Approved April 1, 1986
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Chairman Joe Knopp at
Chairperson

3:30 a.m./p.m. on March 31, 1986 in room 313-S of the Capitol.

All members were present except:

Committee staff present:
Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Mary Torrence, Revisor of Statutes' Office
Jan Sims, Committee Secretary

Conferees appearing before the committee:
Matt Lynch, Judicial Council
Walter N. Scott
Ron Smith, Kansas Bar Association
Sen. Robert Frey
Professor Ryan, Washburn University
Larry Dimmitt, Kansas Bar Association
Jim Kaup, Kansas League of Municipalities
Joe Furjanic, Kansas Association of School Boards
Cathy Peters, Assistant City Attorney, Kansas City, Kansas
Henry Cox, Assistant City Attorney, Overland Park, Kansas
Bill Sneed, Kansas Association of Defense Counsel
Kathleen Sebelius, Kansas Trial Lawyers Association
Ted Fay, Insurance Commissioner's Office

SB 480 - An act relating to civil procedure.

Matt Lynch of the Judicial Council appeared before the committee in support of SB 480. He stated that most of the changes were necessary because of federal changes. The bill is the result of a Judicial Council study and is designed to expedite the litigation process. He offered some technical amendments to the bill due to certain sections being governed by the Supreme Court rules.

Walter N. Scott appeared questioning lines 269-70 and 289-91 regarding notice and summons procedures. He stated that there should be consistency within the sections of the bill and consistency between provisions concerning Chapter 60 and 61.

Ron Smith of the Kansas Bar Association handed out the Bar's position in support of SB 480 (Attachment 1).

SB 415 - An act amending the act for judicial review and civil enforcement of agency actions; providing for application thereof to political subdivisions.

Sen. Robert Frey appeared before the committee to give the background of the bill over the last few years leading up to the present bill. He stated that it has now been two years since the political subdivisions were given a respite from coming under the act. It has been slow work and is now ready to go into the second stage. The legislature has acted in good faith to wait two years and now it is time for the political subdivisions to act in good faith and come under the act. Any opposition at this point would indicate a philosophical opposition to the act. Enough time has been given to them.

Professor Ryan appeared before the committee in support of SB 415. He stated that this is the last cornerstone of the Administrative Procedures Act and Judicial Review Act which have been worked on for over 35 years. When it was presented to the Legislature three years ago it contained a judicial review act which simply covered judicial review. Under pressure from local political subdivisions it was set aside but has been discussed considerably in the meantime. It is now presented again. Professor Ryan stressed that again this bill has a delayed effective date.

He also stressed that this is judicial review, not administrative procedure. They are separate acts. The basic provisions of the bill provide a method of getting matters tocourt in a unified manner and eliminating the differences found from county to county and district to district. It also codifies a very limited scope of review offering more protection to units of local government. He stated that the Association of School Boards had been the most vocal in opposition to the act and that with some technical amendments to be offered by another conferee today they could now support the bill. The amendment is a friendly one indicating only some technical language that did not get into the bill as printed.

Ron Smith of the Kansas Bar Association stated his association's support for the bill.

Larry Dimmitt, President of the Administrative Law section of the Kansas Bar stated that that section supports the bill.

Jim Kaup of the Kansas League of Municipalities appeared stating that two years ago the League supported the principle of this bill so long as it was practical in implementation. The House Judiciary Committee at that time allowed political subdivisions some time to see how the procedure would work with state agencies before bringing them in. The bill now will include not only cities and counties but rural water districts, street lighting districts, etc. The League at this time does not support or oppose the bill; they just have some very serious questions about it. They have members who support it and members who oppose it.

Joe Furjanic of the Kansas Association of School Boards appeared offering a friendly amendment on page 5(7). This was to have been changed by the Judicial Council and did not get in in time for printing. With this change the school boards can support the bill (Attachment 2).

Cathy Peters, Assistant City Attorney for Kansas City, Kansas appeared stating they are not really in support or opposition to the bill but feel it raises some very serious questions for the city and the operation of its hearings, boards, etc. They are not sure what some of the procedures mean. They could support the principle of the bill with some technical changes.

Henry Cox, Assistant City Attorney for Overland Park, Kansas appeared in opposition to the bill. He stated that the cities have not participated in this process since single cities were excluded from the original bill two years ago. He stated that this bill is frightening because it has gone through so many committees and it undercuts the whole rudiment of local government. It is another attempt to destroy home rule. He has some real problems with the provisions which leave the court determining whether a decision is a judicial decision or a legislative decision.

Professor Ryan responded to the concerns of the representatives from Kasnas City, Kansas and Overland Park stating that their concerns were addressed in the bill.

HB 2458 - An act concerning wrongful death actions; relating to admissibility of certain evidence to prove mitigation of damages.

Ron Smith of the Kansas Bar Association appeared in support of this bill (Attachment 3). He stated that wrongful death actions are creatures of statute and there is no common law governing them. The legislature has the power to regulate these actions and the evidence therein. In response to questions he stated that he feels juries are speculating now whether remarriage has occurred even though the evidence is not admissible.

