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Kansas

1. **What are the statute of limitations for tort and contract actions as they relate to the transportation industry.**

Personal injury and wrongful death claims are governed by a two (2) year statute of limitation. K.S.A. § 60-513(a). This period of limitation begins to run once "the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation" begins to run once the fact of injury becomes reasonably ascertainable to the injured party. K.S.A. § 60-513(b). Furthermore, Kansas law sets forth a ten-year statute of repose for tort actions. K.S.A. § 60-513(b). The ten (10) years is an outside limit, meaning that no tort action can be maintained more than ten (10) years from the date of the act giving rise to the cause of action, irrespective of when or if the injury is discovered. *Id.*

A claim for breach of a written contract carries a five (5) year statute of limitation, and a claim for breach of an oral contract carries a three (3) year statute of limitation. K.S.A. § 60-511(1); K.S.A. § 60-512(1).

2. **What effects, if any, has the COVID Pandemic had on tolling or extending the statute of limitation for filing a transportation suit and the number of jurors that are sat on a jury trial.**

Pursuant to Kansas Supreme Court Administrative Orders issued in response to the COVID-19 pandemic, all statutes of limitation were tolled beginning March 19, 2020. See Kansas Supreme Court Administrative Orders 2020-PR-016 and 2020-PR-032. Statutes of limitation did not resume until April 15, 2021. See Kansas Supreme Court Administrative Order 2021-PR-020. Thus, from March 19, 2020 through April 14, 2021 – 391 days – all state statutes of limitation were tolled. See Fullen v. City of Salina, No. 21-4010-JAR-TJJ, 2021 WL 4476780, at *8 (D. Kan. Sept. 30, 2021).

Orders have not been issued limiting the number of jurors permitted to be sat on a jury trial. In fact, as in-person court proceedings were permitted to resume, although restrictions were put in place prohibiting any hearing or docket from being conducted if it required more than ten (10) people in a courtroom, such restriction did not apply to jury proceedings. See Kansas Supreme Court Administrative Order 2020-PR-054. Under 2020-PR-054, criminal jury trials were permitted to resume under limited circumstances, provided safety measures were complied with, and courts were permitted to gather more than ten (10) people for the same. Id.

Notwithstanding, Kansas jury proceedings were significantly impacted by the COVID-19 pandemic. For instance, all jury trials scheduled to begin on or after March 18, 2020 were continued as a result of the pandemic. See Kansas Supreme Court Administrative Order 2020-PR-016. As jury trials resumed, guidance was issued by the Kansas Supreme Court to ensure the safety of court personnel, the public, litigants, witnesses, and jurors. See Supreme Court Guidance Regarding

Conducting Jury Proceedings, Revised May 24, 2021. Such guidance encouraged the district courts to implement a number of safety measures, including physical distancing and cleaning, as well as conducting civil trials virtually, if feasible. Id.

3. **Does your state recognize comparative negligence and if so, explain the law.**

Kansas has adopted a statutory system for comparing fault among joint tortfeasors. See K.S.A. § 60-258a. Under Kansas law, all types of fault, regardless of the degree and regardless of whether the party at fault is the plaintiff, defendant, or a non-party are compared in order to apportion responsibility. Further, under Kansas' comparative fault law, a plaintiff's damages will be reduced for any fault that is contributed to them, and a plaintiff will be barred from collecting any damages if he or she is at least 50% at fault.

4. **Does your state recognize joint tortfeasor liability and if so, explain the law.**

The Kansas Comparative Fault statute abolished joint and several liability. As such, each party is only liable for its proportional share of fault and the resultant damages.

5. **Are either insurers and/or insureds obligated to provide insurance limit information pre-suit and if so, what is required.**

Kansas law does not require insurance limit information to be disclosed to third-party claimants pre-suit.

6. **Does your state have any monetary caps on compensatory, exemplary or punitive damages.**

In personal injury cases, neither economic nor noneconomic damages are limited by Kansas statute. Kansas law previously limited noneconomic damages in personal injury cases by statute, K.S.A. § 60-19a02, but that has since been held unconstitutional by the Kansas Supreme Court in Hilburn v. Enerpipe Ltd., 309 Kan. 1127, 442 P.3d 509 (2019). In wrongful death cases, although economic damages are not limited, noneconomic damages are capped at $250,000.00. K.S.A. § 60-1903.

