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PRESIDENT'S MESSAGE:

We are trial lawyers. By training and practice, we recognize and appreciate that a foundational requirement of our success as lawyers is access to information and knowledge. Our membership in KADC advances that goal. Moreover, beyond the passive participation of simply joining KADC and receiving its ancillary benefits, our commitment to KADC exponentially expands the potential benefit.

KADC provides both direct and indirect advantages to its membership. The indirect benefits include the organization's core tasks such as legislative oversight through the legislative committee and appellate advocacy through the amicus committee. Both committees were active this past year and served the membership well. We provided testimony for bills concerning asbestos litigation, supersedeas bonds for appeals, and admissibility of seat belt evidence for automobile-related litigation. We submitted briefs to the Kansas Supreme Court supporting Kansas dram shop liability law and adjustments and setoffs for admissibility of evidence in damages cases. Of course, the committees also monitored all legislation and every appellate case for other issues that impact our members and their clients.

The direct KADC benefits include a member's access to premium legal education presented by judges and leaders of the profession at the annual meeting, receipt of the KADC Journal containing topical and thoughtful articles and news, the trial skills academy for new lawyers, and the acquisition of business relationships formed at the meeting.

Regardless of the source, any KADC benefit may be enhanced by a member's commitment to and involvement in the organization. Here, the KADC always has opportunities for any member to participate

in substantive committees, as contributing authors to the Journal, or as presenters at the meeting seminars. The relationships formed from the commitment to the organization are lifetime lasting and professionally invaluable.



William Townsley
Fleeson, Gooing,
Coulson & Kitch

The bottom line is that your commitment to the KADC will both enhance your experience as a trial lawyer and make the organization stronger at the same time. Some say that one's participation in a professional organization like KADC can be analogized to the chicken and pig's relationship to the breakfast meal. For a delicious bacon and eggs breakfast, the ingredients require some participation from a chicken and a pig; but, whereas the chicken may be partially involved in the process, the pig is wholly committed to the end result. That wholly committed approach serves us all well at the KADC.

Our organization is strong and vital. On Friday, November 30, we will again reconvene for the annual meeting and continuing education seminars. The program is spectacular with Patricia Miller, the chief of the Federal Litigation Department of the New York City Law Department, serving as the keynote speaker; however, the entire agenda is loaded with good programs and great speakers. Commit to attending the meeting for both the seminars and the opportunity to make and renew relationships with your colleagues. Moreover, commit to bringing your partners and, most importantly, the younger lawyers you employ or know so that they, too, can appreciate the benefits of KADC.

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The *Kansas Defense Journal* is a quarterly publication of the Kansas Association of Defense Counsel. If you have any questions, comments, or ideas for future articles, please contact:

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www.kadc.org*President's Message (Continued from page 1)*

KADC remains in the good hands of great leaders. Zach Chaffee-McClure will become our president at the annual meeting. Joining him on the executive committee will be Lora Jennings, Shannon Wead and Terelle Mock. Many of our other colleagues also will serve in vital and important roles for the organization as board or committee members. I owe them all a debt of gratitude for ensuring our successes this past year.

I have greatly enjoyed my opportunity to serve KADC. I have appreciated getting to know most of our members and hope to meet even more of you at the meeting in a few weeks. KADC will continue to succeed as we advocate for our clients and advance the notions of due process through trial work. I implore you all to commit to KADC to benefit your own practice and to advance our mission as trial lawyers. Thanks for your support.

EXECUTIVE DIRECTOR'S REPORT

Hello from the KADC office!

The DRI Annual Conference was October 18 – 20 in San Francisco. KADC President Bill Townsley, President-elect Zach Chaffee-McClure and I attended along with several other KADC members. They always have quality keynote speakers and sessions and provided a great chance to learn more about the profession and what other states are doing with their state associations.

Registration is now open for the KADC Annual Conference. Which will be held November 30- December 1, 2018. The Conference Committee has been hard at work planning a full agenda of engaging

speakers. This year's keynote speaker, Patricia Miller, has tried more than 60 cases in federal court. She currently serves as the Chief of the Special Federal Litigation Division for the New York City Law Department. In her current role, Ms. Miller supervises the department responsible for defending all federal civil rights lawsuits brought against NYC law enforcement. You will not want to miss this engaging and informative speaker.

