Survey of Kansas Tort Law: Part II

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I. INTRODUCTION

This survey of Kansas tort law covers more than a twelve-year period in which the Kansas Supreme Court and the Kansas Court of Appeals produced more than four hundred decisions addressing various tort law issues. In Part I of this survey Dean McAllister and I discussed developments in Kansas negligence law. In Part II of this survey I will discuss developments in other tort actions, including the traditional intentional torts, products liability, wrongful death and survival, defamation and invasion of privacy, misrepresentation, malicious prosecution, tortious interference with economic and family relations, and retaliatory discharge.

II. INTENTIONAL TORTS

A. Intent

In 1927 Kansas adopted the unanimous American rule that insanity does not prevent the existence of an intent for purposes of civil liability. In Williams v. Kearbey an insane defendant shot five people, killing one of them. The court of appeals declined to change the rule governing insanity. The court reasoned that (1) the rule is still unanimous that

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4. Id. at 565–67, 775 P.2d at 672.
insane persons are held liable for their intentional torts,\(^5\) (2) as a matter of public policy the loss should fall on the person who causes it rather than on the injured party or the general public,\(^6\) and (3) insanity does not prevent the existence of intent if the jury could conclude that the defendant hit the plaintiff with the intent of causing a harmful or offensive bodily contact.\(^7\)

The overwhelming judicial approval of the insanity rule in intentional torts is probably best explained by the fact that courts are not yet capable of fully understanding what occurs within the human mind and thus are unable to prevent fraudulent claims of either the existence of insanity or the causal connection between insanity and the injury to another. Moreover, the holding is limited to cases in which the insane person does intend to cause the harm, but his insanity prevents his appreciation of the wrongfulness of his conduct.\(^8\)

The court’s policy rationale requires more careful examination. If the court meant to say that the loss should fall on one who causes the harm rather than on either the injured party or the general public, the rationale is at odds with the rule that fault plus causation, and not causation alone, is normally required for tort liability. The policy is sound only if one first concludes that, despite the insanity, the defendant entertained a sufficient appreciation of his conduct to be considered as having done it intentionally.

**B. Assault**

In Kansas assault is defined as “an intentional threat or attempt, coupled with apparent ability, to do bodily harm to another, resulting in immediate apprehension of bodily harm.”\(^9\) In *Vetter v. Morgan*\(^10\) two

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5. *Id.* at 565, 775 P.2d at 672.
6. *Id.* at 567, 775 P.2d at 673.
7. *Id.* at 569–70, 775 P.2d at 674.
8. *Id.*
defendants drove alongside plaintiff's van, which was stopped at a red light. Defendant passenger leaned through the window of his vehicle, screamed obscenities at plaintiff, shook his fist at her, and verbally threatened to drag her from her van.\textsuperscript{11} As she then attempted to drive away, defendant driver feigned swerving into her lane, causing her to run into the curb and suffer a minor injury.\textsuperscript{12} The court of appeals held that the defendant passenger's conduct was sufficient to constitute an assault and that plaintiff's ability to lock her door and drive away would not negate the assault.\textsuperscript{13}

The court's analysis of the assault claim is noteworthy. Traditionally courts have strictly limited the cause of action to cases in which the actor threatens to commit battery immediately rather than at some time in the future. Two reasons support this strict interpretation. First, assault may be viewed as an action encompassing a narrow category of directly caused emotional distress, which at common law courts were loathe to recognize. Second, the action encompasses some frivolous or trivial claims because it permits nominal damages when an assault actually causes no actual damage. Of course, \textit{Vetter} is not a trivial case involving only nominal damage, and according to the \textit{Restatement (Second) of Torts} "imminent" means only "no significant delay" and not necessarily "immediate."\textsuperscript{14} As discussed in a later subsection, plaintiff failed to state a claim for intentional infliction of emotional distress because plaintiff's being "very, very frightened" without the need for medical assistance was deemed insufficient to establish "severe" emotional distress.\textsuperscript{15} Perhaps the policies of tort law are better served by slightly expanding the meaning of "imminent" for assault rather than significantly weakening the "severe" distress requirement for intentional infliction of emotional distress.

\textbf{C. False Imprisonment and False Arresr}

The essential consequence for false imprisonment or false arrest is confinement or loss of freedom of movement, and the modern rule is that an actor may commit an intentional tort either directly or indi-

\begin{itemize}
\item \textsuperscript{11} \textit{Id.} at 2, 913 P.2d at 1202.
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} \textit{Id.} at 5, 913 P.2d at 1204.
\item \textsuperscript{14} \textit{Restatement (Second) of Torts} § 29 cmt. b (1965).
\item \textsuperscript{15} \textit{See infra} note 41 and accompanying text.
\end{itemize}
rectly. In *Dozier v. Dozier* plaintiff's former wife initiated proceedings to collect unpaid alimony and received a court order requiring plaintiff to make certain payments. When plaintiff failed to make those payments, the court directed the plaintiff to appear in court to show cause why he should not be held in contempt. However, the process server was unable to find plaintiff to serve the order, and upon his former wife's allegation that he was secreting himself, the court issued a bench warrant for his arrest. Plaintiff had in fact filed a notice of a new temporary address, but had failed to serve a copy of that notice on his former wife. When his former wife saw plaintiff and informed the sheriff, plaintiff was arrested and briefly jailed. He subsequently filed a false arrest claim against his former wife. The supreme court affirmed a summary judgment in favor of the former wife.

The court reasoned that false arrest is not committed by one who merely informs the authorities of the circumstances as one believes them to be and leaves it to the discretion of the authorities to take what actions they may deem proper. A bench warrant merely directs the authorities to bring a party before the court. Plaintiff's former wife merely requested a bench warrant when he failed to appear at the contempt hearing and then notified the sheriff when she located him. The decision to jail him was made in the discretion of the authorities, not upon his former wife's motion or insistence. The result is sound. Many aspects of criminal and civil law enforcement depend on citizens providing information in good faith to the appropriate authorities to be acted upon in their discretion. Treating such good faith actions as actionable would deter citizens from providing public authorities with appropriate and desirable cooperation.

The traditional common law rule treated an innocent or reasonable mistake of fact by an actor seeking to recover his personal property from one mistakenly believed to have taken it as sufficient to negate the privilege of recovery of property. This rule put merchants in a quandary. Shoplifting costs merchants millions of dollars each year, and

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18. *Id.* at 1036, 850 P.2d at 791.
19. *Id.* at 1043, 850 P.2d at 795.
20. *Id.*
21. *Id.* at 1042, 850 P.2d at 794.
22. A similar privilege to provide information to authorities that the authorities may act upon in their discretion exists to protect citizens from defamation actions and malicious prosecution claims. See *Restatement (Second) of Torts* § 598 (1977) (stating privilege in defamatory matter if the information affects an important public interest); see also *id.* § 653 cmts. d & g (stating instances in which communication of accusations does not lead to malicious prosecution).
those costs are passed on to honest customers. Yet if a merchant detained a customer in the reasonable but mistaken belief that the customer had stolen some merchandise, the merchant lost the privilege of recovery of property and was subject to a claim for false imprisonment. In response, most states, including Kansas, have recognized a special merchant's privilege to detain for investigation any customer who the merchant reasonably believes has stolen merchandise.

In *Melia v. Dillon Cos.*, defendant store's head of security saw plaintiff take a pouch of tobacco, conceal it in his pocket, and leave the store without paying for it. Defendant held plaintiff for forty-five minutes while waiting for the police to arrive and investigate. The store's privilege is set forth in Kansas Statutes Annotated, chapter 21, section 3424(c), which provides:

Any merchant, or a merchant's agent or employee, who has probable cause to believe that a person has actual possession of and has wrongfully taken, or is about to wrongfully take merchandise from a mercantile establishment, may detain such person on the premises or in the immediate vicinity thereof, in a reasonable manner and for a reasonable period of time for the purpose of investigating the circumstances of such possession. Such reasonable detention shall not constitute an arrest nor criminal restraint.

In reversing a judgment in favor of plaintiff for false imprisonment, the court of appeals rejected plaintiff's argument that mere possession of merchandise is insufficient for probable cause to detain the plaintiff. The court correctly noted that in addition to possession of the tobacco, the head of security also saw plaintiff conceal the tobacco and leave without paying. Second, the court held that as a matter of law, once probable cause is found to exist, the privilege permits the merchant to wait for police to arrive and do the investigation. Both substantive points in the court's holding seem sound. However, the privilege exists only for a "reasonable period of time," and a forty-five minute wait before beginning the investigation of minor shoplifting might raise a question of fact for the jury.

24. Id. at 6, 846 P.2d at 259.
25. Id. at 8, 846 P.2d at 260.
26. Id.
27. Id. at 8–9, 846 P.2d at 260.
D. Intentional Infliction of Emotional Distress

A direct action for intentionally caused emotional distress was first recognized in the Restatement (Second) of Torts.\textsuperscript{28} Prior thereto, emotional distress was recoverable only as parasitic damage added onto some other cause of action. An action for intentional infliction of emotional distress, often referred to in Kansas as the tort of outrage, requires intentional or reckless conduct by defendant that is extreme and outrageous, causing severe emotional distress.\textsuperscript{29} Physical injury resulting from the emotional distress is generally not required.\textsuperscript{30} This action raises the specter of a flood of litigation comprised of both trivial and fraudulent claims. To prevent these abuses, the Restatement (Second) of Torts provides that the court should make an initial determination as to whether a jury could properly conclude the conduct to be extreme and outrageous and the emotional distress to be severe.\textsuperscript{31}

In Taiwo v. Vu\textsuperscript{32} plaintiff resigned her employment at a day care center owned and operated by defendant.\textsuperscript{33} In retaliation, defendant refused to pay plaintiff’s back wages, then locked plaintiff in the day care center, fabricated false criminal charges against plaintiff and her husband, and persuaded another employee to lie to police to corroborate the false charges. At trial, defendant moved for a directed verdict on the ground that the facts were insufficient to permit a jury finding of either extreme and outrageous conduct or severe emotional distress. The trial court submitted the case to the jury without ruling on the motion, and the jury found in favor of plaintiff and her husband.

In an earlier case the supreme court had ruled that “in the first instance” the trial court must determine whether the evidence satisfies the threshold elements of extreme and outrageous conduct and severe emotional distress.\textsuperscript{34} Defendant urged that the trial court committed reversible error in failing to decide the threshold issues raised in the motion for directed verdict before submitting the case to the jury. The supreme court, however, held that taking the motion under advisement is deemed to constitute a submission of the issues to the jury, subject to a later ruling on the two threshold issues.\textsuperscript{35} In essence, the court refused

\begin{footnotes}
\item[28.] Restatement (Second) of Torts § 46 (1965).
\item[29.] Id.
\item[30.] Id. § 46 cmt. k.
\item[31.] Id. § 46 cmt. h.
\item[33.] Id. at 586, 822 P.2d at 1026.
\item[35.] Taiwo, 249 Kan. at 591, 822 P.2d at 1028.
\end{footnotes}
to adopt a rigid procedural timeline for judicial examination of the threshold issues and instead kept its focus on the fundamental substantive and policy consideration of limiting actionable claims to the most egregious cases in order to avoid a flood of fraudulent and fictitious claims.

The approach is sound. Whenever a wrong requires a quantitative and qualitative examination of the allegedly wrongful conduct, the need to limit the volume of cases conflicts with the prevailing standards for summary judgment. Unless the court has express authority to make these threshold determinations, the existence of some evidence in support of the claim might prevent the imposition of summary judgment.

The Kansas courts continue to make the initial determination of whether conduct might be “extreme and outrageous.” For example, the court found sufficient evidence of “extreme and outrageous conduct” to justify submission to a jury when a doctor used the occasion of a court-ordered medical examination to sexually abuse a plaintiff who had previously alleged head and neck injuries caused in a collision.36 However, the courts continue to dismiss as insufficient those cases in which the conduct seemed at most to consist of “mere insults, indignities, threats, [and] petty expressions.”37 Thus, mistakenly entering a home believed to have been abandoned in order to make preparations for foreclosure proceedings,38 settling a medical malpractice case on behalf of the Kansas Insurance Stabilization Fund without first obtaining the defendant doctor’s approval,39 or terminating the employment of an employee accused of stealing when the evidence of stealing was not sufficiently persuasive40 simply did not satisfy the threshold test for extreme and outrageous. Courts also make the initial determination of “severe” emotional distress. Thus, a plaintiff’s feeling “very, very frightened” without any medical or psychiatric treatment was not a sufficient showing of “severe” distress to justify submitting the issue to a jury.41

37. Taiwo, 249 Kan. at 593, 822 P.2d at 1030.
41. Vetter v. Morgan, 22 Kan. App. 2d 1, 4, 913 P.2d 1200, 1203 (1995). Federal decisions based on Kansas law have placed similar emphasis on the absence of medical and psychiatric treatment. See, e.g., Wood v. City of Topeka, 90 F. Supp. 2d 1173, 1195 (D. Kan. 2000) (holding that a plaintiff merely claiming depression was not sufficient to prove severe emotional distress when plaintiff was not hospitalized, seen by a doctor, or given medication); Glover v. Heart of Am. Mgmt.
Generally, these initial determinations seem fact-based, sensible and not controversial. Yet it should be noted that the polemic for extreme and outrageous conduct leaves a substantial portion of the cases without clear guidance. At the top of the pyramid is conduct so “extreme and outrageous” as to be utterly intolerable and beyond all bounds of decency. This conduct is contrasted with “mere insults, indignities, threats, annoyances, petty expressions, or other trivialities.”42 This classic model of contrasting the clear extremes leaves a vast middle ground of serious misconduct falling between the intolerable and the trivial, and at some point the courts must decide when and under what circumstances some portion of those middle ground cases might give rise to liability.

Other allegations of extreme and outrageous conduct may fail because the conduct is privileged. For example, in Clevenger v. Catholic Social Services43 two minor children alleged that they were sexually molested by plaintiff, a social worker hired by defendant Catholic Social Services (CSS) as a therapeutic foster parent for troubled children.44 A CSS employee investigated, terminated plaintiff’s employment, and reported a likely violation to authorities. The authorities never filed charges against plaintiff, who filed an action against CSS for intentional infliction of emotional distress. The court of appeals affirmed a summary judgment in favor of CSS because section 38-1526 of the Kansas Statutes Annotated provided a privilege to any person “participating without malice in the making of an oral or written report to a law enforcement agency or the department of social and rehabilitation services relating to injury inflicted upon a child under 18 years of age as a result of . . . sexual abuse . . . .”45 The court interpreted “malice” in the statute to mean “actual malice” as used in modern defamation cases, i.e., knowledge of falsity or reckless disregard of truth or falsity rather than mere spite or ill will.46 The court held that summary judgment is appropriate when plaintiff makes a bare allegation of malice with no support-

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42. Taiwo, 249 Kan. at 593, 822 P.2d at 1030.
44. Id. at 523, 901 P.2d at 531.
45. Id. at 528, 901 P.2d at 535.
46. See id. at 530, 901 P.2d at 535 (stating the need for direct evidence of malice or at least an indication that the defendant had reason to act in a malicious manner).
ing evidence and with no basis for inferring some reason for defendant to act maliciously.\textsuperscript{47}

The court's adoption of the defamation standard for malice is sound. It follows the trend in other abuse of privilege cases,\textsuperscript{48} and it avoids the pitfalls of bare allegations of ill will or spite, which might too easily survive summary judgment and thus undermine the privilege. The court did not, however, explain how the question of privilege fits into the structure of intentional infliction of emotional distress. The "extreme and outrageous conduct" element refers to conduct that is beyond all bounds of decency and utterly intolerable in a civilized society.\textsuperscript{49} Whatever ambiguity might exist in that standard, it cannot logically include conduct that the state authorizes and indeed encourages.\textsuperscript{50}

\textbf{E. Trespass to Land}

During the survey period the supreme court reaffirmed that trespass to land is an intentional tort and is not based on strict liability. In \textit{United Protein, Inc. v. Farmland Industries, Inc.}\textsuperscript{51} defendant Farmland accidentally caused in 1982 a release of chemicals from its fertilizer plant into the aquifer beneath its plant and then immediately initiated cleanup operations.\textsuperscript{52} Nevertheless, those chemicals eventually leached into and contaminated the ground water beneath an adjoining property that was later purchased by plaintiff United Protein (UPI) with knowledge of the contamination. UPI's subsequent efforts to sell the property were unsuccessful, allegedly because of the chemical contamination. The su-

\begin{itemize}
\item \textsuperscript{47} \textit{Id.} at 531, 901 P.2d at 536.
\item \textsuperscript{48} \textit{See generally} DAN B. DOBBS, \textit{THE LAW OF TORTS} § 416, at 1165–69 (2000) (discussing the abuse or loss of privilege both under the common law and under the current constitutional precedent).
\item \textsuperscript{49} \textit{RESTATEMENT (SECOND) OF TORTS} § 46 cmt. d (1965).
\item \textsuperscript{50} It should be noted that comment g to section 46 of the \textit{Restatement (Second) of Torts} suggests that conduct that is otherwise "extreme and outrageous" might nevertheless be privileged. It uses the illustration of the landlord effecting a heartless but legal eviction of tenants. \textit{RESTATEMENT (SECOND) OF TORTS} § 46 illus. 14 (1965). One may question whether "privilege" is the appropriate word to describe the legality of the landlord's private action. In any event, when the state affirmatively provides a privilege to further a public societal interest, it seems axiomatic that as a matter of law the conduct so encouraged is simply not amenable to the extreme and outrageous characterization.
\item \textsuperscript{51} 259 Kan. 725, 915 P.2d 80 (1996).
\item \textsuperscript{52} \textit{Id.} at 727, 915 P.2d at 82.
\end{itemize}
preme court reversed a nominal damage recovery against Farmland on a theory of continuing trespass.53 The supreme court correctly reasoned that trespass requires intent. Continuing trespass requires that the initial trespass was intentional and that defendant then permitted the contamination to remain on plaintiff’s property.54 If defendant permitted the contamination to remain long enough, then some portion of the contamination would be within the ten-year statute of repose.55 However, intent requires either purpose to enter onto the land of another or knowledge with substantial certainty that the entry would occur.56 Yet UPI alleged that the initial entry on the land was an accident, not that it was intentional. The court concluded that if the initial entry was not intentional, there was no intent for a continuing trespass.57 The result is correct, but the reasoning may require some clarification. Even if the initial entry was accidental, a continuing trespass might occur when defendant purposefully refuses to remove the contamination from the property. However, in this case, there was no evidence of such an intent to leave the contamination on UPI’s property.

The supreme court also reaffirmed the traditional rule that trespass to land allows recovery of nominal damages for physical invasion of another’s land. In *Gross v. Capital Electric Line Builders*58 an electric company temporarily parked its vehicles on plaintiffs’ asphalt-covered vacant lot next to some traffic signals the electric company was installing as part of a highway project, and the State used the lot for a brief time while conducting some spot weight checks on trucks.59 Plaintiffs were unable to prove what damage, if any, resulted from this use of their property, although they alleged that the number and size of cracks in the asphalt had increased. In reversing a summary judgment for defendants on the trespass claim, the supreme court held that plaintiffs could recover nominal damages even if they were unable to prove actual damages.60 Defendants urged the court to follow the emerging rule in cases involving intangible invasion from pollution and allow recovery only if some substantial damage to land occurred. The court refused to substitute the

53. *Id.* at 734, 915 P.2d at 86. The trial court had correctly held that UPI’s negligence and strict liability claims, filed in 1993, were barred by the ten-year statute of repose in section 60-513(b) of the Kansas Statutes Annotated.

54. *Id.* at 729, 915 P.2d at 83.

55. *Id.* at 728, 915 P.2d at 83.

56. *Id.* at 730, 915 P.2d at 84.

57. *Id.* at 729–31, 915 P.2d at 83–84.


59. *Id.* at 799, 861 P.2d at 1328.

60. *Id.* at 804, 861 P.2d at 1331.
substantial damage rule adopted in the intangible invasion cases for the traditional requirement of physical entry. 61

The court’s rejection of defendants’ position is probably the better course of action for two reasons. First, in practical terms this pollution action permits recovery when intangible matter not only passes through the landowner’s airspace, but also sufficiently accumulates on the land to cause substantial damage. This rule attempts to merge principles from both trespass and nuisance, creating a hybrid action which is not limited to intentional invasion, but which then eliminates recovery of nominal damages. This action accomplishes nothing not already available in the existing law of nuisance. The courts would be well advised to retain the distinction between nuisance and trespass, i.e., that nuisance protects the possessor’s interest in the use and enjoyment of land while trespass protects the interest in the possessor’s exclusive possession of the land. An expansion of this rule to physical invasions of land would simply undermine the right of exclusive possession for no persuasive reason. Second, while little practical reason exists to support nominal damage claims, Gross arguably involved something more than nominal damage because defendants used the land for their own purposes without paying the reasonable rental value thereof. Trespass rather than nuisance better serves to protect the plaintiffs’ interests in this situation.

F. Conversion

Conversion is an intentional and unauthorized exercise of dominion and control over the personal property of another that is so substantial as to justify a “forced sale” at the market value of the property to the defendant. 62 Although courts, attorneys, and law faculty will occasionally refer, for convenience of expression, to the plaintiff’s “ownership” of the property, the action technically exists in favor of the party with the right to immediate possession of the property. Thus, in Farrell v. General Motors Corp. 63 a car dealership’s mechanics lien based on repairs performed for the general owner of a van gave the dealership a superior right of possession to that of plaintiff, the general owner, that rendered a conversion claim by plaintiff against the dealer invalid. 64

61. Id. at 803–04, 861 P.2d at 1330–31.
64. Id. at 245, 815 P.2d at 548–49.
On the other hand, possession must be lawful in order to be enforceable against the general owner, and a good faith purchaser of stolen property cannot acquire title. Accordingly, a pawnbroker who acquires stolen goods does not acquire any title and refusal to return the goods to the rightful owner upon demand would constitute a conversion. In addition, the statutory two-month redemption period in section 16-714 of the Kansas Statutes Annotated does not give the pawnbroker a right to retain the property until expiration of the redemption period against the demand of the rightful owner. The rightful owner will be entitled to attorneys' fees as part of the costs of recovering the property.