Bill Sneed of the Kansas Association of Defense Counsel appeared in support of the bill (Attachment 4). He stated that this is probably not going to change a lot of cases around in that it will simply allow a jury to know the facts.

Kathleen Sebelius of the Kansas Trial Lawyers Association appeared in opposition to the bill. She stated that there is currently a cap of $100,000 on noneconomic losses in wrongful death actions. This bill would be likely to create discrimination

against women because that is the situation in most wrongful death actions; the husband dies and leaves a wife and children. If she remarries there is the inference made that the new husband is providing for the economic needs of the wife and children when in fact that may not be so.

Ted Fay of the Insurance Commissioner's Office appeared stating that the Commissioner's office supports the bill.

The Chairman announced that there will be a meeting of the committee tomorrow upon adjournment of the House until 12:30 P.M. in room 313-S.

The Chairman adjourned the meeting at 5:35 P.M.

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SB 480

House Judiciary Committee

March 31, 1986

Mr. Chairman. Members of the House Judiciary Committee. I am Ron Smith, Legislative Counsel for the Kansas Bar Association.

KBA supports this legislation. We have especially supported changes in KSA 60-216 to conform to the current Federal Rule 16. These changes are made in Section 3.

Our suggested Senate amendment was included as the current Section 5(f) and 5(g) at page 11. What it does is conform KSA 60-226 dealing with discovery to Federal Rule 26. KBA has supported the changes recommended in KSA 60-216 and 226 for some time now. The provisions conform our statute to Federal rule of civil procedure 26. However, the Kansas Supreme Court does have Rule 136 which outlines the Court's discovery conferencing system and appears to be substantially in conformity with Section 5(f).

I've also enclosed two articles from recent editions of the National Law Journal which indicates how the federal courts are using these rules and sanctions against attorneys.

Attachment 1
House Judiciary
March 31, 1986

The January 27th article discusses the interpretation of Federal Rule 11, whose counterpart in SB 480 is Section 1. The article indicates that federal courts of appeal are taking the attitude that attorneys may no longer feel secure believing they acted in subjective good faith in filing an action or pleading.

The March 17th article discusses growing court concerns over discovery abuses which is addressed by your amendments in Section 3(b) on page 5.

These changes in the Federal rules of civil procedure are fairly recent, so case law interpreting their use are just getting into the books. We believe that such interpretations, however, will have an effect on Kansas courts if our rules of civil procedure are similar. They will reduce some of the potential abuse in discovery that has the unwanted effect of increasing costs of litigation, give notice to all attorneys that the courts have appropriate sanction powers to punish inappropriate behavior.

Kansas trial courts are beginning to impose hefty sanctions. We see this in our closed claim studies of malpractice actions. There was a Cloud County trial court which imposed a $19,000 fee against an attorney for bringing what the court concluded was a spurious probate matter. Clearly with these changes, the potential for courts to better discipline counsel for discovery and frivolous abuse of the legal process will improve.

Thank you.

Rule No. 136

DISCOVERY CONFERENCE. To expedite processing and disposition of litigation, minimize expense and conserve time, the court in any action shall conduct a discovery conference with counsel, upon request of a party, or on the court's own motion. The request must be called to the attention of the judge but may be endorsed on any pleading or made by motion. The discovery conference shall be scheduled by the court as soon as possible.

The court may, at a discovery conference or other appropriate time, designate the time and place of discovery, restrict discovery to certain designated witnesses, or require statements to be taken in writing or by the use of electronic recording rather than by stenographic transcription.

If a discovery conference is requested in a damage action, no depositions, other than of the parties, shall be taken until after the discovery conference is held, except by agreement of the parties or order of the court.

At the discovery conference, the issues shall be identified and the possibilities of stipulations and settlement explored. There shall be an exchange of information on the issues of the case and appropriate discovery procedures determined and ordered. The judge shall require completion of discovery within a definite number of days after the discovery conference has been conducted. If discovery cannot be completed within the period of time originally prescribed by the judge, the party not able to complete discovery shall file a motion prior to the expiration of the original period for additional time to complete discovery. Such motion shall contain a discovery plan and shall set forth the reasons why discovery cannot be completed within the original period. If additional time is allowed, the judge shall grant only that amount of time reasonably necessary to complete discovery.

[History: Am. effective December 11, 1980.]

Good-Faith Standard Replaced

Attorneys in Affirming Pleadings Risk Sanctions

By Mark A. Dombroff
Special to The National Law Journal

ON MAY 21, THE 2d U.S. Circuit Court of Appeals decided one of the first appellate-level cases focusing on Rule 11 of the Federal Rules of Civil Procedure as amended in 1983. *Eastway Construction Corp. v. City of New York.* Rule 11 provides a relatively broad standard for the imposition of sanctions, including attorney fees.

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

One of the striking things about Rule 11 as amended is not so much the language of the rule itself as the way it contrasts with its predecessor. Rule 11 in its previous form discussed the subjective knowledge of an attorney; a lawyer's certification of a pleading amounted to an assertion that "to the best of his knowledge, information, and belief, there [was] good ground to support it."

