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KANSAS

1. What are the legal considerations in your State governing the admissibility or preventability in utilizing the self-critical analysis privilege and how successful have those efforts been?

In 1990, the Kansas Supreme Court recognized a qualified privilege of self-critical analysis. Kansas Gas & Elec. v. Eye, 246 Kan. 419, 426–27, 789 P.2d 1161 (1990) (hereinafter "KG & E"). In order for a party to claim such privilege, four conditions must be established:

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

Id. at 426 (citing Berst v. Chipman, 232 Kan. 180, 189, 653 P.2d 107 (1982)).

In KG & E, a corporation operating a nuclear facility implemented a whistle-blower program in order to improve its operations. Id. at 420. The corporation "established a mechanism for employees of the plant to voluntarily and confidentially report to an independent organization any suggestions or concerns they might have with regard to safety or efficiency of the construction or operation of" the facility. Id. at 420–21. At some point, third parties obtained such confidential files from the independent organization and thereafter the corporation sought to enjoin such third parties from disclosing the files based on the qualified privilege of self-critical analysis. Id. at 422, 425.

In applying the above factors, the Kansas Supreme Court seems to place the greatest weight on the last factor, providing a balancing of interests test. Id. at 426–27. Ultimately the court held that although "the maintenance of confidential communications is an important aspect of self-critical analysis and whistle-blower programs[,] … the public [nevertheless] has an overriding interest in the dissemination of information related to costs, construction, and safety practices of nuclear power plants." Id. at 427. The court further opined that it was alleged that the confidential files contained information concerning violations of law, falsifying documents, and intimidating and harassing power plant inspectors. Id. at 428. Therefore, the court noted, "release of the information contained within the [confidential] files is one manner by which [the corporation], manager of a potentially dangerous plant, can be held accountable to the public." Id.

Because the corporation did not satisfy the four conditions, the corporation could not withhold such confidential information based on the self-critical analysis privilege. Id. The court also noted that even if such privilege did apply, however, the corporation waived such privilege because such files were disclosed to third parties. Id. at 428–29. Thus, it is evident that, even if a Kansas court finds such

privilege applies, such privilege is waivable.

2. Does your State permit discovery of 3rd Party Litigation Funding files and, if so, what are the rules and regulations governing 3rd Party Litigation Funding?

To date, the Kansas legislature has not created a statute referencing the discovery of third-party litigation funding files, and no Kansas court has decided whether to permit discovery of such files. Nonetheless, a federal District of Kansas case has decided the issue of whether to permit discovery of litigation financing agreements. See Freeman v. Gerber Prods. Co., 2006 WL 8440588 (D. Kan. May 4, 2006) (unpublished opinion). While such decision is not binding on Kansas courts, if a Kansas court were to analyze this issue as one of first impression, it would undoubtedly give weight to the District of Kansas decision as persuasive guidance.

Freeman involved a motion of the defendant to compel the plaintiffs to more fully respond to document requests, including a request for contingency fee agreements or litigation financing agreements. Id. at *1. The court noted that, under the federal rules, "a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party." Id. at *2 (citing Sheldon v. Vermonty, 204 F.R.D. 679, 689–90 (D. Kan. 2001)). Notably, under Kansas' rules of civil procedure, the standard is the same: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense…." See K.S.A. 60-226(b). Because the court found "that information pertaining to plaintiffs' ability to pursue litigation [], by way of a contingency fee agreement or other arrangement, may lead to the discovery of admissible evidence…." such fee agreements were relevant and, by extension, discoverable. Freeman, at *2.

Accordingly, if a Kansas court were to adopt the view in Freeman, the court would likely allow discovery of a litigation funding agreement if such agreement was relevant to a party's claim or defense. This is, of course, a fact-specific inquiry.

Of significance, however, there is currently a bill in Kansas that would require parties, without awaiting a discovery request, to provide the other parties with third-party funding agreements. S.B. No. 152 (2021). Specifically, the bill requires parties to provide "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment or otherwise." The bill was referred to Committee on February 5, 2021, but has not yet been heard. See http://kslegislature.org/li/b2021_22/measures/sb152/. If this bill becomes law, it would significantly change plaintiff's discovery obligations in Kansas.

3. Who travels in your State with respect to a Rule 30(b)(6) witness deposition; the witness or the attorney and why?

K.S.A. 60-230(b)(6) is the Kansas counterpart to Federal Rule of Civil Procedure 30(b)(6). As a general rule, the party who wishes to depose another by oral questions must provide notice to every other party and "[t]he notice must state the time and place of the deposition." K.S.A. 60-230(b)(1) (emphasis added). Based on this, a party who names as deponent an association, pursuant to K.S.A. 60-230(b)(6), may either require the deponent to travel, if it sets the deposition where the party is located, or may set the deposition where that association is located, requiring the party's attorney to travel. However, the trial court retains considerable discretion in preventing undue hardship and expense in setting the place for depositions.

