Updates in State and Federal Civil Procedure
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Recent Developments in the Law
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Civil Procedure Updates
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United States Supreme Court Civil Procedure Cases of Note

**Personal Jurisdiction**

In *Walden v. Fiore*, --- U.S. ---, 134 S. Ct. 1115 (2014), defendant Walden, a Georgia police officer working as a deputized Drug Enforcement Administration agent at a Georgia airport, searched plaintiffs, Fiore and her companion, and seized $97,000 in cash. Plaintiffs allege that after they returned to their Nevada residence, defendant helped draft a false probable cause affidavit in support of the funds' forfeiture and forwarded it to a United States Attorney's Office in Georgia. No forfeiture complaint was filed, and the plaintiffs’ funds were returned. The plaintiffs filed a *Bivens* tort suit against petitioner in Federal District Court in Nevada. The defendant responded with a motion to dismiss for lack of personal jurisdiction, which the district court granted. The Ninth Circuit, however, reversed. The Supreme Court took certiorari and reinstated the district court ruling. The Court, in so holding, reiterated two fundamental principles of personal jurisdiction law. First, only the defendant’s contacts with the forum state—not those of the plaintiff or third parties—may be considered as part of the *International Shoe* contacts analysis. Second, defendant’s contacts must be with the forum state itself, not merely with a person who resides in the forum state. Applying these principles, the Court concluded that the defendant lacked minimal contacts with Nevada. The Court emphasized that no part of petitioner's course of conduct occurred in Nevada. Rather, the defendant approached, questioned, and searched the plaintiffs, and seized the cash at issue, in the Atlanta airport. Further, defendant helped draft the alleged false probable cause affidavit in Georgia and forwarded that affidavit to a United States Attorney's Office in Georgia. Indeed, the defendant never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. “In short, when viewed through the proper lens—whether the defendant's actions connect him to the forum—petitioner formed no jurisdictionally relevant contacts with Nevada.” *Id.*, 134 S.Ct. at 1124. While this case, which was unanimously decided, is but a routine application of personal jurisdiction law, issued mostly to correct the Ninth Circuit’s outlier opinion, it serves as a nice summary of these aspects of the doctrine.

**Admissability of Juror Evidence Under F.R.E. 606(b)**

In *Warger v. Shauers*, --- U.S. ---, 135 S. Ct. 521, 524, 190 L. Ed. 2d 422 (2014), after a defense verdict was entered in a tort case, a juror signed an affidavit showing that, in essence, a fellow juror’s statements in the jury room demonstrated that the fellow juror
lied during voir dire in a manner that would have lead that fellow juror to be struck for cause. The plaintiff proffered the affidavit as part of a motion for judgment as a matter of law or new trial. The U.S. Supreme Court, affirming the decisions below, held the affidavit inadmissible. Federal Rule of Evidence 606(b) provides that juror testimony regarding what occurred in a jury room is inadmissible “[d]uring an inquiry into the validity of a verdict.” The Court held that the plain language of 606(b) precluded introduction of this affidavit. The Court also held that this affidavit could not fit into the exceptions to the 606(b) rule embodied at F.R.E. 606(b)(2)(A)-(B), which states that only evidence that shows “extraneous prejudicial information was improperly brought to the jury’s attention; [or] an outside influence was improperly brought to bear on any juror” may be admitted. Here the evidence was neither “extraneous” nor “an outside influence.” Finally the Court held that no other policy goals would trump this plain-language approach to 606(b).

The applicability of Warger as persuasive authority in Kansas is likely limited. While K.S.A. 60-441 roughly tracks F.R.E. 606(a), K.S.A. 60-444, which is the analogue to F.R.E. 606(b), does not so closely track the federal rule. Indeed, the Kansas rule by its plain text offers a wider scope for the taking of juror evidence than does the federal rule. “This article shall not be construed to (a) exempt a juror from testifying as a witness to conditions or occurrences either within or outside of the jury room having a material bearing on the validity of the verdict or the indictment, except as expressly limited by section 60-441.” K.S.A. 60-444 (emphasis added). Given that the Kansas statute explicitly envisions taking evidence regarding matters “within” the jury room, a provision purposely absent in the federal rule, it would seem that the decision in Warger is not likely to serve as persuasive authority in interpreting K.S.A. 60-444. This textual difference between F.R.E. 606(b) and K.S.A. 60-444 also explains why the U.S. Supreme Court’s Tanner v. United States, 483 U.S. 107, 107 S. Ct. 2739, 97 L. Ed. 2d 90, 22 Fed. R. Evid. Serv. 1143 (1987), decision remains of limited persuasive value in constructing the Kansas rule.

