



# STATE OF KANSAS RETAIL AND HOSPITALITY COMPENDIUM OF LAW

**Prepared by**

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## **PRE-SUIT AND INITIAL CONSIDERATIONS**

### **Pre-Suit Notice Requirements/Prerequisites to Suit**

A) **Municipality.** KAN. STAT. ANN. § 12-105b(d) governs the pre-suit notice requirement for claims against a municipality. That section provides that a claimant may not commence a claim until after the municipality notifies the claimant that it has denied the claim, or until after one hundred twenty (120) days has passed since the notice of claim was provided to the municipality, whichever occurs first. Additionally, if a claimant intends to bring suit under the Kansas Tort Claims Act, “a claimant shall have no less than ninety (90) days from the date the claim is denied or deemed denied in which to commence an action,” even if this exceeds the statute of limitations under the Code of Civil Procedure.

B) **Sale of goods.** Kansas has adopted the U.C.C., which requires a buyer who has accepted goods to notify a seller within a reasonable time after discovery of any breach of a contract for the sale of goods. KAN. STAT. ANN. § 84-2-607(3) states:

[w]here a tender has been accepted (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy; and (b) if the claim is one for infringement or the like (subsection (3) of section 84-2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

### **Relationship to the Federal Rules of Civil Procedure**

A) The Kansas Rules of Civil Procedure are found at KAN. STAT. ANN. § 60-201 et seq. The Kansas Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure. *Black-Wenzell v. Williams*, 279 Kan. 346, 349, 109 P.3d 1194, 1196 (2005).

B) Kansas Courts often look to federal case law interpreting the Rules of Civil Procedure for persuasive guidance. *Id.*

### **Description of the Organization of the State Court System**

A) **Structure.** The Kansas court system consists of three courts: the Supreme Court, the Court of Appeals, and the District Court.

1. **Supreme Court.** The Supreme Court consists of seven justices. The Supreme Court is the court of last jurisdiction. The justices are nominated by the Supreme Court Nominating Commission, which selects a panel of three which it submits to the Governor. The Governor then appoints one of the three nominees to the Supreme Court. The justices stand for retention election every six years.

2. **Court of Appeals.** There is one Court of Appeals, which is an intermediate appellate court. It consists of fourteen judges who are appointed by the Governor and approved

by the Senate. The Court of Appeals generally sits in panels of three judges, but may hear cases en banc. The Court of Appeals judges stand for retention election four years.

3. **District Courts.** There are thirty-one District Courts covering one hundred and five counties. The number of counties per District varies by population. The District Courts are trial courts of general jurisdiction. In seventeen Districts, district judges are nominated by a judicial nominating commission, which selects two or three nominees to submit to the Governor who then appoints the judge. District judges selected by the merit based system stand for retention election every four years. In fourteen Districts, district judges are elected in partisan elections for four year terms.

### **Alternative dispute resolution**

- A) Kansas does not have a comprehensive statewide statute for all methods of alternative dispute resolution.
  1. Pursuant to KAN. STAT. ANN. § 5-509(a), “[A] judge may order the parties to the case to participate in a settlement conference or a non-binding dispute resolution process.”

### **Service of Summons**

- A) **Person.** In-state service on a person is governed by KAN. STAT. ANN. § 60-303. Service may be had by: (1) personal service; (2) residence service, which is leaving a copy of the process and petition, at the person’s dwelling house or usual place of abode with someone of suitable age and discretion residing therein; (3) if no person other than a minor or person under disability is at the dwelling, service may had by leaving a copy of the process and petition, at the defendant’s dwelling house or usual place of abode and mailing a notice that such copy has been left at such house or place of abode to the individual by first-class mail.
- B) **Corporations, LLCs, Partnerships.** Service of summons upon corporations, limited liability companies and partnerships may be had by:
  - (1) by serving an officer, manager, partner or a resident, managing or general agent, or (2) by leaving a copy of the summons and petition at any business office of the defendant with the person having charge thereof, or (3) by serving any agent authorized by appointment or required by law to receive service of process, and if the agent is one authorized by law to receive service and the law so requires, by also mailing a copy to the defendant. KAN. STAT. ANN. § 60-304(e)

If such an entity (other than a partnership) fails to designate or maintain a resident agent in this state, or such a resident agent “cannot with reasonable diligence be found at the registered office in this state, the secretary of state shall be irrevocably authorized as the agent and representative of [such entity].” KAN. STAT. ANN. § 60-304(f).