Finally, conversion was originally applicable only to interferences with physical personal property, not to either real property or to intangible property. While the action still does not extend to real property, courts have expanded the meaning of personal property to include certain intangible personal property rights. For example, in Farmers State Bank v. FFP Operating Partners, L.P. plaintiff bank had perfected a security interest in the inventory of a business. When defendant acquired the business, the bank informed defendant of the bank's security interest in the inventory. Nevertheless, defendant sold off the inventory. The court of appeals relied on the definition of a security interest in section 84-1-201(37) of the Kansas Statutes Annotated as "an interest in personal property" to reject defendant's argument that the bank's security interest was not personal property capable of being converted.

III. PRODUCTS LIABILITY

The most significant development in products liability during the survey period is the adoption by the American Law Institute of a new Restatement (Third) of Torts: Products Liability. This Restatement seeks to define and clarify rules based on the thousands of case decisions interpreting section 402A in the Restatement (Second) of Torts since 1965.

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67. See C.M. Showroom, Inc. v. Boes, 23 Kan. App. 2d 647, 653, 933 P.2d 793, 798 (1997) (stating that courts may award attorney fees against pawnbrokers or dealers according to section 16-720(b) of the Kansas Statutes Annotated).


69. Id. at 712, 935 P.2d at 234.

70. Id. at 714, 935 P.2d at 235.
The Kansas courts have not yet comprehensively addressed this new Restatement. One supreme court decision has rejected at least one comment to the defectiveness section, and one court of appeals decision cites an economic loss subsection with approval. This new Restatement is a thoughtful, balanced work that deserves careful consideration by Kansas courts. Indeed, many of its rules are substantially consistent with existing Kansas product liability law, but a few fundamental points in the new Restatement are in apparent conflict with both Kansas case law and section 402A of the Restatement (Second) of Torts.

A. The Test for Defectiveness—A Prelude.

The most pronounced difference between existing Kansas law and the new Restatement concerns the legal standard governing defectiveness. Section 402A of the Restatement (Second) of Torts adopted the consumer expectations test for all product defects without regard to the type of defect. Under this test a product is “in a defective condition unreasonably dangerous to the user or consumer” when it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”

The consumer expectations test had its origins in the contract law principle that the buyer should receive that which he contracted to receive. Applied to tort actions, however, the consumer expectations test came under sharp criticism by courts and commentators. First, it

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72. See Koss Constr. Co. v. Caterpillar, Inc., 25 Kan. App. 2d 200, 205, 960 P.2d 255, 258 (1998) (discussing the increased number of jurisdictions that follow the “economic loss rule” where a buyer can only sue in tort where injury occurs beyond the damages solely to the goods purchased).

73. RESTATEMENT (SECOND) OF TORTS § 402A cmts. g & i (1965).

74. Id. § 402A.

75. Id. § 402A cmt. i.


77. See Sperry-New Holland v. Prestage, 617 So. 2d 248, 256 (Miss. 1993) (noting a move away from a consumer expectations analysis that is consistent with a national trend); see also Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1036-37 (Or. 1974) (stating that the consumer expectations test is not necessarily a different standard than a negligence standard imposed on a seller).
is limited to latent product dangers that in essence catch the user or consumer by surprise,\textsuperscript{79} while excluding obvious or otherwise known dangers that nevertheless constituted unreasonable dangers.\textsuperscript{80} Second, ordinary consumers generally lack any well-defined expectations about the safety of complex products.\textsuperscript{81} Third, with the focus shifted from the buyer in contract cases to the "user or consumer" in tort cases, courts have had difficulty determining whose expectations should govern in cases where a child was injured by a product purchased by a parent,\textsuperscript{82} an employee was injured by a product purchased by the employer,\textsuperscript{83} a patient injured by a product prescribed by a doctor,\textsuperscript{84} or a bystander injured by a product purchased by a user or consumer.\textsuperscript{85}

The criticism led to the replacement of the consumer expectations test by a modified risk-benefit test. This test first imputed to the seller knowledge of the product's risk and then applied the traditional risk-benefit factors to determine whether a reasonable seller would market a

\textsuperscript{78} See William A. Donaher et al., \textit{The Technological Expert in Products Liability Litigation}, 52 Tex. L. Rev. 1303, 1307 (1974) (calling for the abandonment of reasonable consumer and reasonable seller considerations in products liability cases).

\textsuperscript{79} The consumer expectations test was always well suited to latent manufacturing defects, such as the suddenly exploding bottle or the foreign object hidden in a food product. The new \textit{Restatement} retains the consumer expectations test for food product cases and used product cases. \textit{Restatement (Third) of Torts: Products Liability} §§ 7, 8 (1998). The new \textit{Restatement} avoids using the consumer expectations test for manufacturing defects, but retains strict liability by imposing liability "when the product departs from its intended design." Id. § 2(a).

\textsuperscript{80} See Vineyard v. Empire Mach. Co., 581 P.2d 1152, 1155–56 (Ariz. Ct. App. 1978) (affirming summary judgment in favor of manufacturer and seller because the danger of being crushed because of the absence of a roll-over bar on a heavy vehicle was obvious); see also Menard v. Newhall, 373 A.2d 505, 507 (Vt. 1977) (stating that the danger of eye injury from a BB rifle is generally known).


\textsuperscript{82} See, e.g., Bellotte v. Zayre Corp., 352 A.2d 723, 725 (N.H. 1976) (discussing previous determinations of whether the expectations of parent or child should govern), \textit{modified}, 352 A.2d at 726.

\textsuperscript{83} See, e.g., Jackson v. Coast Paint \& Lacquer Co., 499 F.2d 809, 812–13 (9th Cir. 1974) (noting a lower court's error in instructing a jury that the knowledge and expectations of the employer governed).

\textsuperscript{84} See, e.g., V. Mueller \& Co. v. Corley, 570 S.W.2d 140, 145 (Tex. Civ. App. 1978) (noting an argument over whether the expectations of the physician or the patient should govern).

\textsuperscript{85} See, e.g., Trespalacios v. Valor Corp., 486 So. 2d 649 (Fla. Dist. Ct. App. 1986) (dismissing a product liability claim initiated by the survivors of bystanders shot by a mad gunman on the grounds that the gun was not defective because it did not fail to operate as the consumer expected); Ewen v. McLean Trucking Co., 706 P.2d 929, 934–35 (Or. 1985) (stating that the trial judge's instruction extending the consumer expectation test to include the expectations of anyone who might reasonably come into contact with a product was erroneous).
product in that condition. In essence, this test had its origins in negligence law, but without the preliminary requirement of a foreseeable risk. Under this test, dangers that were obvious or otherwise known to the user or consumer could constitute defects.

Most of the chaos in Kansas product liability law traces back to a series of early cases addressing defectiveness. After adopting Restatement (Second) of Torts section 402A in 1976, Kansas then went through a series of cases addressing defectiveness. First, in 1982 the supreme court adopted the consumer expectations test in Lester v. Magic Chef, Inc. The following year, in Siruta v. Hesston Corp., the supreme court upheld a finding of defectiveness based on risk-benefit analysis in an opinion that made no mention of Lester. In 1984 the court reiterated in Barnes v. Vega Industries, Inc. that Kansas has adopted the consumer expectations test. Barnes cited Lester and ignored Siruta. Later that year the author of the Siruta opinion wrote the opinion in Betts v. General Motors Corp., which held that while Kansas follows the consumer expectations test, risk-benefit evidence is admissible for unstates other purposes.

The new Restatement adopts two major changes: it adopts a different test for each type of defect, and it limits strict liability to manufacturing defects while reverting to negligence-based tests for design and warning defects. Thus, a manufacturing defect will exist “when the product

86. See John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 837–38 (1973) (offering a revised list of factors relevant to the determination of whether a product is unreasonably dangerous); W. Page Keeton, Products Liability—Inadequacy of Information, 48 Tex. L. Rev. 398, 404 (1970) (questioning whether knowing the risks involved with a product’s use would change the way the product was marketed).

87. Whereas the consumer expectations test is logically limited to strict liability actions and should not affect negligence actions, the risk-benefit test might be viewed as a slight movement toward an integrated product liability action bringing strict liability and negligence under a single claim.

88. See generally Wade, supra note 86, at 837–38 (listing the user’s “awareness of the dangers inherent in the product and their avoidability” as a factor to be weighed in a risk-benefit analysis of the product). Some, but not all, generally known or obvious product dangers may render a product defective. Id. at 842–43.

92. Id. at 666–69, 659 P.2d at 808–09.
94. Id. at 1014–15, 676 P.2d at 763.
95. Id.
97. Id. at 115–16, 689 P.2d at 801.
departs from its intended design.”99 The plaintiff does not have to show that the departure from intended design was the result of any fault. By contrast, a design defect will exist only when the manufacturer failed to adopt a “reasonable alternative design” that would have reduced or eliminated unreasonable dangers in the product’s design.100 In essence, this test is a negligence test relying on traditional risk-benefit analysis. A warning defect will exist only “when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings . . . .”101 Limiting the obligation to warn or instruct to foreseeable dangers is a negligence standard.102 The new Restatement thus does not impose strict liability for a design that could not have been made safer under the existing state of the art, nor does it impose strict liability for failure to warn or instruct about product risks that were not knowable under the existing state of the art.103

Unfortunately, the Kansas courts have not yet given any indication that they are considering adoption of this new approach to defectiveness. Rather, the courts still maintain that the proper test in Kansas is consumers’ expectations, but that the plaintiff is allowed, though not required, to introduce risk-benefit evidence for some unstated pur-

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99. Id. § 2(a).
100. Id. § 2(b).
101. Id. § 2(c).
102. The success of the new Restatement may turn in part on the willingness of some academics, judges, and practicing lawyers to overcome that irrational sense that in products liability law negligence is somehow akin to a vulgar four-letter word. It is, in fact, a vibrant cause of action which, if fully applied, could provide users and consumers with substantial levels of product safety. To provide just two examples, it has been an expansion of negligence rather than the adoption of strict liability that provided the analytical basis for abandoning the obvious danger rule, see infra notes 115–123 and accompanying text, and the recognition of a post-sale duty to warn. See infra notes 186–199 and accompanying text.
103. Rather than refer to the “new” Restatement approach, it might be better to refer to it as simply a candid description of the long-practiced approach. Courts frequently talk about strict liability for design and warning defect cases, but never in fact apply it. Indeed, a well-known case, Phillips v. Kimwood Mach. Co., 525 P.2d 1033 (Or. 1974), emphasized that the imputation of knowledge of the product risk to the manufacturer would retain strict liability. Id. at 1038–40. Yet in that case the danger was the propensity of an industrial sanding machine to occasionally kick back a sheet of plywood, injuring the operator. The remedy was the incorporation of slanted metal teeth to catch any kick-back before it could cause injury. Despite all the talk about strict liability, the danger was well known throughout the industry and the metal teeth had already been incorporated into sanders made by other manufacturers and by other models of sanders made by defendant manufacturer. Kansas cases engage in the same charade, talking the language of strict liability in cases involving known or foreseeable dangers with available alternative designs or warnings to address those dangers. See, e.g., Delaney v. Deere & Co., 268 Kan. 769, 790, 999 P.2d 930, 945 (2000) (noting that an alternative design may be introduced in a design defect action); Savina v. Sterling Drug, Inc., 247 Kan. 105, 115, 795 P.2d 915, 924 (1990) (holding that if inadequate warnings exist, a manufacturer cannot use the unavoidably unsafe product exception).
pose. The cases also continue to assume that strict liability applies to all categories of product defect. The result has been serious and ongoing confusion in the Kansas cases.

B. Defectiveness—The Relationship Between Design and Warning Defects

A major ongoing debate in products liability involves the extent to which the user's or consumer's knowledge of a product danger might render the product nondefective. In *Delaney v. Deere & Co.*, plaintiff was operating a front-end loader with a homemade bale fork to lift and move large round hay bales. He was injured when a bale fell off the bale fork. While the defendant who manufactured the front-end loader offered as optional equipment bale forks, holders and clamps, the plaintiff's homemade bale fork did not have any clamps to prevent bales from falling off. The front-end loader was a multi-functional piece of equipment, and plaintiff was in the oil field business, not farming, when he purchased it. The front-end loader adequately warned about the need to use bale clamps with the bale forks when moving large round bales, and plaintiff read and understood those warnings at the time he purchased it. The Tenth Circuit Court of Appeals certified three questions to the Kansas Supreme Court: (1) whether section 60-3305(c) of the Kansas Statutes Annotated applies to design defects; (2) the extent to which Kansas follows comment j to *Restatement (Second) of Torts* section 402A; and (3) whether Kansas would adopt comment l to section 2 of the new *Restatement (Third) of Torts: Products Liability*.

First, the supreme court held that section 60-3305(c) applies only to warnings and instructions and not to product design. Section 60-3305(c) provides in pertinent part:

In any product liability claim any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which

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105. For further discussion, see infra notes 141–45 and accompanying text.
106. 268 Kan. at 769, 999 P.2d at 930.
107. *Id.* at 769, 999 P.2d at 932.
108. *Id.* at 774, 999 P.2d at 936.
109. *Id.* at 782, 999 P.2d at 940.
110. *Id.* at 786, 999 P.2d at 943.
111. *Id.* at 782, 999 P.2d at 940.
could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product shall not extend:

(c) to warnings, protecting against or instructing with regard to dangers, hazards or risks which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product.\textsuperscript{112}

The court reasoned first that as a matter of statutory interpretation, “protect against” simply modifies “warn” because it is paired with “warn” in the introductory sentence.\textsuperscript{113} Moreover, as a matter of public policy, interpreting “protect against” to refer to product design would eliminate any duty to protect users and consumers from product dangers that are obvious.

Second, the supreme court declined to adopt a broad interpretation of comment j.\textsuperscript{114} Comment j to \textit{Restatement (Second) of Torts} section 402A provides that “[w]here warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in a defective condition, nor is it unreasonably dangerous.” The court reasoned that a broad application of comment j would be inconsistent with the court’s “longstanding rejection of the open and obvious danger rule,” and therefore comment j should only apply when the product has already achieved maximum design safety.\textsuperscript{115}

\begin{itemize}
  \item \textsuperscript{112} \textit{Kan. Stat. Ann.} § 60-3305(c) (1994).
  \item \textsuperscript{113} \textit{Delaney}, 268 Kan. at 774–82, 999 P.2d at 936–40. The court’s statutory interpretation of section 60-3305(c) seems sound. The interpretation makes “protect against” redundant, but the statute is replete with redundancies such as “dangers, hazards or risks” and “patent, open or obvious.” No persuasive reason suggests that “protect against” should be given a separate meaning, but not “hazard,” “risk,” “open,” or “obvious.” Moreover, the statute applies to negligence actions as well as strict liability actions. \textit{See Kan. Stat. Ann.} 60-3302(c) (1994) (providing that the Kansas Product Liability Act applies to negligence, strict liability and breach of warranty actions). Thus, the broader interpretation sought by defendant would have completely immunized the seller of a product containing an obvious danger regardless of how unreasonable that danger might be. The court was correct in refusing to adopt such a harsh interpretation of ambiguous language when there is no clear indication that the legislature intended such a result.
  \item \textsuperscript{114} \textit{Delaney}, 268 Kan. at 786, 999 P.2d at 942–43.
  \item \textsuperscript{115} \textit{Id.}, 999 P.2d at 942. This rationale simply does not hold up to routine examination. In \textit{Lester v. Magic Chef}, 230 Kan. 643, 641 P.2d 353 (1982), a two and one-half year old child was severely burned when she brushed against a burner and ignited it while climbing onto a gas stove to reach some cookies. The ignition knob for the burner was a one-motion knob that could be turned on by accident, rather than the two-motion knob that must be depressed and then turned to produce ignition. For a slight increase in price to incorporate two-motion knobs on its stove, the manufacturer could have prevented a crippling accident to a small child. The court rejected the notion that the stove was defective because its design failed to avoid preventable dangers. \textit{Id.} at 654, 641 P.2d at 361. The court also rejected the two-part \textit{Barker} test that allows a plaintiff to proceed under either the consumer expectations test or the risk-benefit test. \textit{Id.; see Barker v. Lull Eng’g Co.}, 573 P.2d 443, 446 (Cal. 1978) (introducing the two-part test which says a manufacturer can be held strictly liable in one of two ways: (1) if a plaintiff can establish that the product failed to perform safely...
Third, the court held that Kansas would not follow comment \( l \) to section 2 of the new *Restatement*,\(^{116}\) which provides:

1. **Relationship between design and instruction or warning.** Reasonable designs and instructions or warnings both play important roles in the production and distribution of reasonably safe products. In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of a safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or warnings. However, when an alternative design to avoid risks cannot be reasonably implemented, adequate instructions and warnings will normally suffice to render the product reasonably safe. Compare Comment \( e \). Warnings are not, however, a substitute for the provision of a reasonably safe design.

The fact that a risk is obvious or generally known often serves the same function as a warning. See Comment \( j \). However, obviousness of risk does not necessarily obviate a duty to provide a safer design. Just as warnings may be ignored, so may obvious or generally known risks be ignored, leaving a residuum of risk great enough to require adopting a safer design.

In rejecting comment \( l \), the court explained that the requirement of a reasonable alternative design in a design defect case is contrary to Kansas law,\(^{117}\) that Kansas follows the consumer expectations test\(^{118}\)—though it allows the introduction of risk-benefit evidence for unstated purposes\(^{119}\)—and that because a majority of states do not require a reasonable alternative design, section 2(b) and comment \( l \) go beyond merely restating the law.\(^{120}\)

It is difficult to make sense of the overall opinion. The first two issues are sound at a public policy level. The court's interpretation of

\(^{116}\) *Delaney*, 268 Kan. at 793, 999 P.2d at 946.

\(^{117}\) Id. at 791, 999 P.2d at 945.

\(^{118}\) Id. at 788, 999 P.2d at 944.

\(^{119}\) Id. at 789, 999 P.2d at 944.

\(^{120}\) Id. at 792, 999 P.2d at 946.
the statute prevents the resurrection of the obvious danger rule that once immunized the manufacturer from any duty to redesign a product if the product had no manufacturing defect and the danger was obvious. 121 Its interpretation of comment j prevents a similar immunity when a warning makes the product danger known to the user or consumer. The widespread rejection of the obvious danger rule 122 and comment j 123 is based on the concern that both rules allow the manufacture and sale of unreasonably dangerous products so long as the manufacturer makes the danger obvious or known to the user or consumer. To the extent that tort law is primarily concerned with establishing standards that avoid or reduce accidents, there is no persuasive justification for allowing a manufacturer to impose on users and consumers the risk of a severe injury that could have been avoided by use of an available, inexpensive safer design. The court’s interpretation of both section 60-3305(c) and comment j is consistent with that broad objective of tort law.

But, the court’s first two holdings raise two concerns. First, both are completely inconsistent with the consumer expectations test adopted in Kansas. If the danger in a product is either obvious or known to the user or consumer, the product cannot be more dangerous than the user or consumer expects it to be. Second, both holdings are consistent with comment l, which is primarily concerned with explaining that the fact that a danger is obvious or known does not necessarily make a product

121. See, e.g., Blankenship v. Morrison Mach. Co., 257 A.2d 430, 432–33 (Md. 1969) (holding that the manufacturer was not liable to the machine operator for failing to equip machines with protective safeguards); Campo v. Scofield, 95 N.E.2d 802, 803 (N.Y. 1950) (holding that the only duty a manufacturer owes is to eliminate any concealed defects); Bartkiewich v. Billinger, 247 A.2d 603, 604–05 (Pa. 1968) (holding that the manufacturer was not liable for a defectively designed machine when it was used in an unusual way).

122. See Auburn Mach. Works Co. v. Jones, 366 So.2d 1167, 1172 (Fla. 1979) (rejecting the doctrine of obvious danger and holding that it is not an exception to liability); see also Owens v. Allis-Chalmers Corp., 326 N.W.2d 372, 376 (Mich. 1982) (holding that the test is not whether risks are obvious, but whether risks are unreasonable and foreseeable); Micallef v. Michle Co., 348 N.E.2d 571, 578 (N.Y. 1976) (holding that ordinary rules of negligence apply rather than the obvious danger doctrine). Despite formal adherence to the consumer expectations test, some Kansas cases have imposed liability for harms caused by obvious dangers. See Prince v. Leeson Corp., 720 F.2d 1166, 1171 (10th Cir. 1983) (holding that manufacturers have a strict duty of care to guard against ordinary dangers); see also Siruta v. Hesston Corp., 232 Kan. 654, 663, 659 P.2d 799, 806 (1983) (holding that a manufacturer of a large round hay baler would be liable for not putting a safety guard over the front portion of it).

reasonably safe. Thus, the court rejects in its third holding the precise rationale upon which it based its first two holdings.

The court's rationale for rejecting comment 1 is troubling. The criticism that the "reasonable alternative design" requirement is new law rather than a restatement of old law is probably wrong, and in any event, irrelevant. It is probably wrong because no state court has ever imposed liability for a defective design when the evidence showed that no feasible safer alternative design was technologically possible under the state of the art. If a feasible safer alternative design is possible under the state of the art, it matters little that a court says it is imposing strict liability. Moreover, the Restatement is a secondary source produced by the American Law Institute for its persuasive value. If a Restatement provision should go beyond the majority rule to a more rational and effective new rule, the authors of the Restatement have committed no "offence" that automatically nullifies their product. The strength of the common law is its ability to permit constant change to make legal rules more just, more efficient, and more compatible with the changing needs of a society.

While the court in Delaney focused on preserving strict liability for design defect litigation, the central issue in the case involved the circumstances under which safety equipment may be sold as optional rather than as standard equipment. This issue is solely one of negligence, i.e., a foreseeable and known risk and a reasonable alternative design that was available to plaintiff for purchase from the manufacturer as optional equipment. A manufacturer may have a nondelegable duty to provide safety devices as standard equipment when they are compatible with all uses of the product. Requiring safety devices as standard equipment


125. It should be noted that in 1965 only one state had already adopted a rule of strict liability for defective products when the American Law Institute adopted section 402A. See Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1962) (holding that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being"). Thus, section 402A could hardly be qualified as a true "restatement" of the law. On the other hand, one could read what courts were doing with the elimination of privity and other contract barriers to recovery in implied warranty actions to conclude that a majority of states had in fact endorsed the concept of strict products liability. See William L. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1147-48 (1960) (indicating how courts are in fact endorsing strict liability upon manufacturers).