Pleading Rules

In Johnson v. City of Shelby, --- U.S. ---, 135 S. Ct. 346 (2014) (per curiam), the plaintiffs were police officers alleging unconstitutional retaliation against them by the city for bringing to light the criminal activity of city council members. The court of appeals had affirmed the granting of defendant’s summary judgment motion because the complaint, while factually sufficient to state a 42 U.S.C. § 1983 claim, failed to affirmatively mention § 1983 in the text of the pleading itself. The Supreme Court summarily reversed per curiam, holding that no express statement of a legal theory was needed in the complaint to survive dismissal for failure to state a claim.

What makes City of Shelby especially interesting is its implications for the development of the Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), line of cases. In City of Shelby, the Court holds that no heightened pleading rule applies to § 1983 cases. In so holding, the Court cites to Leatherman v. Tarrant County
Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), and Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Many thought both Leatherman and Swierkiewicz of dubious value post Twombly and Iqbal; a theory which City of Shelby puts to rest. These cases remain alive and well. Moreover, City of Shelby holds that neither Twombly nor Iqbal apply in this case. Twombly and Iqbal’s plausibility requirements, holds the City of Shelby Court, apply only to factual allegations, not legal theories. City of Shelby, then, cabins the effect of Twombly and Iqbal solely to factual allegations, which is a significant clarification of this still-evolving approach to pleading.

When a defendant removes a case from state to federal court under CAFA it must file in the federal forum a notice of removal “containing a short and plain statement of the grounds for removal.” 28 U. S. C. §1446(a). In Dart Cherokee Basin Operating Company, LLC v. Owens, --- U.S. ---, 135 S.Ct. 547 (2014), the Court held that in meeting this statutory standard, a defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions. Of further note, the Court stressed that removal borrows Federal Rule of Civil Procedure 8(a)’s standard, which when coupled with the Court’s use of “plausibility,” illustrates that the Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), line of cases apply in the removal context.

Statute of Limitations

In United States v. Wong, --- U.S. ---, --- S.Ct. ---, 2015 WL 1808750, U.S. No. 13-1074 (2015), the Supreme Court held that the time limits of the Federal Tort Claims Act, which provides that a tort claim against the United States "shall be forever barred" unless it is presented to the appropriate federal agency for administrative review within two years after the claim accrues and, if it is denied, the claimant files suit in federal court within six months of the denial, are subject to equitable tolling.

Class Certification

In Halliburton Co. v. Erica P. John Fund, Inc., --- U.S. ---, 134 S.Ct. 2398 (2014), a putative § 10(b) and Rule 10b–5 class action case, the Supreme Court re-affirmed Basic Inc. v. Levinson, 485 U. S. 224 (1988), which held that investors could invoke a presumption that the price of stock traded in an efficient market reflects all public, material information—including material misrepresentations. But the Court also held that, during class certification, a defendant could rebut this presumption by showing that the alleged misrepresentation did not actually affect the stock price—that is, that it had no “price impact.”

Discovery
In Republic of Argentina v. NML Capital, --- U.S. ---, 134 S.Ct. 2250 (2014), the Court held that assuming that district court had discretion to order discovery from third-party banks about a judgment debtor's assets located outside the United States under Federal Rule of Civil Procedure 69(a)(2), the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602 et seq., does not preclude judgment creditor's discovery of a foreign sovereign’s extraterritorial assets in postjudgment execution proceeding after creditor prevailed in debt-collection actions arising from the foreign sovereign’s default on its external debt.

Appellate Jurisdiction

In Gelboim v. Bank of America Corporation, --- U.S. --, 135 S.Ct. 897 (2015), the Supreme Court held that when a district court dismisses the only claim in a case that has been consolidated with other actions for pretrial proceedings in multidistrict litigation, the district court’s order is a final and appealable order, even if other claims remain in other actions which were included in the MDL.