- C) **Insurance Companies.** “Service of summons or other process on any insurance company or association, organized under the laws of this [Kansas], may also be made by serving the commissioner of insurance in the same manner as provided for service on foreign insurance companies or associations.
- D) **Waiver.** A party waives service by “[a]n acknowledgment of service on the summons is equivalent to service. The voluntary appearance by a defendant is equivalent to service as of the date of appearance.” KAN. STAT. ANN. § 60-303(e).
- E) **Jurisdiction.** The Kansas long-arm statute is KAN. STAT. ANN. § 60-308(b)(1). It lists the specific acts that will subject a person to jurisdiction in Kansas with respect to causes of action arising from the doing of any of those acts. Additionally, a person who has substantial, continuous and systematic contact with Kansas may be subject to jurisdiction in Kansas for acts that occur outside the state. KAN. STAT. ANN. § 60-308(b)(2).

### **Statutes of Limitations**

- A) **Tort Claims.** In general, tort claims must be brought within two years after the cause of action accrued. KAN. STAT. ANN. § 60-513(a). The following actions must be brought within two years.
  - (1) Trespass upon real property.
  - (2) Actions for taking, detaining or injuring personal property, including actions for the specific recovery thereof.
  - (3) Fraud, but the cause of action shall not be deemed to have accrued until the fraud is discovered.
  - (4) Personal injury.
  - (5) Wrongful death.
  - (6) Professional negligence by a health care provider, not arising on contract.
- B) **Inception.** Tort claims generally accrue when the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until sometime after the initial act. Then period of limitations shall not commence until the fact of injury becomes reasonably ascertainable. KAN. STAT. ANN. § 60-513(b).
- C) **Statute of Repose.** Kansas has a general ten-year statute of repose for tort actions. KAN. STAT. ANN. § 60-513(b). The statute of repose for professional negligence of health care providers is four years. KAN. STAT. ANN. § 60-513(c). The statute of repose for negligence actions by corporations against officers and directors is five years. KAN. STAT. ANN. § 60-513(d). The statute of repose for non-negligence actions by corporations against officers and directors is ten years. KAN. STAT. ANN. § 60-513(d).

- D) **Oral contracts.** Actions upon oral contracts must be brought within three years after the cause of action accrued. KAN. STAT. ANN. § 60-512.
- E) **Written contracts.** Actions upon a written contract, agreement, or promise shall be brought within five years after the cause of action accrued. KAN. STAT. ANN. § 60-511.
- F) **Statutory liability.** Actions upon a liability created by a statute other than a penalty or forfeiture shall be brought within three years after the cause of action accrued. KAN. STAT. ANN. § 60-512.
- G) **Others.** An action for relief, other than the recovery of real property, not specifically addressed by statute, shall be brought within five years after the cause of action accrued. KAN. STAT. ANN. § 60-511.
- H) **Tolling.** If a person is less than eighteen years of age, incapacitated, or imprisoned, the statute of limitations is tolled until such disability is removed. An action must then be brought within one year after the removal of the disability. However, no action may be brought more than eight years after the time of the act giving rise to the cause of action. KAN. STAT. ANN. § 60-515.

#### **Venue Rules**

- A) Venue in Kansas is governed by Article 6 of Chapter 60 of the Kansas Annotated Statutes
- B) **Actions against Kansas residents.** Venue in an action against residents of Kansas is governed by KAN. STAT. ANN. § 60-603. Unless venue is otherwise specifically prescribed by law, an action may be brought in the county:
  - 1) In which the defendant resides, or
  - 2) In which the plaintiff resides if the defendant is served therein, or
  - 3) In which the cause of action arose, or
  - 4) In which the defendant has a place of business or of employment if said defendant is served therein, or
  - 5) In which the estate of a deceased person is being probated if such deceased person was jointly liable with the defendant and a demand to enforce such liability has been duly exhibited in the probate proceedings, or
  - 6) In which there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with [KAN. STAT. ANN. §] 60-1005 the time of the filing of the action.

**C) Domestic Corporation.** Venue in an action against a domestic corporation, or against a foreign corporation which is qualified to do business in this state is prescribed in KAN.STAT. ANN. § 60-604. Unless venue is otherwise specifically prescribed by law, an action may be brought in the county in which:

- 1) Its registered office is located;
- 2) The cause of action arose;
- 2) The defendant is transacting business at the time of the filing of the petition, if the plaintiff is a resident of such county at the time the cause of action arose;
- 3) There is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with [KAN. STAT. ANN. §] 60-1005 and amendments thereto at the time of the filing of the action; or
- 5) Equipment or facilities for use in the supply of transportation services, or communication services, including, without limitation, telephonic communication services, are located, where the subject of such action relates to transportation services or communication services supplied or rendered, in whole or in part, using such equipment or facilities.