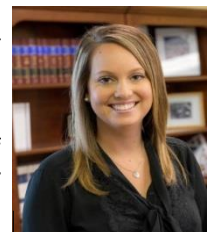
The Young Lawyers Committee will hold their Trial Skills Workshop on November 29 and have arranged a great breakout session during the Annual Conference. We are offering 12.5 hours of Kansas CLE (pending approval) for attendance including two hours of ethics (pending approval). [Register now](#) and make your hotel reservation at the Marriott Country Club Plaza before they sell out.

There are still sponsor and vendor opportunities available. If you or anyone you know is interested, please contact Alison

Connell at Alison@kadc.org. The Annual Conference is always a great opportunity to get new KADC members, so please reach out to any non-members you know and invite them as well.

We are in the process of putting together a slate for the Board of Directors and volunteers to serve on Committees for the coming year. If you are interested in serving on any of the following, please email me at elsie@kadc.org

- Amicus
- Legislative
- Membership
- Young Lawyers
- Annual Conference
- Social Media
- Trial Skills Workshop
- Community Service and Outreach
- KADC Journal



Elsie Kreidler
KADC

I look forward to seeing you November 30 - December 1 in Kansas City!

- Elsie Kreidler

WELCOME NEW KADC MEMBERS

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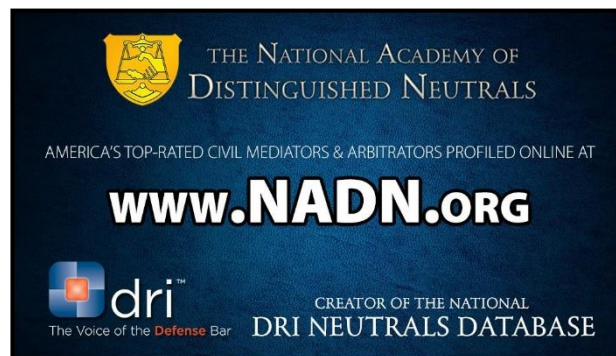
Lawyers admitted to the Bar five years or less who join KADC will receive one free registration to the Annual Conference in their first year of KADC membership (a value of up to \$410).

Law students who are members of KADC will receive free registration to the Annual Conference while they are full time students.

Young lawyers admitted to the Bar five years or less who join DRI will also receive a certificate for a free registration for one DRI seminar of their choice or the DRI Annual Meeting.

JOIN KADC ON SOCIAL MEDIA

KADC created a LinkedIn group for members. We anticipate utilizing this group to share ideas, tips, experts, and answer questions. We would like to transition all content sharing from the old Yahoo list serve format to the LinkedIn Group. This is a closed group for members only. If you are not already a member of the group, please [join](#)! While you're at it, like us on [Facebook](#) and follow us on [Twitter](#).



ARTICLES SUBMITTED BY MEMBERS:

KADC AMICUS COMMITTEE REPORT

By Eric Turner and Anne Kindling

The Kansas Supreme Court will hear oral arguments on its October docket for a case in which the KADC has filed an amicus brief on the issue of dram shop liability. The Court will hear arguments in *Kudlacik v. Johnny's Shawnee, Inc.* in the Friday morning session on October 26.

In *Kudlacik*, the Court will review whether an establishment serving alcohol can be held liable for injuries caused by an intoxicated customer. The plaintiff sued two restaurants in Johnson County, alleging that they served alcohol to an intoxicated customer before the customer ran a red light going 70 in a 45-m.p.h. zone and struck plaintiff's vehicle, causing severe injuries. The driver had been at the two restaurants—the second for an hour or less—for more than five hours and had a blood alcohol level of .179 at the time of the crash.

The Johnson County District Court dismissed the lawsuit based on Kansas Supreme Court precedent established in 1985 in *Ling v. Jan's Liquors*,¹ and affirmed in 2005 in *Bland v. Scott*.² The Kansas Court of Appeals granted defendants' motions for summary disposition, and the Kansas Supreme Court granted review in August 2017.