Punitive or exemplary damages are limited by Kansas statute at the lesser of (1) the defendant's annual gross income based on the defendant's highest annual gross income earned for any one of the five years immediately before the punitive conduct, unless the court determines such amount is inadequate to penalize the defendant in which case the court can award up to 50% of the defendant's net worth, or (2) $5 million. K.S.A. § 60-3702(e). Notwithstanding, if the court determines that the profitability of the defendant's misconduct exceeds the lesser of the defendant's annual gross income or $5 million, then the court may award as punitive damages up to one and a half times the amount of such profit. K.S.A. § 60-3702(f).

7. **Has your state recently implemented any tort reforms which may affect transportation lawsuits or is your state planning to, and if so explain the reforms.**

Kansas has not implemented any recent tort reforms which may affect transportation lawsuits.

8. **How many months generally transpire between the filing of a transportation related complaint and a jury trial.**

At this time, jury trials are typically being set approximately 9-14 months after the filing of the petition.

9. **When does pre-judgment interest begin accumulating and at what percent rate of interest.**

Generally, pre-judgment interest is not awarded on unliquidated claims. Miller v. Botwin, 899 P.2d 1004 (Kan.

1995). However, Kansas courts have discretion to award prejudgment interest on unliquidated claims where necessary to allow full compensation. Lightcap v. Mobil Oil Corp., 562 P.2d 1 (Kan. 1977).

10. What evidence at trial are the parties allowed to enter into evidence concerning medical expense related damages.

Under Kansas law, the plaintiff may present the amount billed and/or paid by the medical providers and the defendant may present the amount accepted by the medical providers in full satisfaction of the amount billed if plaintiff does not present such evidence. It is then left to the finder of fact to determine reasonable value of the medical care and expenses for the treatment of the plaintiff's injuries. In Martinez v. Milburn Enterprises, Inc., 290 Kan. 572, 574, 233 P.3d 205, 208 (2010), the Kansas Supreme Court considered the issue of "whether in a case involving private health insurance the collateral source rule applies to bar evidence of (1) the amount originally billed for medical treatment or (2) the reduced amount accepted by the medical provider in full satisfaction of the amount billed, regardless of the source of payment." Id. at 208. The court held that evidence of (1) the original amount billed and (2) the amount accepted by the hospital in full satisfaction of the amount billed was admissible. 233 P.3d at 229. "However, evidence of the source of any actual payments is inadmissible under the collateral source rule." Id. "The finder of fact is permitted to determine from these and other facts, the reasonable value of the medical services provided." Id.

11. Does your state recognize a self-critical analysis or similar privilege that shields internal accident investigations from discovery?

The Kansas Supreme Court has recognized a qualified privilege of self-critical analysis that may prevent disclosure of confidential communications under particular circumstances. See Wichita Eagle & Beacon Publishing Co., Inc. v. Simmons, 50 P.3d 66, 86 (Kan. 2002) (holding that "the public policy favoring self-analysis and improvement … is outweighed in this instance"); Kansas Gas & Electric v. Eye, 789 P.2d 1161, 1166-67 (Kan. 1990). The Eye Court's recognition and analysis of the privilege is based on federal law and on the Kansas Supreme Court's opinion in Berst v. Chipman, 653 P.2d 107 (Kan. 1982). In Berst, the court held that "[w]here the parties have conflicting interests in materials sought to be discovered, the protective power of the court may be sought by a party under this provision, and the court must balance the litigant's interest in obtaining the requested information with the resisting party's interest, as well as the public interest, in maintaining the confidentiality of the material." Berst, 653 P.2d 107.

In Eye, the Kansas Supreme Court provided four conditions that must be satisfied before a litigant may rely on the privilege:

(1) the communications must originate in a confidence they will not be disclosed;

(2) the element of confidentiality must be essential to the maintenance of the relation between the parties;

(3) the relation must be one which in the opinion of the community ought to be sedulously fostered;

(4) the injury caused by disclosure must be greater than the benefit gained for the correct disposal of litigation.

Eye, 789 P.2d at 1167.

In Eye, several parties acquired copies of what were originally confidential employee "whistle-blower reports" regarding operations and safety at defendant's nuclear power plant. Defendant had also shared these files with a few government agencies that had regulatory authority over it. Defendant filed a petition seeking to retrieve all originals and copies of these documents from plaintiffs and an injunction to prevent plaintiffs from disclosing, reproducing or disseminating the reports. Defendant asserted the self-critical analysis privilege.

The district court granted an order of replevin and permanent injunction. The Kansas Supreme Court reversed on appeal.