**D) Non-Residents.** Actions against nonresidents of Kansas, or against corporations not qualified to do business in Kansas may be brought in any county where:

- 1) The plaintiff resides; or if the plaintiff is a corporation, in the county of its registered office or in which it maintains a place of business; or if the plaintiff is a partnership, either general or limited, in the county of the residence of a partner, in the county of the registered office of a corporate partner or in the county in which the partnership maintains a place of business;
- 2) the defendant is served;
- 3) the cause of action arose;
- 4) the defendant is transacting business at the time of the filing of the petition;
- 5) there is property of the defendant, or debts owing to the defendant;
- 6) there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with K.S.A. 60-1005 and amendments thereto at the time of the filing of the action; or
- 7) equipment or facilities for use in the supply of transportation services, or communication services, including, without limitation, telephonic communication services, are located where the subject of such action relates to transportation services

or communication services supplied or rendered, in whole or in part, using such equipment or facilities.

KAN. STAT. ANN. § 60-605.

- E) Forum non conveniens.** The Kansas Supreme Court has adopted the reasoning of the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) regarding *forum non conveniens*. Kansas courts have the discretion to decline jurisdiction based upon *forum non conveniens*. However, the power “should be exercised only in exceptional circumstances and when an adequate showing has been made that the interests of justice require a trial in a more convenient forum.” *Gonzales v. Atchison T. & S. F. Ry. Co.* 189 Kan. 689, 696 371 P.2d 193 (1962).

## **NEGLIGENCE**

### **Negligence Defined**

- A)** Negligence is “the failure of a person to do something that a reasonably careful person would do, or the act of a person in doing something that a reasonably careful person would not do, measured by all the circumstances then existing.” [citation omitted].” *Elstun v. Spangles, Inc.*, 289 Kan. 754, 756, 217 P.3d 450, 453 (2009).
- 1) **Elements** In order to prove negligence, a plaintiff must prove that the defendant owed a duty to the plaintiff, the defendant breached that duty, there was some sort of injury that occurred because of that breach, and there is a causal connection between the duty breached and injury suffered. See *Elstun v. Spangles, Inc.*, 289 Kan. 754, 757, 217 P.3d 450, 453 (2009).

### **Premises Liability**

- A)** “Premises liability law is not limited to cases where there is a physical defect in the premises.” It can also arise from any activities occurring on the property. See *S. ex rel. S. v. McCarter*, 280 Kan. 85, 100, 119 P.3d 1, 11 (2005).
- B)** The proper defendant for a negligence action against a party for failing to keep the premises in a reasonably safe condition is the owner, occupier, or possessor of the premises. See *Miller v. Zep Mfg. Co.*, 249 Kan. 34, 41-42, 815 P.2d 506, 513 (1991). Kansas has applied the “occupation with intent to control principle” when determining if a party is a “possessor of land.” See *Id.*
- C)** The duty of a landowner depends on the status of the person who enters their property:
- 1) “In premises liability cases, the duty of care owed by the possessor to the injured party depends, generally, upon the status of the party entering the premises.” *Miller v. Zep Mfg. Co.*, 249 Kan. 34, 42, 815 P.2d 506, 513 (1991).

2) **Statuses.** There are three main statuses that a person may be upon entering a property. The person can be either an invitee, licensee or a trespasser.

- a) An invitee is “one who enters or remains on the premises of another at the express or implied invitation of the possessor of the premises for the benefit of the inviter, or for the mutual benefit and advantage of both inviter and invitee.”
- b) A licensee is “one who enters or remains on the premises of another by virtue of either the express or implied consent of the possessor of the premises, or by operation of law, so that he [or she] is not a trespasser thereon.”
- c) A trespasser is defined as “one who enters on the premises of another without any right, lawful authority, or an express or implied invitation or license.”

*Seitz v. The Lawrence Bank*, 36 Kan. App. 2d 283, 288-89, 138 P.3d 388, 393 (2006).

3) The duty owed to “invitees and licensees alike is one of reasonable care under all the circumstances.” In contrast, the duty owed by an occupier of land to trespassers is “to refrain from willfully, wantonly, or recklessly injuring” the trespasser. *Seitz v. The Lawrence Bank*, 36 Kan. App. 2d 283, 288, 138 P.3d 388, 392-93 (2006).

4) The factors to determine if the land owner used reasonable care under all the circumstances include:

- a) “the foreseeability of harm to the entrant,
- b) the magnitude of the risk of injury to others in maintaining such a condition of the premises,
- c) the individual and social benefit of maintaining such a condition, and
- d) the burden upon the land occupier and/or community, in terms of inconvenience or cost, in providing adequate protection.”

*Crowe v. True’s IGA, LLP*, 32 Kan. App. 2d 602, 607, 85 P.3d 1261, 1266 (2004).



