A New Guiding Principle: The Kansas Supreme Court’s Trend to Review and Reconsider Legal Precedent
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Cover Design by Ryan Purcell

Editor’s Note:
Digest of case No. 97,919, published by The Journal of the Kansas Bar Association in its July/August 2008 issue, concerned attorney Donald C. Krueger, not Thomas A. Krueger, Emporia.

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Threading the Chain
By Christopher F. Burger
My friend, Dick Honeyman, put me onto a great book a few years ago, Mark Helprin’s novel, “A Soldier of the Great War.” It contains a great description of the reaction to technological change in a law office.

For hundreds of years, courts and law offices in Italy employed scribes to write and copy legal instruments. These documents were works of art with flourishes, curlicues, and other embellishments. Men (only) spent lifetimes producing contracts and mortgages with an artistry and precision that rivaled the masters. Scribes dreamed of being called upon to create a Treaty or similar document. Scribes were artists and artists can’t be rushed. The end of Wars and other Hostilities had to await the painstaking completion of these masterpieces.

The following experience takes place shortly before Italy’s involvement in the Great War. Orfeo, the chief scribe, explains to the lawyer’s son what his father has done and why Orfeo is going to go away and die.

Do you know what he did? I’ll tell you what he did. He brought in a machine for writing, the so-called typewriter, which is noisier than a flush toilet, as ugly a thing as you can imagine, and writes in individual letters that are all the same, exactly the same, dead. Machines have no grace. It cannot make a flourish, vary the thickness of a line or tantalize the reader with a lapse into an indecipherable but lovely style.

The typewriter is mechanized and quick, as dead as steel like those guns that shoot a hundred bullets at a time, it has killed my life, it has broken the beautiful lines, and it has bullied and beaten time. The old world is dead, and now, you know, they’ll put motors in them and you’ll have to sit on a rubber throne or wear a rubber suit so they won’t electrocute you. And they’ll attach your hands to the keys, and you’ll just sit there, in the electric light that hurts your eyes, on your rubber chair with nothing left of this life. Can’t you see? Nothing whatsoever.

This is not overly dramatic when you consider that these monstrosities produced an amazing two pages per hour.

It wasn’t that Orfeo was against change, he said. They would use this machine if it were a “plausible invention.” After all, they had already adopted chairs that adjusted up and down.

All the establishments that are buying these machines are doomed! They’ll never be used in offices, never! I give you my word. They’re too impersonal. You can tell nothing of what is behind the words. These machines will not come into general use. They’re entirely impractical. I pity the inventor. I pity the users. I pity the seller!

Since the involvement of Orfeo is not central to the story, it won’t spoil anything to say that he was saved by the First World War. The Department of the Navy needed a manager for the typing staff. Who better to manage than someone with experience directing a roomful of artists?

Is there a point to all of this? Perhaps there is. Don’t be like Orfeo. We live in times where the pace of technological change is bewildering and we need to deal with it the way preteens do. They try it. We should do the same.

It is change, continuing change, inevitable change, which is the dominant factor in society today. No sensible decision can be made any longer without taking into account not only the world as it is, but the world as it will be. ...(Isaac Asimov).

Tom Wright may be reached by e-mail at twright21@cox.net or by phone at (785) 271-3166.
Young Lawyers Section News

Top 5 Ethics Tips for New Admittees (and a refresher for the rest of us)

By Scott M. Hill, Hite, Fanning & Honeyman LLP, Wichita, KBA Young Lawyers Section president

As 10 recent law school graduates state the ethics rule that causes the most concern as he or she begins the practice of law, and likely well more than half will tell you “Rule 1.1, Competence.” Fresh out of the books, many new bar admittees are concerned with whether they can provide the “competent representation” required by the Model Rules of Professional Conduct, with the “legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” But the young lawyer need not fear, for being cognizant of his competence may prove half the battle at providing competent representation. You will spend your entire career focusing on improving competence, so instead of offering tips on competence, I will focus on five other quick tips to help you as you begin your practice. And for all the rest of us who have some experience under our belt, it never hurts to review some basics in ethics.

1. Be diligent (Rule 1.3). The rule requires “reasonable diligence ... in representing a client.” But the rule should apply equally in your practice whether it relates specifically to a client representation or not. Give careful attention and effort to what you do.

2. Provide meaningful and timely reports to your client (Rule 1.4). With the rigors of the practice of law come prioritization, and the proverbial “putting something to the back burner.” But the ethics rules require a lawyer to “keep a client reasonably informed about the status of a matter ...” This can be difficult to battle, but remember that a simple telephone call or a short letter to a client advising that “little has occurred” is worth the time and the effort. Diary your files to periodically check in with the client — whether something has occurred or not. This advice not only keeps you in compliance with the Rules of Professional Conduct, but also is an inexpensive method of continued marketing to your client.

3. Learn your conflicts system (Rules 1.7, 1.8, 1.9, and 1.10). One of the more difficult issues to understand (in my experience) is the magnitude of conflicts systems — especially those in law firms. When a new client comes through the door, most young attorneys are more concerned with what they say rather than if they should say. The practical aspects of conflict management go well beyond ensuring that no current conflict exists. Often one of the most critical aspects of understanding conflicts is understanding that a client today might be a conflict tomorrow. Understand both how to check conflicts within your firm, but also understand what clients would be unwanted conflicts for the future.

4. There is more to legal advice than just the law (Rule 2.1). One thing new lawyers (including myself) mistakenly believe upon graduation from law school is that clients come to lawyers for legal answers, to which the client will weigh and balance with other ethical or monetary considerations. After all, isn’t that how law school is structured — providing a fact scenario on a final exam that requires the student to write pages of legal analysis, where the real answer should be “sell the ring and split the proceeds, because the cost of litigation is too high.” According to the official comment to Rule 2.1, “advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant.” Providing sound advice to a client requires a lawyer to step back from the pure legal analysis, to give the client meaningful advice (based upon experience and recommendation) as to the real impact of a legal issue.

5. Above all, be candid with the court and opposing counsel! (Rule 3.3 and 4.1). In my relatively short time in practice, I’ve learned one thing very well — your credibility is your career. Lose it and you will cause a great disservice to your future, your client, and to the bar. No matter the situation, be candid. Do not pass along misinformation from your client to opposing counsel. Do not sidestep the truth to a court. And although we hope it never to occur, if you are put to question on your compliance with any ethical issue, even a short review of ethics opinions from the Supreme Court will show you that honesty in error will serve you well in discipline.

Scott M. Hill may be reached at (316) 265-7741 or by e-mail at hill@hitefanning.com.
New Kansas Law Center Open for Business and Ready to Serve You

I am very pleased to report to the membership that the new addition to the Kansas Law Center has been completed and we are ready to serve you!

To help commemorate this great occasion, several hundred members and friends packed the Law Center for a special re-dedication during this year’s KBA Annual Meeting in June. The event was the culmination of many years of dedicated planning and was purposely scheduled to coincide with the conclusion of a year-long celebration of the KBA’s 125th anniversary. Photos of this wonderful affair can be found on the back page.

The Law Center originally opened in October 1981 to much fanfare and has been an ideal home to the Kansas Bar Association and the Kansas Bar Foundation ever since. Both organizations, however, have seen tremendous growth in the last two decades necessitating a new vision for our Topeka-based headquarters.

In response, the Foundation and Association introduced a collaborative fundraising effort in 2004 named the Raising the Bar Campaign (RTB). The goal of the campaign was a modest $1.2 million. Since that time, many dedicated volunteers serving on the RTB Committee have been hard at work securing financial commitments from prominent law firms and individual members from across the state.

The campaign was a wonderful success as more than 50 firms, along with the Attorneys Liability Protection Society Inc. (ALPS) and countless members stepped forward to help us nearly reach our goal. A complete list of all contributors will appear in next month’s statewide issue of The Journal.

This ambitious initiative was distinctive in that it had two laudable objectives. The first was the aforementioned addition of larger and up-to-date meeting facilities.

The second objective of the campaign was to increase the endowment of the Foundation to help increase funding for civil legal aid to the poor and improve the accessibility of the legal system in Kansas. By the end of 2009, dedicated funds from the campaign and from other fundraising efforts are expected to double the Foundation endowment from 10 years ago to more than $1 million.

During the upcoming year, the Foundation will be unveiling several new law student scholarship awards as well as numerous programs that foster the integrity of the legal profession and enhance public opinion of the role of lawyers in our society.

A fun aspect of the new building will be a “law museum” that will house and showcase legal treasures and historical law pieces. The museum offers an opportunity for members, law firms, and friends of the legal profession to exhibit their personal piece of law history — whether on loan or as a permanent addition to the collection — for all to enjoy.

There will also be a Casemaker training area for members to become better acquainted with the Association’s popular online legal research tool.

To continue to help raise funds, we are pleased to provide our members and other interested persons with a relatively painless way to join in this exciting effort. Our “buy a brick” initiative allows interested folks to purchase a brick for yourself or in honor or memory of friends and loved ones. You can have a name, law firm, or message engraved on a brick that will be permanently displayed within the terrace at the building entrance. For a minimum pledge of just $1,000, which can be paid over a three-year period, you can leave your mark on the legal profession forever.

Please contact me if you would like to know how you or your firm can join in Raising the Bar.

Hope to see you around the Law Center — welcome home!

“A fun aspect of the new building will be a law museum that will house and showcase legal treasures and historical law pieces.”

You may contact Jeffrey Alderman by e-mail at jalderman@ksbar.org or by phone at (785) 234-5696.
Generate New Clients: KBA’s Lawyer Referral Service Generates More Than $300,000 for Participating Attorneys

Need clients? Join the Kansas Bar Association (KBA) Lawyer Referral Service (LRS) … a trusted source for finding the right attorney. Whether you’re a new attorney or a seasoned veteran, LRS is for you. This is not just a service for low-income persons or individuals that might not have acquaintances with attorneys; it is for everyone. KBA LRS is a standout among attorney referral services nationwide and is American Bar Association (ABA) certified. ABA certification does not come easily, and all attorneys participating in our referral service must be qualified by ABA standards.

The KBA’s LRS has become a trusted resource for people who need a lawyer but don’t know how to locate one. In 2007, the LRS answered more than 13,500 calls and referred nearly 2,000 participating attorneys; these referrals generated more than $300,000 in client fees for program participants.

When LRS personnel answer incoming calls, they screen the inquiries to determine whether the caller needs to hire a lawyer or simply needs legal advice. Callers needing to hire a lawyer are then referred to an LRS lawyer in their area (pending attorney availability).

LRS staff refer clients in a variety of areas of law. The most common referrals are made in the areas of divorce, medical malpractice, and contested custody. LRS receives its clients from a variety of sources, including advertising campaigns, Kansas Legal Services, the courts, and other attorneys.

Any lawyer member who is in good standing with the Kansas Supreme Court may qualify as a member of the LRS, providing they meet the following requirements:

- LRS attorneys must grant a consultation as soon as practicable after the request is made.
- LRS attorneys must agree upon any charges for further service with the client, in keeping with the objectives of the LRS and the client’s ability to pay.
- LRS attorneys must keep their professional liability insurance in force during their association with the LRS.
- When a fee from an LRS client amounts to $300 or more, the LRS attorney must remit 10 percent of that fee to the LRS (unless they are dealing with a bankruptcy case).
- LRS attorneys must submit status reports to the LRS within 30 days of referral.
- LRS attorneys who are Kansas Bar Association members must pay the LRS an annual registration fee of $100 (for the remainder of 2008, the fee is $50).
- LRS attorneys must pay an additional $100 (for the remainder of 2008 the fee is $50) annual registration fee to receive bankruptcy referrals in lieu of paying a percentage of fees on bankruptcy cases to the LRS.
- LRS attorneys must agree to refer any case not accepted by the referred attorney back to the LRS.

Join now and save for the remainder of 2008! Enrollees can join LRS for only $50 through Dec. 31, 2008 (an additional $50 fee for those wishing to receive bankruptcy referrals).

If you would like more information about the KBA’s Lawyer Referral Service or would like an application for the program, please contact the KBA at (785) 234-5696 or go online to http://www.ksbar.org/LRS.
Hollywood has mastered the story line surrounding bad hotels. For starters you have “Psycho I and II,” “The Shining,” and “Room 1408.” A less well known movie I’d recommend – “Identity.” And then you have hotel/motel plotlines that aren’t showing at the Crest Theater in Great Bend. Hotel stories so bad and so unbelievable no one would turn it into a movie. Because it wouldn’t be entertaining or believable. Like what happened at the Capri Motel in Kansas City, Mo., on July 14, 2003.

This is what the local news reported: “Police were called to the motel Sunday after a guest checked out of a room because he could no longer tolerate the smell. He had complained about the odor when he checked in last Thursday, but management informed him nothing could be done about it. A cleaning crew finally lifted the mattress off the only bed in the room and discovered a body, that, the police said, was ‘in an advanced stage of decomposition.’ The unidentified remains had been hidden by wooden panels around the base of the bed.”

So stop and ponder the thought — the guest slept over a dead body for three days — that’s 72 hours or 4,320 minutes. This poor loser either had a bad sinus infection or grew up near a landfill. But to his defense, he did complain to management — they replied “nothing could be done about it.” A cleaning crew finally lifted the mattress off the only bed in the room and discovered a body, that, the police said, was “in an advanced stage of decomposition.” The unidentified remains had been hidden by wooden panels around the base of the bed.