Pending United States Supreme Court Procedural Opinions:


Issues: (1) Whether an individual's obligation to report suspected child abuse makes that individual an agent of law enforcement for purposes of the Confrontation Clause; and (2) whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as “testimonial” statements subject to the Confrontation Clause.


Issues: Whether a state court's rejection of a claim of federal constitutional error on the ground that any error, if one occurred, was harmless beyond a reasonable doubt is an “adjudicat[ion] on the merits” within the meaning of 28 U.S.C. § 2254(d), so that a federal court may set aside the resulting final state conviction only if the defendant can satisfy the restrictive standards imposed by that provision; and (2) whether the court of appeals properly applied the standard articulated in Brecht v. Abrahamson.


Issue: Whether an order denying confirmation of a bankruptcy plan is appealable.

2014 Federal Rules of Civil Procedure Amendments

Some minor changes to Rule 77 regarding cross-references to Rule 6.
60-205. Service and filing of pleadings and other papers

In Hollister v. Heathman, 344 P.3d 390 (Kan. App. 2015), the court speaking in dicta notes that service upon a person’s former attorney, who is not currently representing the former client, cannot satisfy 60-205’s provisions for serving of pleading and other papers.

60-206. Time, computation and extension; accessibility of court; definitions

In Vontress v. State, 299 Kan. 607, 325 P.3d 1114 (2014), a habeas corpus case, the supreme court held that K.S.A. 60–1507(f) alone controls whether a 60–1507 motion is timely because it is more specific than the general time limitation exception in 60–206(b).

In In re Zishka, 343 P.3d 558 (Kan. Ct. App. 2015), the court of appeals held that a person involuntarily committed as a sexual predator is entitled to at least seven-days notice, per K.S.A. 60-206(c), of his 59-29a08(a) annual review hearing.

60-208. General rules of pleadings

In Smith v. Philip Morris Companies, Inc., 335 P.3d 644 (Kan. App. 2014), a class of Kansas retail purchasers of cigarettes sued several tobacco companies, alleging they conspired to fix the wholesale price of cigarettes in violation of the Kansas Restraint of Trade Act, K.S.A. 50–101 et seq. Plaintiffs argued that defendants formed a conspiracy to fix the wholesale prices of cigarettes in the United States, engaged in lock-step price increases beginning on November 1, 1993, following a 7–month period of vigorous price competition. The district court granted summary judgment after 12 years of discovery and motion practice, holding that the complaint only spoke to wholesale price fixing, a claim not supported with sufficient evidence. On appeal, plaintiffs contended that their complaint reached non-price-fixing conspiracies as well and that Kansas law did not support summary judgment as to the wholesale claims. Affirming, the court of appeals held that a petition is not intended to govern the entire course of the case. In fact, the nature of the claims presented in some cases may not be clear merely from the pleadings, requiring the courts to look to other filings in the case to fully elaborate the range of the claims and defenses made. Nevertheless the district court in this case fairly limited the complaint to wholesale price fixing given that (1) the first amended petition focused solely on allegations of conspiratorial price-fixing by defendants and (2) the notice of class certification was limited to wholesale price fixing solely. Plaintiffs further argued, without authority, that despite their pleadings and class-certification motions that they justifiably relied upon the trial judge’s past rulings that they had, indeed, stated the broader claim to formulate their litigation strategy and to now hold otherwise would somehow be inequitable. The court of appeals held that the failure of the plaintiffs to take any steps to formalize this understanding constituted a waiving of any equitable reliance arguments.
60-211. Signing of pleadings, motions and other papers; representations to the court; sanctions

The failure to sign a notice of appeal, as required by K.S.A. 60-211(a), does not deprive the Kansas Court of Tax Appeals of jurisdiction. In Protest of Lyerla, 336 P.3d 882 (Kan. App. 2014).