### **Negligence Per Se**

- A) If the landowner violates a duty imposed by law or ordinance then that constitutes negligence per se, meaning that the breach of duty element is met. The proximate cause and injury still must be proven. See *Noland v. Sears, Roebuck & Co.*, 207 Kan. 72, 74-75, 483 P.2d 1029, 1032 (1971).

### **Obvious Dangers**

- A) If the danger on the premises is obvious then the landowner is under no duty to remove it. However, an affirmative duty to minimize the danger may arise if the landowner expects that an invitee to the property may be distracted as to not remember, discover, or protect against the obvious danger. *Miller v. Zep Mfg. Co.*, 249 Kan. 34, 43, 815 P.2d 506, 514 (1991).

### **Third Party Violence**

- A) A landowner “has no duty to protect an invitee on the landowner's premises from a third party's criminal attack unless the attack is reasonably foreseeable and prior similar acts committed upon invitees furnish actual or constructive notice to a landowner.” *S. ex rel. S. v. McCarter*, 280 Kan. 85, 101-02, 119 P.3d 1, 12 (2005).

### **Slip and Fall**

- A) A proprietor “is not an insurer of the safety of his business invitee and the mere fact the latter slips and falls upon foreign material present on the floor of a retail establishment does not raise an inference of negligence.” *Carter v. Food Ctr., Inc.*, 207 Kan. 332, 335, 485 P.2d 306, 309 (1971). “A proprietor must use ordinary care to keep those portions of the premises which can be expected to be used by business invitees in a reasonably safe condition.” *Id.*
- B) If an unsafe condition is created by the proprietor or those for whom he is responsible, or if it is traceable to their actions, proof of notice of the condition is unnecessary. *Id.*
- C) When a dangerous condition is neither created by the proprietor or those for whom he is responsible, nor traceable to their actions, proof of negligence with respect to a floor condition requires some showing they had actual or constructive notice of the dangerous condition. *Id.*
- D) A proprietor may be charged with constructive notice of the condition if the condition existed for such length of time that the proprietor, his agents or employees should have known of it in the exercise of ordinary care.” *Id.*

### **Mode of Operation Rule**

- A) “The mode-of-operation rule looks to a business’ choice of a mode of operation and not to the events surrounding the plaintiff’s accident.” *Hembree v. Wal-Mart of Kansas*, 29 Kan. App. 2d 900, 903, 35 P.3d 925, 927 (2001).
- B) It is a limited exception that allows “a plaintiff to recover without showing the proprietor’s actual or constructive knowledge of the condition if the plaintiff shows the proprietor adopted a mode of operation where a patron’s carelessness should be anticipated and the proprietor fails to use reasonable measures commensurate with the risk involved to discover the condition and remove it.” *Jackson v. K-Mart Corp.*, 251 Kan. 700, 710, 840 P.2d 463, 470 (1992).

### **Slight Defect Rule**

- A) A slight or inconvenient defect in a sidewalk does not furnish a basis for actionable negligence, “even though a pedestrian may trip, fall, and injure [himself or] herself on account of such a trivial defect.” This rule does not apply to parking lots. *See Elstun v. Spangles, Inc.*, 289 Kan. 754, 760, 217 P.3d 450, 455 (2009).

### **Attractive Nuisance Doctrine**

- A) This doctrine is limited only to trespassing children. It holds a possessor of land responsible for the trespassing child’s injury caused if:

“(1) the possessor knows, or in the exercise of ordinary care should know, that young children are likely to trespass upon the premises, and

(2) the possessor knows, or in the exercise of ordinary care should know, that the condition exists and that it involves an unreasonable risk of bodily harm to young children, and

(3) the children because of their youth either do not discover the condition or understand the danger involved in coming into the dangerous area, and

(4) one using ordinary care would not have maintained the condition when taking into consideration the usefulness of the condition and whether or not the expense or inconvenience to the defendant in remedying the condition would be slight in comparison to the risk of harm to children.”

*Mozier v. Parsons*, 256 Kan. 769, 772, 887 P.2d 692, 695 (1995).

- B) The doctrine does not apply to swimming pools. *Id.*

## **Comparative Negligence**

- A) If more than one party is responsible for an accident, comparative negligence allows a jury to apportion fault among those responsible for the accident, including those who are not parties to the litigation. This determines that amount of compensation to which the Plaintiff will be entitled.

## **Contributory negligence**

- A) Kansas Courts define contributory negligence as “conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is the legally contributing cause, compared with the negligence of the defendant, in bringing about the plaintiff’s harm. *Simmons v. Porter*, 298 Kan. 299, 305, 312 P.3d 345, 351 (2013).
  - 1) Under Kansas law, a business invitee may presume that the premises are “safe for the use to be made of them under the invitation to be present in the store.” It is not contributory negligence for a business invitee “to fail to look out for danger when there is no reason for an ordinarily prudent person to apprehend a peril.” *Warren v. T. G. & Y. Stores Co.*, 210 Kan. 43, 46, 499 P.2d 201, 203 (1972).