126. See Bexiga v. Havir Mfg. Corp., 290 A.2d 281, 285 (N.J. 1972) (finding that the public interest in providing safety devices requires that the duty to install such devices be placed on the manufacturer rather than the ultimate purchaser).
makes little sense when they apply to only one of many uses of the product and the buyer intends a different use for the product, as was the situation in Delaney.

C. Unavoidably Unsafe Products Under Comment k.

Comment k to section 402A of the Restatement (Second) of Torts purports to protect manufacturers from strict liability for defective design in certain situations.\textsuperscript{127} It provides that when highly beneficial products, such as prescription drugs, contain an unavoidable danger, they should not be deemed defective if they are properly made, i.e., no manufacturing defect, and are “accompanied by proper directions and warnings,” i.e., no warning defect.\textsuperscript{128} The classic example is the Pasteur treatment of rabies, which would usually spare the patient from suffering a dreadful death from rabies, but which could on occasion cause severe side effects. Because no effective alternative product was available, comment k characterized the unavoidable danger as not constituting a defect so that the continued availability of the product would not be jeopardized.\textsuperscript{129} In essence, the occasional occurrence of severe side effects would not render the product strictly liable for a defect in design.

Some confusion surrounds the interpretation of comment k by Kansas courts. In \textit{Savina v. Sterling Drug, Inc.},\textsuperscript{130} plaintiff suffered lower body paralysis as a result of undergoing a myelogram to determine the nature and extent of a possible back injury.\textsuperscript{131} As part of the myelogram, the doctor had injected metrizamide, a radiopaque contrast agent, into the thecal sac near the spinal cord. During the development and marketing of metrizamide, defendant manufacturer reported some incidents of “temporary or transient paralysis” that could have been caused by metrizamide, but did not report any incidents of long-term paralysis such as that suffered by plaintiff. Plaintiff’s three expert witnesses all opined that the manufacturer had understated in its drug experience reports the severity of paralysis experienced by some patients and that defendant should have provided a much stronger warning about the risks of paralysis from metrizamide. The manufacturer’s evidence was that

\textsuperscript{127} See RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) (stating that in certain circumstances a manufacturer should escape strict liability, and it should be examined on a case by case basis).
\textsuperscript{128} Id.
\textsuperscript{129} See id. (stating that a manufacturer should not be held strictly liable in all situations).
\textsuperscript{131} Id., 795 P.2d at 918.
there had been no reported incident of permanent paralysis prior to plaintiff’s case.

The supreme court reversed a summary judgment in favor of the manufacturer, holding that the trial court erred in finding that metrizamide was a prescription drug immunized from liability by comment k.132 A portion of the court’s analysis was clearly sound. The court correctly sensed that Savina was not a comment k case at all, but rather just an ordinary warning defect case involving a question of fact as to whether the warnings accompanying metrizamide adequately identified the danger of long-term paralysis.133

Unfortunately, the court did not stop at that point, but rather entered into a lengthy discussion of whether comment k applies to all prescription drugs or only to those that are highly beneficial. If a drug is properly made and is accompanied by adequate warnings, yet contains a danger that is unavoidable in the sense that there is no available safer alternative design that would provide the same benefits with less risk, then the seller cannot be negligent in marketing the drug.134 While some courts apply comment k to all prescription drugs in this situation,135 other courts suggest that the manufacturer could nevertheless be strictly liable for a design defect if the drug is not considered “highly beneficial.”136 In what is hopefully seen as dictum, the court indicated that Kansas would apply comment k only to highly beneficial prescription drugs.137

132. Id. at 119, 795 P.2d at 926.
133. A warning defect may be based on the seller’s overpromotion of the product’s safety or its underpromotion of the product’s dangers. See, e.g., Incollingo v. Ewing, 282 A.2d 206, 278–86 (Pa. 1971) (holding doctors liable for not adequately describing the dangers associated with a drug); Ayers v. Johnson & Johnson Baby Prod. Co., 818 P.2d 1337, 1343 (Wash. 1991) (holding that a manufacturer of a drug is subject to liability if adequate warnings of dangers are not provided).
134. See Savina, 247 Kan. at 115, 795 P.2d at 924 (citing Toner v. Lederle Laboratories, 732 P.2d 297 (Idaho 1987)).
135. See, e.g., Brown v. Superior Court, 751 P.2d 470, 476–77 (Cal. 1988) (applying comment k to all prescription drugs as a matter of law rather than treating the issue as a mixed question of law and fact to be decided on the basis of evidence taken by the trial judge away from the jury).
136. See, e.g., Toner, 732 P.2d at 310–11 (stating that comment k was not intended to provide and should not provide all ethical drugs with blanket immunity from strict liability design defect claims). The new Restatement provides that a prescription drug or medical device is defective in design only when “reasonable health-care providers, knowing of the foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 6(c) (1998).
137. Savina, 247 Kan. at 117–18, 795 P.2d at 925–26. Savina also involved an issue concerning the application of Kansas Statutes Annotated section 60-3304(a) to Sterling Drug’s compliance with government safety standards. It should be noted that this statute allows a manufacturer to be liable despite compliance with a safety standard only when the manufacturer “would and could have taken
This dictum is unsound. It presupposes strict liability for a product design that could not have been made safer under the state of the art at the time of manufacture and sale. Despite much bold talk, courts around the country simply have not imposed true strict liability for product design.\textsuperscript{138} Before making such an abstract leap, the court should describe in simple, clear terms the type of case in which the best possible design under the existing state of the art is deemed legally insufficient and give a cogent rationale for a liability that is not imposed elsewhere in the country.\textsuperscript{139} Moreover, section 60-3304(a) provides that a product with a design that complies with governmental standards is presumed nondefective, and that that presumption can be rebutted only when "a reasonably prudent product seller could and would have taken additional precautions."\textsuperscript{140} This rebuttal provision imposes a negligence standard that would prohibit strict liability for failure to warn about a scientifically undiscoverable danger.

\textbf{D. Nonspecific Defect}

The three specific categories of product defect are manufacturing defects, design defects, and warning defects. The circumstances of certain accidents often provide an inference of product defect without proof of the specific nature of the defect.\textsuperscript{141} In \textit{Jenkins v. Anchem Products, Inc.},\textsuperscript{142} plaintiff alleged in various causes of action that his long-term exposure to a chemical herbicide caused his cancer.\textsuperscript{143} Most of his causes of action relied in whole or in part on a failure to warn rationale. However, plaintiff also alleged a strict liability claim based on a nonspecific defect, arguing that a jury could infer a defect simply from the fact that the herbicide causes cancer. The trial court dismissed the entire action.

\begin{footnotes}
\footnotetext{138. See supra note 103.}
\footnotetext{139. Moreover, the court should examine the impact of Kansas Statutes Annotated section 60-3307(a)(1), which—although inartfully drafted—appears to prohibit in any product liability action evidence of scientific and technological advances that were not within the state of the art when the product was manufactured and sold.}
\footnotetext{141. \textit{See generally} \textit{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY} § 3 (1998) (providing that a product defect can be inferred from the circumstances of an accident).}
\footnotetext{142. 256 Kan. 602, 886 P.2d 869 (1994).}
\footnotetext{143. \textit{Id.} at 602, 886 P.2d at 869.}
\end{footnotes}
The supreme court affirmed the dismissal of the failure to warn claims on the ground that they are preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA),\textsuperscript{144} and it affirmed dismissal of the nonspecific defect claim on the ground that plaintiff failed to allege a sufficient defect in the product.\textsuperscript{145} The court's holding once again reflects the fundamental confusion in Kansas product liability law. Plaintiff's argument is, quite simply, that the herbicide is subject to a strict liability claim of design defect because defendant did not allege that its herbicide was a highly beneficial product covered by comment k. Unless defendant shows that the herbicide is a highly beneficial product, defendant may be held strictly liable for a design defect. Under strict liability, proof of a reasonable alternative design is not required, and the mere allegation that the herbicide causes cancer is a sufficient allegation of a design defect. If the supreme court really means that a reasonable alternative design is not required in strict liability, then plaintiff's argument is accurate and logical. In rejecting plaintiff's argument, the court is really rejecting strict liability in design defect cases. What is unclear is the reason for the court's adamant refusal to admit what it is in fact doing in these cases.

\textbf{E. Compliance with Governmental Safety Standards}

Traditionally, compliance with a safety standard in a statute or regulation is only some evidence of due care or nondefectiveness.\textsuperscript{146} The Kansas Product Liability Act gives some increased legal effect to compliance by creating a rebuttable presumption of nondefectiveness when a product complies with legislative or administrative safety standards:

When the injury-causing aspect of the product was, at the time of manufacture, in compliance with legislative regulatory standards of administrative regulatory safety standards relating to design or performance, the product shall be deemed not defective by reason of design or performance, or, if the standard addresses warnings or instructions, the product shall be deemed not defective by reason of warnings or instructions, unless the claimant proves by a preponderance of the evidence that a reasonably prudent product seller could and would have taken additional precautions.\textsuperscript{147}

\begin{footnotes}
\item[145] \textit{Jenkins}, 256 Kan. at 637, 886 P.2d at 890.
\end{footnotes}
In *Savina v. Sterling Drug, Inc.*\(^{148}\) the manufacturer of metrizamide complied with FDA standards concerning the design of and warnings accompanying metrizamide, a radiopaque contrast agent used in myelograms. Section 60-3304(a) of the Kansas Statutes Annotated consists of three discrete parts: a presumption of nondefectiveness for compliance with design standards, a presumption of nondefectiveness for compliance with standards governing warnings and instructions, and a provision for rebutting the presumption.\(^{149}\) The supreme court rejected the manufacturer's argument that the rebuttal provision applied only to warning defects, not to design defects.\(^{150}\) The court's interpretation is clearly correct.\(^{151}\) The Kansas legislature adopted section 60-3304(a) verbatim from section 108 of the Model Uniform Product Liability Act (MUPLA)\(^{152}\) and should be assumed to have also adopted MUPLA's analysis in the comments accompanying section 108. One of the primary examples given in the MUPLA analysis of section 108 involved rebuttal of the presumption of nondefectiveness in design where a reasonable manufacturer could have feasibly exceeded the level of safety mandated by the Federal Flammable Fabrics Act (FFFA).\(^{153}\)

In *Miller v. Lee Apparel Co.*\(^{154}\) plaintiff suffered burn injuries when a ball of flame from a truck carburetor struck his face and chest.\(^{155}\) He alleged that because the inside lining of his coveralls was not sufficiently flame retardant, the lining caught fire and burned more rapidly and intensely, enhancing his injuries. The outside surface of the coveralls easily complied with the standards of the FFFA, but the inside lining barely met those standards. The evidence showed that alternatives existed allowing manufacturers to make fabric less flammable, that some manufacturers made the inside of clothing flame retardant even though not required to by the FFFA, and that plaintiff's coveralls "could have been made a lot safer."\(^{156}\)

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149. KAN. STAT. ANN. § 60-3304(a).


151. The manufacturer’s argument apparently originates in *Alvarado v. J.C. Penney Co.*, 713 F. Supp. 1389 (D. Kan. 1989). However, the court reversed itself and held that the rebuttal provision applied to design defects as well as to warning defects. 735 F. Supp. 371, 374 (1990).


155. *Id.* at 1017, 881 P.2d at 580.

156. *Id.* at 1018, 881 P.2d at 580.
The court of appeals affirmed summary judgment in favor of the manufacturer on the ground that plaintiff did not meet his burden of proving that a reasonable manufacturer would have taken additional precautions.\textsuperscript{157} The court noted that the plaintiff’s expert did not formally opine that a reasonable manufacturer would have taken additional precautions.\textsuperscript{158} Under a preponderance of the evidence standard, evidence that other manufacturers had previously taken the additional precautions should have been sufficient rebuttal to get past a summary judgment to the jury. The court’s holding seems unduly formalistic and improperly involves the court in a process of weighing the evidence to decide summary judgment motions.

The court also noted that the public policy underlying the Kansas Product Liability Act is “to limit the rights of plaintiffs to recover in product liability suits generally.”\textsuperscript{159} However, the court identifies no category of cases in which recovery was once generally allowed, but is now barred by some provision in the product liability act. In fact, no such category of cases exists. A court should not rely on such an inaccurate generalization to uphold a summary judgment when substantial questions of fact exist.

Finally, section 60-3304(a) is similar to section 4(b) in the new Restatement. However, section 4(b) treats compliance with a legislative or administrative standard merely as some evidence of nondefectiveness. If Kansas courts continue to weigh all the evidence in order to determine whether the presumption in section 60-3304(a) has been rebutted in summary judgment proceedings, the Kansas provision will more broadly immunize product sellers from liability than will section 4(b) of the new Restatement.

\textit{F. Damage to the Product Itself}

Section 402A of the Restatement (Second) of Torts imposed strict liability on a seller of “\textit{any product} in a defective condition unreasonably dangerous to the user or consumer or to his property.”\textsuperscript{160} Strict liability applies to actions for death, personal injury, or physical damage to prop-

\textsuperscript{157} Id. at 1029, 881 P.2d at 588.
\textsuperscript{158} Id. at 1027, 881 P.2d at 586.
\textsuperscript{159} Id. at 1025, 881 P.2d at 585 (quoting Patton v. Hutchinson Wil-Rich Mfg. Co., 253 Kan. 741, 752, 861 P.2d 1299, 1309 (1994)).
\textsuperscript{160} \textsc{Restatement (Second) of Torts} § 402A (1965) (emphasis added).
perty, but not to actions for mere economic loss. In *Koss Construction Co. v. Caterpillar, Inc.*, a Caterpillar roller was damaged when defective hydraulic lines in the roller allegedly caused it to catch on fire while in use on a highway project. The court of appeals held that damage to the product itself was a form of economic loss and not recoverable in either strict liability or negligence. This holding is consistent with the vast majority of decisions in other jurisdictions and with section 21(c) of the new Restatement. The court also rejected two narrower propositions that would permit strict liability and negligence actions when the damage to the product itself resulted from a sudden and calamitous occurrence or from a defect in a component part. In essence, the court viewed these actions as more appropriately left to contract law.

The court’s decision was sound. Damage to the product itself is fairly viewed as mere economic loss because it essentially relates to the buyer’s reasonable expectations of product condition and quality derived from the bargaining process between the parties. Admittedly, full legal recognition of this bargaining process means that all the warranty provisions apply, including privity, notice, disclaimer, and limitation of remedy.

Moreover, the two exceptions proposed by plaintiff would produce undesirable consequences. The sudden calamitous occurrence exception would cause confusion because it focuses on how the economic loss occurred rather than on the fact that it is merely economic loss. The component part exception overlooks the fact that the buyer’s commercial expectations arose in the purchase of the finished product from the immediate seller, not from various raw materials and component parts from remote sellers. This expectations approach applies whether the component part is small, such as the hydraulic hoses in *Koss Construction*, or a substantial component part, such as the engine incorporated


163. Id. at 201, 960 P.2d at 256.

164. Id. at 207, 960 P.2d at 260.

165. The Reporters’ Note to section 21 of the Restatement (Third) of Torts: Products Liability cites relevant cases in other jurisdictions. Indeed, the court in *Koss Construction* cited section 21 of the new Restatement with approval as support for its decision. 25 Kan. App. 2d at 205, 960 P.2d at 259.

into a combine in *Jordan v. Case Corp.*\(^{167}\) Moreover, because virtually all modern products are assembled from various raw materials and component parts, this exception would largely erode the dominance of contract law in economic loss cases.

The denial of tort liability in these cases will rarely, if ever, unfairly prejudice the legitimate interests of plaintiffs. Strict liability and negligence will apply whenever the defect in the product causes personal injury or death to the buyer, user, or any bystander or when it causes damage to property other than the defective product itself. For example, in *Elite Professionals, Inc. v. Carrier Corp.*\(^{168}\) a defective coil in a refrigeration unit for a truck caused a shipment of meat to spoil. The plaintiff would have no remedy for the lost meat in an implied warranty claim because the seller had limited the remedy to repair or replacement of defective parts.\(^{169}\) However, the damage to the shipment of meat was damage to property other than damage to the defective product itself. Accordingly, the plaintiff was allowed to bring the action in strict liability, which does not permit disclaimers or limitations of remedy to restrict the plaintiff’s action.\(^{170}\)

\[\text{G. Seatbelts and Other Safety Devices}\]

In *Watkins v. Hartsook*\(^{171}\) plaintiffs’ three-month-old child was killed in a car accident, and defendant driver of the other vehicle asserted a defense based on plaintiffs’ “improper use” of a child’s safety seat. Although the child had been placed in the safety seat, defendant alleged that plaintiffs, for ease in getting the child in and out of the seat, had installed the seat facing forward in the car, not backward as instructed.

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\(169.\) Id. at 629, 827 P.2d at 1199.
\(170.\) Id. at 631, 827 P.2d at 1201. One difficult point in *Elite Professionals* was the court’s attempt to distinguish the decision in *Corral v. Rollins Protective Services Co.*, 240 Kan. 678, 732 P.2d 1260 (1987), which upheld a $250 liquidated damages provision in an installation and service contract for a fire and burglar alarm system when the fire damage to plaintiff’s home was in excess of $180,000. *Id.* at 684, 732 P.2d at 1265. The relevant distinction is not that *Corral* involved a liquidated damages provision not present in *Elite Professionals*, as the court in the latter case seemed to suggest. Rather, the agreement in *Corral* was a service agreement that explicitly provided that all equipment remained the property of the service provider. Courts have traditionally not applied strict liability to service transactions, which is the most appropriate characterization of the transaction in *Corral*. The new *Restatement* adopts a similar approach to service transactions. See *Restatement (Third) of Torts: Products Liability* § 21 (1998) (discussing contractual limitations between parties involved in service contracts).
and that the buckle on the seat belt was loose. The version of Kansas Statutes Annotated section 8-1346 in effect at the time of this accident provided that “[f]ailure to employ a child passenger restraint system shall not constitute negligence per se.”172 After the accident, but before trial, the statute was amended to state: “Evidence of failure to secure a child in a child passenger safety restraining system or a safety belt . . . shall not be admissible in any action for the purpose of determining any aspect of comparative negligence or mitigation of damages.”173 The supreme court upheld the trial court’s exclusion of all evidence relating to the alleged improper use of the safety seat.174

First, the court rejected defendant’s proposed distinction between nonuse and improper use of the safety seat.175 The court viewed both nonuse and improper use as a form of misuse of the safety seat and noted that in common law actions either form of misuse would be evidence relevant to comparative fault.176 Accordingly, the court concluded that the legislature must have intended the statute to exclude evidence of either form of misuse of a safety seat.177 Certainly, as plaintiffs argued, it would be illogical to recognize a comparative fault defense when a parent puts the child in a safety seat but then inadvertently fails to fasten the buckle securely, but not when the parent does not even bother at all to put the child in the safety seat.

Second, the court considered the evidence of improper use inadmissible for purposes of any common law comparative fault defense.178 Technically, the statute in effect at the time of the accident only barred the use of negligence per se. However, the court relied on the rule of statutory construction that older statutes should be harmonized with newer statutes.179 The court then relied on the historical development of both the judicial and statutory rejection of any defense based on non-use of a seat belt to conclude that the legislature had the same intent when it barred the use of negligence per se.180

The court’s reasoning seems slightly confused. The court could have simply relied on its judicial decisions rejecting any seat belt defense on the ground that a driver owes no duty to anticipate in advance the negligence of another. However, the court gave some indication that it

175. Id. at 764, 783 P.2d at 1299.
176. Id. at 764–65, 783 P.2d at 1299.
177. Id.
178. Id. at 765, 783 P.2d at 1299.
179. Id. at 763, 783 P.2d at 1298.
180. Id. at 763–64, 783 P.2d at 1298.
might be reconsidering its earlier analysis of the common law duty. It noted that there is a common law duty to mitigate damages once a risk is known, and the presence of seat belts in cars puts people on notice of the risk of car accidents.\footnote{Id. at 763, 783 P.2d at 1298.} Of course, any such change in analysis would have no impact so long as the legislature retains its statutory bar to the seat belt and child safety seat defense.

Evidence of nonuse of a seat belt is inadmissible only for purposes of comparative fault or mitigation of damages. In \textit{Floyd v. General Motors Corp.},\footnote{Id. at 763, 783 P.2d at 1298.} the plaintiff driver was paralyzed in a rollover accident.\footnote{25 Kan. App. 2d 71, 960 P.2d 763 (1998).} Plaintiff alleged that a breakdown of the steering column caused the accident, while defendant alleged that the breakdown of the steering column occurred when plaintiff's body struck it during the accident because she was not wearing her seat belt. The court of appeals held that the inadmissibility of seat belt nonuse in Kansas Statutes Annotated section 8-2504(c) specifically for purposes of the comparative fault and mitigation defenses provides an inference that the evidence is admissible for other purposes.\footnote{Id. at 71, 960 P.2d at 765.} This holding seems sound and is consistent with many decisions from other jurisdictions.\footnote{Id. at 73, 960 P.2d at 765.} The only concern is that trial courts use their discretionary power to prevent spurious reasons for the admission of nonuse evidence simply to create prejudice by informing the jury that plaintiff was not wearing an available seat belt.

\textbf{H. Post-Sale Duty to Warn}

A post-sale duty to warn may be important to injured plaintiffs who either lack a basis to sue for a product defect at the time of sale\footnote{Id. at 763, 783 P.2d at 1298.} or would be barred by a statute of limitation or repose in any claim based

\begin{footnotesize}
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\item \footnotesize{181. \textit{Id.} at 763, 783 P.2d at 1298.}
\item \footnotesize{182. 25 Kan. App. 2d 71, 960 P.2d 763 (1998).}
\item \footnotesize{183. \textit{Id.} at 71, 960 P.2d at 765.}
\item \footnotesize{184. \textit{Id.} at 73, 960 P.2d at 765.}
\item \footnotesize{185. \textit{See, e.g., DePaepe v. General Motors Corp.}, 33 F.3d 737, 745 (7th Cir. 1994) (explaining that the "rule does not preclude all seat belt evidence, but only evidence of non-use in assessing whether the plaintiff had been negligent").}
\item \footnotesize{186. The "defective condition" in a product liability claim would have existed at the time of sale, but a design or warning defect would not have been actionable if plaintiffs are limited to a negligence standard by the reasonable alternative design requirement in section 2(b) or the foreseeable risk of harm requirement in section 2(c). \textit{Restatement (Third) of Torts: Products Liability} § 2 (1998). Accordingly, the knowledge needed for an alternative design or for a warning might not become available until after the product has been marketed.}
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solely on a time-of-sale defect.\textsuperscript{187} In \textit{Patton v. Hutchinson Wil-Rich Manufacturing Co.}\textsuperscript{188} plaintiff was injured when a wing on a twenty-eight-foot wide cultivator collapsed on him.\textsuperscript{189} Plaintiff’s father purchased the cultivator in 1977 and the wing collapsed on plaintiff in 1977 while he was replacing the hydraulic cylinder that normally holds up the wing during use of the cultivator. If not fully charged or replaced properly, the hydraulic cylinder will not hold up the wing, and one cannot visually ascertain whether the cylinder is fully charged. The wing fell on plaintiff when he removed a lock pin that held up the wing while the cylinder was being replaced.

