Kansas Law Review

RECENT DEVELOPMENT IN KANSAS CIVIL PROCEDURE

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Every case involves procedural issues, as a perusal of any volume of the Kansas Reports will confirm. During this survey period,1 the two appellate courts in Kansas handed down at least eighty decisions that dealt directly with some aspect of civil procedure and many more in which procedural issues were present peripherally. I have attempted to select for discussion the more significant and interesting cases.

I. JURISDICTION AND RELATED MATTERS

A. Long-Arm Statute

This survey period contained several cases in which the Kansas appellate courts construed the “transaction of business” provision of the long-arm statute.2 In Kippel v. Heinz,3 plaintiff, a resident of Missouri, was the operator of two Kansas oil and gas leases owned by defendants, residents of Illinois. Both the lease assignments by which defendants purchased their interests and the operating agreements between plaintiff and defendants were executed by all parties outside Kansas. Plaintiff subsequently sued to recover unpaid operating expenses allegedly due under the agreements. The trial court dismissed on the ground that plaintiff’s claims did not arise from any transaction of business by defendants within the state, but the supreme court reversed unanimously.4 Noting that it had previously found the ownership of working interests in oil leases to constitute “doing business” within the meaning of the venue statute,5 the court applied the same rationale to the long-arm statute. That all the parties were nonresidents was immaterial, the court reasoned, since the contracts under which the obligations had been incurred involved Kansas land.

The court probably reached the correct result, although the Kansas interests in this dispute were not overwhelming.6 The legislature intended to extend the

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1 This survey includes cases decided during the period from January 1980 through August 1983.
4 Id. at 312-14, 644 P.2d at 429-30.
6 The court did not articulate the forum interest in its discussion of jurisdiction, although in disagree-
jurisdiction of the Kansas courts to the limits allowed by the due process clause of the Fourteenth Amendment, and due process does not always require actual physical contacts between the defendant and the forum state. Although all of the transactions between the parties took place outside the state, they involved Kansas real estate, and they contemplated that plaintiff would perform services in Kansas. Therefore, defendants should have "reasonably anticipate[d] being haled into court" in Kansas.

In *Odum v. Arthur Murray, Inc.*, on the other hand, all of the activities involved in the dispute took place outside of Kansas. In this suit for fraud, deceptive practices, and intentional infliction of emotional distress, the court of appeals held that defendant dance studio, located in Kansas City, Missouri, was transacting business in Kansas within the meaning of 60-308(b)(1) by virtue of regular advertising in media that reached Kansas residents and telephone solicitation of potential Kansas customers, including plaintiff. A further factor weighing in favor of jurisdiction was that the studio had received over $40,000 in revenues from Kansas residents during the time period when plaintiff had taken her lessons. There was no jurisdiction, however, over the studio's franchisor, which had apparently engaged in none of the complained-of activities, or over an individual dance instructor, who twice visited plaintiff at her home in Kansas City, on "social occasion[s]" unrelated to the dance studio. The court relied on *Prather v. Olsen* for the proposition that solicitation within the state for services to be performed outside the state may constitute the transaction of business in the state, even though defendant is never physically present. The personal solicitation aspects of both *Odum* and *Prather* serve to distinguish them from cases in other jurisdictions in which more general solicitation, such as advertising or the maintenance of a toll-free telephone number, were not sufficient to constitute transacting business.

*Schlatter v. Mo-Comm Futures, Ltd.*, involved the transacting business provision of the long-arm statute, as well as 60-308(b)(2), the commission of a tortious act, and section 60-308(b)(6), serving as a director or officer of a corporation. Plaintiffs, Kansas residents, purchased shares in a limited partnership that was to direct investments in commodity futures. Naturally, the deal went sour, and
plaintiffs sued the limited partnership, its general partner, a Missouri corporation, and several of the corporation's directors, alleging damages as a result of the sale of unregistered securities. Two of the director-defendants, who were residents of Missouri, appealed from the trial court's denial of their motion to dismiss for lack of jurisdiction.

The supreme court first rejected the trial court's reliance on a federal case, J.E.M. Corp. v. McClellan, for the proposition that merely acting as an officer or director of a corporation with a place of business in Kansas is sufficient for jurisdiction under 60-308(b)(6). Although J.E.M. does contain dicta to that effect, the statute clearly requires that defendant have "act[ed] within this state." The defendant directors had not participated in any corporation-related activities in Kansas. Although very brief biographies of these defendants had been distributed in Kansas as part of the limited partnership's preorganization subscription agreement, defendants had not been actively engaged in any of the management decisions of the corporation. The sole operating officer of the corporation handled all of its activities and did not consult with defendants. The court concluded that a nonresident director's failure to act would not come within the meaning of 60-308(b)(6).

The court then considered the argument that defendants had either transacted business or committed a tortious act within the state. The court again noted that the allegations against the individual defendants consisted of their failure to control the corporation. While they may have breached their fiduciary duties to the stockholders of the corporation, nonfeasance in office, according to the court, is insufficient to invoke the long-arm statute.

Under each of the three provisions of section 60-308 considered by the court, the question is identical—namely, whether an omission to act comes within the statute. A basic conceptual difficulty with omissions, particularly in light of the current swing of the jurisdictional pendulum toward requiring physical contacts, is that by definition no contact has occurred. Notwithstanding this problem, some state long-arm statutes do speak in terms of acts or omissions. Presumably, the situs of the omission is where defendant should have been in

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17 Id. at 1251.
18 Whether Kansas constitutionally could base jurisdiction on a statute providing that mere membership on a board of directors of a foreign corporation with a place of business in Kansas is open to doubt. In Shaffer v. Heiner, 433 U.S. 186 (1977), the United States Supreme Court held that serving as a director of a Delaware corporation was not a sufficient basis for long-arm jurisdiction in Delaware over nonresident directors, although it suggested that a specifically worded statute might change that conclusion. 433 U.S. at 216. See Armstrong v. Pomerance, 423 A.2d 174 (Del. 1980) (post-Shaffer statute treating acceptance of a directorship in a Delaware corporation as consent to jurisdiction in Delaware upheld); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978) (same for North Carolina statute).
19 Each of the two defendants had been involved in other business activities in Kansas, 233 Kan. at 334, 662 P.2d at 561, but the long-arm statute requires that the cause of action arise out of the forum-related activities. KAN. STAT. ANN. 60-308(b) (1983).
20 The biographies were each less than three lines long. See 233 Kan. at 330-31, 662 P.2d at 558.
21 233 Kan. at 337, 662 P.2d at 563.
22 See supra note 8.
23 See, e.g., MD. ANN. CODE § 6-103(b)(3) (1980) ("causes tortious injury in the State by an act or omission in the State"); § 6-103(b)(4) ("causes tortious injury in the State or outside the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from goods, food, services, or manufactured products used or consumed in the State").
order to do whatever act was not done, although it might also be where the effect of the omission occurs. The Kansas statute, however, does not mention failure to act; it extends jurisdiction over a nonresident who "does any of the acts hereinafter enumerated . . ." Each of the enumerated acts is further qualified by the phrase "within this state." Decisions under other sections of the long-arm statute have found jurisdiction over nonresidents based on acts outside the state with effects in the state, even though defendant was never physically present in Kansas, but the Court has never found jurisdiction based solely on an omission to act outside the state. Further, courts in other states with similar long-arm statutes that require an "act" have denied jurisdiction under analogous facts. To the extent that the attempted assertion of jurisdiction over the Schlatter defendants was based on their omissions, the supreme court has correctly construed the statute.

A point not adequately addressed by the court, however, is the effect of the distribution of defendants' biographies in Kansas. The court shrugged off this Kansas contact on the ground that plaintiffs did not claim that they relied on the biographies in making their investment decision and that, in any event, plaintiffs did not receive the information until after they had made their investment. This reasoning sounds like a discussion of causation for liability purposes, not an analysis of whether a contact is sufficient to support jurisdiction. It may be that this single contact with the state would not give rise to jurisdiction over the individual defendants, but the court should have addressed the point directly.

Finally, two straightforward court of appeals decisions dealt with the application of 60-308(b)(8) in dissolution of marriage actions. In Perry v. Perry, the

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24 See, e.g., Platt Corp. v. Platt, 17 N.Y.2d 234, — , 270 N.Y.S.2d 408, 410, 217 N.E.2d 134, 135 (1966) ("To treat an 'omission' as an 'act' in a particular place, one must be there to do or to omit the act."); Brilmayer, How Contacts Count: Due Process Limitations on State Court Jurisdiction, 1980 Sup. Ct. Rev. 77, 90 ("[A] defendant's failure to act [occurs] within a State if the duty to act that made the omission significant required performance there.").

25 KAN. STAT. ANN. § 60-308(b) (1983).

26 These concepts of "acts" "within this state" must have been intended to have the same meaning in each subsection of 60-308(b). For instance, the provision of chief concern in Schlatter, 60-308(b)(6), we apparently enacted in response to a Tenth Circuit decision that acts admittedly committed in the state by a nonresident individual as a representative of a foreign corporation could serve only as a basis for jurisdiction over the corporation, not over the individual. Wilshire Oil Co. v. Riffe, 409 F.2d 1277 (10th Cir. 1969). Thus, the legislature was concerned only with eliminating the "fiduciary shield" concept, and not with creating a new test for the nature of necessary forum-related activity. For a criticism of Riffe and a discussion of 60-308(b)(6), see Casad, Long Arm and Convenient Forum, 20 KAN. L. REV. 1, 27-31 (1971).


