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Joslyn Kusiak, jkusiak@kellykusiaklaw.com

Executive Director
Jordan Yochim, jyochim@ksbar.org

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Issaku Yamaashi, iyamaashi@foulston.com
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Writing about the legislature—or more accurately, about legislating—without getting into politics may be difficult, but here goes: the Kansas Legislature is experiencing a dearth of lawyers. Those who are serving certainly work hard for their constituents and our state, but even they will tell you they could use some help.

For instance, this year the senate judiciary committee has no members who are licensed attorneys. That’s because there are no licensed attorneys serving in the senate. The lack of lawyers in the senate even forced the legislature to pass a new law, House Sub. for SB 50, which allows the senate president or the speaker of the house to appoint the revisor of statutes or the revisor’s designee to attend special advisory committee meetings should no licensed attorney be elected to their chamber.

This phenomenon isn’t limited to states with small populations and hence small bars. Texas, the second largest state in the union—and the third largest bar in the country—is experiencing the same issue. I recently had the opportunity to hear President of the State Bar of Texas Frank Stevenson speak at a national conference. He spoke eloquently of the need for lawyers to re-enter the public sphere, to run for office. After his presentation, we chatted, and he graciously arranged for the KBA to reprint a president’s column he wrote for the Texas Bar Journal—a piece that speaks to all attorneys, calling them back to public service. His article, reprinted with the permission of the State Bar of Texas, appears to the right.

To encourage more lawyers to run for office in the hopes of growing the ranks of attorneys in the Kansas legislature, the KBA will present a CLE August 23rd from 2:00-4:30 p.m. (mark your calendars!) that will explain the mechanics of a political campaign, what it looks like to practice law while serving in the legislature, and how to re-enter the practice after the session is over or your term is up. Attorneys from both sides of the aisle are encouraged to attend. Look for more details coming soon.

About the Executive Director

Jordan Yochim studied anthropology (B.A.) and business (MBA) at the University of Kansas. He worked as a research administrator for a large state university before joining the KBA. In his spare time he serves as a member of the Douglas County Citizen Review Board and of a local nonprofit children’s organization.

jeyochim@ksbar.org
Fitted for the Wind

In 1966 at Detroit’s Olympia Arena, a country singer prepared to perform before a crowd of 10,000—by far the largest of his two-year career. RCA Victor had released three of his singles but (uniquely) never a publicity photo. When he took the stage, the eager audience went silent. The singer was black.

“I said, ‘You know, I realize it’s a little unique me coming out here on a country music show wearing this permanent tan’,” he recalled. “When I said that there was this big old applause—saying exactly what they were thinking.” After his performance, fans flocked for autographs.

A few months later, he entertained a sold-out audience at the Grand Ole Opry and soon was voted Most Promising Male Artist by the Country Music Association. No longer needing to joke about his race, he began to amass 52 top 10 country hits and sell 70 million records—more than any RCA artist but Elvis. When he was voted CMA’s Entertainer of the Year in 1971, one critic observed that “the color barrier in America’s whitest music had been broken.”

His name is Charley Pride.

An inspiring story—that one of 11 children of sharecroppers in Sledge, Mississippi, rose to dominate the genre of music he loved, despite the narrow racial attitudes of many of its white fans and the scorn many of his own family and Delta neighbors felt toward “cowboy music.” Remarkable that people could see past—even through—their differences to celebrate something they held in common.

Perhaps no less remarkable today—when we’d rather unfriend than understand the person with whom we disagree or differ. When divergent voices get drowned out in the cyclonic vitriol of our national “dialogue.” What role—or even obligation—do we as lawyers have in our increasingly wind-swept world?

First we must be good examples ourselves, ensuring that different views and voices are heard within our own association.

We must recommit ourselves to the State Bar programs that send attorneys into schools to encourage students to consider a legal career. We must celebrate the dozens of State Bar practice areas and diversity sections. We must support programs for minority and female lawyers and law students on interviewing, networking, and leadership skills. We must ensure our bar’s board of directors remains composed of lawyers and public members diverse by every geographical, practice setting and specialty, urban and rural, race and ethnicity, gender, and other measure.

Is that sufficient?

There have never been fewer lawyers in Congress. Even as our population’s percentage of lawyers surges, the percentage in Congress steadily declines. From a high of 80 percent in the mid-19th century, to under 60 percent by the 1960s, to less than 40 percent today. Although not as precipitous, a similar decline has occurred in state legislatures.

Some think the lessening presence of lawyers—especially the estimable ones who could bring their unique problem-solving skills, capacity to disagree without being disagreeable, and commitment to civility—contributes to the increasingly corrosive atmosphere of our highest chambers.

Count me among the “some.”

But worst of all, lawyers are not being forced out; they’re opting out—ceding their public service role in pursuit of career goals. Recall that 25 of the 56 signers of the Declaration of Independence were lawyers, as were 32 of the 55 who framed the Constitution. What if they’d shared our miserly understanding of “career”?

In the prime of Charley Pride’s career, there was no more democratic institution than Top 40 radio. During my brief broadcasting “career” at KJIM “Redneck Radio” in Fort Worth, the playlist consisted of vinyl 45s hung from pegs. The No. 1 single had a peg to itself, Nos. 2 and 3 shared the next, 4, 5, 6, and 7 the next, and so on. Moving in a pattern through the pegs, playing the next (or only) record on each peg, ensured the most-popular disks got the most play.

It also compelled us to listen to everybody else’s favorite song in order to hear our own. Now technology ensures we never have to listen to anything we don’t want to hear. That applies to more than our tunes.

The naturalist Aldo Leopold wrote grandly about the tiny chickadee—how it fears the wind, flying only on calm days and eschewing wind-swept places. “To the chickadee, winter wind is the boundary of the habitable world.”

If you think our nation has nothing in common with the chickadee, you need to tweet more. All media report that Americans are undergoing “the Big Sort,” choosing to flock with the like-minded in where we live, work, worship, and recreate. Apartment listings specify no Republicans or no Democrats. All seeking a life out of the wind.

Understandable, since when political divisions are fierce, we may feel something of a “winter wind” blowing across our Republic. But lawyers are not chickadees—in fact, we’re their opposites. Winter wind is not the boundary of our habitable world; it is our world. Our métier and purpose—what we are trained and made for. Lawyers are fitted for the wind.

We must respond when others simply react. Reflect when others simply reject. Reason when others simply rage.

We must reclaim our public voice, affirming our heritage of placing citizenship at career’s core, and not eschew our nation’s windy places where we’re needed most.

Our State Bar and our dealings with one another must serve our highest chambers.

Happy Birthday, Charley Pride.

Frank Stevenson
President, State Bar of Texas
Between my time in Iowa and Kansas, I have spent most of my life in farm country. While Kansas has long earned its nickname as “The Wheat State,”1 my home state of Iowa prides itself on corn production.2 As a result, part of my youth included detasseling. I have mentioned this job to a number of Kansans and am surprised how often it prompts a blank stare. For those unfamiliar with detasseling, it is the task of pulling off the top of corn plants—the tassel—to achieve cross pollination.3

Detasseling is undoubtedly the worst job I’ve had. We started the workday at 6:00 a.m. while the day was still brisk and the corn still wet. Those of you remembering the gossamer quality of the corn in Field of Dreams as the ballplayers faded into the shadows may not appreciate that corn leaves are actually razor blades in disguise. The corn awaited our arrival to not only soak us and slice our hands, but also to inflict a burning corn rash on any exposed skin.

A day that started with a wet and shivering chill would then give way to blistering sunshine and humidity. During my first summer of detasseling, I burned my shoulders so badly that they took on a painful shade of reddened black that makes me flinch from the memory. I was the smallest guy on the crew, which did not serve me well when walking through rows of Iowa corn that can reach 12 feet tall. I was terrible at the job and felt miserable doing it. At the end of the season, my boss, Del Tjepkes, told me the only reason he hadn’t fired me was that I had a good attitude from start to finish. Small victories, I guess.

I have thought about my first job during this past year as YLS President because it is such a contrast to my current role. There have been many tasks for the KBA that pilfer from my work with the Kansas Association of Counties—meetings, writing, and speaking combined to take substantial time away from my typical duties. My bosses, Randall Allen and Melissa Wangemann, have responded with unwavering support and encouragement. I am deeply grateful for their generosity.

I write this column—my final piece as YLS President—to give public thanks to Randall, Melissa, and the rest of my colleagues at KAC. To be fair, there are endless thanks to give to those beyond the Kansas Association of Counties. The YLS board made it possible to do far more than would have been possible for one person. From the Mock Trial Competition, to the Judicial Externship Program, the YLS Newsletter, our social events and CLEs, our board served with aplomb. The KBA staff also gave enthusiastic support and assistance for each of these undertakings. Most important, my wife and daughters sacrificed time and gave encouragement when my schedule grew particularly busy. I owe thanks to many people on multiple fronts.

While it is easy to thank people for specific acts, it is far more difficult to live with a spirit of gratitude. In my younger days, I am certain I did not give thanks for strong legs to walk miles of corn rows. Or for eyes to squint when the unclouded sun beat down from on high. Or even for the significant paycheck that came at the end of my labor. It was too easy to focus on the long hours, the unpleasant conditions, and the seeming futility in my work.

The same is too often true in our profession. Challenging deadlines, long hours, substance abuse and depression each earn regular attention as blights on the legal community.4 But there are incredible elements that counterbalance the ills. For starters, people seek us out when they have nowhere else to turn. As Jerry Seinfeld noted, lawyers know the rules of the country: “We’re all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem, the lawyer is the only person who has read the inside of the top of the box.”5 Attorneys often have answers or at least know where to find them.

Similarly, we lend a voice—or a written word—for those who have not “read the inside of the top of the box.” The ele-
Interacting with the lawyer disciplinary system is an integral part of law practice management. Whether ensuring general compliance with the Kansas Rules of Professional Conduct or addressing specific complaints, lawyers should understand the disciplinary system to protect the public interest and to preserve our own privilege to practice. It is not always an easy system to understand, however. Anecdotal interviews with complainants, respondents, and lawyers for respondents suggest misunderstanding of the investigatory process is common.

The investigatory process usually begins with the disciplinary administrator referring a case to a local bar association’s ethics and grievance committee after docketing a complaint. The investigatory process within a committee then creates a report to the disciplinary administrator suggesting whether there is probable cause to proceed against a lawyer under the Rules of Professional Conduct. This can be counter-intuitive to complainants and respondents. First, many assume a case was docketed because probable cause was already determined. After all, a civil case does not get a docket assignment until a lawyer has made a finding that the plaintiff has a colorable claim. Second, lawyers often assume the investigatory report must demonstrate that any violations meet a clear and convincing standard. In fact, an investigatory report is often written solely with probable cause in mind. (These features may not necessarily confuse lawyers with a background in criminal procedure but civil lawyers generally express more surprise.)

Multiple local bar associations have ethics and grievance committees comprised of volunteers who investigate a complaint instead of a paid investigator on the disciplinary administrator’s staff. Consequently, lawyers are investigated by peers from their own community. This has piqued the interest of the American Bar Association which apparently worries whether a fair and impartial investigation can be conducted by a respondent’s peers. To assuage those concerns, the ABA has reviewed our processes and concluded that our system is functional and effective. Nevertheless, there are some modifications which might strengthen the perception of our Kansas model.

Variability

One of the surprises of the Kansas investigatory system is that there is no uniformity from one community to the next. For example, a respondent’s case in one city may be investigated by a lawyer on the local bar’s ethics and grievance committee, and then that report is presented to a quorum of committee members for an up or down vote to recommend a case for further disciplinary action. By contrast, the ethics and grievance committee of a different respondent’s city may hold no meetings or formal votes on a final investigative report; it is simply submitted to the disciplinary administrator. Additionally, one committee might produce more open-ended reports that examine probable cause very broadly, while a sister committee’s reports try to be more “dialed in” to speak to the clear and convincing burden ultimately required.

The variability in committee processes and practices is surprising to many lawyers. Several interviewed assumed there was a uniform procedure that spelled out the process. Instead, the investigatory process is largely delegated by the disciplinary administrator to the local bar associations. The local bar associations, in turn, appear to delegate the development and implementation of procedures to the committees themselves or even to the committee chairs alone. This variability may account for some sense of confusion among lawyers about the investigatory process and explain why multiple lawyers might experience the disciplinary process differently.

Oral Tradition

Of the committees examined, none have a formalized process, policy, or procedure in any written organizational...
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ment of representation and advocacy is a responsibility that often leads to stress, but it is also a joy to work on something that matters deeply to someone. Even if the issue does not feel as noble as Atticus Finch defending Tom Robinson, someone trusts you to serve as their voice when they are ill-equipped to speak well.

This individual trust also extends to a public trust. It is the understanding of law that provides the opportunity to guide people through varied challenges. People ask us to serve on boards and run for elected office. If our country is a nation of laws, then lawyers enjoy a distinct role as authors of those laws. Our training in analysis, problem-solving and communication affords us an opportunity to serve in a unique manner of value and worth.

My employer has given generously to me, so I can give to the KBA and YLS. We talk often at KAC about our gratefulness for the opportunity to work with leaders across Kansas at the county level and the Kansas Legislature who serve. It is my hope that our profession is similarly known as a body that lives gratefully for the skills and opportunities we possess and gives accordingly in gratitude.

About the Author

Nathan P. Eberline serves as the Associate Legislative Director and Legal Counsel for the Kansas Association of Counties. His practice focuses on public policy, legal aspects of management, and KOMA/KORA. Nathan holds a J.D. from the University of Iowa College of Law and a B.A. from Wartburg College in Waverly, Iowa.

eberline@kansascounties.org


Standardization

Our lawyer-volunteer system for investigating complaints in Kansas works well, and the ABA should not worry about replacing it. It is worthwhile to examine whether we could strengthen it in any way, however. Addressing the variable practices from committee to committee and documenting procedures in governing documents could improve understanding and perceptions of fairness. Because many of the investigatory processes are delegated by the disciplinary administrator, addressing such matters could even be undertaken by the local bars in concert with one another. As boxer Oscar De La Hoya has said, “There is always space for improvement, no matter how long you’ve been in the business.”

About the Author

Larry N. Zimmerman is a partner at Zimmerman & Zimmerman P.A. in Topeka and former adjunct professor, teaching law and technology at Washburn University School of Law. He is one of the founding members of the KBA Law Practice Management Committee.
kslpm@larryzimmerman.com
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A student sat in my office and wondered aloud whether she should withdraw from a law school course. It had been a particularly challenging semester for her, mostly for reasons beyond her control. She was behind in her course work and very stressed. But, the class she contemplated dropping was one of her favorites. She then pondered whether she should drop the class, but still attend so that she could enjoy the subject matter and class discussion without the pressure of actually performing. I asked her whether she could think of any other ways that she could use those eighty-five minutes, given her current level of stress. What if she took a nap for eighty-five minutes? Or meditated? Or took a walk? Or went to the gym? Or a combination of those options? As much as she liked that course, I suspected she could find other ways to use those eighty-five minutes that would benefit her in some greater way.

