

DIGEST OF INSURANCE LAW

KANSAS

Not Revised for this Edition

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

District Court has unlimited original civil jurisdiction. K.S.A. 20-301

Appellate Courts

Kansas Supreme Court is court of last resort for civil and criminal cases. It is composed of chief justice and six associates. Its decisions are final, excepting federal constitutional questions.

Appeals from District Court are to Kansas Court of Appeals; however, in criminal cases, appeals are taken directly to Kansas Supreme Court when defendant is convicted of class A or B felony, when maximum sentence of life imprisonment has been imposed, or for crimes committed on or after July 1, 1993, when convicted of off-grid crime. Also, in civil and criminal cases, appeals are taken directly to Supreme Court when state or federal statute has been held unconstitutional. Except when question under state or federal constitution arises for first time as result of Appeals Court decision, Supreme Court review thereof is discretionary. *See* K.S.A. 60-2101; K.S.A. 22-3601; K.S.A. 22-3602.

Kansas Civil Procedure follows Federal rules scheme. K.S.A. 60-201 *et seq.* General Statutes of 1949 and supplements thereto have been replaced by Kansas Statutes Annotated.

LAW

Abbreviations

- F. Supp. – Federal Supplement.
- F. Supp. 2d – Federal Supplement, Second Series.
- F.2d – Federal Reporter, Second Series.
- F.3d – Federal Reporter, Third Series.
- Kan. – Kansas Reports.
- K.S.A. – Kansas Statutes Annotated.
- Kan. App. 2d – Kansas Court of Appeals Reports, Second Series.
- MRPC – Model Rules of Professional Conduct.
- P. – Pacific Reporter.
- P.2d – Pacific Reporter, Second Series.

P.3d – Pacific Reporter, Third Series.

ACCIDENT AND HEALTH INSURANCE

See “DISABILITY.”

Assault. Policy excluding coverage for injuries from assault requires more than “simple assault,” and must be such that insured could reasonably anticipate his action would result in bodily injury or death to himself. *Steele v. General Am. Life Ins.*, 217 Kan. 24, 535 P.2d 948 (1975).

Disease Induced by Accident. Insured entitled to recover for neurasthenia caused “by being struck by lightning.” *Stecher v. London Guar. & Acc. Co.*, 133 Kan. 89, 298 P. 754 (1931).

Where accidental injury activates or aggravates dormant disease or physical infirmity, accident said to have been proximate cause of resulting disability within usual provisions and ordinary meaning of policy insuring against accident. Coverage exists even though such disability might later have resulted regardless of accident, and even if accident might not have affected normal person to same extent. *Williams v. Benefit Trust Life Ins. Co.*, 200 Kan. 51, 434 P.2d 765 (1967); *Boring v. Haynes*, 209 Kan. 413, 496 P.2d 1385 (1972).

With regard to aviation exception, *see Knouse v. Equitable Life Ins. Co.*, 163 Kan. 213, 181 P.2d 310 (1947); *McKanna v. Continental Assur. Co.*, 165 Kan. 289, 194 P.2d 515 (1948); *Smith v. Mutual Ben. Health & Acc. Ass’n*, 175 Kan. 68, 258 P.2d 993 (1953); *Walker v. Imperial Cas. & Indem. Co.*, 1 Kan. App. 2d 349, 564 P.2d 588 (1977).

Provisions in policy excluding liability for sickness or disease originating before policy’s effective date are valid and enforceable. Origin or inception of sickness or disease is that point when disease becomes manifest or active, or when there is distinct symptom or condition from which one learned in medicine can diagnose disease. Insured’s knowledge not essential to establish disease’s existence or date of origin. *Southards v. Central Plains Ins. Co.*, 201 Kan. 499, 441 P.2d 808 (1968);



Bishop v. Capitol Life Ins., 218 Kan. 590, 545 P.2d 1125 (1976).

Policy provision requiring doctor's regular attendance will not be enforced where substantial and competent proof shows such attendance would serve no helpful purpose. *Brown v. Continental Cas. Co.*, 209 Kan. 632, 498 P.2d 26 (1972).

Total Disability. Policy which relates total disability to inability to perform insured's occupation does not require total helplessness; it is sufficient if unable to perform substantial duties in usual manner. *Brown v. Continental, Id.*; *Mathews v. Travelers Ins. Co.*, 212 Kan. 292, 510 P.2d 1315 (1973).

Burden of proof on insurer to establish accident is within policy exclusion. *Smith v. Allied Mut.*, 184 Kan. 814, 339 P.2d 19 (1959); *Bishop v. Capitol Life, supra*. Exclusionary clauses are interpreted narrowly against insurer. *State Farm v. Falley*, 23 Kan. App. 2d 21, 926 P.2d 664 (1996). Burden of proof is on plaintiff to prove there was accidental bodily injury. *Evans v. Provident Life Ins. Co.*, 249 Kan. 248, 815 P.2d 550 (1991). Burden of proof on insured to show sudden and accidental. *Cessna Aircraft v. Hartford Acc. & Indem. Co.*, 900 F. Supp. 1489 (D. Kan. 1995). Both plaintiff and insurance company must prove their claim is more probably true than not true. *Id.* There is presumption against suicide. *Id.*

Notice and Proof of Loss. Requirement that notice of loss be mailed within forty-eight hours not unreasonable. *Mayse v. Great American*, 117 Kan. 662, 232 P. 865 (1925). However, prejudice must appear from type of insurance and notice required. *Home Life Ins. Co. v. Clay*, 11 Kan. App. 2d 280, 719 P.2d 756 (1986). Issue of timeliness is factual. *Id.* Duty to give immediate notice did not arise until assured was aware disability was due to accident. *Hawthorne v. Protective Ass'n of America*, 112 Kan. 356, 210 P. 1086 (1922); *See also Goff v. Aetna Life & Cas. Co., Inc.*, 1 Kan. App. 2d 171, 563 P.2d 1073 (1977).

Insanity no excuse for failure to furnish proof of disability. *Smith v. Missouri State Life Ins. Co.*, 134 Kan. 426, 7 P.2d 65 (1932).

Exclusion in group policy for "injuries arising out of and in course of employment for wage or profit" defined as in workers' compensation act. *Bienz v. John Hancock Mut. Life Ins. Co.*, 195 Kan. 422, 407 P.2d 222 (1965). Ambiguous language in exclusionary clause pertaining to injuries arising out of employment is construed against insurer. *Crawford v. Prudential Ins. Co.*, 245 Kan. 724, 783 P.2d 900 (1989).

Business pursuit exclusion applied. *AMCO Ins. Co. v. Beck*, 261 Kan. 266, 929 P.2d 162 (1996).

Insured's recovery under accident policy limited to loss of foot under scheduled injuries although entire leg was lost. *Taylor v. State Farm Mut. Auto Ins. Co.*, 190 Kan. 600, 376 P.2d 801 (1962).

Uniform Policy Act pertaining to accident and sickness insurance policies considered in *Parker v. Continental Cas. Co.*, 191 Kan. 674, 383 P.2d 937 (1963).

Accidental death and dismemberment policies are not covered by K.S.A. 40-434. *Stockham v. Life Ins. Co. of N. Am.*, 27 Kan. App. 2d 639, 3 P.3d 97 (2000).

ACCIDENTAL MEANS

Defined. *Akins v. Illinois Bankers Life Assur. Co.*, 166 Kan. 648, 203 P.2d 180 (1949); *Boring v. Haynes*, 209 Kan. 413, 496 P.2d 1385 (1972). *See also Steele v. General American Life Ins. Co.*, 217 Kan. 24, 535 P.2d 948 (1975). No distinction between accidental means and accidental result. *Whitaker v. State Farm*, 13 Kan. App. 2d 279, 768 P.2d 320 (1989) (back injury from lifting ice chest in van covered).

Following have been held to be accidental means: Intentional killing by third person, *McCullough v. Liberty Life Ins. Co.*, 125 Kan. 324, 264 P. 65 (1928); *Evans v. Provident*, 249 Kan. 248, 815 P.2d 550 (1991); slipping in attempt to lift empty coal car, *Skibbie v. Liberty Life Ins. Co.*, 130 Kan. 121, 285 P. 581 (1930); over-exertion of workman while lifting causing hernia, *Thomas v. Liberty Life Ins. Co.*, 131 Kan. 175, 289 P. 414 (1930); struck by lightning causing nervous shock, *Stecher v. London Guar. & Acc. Co.*, 133 Kan. 89, 298 P. 754 (1931); heat prostration causing death, *Bukata v. Metropolitan Life Ins. Co.*, 145 Kan. 858, 67 P.2d 607 (1937); unintentional overdose of drug causing death, *Spence v. Equitable Life Assur. Soc.*, 146 Kan. 216, 69 P.2d 713 (1937); *Hawkins v. New York Life Ins. Co.*, 176 Kan. 24, 269 P.2d 389 (1954).

Following held not accidental means: Death by breathing illuminating gas. *Minner v. Great Western Acc. Ass'n*, 99 Kan. 575, 162 P. 1160 (1917).

Exclusion in automobile liability policy for intentional acts encompasses any injury which is natural and probable consequence of insured's intentional acts. *State Farm v. Falley*, 23 Kan. App. 2d 21, 926 P.2d 664 (1996); *see also Guar. Nat'l Ins. Co. v. McGuire*, 173 F. Supp. 2d 1107 (D. Kan. 2001).

Plaintiff may recover if accident shown to be proximate or predominant cause of injury. *Williams v. Gen. Acc. Fire & Life Assur. Corp.*, 144 Kan. 755, 62 P.2d 856 (1936).



ADJUSTER

Kansas statutes governing insurance do not define the term adjuster. However, K.S.A. 75-7b01, *et seq.*, "Private Investigation or Security Operations," defines insurance adjuster as one, for purposes of that act, to mean "any person who, for any consideration whatsoever, adjusts or otherwise participates in the disposal of any claim under or in connection with policy of insurance or engages in soliciting insurance adjustment business;" K.S.A. 75-7b03(k). Pursuant to K.S.A. 75-7b03, insurance adjuster is not deemed to be engaging in detective business, so as to necessitate detective license pursuant to Kansas Law.

K.S.A. 40-214 sets forth licensing requirements for transacting business of insurance. Statute itself does not directly mention insurance adjusters. Statute provides, "It is unlawful for any person, company, corporation or fraternal benefits society to transact the business of insurance . . . unless such person, company, corporation or fraternal benefits society shall have been duly authorized under the laws of this state to transact such business and shall have received proper written authority from the Commissioner of Insurance in conformity with the provisions of the laws of this state."

Insurer which accepts fruits of alleged fraud of its adjuster liable for fraud. *Ware v. State Farm*, 181 Kan. 291, 311 P.2d 316 (1957).

Insured cannot recover on ground that damage was sustained due to investigation and handling of claim by adjuster when insurer's investigation showed insured's act was intentional and jury verdict found insurer's position to be justified. *Hass v. Preferred Risk Mut. Ins. Co.*, 214 Kan. 747, 522 P.2d 438 (1974). Statement of adjuster that company would take care of medical bills did not result in enforceable contract for lack of promise and consideration. *Farmers Ins. Exch. v. Schropp*, 222 Kan. 612, 567 P.2d 1359 (1977).

AGE

See "AUTOMOBILES"; "LIABILITY INSURANCE, Violation of Law"; "NEGLIGENCE."

AGENTS AND BROKERS

Definition. Insurance agent defined under K.S.A. 40-239. K.S.A. 40-239 amended July 1, 1996 to include references to health maintenance organizations having ability to authorize party as "insurance agent." 1996 Ch. 169 §4. Insurance broker is one who acts as middleman between insured and insurer; one who solicits contracts from public under no employment from any special company, but, having secured order, places insurance with company selected by insured, or, in absence of any

selection by him, then with company selected by such broker. *Rosedale v. Home Ins. Co.*, 120 Kan. 415, 243 P. 1023 (1926); *Harvey v. Allstate*, 768 F. Supp. 784 (D. Kan. 1991). "Insurance Agent" distinguished from "General Agent." *Service v. Pyramid Life Ins.*, 201 Kan. 196, 206, 440 P.2d 944 (1968).

General Agent. Person who has charge of insurance company's business in state, has agents under his supervision, power to appoint agents, and who acts under general instructions without special limitations upon his authority. General agent has power to orally waive or modify policy provision. *Service, supra*.

For Whom. Persons making application to company general agents held brokers and agents of insured. *Rosedale v. Home Ins. Co.*, 120 Kan. 415, 243 P. 1023 (1926). Absent fraud, collusion or special personal interest, where interests of insured and insurer are not conflicting, agent may represent both. *Wright v. Providence Wash. Ins. Co.*, 130 Kan. 438, 286 P. 237 (1930). Insurance agent. Agent of insurer not insured; insurer is liable for misrepresentation regarding protection afforded by policy sold. *Stewart v. Commonwealth Cas. Co.*, 137 Kan. 919, 22 P.2d 435 (1933); *Earth Scientists v. USF&G*, 619 F. Supp. 1465 (D. Kan. 1985). Under particular facts, soliciting agent held without power to bind company by oral contract. *Stephan v. Mut. Benefit Health & Acc. Ass'n*, 146 Kan. 307, 69 P.2d 694 (1937); *Hudson v. Travelers Ins. Co.*, 149 Kan. 528, 88 P.2d 1096 (1939).

Ordinarily, brokers are agents of insurer for purposes of delivery of policy and collection of premiums. *Ocean Acc. & G. Corp. v. Emporia Tele. Co.*, 139 Kan. 106, 29 P.2d 1084 (1934). Where agent delivers policy and collects premiums, he holds latter in trust for insurer. *Meixner v. Heusser*, 153 Kan. 558, 112 P.2d 103 (1941); K.S.A. 40-247.

Agency for Insurer. It is obligation of agent that he make prompt, full and frank disclosure to insurer of all matters concerning acts of agency, and where failure is proximate cause of liability and loss to insurer, agent may be held liable for loss. *Hays v. Farm Bureau*, 225 Kan. 205, 589 P.2d 579 (1979); *see also Foley Co. v. Scottsdale Ins. Co.*, 28 Kan. App. 2d 219, 15 P.3d 353 (2000).

Insurance agent or broker who undertakes to procure insurance for another and thereafter fails to do so is liable for damages resulting therefrom. *Keith v. Schiefen-Stockhan Ins.*, 209 Kan. 537, 498 P.2d 265 (1972). *See also Blair v. Fidelity Life Ass'n*, 1 Kan. App. 2d 382, 567 P.2d 22 (1977). Payment of premium not required in order to hold agent liable who had negligently or corruptly failed to procure insurance after he



had given assurance he had done so. *Boone v. Lowry*, 8 Kan. App. 2d 293, 657 P.2d 64 (1983).

One who requests or directs agent or broker to procure insurance must be deemed to obligate himself to pay reasonable costs of insurance to be procured; this and agent or broker's expectation of compensation fulfills requirement of agreed compensation. Any action for breach of "exercise care duty" in respect to procurement of insurance may be brought in contract or tort. *Marshall Investments Inc. v. Cohen*, 6 Kan. App. 2d 672, 634 P.2d 133 (1981).

Acts of agent with authority to issue policies bind company within scope of apparent authority. *Service v. Pyramid, supra.*; *Lattner v. Fed. Union Ins. Co.*, 160 Kan. 472, 163 P.2d 389 (1945). Payment of premium to broker with whom policies had been entrusted for delivery held payment to company. *Riddle v. Rankin*, 146 Kan. 316, 69 P.2d 722 (1937).

When prospective insured fully informs agent of type of insurance desired and agent prepares application which is accepted by company, but through mistake or design policy is issued which affords less coverage than policy which could have been written in response to application, policy may be reformed to correspond with application. *Stamps v. Consolidated Underwriters*, 205 Kan. 187, 468 P.2d 84 (1970); *Rider v. State Farm*, 514 F.2d 780 (10th Cir. 1975).

Agent's negligence in forwarding application not imputed to company. *Butterfield v. Springfield Life Ins. Co.*, 128 Kan. 510, 278 P. 733 (1929). Where insurance agent responded to "other insurance" question on application, and insurer knew of other insurance, no concealment of material fact existed. *Kimmi v. Brown Co. Farm. Mut.*, 135 Kan. 555, 11 P.2d 706 (1932).

Regulation of certain insurance practices governed by statute. K.S.A. 40-2401, *et seq.*

APPLICATION

K.S.A. 40-418 provides no misrepresentation made in obtaining or securing policy of insurance on lives of any person or persons, citizens of this state, shall be deemed material or render policy void unless matter misrepresented shall have actually contributed to contingency or event on which policy is to become due and payable.

Statute applied, *Schneider v. Wash. Nat'l Ins. Co.*, 200 Kan. 380, 437 P.2d 798 (1968). Statute's predecessor was applicable to policy issued by health and accident insurance company giving indemnity for loss of life by accidental means. *Becker v. Kansas Cas. & Sur. Co.*, 105 Kan. 99, 181 P. 549 (1919) (overruled as to "moral

risk" rule in *Hawkins v. New York Life Ins. Co.*, 176 Kan. 24, 269 P.2d 389 (1954)). Health insurance which does not provide indemnity in case of death from sickness is not life insurance, statute is not applicable. *Russell v. U.S. Cas. Co.*, 123 Kan. 282, 255 P. 65 (1927); however, see *Elliff v. Inter-State Business Men's Accident Co.*, 153 Kan. 177, 109 P.2d 92 (1941). Application for insurance is not contract of insurance; it is only offer to purchase insurance. *Chute v. Old American Ins. Co.*, 6 Kan. App. 2d 412, 629 P.2d 734 (1981), *overruled on other grounds by Harper v. Prudential*, 233 Kan. 358, 662 P.2d 1264 (1983).

Insurer cannot avoid payment on life policy on alleged misrepresentation of insured when prudent inquiry by insurer would have revealed facts. *First Nat'l Bank of Manhattan v. Modern Woodmen of Am.*, 486 F.2d 10 (10th Cir. 1973).

Binder/policy distinction of no importance in determining whether policy void ab initio because of fraud. *Dunn v. Safeco Ins. Co.*, 14 Kan. App. 2d 732, 798 P.2d 955 (1990). Insurance company has right to rescind policy ab initio for misrepresentation, but only as to insured and not injured third party. *Id.*

ARBITRATION

Kansas follows Uniform Arbitration Act. K.S.A. 5-401, *et seq.* Arbitration clause in contract of insurance invalid and unenforceable, except those contracts between insurance companies including reinsurance contracts. K.S.A. 5-401(c)(1). Appraisal clause in fire insurance contract held unenforceable under this provision. *Friday v. Trinity Universal*, 262 Kan. 347, 939 P.2d 869 (1997). K.S.A. 5-401 was amended in 1995 to provide that reinsurance contracts are not to be considered contracts of insurance within 5-401(c)(1). *Id.*

Arbitration clause which places conditions precedent to commencement of action to recover uninsured motorist benefits void under K.S.A. 40-284. *Clayton v. Alliance Mut. Cas. Co.*, 212 Kan. 640, 512 P.2d 507 (1973), *Superseded by statute on other grounds as stated in Farmers v. Gilbert*, 14 Kan. App. 2d 395, 791 P.2d 742 (1990).

ASSIGNMENT

See "FIRE INSURANCE."

ATTORNEYS

The Model Rules of Professional Conduct (MRPC) govern attorney behavior and ethics.

