



Kansas Defense Journal

2019 No. 4

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KADC President's Message

► By Lora Jennings Mizell, KADC 2020 President

As we start a new year at KADC, our Executive Committee and Board of Directors will be working to ensure that KADC continues to provide exceptional value to its members. One of the most visible and tangible ways KADC provides value to its members is through its Annual Conference. This past December, KADC again presented a successful Annual Conference, offering twelve hours of continuing legal education and the opportunity to learn from and network with other defense counsel from across the state.

Our Keynote Speaker was Ross Guberman, who presented on legal writing. In addition, we were fortunate to have the Honorable James P. O'Hara present on the rules of discovery and to have the Honorable Karen Arnold Burger present our Kansas Court Update. The conference also features several great speakers who spoke on a variety of practical topics, ranging from electronically stored information ESI, to Rule 30(b)(6) depositions and expert depositions, to our annual Kansas case law update.

Our Annual Conference also included the 12th Annual Litigation Skills Workshop, which provides attorneys the opportunity to learn trial and other litigation skills. This year, twelve attorneys from eight different firms attended the workshop. I would encourage you to make plans now to attend this year's conference.

The Amicus Curiae Committee remains eager to receive our members' requests for KADC to prepare and submit amicus curiae briefs on matters of substantial interest to KADC members. Likewise, KADC remains committed to providing strong advocacy and support through our Legislative Committee. The current legislative session is underway and legislative reports have already been sent out.

KADC's Executive Committee and Board will be working this year to continue our Association's community service work through our Community Service Committee and its contributions to our communities.

As always, if you believe there are ways we can improve the value that KADC provides to you and your practice, please let us know. If you have any interest in becoming a committee member, we would love to have you. And, let other attorneys know about all the great benefits to be found here at KADC and encourage them to become members. Finally, I would like to thank all of the KADC members who have volunteered their time and effort to help make KADC a great association of defense attorneys.



**Zach Chaffee-McClure and Laura Jennings Mizell-
Laura presents Zach with award as 2019 President.**

Executive Director's Message

► **By Scott Heidner**

Greetings from KADC headquarters!

It was great to see so many of you at the 2019 Annual Conference. Kudos to Terelle Mock and her planning team for putting together a fantastic event. Great sessions, great networking, and the best PDH value for the cost in Kansas!

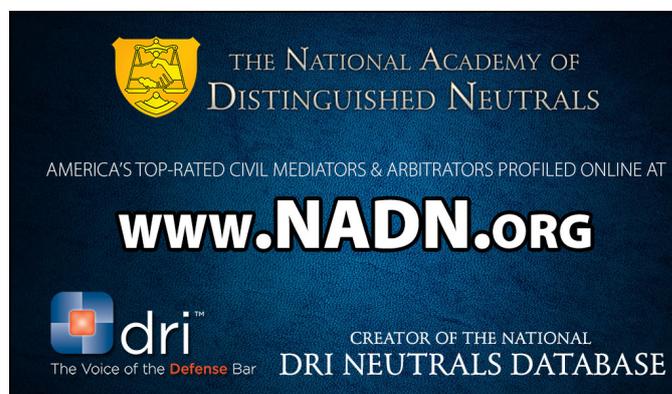
Speaking of the Annual Conference, it's never too early to mark your calendars for the 2020 event. It will once again be held at the Marriott Country Club Plaza, and the dates have been set for December 4-5, 2020. New KADC Secretary Nathan Leadstrom has the helm in planning this event, and he and the KADC team are already underway.

Speaking of the KADC team, we are very excited to announce the addition of Brad Parker to our team. Brad comes to us with over 20 years of association management experience. He has the Certified Association Executive (CAE) credential, which is the gold standard in the world of association management. He will be working on KADC items right out of the gate, and I'm excited for you to meet him.

The 2020 legislative session is officially underway. There are several bills of interest from 2019, which all are alive and subject to action again in 2020. There will undoubtedly be new legislation which will be of importance to our KADC members. There will be continued negotiation regarding judicial selection and court funding, which will have a new wrinkle with the courts suing the legislature over funding. As always, we'll have legislative bulletins sent to you each Friday to keep you updated.

I want to share one last note about KADC committees. New President Lora Jennings Mizell is working as we speak to appoint committee leaders and members. There is an enormous amount of work that goes on behind the scenes at KADC through our committee structure. If you have any interest in serving, please let me know. I promise you'll get more from the experience than you can imagine, and we rely on our talented members to keep our committees effective and engaged.

Thanks for your ongoing membership and support of KADC!