So stop and ponder the thought — the guest slept over a dead body for three days — that’s 72 hours or 4,320 minutes. This poor loser either had a bad sinus infection or grew up near a landfill. But to his defense, he did complain to management — they replied “nothing could be done about it.” Really? There goes their Zagat and Mobile Travel Guide five star rating. As one blogger commented: “That’s right. All of our rooms smell like dead, bloated, rotted, decomposing, maggot-filled corpses. There’s nothing we can do about it.”

Some were quick to criticize the paying guest. But in fairness to the guy, who thinks “I’m sleeping on top of a dead body” when a bad odor invades the nostrils? As a father of four teenagers, the differential diagnosis of bad odors includes many things before you get to “dead guy below.” So here are the “tips and tricks” to make sure your hotel room isn’t also serving as a poor man’s funeral home with you unknowingly paying respects.

1. Let’s begin with the obvious: Avoid the Capri Motel. Let’s include all Independence, Mo., motels. Especially ones that advertise “Jacuzzis and hot tubs.”

2. Your nose knows. Avoid smelly rooms — good or bad. If the second you turn the room key you think “dead guy” — request a suite upgrade.

3. When you walk into the hotel room, always check under the bed. This is an old trick I learned a long time ago. While you are at it, try the closet and shower too. If there is cheap wood paneling separating you from the unknown — be persistent. If curiosity killed the cat, that cat would have died anyway.

4. Avoid hotels that rent rooms by the hour.

5. Stick to Marriott, Hyatt, and Holiday Inn. It’s more than the points. It’s peace of mind.


7. Larger red flag: Note left on the night stand — “I want out!”

8. Mattresses that sag horribly in the middle, surrounded by wood paneling.

9. Hotels across the street from the funeral home.

10. Hotels across the street from police station.

If you follow these simple rules, the odds of sleeping with a dead guy are greatly diminished.

Someday you may thank me.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for April through June 2008. Your commitment and invaluable contribution is truly appreciated.

Brooke Aziere, Foulston Siefkin LLP, Wichita
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Hon. Edward E. Bouker, Ellis County District Court, Hays
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J. Randall Coffey, Fisher & Phillips LLP, Kansas City, Mo.
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Robert Metcalf, Marks, Nelson, Volhland, Campbell & Radetic LLC, Overland Park
Debra L. Miller, Office of Chapter 13 Trustee, South Bend, Ind.
Matthew C. Miller, Shook, Hardy & Bacon LLP, Kansas City, Mo.

(Continued on next page)
Deadline to Submit 2009 IOLTA Grant Applications is Dec. 1

The Kansas Bar Foundation (KBF) is soliciting grant applications for the 2009 Interest on Lawyers’ Trust Accounts (IOLTA) grant cycle that runs from April 1, 2009, through March 31, 2010. The deadline to submit applications is Dec. 1, 2008. The KBF Board of Trustees will make a decision on the applications in February 2009.

The Kansas IOLTA program, approved by the Kansas Supreme Court in 1984, is supported by more than 3,450 lawyers across the state. The program collects interest from trust accounts in which funds are nominal in amount or are expected to be held for a short period of time. IOLTA grants are primarily aimed at funding programs that provide civil legal services for low-income people, law-related charitable public service projects, and improvements to the administration of justice, with the largest share going to provide direct legal services for victims of domestic violence.

Grant applications are reviewed by the KBF’s IOLTA Committee, which is comprised of appointees from the KBF, the Kansas Bar Association, the Kansas Supreme Court, the Kansas Association for Justice, the Kansas Association of Defense Counsel, and the governor’s office. The committee forwards its recommendations to the KBF Board of Trustees for final approval.

In order to qualify for IOLTA funds, an organization must:

• be a 501(c)(3) or 501(c)(6) if a local bar association,
• use the funds for a specific charitable purpose,
• agree to an audit or a review of expenses,
• provide quarterly and year-end reports as necessary, and
• demonstrate fiscal responsibility and the ability to provide quality services.

For more information or to request an IOLTA grant application for 2009, contact Meg Wickham, manager of public services, at (785) 234-5696 or at mwickham@ksbar.org or visit www.ksbar.org/public/kbf/iolta.shtml. •

2008 Outstanding Speakers Recognition continued

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CHANGING POSITIONS
Andrew L. Bolton has joined Petefish, Im- mel Heeb & Hird LLP, Lawrence.
Amy Fellows Cline has been named a member of Triplett, Woolf & Garretson, Wichita.
Tonna K. Farrar has joined Bonnett Fairbourn Friedman & Balint P.C., San Diego.
Laura D. Fent has joined Hinkle Elkouri Law Firm LLC, Wichita.
Jodi J. Fox has joined McAnany, Van Cleave & Philipps, Kansas City, Kan., as an associate in the Workers’ Compensation Defense Practice Group.
Jodi M. Hoss and Adam T. Pankratz have joined Sonnenschein Nath & Rosenthal LLP, Kansas City, Mo.
Mark A. Lippelmann has joined Martin, Pringle, Oliver, Wallace & Bauer, Wichita, as a summer clerk.
Gregory F. Mischlich has joined Swiss Reinsurance Co., Overland Park.
Dana L. Parks has joined Norton Hubbard, Ruzicka, Kreamer & Kincaid L.C., Olathe.
Laine C. Rundus has joined the Law Office of Steven W. Graber P.A., Manhattan.
Jon P. Whitton has joined Henson, Clark, Hutton, Mudrick & Gragson LLP, Topeka, as an associate.

CHANGING LOCATIONS
The Law Office of David R. Alig has moved to 11115 Ash St., Leawood, KS 66211.
Matthew L. Hood has started his own firm, Matthew L. Hood LLC, 4505 Madison, Kansas City, MO 64111.
Kendall M. McVay has started her own firm, McVay Law Office LLC, 3615 S.W. 29th St., Topeka, KS 66614.

MISCELLANEOUS
W. Robert Alderson, Topeka, received the Lifetime Achievement Award from the Transportation Lawyers Association.
Michael F. Delaney, Overland Park, has been elected a fellow by the College of Labor and Employment Lawyers.
Professors Myrl L. Duncan and William G. Merkel, Topeka, have been admitted to the bar of the U.S. Supreme Court.
The law firms Erickson & Kleypas L.C., Kansas City, Mo., and Chase Law Firm L.C., Overland Park, have merged to form Erickson, Kernell, Derusseau & Kleypas LLC.

Randall D. Grisell, Garden City, was elected president of the Kansas School Attorneys Association.
Craig C. Reaves, Kansas City, Mo., was elected president of the National Academy of Elder Law Attorneys.
David J. Rebein, Dodge City, has been elected to the Kansas Humanities Council board of directors.
Hon. Deanell R. Tacha, Lawrence, has been selected as the recipient of the Edward J. Devitt Distinguished Service to Justice Award from the American Judicature Society.
Willard B. Thompson, Wichita, received the Lifetime Achievement Award at the Wichita Bar Association Awards and Installation Dinner.
The Wichita Bar Association officers for 2008-2009 are: Michael D. Herd, president; J. Michael Kennalley, president-elect; Kari S. Schmidt, vice president; and Joni J. Franklin, secretary-treasurer.

Correction: Calvin D. Rider has joined Fleeson, Gooing, Coulson & Kitch LLC, Wichita, as of counsel. In the July/August issue it was erroneously reported that he had joined Brown Dengler Bood & Rider L.C.

Editor’s note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.

Dan’s Cartoon by Dan Rosandich

“Objection sustained – witness will refrain from prefixing his answers with ‘would you believe!’”

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
SEPTEMBER 2008 – 11
The Value of Internships: Law in the “Real World”

By Karen Collier, University of Kansas School of Law

“You cannot acquire experience by making experiments. You cannot create experience. You must undergo it.”

— Albert Camus

I suspect I have little in common with Albert Camus, but I wholeheartedly agree with this quote. I’m a big fan of internships and have been ever since I was in undergraduate school. Back then, my main purpose for interning during summer breaks was to beef up a resume devoid of any substantial work experience (I correctly assumed babysitting and selling frozen yogurt wouldn’t impress future employers). However, I quickly learned that internships served a more valuable purpose: The experience I gained helped me discover what I liked about a certain career path, as well as — and perhaps more importantly — what I disliked.

Realizing how useful internships could be for taking a “real world” peek into a career, I continued interning while in graduate school. However, participating in an internship had never been as meaningful or beneficial as when I started interning while in law school. As a wide-eyed law student with no prior legal experience, I often lost sight of the proverbial forest for the trees my first year, becoming wrapped up in the details of my classes with no idea of how everything I was learning actually worked in the legal world outside Green Hall. Fortunately, that is where internships come in, and everything one learns in the classroom begins to take meaningful shape in the context of real cases.

Through two summer internships and a fall/spring clinic, I have been fortunate enough to work with three different public service agencies. Through these opportunities, I’ve prepared power of attorney documents, drafted an appellate brief, and overseen will signings — everyday legal duties I was relatively prepared for thanks to my classes at KU Law. However, as thorough as my classes were and as knowledgeable as all my professors have been, there are certain realities of life as a lawyer for which no amount of formal education could have prepared me, and where the experience Camus refers to fills in the gaps:

Reality No. 1: Good people skills are more important than you think. Through my internships, I have interacted with clients, defense attorneys, witnesses, victims, judges, law enforcement officers, and legal staff (not to mention my supervising attorneys, of course). Regardless of whom my audience has been, I have learned that good people skills are more than preferred — they are crucial. Whether I’ve needed to clarify what a witness saw during a theft or explain to an elderly client why his Social Security is exempt from creditors, I have learned that the manner in which I communicate has a direct effect on how well (or poorly) I accomplish the task at hand. A respectful, compassionate, and open-minded approach works with everyone, regardless of who they are. Oh, and as one judge I spoke with — they are crucial.

Reality No. 2: The attorney on the other side of the issue is not necessarily the bad guy. In law school, we learn that the trial setting is an adversarial one, which of course is true. However, I never appreciated the professional camaraderie that exists among lawyers — particularly prosecutors and defense attorneys — until I started interning. Even though it is my responsibility to advocate for my client, I can do so while congenially working out a mutually beneficial agreement with the other party’s attorne

Reality No. 3: Crime scenes are nothing like they appear in the movies or on television. As an intern with a district attorney’s office, I visited the scene of a homicide. While the other interns and I appreciated the opportunity to see a real crime scene, nothing could have prepared us for the brutal nature of what had occurred. For a law student contemplating a career in criminal law, this type of experience is invaluable — and a wake-up call. Far from being glamorous, I learned that crime scenes are intense environments where a variety of professionals are focused on a very important task at hand. The harsh reality is that someone lost their life, and separating the emotions involved from the objective task of analyzing the evidence is clearly a skill hard learned.

Reality No. 4: Acronyms abound. JE, BFAW, PV, LOP, MTRB, etc. ... the list goes on. Like most professions, the legal world has its own set of acronyms, and I’ve learned that even though it can be aggravating, I just have to keep asking, “Now, what does BFAW stand for?” until I get it straight. Every attorney I’ve worked with has been happy to answer my self-proclaimed “dumb questions,” which we all know don’t exist unless we’re the person asking them.

Reality No. 5: Nothing is as nerve-wracking as being “on the record.” Hearing the clickity-click of the court reporter’s typing during my first preliminary hearing is a sound I’ll never forget. It was thrilling ... and the stuff of nightmares.

Each of these realities has to be learned “on the job,” and law students are lucky there are many opportunities to gain these experiences. Now that I think about it, Camus said we have to “undergo” experience, and I can’t help but make a correlation to “undergoing” surgery. Sure, the experience gained during an internship may at times be as stressful or unpleasant as a root canal or an appendectomy, but in the end, like surgery, it’s the only way to get better.

About the Author

Karen Collier, Wichita, received her Bachelor of Arts in telecommunications and environmental studies from Baylor University and her master’s in communication from Wichita State University. She is currently a third-year student at the University of Kansas School of Law, where she is an articles editor for The Kansas Journal of Law & Public Policy. During her second year, she interned at Kansas Legal Services, Topeka, and she spent her summers interning for the City of Wichita Department of Law and the Sedgwick County District Attorney’s Office.
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Recent Kansas Case Emphasizes Importance of Strict Compliance with Mechanic’s Lien Statutes; Failure to Verify Lien Claimant’s Address Renders Lien Invalid

By Brett C. Randol, Polsinelli Shalton Flanigan Suelthaus P.C., Overland Park

Kansas courts have long required strict compliance with the mechanic’s lien statutes in order to perfect a mechanic’s lien. A recent Kansas Court of Appeals decision demonstrates how failure to adhere to even the smallest requirement can render a mechanic’s lien invalid. Buchanan v. Overley, 2008 WL 612255 (Kan. App.).

Kansas statutes require a mechanic’s lien statement to contain certain information, including the name of the owner, a description of the property, an itemized statement and amount of the claim, and the name and address of the claimant sufficient for service of process. The mechanic’s lien statement must not only contain the requisite information but also be fully verified. K.S.A. 60-1102.

In Buchanan, the court held a mechanic’s lien invalid because the contractor did not properly state or verify his address on the lien statement. The contractor used a preprinted lien form, which did not include the contractor’s address. However, the address was included at least 21 times on bills and invoices that were attached to the lien statement. Notwithstanding, the court held that strict compliance with the lien statute required the address to be set forth on the lien statement and verified, which it was not.

