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Kansas

Are preventability determinations and internal accident reports discoverable or admissible in your state? What factors determine discoverability or admissibility?

Preventability determinations and internal accident reports are typically admissible subject to standard evidentiary objections, including the work-product doctrine.

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?

Kansas does not specifically permit discovery of third-party litigation funding files. In 2021, Senate Bill 152 was introduced, which, if passed, would have required parties, without awaiting a discovery request, to provide the other parties with third party funding agreements. However, the bill did not become law and died in Committee in May 2022.

Notwithstanding, third-party litigation funding files may be discoverable in Kansas if relevant to any party's claim or defense. In *Freeman v. Gerber Prods. Co.*, a federal District of Kansas Court ruled that litigation funding agreements were discoverable because "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". 2006 WL 8440588, at *1, *2 (D. Kan. May 4, 2006).

What is the procedure for the resolution of a claim for injuries to a minor in your state? Does the minor's age affect the statute of limitations for a personal injury claim?

Minors in Kansas are permitted to file suit for personal injury claims up until one year after the minor's eighteenth birthday, except that no action may be commenced more than eight (8) years after the time of the act giving rise to the cause of action. *See* K.S.A. 60-515(a).

Any settlement regarding personal injuries sustained by a minor must be approved by the Court. *See Childs v. Williams*, 243 Kan. 441, 441, 757 P.2d 302 (1988). The Court must determine whether the agreement is in the minor's best interest. *White v. Allied Mut. Ins. Co.*, 29 Kan. App. 2d 797, 800, 31 P.3d 328 (2001). With regard to safeguarding the settlement funds, common methods include (1) the court appointment of a conservator (often a parent) to ensure that the funds are used for the minor's benefit; (2) the court appointment of a guardian ad litem to ensure that the funds are used for the minor's benefit; or (3) where the settlement is for $100,000.00 or less, the funds can be placed in a restricted bank account that can be accessed by the minor when he or she attains the age of 18 years. *See* K.S.A. 59-3055(a).

What are the advantages or disadvantages in your State of admitting that a motor carrier is vicariously liable for the fault of its driver in the context of direct negligence claims?

Kansas follows the minority view on this issue whereby a motor carrier cannot avoid liability for direct negligence claims by admitting its driver was acting in the course and scope of his or her employment. *See Marquis v. State Farm Fire & Cas. Co.*, 265 Kan. 317, 333–35, 961 P.2d 1213 (1998).

What is the standard applied for spoliation of physical and/or documentary evidence in your state?

"A party claiming spoliation of evidence must establish that '(1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed with a culpable state of mind; and (3) the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.'" *LendingTools.com Inc. v. Bankers' Bank of Kansas, N.A.*, Nos. 116, 898 & 117,586, 2018 WL 4655656, *9 (Kan. Ct. App. Sept. 28, 2018). Notably, there is no common law duty to preserve evidence. *See Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 896, 259 P.3d 676 (2011); *Koplin v. Rosel Well Perforators, Inc*., 241 Kan. 206, 215, 734 P.2d 1177 (1987). Rather, the duty to preserve evidence must arise because of an independent tort or because of a contract, agreement, voluntary assumption of duty, or special relationship of the parties. *See Kimball*, 292 Kan. at 896.

Is the amount of medical expenses actually paid by insurance or others (as opposed the amounts billed) discoverable or admissible in your State?

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.

What is the legal standard in your state for obtaining event data recorder ("EDR") data from a vehicle not owned by your client?

Upon litigation commencing, a party may serve a discovery request requesting any data previously obtained from a vehicle. A party can also serve a request requiring the other party to produce the vehicle for inspection and copying of the data. Specifically, K.S.A. 60-234(a)(1)(A) provides that a party may serve on any other party a request to produce and permit the requesting party to inspect, copy, test or sample data or data compilations, stored in any medium from which information can be obtained.

Pre-suit, a party may request to inspect the vehicle. If such request is denied, the requesting party could ask the Court for an adverse inference instruction for failure to preserve and produce the evidence. Specifically, Pattern Jury Instruction 102.73 provides as follows: "If you find there is evidence that would help explain an issue and that a party has control over that evidence, but has not presented it, you are to presume that the evidence is unfavorable to that party, unless you find that a reasonable excuse for not presenting the evidence has been shown."

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What is your state's current standard to prove punitive or exemplary damages against a motor carrier or broker and is there any cap on same?

Punitive damages may be awarded whenever there is clear and convincing evidence "of fraud, malice, gross negligence, oppression, outrageous or vindictive conduct, intentional wrongdoing, or wanton invasion of the rights of the injured party…." *Mohr v. State Bank of Stanley*, 241 Kan. 42, 56, 734 P.2d 1071 (1987); *Reeves v. Carlson*, 266 Kan. 310, 313, 969 P.2d 252 (1998). However, "the law does not require a specific finding of an intentional and ruthless desire to injure in order to sustain an award of punitive damages." *Watkins v. Layton*, 182 Kan. 702, 708, 324 P.2d 130 (1958). Rather "[t]he burden of proof is sustained, once the injured party shows such gross neglect of duty as to evince a reckless indifference of the rights of others on the part of the wrongdoer." *Id.*

Punitive damages are capped by statute at the lesser of either $5 million, or "[t]he annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded, unless the court determines such amount is clearly inadequate to penalize the defendant, then the court may award up to 50% of the net worth of the defendant, as determined by the court…." K.S.A. 60-3702(e). In lieu of the limitation provided in K.S.A. 60-3702(e), "if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed the limitation of subsection (e), the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1 ½ times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct." K.S.A. 60-3702(f).