28 See, e.g., Witt v. Scully, 539 F.2d 950 (3d Cir. 1976) (applying Pennsylvania law) (failure to attend meetings of board of directors, failure to see that adequate corporate records were kept, and failure to exercise any control or management of Pennsylvania corporation, all of which occurred while defendant resided in Ohio, did not constitute "acting outside of this Commonwealth"); Platt Corp. v. Platt, 17 N.Y.2d 234, 270 N.Y.S.2d 408, 217 N.E.2d 134 (1966) (Florida resident whose alleged wrongs were failure to attend directors' meetings in New York and neglecting to perform in New York any of his duties as a director had not committed a "tortious act" in New York).

29 233 Kan. at 333, 662 P.2d at 560.

30 Indeed, the court proceeded to note that the securities carried a warning of the high degree of risk involved and implied that plaintiffs would have been foolish to rely on the defendants' biographies. Id. at 334, 662 P.2d at 560.

31 See Misco-United Supply, Inc. v. Richards of Rockford, Inc., 215 Kan. 849, 528 P.2d 1248 (1974) (defendant's sole contacts with Kansas were a telephone call and payment sent to plaintiff in Kansas; no jurisdiction under 60-308(b)(5)).

32 KAN. STAT. ANN. § 60-308(b)(8) (1976) provides for long-arm jurisdiction for actions arising out of
court of appeals defined the phrase "lived in the marital relationship" to mean "established a marital domicile." Thus, in a divorce action instituted by the resident husband, Kansas courts did not have in personam jurisdiction over a wife whose only stays in the state were in 1969, during a family move from Hawaii to Virginia, and in 1960, when she visited her mother-in-law. In Guye v. Guye, the couple lived in Kansas for thirteen months, moved to Illinois, and then separated. The wife returned to Kansas with the couple's child. Neither her presence nor the earlier residence of both parties conferred jurisdiction over the husband, for 60-308(b)(8) requires continuous residence in the state by one spouse.

B. Service of Process

1. Notice

Two decisions during this survey period dealt with the interrelationship of the statutory prescriptions for service of process and the constitutional requirement of notice. One was treated as a notice case, when it could actually have been decided purely as a matter of statutory interpretation, while the other involved due process considerations that the court ignored completely. In Federal National Mortgage Association v. Beard, an action to foreclose a mortgage, after service of process was attempted unsuccessfully at what plaintiff believed to be defendant's residence, plaintiff filed an affidavit for service by publication under 60-307 and listed defendant as one whose residence was unknown. Plaintiff never mailed a copy of the publication notice to defendant, even though plaintiff knew that defendant was receiving mail sent to the address at which personal service had been attempted. The trial court entered default judgment, and defendant then appeared with a motion to set aside the default and to enjoin the scheduled sheriff's sale on the ground she had not received notice of the foreclosure.

The court of appeals examined the publication statute and noted its use of both "residence" and "address" in describing plaintiff's notice obligations. The presence of these two different terms is apparently the result of legislative oversight. Before 60-307 was enacted in 1963, its predecessor statutes provided only

"lived in the marital relationship within this state notwithstanding subsequent departure from the state, as to all obligations arising for alimony, child support, or property settlement . . . if the other party to the marital relationship continues to reside in the state."

33 The court had in rem jurisdiction over the marriage by virtue of the residence of one of the parties, and it therefore had the power to grant a divorce. In personam jurisdiction over the defendant spouse is necessary, however, before any other related orders, including child support, property division, and alimony, can be made. See, e.g., Lillis v. Lillis, 1 Kan. App. 2d 164, 563 P.2d 492 (1977).
36 Kan. Stat. Ann. § 60-307 allows service by mail or publication, at plaintiff's option, in a number of specified situations, including, under (a)(3):

In actions which relate to or the subject of which is real . . . property in this state, where any defendant has or claims an interest, vested or contingent, therein, or the relief demanded consists . . . of foreclosure of a lien, and . . . where plaintiff with due diligence is unable to make service of summons upon the defendant within the state.

37 Kan. Stat. Ann. § 60-307(d)(1) requires that before publication is made, plaintiff must file an affidavit listing the "residences" of all defendants, if known, and the names of all defendants whose "residences" are not known. The form of the affidavit given at Kan. Stat. Ann. § 60-307(d)(5), however, requires plaintiff to list the defendants "whose names and addresses are known." Kan. Stat. Ann. § 60-307(f) requires the party accomplishing service by publication to mail a copy of the publication notice to each defendant whose "address" is known.
for service by publication and did not require notice of publication to be mailed to defendant. The only statutory concern was with whether defendant’s residence was known, so that personal service could be attempted before publication was allowed. Each subsection of the statute containing the term “address” was added in 1963 as part of the provision for service by mail.39 Thus, at the very least, the court concluded, 60-307(f), which requires plaintiff to mail a copy of the publication notice to defendant’s “address,” means the mailing address. Plaintiff admittedly did not mail a copy of the notice to defendant, at any address, and, therefore, the court set aside the default for inadequate service. That could have ended the matter since failure to comply with the requirements of the service statutes invalidates the attempted service,40 particularly when there is no actual notice to defendant. The court went on, however, to discuss more generally the due process requirement that notice be given to any defendant whose name and address are known or easily ascertainable and concluded that the Constitution mandated its result as well.

While there is nothing terribly wrong with attempting to base a decision on a constitutional ground when a statutory ground would have sufficed, Beard should be contrasted with another mortgage foreclosure case, Mid-Kansas Federal Savings & Loan Association v. Burke,41 in which there was an unchallenged claim of lack of actual notice, and yet no mention by the court of due process. The real estate at issue was owned by Mr. and Mrs. Burke. Mr. Burke was served on behalf of both defendants at the couple’s home. Neither party answered the petition, default judgment was entered, the sheriff’s sale was conducted, the redemption period ran, and a writ of assistance was served. The testimony was undisputed that Mrs. Burke had no knowledge of any of the proceedings until the delivery of the writ of assistance, after which she promptly filed a motion under 60-260(b) to vacate the default. After a hearing, the trial court held that because of “a drinking problem,”42 Mr. Burke was not a “person of suitable age and discretion” within the meaning of K.S.A. 60-304(a),43 and, therefore, service on him did not constitute service on his wife. The trial court set aside the sheriff’s sale on the condition that Mrs. Burke reimburse the buyer for the purchase price.

The court of appeals reversed.44 First, it found that “the crucial fact”45 necessary for the district court’s decision was Mr. Burke’s level of sobriety at 9:12 a.m. on May 2, 1981, when the deputy sheriff handed him the summons and petition addressed to Mrs. Burke. Since there was no testimony on that point, the trial court’s finding was not supported by sufficient evidence. The court of appeals went on to opine that Mrs. Burke’s failure to “exercise any degree of normal or reasonable concern or care about her family’s financial matters when she . . .

40 See infra text accompanying notes 60-68.
42 8 Kan. App. 2d at 449, 660 P.2d at 573.
43 Kan. Stat. Ann. § 60-304(a) (1976) provides that service on an individual may be made by delivering a copy of the summons and of the petition to the individual personally or by leaving copies thereof at such individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . .
44 8 Kan. App. 2d at 443, 660 P.2d at 569.
45 Id. at 448, 660 P.2d at 573.
knew her husband was suffering . . . from a ‘drinking problem’ 46 rendered her guilty of inexcusable neglect and thus ineligible for relief under K.S.A. 60-260(b)(1).

The supreme court affirmed the court of appeals on the service of process issue, but reversed the ruling on relief from the default judgment.47 It held that Mrs. Burke could not possibly be accused of inexcusable neglect, which it defined as reckless indifference, since there was no showing that she had been neglectful of her responsibilities. Further, the court found that the judgment could also be vacated on another 60-260(b)(1) ground, “surprise,” which it defined as “some condition or situation in which a party to an action is unexpectedly placed to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against.” 46

Although the decision on the service of process issue misunderstands the nature of drinking problems, it does reflect the rationale of 60-304(a). The alternate means for personal service provided in 60-304(a) are an accommodation to the difficulties of achieving in-hand service and an attempt to allow service in a manner reasonably calculated to give actual notice. It is the process server who must initially decide whether the person who appears at defendant’s door falls within the statute’s definition, and absent obvious signs of unsuitability, the server should be permitted to assume that defendant will receive actual notice. Any system, however, that flatly upheld complying service when there was no actual notice would be constitutionally flawed. In discussing a statute with language identical to that at issue in *Burke*, the Kansas Supreme Court specifically dealt with the possibility that in spite of complying service a defendant might remain ignorant of the institution of an action.

In those rare instances where such a notice is not actually found or received by the person intended to be served, the trial courts are not powerless to set aside any judgment entered if application therefor is made promptly upon receipt of actual notice. We have confidence that our trial courts will see that the ends of justice are properly served in such instances.49

Fortunately, the court reached the just result in *Burke* by vacating the default judgment, although it did not seem to recognize the due process implications of the decision of the court of appeals.

2. Statute of Limitations

The relationship between service of process and the statute of limitations received much attention during this survey period. Under the tolling statute, 60-517,50 if a defendant should “depart from the state, or abscond or conceal himself

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46 *Id.* at 448-49, 660 P.2d at 573.
47 233 Kan. at 796, 666 P.2d at 203.
48 *Id.* at 799, 666 P.2d at 206.