60-212. Defenses and objections; presentations, when and how; certain motions; waiver

In Smith v. Philip Morris Companies, Inc., 335 P.3d 644 (Kan. App. 2014), a class of Kansas retail purchasers of cigarettes sued several tobacco companies, alleging they conspired to fix the wholesale price of cigarettes in violation of the Kansas Restraint of Trade Act, K.S.A. 50–101 et seq. Plaintiffs argued that defendants formed a conspiracy to fix the wholesale prices of cigarettes in the United States, engaged in lock-step price increases beginning on November 1, 1993, following a 7–month period of vigorous price competition. The district court granted summary judgment after 12 years of discovery and motion practice, holding that the complaint only spoke to wholesale price fixing, a claim not supported with sufficient evidence. On appeal, plaintiffs contended that their complaint reached non-price-fixing conspiracies as well and that Kansas law did not support summary judgment as to the wholesale claims. Affirming, the court of appeals held that a petition is not intended to govern the entire course of the case. In fact, the nature of the claims presented in some cases may not be clear merely from the pleadings, requiring the courts to look to other filings in the case to fully elaborate the range of the claims and defenses made. Nevertheless, the district court in this case fairly limited the complaint to wholesale price fixing given that (1) the first amended petition focused solely on allegations of conspiratorial price-fixing by defendants and (2) the notice of class certification was limited to wholesale price fixing solely. Although procedurally set as a summary judgment case, this decision should be persuasive as to stating of the elements of a claim in some 60-212(b)(6) motions as well.

60-215. Amended and supplemental pleadings

In Smith v. Philip Morris Companies, Inc., 335 P.3d 644 (Kan. App. 2014), a class of Kansas retail purchasers of cigarettes sued several tobacco companies, alleging they conspired to fix the wholesale price of cigarettes in violation of the Kansas Restraint of Trade Act, K.S.A. 50–101 et seq. Plaintiffs argued that defendants formed a conspiracy to fix the wholesale prices of cigarettes in the United States, engaged in lock-step price increases beginning on November 1, 1993, following a 7–month period of vigorous price competition. The district court granted summary judgment after 12 years of discovery and motion practice, holding that the complaint only spoke to wholesale price fixing, a claim not supported with sufficient evidence. Plaintiffs then moved to amend, which by now was more than 10 years after they filed their first amended petition. Their motion followed on the heels of the trial judge’s ruling that plaintiffs had raised but a single claim for a wholesale price-fixing conspiracy. The motion was denied. The court of appeals affirmed. The court noted that the Kansas supreme court has recognized at least
five valid justifications for denying a motion to amend a pleading: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility of amendment. In this case, the motion to amend was in violation of all of these reasons, excepting number 3.

60-217. Parties; capacity

In Curo Enterprises, LLC v. Dunes Residential Servs., Inc., 342 P.3d 948 (Kan. App. 2015), the asset manager for the owner of an apartment complex, Curo Enterprises, brought an action to remove Dunes Residential Services, Inc. as the property manager. The owner of the apartment complex was never formally listed as a party. Following Dune’s resignation on eve of trial and settlement, Curo sought attorney’s fees pursuant to the management agreement between the complex owner and Dune. The district court denied the fee request. Reversing, the court of appeals held that, by contract, Curo was both an agent of the owner and a third-party beneficiary of the management agreement. The court ruled that despite the fact that it sued Dune in Curo’s name and not the owner’s name, in violation of K.S.A. 60-217(a)(1), the case need not be dismissed. “The purpose of the real party in interest rule is to protect a defendant from being repeatedly harassed by a multiplicity of suits for the same cause of action so that if a judgment be obtained it is a full, final and conclusive adjudication of the rights in controversy that may be pleaded in bar to any further suit instituted by any other party.” Curo Enterprises, 342 P.3d at 954 (internal quotations and citations omitted). In this case, it was clear to all parties, including the defendant Dunes, that Curo was acting solely on behalf of the owner. Dunes itself treated Curo as the owner’s agent throughout the dispute. As such, Curo functioned as the agent for the real party in interest for purposes of 60-217.

