanding mortgage without being granted an interest in the land. The Court of Appeals rejected Scarrow's objection and held there was no requirement that the assignment of half of the amount of a mortgage obligation cannot be done without awarding a specific interest in the object of the mortgage to the person it was assigned to. The Court of Appeals also rejected Johnson's argument that the trial court erred in denying his motion for new trial, finding the trial court's ruling was supported by substantial competent evidence.

[101.123](#) – Walker, et al. v. Davis – Leben, J. – Affirmed – Sherman.

Emily Walker, Jesse Shaver, John Shaver, and Joseph Shaver v. Janet Shaver Davis, as Trustee of The Mildred Shaver Testamentary Trust, and as Trustee of The James Shaver, Sr. Testamentary Trust, Case No. 101,123 (Kan. App. December 31, 2009)

Four children of James Shaver Jr. filed suit against their aunt, Janet Shaver, seeking an accounting to determine whether their father got all he was entitled to when his parents died. Janet served as trustee for a trust one of her parents created and as the estate executor when the second parent died. James and Janet's parents both died more than 10 years before James' children filed this suit. Further, James, who survived his parents by more than 5 years, had not brought suit against his sister. The district court granted Janet's motion to dismiss (treated as a motion for summary judgment) on the basis that James' children were not beneficiaries of the trust at issue in the lawsuit and that they did not have standing to sue. The Court of Appeals determined that ruling was correct, stating only a beneficiary under the trust had any rights concerning it, and none of James' children were beneficiaries of the trust when James Sr. died and the trust ended by its own terms. James Jr. and Janet were the only beneficiaries of Mildred's trust when it ended; the children of James Jr. were never beneficiaries during the trust's existence. While Mildred's trust was in existence, the children of James Jr. had a contingent interest in it. Had their father died before the trust terminated, they would have become actual beneficiaries. However, Mildred's trust terminated upon James Sr.'s death and James Jr. was still alive. So,

James Jr. took his share of the trust property at that time. Any remaining right to the property comes to the children of James Jr. through their rights, if any, to his property, not through some contingent right to benefit from Mildred's trust. Thus, they have no standing to sue Janet in her capacity as the successor trustee. Affirmed.

[101.190](#) – In the Matter of the Marriage of Smith – Per Curiam – Affirmed – Shawnee.

[101.476](#) – Goodell v. Tyson Fresh Meats – Per Curiam – Affirmed – Workers Compensation Board.

Nicole Goodell v. Tyson Fresh Meats, Case No. 101,476 (Kan. App. December 31, 2009)

Tyson appealed the decision of the Workers Compensation Board awarding benefits to Goodell. Tyson argued there was not a majority opinion by the Board regarding the nature and extent of Goodell's work disability. Whether the Board entered a majority opinion under K.S.A. 44-555c(k) is a question of statutory interpretation over which the Court of Appeals had unlimited review. Two majority Board members held Goodell suffered a compensable injury to her lower back. Two minority Board members agreed that she suffered a compensable injury to her lower back. These four members only disagreed with how the award should be computed. However, the two majority Board members were joined by the one separate minority Board member in finding that both the scheduled lower leg injury and the nonscheduled lower back injury should be combined for purposes of determining Goodell's whole person permanent impairment and work disability. Based on this, the Court of Appeals found the Board entered a decision where at least three members agreed on all the points of law entered by the Board and the Board complied with the mandates of K.S.A. 44-555c(k). Next, Tyson challenged the Board's assessment of work disability for injuries to Goodell's lower back. On this point, the Court of Appeals determined Tyson was asking the Court of Appeals to reweigh the evidence and assess the credibility of witnesses, which the Court of Appeals was precluded from doing. On this point, the Court of Appeals held there was substantial support for the majority decision of the Board. Tyson also argued the Board erroneously relied on a doctor's permanent partial impairment rating of 3% to the body as a

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whole for Goodell's lower back condition because the AMA Guides to Evaluation of Permanent Impairment do not include impairment ratings for this condition. The Court of Appeals noted the lack of an impairment rating listed in the AMA Guide does not require a finding of zero impairment. K.S.A. 44-510e(a) specifically contemplates the existence of impairment ratings not contained in the AMA Guides. Here, the Court of Appeals determined the doctor's testimony concerning his computation of Goodell's impairment rating for sacroiliac derangement to be supported by the evidence. Tyson contended the Board also erred in finding Goodell made a good faith effort to find appropriate post accident employment. The Court of Appeals noted *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. ___, 214, P.3d 676 (2009), abolished the requirement that an injured worker put forth a good-faith effort to find appropriate post accident employment. As such, the Board did not err in awarding Goodell 100% wage loss in calculating her work disability award. Finally, Tyson argued the Board erred in combining her scheduled injury with the nonscheduled lower back injury to arrive at a single functional impairment and a single work disability award. Here, K.S.A. 44-510d only covered Goodell's left lower leg injuries. Kansas courts have held that if the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under K.S.A. 44-510e. Thus, the Court of Appeals held the Board did not err in considering her permanently and totally disabled.

[102,208](#) – In the Interest of L.M. – Per Curiam – Dismissed – Crawford.

In the Interest of L.M., Case No. 102,208 (Kan. App. December 31, 2009)

The mother appealed the district court's decision to deny her request to appoint the great-grandmother as the permanent custodian of her child. The Court of Appeals dismissed for lack of jurisdiction. The mother previously appealed this exact issue, which was summarily dismissed by the Court of Appeals. The Court of Appeals noted its position that its review of this issue in this second appeal is precluded under the law of the case doctrine. Under that doctrine, once an issue is decided by the court, it should not be relitigated or reconsidered unless it is clearly

erroneous or would cause manifest injustice. The Court of Appeals previously determined that the district court's decision to deny the great-grandmother's appointment as the child's permanent custodian is not a "disposition" for purposes of K.S.A. 38-2273(a) as argued by the mother. Affirmed.

December 24, 2009

COURT OF APPEALS

Docket Number / Case Name / Judge / Disposition / County

[100,871](#) – In the Matter of the Estate of Trembley – Per Curiam – Affirmed – Cloud.

In the Matter of the Estate of Henrietta M. Trembley, Case No. 100,871 (Kan. App. December 24, 2009)

The appeal raised the questions of whether the district court abused its discretion in allowing co-administrator compensation and attorney fees in amounts less than requested, in allowing attorney fees to an heir-at-law, and in denying the co-administrators an allowance for expert witness fees. The Court of Appeals held the district court based its decision on substantial competent evidence and did not abuse its discretion in any of its rulings.

[101,465](#) – Hauserman v. Westar Energy – Per Curiam – Affirmed – Workers Compensation Board. 101,675 – State v. Saucedo – Per Curiam – Remanded with directions – Seward.

Richard Leroy Hauserman v. Westar Energy, Inc., Case No. 101,465 (Kan. App. December 24, 2009)

Westar appealed the decision of the Workers Compensation Board awarding Hauserman permanent partial disability, medical expenses, and future medical expenses. Westar claimed the Board lacked substantial competent evidence to find that Hauserman suffered an injury that arose out of and in the course of employment with Westar. Westar alleged that Hauserman's work duties did not cause him to experience increased disability. Westar argued there was no evidence that Hauserman's work activities accelerated his need for surgery more than his day-to-day activities. Westar contended that a repetitive work injury must not only aggravate symptomology, but must also

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increase disability. The Court of Appeals determined that the Board only needed evidence that job-related activities aggravated the worker's condition, not that the work activities aggravated it more than his non-work activities. It held the Board had substantial evidence that Hauserman's condition was aggravated by his job-related activities. With respect to the increased disability issue, the Court of Appeals noted that determination of an aggravation of symptoms versus an aggravation of the condition can be difficult to factually distinguish. The Court of Appeals found there was substantial and competent evidence to support the finding of a work-related injury. Westar also took issue with the Board's determination of the date of accident. The Court of Appeals commented that Westar improperly characterized the date of accident as the date when an actual injury must occur. The Court of Appeals held the appropriate date of accident is either the date Westar received written notice of Hauserman's injury or the date Hauserman's condition was diagnosed as work related, whichever is earliest. Westar received written notice on February 14, 2007; yet, the condition was not diagnosed as work-related until July 9, 2007. The district court correctly determined the date of accident was February 14, 2007. The Court of Appeals rejected Westar's contention that the application for hearing was untimely, finding the date of accident was the same date as the date of notice and Hauserman timely filed his application for hearing.