First, it is worth noting, that under local district court rules, such as the rules of the Third Judicial District in Shawnee County, Kansas, for example, counsel are expected to cooperate with each other and the deponents "in selecting the least expensive and least disruptive manner of conducting the deposition. Counsel should

consider such cost saving methods as telephone depositions, and sharing of expenses in bringing an out-of-state witness to Kansas for the deposition rather than all counsel traveling to the out-of-state location." DCR 3.203(1). "Absent extraordinary circumstances, counsel shall consult in advance with opposing counsel and proposed deponents in an effort to schedule depositions at mutually convenient times and places." DCR 3.203(3). And, notably, the rules further instruct that "[t]he most convenient location for a party's deposition shall be presumed to be in the office of that party's counsel." Id.

In accord with these local rules, K.S.A. 60-226(c) allows a deponent, who certifies to the court that he/she "has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action," to move for a protective order. The statute provides that "[t]he court may, for good cause, issue [such] order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including … specifying [the] time and place or the allocation of expenses, for the [] discovery." As such, assuming the parties have conferred, the court may ultimately set the place for a deposition.

Moreover, Isis Foods, Inc. v. Mo-Kan Enterprises, Inc. makes clear that "the trial court is vested with broad powers of discretion in making [] orders with respect to the allowance of costs and expenses in the taking of depositions as it deems necessary to protect the party or witness from undue financial hardship." 205 Kan. 203, 205–06, 468 P.2d 113 (1970). Thus, while a party or other person may have to travel for a deposition, the court may, in its discretion, allow such person travel expenses.

4. **What are the benefits or detriments in your State by admitting a driver was in the "course and scope" of employment for direct negligence claims?**

The Kansas Supreme Court follows the minority view on this issue, and thus, it is not beneficial for a defendant to admit its employee driver was acting in the course and scope of employment. In Marquis v. State Farm Fire & Cas. Co. an employee acting in the course and scope of his employment was involved in a car accident injuring plaintiff. 265 Kan. 317, 318–19, 961 P.2d 1213 (1998). The defendant argued that plaintiffs were barred from asserting direct negligence claims such as negligent hiring, retention, and supervision because the defendant had already admitted that the driver was an employee acting within the scope of his employment. Id. at 333. However, the court ultimately held that an admission that an employee was acting in the course and scope of his employment at the time of an accident does not preclude an action for direct negligence claims, including negligent entrustment or negligent hiring, retention, or supervision. Id. at 334–35 (citing Kansas State Bank & Tr. Co. v. Specialized Transp. Servs., Inc., 249 Kan. 348, 362, 819 P.2d 587 (1991)). The court reasoned that "the torts of negligent hiring, retention, or supervision are recognized in Kansas as separate torts that are not derivative of the employee's negligence…." Id.

5. **Please describe any noteworthy nuclear verdicts in your State?**

There have not been any noteworthy nuclear Kansas verdicts from January 2020 to February 2021.

6. **What are the current legal considerations in terms of obtaining discovery of the amounts actually billed or paid?**

Both the amount billed and the amount actually paid are discoverable in Kansas. Kansas has adopted the majority position employing the "reasonable value of services" approach when it comes to medical expenses. Martinez v. Milburn Enters., Inc., 290 Kan. 572, 233 P.3d 205 (2010). Under this approach, evidence of the "original amount billed" and the "amount accepted . . . in full satisfaction of the amount billed" may both be admitted in evidence for the jury to consider as relevant to determining the reasonable value of the medical services provided to plaintiff, and the collateral source rule does not bar such evidence. Id. at 611–12.

Under Kansas' discovery rules, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense…." K.S.A. 60-226(b). Martinez noted that "relevant evidence is any 'evidence having any tendency in reason to prove any material fact.'" 290 Kan. at 611 (quoting K.S.A. 60-401(b)). The court then specifically indicated that "[e]vidence of the amount accepted in satisfaction of the bill for medical services provided to an injured plaintiff is of relevance, i.e., some value, in determining the reasonable value of those services." Id. As such, the amount billed and the amount actually paid would undoubtedly be discoverable in Kansas.

This is further demonstrated by a federal District of Kansas case wherein the defendant sought to discover "all documents concerning any money, payments or reimbursements received by [plaintiff] from any party related to any of [sic] damages, missed work, or medical treatments received as a result of the events described in" plaintiff's petition. Rowan v. Sunflower Elec. Power Corp., 2016 WL 2772210, at *3 (D. Kan. May 13, 2016). The court agreed, citing the Martinez decision noted above, that the defendant was entitled to discover such information as it is relevant to the amount of money a plaintiff may recover in damages. Id. at *6.

7. How successful have efforts been to obtain the amounts actually charged and accepted by a healthcare provider for certain procedures outside of a personal injury? (e.g. insurance contracts with major providers)

While there is no Kansas authority directly on point on this issue, it is assumed, based on the authority cited under Question 6, that such evidence would be discoverable assuming it meets the standard under K.S.A. 60-226(b), i.e. it is relevant to a claim or defense of a party.

8. What legal considerations does your State have in determining which jurisdiction applies when an employee is injured in your State?