As a result, an inquiry on a sanctions proceeding was premised on the subjective knowledge of the attorney who certified the pleading at the time it was signed. In effect, this amounted to an inquiry into the subject of bad faith.

The drafters of the 1983 amendments, both in the legislative history and in the revised rule's very language, gave clear indication that bad faith was no longer going to be a criterion, since the standard was no longer one of subjectivity. Rule 11 now focuses on a far broader range of requirements, including:

- The attorney must have read the pleading.
- The attorney must have made reasonable inquiry regarding the contents of the pleading.
- The pleading must be well-grounded in fact.
- The pleading must be warranted by existing law, or by a good-faith argument for an extension of existing law, or by a modification of existing law, or by a reversal of existing law.
- The pleading must not have been filed for an improper purpose, including harassment, delay or increase in the cost of the litigation.

Broader Rule

Clearly, the new wording of Rule 11 is far broader and permits a far greater degree of scrutiny of the particular pleading in question. In some measure, attorneys sign pleadings of any kind at their own risk. While this always has been the case, the subjective standard that was applicable under the original Rule 11 has given way to a standard that exposes lawyers to the hazards of second-guessing and the broad range of judicial discretion.

Eastway Construction Corp. involved an antitrust action brought after a bribery scandal involving New York City's public-housing rehabilitation program. That scandal resulted in the city's decision not to enter into any contracts with firms that were in arrears or had defaulted on any loans.

A federal appeals court stated that attorneys may no longer feel secure believing they acted in subjective good faith.

This policy was extended to preventing firms that had contracts with the city or were under city supervision from contracting with such firms. The principals of the plaintiff firm controlled entities that had defaulted on city loans and, as a result, found themselves precluded from contracting with companies that were engaged in city finance reconstruction projects. The antitrust action resulted and was subsequently dismissed.

'Out of Frustration'

On appeal, the city of New York asserted that under Rule 11 it should have been entitled to its attorney fees. After reviewing Rule 11, both historically as well as after the 1983 amendments, Judge Irving R. Kaufman writing for the court, stated:

> Here, it cannot be said for certain that the firm or its counsel acted in subjective bad faith in bringing this lawsuit, or that its actual motive was to harass the city. It might just as well have been acting out of frustration or desperation. It can be said, however, that the firm's claim of an antitrust violation by noncompetitors, without any allegation of antitrust injury, was destined to fail. Moreover, a competent attorney, after reasonable inquiry, would have had to reach the same conclusion. Accordingly, the district court erred in denying the municipal defendant's motion for attorney's fees incurred in defending against the antitrust claim.

Be sure not only to aver that 'reasonable inquiry' was made but also to lay out in detail its nature and why it was limited.

Thus, for perhaps the first time, a federal court of appeals focused on Rule 11 and stated explicitly that attorneys may no longer feel secure believing they acted in subjective good faith. Rather, attorneys must now be able to justify the pleading and their signature thereon in a subsequent inquiry.

The Notes of the Advisory Committee on the 1983 amendment to Rule 11 are interesting because they indicate the purpose of the rule is not to "chill

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an attorney's enthusiasm or creativity in pursuing factual or legal theories." Rather, "the court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." While in some respects one could read "good faith" into this note, the application of Rule 11 to date makes it clear that "good faith" is not the test.

Protective Measures

From a trial lawyer's perspective a number of steps should be taken in order to protect against possible imposition of sanctions under Rule 11.

First of all, before signing any pleading that you have reason to believe, realistically or unrealistically, may subject you to a motion for sanctions, specifically take Rule 11 into account and review it. This is important not so much as an exercise but so that one can file an affidavit when resisting Rule 11 sanctions asserting that the rule and its individual provisions were specifically considered.

Determine Steps

In this regard you should determine the steps taken to make the reasonable inquiry required by the rule. Do the facts of the case justify the filing of the particular pleading? Is the pleading in question based upon existing law or the seeking of an extension, modification or reversal of existing law? Was your intent to harass, delay or increase he cost of the litigation?

While each of these simply is an element of the rule itself, the ability to execute an affidavit in opposition to Rule 11 sanctions stating that you in fact went through this mental process in some detail before filing the actual pleading can provide an important tool for combating such sanctions.

Another factor to raise in resisting the imposition of sanctions is the amount of time available for investigation before signing the pleading. For example, if the pleading in question is one arising in a temporary restraining order setting, the amount of time available to investigate or make your "reasonable inquiry" would be far less than that involved in other kinds of litigation.

In short, there is no purely objective standard for determining what is a reasonable inquiry. Rather, the question of what is reasonable must be determined through a weighing of the circumstances, and this is something to which reference should be made in opposition papers.

Reliable Source?

Consider the source of the information you are relying upon in filing a certain pleading. In many instances the information must come from the client. What other sources of information besides the client are there, and, as a practical matter, is any additional inquiry necessary or fruitful? Be sure not only to aver that "reasonable inquiry" was made but also to lay out in detail the nature of the inquiry or the reason that the inquiry was limited to particular sources.

Consider, too, whether the pleading in question was based on, as the Advisory Committee's notes indicate, a "plausible view of the law."