If when a cause of action accrues against a person he or she be out of the state, or has absconded or concealed himself or herself, the period limited for the commencement of the action shall not begin to run until such person comes into the state, or while he or she is so absconded or concealed, and if after the cause of action accrues he or she depart from the state, or abscond or conceal himself or herself, the time of the absence or concealment shall not be computed as any part of the period within which the action must be brought. This
or herself” after a cause of action has accrued, the period of absence or concealment is not counted in computing the running of the statute of limitations. The limitations period is not tolled, however, if jurisdiction over the defendant could be obtained, despite the absence or concealment, by means of the long-arm statute or any other substituted service provisions.\(^{51}\) A plaintiff wishing to invoke the protection of the tolling statute must show due diligence in attempting to locate and serve defendant. Thus, in *Gideon v. Gates*,\(^{52}\) during the entire limitations period the defendant resided either in Kansas or in Missouri at an address plaintiff easily could have learned. Since plaintiff could have served him in either place, 60-517 did not apply to extend the limitations period. Similarly, in *Johnson v. Miller*,\(^{53}\) in which plaintiff claimed defendant had “abscond[ed] or conceal[ed]” himself within the state, the court of appeals held that plaintiff’s inability to locate defendant was not sufficient to trigger 60-517 without proof that defendant was actually trying to hide. Although plaintiff made several inquiries in an attempt to find defendant, she apparently did not ask the right people; defendant’s evidence showed that he lived and worked openly in the Kansas City area during the limitations period and was represented by counsel even before plaintiff’s petition was filed.

An interesting contrast to *Johnson* is *Garrison v. Vu*.\(^{54}\) The return on the initial service, almost two months before the statute of limitations ran, indicated proper residential service on defendant’s nephew. One month before the statute ran, an answer was filed, admitting Kansas residence (although at a different address than the one on the return) and raising several defenses, including insufficiency of service of process. Eight months later, defendant filed a motion for summary judgment based on lack of service and the running of the statute of limitations. Plaintiff immediately obtained personal service on defendant in Texas, where, it turned out, defendant had been living for the past two and one-half years. Defendant had never lived at the address on the original return, and the person originally served was not his nephew. Both the trial court and the court of appeals held that the statute of limitations was not tolled by defendant’s absence from the state because of the availability of alternative means of service. The supreme court reversed.\(^{55}\) It concluded that plaintiff had been diligent in attempting to locate defendant, and therefore, the exception to 60-517 for defendants whose whereabouts are known did not apply.\(^{56}\) Accordingly, the statute of

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51 Bray v. Bayes, 228 Kan. 481, 618 P.2d 807 (1980) (absence from the state means beyond the reach of process; even during defendants’ brief absences, residential service under Section 60-304(a) was available, as was long-arm service under Section 60-308(b)(2), no tolling); Carter v. Kretschmer, 2 Kan. App. 2d 271, 577 P.2d 1211 (1978) (substituted service of process under KAN. STAT. ANN. §§ 60-401 to -402 and long-arm service under KAN. STAT. ANN. § 60-308(b)(2) available; no tolling).


55 Id. at 240, 662 P.2d at 1195.

56 Id. The two requirements for application of the exception, a defendant whose whereabouts are known and upon whom service of summons can be effected, may be synonymous in most cases. As the court pointed out, substituted service under Sections 6-401 and -402 is not complete until copies of the summons and petition have been delivered to defendant personally or by registered mail. Id. Similarly, under the long-arm statute, defendant must be served with process. Obviously, neither of these events can take place until defendant’s whereabouts are known. Perhaps the only situations in which the two phrases have independ-
limitations was tolled from the time defendant left the state until the time plaintiff learned he was in Texas, and plaintiff’s action was timely.

Garrison raises the question whether the court intended to weaken or abrogate the due diligence standard previously applied to 60-517. There is no discussion in the opinion of the extent, if any, of plaintiff’s efforts to locate defendant. Although the return of service appeared proper,57 perhaps defendant’s answer should have put plaintiff on notice that something might be wrong. Nothing indicates that plaintiff ever tried to ascertain the substance of defendant’s claim of insufficiency of service of process, or even to clear up the discrepancy in defendant’s supposed Kansas addresses. If plaintiff had made either of these inquiries, he might have realized that he had not obtained effective service and that he needed to continue to search for defendant. On the other hand, in defense of the court’s decision, even defendant’s own attorney was unaware of defendant’s whereabouts until more than two years after plaintiff filed suit,58 and the most diligent search may not have located him. The Garrison decision would be more satisfying, however, had the court elaborated on its conclusion that plaintiff had shown diligence under the facts of the case.

The technicalities of the service of process requirements have been applied rigidly in Kansas, in spite of the “substantial compliance” provisions of 60-204.59 Dunn v. City of Emporia60 is yet another example of that approach, coupled with the savings statute, 60-518.61 Service on the defendant city was accomplished by serving the city attorney, not the city clerk or mayor as required by 60-304(d). It is obvious, of course, that the city received actual notice, and it filed an answer raising the defense of improper service. The court of appeals took pains to point out that although at that point plaintiff still had sixty days to obtain proper service, she did not do so, in spite of the “warning” in defendant’s answer.62 The action was subsequently dismissed for lack of prosecution. Plaintiff refiled, this time serving the city clerk. In response to defendant’s motion to dismiss based on the statute of limitations, plaintiff claimed the benefit of 60-518, which, she argued, gave her six months following the dismissal of her first action to commence a new suit. The court concluded, however, that the savings statute never comes into play unless the first suit was properly commenced. Relying on the long line

57 Judge Gard concludes that this fact serves to distinguish Garrison from cases like Carter v. Kretschmer, 2 Kan. App. 2d 271, 577 P.2d 1211 (1978), in which the return clearly showed that service could not be made in the state. 1 S. GARD, KANSAS CODE OF CIVIL PROCEDURE 2D ANNOTATED 96-97 (1983 Supp.).
58 It is interesting that the parties were able to proceed with eight months of discovery and a pretrial conference without defendant’s presence. See 233 Kan. at 237, 662 P.2d at 1193.
In any method of serving process, substantial compliance therewith shall effect valid service of process if the court finds that, notwithstanding some irregularity or omission, the party served was made aware that an action or proceeding was pending in a specified court in which his or her person, status or property were subject to being affected.
If any action be commenced within due time, and the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if the plaintiff die, and the cause of action survive, his or her representatives, may commence a new action within six (6) months after such failure.
62 7 Kan. App. 2d at 446, 643 P.2d at 1138.
of cases that have virtually ignored the substantial compliance standard of 60-204, the court held that service on the city attorney in the first action was not in substantial compliance with 60-304(d) and was therefore void. The court distinguished Goldsberry v. Lewis, in which service on a nonresident while he was in Kansas to appear at a criminal action against him was sufficient to constitute commencement of an action within the meaning of 60-518, on the ground that the service in Goldsberry was merely voidable prior to judgment, and not void, as in Dunn. Since plaintiff never commenced an action within the original limitations period, the second Dunn suit was time barred.

In response to cases like Dunn and others involving noncomplying service, the legislature in 1983 amended 60-203 to redefine commencement of actions. New subsection (a) is similar to the old statute, except that it gives the trial court discretion to extend for an additional thirty days the time within which service must be made. The standard for this extension is good cause; only time will tell how benevolent the courts will be in finding good cause.

New subsection (b) gives plaintiff ninety days (plus an additional thirty for good cause shown) within which to obtain valid service following an adjudication that service was invalid "due to any irregularity in form or procedure or any defect in making service." The legislature apparently sought to reinstate the intended liberal effect of 60-204 by preventing mere defects in service from derailing a potentially meritorious claim. This goal, however, would have been better served by an amendment to 60-204 defining "substantial compliance," for 60-203(b) raises some totally new areas of uncertainty that may take years to resolve. First, while 60-204 by its terms applies only when defendant receives actual notice, 60-203(b) contains no similar restriction. Defective service that would come within the meaning of 60-203(b) might not always give defendant actual notice of the commencement of the action. With no notice, defendant would not appear, the court would enter a default, and defendant would not receive the first inkling of a suit until plaintiff began execution proceedings. In such a case the determination of the invalidity of the service and thus the triggering of a new period for timely service could occur in a proceeding under 60-260(b) to set aside

65 The amended statute provides:

(a) A civil action is commenced at the time of: (1) filing a petition with the clerk of the court, if service of process is obtained or the first publication is made for service by publication, within 90 days after the petition is filed, except that the court may extend that time an additional 30 days upon a showing of good cause by the plaintiff; or (2) service of process or first publication, if service of process or first publication is not made within the time specified by provision (1).

(b) If service of process or first publication pursuits to have been made within the time specified by subsection (a)(1) but is later adjudicated to have been invalid due to any irregularity in form or procedure or any defect in making service, the action shall nevertheless be deemed to have been commenced by the original filing of the petition if valid service is obtained or first publication is made within 90 days after that adjudication, except that the court may extend that time an additional 30 days upon a showing of good cause by the plaintiff.

(c) The filing of an entry of appearance shall have the same effect as service.


66 This is exactly what happened in both Federal National Mortgage Ass'n v. Beard and Mid-Kansas Federal Savings & Loan Ass'n v. Burke, discussed supra text accompanying notes 34-46.
a default judgment or an execution sale. Since judgments in Kansas are effective for at least five years,\(^{67}\) a defendant who believed the statute of limitations had run on some incident could suddenly, years later, find itself faced with an otherwise stale action miraculously revived by 60-203(b). The possible prejudice to such a defendant is great, for relevant records may have been destroyed and witnesses may have vanished or simply forgotten the events in question. The statute does not even purport to deal with this massive problem. The courts could read a requirement of actual notice into the statute by holding that service without actual notice can never constitute "any irregularity in form or procedure or any defect in making service," but by its terms, the statute applies regardless of the passage of time and the lack of actual notice.