[102,250](#) – In the Matter of the Adoption of Baby Boy L. – Leben, J. – Reversed and remanded with directions – Sherman.

In the Matter of the Adoption of Baby Boy L., Case No. 102,250 (Kan. App. December 24,

2009)

The mother surrendered the child to an adoption agency for adoption by a couple she had met. The agency stopped the adoption after an incident of domestic violence in the couple's home. The agency then selected the couple now before the Court of Appeals, although the mother had by then indicated a desire to have the child returned to her. The district court ruled in favor of the prospective adoptive parents, concluding the mother had unconditionally given up her parental rights and that the adoption agency had not abused its discretion in placing the child with the prospective adoptive parents. The law of New Jersey applied to the case. Under New Jersey law, the Court of Appeals determined the discretion to make a final placement decision was with the court and not the adoption agency. The Court of Appeals reversed the district court and remanded the case so the district court could determine appropriate placement, finding the mother's surrender was a conditional surrender under New Jersey law and, as such, she was entitled to participate in the district court's proceeding to determine the appropriate placement.

December 18, 2009

COURT OF APPEALS

Docket Number / Case Name / Judge / Disposition / County

[100,199](#) – Knarr, et al. v. Moser, et al. – Per Curiam – Affirmed – Johnson.

William Malcom Knarr and Hallmark Farms, LLC v. James Moser, Hallmark Arabian Farms, LLC, and Thomas Heshion, Case No. 101,199 (Kan. App. December 18, 2009)

After a bench trial, the district court entered

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judgment for Knarr and Hallmark Farms. The district court awarded Knarr certain personal property, livestock, and a monetary judgment in the amount of approximately \$160,000. Heshion appealed. Heshion argued that the bench trial had no legal framework. The Court of Appeals determined that issue was not preserved for review and was without merit. The parties had engaged in a number of different business agreements regarding two pieces of property. They presented to the Court and requested that the Court resolve all issues between them. The Court of Appeals rejected Heshion's complaint that there was no pretrial order, finding Heshion requested the trial procedures used by the district court, litigated all issues and claims, introduced the evidence he wished, and was not limited by the district court. The Court of Appeals also determined that Heshion failed to preserve his argument that the district court failed to make sufficient findings of fact and conclusions of law. While Heshion's motion for reconsideration stated his disagreement with those findings and conclusions, he failed to challenge the adequacy of the same. Further, the Court of Appeals held the findings were sufficient and the conclusions were in fact supported. Heshion argued the district court erred in its determination that a June 3, 2006 agreement controlled the disposition of the case. He argued unsuccessfully that the term "succeeds prior agreements" was ambiguous. The Court of Appeals held the district court properly found the June modification was the final recitation of the parties' agreement and controlled the disposition of the case. Heshion claimed the district court placed too much emphasis on the plain language of the agreement rather than his evidence that Knarr misrepresented facts or breached his duty of good faith and fair dealing. The district court made it clear that both parties attacked the others' credibility. The Court of Appeals denied Heshion's argument, stating it would not reweigh the evidence or pass on the credibility of witnesses.

[100.576](#) – Daniels v. Quest Cherokee – Greene, J. – Reversed and remanded with directions – Montgomery.

Roger Dean Daniels v. Quest Cherokee, L.L.C., Case No. 100,576 (December 18, 2009)

Quest, successor in interest to lessee of an oil and gas lease, appealed the district court's summary judgment canceling the lease for failure to pay shut-in royalties. The lease had no express provisions that addressed the impact of the payment or nonpayment of shut-in royalties or otherwise provided how such payment or nonpayment should relate to the duration of the lease term. The trial court entered a stipulation that led to a summary judgment in favor of Daniels canceling the lease and awarding damages and attorney fees. Quested appealed, arguing that its failure to pay the shut-in royalties should not have resulted in the cancellation of the lease but, rather, it entitled Daniels to a money judgment for the unpaid royalties. The Court of Appeals found that the shut-in royalty provision of the lease imposed a contractual obligation to pay or tender the shut-in royalties. Further, it found that such a clause generally supports an action to recover any unpaid royalties rather than an action to cancel the lease. Because the lease did not set forth the effect of nonpayment, the Court of Appeals determined the lease was ambiguous. The Court of Appeals remanded to the district court with directions to vacate the judgment of cancellation that was based on an errant view of the shut-in covenant and directed the parties to address the dilemma posed by the ambiguous lease and to otherwise litigate such other issues as they deem appropriate, including the contention that lease cancellation is warranted due to the lack of a well capable of producing in paying quantities or due to the failure of Quest to exercise diligence in seeking or connecting to a market for the gas.

[101.320](#) – Mutziger v. Homier Distributing Co., et al. – Leben, J. – Affirmed – Workers Compensation Board.

Danny Mutziger, II v. Homier Distributing Company and Wausau Underwriters Insurance Company, Case No. 101,320 (Kan. App. December 18, 2009)

Mutziger was killed in an on-the job accident. The guardian for a 12 year old child, Bowman, filed a claim for survivor's benefits under Kansas workers' compensation law, which was awarded. The employer and insurance carrier appealed, arguing Mutziger was not the presumptive father of Bowman, who was born while his mother was married to another man. Mutziger acknowledged in

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writing that he was Bowman's father, an Oklahoma order determined that he was Bowman's father, and ordered that he pay child support. The employer and carrier were attempting to rely on evidence gathered after the deadline to submit the same. In a workers' compensation proceeding, the ALJ sets a date - called the "terminal date" - for each side to have all evidence submitted. The Board found that the parties did not agree to extend the terminal date and that the employer failed to ask the ALJ for any relief until after the judge decided the case. Whether to extend a terminal date is a discretionary call for the ALJ. Reviewing based on an abuse of discretion standard, the Court of Appeals found the employer had ample opportunity to obtain whatever evidence it sought to present in the case. The Board's denial of the employer's appeal was appropriate. The resolution of this issue was decisive as to all issues in the case. Further, the evidence supporting the Board's factual finding that Bowman was Mutziger's son was ample, and certainly substantial. While there is a statutory presumption that the husband is the father of a child born during the marriage, there is also a presumption that a man who acknowledges paternity in writing is the father and another presumption that a man who has been ordered to pay support is the father. When presumptions conflict under Kansas law, the one that is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control. Mutziger acknowledged his paternity and the support order was duly filed in district court pursuant to Oklahoma law. The Board determined that the employer did not have just cause to refuse payment after it received the paternity order. The Court of Appeals agreed that there was no substantial question regarding paternity and, as such, no just cause to deny payment as of June 1, 2004. The Court of Appeals held the Board did not err in ordering the employer to pay interest on the award.

[101,721](#) – Brian Aviation v. Anderson – Per Curiam – Affirmed – Bourbon.