Case Update

► By Lyndon Vix, Fleeson, Gooing, Coulson & Kitch, LLC

Here's to hoping that everyone steered clear of altercations at White Castle (or, for that matter, Capital Grill) during the KADC Meeting.

During the last three months of 2019, the Kansas appellate courts released several opinions of significance and/or interest.

From the Supreme Court

[Williams v. C-U-Out Bail Bonds, LLC](#) muddies the waters on discretionary function immunity by appearing to move back toward the holding of *Nero v. Kansas State University* that makes immunity harder to obtain than it would be under the more recent *Thomas v. Shawnee County Comm'rs*. A more complete discussion of this area of the law, including an analysis of *Williams*, is found in an article written by Brian Vanorsby in the previous issue of the KADC Journal.

[Corvias Military Living, LLC v. Ventamatic, Ltd.](#) muddies the waters on the economic loss doctrine. The case holds that under the modified version of the doctrine codified in the Kansas Product Liability Act, damage to property—including the product itself—is recoverable. The case further holds that damages incurred to remove and replace a defective product are pure economic losses not recoverable under the KPLA, but also are not subsumed by the KPLA so they could possibly be recovered through another theory such as breach of contract or unjust enrichment.

In [Via Christi Hospitals Wichita, Inc. v. Kan-Pak, LLC](#), the Court holds that language that was mysteriously—and apparently mistakenly—inserted into the 2011 workers compensation fee schedule which severely reduced the amount to be paid for hospital bills of over \$60,000, must be followed. The Court held that the Court of Appeals erred in undertaking an examination of how the Division of Workers Compensation's accidental rulemaking came about under the guise of the "unreasonable, arbitrary or capricious" provision of the Kansas Judicial Review Act.

In [Reardon v. King](#), we are told that, contrary to popular belief, Kansas does not recognize stand-alone causes of action for negligent training and supervision (and presumably not negligent hiring and retention either) because employers do not owe these duties to third parties. Rather, there is only an overarching duty of reasonable care under the circumstances to prevent harm to third parties caused by employees when they are acting within the scope of their employment. Evidence of improper or insufficient training and/or supervision may be evidence of a breach of the overarching duty but are not viable claims on their own. It remains to be seen how far this holding will extend into other areas of negligence law.

If you are involved in eminent domain matters, you may want to note the clarification provided in [GFTLenexa, LLC v. City of Lenexa](#) that an appeal from a judgment in an inverse condemnation case must be taken to the Court of Appeals, rather than directly to the Supreme Court.





Case Update (continued)

From the Court of Appeals

[Morgan v. Helping Hands Home Health Care, LLC](#), involved negligence claims against a home health care service and explains how statutes that do not create a private right of action can still be used to establish a duty of care. In order to do so, the plaintiff must be a member of the class the statute sought to protect and the claimed injury must have been of the character the legislature sought to protect the public against. The court concludes that the mandatory reporter statute can be used to establish the standard of care in this case.

[King v. Casey's General Stores, Inc.](#) is a slip and fall case which addresses accusations of juror deceptiveness in voir dire. The court finds no misconduct, primarily because the juror was never directly asked questions which would have required him to disclose knowledge he purportedly had about the case.

[Kansas City Grill Cleaners, LLC v. BBQ Cleaner, LLC](#) is another case in which a contractual forum selection clause was found to be unenforceable with regard to statutory claims. It holds that because the Kansas Consumer Protection Act contains its own venue provision, that provision cannot be varied by contract.

Quick Hits from the Kansas Federal Courts

[Myers v. Brewer](#) involves a procedural question that may not come up very often. Magistrate O'Hara determines that a district court can stay the proceedings before it while a party seeks interlocutory review in the circuit court of appeals, but the district court does not have the power to further stay the proceedings while the party seeks United States Supreme Court review of the circuit's decision. In [Greenfield v. Newman University](#), Judge Crabtree holds that Kansas does not recognize a claim of defamation based on "false implication or innuendo." Judge Gale, in [Crouch v. State Farm Mutual Automobile Insurance Co.](#) discusses the level of specificity required in connection with the disclosure of non-retained experts, such as treating physicians and investigating officers. In [Runnebaum v. Magellan Healthcare, Inc.](#) Judge Vratil assessed sanctions against an attorney and referred him to the Disciplinary Administrator because his reason for not obtaining timely service on the defendant was that his client had not paid him. In [Long v. American Family Mutual Insurance Company, S.I.](#), Magistrate Mitchell holds that the representative of a defendant is not required to come to mediation with settlement authority sufficient to meet the plaintiff's full demand. However, having only an attorney appear at mediation may be deemed a failure to properly participate. Finally, in [Jones v. Boeckman](#), Judge Teter rules that the fact that a bouncer allegedly initiated the events that eventually led to the plaintiff's arrest and the charging of a crime does not satisfy the "instituted, procured or continued the criminal proceeding of which the complaint is made" element of a malicious prosecution claim against the bouncer and his employer. Apparently Tate's on Moro in Manhattan is another night spot you will want to avoid.