A similar uncertainty could occur even when defendant did have notice of the suit. In *Dunn v. City of Emporia*, for instance, the first action, in which the non-complying service was made, was dismissed for failure to prosecute, not for insufficiency of service of process. The adjudication of invalidity was not made until the second suit, which plaintiff filed after the statute of limitations had run. If 60-203(b) were applied to save plaintiff's claim, the new service made within ninety days of the adjudication would have to relate back to the date of the defective service in the first action. This relation back raises questions about the interrelationship of the new statute and 60-518. One possible reading is that 60-203(b) will avoid the operation of 60-518; no matter when the adjudication of invalidity is made, even if in a subsequent proceeding not commenced within the six months allowed by 60-518, the new, valid service will save the action by relating back to the initial, timely (although defective) action. Alternatively, in a situation like *Dunn*, the statute might be read merely to validate service in the first action, so that that action may be deemed to have been "commenced within due time" within the meaning of 60-518. Then 60-518 would apply to determine the timeliness of the second action. Although this interpretation is probably what the legislature would have wanted had it foreseen the problem, it would result in requiring plaintiff to perform a needless task. New 60-203(b) requires new service to validate the defective service, yet in *Dunn* plaintiff had already obtained good service in the second action. Would she have to serve defendant a third time in order to save her second action?

The effect of the combination of 60-203(b) and 60-204 may be to insulate all sorts of service errors and thus to protect from malpractice claims attorneys who do not understand what the law requires. Since the legislature did not repeal 60-204 when it enacted 60-203(b), the two provisions seemingly cover different kinds of defects. Apparently there are now at least four kinds of service: valid; invalid but substantially complying (60-204); invalid but saved by 60-203(b); and irretrievably invalid. The case law under 60-204 has generally defined its scope, but the courts have yet to construe 60-203(b). Although its language is sufficiently vague to shelter a wide range of irregularities and defects, it will be applied by the same courts that gave 60-204 its narrow reading. The courts could accord 60-203(b) similar treatment, thus placing most noncomplying service in the fourth category. The irony of this result is that if the perceived problem is unnecessary technicalities in the service statutes, the legislature could simply have amended

them to make them simpler and easier to understand. Presumably, it did not take that step because the existing statutory requirements serve a good purpose, yet new 60-203(b) may have the effect of circumventing that purpose.

During this survey period, there were several other less troublesome amendments to the service statutes. The 1982 legislature amended sections 60-303 and 61-1803 to provide that appointment of special process servers shall be freely made, without any showing that substantial savings will result.\(^{68}\) A 1983 amendment to 60-304(f) provides for service on foreign limited partnerships.\(^{69}\) A 1981 amendment to 60-515(a), which deals with the commencement of actions by persons under a legal disability, provides that persons in prison are not deemed to be under a disability if they have access to the courts during the period of imprisonment.\(^{70}\)

C. Venue

In 1983 the legislature enacted several interesting provisions authorizing the transfer of actions in certain situations. New 60-242(c)\(^ {71}\) provides that when civil actions arising out of the same transaction or occurrence are pending in different districts, the supreme court may order them transferred to one of the counties in which an action is pending. The transferee judge has the power to conduct all pretrial proceedings, including motions for summary judgment, and to conduct a joint trial of the consolidated actions upon the consent of the parties. Actions involving parties who do not consent to a joint trial are to be returned to the transferor court for trial. This new statute is patterned on the federal multidis-

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70 Act of May 13, 1981, ch. 232, 1981 Kan. Sess. Laws 990. Two cases during the survey period discussed Section 60-515. In Lewis v. Shuck, 5 Kan. App. 2d 649, 623 P.2d 520 (1981), the court held that tolling takes place only if the disability existed at the time the cause of action accrued or if it came into existence during the limitations period as measured without regard to any tolling. Thus, a second disability that commenced during the statutory one-year period after the removal of a first disability did not trigger the statute again. In Wheeler v. Lenski, 8 Kan. App. 2d 408, 658 P.2d 1056 (1983), the court upheld against an equal protection challenge the 1976 amendment to Section 60-515(a) which shortened to eight years the time for bringing an action on behalf of a person under a disability.

(c) Multidistrict litigation. (1) When civil actions arising out of the same transaction or occurrence or series of transactions or occurrences are pending in different judicial districts, the supreme court, upon request of a party or of any court in which one of the actions is pending and upon finding that a transfer and consolidation will promote the just and efficient conduct of the actions, may order transfer of the pending actions to one of the counties in which an action is pending. The actions may be consolidated for discovery, pretrial proceedings and possible trial. The supreme court shall assign the consolidated actions to a judge designated by the supreme court. Actions filed subsequent to the order may be consolidated as provided herein.

(2) The assigned judge shall have the power to conduct all pretrial and discovery proceedings, issue orders therein, determine questions of law submitted to the court including motions for summary judgment and, when the assigned judge conducts a trial, allocate expenses of the trial among counties.

(3) In the assigned judge's discretion, the assigned judge may conduct a joint trial of any or all of the consolidated actions, but all parties to the actions jointly tried must consent to joint trial. Trials by jury may be conducted in any county which would have had venue of any of the consolidated actions, subject to a change of venue under Kan. Stat. Ann. 60-609 and amendments thereto. If the assigned judge determines not to conduct the trial of any one of the consolidated actions or if any party to any of the consolidated actions does not consent to joint trial, the assigned judge shall return that action, and the record in that action, to the district court from which it originated. The assigned judge shall notify the supreme court of the return of the action.
strict litigation transfer provision, 28 U.S.C. § 1407, although there are a few differences between the two. Unlike 60-242(c), the federal statute does not restrict the choice of the transferee court. Additionally, it does not provide for trial in the transferee court, as does the Kansas statute. The advantages of a consolidated trial under 60-242(c) are diluted somewhat by the consent requirement, but the legislature was undoubtedly trying to preserve the plaintiff’s forum choice. New 60-242(c) probably will not receive as much use as the federal statute, but it is an important first step in any attempt to reduce needless relitigation of issues that arise in the context of multiple actions.

Another 1983 amendment, this time to 60-609, tracks a second federal provision for transfer, 1404(a). New 60-609(a) allows, on motion, transfer of a case “to any county where it might have been brought,” after “due consideration” of plaintiff’s forum choice and a finding that transfer is for the convenience of the parties and witnesses and in the interest of justice. Section 1404(a) replaces the doctrine of forum non conveniens in most situations in the federal courts, and this new Kansas statute achieves the same result, at least when the more convenient forum is also in Kansas. It thus overrules the result in Quillen v. Keston Corp., in which the supreme court reversed for lack of statutory authorization the trial court’s order transferring a case from one county to another following a finding of forum non conveniens. An interesting question is how this provision relates to new 60-242(c). In spite of the consent provision in 60-242(c)(3), new 60-609(a) appears to allow the 60-242(c) transferee court to follow federal practice by transferring a case to itself for trial. The motion of only one of the parties would be required under 60-609(a), even though 60-242(c)(3) requires consent of all parties. Finally, new 60-609(c) allows the transfer of an action to any county upon agreement of all parties and approval of the transferor court and the supreme court.

II. PLEADING

A. Omitted Defenses

Three cases during this survey period dealt with the omission of dispositive defenses from defendant’s answer or pre-answer motion and subsequent attempts by defendant to rectify the omission. Unlike their grudging approach to plaintiffs’ service mistakes, the courts have not held defendants to technical pleading.

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72 Trial can be held in the federal transferee court if that court is one in which the action “might have been brought” within the meaning of 28 U.S.C. § 1404(a) (1976), and the § 1407 transferee court transfers the cases to itself for trial under § 1404(a). See, e.g., Pfizer, Inc. v. Lord, 447 F.2d 122, 124-25 (2d Cir. 1971). The choice of the § 1407 transferee court is often made with § 1404(a) in mind. See Note, The Judicial Panel and the Conduct of Multidistrict Litigation, 87 Harv. L. Rev. 1001, 1024-25 (1974).
73 Although many of the advantages of transfer and consolidation would be lost by severing an action involving a party that refused to consent to a joint trial, it would still be efficient to allow the transferee court to conduct the trial of the severed action. This option seems to be foreclosed by the provision in section 60-242(c)(3) discussed in the text, but see infra notes 72-74 and accompanying text.
74 The consent requirement also gives defendants a chance to engage in reverse forum-shopping.
76 KAN. STAT. ANN. § 60-609 (Supp. 1983).
77 It is not, however, a codification of forum non conveniens, and in fact allows transfer in situations to which the doctrine might not apply. See Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).
requirements if no prejudice to the opposing party is present. Bray v. Bayles\(^79\) involved a finding of prejudice and the resulting denial of defendant’s efforts to amend a defective motion. Service was made on defendant’s secretary within the limitations period, although more than ninety days after plaintiffs filed suit. Still within the limitations period, defendant filed a motion under 60-212(b), seeking change of venue, dismissal for failure to state a claim upon which relief may be granted, and a more definite statement. Fourteen days later, and four days after expiration of the statute of limitations, in response to a second defendant’s 60-212(b)(5) motion to dismiss for insufficiency of service of process, plaintiffs properly served defendant. Defendant then moved to amend this 60-212(b) motion to add the defense of improper service. The trial court granted the motion, held that the amendment would relate back to the date of the original motion, and dismissed plaintiffs’ petition as barred by the statute of limitations. The court of appeals affirmed,\(^80\) concluding that although 60-212(g) and (h) prohibit a second motion under 60-212(b) raising insufficiency of service of process, those rules do not prohibit amendments to the initial motion, at least where no prejudice to the adversary will occur. The supreme court reversed.\(^81\) It agreed with the court of appeals’ view of the law, but it disagreed on its application in this case. Plaintiffs were prejudiced by the amendment, the court found, because at the time of the original motion, effective service could still have been made if plaintiffs had been put on notice of the defect in service. By the time defendant sought to inject defective service as an issue, however, the statute had run and plaintiffs were without recourse.