The issue before the Court is whether Kansas should recognize a common law cause of action for injuries to a third party as a result of the negligent sale of alcohol to an intoxicated person. The plaintiff argues that *Ling* is antiquated case law and no longer accommodates the circumstances of the modern world. Plaintiff also argues for liability under a negligence per se theory based on K.S.A. 41-715, a statute that imposes criminal liability on commercial liquor vendors.

The KADC brief—filed in March by Lyndon Vix and Brian Vanorsby of Fleeson, Gooing, Coulson & Kitch, L.L.C.—focuses on the history of the common law that has consistently rejected a civil cause of action in Kansas and legislative intent as shown by the legislature's inaction in the 33 years since *Ling* was decided. Ultimately, the KADC argues that the issue is a matter of public policy that can be resolved only through the legislative process.

The KADC's amicus brief was one of five filed in *Kudlacik* in addition to briefs filed by the Kansas Restaurant & Hospitality Association, the Kansas Trial Lawyers Association, Mothers Against Drunk Driving, and the Kansas Emergency Medical Services Association. KADC members Todd Thompson and Sarah Warner, of Thompson Warner, P.A., represent co-defendants Barley's, Ltd.

¹237 Kan. 629 (1985).

²279 Kan. 962 (2005).

The KADC also filed an amicus brief in *Hilburn v. Enerpipe, Ltd.*, which addresses a constitutional challenge to Kansas' non-economic damage caps in the personal injury context. Oral arguments were in May, and a decision from the Kansas Supreme Court is pending. As always, the amicus committee welcomes requests for amicus briefs for pending cases that concern a matter of interest to the defense bar. The Amicus Curiae Request Form is available to members on the KADC website.³

³<https://kadc.wildapricot.org/resources/Pictures/KADC%20Amicus%20Curiae%20Brief%20Request%20Form2017.pdf>

THE KANSAS COURT OF APPEALS CONFIRMS INAPPLICABILITY OF KANSAS CONSUMER PROTECTION ACT CLAIMS AGAINST REGULATED BANKS

By Matthew A. Spahn, Martin, Pringle, Oliver, Wallace & Bauer

In a decision having a far-reaching impact on regulated banks doing business in Kansas, on November 17, 2017, the Kansas Court of Appeals affirmed that claims cannot be brought against regulated banks under the Kansas Consumer Protection Act (“KCPA”) in *White v. Sec. State Bank*.¹

The KCPA is a Kansas law that was created, in part, to “protect consumers from suppliers who commit deceptive and unconscionable practices.”² To prevail on a KCPA claim, a plaintiff must prove that it is a “consumer” under the KCPA, that the defendant is a “supplier” under the KCPA, and that the defendant engaged in a “deceptive” or “unconscionable” act or practice that aggrieved the plaintiff.

The KCPA defines a supplier as “a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the customer.”³ The same section of the statute, however, states that a “[s]upplier does not include any bank, trust company or lending institution which is subject to state or federal regulation with regard to disposition of repossessed collateral by such bank, trust company or lending institution.”⁴ This exclusion was tested in *White v. Sec. State Bank*.

In *White*, the plaintiffs asserted fourteen KCPA claims against Security State Bank and its president related to plaintiffs’ loan transactions with the Bank for the family farm. The Whites alleged that the Bank had engaged in a pattern of unconscionable, deceptive, and fraudulent behavior to exploit the Whites during the loan transactions.

The district court dismissed the white KCPL claim. The district court determined that the Bank was excluded from the KCPA’s definition of “supplier” because it was “a regulated supplier.”⁵ The Court of Appeals affirmed the dismissal of the KCPA claim.

On appeal, there was no disagreement that the Bank was regulated. Thus, the critical issue was whether the exclusion in the definition of supplier was applicable to the Bank because no “disposition of repossessed collateral” was at issue.

¹No. 115,179, 2017 Kan. App. Unpub. LEXIS 957 (Kan. Ct. App. Nov. 17, 2017).

²K.S.A. 50-623(b).

³K.S.A. 50-624(l).

⁴*Id.*

⁵*White*, 2017 Kan. App. Unpub. LEXIS 957, at *16.

The Whites challenged the district court's legal conclusion and argued that the exclusion of banks from the definition of "supplier" under the KCPA is expressly limited to only those occasions when the bank is actually disposing of repossessed collateral.