Appointment and Authority. Relationship of attorney and client is one of agency and general rules of law



that apply to agency also apply to that relation. *Bucher & Willis Consult. Engrs. v. Smith*, 7 Kan. App. 2d 467, 643 P.2d 1156 (1982). In determining whether attorney-client relationship exists, the following rules apply: authority of attorney begins with his retainer, but relation of attorney and client is not dependent upon payment of fee, nor is formal contract necessary to create relationship; contract may be implied from conduct of parties; employment is sufficiently established when it is shown that advice and assistance of attorney are sought and received in matters pertinent to his profession. *In re Baby Boy Irons*, 235 Kan. 540, 684 P.2d 332 (1984). Attorney has no authority to compromise or settle his client's claim without his client's approval. *Reimer v. Davis*, 224 Kan. 225, 580 P.2d 81 (1978).

Conflict of Interest. See MRPC 1.7-1.13. Attorney shall not represent client if such representation will be directly adverse to another client unless attorney reasonably believes representation will not adversely affect relationship with other client and each client consents after consultation. MRPC 1.7(a). Attorney shall not represent client if such representation may be materially limited by attorney's responsibilities to another client, third person, or by attorney's own interest unless attorney reasonably believes representation will not be adversely affected and each client consents after consultation. MRPC 1.7(b). In determining whether disqualification of attorney is required for conflict of interest involving adverse concurrent representation, various factors in addition to normal disqualification factors are to be examined, including: 1) nature of ethical violation, 2) prejudice to parties, including extent of actual or potential delay in proceedings, 3) effectiveness of counsel because of violations, 4) public's perception of profession, and 5) whether motion to disqualify has been used as tactical device or for harassment. *Barragree v. Tri-County Elec. Co-op, Inc.*, 263 Kan. 446, 950 P.2d 1351 (1997).

Legal Malpractice. Elements of legal malpractice are: 1) existence of attorney-client relationship giving rise to duty, 2) attorney's breach of that duty by act or omission, 3) attorney's breach proximately caused injury to client, and 4) client sustained damages. *Phillips v. Carson*, 240 Kan. 462, 731 P.2d 820 (1987); *Kansas Pub. Employees Ret. Sys. v. Kutak Rock*, 273 Kan. 481, 44 P.3d 407 (2002). Relationship of attorney to client is fiduciary in character, binding attorney to highest degree of fidelity and good faith on account of trust and confidence imposed. *Id.* Attorney is obligated to client to use reasonable and ordinary care and diligence in handling cases undertaken, to use best judgment, and to exercise reasonable degree of learning, skill and experience which is ordinarily possessed by other attorneys in the

community. *Bowman v. Doherty*, 235 Kan. 870, 686 P.2d 112 (1984).

Fees. Attorney's fee shall be reasonable. MRPC 1.5. Factors considered in determining reasonableness are amount and character of services rendered, labor, time and trouble involved, nature and importance of litigation or business in which services were rendered, responsibility imposed, amount of money or value of property affected by controversy or involved in employment, skill and experience called for in performance of services, professional character and standing of attorney, and results secured. *Caplinger, Chrt'd. v. Lundgren*, 905 F. Supp. 876 (D. Kan. 1995). Contingent fee agreements permitted except in domestic matters, criminal defense, and where prohibited by statute. MRPC 1.5(f). Contingent fee agreement must be in writing and shall state method for fee determination, including percentage that shall accrue to attorney in event of settlement, trial or appeal. MRPC 1.5(d).

AUTOMOBILES

See Law Digest Tables.

See "NEGLIGENCE"; "NO-FAULT."

Age. Driver's license required. Minimum age, 16 years. Department has authority, in certain cases, to grant restricted licenses to younger persons not under 15 years. K.S.A. 8-237.

Agency. Owner of automobile not responsible for negligence of operator unless agent or servant of owner and, at time of accident, was acting in furtherance of owner's business. *Campbell v. KP&L*, 165 Kan. 134, 193 P.2d 177 (1948). However, one may need to consider the presence of negligent entrustment. See below.

Coverage. To constitute "use" or to be "user" under policy, such as to be insured, one must be physically operating vehicle. *Colfax v. Johnson*, 270 Kan. 7, 11 P.3d 1171 (2000).

Negligent Entrustment. Rationale for holding automobile owner liable for negligent entrustment is not founded on negligence of driver but on primary negligence of entruster in supplying chattel to incompetent or reckless driver. *Upland Mut. Ins. v. Noel*, 214 Kan. 145, 519 P.2d 737 (1974).

Negligent entrustment requires that the owner of automobile know or have reasonable cause to know third party is incompetent, careless or reckless. *Mid-Century Ins. Co. v. Shutt*, 17 Kan. App. 2d 846, 845 P.2d 86 (1993). Doctrine of comparative negligence applies to negligent entrustment action and jury must determine percentage of causal fault for all parties to occurrence. *McCart v. Muir*, 230 Kan. 618, 641 P.2d 384 (1982).



Relationship between car dealer and permissive driver or prospective purchaser is insufficient, in and of itself, to create vicarious liability. *West v. Collins*, 251 Kan. 657, 840 P.2d 435 (1992).

Owner of motor vehicle causing or knowingly permitting minor under age sixteen to drive vehicle on highway, and any person who furnishes motor vehicle to minor, is jointly and severally liable with minor for damages caused by minor's negligent driving. K.S.A. 8-222. Owner of motor vehicle who permits minor son under 16 years of age to drive vehicle upon highway is liable for damages caused by minor's negligence. *Davey v. Hedden*, 260 Kan. 413, 920 P.2d 420 (1996). Any person not licensed or under minimum statutory age is conclusively presumed incompetent to drive on public ways. *Greenwood v. Gardner*, 189 Kan. 68, 366 P.2d 780 (1961).

Compulsory Insurance Coverage. No certificate, permit or license shall be issued . . . until applicant has filed with commission liability insurance policy approved by commission in such reasonable amount as commission determines necessary to adequately protect interest of public. Such amounts shall not be less than \$25,000 for personal injury or death to any one person in any one accident, \$50,000 for injury or death to two or more persons in any one accident and \$10,000 for loss to property in any one accident. Certificate of insurance may be filed in lieu of policy itself. Carriers in whose name more than twenty-five (25) motor vehicles are registered may be self-insurers. K.S.A. 40-3104. Every motor vehicle transporting passengers or property for which no permit has been issued as motor carrier by State Corporation Commission, except those used in exempt operations, shall be properly covered by liability insurance policy in sums set out in K.S.A. 40-3107.

Alcohol/DWI. No person shall attempt to operate vehicle while alcohol concentration in person's blood or breath is .08 or more. K.S.A. 8-1567.

Family Purpose Doctrine. Is not recognized. *Mirick v. Suchy*, 74 Kan. 715, 87 P. 1141 (1906); *Daily v. Schneider*, 118 Kan. 295, 234 P. 951 (1925); *Hartley v. Fisher*, 1 Kan. App. 2d 362, 566 P.2d 18 (1977).

Guest. Guest Statute, held unconstitutional and void. *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974).

Imputed Negligence/Joint Enterprise. To constitute joint venture which will support vicarious liability between passenger and driver of automobile there must exist: 1) agreement; 2) common purpose; 3) community of interest; 4) equal right to voice, accompanied by equal right of control over automobile. *Lightner v. Frank*, 240 Kan. 21, 727 P.2d 430 (1986). One relationship that will

give rise to imputed negligence is joint enterprise. *Id.* at 24.

Last Clear Chance. Court will give last clear chance instruction if five elements met: 1) plaintiff by own negligence placed him/herself in position of danger; 2) plaintiff's negligence has ceased; 3) defendant seeing plaintiff in position of danger, or by exercise of due care should have seen plaintiff in such position, by exercising due care had clear chance to avoid injuring plaintiff; 4) defendant failed to exercise due care; and 5) plaintiff injured as result. *Friesen v. Chicago Rock Island Pac.*, 215 Kan. 316, 524 P.2d 1141 (1974).

Ownership/Title. Registration of vehicle requirements set forth at K.S.A. 8-127 *et seq.*

Pedestrians. Pedestrian defined as any person afoot or any person in wheelchair, either manually or mechanically propelled, or other low powered, mechanically propelled vehicle designed specifically for use by physically disabled person; or any person using electric personal assistive mobility device. K.S.A. 8-1446.

No-Fault. Statutes governing no-fault insurance provisions set forth at K.S.A. 40-3101. *et seq.*

Service of Process Upon Non-resident Motorists. Non-resident person defined: either non-resident at time of accident, person who is resident of this state and who departs from this state subsequent to accident or collision and remains absent from this state for thirty days continuously whether such absence is intended to be temporary or permanent, or person who is resident at time of accident, but who subsequently becomes non-resident. Non-resident person operating motor vehicle himself or by agent on highways of Kansas designates Kansas Secretary of State to be his agent upon whom may be served all lawful process in any action against non-resident growing out of any accident or collision in which non-resident's motor vehicle may be involved. Copies of order authorizing service under this statute, summons and petition and notice that same have been served upon Secretary of State are to be served upon non-resident motorist by registered mail or personally by sheriff or deputy sheriff of state in which non-resident motorist resides. K.S.A. 8-401, *et seq.* See also K.S.A. 60-308; K.S.A. 60-517 (Statute of limitations, tolled when cause of action arises out of state and defendant is out of state, but not activated when substitute service available). *Carter v. Kretschmer*, 2 Kan. App. 2d 271, 577 P.2d 1211 (1978); *Garrison v. Vu*, 233 Kan. 236, 622 P.2d 1191 (1983). K.S.A. 8-401 applies only if damage results from use of vehicle upon highway. *Kelley v. Koetting*, 164 Kan. 542, 190 P.2d 361 (1948).

Seat Belts. Front seat occupants required to wear seat belts in most circumstances. K.S.A. 8-2503. Evi-



dence of non-use of safety belt is inadmissible in any action for purposes of determining any aspect of comparative negligence or mitigation of damages. *Floyd v. General Motors*, 25 Kan. App. 2d 71, 960 P.2d 763 (1998).

Speed Limit. K.S.A. 8-1557 *et seq.* Seventy miles per hour maximum speed on any separated multi-lane highway.

Uninsured/Underinsured Endorsements. Requirements of uninsured and underinsured coverage set forth in K.S.A. 40-284 *et seq.* Uninsured motorist's policy which excluded from "uninsured automobile" equipment designed for use principally off public roads, except while actually upon public roads, is interpreted to include dune buggy. *Kansas Farm Bureau Ins. Co. v. Cool*, 205 Kan. 567, 471 P.2d 352 (1970). "Limits" as referred to in K.S.A. 40-284(b) is defined to include both per person and per occurrence liability limit. Whether per person or per occurrence liability limit applies depends on which limit impairs insured's ability to receive compensation from other motorist. *Jones v. Automobile Club Inter-Ins. Exch.*, 26 Kan. App. 2d 206, 981 P.2d 767 (1999).

Omnibus clause of automobile liability insurance policy is to be liberally construed. *USF&G v. Continental Ins.*, 1 Kan. App. 2d 722, 573 P.2d 1106 (1977); *USF&G v. Farm Bureau Mut. Ins. Co.*, 2 Kan. App. 2d 580, 584 P.2d 1264 (1978); *Decker v. Avis*, 20 Kan. App. 2d 43, 883 P.2d 781 (1994).

Weight limits. Statutes allowing state authorities to spot check motor carriers to determine compliance with statutory weight limits held constitutional. *State v. Moore*, 237 Kan. 523, 701 P.2d 684 (1985); *State v. Crum*, 270 Kan. 870, 19 P.3d 172 (2001); K.S.A. 66-1319, 66-1324. Exemption of government vehicles from weight limitations held constitutional. *State v. Moore*, *supra*; K.S.A. 8-1908.

AVIATION

Breach of pilot warranty suspends coverage and causal connection between breach and loss not required. *Western Food Prod. v. U.S. Fire Ins. Co.*, 10 Kan. App. 2d 375, 699 P.2d 579 (1985).

In dual control aircraft, plaintiff has burden of demonstrating who was operating aircraft at time of loss. *Alliance Life Ins. Co. v. Ulysses Volunteer Fireman's Relief Ass'n*, 215 Kan. 937, 529 P.2d 171 (1974); *In re Estate of Hayden*, 174 Kan. 140, 254 P.2d 813 (1953); *Friesen-Hall v. Colle*, 270 Kan. 611, 17 P.3d 349 (2001).

Lienholder's single interest endorsement in hull policy creates separate contract of insurance between lienholder and insurer. *Cessna Finance Corp. v. Ranger Ins.*, 15 Aviation Cases (CCH) 17,309 (D. Kan. 1979).

Lex Loci conflicts rule applies. *Swearngin v. Sears Roebuck & Co.*, 376 F.2d 637 (10th Cir. 1967).

Aviation statutes. K.S.A. 3-201 to 207.

Exculpatory clause in property rental agreement for lease of aircraft holding lessor harmless whether in tort or otherwise was acceptable allocation of risk. *Mid-America Sprayers v. U.S. Fire Ins. Co.*, 8 Kan. App. 2d 451, 660 P.2d 1380 (1983).

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Larceny. Provision in storekeeper's burglary and robbery policy defining safe burglary as felonious entry into safe when all doors thereof are duly closed and locked by all combination locks thereon and requiring such entry to be by actual force and violence leaving physical marks upon exterior of all doors of safe held to be void as against public policy where outer combination on safe had been opened by manipulating combination and violence used only to force inner doors of safe. *Ferguson v. Phoenix Assurance*, 189 Kan. 459, 370 P.2d 379 (1962).

CANCELLATION

Cancellation of particular insurance policy is governed primarily by statutory law. K.S.A. 40-2203 sets forth uniform policy of provisions for accident and health insurance policies. This statute mandates certain language regarding cancellation be set forth in policy. Insurer bears risk of loss current and prior to payment of premium in situation where there is valid insurance contract, which is subsequently cancelled for non-payment of premium, and insurer and insured agree that policy will be reinstated without lapse if premium is paid by certain date and premium is paid pursuant to agreement. *Vargas v. Nautilus, Inc. Co.*, 248 Kan. 881, 811 P.2d 868 (1991).

Cancellation of life insurance policy is governed by K.S.A. 40-410 and K.S.A. 40-411. K.S.A. 40-410 sets forth certain notice requirements for cancellation of life insurance policy due to non-payment of premium. K.S.A. 40-411, sets forth requirements which must be contained in any notice of intention to cancel policy. Failure to follow notice requirements contained in statute has been grounds for denying insurer's claim that

policy has been cancelled. *See Logan v. Victory Life Ins. Co.*, 175 Kan. 88, 259 P.2d 165 (1953); *Penn Mut. Life Ins. Co. v. Ashton*, 93 F.2d 565 (10th Cir. 1937).

Automobile liability insurance policies and cancellation thereof are governed by K.S.A. 40-276, *et seq.* K.S.A. 40-276a requires that insurer give 30 days written notice to named insured prior to cancellation of policy. This section further restricts insurer's ability to cancel automobile insurance policy to six particular circumstances set forth in statute.

Property and casualty insurance policies and cancellation thereof are governed by K.S.A. 40-2,120, *et seq.* K.S.A. 40-2,120 limits ability of company to cancel casualty insurance policy that has been in effect for 90 days except for one of the following reasons: 1) non-payment of premium; 2) policy was issued because of material misrepresentation; 3) any insured violated any of material terms and conditions; 4) unfavorable underwriting factors, specific to insured, exist that were not present at inception of policy; 5) determination by insurance commissioner that continuation of coverage could place insurer in hazardous financial condition or in violation of law; or 6) determination by insurance commissioner that insurer no longer has adequate reinsurance to meet insurer's need. Pursuant to K.S.A. 40-2,122, any insurance company doing business in Kansas shall provide insured written explanation detailing specific reasons why company denied or cancelled renewal of existing policy of insurance.

K.S.A. 40-2,118 allows insurance company to rescind policy, even as to innocent third party claims, upon proof that it was procured by fraudulent act. *Voyles v. Garcia*, 28 Kan. App. 2d 462, 17 P.3d 947 (2001).

CHATTEL MORTGAGE

A chattel mortgage is defined as "pre-Uniform Commercial Code security device" whereby security interest was taken by mortgagee on personal property of mortgagor. *Union State Bank v. St. Paul Fire & Marine Ins.*, 18 Kan. App. 2d 466, 856 P.2d 174 (1993). This type of secured interest is not substantially changed by adoption of UCC in Kansas. Kansas comment to K.S.A. 84-9-102 states: "Perhaps the first rule of coverage is that the form is irrelevant. There are no more distinctions based on whether the transactions are 'chattel mortgage,' a 'conditional sale' or an 'assignment of accounts receivable.' There is only a unitary 'security interest' although no penalty attaches to using the pre-UCC terminology." *Id.*

Security interest is defined as "interest in personal property . . . which secures payment or performance of an obligation." K.S.A. 84-1-201(37). Certain require-

ments must be fulfilled for creditor's security interest to "attach" and become "enforceable." K.S.A. 84-9-203(b).

Attachment. Security interest attaches to collateral when it becomes enforceable against debtor with respect to collateral, unless agreement expressly postpones time of attachment.

Enforceability. Except as otherwise provided in subsections (c) through (i), security interest is enforceable against debtor and third parties with respect to collateral only if: 1) value has been given; 2) debtor has rights in collateral or power to transfer rights in collateral to secured party; and 3) one of the following conditions is met: (a) debtor has authenticated security agreement that provides description of collateral and, if security interest covers timber to be cut, description of land concerned; (b) collateral is not certificated security and is in possession of secured party under K.S.A. 84-9-313 and amendments thereto pursuant to debtor's security agreement; (c) collateral is certified security in registered form and security certificate has been delivered to secured party under K.S.A. 84-8-301 and amendments thereto pursuant to debtor's security agreement; or (d) collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and secured party has control under K.S.A. 84-9-104, 84-9-105, 84-9-106 or 84-9-107 and amendments thereto pursuant to debtor's security agreement.

Pursuant to K.S.A. 84-9-303, security interest in vehicle may be perfected as required by local law of jurisdiction under whose certificate of title goods are covered.

CONSTRUCTION OF POLICY

Construction of written instrument is question of law. Instrument may be construed and its legal effect determined by appellate court. *Godfrey v. Chandley*, 248 Kan. 975, 811 P.2d 1248 (1991); *U.S.D. No. 259 v. Sloan*, 19 Kan. App. 2d 445, 871 P.2d 861 (1994); *Universal Underwriters v. Hill*, 24 Kan. App. 2d 943, 955 P.2d 1333 (1998). Court may not modify terms nor make another contract when insurance policy is not ambiguous. *Metropolitan Life v. Strnad*, 255 Kan. 657, 876 P.2d 1362 (1994); *Universal Underwriters, supra*; *see also Sloan, supra*. ("[C]ourts should not strain to create an ambiguity where in common sense there is none.") Terms of insurance policy are ambiguous only if language is subject to two or more reasonable interpretations and proper meaning is uncertain. *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987 (D. Kan. 1995), *aff'd*, 89 F.3d 850 (10th Cir. 1996); *Lightner v. Centennial Life Ins. Co.*, 242 Kan. 29, 744 P.2d 840 (1987); *Crescent Oil Co. v. Federated Mut. Ins. Co.*, 20 Kan. App. 2d 428, 888 P.2d 869 (1995). Test to determine



whether insurance contract is ambiguous is not what insurer intends language to mean, but what reasonably prudent insured would understand language to mean. *Crescent Oil Co., supra*; *Universal Underwriters, supra*. Fact that policyholder contends plain meaning of insurance policy has different meaning from that found by trial court does not require finding of ambiguity. *Elliott v. Farm Bureau Ins. Co.*, 26 Kan. App. 2d 790, 995 P.2d 885 (1999). When terms of insurance policy are ambiguous, construction most favorable to insured will prevail. *American Media, Inc. v. Home Indem. Co.*, 232 Kan. 737, 658 P.2d 1015 (1983); *Harmon v. Safeco Ins. Co. of Am.*, 24 Kan. App. 2d 810, 954 P.2d 7 (1998).