Another factor is whether the representations of forwarding counsel or some other member of the bar were relied on in drafting the pleading. If so, sanctions under Rule 11 are less likely to be imposed.

Rule 11 will not require an attorney, for the purpose of demonstrating that the signing of pleadings was justified, to disclose either privileged communications or work product. Rule 26(c) of the Federal Rules of Civil Procedure is still available for the purpose of protecting work product or attorney/client communications when either of those sources of information has been utilized as the basis for signing a pleading. This fact is made quite clear in the Notes of the Advisory Committee to the 1983 amendment.

Disqualifying Counsel

One area of litigation that seems to be arising more frequently these days is the attempt to disqualify opposing counsel. It seems that in many instances motions for disqualification are more tactical than substantial.

Rule 11 significantly deters the bringing of such motions. In *Wold v. Minerals Engineering Co.*, 575 F. Supp. 166 (D. Colo. 1983), the plaintiff corporation's motion to disqualify a law firm from representing the defendant was found not to have been based on a reasonable inquiry into relevant facts, but rather to have been interposed for improper purposes. The District Court found that it was filed to harass opposing counsel, cause unnecessary delay in the lawsuit and needlessly increase the cost of the litigation. As a result, counsel for the plaintiff was required to pay reasonable expenses of the defendant, including attorney fees, incurred as a result of filing the motion to disqualify.

Discourages Filing

In today's aggressive litigation environment, Rule 11 clearly acts to discourage not only the filing of frivolous complaints but in the final analysis the filing of any pleading or document not justified by the issues at stake in the litigation.

Generally speaking, as noted in the Advisory Committee's notes to the 1983 amendment, a party who seeks sanctions should, upon discovery of the basis for such sanctions, give notice to the court and the party against whom the sanctions are being sought. However, the imposition of the sanctions quite obviously rests within the broad discretion of the trial judge. More often than not, the question of sanctions will typically be determined at the conclusion of the litigation. Indeed, sanctions may be imposed against even the prevailing party if the basis for them is independent of the issues determining the outcome of the case.

Where an opponent does not promptly bring to the court's attention conduct that may in fact justify imposing Rule 11 sanctions, an argument can be made that they are waived. Certainly, an equitable estoppel argument should be made. The decision, once again, lies within the broad discretion of the trial judge.

* * *

A reading of the advance sheets clearly indicates that the imposition of Rule 11 sanctions is being taken far more seriously by most federal district judges. On occasion, as with any exercise of discretion, there is abuse. However, there is little doubt that the court's ability to sanction attorneys under Rule 11, when properly utilized, can help resolve litigation more expeditiously and at lower cost.

Rule 11 discourages the filing not only of frivolous complaints but any pleading not justified by the issues.

THE NATIONAL LAW JOURNAL

Monday, March 17, 1986 SPECIAL SECTION

Discovery Curbed

Pretrial Abuses Now Punished By U.S. Courts

BY SAMUEL ADAMS
AND CHRISTOPHER E. NOLIN
Special to The National Law Journal

IN RECENT years, many federal courts by explicit announcement or, more often, by the substance of their rulings have begun to declare war on misbehavior in discovery.

In one leading case, *Gates v. U.S.*, 752 F.2d 516 (10th Cir. 1975), the plaintiff sued for a refund of federal income taxes. After the plaintiff's deposition had been noticed twice, the court ordered that the deposition take place on a specific date. On learning that plaintiff had failed to appear as ordered, the District Court dismissed the complaint.

Plaintiff's counsel moved to set aside the dismissal on the basis that the plaintiff had not received notice of the deposition — the letter containing the notice having been returned unclaimed. The motion was denied, and that denial was affirmed on appeal.

The 10th U.S. Circuit Court of Appeals blamed the lack of notice on the plaintiff's failure to contact his attorney during a 60-day period.

> Given the burgeoning dockets of the district courts and the need to move litigation along, this type of inattention is itself sufficient to justify dismissal. In the past, Rule 37 may have been considered a paper tiger, but the time has now come to put teeth in the tiger. Id. at 517.

The Gates decision provides a clear expression of the courts' growing impatience with discovery abuse and a resolve to use the discovery-sanction provisions of the Federal Rules of Civil Procedure to police the parties' conduct.

This aggressive approach is relatively new. The federal courts historically have been reluctant to impose sanctions on parties or their attorneys. By the 1970s, litigants had learned to use excessive-discovery tactics to impose extravagant litigation costs on their opponents. At the same time, discovery avoidance and delay had become commonplace. As a result, in the late 1970s and early 1980s discovery abuse was perceived as a major problem and had become subject of extensive comment. See Sherman & Kinnard, "Federal Court Discovery in the 80's — Making the Rules Work," 95 F.R.D. 245, 246 (1982) (and authorities cited therein).

During the same period, the Federal Rules of Civil Procedure were amended, in 1980 and again in 1983, in an attempt to strengthen the courts' ability to impose discovery sanctions and to encourage the courts to address discovery abuse. See Section of Litigation, ABA, "Second Report of the Special Committee for the Study of Discovery Abuse," 92 F.R.D. 137 (1981). Sanction provisions that can be used to control discovery now appear in no less than six rules: 11, 16, 26, 30, 37 and 45.