We often don't notice opportunities for mindfulness. We tell ourselves that in order to be mindful we need to carve out a thirty minute slot every morning at 6:00 AM. But, mindfulness can happen even if you have just a single minute. When I take sixty seconds to close my eyes, focus on my breath, pay attention to how my body feels in my chair and how my feet are connecting to the ground—before I leave my office to teach or attend a meeting—my state of mind is very different than when I simply rush out after dashing off an email. And it cost me only sixty seconds.

A few students have started attending twenty-minute meditation sessions a colleague and I recently began to lead at the law school. After one session, a student remarked that when he meditates, he experiences the realization that he is not alone. He feels more connected to the world and the people around him. He then wondered why he doesn't meditate more. I reminded him that he doesn't have to commit a large chunk of time to meditation, so he decided to spend a few minutes in meditation before his morning coffee ritual.

Recently I was given the gift of a cancelled meeting and realized that I had sixty minutes of unscheduled time. My first thought was to go down my ‘to do’ list and tackle some items that had been waiting for me. But as I glanced at my list, I had another thought. I could use some of this time to take a walk! It was a beautiful day and I wasn't wearing high heels. So I took a relaxing, yet energizing walk across campus to the koi pond near Washburn’s Art Building. I sat on a big rock, took off my shoes, put my bare feet on the ground and spent a few minutes watching the fish, admiring the flowers, and breathing the fresh air. After about fifteen minutes, I strolled back to my office, feeling clear and grounded, and pulled up my ‘to do’ list.
An Overview of the Law of Negligence in Kansas
This article is intended to be a primer on the basic case law related to negligence in Kansas. The article outlines the basic elements of a negligence case. We start with the law related to determining whether a duty exists. The article next discusses law related to determining what that duty is if it exists and whether that duty has been breached. The article then moves into a discussion on proximate cause and cause in fact. The article does not address statutes or case law related to the types of damages that may be recovered in a negligence action.

"Every person must so use his property as not to injure the rights of others."¹

In negligence cases, “duty” has been defined as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."² A tort is a violation of a duty imposed by law.³ The familiar elements of duty, breach, causation and damages must be present in every tort claim.⁴

In a car wreck case, the plaintiff’s four proof elements are “the determination of what a reasonably prudent driver would do under particular circumstances, whether a driver acted in a manner consistent with that standard, and whether there is a causal connection between the breached duty and the injuries sustained [are] question[s] of fact."⁵

The tort of "[n]egligence is a violation of the obligation which enjoins care and caution in what we do."⁶ Stated another way by the same court,

[r]he above doctrine, in its practical application, would probably be better expressed in these words: Every person, in his intercourse with others, is required to exercise that degree of care and diligence to protect his own rights and to avoid injury to the rights of others, which an ordinarily careful and prudent man usually exercises in his own affairs. The rule thus expressed is of almost universal application.⁷

This definition is over 100 years old. It is the essence of the modern definitions of negligence.

Negligence is that conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.⁸

The standard of conduct to which an individual must conform to avoid being negligent is that of a reasonable person under like circumstances.⁹

The definition is similar under current Kansas law and our jury instructions.

Negligence is the lack of ordinary care under the existing circumstances. It is the failure of a person to do something that an ordinary person would do, or the act of a person in doing something that an ordinary person would not do, measured by all of the circumstances then existing. The degree of care must be equal to the danger reasonably to be anticipated, measured by all of the facts and circumstances.¹⁰

Negligence is the lack of reasonable care. It is the failure of a person to do something that a reasonable person would do, or doing something that a reasonable person would not do, under the same circumstances.¹¹

A plaintiff in a negligence action must prove four elements: what is the duty owed by the defendant to the plaintiff, breach of that duty, causation between the breach of the duty and injury to the plaintiff and damages suffered by the plaintiff.¹²

Does a duty exist?

The existence of a legal duty is a question of law.¹³ At its most basic level all duties are a duty of care and safety, the duty of care in most circumstances is what a “reasonable man [of ordinary prudence]” would do in the like factual circumstances.

c. Standard of the "reasonable man." Negligence is a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk. The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. It must be the same for all persons, since the law can have no favorites; and yet allowance must be made for some of the differences between individuals, the risk apparent to the actor, his capacity to meet it, and the circumstances under which he must act.¹⁴
Courts do make this general duty of care and safety more specific. For examples, the duty of a governmental entity is
to maintain its highways in a reasonably safe condition. A proprietor must use ordinary care to keep those portions of
the premises which can be expected to be used by a business invitee in a reasonably safe condition.

A court can determine that a statute has created a legal duty. In Shirley v. Glass, the court found that a statute created a
private cause of action, that is, a legal duty of care and safety. A court can also determine that a legal duty exists in a par-
cular circumstance. For example, in Russell v Braden, the court recognized that a parent had a duty to control a child
to prevent intentional harm and unreasonable risk of bodily harm to others.

When a duty is created by statute, the violation of that statute is negligence per se. The elements of negligence per se are
(1) a violation of a statute, ordinance, or regulation, and (2) the violation being the cause of the damages. In addition, a plaintiff must establish that an individual right of action for injury arising out of the violation was intended by the legis-
lature.

These principles — violation of a statutory duty, extension of that duty to the circumstances of the plaintiff,
and causation — coalesce in the familiar circumstance of traffic-safety laws. For example, a plaintiff may use
violation of traffic-control statutes to support a claim of breach of a duty in negligence actions involving ve-

What is the duty owed and was the duty breached?

If a court determines that a duty of reasonable care exists, it then becomes a question of fact as to what that duty of
reasonable care and safety is and whether the obligation of reasonable care has been breached.

The law favors trial by jury and the right should be carefully guarded against infringements. It is a right cher-
ished by all free people. A trial court, in the exercise of its prerogative in determining questions of law only in
these kinds of cases, should not usurp the power and function of the jury in weighing evidence and passing
upon questions of fact.

If a duty exists, then the plaintiff must prove a breach of that duty. There are several ways to breach a duty of care:

A. Negligence “either an act, or an omission to act where there is a duty” to act.

B. Gross negligence, or reckless disregard, or wanton conduct, is a more egregious breach of a duty than negligence. A tortfeasor is reckless if he/she knew that he/she was creating a high degree of risk, but he/she is indifferent to that high risk.

C. Intentional tort, willful or deliberate misconduct, with intent to cause harm.

Gross negligence and intentional torts are generally punished more severely than mere negligence. These types of torts
will not be discussed in this article.

Prove the Duty Existed,
and that there was a Breach of the Duty

The factual proof related to whether a legal duty of care has been violated requires two evidentiary steps. One, it requires
evidence of recognized standards, customs and safety rules under all the circumstances then existing. Two, it requires a
showing that the duty was breached. In other words, what the duty of care is under the circumstances is a question of fact.

The contours of a duty, especially one shaped by reason-
ableness, must be cast to the particular circumstances
of the case. But various considerations may inform that determi-
nation. There may be applicable statutes or reg-
ulations establishing a duty of care. Common practices
or standards within an industry often bear on the scope
of a duty owed. An entity’s own policies and procedures
may help measure compliance with a duty.

Estate of Beldon v. Brown County

As the Beldon Court indicated, the contours of the duty of
care and safety are established several ways. A duty of care and
safety can be proven different ways.

A statute or government regulation is intended to prevent
the injury that occurred in the case. An unexcused violation of a statute or regulation is negligence per se. “An obliga-
tion created by statute may serve as a basis for establishing a
duty.”

For example, a plaintiff may use violation of traffic-control
statutes to support a claim of breach of a duty in negligence
actions involving vehicles. Violations of traffic-safety laws do
not, however, impose strict liability on defendants. A plaintiff may thus be able to introduce evidence that a defendant was
driving faster than the statutory speed limit. This evi-
dence tends to demonstrate breach of a duty...

If a court determines that a duty exists, then the plaintiff must prove a breach of
that duty. There are several ways to breach a duty of care:

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statutes to support a claim of breach of a duty in negligence
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not, however, impose strict liability on defendants.

For a jury to determine how reasonable or unreasonable it
is to violate a statutory standard, it may be important for the
jury to hear evidence of the purpose of the statute. “In order
to utilize a statute to establish a duty of care, a plaintiff must
demonstrate that the purpose of the statute includes protect-
ing the plaintiff against the kind of harm that the plaintiff
suffered as a consequence of the violation of the statutory ob-
ligation.”

In addition, the plaintiff may demonstrate that the plaintiff
is a member of the class of people that a statute is designed to
protect. However, the class of people the statute is designed to
protect may be broad and may include all members of the
public.

So in a car wreck case for example, a plaintiff may offer evi-
dence that a speed limit was designed to protect a given class
of persons, and that the plaintiff was a member of that class. A plaintiff may also show that the purpose of the statute that
was violated was to protect the plaintiff against the kind of
harm that the plaintiff suffered as a consequence of the viola-
tion of that statute.

A. Common law

Ofentimes the court will identify factors relevant to
establish contours of the duty of care and safety. For
example, in *Elstun v. Spangles, Inc.*, the court identified a number of factors to consider in the determination of whether reasonable care was exercised. Those factors include (1) foreseeability of harm, (2) magnitude of the risk of injury, (3) social benefit of the condition or behavior, (4) burden upon the defendant to comply with the parameters of the alleged duty of care and safety.

B. Restatement (Second) of Torts

Restatement (Second) of Torts has much to say on factors that determine whether behavior is unreasonable. Below is a sample. Many of these factors are relied upon throughout Kansas case law.

§ 291 Unreasonableness; How Determined; Magnitude of Risk and Utility of Conduct

When an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

§ 292 Factors Considered in Determining Utility of Actor’s Conduct

In determining what the law regards as the utility of the actor’s conduct for the purpose of determining whether the actor is negligent, the following factors are important:

(a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;
(b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;
(c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.

§ 293 Factors Considered in Determining Magnitude of Risk

In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:

(a) the social value which the law attaches to the interests which are imperiled;
(b) the extent of the chance that the actor’s conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;
(c) the extent of the harm likely to be caused to the interests imperiled;
(d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.

C. Engineering standards

or custom in the profession or trade.

Kansas has long recognized the importance of industry customs, standards, rules, and regulations as evidence for a jury to consider as to what reasonable care is under the particular circumstances.

[w]here the activities in question are addressed by published industry standards that are recognized as authoritative, the trial court may need to allow evidence of and instruct the jury as to the relevant industry standards so as to enable the jury to evaluate the degree of care owed by sponsors or participants in such activities.

Kansas case law has numerous examples of the court permitting industry standards. In *Ceretti v. Flint Hills Rural Elec. Co-op, Ass’n*, the court held that a jury instruction stating that “lack of compliance with provisions of the NESC, or other applicable codes, customs or regulations, is relevant evidence on the question of negligence” conformed to Kansas law. In *Wheeler v. John Deere Co.*, the court held that under Kansas law a manufacturer’s compliance with industry standards is germane in determining a manufacturer’s duty of care under a negligence theory.

So important are industry rules and regulations that in *Pullen v. West*, the court held it was reversible error for the trial court to exclude mention of industry standards and to fail to instruct the jury that such standards can be used to evaluate the degree of care owed by the defendant.

D. Company policies and procedures

An entity’s own policies and procedures may help measure compliance with a duty.

Compliance with statutes, regulations or industry safety rules is not de facto evidence of meeting the duty of reasonable care

According to Restatement (Second) of Torts §288C, “compliance with a ... [statute or regulation] does not prevent a finding of negligence where a reasonable man would take additional precautions.” This rule was followed in *Folks v. Kansas Power & Light Co.*, where the court held that conformity with an industry-wide standard is not an absolute defense to negligence, but may be evidence that the company met the duty of reasonable care.

Experts are routinely used to testify about industry safety rules and standards

Experts are often used to explain industry safety rules and standards. A person who undertakes to provide services in the practice of a profession (e.g., physician, attorney, engineer) or trade (e.g., automobile mechanic) “is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing...”

The opinions of those in the practice of a profession establish what the duty of care is and whether it has been breached.

• Learned treatises can also be used to establish safety standards.

• Expert testimony is usually required as to professional standards: Expert testimony generally is required to establish the appropriate standard of care in cases involving professional negligence.

Breach of the duty

In order to demonstrate a breach of the duty, the plaintiff must prove that the defendant failed to do something that a reasonably careful person would do, or did something that a
an overview of the law of negligence in Kansas

reasonably careful person would not do, measured by all the circumstances then existing.48 Breach of duty is a question of fact.49

Evidence of level of harm and frequency of harm is relevant to establish the degree of care that would be exercised by a person acting with reasonable care under the circumstances.

Negligence is the lack of ordinary care. It is the failure of a person to do something that a reasonably careful person would do, or the act of a person in doing something that a reasonably careful person would not do, measured by all the circumstances then existing.50

Failure to use that degree of care and caution which an ordinary careful and prudent person would exercise under same or similar circumstances is negligence.51

Circumstances include the maximum level of harm

“The greater the danger, the greater the care which must be exercised.”52 The degree of care has to be commensurate with the danger.53 “The degree of care must be equal to the foreseeable danger reasonably to be anticipated measured by all of the facts and circumstances.”54 “As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.”55

This proof is essential for the jury to determine how careful a person must be. For example, if a person were to carry a live snake though a crowd of people, to determine whether a breach of the duty of care occurred, a jury would need to know such things as whether the snake was poisonous, and how deadly the venom.

The degree of care that must be used is also intertwined with the foreseeability of harm.56 This connection will be discussed in more detail as it relates to proximate cause.

The relevant circumstances include the frequency of the dangerous event

While the flying off of a wheel does not happen with great frequency, it is by no means an isolated or highly improbable occurrence, and the jury could have found that the danger was such that the operators of a race should have anticipated it and given suitable warning.57

Under the above snake example, relevant evidence would include whether the snake species was aggressive, and how often people had been harmed by bites from snakes in general and this kind of snake in particular. (These are examples of general and specific causation. Those issues will be dealt with in more detail below.)

The plaintiff’s burden is always to establish a breach of the duty of reasonable care. In a car wreck case, the plaintiff may claim that the defendant failed to keep a proper lookout. This requires showing how dangerous it is not to keep a proper lookout. This danger level is established by showing how much harm can occur when a proper lookout is not kept. This danger level is also established by showing how often harm occurs when a proper lookout is not kept. While this example involving a car wreck is perhaps a bit simplistic, such evidence would be more helpful in a case involving more complex industry standards that are not as intuitively obvious to a jury.

Proximate Cause

Proximate cause is a cause “which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred, the injury being the natural and probable consequences of the wrongful act.”

“Proximate cause incorporates concepts falling into two categories: causation in fact and legal causation.”59

To prove legal causation, the plaintiff must show it was foreseeable that the defendant’s conduct might create a risk of harm to the victim and that the result of that conduct and contributing causes was foreseeable.60

Foreseeability is an essential element of plaintiff’s claim

In a negligence action, proximate cause is an element of negligence, and foreseeability is an element of proximate cause.61 However, for an injury to be foreseeable, it does not have to be probable that the injury will occur on any given occasion in which the unreasonable behavior occurs.