Injuries of this nature did not become known in the industry until after the 1977 purchase of the cultivator. In 1983 one of defendant’s competitors developed a secondary wing latch to protect against such accidents and began a program of retrofitting its cultivators. Defendant chose not to retrofit its cultivators, nor did it warn owners about the danger. Plaintiff’s accident then occurred in 1990. In response to questions certified from a federal court, the supreme court held that Kansas does not recognize any duty to retrofit a product with new safety devices, but it does recognize a limited post-sale duty to warn about certain subsequently discovered product dangers.\textsuperscript{190}

The court considered any duty to retrofit to be too broad and burdensome to manufacturers.\textsuperscript{191} Rather, decisions to recall or retrofit products should be left to administrative agencies.\textsuperscript{192} As the court noted, various federal agencies have the power to order recalls of certain products.\textsuperscript{193} This decision was undoubtedly correct and is substantially consistent with the position subsequently adopted in the new \textit{Restatement}.\textsuperscript{194} Recalls and retrofits have the ability to bring older products up to the safety levels of newer products, but the decision of when and to


\textsuperscript{188} \textit{Id.} at 759–63, 861 P.2d at 1313–15.

\textsuperscript{189} \textit{Id.} at 762–63, 861 P.2d at 1315.

\textsuperscript{190} \textit{Id.} at 763, 861 P.2d at 1315.

\textsuperscript{191} \textit{Id.}

\textsuperscript{192} \textit{Id.}

\textsuperscript{193} \textit{Id.}

\textsuperscript{194} Section 11 of the \textit{Restatement (Third) of Torts: Products Liability} limits any duty to recall a product to the seller’s unreasonable conduct in response to a governmental directive to recall the product or the seller’s voluntary undertaking to recall the product. Neither of the two conditions precedent to recall existed in \textit{Patton}. Neither of the two preconditions in section 11 are inconsistent with the fundamental rationale in \textit{Patton}, and one would fully expect the Kansas Supreme Court to adopt section 11 in an appropriate case.
what extent to do so is a complex economic decision that is probably not best left to the courts.

The court recognized a "post-sale duty to warn ultimate consumers who purchased the product who can be readily identified or traced when a defect, which originated at the time the product was manufactured and was unforeseeable at the point of sale, is discovered to present a life-threatening hazard." In addition, this post-sale duty should be decided on a case-by-case basis using a reasonableness test that balances risk and burden considerations; the same reasonableness test should be used to determine whether the warnings should be made directly to the ultimate consumers or may be made indirectly through distributors or retailers; and the manufacturer should have a reasonable time after discovery of the danger to make the requisite post-sale warnings. The court's obvious desire to avoid an overly broad and burdensome duty to warn has merit. Many products have short useful lives, are sold through mass-merchandisers who keep no thorough records of the identity of purchasers, and pose risks that occur only infrequently or cause only minor injury when they occur. Flooding the marketplace with endless warnings about such dangers will do little to prevent accidents, but may do much to add to consumer confusion and court congestion.

Nevertheless, the court's rule may be overly restrictive. Limiting the duty to products containing only life-threatening hazards is too inflexible and excuses inaction for too many serious injuries. For example, machines that sever or mutilate arms and legs and teratogenic chemicals that cause birth defects should not be exempt from a post-sale duty to warn simply because those injuries are not life-threatening. These injuries are devastating to individuals and their families and impose extraordinary expenses on society, and they should be avoided whenever reasonable precautions are feasible. Indeed, while Patton is quite consistent with the subsequently promulgated post-sale duty to warn provision in the new Restatement, that provision only requires a "substantial risk of harm," not a life-threatening one.

Limiting the duty to cases in which the danger was unforeseeable at the time of marketing is another indication that Kansas does not actually

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196. Id. at 760–61, 861 P.2d at 1314.
197. Id.
recognize strict liability for design defects. Otherwise, the unforeseeability of the design defect at the time of manufacture and sale would not protect the manufacturer from liability. The post-sale duty becomes a serious issue only because the basis of liability for design defects is in fact negligence, not strict liability.

The rule in *Patton* is substantially similar to section 10 of the new *Restatement*. Section 10 imposes a post-sale duty to warn when the seller knows or should know that the product poses a substantial risk of harm, the persons at risk can be readily identified and probably are unaware of the danger, the seller may efficiently communicate a warning to those persons, and the risk is substantial enough to justify requiring a warning. This provision requires only a substantial risk of harm, not a "life-threatening" one, and it does not strictly limit the duty to cases in which the defect was unforeseeable at the time of sale of the product.

IV. WRONGFUL DEATH AND SURVIVAL

A. The Kansas Survival Statute

In Kansas a survival action enables the estate of a decedent to recover damages for personal injury claims and specified other claims that existed prior to the decedent's death. In *St. Clair v. Denny* decedent was involved in a two-car collision at an intersection of two county roads. Decedent was unconscious when police arrived at the accident, and he never regained consciousness. There was evidence of skid marks that would allow an inference that decedent had been aware of the pending collision a moment prior to the accident. The supreme court reversed the jury's award of $70,000 damages for the survival action because plaintiff introduced no evidence of any suffering after the collision and no evidence of any actionable mental distress prior to the collision.

The holding seems to constitute an accurate application of existing Kansas law. Prior Kansas cases have awarded post-impact damages for pain and suffering only when the decedent was conscious at some time between impact and death. The only evidence was that when the po-
lice arrived, decedent was unconscious, but had a pulse. While there was a period of time between the collision and the arrival of the police, plaintiff provided no evidence concerning decedent’s state of consciousness during this interval. Thus, there was no evidence from which a jury could have found post-impact pain and suffering. In addition, negligently induced mental distress is not actionable in Kansas without some prior, contemporaneous or resulting physical injury. Injury from the collision does not qualify because the mental distress did not cause the collision.

B. The Kansas Wrongful Death Statute

The wrongful death statute creates a cause of action on behalf of heirs for the wrongful death of the decedent. The action does not concern itself with any damage to the decedent, but rather with pecuniary and nonpecuniary damage suffered by heirs as the result of lost financial and emotional support that would have otherwise been provided by the decedent. The action did not exist at common law and is purely statutory. During the survey period cases have involved interpretation of the scope of the statute, measuring the recoverable damages, and the available defenses.

1. Scope of the Statute

The statute provides for recovery of damages for “the death of a person . . . caused by the wrongful act or omission of another.” In Humes v. Clinton plaintiff sued her doctor for negligence that led to her unwanted pregnancy and subsequent abortion. One of her causes of action was based on the alleged wrongful death of her fetus. The supreme court rejected the wrongful death claim because a nonviable fetus

dent’s consciousness after a car accident); Ingram v. Howard-Needles-Tammen & Bergendoff, 234 Kan. 289, 290, 300, 672 P.2d 1083, 1084, 1091 (1983) (awarding $350,000 to decedent’s estate where decedent survived a collision that caused his truck to fall from a bridge and was ultimately killed when the truck burst into flames); Pape v. Kansas Power & Light Co., 231 Kan. 441, 448, 647 P.2d 320, 325 (1982) (finding evidence sufficient to award pain and suffering damages where decedent was responsive to pain stimuli, was moaning, and could squeeze his wife’s hand).

207. Id.
209. Id. at 591, 792 P.2d at 1034.
is not a "person" as that word is used in the wrongful death statute.\textsuperscript{210} This holding in \textit{Humes} seems sound. It must be emphasized that the holding focuses entirely on statutory interpretation and not on any public policy considerations relating to the abortion debate. The court considered the critical determination to be whether the fetus was viable at the time of the "death."\textsuperscript{211} Viability refers to the capacity of the fetus to live independently and apart from the mother.\textsuperscript{212} Kansas has previously recognized a wrongful death action on behalf of a stillborn viable fetus, but in that case the fetus was capable of a separate existence and thus could be deemed a "person" under the statute.\textsuperscript{213} Similarly, if a nonviable fetus is born alive and then dies shortly thereafter, it had, for a brief time, a separate, independent existence and thus could be a "person" under the statute. However, if the fetus dies before viability, it never had and never was capable of an independent existence, and thus it could not be a "person" under the statute.

The statute also provides that the damages are to compensate the loss suffered by "any one of the heirs at law."\textsuperscript{214} In \textit{Baugh v. Baugh}\textsuperscript{215} a seventeen year-old driver died in a car accident, and was survived by his parents. Four months after his death, a child was born to decedent's girlfriend. After accepting a $100,000 offer to settle the whole case, the parents and the child agreed to divide the settlement amount equally. The court of appeals agreed with the decision to accept the settlement offer, but reversed the allocation of the amount.\textsuperscript{216} The court reasoned that once it was determined that the decedent was in fact the father of the child, the child became decedent's sole heir at law and thus entitled to the entire settlement amount.\textsuperscript{217} The court specifically rejected division of the settlement amount based on the concept of successive heirship whereby the parents would have been the heirs for four months until the child was born.\textsuperscript{218}

2. Damages

The wrongful death statute allows recovery of damages for pecuniary loss without limitation, but caps the amount of damages for nonpe-
cuniary loss.\textsuperscript{219} During most of the survey period the cap was $100,000, but in 1998 the legislature raised the cap to $250,000,\textsuperscript{220} making it consistent with the general cap on nonpecuniary loss in other personal injury actions.\textsuperscript{221} The wrongful death statute is silent about punitive damages, and the supreme court has now held in \textit{Smith v. Printup}\textsuperscript{222} that punitive damages are not available in a wrongful death action.\textsuperscript{223} Allowing punitive damages for conduct that causes injury, but not when the same conduct causes death, may seem illogical and foolish. However, the court reasoned that the wrongful death action is purely statutory and that the express inclusion of both pecuniary and nonpecuniary (i.e., compensatory) damages in a statute that does not mention punitive damages indicates a legislative intent to deny recovery of punitive damages.\textsuperscript{224}

In Part I of this survey we discussed the holding in \textit{Arche v. United States}\textsuperscript{225} that limited recovery of damages for the extraordinary expenses of rearing and educating a severely impaired child to damages not to exceed the period of the child's minority in a wrongful birth action because parents have no legal obligation to support an adult child.\textsuperscript{226} By contrast, in \textit{Laterra v. Treaster}\textsuperscript{227} the court of appeals held that in a wrongful death action involving the death of a minor child's father, damages for loss of financial support may be based on contributions the father would have made during the plaintiff child's lifetime, not merely during his minority.\textsuperscript{228} The two holdings are not necessarily inconsistent. The wrongful birth limitation seeks to find reasonable restrictions on the amount of damages that parents would be obligated to pay but that is in reality beyond the ability of parents to pay. The wrongful death holding is based on amounts that the parent would have in fact

\textsuperscript{222} 254 Kan. 315, 866 P.2d 985 (1994).
\textsuperscript{223} Id. at 334-35, 866 P.2d at 999.
\textsuperscript{224} Id. The author declines to comment on whether blaming the legislature for the punitive damage holding in \textit{Smith} constitutes an affront to comity.
\textsuperscript{225} 247 Kan. 276, 798 P.2d 477 (1990). For the discussion of \textit{Arche} in Part I of the survey, see Westerbeke & McAllister, supra note 1, at 1075-76.
\textsuperscript{226} Arche, 247 Kan. at 290-91, 798 P.2d at 485-86.
\textsuperscript{228} Id. at 733, 844 P.2d at 727.
and voluntarily paid to support the child during lifetime, had not the wrongful act of defendant prevented those payments.

The cap on damages for nonpecuniary loss reflects a limitation on the amount of damages that may be recovered, not a determination of the amount of damages suffered. In both comparative fault cases and in loss of chance cases, the courts have held that the proper sequence of computations is to reduce the total damages in proportion to the plaintiff’s comparative fault or the decedent’s loss of chance and then to apply the cap on nonpecuniary loss, if necessary.

3. Defenses

Defenses to wrongful death actions include defenses based on both the conduct of the decedent and on conduct of the heir or beneficiary. The decedent’s conduct may be a defense because the statute expressly provides that a wrongful death action for damages may be maintained if the decedent “might have maintained the action had he or she lived.” Thus, any defense that would have barred or limited the decedent’s personal injury action, had he or she lived, will operate to similarly bar or limit the heir’s wrongful death action. In addition, defenses may be based on the conduct of an heir or beneficiary, such as the heir whose negligence was the cause of the auto accident in which the decedent died.

This dual source of defenses creates occasional problems with the statute of limitations. The two year statute of limitations governs both personal injury actions and wrongful death actions. In *Crockett v. Medicalodges, Inc.*, plaintiff’s mother was a resident in a nursing home at which defendant doctor provided medical care to the residents. The doctor provided plaintiff’s mother with a prescription drug that was...

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231. Gann, 20 Kan. App. 2d at 141, 884 P.2d at 451; Dickey, 260 Kan. at 16–17, 917 P.2d at 892. For additional discussion, see Westerbeke & McAllister, supra note 1, at 1127–28 (discussing the application of comparative fault to statutory damage caps).
234. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 6 cmt. c, illus. 3 (2000).
236. Id. § 60-513(a)(5).
238. Id. at 434, 799 P.2d at 1023.
unreasonably dangerous to persons having a liver ailment, and plaintiff's mother was known to have a liver ailment. Plaintiff's mother left the nursing home in August 1983 and died in May 1984. Plaintiff filed a wrongful death action in April 1986, which was less than two years after the death, but more than two years after the last possible date of treatment by the doctor. However, the discovery rule for medical malpractice actions could extend the time for filing an additional two years.\footnote{KAN. STAT. ANN. § 60-513(c) (1994).}

The court held that the filing was timely under the wrongful death statute of limitations, but perhaps beyond the malpractice statute of limitations.\footnote{Crockett, 247 Kan. at 442, 799 P.2d at 1028.} If it was beyond the malpractice statute of limitations, the wrongful death action would be barred because the malpractice statute of limitations would have barred the decedent, had she lived, from maintaining a malpractice action against the doctor. However, the trial court's findings did not indicate the date on which the doctor's alleged malpractice was "reasonably ascertainable," and the supreme court remanded the action to determine whether a malpractice action by decedent would have been timely under the discovery rule.\footnote{Id. at 441–42, 799 P.2d at 1028.}

This holding reflects a permissible, though not mandated, interpretation of the statute. Certainly, if the limitations period on the mother's malpractice action had expired prior to the mother's death, prior Kansas cases make clear that the statute of limitations defense would have barred a subsequent wrongful death action based on that malpractice.\footnote{See, e.g., Mason v. Gerin Corp., 231 Kan. 718, 720, 647 P.2d 1340, 1342 (1982) (holding that the injured person must have a right of action at the time of death as a condition precedent to the existence of a right of action for wrongful death).} The question not clearly focused on in Crockett is whether the "had he or she lived" condition precedent to a wrongful death action should be applied at the time the wrongful death action accrues or when it is filed. By opting for the filing date, the supreme court creates the possible problem of a death occurring shortly before the expiration of the personal injury statute of limitations and before the heirs have a reasonable opportunity to assess the situation and file an action. Perhaps the legislature or the courts should consider a grace period to cover that contingency.\footnote{For example, states with statutes of repose occasionally provide a grace period to permit filing with some reasonable period of time when the action accrues shortly before the expiration of the repose period. See, e.g., IND. CODE ANN. § 34-20-3-1 (Michie 1998) (allowing a grace period if}
At one time Kansas cases rejected application of the discovery rule to wrongful death actions on the ground that the death itself put the heirs on notice of the possibility of a claim. Subsequently, a conflict on the issue arose in two decisions of the court of appeals. In Davidson v. Denning, plaintiff's husband died of a pulmonary embolism while being treated in a hospital for burn injuries. One month later, an investigator for plaintiff's attorney discovered some evidence of possible malpractice by defendants. Plaintiff filed a wrongful death action based on medical malpractice more than two years after the death, but less than two years after discovery of the evidence of possible malpractice. In Raile v. Nationwide Agribusiness Insurance Co., a child died shortly after an automobile collision, but plaintiff discovered more than two years later that paramedics may have contributed to the death by failing to use a back board while moving her from the wreck to the ambulance. The court of appeals recognized the discovery rule in Davidson, but not in Raile. The supreme court accepted review in Davidson and held that in limited situations the discovery rule would apply to wrongful death actions, but not in either Davidson or Raile.

The court reasoned that the limitation period accrues when the "fact of injury" is "reasonably ascertainable." In most cases the "fact of injury" means the date of death, which puts one on notice of the obligation to investigate the cause of death. Accordingly, the court held that the discovery rule would extend the time for filing a wrongful death action only when the information necessary to determine the fact of death or negligence "was either concealed, altered, falsified, inaccurate or misrepresented."

The court was undoubtedly correct that the date of death commences the limitations period in the vast majority of cases. But it was also correct in recognizing the propriety of a discovery rule in some limited situations. Certainly, courts have long recognized equitable estoppel in cases in which a defendant uses concealment or deception to cause plaintiff to let the limitations period lapse. The only question is

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248. Id. at 679, 914 P.2d at 948.
249. Id. at 678, 914 P.2d at 948.
250. Id.
251. In re Swine Flu Prods. Liab. Litig., 764 F.2d 637, 641 (9th Cir. 1985) (holding that a county coroner's erroneous assurance that decedent's death was not caused by swine flu could justify delay
whether the rule should be slightly broader to encompass appropriate limited situations in which the plaintiff’s inability to discover either the death or the negligence was not caused by some willful concealment or deception. For example, the discovery rule in a wrongful death action based on products liability would be appropriate when the fact of death is simply not discovered until a few years later when the wreckage of decedent’s helicopter was finally discovered in the wilderness.\textsuperscript{252} The discovery rule might also be appropriate in cases of innocent or inadvertent concealment or misrepresentation not sufficient for fraud, but sufficient for equitable estoppel. The holding in Davidson seems to have sufficient flexibility to permit subsequent consideration of the discovery rule in these and other situations in future cases.

Finally, the supreme court held that governmental immunity in the Kansas Tort Claims Act (KTCA) bars wrongful death actions as well as personal injury actions.\textsuperscript{253} The court correctly reasoned that the legislature did not intend to exempt wrongful death actions by using the word “injuries” in the KTCA as opposed to the word “damages” in the wrongful death statute.\textsuperscript{254} Any decision to the contrary would have been completely inconsistent with the purpose of the KTCA.

V. DEFAMATION

At common law, an action for defamation required a defamatory statement by the defendant “of and concerning” the plaintiff that was published to a third person, causing damage to the plaintiff’s reputation. In most defamation cases, the constitutional concerns of free speech and free press have limited the common law defamation action by requiring plaintiff to prove both falsity and, at some level, the defendant’s knowledge and appreciation of the falsity.

A. Falsity

The United States Supreme Court has held that only in defamation cases concerning a matter of public interest does the plaintiff have the

\textsuperscript{252} See Hanebuth v. Bell Helicopter Int’l, 694 P.2d 143, 144 (Alaska 1984) (allowing the discovery rule to toll the statute of limitations when the helicopter wreckage was not found until almost eight years after the wreck).


\textsuperscript{254} Id.
burden of proving the falsity of the statement.255 In *Gietzen v. Feleciano*,256 plaintiff was a candidate for a state senate seat held by defendant. In response to plaintiff’s “family values” campaign, defendant sent a letter to voters informing them of plaintiff’s battery conviction for spousal abuse and two divorces. The court of appeals affirmed a summary judgment in favor of defendant because plaintiff failed to controvert any of the facts in defendant’s letter to voters, and uncontroverted facts in a summary judgment motion are deemed to be true.257 Because of the procedural context in which uncontroverted facts were deemed to be true, the court had no apparent occasion to comment on the scope of plaintiff’s burden of proving falsity.

B. *Scienter*

At common law defamation was a strict liability action.258 However, in *New York Times Co. v. Sullivan*259 the United States Supreme Court imposed a fault requirement on certain defamation actions in order to satisfy the free speech and free press interests in protecting “uninhibited, robust and wide-open” debate on public issues from the chilling effect of unrestrained defamation liability.260 When the action is against a public official or public figure, the plaintiff must prove that the defamatory statement was made with “actual malice,” which is defined as “knowledge that it was false or with reckless disregard of whether it was false or not.”261 While in most cases the actual malice standard operates to protect the media, the situation may be reversed.

In *Knudsen v. Kansas Gas & Electric Co.*,262 Knudsen was a freelance writer who wrote a story published in the *Kansas City Star* newspaper describing the exclusion of fishermen and other recreational users from the cooling lake at the Wolf Creek Nuclear Power Station jointly owned by Kansas Gas & Electric (KG&E) and Kansas City Power & Light (KCPL).263 KG&E and KCPL officials sought a meeting with editors from the *Star* to discuss what they believed to be false and misleading

257. *Id.* at 490, 964 P.2d at 701. This case brings to mind the offer Sir Winston Churchill once allegedly made to an opponent: “If you will stop lying about my record, I will stop telling the truth about yours.”
260. *Id.* at 270.
261. *Id.* at 280; Curtis Publ’g Co. v. Butts, 388 U.S. 130, 134 (1967).
263. *Id.* at 470, 807 P.2d at 73.
statements in the story and their concern that the Star had failed to verify information with KG&E prior to publication. During this meeting, Koerper, KG&E’s communications manager, made statements questioning plaintiff’s objectivity, honesty and professionalism. Knudsen filed a defamation action against KG&E. In affirming a summary judgment in favor of KG&E, the supreme court held that Knudsen was a limited public figure,\(^{264}\) that KG&E had a qualified privilege to protect its private business interests,\(^{265}\) and that there was no evidence of malice.\(^{266}\)

The holding that Knudsen was a limited public figure seems sound. Public figures fall into two categories: public figures for all purposes based on the person’s position of considerable power, influence or celebrity; and public figures for a limited purpose based on the person’s interjecting himself or herself into a particular public controversy for the purpose of influencing its outcome.\(^{267}\) The court seemed to recognize that participating in public and professional matters as a reporter does not automatically make one a public figure. Rather, public figure status depends on the extent to which the reporter’s participation constitutes an attempt to influence the outcome of a public controversy.\(^{268}\) Thus, Knudsen became a public figure not because he was a reporter, but because in his role as a reporter he was writing under his own by-line in an investigatory tone in an attempt to create a public controversy concerning recreational use at the cooling lake and to influence the outcome of that controversy.\(^{269}\) In an era of advocacy journalism and of journalists as celebrities, with ever-increasing blurring of the lines between reporting facts and rendering opinions, the concept of journalist as limited public figure seems quite appropriate.