About the Author

Brett C. Randol is an associate with Polsinelli Shalton Flanigan Suelthaus P.C., Overland Park. Randol concentrates his practice in the areas of commercial and business litigation, with particular emphasis on real estate contract and commercial landlord tenant disputes, construction, and business torts. He represents clients in the state and federal courts of Kansas and Missouri. He is a graduate of Central Missouri State University and the University of Missouri-Kansas City School of Law.

Threading the Chain

By Christopher F. Burger, Stevens & Brand LLP, Lawrence

Under common practice and the specter of the economic loss doctrine, tracing the chain of contractual privity remains essential in bringing and defending claims among owners, contractors, subcontractors, and suppliers. Regrettably, it is a necessary evil to join every party in the chain, even if the dispute is between only the links at the ends. So what do we do to try simplifying and streamlining a claim between the outer links on the chain? A liquidating agreement is a good solution.

Kansas has recognized the effectiveness of using liquidating agreements to pass-through claims in Roof-Techs International Inc. v State of Kansas, 30 Kan. App. 2d 1184, 57 P.3d 538 (2002). The principle is summarized as:

‘Pass-through claims’ are claims by an allegedly damaged party against an allegedly responsible party with whom it has no contractual relationship. These claims are presented by or through an intervening party in privity with both. The most common example of a pass-through claim is a claim by a subcontractor arising out of the actions of the owner that is passed through to the owner by the prime contractor.

A “liquidation agreement” is a form of a settlement agreement in which a dispute between two parties with contractual privity is liquidated (settled) on terms delineating the rights, responsibilities, and procedures for presenting a pass-through claim to a third party and allocating the costs expended and benefits received when doing so. It is an attempt by the parties to avoid an extra layer of litigation (i.e., litigation between themselves) with its attendant costs and risks by focusing on the party responsible. Id. at 1201.

The real magic in the agreements is the ability for the intermediary parties not only to be able to stay uninvolved, but also to expressly limit their exposure to only the amounts recovered from the litigating parties. The intermediary can avoid having to write a check to the damaged party and stay out of cumbersome, expensive, and complicated litigation.

About the Author

Christopher F. Burger is a partner with Stevens & Brand LLP, Lawrence. Specializing in construction law, Burger provides legal counsel to designers, contractors, and owners in matters of dispute prevention and resolution; drafts and negotiates contracts; and teaches the construction law and litigation class at the University of Kansas School of Law. He is a graduate of the University of Kansas, where he received both his bachelor’s degree, 1991, and juris doctorate, 1993.

Editor’s note: These articles first appeared in the summer 2008 edition of Nuts & Bolts, the Construction Law Section newsletter. If you are interested in joining this or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
Law Practice Management Tips & Tricks

LOST? Get Space-Age Help

By Larry N. Zimmerman, Valentine & Zimmerman P.A., Topeka

How to Get There from Here

Paralegals I know always laugh about tales of newly minted attorneys full of the law but unable to find the courthouse. I have tried to keep the tradition alive by getting lost several times on my way to remote county courthouses. I was waylaid once by a wrecked trailer and a poorly designated detour. Once was because of a flagrant misuse of the words “roadside attraction” when “far end of a farmer’s field in the middle of no-stinkin’-where” would not fit on the sign.

I can now report that I have been quite capable of finding the courthouse for a number of years now. A mixture of low-tech and high-tech tools has made the joke about my being lost on my way to the courthouse metaphorical rather than literal.

The Courthouse Dossier

At some point, one of the paralegals in our office put together a set of file folders for every single courthouse in Kansas. Glued inside the file folder was a map section of the area surrounding the courthouse and driving directions. The phone numbers of the court clerk and judges were also attached as were helpful notes gleaned from clerks, judges, and colleagues. While that worked, it was far from sexy. I wanted space-age help.

The Global Positioning System

When it comes to actually locating the courthouse in a literal sense, nothing beats a great GPS receiver grabbing radio signals from satellites hurtling through space at 12,000 miles per hour. The sleek little GPS receiver throws some heavy math at the incoming satellite signals to triangulate your position in space and time. The data from those satellites are combined with some of the most detailed maps ever made available to the civilian market.

Maps

The value of a GPS receiver for automotive use depends on good maps. Right now, there are two primary map providers for consumer GPS units — NAVTEQ and TeleAtlas. NAVTEQ supplies Garmin and Magellan (as well as Google Maps and MapQuest). TeleAtlas is making its foray into the U.S. market via TomTom’s GPS receivers. The online debates between the two seem to show a slight edge to NAVTEQ for accuracy. I guarantee there will be moments of frustration with either as inaccuracy is a grand tradition among mapmakers.

Route calculation allows you to type in an address or call up a point of interest and the GPS unit will generate a route and then prompt you with spoken driving instructions. Routes calculated by TeleAtlas-equipped units (TomTom) appear to have slight edge in being more direct. One of the first distinguishing features as you creep up from the basic $130 models is whether those instructions are provided as a distance (“Turn right in 500 feet”) or text-to-speech (“Turn right on Main”). Some of the latest and most expensive models allow you to speak instructions to the GPS receiver instead of typing on the touch screen.

Extras

Nice but not necessary are the real-time data services available. Many units work with a subscription service to provide real-time hotel prices, gas prices, and traffic data. Some models integrate with your cell phone (via Bluetooth) to allow you to dial the hotel with the lowest price and make your reservation. That has been a handy feature on long trips where I overestimated my stamina behind the wheel.

Choosing

The most frustrating issue with GPS units is choosing one. GPS makers offer extensive product lines with baffling combinations of features. There are more than 60 models offered just among Garmin, Magellan, and TomTom. Each of their Web sites has comparison tools that allow you to distinguish between the models and get a feel for the actual dollar cost of each added feature.

I eventually traded out a model with subscription data for traffic and hotel/gas prices. Those functions do not show much value in the hinterlands of Kansas. I also traded out the text-to-speech features as they often confused more than they helped. I ended up with the most basic Garmin Nuvi 200. It gets me to court on time and people in my office prone to mocking my directional challenges have even found themselves using it.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Collection Attorneys Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
A NEW GUIDING PRINCIPLE:
The Kansas Supreme Court’s
Trend TO Review
AND
Kansas Supreme Court Decisions
RECONSIDER
LEGAL PRECEDENT

by Ryan Farley
&
Nicole Romine
I. Introduction

The foundation of our legal system depends, in part, on the jurisdiction’s highest court to enforce precedent. A supreme court’s enforcement of precedent establishes controlling law for lower courts and provides consistency in the law. However, no court blindly adheres to past case law. Although stare decisis is the “preferred course” in constitutional adjudication, “when governing decisions are unworkable or are badly reasoned,” the U.S. Supreme Court has never felt constrained to follow precedent.

Like the U.S. Supreme Court, the Kansas Supreme Court has been willing to examine precedent and overturn existing case law. While the Court does not reverse cases with reckless abandon, its recent willingness to review existing law provides litigants with valuable opportunities to challenge controversial or questionable case law. However, as this article attempts to demonstrate through several case summaries, the Court is only willing to break with tradition when the foundations of precedent indicate poor construction, analytical errors, or when the existing rule is confusing and unworkable.

This article will specifically summarize the Court’s recent changes in the following areas of law: double jeopardy, jury instructions, Fourth Amendment, evidence, and workers’ compensation.

II. Double Jeopardy and Multiplicity

In State v. Schoonover, the Court provided a new framework for analyzing double jeopardy issues when a defendant alleges that his or her convictions were multiplicitous. This new framework consists of two parts. A court must consider whether the convictions are based upon the same conduct. If not, the multiplicity analysis ends. If the convictions are based on the same conduct, the court must then consider whether the convictions are based upon a single statute or multiple statutes. If the convictions are based upon different statutes, the convictions are multiplicitous only when the statutes upon which the convictions are based contain identical elements. In adopting this new framework, the Court disposed of the single act of violence/merger doctrine that it had previously outlined.

In Schoonover, the defendant was convicted of numerous drug offenses. On appeal, the defendant argued that many of his drug offenses were multiplicitous, violating the federal and state constitutions’ protections against double jeopardy.

In addressing the defendant’s multiplicity claim, the Schoonover Court summarized the federal analysis of the Fifth Amendment’s Double Jeopardy Clause of the U.S. Constitution, explaining that the case before it raised the issue of whether the defendant was punished multiple times for the same offense:

Multiplicity is the charging of a single offense in several counts of a complaint or information. The reason multiplicity must be considered is that it creates the potential for multiple punishments for a single offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the [U.S.] Constitution and section 10 of the Kansas Constitution Bill of Rights. [citation omitted.]

In Schoonover, the Court first recognized that its decisions in State v. Patten and State v. Groves confused lower courts in the proper application of its double jeopardy and multiplicity analyses. In Patten, the Court applied the same-elements test, which required a court to strictly look at the elements of the multiplicitious crimes. However, did not address whether the “single act of violence/merger doctrine” the Court had previously used to analyze multiplicity issues was still good law. Under the single act of violence/merger doctrine, a defendant could not be convicted of multiple crimes that arose from a single wrongful act. In Groves, the Court applied the single act of violence/merger doctrine to determine that the defendant’s convictions for aggravated robbery and aggravated battery were multiplicitous because they arose from one single act of violence. After considering Patten and Groves, the Schoonover Court recognized that the single act of violence/merger test provided broader protection than the same-elements test. The Court then examined early common law and prior case law to determine whether there was a constitutional basis for this broader protection.

FOOTNOTES

1. See United States v. Dixon, 509 U.S. 688, 704-12, 113 S. Ct. 2849, 125 L. Ed. 556, (1993). In Dixon, the U.S. Supreme Court acknowledged that Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548, was wrongly decided. In overruling Grady, the Court stated “[w]e do not lightly reconsider a precedent, but, because Grady contradicted an ‘unbroken line of decisions,’ contained ‘less than accurate’ historical analysis, and has produced confusion, we do so here.” [Citation omitted] Dixon, 509 U.S. at 711.


5. Id. at 496-97.

6. Id. at 497-98.

7. Id.

8. Id. at 495.

9. Id. at 461.

10. Id. at 462.

11. Id. at 463-73.

12. Id. at 475.


15. Schoonover, 281 Kan. at 475-78.


17. Schoonover, 281 Kan. at 475-76.

18. See id. at 478-92.

19. Id. at 476.

20. Id. at 478-95.
After its lengthy examination, the Court held that the single act of violence/merger doctrine would no longer be applied in Kansas to analyze multiplicity issues. The Court specifically disapproved of "any language in previous cases, which utilized a single act of violence/merger rationale as the basis for holding that two convictions, which were based upon different statutes were multiplicitous...." The Court justified its dramatic change by explaining that the single act of violence/merger doctrine was a corruption of prior case law that had not been consistently applied.

The Schoonover Court then clearly explained its new position on multiplicity law:

When a defendant is convicted of violations of multiple statutes arising from the same course of conduct, the test to determine whether the convictions violate § 10 of the Kansas Constitution Bill of Rights is the same-elements test: Whether each offense requires proof of an element not necessary to prove the other offense. If so, the charges stemming from a single act are not multiplicitous and do not constitute a double jeopardy violation.

To determine whether two convictions are multiplicitous and thus violate double jeopardy, the Schoonover Court noted that "the overarching inquiry is whether the convictions are for the same offense." Specifically, the Court instructed that "[t]here are two components to this inquiry, both of which must be met for there to be a double jeopardy violation: (1) Do the convictions arise from the same conduct? and (2) By statutory definition, are there two offenses or only one?"

The Court further clarified the law by listing four nonexclusive factors to be considered under the first inquiry when determining whether convictions arise out of the same conduct. These factors include (1) whether the acts occurred at or near the same time, (2) whether the acts occurred at the same location, (3) whether there was a casual relationship between the acts, and (4) whether there was a fresh impulse that motivated the later criminal conduct.

The Court also explained that under the second inquiry, courts must determine whether the convictions arise from a single statute or from multiple statutes. If the double jeopardy issue arises from convictions for multiple violations of a single statute, the Court stated that the unit of prosecution test must be applied. Under the unit of prosecution test, the inquiry is whether the Legislature intended to allow more than one unit of prosecution for the same offense. If the double jeopardy issue arises from multiple convictions of different statutes, then the same-elements test must be applied. The Schoonover Court then applied the newly clarified double jeopardy frame-work to determine that the defendant’s convictions were not multiplicitous.

In Schoonover, the Court dramatically clarified Kansas court’s analysis of multiplicity issues under the double jeopardy clause. As evidenced by the Court’s lengthy analysis and summary of prior precedent, it had a strong desire to not only simplify the law regarding multiplicity issues but also to ensure that such case law was consistently applied. The Court’s desire for clarification and consistency in the law is a theme that occurred in many of the Court’s subsequent cases in which it dramatically departed from precedent.

III. Jury Instructions and Unanimity

The Court has not simply set out to rectify inadvertent mistakes but has also been willing to discard unwieldy or confusing legal standards when it becomes apparent that the standard is no longer workable. For example, in State v. Voyles, the Court abandoned its prior framework for addressing allegations that a defendant’s right to a unanimous verdict had been violated in a multiple acts case.