Brian Aviation, L.L.C. v. Dan Anderson, Case No. 101,721 (Kan. App. December 18, 2009)

Brian Aviation, LLC (BAL) appealed the trial court's ruling to reduce its claims for dam-

ages. Anderson damaged his plane and received an estimate from BAL for the repairs, which was approved by Anderson's insurance company. Anderson agreed BAL could repair the plane with a used part as the plane had been manufactured in 1959. BAL completed the repair by installing the used part; however, the part was damaged. BAL billed Anderson, who failed to pay. BAL initiated a collection suit and was awarded \$6,600. On appeal to the district court, the trial court ruled BAL never should have installed the dented replacement part and that it took much longer for BAL to complete the repairs than had been promised. The trial court reduced BAL's damage award to \$1,800. The Court of Appeals recognized there was evidence that Anderson never wanted BAL to put the damaged replacement part on the plane. The Court of Appeals noted the trial court's ruling indicated it believed Anderson's testimony in this regard. As such, the Court of Appeals cannot reweigh the testimony and evidence. The Court of Appeals affirmed the trial court's decision, holding there was no abuse of judicial discretion.

[101,867](#) – Security Bank of Kansas City v. Williams – Per Curiam – Affirmed – Wyandotte.

Security Bank of Kansas City v. Kathy Williams, Case No. 101,867 (Kan. App. December 18, 2009)

Williams appealed from the district court's judgment of foreclosure. Williams argued the district court erred in its determination that the Bank was the proper party to maintain the foreclosure proceeding. The district court found Security Bank was the current owner of the underlying mortgage and note. The Court of Appeals determined there was substantial competent evidence of record to support the district court's finding that Security Bank was the real party in interest. Williams also argued the Bank failed to release monies it owed to her under a prior settlement, which was rejected by the district court. The Court of Appeals refused to reweigh the disputed evidence on this point and held the district court's finding was based on substantial, competent evidence. Williams argued that the Bank's agent's entry onto the property was not contractually authorized and, further, that the agent damaged the property. After a review of the evidence, the Court of Appeals affirmed the

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district court's finding that the mortgaged property had been abandoned and Security Bank gave proper and timely notice to Williams, thereafter taking appropriate action under the terms of the note and mortgage to protect and preserve the property.

[101,910](#) – In the Interest of E.W. – Per Curiam – Appeal dismissed – Sedgwick.

In the Interest of E.W., a minor child under the age of eighteen, Case No. 101,910 (Kan. App. December 18, 2009)

SRS appealed the district court's decision, finding no reasonable efforts were made to find an adoptive home for E.W. The Court of Appeals dismissed the appeal for lack of jurisdiction. SRS claimed that an adoption placement decision is a discretionary function of the executive branch of government, and without an allegation of bad faith or unreasonable conduct amounting to fraud, the district court does not have jurisdiction to review an SRS decision regarding placement. The Court of Appeals noted that constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review. As such, SRS's separation of powers argument was not properly before the Court of Appeals. The opposing side argued that, under the Code, an interested party only has a right to appeal from any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights. The Court of Appeals examined each of these categories and determined that the order SRS was appealing did not fall into any of them. SRS was appealing the district court's decision regarding a change in E.W.'s placement. SRS acknowledged the appellate court does not have jurisdiction to hear appeals from adoption placement decisions. As such, the Court of Appeals determined it lacked jurisdiction to consider the appeal.

December 11, 2009

COURT OF APPEALS

Docket Number / Case Name / Judge / Disposition / County

[99,946](#) – Schmidt, et al. and Flatcoat Storage, II, LLC. v. Keeler, Grisham and DJ of

Kansas, Inc. – Per Curiam – Affirmed – Sedgwick.

Richard Schmidt, Vicki Schmidt and Flatcoat Storage, II, LLC v. Jerry Keeler, John Grisham, and DJ of Kansas, Inc., Case No. 99,946 (Kan. App. December 11, 2009)

Grisham appealed the district court's order granting the plaintiffs' motion for partial summary judgment, finding that he breached the parties' joint venture agreement, and, further, erred in dismissing his counterclaims. The parties were involved in a number of business deals involving storage facilities. Under one agreement, the parties' contract provided the defendants would not receive any compensation beyond the actual costs of construction. The plaintiffs sued the defendants arguing that the defendants billed the plaintiffs for \$175,996.95 in excess of the actual costs of construction for the project, which the defendants denied. Further, as a result of a proposed sale and termination agreement, the defendants received \$250,000.00 that was supposed to be returned if the proposed sale fell through, which it did. As such, the plaintiffs argued the defendants' counterclaims should be dismissed because they waived their rights to the storage facilities in exchange for the \$250,000.00. On the breach of contract claim, the trial court granted the plaintiffs approximately \$125,000 in damages. The trial court held Grisham's counterclaims failed because the defendants made no attempt to place the parties back in their original positions when they failed to repay the \$250,000. On appeal, the Court first rejected Grisham's argument and determined that there was no ambiguity in the contract at issue with respect to the term "cost of construction." The Court of Appeals next determined the trial court properly found that defendants overbilled plaintiffs approximately \$125,000. Grisham argued he should not be liable for the expenses because Defendant Keeler was solely responsible for submitting the invoices. Finding that the contract required Grisham to oversee and monitor the construction work and to make sure only the actual costs of construction would be charged, the Court held Grisham is liable for the overbilled expenses. Finally, the Court of Appeals rejected Grisham's argument that the trial court failed to apportion liability amongst the defen-

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dants. The plaintiffs sought a joint and several judgment for damages. As such, it was Grisham's responsibility to seek indemnification from the other defendants if he felt that he was improperly forced to pay the liability for his co-defendants

[101,692](#) – In the Matter of the Marriage of Short – Per Curiam – Affirmed – Bourbon.

Wendy Short v. Robert Short, Case No. 101,692 (Kan. App. December 11, 2009)

Robert appealed the decree of divorce granted to Wendy by default judgment. Robert claimed the district court should have provided him notice of the default hearing and the district court abused its discretion by *sua sponte* granting the default judgment. Robert did not file any motion to set aside the default divorce decree; rather, he filed a notice of appeal. K.S.A. 60-255 provides for notice of the default hearing if the defendant has entered an appearance. "Appearance" means an overt act by which a party comes into court and submits himself or herself to its jurisdiction. If a party fails to enter an appearance and the case proceeds to a hearing for default judgment, the court may set the hearing for default at its discretion pursuant to Supreme Court Rule 132. The Court of Appeals found that Robert failed to enter an appearance and, as such, was not entitled to notice of the default hearing. Rule 132 applied and the district court had the discretion to set the default hearing at any time without notice to Robert. Robert correctly argued that the district court may not grant a default judgment *sua sponte*. But, Robert's argument that the district court granted the default judgment *sua sponte* in this case was not supported by the record on appeal. Robert argued that Wendy did not


wish to proceed on the petition for divorce. The only evidence on this point was that Wendy appeared at the default hearing in person and *pro se*. The record was silent as to what occurred at the hearing. Thus, the Court of Appeals could not determine whether Wendy asked the court to grant the petition or whether she requested the court not grant the divorce. The Court of Appeals noted it was Robert's burden to designate a sufficient record to establish the claimed error. Affirmed.

[101,909](#) – Ostmeyer v. Amedistaff, LLC and American Home Assurance Company – Greene, J. – Affirmed – Workers Compensation Board.