In contrast to the actual malice standard applicable to public officials and public figures, the scienter standards applicable to private persons are less restrictive. Private persons not participating in public affairs have not voluntarily assumed the risk of occasional defamation flowing from an uninhibited and robust public debate. Nor do they have the same access to media that public officials and public figures

\(^{264}\) Id. at 479, 807 P.2d at 78.

\(^{265}\) Id. at 482, 807 P.2d at 80.

\(^{266}\) Id. at 483–84, 807 P.2d at 81.

\(^{267}\) Id. at 476, 807 P.2d at 77.

\(^{268}\) See id. at 478, 807 P.2d at 78 (“The nature and extent of an individual’s participation in a particular controversy . . . determines if an individual is a ‘public figure.’”).

\(^{269}\) Id. at 476–79, 807 P.2d at 77–79.
generally have to rebut any defamatory statements made in the course of public debate. Accordingly, the United States Supreme Court held in *Gertz v. Robert Welch, Inc.* that private persons need only prove negligence to recover actual compensatory damages, but must prove actual malice when they seek presumed damages or punitive damages. However, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the United States Supreme Court refined the standard. It held that when private persons are involved in a matter not of public concern, they need only prove negligence even when they seek presumed or punitive damages, and actual malice is required for presumed and punitive damages only when the private figure is involved in a matter of public concern.

The *Gertz* and *Dun & Bradstreet* standards reflect the minimal protections that the federal and state courts must provide in defamation actions. States are free to impose more demanding standards. In Kansas the supreme court chose to adopt the higher *Gertz* standard for private figures. In *Knudson* the supreme court appeared to misunderstand the meaning of *Dun & Bradstreet*. It held that even if Knudson retained his private person status, he would still be required to prove actual malice because he was involved in a matter of public concern. In fact, if Knudson retained his private person status, he would come under the *Gertz* standard and could recover compensatory damages on proof of negligence, and actual malice would be required only if he sought to recover presumed or punitive damages.

Indeed, whether Kansas should adopt *Dun & Bradstreet* and lower its standard in private person defamation actions is a difficult question. Currently, under *Gertz* as adopted in Kansas a private person must prove negligence to recover compensatory damages and actual malice to recover presumed or punitive damages regardless of whether the defamatory statement is a matter of public or private concern. In *Zoeller v. American Family Mutual Insurance Co.*, an adjuster for defendant insurance company allegedly referred to chiropractors in general and to plaintiff chiropractor in particular, as “quacks,” stated that plaintiff charged excessive prices for his services, and made an anti-Semitic slur.

271. *Id.* at 349–50.
273. *Id.* at 763.
about plaintiff.\textsuperscript{277} The court of appeals held that plaintiff would have to prove actual malice in order to recover presumed damages.\textsuperscript{278}

In essence, the court relied on its interpretation of two Kansas Supreme Court decisions, \textit{Knudsen} and \textit{Turner v. Halliburton Co.},\textsuperscript{279} for the proposition that Kansas would not adopt the lower standard authorized by \textit{Dun & Bradstreet}.\textsuperscript{280} It is not clear that the Kansas Supreme Court has really addressed the issue. In \textit{Knudsen}, as discussed above, the supreme court seemed to misunderstand the holding in \textit{Dun & Bradstreet}, but in any event its holding viewed \textit{Knudsen} as a private person engaged in a matter of public concern governed by the \textit{Gertz} standard. Nothing in \textit{Knudsen} could be read as an affirmative comment on a possible lower standard for private persons in matters not of public concern. In \textit{Turner} a supervisor made statements to the police that plaintiff employee was suspected of stealing company equipment and later made a similar statement to a prospective new employer of the plaintiff when asked why the supervisor terminated the plaintiff from his prior job.\textsuperscript{281} The issue was whether the supervisor had a qualified privilege to protect his employer’s business interest and the prospective employer’s business interest, and whether that privilege was abused and lost by actual malice in making the statements. Actual malice is one of the means by which a plaintiff may defeat a defendant’s claim of privilege.\textsuperscript{282} Nothing in \textit{Turner} provides any indication of whether the Kansas Supreme Court would adopt the \textit{Dun & Bradstreet} standard.

Nevertheless, the Kansas Supreme Court might be well advised to adopt the \textit{Zoeller} holding and avoid adopting the \textit{Dun & Bradstreet} standard. The difference between a matter of public interest and one that is not is difficult and largely in the eye of the beholder. For example, in \textit{Dun & Bradstreet} the statements were credit reports containing information about the possible insolvency of a construction company, and it is not clear that economic information in credit reports does not possess some of the characteristics of a matter of public concern. The court should be reluctant to adopt standards that simply create ongoing problems of judicial manageability. Moreover, the debate may be much ado

\textsuperscript{277} Id. at 224, 834 P.2d at 392.
\textsuperscript{278} Id. at 229, 834 P.2d at 395.
\textsuperscript{279} 240 Kan. 1, 722 P.2d 1106 (1986).
\textsuperscript{280} \textit{Zoeller}, 17 Kan. App. 2d at 228–29, 834 P.2d at 394–95.
\textsuperscript{281} \textit{Turner}, 240 Kan. at 3–6, 722 P.2d at 1110–11.
\textsuperscript{282} See id. at 14, 722 P.2d at 1117 (holding that communications from a former to a prospective employer are “subject to a qualified privilege which requires the plaintiff to prove actual malice”).
about nothing. Kansas would not permit recovery of punitive damages for mere negligence in any other case, and nothing inherent in defamation would seem to support a separate rule for defamation cases. Proof of some actual damage is not a significant barrier to a litigant, and avoiding that burden of proof does not justify the confusion engendered by *Dun & Bradstreet*.

C. Damages

In Kansas a plaintiff in a defamation action must prove damage to his or her reputation. In *Moran v. State*, the plaintiff was head of the Cardiothoracic Surgery Unit at the University of Kansas Medical Center (KUMC) when a departmental scandal was revealed in the media. The plaintiff alleged that he was defamed by the University and certain administrators who issued public statements implying that the plaintiff was to blame for the problems giving rise to the scandal. The supreme court held that plaintiff's evidence of a decline in the number of job offers he received, a decline in the number of scholarly articles he was asked to write, and a loss of esteem in the opinions of specific co-workers at KUMC was enough to defeat defendants' summary judgment claim. The court correctly relied on the reasonable inference that adverse consequences immediately following defamatory statements were causally related to the defamatory statements.

In addition, the supreme court rejected KUMC's argument that the abolition of defamation per se in Kansas requires a plaintiff now to prove a quantifiable amount of "special damages" to avoid summary judgment in a defamation action. At common law courts presumed that a libel caused damage to a plaintiff's reputation. However, as previously discussed, *Gertz* held that constitutional considerations prevent a private person from recovering presumed or punitive damages without proof of actual malice. Actual damage refers to any damage, whether pecuniary or otherwise. "Special damages" refer only to pecuniary damage and are required in certain slander actions to ensure that a slan-

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285. *Id.* at 584, 985 P.2d at 129.
286. *Id.* at 590, 985 P.2d at 133.
287. *Id.*
288. See *id.* at 598, 985 P.2d at 137 (holding that plaintiff's submitted damage requests were not "special damages" and did not require expert corroborative testimony).
der action involves something more than trivial harm.\textsuperscript{291} \textit{Gertz} requires only proof of some actual damage, not special damages.\textsuperscript{292} The \textit{Moran} court correctly held that plaintiff's evidence of actual damage was sufficient to avoid summary judgment. Moreover, the situation in \textit{Moran} provided no basis for a special damage requirement. The statements were intended for repetition in the media and thus would constitute libel, which does not require proof of special damages. Even if the statements were considered slander, special damages are not required in cases of slander per se, as in \textit{Moran} where the statement concerned the conduct or performance of plaintiff's business, office, or profession. The supreme court correctly rejected the defendants' special damages arguments as being based upon an erroneous understanding of well-established legal rules.

\textbf{D. Qualified Privileges}

An actor has a qualified privilege to publish a defamatory statement that he reasonably believes to be necessary to protect an important interest of the publisher,\textsuperscript{293} an important interest of the recipient or a third person,\textsuperscript{294} or an important common interest.\textsuperscript{295} Thus, in \textit{Dominguez v. Davidson},\textsuperscript{296} the plaintiff's supervisor was protecting interests of third persons when he informed both his employer and the employer's workers' compensation insurance carrier that the plaintiff was playing in baseball games despite medical restrictions on his physical movements while on medical leave from his employer for a work-related back injury.\textsuperscript{297} Similarly, in \textit{Knudsen}, Koerper, an agent of KG&E, was protecting both his company's own interest in having its actions portrayed accurately in the media and the newspaper's interest in not publishing unprofessional and inaccurate news stories when he complained to a newspaper's editors about bias, inaccuracy, and unprofessionalism in an article written by plaintiff, a free-lance writer.

However, even if the occasion for a qualified privilege exists, the privilege may be lost if abused.\textsuperscript{298} A privilege may be abused by making

\begin{flushleft}
\textsuperscript{291} \textit{Id.} \textsuperscript{292} \textit{Gertz}, 418 U.S. at 350. \\
\textsuperscript{293} \textit{RESTATEMENT (SECOND) OF TORTS} \textsuperscript{294} \textit{Id.} \textsuperscript{295} \textit{Id.} \\
\textsuperscript{296} 266 Kan. 926, 974 P.2d 112 (1999). \\
\textsuperscript{297} \textit{Id.} at 934–35, 974 P.2d at 119–20. \\
\textsuperscript{298} \textit{RESTATEMENT (SECOND) OF TORTS} \textsuperscript{299} (1977).
\end{flushleft}
the defamatory statement with actual malice, by publishing the statement for an ulterior purpose, by publishing the statement to persons other than those whose interest is being protected, or by including defamatory matter not necessary to the interest being protected. 299 Thus, in Dominguez the court noted that the defamatory statement was communicated only to interested persons, not to the community at large. 300 Similarly, in Knudsen, Koerper spoke only to editors of the newspaper and to only those KG&E employees with a managerial interest in the newspaper article. He included only matters relevant to the newspaper article in question. Neither minor inaccuracies of the statement in Dominguez nor the angry tone of Koerper’s memo to KG&E managers was sufficient to establish actual malice. 301 Both holdings seem to be sound applications of the principle that employees should have some freedom to act in good faith to protect their employers’ business interests. 302

VI. INVASION OF PRIVACY

One form of invasion of privacy occurs when defendant appropriates plaintiff’s name or likeness. 303 In Haskell v. Stauffer Communications, Inc., 304 unknown persons printed and distributed “Wanted” posters that bore a picture of plaintiff, described his penchant for carrying concealed weapons, suggested that he be incarcerated or committed,

299. Id. § 599 cmt. a. See Knudsen v. Pacific Gas & Elec. Co., 248 Kan. 469, 481, 807 P.2d 71, 80 (1991) (“There is no privilege if the publication is made primarily for the purpose of furthering an interest that is not entitled to protection, or if the defendant acted principally through motives of ill will . . . .”).

Kansas Statutes Annotated section 65-442(a) provides a qualified privilege for statements made in the course of hospital committees. In Smith v. Farha, 266 Kan. 991, 974 P.2d 563 (1999), plaintiff doctor made a presentation to doctors at a hospital about new medical techniques, and in the course of that presentation defendant doctor made a defamatory statement about plaintiff’s possible loss of staff privileges at another hospital. The court of appeals held that section 65-442(a) applied to statements made in the course of peer review committee activities and viewed the presentation to be an aspect of peer review. Id. at 996, 974 P.2d at 567. Nevertheless, the court reversed summary judgment for defendant because malice would defeat the statutory privilege and because a question of fact existed as to whether defendant’s statement might qualify under the actual malice standard because it was based on nothing other than gossip. Id. at 997, 974 P.2d at 568.

300. 266 Kan. at 938, 974 P.2d at 121.


302. In St. Catherine Hospital of Garden City v. Rodriguez, 25 Kan. App. 2d 763, 971 P.2d 754 (1998), a consultant hired by the hospital recommended that the hospital discontinue its use of plaintiff’s radiology services and equipment. The court of appeals affirmed summary judgment in favor of the hospital on the ground that plaintiff had failed to show any actual damage. Id. at 768–69, 971 P.2d at 757–58. The better rationale would have been that the communications were privileged in order to protect the hospital’s private business interests.


referred the reader to news stories and law enforcement agencies for additional information, and offered a reward.\textsuperscript{305} Defendants, a newspaper and its reporter, published an article about these posters. The article carried a picture of the plaintiff, clarified that plaintiff was not wanted by law enforcement and that carrying a concealed weapon was not against the law, and included comments from the local police chief about plaintiff's legal but frightening behavior.

Plaintiff filed an action against the newspaper, the reporter, and others, alleging numerous causes of action, including one for appropriation of name or likeness. The trial court refused defendants' proposed jury instructions containing (1) a commercial appropriation requirement and (2) a newsworthiness privilege.\textsuperscript{306} In reversing a jury verdict for plaintiff, the court of appeals imposed on appropriation actions both a commercial use requirement and a newsworthiness privilege.\textsuperscript{307}

The reversal was clearly correct. The use of plaintiff's name and picture in the news story does not constitute an appropriation within the meaning of the Restatement. Appropriation of name or likeness involves taking advantage of and appropriating to defendant's own use another person's reputation, prestige or other values associated with the person.\textsuperscript{308} The Restatement does not provide a newsworthiness privilege for this form of invasion of privacy, although it does exempt from liability mere "incidental use" of one's name or likeness. An appropriation does not occur when the person's name is merely mentioned "in connection with legitimate mention of his public activities . . . . Thus a newspaper . . . does not become liable . . . to every person whose name or likeness it publishes."\textsuperscript{309} While "incidental use" might encompass some uses of a person's name or likeness that are not necessarily "newsworthy," a newsworthiness privilege would logically seem to be a subcategory of incidental use.

The commercial use holding is more problematic. Admittedly, the overwhelming majority of uses of a name or likeness that constitute appropriations are commercial, such as the use of the name or likeness of a

\textsuperscript{305} Id. at 541, 990 P.2d at 164.
\textsuperscript{306} Id. at 543, 990 P.2d at 165.
\textsuperscript{307} Id. at 544-45, 990 P.2d at 165-66. The jury instructions inadvertently failed to describe the elements of the cause of action, but the court's decision does not appear to have made that procedural oversight the basis for its reversal.
\textsuperscript{308} RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977).
\textsuperscript{309} Id.
star athlete or celebrity to promote a product. However, the Restatement does not limit appropriation to commercial uses. Use of a person's name on a political petition or to promote a charitable event should also constitute an appropriation. Nothing in Haskell required the court to impose a commercial use limitation. The court might have been well advised to defer the commercial use issue and to base its decision solely on the newsworthiness privilege.

Another form of invasion of privacy involves false statements that place the plaintiff in a false light. This action parallels to some extent defamation, but some important differences exist. For example, in Dominguez v. Davidson, plaintiff had been placed on leave from his employment and the doctor had ordered light duty work restrictions with limited bending from the waist. When plaintiff's supervisor saw plaintiff playing baseball while on leave, he terminated plaintiff's employment, accusing plaintiff of "theft, stealing from the company benefits department, [and] making a false claim[.]" In affirming summary judgment in favor of defendants, the supreme court held that plaintiff failed to establish the "publicity" element of false light invasion of privacy. While defamation requires only a "publication" of the defamatory statement to a single third person, false light invasion of privacy requires that the false statement be given widespread "publicity" likely to reach the community at large. This more demanding publicity requirement seems sound. Because a false statement sufficient for false light invasion of privacy need not be defamatory, the harm to reputational interests is theoretically insignificant until the statement reaches a larger audience. Moreover, if the false statement is also defamatory, an alternative action in defamation is available even though the statement has been published to only a small number of persons.

310. Id. § 652C illus. 1.
311. See id. § 652C cmt. b (stating that the rule is not limited to commercial uses).
312. Id. § 652C illus. 5.
313. See id. § 652E (stating that a person who publicly places another in a false light can be held liable if the action was highly offensive to a reasonable person and the person knew or acted in reckless disregard of the probability it would place the other in a false light).
315. Id. at 928, 974 P.2d at 115.
316. Id. at 935, 974 P.2d at 119.
317. Id. at 937–38, 974 P.2d at 121.
319. Id. § 652D cmt. a; see also Ahl v. Douglas Cable Communications, 929 F. Supp. 1362, 1383 (D. Kan. 1996) (stating that a publication to employees at a staff meeting does not constitute the public disclosure necessary for plaintiffs to prevail on their claims of publicity to private affairs and publicity in a false light).
Finally, qualified privileges to commit defamation to protect private interests apply equally to false light invasion of privacy.321 Thus, in Dominguez, plaintiff's supervisor had a qualified privilege to make statements placing plaintiff in a false light in order to protect the employer's business interests because the supervisor's statement that plaintiff had stolen company benefits was made without malice and only to persons concerned with the company's benefits program.322

VII. MISREPRESENTATION

A. Intentional Misrepresentation

One element in an action for intentional misrepresentation, commonly known as fraud, is a false representation made by the defendant.323 Historically, a false representation required some affirmative statement or conduct to mislead the plaintiff, and mere nondisclosure was not sufficient to satisfy the "false representation" element. However, in the modern era the mere nondisclosure rule has been largely negated by exceptions, and now the Restatement324 and the Kansas cases325 recognize liability in certain cases of mere nondisclosure.

In Boegel v. Colorado National Bank of Denver,326 plaintiff was interested in purchasing a 3800 acre farm with an irrigation system that was being sold by defendant bank.327 The bank had recently acquired the farm in foreclosure proceedings. Plaintiff toured the farm with Kerst, a consultant hired to do inspections for the bank. Kerst told plaintiff that one well was bad, a second well needed to be reworked, and the rest of the wells were in "good shape."328 The bank had in its files, but did not

321. Id. § 652G.
322. Dominguez, 266 Kan. at 938, 974 P.2d at 121; see also Castleberry v. Boeing Co., 880 F. Supp. 1435, 1442–44 (D. Kan. 1995) (finding that defendant's alleged statement regarding plaintiffs' discharge was qualifiedly privileged because it was made in good faith, was communicated to those who had an interest in the matter, and did not exceed the scope of the interest).
324. See id. § 551 (stating that a person can be liable for nondisclosure in a business transaction).
325. See, e.g., Griffith v. Byers Constr. Co. of Kan., 212 Kan. 65, 73, 510 P.2d 198, 205 (1973) (stating, in a home owners' action for fraudulent concealment against the developer, that "[t]he silence of the appellee, Byers, and its failure to disclose this defect in the soil condition to the purchasers could constitute actionable fraudulent concealment"); Jenkins v. McCormick, 184 Kan. 842, Syl. ¶ 1, 339 P.2d 8, 9 (1959) (holding that "the silence and failure of [a] vendor to disclose [a] defect in [a] property constitutes actionable fraudulent concealment").
327. Id. at 547, 857 P.2d at 1363.
328. Id.
show plaintiff, a "well list"329 prepared by a tenant that indicated problems with eight or more of the twenty-one wells. Nor did the bank disclose notes made earlier by Kerst and an appraiser's report indicating some problems in a few additional wells. Plaintiff was an experienced irrigation farmer and had reasonable opportunities to inspect the wells and to question tenants and others about the wells, but did not do so. However, the purchase agreement indicated that plaintiff was relying on his own inspection of the wells and not on any representation made by the bank or the bank's agents.

In affirming a jury verdict in favor of the bank, the court of appeals reasoned that there was no "concealment" sufficient to constitute a false representation, particularly in a case where the contract of sale specified that the plaintiff buyer was relying on his own inspections.330 In one sense, there is nothing noteworthy about the case because the jury had competent evidence upon which to base its verdict. Nevertheless, one point of clarification is appropriate. The court did not carefully distinguish between concealment and nondisclosure. Concealment is generally viewed as conduct taken to hide from the buyer some matter that would be important to the buyer, such as covering up a crack in a car's engine block with grease to hide the defect from a buyer.331 As such, it is a form of affirmative representation, made by conduct rather than words. In Boegel there was no such conduct, but Kerst's statement that the other wells were in "good shape," when his notes indicated otherwise, might have been viewed as an affirmative misrepresentation.332

By contrast, a nondisclosure is normally actionable only when the seller is under a duty to disclose certain information to the buyer.333 The court noted that a duty to disclose would arise in cases where (1) there was a disparity in either bargaining power or expertise, (2) a known defect was not known to or reasonably discoverable by the buyer, or (3) the seller knows the buyer is entering the contract pursuant to a mistake about important facts and, because of custom in the trade, the buyer

329. Id. at 548, 857 P.2d at 1364.
330. See id. at 551, 857 P.2d at 1365 ("Moreover, the contract required Boegel to rely on his own inspections rather than the Bank's express or implied representations.").
331. See, e.g., Lindberg Cadillac Co. v. Aron, 371 S.W.2d 651, 651 (Mo. Ct. App. 1963) (holding that there was evidence to support the finding "that defendant in trading to plaintiff an automobile in part payment of purchase price of a new automobile concealed fact that engine block was cracked"); RESTATEMENT (SECOND) OF TORTS § 550 (1977) ("One party . . . who by concealment . . . intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.").
would reasonably expect disclosure of those facts. The court observed that the buyer was an experienced irrigation farmer, the seller did not know that the buyer had not inspected the wells, as called for in the agreement, and thus the seller was not necessarily aware the buyer was proceeding on the basis of a mistake. All of these reasons relate to a conclusion that a mere nondisclosure was not actionable fraud under these circumstances. To avoid unnecessary confusion in future Kansas cases, courts should distinguish more carefully between liability for active concealment and liability for mere nondisclosure.