In the Wake of *Hilburn*

► By Eric Turner, Foulston

Since *Hilburn v. Enerpipe, Ltd.*,¹ declared in June that the statutory cap on noneconomic damages in personal injury actions is unconstitutional, some district courts have addressed some of the questions raised by the Kansas Supreme Court ruling. In *Hilburn*, the Court ruled that the damages cap spelled out in K.S.A. 60-19a02 violates the right to a jury trial in Section 5 of the Kansas Constitution.²

In the most significant ruling to date, Sedgwick County District Court Judge William Woolley ruled in late November that *Hilburn* also applies in medical malpractice actions and to K.S.A. 60-1903, which sets a noneconomic damages cap of \$250,000 in wrongful death actions. In *Perez v. Wesley Medical Center, LLC*,³ Judge Woolley said: “There’s no distinction in applying the case to a medical malpractice case, and if you look at the language of 60-1903, there’s no distinction in the language of 60-19a02 to cause the court—if you’re just analyzing the language—to conclude that *Hilburn* should not be applied to a wrongful death case and to the medical malpractice cases.”⁴

Judge Woolley also ruled that *Hilburn* should apply to all pending cases, not just those filed after *Hilburn* was decided. Judge Woolley cited a United States Supreme Court criminal sentencing case, *Alleyne v. United States*,⁵ in support of his ruling that *Hilburn* applies retroactively, concluding that “the decision on someone, the jury making a decision on those facts instead of the judge making the decision on the facts, applies immediately from the time the case comes down.”⁶ But in this particular case, Judge Woolley held the plaintiff to the damages claimed in the pretrial order. In *Perez*, the jury awarded more than was claimed in the pretrial order. Judge Woolley reduced the damages, concluding that “the pretrial order means something” and that “a party is bound by the pretrial order.”⁷

Ultimately in late December, the defense—represented by Michelle Watson and John Gibson of Gibson Watson Marino—prevailed on its motion for judgment as a matter of law for lack of sufficient evidence on which a jury could find causation. If the plaintiff appeals, these *Hilburn* issues would be teed up for a cross-appeal before the Kansas Court of Appeals.

In other cases:

Shawnee County District Court Judge Teresa Watson allowed a plaintiff to amend his Rule 118 statement of monetary damages from \$2 million to \$11 million in light of *Hilburn*, though the Court declined to rule on the constitutionality of damages caps in the medical malpractice context before trial.⁸ The case is still pending.

¹309 Kan. 1127 (2019).

²*Id.* at 1149-50.

³Case No. 17-CV-854 (Nov. 20, 2019).

⁴*Id.* Transcript of Hearing on Motion to Reduce Noneconomic Damage Award, p. 3.

⁵570 U.S. 99 (2013).

⁶*Perez*, Transcript of Hearing on Motion to Reduce Noneconomic Damage Award, p. 7.

⁷*Id.*, pp. 12-13.

⁸*Stewart v. Borchers*, Case No. 2019-CV-104 (Nov. 14, 2019).

In the Wake of *Hilburn* (Cont.)

United States District Court Judge J. Thomas Marten granted a plaintiff's motion to amend a pretrial order to claim in excess of \$300,000 for noneconomic losses in a personal injury automobile accident case.⁹ The motion was filed three days after *Hilburn* was released and five weeks before the trial date. Judge Marten noted that the plaintiff cited K.S.A. 60-19a02 as the basis for seeking \$300,000 in noneconomic damages in the pretrial order. Thus, it wasn't a self-imposed cap on damages. Judge Marten ultimately found that "it would be manifestly unjust to force Esparza to proceed to trial subject to the unconstitutional statutory cap on non-pecuniary damages."¹⁰ The case settled in late July.

In light of continuing litigation of issues raised by *Hilburn*, the amicus committee is establishing a brief bank and collection of court opinions that KADC members can use as a resource. It is apparent that different plaintiffs have filed similar briefs on issues of common interest, and the defense bar should band together to share our resources for the common goal of all KADC members. If you have an order or brief to share, please forward it to the KADC office or a member of the amicus committee: scott@kadc.org, eturner@foulston.com, or akindling@josephhollander.com.

Amicus Committee Seeks Members, Writers, and Requests

The amicus committee needs a few new members. If you have an interest in appellate practice or just want to get involved in KADC, please join our committee.