In contrast, the Bank argued that the bank exclusion applied whenever a regulated bank is involved in any transaction, regardless of whether that matter involves the disposition of repossessed collateral. The Bank contended that regulated banks must comply with federal and state regulations which already protect consumers from deceptive and unconscionable practices by banks. Thus, according to the Bank, the KCPA's exclusion of regulated banks as suppliers is a recognition that consumers receive protection from other statutory or regulatory sources.

The Court of Appeals agreed with the Bank's interpretation of the definition of supplier.

A plain reading of the statutory language persuades us that the interpretation proposed by the Whites is too narrow. The basic text of the supplier exclusion does not limit its application to only those times when the bank is actively disposing of repossessed collateral. Rather, based on the plain language, if a bank is generally subject to regulations pertaining to disposition of repossessed collateral, the bank is excluded as a supplier under the nomenclature and reach of the KCPA.⁵

In support of its plain reading interpretation of the definition of supplier, the Court of Appeals relied upon two opinions issued by the United States District Court for the District of Kansas. In the 2016 case *Larkin v. Bank of Am., N.A. (In re Larkin)*, Judge Robert Nugent noted that "[i]n every instance where a bank's status as 'supplier' under the KCPA was directly before it, the United States District Courts have held that regulated banks are excluded from the definition, regardless of whether the case actually involves a disposition of repossessed collateral."⁶ Judge Nugent observed:

Wittingly or not, the Legislature has created a sizeable hole in the KCPA through which banks . . . can slip, regardless of their conduct. While the 'guiding principle' of the KCPA is to protect consumers from suppliers who commit deceptive and unconscionable acts, a goal that requires liberal construction, that only goes as far as the words that are contained in the statute. I cannot interpret words that aren't there or replace them with others. Adopting the [plaintiffs'] interpretation would effectively rewrite the 'regulated bank' exclusion in the definition of 'supplier.' That is a task for the Kansas Legislature, not me.⁷

In reaching his ruling in *Larkin*, Judge Nugent had relied on Judge J. Thomas Marten's statutory interpretation in *Kalebaugh v. Cohen, McNeile & Pappas, P.C.*⁸ In *Kalebaugh*, the plaintiff argued

⁵ *Id.* at *18.

⁶ 553 B.R. 428, 444 (Bankr. D. Kan. 2016).

⁷ *Id.* at 444-45.

⁸ 76 F. Supp. 3d 1251 (D. Kan. 2015).

that the KCPA only excludes banks, trust companies, and lending institutions when the issue at hand is the “disposition of repossessed collateral.” Judge Marten disagreed with this narrow reading and concluded, “the court cannot extrapolate this meaning from the plain language of the statute. The court therefore concludes that Discover Bank is not a supplier under the KCPA if it is subject to state or federal regulation.”⁹

In sum, the decision in *White* adopting the rationale of the United States District Court for the District of Kansas confirms that KCPA claims cannot be brought against regulated banks, trust companies or lending institutions.

⁹ *Id.* at 1260; *see also Ellis v. Chase Bank USA, NA*, 2017 U.S. Dist. LEXIS 183866, at *9 (D. Kan. Nov. 7, 2017). In *Ellis*, which was decided after *White*, United States District Judge Daniel D. Crabtree, in granting a Motion to Dismiss, took judicial notice that Chase Bank was federally regulated and as a result, was not a “supplier” under the KCPA.

CASE UPDATE

By Lyndon Vix, Fleeson, Gooing, Coulson & Kitch, LLC.

This article briefly examines several decisions of interest in the Kansas state and federal courts decided over the past three months. Of course, “interest” lies in the eye of the beholder and there may well be significant decisions not discussed here. In addition, these summaries are in no way intended to serve as a substitute for a thorough reading of the decisions. *Caveat lector*.