B. Negligent Misrepresentation

During the survey period the Kansas Supreme Court recognized section 552 of the Restatement (Second) of Torts governing negligent misrepresentation causing economic loss. In Mahler v. Keenan Real Estate, Inc., plaintiffs were negotiating to purchase a house and 160 acres of rural land and asked the real estate agent whether there were any water problems. The agent responded that there were none, when in fact the property had an abandoned cesspool, some unplugged abandoned wells, and slightly elevated sulfate levels in the well water. There was no basis for suggesting the misrepresentation was intentional, and the issue was whether Kansas would recognize an action for negligent or innocent misrepresentation.

First, the court held that the 1986 amendments to the Kansas Real Estate Brokers’ and Salespersons’ License Act (KREBSLA) barred only a private action against a real estate agent for a violation of KREBSLA, but did not bar any common law action for negligent or innocent misrepresentation against a real estate agent. Second, the court’s prior decisions had imposed liability for negligent or innocent misrepresentation on sellers and on agents who relayed to buyers their sellers’ representations, and the court found nothing in those decisions barring any common law negligent misrepresentation action against real

335. Id. at 547, 857 P.2d at 1363.
336. Id. at 550–51, 857 P.2d at 1365.
338. Id. at 594, 876 P.2d at 610.
339. See id. at 597–98, 876 P.2d at 612 ("Thus, we consider if a cause of action for negligent misrepresentation against a real estate agent is recognized in this state.").
estate agents. Third, the court adopted section 552 as a reasonable statement of the principles guiding its prior decisions.

On balance, the decision appears sound. The holding imposes on real estate agents the same duty of reasonable care that other professionals must already satisfy and the same duty that is imposed on real estate agents in the majority of other states. Moreover, the court makes clear that the basis of liability is negligence, not strict liability, despite some statements in prior cases that Kansas might recognize liability for innocent misrepresentation.

Finally, section 552 is a reasonable and balanced rule for negligent misrepresentation. First, it limits liability to transactions occurring in the course of defendant's business, profession, or employment, or in which defendant has a pecuniary interest, and defendant must be providing the information for the guidance of others in their business transactions. These limitations avoid the concern about liability for so-called curbside advice and other casual comments. Second, the loss must be suffered by a person or a limited group of persons for whose benefit defendant supplied the information and whom defendant intends to influence or knows will be influenced in the intended transaction or in a substantially similar transaction. These limitations reasonably restrict the number of potential plaintiffs and thus negate the fear of unlimited liability.

In an effort to allay the realtors' worries about the possibility of expansive new liability, the court in Mahler noted that realtors could protect themselves by various means, including investigation of the seller's representations, requiring the seller to sign and certify as true a written list of representations to be made, and disclaiming knowledge of adverse

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342. Id. at 600-05, 876 P.2d at 613–18.
343. Id. at 604, 876 P.2d at 616; see also RESTATEMENT (SECOND) OF TORTS § 552 (1977) (defining the cause of action for negligent misrepresentation).
344. See Mahler, 255 Kan. at 606, 876 P.2d at 617 (“We know of no valid reason to treat real estate agents differently than other agents . . . .”).
345. Id. at 606-08, 876 P.2d at 617–18. RESTATEMENT (SECOND) OF TORTS section 552C governs innocent misrepresentation, but it is far narrower than section 552 regarding the transactions covered and the damages allowed. It has not yet been recognized in Kansas.
347. Id. § 552(2)(a).
348. The liability of accountants has been a perplexing issue in negligent misrepresentation cases around the country, but Kansas has addressed the issue by statute. See KAN. STAT. ANN. § 1-402 (2000) (stating the restrictions on liability for professional negligence). In Gillespie v. Seymour, 14 Kan. App. 2d 563, 796 P.2d 1060 (1990), the court of appeals characterized the statute as merely codifying the common law negligence rules governing liability for professional accounting services. Id. at 575–76, 796 P.2d at 1068–69. The court then held that the statute does not violate the guarantee of a remedy for wrongs by due course of law in section 18 of the Kansas Bill of Rights because the statute provides an adequate substitute for the common law actions. Id.
conditions. In *Hamtil v. J.C. Nichols Real Estate*, the sellers of a house in a written "Seller's Disclosure Statement" declared only that they did not know of any water leakage or damage. The buyers had the house inspected by a professional, who reported finding no significant problems. At the closing, the buyers, represented by counsel, signed a "Buyer's Acknowledgment and Agreement," stating the following: the buyer has inspected the property; agrees to purchase the house in its present condition; agrees to verify any material information by independent inspection; acknowledges that neither the seller nor the realtor is expert at detecting and repairing defects; and is not relying on any representations other than those, if any, that the buyer wrote on blank lines provided for that purpose on the form. The buyers did not identify any representations in the space provided on the agreement. After completing the purchase, the buyers discovered water leakage and rotted wood in various places throughout the house.

On an interlocutory appeal, the court of appeals relied upon the "Buyer's Acknowledgment and Agreement" to order summary judgment in favor of the realtor. The court reasoned that the freedom to contract means that parties are free to make their own contracts on their own terms so long as the contract is legal, not contrary to public policy, and not fraudulent. The court viewed the buyers as entering the contract knowingly and voluntarily. In addition, because the buyers made their own inspection, used a professional inspector, and were represented by counsel at the closing, they did not rely on any statement by the realtor.

In essence, the court viewed the agreement as a disclaimer of liability. As a general rule, disclaimers are permitted in negligence actions, although strictly construed against the drafter of the document.

351. *Id.* at 810, 923 P.2d at 515.
352. *Id.* at 814, 923 P.2d at 517.
353. *Id.* at 813, 923 P.2d at 517.
354. *Id.*
355. *Id.* at 813–14, 923 P.2d at 516–17.
356. *Id.* at 814, 923 P.2d at 517.
357. Although courts recognize the right to disclaim negligence liability in theory, one simply does not find cases in which a disclaimer has in fact barred an ordinary consumer in a personal injury negligence action. See, e.g., Omni Flying Club, Inc. v. Cessna Aircraft Co., 315 N.E. 2d 885, 888 (Mass. 1974) (holding that buyer's negligence action was not barred by a manufacturer warranty disclaiming obligation); Blanchard v. Monical Mach. Co., 269 N.W. 2d 564, 566 (Mich. Ct. App.
Moreover, given the extensive inspection done on behalf of the buyers, it is not clear from the facts of the case how they were able to discover after purchase that which they and their professional could not discover before the purchase. Nevertheless, some points are troubling. The provision in the agreement that the realtor is not an expert seems slightly at odds with the requirement that realtors must pass a state examination\textsuperscript{358} in order to become licensed and thus should be assumed to possess some expertise. Moreover, this disclaimer could be at odds with cases in which the seller or realtor simply fails to disclose known defects in the house. Although there appears to be no abuse in the use of the disclaimer in \textit{Hamtil}, courts should nevertheless monitor the use of such disclaimers to ensure that they do not evolve into an unfair device to avoid the realtor's responsibility in these transactions.

The general purpose of damages is to restore a party to where it was prior to the negligent misrepresentation. In \textit{Horsch v. Terminix International Co.},\textsuperscript{359} plaintiffs agreed to purchase a farmhouse and outbuildings on five acres of land for $50,000. Prior to the closing, plaintiffs relied on defendant pest control company's inspection report that it had observed no termites or termite damage. After the closing, they found termite damage. The court of appeals affirmed a jury verdict awarding $5045 for physical repairs of the damage plus $12,500 for loss of the house's market value.\textsuperscript{360}

If the damage to the house was simply temporary, the $5045 should have been sufficient to restore plaintiffs to the position they were in prior to the misrepresentation.\textsuperscript{361} However, the court allowed the additional $12,500 in damages for permanent loss of market value because expert testimony established that the market price is adversely affected by the concern of home buyers about houses that have previously suffered termite damage.\textsuperscript{362}

\textsuperscript{1978} (reversing a directed verdict in favor of seller despite the fact that seller sold the product to consumer "as is"). Even in cases between commercial parties, disclaimers of negligence liability are strictly construed against the drafter and rarely upheld. See, e.g., Posttape Assoc. v. Eastman Kodak Co., 387 F. Supp. 184, 186 (E.D. Pa. 1974), \textit{rev'd on other grounds}, 537 F.2d 751 (3d Cir. 1976) (stating that such a contract disclaiming negligence liability "is not favored by the law and must be construed strictly").

\textsuperscript{360} \textit{Id.} at 135, 865 P.2d at 1047.
\textsuperscript{361} \textit{Id.} at 137, 865 P.2d at 1048.
\textsuperscript{362} \textit{Id.}
VIII. TORTIOUS USE OF LEGAL PROCESS

A. Malicious Prosecution

Malicious prosecution involves the bringing of unwarranted litigation for a malicious or wrongful purpose. The elements are (1) defendant's initiation or continuation of a prior action, (2) the termination of that prior action in a manner inferring plaintiff's innocence, (3) defendant's lack of probable cause to bring the prior action, (4) defendant's malice or commencing the prior action for a purpose other than bringing plaintiff to justice, and (5) damage to plaintiff.363 During the survey period the Kansas courts addressed a number of diverse issues concerning malicious prosecution.

1. Initiation of Prior Action

One difficult question concerning the initiation or continuation of the prior action involves the role of persons other than the moving party and legal counsel in the prior action. For example, a store that insists on prosecution of a suspected shoplifter may be viewed as initiating the criminal prosecution formally brought by district attorney or other law enforcement personnel,364 while the citizen who merely reports suspicious conduct to authorities for further investigation is not normally considered to be initiating any subsequent prosecution.365

In Lindenman v. Umscheid,366 a city-county health agency employee (Umscheid) filed a report identifying various violations in three day care centers operated and administered by plaintiffs.367 The Kansas Department of Health and Environment (KDHE) obtained an ex parte order suspending the licenses of the three day care centers. Although the day care centers passed a reinspection shortly thereafter, Umscheid refused to lift the suspension unless plaintiffs stipulated that the report of violations was accurate or waived their right to appeal the final order. When

363. See Thompson v. Gen. Fin. Co., 205 Kan. 76, 91, 468 P.2d 269, 282 (1970) (holding that "the plaintiff must prove that the defendant instituted the proceeding of which complaint is made, that the defendant in so doing acted without probable cause and with malice, that the proceeding terminated in favor of the plaintiff, and that he sustained damages").
365. RESTATEMENT (SECOND) OF TORTS § 653 cmt. g (1977).
367. Id. at 612, 875 P.2d at 968.
plaintiffs refused to stipulate, KDHE initiated proceedings to revoke their license. Approximately one year later KDHE voluntarily dismissed the revocation proceeding. The supreme court held that legal proceedings concerning the license suspension initiated by the city-county health agency based on Umscheid’s report had terminated more than one year before plaintiffs filed their malicious prosecution claim.\footnote{368} Moreover, the court held that Umscheid’s mere filing of a report, even if false, is not an “active part” in the decision to initiate the license revocation proceeding.\footnote{369} In essence, the court viewed the filing of the report as analogous to a citizen’s filing of a report with the police, leaving all decisions thereafter to law enforcement.\footnote{370}

2. Termination of Prior Action

The prior action must be terminated in a manner consistent with the innocence of the person charged in that action. In \textit{Berzona v. Tomson},\footnote{371} the court of appeals held that a settlement of a civil rights action on behalf of all named defendants, including a sheriff who allegedly had no involvement in the alleged misconduct, was not a termination inferring the sheriff’s innocence for purposes of his subsequent malicious prosecution claim.\footnote{372} The holding is sound because settlement of a claim is not consistent with innocence. Parties who committed the offense alleged in a claim are as likely to settle as are those who believe they are innocent but desire to avoid the risk of a bad result in the litigation. Both Kansas precedent and the \textit{Restatement} take the position that any settlement, regardless of how faint the claim might have been against the settling party, defeats the favorable termination element of a malicious prosecution claim.\footnote{373}

Similarly, the court of appeals in \textit{Miskew v. Hess}\footnote{374} affirmed a summary judgment in favor of the attorney who brought the prior litigation and was now the defendant in a malicious prosecution action.\footnote{375} The prior litigation had been dismissed because it had been filed beyond the period of the statute of limitations. The court of appeals held that a

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 625, 875 P.2d at 975.
\item \textit{Id.} at 633, 875 P.2d at 979.
\item For a similar holding, see \textit{Burney v. Kansas Department of SRS}, 23 Kan. App. 2d 394, 403, 931 P.2d 26, 33 (1997) (noting that SRS is statutorily mandated to report suspected sexual abuse).
\item \textit{Id.} at 213–14, 960 P.2d at 254–55.
\item \textit{Id.} at 943, 910 P.2d at 234.
\end{enumerate}
\end{footnotesize}
termination based simply on the expiration of the statute of limitations does not provide any inference of the plaintiff's innocence. The court noted that this view was followed in other states and accepted by secondary authorities as well.

The termination element also affects the date on which a malicious prosecution action accrues for purposes of the one-year statute of limitations. Thus, in *Voth v. Coleman* plaintiff's malicious prosecution action was filed more than one year after the Tenth Circuit Court of Appeals denied reconsideration of defendant's unsuccessful appeal in the prior action. Nevertheless, the court held that the malicious prosecution action was timely filed because the prior action was not terminated until expiration of defendant's ninety days after denial of reconsideration to file for discretionary appeal to the United States Supreme Court.

3. Absence of Probable Cause

The absence of probable cause for initiating the prior action has been the most litigated issue in malicious prosecution cases during the survey period. Probable cause for instituting a criminal proceeding exists "when there are reasonable grounds for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining." In *Melia v. Dillon Cos.* the head of secu-

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376. *Id.* at 940, 910 P.2d at 233.
377. *Id.*, 910 P.2d at 232; *see*., Frey v. Stoneman, 722 P.2d 274, 278 (Ariz. 1986) (holding that a "favorable termination" does not result from a dismissal based on a statute of limitations); Lackner v. LaCroix, 602 P.2d 393, 395 (Cal. 1979) (same); Union Oil Co. v. Watson, 468 So. 2d 349, 353 (Fla. Dist. Ct. App. 1985) (stating that termination is not favorable where dismissal is on technical or procedural grounds, or for "any other reason not inconsistent with the guilt of the accused"); Wong v. Panis, 772 P.2d 695, 699 (Haw. Ct. App. 1989) (holding that termination of a claim due to the statute of limitations "does not reflect on the merits of the claim"); Alcorn v. Gordon, 762 S.W.2d 809, 812 (Ky. Ct. App. 1988) (holding that a dismissal of a claim on statute of limitations grounds is not a favorable termination).
378. *Mikew*, 21 Kan. App. 2d at 938–39, 910 P.2d at 232; *see*, e.g., KEETON ET AL., supra note 232, § 119, at 874 (stating that a favorable termination cannot be obtained from a mere procedural victory).
381. *Id.* at 450–51, 945 P.2d at 427.
382. *Id.* at 453, 945 P.2d at 429.
rity in defendant's store observed plaintiff take a pouch of tobacco off the shelf, put it in his pocket, and leave the store without paying for it.\textsuperscript{385} In finding that defendant had probable cause to initiate a criminal prosecution for shoplifting, the court of appeals rejected the plaintiff's argument that his mere possession of the store's merchandise was insufficient for probable cause.\textsuperscript{386} Probable cause depends on all the circumstances, and in \textit{Melia} defendant's probable cause was based not only on plaintiff's possession of the tobacco, but also on defendant's observing the plaintiff concealing the tobacco on his person and leaving without paying for it.\textsuperscript{387}

In malicious prosecution actions based on prior civil litigation, the standard governing probable cause is much less demanding than for criminal prosecutions. It requires nothing more than "a reasonable belief in the possibility that the claim may be held valid . . ."\textsuperscript{388} Moreover, the malicious prosecution action may be brought against the client, or against the attorney who filed the civil action on behalf of the client, or against both.\textsuperscript{389} In \textit{Bartal v. Brower},\textsuperscript{390} parents of a child paralyzed as the result of surgery filed a medical malpractice action against Doctor Bartal, one of the surgeons involved in the treatment of their child.\textsuperscript{391} After the parents voluntarily dismissed the malpractice action against Dr. Bartal, he sued both the parents and their attorneys for malicious prosecution.\textsuperscript{392} The supreme court affirmed the trial court's grant of summary judgment in favor of the parents and the attorneys on the ground that they had probable cause to initiate the action.\textsuperscript{393}

In holding that the parents had probable cause, the supreme court relied on the "advice of counsel" defense.\textsuperscript{394} This defense applies when lay litigants fully disclose to their attorneys "all material facts within their knowledge and which could have been learned with diligent effort."\textsuperscript{395}

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\footnote{384. 18 Kan. App. 2d 5, 846 P.2d 257 (1993).}
\footnote{385. \textit{id.} at 6, 846 P.2d at 259.}
\footnote{386. \textit{id.} at 9, 846 P.2d at 260.}
\footnote{387. \textit{id.}, 846 P.2d at 261. Factual probable cause is normally a question of fact for the jury, but it becomes a question of law when the facts are undisputed. In \textit{Melia}, the jury found in favor of plaintiff. However, the court of appeals held that as a matter of law probable cause for the shoplifting charge existed and thus the trial court should have granted defendant's motion for a directed verdict. \textit{id.}}
\footnote{388. \textsc{Restatement (Second) of Torts} \textsection{} 674 cmt. b (1977).}
\footnote{389. \textit{id.} \textsection{} 674 cmt. b.}
\footnote{390. 268 Kan. 195, 993 P.2d 629 (1999).}
\footnote{391. \textit{id.} at 196–97, 993 P.2d at 631.}
\footnote{392. \textit{id.}}
\footnote{393. \textit{id.} at 207, 993 P.2d at 637.}
\footnote{395. \textit{id.} (citing \textit{Hunt}, 241 Kan. at 654, 740 P.2d at 1052).}
\end{footnotes}
Dr. Bartal’s argument was that the parents failed to disclose to their attorneys the fact that Dr. Shapiro, not Dr. Bartal, performed the neurological procedure that caused the child’s paralysis and that the parents could have discovered this fact during their post-surgery conversations with the doctors. The supreme court rejected both arguments. The failure to mention the role of Dr. Shapiro was not material because the attorneys reviewed all relevant medical records and would have discovered that fact from the records. Moreover, the duty to investigate by “diligent effort” does not require lay persons to ask sophisticated medical questions that go beyond a lay person’s knowledge and understanding. This part of the holding is sound simply because the parents withheld nothing that would have altered the decisions made by their attorneys.

The supreme court held that the attorneys had probable cause to initiate the malpractice action because they reasonably believed that Dr. Bartal had not obtained informed consent from the parents for the neurosurgical procedure. First, Dr. Bartal argued that subsequent to filing the malpractice action, the attorneys discovered that the resident orthopedic surgeon, Dr. Williams, informed one of the parents about the risks of surgery and that the attorneys had no probable cause to continue prosecuting the claim after that discovery. There is no reason that a malicious prosecution action may not arise subsequent to the legitimate initiation of an action when a litigant continues the action after discovering that probable cause does not exist. The court rejected this argument on factual grounds, however, because there was no written record of this conversation, Dr. Williams admitted the conversation was not for the purpose of obtaining consent, and the parents denied that the conversation took place. In essence, a question of fact remained whether Dr. Williams provided information sufficient for informed consent.

Second, the supreme court held that as the treating or principal physician, Dr. Bartal was responsible to ensure that the parents gave in-
formed consent for all medical procedures regardless of which doctor was to perform the procedures.\textsuperscript{405} Thus, Dr. Bartal’s obtaining written informed consent for only those portions of the surgical procedures that he personally performed would not satisfy his duty to the patient and would not negate the attorneys’ probable cause for including him in the malpractice action.\textsuperscript{406}

Finally, prior to initiating the malpractice action the attorneys reviewed expert witness reports indicating that medical information available to Dr. Bartal prior to surgery raised a question about the appropriateness of surgical intervention for the child.\textsuperscript{407} The attorneys reviewed these reports prior to the initiation of the malpractice action, and this information provided the attorneys with probable cause to believe that Dr. Bartal might have been personally negligent in the treatment of the child.\textsuperscript{408} In summary, the attorneys had multiple reasons “for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious, or prudent, man in the belief that the party committed the act of which he is complaining.”\textsuperscript{409}

An attorney’s factual basis for probable cause to bring an action on behalf of the client was also at issue in \textit{Knight v. Cordry} \textsuperscript{410} and \textit{Miskew v. Hess}.\textsuperscript{411} In \textit{Knight}, defendant attorney had factual probable cause to file a medical malpractice action against plaintiff doctor where one of the two experts that he consulted opined that the plaintiff’s treatment of his patient was substandard even though the other expert found the medical care to be reasonable.\textsuperscript{412} Similarly, in \textit{Miskew} the attorney submitted his own affidavit that a doctor had indicated a willingness to testify that in his professional opinion a drug prescribed by plaintiff doctor was causally related to the patient’s asthma.\textsuperscript{413} Both holdings seem sound. In civil cases probable cause does not require the attorney to weigh conflicting evidence, but only to have some factual basis for reasonably believing there is some slight chance of success.

The supreme court further refined and explained the standards governing an attorney’s probable cause to initiate an action on behalf of a client in \textit{Bergstrom v. Noah}.\textsuperscript{414} In that case, individuals doing business as

\begin{footnotes}
\footnote{405. Id. at 205, 993 P.2d at 636.}
\footnote{406. See id. (discussing Dr. Bartal’s ability to obtain written informed consent).}
\footnote{407. Id. at 206–07, 993 P.2d at 636–37.}
\footnote{408. Id. at 205–06, 993 P.2d at 636.}
\footnote{410. 22 Kan. App. 2d 9, 913 P.2d 1206 (1995).}
\footnote{411. 21 Kan. App. 2d 927, 910 P.2d 223 (1996).}
\footnote{412. 22 Kan. App. 2d at 16–17, 913 P.2d at 1211.}
\footnote{413. 21 Kan. App. 2d at 929–30, 910 P.2d at 227.}
\footnote{414. 266 Kan. 829, 974 P.2d 520 (1999).}
\end{footnotes}
the Stockman's Livestock Exchange (SLE) became aware that the number of livestock being sold at their sale barn decreased and that livestock were frequently being sold at a more distant sale barn operated by individuals, including Bergstrom, under the name Farmers Livestock Commission Company (FLCC). SLE also heard rumors from other sale barn operators that FLCC was offering free or below cost trucking in order to get business in violation of the Packers and Stockyards Act of 1921. A government investigation disclosed one incident of below-cost trucking and sent a "cease and desist" letter to FLCC. SLE's attorney, Noah, then uncovered a few more instances of free or below-cost trucking. Based on this information, SLE's attorney filed an action against FLCC, alleging various state antitrust violations. The trial court initially denied and then, after reconsideration, granted FLCC's motion for summary judgment, and the court of appeals affirmed. FLCC then filed a malicious prosecution action against SLE and its attorney. After SLE settled the claim, the trial court granted summary judgment in favor of SLE's attorney, and the supreme court affirmed.