We are also in need of potential authors. Writing an amicus brief is a great way for seasoned practitioners to get their younger associates involved. Please consider providing your name and practice specialty to the committee.

⁹*Esparza v. Regent Insurance Co.*, Case No. 17-1163-JTM, 2019 WL 2743914 (D. Kan. July 1, 2019).

¹⁰*Id.* at *3.



Motions to Quash: *An Intervention*

► By Jake Peterson, Clark, Mize & Linville, Chtd.

Your client gets served with a non-party business records subpoena seeking particularly sensitive, privileged information. It's the third one of its kind in the last six months from this particular attorney. You remind your client of the now all-too-familiar process of objecting. Serve opposing counsel with written objections within 14 days.¹ Wait for a response.

But your client is over it. No objections. No waiting for responses. No back and forth. She wants you to push back hard this time.

Can do. The written objections aren't mandatory, they're permissive.² And K.S.A. 60-245 – the “normal” subpoena statute – doesn't restrict who can file a motion to quash. It simply confers authority to quash a subpoena upon the court.³

It stands to reason that you, as counsel for the subpoenaed party, can file a motion after being served. It happens all the time, and you're confident that you'll win on the privilege issue. Forcing a hearing will make counsel think twice before serving similar subpoenas in the future.

You file the motion. At the hearing, you're shocked when the opposing party repeatedly objects to your appearance. *He's* the one who served the subpoena *on us!*

Fine. You make an oral motion to enter a limited appearance. The district court grants you leave to appear and grants your motion to quash. Opposing counsel files an interlocutory appeal.

The Court of Appeals reverses, citing *Jones v. Bordman*.⁴ There, the plaintiff's attorney subpoenaed six years of reports (among other things) authored by a less-than-neutral defense expert.⁵ The expert himself attempted to quash the subpoena,⁶ but the plaintiff's attorney objected to the expert's attorney even entering an appearance at the hearing.⁷ The district court granted leave to appear, as in your case, but it denied the motion to quash.⁸

¹Or the time specified for compliance, whichever is earlier. K.S.A. 60-245a(b).

²“A person commanded to produce designated materials or to permit inspection *may* serve on the party or attorney designated in the subpoena a written objection...” *Id.* (emphasis added).

³K.S.A. 60-245(c)(3).

⁴243 Kan. 444 (1988).

⁵*Id.* at 445. (“Dr. Lichtor spends approximately 75 to 90 percent of his professional time on medicolegal matters.... Approximately 75 percent of the medicolegal work performed by Dr. Lichtor is performed for the defendant.”).

⁶*Id.*

⁷*Id.* at 444-45.

⁸*Id.* at 445, 450. The Court also did not find the expert's Ferris Buhler-style antics and transparently-for-hire courtroom demeanor lent much credibility either. Although they don't bear on the standing issue, the details are just too remarkable not to mention.



Motions to Quash: *An Intervention*

On appeal, the Kansas Supreme Court agreed with the plaintiff and held that the expert did not have standing.⁹ Although the expert had leave to appear, that just wasn't good enough in the face of the plaintiff's objection. Crucially, the expert's attorney never asked for (and the district court never granted) leave to *intervene*.¹⁰

If filing a motion and entering an appearance isn't good enough, what's the right way to do it? A motion and a proposed pleading:

Notice and pleading required. A motion to intervene *must* be served on the parties as provided in K.S.A. 60-205, and amendments thereto. The motion must state the grounds for intervention and *be accompanied by a pleading* that sets out the claim or defense for which intervention is sought.¹¹

In *Jones*, even though his money was not at stake, the expert's "defenses against the subpoena and the exclusion of his testimony presented common questions of law and fact, which authorized the district court to utilize its discretion in determining whether to permit intervention."¹²

A previous trial court apparently found that the expert had tried to fool a process server at the door by pretending to be his deceased father and claiming his "son" wouldn't be back until late in the night. *Id.* at 444, 446. The expert's regular car was parked in the driveway. *Id.* That court also found (among other things) that he needlessly commented on the cleanliness of a plaintiff's underwear at trial, and "has demonstrated a pattern over an extended period of time of testifying in an untruthful manner that is intended to deceive the finder of fact.... [He] bases his conclusions to a substantial degree on what will advance the cause of his client and not on the facts in a particular case." *Id.* at 447.

⁹*Id.* at 451. Kansas federal court decisions appear to reach an entirely different result:

Only the person or entity to whom a subpoena is directed can seek to quash or modify that subpoena under Rule 45(c). An exception exists if the party challenging the subpoena has a personal right or privilege with respect to the subject matter at issue in the subpoena.