Although this foreseeability test is stated in terms of events that are “probable,” proximate cause may sometimes be found even for events likely to occur less than half the time, especially when the defendant has created a particularly dangerous condition.62

Foreseeability is defined as “a commonsense perception of the risks involved in certain situations and includes whatever is likely enough to happen that a reasonably prudent person would take it into account.”63 An injury is foreseeable so as to give rise to a duty of care when a defendant knows or reasonably should know that an action or the failure to act will likely result in harm.64 “Foreseeability is a question of fact for a jury.”65 As part of a negligence claim, foreseeability plays out like this:

We say that it is negligent to entrust a vehicle to an intoxicated person precisely because such an entrustment is likely to lead to a car accident, which is what actually occurred here. Assuming that the [entrustor’s] conduct constitutes a breach of the standard of care, the foreseeability of the [entrustee] (and his injury) ties the [entrustor’s] act to the harm done, thereby establishing a legal duty. [Citation omitted.] Here, the act of entrustment breached the standard of care, [citation omitted] and the foreseeability of the harm to [the entrustee] gave rise to the common law duty owed by [the entrustor].66

Proof of foreseeability

Proximate cause is a question of fact.67 "Proximate cause is not an obsolete concept in Kansas law.”68

To prove foreseeability, plaintiff must prove that the “defendant knows or reasonably should know that an action or the failure to act will likely result in harm.”69 An injury which is not reasonably foreseeable by the exercise of reasonable care is not sufficient grounds for a negligence action.70 "It is a well recognized rule of law, frequently applied by this court, that one is not negligent in failing to anticipate danger which could not reasonably be expected.”71 "The degree of care must be equal to the foreseeable danger reasonably to be anticipated
measured by all of the facts and circumstances.”72
Because the degree of care is equal to foreseeable dangers, the Court allows wide latitude for the introduction of evidence by a plaintiff as it relates to proving foreseeability. All relevant evidence, defined as “evidence having any tendency in reason to prove any material fact,” is admissible in a civil trial.73 A court’s determination of relevancy is a matter of logic and experience, not a matter of law.74

Factors relevant to establish foreseeability

Who could be harmed, how badly they could be harmed and how often they could be harmed are all elements of foreseeability that help to establish the level of care and whether the duty of care has been breached. “The degree of care must be equal to the danger reasonably to be anticipated, measured by all of the facts and circumstances.”75

Plaintiff is a member of the class of people that could be harmed

A person owed a duty of reasonable care is one that is “within the range of apprehension.” “The risk to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension.”76 The plaintiff may show not only that the harm was foreseeable, but also that the plaintiff was a member of the class of people that could be harmed—in some cases. Sometimes, belonging to the public at large is enough. This is the case with traffic safety rules. In other cases, there is no duty unless the plaintiff occupies some particular relation with the defendant. For example, in Berry v. National Medicine Services, Inc.,77 the court held that a person who is given a drug test is a foreseeable victim of an inaccurate test. Part of the evidence that a plaintiff may establish is all the types of people that fit within the category of foreseeable victims. This breadth of victims is proof of several things.

First it proves the plaintiff is a member of the class by establishing the boundaries of the class of victims.

Second, it helps to establish the degree of care that must be exercised by the defendant to avoid the harm. Because duty of care is intertwined with the foreseeability of harm, South v. McCarter,78 evidence of foreseeable victims establishes the breadth of the danger that could foreseeably occur and thus helps define the duty. As an example, a jury could conclude that a lower duty of care is needed when the only people who are exposed to a particular harm are healthy professional athletes when compared to the duty of care that might be needed when the people exposed to the danger are children between the ages of five and seven. Allowing the jury to hear who could be foreseeably be harmed will help the jury decide the degree of care that is required.

Defendant’s prior experience is relevant to foreseeability

A defendant’s prior experience with the behavior that led up to the plaintiff’s injuries is relevant to the issue of whether injury arising out of the behavior is foreseeable. For example, one might argue that evidence of a defendant’s experience with car wrecks and car wreck injuries is admissible to establish that it was foreseeable to this defendant that his actions placed the plaintiff in harm’s way or the opposite.

Evidence that the circumstances alleged to have constituted negligence in a particular case have not been the cause of prior complaint or accident may be relevant to show that an accident was not reasonably foreseeable by reason of such circumstances.79

Anadarko argues that the district court erred in excluding testimony and photographic evidence of Anadarko’s experience with similar irrigation ramps. The argument is that such evidence should not have been excluded as irrelevant since it was relevant to the issue of foreseeability. We agree. All relevant evidence, defined as “evidence having any tendency in reason to prove any material fact,” is admissible in a civil trial. [Internal citations omitted.]80 … In a negligence action, proximate cause is an element of negligence, and foreseeability is an element of proximate cause.81

Proximate Cause – Causation in Fact

To establish causation under the fourth element, a plaintiff must show that the breach of duty was “the actual and proximate cause of the injury.”82

Specific and general causation

Causation is general and specific. In Kansas a plaintiff may not always be required to present general causation as an essential element.83

General causation in fact relates to foreseeability

P.I.K. Civ. 104.01 regarding causation recommends that no instruction be given defining causation. Thus it is clear that the plaintiff has the freedom to present evidence of general causation to prove up a case.84

General causation is also intertwined with foreseeability. If an injury is foreseeable, then that is evidence of general causation as well. A classic car wreck example would be a defendant that denies the plaintiff’s injuries are as severe as she claims. In response, the plaintiff is entitled to present evidence of the broad range of types of injuries and their frequency to establish the general causation proposition that a person can be hurt as badly as the plaintiff claims. Dissimilarities in this proof go to the weight of the evidence and to the issue of specific causation and not its admissibility.

Specific Causation - Defendant’s Breach of Duty need not be the Sole Cause of Harm

Where a jury finds it is more likely than not that a tortfeasor’s conduct was a substantial factor in bringing about the harm, the tortfeasor’s negligence is the cause in fact of the harm and the case is determined under traditional negligence law.85

To prove causation in fact, a plaintiff must prove a cause-and-effect relationship between a defendant’s conduct and the plaintiff’s injury. Specifically, the plaintiff must present sufficient evidence to allow a jury to conclude that, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.86

Kansas follows the definition of cause found at Restatement (Second) of Torts § 431 (1965). “The actor’s negligent conduct is a legal cause of harm to another if

(a) his conduct is a substantial factor in bringing about the harm, and

(b) there is no rule of law relieving the actor from liability
because of the manner in which his negligence has resulted in the harm.87

Black’s Law Dictionary (6th ed. 1990) defines “substantial” as follows: “Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. . . . Something worthwhile as distinguished from something without value or merely nominal. . . . Synonymous with material.”88

Comments a and b of the Restatement (Second) of Torts § 433 B (1965) are also instructive:

a. . . . [I]n civil cases, the plaintiff is required to produce evidence that the conduct of the defendant has been a substantial factor in bringing about the harm he has suffered, and to sustain his burden of proof by a preponderance of the evidence. This means that he must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

b. The plaintiff is not, however, required to prove his case beyond a reasonable doubt. He is not required to eliminate entirely all possibility that the defendant’s conduct was not a cause. It is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than it was not.89

In Lay v. Kansas Dept. of Transportation,90 the court quoted Prosser and Keeton on Torts for the burden of proof required of a plaintiff on the issue of causation:
The plaintiff is not, however, required to prove the case beyond a reasonable doubt. The plaintiff need not negative entirely the possibility that the defendant’s conduct was not a cause, and it is enough to introduce evidence from which reasonable persons may conclude that it is more probable that the event was caused by the defendant than it was not. The fact of causation is incapable of mathematical proof, since no one can say with absolute certainty what would have occurred if the defendant had acted otherwise. Proof of what we call the relation of cause and effect, that of necessary antecedent and inevitable consequence, can be nothing more than ‘the projection of our habit of expecting certain consequences to follow certain antecedents merely because we had observed these sequences on previous occasions.’ If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists.91

Courts have generally interpreted this to mean that the plaintiff must prove that the defendant’s conduct caused or contributed to the plaintiff’s injuries.92

Expert medical testimony is ordinarily required to establish a causal connection between the plaintiff’s physical injuries and the defendant’s negligence.93 However, triers of fact may also “draw upon their own experiences in determining causation.”94

When an injury is indivisible, the defendant is responsible for the entire injury

Kansas follows the indivisible injury rule.95

Indivisible Injury Defined
Restatement (Second) of Torts § 433A describes an indivisible injury this way:

An "indivisible injury" occurs when more than one incident contributes to a single injury and there is no logical or rational basis for dividing that injury.96 Under such circumstances, rather than arbitrarily apportioning liability, each tortfeasor is charged with liability for the entire harm.97

The indivisible injury rule applies to pre-existing conditions
Restatement (Second) of Torts, § 433A, Apportionment of Harm to Causes, states:
(1) Damages for harm are to be apportioned among two or more causes where
(a) there are distinct harms, or
(b) there is a reasonable basis for determining the contribution of each cause to a single harm.
(2) Damages for any other harm cannot be apportioned among two or more causes.

Restatement (Second) of Torts § 433A (1965).
The comments to this section of the Restatement are vital to understanding the application of the indivisible injury rule to a pre-existing condition.

a. The rules stated in this Section apply whenever two or more causes have combined to bring about harm to the plaintiff, and each has been a substantial factor in producing the harm, as stated in §§ 431 and 433. They apply where each of the causes in question consists of the tortious conduct of a person; and it is immaterial whether all or any of such persons are joined as defendants in the particular action. The rules stated apply also where one or more of the contributing causes is an innocent one, as where the negligence of a defendant combines with the innocent conduct of another person, or with the operation of a force of nature, or with a pre-existing condition which the defendant has not caused, to bring about the harm to the plaintiff. The rules stated apply also where one of the causes in question is the conduct of the plaintiff himself, whether it be negligent or innocent.

e. Innocent causes. The same kind of apportionment may be made where a part of the harm can fairly be assigned to an innocent cause, as where the defendant’s dam or embankment combines with an unprecedented and unforeseeable rainfall to flood the plaintiff’s land, and it is clear that a part of the flood would have resulted in any event from the rainfall alone. Apportionment may also be made where a part of the harm caused would clearly have resulted from the innocent conduct.
of the defendant himself, and the extent of the harm has been aggravated by his tortious conduct. There may also be apportionment between harm which results from a preexisting condition, for which the defendant is no way responsible, and the further harm which his tortious conduct has caused.

Regarding subsection (2), comment i explains:
Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable, or practical division. . . . By far the greater number of personal injuries . . . are thus normally single and indivisible. Where two or more causes combine to produce such a single result, incapable of division on any logical or reasonable basis, and each is a substantial factor in bringing about the harm, the courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm.98

Restatement (Second) of Torts § 433B(2) (1965) states:
Where the tortious conduct of two or more actors has combined to bring about harm, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

An official comment makes it clear that this section may be applied to single-defendant situations where some preexisting harm is aggravated:

The reason for the exceptional rule placing the burden of proof as to apportionment upon the defendant or defendants is the injustice of allowing a proved wrongdoer who has in fact caused harm to the plaintiff to escape liability merely because the harm which he has inflicted has combined with similar harm inflicted by other wrongdoers, and the nature of the harm itself has made it necessary that evidence be produced before it can apportioned. . . . As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused should fall upon the former. [Emphasis supplied.]

The invisible injury rule is the law around the country
Many courts have held that, if the jury cannot apportion damages between a pre-existing condition and an aggravation injury, the defendant is liable for the total injury.99

The courts in Montana have confronted this issue a number of times.100 However, in Truman v. Montana Eleventh Jud. Dist. Ct.,101 the court reviewed its prior cases and held the following principles to be controlling:

First, a defendant is permitted to submit relevant evidence of accidents to negate allegations that he is the cause or sole cause of an injury. In all of the cited cases, evidence of non-party accidents was admitted subject to traditional evidentiary considerations such as prejudice and relevancy

Second, [plaintiff] must prove [defendant’s] conduct contributed as a substantial factor to the causation of any damages that she has sustained. However, she need not prove the extent to which he is responsible. If she suffers from an indivisible injury, to which [defendant’s] negligence was a substantial contributing cause, [defendant] is liable for the entire damage. However, [defendant] may attempt to negate those allegations with relevant evidence as noted above. To do so, [defendant] must prove, by a reasonable medical probability, that the injury is divisible and that he is only liable for a portion of those damages...However, it is crucial that the jury instructions indicate that [defendant] is liable for the entire injury if he fails to prove that [plaintiff’s] injury is divisible.

The holdings set out above are also endorsed by a leading treatise on tort law. According to Dobbs’ Law of Torts, the indivisible injury rule “is not limited to cases of two tortfeasors, but can apply whenever the injury inflicted by the tortfeasor combines with another condition to produce an indivisible harm.”102 Ideally, the tortfeasor will be held liable only for any aggravation of the preexisting condition. Id. “But if the tortious harm combines with the existing condition to leave the plaintiff with an indivisible injury, courts may impose liability for the whole injury upon the defendant unless he can show grounds for apportionment.” Id.

In Washington, the court specifically applied this reasoning in a scenario that is seen in cases literally every day. In Phenah v. Whalen,103 the plaintiff, with a pre-existing arthritic condition, was injured in two unrelated automobile accidents.

After the first accident, the plaintiff’s doctor concluded that both new symptoms and an aggravation of the plaintiff’s pre-existing condition had been caused by the accident.

Following the second accident, the plaintiff’s doctor testified that the plaintiff’s condition was worse after the second accident and that he thought her condition was permanent. The doctor also testified that each accident affected the severity and permanence of the plaintiff’s disability; that it was impossible to state which accident caused what degree of injury and permanence; and that the damages could not be causally segregated.

The lower court granted the defendants’ motions to dismiss. It held that the plaintiff’s inability to show how a jury could segregate the damages among successive tortfeasors was fatal.

The appellate court, by contrast, observed that, though the two accidents were unrelated, only one harm was produced. If the tortious conduct of a person is a legal cause of harm which cannot be apportioned, where there was no distinct harm, the defendant is subject to liability for the entire harm. Therefore, the court held that once a plaintiff had proven that defendant had caused some damage, the defendant would have the burden of proving allocation of these damages. This rule was justified because it provided recovery for an innocent plaintiff where there is an indivisible harm.