Toni Ostmeyer v. Amedistaff, L.L.C., d/b/a The Right Solutions, and American Home Assurance Company, Case No. 101,909 (Kan. App. December 11, 2009)

Ostmeyer, a traveling nurse for Amedistaff, appealed the denial of her workers compensation claim, arguing the Board erred in concluding that her injury did not arise out of or in the course of her employment. She worked 13 to 26 week contracts at hospitals needing temporary nursing staff. Her contracts provided that the company was not responsible for housing expenses. While she was working a 13 week contract in Hutchinson, she was staying at a local hotel. On her day off, she was attacked by an assailant on her way home from dinner, causing her to suffer a degenerative and bulging spinal disc. She sought workers compensation benefits for the injury. The ALJ and, subsequently, the Board found she did not suffer an injury arising out of and in the course of her employment because she was injured on her day off and she was not at increased risk for her injuries because of her employment. Whether Ostmeyer suffered injuries that

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arose out of and in the course of her employment presented a question of fact. Thus, the Court of Appeals had to determine whether the finding was supported by substantial evidence. While the Court of Appeals recognized a traveling salesman whose travel itself is part of the job is within the Act under Kansas law, it held that travel to and from fixed-situs employment does not fall within the Kansas Act. In considering whether the employment caused Ostmeier to be exposed to an added risk or hazard to some degree greater than if not in her employment, the Court noted if it did, then any mishap during a hotel stay would be compensable (falling in the shower, food poisoning from a local restaurant). The Court of Appeals held such broad coverage was not consistent with the legislative intent or with the appellate case law considering such questions. Affirmed.

[102.068](#) – Maxwell v. Deluca – Per Curiam – Affirmed – Johnson.

[102.706](#) – In the Interest of M.C. – Per Curiam – Affirmed – Wyandotte.

In the Interest of M.C., minor child under the age of eighteen, Case No. 102,706 (Kan. App. December 11, 2009)

The State had filed a motion to terminate the mother's parental rights citing the child's need for permanency, which was granted. The mother appealed. The Court of Appeals determined it was highly probably, by clear and convincing evidence, that the mother's parental rights should be terminated and such termination was in the best interest of the minor child because in the absence of such termination, no permanency would

likely be achieved for the child.

December 4, 2009

COURT OF APPEALS

Docket Number / Case Name / Judge / Disposition / County

[100.447](#) – Schumacher, et al. v. Morris, et al. – Per Curiam – Affirmed – Morris.

Bertha Schumacher, individually and in her capacity as the representative of the Estate of Leo Robert Schumacher v. Edna Morris and Vivian Morris, Case No. 100,447 (Kan. App. December 4, 2009)

Bertha Schumacher, individually and as the representative of the Estate of Leo Robert Schumacher, deceased, appealed the district court's granting of summary judgment in favor of the defendants. Bertha filed a lawsuit against the defendants alleging breach of contract, fraud, and conversion in the sale of real estate to Mark and Vivian using funds given them by Bertha's late husband, Robert. Edna and Robert were siblings. Mark was Robert's nephew and was married to Vivian. Robert had provided money to be used by Mark and Vivian with respect to the purchase of certain real property. Edna, Mark and Vivian claimed the money was a gift. Bertha argued the money was not a gift as Robert expected an interest in the property. On appeal, Bertha also challenged the \$50,000 sanctions imposed against her attorney for filing a frivolous action.

First, Bertha argued the district court erred in barring her claims under the statute of frauds. The statute of frauds requires that an enforceable contract for the sale of real

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estate be in writing and signed by the party against whom enforcement is sought. Bertha argued the oral contract claim was outside the statute of frauds because it was an alleged contract for a joint venture of partnership. The Court of Appeals carefully considered whether Bertha's motion for reconsideration of the order granting summary judgment was timely and ultimately concluded it was untimely under K.S.A. 60-259(f). Bertha argued the summary judgment was not a final judgment because the issue of sanctions was still pending. An outstanding motion for sanctions under K.S.A. 60-211 tolls the timely filing of a notice of appeal, but it has no procedural ramifications for the 10-day motion to amend judgment under K.S.A. 60-259(f).

The Court of Appeals concluded the alleged oral contract did not deal with the sale of real estate. The District Court erroneously applied the statute of frauds; however, the Court of Appeals found the District Court reached the right result for the wrong reason. When an oral contract with a person since deceased is made the basis of an action for specific performance it is not sufficient that the contract be established by a mere preponderance of the evidence, but such evidence must be clear, cogent, and convincing. Bertha had the burden to establish there was a disputed material fact regarding whether the money Robert gave to Mark and Vivian was a gift or if Robert entered into an oral contract to have an interest in the property. It was her burden to establish the existence of an oral contract between Robert and Mark and Vivian to purchase the real estate in Kansas. The Court of Appeals agreed with the District Court that the undisputed evidence did not support Bertha's claim of an oral agreement for the purchase of the Kansas real estate. The Court of Appeals found there was no express evidence of an oral agreement. All of the documents in the case demonstrated that the only intended owners of the real estate were Mark and Vivian. The Court of Appeals concluded the undisputed evidence failed to demonstrate an oral contract between Robert and Mark and Vivian which could survive a summary judgment ruling.

Next, Bertha challenged the District Court's summary judgment ruling on her fraud

claim. The existence of fraud is a question of fact. On appeal, the standard of review is limited to determining whether the District Court's findings of fact were supported by substantial competent evidence and whether the findings are sufficient to support the court's conclusions of law. Even though fraud must be proved by clear and convincing evidence, a party opposing a motion for summary judgment need not present clear and convincing evidence of fraud to defeat the motion. Yet, the Court of Appeals concluded the District Court did not err in finding there was no evidence that the defendants made any misrepresentations regarding whether the two checks from Robert were gifts. Bertha argued the defendants were guilty of fraud by silence. Yet, the District Court concluded she failed to establish the required elements of such a claim that the defendants were under an obligation to communicate the material facts to Bertha or that she justifiably relied on the defendants to communicate the material facts to her. The Court of Appeals affirmed this finding, adding that it did not understand why Bertha could not have discovered the existence of any alleged oral agreement by simply researching debits to the joint checking account used by her and her husband.

Next, Bertha challenged the Court's entry of summary judgment on her conversion claim. Under Kansas law, conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another. Bertha argued the defendant did not have a contractual right to possess Robert's money nor was there evidence that Robert gave "carte blanche permission" for the defendants to use the funds. The Court of Appeals affirmed the District Court's ruling, finding no evidence in the record where express instructions were given by Robert on how the funds were to be used.

Bertha argued the District Court erred by imposing sanctions against her counsel for asserting fraud claims in her petition that had little evidentiary support. The District Court held Bertha's attorneys did not make a reasonable inquiry prior to filing suit as required by K.S.A. 60-211(b). The court acknowledged that attorneys have a duty to react to discovery and where their case falls apart, they are under a duty to dismiss. The Court of Appeals held sanctions were appro-

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appropriate and affirmed the District Court's findings that Bertha's allegations of fraud were baseless. Finally, the Court of Appeals evaluated the amount of the sanctions, \$50,000.00. In assessing the fee, the District Court considered the fact the case had a value of less than \$25,000.00; yet, the total attorneys fees for both sides exceeded \$100,000.00, which did not include the cost of the trial and appeal. The sanctions were approximately \$20,000.00 less than the defendants' attorneys fees. Bertha did not make any argument attacking the validity of the opposing counsel's fees. Thus, the Court of Appeals held the District Court did not abuse its discretion. Affirmed.

Submitted by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

[100.972](#) – Thomas, et al. v. Brewer's Food Mart – Per Curiam – Affirmed – Wyandotte.

David Thomas, individually, as an heir-at-law of Avalon Thomas, deceased, and on behalf of all other heirs-at-all of Avalon Thomas, deceased, and Stephanie Thomas, individually v. Brewer's Food Mart, Inc. d/b/a Brewer's Price Chopper Pharmacy, Case No. 100,972 (Kan. App. December 4, 2009)

The Thomas' child, Avalon, died from SIDS. The Thomases sought damages based on the Pharmacy's alleged errors in filling a prescription for Stephanie, Avalon's mother. The key facts were not in dispute. Shortly after Avalon's birth, Stephanie developed trouble sleeping and her doctor prescribed her Ativan. The pharmacy filled the prescription with the wrong dose (2 mg instead of .5 mg per pill). Stephanie was home alone and put Avalon to bed in her crib. In the morning when she woke, Stephanie found Avalon face down in her bassinet full of loose clothes, her face and hands blue, not breathing but warm. Stephanie performed CPR to no avail. Stephanie had no memory of anything that happened after she went to bed. Amnesia is a common symptom of Ativan. It appeared Stephanie changed Avalon's diaper and moved her to her bassinet after initially putting her to bed.