This is not a case in which an injustice cries out for correction. One can certainly argue, as did the court of appeals, that plaintiffs should have been put on notice by the sheriff’s return, which indicated that service was left “at the office” of defendant,\(^82\) that proper service may not have been achieved.\(^83\) On the other hand, defendant’s initial 60-212(b) motion and accompanying affidavit both alleged that defendant had been served with process in Wilson County (where his office was located), and plaintiff may have been lulled into complaisancy by those statements plus the failure to assert the defense of defective service. Further, the prejudice to plaintiff is obvious. The addition of a meritorious and perhaps complete defense to plaintiff’s claim cannot constitute the kind of prejudice that would prevent amendments, for then amendments could never be allowed. Rather, the prejudice must arise from other factors, such as vast expenditures of time or money in reliance on the initial pleading, or, as here, the loss of the opportunity to correct a fatal error.\(^84\) Ironically, if defendant had been less prompt in filing his answer, the case might have been decided differently. If he had waited the full twenty days allowed by 60-212(a) to file his initial motion, the statute of limitations would have run. Under the supreme court’s

\(^79\) 228 Kan. 481, 618 P.2d 807 (1980).
\(^81\) 228 Kan. 481, 618 P.2d 807 (1980).
\(^82\) 4 Kan. App. 2d at 603, 609 P.2d at 1152.
\(^84\) See generally 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1389 (1969); 6 C. WRIGHT & A. MILLER, id. at § 1487.
rationale, even if the motion omitted the defense of insufficiency of service of process, the trial court would have to allow an amendment, since defendant's delay in seeking the amendment could not have harmed plaintiff at that point.

Illustrating this view of prejudice are two additional cases. In Cross v. City of Kansas City, defendants failed to include the defense of governmental immunity in their answer. Two years after the action was commenced and shortly before trial, defendants moved for summary judgment on the ground of immunity. The trial court granted their motion, and on appeal the supreme court characterized the motion as one for failure to state a claim upon which relief can be granted, rather than as an effort to add an omitted affirmative defense. Since under 60-212(h)(2) such motions to dismiss may be made at any time through trial, defendants' motion was timely. The only prejudice to plaintiffs was the two years of discovery expenses that presumably would not have been incurred if the defense had been asserted early in the case. The supreme court's solution to this problem was to assess the costs of the appeal to defendants.

In Wheeler v. Lenski, an amended answer filed without leave of court raised the statute of limitations as a defense for the first time. Unlike the situation in Bray v. Bayles, there was no service problem that might have affected the timing of the motion. Five months later, defendant moved for summary judgment. In upholding the trial court's grant of the motion, the court of appeals noted that the only prejudice suffered by plaintiffs was the time spent in discovery before the filing of defendant's motion. Both governmental immunity and the statute of limitations are affirmative defenses, and under 60-208(c) they must be pleaded. A liberal attitude toward amendments, as evidenced in these two cases, would allow omitted affirmative defenses to be added later. Moreover, in both Cross and Wheeler facts necessary to establish the affirmative defense may have been contained on the face of the petition; if so, the petition should be vulnerable to a motion to dismiss for failure to state a claim without regard to whether the defense was raised in the answer.

B. Counterclaims

The court of appeals applied the spirit, but not the letter, of the compensatio statute, 60-213(d), in a new setting in State of Kansas, Board of Regents v. Holt. The University of Kansas Medical Center sued for medical and hospital services rendered to defendant's decedent. Defendant responded with a wrongful death counterclaim afflicted with two major defects: it was filed more than two years after the death, and was therefore barred by the statute of limitations, and, in any event, at the time of the suit plaintiff enjoyed governmental immunity. Defendant's first problem is met by 60-213(d), since defendant's counterclaim

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87 The court also found that by granting defendant's motion for summary judgment, the trial court had implicitly granted an implicit motion to amend the answer to add the limitations defense.
88 See 5 C. Wright & A. Miller, supra note 84, at § 1277.
coexisted for some time with plaintiff's claim and the counterclaim arose out of the same "contract or transaction" as the claim. Although the court of appeals did not mention the compensatio statute in finding that the statute of limitations did not bar defendant's counterclaim, it cited several compensatio cases. The court also concluded that there was "no valid reason to distinguish between a claim barred by the statute of limitations and one barred by governmental immunity." Therefore, defendant could maintain his wrongful death claim in spite of plaintiff's immunity, but only by way of set-off or recoupment to the extent of plaintiff's claim. In support of its conclusion, the court cited cases from nine other jurisdictions and noted the absence of authority in Kansas on this issue.

There is undoubtedly a reason for this lack of Kansas cases on point: the legislature has allowed a limited waiver of two specified defenses in 60-213(d), and by negative implication, it probably did not intend to permit waiver of any others. This may also explain the court's puzzling failure to cite 60-213(d), for that provision clearly did not save defendant's counterclaim from the immunity defense. The court may have been attempting to reach what it considered a fair result here. Undoubtedly, it was influenced by the knowledge that today, under the Kansas Tort Claims Act, the state would not be immune from the counterclaim. The legislature gave the act prospective application only, however, and the court of appeals' distaste for the statutorily mandated result in this case should not be sufficient to permit the court to usurp the role of the legislature.

C. Amendments

Anderson v. United Cab Co. involved relation back of amendments under 60-215(c). Plaintiffs filed suit on the last day of the limitations period and served defendant three days later. Their petition, however, identified defendant as United Cab Company, when defendant's name was actually United Cab Company, Inc. One month after service, plaintiffs moved to amend the case caption to add "Inc." to defendant's name. The trial court denied the motion and dismissed plaintiffs' action as barred by the statute of limitations. The court of appeals reversed. First, following Marr v. Geiger Readi-Mix Co., it held that amendments to correct a misnomer or misdescription of a defendant are governed by the change-of-party provisions of 60-215(c). The court then surveyed the federal cases and agreed with the majority position that the phrase "period

recite the date of decedent's death, but all parties apparently agreed that the Tort Claims Act did not apply.


Effect of Death or Limitations. When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim or cross-claim could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other or by reason of the statute of limitations if arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim or connected with the subject of the action; but the two demands must be deemed compensated so far as they equal each other.

93 8 Kan. App. 2d at 437, 659 P.2d at 638.

See supra note 92.


96 Id. at 698, 666 P.2d at 738.

provided by law for commencing the action,” as used in 60-215(c), includes both the applicable statute of limitations and the ninety-day period allowed in 60-203 for effective service to relate back to the date of the filing of the petition. The rationale for this construction is that under 60-203 timely service on the proper defendant can be made even after the statute of limitations has run, and there is no reason to require earlier notice to a miscalled defendant than to a correctly named defendant. Since this amendment was sought within the ninety-day period, it was timely and would relate back to the date of the filing of the petition.

D. Statutory Changes

A 1982 amendment to 60-21199 ties that section to a totally new provision dealing with frivolous claims, also enacted in 1982. The new statute requires the court to assess reasonable attorneys’ fees and expenses as costs against a party who has asserted a claim or defense or denied facts during pleading or discovery, “without a reasonable basis in fact and not in good faith.”100 The party’s attorney may be held individually or jointly and severally liable if he or she “knowingly and not in good faith asserted such a claim, defense or denial or, having gained knowledge of its falsity, failed to inform the court promptly that such claim, defense or denial was without reasonable basis in fact.” The simultaneous amendment to 60-211 makes it clear that costs may be assessed pursuant to 60-2007 for willful violations of the existing requirements for good faith pleading.

Frivolous litigation has become a major concern both nationally and at the state level. The United States Supreme Court has attempted to deal with the problem through both recently adopted and proposed amendments to the Federal Rules of Civil Procedure.101 If new 60-2007 serves its purpose it could prove to be an effective deterrent both to frivolous and harassing lawsuits and to delaying defense tactics. Application of the section, however, turns on such slippery state-of-mind concepts that it may prove very difficult to determine with any certainty cases to which its sanctions should be applied. Absent some explicit evidence of bad faith, courts may be reluctant to assess the winner’s attorneys’ fees against the losing party, particularly when that party is the plaintiff.102

III. Multiparty Litigation; Joinder103

Farmers State Bank & Trust Co. v. City of Yates Center104 raised issues concerning the proper use of interpleader pursuant to 60-222. The suit concerned the city’s liability on over-issued notes, and the city, claiming it was obligated on only one issue, tried to assert a counterclaim for interpleader. The supreme court found

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102 To date one reported case has involved Section 60-2007. In Cornett v. Roth, 233 Kan. 936, 666 P.2d 1182 (1983), the court upheld as within the trial court’s discretion an award of $150 against plaintiffs for filing a motion “essentially identical” to earlier motions already ruled on. Id. at 945, 666 P.2d at 1190.
103 The most significant decisions in this area were Albertson v. Volkswagenwerk, A.G., 230 Kan. 368, 634 P.2d 1127 (1981), and Ellis v. Union Pac. R.R., 231 Kan. 182, 643 P.2d 158 (1982), both involving joinder under the comparative negligence statute. They will be dealt with in the article on torts to appear in issue four.
no need for interpleader, since all of the claimants on the notes were parties to the action and had asserted their claims in the action. The purpose of interpleader is to protect a stakeholder from the danger of multiple lawsuits with conflicting claims. That danger could not exist when the claimants were already involved in one action. More importantly, interpleader was not appropriate because the claimants were not asserting mutually inconsistent claims against an identifiable asset. Each note was a general city obligation, and each claimant based its claim on a separate document. Although judicial economy suggests that all parties to a dispute should be required to join in one action, interpleader can be used to accomplish this goal only when the claims are asserted against an identifiable fund or asset. Interpleader cannot be used when the liability is asserted, as it was here, against defendant's assets in general.\textsuperscript{105}

The Kansas courts handed down one class action decision during the survey period. In\textit{Brueck v. Kring},\textsuperscript{106} one of many suits arising out of the collapse of the Kansas Savings and Loan Association, four named plaintiffs filed a class action on behalf of themselves and all other depositors against various defendants. In June 1978, following a hearing, the trial court certified a class under 60-223(b)(1). Nineteen months later, plaintiffs joined Peat, Marwick & Mitchell as an additional defendant and sought class certification against it. Before holding a hearing on that motion, however, the court granted Peat, Marwick's motion to dismiss based on the running of the statute of limitations and certified that order as final under 60-254(b).\textsuperscript{107} Plaintiffs appealed on behalf of "the plaintiff class."\textsuperscript{108} The court of appeals dismissed the appeal, holding that since there was no plaintiff class as to Peat, Marwick, the notice of appeal was ineffective to confer appellate jurisdiction.\textsuperscript{109} The supreme court reversed.\textsuperscript{110} Noting the general principle that the provisions of Chapter 60 are to be liberally construed,\textsuperscript{111} it found that Peat, Marwick would not be prejudiced by construing the notice of appeal as an appeal on behalf of only the named plaintiffs.