If insurer does not offer temporary coverage upon application, applicant has power to revoke offer made in application, causing company to risk losing costs expended in investigation and medical examination of applicant. *Thomas v. Thomas*, 250 Kan. 235, 824 P.2d 971 (1992). By offering binding receipts, applicant has obligation to perform and insurer has use of premium money at earliest possible date. *Service v. Pyramid Life Ins. Co.*, 201 Kan. 196, 440 P.2d 944 (1968).

Endorsement prevails over irreconcilable printed provisions of policy. *Lindesmith v. Republic Mut. Fire Ins. Co.*, 189 Kan. 201, 368 P.2d 35 (1962); *Dronge v. Monarch Ins. Co.*, 511 F. Supp. 1 (D. Kan. 1979). Endorsement, when attached and referred to in signed declarations page of underlying policy, becomes part of policy. *Topeka Tent & Awning Co. v. Glen Falls Ins. Co.*, 13 Kan. App. 2d 553, 774 P.2d 984 (1989).

General agent of life insurance company, acting on behalf of insurance company with implied or apparent authority, where applicant has no reason to doubt agent's authority, binds insurance company to oral contract of life insurance upon assurance to applicant that he or she is covered upon payment of first premium. *Service, supra*.

DAMAGES

See also "DEATH."

Appellate Review - Excessive Verdicts. In negligence actions, evidence must show with reasonable certainty that damage was sustained as result of alleged act of negligence. Recovery is not permitted where alleged damages are too conjectural or speculative to form basis for measurement. There must be some reasonable basis for computation of damages which will enable trier of fact to arrive at approximate estimate of amount of loss. *Morris v. Francisco*, 238 Kan. 71, 708 P.2d 498 (1985).

Compensatory damages are awarded to make party whole by putting him or her back in same position as if injury had not occurred, not to grant windfall. *State v.*

Wolfenbarger & McCulley, P.A., 236 Kan. 183, 690 P.2d 380 (1984); *Smith v. Stephens*, 23 Kan. App. 2d 1013, 940 P.2d 68 (1997); *McBride v. Dice*, 23 Kan. App. 2d 380, 930 P.2d 631 (1997).

Collateral Estoppel. Collateral estoppel may be applied to judgment confirming award of arbitration. *State v. Thomas Constr. Co.*, 8 Kan. App. 2d 283, 655 P.2d 471 (1982). Res judicata effect of arbitration award applies only to those matters encompassed within claims submitted. *Id.*

Damages in personal injury cases may be awarded for mental anguish resulting from mutilation or disfigurement, *Sponable v. Thomas*, 139 Kan. 710, 33 P.2d 721 (1934); and permanent disability for loss of future earning capacity, *Colin v. De Coursey Cream Co.*, 162 Kan. 683, 178 P.2d 690 (1947). Damages for mental distress may be recovered although there is no physical injury where conduct causing distress is willful, wanton and done with intent to injure. *Lantz v. City of Lawrence*, 232 Kan. 492, 657 P.2d 539 (1983), *questioned by Moran v. State*, 267 Kan. 583, 985 P.2d 127 (1999). Damages for pain and suffering in personal injury cases are limited to \$250,000. K.S.A. 60-19a01; *Cott v. Peppermint Twist Mgt. Co.*, 253 Kan. 452, 856 P.2d 906 (1993); *Carlson v. Underwood Equip.*, 273 Kan. 453, 44 P.3d 439 (2002). However, K.S.A. 60-19a01 only applies to personal injury actions arising on or after July 1, 1987, and before July 1, 1988. Personal injury actions arising on subsequent dates are governed by K.S.A. 60-19a02, which limits amount recoverable for all noneconomic loss to \$250,000. Aggravation of preexisting injury is compensable. *Fusaro v. First Family Mtg. Corp.*, 257 Kan. 794, 897 P.2d 123 (1995). Damages based on plaintiff's loss of time are economic damages and linked with plaintiff's earning capacity. *Shirley v. Smith*, 261 Kan. 685, 933 P.2d 651 (1997). Lost profits are recoverable when it is established business, are proved to reasonable certainty and reasonably were within contemplation of parties. *Hawkinson v. Bennett*, 265 Kan. 564, 962 P.2d 445 (1998).

Comparative Negligence. K.S.A. 60-258a governs comparative negligence. Plaintiff not barred from recovering unless contributory negligence greater than or equal to causal negligence of parties or parties against whom claim for recovery is made.

Indemnification. Cause of action for indemnification does not accrue until indemnitee suffers actual loss or damage by paying money for which indemnitee seeks indemnification. Condition precedent to indemnification is that indemnitee must have actually paid obligation for which he seeks indemnification. *Kan. Pub. Empls. Retirement Syst. v. Reimer Assocs., Inc.*, 261 Kan. 17, 927 P.2d 466 (1996).



One whose property has been injured by another's tortious conduct must exercise reasonable care and diligence to avoid additional loss and minimize resulting damages. *Creten v. Chicago, R.I. & P. R.R. Co.*, 184 Kan. 387, 337 P.2d 1003 (1959). Failure to mitigate damages is matter of affirmative defense and plaintiff need not establish mitigation as part of his case in chief. *Huffman v. Ace Elec. Co.*, 883 F. Supp. 1469 (D. Kan. 1995); *Krehbiel v. Goering*, 179 Kan. 55, 293 P.2d 255 (1956). Expenses incurred in mitigating damages are recoverable. *Atkinson v. Herington Cattle Co.*, 200 Kan. 298, 436 P.2d 816 (1968). There is no obligation to mitigate damages where mitigation involves dealing with breaching party. *W-V Enterprises, Inc. v. Federal Savings & Loan Ins. Corp.*, 234 Kan. 354, 673 P.2d 1112 (1983). Party need only take reasonable steps under circumstances to mitigate damages. *Swift-Eckrich, Inc. v. Advantage Systems, Inc.*, 55 F. Supp. 2d 1280 (D. Kan. 1999). Distinction between permanent injury to property and temporary injury to property. *Morsey v. Chevron*, 94 F.3d 1470 (10th Cir. 1996).

Collateral Source Rule. In common law tort actions, plaintiff's damages are not reduced by fact plaintiff had been wholly or partially reimbursed for his loss by sources other than wrongdoer. *Gregory v. Carey*, 246 Kan. 504, 791 P.2d 1329 (1990). K.S.A. 60-3801 *et seq.* abrogate certain elements of common law collateral source rule. However, this statute was held unconstitutional as violation of equal protection because it was limited to personal injury in cases involving amount in controversy in excess of \$150,000. *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 850 P.2d 773 (1993). Likewise, previous statutory limitation to collateral source rule was held unconstitutional as violation of equal protection because it was limited to medical malpractice cases. *Wentling v. Medical Anesthesia Svcs.*, 237 Kan. 503, 701 P.2d 939 (1985). Collateral source rule prohibits plaintiff from including claim for medical expenses that have been written off by health care provider in conjunction with Medicaid contract. *Bates v. Hogg*, 22 Kan. App. 2d 702, 921 P.2d 249 (1996), *superseded by statute on other grounds as stated in Frans v. Gausman*, 27 Kan. App. 2d 518, 6 P.3d 432 (2000). Collateral source rule does not prohibit plaintiff from including claim for medical expenses written off by health care providers in connection with Medicare contract. *Rose v. Via Christi*, 276 Kan. 539, 78 P.3d 798 (2003), *overruled on other grounds*, 2005 Kan. LEXIS 333 (2005). However, where bills have not been written off and plaintiff is still responsible for full amount, plaintiff can recover entire amount of medical bill (even if plaintiff only paid small portion). *Jackson v. City of Kansas City*, 263 Kan. 143, 947 P.2d 31 (1997).

Plaintiff can recover for reasonable anxiety over future disease or occurrence resulting from existing injury. *Reynolds v. Highland Manor, Inc.*, 24 Kan. App. 2d 859, 954 P.2d 11 (1998). Tort of outrage requires showing that defendant's conduct was intentional or reckless; that conduct was extreme and outrageous; that conduct is causally related to plaintiff's mental distress; and that plaintiff's mental distress was severe and extreme. *Smith v. Welch*, 265 Kan. 868, 967 P.2d 727 (1998).

Appellate Review. Awards for pain, suffering and other subjective elements of damage are overturned only if collective conscious of appellate court is shocked. In reviewing award for objective element of damages such as loss of past and future income which are grounded in mathematical calculation, appellate court must examine record to determine if there is evidence to support jury's calculation of pecuniary loss. *Morris v. Francisco, supra*.

Punitive Damages. Punitive Damages are not intended to compensate injured party, but rather to punish tort-feasor for malicious, vindictive or willful and wanton invasion of injured party's rights and deter others from similar conduct. *Fusaro v. First Family Mtg. Corp.*, 257 Kan. 794, 897 P.2d 123 (1995). Punitive damages are not recoverable unless actual compensatory damages are suffered and recovered. Nominal damages are not sufficient. *Wisker v. Hart*, 244 Kan. 36, 766 P.2d 168 (1988); *Behymer v. Milgram Food Stores, Inc.*, 151 Kan. 921, 101 P.2d 912 (1940). *But see Golconda Screws, Inc. v. West BoHoms Ltd.*, 20 Kan. App. 2d 1002, 894 P.2d 260 (1995) (punitive damages may be awarded incident to equitable relief without actual damages). K.S.A. 60-3703 requires that before plaintiff may include claim for punitive damages in any tort claim, plaintiff must first obtain court order allowing amended pleading that includes claim for punitive damages. Court may allow such amended pleading if plaintiff is able to establish that there is probability that he or she will prevail on punitive damages claim at trial. *Fusaro v. First Family, supra*. In general, punitive damages are recoverable in any action based on tortious conduct involving circumstances or ingredients of malice, fraud, oppression or willful and wanton disregard of another's rights. *Gillespie v. Seymour*, 250 Kan. 123, 823 P.2d 782 (1991). Punitive damages are not recoverable in contract action unless there is some independent tort indicating malice, fraud, or wanton disregard of rights of others. *Cornwell v. Jespersion*, 238 Kan. 110, 708 P.2d 515 (1985). State law permits punitive damages in successive lawsuits filed by different plaintiffs although lawsuits arise out of same course of conduct. *Scheufler v. Gen. Hosp. Corp.*, 126 F.3d 1261 (10th Cir. 1997). Whether punitive damages may be recovered in second action between different plaintiffs and same defendant must be determined on



case-by-case basis—such award does not violate due process. *McDermott v. Kansas Public Serv. Co.*, 238 Kan. 462, 712 P.2d 1199 (1986). Punitive damages are proper when breach of fiduciary duty is involved. *Newton v. Hornblower, Inc.*, 224 Kan. 506, 582 P.2d 1136 (1978). Normally, there is no justification for assessing punitive damages against one who acts under innocent mistake in engaging in conduct that nevertheless constitutes tort; more than mere negligence or mistake is required. *Iola State Bank v. Bolan*, 235 Kan. 175, 679 P.2d 720 (1984). There is no joint and several liability for punitive damages. *York v. InTrust Bank N.A.*, 265 Kan. 271, 962 P.2d 405 (1998). Assessment of punitive damages are largely within jury's discretion. Jury should consider nature, extent, and enormity of wrong, intent of wrongdoer, and all circumstances attending occurrence. Determination of amount of punitive damages shall be made by court in separate proceeding. K.S.A. 60-3701 *et seq.* Statute upheld. *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993). K.S.A. 60-3701 and K.S.A. 60-3702 list factors court may consider in determining amount of punitive damages to be awarded. Cap on punitive damage award in Kansas is generally the lesser of \$5,000,000, or annual gross income based on highest in past five years, but in certain cases court may award damages equaling 1½ times profit gained or expected to be gained based on misconduct. *Id.*

DEATH

See Law Digest Tables.

Survival Actions. K.S.A. 60-1801 provides that in addition to causes of action which survive at common law, causes for mesne profits, personal injury, injury to real or personal property, deceit or fraud, and wrongful death survive death of person liable or entitled to same.

Survival statute authorizes recovery of damages accruing between injury and death of injured person. *Farm & City Ins. Co. v. American Standard Ins. Co.*, 220 Kan. 325, 552 P.2d 1363 (1976); *Mason v. Gerin Corp.*, 231 Kan. 718, 647 P.2d 1340 (1982).

Survival action allows personal representative of decedent to recover damages accrued by injured party between date of injury and death, whereas wrongful death action compensates heirs for such things as loss of support, companionship and comfort. K.S.A. 60-1901; *Mason v. Gerin Corp.*, *supra*; *Marler v. Hiebert*, 960 F. Supp. 253 (D. Kan. 1997).

In survival action for personal injuries of decedent there must be evidence of conscious pain and suffering prior to death. *Nichols v. Marshall*, 486 F.2d 791 (10th Cir. 1973); *Smith v. Printup*, 254 Kan. 315, 866 P.2d 985 (1993); *Sullivan v. U.S. Gypsum Co.*, 862 F. Supp. 317

(D. Kan. 1994). Estate cannot recover damages for negligently induced pre-impact emotional distress experienced by motorist. *Cochrane v. Schneider Nat'l Carriers, Inc.*, 968 F. Supp. 613 (D. Kan. 1997).

Cause of action under civil rights act based on conspiracies (42 U.S.C. §1985, 1986) and Death by Wrongful Act (42 U.S.C. §1983) survives, but action based upon race (42 U.S.C. §1981) is personal and abates at death. *Carter v. City of Emporia*, 543 F. Supp. 354 (D. Kan. 1982).

No-fault statute (K.S.A. 40-3113a) providing for insurer's or self-insurer's right of reimbursement and indemnity does not apply to survivor's benefits payable under personal injury protection provisions of act. *Farm & City Ins. Co. v. American Standard Ins. Co.*, *supra*.

Wrongful Death. Although pecuniary and non-pecuniary loss may be recovered under Kansas Wrongful Death Act, award for non-pecuniary loss cannot exceed in aggregate sum of \$250,000 and costs. K.S.A. 60-1903. Action may be brought by heir at law who has suffered loss as result of death. K.S.A. 60-1902. At conclusion of action court apportions total recovery in proportion to loss sustained by each of heirs. K.S.A. 60-1905.

Damages for wrongful death may be recovered for, but are not limited to: mental anguish, suffering or bereavement; loss of society, companionship, comfort or protection; loss of marital care, attention, advice or counsel; loss of filial care or attention; loss of parental care, training, guidance or education; and reasonable funeral expenses for deceased. K.S.A. 60-1904. *Wentling v. Medical Anesthesia Svcs.*, 237 Kan. 503, 701 P.2d 939 (1985).

Verdict shall be itemized by trier of fact to reflect: non-pecuniary damages; expenses for care of deceased caused by injury; other pecuniary damages. First and third items shall also reflect damages to date and future damages where applicable. K.S.A. 60-1903(c) & (d).

Non-pecuniary damages shall be diminished in proportion to decedent's fault, subject only to subsequent imposition of non-pecuniary loss limitation. *McCart v. Muir*, 230 Kan. 618, 641 P.2d 384 (1982). The \$250,000 limitation is not measure of compensation under wrongful death statute but is cap on non-pecuniary damages that may ultimately be recovered after reductions for comparative fault and loss of chance. *Dickey v. Daughety*, 260 Kan. 12, 917 P.2d 889 (1996); K.S.A. 60-1903(b).

In wrongful death action seeking pecuniary damages under K.S.A. 60-1904 for loss of services, care and guidance, plaintiff satisfies burden of proof by showing

nature and extent of his loss and jury is presumed capable of converting loss into monetary equivalent on basis of their own knowledge and experience. Plaintiff need not prove loss with mathematical certainty. When plaintiff has shown actual loss of such statutory elements of damages as services, care and guidance and extent of such loss, jury is not precluded from considering such loss in arriving at its verdict, even though actual evidence of dollar value has not been presented. *Wentling v. Medical Anesthesia Svcs., supra*.

Non-pecuniary damages generally are intangible in nature such as mental anguish, bereavement, loss of society and loss of companionship. Pecuniary damages are benefits or compensation that reasonably could have been expected to result from continued life of deceased. *McCart v. Muir, supra*. Damages for loss of services, care and guidance are pecuniary in nature. *Wentling v. Medical Anesthesia Svcs., supra*.

Evidence of surviving spouse's remarriage is not relevant to issue of damage, and, therefore, not admissible. *Pape v. KP&L, 231 Kan. 441, 647 P.2d 320 (1982)*.

If spouse kills his or her spouse intentionally and willfully, heirs at law of deceased may bring wrongful death action against tort-feasor spouse. *Stevens v. Stevens, 231 Kan. 726, 647 P.2d 1346 (1982)*.

Action under Act may be maintained for wrongful death of viable unborn child resulting from negligent acts of another. *Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962)*. However, no such action may be maintained if fetus is determined to be not viable. *Humes v. Clinton, 246 Kan. 590, 792 P.2d 1032 (1990)*.

Wrongful death action by minor children of deceased, if otherwise timely, is not barred merely because such action by surviving spouse would be barred by statute of limitations. *Frost v. Hardin, 1 Kan. App. 2d 464, 571 P.2d 11 (1977), aff'd, 224 Kan. 12, 577 P.2d 1172 (1978)*; *Goldsmith v. Learjet, 260 Kan. 176, 917 P.2d 810 (1996)*.

In wrongful death action, fact of injury is decedent's death; two-year statute of limitations under K.S.A. 60-513 applies. *Clark v. Prakalapakron, 8 Kan. App. 2d 33, 648 P.2d 278 (1982)*; *Davidson v. Denning, 259 Kan. 659, 914 P.2d 936 (1996)*.

In wrongful death action, any heir at law may join as plaintiff. No heir is indispensable party and damages to all heirs must be proved in single action regardless of whether heirs are joined as party plaintiffs. *Frost v. Hardin, supra*. Wrongful death action not true "joint" action, all injured need not join. *Id.* Statute authorizes action against personal representative of deceased wrongdoer. *Barr v. MacHarg, 203 Kan. 612, 455 P.2d 516 (1969)*.

Mother not "heir at law" where children survived deceased; not proper party for wrongful death under 42 U.S.C. §1983. *Carter v. City of Emporia, supra*. Error to show benefits received by plaintiff from source independent of wrongdoer; collateral source rule considered. *Allman v. Holleman, 233 Kan. 781, 667 P.2d 296 (1983)*.

Presumption of Death. Unexplained absence for more than 7 years raises presumption of death. *Allen v. Protected Home Circle, 112 Kan. 576, 212 P. 95 (1923)*; K.S.A. 59-2704 (providing for period of not less than five years).

Determination of heirship without proof and finding of death of missing heir violated law of intestate succession. *In re Estate of Newland, 240 Kan. 249, 730 P.2d 351 (1986)*.

Uniform Simultaneous Death Transfer Act. Act governs devolution of property when there is no evidence deaths occurred other than simultaneously. K.S.A. 58-708, *et seq.*

Where husband and wife died as result of accident under circumstance that made it impossible to prove they died other than simultaneously, husband was presumed to have survived wife for purposes of administration of his estate, so that estate of wife, because she was presumed to have died before husband, was not entitled to statutory share in husband's estate and vice versa, pursuant to K.S.A. 58-701. *Schweizer's Estate v. Schweizer's Estate, 7 Kan. App. 2d 128, 638 P.2d 378 (1981)*.

DISABILITY

"Total disability" does not require utter or absolute helplessness on part of insured; it is sufficient that disability renders him unable to perform in usual and customary way substantial and material acts of employment or occupation for which he is or becomes reasonably qualified. *Matthews v. Travelers Ins., 212 Kan. 292, 510 P.2d 1315 (1973)*; *Maresh v. Peoria Life, 133 Kan. 191, 299 P. 934 (1931)*.