60-223. Class actions

In Smith v. Philip Morris Companies, Inc., 335 P.3d 644 (Kan. App. 2014), a class of Kansas retail purchasers of cigarettes sued several tobacco companies, alleging they conspired to fix the wholesale price of cigarettes in violation of the Kansas Restraint of Trade Act, K.S.A. 50–101 et seq. Plaintiffs argued that defendants formed a conspiracy to fix the wholesale prices of cigarettes in the United States, engaged in lock-step price increases beginning on November 1, 1993, following a 7–month period of vigorous price competition. The district court granted summary judgment after 12 years of discovery and motion practice, holding that the complaint only spoke to wholesale price fixing, a claim not supported with sufficient evidence. On appeal, plaintiffs contended that their complaint reached non-price-fixing conspiracies as well and that Kansas law did not support summary judgment as to the wholesale claims. Affirming, the court of appeals held that a class-certification motion, as well as the petition, can speak to what claims plaintiffs brings. Further, the court emphasized that how claims are defined at the class certification stage is critical to satisfy due process requirements. Thus the court concluded that while principles of notice pleading control at the pleading stage, a plaintiff must necessarily more closely define the claim or claims when seeking class certification. Such definiteness serves to properly define the class, to determine whether the filing
plaintiff is a proper class representative, to define the question on which class certification is sought, and to adequately inform potential class members of what claim or claims are involved so they can determine whether to opt out of class membership as provided under 60–223(c)(2). Moreover, if the plaintiffs materially alter the claims or relief sought in the certification order, as is allowed under 60-223(c)(1)(C), amended notice must be sent to the class.

60-225. Substitution of parties

In Hollister v. Heathman, 344 P.3d 390 (Kan. App. 2015), former client brought legal malpractice action against his former attorney pro se. The client died while the case was pending. The former attorney filed a “Suggestion of Death” pursuant to 60-225(a)(1). The former attorney served notice of the suggestion of death on the decedent’s wife, who was a non-party, by delivery to wife’s former attorney. The wife’s former attorney was not then representing the wife or her late husband in any manner. The Court of Appeals held that such service of a non-party violated 60-225(a)(3), which requires that notice of a suggestion of death to a non-party be served like a summons pursuant to 60-303 and 60-304. Moreover, the court stated in what is dicta, that if the wife had been a party service of the suggestion of death upon her former attorney would not satisfy 60-205. The court went on to hold that because the wife was never properly served, the former attorney could not move to dismiss for failure to substitute a party for the decedent within a reasonable time. Citing Graham v. Herring, 297 Kan. 847, 855, 305 P.3d 585 (2013), the court held that calculating reasonable time for purposes of 60-225(a) can only begin after proper service of the suggestion of death.

60-226. General provisions governing discovery

In bench trial on petition to commit sex offender under the Sexually Violent Predator Act, K.S.A. 59–29a06(c), reports of examining psychologists were inadmissible as substantive evidence, since the reports contained inadmissible hearsay. The reports included detailed descriptions of the offender's medical treatment, criminal offenses, and sexual history without identifying the specific sources of information, and described incidents reported in progress notes or other documents from various institutions without identifying the persons recounting the events or whether those individuals even had firsthand knowledge of the circumstances. The error was nevertheless harmless as the case was tried to the bench. In re Quary, 324 P.3d 331 (Kan. App. 2014), review denied (Kan. Aug. 14, 2014).

Civil discovery rule requiring disclosure of expert testimony 90 days before trial did not apply in criminal case, since there was a relevant rule of criminal procedure, the structure of the rules of criminal and civil procedure provided no suggestion that the civil discovery rule might apply in criminal cases, and the timing provisions of the civil discovery rule were unrealistic if applied to criminal cases. State v. Lewis, 327 P.3d 1042 (Kan. App. 2014).

In City of Neodesha v. BP Corp. N. Am., 334 P.3d 830 (Kan. App. 2014), the court of appeals held that the trial court did not abuse its discretion by denying plaintiffs’ motion seeking disclosure of attorney-client communications pursuant to the crime-fraud exception, because plaintiffs failed to identify any specific document or group of documents to support their claim that the crime-fraud exception applied. See K.S.A. 60–426(b)(1). The court of appeals reaffirmed that a trial court may conduct an in-camera inspection of alleged confidential communications to determine whether the attorney-client privilege applies. Finally, under 60-226(b)(4), the appellate court held that the work-product doctrine does not extend to reports or statements, even if written, obtained by the client or his or her investigators which are not prepared under the supervision of an attorney in preparation for trial.