Kansas law is the burden of apportionment falls on the defendant
In the case of Yount v. Deibert,104 the Kansas Supreme Court was asked to consider how to compare fault when one or more members of a group of people may have been responsible for
starting a fire, but there was no evidence of which members were responsible. Citing the adoption of comparative fault in Kansas, the court refused to adopt Restatement (Second) of Torts §876 as it relates to persons acting in concert. The court held:

By adopting the comparative negligence statute, the Kansas Legislature intended to impose individual liability for negligent torts "based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages." [Internal citations omitted.] . . . see also Restatement (Second) of Torts § 433B(2) (where tortious conduct of two or more actors has combined to bring about harm to plaintiff, and one or more actor seeks to limit his or her liability on ground that harm is capable of apportionment, the burden of proof regarding apportionment is upon each such actor).105

This case clearly shows that Kansas has adopted §433 of Restatement (Second) of Torts. §433A, set out previously, is the indivisible injury rule, which is recognized in Kansas.106 Even in Kansas after the passage of K.S.A. 60-258a, the defendant has the burden of proof on alternate causation. When tort liability is predicated on conduct less culpable than "intentional," the general rule is to compare fault and causation.107

Conclusion

Modern negligence law in Kansas contains certain elements that are often forgotten by the practitioner, specifically proximate cause. It is the intention of the author that this article serve as a reference and a checklist for the new and the seasoned practitioner.

About the Author

Ryan Hodge graduated from Baylor University in Business Administration. He received his JD from the University of Kansas and completed his MBA at Eastern College in Pennsylvania. Practicing with his father in Wichita, Ryan served as a general practitioner handling civil litigation, domestic, criminal and bankruptcy matters. His practice gravitated toward personal injury to which he now devotes almost all of his time. He has first-chaired close to a hundred jury trials in his career and litigated hundreds more.

8. Restatement (Second) of Torts §282.
9. Id. §283.
11. PK Civil 103.01.
12. Shirley v. Glass, 297 Kan. 888, Syl. ¶ 4 (2013); see also Restatement (Second) of Torts §§281, 328A.
14. Restatement (Second) of Torts §283, cmt. c (emphasis added).
21. Restatement (Second) of Torts §282, cmt. a, see also §284.
22. Restatement (Second) of Torts §500.
26. Restatement Second of Torts §285(a), 286, 288, 288A.
27. Id. §288B.
31. Id. Syl. ¶ 7 (2013).
32. Id. Syl. ¶ 8 (2013).
33. Restatement (Second) of Torts §285(c).
35. Restatement (Second) of Torts, §§ 291-293.
36. Restatement (Second) of Torts §295A. Texas & Pacific Ry. v. Behymer, 189 U.S. 468, 470 (1903) (Oliver Wendell Holmes, J.) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.").
40. See also Estate of Beldon v. Brown County, 46 Kan. App. 2d 247, Syl. ¶ 12 (2011) ("Common practices or standards within an industry often bear on the scope of a duty owed.").
45. Restatement (Second) of Torts §299A.
46. Wilson v. Knight, 26 Kan. App. 2d 226, 229, 982 P.2d 400, 403 (1999) ("The Kansas learned treatise exception to the hearsay rule permits the admission into evidence of a medical treatise as independent substantive evidence if reliability and relevancy are established.").
Pipe v. Hamilton (substantial chance) defined as "one which is capable of being estimated, weighed, judged, or recognized by a reasonable mind".


Moreover, the jury instructions issued by the district court required the jury to determine whether Willits was at fault in the accident. The district court defined “fault” as negligence which caused or contributed to the plaintiff’s injuries. "Negligence" was defined as lack of ordinary care under all the circumstances then existing. The court set forth the allegations of fault that each party was required to prove and instructed the jury on each of the allegations. Such instructions fairly state the law of negligence and, indeed, differ only insubstantially from the law of negligence set forth by our Supreme Court in Wilson, upon which the defendant so heavily relies. (Emphasis added) Dickerson v. Saint Luke’s South Hospital, Inc., No. 110,513 (Kan. Ct. App. Apr. 3, 2015) (citing Lamb v. Hartford Accident & Indemnity Co., 180 Kan. 157, 161, 300 P.2d 387 [1956]); Anderson v. Employers Mutual Casualty Co., 27 Kan. App. 2d 623 (2000).


96. Restatement (Second) of Torts § 433A (1965).


98. Restatement (Second) of Torts § 433A cmnts. (1965).

99. LaMoureau v. Totem Ocean Trailer Express, Inc., 632 P.2d 539, 545 (Alaska 1981); Newbury v. Vogel, 151 Colo. 520, 379 P.2d 811, 813 (1963)(holding that defendant was responsible for the entire damage when court found it impossible to apportion between damages from accident and damages from pre-existing arthritic condition); Maser v. Fioretti, 498 So. 2d 568, 570 (Fla. Dist. Ct. App. 1986); Bushong v. Kaminsah Grain, Inc., 96 Idaho 659, 534 P.2d 1099, 1101 (1975); Lovely v. Allstate Ins. Co., 658 A.2d 1091, 1092 (Me. 1995)(holding that defendant was liable for all damages to plaintiff’s elbow when court was unable to apportion injuries between accident and pre-existing fracture); McNabb v. Green Real Estate Co., 62 Mich. App. 500, 233 N.W.2d 811, 819-20 (1975), (superseded by statute on other grounds, Mich. R. Evid. 404); Brake v. Speed, 605 So. 2d 28, 33 (Miss. 1992); David v. DeLeon, 250 Neb. 109, 547 N.W.2d 726, 730 (1996); Kleitz v. Raskin, 103 Nev. 325, 738 P.2d 508, 509 (1987); Tang v. Mitchell, 53 Ohio St. 3d 186, 559 N.E.2d 1313, 1324-25 (1990) (relying on Restatement (Second) of Torts § 433B cmt. d); Haws v. Ballock, 592 S.W.2d 588, 591 (Tenn. Ct. App. 1979); Tingey v. Christiansen, 987 P.2d 588, 592 (Utah 1999); Pfeunath v. Whalen, 28 Wash. App. 19, 621 P.2d 1304, 1309 (1980); Bigley v. Craven, 769 P.2d 892, 898 (Wyo. 1989)(jury should have been instructed that if they could not apportion between degenerative condition, prior accident, and current action, defendant was liable for all proven damages); Kawamoto v. Yasukake, 410 P.2d 976, 981 (Haw. 1966); Callan v. Hackett, 170 Vet. 609, 749 A.2d 626 (2000) (Apportionment between two or more causes is appropriate where there are “distinct harms” or there is a “reasonable basis for determining the contribution of each cause to a single harm.”); Mayer v. North Arunel Hosp. Ass’n, 145 Md. App. 235, 802 A.2d 845 (2002) (If the fact finder determines the harm was not capable of apportionment, the fact finder shall compensate the plaintiff for the entire harm, citing Restatement (Second) of Torts § 433A(2)); McDonald v. United Airlines, Inc., 565 F.2d 593, 594 (10th Cir. 1976); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 260, 99 S. Ct. 2753, 2756, 61 L. Ed. 2d 521 (1979) (noting that the common law “allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor’s negligence was a substantial factor in causing”); Mitchell v. Gikon, 233 Ga. 453, 211 S.E.2d 744, 745 (1975) (upholding the lower court’s holding that defendant was responsible for entire harm in the event of a single indivisible injury and the resulting damages lacked a rational basis for apportionment); Radu v. Grimm, 252 Iowa 1266, 110 N.W.2d 321, 324 (1961) (where the damage is indivisible . . . Negligent parties are fully liable); Restatement (Second) of Torts § 879 (1979) (stating that “[i]f the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive”); William L. Prosser, Joint Torts and Several Liability, 25 Cal. L. Rev. 413, 432 (1936) (“Entire liability in these cases rests upon the obvious fact that each defendant is responsible for the loss, and the absence of any logical basis for apportionment . . .”).


105. Id. Kan. at 634 (emphasis supplied).


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As members of the legal profession, we hold a unique place in our communities. We are expected to act as role models, advocates and educators—we are expected to be well-reasoned and inclusive, not divisive. These are not outrageous expectations, and, in fact, as a newly admitted Kansas attorney, I am finding more and more opportunities to give back to my community through local and statewide bar membership. A wonderful example of inclusion that I have encountered is in the Earl O’Connor Inn of Court, based in Johnson County, that hosts a wonderful community outreach event—Special Prom aka Job Olympics Dance—at J.C. Harmon High School for special needs children of Wyandotte County.

For over a decade now, the Earl O’Connor Inn of Court has held this fun and inviting school dance that is likely the only opportunity these kids have to enjoy a school dance and feel totally supported and included at their school. I volunteered to help with the prom the last two years, and it was the most rewarding experience I’ve ever had. As children of all ages and disabilities arrived, they were greeted and escorted to the dance floor by the judges and attorneys of the Earl O’Connor Inn of Court. Some guests were accompanied by their parents, friends, and siblings, while others ditched the parents for a night out with friends. Several wonderful teachers and aides from J.C. Harmon High School were on site to chaperone and help the parents feel as comfortable as possible leaving their children to enjoy the prom.

Along with the obvious prom entertainment (a fantastic DJ), members of the Earl O’Connor Inn also hired balloon artists to decorate the high school cafeteria, as well as a caricature artist, photographer, and magician to make the event as lively as possible for the guests. Additionally, a local non-profit organization called “Little Yellow Dress” donated dozens of dresses for the girls to choose from for the special night! The kids ate pizza, cookies and soda served by Kansas attorneys and judges when they took a break from showing off their moves on the dance floor. The highlight of the evening was the infamous limbo line, a tradition carried on by Judge Droegge and Judge Ryan that many recurring guests really enjoy.

As a member of the Special Prom committee, I helped set up for the night and escort the kids and their parents to the dance. Last year, on the way to the cafeteria where all the action was, I was stopped by the father of a 21-year old boy with autism. He told me that he wanted to thank the Inn for having this dance because it had been the highlight of his son’s year for the past several years. His son has been attending Special Prom since he started high school and he looked forward to the event every spring. The father told me that he lent his son’s belt and dress slacks for the dance, and he was so happy to see him well-dressed and excited to be around other people, which is not normally in his nature!

Members of the Inn of Court are also invited and encouraged to volunteer to judge the dance’s co-event, Job Olympics, and they always do. Every year, the Wyandotte County Comprehensive Special Education Cooperative hosts a friendly Job Olympics competition created for secondary students with disabilities. This competition allows the students to showcase their practiced job skills, such as sacking groceries, basic carpentry, sorting mail, and folding laundry and pizza boxes.

There are an untold number of causes and social issues that deserve our attention and care. The Earl O’Connor Inn of Court has developed a unique and fun way to recognize the children with special needs in our communities, and we are...
so lucky we’ve been able to carry on this tradition for over a decade.

Special Prom exists through the proceeds of the Earl O’Connor Inn of Court’s G. Thomas VanBebber Annual Ethics in Litigation Forum that happens every spring! This half-day ethics CLE brings those coveted ethics hours to Kansas and Missouri lawyers at the U.S. District Courthouse in Kansas City, Kansas, at a low cost. We hope all Kansas attorneys mark this ethics CLE on their calendars so we can keep fundraising for this great Wyandotte County, Kansas, tradition.

About the Author

Danielle Atchison represents immigrant women and children survivors of domestic violence and other violent crimes and also practices corporate immigration law. She assists employers with immigration compliance plans, policies and procedures and helps clients with visas and green cards for international personnel, investors, and executives. Danielle is a member of several local and statewide legal organizations, and is a board member on the Earl E. O’Connor Inn of Court. She is also a Jackson County CASA Volunteer since 2015.

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How Big is Your 'WE'?

But do you remember who a lot of the people in your class in law school were, and what they were like. There’s just a certain kind of bond that grows out of a shared experience, particularly one that is at times harrowing. You see it in lots of places—among veterans, for instance, or among fellow workers on an engrossing project, maybe even the people you first zip lined with. I can still remember vividly the intrepid group of six who set out on the first multi-day backpacking trip I ever took (along the Paria River out of Utah into Arizona; five days, four nights). Sometime when you’re pondering existential realities, that might be a good exercise: to list all those special groups with whom you feel a particular solidarity due to shared experience, and savor that distinctive bond.

There is a solidarity that exists between individuals who have something in common. But in this article, I’m considering that something in common to be simply existing in the world as a human being, among and with other human beings. The world is pretty big though, so let’s just focus for now on the folks we see regularly in our own life. Family, friends, colleagues, neighbors, the staff in our office, the regulars at the gym, opposing counsel, our clients, maintenance staff, the person who hands you your order at Starbucks or McDonalds— I’m sure you can think of yet other people. Do you ever look at them and wonder about their lives, or about what it feels like to be that person? (For that matter, do you ever wonder what your own feelings feel like—or are you too busy to ponder that?)

A few years ago, the Lyric Opera in Kansas City staged "Silent Night," a true story about a spontaneous, voluntary truce between warring soldiers on Christmas Eve in World War I. The ad in the paper had this line: "Once the enemy becomes human, war is impossible." Don’t stop reading yet: I’m not going off into an anti-war zone. Just look at the first part of the sentence: "enemy becomes human." Why did they select that particular way of saying it? I think probably it was because there is a basic bond among humans. We are each unique beings of a common species: *homo sapiens*. A lot of our stress, as lawyers and as humans, is generated by our perception—sometimes erroneous or incomplete—of the people and circumstances that surround us. We may view them as hostile or threatening. Or as painful.

Other times, we are so wrapped up in our own world that we aren’t even aware of our environs. And if we react and base our own behavior on our perceptions and those perceptions are negative, then that negativity will generate "dis-ease," dissatisfaction, discontent—all those "dis" words that connote something bad, unwelcome or harmful. Our muscles tighten, our thoughts go awry. It is very hard to perform at satisfactory, let alone optimum, levels when we are in such a state. And thus begins the ride down the slippery slope to those ethical violations that are so common. Not communicating with clients, not responding to letters or emails, not handling client matters with diligence and competence.

How different our life and our practice might be if we focused on the "WE." "We-consciousness is knowing and feeling oneself intimately connected with and part of everything that is, and coming to act and relate out of that awareness. Beatrice Bruteau writes, "The question is: How big is your ‘we’?"

If we looked at each person we encounter first as a fellow human being, with whom we share a common bond—the experience of being in the world together, the interaction could become pleasant and would not generate that tightness and stress that rises from negative perceptions. If we were mindful of the good moments wherein we savored the shared experience of being colleagues, friends, or whatever role in which our contact occurs, we could generate lots of that oxytocin the scientists talk about.

Always the skeptic, some lawyer is saying, "How naïve. What a Pollyanna." So let me make some common sense distinctions. Shared humanity notwithstanding, some people are broken and can harm us, and we do need to be aware of that and take care of ourselves. That’s not the context I’m examining. Remember at the beginning, I said I was focusing on the people we see regularly in our own every day comings and goings. And even then, all I’m saying is consider adding a small new depth or dimension to those interactions by being aware of them, being mindful of what we do have in common with that other person. Maybe even going so far as to rejoice in sharing a kind gesture or experience of the beauty in nature or music. Try it. See for yourself if that stress doesn’t melt away when you take a deep breath and expand your concept of "WE".

About the Author

Anne McDonald was appointed to the Lawyers Assistance Program Commission at its inception in 2001 and has served as the Executive Director of KALAP since 2009. She graduated from the University of Kansas School of Law in 1982.

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What’s so GREat about the LSAT?