[Castleberry v. DeBrot](#), [Burnette v. Eubanks](#) and [Biglow v. Edienberg](#) are a trio of medical malpractice cases decided by the Kansas Supreme Court on August 24. All three dealt in large part with jury instructions. In *Castleberry* and *Burnette*, the Court held that a causation instruction stating that a party is liable when his or her negligence “caused or contributed” to the event that injured the plaintiff was both factually and legally appropriate. The Court rejected the argument that the inclusion of “contributed” in the instruction could remove the requirement of “but for” causation. *Biglow* approved the use of two instructions defining “negligence.” Also, both *Castleberry* and *Biglow* address the plaintiff’s use of the word “safe” in describing a physician’s duty. In *Castleberry*, the Court found the use of the term in closing argument to be improper, but harmless. In *Biglow*, the Court upheld the district court’s *in limine* ruling that the term could not be used. Finally, *Burnette* is notable in that it attempts to clarify the often blurry line between economic and noneconomic damages in a wrongful death case. The Court decides that submitting a claim for “loss of attention and care” to the jury as an economic loss is only appropriate when there is evidence that what has been lost has real economic value. In the absence of such evidence, “loss of attention and care” is a noneconomic loss.

Workers compensation practitioners are no doubt aware that on August 3, in [Johnson v. U.S. Food Service](#), the Court of Appeals held that the statute directing physicians to use the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment in assigning a percentage of impairment to claimants is unconstitutional. Because the Sixth Edition results in significantly lower ratings than the previously used Fourth Edition, the Court held that the Act would no longer provide an adequate substitute remedy for injured workers as a *quid pro quo* for precluding them from suing their employers at common law. Petitions for review have been filed both by the respondent and by the Attorney General who has intervened to defend the statute.

In [Manley v. Hallbauer](#), decided on August 10, the Supreme Court affirmed the longstanding rule that a landowner whose property abuts a rural intersection owes no duty to passing drivers to trim or remove trees or other vegetation on the property. In so doing, the Court chose to stick with the policy articulated in two cases from the 1920’s over a more expanded view set forth of the Restatement (Third) of Torts.

[Trear v. Chamberlain](#), decided by the Supreme Court on August 24 is not particularly noteworthy outside the real estate realm, and is mentioned here only to highlight Justice Johnson's observation that, "To channel Paul Simon, there must be 50 ways for Trear to lose this lawsuit."

In [McCullough v. Wilson](#), decided on September 7, the Supreme Court confirmed the holdings of prior cases that, although automobile insurance carriers who pay personal injury protection (PIP) benefits obtain the right to sue to collect their lien after 18 months, this does not divest the injured party of his or her right to sue for the same damages. Relying heavily on the doctrine of stare decisis, the Court turned back a challenge to these precedents that argued a different result was compelled by the plain language of the statute, which states that if the injured party does not commence an action with 18 months the cause of action is "assigned" to the insurer.

A few quick hits from the local federal district court: In [Pipeline Productions, Inc. v. Madison Companies, LLC](#), Magistrate Sebelius made clear that terminating a deposition is not a proper response to improper questions. Rather, the offended party must make efforts—perhaps even heroic efforts—to get a judge involved while the deposition is still in session. In [Progressive Northwestern Insurance Company v. Gant](#), Judge Robinson held that an insurance carrier cannot be held vicariously liable for the misconduct of the counsel it retains to defend an insured, so as to create bad faith liability for the insurer. In [Foster v. USIC Locating Services, LLC](#), Judge Murguia held that, even though the injured party is the proper plaintiff for a spouse's loss of consortium claim, that claim must be pled separately. In [Cole v. National Railroad Passenger Corp.](#), Magistrate Gale clarified the language to be utilized in an order that allows defense counsel to consult *ex parte* with a plaintiff's treating physician. In [Barcus v. Phoenix Insurance Co.](#), Judge Gale discussed how to determine whether an expert is truly a rebuttal expert, when a litigant appears to be attempting to avoid the consequences of not including the expert in initial expert disclosures. And in [D.M. v. Wesley Medical Center](#), Magistrate Gale (keeping busy) addressed the propriety of including in a pleading, screenshots of social media posts that are unflattering to the opposing party.

PROCEDURAL PREDICAMENTS: *INSURANCE? THEY WANT TO TALK ABOUT INSURANCE?!*

By Jake Peterson, Clark, Milze & Linville, Chtd.

You file the typical motions *in limine* that you prepare before every personal injury trial. You ask for orders preventing mention of income tax, liability insurance, and limiting expert opinions to those previously disclosed. You also file motions regarding improper closing argument (which you know will create more disputes than it should due to the plaintiffs' bar's reptilian strategy) but plaintiffs' counsel typically agree to your other motions – they're well-settled law. Then plaintiff files her response.