## **Modified comparative fault**

- A) Comparative fault can be assessed against both parties and non-parties. There is no joint and several liability. As such, a defendant is responsible only for the percentage of fault assessed against to it by the fact finder. *Glenn v. Fleming*, 240 Kan. 724, 730-732 P.2d 750, 755 (1987).
- B) Additionally, in order to recover any damages against a defendant, a plaintiff’s fault must be less than the causal negligence of the party or parties against whom a claim is made. KAN. STAT. ANN. § 60-258a(d).
- C) This is sometimes referred to as the 49% rule. However, a party to the suit must request a comparing of the relative fault of non-parties. *Glenn v. Fleming*, 240 Kan. 724, 730, 732 P.2d 750, 755 (1987).

## **Affirmative defense**

- A) The plaintiff’s contributory negligence must be pleaded as an affirmative defense, and the defendant has the burden of proving comparative negligence. KAN. STAT. ANN. § 60-208(c); *Horton v. Atchison, T. & S. F. Ry. Co.*, 161 Kan. 403, 416, 168 P.2d 928, 939 (1946).
- B) Negligence is required to “be prove[n] by substantial competent evidence.” *Yount v. Deibert*, 282 Kan. 619, 624, 147 P.3d 1065, 1070 (2006).

### **Strict liability**

- A) Comparative negligence is applicable in strict liability cases. *Forsythe v. Coats Co., Inc.*, 230 Kan. 553, 554, 639 P.2d 43, 44 (1982).
- B) Kansas Courts have also held that “the common-law assumption of risk doctrine is restricted to cases involving employer-employee relationships.” *Tuley v. Kan. City Power & Light Co.*, 230 Kan. 553, 555, 843 P.2d 248, 252 (1992).

### **Joint and Several Liability**

- A) Kansas does not have joint and several liability. Rather, in Kansas, each defendant is responsible only for that defendant’s percentage of fault.
- B) A defendant may seek to compare the fault of non-parties to the action, including defendants who have already settled. *McCart v. Muir*, 230 Kan. 618, 621-22, 641 P.2d 384, 388 (1982).

### **Products liability**

- A) The Kansas Product Liability Act is contained in KAN. STAT. ANN. § 60-3301 *et seq.*
- B) Kansas courts recognize strict liability under the following theories:
  - 1) Unreasonably dangerous products. *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 630, 886 P.2d 869, 886 (1994); and
  - 2) Ultra hazardous activities or abnormally dangerous activities, *Pullen v. West*, 278 Kan. 183, 189, 92 P.3d 584, 591 (2004). Kansas has adopted Sections 519 and 520 of the RESTATEMENT (SECOND) OF TORTS to determine strict liability in tort for abnormally dangerous activities. *Williams v. Amoco Prod. Co.*, 241 Kan. 102, 734 P.2d 1113 (1987).

### **Abnormally dangerous**

- A) In determining whether an activity is abnormally dangerous, the following factors are to be considered:
  - 1) Existence of a high degree of risk of some harm to the person, land or chattels of others;
  - 2) Likelihood that the harm that results from it will be great;
  - 3) Inability to eliminate the risk by the exercise of reasonable care;
  - 4) Extent to which the activity is not a matter of common usage;

- 5) Inappropriateness of the activity to the place where it is carried on; and
- 6) Extent to which its value to the community is outweighed by its dangerous attributes. *Williams*, 241 Kan. at 114.

### **Defects**

- A) KAN. STAT. ANN. § 60-3306 states: [a] product seller shall not be subject to liability in a product liability claim arising from an alleged defect in a product, if the product seller establishes that:
- 1) Such seller had no knowledge of the defect;
  - 2) Such seller in the performance of any duties the seller performed, or was required to perform, could not have discovered the defect while exercising reasonable care;
  - 3) The seller was not a manufacturer of the defective product or product component;
  - 4) The manufacturer of the defective product or product component is subject to service of process either under the laws of the state of Kansas or the domicile of the person making the product liability claim; and
  - 5) Any judgment against the manufacturer obtained by the person making the product liability claim would be reasonably certain of being satisfied.

### **Participation in abnormally dangerous activity**

- A) Under Kansas law, strict liability is not an available remedy for a person who participated in an abnormally dangerous activity. *Pullen v. West*, 278 Kan. 183, 192, 92 P.3d 584, 593 (2004) (“[w]hile [plaintiff] is not completely barred from recovery based on his participation in an abnormally dangerous activity, he is unable to obtain the benefit of the doctrine of strict liability because he participated in the abnormally dangerous activity”).