In Voyles, the defendant was convicted of four counts each of aggravated criminal sodomy and aggravated indecent solicitation of a child over the course of three months. The victims were the defendant’s 9-year-old daughter and 10-year-old stepdaughter. The girls testified to approximately five different occasions when the defendant ordered them to perform oral sex on him, which resulted in 20 possible criminal acts. Although a large number of criminal acts potentially occurred over a long period of time, the state charged the defendant with less than half of the acts. This factual situation led to the defendant’s argument that it was possible that he was convicted by less than a unanimous verdict.

The defendant claimed the state presented the jury with multiple criminal acts upon which the jury could have relied on in convicting him. He argued that his constitutional right to a unanimous verdict was violated when "the jury was not told to unanimously agree upon the specific act, which constituted each count." Kansas law requires either that the state elect which act it is relying on to support the charge or that the district court instruct the jury that it must unanimously agree which act supports a guilty verdict.

The Court concluded that the defendant’s case presented a multiple acts case in which an error was committed. To resolve the defendant’s case, the Court then analyzed its decision in State v. Hill to determine whether the error was reversible or harmless. In Hill, the Court rejected a structural error approach in favor of a two-step harmless error test to determine whether a unanimity instruction should have been given where the state failed to elect which of the multiple

21. Id. at 495.
22. Id. at 495.
23. Id. at 493-96.
24. Id. at 453, Syl. ¶ 12.
25. Id. at 496.
26. Id.
27. Id. at 496-97.
28. Id. at 497-98.
29. Id. at 498-505.
31. Id. at 252.
32. Id. at 240-43.
33. Id. at 243-44.
34. Id. at 241-44.
35. Id. at 244.
38. Voyles, 284 Kan. at 245.
acts it was relying on to support the convictions. Under the first step outlined in Hill, the Court had to decide whether there was a possibility of jury confusion from the record or if evidence showed either legally or factually separate incidents. If the first step was shown, then the second step required the Court to determine if the error was harmless beyond a reasonable doubt with respect to all acts.

The Court reviewed Hill’s harmless error formula and determined that lower courts struggled to follow the formula. Instead of analyzing both steps, courts had taken an analytical shortcut by simply determining if the alleged error was harmless. If the error was harmless, then courts ended their analysis. If, on the other hand, courts determined the error was not harmless they would return to step one of the analysis. The Court concluded that Hill’s harmless error formula was confusing and unwieldy, had been heavily criticized, and created an analytical framework with an imbedded shortcut. Recognizing the legitimate criticism that Hill’s “harmless error beyond a reasonable doubt” formula had received, the Court abandoned the formula and replaced it with a three-step process culminating in the application of the “clearly erroneous” standard articulated in K.S.A. 2007 Supp. 22-3414(3).

The Court then applied the clearly erroneous standard to the defendant’s case and reversed his convictions finding that “there [was] a real possibility the jury would have returned a different verdict if the unanimity instruction had been given.”

IV. The Fourth Amendment and the Return of the Good-Faith Exception

The Court’s commitment to clarifying the law, even in the face of overturning legal precedent, was again demonstrated when it decided to review a prior decision that caused Kansas to deviate from the U.S. Supreme Court’s constitutional interpretation of the Fourth Amendment. In State v. Hoeck, the Court found that it had incorrectly construed the holding in United States v. Leon by applying a test that restricted the good-faith exception to the Fourth Amendment exclusionary rule.

In Hoeck, the defendant moved to suppress evidence that was seized from his residence pursuant to a search warrant. The district court granted the motion to suppress, finding that the good-faith exception to the exclusionary rule did not apply. The state filed an interlocutory appeal, and the Court of Appeals affirmed. On appeal to the Court, the parties framed the issue as whether the affidavit in support of the warrant established a nexus between the crimes and the defendant’s residence sufficient to authorize a search of the residence for evidence relating to the crimes.

The Hoeck Court first acknowledged that the U.S. Supreme Court’s decision in Leon applied in Kansas. The Leon Court held that “the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution’s case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause.”

Under Leon, a reviewing court should give great deference to a magistrate’s probable cause determination when determining the validity of the warrant. The Hoeck Court recognized that pursuant to Leon there are three situations when a reviewing court should not defer to a magistrate judge’s probable cause determination: (1) where the probable cause determination was based on knowing or reckless false information, (2) where the magistrate judge was not neutral and detached, and (3) where the warrant was based on an affidavit that did not provide the magistrate judge with a substantial basis for determining that probable cause existed.

The Hoeck Court further recognized Leon’s holding that the exclusionary rule should not be applied in cases in which an officer reasonably relied on an invalid warrant that was obtained with objective good-faith from a neutral and detached magistrate. In Leon, the U.S. Supreme Court identified four circumstances where an officer’s reliance would not be objectively reasonable and the exclusionary rule should be applied: (1) where the magistrate was deliberately misled with false information, (2) where the magistrate was not detached or neutral, (3) where it was unreasonable for the officer to believe that the warrant was valid because the affidavit did not contain enough information for the magistrate to make a probable cause determination, and (4) where the warrant lacked specificity to a point that the officer could not determine the place to be searched or the items to be seized.

Prior to Hoeck, the Court had incorrectly construed Leon in at least three cases. In these cases, the Court had examined whether there was a substantial basis for the magistrate’s probable cause determination to determine both whether the warrant was valid and whether the good-faith exception applied.

For instance, the Court considered Leon for the first time in State v. Doile, in which the Court did not apply the good-faith exception even though it determined that none of the four exceptions enumerated in Leon were present. Instead, the Doile Court found that it could not apply the good-faith exception because the magistrate did not have a substantial basis for making a probable cause determination.

41. Id. at 253-55.
42. Id. at 253-56.
45. Hoeck, 284 Kan. at 442.
46. Id. at 446.
47. Id. at 446-47.
48. Id. at 442.
49. Id. at 448 (quoting Leon, 468 U.S. at 900).
50. Id. at 449-50 (citing Leon, 468 U.S. at 914).
51. Id. at 450 (citing Leon, 468 U.S. at 914).
52. Id. at 450-51 (citing Leon, 468 U.S. at 918-22).
53. Id. at 451-52 (citing Leon, 468 U.S. at 922-23).
54. Id. at 455-62.
56. Id. at 502.
57. Id.
However, as noted by the Court in *Hoeck*, whether the magistrate had a substantial basis for determining the existence of probable cause should only be considered when reviewing a court determines whether a search warrant was valid. Under *Leon*, this “substantial basis” language is not relevant in determining whether the good-faith exception is applicable. In *Hoeck*, the Court concluded that the *Doile* Court had properly applied the language in the wrong context.58

The *Hoeck* Court then acknowledged that it had also incorrectly applied *Leon’s* good-faith exception in *State v. Ratzlaff*.59 When stating the issue on appeal, the *Ratzlaff* Court stated that “[t]he question here [was] whether [the affiant detective], as a well-trained police officer, reasonably should have known that his affidavit failed to establish probable cause.” 60 The *Hoeck* Court found that although the *Ratzlaff* Court did not include the troublesome language from *Doile*, it improperly stated the issue on appeal. Instead, the *Hoeck* Court found that the true issue in *Ratzlaff* was “whether there [was] so little indicia of probable cause in the affidavit that reliance on it was objectively unreasonable.”61

After *Ratzlaff*, the Court misconstrued *Leon’s* holding again in *State v. Longbine*,62 in which it again cited the substantial basis language to determine whether the good-faith exception applied.63 The *Longbine* Court held that the good-faith exception did not apply to a warrant that failed to provide a magistrate with a substantial basis for making a probable cause determination.64 The *Hoeck* Court found that, like the *Doile* Court, the *Longbine* Court confused the initial determination of whether a warrant was valid with the secondary determination of whether the good-faith exception applied.65

After reviewing these decisions, the *Hoeck* Court specifically rejected its prior holdings in which it had held that the substantial basis test may be applied in determining both whether the warrant is valid and whether the good-faith exception applies. The Court disapproved of any language it had used in *Longbine*, *Ratzlaff*, and *Doile*, finding that these decisions had misconstrued and unintentionally nullified *Leon*.66

The Court then refused to intentionally depart from *Leon* on state law grounds, concluding that the “[t]he *Leon* good-faith exception applies when an affidavit does not supply a substantial basis for the determination of probable cause but does provide some indicia of probable cause sufficient to render official reliance reasonable.”67 The Court ultimately determined that the good-faith exception to the exclusionary rule applied to the facts of the case before it and reversed the district court’s decision to grant the defendant’s motion to suppress.68

*Hoeck* is a startling example of the Court’s new willingness to review legal precedent and reverse such precedent if it is confusing or unsound. Not only did the Court reverse a long-standing and oft-repeated Fourth Amendment legal standard, but it also provided courts with a new clarified standard that can be more easily applied and understood.

V. Evidence and the Death of Res Gestae

One of the most notable departures from precedent was the Court’s restructuring of the admission of prior bad acts evidence under K.S.A. 60-455.69 In *State v. Gunby,*70 the Court analyzed in detail the historical background of the rule of evidence permitting the admission of prior bad acts.71 In *Gunby*, the defendant was convicted of the first-degree murder of an acquaintance.72 At trial, the defendant claimed that he had accidentally killed his acquaintance while they engaged in rough sex.73 Over the defendant’s objection that the evidence was unduly prejudicial, the district court admitted evidence of previous violent incidents between the defendant and the victim as evidence of their prior discordant relationship.74 Additionally, the district court did not provide a limiting instruction.75

On appeal, the defendant argued that the testimony of prior bad acts was inadmissible under K.S.A. 60-455, and that if it was admissible, the district court had failed to give a limiting instruction,

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61. Id. at 459.
66. Id. at 461-62.
67. Id. at 464-65.
68. Id. at 464-65.
69. K.S.A. 60-447 provides as follows: “Subject to K.S.A. 60-447 evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-445 and 60-448, such evidence is admissible when relevant to prove some other material fact, including motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”
71. Id. at 48-63.
72. Id. at 81.
73. Id. at 49.
74. Id. at 44-45.
75. Id. at 47.
which constituted reversible error.\textsuperscript{76} The defendant also urged the Court to re-evaluate res gestae and prior case law interpreting the admission of K.S.A. 60-455 evidence.\textsuperscript{77} The Court accepted the defendant’s request and completely revamped the admission of prior bad acts evidence.\textsuperscript{78}

Before Gunby, a district court could admit prior bad acts evidence in a myriad of ways. First, a district court could admit evidence under K.S.A. 60-455 if it was relevant to prove a material fact listed in the statute.\textsuperscript{79} The listed fact had to be disputed and the district court was required to balance the probative value of the evidence against the undue prejudicial effect.\textsuperscript{80} To avoid reversal, precedent required the district court to instruct the jury that the K.S.A. 60-455 evidence could only be used for the stated purpose and not as evidence that the defendant had a propensity to commit the illegal act.\textsuperscript{81} Moreover, the list in K.S.A. 60-455 had been interpreted to be an exclusive rather than an exemplary list.\textsuperscript{82}

Because of both the limited list of prior bad acts and the harsh rule requiring automatic reversal when the district court failed to give a limiting instruction, other methods of admitting prior bad acts evidence surfaced.\textsuperscript{83} For example, courts had admitted evidence that demonstrated a past discordant marital relationship when a spouse was accused of killing the other under common-law rules of evidence.\textsuperscript{84} The discordant relationship exception to K.S.A. 60-455 was expanded to include evidence of a prior sexual or intimate relationship between the accused and the victim.\textsuperscript{85} District courts had also admitted evidence of prior wrongs to corroborate the testimony of a witness or to demonstrate a continuing course of conduct.\textsuperscript{86} Finally, courts had admitted prior bad acts evidence independent of K.S.A. 60-455 through “res gestae,” a concept that allowed the admission of facts that were closely linked to the charged event.\textsuperscript{87}

After discussing the history of prior bad acts evidence and the exceptions that had swallowed the rule, the Court interpreted K.S.A. 60-455.\textsuperscript{88} In conducting its statutory analysis, the Court emphasized the necessity of applying the basic steps of admission of evidence: (1) determining whether the evidence is relevant, (2) balancing the probative value of the evidence against its prejudicial effect, and (3) applying the statutory or common-law rule of evidence to determine whether it is admissible.\textsuperscript{89} While the Court maintained that the district court should give a limiting instruction, it held that the failure to do so would be analyzed under the harmless error rule rather than resulting in an automatic reversal.\textsuperscript{90} After summarizing the proper method of evaluating prior bad acts evidence, the Court made clear that res gestae was dead and no longer an acceptable analytical tool.\textsuperscript{91}

Explaining its decision to reverse years of precedent on the admission of bad acts evidence, the Court made the following comment:

This enables our return to sensible application of K.S.A. 60-455 and puts an end to the practice of admission of other crimes and civil wrongs evidence independent of it. It recognizes that the list in the statute has always been inclusive rather than exclusive, and that the several ways around application of and safeguards attendant to K.S.A. 60-455 must be abandoned, not only because they lack reliable precedent but because they were never necessary in the first place. Other crimes and civil wrongs evidence that passes the relevance and prejudice tests we have set up and is accompanied by an appropriate limiting instruction should always have been admissible, even if the particular material fact on which it was probative was not explicitly set forth in the statute. It never actually required a specially designed rule to admit it independent of the statute. Rather, such evidence, if permitted to do so, would have fallen squarely within it.\textsuperscript{92}

As demonstrated by this comment, the Court is dedicated to clarifying legal principles that have been muddied by years of confusing cases or by erroneous statutory

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VI. Workers’ Compensation and the Parallel Injury Rule

The Court’s review of precedent has not been limited to criminal or evidentiary issues, but it also extends to long-standing workers’ compensation precedent. For instance, in Casco v. Armour Swift-Eckrich,103 the Court reviewed the statutory basis of the parallel injury rule.