In March, Harvard announced that it will be accepting the Graduate Records Examination scores as well as the LSAT scores of law school applicants for the 2017-2018 academic year. Citing a desire to increase diversity, Harvard is the second law school to accept the Graduate Records Examination, or GRE, as a LSAT replacement. Harvard’s influence almost certainly makes this decision a major turning point away from the LSAT’s monopoly on law school admissions testing. This is a positive change for two reasons: first, the LSAT does not deserve its monopoly because it is a poor predictor of law school performance; and second, the law lacks practitioners with predominately technical backgrounds, and the ubiquity of the GRE will add this diversity to the candidate pool.

The LSAT is a poor predictor of law school success. The test is designed to measure the skills the Law School Admissions Council believes are needed for future lawyers to succeed in law school, such as reading comprehension, analytical reasoning, and logical reasoning. However, at best, the LSAT only has a .56 correlation coefficient when predicting whether a student will fall into the top third of their class. More impartial metrics have found that the LSAT only predicts law school success with a 20% accuracy.

Recent experimental data score the GRE about the same as the LSAT in predicting law school success. There are no hard statistics about the GRE’s prediction ability, because this academic year marks the first time in which students have been accepted to accredited law schools using the GRE. The study found that GRE scores have a .55 correlation coefficient when predicting a student’s law school success—or 1% worse than the LSAT.

Close enough. While it would be ideal to have a test with more accurate predictive outcomes for determining whether a law school applicant will be successful in law school, we shouldn’t hold out for one. Nor should we continue to embrace a test which performs—at best—slightly better than a coin flip. While the reasons the legal community continues to accept a test as inaccurate as the LSAT are unclear, a more pessimistic observer could conclude one reason the LSAT continues to reign is because its creators aggressively attack any school who wants to use another standard. Maybe a bit of healthy competition will improve the predictability of these tests.

The healthy competition the GRE represents will positively impact the types of applicants to law school. A small cabal of undergraduate degrees dominate the law, but this largely remains unacknowledged outside of jokes about law and the liberal arts. The top five undergraduate degrees of prospective law students (Political Science, Criminal Justice, Psychology, English, and History) account for 40% of all candidates. The first STEM—or Science, Technology, Engineering, and Math—undergraduate degree appearing on the list of most common degrees is Biology, and it doesn’t appear until #21. A second STEM degree doesn’t appear until #30, with Environmental Sciences claiming 0.54% of all applicants. In total, STEM degrees rank only nine times in the top 50 undergraduate degrees, accounting for only 3.39% of all law school applicants.

This is terrible for the legal field. The number of STEM-related cases, such as those found in patent litigation, are increasing. As Justice Breyer once observed, “[p]atent law cases can turn almost entirely on an understanding of the underlying technical or scientific subject matter.” But less than 10% of district court judges have STEM or technical backgrounds. Our society is not going to get less technical. If there is any hope for the law to keep up in a world of ever-changing technology, it needs lawyers with technical backgrounds.

Allowing GRE submissions for law school may attract those with technical skills. The GRE already evaluates most graduate school candidates, with over 2,000 universities across the world accepting GRE scores in applications for graduate programs. These include STEM programs, which either accept students by their GRE alone, or require an additional field-specific component test to the general GRE test. So instead of requiring another standardized test specifically required for law school admission, a student with a STEM background who is evaluating their next step should simply be able to apply directly to law school using their current GRE scores. This simplicity will surely result in an increase in STEM undergraduates applying to law school.

Some have noted that this simplicity helps law schools more than law students. Noting that LSAT scores are a major component of the U.S. News and World Report ranking, these people suggest that accepting students by GRE scores will al-
low law schools to inflate their average LSAT scores by accepting GRE students in place of lower-scoring LSAT candidates, or will allow schools to accept scores of GRE candidates without depressing the school’s average LSAT score.\(^1\)

These arguments miss the point. Not only is the U.S. News ranking system likely to adapt to any significant shift away from the LSAT, but these arguments also place far too much emphasis on law schools and far too little on the law. The legal community, not law schools, needs more students with technical backgrounds. If accepting GRE candidates helps law schools, so much the better—having a law school’s interests aligned with the law is surely something to be desired instead of criticized.

It is in everyone’s interest to have more lawyers with STEM backgrounds. I don’t know how many Political Science majors it takes to unscrew a light bulb, but I’m certain none could invent one. The world is rapidly being changed by people who invent forward-looking technologies, while the law slowly struggles to make sense of those changes, relying on retrospection and centuries-old precedents. With all respect to those who value the LSAT, we need people with the technical skills to bridge the gap between technology and the law. Because the GRE is readily available and likely well known to those embracing technical undergraduate studies, and is very nearly as accurate as the LSAT for predicting success in the law, we should embrace Harvard’s decision to allow law school candidates to use it. ■

**About the Author**

Joe Uhlman is a second-year law student at the University of Kansas School of Law. Prior to law school, he spent fifteen years working as a firefighter. He is not smart enough to have a STEM degree. After graduation, Uhlman plans to work in criminal prosecution.
Can You Give Us Five?

Give five minutes to the Kansas Bar Foundation each work day, week, or month.

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At five minutes per week for 48 weeks, that is 240 minutes, or 4 hours.
At $200 per hour, that’s $800.

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One hour of your time for the whole year.
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Todd N Thompson, Kansas Bar Foundation President, at todd.thompson@trqlaw.com or Anne Woods, Public Services Director, at awoods@ksbar.org or (785) 861-8838.
Need a Trust Account? Consider IOLTA

The Interest on Lawyers Trust Accounts (IOLTA) program is an idea that originated in British, Canadian and Australian jurisdictions in the 1960s. In the U.S., IOLTA was pioneered in Florida and now exists in every state in the country. The Kansas IOLTA program was established in 1984. Through IOLTA, attorneys and law firms place IOLTA–eligible client funds in a pooled interest bearing trust account. IOLTA funds support the following:

- Legal services to the disadvantaged
- Public education about the law
- Administration of justice programs and other programs as approved by the court

Without IOLTA, nominal or short term client funds held in non-interest bearing, pooled checking accounts benefit neither the client nor the lawyer. Under IOLTA, these same nominal or short-term funds are still pooled into one account. However, Kansas banks may remit interest on these pooled accounts to the Kansas Bar Foundation. Each year, the IOLTA Committee selects organizations to receive IOLTA grants. In the past few years, approximately $80,000 per year has been distributed to organizations in Kansas that provide civil legal services to low-income Kansans.

It is easy to join almost 4,000 Kansas attorneys who are part of the IOLTA program

- Complete the IOLTA Application. Visit www.ksbar.org/iolta to print an application.
- Take the completed and signed application to an interest bearing approved financial institution. There is a list of approved institutions on www.ksbar.org/iolta.
- Mail, fax or email a scanned copy of the completed and signed KBF IOLTA application to

Kansas Bar Foundation
1200 SW Harrison St.
Topeka, KS 66612-1806
Fax: (785) 234-3813
Email: info@ksbar.org (please put IOLTA Application in the subject line)

IOLTA would not be possible without the commitment of the Kansas banks that have agreed to provide IOLTA to their customers. The support of these banks and the staff that provide monthly or quarterly reports to the Kansas Bar Foundation is invaluable! Thank you Kansas banks! You can view a list of IOLTA banks at http://www.ksbar.org/iolta.
We have an unfinished task. After more than a decade of enjoying our larger, enhanced Kansas Law Center, there still remains about $270,000 to pay off the mortgage on our fine facility.

**We need to burn the mortgage.** Let’s pay it off and have a big party to commemorate the achievement. Join us. Participate in the Foundation’s MBF—Mortgage Burning Fund. Through the generosity of KBA members, we built this center. Let’s close the books on this effort for good!

Please...grab your checkbook, or, contribute digitally. Today.

http://www.ksbar.org/BurnTheMortgage
Members in the News

Changing Positions

Aaron Boswell has joined the law firm of Klenda Austerman as an associate. He will handle general litigation for the firm.

Shawnee County District Court Judge Rebecca Crotty will retire June 19 after seven years on the bench. A graduate of KU in secondary education, Judge Crotty received her J.D. from Washburn and clerked for Kansas Supreme Court Justice Holmes and Chief Justice Harold Fatzer. She was in private practice in her hometown of Garden City before being appointed a magistrate judge in Finney Co. She then served on the three-member Court of Tax Appeals where, as chief judge, she supervised the computerization of court proceedings. Crotty is on the board for CASA, and she looks forward to traveling and spending time with family and extended family.

District Magistrate Judge Sheila P. Hochhauser will retire in August. Hochhauser served four two-year terms in the Kansas House of Representatives, taught business law for nine years at KSU, and has been a magistrate judge in Riley County for 10 years. She practiced law in Manhattan for 22 years before her appointment to the 21st Judicial District.

McDowell Rice Smith & Buchanan, PC, is proud to announce that Corby W. Jones and William C. Odle have joined the firm as shareholders, bringing their sports law practice knowledge and experience. Together, they will continue to practice in all aspects of sports law, white collar defense and government investigations, and litigation.

Allison Koehn has joined the Topeka law firm of Newbery, Ungerer & Hickert LLP. After earning her J.D. from Washburn and an LL.M. degree in taxation from the University of Denver Sturm College of Law, Koehn completed an externship in the office of the chief counsel at the IRS. Her practice includes estate planning, probate and trust administration, tax planning and business law.

William Schmidt is Clinic Director for the Low Income Taxpayer Clinic at Kansas Legal Services. The clinic handles federal and state tax controversies for low income people throughout the state of Kansas.

K.J. Wall has joined Forbes Law Group, LLC in Overland Park, KS, as a partner. His practice focuses on healthcare litigation, appeals, and regulatory compliance.

Changing Locations

Kansas City-based Spencer Fane law firm has opened an office in Las Vegas. Partner John Mowbray, an experienced commercial litigator in Nevada, serves at the helm in the new Nevada office.

Miscellaneous

Attorney Diane L. Bellquist, of Joseph, Hollander & Craft LLC, is the newly elected President-Elect of the Topeka Bar Association. Bellquist has been a member of the TBA Board of Directors since 2011. She was honored as the TBA’s Outstanding Young Lawyer in 2012 and is a Past President of the TBA’s Young Lawyers’ Division.

The Independence law firm of Kelly & Kusiak, owned by William Kelly and Joslyn Kusiak, has been retained by the City of Caney to serve as a collection agency to pursue unpaid fee and fines for the city.

Kerry E. McQueen, a 1965 graduate of the Washburn University School of Law, was celebrated by the university with the Honorary Doctor of Law. McQueen also delivered the Commencement Address for the law school. McQueen is an accomplished litigator and president of Sharp McQueen, PA, with offices in Liberal and Overland Park, Kansas.

Attorneys Darrel Miller (Mankato) and Kay Prather (Beloit) offered informative programs for seniors in late March and mid-April. Topics included differences between wills and trusts; when to give someone power of attorney; what is a living will, and how does a reverse mortgage work.

Who’s Who Legal 2017 has named Dan Monnat, of Monnat & Spurrier, Chartered, one of the world’s leading practitioners in the Investigations sector. Who’s Who Legal combines annually with Global Investigations Review to identify the world’s leading lawyers, forensic accountants and digital forensics experts who assist companies and individuals during internal and external investigations.

Shawn Yancy was recently honored for his outstanding performance by the Kansas Department of Labor’s Employee Recognition Awards Program. He was honored for Meritorious Service as the February KDOL Employee of the Month.
Obituaries

Steven W. Wilhoft, 58, of Parsons died April 18th, 2017, from injuries received in an automobile accident. Steve was born July 22, 1958, in Denver to Frederick J. Wilhoft Jr. and Terry A. (McNassor) Wilhoft. He attended elementary school in Brighton, Colorado, and graduated in 1976 from Ranum High School in Denver. He earned a business degree from Ottawa University, Ottawa. Steve graduated from Washburn University School of Law in 1992. In 1985 Steve married Karissa J. Bartlett at First Christian Church, St. Francis. They have three children.

Steve’s career began with the Law Office of Richard Tucker in Parsons. He later opened his own private practice. He served as Labette County attorney from 2000 to 2007, when he became an assistant attorney general for the state of Kansas, working as a part of the Kansas Bureau of Investigation Southeast Kansas Drug Task Force. He remained in this position until his passing. In March he was the first recipient of the Drug Prosecutor of the Year Award through the Kansas Narcotics Officers Association.

Steve served as an elder at Trinity Lutheran Church, Parsons. He was an enthusiastic sports fan, devoted to the Kansas City Chiefs and the Kansas City Royals. He enjoyed collecting vintage comedian memorabilia and watching classic silent comedies. Steve was a talented musician. He had a beautiful tenor voice and also played the guitar and banjo. He was an avid reader who loved reading historical nonfiction. Steve was a staunch conservative.

Steve is survived by his wife and best friend, Karissa; his son, Jonathan Wilhoft and his wife, Courtney, of Parsons; two daughters, Violet Riggs and her husband, Stephen, of Derby and Liesl Wilhoft of the home. He also leaves three grandsons who were his pride and joy, Atticus and Jonas Wilhoft and Oliver Riggs, and was anticipating the arrival of his fourth grandchild who is due in October. He is survived by his parents; his sister, Debbie Westmoreland and her husband, Dennis, of Bailey, Colorado; and two brothers, Frederick Wilhoft III and his wife, Kathy, of Wichita and Jonathan Wilhoft of Omaha, Nebraska. Steve is also survived by his father-in-law, John Bartlett, of Parsons; 14 nieces and nephews; and many great-nieces and nephews.

The service was held at the Parsons Municipal Auditorium, with committal immediately following at Oakwood Cemetery. The family received friends at Forbes-Hoffman Funeral Home. Memorials are suggested to Trinity Lutheran Church and may be left at or mailed to the funeral home, 405 Main St., P.O. Box 374, Parsons, KS 67357.
A Brief Primer on Summary Judgment—Tips for New Lawyers

As a litigation attorney, your time is limited and in high-demand. Here’s a practice-focused collection of tips to help you efficiently draft effective summary judgment briefs. Some of these suggestions are basic and rule-driven, but it’s always helpful to revisit the basics. And some of these suggestions are not-so-obvious, derived from our personal experiences clerking for trial judges.

1. **Start With the Pretrial Order**
   Before beginning, read the pretrial order governing your case. Know the stipulations, asserted claims, abandoned claims, and affirmative defenses; don’t rely on the complaint and answer. In federal court, the pretrial order supersedes the complaint and controls the subsequent course of litigation. If a plaintiff hasn’t retained all of her claims in the pretrial order, for instance, the district court may consider the claims abandoned and decline to address them on the defendant’s motion for summary judgment.

2. **Just the Facts**
   Organize your material facts in separate, numbered, non-argumentative paragraphs, each supported by the record. When practicing in Kansas federal court, parties must number their factual assertions. And although it may somewhat impede the flow of the story you are trying to tell, we suggest you limit your factual material to one main fact per numbered paragraph. This allows the responding party to cleanly respond to the fact asserted and helps the district court to easily organize the material. In other words, stick to the facts without interjecting inflammatory, argumentative, or legally conclusive language.