The Kansas Division of Workers' Compensation has jurisdiction over a claim for any injury which occurs within the state of Kansas. K.S.A. § 44-506. The statute also confers jurisdiction in cases involving injuries outside of the state of Kansas where:

(1) the principal place of employment is within the state; or

(2) the contract of employment was made within the state.

K.S.A. § 44-506.

9. What is your State's current position and standard in regards to taking pre-suit depositions?

Pre-suit depositions are available procedurally for the perpetration of testimony only, but on a very limited basis only as under the Federal Rules. See K.S.A. §60-227.

10. Does your State have any legal considerations regarding how long a vehicle/tractor-trailer must be held prior to release?

No Kansas court has specifically addressed the length of time that a vehicle/tractor-trailer must be held prior to release. However, in determining whether to release a vehicle/tractor-trailer, it should be considered that Kansas law generally provides that "failure to throw light upon an issue peculiar with any parties' own knowledge or reach raises a presumption open to explanation, of course, that the concealed information was unfavorable to him." 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 (he) (she) believed it to be favorable to him. (4) No reasonable excuse for the failure has been shown.

11. What is your state's current standard to prove punitive or exemplary damages and is there any cap on same?

To warrant an award of punitive damages under Kansas law, a party must prove to the trier of fact that the party against whom punitive damages is to be assessed is liable for willful or wanton conduct, fraud or malice. Mynatt v. Collins, 57 P.3d 513 (Kan. 2002); Reeves v. Carlson, 969 P.2d 252 (Kan. 1988); Trendel v. Rogers, 955 P.2d 150, 152 (Kan. Ct. App. 1998). A wanton act is more than ordinary negligence, but less than a willful act. Reeves, 969 P.2d at 255. Punitive damages are to punish the wrongdoer for malicious, vindictive or willful and wanton invasion of another's rights. Cerretti v. Flint Hills Rural Elec. Co-op Ass'n, 837 P.2d 330, 334 (Kan. 1992). Gloconda Screw Inc. v. W. Bottoms Ltd., 894 P.2d 260, 265 (Kan. Ct. App. 1995).

Clear and convincing evidence is required to sustain an award of punitive damages. Reeves 969 P.2d at 255. Additionally, pursuant to K.S.A. § 60-3703, a plaintiff cannot proceed with a claim for punitive damages in Kansas without first applying to the trial court and requesting permission to amend a petition to include a claim for punitive damages. K.S.A. § 60-3703. provides as follows:

> No tort claim or reference to a tort claim for punitive damages shall be included in a petition or other pleading unless the court enters an order allowing an amended pleading that include a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim pursuant to K.S.A. 60-209, and amendments thereto.

In the context of K.S.A. §60-3703, "probability" has a specific meaning. "It means more likely than not and, when applied to K.S.A. § 60-3703, means that it is more likely than not that the [movant] will prevail on a claim of punitive damages upon trial of the case." Fusaro v. First Family Mtg. Corp., 257 Kan. 794, 801, 897 P.2d 123 (1995). A court should only allow such an amendment "if the evidence is of sufficient caliber and quality to allow a rational factfinder to find that the [non-movant] acted towards the [movant] with willful conduct, wanton conduct, fraud, or malice." Id. at 802. An unknowing action unmotivated by any intent to harm the movant does not satisfy this standard.

In examining a motion to amend a pleading to add a claim for punitive damages, the court must also consider the "clear and convincing" standard of proof the movant will be required to meet at trial. Thus, "[t]he initial question for the trial court when considering the evidence is whether 'plaintiff has established that there is a probability [considering that the burden on plaintiff is proof by clear and convincing evidence] that the plaintiff will prevail on the claim.'" Id.

Kansas has a statutory cap on punitive damages which is an amount that does not exceed the lesser of the annual gross income earned by the defendant in any of the five years immediately before the punitive conduct unless the court determines that amount to be inadequate to penalize the defendant in which case it can ward up to 50% of the net worth of the defendant, or $5 million dollars. K.S.A. 60-3702 (e)(1) & (2). In lieu of those limitations, however, if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed those amounts, the court can award an amount equal to 1.5 times the amount of profit that the defendant gained or is expected to gain as a result of the defendant's punitive conduct. See K.S.A. 60-3702(f).

12. Has your state mandated Zoom trials? If so, what have the results been and have there been any appeals.

Kansas has not mandated "Zoom trials."

13. **Has your state had any noteworthy verdicts premised on punitive damages? If so, what kind of evidence has been used to establish the need for punitive damages? Finally, are any such verdicts currently up on appeal?**

In a case decided in Jackson County, Missouri, the trial court applied what it thought was Kansas law. Roger Ross, Lorinda Ross v. Jeschke Ag Service LLC. Plaintiffs alleged that a truck driver attempted to pass in no passing zone while farm tractor (plaintiff) made left turn resulting in brain injury, fractured skull/pelvic, cerebral hemorrhage, cognitive/memory losses; $6,300,000 verdict (comparative fault 65% D and 35% P). Damages reduced: $3.9 million in economic reduced to $2.535 million because of comparative fault; $2.4 million in non-economic reduced to $250,000 due to application of Kansas statutory cap (conflict of law issue); $750,000 in punitive. Net result: $3.535 million.