In response to these developments, the federal courts are slowly becoming more and more willing to impose sanctions. Recent case law indicates that courts are now imposing sanctions in an expanding range of circumstances. However, despite this expansion, the broad sanction provisions contained in Rule 26(g) have yet to receive much use. What follows is a review of several relatively recent cases, a discussion of some of the tactical issues posed by developments in sanction standards and some observations concerning the potential for sanctions under Rule 26(g).

Expanded Use of Sanctions

The Gates decision is significant in its frank recognition of sanctions as a method of docket control. Even if misbehavior in discovery has caused little, if any, injury to the opposing party, the responsible party may still have to answer to the court itself for any administrative inconvenience it has caused. A federal judge who is under pressure to reduce his caseload may have very little patience with tactics that prolong litigation, and may be more than willing to take advantage of sanction powers to dispose of a case or to put one party at such a disadvantage that settlement becomes inevitable.

Gates is also notable for the court's lack of sympathy with what may have been a legitimate practical problem. Other courts have shown an increased willingness to punish apparently inadvertent, as opposed to intentional, failure to comply with court directives.

In *Hawkins v. Fulton County*, 96 F.R.D. 416 (N.D. Ga. 1982), the court ascribed the defendant's failure to comply with a discovery order to "confusion and poor communication" between counsel of record and associate counsel responsible for discovery. Although the record did not disclose which of the two was at fault, the court not only chose to charge counsel of record with costs, attorney fees, and expert accounting fees incurred by the opposing party, but also ordered counsel of record to show cause why he shouldn't be held in contempt.

The attorney, as an officer of the court and as the person appearing before the judge, is a natural target for discipline through sanctions. The courts recognize that most abusive tactics involve at least the negligence of counsel, and they frequently impose fees and costs directly against attorneys. See *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469 (7th Cir. 1984) (Rule 37(b) sanctions may include costs of appeal); *Tise v. Kule*, 37 Fed. R. Serv. 2d 846 (S.D.N.Y. 1983).

In fact, where the attorneys are perceived as responsible for abuse, the courts are likely to single out attorneys for sanctions from which their clients are exempted. See *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338 (D.Conn. 1981); *Birkner v. New York University*, Slip op. 82-Civ-6876 (MEL), Dec. 22, 1983 (S.D.N.Y.).

One rationale for this type of punishment is the deterrent effect it should have in future cases. The U.S. Supreme Court has expressly encouraged application of sanctions for this purpose, *Roadway Express Inc. v. Piper*, 447 U.S. 752, 763 (1980), and outright fines are an obvious deterrent device. Consequently, courts have imposed sizable fines payable to the court under findings of contempt or disguised as court costs. See *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir. 1983) ($10,000 fine).

In *Xaphes v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 102 F.R.D. 545 (D. Maine 1984), the court ordered the defendant to pay $10,000 into the court registry. It noted that, although the defendant's refusal to obey a court order had only a minor prejudicial effect on the plaintiff, the burden of the defendant's tactics on the court was heavy, thus justifying the penalty.

Continued on page 18

Mr. Adams is a partner and Mr. Nolin is an associate at Boston's Warner & Stackpole.

Di overy Abuses Now Being Disciplined by Court

Continued from page 15

Practical Considerations

The growing potential for sanctions raises a number of practical difficulties and opportunities for the practitioner. The willingness of courts to impose sanctions directly on attorneys expands the potential for attorney-client conflicts of interest. The attorney must be prepared, in the event that discovery conduct is ruled inappropriate, to demonstrate to the court that the client was responsible for the tactic in question. Otherwise the attorney may be held completely accountable. *Watkinson v. Great Atlantic & Pacific Tea Co. Inc.*, 38 Feb. R. Serv. 2d 1310 (E.D.Pa. 1984) (fees assessed against attorney in absence of showing that party was aware of tardiness and evasion).

Counsel are thus encouraged to ensure that their clients' actions are appropriate. If a client insists on following a risky discovery strategy, both the attorney and the client are at risk; and the factor of self-interest may cause an attorney to shy away from

A federal judge under pressure to reduce his case load may have little patience with tactics that prolong litigation.

novel legal theories, even when the client is willing to back them.