The parents filed individual claims against the pharmacy. David argued that by overdosing and failing to warn Stephanie of the vastly increased risks of negative side ef-

fects due to such overdosing the Pharmacy actively created the risk that Avalon's sole caregiver would be tending to her in an oversedated, confused and disoriented condition. The central question was whether the deceased might have maintained the action had she lived. Thus, the Court of Appeals first addressed whether the Pharmacy owed a legal duty to Avalon, which was a question of law. Kansas law provides a defendant (Pharmacy) generally bears no duty to control the conduct of a third person (Stephanie) to prevent that person from causing harm to others unless there is a special relationship between the actor and the third party or the actor and the injured party. The Court of Appeals determined the Pharmacy owed a duty to Avalon if a special relation existed between the Pharmacy and Stephanie which imposed a duty upon the Pharmacy to control Stephanie's conduct, or if a special relation existed between the Pharmacy and Avalon which gave Avalon a right to protection. On appeal, David did not address the "special relation" issue and the Court of Appeals determined the issue was abandoned. But David did argue that a special relationship existed between Stephanie and the Pharmacy creating a duty to Avalon due to the "foreseeable peril" that Stephanie would be left to tend to her two young children, having been unknowingly overmedicated to a profound extent, relying on dicta from an earlier case. The Court of Appeals found Stephanie was unwarned but the peril was to Avalon and the harm was too remote to establish liability. Ultimately, the Court of Appeals held David's failure to brief the conditions set forth in Sec. 315 was a sufficient basis to uphold the district court's decision because he failed to prove the existence of a legal duty which was essential to any negligence cause of action. The Court of Appeals also recognized the precedent that Avalon was a bystander, and generally bystanders are not able to recover for the negligence of a pharmacist.

The Court of Appeals also affirmed because David did not come forward with any evidence that Stephanie actions in placing the baby face down were not actions she might have taken even unmedicated. As such, David failed to show, as a matter of law, a causal connection between the negligence and the injury. David did not appeal this causation finding, which was enough to affirm

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the District Court's decision. On the causation issue, the Court of Appeals also noted that even in those circumstances where a pharmacist clearly breaches his or her professional duty by negligently packaging or dispensing a prescription drug, a negligence claim will fail unless the plaintiff can prove the negligent behavior caused the injuries in question. The Court of Appeals found there was no evidence that Stephanie's use of Ativan cause Avalon to dies of SIDS.

Stephanie argued the District Court erred in granting summary judgment on her claim for negligent infliction of emotional distress because it required she establish a physical injury. Further, even if a physical injury is required, she claimed a factual dispute existed because she suffered a chipped tooth. Under Kansas law, a plaintiff may not recover damages for negligent infliction of emotional distress unless it is accompanied by or results in immediate physical injury to the plaintiff. After establishing the physical injury, the plaintiff must show the injury resulted from emotional distress allegedly caused by the defendant's negligence and appeared within a short span of time after the emotional disturbance. Stephanie claimed she suffered a chipped tooth after she took the medication; however, the Court noted she did not discover Avalon until the next morning. Thus, the Court of Appeals held there was no evidence that the chipped tooth was caused by Stephanie's emotional distress. The Court of Appeals further found there was no causal connection between the injury and ingestion of Ativan. Affirmed.

Submitted by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

[101,355](#) – State v. Mike W. Graham & Asso-

ciates, LLC, and Lawrence Memorial Park Cemetery, LLC, et al. – Greene, J. – Reversed and remanded – Douglas.

State of Kansas, ex rel. Steven N. Six, Attorney General v. Mike W. Graham & Associates, LLC and Lawrence Memorial Park Cemetery, LLC, et al, and Charles Heinsohn, Case No. 101,355 (Kan. App. December 4, 2009)

Heinsohn, judgment creditor of the former owner of Lawrence Memorial Park Cemetery in Douglas County, appealed the District Court's order dismissing his attempt to enforce his judgment lien against cemetery assets, arguing the statute relied on by the District Court., K.S.A. 17-1367, was unconstitutionally applied to defeat his judgment lien. The Court of Appeals decided on the same date a companion case regarding West Lawn Memorial Cemetery in Shawnee County. The Court of Appeals determined the facts and procedural history of the litigation does not materially differ from that before the Court in Shawnee County. Thus, the Court held its decision in the Shawnee County matter was controlling except to the extent it may not fully address one of the grounds of the District Court's opinion. The Court of Appeals remanded the case due to its conclusion as to the unconstitutional application of K.S.A. 17-1367 and, further found it was in the interest of judicial economy for the District Court to address on remand a number of issues that may have bearing on the availability to execute on the permanent maintenance fund. The Court of Appeals reversed the District Court based upon its holding in the companion Shawnee County case, and remanded for further proceedings.

Submitted by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

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[102.745](#) – In the Interest of C.W. and W.N. – Rulon, C.J. – Affirmed – Johnson.

In the Interest of C.W. and W.N., minor children under the age of eighteen, Case No. 102, 745 (Kan. App. December 4, 2009)

The mother appealed the District Court's Order terminating her parental rights. The evidence showed Mother violated the terms of the reintegration plan by failing on a number of occasions to report the acquisition of prescription painkillers to her case manager, engaged in drug-seeking behavior, failed to make herself available to the assigned case-worker, and failed to engage in required counseling and treatment. The Court of Appeals found no error and determined there was clear and convincing evidence Mother failed to complete her reintegration plan or to conform her conduct to meet the needs of her children under the plan. The Court of Appeals also rejected Mother's argument that the termination of her rights but not terminating the father's parental rights violated Kansas public policy. The Court of Appeals noted the plain language of K.S.A. 38-2266 provides "either" parent's rights can be terminated. Affirmed.

Submitted by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

November 25, 2009

COURT OF APPEALS**Docket Number / Case Name / Judge / Disposition / County**

[100.906](#) – Building Erection Services Co. v. Walton Construction Co., et al. – Per Curiam – Affirmed in part, reversed in part, and remanded with directions – Johnson.

Building Erection Services Company, Inc. v. Walton Construction Company, Inc., Case No. 100,906 (Kan. App November 25, 2009)

On June 29, 1998, KU and Walton signed an approximate \$13,000,000.00 construction contract to renovate KU's Memorial Stadium press box. BESCO signed a subcontract with Walton in August 1998 for BESCO to assemble the press box's structural steel, install aluminum door hardware, install glazing of operable windows, and install steel reinforcing of the glass curtain wall. Another subcontractor of Walton's was CCI. During the

first test of the press box on August 6, 1999, there were considerable water leaks discovered. Walton wrote CCI and demanded CCI repair its panels at CCI's costs. Walton was unable to correct the water leakage problem and hired Slemmons Associates Architects. Slemmons found KU was 10% responsible, the architect was 10% responsible, and Walton was 80% responsible. Initially, KU withheld a \$422,209 payment to Walton due to the water infiltration, which included approximately \$25,000 owed to BESCO. Because Walton did not receive its payment from KU, Walton did not pay BESCO. On June 10, 2002, BESCO sued Walton, KU, the State of Kansas, and Walton's bonding company, for breach of contract, claiming BESCO performed its contract and was entitled to payment. Each defendant denied liability and asserted cross-claims against the others.