60-237. Compelling discovery; failure to comply; sanctions

In City of Neodesha v. BP Corp. N. Am., 334 P.3d 830 (Kan. App. 2014), the court of appeals held that the trial court did not abuse its discretion in refusing to strike oil refinery owner’s pleadings or to enter a default judgment against owner in action brought by landowners for damages related to soil and groundwater contamination as a discovery sanction due to owner's late production of documents. Although landowners received a huge number of documents just before trial started, the matter was tried to a jury for 17 weeks and landowners were not forced to abandon any of their arguments due to the late production.

60-241. Dismissal of actions

Dismissal for failure to prosecute requires notice sent to plaintiff’s counsel under K.S.A. 60-241(b)(2). The failure to preserve this argument at trial, however, prevents the appellate court from reaching this matter on subsequent appeal. Lehman v. City of Topeka, 323 P.3d 867 (Kan. App. 2014).

60-245a. Subpoena of nonparty business records

Although K.S.A. 60–245a allows the use of custodian affidavits as a prima facie basis to admit the subpoenaed documents as business records under 60–460(m), 60-245a applies only to nonparties. As such, subpoenas issued to agencies of the State when the State is a party to the action, may not rely upon 60-245a as a basis for admitting business records. In re Quary, 324 P.3d 331 (Kan. App. 2014), review denied (Kan. Aug. 14, 2014).

60-250. Judgment as a matter of law; motion for new trial

In City of Neodesha v. BP Corp. N. Am., 50 Kan. App. 2d 731, 334 P.3d 830 (Kan. App. 2014), the court of appeals held that the plaintiffs were precluded from asserting on
appeal that they were entitled to judgment as a matter of law under an abnormally dangerous activity theory, because they never sought judgment as a matter of law in the district court under the abnormally dangerous activities standard. Rather, the plaintiffs based their trial arguments solely on their perception that Kansas law created a per se liability for contamination of groundwater.

Landowners sued oil and gas lessee for breach of an implied covenant to prudently develop the leased land, seeking cancellation of the lease as to the right to drill for oil. After landowners rested their case at a bench trial, the trial court granted judgment as a matter of law in favor of defendant lessee. The court of appeals affirmed. The plaintiffs’ evidence submitted spoke only to the cancellation of the lease; plaintiffs failed to present any evidence to show that defendant breached the implied duty to prudently develop the plaintiffs’ land. Novy v. Woolsey Energy Corp., 339 P.3d 392 (Kan. App. 2014).

60-254. Judgment

In Garcia v. Ball, 50 Kan. App. 2d 197, 323 P.3d 872 (2014), the plaintiff sued his former attorney for malpractice, seeking over $500,000. The former attorney failed to answer the complaint for more than 4 months. The plaintiff then requested, and was awarded, a default judgment under K.S.A. 60-254. The defendant attorney moved the district court to set aside the default judgment, claiming excusable neglect pursuant to 60-260(b)(1) or for “any other reason” under 60-260(b)(6). The motion to set aside the default did not, however, provide any factual basis to support the defendant’s excusable-neglect claim. Nevertheless, the district court granted that motion. On appeal, the appellate court held first that 60-260(b)(6) was not an available grounds for relief because “when a party's claim for relief is covered by subsection (b)(1), the catch-all provision of subsection (b)(6) does not apply.” Id. at 201. Second, the court ruled that the trial court abused its discretion in setting aside the default judgment because the defendant’s motion “failed either to explain what facts constituted excusable neglect or to provide any evidence to support that claim.” Id. at 197. Judge Pierron dissented. He acknowledged that the delay in answering was not excusable. Nevertheless, he concluded that the trial court did not abuse its discretion here because the delay could have been inadvertent within the meaning of 60-260(b)(1), fall within the catch-all provision of 60-260(b)(6), and that good policy preferences decisions on the merits over default judgments.