The supreme court drew a distinction between the normal standard for a litigant's probable cause and the standard applicable to the litigant's attorney. A litigant must have "a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent man in the belief that the party committed the act of which he is complaining." The court recognized, however, the standard for an attorney is much lower:

An attorney who initiates a civil proceeding on behalf of his client... is not liable if he has probable cause... and even if he has no probable cause and is convinced that his client's claim is unfounded, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim... An attorney is not required or expected to prejudge his client's claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adju-

415. Id. at 831, 974 P.2d at 523.
418. Id. at 838, 974 P.2d at 527.
419. Id. at 836, 974 P.2d at 526.
420. Id. at 846, 974 P.2d at 531.
421. Id. at 838–39, 974 P.2d at 527.
dication if his client so insists after he has explained to the client the nature of the chances.\textsuperscript{423}

Accordingly, probable cause does not require the attorney to have the same degree of certainty about the factual allegations to proceed with a civil action as is required of the criminal prosecutor. It was sufficient that the attorney did not actually believe any of the allegations to be false or based on false testimony.\textsuperscript{424} This is appropriate because in civil litigation the facts frequently are not discovered until well into the discovery process.

An attorney's probable cause includes legal probable cause as well as factual probable cause, and the standard governing the attorney's belief in the legal validity of the claim is also reduced. Comment f to section 675 of the \textit{Restatement (Second) of Torts} emphasizes that "[t]he question is not whether [the attorney] is correct in believing that the court would sustain the claim, but whether his opinion that there was a sound chance that the claim might be sustained was a reasonable one."\textsuperscript{425} Two factors strongly favored the attorney in \textit{Bergstrom}. First, the attorney had discovered some facts suggesting a reasonable likelihood that a pattern of anticompetitive conduct would be revealed in the course of discovery. Second, the state antitrust laws in Kansas were broadly worded and virtually undeveloped in the case law. The court's holding is sound in providing attorneys sufficient leeway to vigorously represent clients by developing legal claims that may appear at the outset to have only a limited likelihood of success.

4. Malice or Improper Motive

If a criminal or civil proceeding is initiated primarily for a purpose other than bringing an offender to justice, the malice element is satisfied.\textsuperscript{426} On the other hand, if the primary purpose is to bring an offender to justice, the mere existence of some additional motive does not satisfy the malice element.\textsuperscript{427} Therefore, when the primary purpose is to bring the offender to justice, malice is not satisfied merely because the attorney failed to give the other side notice of his intent to refile a

\textsuperscript{423} \textit{Bergstrom}, 266 Kan. at 838, 974 P.2d at 527 (quoting the \textit{Restatement (Second) of Torts} section 674, comment d).
\textsuperscript{424} \textit{Id.} at 840, 974 P.2d at 528.
\textsuperscript{425} \textit{RESTATEMENT (SECOND) OF TORTS} § 675 cmt. f (1977).
\textsuperscript{427} \textit{Id.}
claim,\textsuperscript{428} or because he was influenced by the size of the potential contingency claim,\textsuperscript{429} or because he desires to protect himself from a possible malpractice claim if he did not refile the case.\textsuperscript{430} Similarly, there is no malice involved when an attorney files a claim after having explained to the client that the evidence was weak, but the client insisted on going forward.\textsuperscript{431} These decisions are sound. One could always suggest the existence of some other or additional motive for filing any claim, particularly when the evidence of a claim is weak. Moreover, it is important to remember that at least when the prior action was a civil claim, weak evidence will still usually satisfy the requirement for probable cause. If probable cause exists, then a malicious prosecution claim fails regardless of the purpose for filing the claim.\textsuperscript{432}

In \textit{Burney v. Kansas Department of Social and Rehabilitative Services},\textsuperscript{433} the supreme court appears to have created some special limitations on the malice requirement for actions against employees of SRS. In that case, a student accused Burney, a substitute teacher, of molesting her.\textsuperscript{434} Burney advised SRS that the accusation was in retaliation for a bad grade, but SRS concluded that the accusation was probably true and forwarded the matter to the district attorney. The district attorney charged Burney with aggravated sexual battery. At the preliminary hearing the judge inquired whether SRS had any other files on the accuser, and SRS then discovered some additional files that caused the charges against Burney to be dismissed. Although a jury found for Burney in his subsequent malicious prosecution claim, the court of appeals reversed.\textsuperscript{435}

The court reasoned that Burney had insufficient evidence of malice.\textsuperscript{436} Malice has been defined in Kansas as “evil-mindedness or specific intent to injure,”\textsuperscript{437} which could not be satisfied by mere negligence by SRS in conducting its investigation of the molestation claim.\textsuperscript{438} Moreover, even though malice is normally a question of fact, the court

\textsuperscript{428} Id.
\textsuperscript{429} Id. at 937, 910 P.2d at 231.
\textsuperscript{430} Id. at 938, 910 P.2d at 231.
\textsuperscript{432} Id. at 12, 913 P.2d at 1209.
\textsuperscript{434} Id. at 395–96, 931 P.2d at 28.
\textsuperscript{435} Id. at 395, 931 P.2d at 28.
\textsuperscript{436} Id. at 406, 931 P.2d at 34.
\textsuperscript{437} Id. at 404, 931 P.2d at 33 (citing Turner v. Halliburton Co., 240 Kan. 1, 8, 722 P.2d 1106, 1113 (1986)).
\textsuperscript{438} Id.
requires that in malicious prosecution cases against SRS, the plaintiff must produce direct evidence of malice or prove facts showing that SRS had a motive or reason for acting maliciously in the manner it investigated or reported a claim. The court feared that without the persuasive evidence of malice required by these special rules, SRS might become reluctant to promptly report suspected child abuse to the proper authorities. Although not discussed by the court, these special rules appear to eliminate in actions against SRS the traditional rule that malice may be inferred from an absence of probable cause to initiate or continue the action.

5. Malicious Defense

Despite recognizing an action for the malicious prosecution of a civil action, the Kansas Supreme Court recently refused to recognize an action for “malicious defense”—the malicious prosecution of an invalid defense to an action or proceeding. In Wilkinson v. Shoney’s, Inc., plaintiff was terminated from his supervisor’s job at a restaurant owned by defendant restaurant company after an employee complained that his joking comments constituted sexual harassment. When plaintiff filed for unemployment compensation, defendant insurance company sought denial of benefits on the ground that plaintiff had been terminated for sexual harassment. At that time, defendants had not investigated the harassment allegation and later they determined that they lacked sufficient corroboration to support the harassment claim.

The supreme court relied on five grounds to refuse to recognize a “malicious defense” action. First, the court viewed the action as inconsistent with the first element of malicious prosecution that defendant be the “moving force” behind the initiation of the action. Second, Kansas had once previously refused to adopt a malicious defense action, and the majority of courts from other states also refused to adopt the action. Third, defenses usually had to be listed prior to the start of formal discovery. Fourth, criminal penalties for filing knowingly false statements and sanctions for abuse of process provide sufficient deter-

439. Id. at 404-05, 931 P.2d at 33-34.
440. Id. at 405, 931 P.2d at 33-34.
441. See RESTATEMENT (SECOND) OF TORTS § 669 (1977) (“Lack of Probable Cause as Evidence of an Improper Purpose”); see also id. § 676 cmt. c (describing situations in which initiation of civil proceedings is primarily for an improper purpose).
443. Id. at 208, 4 P.3d at 1159.
444. Id. at 205-08, 4 P.3d at 1157-59.
445. Id. at 207, 4 P.3d at 1159.
rence of misconduct by defendants.\textsuperscript{446} Fifth, a malicious defense action could impose hidden costs on defendants by deterring them from pursuing possibly valid defenses that had not yet been fully investigated and not fully supported by the facts known at the time when defenses must be listed.\textsuperscript{447}

These reasons are not entirely persuasive. The first two reasons are merely formalistic distinctions between malicious prosecution and malicious defense. Indeed, a contrary view might emphasize that the malicious assertion of a defense continues litigation in the same manner that a defendant may initiate "or continue" a malicious prosecution.\textsuperscript{448} In addition, the risk of losing a defense not timely pleaded is tempered by the willingness of courts to allow the amendment of pleadings when good cause is shown. Moreover, criminal penalties and sanctions are rarely used in such cases and in any event provide no relief to the plaintiff forced to bear the additional costs of prolonged litigation. The "hidden costs" argument should apply equally to the recognition of malicious prosecution, i.e., that legitimate claims might be lost because the facts known at the end of the limitations period do not fully support a claim.

Perhaps the better explanation is a trend in Kansas and elsewhere to avoid expansion of actions for misuse of judicial process beyond the traditional action for malicious prosecution. In recent years Kansas courts have refused to recognize actions for various specific abuses of judicial process, such as actions for jury tampering or "embracery,"\textsuperscript{449} for perjury,\textsuperscript{450} and for spoliation of evidence.\textsuperscript{451} In lieu of these specific actions, courts rely on the power of courts to correct abuses of judicial process by sanctions. To date, however, there is no indication that the Kansas courts might abolish malicious prosecution of civil actions and rely instead on sanctions. Moreover, such a change should probably not be considered until Kansas courts develop a greater willingness to use sanctions when parties or counsel seriously misuse judicial process.

\textsuperscript{446} Id. at 205–06, 4 P.3d at 1158.
\textsuperscript{447} Id. at 207, 4 P.3d at 1159.
\textsuperscript{448} Admittedly, nothing in the comments to Restatement (Second) of Torts section 674 provides support for such an interpretation of "continuation."
6. Preemption

Whenever federal statutes govern an area of law, the issue arises whether those statutes preempt state law. In *Edmonds v. Lawrence National Bank & Trust Co.*, the court of appeals held that the federal Bankruptcy Act preempted state malicious prosecution and abuse of process claims. The court reasoned that determinations by state courts about when the filing of a bankruptcy proceeding is malicious would subvert the exclusive jurisdiction of the federal courts and would threaten the uniformity of bankruptcy law by allowing collateral attacks on bankruptcy petitions. In addition, the court could conclude that Congress intended this preemption because it provided separate sanction provisions in the Federal Rules of Bankruptcy Procedure as well as in the Federal Rules of Civil Procedure.

In *McShares, Inc. v. Barry*, however, the supreme court rejected a broad extension of the bankruptcy holding in *Edmonds* to other areas of federal jurisdiction and specifically to federal antitrust actions under the Sherman Act. The court distinguished between bankruptcy and antitrust. Preemption in bankruptcy cases is appropriate because bankruptcy is a matter of exclusive federal jurisdiction, whereas other areas of federal law, such as antitrust and civil rights, may be pursued in either federal or state courts. Moreover, unlike bankruptcy, the Sherman Act does not provide a specific federal remedy for unwarranted or abusive use of judicial process in antitrust actions. In this situation, there is little basis for an inference that Congress intended the Sherman Act to preempt state malicious prosecution and abuse of process claims.

B. Embracery

As previously discussed, Kansas courts have been reluctant to recognize narrower actions for wrongful conduct affecting specific aspects of litigation and have previously refused to adopt civil actions for per-
jury or for spoliation of evidence.\textsuperscript{462} In \textit{OMI Holdings, Inc. v. Howell}\textsuperscript{463} the supreme court also rejected a civil action for jury tampering, also known as embracery.\textsuperscript{464} In that case, plaintiff was a party to a federal patent case in which the trial court declared a mistrial after twenty-four trial days because defendant, an expert witness for the other side, had engaged in a number of conversations with jurors during breaks in the trial. The primary item of claimed damage was the cost of the twenty-four trial days that had to be repeated in a new trial.

The supreme court had three basic reasons for refusing to recognize an embracery action.\textsuperscript{465} First, if alternative remedies such as Rule 11 sanctions existed, an embracery action would put the party who pursued those remedies in a worse position than the party who ignored those remedies.\textsuperscript{466} Second, not recognizing embracery is consistent with the court's earlier rejection of a civil perjury action and a civil action for spoliation of evidence.\textsuperscript{467} Third, criminal penalties for jury tampering should provide a sufficient deterrent against intentional tampering.\textsuperscript{468}

These reasons are not entirely persuasive. The courts have not eliminated malicious prosecution or abuse of process actions simply because those problems could be resolved through sanctions, and in \textit{OMI Holdings}, the trial was in federal court where Rule 11 does not authorize sanctions against a witness. The rejection of perjury and spoliation actions is distinguishable. A civil action for perjury would undermine the judicial interest in finality by avoiding collateral attacks on judgments, a problem not involved in jury tampering cases if the civil action is limited to those cases where the tampering has independently negated the initial litigation through mistrial or reversal. Spoliation actions often involve serious causation problems because the relevance and importance of a lost item of evidence may be unknown. Finally, the availability of a criminal penalty does little for the party who has lost substantial economic values as the result of another's misconduct. Nevertheless, the long-term objective of tort law is to deter wrongful conduct, and there is no evidence of such wide-spread jury tampering that additional penalties, including civil penalties, are needed.

\textsuperscript{462} See supra notes 449–51 and accompanying text.
\textsuperscript{464} Id. at 331, 918 P.2d at 1291.
\textsuperscript{465} Id. at 331–32, 918 P.2d at 1291–92.
\textsuperscript{466} Id. at 326–28, 918 P.2d at 1289–90.
\textsuperscript{467} Id. at 315, 918 P.2d at 1282.
\textsuperscript{468} Id. at 331–32, 918 P.2d at 1291–92.
OMI Holdings reflects a choice between conflicting policy considerations that do not provide a clearly correct answer. Yet at a time when the legal profession seems to be under constant attack, the court's rather subdued approach to purposeful misconduct by an attorney acting in the capacity of an expert witness is troubling. At some point, the Kansas courts will hopefully revisit the question of what additional remedies, if any, are appropriate to ensure a high level of integrity in the judicial process.

IX. TORTIOUS INTERFERENCE WITH RELATIONS

A. Economic Relations

Tortious interference with economic relations encompasses three causes of action: injurious falsehood,\textsuperscript{469} intentional interference with existing contractual relations,\textsuperscript{470} and intentional interference with prospective economic or business advantage.\textsuperscript{471} Interference with an existing contract protects the interest of parties to an existing contract in their contractual relationship from intentional and improper interference by a third party. The action does not lie when the interference is by one of the parties to the contract itself, as opposed to a third party. For example, in Clevenger v. Catholic Social Service of the Archdiocese of Kansas City in Kansas, Inc.\textsuperscript{472} the court of appeals held that the intent element for interference with an existing contract was not satisfied where an investigation by an employee of a charity led to the plaintiff's termination as a social worker for that charity.\textsuperscript{473} The investigating employee was not an outside third party, but rather was acting in the course and scope of his employment with the charity that was one of the parties to the

\textsuperscript{469} Injurious falsehood is the modern name for a general action that encompasses a number of narrower but related older causes of action, such as slander of title, trade libel, and business or product disparagement. See generally Restatement (Second) of Torts §§ 623A–652 (1977) (discussing the injurious falsehood general cause of action). During the survey period, the court of appeals decided one minor "slander of title" action, LaBarge v. City of Concordia, 23 Kan. App. 2d 8, 15–19, 927 P.2d 487, 492–94 (1996), and in a separate case, held that an action for "business disparagement" has not yet been recognized in Kansas. St. Catherine Hosp. of Garden City v. Rodriguez, 25 Kan. App. 2d 763, 768, 971 P.2d 754, 757 (1998).

\textsuperscript{470} See Restatement (Second) of Torts §§ 766 & 766A (1977) (discussing intentional interference with performance of contract by third person and with another's performance of his own contract).

\textsuperscript{471} See id. § 766B (discussing the tort of intentional interference with prospective contractual relation).


\textsuperscript{473} Id. at 525–28, 815 P.2d at 532–34.
In addition, the interference is not intentional and improper unless the defendant knows about the existence of the contract prior to becoming involved with one of the parties. For example, in *Macke Laundry Service LP v. Mission Associates, Ltd.* an action for interference is not proper where defendant sought the laundry equipment business of an apartment complex only after the complex had terminated its contract with its prior supplier.

A major issue has been the precise nature of a prima facie case for interference with either an existing contract or with a prospective economic advantage. Under the first *Restatement*, the plaintiff only had to show that the interference was intentional, and then the burden shifted to defendant to prove it was justified. Under the second *Restatement*, plaintiff’s prima facie case has been expanded to require proof that the interference was not only intentional but also “improper.” Nevertheless, the second *Restatement* still recognizes a variety of privileges that should provide justification for an interference as well as negating any suggestion that the interference was “improper.”

For example, one has a privilege to interfere with the prospective business or economic opportunities of another in order to protect his or her own financial or business interest in the transaction so long as no improper means are employed. Accordingly, in *Gillenwater v. Mid-American Bank & Trust Co.*, a bank was privileged to protect its interest in recovering on a loan that was in default by selling the collateral at a price below its face value. The sale was to protect the bank’s financial interest, and the means were not improper because the bank complied fully with all UCC requirements governing the sale of pledged collateral.

The privilege to protect one’s own financial interest in the transaction applies to actions for interference with prospective economic advantage, but not to actions for interference with existing contract. In

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474. The court explained its holding on the ground of privilege, but a privilege is necessary only if a prima facie case exists. A prima facie case did not exist because the interference was by a party to the contract.
476. Id. at 560–61, 873 P.2d at 225.
479. Id. §§ 768–774.
480. Id. § 769.
482. Id. at 424, 870 P.2d at 704.
483. Id. at 425, 870 P.2d at 704.
Dickens v. Snodgrass, Dunlop & Co. plaintiff, an employee of an accounting firm, was assigned by her firm to work on a city’s annual audit. The city requested that plaintiff be reassigned to other duties because her husband and the city were involved in an ongoing dispute. The firm reassigned her and then, four months later, terminated her. The court correctly held that her action should be viewed as one concerning prospective advantage because she was an at-will employee and contracts terminable at will may be terminated by either party at any time for any reason. The court also considered the interference by the city justified. Although the court did not identify a specific privilege, the privilege to interfere to protect one’s own interest in a transaction would seem applicable in this situation.

Finally, one example of “improper means” to interfere with an existing or prospective relation is the use of defamation. In Taylor v. International Union of Electronic Workers plaintiff was assisting the Teamsters, one of the two unions competing to organize the workers at a plant, in the hope of getting a job with the Teamsters if the organizing effort was successful. Plaintiff had formerly worked for the other union, which sent a letter to workers at the plant questioning plaintiff’s motives and mental condition. The Teamsters then terminated their association with plaintiff. Plaintiff filed his action after expiration of the one-year statute of limitations for defamation, but within the two-year statute of limitations for tortious interference with prospective economic advantage.

The court of appeals reversed a jury verdict in favor of plaintiff on the ground that the action was more analogous to a defamation action than to a tortious interference action. The court did not identify any failure or inadequacy in the pleading, proof, or instructions governing plaintiff’s tortious interference action, and it cited no authority that a single set of facts could not satisfy the elements of more than one tort action. Courts, including Kansas courts, have recognized that a claim,

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485. Id. at 172, 872 P.2d at 259; see RESTATEMENT (SECOND) OF TORTS § 766 cmt. g (1977) (discussing contracts terminable at will).
486. Dickens, 255 Kan. at 172, 872 P.2d at 259.
487. See Wild v. Rarig, 234 N.W.2d 775, 793 (Minn. 1975) (holding wrongful interference claim by means of defamation actually was a part of plaintiff’s defamation claim); Woody v. Brush, 165 N.Y.S. 867 (N.Y. App. Div. 1917) (holding a cause of action exists for a supervising employee’s false and malicious reports concerning a subordinate). See generally RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1977) (discussing the nature of an actor’s conduct in interfering with a contract).
489. Id. at 680, 968 P.2d at 692.
untimely filed for one cause of action, may be timely filed for purposes of another cause of action.\textsuperscript{490} While courts should be vigilant to prevent mischaracterization of actions to circumvent the statute of limitations or other restrictions,\textsuperscript{491} the court of appeals in \textit{Taylor} did not provide an adequate explanation of why plaintiff's tortious interference claim was inadequate.

\subsection*{B. Family Relations}

Kansas has long followed the traditional rule that a minor child does not have a loss of consortium claim against one whose negligence has injured the child's parent.\textsuperscript{492} Nevertheless, a significant minority of states has now recognized a loss of consortium on behalf of a child,\textsuperscript{493} and during the survey period the issue was reconsidered in Kansas. In \textit{Klaus v. Fox Valley Systems, Inc.},\textsuperscript{494} a parent was blinded by a spray paint can that exploded.\textsuperscript{495} His son filed a claim for loss of consortium in federal court, which in turn certified the issue to the Kansas Supreme Court.

\textsuperscript{490} For claims filed too late for a strict products liability action, but timely filed for a breach of implied warranty action, see, for example, \textit{Berry v. G.D. Searle & Co.}, 309 N.E.2d 550, 553–54 (Ill. 1974), which held that the statute of limitations provided by the Uniform Commercial Code on contracts of sale applied to an implied warranty cause of action, and \textit{Sinka v. Northern Commercial Co.}, 491 P.2d 116, 118 (Alaska 1971), which held that the statute of limitations provided by the Uniform Commercial Code is applicable when the action is brought within the framework of the Code, even though the damages are for personal injury. The Kansas Supreme Court first adopted a strict products liability cause of action in a case that arose after expiration of the limitations period for an action for breach of the implied warranty of merchantability. See \textit{Brooks v. Dietz}, 218 Kan. 698, 702, 545 P.2d 1104, 1108 (1976) (holding the rule of strict liability as stated in section 402A of the \textit{Restatement (Second) of Torts} is officially recognized in Kansas).

\textsuperscript{491} See, e.g., \textit{Beeson v. Erickson}, 22 Kan. App. 2d 452, 456, 917 P.2d 901, 905 (1996) (holding that a party may not bring “an action which arises out of the performance of a contract and call it a tort action” in order to avoid a mandatory arbitration clause).