Disability arising some weeks after accident held not within policy provision requiring assured be "wholly and continuously disabled from date of accident." *Penquite v. General Accident, 121 Kan. 174, 246 P. 498 (1926)*. However, term "immediately" in disability policy does not mean instantly, but that disability is immediate if it follows directly from accidental injury and within such time as processes of nature take in bringing total disability. *Thomas v. Mutual Benefit, 136 Kan. 802, 18 P.2d 151 (1933)*. Attempting to work held no bar to plaintiff's recovery for total disability. *Simmons v. Wilson, 145 Kan. 128, 64 P.2d 50 (1937)*. What constitutes



inability to perform work for profit, considered. *Maresh v. Peoria Life, supra*.

Inability to perform daily duties held partial disability. *Brown v. Reserve Health & Acc.*, 114 Kan. 337, 219 P. 505 (1923). Inability to perform any kind of work for which plaintiff was or reasonably could become competent held total disability. *Woods v. Aetna Life*, 204 Kan. 466, 464 P.2d 183 (1970).

If insured is totally disabled under policy, and policy requires regular attendance of physician, such provision will not be enforced when substantial competent evidence shows such attendance would be futile and that no helpful purpose would be gained. *Brown v. Continental Cas. Co.*, 209 Kan. 632, 498 P.2d 26 (1972).

Policy provision stating insured be "regularly employed," "for at least 30 hours each week" did not preclude recovery for death of managerial employee who was sick and absent from place of business and who performed his usual duties through assistance of another employee with approval of head of company while receiving full pay. *Bingham v. Nationwide Life*, 7 Kan. App. 2d 72, 638 P.2d 352 (1981), *aff'd as modified*, 231 Kan. 389, 646 P.2d 1048 (1982).

In action by insured claiming benefits under health and accident policy as result of coronary heart disease, insurer has burden to prove disability was not in existence prior to effective date of policy. *Bishop v. Capital Life*, 218 Kan. 590, 545 P.2d 1125 (1976); *McDaniel v. State Farm*, 3 Kan. App. 2d 174, 591 P.2d 1094 (1979); *St. Francis Hosp. v. Baldwin*, 6 Kan. App. 2d 124, 626 P.2d 1229 (1981).

K.S.A. 40-2203, requiring uniform provisions to be included in any accident and sickness policy delivered or issued for delivery in Kansas, applies only to individual accident and sickness policies, not to group policies. *Simms v. Metropolitan Life*, 9 Kan. App. 2d 640, 685 P.2d 321 (1984).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

Carriers. See "AUTOMOBILES."

FIRE INSURANCE

Appraisal. Appraisal clause in fire insurance contract held unenforceable under K.S.A. 5-401(c)(1). *Friday v. Trinity Universal*, 262 Kan. 347, 939 P.2d 869 (1997). Appraisal of damage by agreement binding in absence of fraud or mutual mistake. *McKenzie v. Fidelity-Phoenix*, 133 Kan. 721, 3 P.2d 477 (1931).

Arson. Strong principles of public policy deny insured right to recover when he intentionally sets on fire property covered by insurance contract. Burden of proof is by preponderance of evidence. *Neises v. Soloman State Bank*, 236 Kan. 767, 696 P.2d 372 (1985).

Assignment. Right of action for damage to property of another not assignable. *St. Paul Fire v. Bender*, 153 Kan. 752, 113 P.2d 1062 (1941).

Cancellation. Form of notice to cancel fire policy not important provided insured understands policy is to be canceled. *Plotner v. National Fire*, 118 Kan. 234, 234 P. 959 (1925). Voluntary petition by heirs for partition not within purview of mutual policy providing for cancellation on sale of property. *Farmers Mut. v. Millard*, 129 Kan. 283, 282 P. 582 (1929). Insurers ordering cancellation of policies when ignorant as to whether or not such had been issued, does not admit existence of policies. *Williams v. Insurance*, 119 Kan. 502, 240 P. 411 (1925). Provision in fire policy authorizing insurer to cancel policy by giving notice to insured "in person or by mail" did not mean if notice was mailed it became effective even though never received by insured. *Merrill v. Farmers' Alliance*, 155 Kan. 31, 122 P.2d 776 (1942).

Chattel Mortgage. *Continental v. Ward*, 50 Kan. 346, 31 P. 1079 (1893). Contract severable. *Brown v. Westchester*, 9 Kan. App. 526, 58 P. 276 (1899). Incumbrance without consent voids policy. *Wood v. American Auto*, 109 Kan. 801, 202 P. 82 (1921). Held change of ownership or interest would terminate policy. Application containing no questions as to encumbrances not sufficient to impose liability on company where policy provided it was void if property encumbered by chattel mortgage. *Akers v. Farmers' Alliance*, 118 Kan. 241, 234 P. 956 (1925). Provision voiding policy if insured property is or becomes encumbered by chattel mortgage, or if assured conceals or misrepresents any fact, relieves insurer from liability where assured fails to disclose chattel mortgage on application. *Nowak v. New York Ins.*, 141 Kan. 571, 42 P.2d 954 (1935).

Co-insurance. Clause construed. *Dolan v. Wholesale Grocery*, 131 Kan. 374, 291 P. 935 (1930).

Improvements. "Improvements and betterments" clause of fire insurance policy which covers lessee's use interest in fixtures, alterations, installations or additions added to leased property only covers improvements added during lease term. *Ron Henry Ford v. National Union Fire*, 8 Kan. App. 2d 766, 667 P.2d 907 (1983).

Mortgage Clause. Mortgagee, under union mortgage clause, may recover although policy void as to mortgagor because of misrepresentations as to encumbrances. Insurer not liable to mortgagor upon payment of loss to mortgagee. Insurer is entitled to be subrogated to

security of mortgage debt to extent of payment made. *Metropolitan Life v. Mennonite Mut. Fire*, 131 Kan. 628, 293 P. 402 (1930).

Clause “payable to named insurers as their interest may appear” means interests existing at time of loss. *New Hampshire Ins. v. American Employers Ins.*, 208 Kan. 532, 492 P.2d 1322 (1972).

Ownership. Deed in escrow does not constitute change of ownership although purchaser occupies property with consent of seller in anticipation of completing contract of sale. *Dow v. Fireman’s Ins.*, 115 Kan. 190, 221 P. 1112 (1924). Sale effected by operation of law not such as to require notice of change of ownership. *Winchel v. National Fire Ins.*, 129 Kan. 225, 282 P. 571 (1929). Conveyance of property to mother of insured with reconveyance to insured and his wife on same day, not such change in ownership as to avoid policy. *Holyfield v. Farmers Alliance*, 132 Kan. 539, 296 P. 710 (1931). Plaintiff not sole owner of property could not recover. *Marett v. World Fire & Marine*, 160 Kan. 125, 160 P.2d 664 (1945).

Probate. Fire insurance policy proceeds go with land and not into estate of deceased insured. *In re Estate of Burns*, 227 Kan. 573, 608 P.2d 942 (1980).

Proof of Loss. K.S.A. 40-924 requires insurance companies to accept notice of fire or tornado loss and within 10 days supply insured with forms without admitting liability by so doing.

Standard policy provisions. K.S.A. 40-901 covers standard forms allowing companies to do business as authorized by their charter.

Value reporting. Clause construed. Report of values filed after fire but within grace period allowed by policy is ineffective. *Ron Henry Ford v. National Union, supra*.

Rights of Insured. Rights of insured under fire policy against insurers and rights of insurers as to apportionment must be determined by provision of contracts made. *New Hampshire Ins. v. American Employers Ins., supra*.

GUEST CASES

See “AUTOMOBILES.”

HOSPITAL

Hospitals have duty to exercise reasonable care to their patients by not entrusting their care to independent physician who is not competent and/or careful. *Aldoroty v. HCA Health Svcs.*, 265 Kan. 666, 962 P.2d 501 (1998).

Liens. Hospital given lien for services to extent of \$5,000 on any money payable by reason of personal injury. If amount claimed exceeds \$5,000, amount in excess is subject to equitable distribution by court. Act provides for filing lien with clerk of District Court and serving notice on party causing injury. K.S.A. 65-406, *et seq.*

Lien provided in K.S.A. 40-3113a for insurance carrier has priority over hospital lien provided in K.S.A. 65-406. *Richards v. Etzen*, 231 Kan. 704, 647 P.2d 1331 (1982).

Factual statements contained within peer review documents are subject to discovery and are not protected from disclosure by Kansas Peer Review Statute. *Adams v. St. Francis*, 264 Kan. 144, 955 P.2d 1169 (1998).

HUSBAND AND WIFE

See Law Digest Tables.

Doctrine of interspousal immunity overruled. One spouse may maintain action against other spouse for tortious personal injury occurring during marriage. *Flagg v. Loy*, 241 Kan. 216, 734 P.2d 1183 (1987); *see also Bonin v. Vannaman*, 261 Kan. 199, 929 P.2d 754 (1996).

Wife has no separate cause of action for loss of consortium due to personal injury of husband. *Annis v. Butler Mfg.*, 715 F. Supp. 328 (D. Kan. 1989); K.S.A. 23-205. *See Cleveland v. Wong*, 237 Kan. 410, 701 P.2d 1301 (1985).

Spouse has no claim for lost income due to injury of spouse. Economic loss limited to value of nursing services provided, if any. *Western Union v. Morris*, 10 Kan. App. 61, 61 P. 972 (1900); *see also Skaer v. Moore*, 1995 U.S. Dist. LEXIS 19400 (D. Kan. Dec. 4, 1995).

Common Law Doctrine of Necessaries. Both spouses are liable for necessary expenses of the other. *St. Francis v. Bowles*, 251 Kan. 334, 836 P.2d 1123 (1992). Creditor must first pursue claim against benefitting spouse. *Bethany Med. Ctr. v. Niyazi*, 20 Kan. App. 2d 464, 890 P.2d 349 (1995).

Common law marriage requires capacity to marry, present marriage agreement and holding out as husband and wife. Common law ages of consent are 14 for male and 12 for female. *In re Pace*, 26 Kan. App. 2d 538, 989 P.2d 297 (1999).

No action for negligent entrustment arises when spouses share equal right to use car. *Snodgrass v. Baumgart*, 25 Kan. App. 2d 812, 974 P.2d 604 (1999).



INFANTS

See "AUTOMOBILES, Age"; "LIABILITY INSURANCE, Violation of Law"; "NEGLIGENCE, Age."

Minor tort-feasor is answerable for damages caused by his negligence to same extent as adult. *American Family v. Grim*, 201 Kan. 340, 440 P.2d 621 (1968).

Attractive Nuisance Doctrine stated. *Brittain v. Cubbon*, 190 Kan. 641, 378 P.2d 141 (1963). *Carter v. Skelly Oil*, 191 Kan. 474, 382 P.2d 277 (1963); *Kerns v. G.A.C. Inc.*, 255 Kan. 264, 875 P.2d 949 (1994).

Generally, swimming pool, whether public or private, is not attractive nuisance absent highly unusual and aggravated factual circumstances. *Mozier v. Parsons*, 256 Kan. 769, 887 P.2d 692 (1995).

Distinction between licensees and invitees has been abolished in Kansas. *Jones v. Hanson*, 254 Kan. 499, 867 P.2d 303 (1994). Where five-year-old girl gained access to roof of church from which she fell causing her death, child was held to be licensee and not invitee and no greater care was owed to child than was owed to adult. *Lemon v. Busey*, 204 Kan. 119, 461 P.2d 145 (1969).

Essential element of doctrine of attractive nuisance is that danger must be latent or concealed - this extends to things and conditions hidden from appreciation of and not understood by children. *Albanese v. Edwardsville Mobile Home*, 215 Kan. 826, 529 P.2d 163 (1974).

Unemancipated minor child may recover damages in action brought against parent for personal injuries caused by negligence of parent in operation of motor vehicle. *Nocktonick v. Nocktonick*, 227 Kan. 758, 611 P.2d 135 (1980); see also *Bonin v. Vannaman*, 261 Kan. 199, 929 P.2d 754 (1996).

Action pursuant to K.S.A. 38-120, parental liability only if act and injury or damage is willful or malicious. *Hanks v. Booth*, 240 Kan. 30, 726 P.2d 1319 (1986). Parents have duty to rescue, render aid and protect child due to special relationship. *State v. Hunter*, 22 Kan. App. 2d 103, 911 P.2d 1121 (1996). Children have no cause of action for loss of parental care and society. *Annis v. Butler Mfg.*, 715 F. Supp. 328 (D. Kan. 1989); *Klaus v. Fox Valley*, 259 Kan. 522, 912 P.2d 703 (1996).

Parents have no cause of action for emotional, physical or other injuries following injury of child due to third party's negligence when parent is not present at accident scene. *Schmeck v. City of Shawnee*, 231 Kan. 588, 647 P.2d 1263 (1982); see also *Klaus v. Fox Valley*, *supra*.

Statute of limitations for tort actions brought by minors runs one year after minor reaches age of majority

(18), but no action shall be commenced more than eight years after act giving rise to cause of action. K.S.A. 60-515.

INLAND MARINE

Kansas law recognizes two exceptions for inland marine cases. Under K.S.A. 40-955(a), "Every insurer shall file with the commissioner, except as to inland marine risks where general custom of the industry is not to use manual rates or rating plans, every manual of classifications, rules and rates, every rating plan, policy form and every modification of any of the foregoing which it proposes to use." K.S.A. 40-955(c) indicates inland marine rates which shall be effective on filing, subject to commissioner disapproving same if rates are determined to be inadequate, excessive, unfairly discriminatory or otherwise fails to meet requirements of this act.

LIABILITY INSURANCE

Compromise of Claims. Insurer owes duty to insured to act in good faith. *Spencer v. Aetna Life*, 227 Kan. 914, 611 P.2d 149 (1980). Insurer has duty to consider interests of insured where claim is in excess of policy limits whether insured is solvent or not. *Farmers Ins. Exch. v. Schropp*, 222 Kan. 612, 567 P.2d 1359 (1977); see also *Miller v. Sloan*, 267 Kan. 245, 978 P.2d 922 (1999).

Negligence and failure to act in good faith will result in insurer being held liable for full amount of insured's resulting loss even if that amount exceeds policy limits. *Rector v. Husted*, 214 Kan. 230, 519 P.2d 634 (1974). *Sours v. Russell*, 25 Kan. App. 2d 620, 967 P.2d 348 (1998). Liability arises from contractual obligation to defend. Punitive damages will not be awarded in absence of independent tort causing injury. *Guarantee Abstract v. Interstate Fire*, 232 Kan. 76, 652 P.2d 665 (1982). Duty of insurer to settle does not depend on existence of settlement offer by plaintiff. Appropriate inquiry is whether insurer would initiate settlement negotiations on its own behalf if its potential liability were equal to that of insured. *Coleman v. Holecek*, 542 F.2d 532 (10th Cir. 1976). Insurer has duty to keep insured informed of all settlement negotiations, regardless of whether insured will consent to settlement. *Insurance Co. of North Am. v. Medical Protective Co.*, 768 F.2d 315 (10th Cir. 1985).

Any liability of insurance company in excess of its policy limits must be based upon wrongdoing by insurer which has caused loss to insured. *Heinson v. Porter*, 244 Kan. 667, 772 P.2d 778 (1989), *overruled on other grounds*, *Glenn v. Fleming*, 247 Kan. 296, 799 P.2d 79 (1990). Plaintiff who enters into covenant not to execute against insured who is liable to pay judgment cannot



garnish insurer for excess if judgment is reasonable and covenant was entered into in good faith. *Glenn v. Fleming, supra*.

Cooperation of Insured in Defense of Action. Burden of establishing policy defense based upon insured's failure to cooperate is on insurer. *Watson v. Jones*, 227 Kan. 862, 610 P.2d 619 (1980); see *Johnson v. Westhoff Sand Co.*, 31 Kan. App. 2d 259. To establish defense based upon breach of cooperation clause, insurer must prove that had cooperation clause not been breached, there is substantial likelihood trier of fact, in action against insured, would have found in insured's favor. *Boone v. Lowry*, 8 Kan. App. 2d 293, 657 P.2d 64 (1983).

Coverage. Clause in comprehensive liability policy excluding insured's work product where insured's faulty workmanship gives rise to damage is enforceable. *Owings v. Gifford*, 237 Kan. 89, 697 P.2d 865 (1985).

Kansas follows majority rule construing two policies covering same loss. If one policy contains excess insurance clause and other pro rata clause, policy with pro rata clause will be applicable first to its stated limits. *Western Cas. v. Trinity Universal*, 13 Kan. App. 2d 133, 764 P.2d 1256 (1988), *aff'd*, 245 Kan. 44, 775 P.2d 176 (1989).

Where two or more policies provide coverage for particular event and all policies contain excess insurance clauses, such clauses are mutually repugnant, and each is prorated equally up to limits of lower policy. *Western Cas. v. Universal Underwriters Ins.*, 232 Kan. 606, 657 P.2d 576 (1983). Statutory prohibition against "stacking," (recovery from more than one policy in amount not to exceed total limits, up to full amount of damages) is read into each policy. *Eidemiller v. State Farm*, 261 Kan. 711, 933 P.2d 748 (1997).

Insurance coverage exists for injuries arising out of use of insured car when use has some causal connection to injuries. *Molitor v. Davison*, 26 Kan. App. 2d 83, 978 P.2d 294 (1999) (no coverage for accident subsequent to driver of insured car removing stop sign).

Comprehensive farm liability policy issued to one engaged in business of custom farming held not to cover liability incurred as result of his breach of contract. *Isaac v. Reliance Ins. Co.*, 201 Kan. 288, 440 P.2d 600 (1968).

With regard to exclusion of property under care, custody and control of insured, see *Buchanan v. Employers Mut.*, 201 Kan. 666, 443 P.2d 681 (1968); *Herrman v. Folkerts*, 202 Kan. 116, 446 P.2d 834 (1968); *Adventure Line Mfg. v. Western Cas.*, 214 Kan. 820, 522 P.2d 359 (1974).

Term "furnished for regular use" in exclusionary clause of automobile policy is not ambiguous. Exclusions application is factual determination based upon nature of intended use of vehicle. *Central Security Mut. v. De Pinto*, 235 Kan. 331, 681 P.2d 15 (1984). Term "assault and battery" under liability policy exclusion not ambiguous. *First Financial Ins. Co. v. Bugg*, 265 Kan. 690, 962 P.2d 515 (1998). Term "accident" means not resulting from misconduct of insured party, and may include circumstances where injury is intentionally inflicted by other party. *Brumley v. Lee*, 265 Kan. 810, 963 P.2d 1224 (1998). Compulsory terms mandated by state (e.g. Kansas Health Care Provider Insurance Availability Act, K.S.A. 40-3401, *et seq.*; Kansas Automobile Injury Reparations Act, K.S.A. 40-3101, *et seq.*) will be read into policy of insurance to extent that provisions of policy contradict statute. Coverage which exceeds statutory minimum is governed by policy provisions. *Missouri Medical Ins. Co. v. Wong*, 234 Kan. 811, 676 P.2d 113 (1984); *Canal Ins. Co. v. Sinclair*, 208 Kan. 753, 494 P.2d 1197 (1972).

Insolvency of Insured. Practically all policies issued in Kansas contain insolvency clause and it was held in *Johnson v. Bondurant*, 187 Kan. 637, 359 P.2d 861 (1961), that bankruptcy of defendant in damage action does not constitute defense nor affect liability of insurer of bankrupt defendant. See also 10 Kan. L. Rev. 187, 109-90 (1961).