KU contracted Ferrell Construction of Topeka for remediation of the press box for approximately \$730,000.00. BESCO was hired as one of the subcontractors on the remediation work. In June 2004, Walton first learned of BESCO's used the wrong screws to hold the windows in place. Walton demanded BESCO indemnify it from any and all claims related to the use of the wrong screws. In response, BESCO told Walton it used the screws provided by the window manufacturer and refused to indemnify Walton. In March 2005, Walton, American, KU, and the State of Kansas entered into a settlement agreement. Walton agreed to pay KU \$639,551. In June 2005, Walton filed a separate indemnification action against BESCO requesting its damages in the amount of \$594,550, and KU's damages in the amount of \$298,880.34, plus interest and attorneys fees. The District Court consolidated BESCO's 2002 claim and Walton's 2005 claim and set the case for trial. After the trial, the District Court concluded BESCO was not entitled to a portion of its final payment because the architect did not certify that BESCO performed in accordance with its subcontract, and BESCO failed to install the glass curtain wall as designed. The District Court determined BESCO breached the contract by delivering defective work. The District Court awarded Walton \$894,430.34 and subtracted the amount Walton withheld from BESCO on the structural steel subcontract and retainage amounts. The court awarded Walton attorneys fees and BESCO

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its attorneys fees incurred while pursuing the steel contract retainage. It denied Walton's claim for prejudgment interest and granted BESCO's request for prejudgment interest. On June 23, 2008, the court entered its final order awarding a total of \$1,085,505.12 to Walton after figuring the various set-offs. Both parties appealed.

The District Court concluded Walton was seeking to recover from BESCO based on the contract indemnification language from the "consequences that flowed from negligent acts or omissions performed by BESCO." BESCO argued Walton's claim was barred by the economic loss doctrine. The economic loss doctrine was created to prevent a person from asserting a tort remedy in circumstances governed by contract law. Walton claimed BESCO failed to follow the manufacturer's installation manual for the glass curtain wall system and, as a result, KU withheld its retainage payment. Thus, Walton argued BESCO failed to perform a material duty arising under or imposed by the agreement, not a wrong independent of the contract. The Court of Appeals found the economic loss doctrine did not apply and Walton was entitled to indemnification from BESCO.

BESCO argued the District Court erred when it assessed all of the damages against BESCO and failed to determine which damages were caused by BESCO or other subcontractors. The Court of Appeals found that BESCO agreed to indemnify Walton against all claims arising out of BESCO's performance only to the extent caused in whole or in part by negligent acts or omissions of BESCO. Yet, the District Court ordered BESCO to pay all of the loss Walton agreed to be responsible for in its settlement agreement with KU, regardless of whether

BESCO's actions actually caused the damages. There was no evidence in the record on appeal that tied Walton's requested damages to BESCO's failure to follow the correct shop drawings. The District Court did not determine that BESCO's failure to use the appropriate size screw caused, or contributed to, the water infiltration. The remediation work was started only because of the extensive leakage in which both the Slemmons and another engineering reports did not attribute any fault to BESCO. The Court of Appeals held the District Court's award of all damages against BESCO was not supported by either the indemnification language in the contract or the record on appeal. The Court of Appeals reversed and remanded this issue to the District Court for a determination of those damages that arose out of, or resulted from, BESCO's negligent acts or omissions. The issue of the attorney fee award to BESCO was also reversed and remanded because the District Court did not make specific findings on the record concerning the attorney fee award to BESCO. Finally, Walton's appeal of the District Court's denial of Walton's request for prejudgment interest was denied as the amount BESCO actually owed and the date that amount was due was not certain until the District Court's Order.

Submitted by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

November 20, 2009

COURT OF APPEALS

Docket Number / Case Name / Judge / Disposition / County

[100,948](#) - King v. Butler County, Kansas - Per Curiam - Affirmed - Board of Tax Ap-

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peals.

William R. King v. Butler County, Kansas, Case No. 100,948 (Kan. App. November 20, 2009)

King appealed the Kansas State Court of Tax Appeals' (COTA) property tax valuation of two properties he owned in Butler County, Kansas. King disagreed with the County's values and appealed to the small claims division of the Board of Tax Appeals (BOTA). King claimed that utilization of the cost method was not supported by substantial evidence when viewed in light of the record as a whole, and is unreasonable, arbitrary, and capricious.

The question on appeal was whether COTA's valuation of King's properties considered and applied the statutory factors listed in K.S.A. 79-503a. The statute lists 11 factors a taxing authority should consider when determining a property's fair market value. King argued COTA should have valued his properties using the income approach. The income approach does not use the property's actual income; rather, it relies on a capitalization rate. The income approach uses a property's rental potential, not the property's actual income, but can be one factor to determine a property's value. The Court of Appeals acknowledged the County substantially increased the properties' values from 2006 to 2007. Yet, the Court found King did not show that COTA's order was invalid in any way. Thus, after analysis the record evidence, the Court held substantial competent evidence supported COTA's determination of fair market value. The Court further found the valuations satisfied the requirements of K.S.A. 79-503a and, as such, King failed to prove COTA's order was unreasonable, arbitrary, or capricious.

Submitted by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

[101.324](#) – In the Matter of the Marriage of Ulrich – Caplinger, J. – Affirmed – Sedgwick.

In the Matter of the Marriage of David Frederick Ulrich, and Teresa Michelle Ulrich, Case No. 101, 324 (Kan. App. November 20, 2009)

The District Court granted the parties' di-

voiced in January 2004. In June 2004, after an evidentiary hearing, the court granted the parties joint legal custody, granted Teresa primary residential custody, and ordered David to pay \$299 per month in child support beginning July 1, 2004. After the evidentiary hearing but before the journal entry was prepared, David sought the District Court's permission to reopen discovery to require Teresa to produce copies of e-mails she allegedly illegally obtained from his private e-mail accounts, which she arguably used to influence the court's custody decision. David's request was denied. Teresa subsequently filed for bankruptcy and David filed an adversary proceeding against her in the bankruptcy matter. In the bankruptcy proceedings, Teresa admitted she accessed David's private email accounts.

In May 2007, David filed a motion in the divorce case seeking permission to introduce evidence he obtained during the bankruptcy proceeding. At that time, the parties were seeking the District Court's determination regarding where their child would attend school. The District Court granted his motion in part, allowing the evidence to be shared with the parties and the case manager assigned to the school placement issue. In March 2008, David filed a motion for reconsideration of the earlier June 2004 custody order based on Teresa's alleged misconduct. David was not seeking reconsideration of custody or parenting issues; rather, he was seeking sanctions against Teresa. David's motion was denied. David appealed. David argued his due process rights were violated when the District Court failed to conduct an evidentiary hearing, which presented a question of law. The Court of Appeals held, even if David was entitled to an evidentiary hearing on his motion, he did not have a protected property interest in that entitlement.

Next, David argued his due process rights were violated because the judge who decided the initial custody matter allegedly conferred with the judge who presided over the school placement issue. The Court of Appeals determined this argument lacked factual and legal merit. The Court of Appeals determined it was unable to conclude the judges conferred based on the record before it. Further, the Court of Appeals addressed David's argument that Rule 601B of the Kansas Code of Judicial Conduct (2009 Kan. Ct. R. Annot. 663) supported his position that

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judges were not permitted to confer. The Court of Appeals noted, however, this rule did not become effective until March 1, 2009 and the motions at issue were both denied prior to the effective date. The Court of Appeals held any alleged violations of the Kansas Code of Judicial Conduct was governed by Rule 601A, which permitted judges to confer with one another.

Next, the Court of Appeals rejected David's argument that the District Court erred in treating his amended motion for sanctions as one for costs and attorney fees under K.S.A. 60-1610(b)(4). The Court of Appeals found the District Court's reference to K.S.A. 60-1610 was not material to the outcome of the motion. Regardless of whether the District Court considered the motion under 60-1610 or a motion for sanctions under the court's inherent powers, the Court of Appeals held the District Court's decision that sanctions were not appropriate was reasonable under the circumstances. Further, because David abandoned his motion to reconsider the court's custody decision, he had no ground to complain about prejudice arising from the earlier custody order.