The Court held that defendant failed to meet all four conditions for protection under the privilege because the documents it sought to protect had lost their confidentiality through unauthorized disclosures. The Court also applied a "balancing test" to determine whether the injury caused by disclosure was greater than the benefit conferred. It determined that society's interest in nuclear power plants safety outweighed any injury caused by the disclosures. The Court further held that the injunction served no purpose since confidentiality was lost and that the reports were not specific personal property subject to replevin.

Caution must be exercised because in Kansas, when an insurer is working up a claim, much of the claim investigation is discoverable.

12. Does your state allow independent negligence claims against a motor carrier (i.e. negligent hiring, retention, training) if the motor carrier admits that it is vicariously liable for any fault or liability assigned to the driver?

An admission that an employee was acting within the scope of his and her employment does not preclude an action for both respondeat superior and negligent hiring, retention and supervision. Marquis v. State Farm Fire & Cas. Co., 265 Kan. 317, 334-35, 961 P.2d 1213, 1224 (1998). Because the torts of negligent hiring, retention, or supervision are recognized in Kansas as separate torts that are not derivative of the employee's negligence, and admission that the employee was acting within the scope of his or her employment does not preclude an action for both respondeat superior and negligent hiring, retention, or supervision. Id.

13. Does your jurisdiction have an independent claim for spoliation? If not, what are the sanctions or repercussions for spoliation?

Kansas does not recognize a separate cause of action for spoliation. See, e.g., Superior Boiler Works, Inc. v. Kimball, 292 Kan. 885, 259 P.3d 676 (2011); Aramburu v. The Boeing Co., 112 F.3d 1398 (10th Cir. 1997). In Koplin, the Kansas Supreme Court considered whether to recognize a common law tort action for intentional interference with a civil action by spoliation of evidence under the facts presented. The Court concluded that "absent some independent tort, contract, agreement, voluntary assumption of duty, or some special relationship of the parties, the new tort of spoliation of evidence should not be recognized in Kansas under the facts presented." Koplin, 734 P.2d at 1183. However, the holding in Koplin was limited to the facts of the case. The court left open the possibility that it may recognize a cause of action for intentional first-party spoliation wherein defendants or potential defendants in the underlying case destroy evidence to their own advantage. Id. at 1882.

Kansas courts have acknowledged that if a spoliation claim were recognized in Kansas, the elements for intentional spoliation of evidence are: (1) existence of a potential civil action, (2) defendant's knowledge of a potential civil action, (3) destruction of evidence; (4) intent; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages. See, e.g., Superior Boiler Works, Inc. v. Kimball, 292 Kan. 885, 259 P.3d 676 (2011) citing Foster v. Lawrence Memorial Hosp., 809 F. Supp. 831 (D. Kan. 1992).

When spoliation occurs, Kansas courts may give a spoliation instruction to the jury if it is established that a party had evidence in its possession which the party destroyed or otherwise concealed from the opposing party. See Armstrong v. City of Salina, 211 Kan. 333, 339, 508 P.3d 323 (1973). Failure to produce records and documents within a party's control raises a presumption that the evidence which would be disclosed by those records is unfavorable to that party." Home Life Ins. Co. v. Clay, 13 Kan. App. 2d 435, Syl. ¶ 2, 773 P.2d 666, rev. denied 245 Kan. 783 (1989) ("Failure to produce records and documents within a party's control

raises a presumption that the evidence which would be disclosed by those records is unfavorable to that party.").

Kansas utilizes a pattern jury instruction, K.P.J.I. § 102.73 for "Inferences Arising from Failure to Produce Evidence." K.P.J.I. § 102.73, provides: If a party to [the] case has failed to offer evidence within his power to produce, you may infer that the evidence would have been adverse to that party, if you believe each of the following elements: (1) The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence, (2) the evidence was not equally available to an adverse party, (3) A reasonably prudent person under the same or similar circumstances would have offered if they believed it to be favorable, (4) No reasonable excuse for the failure has been shown.

Finally, K.S.A. 60-237(e) specifically addresses the remedies available for a party's failure to preserve electronically stored information. The statute authorizes dismissal of an action, or entry of default against a party, though precludes the court from taking any action beyond what is necessary to cure the prejudice. K.S.A. 60-237(e) ("absent exceptional circumstances, a court may not impose sanctions under this article on a party for failing to provide electronically store information lost as a result of the routine, good-faith operation of an electronic information system.").