Duty to Defend. Insurer may not rely on pleadings alone in determining whether it has duty to defend. Instead, it must take into account facts known to it or reasonably discoverable by it. If there is possibility that coverage exists, there is duty to defend. Possibility of coverage is possibility that insured may be found legally obligated to pay damages because of occurrence that was insured risk; that is, possibility there may be duty to indemnify. *American Fidelity v. Employers Mut.*, 3 Kan. App. 2d 245, 593 P.2d 14 (1979).

Though possibility of insurers duty to defend may be remote, company owes insured defense if possibility exists. Possibility of coverage must be determined by good-faith analysis of all information known to insured, or all information reasonably ascertainable by inquiry and investigation. *Spruill Motors, Inc. v. Universal Underwriters*, 212 Kan. 681, 512 P.2d 403 (1973).

Before insurer bears duty to defend, it must be shown that under policy defendant is, in fact, insured. Insurer is not obligated to provide defense for stranger merely because plaintiff alleges that stranger is insured, or alleges facts which, if true, would make him insured. *Williams v. Community Drive-In Theater, Inc.*, 3 Kan. App. 2d 352, 595 P.2d 724 (1979), *rev. denied*, 226 Kan. 793 (1979).



Where same risk is covered by both primary and secondary insurance, primary insurer has primary duty to defend. Where claim made is within limits of primary policy and primary insurer undertakes defense, secondary insurer is not required to defend. Where claim is over limits of primary policy, and only one insurer undertakes defense, primary insurer and excess insurer will each be liable for pro rata share of costs of defense in proportion to amount of claim each is required to pay. *American Fidelity Ins. Co. v. Employers Mut. Cas. Co.*, 3 Kan. App. 2d 245, 593 P.2d 14 (1979).

Excess. In acting on offers of settlement within policy limit insurer may properly give consideration to its own interests, but it must also give equal consideration to interests of insured. Insurer must evaluate claim without looking at policy limits as though it alone would be responsible for entire amount of any judgment. *Bollinger v. Nuss*, 202 Kan. 326, 449 P.2d 502 (1969). See also *Farmers Ins. Exch. v. Schropp*, 222 Kan. 612, 567 P.2d 1359 (1977).

Decisive factor in fixing extent of liability of insurer for judgment in excess of policy limits is not refusal to defend, but refusal to accept offer of settlement within policy limits. *Coleman v. Holecek*, 542 F.2d 532 (10th Cir. 1976). Wrongful refusal to defend insured will not subject insured to liability in excess of policy limits unless insured's excess judgment is traceable to insurer's refusal to defend. *George R. Winchell, Inc. v. Norris*, 6 Kan. App. 2d 725, 633 P.2d 1174 (1981); explained by *Hartford Cas. Ins. v. Credit Union 1*, 268 Kan. 121, 992 P.2d 800 (1999). Insurer is not bound to defend in actions brought wholly outside coverage obligations assumed in policy or when insurer would have no liability if third party secured judgment against insured. Where there is no coverage, there is no duty to defend. *Patrons v. Harmon*, 240 Kan. 707, 732 P.2d 741 (1987).

Interest. Usual standard interest clause in liability policy creates liability for interest on entire judgment up to policy limit, plus interest on whole judgment, until such amount has been tendered, offered or paid, *Glenn v. Fleming*, 247 Kan. 296, 799 P.2d 79 (1990).

Violation of Law. There are no cases covering liability of insurer, for operation of automobile by persons under age permitted by law. General rule is that contract of insured providing age limit is binding.

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

MALPRACTICE

General. To recover on malpractice claim against health care provider, plaintiff must establish by competent evidence three elements: 1) standard of care owed by health care provider; 2) deviation from that standard of care by health care provider; and 3) deviation caused plaintiff's damages.

Expert Testimony. Expert medical testimony is required to establish negligence and causation on part of health care provider unless medical procedures employed are so patently bad that negligence is manifest to lay observer. *Hiatt v. Groce*, 215 Kan. 14, 19, 523 P.2d 320 (1974); *Karrigan v. Nazareth Convent*, 212 Kan. 44, 510 P.2d 190 (1973); *Webb v. Lungstrom*, 223 Kan. 487, 575 P.2d 22 (1978); *Hare v. Wendler*, 263 Kan. 434, 949 P.2d 1141 (1997).

Statute of Limitations. For medical malpractice cases is found K.S.A. 60-513(c). Cause of action arising out of rendering of or failure to render professional services by health care provider shall be deemed to have accrued at time of occurrence of act giving rise to cause of action unless fact of injury is not reasonably ascertainable until sometime after initial act, and then period of limitation shall not commence until fact injury becomes reasonably ascertainable to injured party, but in no event shall such action be commenced more than four years beyond time of act giving rise to cause of action. See *Davidson v. Denning*, 259 Kan. 659, 914 P.2d 936 (1996), distinguished by *Hall v. Miller*, 29 Kan. App. 2d 1066, 36 P.3d 328 (2001) (addressing similar issue without bright-line triggering event); *Kelley v. Barnett*, 23 Kan. App. 2d 564, 932 P.2d 471 (1997).

No vicarious liability exists for health care provider qualified for coverage under health care stabilization fund. K.S.A. 40-3403(h). *Lemuz v. Fiser*, 261 Kan. 936, 933 P.2d 134 (1997); *Aves v. Shah*, 258 Kan. 506, 906 P.2d 642 (1995); *McVay v. Rich*, 255 Kan. 371, 874 P.2d 641 (1994). To succeed on loss of chance of survival or loss of chance of better recovery, plaintiff must prove negligence by preponderance of evidence and negligence deprived plaintiff of substantial chance of survival or recovery. *Delaney v. Cade*, 255 Kan. 199, 873 P.2d 175 (1994) (question on recognition of theory of loss of chance of recovery certified by 10th Circuit). Damages recoverable are limited to amount attributable to lost or reduced chance. *Id.* Non-pecuniary damages are subject to percentage of lost chance before statutory cap of K.S.A. 60-1903 is applied. *Dickey v. Dougherty*, 21 Kan. App. 2d 655, 905 P.2d 697 (1995), *aff'd*, 260 Kan. 12, 917 P.2d 889 (1996). K.S.A. 40-3403 statutory medical malpractice insurance coverage under Kansas Health Care Stabilization Fund provides coverage with liability limit per judgment or settlement. *Wilson v. Ramirez*, 269



Kan. 371, 2 P.3d 778 (2000). When there is only one cause of plaintiff's injuries, there is only one claim or occurrence for purposes of medical malpractice insurance coverage. *Id.*

Medical Malpractice Screening Panel. K.S.A. 65-4901 *et seq.* and Supreme Court Rule 142. Screening panel may be convened upon motion by any party or court. Motion to convene screening panel tolls applicable statute of limitations. Written report of screening panel shall be admissible in any subsequent legal proceedings. Either party may subpoena members of panel as witnesses at trial.

Factual statements contained within peer review documents are subject to discovery and are not protected from disclosure by Kansas Peer Review Statute. *Adams v. St. Francis*, 264 Kan. 144, 955 P.2d 1169 (1998). Documents for which privilege is claimed are subject to *in camera* review by Court. *Id.*

NEGLIGENCE

See Law Digest Tables.

See "AUTOMOBILES"; "NO-FAULT."

In products liability context, insured only liable for its individual proportionate fault. No non-contractual indemnity or contribution among defendants. *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980). Where joint tort-feasor settles claim releasing all tort-feasors, settling tort-feasor can seek indemnification from other tort-feasors. *Id.* But see *Teepak v. Learned*, 237 Kan. 320, 699 P.2d 35 (1985).

Age. Children of tender years are not held to same standard of care as adults. *Honeycutt v. City of Wichita*, 247 Kan. 250, 796 P.2d 549 (1990). Negligence and contributory negligence of infants discussed. *Greiving v. La Plante*, 156 Kan. 196, 131 P.2d 898 (1942). However minor operating motor vehicle is held to same standard of care and caution as adult. *Williams v. Esaw*, 214 Kan. 658, 522 P.2d 950 (1974), *superseded by statute on other grounds as stated in Eli v. County*, 235 Kan. 684, 681 P.2d 673 (1984); K.S.A. 60-258a.

Architect Liability. Normally architect only owes duty to owner and not to construction workers for job-site safety practices absent contractual obligation, implied assumption of duty, or actual knowledge of unsafe job-site practices. *Hanna v. Huer, et al.*, 233 Kan. 206, 662 P.2d 243 (1983); *Balagna v. Shawnee County*, 233 Kan. 1068, 668 P.2d 157 (1983); *Tamarac Dev. Co. v. Delamater, Freund & Assocs.*, 234 Kan. 618, 675 P.2d 361 (1984).

Attractive Nuisance and elements thereof discussed in *Mozier v. Parsons*, 256 Kan. 769, 887 P.2d 692

(1995). Residential swimming pools generally not considered attractive nuisance. *Id.*

Comparative Negligence. In 1974, legislature abolished contributory negligence as bar to recovery and placed damages on comparative negligence basis. See K.S.A. 60-258a, effective July 1, 1974.

Tort Actions. Under doctrine of comparative negligence, each party is responsible in proportion to his share in causing injury or damage. *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978); *Wilson v. Probst*, 224 Kan. 459, 581 P.2d 380 (1978); *Mick v. Mani*, 244 Kan. 81, 766 P.2d 147 (1988); *Cox v. Lesko*, 263 Kan. 805, 953 P.2d 1033 (1998).

Joint and several liability no longer exists in comparative negligence actions. Separate individual judgments are rendered against each defendant. *Haysville U.S.D. #261 v. GAF Corp.*, 233 Kan. 635, 666 P.2d 192 (1983).

Kansas comparative negligence statute applies "49%" rule. But if plaintiff's comparative fault is less than fault of all other "parties" plaintiff may recover even against defendant with less fault than himself. *Langhoffer v. Reiss*, 5 Kan. App. 2d 573, 620 P.2d 1173 (1980); *Pape v. Kansas Power & Light Co.*, 231 Kan. 441, 647 P.2d 320 (1982). Doctrine of comparative negligence has abrogated doctrine of active-passive negligence as basis for indemnification. *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980); *Haysville U.S.D. #261, supra*; *Gaulden v. Burlington Northern, Inc.*, 232 Kan. 205, 654 P.2d 383 (1982). But, implied comparative indemnity between tort-feasors can arise with settlement of plaintiff's claim by one tort-feasor. *Id.* Comparative negligence doctrine applies to strict liability and negligent entrustment claims and whenever contributory negligence would have been defense. *Kennedy, supra*; *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982); *McCart v. Muir*, 230 Kan. 618, 641 P.2d 384 (1982); *Arredondo v. Duckwall Stores, Inc.*, 227 Kan. 842, 610 P.2d 1107 (1980). Comparative negligence is not applicable to intentional torts. *Sieben v. Sieben*, 231 Kan. 372, 646 P.2d 1036 (1982); *Adams v. Via Christi*, 270 Kan. 824, 19 P.3d 132 (2001). Nor is it applicable in breach of warranty actions where there is only simple economic loss. *Haysville U.S.D. #261, supra*.

Assumption of risk has survived comparative negligence doctrine. *George v. Beggs*, 1 Kan. App. 2d 356, 564 P.2d 593 (1977). However, assumption of risk is generally limited to cases involving master-servant relationship. *Tuley v. Kansas City Power & Light*, 252 Kan. 205, 843 P.2d 248 (1992); *Borth v. Borth*, 221 Kan. 494, 561 P.2d 408 (1977); *Jackson v. City of Kansas City*,



235 Kan. 278, 680 P.2d 877 (1984); K.S.A. 75-6103. Assumption of risk has also been applied where other contractual relationship exists, e.g. physician-patient. *Natanson v. Kline*, 187 Kan. 186, 354 P.2d 670 (1960). Further, defense of assumption of risk is not available where injury received is subject to Workers' Compensation Act. See K.S.A. 44-545.

Under Kansas doctrine of comparative negligence all parties to occurrence must have their fault determined in one action, even though some parties cannot be formally joined or held legally responsible. Those not joined as parties for determination of fault and recovery escape liability. *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 634 P.2d 1127 (1981); *Gaulden, supra*; *Ellis v. Union P. R. Co.*, 231 Kan. 182, 643 P.2d 158 (1982); *McGraw v. Sanders Co. Plumbing & Heating, Inc.*, 233 Kan. 766, 667 P.2d 289 (1983). "One-action rule" is more accurately described as one-trial rule. *Tersiner v. Gretencord*, 17 Kan. App. 2d 551, 840 P.2d 544 (1992). All counter claims and cross-claims by parties to comparative negligence action are compulsory. *Eurich v. Alkire*, 224 Kan. 236, 579 P.2d 1207 (1978); *Anderson v. Scheffler*, 242 Kan. 857, 752 P.2d 667 (1988); K.S.A. 60-213.

Governmental Immunity. Pursuant to Kansas Tort Claims Act, K.S.A. 75-6101 *et seq.*, unless one of numerous exceptions to liability applies, governmental entity shall be liable for damages caused by negligent or wrongful act or omission of any of its employees while acting within scope of employment if private person would be liable for same action. K.S.A. 75-6103(a).

Imputed Negligence. Kansas courts have recognized doctrine of imputed negligence in two special circumstances: master/servant and joint enterprise. *Schmidt v. Martin*, 212 Kan. 373, 510 P.2d 1244 (1973); *Klose v. Wood Valley*, 267 Kan. 164, 975 P.2d 1218 (1999).

Where passenger does not have equal privilege and right to control vehicle, negligence of operator not imputed to passenger. *Scott v. McGaugh*, 211 Kan. 323, 506 P.2d 1155 (1973). See *Schmidt v. Martin*, 212 Kan. 373, 510 P.2d 1244 (1973) for general discussion of imputed negligence under Kansas law.

Last Clear Chance Doctrine Discussed. *Gibson v. Bodley*, 156 Kan. 338, 133 P.2d 112 (1943); *Letcher v. Derricott*, 191 Kan. 596, 383 P.2d 533 (1963); *Southard v. Lira*, 212 Kan. 763, 512 P.2d 409 (1973).

Proximate Cause. May be solely question of law. *Hickert v. Wright*, 182 Kan. 100, 319 P.2d 152 (1957); *Citizens State Bank v. Martin*, 227 Kan. 580, 609 P.2d 670 (1980).

Licensees and Business Invitees. In Kansas, duty owed by occupier of land to licensees is no longer dependent upon status of entrant on land. Common-law classification and duty arising from classification is no longer applied. *Jones v. Hansen*, 254 Kan. 499, 867 P.2d 303 (1994). Duty owed by occupier of land to invitees and licensees alike is one of reasonable care under all circumstances. *Id.*

Business invitee must show proprietor has either actual notice of dangerous condition or condition existed for such period of time that in exercise of ordinary care, proprietor should have known of it. *Hein v. Mills Bldg. Co.*, 190 Kan. 198, 372 P.2d 994 (1962); *Napell v. Aten*, 115 F. Supp. 2d 1275 (D. Kan. 2000). Where proprietor helped create dangerous condition, notice of danger need not be proved by invitee. *Reel v. S.H. Kress & Co.*, 192 Kan. 525, 389 P.2d 831 (1964); *Elrod v. Walls, Inc.*, 205 Kan. 808, 473 P.2d 12 (1970); *Warren v. T.G.&Y. Stores Co.*, 210 Kan. 43, 499 P.2d 201 (1972). Notice also need not be shown under "mode-of-operation" exception, if proprietor should have reasonably anticipated dangerous condition due to its mode-of-operation. *Jackson v. K-Mart*, 251 Kan. 700, 840 P.2d 463 (1992).

Kansas Supreme Court has refused to abandon distinction between trespasser on one hand and invitee and licensee on the other hand. *Jones, supra*. Comparative negligence does not alter these traditional rules. *Britt, supra*; *Bowers, supra*.

Liquor Liability/Dram Shop. Kansas does not have dram shop act.

Negligence Per Se. Negligence per se results from violations of specific law ordinances. Only determination for fact-finder is whether there was commission or omission of specific act prohibited or required. *Bi-State Development Co. v. Schafer*, 26 Kan. App. 2d 515, 990 P.2d 159 (1999).

Premises Liability. In order to be liable, party must have control over premises. *Gragg v. Wichita State*, 261 Kan. 1037, 934 P.2d 121 (1997). Kansas now holds that duty owed to licensees and invitees alike is one of reasonable care. *Jones v. Hansen*, 254 Kan. 499, 867 P.2d 303 (1994).

Sudden Emergency. Jury instruction on sudden emergency should not be given. *Crowley v. Ottken*, 224 Kan. 27, 578 P.2d 689 (1978).

NO-FAULT

"Kansas Automobile Injury Reparation Act," K.S.A. 40-3101, *et seq.*, is compulsory. *Barnes v. Kansas Dept. of Rev.*, 238 Kan. 820, 714 P.2d 975 (1986). Every motor vehicle owner is required to provide by in-



insurance or qualifying as self-insured: Liability Coverage for named insured, any person using such vehicle with consent; no less than \$25,000 personal injury, per person; \$50,000 personal injury, per accident; \$10,000 property damage. Personal Injury Protection Benefits (PIP Benefits) for named insured, relatives living with him, any person operating, passenger or person struck by motor vehicle without regard to fault, following: 1) Disability Benefits—maximum of not less than \$900 per month lost income for one year; 2) Funeral Benefits—up to \$2,000 per person; 3) Medical Benefits—up to minimum of \$4,500; 4) Rehabilitation Benefits—up to minimum of \$4,500; 5) Substitution Benefits—up to \$25 per day for up to 365 days; 6) Survivors Benefits—maximum of not less than \$900 per month plus substitution benefits, less expenses avoided by death. PIP benefits not required for motorcycles. See K.S.A. 40-3107; K.S.A. 40-3103.

Exclusion. Liability Coverage. Insurer may exclude liability coverage for: insured vehicles rented to another or carrying passengers for charge, but not private passenger car on a share the expense basis; insured vehicles being repaired, serviced or used by one employed or engaged in automobile business unless performed by named insured, spouse or resident relatives, agents, employers, employees or partners of the named insured, spouse or resident relative; and any damage for which U.S. government may be liable for insured's use of vehicle; any damages to property owned by, rented to, in charge of or transported by insured unless coverage is for rented residence or private garage; any obligation of insured or insured's insurer for workers' compensation, disability or similar law; liabilities assumed by insured by contract or agreement; if two or more vehicle liability policies apply to same accident, total limits of liability under all such policies shall not exceed that of policy with highest limit of liability; any damages arising from an intentional act; any damages to any person who would be covered such damages under a nuclear energy liability policy; any obligation of insured to indemnify another for damages resulting from bodily injury to insured's employee by accident arising from such employee's employment; for bodily injury to any fellow employee arising from such employee's employment; for bodily injury to property damage for the handling of property. K.S.A. 40-3107(h) and (i).

Insurer may exclude PIP benefits for: injury sustained by named insured and relatives residing in same household while occupying another motor vehicle owned by named insured and not insured under its policy or while operating insured motor vehicle without consent of insured; any person who intentionally caused injury to himself; converter of motor vehicle at time injury was sustained; any person injured while repairing,

servicing or otherwise maintaining motor vehicles, unless off of business premises; any person injured in course of loading and unloading motor vehicle, unless conduct occurred while occupying, entering into or alighting from such vehicle. K.S.A. 40-3108.

A step down provision is permissible in motor vehicle liability policy limiting coverage under specific circumstances to minimum liability coverage required by Kansas Automobile Injury Reparations Act. *Brooks v. Bennett*, 29 Kan. App. 2d 308, 26 P.3d 73 (2001).