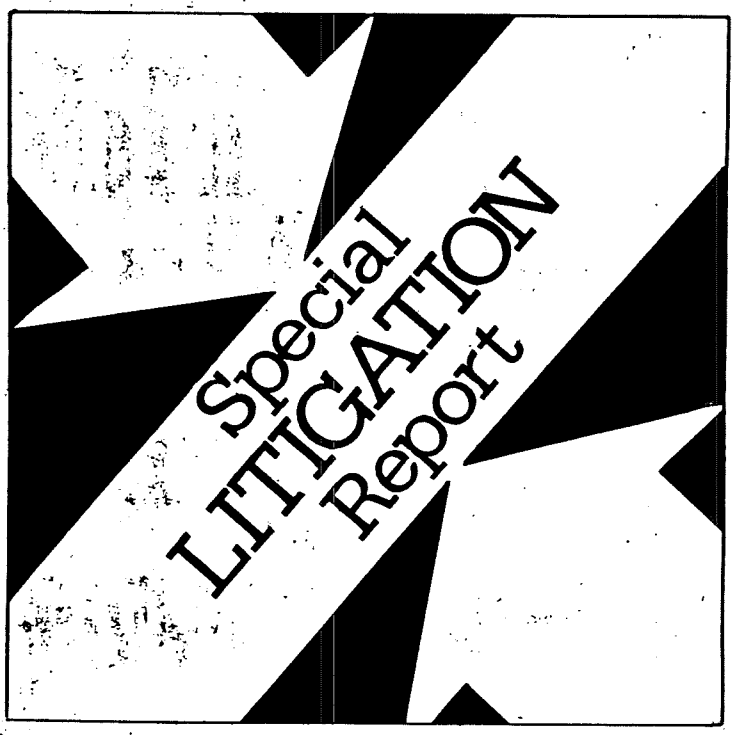
Attorney accountability encourages a deeper inquiry by the attorney than has been the case in the past. The Advisory Committee Notes to Rule 26(g) would require a "reasonable effort" by the attorney to determine that a discovery response is complete, but the proper scope of this inquiry is unclear. If the client represents that a document production is complete, what further steps should be taken so that an incomplete production will not result in sanctions against the attorney personally? Some written verification by the client is probably advisable, and if some doubt exists, a review of the original file location by the attorney or his staff may be necessary.

The courts frequently decide to impose sanctions on a party for what apparently are its attorney's decisions in which the party has played little part. See *Damiani v. Rhode Island Hospital*, 704 F.2d 12 (1st Cir. 1983) ("The argument that the sins of the attorney should not be visited on the client is a seductive one, but its siren call is overborne by the nature of the adversary system.") Essentially, such rulings place the burden of sanctions on the client's shoulders. To the extent that the attorney is responsible for the abuse, the deterrent role of a sanction is left to the malpractice bar or to the embarrassment of bad publicity.

Counsel have traditionally used excuses of good-faith effort and practical difficulty to explain delay or failure to comply with discovery orders. In the view of some federal courts, such excuses are no longer reliable. For example, in *Wilson v. Electro Marine Systems Inc.*, Slip Op. 83-C-5863, Dec. 20, 1985 (N.D. Ill.), the court ruled sanctions appropriate where a delay in document production was the result of counsel's mistaken belief that information initially produced was complete. Although the producing party corrected the error before the court's ruling, the court nevertheless awarded attorney fees and costs caused by the delay.

In *Minnesota Mining & Manufacturing Co. v. Eco Chemical Inc.*, 757 F.2d. 1256 (Fed. Cir. 1985), the court upheld imposition of sanctions, even though the respondent company had gone out of business during the pendency of litigation and was therefore unable to respond to discovery. In both *Wilson* and *Minnesota*, the courts' rulings were buttressed by a history of delay or other misbehavior, but the message to litigants is clear. In the context of delay or other abuse, parties cannot rely on good intentions or practical difficulties to protect them from sanctions.

A tactic widely used by a party responding to discovery has been to bury the opponent in information. In the traditional view of the pretrial process, there was generally no such thing as too much discovery, and the federal courts were not sympathetic to claims that too much, rather than too little, information had been disclosed.



Responding attorneys turned this view to their advantage by producing boxcars of information in an attempt to overwhelm the fact-finding capacity of their opponents. The changing attitude toward discovery abuse means that this tactic is no longer without risk.

In *Consolidated Equipment Corp. v. Associates Commercial Corp.*, Slip Op. 84-618-S, Jan. 9, 1985 (D. Mass.), the plaintiff had been ordered to respond to interrogatories and related document requests. The plaintiff then offered to permit the defendant to inspect 47 feet of business files that purportedly included the information sought. The court ruled that this response was inadequate and dismissed the complaint as a sanction.

Another byproduct of the courts' initial belief that discovery should be encouraged has been the systematic practice of burdensome discovery requests. Given the recent willingness of certain courts to punish excessively zealous discovery, care should be taken in the choice of such tactics.

In *Hayes v. National Gypsum Co.*, 38 Fed. R. Serv. 2d 645 (E.D.Pa. 1984), a defendant's attorney was sanctioned for serving duplicative interrogatories and motions to compel. In *Jenkins v. Toyota, Japan*, 40 Fed. R. Serv. 2d 1125 (W.D.N.Y. 1984), an order for costs and fees was imposed on both the defendant and counsel for moving to compel discovery without first seeking informal resolution and for moving for sanctions without first finding out why the plaintiff had failed to comply with a consent order.

Aside from regulation of the procedural aspects of discovery, courts have voiced an interest in protecting the integrity of the discovery process itself. See *Aztec Steel Co. v. Florida Steel Corp.*, 691 F.2d 480, 482 (11th Cir. 1982). For example, in *Wm. T. Thompson Co. v. General Nutrition Corp. Inc.*, 593 F. Supp. 1443, (C.D.Calif. 1984), the court imposed a duty on the defendant to preserve documents relevant to the case, even though not covered by any discovery request:

> Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information. Id. at 1455.