Both courts agreed, citing the same federal cases, that an appeal from a final decision in a purported class action should be treated as an appeal by the named plaintiffs only if there has been no class determination by the trial court. Indeed, any other holding could violate the due process claims of the absent members of the would-be class, for their rights would be foreclosed without any determination that class treatment is appropriate or that the named plaintiffs are adequate representatives. Thus, the only point of disagreement was over the construction of the notice of appeal. Although matters of appellate jurisdiction are often viewed narrowly,\textsuperscript{112} the decision of the court of appeals was unduly restrictive. It would have cut off an otherwise proper and timely appeal solely because of the presence of the word "class" in the notice of appeal. In the posture of the case,

\textsuperscript{106} 230 Kan. 466, 638 P.2d 904 (1982).
\textsuperscript{108} Id. at 624, 631 P.2d at 1234.
\textsuperscript{109} Id. at 625, 631 P.2d at 1236.
\textsuperscript{110} 230 Kan. at 466, 638 P.2d at 904.
\textsuperscript{111} See KAN. STAT. ANN. § 60-102 (1983).
\textsuperscript{112} For instance, a timely notice of appeal is an absolute prerequisite to appellate jurisdiction, see, e.g., Giles v. Russell, 222 Kan. 629, 567 P.2d 845 (1977), although in this area the Kansas courts have been much more relaxed than the federal courts. See infra notes 147-51 and accompanying text.
Peat, Marwick could never succeed in binding the unnamed class members; the only question was whether the named plaintiffs would be given an opportunity to overturn the trial court’s decision and perhaps at some later date obtain class certification against Peat, Marwick. As it turned out, the supreme court upheld the district court’s ruling that the statute of limitations barred the action against Peat, Marwick.

Two court of appeals decisions during the survey period dealt with 60-225(a), which provides that when a party dies and the claim is not extinguished by the death, a proper party must be substituted for the decedent. If a motion for substitution is not made “within a reasonable time after the death is suggested,” the action is to be dismissed as to the deceased party. In Long v. Riggs,\(^{113}\) the court of appeals held that 60-225(a) applied to cases pending on appeal. In Livingston v. Bias,\(^{114}\) the court of appeals ruled that a delay of six months following defendant’s death was not a reasonable period of time, and thus the trial court’s order of dismissal was proper.

IV. DISCOVERY

Many cases with discovery headings actually involve evidentiary matters, and, accordingly, they will be dealt with in that article. Two cases during this survey period, however, bear mention here. In Independent Manufacturing Co. v. McGraw-Edison Co.,\(^{115}\) defendant sought discovery of two reports prepared by independent experts hired by plaintiff’s insurer to investigate the cause of a fire. The trial court refused to accord protection to the requested material under 60-226(b)(4), and the supreme court affirmed.\(^ {116}\) In 1979, in Henry Enterprises, Inc. v. Smith,\(^ {117}\) the supreme court held that an investigation of a potential claim made by a party’s insurance company before the commencement of litigation and not requested by or made under the guidance of counsel is conducted in the ordinary course of the insurer’s business and not “in anticipation of litigation or for trial” within the meaning of 60-226(b)(3). Therefore, reports, statements, and other materials resulting from the investigation do not possess any qualified protection from discovery as work product. Henry Enterprises involved the written statement of an officer of the insured, but the court in Independent Manufacturing refused to distinguish discoverability under 60-223(b)(3) and (b)(4) in this context and upheld the trial court’s order compelling production of the reports.\(^ {118}\)

A second case, Wilson v. American Fidelity Insurance Co.,\(^ {119}\) involved discovery in Chapter 61 actions. Plaintiff sued under the Kansas Automobile Injury Reparations Act\(^ {120}\) (KAIRA) to recover allegedly overdue personal injury protection disability benefits. Defendant had selected a Kansas City, Missouri, physician to examine plaintiff and then filed a motion to take his deposition for use at trial. The trial court refused to allow the deposition and at trial refused to allow de-

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\(^{117}\) The court also affirmed the trial court’s dismissal under § 60-237(b) based on plaintiff’s failure to produce the reports. 6 Kan. App. 2d at 988-89, 637 P.2d at 435-36.


fendant to cross-examine plaintiff concerning the examination. Under 61-1710, the court may allow the taking of a deposition to be used as evidence in a limited action, but only if at least one of the provisions in 61-1711 is present. The only provision applicable to this case was 61-1711(a)(2) which allows depositions when "the witness is outside the county of the place of trial or hearing, unless it appears that the absence of the witness was procured by the party offering the deposition." Since the doctor’s office was in Kansas City, Missouri, this provision was satisfied. The court of appeals, however, looked to the KAIRA, which specifies that required physical examinations must be conducted within the city or county of the insured’s residence unless there is no qualified physician there.\(^\text{121}\) Plaintiff lived in Kansas City, Kansas, and defendant did not contend that there were no physicians in Wyandotte County qualified to examine plaintiff. Defendant had also violated the KAIRA by refusing to furnish plaintiff a copy of the examination and by trying to force her to pay one half of the cost of the examination.\(^\text{122}\) Although the KAIRA contains no penalty or sanction for violation of its provisions, the court of appeals noted that courts have the inherent power to enforce obedience to the law. An appropriate manner of exercising that power was a refusal to admit any evidence of the physical examination.

V. Default Judgments

As one court has commented, “[D]efault judgments are generally disfavored; whenever it is reasonably possible, cases should be decided on their merits.”\(^\text{123}\) This cautious approach is echoed not only in the language of 60-254(c) and -255, but also in the judicial response to these rules. For instance, *Hood v. Haynes*\(^\text{124}\) dealt with the requirement in 60-255(a) that three days’ notice of the hearing on an application for default judgment must be given to a party who has appeared. Two weeks before default was entered, defendant, who had not filed an answer or a formal appearance, wrote a letter to the trial judge asking the court to notify him of any activity in the case and discussing several purported defenses to the action. The court of appeals noted that an “appearance” within the meaning of 60-255 could be accomplished not only by filing an answer, but also by less formal actions, such as physical presence, informal communications, and settlement negotiations. The key, reasoned the court, is whether the party has indicated an intent to defend the suit. Citing a number of federal and state cases, the court of appeals held that defendant’s letter to the court constituted an appearance and that the trial court erred in entering default judgment without the statutory three days’ notice. This result may have been a Pyrrhic victory for defendant, since the trial court had also refused to allow him to file an untimely answer. This ruling was left intact, and, thus, as the court of appeals said, defendant’s role on remand would be “severely [sic] limited.”\(^\text{125}\)

Similarly, in *Simmon v. Bond*,\(^\text{126}\) defendant did not file an answer, although he did file a motion for summary judgment, which the trial court subsequently de-

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\(^{123}\) Schwab v. Bullock’s, Inc., 508 F.2d 353, 355 (9th Cir. 1974).


\(^{125}\) *Id.* at 598, 644 P.2d at 1376. See also 10 C. Wright & A. Miller, *supra* note 84 at § 2688.

nied. At the trial of the case, plaintiff's attorney for the first time raised the failure to answer by orally moving for judgment on the pleadings. The district court granted plaintiff's motion, but the court of appeals reversed. First it held that a motion for judgment on the pleadings under 60-212(c) is not proper until the pleadings are closed, an event that does not occur until an answer is filed. Rather, the proper motion was one for a default judgment, but no default could be granted without the three days' written notice required by 60-255(a).127

In Sweetser v. Sweetser,128 a divorced mother sought a change of custody of the parties' children from herself to the maternal grandmother. Notice to the father was given by mail and publication, but he did not enter an appearance or otherwise respond. At the hearing on plaintiff's motion for change of custody, the trial court found both parents unfit and terminated their parental rights. The court of appeals reversed this judgment for violation of 60-254(c), which provides that a default judgment may not be different in kind or amount from that prayed for in the demand for judgment. The termination order was also invalid because it violated the father's due process right of notice.

VI. POST-TRIAL MATTERS

A. Impeaching the Jury's Verdict

Juror misconduct can be grounds for a new trial,129 but the problem lies in proving that misconduct took place.130 Under Kansas law, no evidence may be received to prove "the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him or her to assent to or dissent from the verdict . . . or concerning the mental processes by which it was determined."131 Jurors may testify, however, concerning "conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict . . ."132 Thus, unlike the Federal Rules of Evidence,133 the Kansas rules allow some testimony by jurors about their deliberations. Jurors apparently may

127 The court rejected the argument that no written notice was required because the oral motion was within the exception contained in 60-207(b)(1) for motions made at trial. That exception applies only to oral motions that are incidental to the matter being heard, and the trial was not for the purpose of determining a default judgment. 6 Kan. App. 2d at 769, 634 P.2d at 1151.
130 For a discussion of some of the evidentiary issues, see Concannon, Impeaching Civil Verdicts: Juror Statements as Prejudicial Misconduct, 52 J.B.A.K. 201 (1983).
131 Id. § 60-441 (1976).
132 Id. § 60-444.
133 606(b) provides:

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes. Fed. R. Evid. 606(b).