In Casco, the claimant worked for his employer for two years before suffering a repetitive use injury to his left shoulder. After receiving treatment for the injury, the claimant returned to work with restrictions.94 The employer appealed to the Workers’ Compensation Board (Board).95 The Board rejected the ALJ’s conclusions, finding that the parallel injury rule was inapplicable because the claimant suffered injuries to both eyes, hands, feet, arms, legs, or any combination of those members.96

The employer appealed to the Kansas Supreme Court. The court reversed the Board, concluding that the Board’s interpretation of the statute did not follow a key tenet of statutory construction – courts cannot add something to a statute that is not readily found in the language of the statute.” Id. at 525.

The Court concluded that Honn’s parallel injury rule was not only analytically unsound but that it also contravened the Legislature’s intent. The Court went on to acknowledge that in Pruter it had refused to explicitly overrule Honn. The Court, however, demonstrated its new dedication to ensuring that the law is not “short-changed” by explicitly overruling Honn and its unsound precedent.112

VII. Conclusion

In light of these opinions, it appears the Kansas Supreme Court has adopted a new “guiding principle.” Under this guiding principle, precedent should exist to clarify the law, provide sound analytical frameworks, and implement the Legislature’s intent as derived from the plain language of its statutes. Precedent that does not conform to these purposes should be revised in favor of legal opinions that fulfill these goals.113

94. Id. at 510.
95. Id. at 510, 512.
96. Id. at 510-11.
97. Id. at 512.
98. Id.
99. Id. at 512-13.
100. Id. at 513.
101. Id.
103. Casco, 283 Kan. at 527.
106. Id. at 524-25. The Kansas Supreme Court explained that “[t]he Honn Court’s interpretation of the statute did not follow a key tenet of statutory construction – courts cannot add something to a statute that is not readily found in the language of the statute.” Id. at 525.
109. Id.
110. Id. at 526.
111. Id. at 527-28.
112. Id. at 527.
113. This thesis is not unique to the authors. At least one Supreme Court justice has announced this principal in two separate CLEs recently.
The Court’s recent willingness to review precedent may be the result of the large infusion of new members to the Court. Since August 2002, six new justices have been appointed to the Supreme Court.\(^{114}\) Although it is impossible to identify the exact reason or reasons for the Court’s adherence to a new guiding principle regarding legal precedent, it appears that the Court’s new trend of reviewing and reconsidering confusing, unsound, and inconsistent legal precedent is unlikely to change.\(^{115}\) In light of the Court’s trend of reviewing precedent for consistency and clarity, the Court’s adherence to this new guiding principle provides appellate attorneys with a valuable opportunity to challenge precedent that is confusing, unsound, or inconsistent with the Legislature’s intent.

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\(^{114}\) Justice Lawton Nuss was appointed in August 2002, Justice Marla Luckert was appointed in January 2003, Justice Carol Beier was appointed in September 2003, Justice Eric Rosen was appointed in November 2005, and Justice Lee Johnson was appointed in January 2007. Justice Robert Gernon was appointed in January 2003, but passed away in March 2005. It should also be noted that the Supreme Court is facing additional changes with the impending retirement of its two most senior justices.

\(^{115}\) For instance, during the writing of this article, the Kansas Supreme Court reviewed and restructured the standard of review when a district court summarily dismisses a K.S.A. 60-1507 motion. *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007). In *Bellamy*, the Court disapproved of the abuse of discretion standard of review in favor of a de novo review when the district court summarily dismisses the motion based solely on the motion, files, and records in the case without holding an evidentiary hearing. *Id.* In its opinion, the Court recognized that its standard of review in K.S.A. 60-1507 cases had been confusing and inconsistent even up to its recent decision in *Laymon v. State*, 280 Kan. 430, 436-38, 122 P.3d 326 (2005). *Bellamy*, 285 Kan. at 350-54.
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Supreme Court

Attorney Discipline

IN RE MICHAEL C. ALLEN
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION

FACTS: Respondent was admitted in 1992 and engaged in a solo immigration law practice. In February 2006, he abandoned his practice, leaving many clients in the lurch. When he failed to complete his annual registration requirements, he was administratively suspended in October 2006; his license remains suspended.

One client couple filed a disciplinary complaint. At the formal hearing, the panel concluded that respondent accepted the matter and collected advance fees, which he placed in his operating account and converted to his personal use, failed to complete the terms of the representation agreement, and sent letters to his clients advising them that he was closing his office due to health problems and that they would need to seek replacement counsel. In this case, he did refund $1,287 of the advanced fees to his clients.

The hearing panel found violations of KRPCs 1.3 (diligence), 1.4 (communication), 1.15 (safekeeping property), 1.16 (terminating representation), and 3.2 (expediting litigation). The panel further found three aggravating factors and four mitigating factors to be present. The panel approved the disciplinary administrator’s requested sanction that respondent be indefinitely suspended retroactively to the date of administrative suspension and be required to furnish a list of clients who were harmed in the abrupt closure of his practice.

HELD: Respondent filed exceptions to the panel’s subject matter jurisdiction, conclusions of law and recommended sanction. The Supreme Court enumerated instances in the record where respondent’s conduct fell short of required standards and amply supported the conclusions of rules violations, dismissed the jurisdictional challenge, and considered the appropriate level of sanction. The Court noted respondent’s “inability to understand or appreciate the wrongfulness of his actions that led to these proceedings” and ordered disbarment.

IN RE KEVIN C. HARRIS
ORIGINAL PROCEEDING IN DISCIPLINE
TWO-YEAR DEFINITE SUSPENSION
NO. 99,705 – JUNE 27, 2008

FACTS: Respondent was a private practitioner in Johnson County. He was appointed as the guardian of his elderly father in a probate proceeding. After the death of their father, respondent’s sister wrote to the judge to complain about the way respondent had failed to follow orders of the court. Respondent responded to the letter by suing his sister and her attorney civilly for defamation. However, he failed to respond to discovery requests in the matter. The suit was eventually found to be frivolous in nature and was dismissed, and monetary sanctions were imposed against respondent.

A disciplinary complaint proceeded to formal hearing. The panel concluded that respondent violated KRPCs 3.1 (meritorious claims and contentions), 3.2 (expediting litigation), and 3.4 (fairness to opposing party and counsel). Six aggravating factors and two mitigating factors were found, and the panel recommended that respondent’s license be suspended for a period of two years.

HELD: Respondent filed exceptions to the factual findings but not to the conclusions of law. The Supreme Court found clear and convincing evidence to support the panel’s findings and reviewed the factors in mitigation and aggravation. Despite respondent’s challenges to those findings, the Court found the panel’s rationale persuasive and adopted the recommended sanction.
FACTS: Respondent, who is admitted in Kansas but resides in Texas, wrote to the clerk of the appellate courts voluntarily surrendering his license to practice law in Kansas pursuant to SCR 217. At the time he sent the letter, a formal disciplinary hearing had been held and respondent was awaiting the decision of the panel. The formal complaint alleged violations of KRPCs 8.4(c) (misconduct involving deception), 8.4(d) (misconduct prejudicial to the administration of justice), and 8.4(g) (misconduct that adversely reflects on fitness to practice law) based on respondent’s conviction of nine counts of violating a court’s no stalking order and one count of computer trespass.

HELD: The Court examined the Disciplinary Administrator’s files and found that the surrender should be accepted and respondent disbarred.

IN RE CLAY F. HUMMER
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 19,298 – JULY 24, 2008

FACTS: Respondent was admitted in Kansas in 1968 and practiced in Wichita. He was the appointed administrator in a probate case that was opened in 1998. By 2000, all the property had been liquidated and all the debts paid. However, respondent took no action to prepare the final accounting to close the estate and distribute the proceeds to the heirs, who contacted him many times over the next several years. Finally, an heir filed a disciplinary complaint in February 2006. Respondent then obtained a journal entry of final settlement in December 2006.

The hearing panel found violations of KRPCs 8.1(b) (cooperating with the disciplinary investigation), 8.4(d) (misconduct prejudicial to the administration of justice), and 8.4(g) (misconduct reflecting adversely on fitness to practice) and SCRs 207 (cooperation with the disciplinary administrator) and 211(b) (failure to file answer to formal complaint). The panel found seven aggravating and three mitigating factors to be present and recommended suspension for two years.

HELD: Respondent filed exceptions to the findings facts and conclusions of rules violations. However, the Court found clear and convincing evidence to support the panel’s determinations. With regard to the recommended sanction, the Court noted several instances of similar prior disciplinary offenses and imposed indefinite suspension.

IN RE STEPHEN J. JONES
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
NO. 99,884 – JUNE 27, 2008

FACTS: Respondent wrote to the Supreme Court stating that she would not file exceptions to the findings of fact or conclusions of violations but reserved her right to address the Court regarding the disposition.

HELD: The Court affirmed the uncontested findings of the commission and reviewed respondent’s request for informal admonishment. However, the Court noted that respondent’s actions negatively impacted the proper administration of justice in a felony criminal matter over which she presided and concluded that the appropriate discipline is public censure.

IN RE LEROY C. ROSE
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 08,370 – JULY 24, 2008

FACTS: Respondent, a Garden City private practitioner, wrote to clerk of the appellate courts voluntarily surrendering his license to practice law pursuant to SCR 217. At the time of the surrender, there were six cases pending against respondent in the Disciplinary Administrator’s office. The complaints alleged failure to appear in court, allowing default judgments to be taken against his clients, failure to communicate with clients, lack of candor to the tribunal, engaging in conflicts of interest, failure to return unearned retainer fees, and failure to file timely responses in the disciplinary investigations.

HELD: The Court examined the Disciplinary Administrator’s files and found that the surrender should be accepted and respondent disbarred.

COURT OF APPEALS – AFFIRMED
REMANDED WITH DIRECTIONS

FACTS: Roderick Bremby, secretary of the Kansas Department of Health and Environment (KDHE), issued a permit to Waste Connections of Kansas Inc. (Waste Connections) for the construction of a landfill in Harper County. The Board of Commissioners of Sumner County, Tri-County Concerned Citizens Inc. (Tri-County), and Dalton Holland filed a petition for review in district court challenging the issuance of the permit based on damage to the surrounding areas. The district court dismissed their petition for lack of standing based on the permit was directed at Waste Connections, not the appellants. There were no proceedings under the Kansas Administrative Procedure Act where the appellants would have been parties. The Kansas Court of Appeals reversed, concluding that appellants each had standing as a party to the agency proceedings under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA) in Board of Sumner County Comm’rs v. Bremby, 38 Kan. App. 2d 557, 168 P.3d 1034 (2007).

ISSUE: Landfill permits

HELD: Court stated that the Legislature intended the term “proceeding,” as it is used in the KJRA, to be read broadly to refer to the process by which an agency carries out its statutory duties. Under this broad reading, the permit process that the KDHE undertakes when considering whether to grant a landfill permit is a proceeding within the meaning of the KJRA. Court also stated that the landfill permit process allows the submission of any interested persons’ comments during a public notice and comment period and all persons’ comments made in a public hearing held by an agency, and both of these activities qualify as participation within the meaning of the KJRA’s standing requirements. Court concluded that an association has standing to sue on behalf of its members when (1) the members have standing to sue individually, (2) the interests the association seeks to protect are germane to the organization’s purpose, and (3) neither the claim asserted nor the relief requested require participa-
tion of individual members. Court held that because the appellant's participated in the landfill permit process by offering written and oral comments, they have standing to challenge the KDHE's issuance of the permit. Court also held that all the appellants met the requirements for traditional standing.

STATUTES: K.S.A. 19-101; and K.S.A. 77-415, -501, -601, -602(f), -611, -612, -615

PROMISSORY NOTE AND ACCELERATION CLAUSE FOUNDATION PROPERTY INVESTMENTS LLC V. CTP LLC

FACTS: CTP purchased a truck stop in South Hutchinson and borrowed $96,000 from Foundation for the purchase. In April 2004, Foundation obtained a promissory note from CTP containing an acceleration clause upon default of any payment. CTP entered into a contract to have Foundation Properties Corp. (FPC), a company closely related to Foundation, manage the truck stop. Eventually, CTP was late in making payments. CTP later took back management duties from FPC in April 2005. In July 2005, Foundation's counsel informed CTP that a default existed in the payment of interest and principal due July 1 and demanded full payment under the acceleration clause. CTP responded that the parties had established a course of dealing permitting payments to be made after the first day of the month. Foundation sued CTP. The district court granted summary judgment to Foundation finding that the repeated acceptance of late payments did not constitute a waiver of the option to accelerate and that Foundation was entitled to payment of the loan's full principal, accrued interest, attorney fees, and costs, for a total amount of $110,975.58. The Court of Appeals reversed, holding that Foundation waived its acceleration rights, particularly in the absence of an anti-waiver clause and remanded with instructions to the district court to enter judgment in favor of CTP, i.e., reinstatement of the note and terms.

ISSUES: (1) Promissory note and (2) acceleration clause
HELD: Court held the promissory note did not contain an anti-waiver feature. Court stated that under the undisputed material facts of this case, the lender waived its right to enforce a promissory note's acceleration clause because of the lender's repeated acceptance of late monthly payments from its borrower. However, the Court stated that under general principles of contract law, a party who has made a waiver affecting an executory portion of a contract may retract the waiver by notifying the other party that strict performance of any term waived will be required, unless such a retraction would be unjust because of a material change of position made in reliance on the waiver.