The court justified this rule both as a discovery sanction under Rule 37 and under the court's inherent powers.

Unrealized Potential

Despite the increasing number of sanction orders, the courts still appear uncertain in their pursuit of discovery regulation. One indication of this is the dearth of decisions using the new Rule 26(g), which provides for sanctions in the event that discovery requests or responses are not supported by law, are interposed for an improper purpose or are unreasonable under the specific circumstances of the case.

Rule 26(g) gives a court much greater sanction flexibility than Rule 37. It allows sanctions to be imposed without an existing order compelling behavior and even in the absence of a motion for sanctions. This permits the courts to address abuses immediately and directly.

Moreover, the rule does not by implication limit the sanctions available. It specifies only an "appropriate sanction," thus inviting the courts to exercise latitude in crafting their orders. Deposition practice is the one area of discovery not directly reached by Rule 26(g), because of the rule's emphasis on written requests and responses. If, for example, an attorney obstructs a deposition, Rules 30, 37 or 45 remain the proper recourse.

Although Rule 26(g) was formally adopted in April 1983, to date there exist only a handful of reported cases that use its provisions. This lack of use is puzzling, since the procedural limitations on Rule 26(g) sanctions are greatly reduced and sanctions under the rule appear to be mandatory, once a violation of the rule occurs. See *Collins v. American Society for Testing Materials*, Slip Op. 83-3173, May 20, 1985 (E.D.Pa.); Advisory Committee Notes to Rule 26(g).

Punishing Behavior

Nevertheless, Rule 26(g) has been used to punish behavior that might be difficult to address under Rule 37. See *Hayes*, supra. In *Olga's Kitchen of Hawyard Inc. v. Papo*, Slip Op. 83-CV-3878-DT, Dec. 18, 1985 (E.D.Mich.), the court imposed an order for attorney fees and costs of $20,000 and a $1,000 penalty against both the defendant and his attorney based in part on the use of a "fatuous" valuation approach in discovery.

Courts realize that most abusive tactics involve at least the negligence of counsel, on whom they will impose costs and fees.

In *H.L. Hayden Co. of New York Inc. v. Siemens Medical Systems Inc.*, Slip Op. 0306 (GLG), Dec. 16, 1985 (S.D.N.Y.), a penalty was assessed against an attorney for advancing a frivolous argument of privilege in the course of resisting discovery.

Explicit Criteria

Despite such cases, litigants and the courts have yet to tap the defensive potential of Rule 26(g). Since the rule explicitly applies to discovery requests, it can be used as an effective counter to a strategy of excessive discovery. The rule contains explicit criteria by which to evaluate discovery requests, and it is not necessary under the rule for the discovery respondent to isolate specific instances of repetition or overbearing conduct (although this continues to be helpful).

A sanction can be imposed if the bulk of the requests are simply out of proportion to the case. If the tactic in question was aimed at impeding the case, the time-consuming procedure of seeking a protective order and then a sanction based on the order or responding by objection and awaiting a motion to compel can be short-circuited entirely by a Rule 26(g) motion.

Although the rule offers a variety of advantages as a basis for sanctions, it has yet to be fully incorporated into the courts' sanction arsenal. In light of the courts' increasing interest in sanctions, Rule 26(g) could well become the most popular discovery sanction device.

LEVEL 1 - 1 OF 465 CASES

City of Birmingham, a municipal corporation v. Tutwiler Drug Company, Inc., and Streetlife, Inc., City of Birmingham, a municipal corporation v. Tutwiler Drug Company, Inc., et al.

Nos. 82-1007, 82-1287

Supreme Court of Alabama

475 So. 2d 458

June 7, 1985; Rehearing Denied August 23, 1985

OPINION:

... without seeking a protective order, the city unilaterally decided that certain documents were privileged and withheld those and other documents which, even under its own interpretation of the request for production, should have been produced. On the plaintiff's motion for **sanctions**, the trial court awarded the plaintiff and its **attorney** $7,175.00 to compensate for attorney's fees incurred as a result of the city's failure to comply with the Alabama Rules of Civil Procedure. The order on the motion for sanctions is hereby affirmed.

LEVEL 1 - 3 OF 465 CASES

Ultracashmere House, Ltd., a Corporation v. Ted Meyer, d/b/a Alex Rice Company

No. 80-391

Supreme Court of Alabama

407 So.2d 125

November 20, 1981

OPINION:

... conduct cannot be sanctioned. The trial court has found that this defendant has willfully disregarded reasonable and necessary court orders and caused the plaintiff considerable delay and expense in having its claim adjudicated. We affirm the trial court's imposition of these **sanctions**, including the award of **attorney's** fees, which likewise are expressly authorized in Rule 37.It has been observed that the sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which a court may apply, and its use ...

cordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines any one or more of the following:

(1) The agency action, or the statute, *ordinance, charter ordinance, resolution, charter resolution* or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;

(2) the agency has acted beyond the jurisdiction conferred by any provision of law;

(3) the agency has not decided an issue requiring resolution;

(4) the agency has erroneously interpreted or applied the law;

(5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;

(6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;

(7) the agency action ~~[: (A) Is not an action of a political subdivision in the enactment of an ordinance, charter ordinance, resolution or charter resolution of general applicability; and (B)]~~ is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; ~~or~~

(8) the agency action is otherwise unreasonable, arbitrary or capricious.