### **Unavoidably unsafe products**

- A) Kansas follows the RESTATEMENT (SECOND) OF TORTS § 402A view regarding “unavoidably unsafe products” in that an unavoidably unsafe product, “when properly prepared and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous.” This must be raised as an affirmative defense. *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 631, 886 P.2d 869, 887 (1994).

### **Learned intermediary doctrine**

- A) The learned intermediary doctrine is followed in Kansas, specifically that “[t]he ethical drug manufacturer is . . . subject to a duty to warn the medical profession[al] of untoward effects which the manufacturer knows, or has reason to know, are inherent in the use of its

drug.” *Wooderson v. Ortho Pharm. Corp.*, 235 Kan. 387, 401, 681 P.2d 1038, 1050 (1984). Thus, drug manufacturers have no duty to directly warn consumers of these effects or risks.

## **DAMAGES**

### **Caps on Damages**

- A) **Personal injury.** There are certain statutory caps on damages in Kansas that limit the recovery available in particular causes of action. Pursuant to KAN. STAT. ANN. § 60-19a02(b), “[i]n any personal injury action, the total amount recoverable by each party from all defendants for all claims for non-economic loss shall not exceed a sum total of: (1) \$250,000 for causes of action accruing on or after July 1, 1988, and before July 1, 2014; (2) \$300,000 for causes of action accruing on or after July 1, 2014, and before July 1, 2018; (3) \$325,000 for causes of action accruing on or after July 1, 2018, and before July 1, 2022; or (4) \$350,000 for causes of action accruing on or after July 1, 2022 \$250,000.” KAN. STAT. ANN. § 60-1903 contains a similar limitation for wrongful death actions, limiting a plaintiff’s non-pecuniary losses to \$250,000.00.

### **Calculation of Damages**

- A) **Personal injury.** A personal injury plaintiff is entitled to the amount of money that will reasonably compensate his or her injuries and losses resulting from the occurrence in question. KANSAS PATTERN INSTRUCTIONS, 4TH § 171.02. Compensation may include:
- 1) **Medical Expenses.** Medical expenses include the reasonable expenses of necessary medical care, hospitalization and treatment received as a result of plaintiff’s injuries to date (and the medical expenses plaintiff is reasonably expected to incur in the future) [reduced to present value]. KANSAS PATTERN INSTRUCTIONS, 4th § 171.02.
  - 2) **Economic damages.** Economic loss includes loss of time or income and losses other than medical expenses incurred as a result of a plaintiff’s injuries to date (and the economic loss plaintiff is reasonably expected to incur in the future) [reduced to present value]. *Id.*
  - 3) **Non-economic damages.** Non-economic loss includes pain, suffering, disabilities, disfigurement and any accompanying mental anguish suffered as a result of plaintiff’s injuries to date (and the noneconomic loss plaintiff is reasonably expected to suffer in the future) [reduced to present value]. *Id.* Wherever a plaintiff establishes they suffered an injury and more than minimal discomfort resulted, the plaintiff is entitled to compensation for pain and suffering. Calculating noneconomic damages rests in the sound discretion of the fact finder. *Id.* When determining the amount of a plaintiff’s damages, the fact finder considers the plaintiff’s age, health and the nature, extent and duration of the injuries involved. *Id.*
- B.) **Wrongful death.** In an action for the wrongful death of a spouse, three potential types of damages exist: the expenses for the care of the deceased, economic damages and

noneconomic damages. Economic damages include: (1) loss of marital care, attention, advice, counsel, or protection; (2) loss of earnings the finder of fact determines the deceased would have provided; (3) expenses for the care of the deceased caused by the injury; and (4) reasonable funeral expenses. Non-economic damages include: (1) mental anguish, suffering, or bereavement; and (2) loss of society, loss of comfort, or loss of companionship. KANSAS PATTERN INSTRUCTIONS, 4th § 171.30.

Expenses for the care of the deceased which resulted from the wrongful act may also be recovered by any one of the heirs who paid or became liable for them where no probate administration for the estate of the deceased has been commenced. KAN. STAT. ANN. § 60-1904(b). Those expenses and any amount recovered for funeral expenses are not included in the \$250,000 limitation in KAN. STAT. ANN. § 60-1903.