   **Example:**
   2. Before Debra bought Ralph, Ralph’s previous owner told Debra that Ralph once bit a child. Id. at 13:04-13:10.
   4. Jerry Smith approached Debra and asked if he could pet Ralph. Id. at 46:10-46:15.
   5. Debra responded, “Yes, he loves people.” Id. at 46:16.
   6. When Jerry reached down to pet Ralph, Ralph bit him on the left arm. Ex. B. at 12:14-14:15.

   **Not:**
   On the date in question, Debra Defendant owned a dog, which she knew was a biter. Despite knowledge of her dog’s vicious tendencies, Debra recklessly took the dog out in public on January 1, 2014, where she invited Jerry Smith to pet Ralph. As any reasonable person would expect, Ralph attacked Jerry. Ex. A at 12-47; Ex. B at 12-14.

3. **Compiling and Citing Exhibits**
   • Ensure that your record citations support all parts of the fact asserted.
   • Use appropriate labeling conventions to prevent confusion and provide a clean record. For example, if the moving party labels the exhibits by letter, the responding party might label additional exhibits by number.
   • Consistently cite to each exhibit’s number or letter (instead of the underlying document’s title in isolation).
   • When using deposition or court transcripts as exhibits,
Jerry was bitten and was taken to the hospital where he was examined for rabies.

Beware of the “Cut and Paste”

Cite cases that ultimately support your conclusion. You don’t want to cite to a small section of a case because the wording seems favorable, only to have opposing counsel point out that the case doesn’t support your position at all. If the cases you cite don’t support your ultimate position, distinguish them on your facts. Also, long block quotes are rarely helpful, and readers tend to skim over them.

Polish and Proofread

After you edit each legal argument for content, flow, and transitions, take time to polish your product. First, strengthen your sentences—try to reduce any sentence that runs three lines or longer; bring the subject and verb close together; and minimize nominalizations (words that end in “ion” and “ment”). Second, read your paper aloud to your friend, cat, or begonia. A paragraph that you thought was so elegant may turn out to make little sense. Third, proofread—don’t assume that mistakes will be obvious through the course of general editing and trust fate to catch everything. Compiling your own checklist for proofing ensures you won’t forget any of the dozens of proofing considerations. Carefully check your citations for accuracy and format. Check that each “id.” correctly refers to the correct authority cited just before it.

Conclusion

Efficiently drafting effective summary judgment briefs is daunting, particularly for new lawyers. We hope you’ll use this article as a tool to help plan and streamline the process. These tips won’t ensure success on summary judgment, of course. But at the very least, they should help you narrow your case’s material facts, clarify the applicable legal issues, and focus your theory of the case, which will advance your client’s interests in the long-run.

About the Authors

Mary L. Matthews is a career law clerk for the Hon. Kathryn H. Vratil, U.S. District Court for the District of Kansas. She previously served as law clerk to the Hon. James K. Logan, U.S. Court of Appeals for the Tenth Circuit. Matthews received her J.D. from Washburn Law School where she was Editor-In-Chief of the Washburn Law Journal. She has served as an adjunct professor at KU Law and Washburn Law. This fall she will return to Washburn as a Visiting Associate Professor of Law.

Monique M. McElwee has served as a federal law clerk for nearly three years. She graduated from Washburn University School of Law, where she was the Executive Editor of the Washburn Law Journal. Before clerking, she practiced business litigation at Stinson Leonard Street LLP, where she plans to return this fall.
1. Some prefer a formal style to their dispositive motion articles. In an effort to lighten the mood and engage the reader, we’ve chosen to use conversational contractions throughout. There’s even support for that. See Joyce Rosenberg, *Let’s Break Some Rules*, J. Kan. Bar Ass’n, Feb. 2017, at 22, 23 (“Readers are more likely to engage with writing in a more conversational style.”).

2. Fed. R. Civ. P. 16(d); *Franklin v. United States*, 992 F.2d 1492, 1497 (10th Cir. 1993).

3. See, e.g., *Lewis v. City of Topeka*, 305 F. Supp. 2d 1209, 1216 (D. Kan. 2004) (“Plaintiffs omitted several of their claims from the pretrial order that Defendants had addressed in their summary judgment briefs . . . . The court therefore need not address Defendants’ arguments regarding Plaintiffs’ abandoned claims.”).

4. See, D. Kan. R. 56.1(a), (b) (requiring asserted and responsive material to be organized in separately numbered paragraphs).


6. See, id.

7. See, Bryan A. Garner, *The Redbook* 361 (3d ed. 2013) (“What makes for bad writing—and especially bad legal writing—is to just declare, for example, that your adversary’s conduct was ‘unconscionable’ rather than explaining the specific facts that make it so.”).


9. See, id. at 5-6.

10. See, id.


12. See, Whipple v. Taylor Univ., Inc., 162 F. Supp. 3d 815, 841 (N.D. Ind. 2016) (noting that plaintiff’s argument would be more convincing if supported by case law rather than by “a colorful metaphor; . . . as it stands, [plaintiff’s] argument is about as valuable as a box of rocks.”).


17. See, id.


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**New Grant Program for Not-for-Profits Offering Community Redevelopment Legal Assistance and Foreclosure Prevention Legal Assistance**

The **Kansas Bar Foundation** has opened the application process for a special grant program; it will award funds to legal aid organizations in Kansas to provide legal assistance relating to foreclosure prevention and community redevelopment benefitting Kansas residents. This multi-year program will offer several grants of up to $50,000 per year. Legal aid organizations eligible for these grants include any not-for-profit organization (or distinct part of such organization) in Kansas that regularly provide civil legal assistance to low-income individuals or groups without charge or at a greatly reduced cost.

This is an exciting opportunity to help revitalize and stabilize low and moderate income communities and help our fellow Kansans by removing legal barriers to housing.

If you are interested in submitting an application to be funded through this program, please visit [https://go.ksbar.org/crha-grant-news](https://go.ksbar.org/crha-grant-news) to learn about the grant process and eligibility requirements.

**Proposals for 2018 funding are due by June 30, 2017.**
Client files are maintained by the lawyer for the benefit of his or her principal, the client.1 Client files accumulate over the life of the case and include everything that you created or gathered while you were providing services to the client.2

Whether it is the end of your legal practice, a merge with another firm, or a need for more space, at some point you may be asking “what do I do with all of this stuff?” If you find yourself faced with overflowing piles, this article provides guidance based on Kansas ethics rules and opinions to minimize your risk and protect you and your clients.3

Rules and Opinions
Whatever your reason for wanting to clean your office of old files, being clear on the ethical guidelines relating to ownership, retention, and destruction of files is the first step:

Ownership
• Make an effort to return the file to the client. “This also serves the beneficial purpose of decreasing the volume of files to be stored by the lawyer at the lawyer’s expense. Returning the file to the client at the conclusion of the engagement would serve to bring closure and reduce the number of files to be stored by the lawyer.”4

Retention
• Return original documents to the client at the end of the case or termination of representation. But, if not, and these documents remain in the file, then retain the original documents;5

• Keep information that the lawyer knows the client may need in the future, including items the client may need to defend himself or herself in a matter for which the applicable statute of limitations has not yet expired;6
• Maintain complete records of client trust account transactions for a period of not less than 5 years;7
• Keep a comprehensive list of the files the lawyer has disposed of or destroyed;8
• Follow “…a good rule of thumb for an initial retention period for most files is ten years, since that span exceeds the statutes of limitations and repose applicable to most professional liability claims;”9
• Remember that "estate and trust files are somewhat different and should be returned to the client, or retained indefinitely;”10
• Pay special "attention to governmental or law-imposed requirements, e.g., federal tax preparation requirements.”11

Destruction
• Provide the client the opportunity to take possession of the record to which they are entitled before disposing of an old file;12
• Make a good-faith effort to find and notify clients about a pending disposition even if no business was done with them for many years;13
• Protect the confidentiality of the contents, when disposing of the file. “Destruction of such files should be complete.”14
**Client Contacts and Notice**

The best practice for alerting clients to your record retention and file destruction policy is to place this information in your Client Fee and Engagement Letter. By having this information at the beginning of the attorney-client relationship, the client is prepared to make informed decisions about what to do with the documents and materials held by the attorney while having full knowledge of when the documents are set to be destroyed. Additionally, you will want to include the destruction time frame information in the Disengagement Letter when the case comes to a close or you terminate the attorney-client relationship. However, even with these practices in place, notice must still be provided when the destruction date is approaching. By having these practices in place, the lawyer is providing the client more time, information, and flexibility which can be beneficial to the client’s interests.

When it is decided to destroy the file, take reasonable steps to notify the client that you intend to destroy the documents before any action is taken.

• **What if I Can’t Find the Client?** In most instances, the lawyer will need to take reasonable steps to notify the client that she or he intends to destroy the documents before doing so. Mail notice of the intent to destroy the file to the client’s last known address by regular or certified mail and wait a reasonable time for a response (e.g., 60-180 days). The lawyer will need to document each attempt to contact the client on a form or spreadsheet. If you have taken reasonable steps to locate your client, and you have documented all of the steps in [your] process – what you did and when16 – “and have not otherwise advised the client of [your] retention and destruction policy, then [the lawyer] may turn it over to the State Treasurer under the Kansas Unclaimed Property Act.”22

• **What if the Client Wants a File: Can I Charge for Copying and Postage?** Once lawyers reach out to clients to let them know of the intent to destroy the files, some clients may express interest in regaining possession of the documents. First, the lawyer needs to review all of the documents in the file to ascertain which documents are appropriate for the client and which, if any, are work product or are not meaningful for the client or contain third party information. Then, the lawyers can move forward preparing the file for return to the client. In Kansas, it is permissible to charge some fees to the client. But the lawyer must let the client know about the charges up front and follow these photocopying guidelines:

1. “The client is entitled to the return of any document or other property that has been delivered to the lawyer or exposed to the case and the copying of these items should be at the lawyer’s expense;
2. Work product that has been paid for is also client property. Copying these items should also be at the lawyer’s expense;
3. The copying of other items in the file may be at the expense of the client at actual cost.39”
4. When returning a file to a client have the client sign a letter of receipt and retain that letter as documentation that the file was returned. This process can be done electronically or in person.24

Postage should be assessed using a similar analysis. If the lawyer is mailing documents the client is entitled to, then the lawyer should pay the postage. If the lawyer is mailing the client’s property back to the client, then the lawyer should pay the postage. If the lawyer is copying other items in the file and mailing those items to the client, it is possible that the lawyer could charge postage to the client. Again, those charges need to be negotiated up front with the client.

**Destruction of the File**

Cleaning out law offices is not like cleaning out other rooms or spaces; we can’t just throw all of the files in the dumpster and be done with it. We mustn’t put it all together and hand it over in raw form25 for someone else to take care of, such as, a recycler, either. Instead, we must prepare safe options to protect client confidentiality and privacy:

• **Paper Documents**: The lawyer can shred all paper documents in her or his office, or do it her or himself at another location, or witness the shredding and obtain a certificate of destruction.

• **Electronic Files**: The lawyer can either:
cleaning out the clutter

1. Use a data destruction program that meets government or military standards – such programs generally delete the content by overwriting it a number of times; or,
2. Physically destroy the drive. There are also businesses that specialize in the disposal of both hard copy and electronic records and they do it well. If you aren’t familiar with a reputable and certified information destruction company in your area, “contact the National Association for Information Destruction for the names of local providers” or access a map of certified vendors by following this link: [http://directory.naidonline.org/](http://directory.naidonline.org/). Remember, the duty of confidentiality persists even when contracting with a third party:

> “When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience, and reputation of the non-lawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.”

Creating an Organized Process for the Future

You’ve reviewed the rules and opinions, walked through a thoughtful analysis of the types of files you have stored in your office, and are considering the best way to contact all of your clients. With all of that accomplished, you have started the process. Now, it is time to think about how you move forward. The next step is thinking about how you will review each case file, paper and electronic, upon closing. To begin, ask the following questions to take stock of your file management practices:

1. Does the title of the file adequately describe the matter so you can easily identify it in the future?
2. Are your files arranged alphabetically so you, your office manager, or an attorney assigned to assist in the case of an emergency could easily locate the file?
3. Do you have a process in place to ensure you are capturing the most current contact information for clients? Is that information easily accessible in the client file?
4. Are the documents of particular interest to clients, i.e., estate planning documents, deeds, contracts, etc., located in a special section of the file that is easily identified and accessible?
5. Is it time to take the office filing system electronic? While it is impossible to go entirely paperless, many small firms have been able to take their files to the cloud creating much more space and much less clutter.
6. When closing the file, do you include notes for your later reference? Remember, you will be coming back to many of these files years after the case disposition. Will you remember how the case ended? You may consider inserting a copy of your journal or spreadsheet with the name of the client, matter, close date, contact information, and brief notes detailing if you succeeded, and the decision. These notes could make future phone calls and client conversations much easier.

Next, once you’ve cleaned out your paper files, you may want to consider creating a single electronic folder containing a few, well-organized documents:

- “Your spreadsheet/journal that lists all the matters, property, and contact information, along with the results of your contact efforts;
- A sample of each letter or email that you sent at each step along the way;
- A copy of any legal notices you posted; and,
- Your signed and dated certificates of destruction with a listing of what was destroyed.”

Record Retention Policies

Remember how beneficial engagement and disengagement letters can be for helping clients understand your file management, retention, and destruction policies. Comprehensive record retention policies are beyond the scope of this article, but every law office should have a record retention policy. For that reason, this article will offer a few pointers, but more detailed information is necessary to draft and adopt a comprehensive retention policy.

Use the engagement and disengagement letter writing opportunity to explain your record retention processes and procedures to your clients. Your engagement letter may say that your firm has “a records retention policy that is designed to comply with Kansas legal and ethical requirements.” In your engagement letter, you may say that you will return client property and requested documents at the case disposition or the termination of representation. In the disengagement letter, you may say that you will retain the file until the 10-year retention period (unless it is a specific, longer time-period required by law) has expired, “at which time you will be notifying the client to discuss options for final file disposition.” And you don’t have to pick and choose from this language for your notices to clients; instead you can use all of it, or even more expansive language, to describe the processes in place at your firm to protect clients as you manage and retain client documents and before any files are destroyed.

Take Action

Let the most important take-away from this article be that your firm takes action and prepares a plan that conforms with the ethical rules and guidelines to deal with the closed client file backlog in your office. No matter what firm size you are working in, the backlog can grow quickly and, without action, it can become overwhelming. But with action, you can have it under control very soon. Here are a few additional tips:

- Establish a review process for boxes of closed files.
- Inventory the closed files to know what files exist and what needs to happen with files at different locations.
• Set aside a “Closed Client File Day” of each week or each month until all files are closed, sorted and disposed of in the appropriate manner.
• Set a date to start electronic storage and keep it!
• Review and revise the closed file process and streamline it as needed.
• Review and revise the Record Retention Policy as needed.
• Review and revise the Fee and Engagement Letter as needed.
• Review and revise the Disengagement Letter as needed.