Has your state had any noteworthy recent punitive damages verdicts? If so, what evidence was admitted supporting issuance of a punitive damages instruction? Finally, are any such verdicts currently on appeal?

There have not been any recent noteworthy punitive damage verdicts.

Does your state permit an expert to testify as to content of the FMCSRs or the applicability of the FMCSRs to a certain set of facts?

Kansas Courts have not specifically addressed the issue of whether an expert may testify to the contents of the FMCSRs or the applicability of the FMCSR to a set of facts. However, in general experts may provide testimony in the form of inferences or opinions, including testimony that embraces the ultimate issue or issues to be decided by the trier of fact. K.S.A. § 60-456(d).

Does your state consider a broker or shipper to be in a "joint venture" or similar agency relationship with a motor carrier for purposes of personal injury or wrongful death claims?

A broker or shipper may have an agency relationship with a motor carrier depending on the facts and circumstances. Under Kansas law, "An agency relationship can be created either expressly or implied by the conduct of the parties." *Barton v. Waechter,* No. 06-1349-MLB, 2008 U.S. Dist. LEXIS 143896, at *21 (D. Kan. Jan. 3, 2008). An implied agency may exist where the parties' "words, conduct or other circumstance" indicated that the principal intended to give the agent authority to act. *Id*.

An independent contractor, on the other hand, is "one who contracts to do certain work according to his or her own methods, without being subject to the control of the employer except as to the results or product of his or

her own work." *Id.*

> Indications of an independent contractor relationship include: (1) the existence of a contract for the performance by a person of a certain kind of work at a fixed price; (2) the independent nature of the business or distinct calling; (3) the employment of assistants with the right to supervise their activities; (4) the obligation to furnish necessary tools, supplies, and materials; (5) the right to control the progress of the work, except as to final results; (6) the time for which the worker is employed; (7) the method of payment-whether by time or by job; and (8) whether the work is part of the regular business of the employer. The right to control, supervise, and direct an alleged employee's work is the primary test for determining an employer/employee relationship.

Barton v. Waechter, No. 06-1349-MLB, 2008 U.S. Dist. LEXIS 143896, at *22-23 (D. Kan. Jan. 3, 2008) (internal citations omitted).

Provide your state's comparative/contributory/pure negligence rule.

Kansas has adopted the doctrine of modified comparative negligence. K.S.A. § 60-258a (1994). Under this doctrine, a claimant's action is barred if his negligence is equal to or greater than the combined negligence of all defendants. Otherwise, the claimant's recovery is diminished in proportion to his degree of negligence. Id.

Provide your state's statute of limitations for personal injury and wrongful death claims.

In Kansas, personal injury and wrongful death claims must be brought within two years from the date that the act giving rise to the cause of action first causes substantial injury. K.S.A. § 60-513.

In your state, who has the authority to file, negotiate, and settle a wrongful death claim and what must that person's relationship to the decedent be?

An action may be commenced by any one of the heirs at law of the deceased who has sustained a loss by reason of the death. K.S.A § 60-1902. An heir-at-law refers to one who takes property by intestate succession. *Osborn v. Anderson*, 56 Kan. App. 2d 449, 453, 431 P.3d 875, 879 (2018)(citations omitted).

Only one wrongful death lawsuit may be maintained for the benefit of all heirs, regardless of whether all heirs intervene. *Frost v. Hardin*, 1 Kan. App. 2d. 464, 572 P.2d 11 (1977). Accordingly, any one heir may file, negotiate and/or settle a wrongful death claim on behalf of all of the heirs in Kansas. *See id.*

Is a plaintiff's failure to wear a seatbelt admissible at trial?

Evidence of a failure to use a seat belt is inadmissible under the comparative negligence doctrine on the issue of contributory negligence or mitigation of damages. K.S.A. § 8-2504.

In your state, are there any limitations on damages recoverable for plaintiffs who do not have insurance coverage on the vehicle they were operating at the time of the accident? If so, describe the limitation.

Yes. If an injured person fails to maintain personal injury protection benefits required by law, that injured person has no cause of action to recover non-economic losses sustained as a result of an accident while operating an uninsured vehicle. K.S.A. § 40-3130.

How does your state determine applicable law/choice of law questions in motor vehicle accident cases?

Kansas follows the rule that the law of the state where the tort occurred, *lex loci delicti*, should apply. *Raskin v.* Allison, 30 Kan. App. 2d 1240, 1241, 57 P.3d 30, 32 (2002)(citing) Ling v. Jan's Liquors, 237 Kan. 629, 634, 703 P.2d 731 (1985). The Kansas Supreme Court has repeatedly applied the law of the place of the injury, even when all the parties were residents of Kansas. Raskin at 30.