### **Lost Opportunity Doctrine**

- A) Generally.** Where a patient fails to survive and the loss suffered is the lost chance of surviving a preexisting injury or illness or at least a lost chance of a substantial increase in the length of such survival, “lost opportunity” or “loss of chance” damages may be available. Such damages are available in two types of actions in Kansas: where the chance lost was a “better recovery” and where the chance lost was “survival.” The choice of which of these two types of action applies depends upon whether or not the plaintiff survived the alleged wrongdoing.
- B) Test.** The lost opportunity doctrine test in Kansas provides that: [t]he ‘loss of chance’ rule is an exception to the normal requirement of proving causation.” . . . the ‘loss of chance’ cause of action applies when a doctor’s negligence eliminates or substantially reduces a patient’s chance of survival. The court held that the substantial factor test rather than the but for test is the proper test for causation. *Donnini v. Ouano*, 15 Kan. App.2d 517, 521, 810 P.2d 1163, 1167 (1991) (internal citations omitted). The “substantial” chance referred to above “is one which is capable of being estimated, weighed, judged or recognized by a reasonable mind... a “substantial factor” must be distinguished from a factor which had a merely negligible effect. KANSAS PATTERN INSTRUCTIONS, 4th §§ 123.21, 123.22.

It is important to note that where the jury finds a patient would have had a greater than fifty percent chance of surviving had he received proper medical treatment, traditional negligence rules apply, not the loss of chance rule. *Donnini*, 15 Kan. App. 2d 517.

## Mitigation

- A) **Generally.** Where physical injury results from the fault of another, a plaintiff has a duty to prevent any loss which could have been prevented by his or her reasonable care and diligence after the alleged loss occurred. *Merrick v. Mo.-Kan.-Tex. R. Co.*, 141 Kan. 591, 42 P.2d 950, 953 (1935); KANSAS PATTERN INSTRUCTIONS, 4TH § 171.42.
- B) **Limitation.** While generally one must use reasonable diligence to mitigate one's damages once a risk is known, one is not required to anticipate negligence and guard against damages which might ensue if such negligence should occur. *Hampton v. State Highway Comm'n*, 209 Kan. 565, 580, 498 P.2d 236, 249 (1972). "The duty to mitigate damages is not an unlimited one; an injured party is bound only to exert reasonable efforts to avoid damage; his duty is limited by the rules of common sense." *Steele v. J. I. Case Co.*, 197 Kan. 554, 565, 419 P.2d 902, 911 (1966).

## Punitive Damages

- A) **Burden.** In any action seeking punitive damages, plaintiff "shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice." KAN. STAT. ANN. § 60-3702(c).
- B) **Requirements.** A punitive damage award is incident to and dependent upon an independent cause of action. *Smith v. Printup*, 254 Kan. 315, 322, 866 P.2d 985, 992 (1993); *Golconda Screw, Inc. v. West Bottoms Ltd.*, 20 Kan.App.2d 1002, 894 P.2d 260 (1995). In Kansas, no petition may include a claim for punitive damages. Instead, a plaintiff seeking punitive damages must petition the Court to file an amended pleading that includes a claim for punitive damages. KAN. STAT. ANN. § 60-3703. This motion must be filed before the pre-trial conference or sufficiently in advance of trial to avoid prejudice to the defendant. *Id.*; *Gates v. Goodyear*, 37 Kan.App.2d 623, 630-31, 155 P.3d 1196, 1201 (2007). The motion must also demonstrate through affidavits that there is a probability that the plaintiff will prevail on the claim for punitive damages. KAN. STAT. ANN. § 60-3703.
- C) **Factors.** At a proceeding to determine the amount of exemplary or punitive damages, the fact finder may consider:
- 1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;
  - 2) The degree of the defendant's awareness of that likelihood;
  - 3) The profitability of the defendant's misconduct;
  - 4) The duration of the misconduct and any intentional concealment of it;



- 5) The attitude and conduct of the defendant upon discovery of the misconduct;
  - 6) The financial condition of the defendant; and
  - 7) The total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected. *Id.*
- D) Limitations.** Generally, punitive damages cannot exceed the lesser of (1) the annual gross income earned by the defendant or five million dollars. KAN. STAT. ANN. § 60-3701(e). However, if a court finds the profitability of the defendant's misconduct exceeds these caps, the court may award one-and-one-half times the profit the defendant is expected to gain as a result of their misdeed. KAN. STAT. ANN. § 60-3701(f).
- E) Trier of Fact.** Under Kansas law, the trier of fact determines if punitive damages are to be awarded. The determination must be supported by clear and convincing evidence that the defendant acted with willful conduct, wanton conduct, fraud or malice. KAN. STAT. ANN. § 60-3701.
- F) Separate Proceedings.** If the trier of fact determines that punitive damages should be awarded, Kansas law requires that a separate proceeding be held by the Court to determine the amount of punitive damages. However, the statutory procedure providing for the court to determine the amount of punitive damages has been ruled unconstitutional in a federal case in which jurisdiction was based upon diversity. *Capital Solutions, LLC v. Konica Minolta Business Solutions, U.S.A., Inc.*, 695 F.Supp.2d 1149 (D. Kan. 2010) (holding that the Seventh Amendment guarantees the right to a jury trial on the issue of punitive damages).
- G) Wrongful Death.** Kansas Courts have held that because the wrongful death cause of action is purely a creature of statute, the only damages available are those expressly allowed by the wrongful death statute, i.e. compensatory damages. *Smith v. Printup*, 866 P.2d 985, 999 (1993). Punitive damages are not recoverable in a wrongful death action, but are recoverable in a survival action. *Id.*
- H) Due process.** Whether an award of punitive damages violates due process depends on:
- (1) the degree of reprehensibility of defendant's conduct;
  - (2) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and
  - (3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases.

*Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 281 Kan. 1287, 1307, 136 P.3d 428, 442-43 (Kan. 2006) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)).

### **Judgment Interest**

- A) **Pre-judgment interest.** In Kansas, pre-judgment interest is generally allowable on liquidated claims. A claim is liquidated when both the amount due and the date on which such amount is due are fixed and certain or are definitely ascertainable by mathematical calculation. A good-faith controversy as to whether the party is liable for the money does not preclude a grant of prejudgment interest. *Blair Const., Inc. v. McBeth*, 273 Kan. 679, 689, 44 P.3d 1244, 1251 (2002) (internal citations omitted).
- B) **Post-judgment interest.** Post-judgment interest is available on all Kansas judgments. KAN. STAT. ANN. § 16-204. Through June 30, 2017, the applicable judgment rate is 5.00%.

### **Recovery of Attorneys' Fees**

- A) **Requirements.** Attorneys' fees are recoverable unless authorized by statute or agreement of the parties. *University of Kansas v. Sinks*, 644 F. Supp. 2d 1287 (D. Kan. 2009); *Dickinson, Inc. v. Balcor Income Props. Ltd--II*, 12 Kan.App.2d 395, 399, 745 P.2d 1120, 1123 (1987).
- B) **Standard of review.** The trial court has discretion to determine the amount of attorneys' fees to be awarded and will only be reversed if no reasonable person would have taken the same position as the trial court. *Evans v. Provident Life & Acc. Ins. Co.*, 249 Kan. 248, 263, 815 P.2d 550, 561 (1991).

### **Settlement Involving Minors**

- A) When a minor has a representative, the representative may sue or defend on behalf of the minor or incapacitated person. If a minor does not have a duly appointed representative the minor may sue by the minor's next friend or by a guardian ad litem. KAN. STAT. ANN. § 60-217(c).

## **KANSAS DRAM SHOP LAW**

### **Kansas Dram Shop Law Generally**

- A) Kansas is one of the few states that has no “dram shop” or “social host” laws. This means that an injured person cannot hold a social host or vendor financially responsible, or seek damages, when they serve alcohol to someone who then causes injuries as a result of an alcohol-related accident.
  - 1) “At common law, and apart from statute, no redress exists against persons selling, giving or furnishing intoxicating liquor for resulting injuries or damages due to the

acts of intoxicated persons, either on the theory that the dispensing of the liquor constituted a direct wrong or that it constituted actionable negligence. *Bland v. Scott*, 279 Kan. 962, 965-66 (Kan. 2005 ) (quoting *Ling v. Jan's Liquors*, 237 Kan. 629, (Kan. 1985) and *Stringer v. Calmes*, 167 Kan. 278, (Kan. 1949)).

- 2) Since Kansas does not have a dram shop act, the common-law rule prevails in Kansas. *Id.*

**B) Ling v. Jan's Liquors**

- 1) A 1985 action by an injured third party against the liquor vendor who sold liquor to the minor who injured the third party in an automobile accident.
- 2) The decision discussed the history and development of the dram shop law in considerable detail.
- 3) In holding that an action in negligence could not be maintained under Kansas law, the *Ling* court noted that the common-law rule was based on the theory that the cause of the harm was “the act of the purchaser in drinking the liquor and not the vendor in selling it.” 237 Kan. at 635.

- C) However, the injured person may have claims under other Kansas negligence and personal injury rules.

**Criminal Liability**

- A) Although Kansas law does not allow an injured person to file a civil lawsuit seeking damages from those who provide alcohol, state law does create criminal penalties for vendors and social hosts who sell, serve, or give alcohol to certain individuals.

**B) Kansas Annotated Statutes § 41-715:**

- 1) Makes it a misdemeanor to “knowingly sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquor” to a person who is incapacitated, including a person who is incapacitated by alcohol intoxication.
- 2) Because this is a criminal statute, a person may face penalties for violating it only if they are charged and convicted by a prosecuting attorney or similar government entity.

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor**

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