60-255. Default

In Smith v. Philip Morris Companies, Inc., 335 P.3d 644 (Kan. App. 2014), a class of Kansas retail purchasers of cigarettes sued several tobacco companies, alleging they conspired to fix the wholesale price of cigarettes in violation of the Kansas Restraint of Trade Act, K.S.A. 50–101 et seq. Plaintiffs argued that defendants formed a conspiracy to fix the wholesale prices of cigarettes in the United States, engaged in lock-step price increases beginning on November 1, 1993, following a 7–month period of vigorous price competition. Defendants, in a class action suit that had gone on for over a decade, responded to a set of partial motions for summary judgment with a motion to “defer briefing.” Believing these not a sufficient response, plaintiff class moved for default
judgment for $7.5 billion. The district court declined to grant summary judgment, holding that while not perfect defendant’s motion is best construed as a motion under 256(f) and that default judgments are not favored. The court of appeals affirmed.

60-256. Summary judgment; filing fee

In Smith v. Philip Morris Companies, Inc., 335 P.3d 644 (Kan. App. 2014), a class of Kansas retail purchasers of cigarettes sued several tobacco companies, alleging they conspired to fix the wholesale price of cigarettes in violation of the Kansas Restraint of Trade Act, K.S.A. 50–101 et seq. Plaintiffs argued that defendants formed a conspiracy to fix the wholesale prices of cigarettes in the United States, engaged in lock-step price increases beginning on November 1, 1993, following a 7–month period of vigorous price competition. The district court granted summary judgment after 12 years of discovery and motion practice, holding that the complaint only spoke to wholesale price fixing, a claim not supported with sufficient evidence. On appeal, plaintiffs contended that their complaint reached non-price-fixing conspiracies as well and that Kansas law did not support summary judgment as to the wholesale claims. Affirming, the court of appeals held that in a Kansas Restraint of Trade Act case to establish a material question of fact and thereby survive summary judgment, plaintiffs must come forward with evidence that Defendants' wholesale pricing practices resulted from something more than legal conscious parallelism.

A genuine issue of material fact existed as to whether daughter's reliance on alleged promise from her father that she would inherit land worth over $1 million if she left her law professorship and managed his cattle ranching business was reasonable, precluding summary judgment in daughter's action for restitution of lost wages on theory of promissory estoppel after father sold the land she would have allegedly inherited. Bouton v. Byers, 50 Kan. App. 2d 35, 321 P.3d 780 (2014), review denied (Feb. 19, 2015).

In Whaley v. Sharp, 343 P.3d 63 (Kan. 2014), on review of a motion for summary judgment, the Kansas supreme court held that the written 120–day notice of claim, which is a prerequisite to suit against a municipality, does not apply to suits against a municipal-hospital physician; overruling King v. Pimentel, 20 Kan.App.2d 579, 890 P.2d 1217.

60-259. New trial; motion to alter or amend judgment

K.S.A. 60–259(a)(1)(C) grants the trial court authority to order a new trial when the jury verdict was given under the influence of passion or prejudice. Further, under Supreme Court Rule 181 (2013 Kan. Ct. R. Annot. 277) a juror may be called to testify at a hearing on a posttrial motion only if the court—after a hearing to determine whether all or any jurors should be called—grants a motion to call the juror. That said, recalling jurors after their service has ended is not common and should be undertaken only for just cause. If jury misconduct causes a fundamental failure of the trial process that is substantially prejudicial to the complaining party, the trial court abuses its discretion if it fails to order a new trial. When ruling on motions such as this, a court must follow both K.S.A. 60–441 and K.S.A. 60–444 when taking evidence from jurors. Attempts by jurors in the majority to persuade jurors in the minority, even if aggressively made, to change their

60-260. Relief from judgment or order

K.S.A. 60–260(b)(4) does not provide a procedure for a criminal defendant to obtain postconviction relief from his or her conviction or sentence. State v. Kingsley, 326 P.3d 1083 (Kan. 2014)

60-303. Methods of service of process

In Hollister v. Heathman, 344 P.3d 390 (Kan. App. 2015), the court held that service of notice of suggestion of death upon a non-party must comply with the rules for service of a summons under 60-303 and 60-304.

Given the rise of social media, some courts are beginning to explore whether service by social media may constitute service by publication, or by “other means.” For example, a New York trial court in a divorce case allowed service by Facebook of an out-of-state defendant who was otherwise impossible to locate. See Baidoo v. Blood-Dzraku, 2015 NY Slip Op. 25096 (Sup. Ct. New York County Mar. 27, 2015). Whether this same means of service complies with Kansas law will likely be a question of importance soon.