DISSENT (Beier, J.): Would affirm the district court.
STATUTE: K.S.A. 20-3018(b)

CINC AND STANDARD OF REVIEW IN RE B.D.-Y.

FACTS: At birth, B.D.-Y. had problems eating and swallowing. Doctor's inserted a feeding tube. At a routine check up, a physician suspected child abuse after seeing bruising on B.D.-Y.'s face, legs, and chest. X-rays revealed that she had at least 12 rib fractures. B.D.-Y. was in the care of her mother, father, and grandmother. A trial court found B.D.-Y. to be a child in need of care (CINC). It rejected as implausible Dr. Young's suggestion that all of B.D.-Y.'s injuries resulted from one accidental event, determining that B.D.-Y. was either abused or injured in a series of accidents. It also rejected the parents' explanations for the injuries. Finally, the Court determined that even if the injuries were accidentally caused during one of the father's seizures, B.D.-Y. was nevertheless without proper parental care and control.

ISSUES: (1) CINC and (2) standard of review
HELD: Court clarified its standard of review for CINC cases. Court stated that the standard of review is clear and convincing evidence. Court held that clear and convincing evidence is evidence, which shows that the truth of the facts asserted is highly probable. Court provided the following clarification: "When an appellate court reviews a trial court's determination, which is required to be based upon clear and convincing evidence, it considers whether, after review of all the evidence, viewed in the light most favorable to the state, it is convinced that a rational factfinder could have found the determination to be highly probable." Court held that under the facts and new appellate standard of review articulated in this case, sufficient evidence supported the trial court's determination that the infant B.D.-Y. was a child in need of care.

STATUTE: K.S.A. 2007 Supp. 38-2202(d), (x), -2250, -2273(a)

WORKERS' COMPENSATION HALL V. DILLON COMPANIES INC.

FACTS: Workers' Compensation Board (Board) affirmed award to Hall by administrative law judge (ALJ) of 20 weeks of permanent partial disability compensation, based upon 10 percent permanent partial disabilities in left and upper right extremities. Hall appealed, claiming uncontested evidence supported additional impairment. Hall also argued for Casco v. Armour Swift-Eckrich, 283 Kan. 508 (2007), to be overruled as violating stare decisis and as bad public policy, and for prospective application to injuries arising after Casco decided. Appeal transferred to Supreme Court.

ISSUES: (1) Disability ratings and (2) parallel-injury rule
HELD: Evidence not disputed. Neither ALJ nor Board disregarded one doctor's diagnosis, but instead found another diagnosis more persuasive. In evaluating injuries under Workers' Compensation Act, a physician is not required to explicitly rule out every other possible diagnosis except the diagnosis the physician is making.

Extended error of Honn v. Elliott, 132 Kan. 454 (1931), and absence of legislative action to reverse that error do not compel revival of Honn as the governing rule for parallel-member injuries despite strict statutory language. Casco did not establish a new rule of law and is not limited to prospective application. No persuasive challenge to analysis in Casco and Pruter v. Larned State Hospital, 271 Kan. 865 (2000).

STATUTES: K.S.A. 2007 Supp. 44-501(a), -508(g); K.S.A. 20-3018(c), 44-410d, -510c(a)(2), -510d, -510e; and R.S. 1923 44-510(3)(b) and (c) (1930 Supp.)

Criminal

STATE V. COOK
WYANDOTTE DISTRICT COURT – REVERS
NO. 98,671 – JULY 25, 2008

FACTS: Cook convicted in 1999 of aggravated indecent solicitation of child and registered as a sex offender upon his release in 2005. Kansas Bureau of Investigation attempts to reach Cook in January 2006 at his registered address were unsuccessful. Effective July 1, 2006, sex offender registration act was amended to increase the felony offense for not reporting and made each failure to report a new offense every 30 days. Cook arrested in November 2006 and charged with the more serious nonreporting felony. District court dismissed the charge as violating ex post facto clause. State's appeal transferred to Supreme Court.

ISSUE: Constitutional challenge to Kansas Offender Registration Act

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
HELD: No ex post facto violation. District court's order is reversed. State's argument of a continuing crime is examined and cases are discussed. Applied here, the constant danger Cook posed to the community through his failure to register made any crime that began before the 2006 amendments continued after those amendments. However, given the new violations that accumulated after effective date of the 2006 amendments, prior events did not have to be considered and could be disregarded.

STATUTES: K.S.A. 2006 Supp 22-4903, -4903(a), -4904, -4904(b), -4904(c); K.S.A. 20-3018(c); K.S.A. 22-4904(b)(1) (Furse 1995); and K.S.A. 1993 Supp. 22-4901 et seq.

STATE V. MORTON
RENO DISTRICT COURT – REVERSED
COURT OF APPEALS – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 95,209 – JULY 3, 2008

FACTS: Morton entered no contest pleas to drug charges. District court denied Hemphill's later motion to withdraw pleas. District court also denied Hemphill's successive motions to appeal out of time from his conviction and sentence, and from the denial of his motion to withdraw pleas. In unpublished opinions, Court of Appeals reversed the denial of Hemphill's motion for leave to appeal out of time from his sentence, citing State v. Ortiz, 230 Kan. 733 (1982). It also affirmed the district court's denial of an appeal from Hemphill's motion to withdraw his pleas, finding any error was harmless. Supreme Court granted Hemphill's petition for review.

ISSUES: (1) Appeal of sentences and (2) appeal from denial of motion to withdraw pleas

HELD: Agrees with Court of Appeals, and orders Hemphill's case to district court for a hearing under Ortiz, because record fails to demonstrate that he was ever advised of his appellate rights regarding his sentence.

District court's denial of Hemphill's motion to withdraw pleas is reversed. Ortiz is not appropriate to an appeal from the denial of post-sentence motion to withdraw pleas because district court not statutorily obligated to inform Hemphill of his right to appeal the denial of that motion. However, because actions of Hemphill's appointed attorney were both egregiously ineffective and highly prejudicial, court may act to remedy such inadequacy. An appeal out of time may be permitted under rationale in Roe v. Flores-Ortega, 528 U.S. 470 (2000), and holding in Kargus v. State, 284 Kan. 908 (2007). Under circumstances in this case, appropriate relief is to grant Hemphill another hearing on his motion to withdraw pleas.

STATUTE: K.S.A. 22-3424(f), -3608, -3608(c), -4505(a), 60-1507

STATE V. MURDOCK
CLOUD DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 95,365 – JULY 18, 2008

FACTS: Murdock convicted of aggravated battery with a deadly weapon. After state rested, defense moved for judgment of acquittal because no evidence that Murdock hit victim with brass knuckles. District court denied the motion and allowed state to reopen case to present testimony on that fact. Murdock appealed. Court of Appeals affirmed in unpublished opinion. Murdock's petition for review granted on alleged: (1) error by district court in denying motion for acquittal and in reopening state's case, (2) ineffective assistance of counsel in raising evidentiary defect in motion for acquittal, and (3) reversible error in district court's response to jury question about aggravated battery by going beyond scope of question and not allowing defendant an opportunity to provide input on an appropriate response.

ISSUES: (1) Motion for judgment of acquittal, (2) motion to reopen state's case, (3) ineffective assistance of counsel, and (4) response to jury's question

HELD: No error in district court's denial of motion for judgment of acquittal. Although no direct evidence that Murdock attacked victim while wearing brass knuckles, there was substantial circumstantial evidence from which jury could conclude guilt beyond reasonable doubt of either aggravated battery with deadly weapon or aggravated battery in a manner whereby great bodily harm could be inflicted.

Past Kansas decisions have not sufficiently identified factors relevant to whether to permit party to reopen its case after resting. United States v. Blankenship, 775 F.2d 735 (6th Cir. 1985), provides appropriate guidelines for district court in responding to such a motion. No abuse of discretion by district court under circumstances of this case.

Defense counsel's behavior in moving for judgment of acquittal at original close of state's case in chief was not constitutionally deficient.

No abuse of discretion in district court's response to jury's question. Response was a genuine but risky attempt to explain elements of the offense. It went far beyond what was necessary to clarify the two types of aggravated battery in question, but was not an incorrect statement of law as applied to the facts in evidence, and did not overemphasize Murdock's guilt or innocence.

CONCURRING (Beier, J.): Clarifies her conclusion on first two issues. Under facts, there was no need to reopen state's case for additional evidence, thus no legal prejudice resulted from district court allowing state to reopen, or by defense counsel's motion for judgment of acquittal.

STATUTE: K.S.A. 21-3414(a)(1)(B), -3419(1), -3420(3)

(Continued on Page 29)
Appellate Practice Reminders . . .  
From the Appellate Court Clerk’s Office

Recent Amendments to Appellate Rules

Rule 2.041 Docketing Statement
The Criminal Docketing Statement (Example 3) has been amended to require more information on the defendant’s custodial status. Appellant’s counsel must state whether the defendant is subject to appeal bond or incarcerated. If defendant is incarcerated, the earliest possible release date must be given.

New Rule 2.042 Custodial Status of Defendant in Sentencing Appeals
If sentencing is challenged on appeal, it is the state’s obligation to notify the appellate clerk in writing of any change in the custodial status of the defendant during the pendency of the appeal.

Rule 7.043 References to Certain Parties
Amendments to this rule extend anonymity provisions intended to protect the identity of a child in need of care, a juvenile offender, or a party to an adoption proceeding and clarify references to victims of sex crimes.

Rule 9.03 Tax Appeal Cases
Amendments reflect the new legislative designation of the Court of Tax Appeals [formerly Board of Tax Appeals] and clarify that a petition for judicial review, rather than a notice of appeal, is to be filed with the appellate courts.

Rule 9.04 Workers’ Compensation Cases
Amendments clarify that provisions of the Kansas Act for Judicial Review are to be followed when review is sought in the appellate courts.


A General Note: Anytime an appellate rule requires that a copy of the opinion be attached, for example on a petition for review or a motion for rehearing or modification, attach a copy of the slip opinion issued by the court in order to keep everyone “on the same page.” Electronic copies, even those obtained from the court’s own Web site, will have different pagination.

For questions about these practices or appellate court rules, call the Clerk’s Office at (785) 296-3229 and ask to speak with Carol G. Green, Clerk of the Appellate Courts.

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STATE V. SCAIFE
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 97,183 – JULY 3, 2007

FACTS: Scaife convicted of premeditated murder, attempted premeditated murder, aggravated robbery, and fleeing or attempting to elude police officer. On appeal, Scaife argued: (1) insufficient evidence supported premeditated murder conviction, (2) error to not instruct jury on second-degree murder as a lesser-included offense of first-degree premeditated murder, (3) prosecutorial misconduct in closing argument, (4) district court failed to consider Scaife’s ability to pay when ordering reimbursement of attorney fees to Board of Indigents’ Defense Services (BIDS), (5) sentencing journal entry did not comport with district court’s pronouncement from bench regarding BIDS application fee, and (6) error to impose higher sentence based upon criminal history not proved to jury beyond a reasonable doubt.

ISSUES: (1) Sufficiency of evidence, (2) lesser-included offense instruction on second-degree murder, (3) prosecutorial misconduct, (4) BIDS attorney fee reimbursement, (5) sentencing journal entry, and (6) criminal history.

HELD: Sufficient evidence supports premeditation element of first-degree murder. Notwithstanding Scaife’s claim of spontaneity, jury could have reasonably concluded or inferred from circumstantial evidence that Scaife had thought the matter over beforehand and that his intent to kill victims was premeditated.

Prosecutor’s comments were not prohibited personal opinion on witness veracity, but instead were fair argument on the evidence.

Imposition of attorney fees is vacated. Remanded for explicit findings on the record as to Scaife’s financial resources and burdens imposed by attorney fee reimbursement.

As decided in State v. Hawkins, 285 Kan. 842 (2008), time for ordering payment of BIDS application fee is when the defendant applies for appointed counsel, rather than at sentencing. If ordered fees remain unpaid at sentencing, court may include the unpaid fee in the sentencing order without making additional findings.

No departure from State v. Ivory, 273 Kan. 44 (2002), and progeny. Scaife’s Apprendi criminal history claim is rejected.

DISSENT (Rosen, J., joined by McFarland, C.J., and Davis, J.): Agrees that circumstances of case could lead jury to reasonably infer that crime was premeditated, but disagrees that an instruction on second-degree murder was mandated based on the facts that Scaife never claimed he shot victims on impulse.

STATUTE: K.S.A. 21-3401(a), -3402, 22-3414(3) -413, -4513(b), -4529, 60-460(d)(2), -460(e)

COURT OF APPEALS

CHILD CUSTODY AND BURDEN OF PROOF
IN RE MARRIAGE OF GRIFFIN
ATCHISON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 99,311 – JULY 3, 2008

FACTS: Sonya and Michael had a son during a short-lived marriage. Sonya was granted primary residential custody, subject to Michael’s reasonable parenting time. After a decade, Sonya had remarried and told Michael of an anticipated move to Arizona. Sonya said Michael agreed to the move. Michael said he did not want his son to move away and his attorney would need to review any proposed parenting schedule. Sonya provided written notice of the move, but not within the required 30 days prior to the move. Michael moved to change residential custody, claiming the move to Arizona constituted a material change in circumstances. The district court granted the order and ordered Michael to serve as primary residential parent.