Use these suggestions to make your office a fun and happy space. Don’t be afraid to open your office doors any longer. Take care of the backlog, be confident in your file management practices, and enjoy your practice.

If you would like more information about File Management, Retention, or Destruction, Fee and Engagement Letters, or any other Law Practice Management issue, contact:
Sara Rust-Martin
KBA Law Practice Management Attorney
785.234.5696
e-mail at srustmartin@ksbar.org.

The contents of this article are informational only and should not be construed as providing legal advice.

3. Id.
6. Id.
7. Rule 226, KRPC 1.15(a).
9. Id.
10. Id.
11. Id.
13. Id.
24. Id.
26. Id.
27. Id.
28. Rule 226, KRPC 5.3, cmt. 3.
30. Id.
31. Id.
ATTORNEY DISCIPLINE

ORDER OF DISBARMENT
IN RE FAHRENHOLTZ
NO. 116,544 – APRIL 14, 2017

FACTS: After she did not file an answer or appear, a panel of the Kansas Board for Discipline of Attorneys determined that Fahrenholtz violated KRPC 1.1 (competence), 1.3 (communication), 1.15(a) (safekeeping property), 1.16 (termination of representation), 3.2 (expediting litigation), and Rule 211(b) (failure to file an answer in a disciplinary proceeding). The violations arose after Fahrenholtz was disbarred in two states and suspended in Kansas for failing to comply with annual licensing requirements. The Office of the Disciplinary Administrator learned of the discipline in other states and docketed a complaint here. But Fahrenholtz did not respond to any of the letters sent by the office and did not file an answer to the formal complaint.

HEARING PANEL: After concluding that Fahrenholtz received proper notice of hearing, the hearing panel agreed with the disciplinary administrator and recommended disbarment.

HELD: The court adopted the hearing panel’s findings and conclusions. The court also agreed with the recommended discipline of disbarment.

ORDER OF DISBARMENT
IN RE DENNIS JAMES MOLAMPHY
NO. 116,804 – APRIL 11, 2017

FACTS: In a letter signed April 7, 2017, Dennis James Molamphy voluntarily surrendered his license to practice law in Kansas. At the time he surrendered his license, review was pending before the court on the final hearing report from the disciplinary hearing panel. The hearing panel found that Molamphy violated multiple the court on the final hearing report from the disciplinary hearing panel. The hearing panel found that Molamphy violated multiple

CIVIL

CIVIL PROCEDURE—JURISDICTION—STANDING—UNIFORM COMMERCIAL CODE

THE DISTRICT COURT IS AFFIRMED IN PART AND REVERSED IN PART, CASE REMANDED
IN RE CASTLE ROCK CASINO RESORT, LLC
NO. 115,978 – MARCH 27, 2017

FACTS: Castle Rock Casino Resort, LLC and the Board of County Commissioners of Cherokee County filed this action after the Kansas Lottery Commission selected Kansas Crossing Casino, LLC to manage a state-owned and operated casino in Southeast Kansas. The Lottery Commission rejected Castle Rock’s proposal and suggested the state would be better served by a smaller casino
in Crawford County, primarily because Castle Rock’s proposed site was directly across the state line from a large casino in Oklahoma. After the Lottery Commission made its selection, the Kansas Racing and Gaming Commission received many public comments, many of which disagreed with the Lottery Commission’s choice. After a public hearing, the KRGC voted unanimously to approve Kansas Crossing’s proposed facility. Cherokee County sought review in district court, as did Castle Rock. The district court denied the requests for relief, finding that the decision to select Kansas Crossing was not arbitrary, capricious, or unreasonable in light of the Southeast Kansas market. The motion to alter or amend was denied.

ISSUES: (1) Was the scope of discovery appropriate; (2) was there error when ruling on the motion to amend the petitions; (3) was there error in refusing to allow an evidentiary hearing; (4) did the KRGC misapply the lottery act by failing to make required findings; (5) was the KRGC’s decision supported by sufficient evidence?

HELD: The scope of discovery was within the trial court’s discretion and it was unclear whether traditional discovery was available in proceedings under the KJRA. It did not matter in this case, though, since the district court disallowed discovery because the requested discovery did not relate to issues raised in the petition for judicial review. Because Appellants did not brief the issue of whether amended petitions would have prejudiced the defendants, the district court was affirmed on that issue. The request for an evidentiary hearing was a duplicative renewed motion for discovery that was properly denied. The KRGC has broad discretion to decide which gaming contract is best for the state. The statute does not specifically require findings of fact. The record as a whole shows substantial evidence to support the choice of Kansas Crossing.

STATUTES: K.S.A. 2016 Supp. 74-8702(f)(2), -8734(b), -8734(g), -8734(h), -8735, -8735(a), -8735(b), -8736(b), -8736(e), -8737, -77-603(a), -614(b), -614(c), -621(a), -621(c), -621(d);
K.S.A. 2015 Supp. 74-8736(b), 77-621(c); K.S.A. 2007 Supp. 74-8702(f), -8734(a); K.S.A. 77-606, -619(a)

APPEALS—CRIMINAL PROCEDURE—POSTCONVICTION REMEDIES—SENTENCES
KIRTDOLL V. STATE
SHAWNEE DISTRICT COURT—AFFIRMED
NO. 114,465—MAY 12, 2017

FACTS: Kirtdoll’s 2004 conviction and hard 50 sentence were affirmed in his direct appeal which included an Apprendi challenge to his hard 50 sentence. No relief was granted in his two post-conviction motions under K.S.A. 60-1507. He filed a post-conviction motion in 2013, citing Alleyine v. United States, 570 U.S. ___ (2013). District court analyzed the motion under K.S.A. 22-3504 and K.S.A. 60-1507 and denied relief, finding a motion to correct an illegal sentence could not be used to raise a constitutional claim, and the change in the law in Alleyine did not excuse a successive and untimely motion under K.S.A. 60-1507. Kirtdoll appealed.

ISSUES: (1) Appellate jurisdiction, (2) retroactive application of Alleyine to final cases

HELD: To dispose of the entire matter, the 60-1507 portion of the appeal is transferred to the Kansas Supreme Court on its own motion.

To the extent Kirtdoll’s motion is considered a motion to correct an illegal sentence under K.S.A. 22-3504, the rule of law in Alleyine cannot be applied retroactively to invalidate a sentence that was final when the Alleyine decision was released. For K.S.A. 60-1507 motions to be considered hereafter, Alleyine’s prospective-only change in the law cannot provide the exceptional circumstances required to permit a successive 60-1507 motion, or the manifest injustice necessary to excuse an untimely 60-1507 motion.

STATUTES: K.S.A. 2016 Supp. 22-3601(b)(3), 60-1507(d); K.S.A. 2013 Supp. 21-6620; K.S.A. 20-3018(c), 21-4635, 22-3504, 60-1507

WORKERS COMPENSATION
APODACA V. WILLMORE
SHAWNEE DISTRICT COURT—COURT OF APPEALS IS AFFIRMED, DISTRICT COURT IS AFFIRMED
NO. 111,987—APRIL 14, 2017

FACTS: Apodaca was a police officer who responded to a one-vehicle accident on a state highway. Willmore, the driver, had left the disabled vehicle on the road without any lights. When Apodaca responded to the accident he hit Willmore’s vehicle and suffered serious injuries. Apodaca received workers compensation benefits and also filed suit against Willmore, claiming that his negligence caused Apodaca to suffer personal injuries. In granting Willmore’s motion for summary judgment, the district court extended the “firefighter rule” to law enforcement officers, holding that Apodaca was barred from recovering in a negligence action for injuries that arose within the scope of his duties as a law enforcement officer. The Court of Appeals affirmed, and Apodaca’s petition for review was granted.

ISSUES: (1) Should the firefighter’s rule be extended to law enforcement officers; (2) does an exception to the firefighter’s rule allow Apodaca’s claim to survive?

HELD: There has been no legislative limitation of the firefighter’s rule in Kansas. A majority of other jurisdictions have extended the firefighter’s rule to police and other public safety officers. An extension of the rule to law enforcement officers is the wisest course for Kansas and it is so extended. None of the three exceptions to the firefighter’s rule apply here, rendering summary judgment appropriate. And a fourth exception was not properly raised before the district court, which means the court is without jurisdiction to consider the merits of Apodaca’s argument.

DISSENT: (Johnson, J., joined by Biles, J. as to the public policy issue) The firefighter’s rule is “constitutionally suspect”, and public policy cannot justify the denial of an injured person a right to remedy based solely on a job classification. The majority also fails to define exactly what sort of law enforcement officer is covered by this expanded rule.

DISSENT: (Stegall, J.) He agrees that Kansas has a firefighter’s rule that extends to law enforcement officers. But this is a traditional duty standard and not a rule. A jury should get to decide whether Apodaca is entitled to recover for Willmore’s negligence.

[No statutes cited].

CRIMINAL
CRIMINAL PROCEDURE—SENTENCES—POSTCONVICTION REMEDIES—SENTENCES
STATE V. BROWN
WYANDOTTE DISTRICT COURT—AFFIRMED
NO. 114,350—MAY 12, 2017

FACTS: Brown’s 1999 conviction and hard 40 life sentence were affirmed on direct appeal, and he obtained no relief through various post-conviction motions. In 2013 he filed motion to correct an illegal sentence, K.S.A. 22-3504, citing Alleyne v. United States, 570 U.S. ___ (2013). District court denied relief, finding Alleyne did not apply retroactively to cases that were final when Alleyne was decided. Brown appealed, arguing K.S.A. 2013 Supp. 21-6620 mandates retroactive application of Alleyne.

ISSUE: Retroactive application of Alleyne to final cases

HELD: A claim that a sentence violated the holding in Alleyne does not fit within the definition of an illegal sentence that may be addressed with a K.S.A. 22-3504 motion to correct an illegal sentence. K.S.A. 2013 Supp. 21-6620(d)(2) does not provide an independent reason to correct a hard 40 life sentence, such as Brown’s, that was final prior to June 2013. Because his conviction and sentence have not been vacated, they are excluded from that statute’s hard 50 sentencing procedures.
CRIMINAL LAW—EVIDENCE—VENUE
STATE V. CHAPMAN
BARTON DISTRICT COURT—AFFIRMED
NO. 113,962—APRIL 28, 2017

FACTS: Jury convicted Chapman of first-degree murder. On appeal he claimed district court erred by denying Chapman's repeated requests for change of venue due to pretrial publicity including publicity generated about a defense request to remove or cover a provocative tattoo, and about Chapman's family. He also claimed trial court erred by permitting State to cross examine him about a text message that was hearsay and unduly prejudicial.

ISSUES: (1) Venue, (2) Hearsay Evidence

HELD: Factors to be considered when determining whether a change of venue is necessary are stated and applied to facts of case, finding a few could favor a change of venue but balance of all factors does not. No abuse of district court's discretion in denying Chapman's requests for change of venue.

Any error in the admission of the text message was harmless on the facts and record of this case. No reasonable probability the prosecutor's question about the text message affected the trial's outcome.

STATUTES: K.S.A. 2016 Supp. 22-3601(B)(3), 60-261, -460(I)(2); K.S.A. 22-2616(1)

CRIMINAL PROCEDURE—SENTENCES—STATUTES
STATE V. CLARK
SEDGWICK DISTRICT COURT—AFFIRMED
NO. 114,397—APRIL 14, 2017

FACTS: Clark was convicted of first-degree murder and attempted first-degree murder for October 1994 crimes. His 1995 sentence included a hard 25 life sentence. Some 20 years later Clark filed motions to correct an illegal sentence, arguing in part the statute authorizing the hard 25 sentence was not yet in effect when Clark was sentenced. District court denied the motions. Clark appealed.

ISSUE: Motion to Correct Illegal Sentence

HELD: District court's decision is affirmed. The hard 25 sentencing statute, effective July 1, 1994, applies to certain crimes committed on or after that date, and thus applies to Clark's crimes.

STATUTES: K.S.A. 22-3504, -223504(1), -3601(b)(3), -3601(b)4; K.S.A. 1994 Supp. 22-3717, 3717(b)(1)

APPEALS—CRIMINAL PROCEDURE—STATUTES
STATE V. COTTON
WYANDOTTE DISTRICT COURT—AFFIRMED
NO. 114,351—APRIL 14, 2017

FACTS: Cotton's 1988 convictions were affirmed on direct appeal. Twenty-six years later, he filed two pro se motions "to set aside a void judgment." District court summarily denied both as untimely filed whether considered as a request to arrest judgment or for a judgment of acquittal, and stated the defendant appeared to be past any deadline for post-conviction relief. On appeal Cotton argued for treatment of his pro se submissions as a motion to correct an illegal sentence.

ISSUE: Motion to correct an illegal sentence

HELD: A motion to correct an illegal sentence would not be time barred. Assuming without deciding that Cotton's motion could be so construed, a motion to correct an illegal sentence would not be proper. Cotton's specific allegations of error plainly attack his conviction rather than his sentence, and a claim of being denied due process cannot be remedied in a motion to correct an illegal sentence.

STATUTES: K.S.A. 2015 Supp. 22-3601(b)(3); K.S.A. 22-3419, -3502, -3504, -3504(1)

CRIMINAL LAW—EVIDENCE—JURY INSTRUCTIONS
STATE V. STEWART
JOHNSON DISTRICT COURT—AFFIRMED
NO. 111,995—APRIL 28, 2017

FACTS: Stewart was convicted of offenses including felony murder and aggravated robbery. Relevant to issues raised on appeal, the trial judge adopted the pretrial judge's rejection of Stewart's request for a Frye hearing about blood spatter evidence, and denied Stewart's renewed motion for a hearing; reviewed competing evaluations of Stewart's mental competency and found Stewart competent to stand trial; and used PIK Crim. 3rd 56.02-A to instruct jury on State's alternative theories of first-degree murder—premeditated murder and felony murder. On appeal Stewart claimed: (1) district court erred in instructing jury to consider lesser included offenses for both alternative theories of first-degree murder, despite felony murder having no lesser included offenses; (2) district court failed to instruct jury that the justified force in the self-defense jury instruction could not satisfy the taking-by-force element of aggravated robbery; (3) district court should have found him incompetent to stand trial based on evidence of low IQ and corresponding impaired cognitive function; (4) error to admit blood spatter evidence over Stewart's objection based on Frye; and (5) cumulative error denied him a fair trial.

ISSUES: (1) Jury instructions—alternative theories of first-degree murder, (2) jury instruction on force, (3) competency to stand trial, (4) blood spatter evidence, (5) cumulative error

HELD: District court appropriately instructed jury to simultaneously consider both alternative theories of proving first-degree murder, and upon finding Stewart guilty on either or both theories, to sign the verdict form, ending deliberations without consideration to any lesser included homicide offenses.

In response to jury question about what constituted force for aggravated robbery, Stewart failed to dispel any purported confusion about force. If any instructional error, defense's unequivocal affirmative assertion that the instruction packet contained all the instructions Stewart wanted precluded first-time-on-appeal argument that jury instructions were clearly erroneous.