She's objecting to your motion on... liability insurance? Apparently, she wants to ask the jury panel a line of questions about insurance during *voir dire*. And she appears pretty confident about her position.

You know that the caselaw you've cited has not been overruled and that K.S.A. 60-454 generally bars admission of liability insurance, but you haven't explicitly researched this issue in a few years. So, you do a quick search to see if there's a new case you're not aware of.

The first hit, interestingly, is *Biglow v. Eubanks*.¹ In addition to the reptilian arguments addressed by the Supreme Court in a later decision, the Court of Appeals also addressed a juror's comments about medical malpractice liability insurance in jury selection. A juror in *voir dire* volunteered, in front of the entire panel, "[h]onestly I feel like the insurance company with the doctors can be paying the money. So if the doctor did anything wrong, he's really not ever going to feel the pain for it."² Referring to the mention of liability insurance as "inadvertent," the Court of Appeals ruled that the trial court eliminated any prejudicial error through a jury instruction.³

You're surprised by how unconcerned the Court of Appeals seemed, but not worried. That case is easily distinguishable from what plaintiff is proposing in this case. As stated in *Biglow*, "our Supreme Court has made it clear that the *deliberate* injection of insurance into trial testimony constitutes prejudicial and reversible error."⁴ Indeed, the Kansas Supreme Court in *Unruh v. Purina Mills, LLC*, cited a long line of cases stating that mention of insurance is extraordinarily prejudicial:

A long line of Kansas cases suggest that the deliberate injection of insurance into trial testimony constitutes prejudicial and reversible error. *See, e.g., Harrier v. Gendel*, 242 Kan. 798, Syl. ¶ 2, 751 P.2d 1038 (1988) (introduction of evidence of collateral source benefits is inherently prejudicial because it may induce a jury to decide cases on improper grounds); *Ayers v. Christiansen*, 222 Kan. 225, 228, 564 P.2d 458 (1977) (introducing evidence of defendant's insurance status in regard to

¹52 Kan. App.2d 751, 379 P.3d 372 (2016).

² *Id.* At 774

³ *Id.* at 774

⁴ *Id.* at 775. (emphasis added).

issue of fault is irrelevant and prejudicial); *Kelty v. Best Cabs, Inc.*, 206 Kan. 654, Syl. ¶ 1, 481 P.2d 980 (1971); *Caylor v. Atchison, T. & S.F. Rly. Co.*, 189 Kan. 210, 214, 368 P.2d 281 (1962) (“Where the offending party secures a verdict *and the opposing party makes a timely objection*, and otherwise has adequately protected the right to review, the offense [of introducing evidence of insurance coverage] is so inherently prejudicial as to require reversal unless unusual circumstances are shown.” [Emphasis added]).⁵

Deliberate injection is *exactly* what your motion is aimed to combat. What could plaintiff’s counsel argue in the face of all of that authority?

She first cites to *Mathena v. Burchett*.⁶ In that case, the Supreme Court *endorsed* the following two questions asked by plaintiff’s counsel to the (apparently all-male) panel:

Q. * * * have any of you gentlemen ever attended law school or adjusted losses for either an adjusting company or insurance company or engaged in that work, or been engaged in the sale of insurance as an insurance agent? Have any of you gentlemen ever been engaged in that type of work?

Q. Have any of you gentlemen ever been law enforcement officials at any time and as such compelled to investigate accidents?⁷

After reasoning that the above questions did not create an inference about the defendant’s insurance coverage, the Court stated that plaintiff’s counsel was “entitled” to ask those questions, because it was important “to know if any of the prospective jurors had engaged in counsel’s opinion would give such juror a special knowledge of the legal implications of such a case....”⁸ Unfortunately, the Court reaffirmed this holding more recently in *McKissick v. Frye*.⁹

But all is not lost. Based on the line of cases discussed in the Supreme Court’s *Unruh* decision, *Mathena* and *McKissick* should be interpreted very narrowly. While counsel may be permitted to ask about the nature of juror’s experience, it’s a fine line between inquiring about experience and deliberately injecting the issue of insurance coverage into the case. Using a typical progression of *voir dire* questions from the questions in *Mathena* illustrates that concern well:

Q. Have any of you adjusted losses for either an adjusting company or insurance company, engaged in the sale of insurance, or in the insurance or adjusting business?