The "intrinsic/extrinsic" distinction of the rule was adopted as an explicit rejection of the approach exemplified by the Kansas rule. The federal rule "does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations." H.R. Rep. No. 1597, 93d Cong., 2d Sess. 8 (1974).
testify about statements made during their deliberations, but not about the effect of those statements on their decision.\textsuperscript{134} The court must then decide whether the statement was so inherently prejudicial that the verdict cannot be allowed to stand. The recurring issue for the courts is whether the preferred testimony is admissible, and, if so, what effect it should be given.

In 1980, the supreme court construed these rules in a manner that seemed to declare open season on verdicts. \textit{Verren v. City of Pittsburg}\textsuperscript{135} was a comparative negligence case in which plaintiff was found thirty percent at fault and awarded a net recovery of $5,600. Defendant moved for a new trial on the basis of affidavits of two jurors stating that, in computing total damages and percentages of fault, the jury had considered both plaintiff’s attorneys’ fees and a predetermined net recovery to plaintiff. The supreme court reversed an unpublished opinion by the court of appeals upholding the trial court’s refusal to admit the affidavits. Although acknowledging the law on juror testimony, the court noted:

\[\text{T}h\text{e} \text{r}e\text{e}\text{\ are}\text{\ certain}\text{\ formalitie}s\text{\ of}\text{\ conduct}\text{\ which}\text{\ a}\text{\ jury}\text{\ is}\text{\ required\ to}\text{\ follow}\ldots\text{Evidence}\text{\ may}\text{\ be}\text{\ offered}\ldots\text{to}\text{\ impeach}\text{\ a}\text{\ verdict}\text{\ when}\text{\ the}\text{\ evidence}\text{\ will}\text{\ show}\text{\ actions}\text{\ of}\text{\ the}\text{\ jurors}\text{\ by}\text{\ which}\text{\ they}\text{\ have}\text{\ intentionally}\text{\ disregarded}\text{\ the}\text{\ court’s}\text{\ instructions}\text{\ or}\text{\ violated\ one\ or\ more\ of\ the\ essential\ formalities\ of\ proper\ jury\ conduct.}\text{\textsuperscript{136}}\]

According to the court, the jury’s sins in \textit{Verren} were two-fold: first, since the instruction listing items to be considered in determining the amount of damages did not include attorneys’ fees, the jury necessarily disregarded that instruction; second, another instruction specifically admonished the jury not to consider percentages of fault in arriving at a damage figure.\textsuperscript{137} Further, since there had been no evidence on attorneys’ fees, any amount awarded for that purpose had to be the result of sheer speculation by the jury. This misconduct, according to the court, constituted a “conscious conspiracy”\textsuperscript{138} by the jury to circumvent the comparative negligence law, and, therefore, the affidavits were admissible in the hearing on defendant’s motion for a new trial.

The flaw in the court’s approach is that it disregards the mandate of 60-441 by allowing evidence of the “mental process” of the jury.\textsuperscript{139} The affidavits did not identify any “conditions or occurrences” that might have rendered them admissible under 60-447. Matters such as misunderstanding of or confusion about instructions,\textsuperscript{140} disregard of evidence,\textsuperscript{141} mistake, and lack of agreement\textsuperscript{142} have been held to be improper subjects of post-verdict inquiry under Kansas law be-

\textsuperscript{136} Id. at 261, 607 P.2d at 38.
\textsuperscript{137} Instruction No. 7 provided: “In arriving at the full damage figure for each party, you should not consider the question of fault. Do not reduce the damages by any percentage of fault.” Id. at 263, 607 P.2d at 39.
\textsuperscript{138} Id. at 262, 607 P.2d at 39.
\textsuperscript{139} See Concannon, supra note 119, at 207-10.
cause they involve the jurors’ reasoning processes. Further, Kansas courts have emphasized that explicit evidence of disregard of instructions is inadmissible to impeach a verdict.\textsuperscript{143} To decide in Verren that disobedience of the court’s instructions, without more, is admissible as proof of jury misconduct casts these prior decisions in doubt and raises serious questions about the stability of verdicts.

Another serious defect in the reasoning of Verren was pointed out by Justice Miller in dissent. Most people know that the parties to a lawsuit must somehow manage to pay their attorneys, and many people may have some notion of the contingent fee system. If the discussion of attorneys’ fees by the jury automatically invalidates a verdict, “most verdicts will be suspect and retrials will become almost automatic.”\textsuperscript{144} Further, the very structure of comparative negligence and the instructions given the jury in a comparative negligence case invite mathematical determinations based on percentage of fault. Indeed, it would be surprising if a jury that had decided in favor of plaintiff did not manipulate fault determinations to reach the monetary result it wanted.

The Verren court relied on a 1970 decision, Dunn v. White,\textsuperscript{145} to support its contention that evidence of consideration of attorneys’ fees is admissible to determine jury misconduct. The primary focus in Dunn, however, was the jury’s speculation about insurance coverage.\textsuperscript{146} Further, as the dissent in Dunn pointed out, such speculation had consistently been held inadmissible in attempts to impeach a verdict.\textsuperscript{147} Indeed, until Verren, Dunn might have appeared to be an aberration.

Although Verren arguably created a huge loophole in 60-441, the court of appeals did not apply it generously. In Johnson v. Haupt,\textsuperscript{148} the court of appeals upheld a refusal to consider affidavits that the jury read a newspaper article on the trial in violation of the court’s instruction to consider only evidence admitted at trial. In Cornejo v. Probst,\textsuperscript{149} the second post-Verren decision, the court of appeals again upheld the trial court in excluding evidence that the jury considered attorneys’ fees and income taxes in reaching its verdict. Although recognizing the effect of Verren, the court of appeals determined that the evidence offered by defendant did not clearly show that the jury had specifically included amounts for fees and taxes.

Finally, the supreme court itself limited Verren in Merando v. Atchison, Topeka & Santa Fe Railway Co.\textsuperscript{150} Post-trial affidavits showed that the jury determined plaintiff’s net recovery and then figured his percentage of fault based on that desired net recovery, all in clear disobedience to the court’s instruction. The trial court refused to admit the affidavits, and the supreme court affirmed. Verren was distinguished on the ground that “[t]he primary wrong . . . was the inclusion in the verdict of a wholly speculative sum for plaintiff’s attorney fees.”\textsuperscript{151} In Merando, according to the court, the jury did not go outside the record in consider-

\textsuperscript{144} 227 Kan. at 264, 607 P.2d at 40 (Miller, J., dissenting).
\textsuperscript{146} See id. at 282-83, 479 P.2d at 218-19.
\textsuperscript{149} 232 Kan. 404, 656 P.2d 154 (1982).
\textsuperscript{150} Id. at 409, 656 P.2d at 159.
ing the extent and amount of plaintiff’s damages, and, therefore, any evidence of jury misconduct was insufficient to overcome the command of 60-441. *Merando* will at least restore some element of stability to verdicts in comparative negligence cases; whether the court will retreat further from *Verren* and reject evidence concerning speculation about matters not in the record remains to be seen.

B. Remittitur

In *Garden City Country Club v. Commercial Turf Irrigation, Inc.*, the supreme court overruled *Ansiaet v. Christesen* and *Hawkins v. Wilson* and held that by moving for remittitur defendant is not deemed to have consented to or acquiesced in its entry. Therefore, a defendant whose motion for remittitur has been granted may still appeal from the reduced judgment.

C. Relief from Judgment

Several decisions of the court of appeals during the survey period dealt with procedural matters governing motions under 60-260(b) for relief from judgment. In *Darnall v. Lowe*, the court reviewed the language of the statute and determined that a court may not grant relief from a judgment or order on its own initiative. Rather, there must be a motion and notice of hearing given to all affected parties. In any event, the trial court loses jurisdiction to consider a motion under 60-260(b) after an appeal has been docketed. Conversely, the issuance of the mandate by an appellate court does not divest the trial court of its power to consider a motion under 60-260(b). In *Barkley v. Toland*, the court of appeals held that a motion under 60-260(b)(4) to set aside a judgment that was void for lack of personal jurisdiction must be sustained even though the motion was not made “within a reasonable time,” as required by the statute.

VII. Appellate Procedure

A common problem in appellate procedure is the failure of some or all of the parties to receive notice of entry of judgment in non-jury cases or in cases where a final disposition is made before trial. The federal courts resolve this issue at the expense of the losing party, because failure to receive notice of entry of judgment does not affect the running of the time for filing a notice of appeal or post-trial motions. Moreover, a federal district court generally may not vacate and re-enter judgment in order to start a new appeal time running. In Kansas, however, the rule is different. In *Daniels v. Chaffee*, the supreme court construed 60-258 and Supreme Court Rule No. 134 to mean that the filing of a journal

159 FED. R. CIV. P. 77(d); Advisory Committee Note, 5 F.R.D. 433, 492 (1948).
160 See, e.g., *In re Morrow*, 502 F.2d 520 (5th Cir. 1974).
162 *KAN. STAT. ANN.* § 60-258 provides in part: When judgment is entered by judgment form, the clerk
entry or judgment form creates a valid judgment, even though no notice is given

to the parties. The time for filing post-trial motions or taking an appeal, how-
ever, begins to run only when there has been compliance with the notice
requirements.

Although the court has thus reinforced the requirement of written notice to
the parties of entry of judgment, parties must pay close attention to communi-
ques from the district court, lest they find that the clock has already run on their
right to appeal. In Smith v. Smith, the trial court filed written findings of fact
and conclusions of law, and sent copies to the parties. Nine months later, a jour-
nal entry of judgment was made, and plaintiff filed a notice of appeal seven days
after that entry. Unfortunately for plaintiff, the court of appeals determined that
although not so labeled, the findings of fact and conclusions of law were "sub-
stantially" the judgment form required by 60-258, and, therefore, plaintiff's no-
tice of appeal was out of time.