\textsuperscript{494} 259 Kan. 522, 912 P.2d 703 (1996).

\textsuperscript{495} \textit{Id.} at 523, 912 P.2d at 704.
Court. The supreme court held that Kansas would not recognize the claim.496

The court based its holding on a mixture of stare decisis and judicial deference to the legislature. The court suggested that the legislature is the more appropriate branch of government to recognize new causes of action.497 The legislature created a wrongful death action that allowed a child to proceed against one who caused a parent’s death,498 and the legislature later created a cause of action for loss of consortium that allowed a spouse to proceed against one who physically injured the other spouse.499 However, the legislature has never reacted to the judicial decisions refusing to recognize a child’s loss of consortium action for injury to a parent.500

The court’s decision is troubling for three reasons. First, the court opined that while both the courts and the legislature may modify existing common law, “the declaration of public policy of whether an action can be brought under the common law is more properly a function of the legislative branch of government.”501 This view of stare decisis seems to be an abrogation of the judiciary as an equal and independent branch of government. Under this view, Kansas would not have recognized intentional infliction of emotional distress,502 invasion of privacy,503 strict liability for defective products,504 retaliatory discharge505 and numerous other actions that are now a part of the common law of torts in Kansas.

Second, the court’s deference to legislative inaction seems to reflect a naive belief that legislative inaction on the issue of a child’s loss of consortium represents an affirmative decision that such an action would

496. Id. at 531, 912 P.2d at 708.
497. Id. at 529, 912 P.2d at 707.
498. Id. at 528, 912 P.2d at 706 (citing KAN. STAT. ANN. § 60-190 (1995)).
499. Id. (citing section 23-205 of the Kansas Statutes Annotated).
500. Id. at 528, 912 P.2d at 707.
501. Id. at 529, 912 P.2d at 707.
503. See Dotson v. McLaughlin, 216 Kan. 201, 208, 531 P.2d 1, 6 (1975) (“We believe that the analysis of the right of privacy as contained in the Restatement, Second, Torts § 652, is sound and that the courts of this state should follow it in fixing the boundaries for its protection.”).
504. See Brooks v. Dietz, 218 Kan. 698, 702, 543 P.2d 1104, 1108 (1976) (“We have concluded the time has come for this court to adopt the rule of strict liability as set out in § 402A of the Restatement, supra, and we therefore so hold.”).
505. See Murphy v. City of Topeka, 6 Kan. App. 2d 488, 496, 630 P.2d 186, 192 (1981) (finding that plaintiff has a valid cause of action for retaliatory discharge when plaintiff was terminated for filing a workmen’s compensation claim, even though the Kansas legislature twice failed to adopt amendments to the Workmen’s Compensation Act which would have allowed this type of action).
constitute bad public policy. Notably, the court does not supplement its reliance on legislative inaction by citation to periodic legislative studies of the problem. The court needs some analytical mechanism to determine when legislative inactivity reflects a specific public policy determination and when it reflects lethargy or indifference.\footnote{506}

Finally, the legislative deference approach simply allows the court to avoid the merits of a difficult issue. A century or more ago, children were frequently viewed as cheap labor for the farm or factory and had virtually no legal rights.\footnote{507} In the ensuing years, society’s attitude toward children has changed greatly, and courts have afforded children various constitutional rights.\footnote{508} Moreover, the loss of a parent’s companionship and support is equally as devastating to a young child as the loss of that parent’s companionship and support is to his or her spouse. The court should address the issue on its merits, recognizing of course that the legislature may later intervene with clarifying or limiting legislation, if it so desires.

X. RETALIATORY DISCHARGE

The tort of “retaliatory” or “wrongful” discharge is a public policy exception to the employment-at-will doctrine.\footnote{509} Generally, an employer or employee is free to terminate an employment-at-will at any time for any reason.\footnote{510} For example, an employee accused of a crime may be innocent until proven guilty in the eyes of the criminal law, but he may also be discharged from an at-will employment without any recourse.\footnote{511} However, when an employee is discharged for conduct that is supported by strong public policy, the tort of wrongful discharge provides a rem-

\footnote{506. When I fail to rake up the leaves in my yard in the fall, it reflects my laziness and indifference, not a careful policy determination that our world would be a better place if I do not rake and bag them.}
\footnote{507. See Selders v. Armentrout, 207 N.W.2d 686, 688 (Neb. 1973) (holding that restrictions on damages for wrongful death of children “arose in a day when children during minority were generally regarded as an economic asset to parents”).}
edy for violation of the public policy where otherwise no adequate remedy would exist.\textsuperscript{512}

\textbf{A. Worker's Compensation Exception}

Kansas initially recognized wrongful discharge to protect workers from being discharged in retaliation for filing a worker's compensation claim.\textsuperscript{513} Strong public policy supports the availability of worker's compensation for injured employees because large numbers of employees are injured in the workplace and often worker's compensation is the only remedy available to the injured employee. During the survey period a series of cases clarified the scope of this exception. Thus, a wrongful discharge claim will protect the employee who is discharged for being absent from work due to an injury that could become the basis for a worker's compensation claim,\textsuperscript{514} and it will also protect the spouse who is discharged because the other spouse filed a worker's compensation claim.\textsuperscript{515} On the other hand, a wrongful discharge claim does not require an employer to find alternative work for the employee whose job-related injury makes him no longer able to perform his required job.\textsuperscript{516}

Procedurally, an earlier holding required that the employer's liability under the whistle blower exception be proven by clear and convincing evidence.\textsuperscript{517} In \textit{Ortega v. IBP, Inc.}\textsuperscript{518} the Kansas Supreme Court held that for reasons of consistency the clear and convincing evidence standard also governs proof of the employer's liability under the worker's

\begin{itemize}
\item \textsuperscript{512} \textit{Id.}
\item \textsuperscript{513} Murphy v. City of Topeka, 6 Kan. App. 2d 488, 497, 630 P.2d 186, 193 (1981).
\item \textsuperscript{514} See Pilcher v. Bd. of Wyandotte County Comm'res, 14 Kan. App. 2d 206, 211, 787 P.2d 1204, 1208 (1990) (allowing a wrongful discharge claim as where the discharge "contravenes a clear public policy").
\item \textsuperscript{515} See Marinhergen v. Boster, Inc., 17 Kan. App. 2d 532, 541, 840 P.2d 534, 541 (1992) (stating that allowing an employer to retaliate against one spouse because the other spouse exercised his rights under the Workman's Compensation Act frustrates the purpose of allowing employees to freely exercise their rights under the Act).
\item \textsuperscript{517} See Palmer v. Brown, 242 Kan. 893, 900, 752 P.2d 685, 690 (1988) (holding that an employee has the burden of proving by clear and convincing evidence that a co-worker or employer violated rules, regulations, or law).
\item \textsuperscript{518} 255 Kan. 513, 874 P.2d 1188 (1994).
\end{itemize}
compensation exception. The consistency rationale seems persuasive because the two exceptions are not sufficiently distinguishable to justify different standards of proof. Moreover, a heightened standard of proof is perhaps sound in both situations in order to provide more certainty in cases in which the evidence concerning motive is somewhat speculative and capable of conflicting inferences. For example, in Ortega the two terminated workers had filed worker's compensation claims, but each also engaged in some uncooperative or insubordinate behavior. Therefore, the evidence could support both an improper motive and a proper motive for the termination. The clear and convincing evidence standard simply puts a slightly increased burden on the employee to establish that the employer acted from the improper motive. This increased burden is an arguably appropriate means of avoiding undue interference with the employment-at-will doctrine.

Recently, the court of appeals provided a procedure for addressing mixed motive claims. In Rebarchek v. Farmers Cooperative Elevator & Merchantile Ass'n of Dighton, plaintiff had a series of back injuries that restricted his ability to perform certain tasks in his job as manager of a grain storage facility. At the same time, he was generally combative and failed to perform certain aspects of his job adequately. The issue was whether his termination shortly after returning from back surgery was for poor performance or for filing a worker's compensation claim. The court of appeals adopted the burden shifting approach used in Kansas discrimination cases. Plaintiff has the initial burden to establish a prima facie claim of retaliatory discharge. Defendant then has the burden of going forward to show a legitimate purpose for the termination. Finally, the burden shifts back to plaintiff to show that the reason offered by defendant was a mere pretext for retaliatory discharge.

519. Id. at 528, 874 P.2d at 1197–98.
520. Id. at 514–15, 874 P.2d at 1190.
522. Id. at 107–08, 13 P.3d at 22–23.
523. Id. at 111–12, 13 P.3d at 24–25.
525. Id. at 111, 13 P.3d at 24.
526. Id., 13 P.3d at 24.
527. Id., 13 P.3d at 25. The court also noted that a significant delay between filing a workers compensation claim and the subsequent termination may negate an inference of improper motive for termination, but only when the improper motive rests solely upon the fact of a termination subsequent to the filing of a workers compensation claim. Id. at 110, 13 P.3d at 24.
B. Whistle Blower Exception

Kansas has also recognized a so-called whistle blower exception in which wrongful discharge protects an employee's "good faith reporting of a serious infraction." During the survey period courts extended this exception to apply when the report of wrongdoing is to management rather than to law enforcement authorities. On the other hand, a report of a suspected violation made solely to an outside private company is not within the exception. Moreover, the exception does not apply to disclosure of a suspected violation of a company's internal operating policies, such as disclosure of a loan allegedly made in violation of a savings and loan association's internal policy regarding loans to employees and their friends. Nor does the exception apply to public disclosure of mere mismanagement of a public office. Neither the internal procedures nor the mismanagement constituted criminal activity at all, much less a serious violation. Finally, the exception does not apply when the employer is unaware of the whistle blowing at the time of the discharge.

C. Free Speech Exception

Kansas courts have also recognized a qualified free speech exception to protect the public employee who speaks out publicly on a matter of public concern. In both Larson v. Ruskowitz and Dennis v. Ruskowitz employees of the Wyandotte County Community Corrections


532. See Dennis v. Ruskowitz, 19 Kan. App. 2d 515, 522-23, 873 P.2d 199, 204-05 (1994) (distinguishing the retaliatory discharge of a private or public employee because of whistleblowing from the retaliatory discharge of a public employee for having exercised his rights under the First Amendment).


534. This exception is based on the holding in Pickering v. Board of Education, 391 U.S. 563 (1968). The doctrine applies only to those in public employment. The private employer is not "government" and therefore may terminate the employee who speaks out publicly against the employer.


program alleged that they were terminated for communicating to a
ewspaper their concerns about various aspects of mismanagement of
the program by their supervisors. In each case the appellate court re-
versed because the trial court incorrectly applied the whistle blower ex-
ception.\footnote{Larson, 252 Kan. at 974–75, 850 P.2d at 261–62; Dennis, 19 Kan. App. 2d at 527, 873 P.2d at
207.} In \textit{Larson} the employees made no accusation of misappropriation of public funds or other criminal conduct, and in \textit{Dennis} an
allegation of misappropriation of funds was made only in-house.\footnote{It is unclear whether this distinction is still valid. Subsequent to this holding in \textit{Dennis}, the
whistle blower exception could apply when the report was made to management rather than to
criminal authorities. \textit{Id.} at 208, 885 P.2d at 395.} Rather, both courts recognized that public employees have a first
amendment right to speak.\footnote{Larson, 252 Kan. at 968, 850 P.2d at 257; Dennis, 19 Kan. App. 2d at 521, 873 P.2d at 204.
} However, this right is qualified, not absolute, and requires satisfaction of two threshold matters. First, the
speech must relate to a matter of public interest.\footnote{Larson, 252 Kan. at 969, 850 P.2d at 258; Dennis, 19 Kan. App. 2d at 523, 873 P.2d at 205.
} Second, the speech interest must be balanced against the governmental entity’s interest in
promoting efficient delivery of public services.\footnote{Larson, 252 Kan. at 968–73, 850 P.2d at 257–61; Dennis, 19 Kan. App. 2d at 521–26, 873
P.2d at 204–06.} In addition, the gov-
ernmental entity may show that it would have terminated the employee
for reasons unrelated to any speech.\footnote{In \textit{Larson} the governmental entity was facing budget cuts that would require termination of
either employees or services. To the extent that this consideration relates directly to the cause of
the plaintiff’s termination, it is arguably part of the plaintiff’s burden of proof of causation rather than a
“defense” available to the defendant. 252 Kan. at 969–73, 850 P.2d at 258–61.} Both cases were remanded for
consideration of these threshold issues.\footnote{\textit{Id.} at 975, 850 P.2d at 262; Dennis, 19 Kan. App. 2d at 527, 873 P.2d at 207.
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\section*{D. \textit{Implied Contract Exception}}

Prior to the survey period Kansas recognized an action based upon
a discharge from employment that violates the terms of an “implied
contract” between the parties, such as a provision in an employees’
manual that employees would not be discharged except for “good
(stating that an implied contract that imposes a duty of good faith and fair dealing may be present in
an employment contract).} Technically, the implied contract exception is not part of the
retaliatory discharge doctrine, but rather a device to characterize the em-
ployment as governed by contract rather than as employment-at-will.\textsuperscript{545} Accordingly, the reason for which the employer terminated the employment need not contravene an important public policy.\textsuperscript{546}

Ambiguity or inconsistency in an employment manual may create a jury question on the nature of the employment. In \textit{Brown v. United Methodist Homes for the Aged}\textsuperscript{547} United Methodist Homes (UMH) terminated a full-time employee who, at the end of ninety days approved leave, failed on two occasions to report for work in a temporary part-time position. The employment manual provided that an employee may be terminated for two unexcused absences from work, and the manual expressly described his employment as "at will" and terminable by either party. However, even though the manual authorized UMH to fill the position of an employee on approved leave, it also required UMH to reinstate the employee "to first available, same, or similar position" upon return from an approved leave.\textsuperscript{548} The court held that employment is not "at will" merely because of a statement to that effect in an employment manual.\textsuperscript{549} Rather, whether an implied contract exists depends on the intent of the parties as determined from all the circumstances surrounding the employment relationship and is usually a factual question for jury determination.\textsuperscript{550} Thus, a jury could have found a breach of implied contract based on the employer's failure to offer the employee full-time positions that became available after his leave of absence.

Not every ambiguity in an employment manual will raise a question of fact concerning the intent to create an implied contract of employment. Statements in a company employment manual that specific misconduct would constitute just cause for termination are not necessarily statements that the employment could \textit{only} be terminated for just

\textsuperscript{545} In Kansas a plaintiff must give notice prior to filing a tort claim against a governmental entity under the Kansas Tort Claims Act. See \textit{Kan. Stat. Ann.} \textsection 12-105b(d) (1991) ("Any person having a claim against a municipality which could give rise to an action brought under the Kansas tort claims act shall file a written notice . . . before commencing such action."). Prior notice is not required for contract claims against a governmental entity. Accordingly, failure to file prior notice of a claim barred a retaliatory discharge claim, but not an implied contract of employment claim, based on termination of employment with a governmental entity. \textit{Wiggins v. Hous. Auth. of Kansas City}, 19 Kan. App. 2d 610, 614, 873 P.2d 1377, 1380 (1994).


\textsuperscript{548} \textit{Id.} at 129, 815 P.2d at 77.

\textsuperscript{549} \textit{Id.} at 139–40, 815 P.2d at 83–84.

\textsuperscript{550} \textit{Id.} at 136, 815 P.2d at 81.
Moreover, company policies not shown to an employee until after his hiring could not be the basis for finding an implied contract of employment at the time of his hiring.\textsuperscript{552}

E. Wrongful Demotion

In \textit{Brigham v. Dillon Cos., Inc.}\textsuperscript{553} the supreme court expanded the action for wrongful discharge to include an action for wrongful demotion.\textsuperscript{554} In that case plaintiff alleged that he had been demoted from grocery store manager to frozen foods manager in retaliation for filing a worker's compensation claim. The court of appeals rejected the cause of action because it feared a wrongful demotion action would invite a flood of litigation. The supreme court reversed the court of appeals and recognized the action.\textsuperscript{555} It reasoned that failure to recognize a retaliatory demotion claim would allow employers to demote or otherwise retaliate against employees rather than fire them, thereby circumventing the sound public policy basis underlying the retaliatory discharge action.\textsuperscript{556} The supreme court did not agree that this decision would cause a flood of litigation, nor did it believe that a substantial increase in litigation, should it occur, would justify a refusal to recognize the wrongful demotion action.\textsuperscript{557}

This holding, while problematic, involves a classic choice between two conflicting policy considerations. The supreme court is correct that employers could use demotion in lieu of discharge to avoid liability for violating the strong policies that gave rise to the wrongful discharge action. Yet the decision does create the potential for a flood of claims. Perhaps the court should have tried to discourage excessive litigation by requiring that any demotion or other retaliation must be substantial in order to be actionable. Nevertheless, to date the feared flood of litigation has simply not materialized.

\textsuperscript{551} See Kastner v. Blue Cross & Blue Shield of Kansas, Inc., 21 Kan. App. 2d 16, 894 P.2d 909 (1995) (holding that the giving of specific termination grounds is not proof of an implied-in-fact contract, in which an employee could only be terminated for just cause).

\textsuperscript{552} \textit{Id.} at 26–27, 894 P.2d 917–18.

\textsuperscript{553} 262 Kan. 12, 935 P.2d 1054 (1997).

\textsuperscript{554} \textit{Id.} at 20, 935 P.2d at 1059–60.

\textsuperscript{555} \textit{Id.}

\textsuperscript{556} \textit{Id.}, 935 P.2d at 1060.

F. Available Alternative Remedy

Kansas courts have struggled with the issue of when the existence of an alternative remedy would bar a retaliatory discharge claim. Initially, Kansas did not recognize retaliatory discharge when an employee was protected by a union collective bargaining agreement that limited discharge to cases involving good cause. That rule, however, changed when the court recognized that a grievance procedure might afford the employee a limited remedy that is not necessarily an adequate remedy. The more recent cases have emphasized the adequacy of the alternative remedy. For example, in Flenker v. Willamette Industries, Inc. plaintiff alleged that his employment was terminated because he reported certain workplace safety violations to OSHA. The supreme court held that an administrative whistle-blower remedy for reporting OSHA was not an adequate remedy that would bar a retaliatory discharge tort action. The administrative remedy was inadequate because (1) it requires the employee to file a complaint within thirty days; (2) it requires the complaint to be filed with the Secretary of Labor, who has discretion to file an action on the employee’s behalf; (3) the employee has no right of appeal if the Secretary decides not to file an action; and (4) if the Secretary brings an action, the relief afforded the employee is wholly within the Secretary’s discretion.

The reasoning in Flenker provides only limited guidance about what is required for an adequate remedy. For example, the court contrasted the remedies available under both the Energy Reorganization Act and Title VII of the Civil Rights Act, and placed considerable weight on the fact that both statutes allow the plaintiff to file an action in federal court if the relevant agency does not act favorably on the employee’s com-

561. Id. at 199, 967 P.2d at 297.
562. Id. at 209–10, 967 P.2d at 303.
563. Id. at 205, 967 P.2d at 301.
564. Id.
565. Id.
566. Id.
plaint.\textsuperscript{567} Nevertheless, the court does not give any guidance on how much depletion of the employee's procedural or substantive rights might be tolerated before finding the alternative remedy inadequate.

G. After-Acquired Evidence Defense

In \textit{Gassman v. Evangelical Lutheran Good Samaritan Society},\textsuperscript{568} defendant terminated plaintiff's employment as a nurse's aide because of her allegedly inconsiderate treatment of residents, and plaintiff responded with a breach of implied contract lawsuit.\textsuperscript{569} Subsequently, plaintiff admitted she had taken a videotape of a company meeting, removed it from the premises, copied it, and returned it the next day. Defendant's employee handbook provides that any theft of property from a co-worker, from a resident, or from the facility itself is grounds for termination. The court held that even if the discharge initially lacked good cause, after-discovered evidence of wrongdoing might constitute a defense to the action.\textsuperscript{570} The court adopted the \textit{McKennon}\textsuperscript{571} three-part test governing the after-acquired evidence defense: first, plaintiff was guilty of some misconduct of which defendant was unaware; second, the misconduct justified discharge; and third, if the employer had known of the wrongdoing, it would have discharged the plaintiff on that basis alone.\textsuperscript{572} The court affirmed a denial of summary judgment because it was unclear that taking the videotape in order to copy it constituted "theft."\textsuperscript{573}

In \textit{Gassman} the court viewed after-acquired evidence as constituting a complete defense, while \textit{McKennon} held that it was only a partial defense. But \textit{Gassman} involved only a claim for breach of implied contract, while \textit{McKennon} involved a claim of age discrimination. The \textit{Gassman} court was careful to limit its holding to claims for breach of implied contract.\textsuperscript{574} Recently, however, in \textit{Riddle v. Wal-Mart Stores, Inc.},\textsuperscript{575} the court of appeals followed \textit{McKennon} and held that the after-acquired evidence defense was limited to its relevance on the issue of

\begin{footnotesize}
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\item \textsuperscript{567} Id. at 208–09, 967 P.2d at 302–03.
\item \textsuperscript{568} 261 Kan. 725, 933 P.2d 743 (1997).
\item \textsuperscript{569} Id. at 726, 933 P.2d at 744.
\item \textsuperscript{570} Id.
\item \textsuperscript{571} McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995).
\item \textsuperscript{572} Gassman, 261 Kan. at 728, 933 P.2d at 745.
\item \textsuperscript{573} Id. at 732, 933 P.2d at 748.
\item \textsuperscript{574} Id. at 730, 933 P.2d at 747.
\item \textsuperscript{575} 27 Kan. App. 2d 79, 998 P.2d 114 (2000).
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damages.\textsuperscript{576} Thus, the defense does not prevent recovery of damages for retaliatory discharge accrued prior to the employer's discovery of the evidence of employee wrongdoing.\textsuperscript{577} The court reasoned that a complete defense is appropriate in a case such as \textit{Gassman}, which involved only the employee's interest in an implied contract and not any considerations of strong public policy.\textsuperscript{578} By contrast, a retaliatory discharge claim is based upon considerations of strong public policy analogous to the discrimination claims involved in \textit{McKennon}, and these public policy considerations could be undermined if after-acquired evidence were to constitute a complete defense.

\textsuperscript{576} \textit{Id.} at 88, 998 P.2d at 121.
\textsuperscript{577} \textit{Id.}
\textsuperscript{578} \textit{Id.} at 87, 998 P.2d at 120.