District court's finding that Stewart was competent to stand trial was affirmed. District court acted well within its discretion by relying on opinions of State's experts, after carefully weighing conflicting evidence.

Any abuse of trial court's discretion in failing to independently consider the merits of Stewart's Frye objection was harmless on the record in this case.
Cumulative effect of one possible error by trial court in not ruling on merits of Stewart's Frye objection, and of one instructional error invited by defense, did not substantially prejudice Stewart and deny him a fair trial.

STATUTES: K.S.A. 2015 Supp. 21-5402(d), -5402(e), 22-3601(b)(3)-(4); K.S.A. 21-3426, -3427, 22-3219, -3301(1), -3303(1), -3302(1), -3413(4), 60-460

CRIMES AND PUNISHMENT—STATUTES
STATE V. TOLIVER
RILEY DISTRICT COURT—REVERSED AND REMANDED; COURT OF APPEALS—AFFIRMED

NO. 112,509—APRIL 14, 2017

FACTS: Toliver spit on Officer Johnson while Toliver was confined in police car after his arrest and during delivery at jail. Toliver was charged and convicted of various offenses including felony battery against a law-enforcement officer under K.S.A. 2013 Supp. 21-5413(c)(3)(D), defining battery by a confined person against a city or county “correctional officer or employee.” In unpublished opinion Court of Appeals reversed that conviction, holding the State failed to prove that Johnson was a correctional officer or employee. State petitioned for review. It conceded that Johnson was neither a correctional officer nor a correctional employee, but argued the statute required only a showing that Johnson was a county employee engaged in work at the county jail.

ISSUE: Statutory Interpretation - K.S.A. 2013 Supp. 21-5413(c)(3)(D)

HELD: Wording in statute was ambiguous as to whether “correctional” modifies both “officer” and “employee,” or modifies only “officer.” Standard English grammar rule governing modifiers of nouns in a sequence is applied, holding the word “correctional” in K.S.A. 2013 Supp. 21-5413(c)(3)(D) modifies both “officer” and “employee.” Toliver’s felony conviction and sentence for battery against a law enforcement officer was vacated. Case was remanded to district court for resentencing.


CONSTITUTIONAL LAW—EVIDENCE
STATE V. WILLIAMS
ELLIS DISTRICT COURT—COURT OF APPEALS IS AFFIRMED, DISTRICT COURT IS AFFIRMED

NO. 111,046—APRIL 21, 2017

FACTS: Law enforcement met with a confidential informant to set up a drug purchase from Williams. After participating in a controlled buy with the informant and an officer, Williams was arrested and charged. At trial, the State introduced an audio recording of the buy which included statements of the informant, who did not testify at trial. Williams objected, arguing that the statements were testimonial and that playing the tape for the jury violated Williams’ rights under the Confrontation Clause. Williams’ objection was overruled and the jury heard the entire tape. On appeal, the Court of Appeals concluded that the informant’s statements were not testimonial. The informant was not aware that the exchange was being recorded, she was not responding to questions, and she was not in custody at the time the recording was made. The Supreme Court accepted Williams’ petition for review.

ISSUES: (1) Was the confrontation clause implicated by the informant’s recorded statements; (2) was any error in admitting the statements harmless?

HELD: The court suggests that rigid application of the Brown factors is not the best way to determine whether a statement runs afoul of the Sixth Amendment. Rather, an inquiry should be made to identify statements that are, by their nature, substituting for trial testimony. The Court of Appeals erred by so heavily relying on the fact that the informant’s statements were not made during a custodial interrogation. The court rejects the State’s argument that the informant’s statements merely provided context. Instead, the statements qualify as testimonial. Because the introduced evidence violated Williams’ constitutional right to confront witnesses, the federal constitutional harmless error standard must be applied. Because there was overwhelming, independent evidence of Williams’ guilt, the constitutional harmless error standard is satisfied and Williams’ conviction is affirmed.

STATUTE: K.S.A. 2015 Supp. 21-5705(a)(1), 60-460(i)(2)

CRIMINAL LAW—SENTENCES
STATE V. WOOD
SEDGWICK DISTRICT COURT—AFFIRMED; COURT OF APPEALS—AFFIRMED

NO. 111,243—MAY 5, 2017

FACTS: Wood was convicted in 2003 of attempted indecent liberties with a child. Sentence imposed included certification of Wood as a sex offender with duty to register. Kansas Offender Registration Act (KORA) was amended in 2011 to increase registration period from 10 to 25 years. Woods filed motion challenging the retroactive application of the 2011 amendments. District court ruled it lacked jurisdiction to consider Wood’s constitutional claims. Wood appealed, arguing the district court possessed jurisdiction to consider his challenge as a motion to correct an illegal sentence. In unpublished opinion, Court of Appeals cited cases that rejected a similar argument, and dismissed the appeal for lack of jurisdiction. Wood’s petition for review was granted.

ISSUE: Motion to correct illegal sentence—constitutional claim

HELD: Lower courts had jurisdiction to hear and consider Wood’s motions to correct an illegal sentence, but Wood’s claim was premised on allegations of constitutional deficiencies. As in State v. Dickey, 305 Kan. 217 (2016), Wood advanced no meritorious argument demonstrating his sentence was illegal, so his claim failed on the merits. Judgments below were affirmed as right for the wrong reason.


CONSTITUTIONAL LAW—CRIMINAL LAW—SEARCH AND SEIZURE
STATE V. ZWICKL
RENO DISTRICT COURT—REVERSED AND REMANDED; COURT OF APPEALS—AFFIRMED

NO. 113,362 - MAY 5, 2017

FACTS: Officers executed a warrant for search of Zwickl’s car and discovered pounds of marijuana. This led to issuance of a search warrant for Zwickl’s residence where more drug evidence was discovered. State charged Zwickl with possession of marijuana with intent to sell and other related offenses. He filed motion to suppress, alleging the affidavit supporting the vehicle search warrant provided insufficient evidence to find probable cause for issuing the warrant. District court granted the motion, finding it entirely unreasonable for an officer to believe the vehicle search warrant was valid. State filed interlocutory appeal. In unpublished opinion, Court of Appeals reversed, finding sufficient indicia of probable cause for officers to reasonably rely in good faith on the warrant. Zwickl’s petition for review was granted.

ISSUE: Good-faith exception—probable cause determination

HELD: Applying Leon good-faith exception to exclusionary rule, adopted in State v. Hoeck, 284 Kan. 441 (2007), the details in the affidavit supporting the vehicle search warrant were examined, including the Colorado surveillance of Zwickl. That affidavit contained sufficient indicia of probable cause such that an officer’s reliance on the warrant was not entirely unreasonable. Panel’s decision was affirmed. District court’s suppression of the evidence was reversed and case was remanded.

STATUTE: K.S.A. 60-2101(b)
FACTS: White filed a K.S.A. 60-1501 petition after Department of Corrections staff withheld from White two magazines and a book; DOC staff informed White that the content was either a safety threat or too sexually explicit. White challenged the seizure of this material as a First Amendment violation and also claimed the DOC regulations were unconstitutionally vague and overbroad. White filed requests for discovery with DOC. The request was met with objection from DOC, which claimed that the materials requested by White created safety concerns. The district court ruled that the full array of discovery was not available in a K.S.A. 60-1501 proceeding and denied White’s request. White’s K.S.A. 60-1501 petition was denied after an evidentiary hearing, and he appealed.

ISSUES: (1) Do the rules of discovery apply to a K.S.A. 60-1501 proceeding; (2) was White entitled to an evidentiary hearing?

HELD: K.S.A. 60-1501 proceedings are not subject to the ordinary rules of civil procedure. This includes the rules of discovery. The heightened pleading requirements for K.S.A. 60-1501 petitions almost always make discovery unnecessary. And even if White was arguably received two evidentiary hearings before entitled to discovery, none of the requested discovery was relevant to almost always make discovery unnecessary. And even if White was entitled to discovery, none of the requested discovery was relevant to

APPEALS—CRIMINAL PROCEDURE—SENTENCES—STATUTES
STATE V. CARVER
SEDGWICK DISTRICT COURT—AFFIRMED
NO. 114,556—APRIL 28, 2017

FACTS: Jury found Carter guilty of aggravated battery in violation of K.S.A. 2015 Supp. 21-5413(b)(1)(A), and also found the crime was an act of domestic violence. On appeal, Carter claimed clear error by trial court in failing to instruct jury on domestic battery as a lesser included offense of aggravated battery. He also claimed district court unconstitutionally considered Carter’s criminal history to enhance the sentence.

ISSUES: (1) Lesser included offenses of aggravated burglary, (2) sentencing


Controlling Kansas precedent defeats Carter’s Apprendi sentencing claim.

STATE V. FAHNERT
SALINE DISTRICT COURT—APPEAL DISMISSED AND CASE REMANDED WITH DIRECTIONS
NO. 115,058—APRIL 28, 2017

FACTS: Cooper was convicted of possession of a controlled substance and other crimes. District court imposed the term sentences recommended in plea agreement, and granted Cooper’s motion for dispositional departure to probation. Cooper appealed the sentence. Kansas Supreme Court granted Cooper’s motion for summary disposition of the appeal.

ISSUE: Jurisdiction to review sentencing appeal

HELD: State v. Looney, 299 Kan. 903 (2014), is distinguished on facts in this case. Even though K.S.A. 2016 Supp. 21-6820(a) provides that a departure sentence is subject to appeal by the defendant or the State, an appellate court shall not review a departure sentence resulting from an agreement between the State and defendant which the sentencing court approves on the record. Here, the district court gave Cooper the precise sentence he requested which included a departure, and there is no claim the sentence is illegal. K.S.A. 2016 Supp. 21-6820(c)(2) divests the appellate court of jurisdiction to consider Cooper’s appeal.

STATUTES: K.S.A. 2016 Supp. 21-6801 et seq., -6820(1), -6820(c)(1), -6820(c)(2), -6820(g), -6820(h); K.S.A. 21-4721(a), -4721(c)(2)

CONSTITUTIONAL LAW—CRIMINAL LAW—SENTENCES
STATE V. FAHNERT
JOHNSON DISTRICT COURT—SENTENCE VACATED AND CASE REMANDED WITH DIRECTIONS
NO. 114,556—APRIL 28, 2017

FACTS: District court classified Fahnert’s prior Missouri burglary conviction as a person felony for purposes of scoring his criminal history. Fahnert appealed,

ISSUE: Classification of Prior Out-of-State Conviction

HELD: Court reviewed constitutional protections in Mathis v. United States, 579 U.S. ___ (2016), Descamps v United States, 570 U.S. ___ (2013), and Apprendi v New Jersey, 530 U.S. 466 (2000), as applied in State v. Dickey, 301 Kan. 1018 (2015). K.S.A. 2016 Supp. 21-6811(e) governs classification of a prior conviction as a person or nonperson offense for purposes of scoring criminal history when the prior offense qualifies as both an out-of-state conviction and as a prior burglary conviction. Under facts in this case, district court was constitutionally prohibited from classifying Fahnert’s prior burglary conviction as a person felony because doing so necessitated making or adopting a factual finding that the prior burglary involved a dwelling. This went beyond simply identifying the statutory elements of the prior burglary conviction. Under Dickey, Fahnert’s Missouri burglary conviction should have been classified as a nonperson felony. Sentence was vacated and case remanded for resentencing. Conflict noted between this decision and State v. Sadders, No. 115,366 (Kan. Ct. App. 2017)(unpublished), petition for review filed March 3, 2017.

STATUTES: K.S.A. 2016 Supp. 21-5111(k), -5807, -6811 et seq., -6811(d), -6811(e); K.S.A. 2014 Supp. 21-5807; K.S.A. 21-3715(a), -4711(d), -4711(c)
**Criminal Law—Sentences**

**State v. McAlister**

*Finney District Court—Sentence VACATED AND CASE REMANDED WITH DIRECTIONS*

**No. 115,887—April 28, 2017**

**Facts:** McAlister's convictions and sentences for 1996 offenses were affirmed on appeal. In 2015, he filed motions to correct his illegal sentences. Citing *State v. Dickey*, 301 Kan. 1018 (2015), he claimed the 1992 Missouri burglary-related convictions in his criminal history should have been scored as nonperson felonies. District court denied the motions as procedurally barred by res judicata, and because holding in *Dickey* did not apply retroactively to McAlister's sentences. McAlister appealed. State did not preserve res judicata argument on appeal, but argued McAlister was not entitled to retroactive relief under *Dickey* because unlike *Dickey*, McAlister's sentences became final prior to *Apprendi*.

**Issue:** Motion to correct illegal sentence

**Held:** Holding in *Dickey* was reviewed, as clarified by *State v. Dickey*, 305 Kan. 217 (2016)(*Dickey II*). The proper classification of a prior crime as a person or nonperson felony for criminal history purposes is a question of state statutory law, not constitutional law. Accordingly, a defendant whose sentence is illegal based on holding in *State v. Dickey*, 301 Kan. 1018 (2015), is entitled to receive a corrected sentence at any time, even if the sentence became final prior to *Apprendi*. District court erred in finding McAlister's motions to correct his illegal sentences were procedurally barred. Remanded for resentencing based on the correct criminal history score.

**Concurrence (Gardner, J.):** Concurs in the result because panel is bound by holding in *Dickey II*, but does not read *Dickey II* as broadly as the majority, and does not believe the "at any time" language in K.S.A. 22-3504 means an illegal sentence can be corrected in any manner under any circumstances, or repeatedly litigated.

**Statutes:** K.S.A. 2016 Supp. 21-6811(d); K.S.A. 2014 Supp. 21-5807(a)(1), -6811(d); K.S.A. 21-3715(a), 22-3501(1), -3504(1), -3628(c), 60-1501(b), -1507(f)(1); K.S.A. 1991 Supp. 21-3715

**Criminal Procedure—Statutory Construction**

**State v. Niehaus**

*Saline District Court—Affirmed*

**No. 116,244—April 21, 2017**

**Facts:** Niehaus pled no contest to four counts, including one count of second-degree murder. At sentencing, Niehaus indicated that she was physically able to work while in prison and after her release. Niehaus did not object to restitution or to the imposition of any costs and fees. The fees assessed against Niehaus by the district court included a $200 DNA database registration fee. The district court waived some fees, finding that their imposition would pose an undue hardship to Niehaus. She appealed.

**Issue:** Whether the district court had an independent obligation to consider Niehaus' ability to pay the DNA database registration fee

**Held:** The DNA database fee statute contains no requirement that the district court consider the financial burden that will be placed on a defendant. Thus, under the plain language of the statute, the district court was not required to make that finding at sentencing. But, even if the district court did have that obligation, the record shows that the district court did make independent inquiry of Niehaus’ ability to pay costs and fees. She is not entitled to any relief.

**Statutes:** K.S.A. 2016 Supp. 75-724(c); K.S.A. 22-4513, -4513(b)

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