David also argued the District Court violated Sedgwick County District Court Rule 210 by failing to assign the posttrial motions to the trial judge, Judge Yost. That rule provides: "All post-trial motions in civil cases will be heard at a time and date set by the Judge who tried the case." The Court of Appeals found David's argument lacked merit. Further, Local Rule 406 specifically provided motions, such as the ones he filed, were to be heard by a *district judge* on Mondays or Tuesdays. Accordingly, the District Court did not err by failing to assign the motions to Judge Yost.

Finally, David argued the District Court violated Supreme Court Rule 133(c) by denying his motion to alter or amend its denial of his motion for sanctions without conducting a hearing or specifically finding a hearing was not necessary. The Court of Appeals recognized that David was correct that the District Court failed to comply with Rule 133(c) in light of his request for oral argument. However, he failed to cite any authority supporting his contention that a violation of this rule constitutes a *per se* abuse of discretion. The Court of Appeals held there was no abuse of

discretion.

Submitted by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

[102,467](#) – In the Interest of M.H. and S.H. – Per Curiam – Affirmed – Shawnee.

November 13, 2009**COURT OF APPEALS**

Docket Number / Case Name / Judge / Disposition / County

[101,185](#) – Donley v. Mann, et al. – Per Curiam – Affirmed – Wyandotte.

Maurice Donley and Ladessa Donley v. Chris Mann and Marathon Investments, LLC and Liberty Asset Management, LLC, Case No. 101,185 (Kan. App. November 13, 2009)

The Donleys signed a contract with Liberty, agreeing to sell their redemption rights to certain real property. Under the contract, Liberty agreed to pay the Donleys \$500 upon signing the contract and \$10,000 when they vacated the residence. In turn, the Donleys agreed to pay \$150 per day after May 7, 2006 if they failed to relinquish possession to Liberty by that date. The Donleys failed to relinquish possession until July 27, 2006. Liberty argued it did not owe any money to the Donleys; rather, the Donleys were indebted to Liberty. Liberty offered to settle the matter by paying the Donleys \$3,400. Along with the letter that contained the offer of settlement, Liberty sent the Donleys the proposed settlement check. The offer letter stated cashing the check would constitute acceptance of the settlement. The Donleys rejected the offer and Liberty put a stop payment on the check. Almost one year later, the Donleys attempted to cash the check but were unsuccessful due to the stop payment. The Donleys filed suit against Mann and Marathon, claiming a violation under K.S.A. 60-2610, which imposes liability against the makers of worthless checks. Liberty filed a motion to intervene, which was granted. The parties filed cross-motions for summary judgment. The court granted Mann and Marathon's motion, dismissing Donleys' petition. The Donleys appealed.

The Donleys argued that the check met the statutory definition of a worthless check because it was issued to them to pay a "preexisting debt" for redemption rights pre-

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viously purchased from them by Liberty. The Court of Appeals determined the term "preexisting debt" as used in K.S.A. 60-2610(h)(1) means a sum of money that was owed to the holder of the check prior to the making of the check. The Court determined Liberty did not owe money to the Donleys prior to the \$3,400 check being issued and, thus, the check was not a payment for "preexisting debt." Thus, the Court held neither Mann nor Marathon violated any part of K.S.A. 60-2610. Affirmed.

Submitted by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

November 6, 2009**COURT OF APPEALS****Docket Number / Case Name / Judge / Disposition / County**

[101,226](#) -Van Deelen v. City of Kansas City, Missouri, et al. - Per Curiam - Affirmed - Douglas.

Michael D. Van Deelen v. City of Kansas City, Missouri, et al., Case No. 101,226 (Kan. App. November 6, 2009)

Van Deelen, proceeding pro se, appealed the decision of the District Court to grant a motion to amend answer, to deny his motion to amend petition to include a claim for punitive damages, and to grant summary judgment in favor of the City of Kansas City, Missouri, Roy Greenway, David Severenuk, and Brian Loopey (Defendants) based on principles of *res judicata* and collateral estoppel.

Van Deelen filed a federal suit, raising alleged violations of 42 U.S.C. Sec. 1983 against KCMO, Greenway, and other city employees. With the exception of one count, the District Court granted summary judgment on all of Van Deelen's other legal claims.

The one remaining claim was later resolved at a bench trial. In analyzing whether Van Deelen's claims were barred by the doctrine of *res judicata*, the Court of Appeals first determined Van Deelen's federal lawsuit resulted in a final judgment on the merits.

Next, Van Deelen had filed one action in federal court and two actions in state court.

Van Deelen was the Plaintiff and KCMO was a defendant in all three actions. Greenway

was named as a defendant in the federal case and one state case. The question presented was whether Severenuk and Loopey, who were not named in the federal lawsuit but were named in one of the state suits, should be considered "in privity" with KCMO for purposes of applying *res judicata* to Van Deelen's claims against them. The Court of Appeals found Severenuk and Loopey were "in privity" with KCMO because any alleged liability against them arose from the acts they undertook on behalf of KCMO.

Then, in analyzing whether the federal and state suits were based on the same cause of action or claim, the Court of Appeals noted the relationship between Van Deelen and KCMO was an employment relationship. The Court of Appeals recognized the Tenth Circuit has repeatedly held all claims arising from the same employment relationship constitute the same transaction or series of transactions for claim preclusion purposes. Here, the federal and state suits arose from facts related to KCMO's investigation and enforcement of its residency requirement for employees. The Court of Appeals held the same factual transaction or series of connected transactions were the basis for the legal claims raised in both the federal and state suits; thus, all three lawsuits are based on the same cause of action.

The Court of Appeals concluded Van Deelen was prevented from going forward with his legal claims in state court against Defendants. The Court of Appeals also determined it was not feasible for Defendants to raise the defenses of *res judicata* or collateral estoppel initially because those defenses were not available at the time Defendants filed their answer. When the final judgment was entered on the federal claim, Defendants promptly moved to amend his answer in state court. The Court of Appeals found no error in the District Court's decision to allow the amendment.

Finally, the Court of Appeals determined *res judicata* prevented Van Deelen from pursuing punitive damages and, thus, the District Court's decision to deny Van Deelen's motion to amend to add a claim for punitive damages was not an abuse of discretion.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

[102,458](#) - In the Interest of H.M. and C.M. -

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Per Curiam – Affirmed – Johnson.

[102,739](#) – In the Interest of A.M.B., R.L.B., K.L.B. and J.T.B. – Per Curiam – Affirmed – Sedgwick.**October 30, 2009****COURT OF APPEALS****Docket Number / Case Name / Judge / Disposition / County**[102,138](#) – In the Interest of E.S.S. – Per Curiam – Affirmed – Johnson.[102,596](#) – In the Interest of B.V., Jr. – Per Curiam – Affirmed – Ellis**October 23, 2009****COURT OF APPEALS****Docket Number / Case Name / Judge / Disposition / County**[101,396](#) – Hirsch v. Transam Trucking – Per Curiam – Affirmed – Workers Compensation Board.***Elmar Hirsch v. Transam Trucking, Inc., Case No. 101,396 (Kan. App. October 23, 2009)***

Transam appealed the order of the Appeals Board for the Kansas Division of Workers Compensation (Board), which awarded Hirsch compensation for injuries sustained in a July 2005 accident when a train struck a tractor-trailer he was driving. Hirsch suffered from two hematomas, which were diagnosed after the accident. On appeal, Transam argued that there was absolutely no evidence in the record to conclude the accident caused the left hematoma; rather, Transam argued it was caused by Hirsch's pre-existing kidney disease.