Deductions. Benefits under any workman's compensation law shall be credited against PIP benefits. Actions arising after enactment of statute require proportionate sharing of reasonable attorneys' fees between PIP insurer and insured notwithstanding absence of independent contract for hire between insurer and insured's attorney. *Johnston & Johnston, P.A. v. Gulf Ins. Co.*, 8 Kan. App. 2d 401, 659 P.2d 249 (1983).

Attorney Fees. Attorney is entitled to reasonable fee for advising and representing claimant in action for PIP benefits which are overdue and such fee shall be charged against insurer for unreasonable delay or refusal to pay claim. Insurer may be allowed reasonable sum of attorneys' fees and costs of suit for defense of fraudulent, excessive or frivolous claim. K.S.A. 40-3111(b); *Scott v. State Farm Mut. Auto Ins.*, 18 Kan. App. 2d 93, 850 P.2d 262 (1992).

In liability suit, wherein insured recovers damages duplicative of PIP payments by settlement, judgment or otherwise, court shall fix attorneys' fees which shall be paid proportionately by insurer and insured. K.S.A. 40-3113a. Attorneys' fees may also be assessed against insurer notwithstanding fact that insurer is not formal party. *Potts v. Goss*, 233 Kan. 116, 660 P.2d 555 (1983). When single insurance company insures both parties, attorneys' fees generally not recoverable. *Servos v. Corbett*, 26 Kan. App. 2d 385, 987 P.2d 1132 (1999).

Exempt Vehicles. Following are exempt: Vehicles owned by U.S. or any state; implements of husbandry, special mobile equipment; vehicle operated only for purpose of crossing highway; non-highway vehicles. K.S.A. 40-3105.

Tort Claims. Plaintiff may recover non-economic tort damages in tort against owner, occupant, operator of motor vehicle or other person legally responsible for accidents after July 1, 1987, only if: injury required medical treatment having reasonable value of \$2000 or more, or injury consists of permanent disfigurement, fracture of weight bearing bone, compound, comminuted, displaced or compressed fracture, loss of body member, permanent injury or loss of bodily function or death. K.S.A. 40-3117.

Enforcement. No vehicle may be registered unless it is insured (or self-insured) as provided in Act. Registration is to be revoked upon cancellation of insurance. Any person driving motor vehicle on highways without such insurance or owner allowing his vehicle to be driven without insurance will be guilty of Class B misdemeanor with maximum penalty of \$1,000 fine and/or six months confinement for first offense; second offense is Class A misdemeanor if committed within three years of prior conviction for same charge. In addition, Director may suspend certain other rights of offender. K.S.A. 40-3118; K.S.A. 21-4502 and K.S.A. 21-4503.

Nonresidents while in Kansas are subject to Act. K.S.A. 40-3106(a); *Mayer v. Harris*, 224 Kan. 231, 579 P.2d 715 (1978); *Safeco v. Allen*, 262 Kan. 811, 941 P.2d 1365 (1997).

Reimbursement Rights. Insurer may maintain action against tort-feasor for damages which are duplicative of PIP benefits in event injured person, his or her dependents or personal representative fails to commence action against such tort-feasor within eighteen months after date of accident resulting in injury. K.S.A. 40-3113a(c). Insurer who has paid PIP benefits is subrogated to and granted lien against funds recovered by insured to extent they are duplicative. K.S.A. 40-3113a(b).

Such recovery is duplicative to extent that it would result in double recovery by insured. PIP benefits are presumed to be included in any recovery absent proof by insured to contrary. *Easom v. Farmers Ins. Co.*, 221 Kan. 415, 560 P.2d 117 (1977); *State Farm v. Kroeker*, 234 Kan. 636, 676 P.2d 66 (1984); *Bardwell v. Kester*, 15 Kan. App. 2d 679, 815 P.2d 120 (discussing statutory changes). If insured settles his "total claim" with tort-feasor, recovery is duplicative since it includes PIP benefits. *Russell v. Mackey*, 225 Kan. 588, 592 P.2d 902 (1979). However, where insured enters into partial settlement with tort-feasor and insured's damages exceed settlement amount plus PIP benefits previously paid, recovery is not duplicative. *Kroeker, supra*. Insurer does not have subrogation right against tort-feasor whose liability did not arise out of operation or use of motor vehicle. *Yunghans v. Carson*, 9 Kan. App. 2d 45, 670 P.2d 928 (1983). Where parties contract for PIP medical benefits in excess of statutory minimum and claim is subsequently paid, insurer is subrogated to amount paid and not limited to statutory figure. *Hall v. State Farm Mut. Auto Ins. Co.*, 8 Kan. App. 2d 475, 661 P.2d 402 (1983).

Action by insurer to recover subrogated PIP benefits is limited to two year statute of limitations. *Farmers Ins. Co. v. Farm Bureau Mut. Ins. Co.*, 227 Kan. 533, 608 P.2d 923 (1980). Provisions of K.S.A. 40-275, which toll statute of limitations during partial payments

to insured, will not toll statute unless paid as accommodation to insured. Reimbursement of PIP payments to another insurer does not toll statute. *Lytle v. Pepsi Cola Gen. Bottlers, Inc.*, 8 Kan. App. 2d 332, 656 P.2d 786 (1983).

Insurer is not barred from recovery of PIP lien against settlement between insured and third party tort-feasor by failure to notify third party of lien before settlement. *Hawkeye Security Ins. Co. v. Nelson*, 6 Kan. App. 2d 17, 626 P.2d 795 (1981).

K.S.A. 40-3113a(e), which authorizes apportionment of attorney fees between insured and insurance carrier that has paid PIP benefits, should apply retrospectively. *Nitchals v. Williams*, 225 Kan. 285, 590 P.2d 582 (1979). Prior to enactment of K.S.A. 1992 Supp. 40-3113a(e), Kansas Supreme Court interpreted statute to allow full reimbursement of all PIP benefits paid without reduction of attorneys' fees or expenses. *Easom v. Farmers Ins. Co.*, 221 Kan. 415, 560 P.2d 117 (1977); *Davis v. Western Ins. Co.*, 221 Kan. 441, 560 P.2d 133 (1977).

Act does not give right to direct action against insurer. *White v. Goodville Mut. Cas. Co.*, 226 Kan. 191, 596 P.2d 1229 (1979); *King v. American Family Ins. Co.*, 19 Kan. App. 2d 620, 874 P.2d 691 (1994).

Mother, who suffers psychiatric problems upon learning her daughter was struck by negligent operation of motor vehicle, not entitled to PIP benefits. *Pestock v. State Farm Auto. Ins. Co.*, 9 Kan. App. 2d 188, 674 P.2d 1062 (1984).

Overdue Benefits. PIP benefits are overdue if not paid within 30 days of insurer's receipt of written notice of covered loss, unless insurer has reasonable proof to establish it is not responsible for payment. Disability benefits payable not less than every two weeks after such notice. No claim for PIP benefits after two years from date of injury. Overdue payments bear simple interest at rate of 18%. K.S.A. 40-3110(b). Eighteen percent interest penalty attaches if not paid within 30 days of "reasonable proof" of claim. "Reasonable proof" is furnished by "a bill for medical treatment which, when viewed with other objective facts furnished by the insurer, shows a clear relation to a covered loss." *DiBassie v. American Standard Ins. Co. of Wisconsin*, 8 Kan. App. 2d 515, 519, 661 P.2d 812 (1983). Delay in payment "without just cause or excuse" may result in discretionary award of reasonable attorneys' fee. *Id.* at 523. Assessment of attorneys' fees and 18% interest penalty are not chargeable where insurer's refusal to pay arises out of good faith controversy. *Armacost v. State Farm Mut. Auto Ins. Co.*, 231 Kan. 276, 644 P.2d 403 (1982).

PENALTY AND ATTORNEYS' FEES

Penalty. Whenever any insurance company becomes liable to pay any loss to any person in this state, and neglects or refuses for three months after final judgment to pay, company may be enjoined from doing business in state until judgment is paid if there is no appeal pending and supersedes bond filed. K.S.A. 40-219.

Unless otherwise provided, every violation of any provision of this code shall subject person to penalty, not exceeding \$500.00 for each violation or imprisonment not to exceed six months in county jail or both. K.S.A. 40-254.

Attorneys' Fees. In all actions in which judgment is rendered against insurance company, if it appears from evidence that company refused "without just cause or excuse" to pay full amount, judgment shall allow reasonable attorneys' fees, including appeal; provided, however, that when tender is made by such insurance company before suit and amount recovered is not in excess of such tender, no such costs shall be allowed. K.S.A. 40-256.

Whether attorneys' fees are allowed under K.S.A. 40-256 depends on facts and circumstances of each case. *Koch v. Prudential Ins. Co.*, 205 Kan. 561, 470 P.2d 756 (1970); *Crawford v. Prudential Ins. Co.*, 245 Kan. 724, 783 P.2d 900 (1989).

Where only issue between parties is factual dispute with respect to coverage under policy, and insurer refused to pay full amount of insured's loss for that reason, "without just cause or excuse" means frivolous or unfounded denial of liability. *Brown v. Combined Ins. Co. of Am.*, 226 Kan. 223, 597 P.2d 1080 (1979).

Insured must prove by preponderance of evidence that company refused to pay "without just cause or excuse." *Anderson v. Nationwide Life Ins. Co.*, 6 Kan. App. 2d 163, 627 P.2d 344 (1981), *rev. denied*, 229 Kan. 669 (1981). Just cause or excuse is determined at time claim is denied, judging circumstances as they would appear to reasonably prudent person having duty to investigate in good faith and determine facts of controversy. *Friedman v. Alliance Ins. Co.*, 240 Kan. 229, 729 P.2d 1160 (1986). "Where there is genuine issue, raised in good faith, the insurer should be able to litigate it without being subject to paying counsel fees under this statute." *Id.* at 239.

Statute has no provision for awarding attorneys' fees to unsuccessful plaintiff. *Girrens v. Farm Bur. Mut. Ins. Co.*, 238 Kan. 670, 715 P.2d 389 (1986). Obtaining judgment against insurer is condition precedent to award of attorneys' fees. *Bell v. Tilton*, 234 Kan. 461, 674 P.2d 468 (1983).

Defendant insured allowed attorneys' fees in declaratory action, filed by primary insurer, for cancellation and construction of policy in medical action. *Missouri Med. Ins. Co. v. Wong*, 234 Kan. 811, 676 P.2d 113 (1984). Kansas Health Care Stabilization Fund, which defended claims after primary insurer refused to defend, allowed attorneys' fees. *Id.* Excess carrier cannot recover cost of defense if it was contractually obligated to defend insured. *Id. Insurance Co. of North Am. v. Medical Protective Co.*, 570 F. Supp. 964 (D. Kan. 1983).

Attorneys' fees allowed to judgment creditor in garnishment proceeding based on insurance. *Farmco, Inc. v. Explosive Specialists, Inc.*, 9 Kan. App. 2d 507, 684 P.2d 436 (1984).

K.S.A. 40-256 inapplicable to workers' compensation cases. *Barnett & Lerner, Chtd. v. Aetna Cas. & Sur. Ins. Co.*, 8 Kan. App. 2d 270, 656 P.2d 165 (1982).

K.S.A. 40-908 states in all actions wherein judgment is rendered against insurance company on policy insuring property against loss by fire, tornado, lightning or hail, court shall allow plaintiff reasonable sum for attorneys' fees unless tender is made before commencement of action in amount equal to or greater than judgment. Fixing of fair and reasonable attorneys' fees is duty of judge; award of appellate fees mandatory. K.S.A. 40-908 was not impliedly repealed by enactment of K.S.A. 40-256. *State Farm Fire & Cas. Co. v. Liggett*, 236 Kan. 120, 689 P.2d 1187 (1984). Under K.S.A. 40-908, type of policy controls, not type of loss. *Hamilton v. State Farm Fire & Cas. Ins. Co.*, 263 Kan. 875, 953 P.2d 1027 (1998).

Insured cannot state tort claim by alleging insurer was motivated by bad faith in breaching contract of insurance. *Resolution Trust Corp. v. Fidelity & Dep. Co.*, 885 F. Supp. 228 (D. Kan. 1995); *Spencer v. Aetna Life & Cas. Ins. Co.*, 227 Kan. 914, 611 P.2d 149 (1980). Kansas Unfair Trade Practices Act, K.S.A. 40-2401 *et seq.*, does not imply private cause of action for bad faith. *Earth Scientists v. USF&G*, 619 F. Supp. 1465 (D. Kan. 1985). Plaintiff may, however, proceed against insurer based on tort of outrage. *Kansas Farm Bur. Ins. Co. v. Miller*, 236 Kan. 811, 696 P.2d 961 (1985).

K.S.A. 40-3111(b) states attorney is entitled to reasonable fee for representing claimant in action for overdue PIP benefits. Attorneys' fees shall be charged against insurer. *DiBassie v. American Standard Ins.*, 8 Kan. App. 2d 515, 661 P.2d 812 (1983). Plaintiff not entitled to attorneys' fees where there is good faith controversy. *Armacost v. State Farm Mut. Auto. Ins. Co.*, 231 Kan. 276, 644 P.2d 403 (1982). Within discretion of court, insurer or self-insurer may recover attorneys' fees



for defense of “fraudulent, excessive or frivolous claim” and such award may be used to offset any benefits due or to become due to such person. K.S.A. 40-3111(b).

K.S.A. 40-3113a allows attorneys’ fees from recovery of PIP benefits. Pursuant to K.S.A. 40-3113a(e), attorneys’ fees must be paid proportionately by insurer and injured in amounts determined by court. Award of attorneys’ fees is not contingent upon contract between insurer and attorney. *Johnston & Johnston, P.A. v. Gulf Ins. Co.*, 8 Kan. App. 2d 401, 659 P.2d 249 (1983). Court has jurisdiction to assess attorneys’ fees against PIP insurer even though insurer is not party to action between insured and tort-feasor. *Potts v. Goss*, 233 Kan. 116, 660 P.2d 555 (1983).

In third-party action for recovery of workers’ compensation benefits, K.S.A. 44-504(c) gives trial court discretion to fix attorneys’ fees to be paid proportionately by employer and employee when either brings action against third party. *Anderson v. National Carriers, Inc.*, 240 Kan. 101, 727 P.2d 899 (1986).

K.S.A. 60-2006 provides for attorneys’ fees for prevailing party in automobile negligence actions for less than \$7,500, unless prevailing party recovers no damages or adverse party, prior to commencement of action, tendered amount equal to or in excess of amount recovered. In order for plaintiff to be awarded attorneys’ fees, written demand for settlement, including all claimed property damage and monetary amount demanded, shall be made on adverse party not less than thirty days before commencement of action. For defendant to be awarded attorneys’ fees, written offer of settlement shall have been made to plaintiff not more than thirty days after defendant filed answer.

K.S.A. 60-2007(b) provides for attorneys’ fees for claims or defenses asserted without reasonable basis and not in good faith. Two requirements must be met before fees can be assessed pursuant to K.S.A. 60-2007(b): 1) claim asserted without reasonable basis in fact; 2) claim not asserted in good faith. *Rood v. Kansas City Power & Light Co.*, 243 Kan. 14, 755 P.2d 502 (1988). Attorneys may be subject to discipline and attorneys’ fees, pursuant to K.S.A. 60-211, for filing of pleading without grounds of support or for purposes of delay. *Id. See also Giblin v. Giblin*, 253 Kan. 240, 854 P.2d 816 (1993).

Court lacks authority to assess attorneys’ fees under equitable powers absent statutory authority. *Walker v. State*, 26 Kan. App. 2d 410, 988 P.2d 283 (1999).

PRIVILEGED COMMUNICATIONS

Lawyer/Client. Subject to certain exceptions, communications between lawyer and client in the course of that relationship and in professional confidence are

privileged. K.S.A. 60-426. Client has privilege to refuse to disclose any such communication, prevent lawyer from disclosing it and under certain circumstances to prevent any other witness from disclosing such communication. *Id.*

Physician/Patient. Kansas recognizes privilege for confidential communication between patient and physician when communication was reasonably believed to be necessary or helpful to enable physician to make diagnosis of condition of patient or to prescribe or render treatment. K.S.A. 60-427(b). No privilege exists in situations such as action to commit patient; when condition of patient is element or factor of claim or defense of patient; when blood is drawn at request of law enforcement officer, pursuant to K.S.A. 8-1001; when services of physician were sought to obtain or enable or aid anyone to commit or plan to commit crime or tort or escape detention or apprehension after commission of crime or tort; and when patient provides false information to physician for purpose of obtaining prescription-only drug. K.S.A. 60-427(c)(d)(e)(f)(h).

Marital. Subject to certain exceptions, spouse who communicates confidential information may claim privilege during marital relationship to refuse to disclose and to prevent other from disclosing communications which are found to have been made in confidence between them while husband and wife. K.S.A. 60-428.

Penitential. Confidential communications between penitent and regular or duly ordained minister of religion, which penitent intends shall be kept secret and confidential and which pertains to advice or assistance in determining or discharging penitent’s moral obligations, or to obtaining God’s mercy or forgiveness for past culpable conduct, are privileged. K.S.A. 60-429.

PRODUCTS LIABILITY

Purpose of Kansas Product Liability Act, K.S.A. 60-3301, *et seq.*, is to consolidate all product liability actions, regardless of theory, into one legal theory entitled “product liability claim.” *Miller v. Lee Apparel Co.*, 19 Kan. App. 2d 1015, 881 P.2d 576 (1994). Prima facie products liability case requires proof of three elements: 1) injury resulted from condition of product; 2) condition was unreasonably dangerous; and 3) condition existed at time it left defendant’s control. *Mays v. Ciba-Geigy Corp.*, 233 Kan. 38, 661 P.2d 348 (1983) (strict liability); *Lane v. Redman Mobile Homes, Inc.*, 5 Kan. App. 2d 729, 624 P.2d 984 (1981) (negligence, strict liability and implied warranty). Liability may not be predicted merely on risk of future harm. *City of Wichita v. U.S. Gypsum Co.*, 72 F.3d 1491 (10th Cir. 1996) (In asbestos case, mere presence of asbestos is not remediable without present risk of harm to building occupants.)



Statute of Limitations. K.S.A. 60-513 provides tort action shall be brought within two years of accrual. Cause of action does not accrue “until the act giving rise to the cause of action first causes substantial injury, or, if the fact of the injury is not reasonably ascertainable . . . the period of limitation shall not commence until the fact of the injury becomes reasonably ascertainable . . .,” K.S.A. 60-513(b). *Uhock v. Sleitweiler*, 13 Kan. App. 2d 621, 778 P.2d 359 (1988) (When injury becomes reasonably ascertainable is question for trier of fact); *Hecht v. First Nat'l Bank & Trust Co.*, 208 Kan. 84, 490 P.2d 649 (1971) (In case involving radiation therapy “substantial injury” does not occur until sufficient time passes to show damage is more than anticipated side-effect); *Roe v. Diefendorf*, 236 Kan. 218, 689 P.2d 855 (1984) (Accident which results in immediate minor damage, but then after two years damage is more severe, “substantial injury” is “actionable damage” regardless of its severity); *Dobson v. Larkin*, 251 Kan. 50, 832 P.2d 345 (1992) (holding that K.S.A. 60-513(b) is statute of repose with 10 years from occurrence of act giving rise to cause of action as absolute limit for filing actions). With respect to action under Uniform Commercial Code, K.S.A. 84-2-725(1) provides: “action for breach of any contract for sale must be commenced within four years after cause of action has accrued.” *Koch v. Shell Oil Co.*, 815 F. Supp. 1434, (D. Kan. 1993) (K.S.A. 60-513 applies to breach of warranty action where claim sounds in tort).