ISSUES: (1) Child custody and (2) burden of proof.

HELD: Court stated that Michael proved a material change in circumstances meeting his burden for a child custody hearing. Court held that the district court applied the wrong burden of proof in determining what was in the best interests of the child. Court stated that Michael bore the burden of proving that consideration of the factors established that it was in his son’s best interest to remain in Kansas with his father. However, the district court required Sonya to prove best interest in her favor because she was moving to Arizona. Court reversed the district court and set aside the order changing primary residential custody and remanded for the district court to reconsider the evidence previously presented to determine if Michael met his burden of proving that primary placement of his son should be changed from Sonya to him. Court encouraged the district court to detail its findings in the context of the statutory factors and any other relevant factors.

Under facts of case, district court’s refusal to give requested lesser-included offense instruction on second-degree murder requires reversal of the premeditated first-degree murder conviction. Remanded for new trial on that charge.

Civil

CHILD SUPPORT AND LUMP SUM PAYMENTS
IN RE MARRIAGE OF ORMISTON
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 98,554 – JULY 18, 2008

FACTS: Alvin Ormiston received a one-time cash payment of $34,556 in December 2006 and a one-time stock payment of $26,884 in March 2007 from his employer, Spirit AeroSystems. The payments were made pursuant to a collective bargaining agreement between the International Association of Machinists and Aerospace Workers and Spirit AeroSystems following the sale of Boeing’s Wichita facility to Onex Corp., Spirit AeroSystems’ parent corporation. Jamie McCabe filed a motion to increase the child support paid by Ormiston based upon Ormiston’s receipt of the payments. A hearing officer denied the motion, and McCabe appealed the decision to the district court. The district court reasoned the payments made to Ormiston clearly appeared to come within the broad definition of income in the guidelines. Nevertheless, the district court believed it was constrained by In re Marriage of Brand, 273 Kan. 346, to conclude that lump sum payments not periodically or regularly received cannot be considered income for child support purposes. The district court thus affirmed the hearing officer’s denial of McCabe’s motion to increase child support.

ISSUES: (1) Child support and (2) lump sum payments.

HELD: Court held that in Brand, which concerned whether retained earnings and distributions made from a Subchapter S corporation are included within the gross income of the recipient for purposes of calculating child support, is distinguished on its facts. Court stated that the guidelines do not exclude income that is not regularly and periodically received from the calculation of gross income. Rather, the guidelines explicitly include income, which is reg-
but record supported district court's findings in this case.

Marilyn and Marquardt concluded there is substantial and competent evidence to support the district court's order.

STATUTES: None

CHILD SUPPORT AND PUBLIC ASSISTANCE
STATE OF KANSAS ET AL. V. MOSES
WYANDOTTE DISTRICT COURT – AFFIRMED

FACTS: Donald Moses was adjudged to be the father of Queen Moses. In November 2004, Sheema Williamson, Queen's mother, obtained an order for Moses to pay $590 per month in child support. Moses moved to reduce child support. Because Moses was receiving only Supplemental Security Income (SSI), the court modified his support to $76 per month. In March 2007, Moses moved to terminate child support and to abate the outstanding arrearage based on his only income being SSI. The district court granted Moses' motion to terminate child support, but found that it lacked authority to abate the outstanding child support.

ISSUES: (1) Child support and (2) public assistance

HELD: Court stated that the Kansas Child Support Guidelines (KCSG) defines domestic gross income as income from all sources, except public assistance. Court held the presumptive child support obligation of a noncustodial parent whose income is solely derived from public assistance would be $0 under the child support guidelines. Court also held the best interests of the child criterion would not be a proper ground to deviate from the presumptive child support obligation of $0 under the child support guidelines if the noncustodial parent's income is solely derived from public assistance. Court held the district court correctly interpreted and applied the provisions of the KCSG that specifically require SSI be excluded from the calculation of domestic gross income. Court held the state failed to show that the trial court abused its discretion by terminating Moses' obligation to pay child support.

STATUTES: None

ESTATES – HOMESTEAD
IN RE ESTATE OF LANE
MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 98,352 – JULY 18, 2008

FACTS: Jerry Lane died while married to second wife Deanna who was named executor of his estate. She did not include farm in estate property because she was sole title owner of leases that allowed gas storage and cell phone tower on the homestead, but did include half interest in property and cattle she co-owned with Jerry. Jerry's heirs challenged this listing of property in the estate, and claimed Deanna not entitled to homestead and spousal allowances. District court ruled for Deanna, adopting Deanna's proposed findings verbatim. Heirs appealed, objecting to the allowances and claiming Deanna not entitled to homestead and spousal allowances. District court found no agreement existed between Jerry and Deanna regarding the farm's disposition.

ISSUES: (1) District court's factual findings, (2) constructive trust, (3) co-ownership of personal property, (4) spousal and homestead allowance, and (5) future rent

HELD: Better practice for district judge to draft own findings, but record supported district court's findings in this case.

No abuse of discretion in district court's decision that Deanna did not hold farm in constructive trust for other heirs, where district court found no agreement existed between Jerry and Deanna regarding the farm's disposition.

Substantial competent evidence supports district court's decision that Deanna and Jerry were co-owners of farm machinery and cattle.

No abuse of discretion shown in district court's granting of spousal allowance. In re Estate of Wheat, 24 Kan. App. 2d 934 (1998), is distinguished. Homestead allowance under K.S.A. 59-6a215 is an entitlement for surviving spouse to receive either the homestead or $35,000 allowance in lieu of the homestead. This is true even if the surviving spouse owns a home that is not part of the decedent's estate.

Right to receive future rent for lease of real estate is an interest in the land. Only those with an interest in that land may have an interest in the future rents for lease of that land unless the interest has been separately assigned.

CONCURRING (Greene, J.): Agrees that record supports findings, but writes separately to emphasize that verbatim adoption of one party's proposed findings without any assurance of an independent review of the record is clearly not the better practice and may invite heightened scrutiny of such findings on appeal.

STATUTE: K.S.A. 23-201, -201(b), 58-501, 59-6a215, -403, -403(b)

GUARDIANSHIP AND JURISDICTION
IN RE GUARDIANSHIP OF SOKOL
JOHNSON DISTRICT COURT
REVERSED AND REMANDED
NO. 98,520 – JULY 25, 2008

FACTS: Robert Sokol and Julie Bergmann were divorced in 1995. They had four children of the marriage. In 1998, Julie moved to New York with the children. In March 2003, Robert was awarded custody of the three younger children. In July 2003, the oldest child returned to Kansas and Julie attempted to block the custody determination in the New York courts. Robert ultimately obtained custody of the two younger children, one of whom, Moshe Sokol, is the proposed ward in the case. Moshe was born with spina bifida and is paralyzed in the lower half of his body. Moshe was able to attend high school and possessed the intellect and maturity of an average 17-year-old. The district court denied an emancipation request, but Moshe specifically expressed his desire to attend high school in New York. About a week before Moshe turned 18, Robert filed a petition to be appointed Moshe's guardian in Johnson County. After the district court vacated preliminary orders, Julie obtained a modification of the custody order, granting her physical custody of Moshe in order to assist him in his move to New York. With the guardianship petition pending, Moshe left for New York. Moshe filed a motion to dismiss the guardianship petition and the district court dismissed the guardianship petition for lack of subject matter jurisdiction, concluding that Moshe, now an adult, had chosen to reside in New York. Robert did not file an appeal until after the district court filed a journal entry denying his motion to alter or amend judgment. After a show-cause order, the parties were ordered to address whether tolling procedures applied in probate proceedings.

ISSUES: (1) Guardianship and (2) jurisdiction

HELD: Court held the tolling provisions of chapter 60 applied equal to probate proceedings under chapter 59. Court held that Robert's notice of appeal was timely filed. Court stated that a district court has jurisdiction to consider a guardianship petition filed in the proposed ward's county of residence, or in any county where the proposed ward may be found. Court also stated that a court obtains subject matter jurisdiction over a guardianship proceeding when the proceeding is properly commenced. Once subject matter jurisdiction has attached, the district court is not deprived of jurisdiction if
the proposed ward leaves Kansas to reside in another state before a
guardian is appointed. Court held that when the district court ob-
tains subject matter jurisdiction in a guardianship proceeding, but
the proposed ward leaves Kansas to reside in another state before a
guardian is appointed, the district court may dismiss the guardianship
petition as a matter of comity if the court finds it is not in the
proposed ward’s best interests or it is not in the interests of justice
that the proceeding takes place in that county. Court remanded for
the district court’s consideration of the issues in light of its opinion.

STATUTES: K.S.A. 59-2213, -2401a, -3058, -3059; and K.S.A.
60-206, -250, -252, -259, -260, -2103(a)

REAL ESTATE AND DISCLOSURE OF DEFECTS
OSTERHAUS V. TOTH ET AL.
JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVESED IN PART, AND REMANDED
NO. 97,847 – JULY 3, 2008

FACTS: Osterhaus purchased a home in Overland Park from
Toth. When Toth had purchased the property, a seller’s disclosure
statement acknowledged movement of walls or foundation and
water leakage in the basement. However, Toth made no disclosure
when she sold the property to Osterhaus concerning movement
of walls, cracks in foundation, or water leakage. Toth had a prior
sale cancel after inspection of the house. Osterhaus signed a buyers’
agreement disclaiming any warranties or guaranties. Osterhaus had
the house inspected. Osterhaus eventually experienced water leak-
age almost every time it rained. Osterhaus sued Toth, her real estate
agent Schunk, and the reality company TopPros for $80,000 to fully
repair the basement. The district court granted summary judgment
to Toth, Schunk, and TopPros finding Osterhaus had an indepen-
dent inspection and knew there was major cracking in the basement
walls and prior Kansas caselaw holds that buyers’ agreement worked
as a release and Toth had no obligation to disclose adverse informa-
tion and any false statements made by Toth did not breach their
duty to disclose.

ISSUES: (1) Real estate and (2) disclosure of defects
HELD: Court reversed summary judgment on the basis that Toth
did not disclose to Osterhaus the prior inspection report, that she
had repaired the cracks in the foundation merely two days before
his inspection, that she had had water in her basement, or that the
foundation had moved. Court stated that a seller of real property has
an affirmative duty to be honest on its disclosure statement. When
a seller is untruthful about material facts in its disclosure statement,
the material fact is not discoverable in a reasonable inspection, and
the seller does not correct the untruth before closing, the buyer’s
signature on the disclosure statement does not constitute a waiver of
the seller’s untruths. Court found Osterhaus’ equal protection argu-
ment to be meritless. Court remanded for the district court to con-
sider Osterhaus’ consumer protection argument, claim under the
Brokerage Relationships in Real Estate Transactions Act (BRRETA),
allegation of fraud through silence, and failure to update disclosure
statement. Court also remanded for consideration of Osterhaus’
motion to amend to include rescission, civil conspiracy, violations
of real estate code, and punitive damages.

DISSENT: Judge Leben dissented in part finding that prior deci-
sions of the Court of Appeals are contrary to the majority’s decision
and those prior decisions should control until reversed by the Kan-
sas Supreme Court. Leben would affirm the district court. Leben
agreed with the majority on the BRRETA claim.

STATUTE: K.S.A. 50-626, -627, -30,101, -30,106(c), (d)(4)

TAXATION, EXEMPTION, AND RELIGIOUS USE
IN RE TAX APPEAL OF WESTBORO BAPTIST CHURCH
KANSAS STATE BOARD OF TAX APPEALS – AFFIRMED
NO. 98,443 – JULY 25, 2008

FACTS: Westboro Baptist Church (WBC) filed an application for
tax exemption before the Board of Tax Appeals (BOTA) in 2002 for
a 2002 Ford F-150. The application claimed the truck was used ex-
clusively for WBC’s street ministry and qualified for exemption un-
der the religious use exemption in the Kansas Constitution. BOTA
denied the application finding that it was undisputed that WBC had
used the truck exclusively, actually, and regularly to facilitate
WBC’s picketing activities by transporting church members and
signs. However, BOTA stated it was less clear whether the picketing
activities served an exclusively religious purpose of the Kansas Con-
stitution. Because BOTA found that WBC had failed to show that
the truck was used to transport only signs conveying a religious mes-
to street-side display locations, BOTA held that the truck did not
qualify for the exception in the constitution that extends the exemption
to properties used for a nonexempt purpose when the use was minimal
in scope and insubstantial in nature.

ISSUES: (1) Taxation, (2) exemption, and (3) religious use
HELD: Court rejected WBC’s argument that a sincerely held re-
ligious belief is adequate to establish a free exercise claim. Court
stated that if that were the case, any sincere act would be sacrosanct
and potentially protected by the First Amendment. Court held that
WBC could not meet the first prong of the two-part test under the
free exercise claim namely that the government has placed a sub-
stantial burden on the observation of a central religious belief or
practice. Court stated that WBC provided no evidence BOTA’s de-
cision would render its street ministry crushed and closed out by
the sheer weight of the toll, which is exacted. Court also rejected
WBC’s claim that BOTA’s decision violated the establishment clause
by excessive government entanglement. Court stated that although
WBC maintained that its picketing activities were exclusively reli-
gious purposes, there is an obvious political component to its activi-
ties. Court also stated that merely saying a message is apolitical does
not make it so. Although court accepted WBC’s contention that its
picketing activities represent its sincerely held religious beliefs, court
determined that its political activities and secular philosophy, which
constitute a significant part of its picketing activities, precluded a tax
exemption for its 2002 Ford F-150 truck when the use is minimal in
scope and insubstantial in nature.