In Anderson v. United Cab Co., on the other hand, the trial court rendered a
decision by letter to both parties on February 10 and directed counsel for defend-
ant to prepare a proper journal entry reflecting the ruling. At the same time, a
notation "Judg Form" was entered on the docket sheet. A journal entry of dis-
missal was entered on April 29, and plaintiff filed a notice of appeal on May 28.
Defendant contended that the notice was out of time because the court's letter
and the docket notation constituted an effective entry of judgment. The court of
appeals disagreed on the ground that the notation was not identifiable as a direc-
tion of the trial court and apparently that the letter did not constitute a judg-
ment form, so that there had been no compliance with 60-258. The court failed
to mention Smith v. Smith, although it might be distinguished because in Anderson
plaintiff reasonably could have relied on the court's direction to defendant in
assuming no notice of appeal was necessary until there had been a journal entry.

VIII. Preclusion

In Kearney v. Kansas Public Service Co., the supreme court took what may be a
major step toward abolishing the requirement of mutuality for the application
of collateral estoppel. Kearney was one of several actions arising out of a natural
gas explosion in Lawrence. Defendants in all of the suits were Kansas Public Service
Company, E. I. duPont de Nemours and Company, Inc., and Dresser Industries,
Inc. Kearney, the first case to be tried, resulted in a verdict placing 100 percent
of the fault on KPS. KPS then settled eight of the remaining cases and filed cross-
claims for comparative indemnity against duPont and Dresser in each of those
actions. It did not, however, file cross-claims in two actions that remained pend-
ing. Subsequently, duPont and Dresser moved for summary judgment in all ten

\[\text{(Footnotes)}\]

\[^{163}\text{Supreme Court Rule No. 134, 225 Kan. lxxiv, effective January 10, 1977, requires written notice of}
\]\n\[^{164}\text{rulings to be sent to parties who are not present at the time of the ruling. Its predecessor, Rule No. 11, 214}
\]\n\[^{165}\text{Kan. xxxvii, provided that failure to receive notice did not affect the validity of the judgment, but that}
\]\n\[^{166}\text{language was omitted from Rule No. 134. See 230 Kan. at 36-37, 630 P.2d at 1093-94.}
\]\n\[^{167}\text{8 Kan. App. 2d 252, 655 P.2d 469 (1982).}
\]\n\[^{168}\text{8 Kan. App. 2d 694, 666 P.2d 733 (1983).}
\]\n\[^{169}\text{233 Kan. 492, 665 P.2d 747 (1983).}
\]
actions, based on the jury's finding in *Kearney* that KPS was solely at fault in the explosion. The trial court granted the motions, and KPS appealed.

KPS raised two arguments in an attempt to avoid summary judgment. First, it contended that since there were no cross-claims among the defendants in *Kearney*, the requirement of adversity necessary for collateral estoppel had not been met. KPS relied on *Williams v. Evans*\(^{167}\) for the proposition that the issues on which preclusion is sought must have been raised "by appropriate cross-pleadings between the defendants themselves, so that each may have control of the proceedings to enable him to exhaust the question of liability *inter se.*"\(^{168}\) The *Kearney* court, however, distinguished *Williams* on the grounds that it arose before the adoption of comparative negligence and that the relative positions of litigants have been altered by the structure of comparative negligence actions. Even where no cross-claims have been filed among the defendants in a comparative negligence case, their interests and litigation postures are often actually adverse. The court pointed out that in the *Kearney* portion of the appeal, KPS had argued that the other two defendants had "ganged up on it"\(^{169}\) during the trial. Further, the court noted that the new Restatement (Second) of Judgments does not always require the existence of formal adversarial pleadings for the application of issue preclusion among former co-parties.\(^{170}\)

KPS then argued that even if the absence of cross-claims in *Kearney* would not bar issue preclusion, the lack of mutuality of parties would have this effect. The court responded that the only nonmutual parties were the remaining plaintiffs, and there was no contention that any of them had been in any way at fault. Therefore, the only questions in any of the remaining cases would involve the relative fault of the defendants, and, as between them, mutuality did exist. In support of this proposition, the court cited a Nebraska case involving a similar natural gas explosion, in which a defendant that had been exonerated in an earlier case had successfully precluded the defendant that lost in that case.\(^{171}\)

Although the court in *Kearney* purported to rely totally on the comparative negligence setting of the case, very little of its reasoning actually depends on that fact. Even in noncomparative cases, co-defendants often argue against each other in an attempt to avoid liability to the plaintiff, and are therefore actually adverse. The Second Restatement recognizes this reality of litigation; its position on preclusion among co-parties is couched in general terms and is not predicated on the existence of comparative fault.\(^{172}\) Rather, the Reporter's Note indicates that the reformulation of the position of the first Restatement, which generally required adversarial pleadings for preclusion, was the result of the abandonment of the requirement of mutuality in most jurisdictions.\(^{173}\) The rationale was that


\(^{168}\) Id. at syl. ¶ 3, 552 P.2d 876 (1976).

\(^{169}\) 233 Kan. at 508, 665 P.2d at 771.

\(^{170}\) RESTATEMENT (SECOND) OF JUDGMENTS § 38 (1982).

\(^{171}\) The first case was Hammond v. Nebraska Natural Gas Co., 204 Neb. 80, 281 N.W.2d 520 (1979). The second case, in which preclusion was sought and granted, was Peterson v. Nebraska Natural Gas Co., 204 Neb. 136, 281 N.W.2d 525 (1979).

\(^{172}\) Interestingly, the comments to the section cited by the court include an illustrative case almost identical to *Kearney*, but brought under a strict negligence/contributory negligence scheme. RESTATEMENT (SECOND) OF JUDGMENTS § 38, comment a, illustration 1 (1982). The illustration is based on the facts of Creeco Co. v. Northern Illinois Gas Co., 73 Ill. App. 2d 218, 219 N.W. 2d 257 (1966).

\(^{173}\) RESTATEMENT (SECOND) OF JUDGMENTS § 38, Reporter's Note at 381 (1982).
if a total stranger to a case can profit from the results of the prior litigation, a co-party should similarly benefit.\textsuperscript{174}

The only possible support that the comparative fault aspect of Kearney lends to the decision is the effect of \textit{Eurich v. Alkire},\textsuperscript{175} which created a type of compulsory cross-claim in comparative negligence cases. An argument advanced in favor of the first Restatement's position of requiring adversarial pleadings for preclusion among co-parties, particularly among co-defendants, is that since defendants do not choose the time and place for the initial plaintiff's suit against them, they may be placed at a serious litigating disadvantage. For this reason cross-claims are permissive; it is considered unfair to force co-parties to assert their claims against each other in the atmosphere of the plaintiff's action. A cross-claim for property damage between two corporations may have an entirely different flavor if it has to be presented as part of plaintiff's suit against both defendants for personal injuries. Since cross-claims are permissive, defendants should not face preclusion unless they have chosen to assert those claims.\textsuperscript{176} \textit{Eurich}, however, makes the assertion of cross-claims among co-defendants in a comparative negligence case mandatory; since defendants will lose claims not brought, adding the possibility of preclusion as well may not be a serious additional price.

In support of its contention that it was not abolishing mutuality, the court noted that the nonmutual plaintiffs were clearly not at fault and were, apparently, irrelevant to the discussion. The absence of relevant individual issues bearing on plaintiff's case, however, is a hallmark of situations in which collateral estoppel may be used offensively by a stranger to the first litigation. If the plaintiff's behavior affected liability or if the factual setting of the case differed significantly from plaintiff to plaintiff, the use of nonmutual issue preclusion would be improper.\textsuperscript{177} It is no coincidence that the offensive use of collateral estoppel is often sought in cases like \textit{Kearney}, in which the plaintiffs are not at fault and there are no individual defenses. In \textit{Kearney}, it was the defendants who sought preclusion, but the result should have been the same if the remaining plaintiffs had filed the motion instead. Incidentally, the court's reliance on the Nebraska case is misplaced, for Nebraska has clearly abolished mutuality.\textsuperscript{178} Perhaps it is time for Kansas to do the same.

\textsuperscript{174} See, e.g., Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 845 (3d Cir. 1974).

\textsuperscript{175} 224 Kan. 236, 579 P.2d 1207 (1978). In \textit{Eurich} the supreme court held that in a comparative negligence case named defendants who do not assert their claims against other defendants will be barred from asserting those claims in another action.

\textsuperscript{176} 18 C. WRIGHT & A. MILLER, supra note 84, at § 4450.

\textsuperscript{177} See, e.g., Weinberger, \textit{Collateral Estoppel and the Mass Produced Product: A Proposal}, 15 NEW ENG. L. REV. 1 (1979) (contending that offensive use of collateral estoppel is appropriate only in manufacturing or design defect cases, and not in failure to warn cases because the issues in the latter revolve around such individual matters as the reasonableness of plaintiff's behavior).

\textsuperscript{178} See cases cited in Peterson v. Nebraska Natural Gas Co., 204 Neb. at --, 281 N.W.2d at 527. Nebraska does have a form of comparative fault, but it is not as well-defined as the Kansas scheme. Nebraska allows recovery by plaintiff if plaintiff's negligence is "slight" and defendant's negligence was "gross in comparison." \textit{Neb. Rev. Stat.} § 25-1151. The statute does not define these terms, and the entire matter of whether plaintiff will recover and, if so, how much is for the jury. See C. Heft and C. Heft, \textit{Comparative Negligence Manual} § 3.340 (1978 and Supp. 1983).