Useful Safe Life and Statute of Repose. Useful Safe Life and Statute of Repose provisions of Kansas Product Liability Act apply to all product liability claims against any product seller for death, personal injury or property damage regardless of theory of liability. K.S.A. 60-3302(c). Useful Safe Life Provision states product seller is not liable for harm that occurs after product’s “useful safe life” has expired unless seller expressly warrants longer period. Product seller has burden of proving useful safe life expired prior to injury. Definition of useful safe life is objective: “[it] begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner.” K.S.A. 60-3303(a)(1). Statute lists types of evidence which are “especially probative” on useful safe life issue. K.S.A. 60-3303. Burden of proof. *Kerns v. GAC, Inc.*, 255 Kan. 264, 875 P.2d 949 (1994).

Statute of Repose creates presumption product’s useful safe life expired if claim involves harms caused more than ten years after time of delivery. K.S.A. 60-3303(b)(1). Claimant must rebut presumption by clear and convincing evidence. K.S.A. 60-3303. *Hendricks v. Ercole*, 763 F. Supp. 505 (D. Kan. 1991) (presumption rebutted where product only subjected to light use and was of type expected to last for decades). Statute identi-

fies four situations in which presumption does not apply. K.S.A. 60-3303. Statute of repose contained in this statute is inapplicable if injury is caused by prolonged exposure to product or if defect was not reasonably discoverable within 10 years after delivery. K.S.A. 60-3303(b)(2)(D); *Kerns v. GAC, Inc.*, *supra*. (Statute of Repose barred claim for breach of duty to warn because alleged hazard was “open and obvious.”)

K.S.A. 60-3303(d)(1) provides exception to general statute of repose, K.S.A. 60-513, as to latent disease caused by exposure to harmful material. Ten-year statute of repose begins when plaintiff reasonably should have discovered his disease and its cause. K.S.A. 60-3303(d)(1). *Koch v. Shell Oil Co.*, *supra*.

Defect. Proof of product “defect” is required under theories of negligence, breach of implied warranty and strict liability. *Garst v. G.M. Corp.*, 207 Kan. 2, 484 P.2d 47 (1971). Product is defective if it is in condition not contemplated by ultimate user which will be unreasonably dangerous to user or consumer. *Betts v. G.M. Corp.*, 236 Kan. 108, 689 P.2d 795 (1984); *Barnes v. Vega Ind., Inc.*, 234 Kan. 1012, 676 P.2d 761 (1984); *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 641 P.2d 353 (1982). Product is “unreasonably dangerous” if it is dangerous beyond extent contemplated by ordinary consumer who purchases it, with ordinary knowledge of its characteristics common in community. *Lester*, *supra*. Consumer expectations test rather than risk/utility test, applies to claims based upon design defect, manufacturing defect and warning. *Delaney v. Deere & Co.*, 268 Kan. 769, 999 P.2d 930 (2000).

Design Defects. It is insufficient in “design” case merely to show “different,” “safer,” or “better” design would have prevented accident. *Garst v. G. M. Corp.*, *supra*. Plaintiff in design defect case must show there was defect in design and not merely better design might have been conceived. *Id.* If plaintiff’s case is based on alternative design, plaintiff has burden of proving alternative design was feasible and practical. *Id.* Product is not defective if it complies with legislative and administrative standards, unless plaintiff can prove reasonably prudent product seller could and would have taken additional precautions. K.S.A. 60-3304. *Pfeiffer v. Eagle Mfg. Co.*, 771 F. Supp. 1141 (D. Kan. 1991); *Alvarado v. J.C. Penney Co.*, 735 F. Supp. 371 (D. Kan. 1990). Use of same design by other product sellers is admissible as tending to negate existence of negligence. *Garst*, *supra*. “Unavoidably unsafe” product is not defective in design if it is apparently useful and desirable with known but apparently reasonable risk. *Johnson v. American Cyanamid Co.*, 239 Kan. 279, 718 P.2d 1318 (1986). Adequate warning does not foreclose finding that product is defectively designed. *Delaney v. Deere & Co.*, *supra*.



Warning Defects. K.S.A. 60-3305 provides duty of manufacturer or seller to warn or instruct does not extend to: safeguards, precautions and action reasonable user with ordinary training, education and experience and any special knowledge he/she did, should or was required to possess could and should have taken; situations where safeguards, precautions and actions would or should have been taken by reasonable user using reasonable care; and dangers, hazards, or risks that are patent, open, or obvious and should have been realized by reasonable user. *Neff v. Coleco Indus.*, 760 F. Supp. 864 (D. Kan. 1991) (consequences of diving into pool four feet deep was readily apparent). Where warning is given, seller may reasonably assume it will be read and heeded. *Wooderson v. Ortho Pharm.*, 235 Kan. 387, 681 P.2d 1038 (1984), *cert. denied*, 469 U.S. 965 (1984). *See also Mays v. Ciba-Geigy Corp.*, *supra*. (No duty to warn sophisticated users or consumers of dangerous characteristics in products that are regularly used by them). *Hendricks v. Ercole*, *supra*. (factual dispute as to knowledge of user). *But cf. Long v. Deere & Co.*, 238 Kan. 766, 715 P.2d 1023 (1986) (Manufacturer held liable for failure to provide adequate warnings to worker injured in roll over of crawler loader, notwithstanding warnings in operator's manual provided). Manufacturer has post-sale duty to warn ultimate consumers who can be readily identified or traced when defect is life threatening. *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 861 P.2d 1229 (1993). Successor companies may be held liable for post-sale failures to warn of defects precipitated by predecessors in interest. *Patton v. TIC United Corp.*, 77 F.3d 1235 (10th Cir. 1996).

When plaintiff's case involves question of adequacy of warning, rather than failure to warn, test is one of reasonableness—plaintiff must show negligence on part of manufacturer. *Johnson v. American Cyanamid Co.*, *supra*; *Wooderson v. Ortho Pharmaceutical Corp.*, *supra*. In *Wooderson*, where plaintiff's kidneys were injured by ingestion of oral contraceptive, Supreme Court held defendant had duty to give timely and adequate warning commensurate with danger.

Strict Liability. Kansas has adopted Doctrine of Strict Liability in Tort as set forth in Restatement (Second) of Torts, §402A (1965). *Brooks v. Dietz*, 218 Kan. 698, 545 P.2d 1104 (1976). Early cases decline to decide whether comparative negligence would be applied in "pure form" rather than according to 49 percent rule and Individual Judgment Provision of Kansas Comparative Negligence Statute. *Stueve v. American Honda Motors Co., Inc.*, 457 F. Supp. 740 (D. Kan. 1978); *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980). However, in *Forsythe v. Coats Co.*, 230 Kan. 553, 639 P.2d 43 (1982) court held 49 percent rule is applicable in strict liability cases. According to principles of compara-

tive fault, all persons who are named as parties and who are properly served with summonses are bound by percentage determination of causal negligence, and any party who fails to assert claim against another party in comparative negligence action is forever barred. *Mick v. Mani*, 244 Kan. 81, 766 P.2d 147 (1988); *Kearny v. Kansas Pub. Serv. Co.*, 233 Kan. 492, 665 P.2d 757 (1983); *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 634 P.2d 1127 (1981); *Eurich v. Alkire*, 224 Kan. 236, 579 P.2d 1207 (1978). Exception to rule barring subsequent suit against comparatively at fault party not joined in original suit is recognized where plaintiff is prevented from joining necessary party in federal court because of loss of diversity. *Anderson v. Scheffler*, 242 Kan. 857, 752 P.2d 667 (1988). Plaintiff's contributory negligence and product misuse are considered in apportioning causal fault. *Lenherr v. NRM Corp.*, 504 F. Supp. 165 (D. Kan. 1980).

Proximate Cause. Proximate cause must be one that in natural and continuing sequence, unbroken by efficient intervening cause, produces injury and without which injury would not have occurred. *Neff v. Coleco Indus.*, 760 F. Supp. 864 (D. Kan. 1991). *Wilcheck v. Doonan Truck & Equip. Inc.*, 220 Kan. 230, 552 P.2d 938 (1976). Mere fact person suffered injury while using product is insufficient in itself to satisfy requirement of proof that defect in product was proximate cause of injury. *Id.* Liability of manufacturer and distributors extends to individuals to whom injury from defective product may reasonably be foreseen, and only when product is being used for purpose reasonably foreseeable. *Kennedy v. City of Sawyer*, 228 Kan. 439, 618 P.2d 788 (1980).

Cause in Fact. Liability in products liability action cannot be predicated on mere speculation, guess or conjecture; circumstances shown must justify inference of probability as distinguished from mere possibility. *Mays v. Ciba-Geigy Corp.*, *supra*. If plaintiff intends to rely on circumstantial evidence to make out prima facie case, it must tend to negate other reasonable causes, or there must be expert opinion that product was defective. *Id.*

Express Warranties. No particular language is necessary to constitute express warranty. *Corral v. Rollins Protective Serv. Co.*, 240 Kan. 678, 732 P.2d 1260 (1987). Any direct and positive affirmation of matter of fact, as distinguished from mere matter of opinion or judgment, made by one party during contract negotiations and as part of contract, designed or intended by first party to induce other party to enter into contract, actually relied upon by other party in doing so, is "warranty." *Id.* Advertising or packaging may form basis of or part of express warranty. *Cantrell v. Amarillo Hardware Co.*, 226 Kan. 681, 602 P.2d 1326 (1979); *Scheuler*

v. Aamco Transmissions, Inc., 1 Kan. App. 2d 525, 571 P.2d 48 (1977). Kansas Uniform Commercial Code, K.S.A. 84-2-313 governs express warranties as to transactions in goods within scope of Article 2 of Uniform Commercial Code.

Implied Warranties. Kansas Uniform Commercial Code, K.S.A. 84-2-314 & 315, cover implied warranties of merchantability and fitness arising out of transactions in goods within scope of Article 2 of Uniform Commercial Code. In addition to statutorily created implied warranties, implied warranties may arise under common law. *Corral v. Rollins Protective Serv. Co.*, *supra*. Comparative fault principles apply to implied warranty causes of actions. *Kennedy v. City of Sawyer*, *supra*. Implied warranties of fitness and merchantability do not extend to remote seller or manufacturer where product is not inherently dangerous, plaintiff seeks only economic loss and not damages for personal injury, and there is no contractual privity between plaintiff and remote seller or manufacturer. *Professional Lens Plan, Inc. v. Polaris Leasing Corp.*, 234 Kan. 742, 675 P.2d 887 (1984). Commercial buyer of defective goods must sue for breach of warranty not strict liability or negligence, where only damage is to goods themselves. *Koss Constr. v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255 (1998).

Kansas Consumer Protection Act. K.S.A. 50-639(a)(1) prohibits disclaimer of implied warranties of merchantability and fitness for particular purpose where products are subject to "consumer transaction." Consumers who prevail in breach of warranty action may recover not only actual damages, but also reasonable attorneys' fees and civil penalties. *Id.* See K.S.A. 50-634, 636; *see also Corral v. Rollins Protective Serv. Co.*, *supra*.

Magnusson-Moss Warranty Act. In *Corral v. Rollins Protective Services Co.*, *supra*, court held Act was not applicable to "installation-service agreement" under which defendant was to install and service burglary/fire alarm system at plaintiff's residence and plaintiff agreed to pay sum for installation and monthly charge for service.

RELEASE

See Law Digest Tables.

Every contract requires consideration to be legally enforceable. *Dugan v. First Nat'l Bank*, 227 Kan. 201, 211, 606 P.2d 1009 (1980).

Accord and Satisfaction. In Kansas accord and satisfaction is adjustment of disagreement over what is due and requires meeting of minds and sufficient considera-

tion. *Barnes v. Mid-Continent*, 192 Kan. 401, 388 P.2d 642 (1964).

Effect of release of tort-feasor on liability of another is to be determined by terms of releasing instrument. *Atkinson v. Wichita Clinic, P.A.*, 243 Kan. 705, 763 P.2d 1085 (1988); *Lupton v. Torbey*, 548 F.2d 316, (10th Cir. 1977). When document is silent on matter, other parties presumed not released. *McCullough v. Bethany Med. Ctr.*, 235 Kan. 732, 683 P.2d 1258 (1984). Rules for construing release stated and applied. *Luther v. Danner*, 268 Kan. 343, 995 P.2d 865 (2000).

Under K.S.A. 60-2801(a), negotiation of settlement or execution of Release is not allowed within 15 days of date of occurrence causing injury if injured is under medical care or confined to health care facility. Violation of statute does not give rise to separate cause of action. *Traylor v. Wachter*, 3 Kan. App. 2d 536, 598 P.2d 1061 (1979), *aff'd in part, rev'd in part*, 227 Kan. 221, 607 P.2d 1094 (1980).

Release may be set aside for mutual mistake of past or present fact material to agreement, but must not be mistake in prophecy, or belief relative to uncertain event; mere mistake on part of only one party to release will not set aside release in absence of fraud, undue influence or mental incapacity. *McMillin v. Farmers & Bankers Life*, 167 Kan. 502, 206 P.2d 1061 (1949); *Fieser v. Stinnett*, 212 Kan. 26, 509 P.2d 1156 (1973); *Gonzalez v. Allstate*, 217 Kan. 262, 535 P.2d 919 (1975); *Luttjohann v. Goodyear Tire & Rubber Co.*, 938 F. Supp. 694 (1996) (Validity of release determined by totality of circumstances.)

Where injury is caused by independent and concurring or successive torts, release of one independent tort-feasor does not release other. *Milwaukee Ins. Co. v. Gas Service Co.*, 185 Kan. 604, 347 P.2d 394 (1959); *Luther v. Danner*, *supra*.

Where party injured in automobile accident executed covenant not to sue and agreement to hold harmless employee whose negligence caused accident, basis for imputing employee's negligence to his employer in later action was removed. *Atkinson v. Wichita Clinic, P.A.*, *supra*. Kansas Supreme Court disapproves of strict interpretation of general releases. *Luther v. Danner*, *supra*.

Settlement by insurer of claim by third person against insured does not necessarily bar action by insured against third party. *Lohman v. Woodruff*, 224 Kan. 51, 578 P.2d 251 (1978); *Jones v. Smith*, 1 Kan. App. 2d 331, 564 P.2d 574 (1977). Under Kansas Comparative negligence statute, release of one defendant cannot inure to benefit of potential co-defendants. *Stueve v. American*



Honda Motors Co., Inc., 457 F. Supp. 740 (D. Kan. 1978).

Insured who settles claim for injuries against underinsured motorist and releases motorist from further liability without notice to insurer also forfeits right of recovery of underinsured motorist benefits. *Dalke v. Allstate Ins. Co.*, 23 Kan. App. 2d 742, 935 P.2d 1067 (1997).

REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Provision in blanket sickness and accident insurance policy shall contain provision no less favorable than that contained in K.S.A. 40-2210(B)(1) which requires "any statement made by the policyholder or by a person insured shall in absence of fraud, be deemed a representation and not a warranty, and that no such statements shall be used in defense to a claim under the policy, unless contained in a written application."

Disclaimer. One purpose of Kansas Consumer Protection Act, K.S.A. 50-623 *et seq.*, is to protect consumers from unbargained for warranty disclaimers. K.S.A. 50-623(c). It is a violation to "exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of implied warranty of merchantability and fitness for a particular purpose." K.S.A. 50-639(a)(2). Supplier may limit implied warranty only if consumer had knowledge of defect and was basis for bargain. K.S.A. 50-639(c). Making limited express warranty not itself violation. K.S.A. 50-639(f).

Kansas "lemon law," K.S.A. 50-645 *et seq.*, requires dealers to repair vehicle in accordance with applicable warranty.

Lease-purchase agreement must contain language which transfers to consumer rights under manufacturer's warranty. K.S.A. 50-684(a)(10).

Action for breach of express or implied warranty is merged with strict liability, negligence, and tort into "product liability claim" under Kansas Product Liability Act. K.S.A. 60-3302(c).

Sale of Goods. Seller warrants title conveyed shall be good, transfer rightful, and goods delivered free from encumbrance unknown to buyer. K.S.A. 84-2-312. Express warranties. K.S.A. 84-2-313. Implied warranty of merchantability. K.S.A. 84-2-314. Implied warranty of fitness for particular purpose. K.S.A. 84-2-315. Exclusion or modification of warranties. K.S.A. 84-2-316. Cumulation and conflict of express or implied warranties. K.S.A. 84-2-317. Third party beneficiaries of expressed or implied warranties. Buyer's damages for

breach of warranty for accepted goods. K.S.A. 84-2-714. Consequential damages for buyer include injury to person or property proximately caused by breach of warranty. K.S.A. 84-2-715(2)(b). Absent privity, corporate purchaser who has incurred only economic loss may not maintain action for breach of implied warranty of merchantability against manufacturer. *Koss Constr. v. Caterpillar, Inc.*, 25 Kan. App. 2d 200, 960 P.2d 255 (1998).

Lease of Goods. Express warranties. K.S.A. 84-2a-210. All warranties in favor of lessor extend to lessee. K.S.A. 84-2a-209. Warranties against interference and infringement. K.S.A. 84-2a-211. Implied warranty of merchantability. K.S.A. 84-2a-212. Implied warranty of fitness for particular purpose. K.S.A. 84-2a-213. Exclusion or modification of warranties. K.S.A. 84-2a-214. Cumulation and conflict of express or implied warranties. K.S.A. 84-2a-215. Third party beneficiaries of expressed or implied warranties. K.S.A. 84-2a-216. Statute of limitations for breach of warranty is four years. K.S.A. 84-2a-506. Lessee's damages for breach of warranty for accepted goods. K.S.A. 84-2a-519. Consequential damages for buyer include injury to person or property proximately caused by breach of warranty. K.S.A. 84-2a-520(2)(b).

Misrepresentations. Fraudulent misrepresentation in action to rescind insurance contract includes untrue statement of fact, known to be untrue by party making it, made with intent to deceive or recklessly made with disregard for truth, where another party justifiably relies on statement and acts to his injury and detriment. Representation made innocently and in good faith does not constitute fraud. *Waxse v. Reserve Life Ins. Co.*, 248 Kan. 582, 809 P.2d 533 (1991). Falsity of statement does not bar recovery under policy unless false statement actually contributes to contingency or event on which policy becomes due and payable. K.S.A. 40-2205(c).

Unlike action for fraud, insurer who asserts insurance defense of concealment or misrepresentation of material fact does not have to prove it actually relied on concealment or misrepresentation or it suffered injury to establish defense. *Pink Cadillac Bar & Grill v. USF&G Co.*, 22 Kan. App. 2d 944, 925 P.2d 452 (1996).

Generally insurer has right to rescind policy for fraud or misrepresentation where controversy involves only insurer and its insured over nonliability, noncompulsory features of insurance policy. Rescission or reformation of policy generally not allowed to exclude claim of injured innocent third party. *Slaby v. Cox*, 250 Kan. 429, 827 P.2d 18 (1992).

Materiality. Test generally applied as to whether misrepresentation is material, so as to permit insurer to



avoid obligation under policy is whether knowledge of truth would have reasonably influenced insurer in accepting risk or fixing premium. *American States Ins. Co. v. Ehrlich*, 237 Kan. 449, 701 P.2d 676 (1985).

Rescission. To rescind policy for fraud and misrepresentation, insurance company must prove (a) insured was guilty of fraud or misrepresentation in connection with issuance of policy; and (b) insurance company acted to its detriment in reliance on fraudulent representations or fraudulent failure to disclose facts by insured. *Coffman v. Lien Enterprises, Inc.*, 16 Kan. App. 2d 140, 827 P.2d 68 (1991).

Reformation. Rescission or reformation of policy generally not allowed to exclude claim of injured innocent third party. *Slaby v. Cox*, 250 Kan. 429, 827 P.2d 18 (1992).