STATUTES: K.S.A. 77-514, -621(c); and K.S.A. 79-101, -201
Second

WORKERS’ COMPENSATION
ADEE V. RUSSELL STOVER CANDIES INC. ET AL.
WORKERS’ COMPENSATION BOARD – AFFIRMED

FACTS: Marva Adee suffered a heart attack while working at Rus-
sell Stover Candies (RSC). Employees performed CPR and used an
automated external defibrillator (AED). Emergency personnel ar-
ived and continued rendering care. Adee was transported to the
hospital where she regained a pulse and blood pressure, but was
unresponsive. Adee died several days later after life support was
discontinued because it was unlikely she would regain meaningful
neurological function. Adee’s husband filed for workers’ compensa-
tion benefits as a surviving spouse. The claimant hired Dr. Miki-
niski to assess the timing and survivability of Adee’s heart attack.
The administrative law judge (ALJ) determined that RSC had an
affirmative duty to provide medical aid adequate under the circum-
cstances and that RSC met this standard and was not liable under the
Workers’ Compensation Act (Act). The appeals board affirmed the
ALJ and found that the RSC employees’ actions and inactions did not constitute negligence.

ISSUE: Workers’ compensation

HELD: Court stated that coronary or coronary artery disease is not covered under the Act unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee’s usual work in the course of the employee’s regular employment. Court also stated that where an employee is negligently treated for a nonwork-related injury by an employer or co-employee whose job is to provide medical treatment to employees, there is a sufficient causal connection to make any aggravation of the injury or additional injury arising from that treatment compensable unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee’s usual work in the course of the employee’s regular employment.

STATUTE: K.S.A. 2007 Supp. 44-501(a), (b), (e), (g)

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**Criminal**

**STATE V. ANDERSON**

**SALINE DISTRICT COURT – REVERSED AND REMANDED**

**NO. 98,611 – JULY 25, 2008**

FACTS: Anderson registered as sex offender, but sheriff did not have Anderson sign acknowledgment form that registration procedure had been explained. Anderson was later charged with failing to report during birthday month. Finding the sheriff’s office had not provided appropriate information, district court dismissed the criminal charge. State appealed.

ISSUE: Sex offender’s duty to report

HELD: A person required to register under Kansas Offender Registration Act (Act) is criminally liable for violating any provisions of the Act. That criminal liability is not contingent upon a sheriff fulfilling his or her own duties under the Act. Sheriff’s failure to fulfill statutory duties does not relieve a sex offender from obligations to comply with the Act or from penalties for failing to do so. There is proper jurisdiction for state’s appeal from the district court’s dismissal of the complaint, and state is not barred from continuing to prosecute Anderson in this case.

CONCURRING (Greene, J.): Agree that district court’s judgment must be reversed, but would do so solely because statute requires sheriff to explain registration, but not reporting requirements.

STATUTES: K.S.A. 2006 Supp. 22-4903, -4904(a)(1) and (5), -4904(c), -4904(d), -4905(a), -4905(b); and K.S.A. 21-3108(1)(b), 22-3419(1), -3602(b)(1)

**STATE V. MAY**

**DOUGLAS DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

**NO. 96,368 – JULY 3, 2008**

FACTS: May convicted of aggravated burglary. On appeal he claimed insufficient evidence supported the conviction for the aggravated offense because homeowner was not in home during the burglary, but only showed up afterward. He also claimed trial court failed to instruct jury on lesser-included offense of simple burglary, and claimed error in sentencing.

ISSUES: (1) Sufficiency of evidence, (2) jury instructions, and (3) sentencing

HELD: Aggravated burglary does not require proof that defendant knew there was a person present in the building at the time it was burgled. The mere presence of a person during the crime is sufficient. Ample evidence that May entered the home with intent to steal household goods.

Because there was no evidence that May was alone in the home throughout the crime, district court did not err in refusing to instruct jury on simple burglary as a lesser-included offense.

May’s guilty plea to two prior burglaries defeats claim that jury had to determine if burglaries were of a dwelling before sentencing court could classify those offenses for May’s criminal history, and district court’s use of criminal history to enhance sentence did not violate Apprendi. Order to repay attorney fees is set aside and remanded for compliance with K.S.A. 22-4513 and State v. Robinson, 281 Kan. 538 (2006).

STATUTES: K.S.A. 21-3701, -3715, -3715(a)-(c), -3716, -4711(d), -4711(d)(1), -4711(d)(2), 22-3414(3), -4513; and K.S.A. 21-3715 (Weeks)

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**STATE V. HAWKINS**

**SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, APPEAL DISMISSED IN PART, AND REMANDED**

**NO. 97,657 – JULY 25, 2008**

FACTS: Hawkins convicted of aggravated assault, aggravated assault against a law enforcement officer, and criminal possession of a firearm. On appeal he claimed insufficient evidence of the evidence, cumulative trial error, and sentencing error.

ISSUES: (1) Sufficiency of the evidence, (2) jury question, (3) multiplicity, (4) cumulative error, (5) and sentencing

HELD: Although there was conflicting evidence of the incident, there was sufficient evidence to find aggravated assault resulting from initial shot fired and of aggravated assault of law enforcement officer resulting from balance of Hawkins’ actions.

Under facts, where trial court responded to jury question on aggravated assault charge that “someone’s act must be intentional” and the intentional act “must have placed another in reasonable apprehension,” the court’s response seriously misstated the intent element required for aggravated assault and likely misled the jury. Hawkins’ conviction of aggravated assault is reversed and remanded for new trial on this charge.

Multiplicity argument rejected because challenged convictions did not proceed from same conduct. No double jeopardy violation because convictions were not for same offense.

No merit to cumulative error claim.


No jurisdiction to review Hawkins’ presumptive sentence. Challenge to constitutionality of a presumptive sentence must be brought in a 60-1507 motion. Because the sentence reversed was not the primary crime among multiple convictions, no resentencing on the affirmed convictions affirmed is necessary.

DISSENT (Leben, J.): Does not agree with majority on single issue of whether district court must resentence the defendant after one of the underlying convictions has been reversed. District court imposed consecutive sentences. No way to know whether consecutive or concurrent sentences would have been imposed on fewer convictions. Remand for resentencing in a multiple conviction case is not precluded by K.S.A. 21-4720(b)(5) when crime other than the primary crime is reversed on appeal. District court should be required to resentence Hawkins once any retrial on the aggravated assault charge has been completed.

STATUTES: K.S.A. 21-3408, -3410, -3411, -4704(f), -4720(b), -4720(b)(5), -4721(c)(1), 60-1507; and K.S.A. 2000 Supp. 21-3413, -3413(a)(2)
STATE V. OLIVER  
NEMAH DISTRICT COURT – AFFIRMED  
NO. 98,486 – JULY 11, 2008

FACTS: Oliver waived his preliminary hearing before Magistrate Judge O’Connor and entered no contest plea to Judge Patton on drug charge. Oliver later moved to withdraw his plea and alleged judicial misconduct by both magistrate and district court judges in his case. District court found no manifest injustice and denied the motion. Oliver appealed, claiming (1) abuse of discretion to deny motion to withdraw plea, (2) ineffective assistance of counsel in not seeking recusal of magistrate judge who had issued search warrants in Oliver’s case, and (3) misconduct by district court judge by participating in plea negotiations.

ISSUES: (1) Motion to withdraw plea, (2) judicial misconduct of magistrate judge, and (3) judicial misconduct of district court judge

HELD: Oliver’s recitation of grievances and allegations regarding his plea is not adequate argument for appellate review. Issue is deemed abandoned.

K.S.A. 22-2301(2) applies in the unusual situation where a judge orders prosecutor to institute criminal proceedings against a defendant, and does not prohibit district court judge in this case from participating in Oliver’s preliminary hearing. Also, no prejudice established under facts of case.

No Kansas authority identified as to what constitutes judicial participation in plea negotiations. Cases in other courts provide a clear, fair, and workable standard. Judges should not participate in negotiation of proposed terms of a plea agreement, nor should they encourage the defendant to accept or reject any of the proposed terms. Nothing in record establishes the district court judge did either in Oliver’s case.

STATUTE: K.S.A. 20-302b(a), 22-2301(2), -3210(d)

STATE V. TONEY  
SEDGWICK DISTRICT COURT  
REVERSED AND REMANDED  
NO. 97,326 – JULY 11, 2008

FACTS: Toney was represented by a public defender when entering plea to burglary charge. Chief public defender appeared at sentencing and did not challenge Toney’s criminal history. Toney later asked to withdraw the plea, and in letter to the court alleged attorney mishandling of his case. Public defender later filed motion to withdraw plea based on allegations of innocence and lack of understanding, but did not mention allegations of ineffective assistance. At hearing on that motion, attorneys acknowledged public defender’s apparent conflict of interest. District court denied the motion. Toney appealed, claiming ineffective assistance by public defender in not investigating the case prior to a guilty plea, and conflict of interest on motion to withdraw plea.

ISSUE: Conflict of interest

HELD: Supreme Court’s established guidelines for district court facing possible conflict of interest in a criminal case are stated and applied. Toney’s letter and in-court statements, coupled with acknowledgments by public defender and prosecutor of an apparent conflict of interest, were sufficient to engage district court’s duty to inquire further. District court’s failure to do so was an abuse of discretion. Under the circumstances, the divided loyalties of Toney’s public defender adversely affected her performance as Toney’s counsel and created an actual conflict of interest with presumed prejudice. District court’s ruling on motion to withdraw plea is reversed. Remanded to district court for appointment of conflict-free counsel and reconsideration of motion to withdraw plea.

STATUTE: K.S.A. 21-3715(a)
Positions Available

THE DIRECTOR OF WORKERS’ COMPENSATION for the state of Kansas is accepting applications for two positions on the Workers’ Compensation Board for the term beginning Dec. 3, 2008, and ending Dec. 2, 2012, pursuant to K.S.A. 44-555c. In order to be considered by the nominating committee, each applicant shall be an attorney regularly admitted to practice law in Kansas for a period of at least seven years and shall have engaged in the active practice of law during such period as a lawyer, judge of a court of record or any court in Kansas, or a full-time teacher of law in an accredited law school, or any combination of such types of practice. Excellent writing skills are required. Please send your application and/or resume by Oct. 15, 2008, addressed to: Paula S. Greathouse, Director, Division of Workers’ Compensation, 800 S.W. Jackson, Suite 600, Topeka, KS 66612-1227.

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( Newly renovated KBA offices), Topeka

Friday, September 12
Agricultural Law
Co-sponsored by Kansas Farm Bureau Legal
Foundation for Agriculture and Kansas State
Foundation, Kansas Farm Bureau, Manhattan

Friday, September 26
Litigation
Radisson Hotel, Lenexa

Friday, September 26
Recreation Law & Clay Shoot,
Flint Oak Resort, Fall River

Wednesday, October 8, 2:30 – 5:30 p.m.
Young Lawyers Section
Ethics & Reception
Featuring: Kansas Court of Appeals Judges,
Kansas Law Center, Topeka

Friday, October 10
Federal and Ethics,
Country Club Plaza Marriott, Kansas City, Mo.

Friday, October 10
Law Practice Management
Co-sponsored by Kansas Lawyers Assistance
Program,
Kansas Law Center, Topeka

Wednesday, October 15, 1:30 – 5:30 p.m.
Legislative Conference & Reception
Co-sponsored by Whitney B. Damron P.A.,
Kansas Law Center, Topeka

Friday, October 17
Real Estate, Probate & Trust Law
Featuring: Probate & Trust Administration After
Death Handbook Debut,
The Bicentennial Center, Salina

Friday, October 24
KBA/KIOGA Oil and Gas Conference,
Marriott, Wichita

Telephone Seminars

Tuesday, September 23, Noon – 1 p.m.
National Childhood Vaccine Injury Compensation Act
Matthew R. Crimmins, Walters, Bender, Strohbehn & Vaughan P.C.,
Kansas City, Mo.

Wednesday, September 24, Noon–1 p.m.
Healthcare Provider Competence/Impairment Evaluations,
Remediation & Discipline,
Kelli J. Stevens, Kansas Board of Healing Arts, Topeka

Tuesday, October 7, Noon – 1 p.m.
On Leave: Military, FMLA, & Other Leave Requirements
Co-sponsored by Human Rights Commission,
Shelly Freeman, Human Resources Return on Investment LLC, Kansas City, Mo.

Tuesday, October 14, Noon – 1 p.m.
Religious Accommodations in the Workplace: A Case Update
Co-sponsored by Human Rights Commission,
Alan Rupe, Kutak Rock LLP, Wichita

Tuesday, October 21
Ten Years of Faragher/Ellerth: What Have We Learned & Where Do
We Go From Here? Co-sponsored by Human Rights Commission,
Rich Olmstead, Kutak Rock LLP, Wichita

Tuesday, October 28, Noon – 1 p.m.
Wrongful Discharge Claims in an Employment-at-Will State
Co-sponsored by Human Rights Commission,
Dave Mudrick, Henson, Clark, Hutton, Mudrick & Gragson, LLP, Topeka
Several hundred members and friends packed the Law Center for a special rededication during this year’s KBA Annual Meeting in June.