A. [2 affirmative responses]

Q. What was your position, [identifying one of the jurors]?

A. I was an adjustor for State Farm Insurance.

Q. How would you describe what you did for State Farm?

⁵ 289 Kan. 1185, 1198 (2009).

⁶ 189 Kan. 350 (1962).

⁷ *Id.* at 352 (internal quotations omitted)

⁸ *Id.* at 355.

⁹ 255 Kan. 566 (1994).

- A. I analyzed the value of damages that were being claimed under State Farm's policies.
- Q. Did you work for any other insurance companies?
- A. No.
- Q. As a part of your adjusting work for a liability insurance company, did you ever adjust losses for the [types of claims at issue in the case]?
- A. Yes.
- Q. Is there anything about your experience working for a liability insurance company that would prevent you from being a fair and impartial juror in this case?
- A. No.
- Q. And if the judge were to instruct you that you shouldn't consider insurance, or whether or not the defendant had insurance, is that an instruction you can follow in reaching your verdict?
- A. Yes.
- Q. And what about you, [identifying second juror]?

Those questions could very easily be asked with any juror that has an occupation of interest to an examining attorney. Yet, the answers above are fraught with danger. There were *five* mentions of insurance in *seven* questions, and the questions will inevitably cause jurors to wonder about insurance coverage in *your* case.

Plaintiff could respond to your concerns by stating that she can control the questioning to avoid these issues. It is her "right" as counsel, to use the reasoning from *Mathena*, to ask those questions, after all. If Kansas courts are willing to overlook the *highly* prejudicial comments in *Biglow* about how the doctor won't be paying damages, then surely a routine line of inquiry about juror occupations and experience wouldn't be erroneous.

If "juror experience" and preconceptions are as big a concern as the plaintiff alleges, though, then you should be permitted to inquire about a juror's experience with third party payors and health insurance during *voir dire*. Most courts (and plaintiff's counsel, for that matter) would be loath to permit that inquiry.

There is also a huge difference between a spontaneous comment by an isolated juror, and a protracted inquiry – no matter how well-intentioned – to the entire panel. And the lack of a deliberate inquiry was a major distinguishing fact for the Court of Appeals in *Biglow*. Jurors, especially *en masse*, are incredibly savvy, and the significance of lengthy, repeated exchanges about liability insurance will not be lost on them. Even well-intentioned, seemingly proper questions can be unduly prejudicial, and could easily lead to reversible error. Removing jurors to chambers in such a circumstance to discuss "insurance" will also undoubtedly create a similar effect on prospective jurors: What is it about "insurance" that is so important that we have to discuss it in the judge's office?

Ultimately, it seems that plaintiff is correct up to a point, but her approach is fraught with risks. As the Court in *Mathena* itself recognized:

Considerable latitude should be allowed in the examination of jurors to the end that all who have any bias or prejudice, or are otherwise disqualified, may be excluded from the panel, but the inquiry should never extend so far as unnecessarily to introduce extraneous matter of a prejudicial character that may improperly influence the verdict.¹⁰

Thankfully, the Court is now aware of these pitfalls, and agrees that plaintiff should avoid emphasizing the issue at trial. And plaintiff's counsel knows that you will be keeping a close eye on how far she takes the matter at trial. While you can't likely get an outright victory, you have mitigated the risks to your client as well as you can.

A note about this article:

I plan to continue to submit similar articles regarding what I hope are helpful discussions about civil procedure or evidentiary issues under Kansas law for the foreseeable future. I don't intend for them to provide comprehensive guidance, but merely to show how certain rules could be read or applied in a specific factual scenario. (And, to be blunt, I'm not qualified to or interested in writing a civil procedure treatise anyway.) My objective is for the articles to be short and vivid enough to give a sense of familiarity when similar issues are encountered in the future and to provide a starting point for research. I very much appreciate the opportunity to write for the *Defense Journal*.

¹⁰*Id.* at 350, Syl. ¶ 2.


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