Where insurance binder was fraudulently obtained after knowledge of accident and injury to third party, reformation of policy to exclude coverage was allowed. *Id.*

When prospective insured fully informs insurance agent of type of coverage desired, and agent prepares application and company through mistake or design issues policy which affords substantially less coverage, policy may be reformed to correspond with application. *Stamps v. Consolidated Underwriters*, 205 Kan. 187, 468 P.2d 84 (1970).

SERVICE OF PROCESS

Upon Non Resident Motorists. See "AUTOMOBILES."

Upon Corporations. Process must be served on domestic or foreign corporation's 1) officer or resident, managing or general agent; 2) by leaving copy of summons and petition at any business office with person having charge thereof; or 3) on any agent authorized by appointment or required by law to receive service and, if upon agent required by law, by also mailing copy to defendant. K.S.A. 60-304(e). Service may be made by certified mail to officer or agent. See K.S.A. 60-303(c), 304(e); *Oltremari v. Kansas Social & Rehab. Svc.*, 871 F. Supp. 1331 (D. Kan. 1994).

Service on foreign corporation may also be made on resident agent. If foreign corporation fails to appoint or maintain resident agent, or transacts business in Kansas without obtaining authority to do so, service may be made on Secretary of State. K.S.A. 60-304(f); *Brand v. Mazda Motor of Am., Inc.*, 920 F. Supp. 1169 (D. Kan. 1996).

Upon Insurance Commissioner. Process may be served on any insurance company by serving Insurance Commissioner. K.S.A. 40-2002; 60-304(g).

Personal Service. Personal service shall be made by delivering or offering to deliver copy of process and accompanying documents to person to be served. K.S.A. 60-303(c).

SUBROGATION

Insurer's right of subrogation arises by operation of law, regardless of policy provision. *New Hampshire Ins. Co. v. Kansas Power & Light Co.*, 212 Kan. 456, 510 P.2d 1194 (1973); *Hartford Fire Ins. Co. v. Western Fire Ins. Co.*, 226 Kan. 197, 597 P.2d 622 (1979). Insurer is subrogated only to extent of rights of insured. *Farmers Ins. Co. v. Farm Bur. Mut. Ins. Co.*, 227 Kan. 533, 608 P.2d 923 (1980). Kansas recognizes subrogation based both on contract and in equity. *Old Colony Ventures I, Inc. v. SMWNPF Holdings, Inc.*, 924 F. Supp. 1076 (D. Kan. 1996). Equitable subrogation is broadly construed so that it includes every instance where one party is required to pay debt that another is primarily responsible for. *Corley v. Wichita Elec. Co., Inc.*, 163 F.R.D. 12 (D. Kan. 1995).

Where insured's loss has been fully satisfied under insurance policy containing subrogation clause, right of action against third party wrongdoer vests in insurer who becomes real party in interest. *Ellis Canning v. International Harvester*, 174 Kan. 357, 255 P.2d 658 (1953); *J.C. Livestock Sales, Inc. v. Schoof*, 208 Kan. 289, 491 P.2d 560 (1971). When insured's loss has been only partially reimbursed then insured is real party in interest and suit must be in his name. Insurer who has paid part of loss is not indispensable or necessary party to action by insured against tort-feasor. *Ellsaesser v. Mid-Continent Cas. Co.*, 195 Kan. 117, 403 P.2d 185 (1965).

In subrogation action defenses viable against insureds are likewise viable against insurer. *Bowen v. Westehaus*, 224 Kan. 42, 578 P.2d 1102 (1978); *Shelman v. Western Cas. & Sur. Co.*, 1 Kan. App. 2d 44, 562 P.2d 453 (1977).

Doctrine of subrogation may be invoked in favor of persons who are legally obligated to make good loss caused by negligence of another. *Rexroad v. Kansas Power & Light*, 192 Kan. 343, 388 P.2d 832 (1964).

WAIVER AND ESTOPPEL

Waiver must be clear, unequivocal and decisive act of company showing intention to relinquish known right. *Patrons Mut. Ins. Ass'n v. Union Gas Systems*, 250 Kan. 722, 830 P.2d 35 (1992); *Musgrave v. Equitable Life Assur. Soc.*, 124 Kan. 804, 262 P. 571 (1928). Omissions and defects in application waived where signed by agent representing both insurer and insured. *Wright v. Providence Wash. Ins. Co.*, 130 Kan. 438, 286 P. 237 (1930).

Insurer assumes duty to define any limitations on coverage in clear and explicit terms. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 261 Kan. 806, 934 P.2d 65 (1997). Where insurer has notice of loss and negotiates or promises to settle same, formal notice and proof thereof is waived. *Penquite v. General*, 121 Kan. 174, 246 P. 498 (1926); *Mayse v. Great American Ins. Co.*, 123 Kan. 692, 256 P. 1002 (1927); *Kinney v. Hudson*, 127 Kan. 264, 273 P. 416 (1929); *Clymer v. Westchester*, 130 Kan. 774, 288 P. 536 (1930). Also denial of liability held waiver of proof of death, *De Bus v. Missouri State Life Ins. Co.*, 115 Kan. 773, 225 P. 91 (1924), and waiver of requirement that timely proofs of loss be furnished. *Winchel v. National*, 129 Kan. 225, 282 P. 571 (1929). Acceptance and retention of premiums does not dispense with proof of good health to procure reinstatement. *Pickens v. Security Ben. Ass'n*, 117 Kan. 475, 231 P. 1016 (1924); *Gray v. Grand Lodge*, 111 Kan. 88, 206 P. 311 (1922). Insured, by signing prepared proofs of loss setting forth adjuster's apportionment, did not waive right to impeach award. *Dolan Mercantile Co. v. Wholesale Grocers*, 131 Kan. 374, 291 P. 935 (1930). Knowledge of insurer does not estop it to assert defense of lack of insurable interest. *Colver v. Central*, 130 Kan. 556, 287 P. 266 (1930). Company by acquiescence of acts of agent estopped to deny his authority. *Chambers v. North Am.*, 118 Kan. 494, 235 P. 859 (1925). Issuance of policy by general agent with knowledge of soliciting agent's waiver, binds company. *Boberg v. Fitchburg*, *supra*. Insurer estopped from asserting defense of non-payment in view of custom of collecting from bank upon presenting receipt for matured assessment. *Saum v. Grand Lodge*, 119 Kan. 132, 237 P. 885 (1925). Waiver of proof of loss by adjuster in course of adjustment of fire loss may be by parol evidence, notwithstanding provision of policy that waiver of any of its terms must be indorsed on or attached to policy. *Devault v. Western Grain*, 138 Kan. 773, 28 P.2d 735 (1934). Custom of past acceptance of overdue premiums by company considered with relation to forfeiture. *Utt v. National*, 146 Kan. 863, 73 P.2d 1095 (1937). Waiver by agent in accepting premiums construed. *Hudson v. Travelers Ins. Co.*, 149 Kan. 528, 88 P.2d 1096 (1939). Insurer not estopped from denying liability to insured where insurer defended insured after serving notice reserving right to cancel for fraudulent statements by insured. *Iowa Hardware v. Burgen*, 178 Kan. 557, 290 P.2d 1034 (1955).

After denial of liability by company on specific grounds, it cannot thereafter defend on other grounds. *Reser v. Southern*, 150 Kan. 58, 91 P.2d 25 (1939). By-laws of mutual company control and agent cannot waive them in written application for insured. *Lallak v. Farmers*, 174 Kan. 720, 257 P.2d 933 (1953).

Insurance company failed to notify Safety Responsibility Division policy was not in effect at time of accident. Company not estopped from relying upon exclusion clause in action on policy. *Marley v. Lewis*, 189 Kan. 658, 369 P.2d 783 (1962).

Insurer waives reliance on statements contained in application where insurer's agent fills in application without propounding any questions to insured. *Schneider v. Washington Nat'l Ins. Co.*, 200 Kan. 380, 437 P.2d 798 (1968). Waiver and estoppel cannot be used to expand coverage under insurance contract, but may be used to forestall its forfeiture. *Federated Mut. Ins. Co. v. Botkin Grain Co.*, 64 F.3d 537 (10th Cir. 1995); *Topeka Tent & Awning v. Glen Falls Ins. Co.*, 13 Kan. App. 2d 553, 774 P.2d 984 (1989);

WORKERS' COMPENSATION

Compensability. If in any employment to which workers' compensation applies, personal injury by accident arising out of and in course of employment is caused to employee, employer shall be liable to pay compensation to employee in accordance with provisions of Workers' Compensation Act. K.S.A. 44-501. Burden of proof shall be on claimant to establish claimant's right to award of compensation and to prove various conditions on which claimant rights depend. K.S.A. 44-501(a). In order for claim to be compensable, employee has burden of proving: 1) that he or she was employee for covered employer. K.S.A. 44-508(a) and (b); 2) that employee sustained personal injury or death by accident, or that employee's personal injury or death was result of occupational disease. K.S.A. 44-501, 44-508(d), 44-508(e), and 44-510, and 44-5a01; 3) that employee's accidental injury and disability arose out of and in course of employment. K.S.A. 44-508(f); and 4) that timely notice of accident and claim was given to employer. K.S.A. 44-520, 44-520(a), and 44-5a17.

Personal injury means any lesion or change in physical structure of body, causing damage or harm thereto, so that it gives way under stress of worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. K.S.A. 44-508(e). Employee's personal injury need not be caused by trauma or physical force. *Demars v. Rickel Mfg. Corp.*, 223 Kan. 374, 573 P.2d 1036 (1978). In order for employee to recover for mental injury, mental injury must result from physical injury. *Gleason v. Samaritan Home*, 260 Kan. 970, 926 P.2d 1349 (1996); *Followill v. Emerson Electric Co.*, 234 Kan. 791, 674 P.2d 1050 (1984).

Under Kansas Workers' Compensation Act, accident is undesigned, sudden and unexpected event or events, usually of afflictive or unfortunate nature and



often, but not necessarily, accompanied by manifestation of force. K.S.A. 44-508(d).

An injury arises out of employment if it stems from nature, conditions, obligations, and incidents of particular employment. There must be some causal connection between injury and employment. *Scott v. Wolf Creek*, 23 Kan. App. 2d 156, 928 P.2d 109 (1996). Injuries resulting from risks personal to employee do not arise out of employment in some circumstances. *Martin v. U.S.D.* 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980); *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002). Where injury is clearly attributable to personal condition of employee and no other factors intervening to cause or contribute to injury, no compensation award is allowed; but where injury is result of concurrence of some pre-existing personal condition and some hazard of employment, compensation is generally allowed. *Baggett v. B&G Constr.*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995); *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied*, 250 Kan. 804 (1992).

An injury occurs in the course of employment if injury occurred while worker was at work in his employer's service. This phrase refers to time, place and circumstances under which accident occurred. *Lentz v. City of Marion*, 222 Kan. 169, 563 P.2d 456 (1977). Injury may be found to be compensable, in some circumstances, if caused by assault by fellow employee if claimant shows circumstances giving rise to assault arose out of conditions of his or her employment. *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394 (1985), *rev. denied*, 238 Kan. 878. See *Baggett v. B&G Constr.*, *Supra*. Personal injuries which result from employee's horseplay may be compensable if employee proves that horseplay is regular incident of employment and employer knows of horseplay. *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966). Injuries sustained while going to and from work are not generally compensable. K.S.A. 44-508(f).

Defenses to Compensability. K.S.A. 44-501(b) prohibits civil damage or wrongful death action against employer or fellow employee for injury or death compensable under Kansas Workers' Compensation Act. *Rajala v. Doresky*, 233 Kan. 440, 661 P.2d 1251 (1983). Injury resulting from employee's deliberate intention to cause injury, or from employee's willful failure to use guard or protection against accident required pursuant to any statute and provided for employee, or reasonable and proper guard and protection voluntarily furnished employee by employer, shall not be compensable. K.S.A. 44-501(d)(1). Injury is not compensable if it was

contributed to by use or consumption of alcohol or drugs. K.S.A. 44-501(d)(2).

Definition of Employee. Employee is any person who has entered into employment of or works under any contract of service or apprenticeship with employer. K.S.A. 44-508(b). Under Kansas Workers' Compensation Act, independent contractors are not considered employees. Primary test to determine if employer-employee relationship exists is right to control and supervise work of particular employee. It is right to control or exercise authority which determines status of employee, not actual exercise of control or authority. *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991); *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976); *Scammahorn v. Gibraltar Savings & Loan Ass'n*, 197 Kan. 410, 416 P.2d 771 (1966); *Wallis v. Secretary of Kansas Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984). Independent contractor, on the other hand, is one who contracts to do piece of work according to his own methods and without being subject to control of his employer, except as to results of his work. *Evans v. Board of Ed. of Hays*, 178 Kan. 275, 284 P.2d 1068 (1955). In analyzing whether particular individual is employee, other factors are indicative of being employee, including whether alleged employer has right to discharge worker, whether employee is paid by hour rather than completed project, and whether alleged employer furnishes tools and equipment. *McCarty v. Great Bend Board of Ed.*, 195 Kan. 310, 403 P.2d 956 (1965). Individual employers are not covered by Act unless proper election is made. K.S.A. 44-508(b).

In Kansas, employees of subcontractor are given remedy against principal contractor in order to prevent employers from avoiding liability for workers' compensation benefits by contracting with independent contractor to do portion of work undertaken by principal contractor. K.S.A. 44-503; *Atwell v. Maxwell Bridge Co.*, 196 Kan. 219, 409 P.2d 994 (1966). In order for liability to exist on part of principal contractor under K.S.A. 44-503, accident must have occurred on premises where principal had undertaken to perform work. In addition, work being performed under contract must be integral part of principal's trade or business, and work being done by injured employee is of such nature as it would ordinarily have been done by employees of principal. *Hanna v. CRA, Inc.*, 196 Kan. 156, 409 P.2d 786 (1966); *Fugit, Administratrix v. United Beechcraft, Inc.*, 222 Kan. 312, 564 P.2d 521 (1977); *Hataway v. Proctor & Gamble Mfg. Co.*, 195 Kan. 335, 405 P.2d 350 (1965); *Waterbury v. Riss & Co.*, 169 Kan. 271, 219 P.2d 673 (1950), *overruled on other grounds, as stated in Lessley v. KP&L Co.*, 171 Kan. 197, 231 P.2d 239 (1951); *Hoffman v. Cudahy Packing Co.*, 161 Kan. 345, 167 P.2d 613 (1946).



Medical Compensation. According to K.S.A. 44-510h, injured worker having sustained compensable work-related injury is entitled to medical benefits which are reasonably necessary to cure and relieve effects of injury. K.S.A. 44-510h(a). Employee who sustains compensable work injury is entitled to future medical benefits after award. *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 573 P.2d 1065 (1978). Employee suffering from compensable work injury is also entitled to unauthorized medical treatment up to \$500. K.S.A. 44-510h(b)(2). If Director of Workers' Compensation finds, upon application of injured employee, that services of health care provider being furnished are not satisfactory, Director may authorize appointment of some other health care provider. In any such case, employer shall submit names of three health care providers that are not associated in practice together. Injured employee may then select one from list who shall then be authorized treating health care provider. K.S.A. 44-510h(b)(1). If employer fails to provide physician, employee is authorized to choose physician of his or her own, and employer will be responsible for medical care. K.S.A. 44-510h.

Death Benefits. In order for individual to be entitled to compensation in death case, individual must prove that he or she is a dependent under Workers' Compensation Act. K.S.A.44-508(c). If employee leaves any dependents wholly dependent upon his or her earnings at time of his or her work-related accident, all compensation shall be paid to such dependent persons. There shall be initial payment of \$40,000 to surviving spouse or wholly dependent child or both. Payment shall be apportioned 50% to each if they both exist. K.S.A. 44-510b(d). Such dependents shall be paid weekly compensation in total sum to all such dependents, equal to 66-2/3% of average gross weekly wage of deceased employee at time of work-related accident. K.S.A. 44-510b(a). Surviving legal spouse shall be paid compensation benefits for life, subject to any statutory cap placed on this right. K.S.A. 44-510b(a)(2). Generally, any wholly dependent child of employee shall be paid compensation until such dependent child becomes 18 years of age, except that any such dependent child who is not physically or mentally capable of earning wages in any type of substantial and gainful employment, or who is enrolled as full-time student in accredited institution of higher education or vocational education, shall be paid compensation until such dependent child becomes 23 years of age. K.S.A. 44-510b(a)(3). Dependency upon worker's earnings may vary from wholly dependent to wholly independent, and degree of dependency is question of fact. *Lees, Administrator v. White*, 197 Kan. 118, 415 P.2d 272 (1966). In death cases, burial benefits are payable. K.S.A. 44-510b(g).

Disability Benefits. Whenever employee sustains compensable work injury, employee may be entitled to temporary total disability benefits pursuant to K.S.A. 44-510c(b)(1) and, possibly, permanent disability compensation. Where temporary total disability results from injury, no compensation shall be paid during first week of disability except medical compensation, unless temporary total disability exists for three consecutive weeks, in which case compensation shall be paid for first week of such disability. Thereafter, weekly payments shall be made during such temporary total disability, in a sum equal to 66-2/3% of average gross weekly wage of injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, but in no case less than \$25.00 per week and no more than dollar amount nearest to 75% of state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto, per week. Temporary total disability exists when employee, on account of injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. K.S.A. 44-510c(b)(2).

Even if injured employee is not rendered temporarily totally disabled, he or she may be entitled to temporary partial disability benefits. Weekly compensation for temporary partial general disability shall be 66-2/3% of difference between average gross weekly wage that employee was earning prior to his or her work-related injury and amount employee is actually earning after work-related injury in any type of employment. K.S.A. 44-510e(a).

Permanent total disability exists when injured employee has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. K.S.A. 44-510c(a)(2). Individual must be essentially and realistically unemployable. *Wardlow v. ANR Freight Sys.*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993). Individual suffering from permanent total disability from work-related injury is entitled to weekly payments during period of permanent total disability in a sum equal to 66-2/3% of average gross weekly wage of injured employee, but in no case less than \$25.00 per week nor more than dollar amount nearest to 75% of state's average weekly wage. K.S.A. 44-510c(a)(1). Such weekly payments for permanent total disability continue for duration of permanent total disability, subject to \$125,000.00 statutory cap and review and modification procedure set forth in K.S.A. 44-528. In Kansas, loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in absence of proof to contrary, constitutes permanent total disability. In addition, substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. K.S.A. 44-510c(a)(2).



K.S.A. 44-510d sets forth individually defined and described injuries. If particular injury is not set forth in K.S.A. 44-510d schedule, it is considered general body injury. Injuries set forth in schedule at K.S.A. 44-510d include injuries to thumb, fingers, hands, upper extremities, shoulder, feet, lower extremities, eyes, ears, and hernias.

In order to determine whether particular disability is considered scheduled or general, one must look to situs of resulting disability. *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986). When worker sustains non-scheduled, general body disability as result of work-related accident, his or her entitlement to permanent partial disability benefits is controlled by K.S.A. 44-510e. In Kansas, injured worker is only entitled to permanent partial disability benefits based on his or her percentage

of functional impairment so long as injured worker is earning wages equal to 90% or more of average gross weekly wage he or she was earning at time of work-related injury, in accommodated position. K.S.A. 44-510e(a). If injured worker is not earning 90% or greater of his or her pre-injury wage, his or her entitlement to permanent partial disability benefits is based on percentage to which, in opinion of physician, employee has lost ability to perform work tasks employee performed during 15-year period preceding accident, averaged with difference between average weekly wage worker was earning at time of injury and average weekly wage worker is earning after injury. K.S.A. 44-510e(a).

Maximum Liability for Disability Compensation. Employer's maximum liability for disability compensation is set forth at K.S.A. 44-510f.