McDonald v. Kellogg Co., No. 08-2473-JWL, 2009 WL 10664465, at *1 (D. Kan. Nov. 5, 2009); *see also, e.g., Gilpatrick v. Harper Co., Kansas*, No. 18-1245-JWB-KGG, 2018 WL 6504394, at *1 (D. Kan. Dec. 11, 2018), *reconsideration denied*, No. 18-1245-JWB-KGG, 2019 WL 184102 (D. Kan. Jan. 14, 2019).

¹⁰*Jones*, 243 Kan. at 451-52.

¹¹K.S.A. 60-224(c) (emphasis added).

¹²*Id.* at 448; K.S.A. 60-224(b)(1). Despite the warnings in *Jones*, strict compliance with K.S.A. 60-224 is not *always* required. *See Price v. Nationwide Mut. Ins. Co. of Des Moines*, 152 P.3d 1274, *3 (Kan. Ct. App. 2007) (unreported) (holding that the district court did not abuse its discretion when granting a motion to intervene even though no proposed pleading was attached to the motion because the motion gave opposing parties adequate notice of the intervening claim). Nevertheless, it's best not to rely on a court's good graces because appellate caselaw on intervention often takes a hard turn:

K.S.A.2012 Supp. 60-224(c) means what it says. The... argument that it "was obvious" what [the intervenor] was trying to do sucks the life out of the statute. How is a court to decide if a party should intervene if no proposed pleading is filed along with such a motion? The law does not require district judges to be mind readers. We view this failure to file a proposed pleading with this motion to intervene to be just as deficient as a motion for summary judgment that is filed and has no uncontroverted findings of fact as required by Supreme Court Rule 141(a)



Motions to Quash: *An Intervention*

Of course, the way (most of the time¹³) to avoid the intervention headache is to simply follow the more typical objection process. A motion by a subpoenaing party in response to written objections seems to implicitly confer standing upon the responding party.¹⁴ And while it doesn't quite have the same aggressive ring as "quashing" a subpoena, you could always move for a protective order under K.S.A. 60-226: "A party or *any person from whom discovery is sought* may move for a protective order...."¹⁵

Ultimately, you resolve to stick with written objections in the future, unless absolutely necessary. Why should you file a motion when you can force opposing counsel to do so, instead?

Enter. Bank & Tr. v. VanLerberg, 299 P.3d 798, at *5 (Kan. Ct. App. 2013) (emphasis added); see also *Memorial Hospital Ass'n, Inc. v. Knutson*, 239 Kan. 663, 666 (1986) (upholding denial of a motion to intervene where the party only made an oral motion); *Wilson & Walker v. State*, 230 Kan. 49, 56 (1981) (same).

¹³You could bother the Supreme Court with a petition for writ of mandamus in other circumstances, too, but that is clearly not a viable option in most cases. *Kansas Med. Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 608, 619 (2010).

¹⁴K.S.A. 60-245(c)(2)(B) ("If an objection is made... [a]t any time, *on notice to the commanded person*, the serving party may move the issuing court for an order compelling production or inspection.")(emphasis added).

¹⁵K.S.A. 60-245(c)(emphasis added).

SAVE THE DATE!



Community Service Update:

KADC Collects for Children's Mercy

During the Annual Meeting, KADC ran a drive to collect items for families that have a child facing an extended stay in the hospital. Children's Mercy provides critical care to children and many times families end up spending considerable time at the Hospital. The goal was to try and make that situation a little easier by providing items to help with their stay or pass the time. Our members provided a variety of items including, games, books, coloring books, toys, art supplies and clothes. After the Conference the boxes of donations were delivered and they did not sit for long. Children's Mercy staff put this stuff right to use and it came at a perfect time for those that have to spend time in the Hospital during the holidays.

A huge thank you to all of those who donated! Below is a thank you note from Children's Mercy.



Dear John,

You've made a gift that will brighten a child's day. Thank you.

Many trips to Children's Mercy are unplanned and unexpected, which means families arrive without the essentials and the comforts of home. Your recent gift helps bring comfort to patients and their families when they need it most.

At Children's Mercy, care is much more than medicine, particularly during the holidays. Because you took time to donate, a family stuck in the hospital during the holidays will have a moment of joy. Your thoughtful gift brings children just what they need to help them heal: a distraction from a procedure, something soft to cuddle, a smile, a reminder of what it feels like to just be a kid.

Without you, Children's Mercy couldn't care for every child who comes through our doors or provide special services to support a family's every need. Thank you for your generosity and for remembering the kids in our care this holiday season.

With gratitude,

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