Hirsch acknowledged the record on appeal did not contain an explicit medical opinion concerning the causal link between the accident and the second hematoma, but suggested the record on appeal contained facts on which the Board could rely to conclude a causal relationship existed. In reviewing the evidence as a whole, including evidence that supported and detracted from the Board's finding, the Court of Appeals determined there was substantial competent evidence to conclude the hematoma evacuation proce-

dure was necessary due to the accident. Affirmed.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

[101,997](#) – In the Interest of A.M.W. – Per Curiam – Reversed and remanded – Butler.***In the Interest of A.M.W., minor child under the age of eighteen, Case No. 101,997 (Kan. App. October 23, 2009)***

Father and mother appealed the order terminating their parental rights and the denial of their motion for rehearing. Finding that the journal entry denying the motion for rehearing contained insufficient findings of fact and conclusions of law as to the jurisdictional and constitutional issues raised by Father to allow meaningful appellate review, the Court of Appeals reversed for further findings and conclusions by the District Court as to the motion for rehearing.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

[102,240](#) – In the Matter of the Adoption of Baby Boy M. – Per Curiam – Affirmed in part, vacated in part, and remanded with directions – Shawnee.***In the Matter of the Adoption of Baby Boy M., Case No. 102,240 (Kan. App. October 23, 2009)***

Potential adoptive parents and current custodial parents appealed the judgment refusing to terminate the parental rights of natura father and related judgment denying the petition for adoption.

Petitioners argued the District Court erred in admitting a report from Minnesota that was offered during cross-examination of a woman the natural father dated, who became pregnant after B.B.M.'s mother. The report was used to impeach the woman. The Court of Appeals held the use of the report to compare statements made by the woman was consistent with the limited purpose for which the report was admitted – to impeach her credibility – under K.S.A. 60-460(a). Yet, the report also included three statements of the expeditor's opinions regarding the credibility of the woman. The expeditor could not be cross-examined regarding its contents or the opinions that were formulated. The Court of Appeals held it was error to reference these portion of the report in evidence. After re-

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viewing the evidence, the Court of Appeals determined this error was harmless.

Petitioners also appealed the decision to deny their motion to amend pleadings to add additional reasons to support the termination of the natural father's rights. The motion to amend was filed approximately six weeks before trial. This case was remanded to the District Court from an earlier appeal. The order of remand directed the proceedings be expedited. Further, the Court of Appeals noted Petitioners had unfettered opportunity to offer considerable evidence as to natural father's unfitness and that this evidence was considered by the District Court. The Court of Appeals concluded there was no abuse of discretion in denying the motion to amend.

Next, Petitioners argued the natural father should have been required to prove that he had reasonable cause for failing to provide the natural mother support. The Court of Appeals noted it believed the District Court could determine whether clear and convincing evidence established the reasonable cause for his failure to support the mother during her pregnancy. The Court of Appeals held there was no misapplication of the burden of proof.

Petitioner argued termination was appropriate because the natural father abandoned the mother after having knowledge of the pregnancy. The Court of Appeals determined, viewed in light of the circumstances most favorable to the natural father, despite breaking up with the mother, there was clear and convincing evidence that he did not abandon the mother.

The Court of Appeals rejected Petitioners' argument that the District Court should have awarded them custody despite the denial of their request to terminate the natural father's parental rights. The Court of Appeals concurred with the natural father's argument that it would be inconceivable that the court would find his rights were not terminated and, as such, the adoption could not be completed, and then say, it would allow Petitioners to become de facto parents and deprive

the natural father of his right to care, custody, and management of his child.

Petitioners next argued there was suppose to be an evidentiary hearing before the natural father could be awarded full legal custody. The natural mother's rights were restored. However, she was not a party to the appeal. Despite this, the District Court determined custody issues without participation of the natural mother. The Court of Appeals determined this violated her due process rights and did not comply with K.S.A. 38-1352. Having concluded the adoption proceeding, restored the rights of natural parent, and knowing no party having an interest in custody had residence in Kansas, the District Court should have examined its continuing jurisdiction under K.S.A. 38-1349. The Court of Appeals then vacated the District Court's judgment regarding custody and remanded with directions to reexamine jurisdiction pursuant to K.S.A. 38-1349, to comply with UCCJEA as to any proceedings pursuant to K.S.A. 38-1353, and if jurisdiction is asserted in Kansas, to assure notice and joinder of all interested parties pursuant to K.S.A. 38-1343, and to assure compliance with any and all applicable aspects of the UCCJEA and Revised Code for Care of Children, K.S.A. 38-2201.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C.

[102,569](#) – In the Interest of K.S. – Per Curiam – Affirmed – Sedgwick.

In the Interest of K.S., minor child under the age of eighteen, Case No. 102,569 (Kan. App. October 23, 2009)

Father appealed the decision granting permanent custodianship. A review of the lower court's findings indicated it reviewed specific facts of the case and found by clear and convincing evidence the child was in need of care and mentioned the same statutory factors listed in the journal entry. The Court of Appeals' review of the same evidence convinced it that a rational factfinder could have found it highly probable that the child was in need of care.

Summary by: Jackie Sexton of Foland, Wickens, Eisfelder, Roper & Hofer, P.C. ▲

Kansas Association of Defense Counsel

Application for Attorney Membership

Category for individual attorney membership in KADC:

- Defense Attorney – \$190 / yr
- Government Attorney – \$100 / yr
- Young Lawyer – \$100 / yr (*admitted to the Bar for five or fewer years*)

Mr. Ms.

Name _____ Title _____

Organization _____

Address _____

Phone _____ Fax _____

Email _____

Date admitted to the Bar in the State of Kansas _____

Primary area(s) of practice _____

Bar associations, professional organizations or law societies to which you belong _____

Legal or public offices held _____

Are you a member of the Defense Research Institute (DRI)? Yes No

Referred by (*name of referring KADC member(s), if applicable*) _____

I have read the above and hereby make application for individual membership. I devote a substantial amount of my professional time to the defense of litigated cases.

Signature of Applicant _____ Date _____

This application, together with membership fee, should be mailed to the Kansas Association of Defense Counsel, 825 S. Kansas Ave., Suite 500, Topeka, KS 66612

Membership Benefits

Being a member of KADC allows you to take advantage of benefits such as:

- ◆ Continuing legal education
- ◆ Legislative liaison
- ◆ A quarterly newsletter to keep you abreast of legal changes and events in Kansas
- ◆ Amicus Briefs
- ◆ Weekly emails with hotlinks to Supreme Court and Court of Appeals published opinions, as well as to summaries of unpublished opinions so that you can quickly determine which ones are most pertinent to your practice
- ◆ Representation to the Defense Research Institute (DRI)
- ◆ One year free membership in DRI for new KADC Attorney members who have not previously been a member of DRI
- ◆ With both KADC and DRI membership you have the opportunity for exchange of ideas with some of the best attorneys in the state, region and nation

Visit our website at www.KADC.org

Kansas Association of Defense Counsel

Application for Law Student Membership

Mr. Ms.

Name _____

Law School _____

Address _____

Phone _____ Fax _____

Email _____

Permanent Mailing Address _____

Expected graduation date _____ (*Student membership expires 6 mos after graduation*)

Future area(s) of practice, if known _____

Associations, professional organizations or student law societies to which you belong _____

Are you a student member of the Defense Research Institute (DRI)? Yes No

Referred by (*name of referring KADC member(s), if applicable*) _____

I have read the above and hereby make application for individual membership. I am currently registered as a student pursuing a J.D. at the school identified above.

Signature of Applicant _____ Date _____

Individual law student membership in KADC – \$20 / yr

This application, together with membership fee, should be mailed to the Kansas Association of Defense Counsel, 825 S. Kansas Ave., Suite 500, Topeka, KS 66612

Membership Benefits

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- ◆ Continuing legal education
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