(d) In making the foregoing determinations, due account shall be taken by the court of the rule of harmless error.

Sec. 5. K.S.A. 77-602, 77-609 and 77-621 and K.S.A. 1985 Supp. 60-2101 are hereby repealed.

Sec. 6. This act shall take effect and be in force from and after July 1, 1987, and its publication in the statute book.

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act, except that this subsection shall not apply to actions of general applicability of political subdivisions in the enactment of ordinances, charter ordinances, resolutions, charter resolutions, or rules and regulations; or

Attachment 2
House Judiciary
March 31, 1987

KANSAS BAR ASSOCIATION

1200 Harrison
P.O. Box 1037
Topeka, Kansas 66601
(913) 234-5696

HB 2458

House Judiciary Committee

March 31, 1986

Mr. Chairman. Members of the House Judiciary Committee. I am Ron Smith, Legislative Counsel for the Kansas Bar Association.

This legislation was requested by the Kansas Bar Association as early as three years ago, after the legislation which increased the pain and suffering limit for wrongful death actions from $25,000 to $100,000. At that time, it was KBA's preference that along with the increase in the pain and suffering limit, that evidence of remarriage be allowed to be considered by the jury for mitigation of damages.

I've enclosed a copy of Pape v. Kansas Power & Light Company, 231 Kan. 441, 647 P2d 320 (June, 1982).[1] This is the lead case in Kansas, and its holding would be partially reversed if this law is enacted. The other rules of law in Pape, such as damages in wrongful death cases being fixed at the time of death, would not be disturbed by this bill.

Attachment 3
House Judiciary
March 31, 1986

KBA supports HB 2458. We believe there are several key issues to remember when considering this legislation and the entire background of wrongful death litigation:

(A) Wrongful death actions are creatures of statute. There was no common law right to maintain an action based on the wrongful death of a relative. If the Legislature has the power to create a cause of action, it also has the power to repeal such cause of action.

(B) It also follows if you have the power to repeal the statute, it has the power to regulate the evidence that is presented to the jury.

The majority rule in this country is that a surviving spouse's remarriage, whether ceremonial or common law, is not a factor for the jury to consider in assessing damages of the surviving spouse.[2] This rule of exclusion is based on one branch of the collateral source rule.[3]

The Collateral Source Rule is primarily designed -- and most often used -- to insure that the wrongdoer causing actual money damages does not benefit from the foresight of the plaintiff to insure himself or herself against loss. The theory in the remarriage evidence, HB 2458, is different, however.

The damages in wrongful death actions are fixed at time of death. Actual damages, loss of earnings, and pain and suffering awards seek to compensate the heirs of the deceased for their loss. This is accomplished by presenting evidence of the disruption of the family structure, and the resulting mental condition of the heirs.

At trial in the Pape case, the surviving spouse, Kathleen Pape, testified that her deceased husband was a good husband and father, which raised the inference of disruption to the family structure. However, she had remarried within 7 months after her husband's death and was married at the time of trial. Once this disruption is put into evidence, logic indicates the defendant ought to be able to show Kathleen Pape took action that made the disruption short-lived, if that is in fact the case. How does the surviving spouse in a wrongful death case mitigate the damage the defendant has caused? They get remarried.

There is no duty for a surviving spouse in wrongful death actions to mitigate damages by remarriage. But if they do, it appears to KBA to be relevant evidence for the jury to consider. However, the jury was not told Kathleen Pape had remarried. They could infer she was left to raise her children by herself, without support or advice and counsel of a husband and father.

The Pape decision ignores reality to some extent. Remarriage of surviving spouses is the norm, not the unusual. Indeed, if the surviving spouse is young, handsome or nice looking, the jury probably specu-

lates in the jury room as to how fast the spouse will remarry. Or they wonder who that person was sitting in the back of the courtroom throughout the trial that was never called as a witness, but who was seen several times with the plaintiff.

In other states, there are cases where the evidence tries to show the surviving spouse has trouble "readjusting."[4] Or emotional problems spring up -- problems that the defendant is precluded from showing might be caused by the CURRENT marriage because of the rule against remarriage evidence.[5] That is an unfair advantage in the trial of wrongful death actions.

If a plaintiff is going to offer the evidence that the deceased was a kind, loving father, and wonderful husband, and evidence is introduced that covers the period after the date of death, or infers that such stability is no longer present in the plaintiff's life, or readjustment problems persist, then defendant ought to be able to introduce the fact of remarriage -- not to show that the defendant caused fewer damages but rather that the plaintiff took an affirmative step to mitigated damages.

Will evidence of remarriage be unfairly used? Judges have wide latitude to control the flow of evidence, and prevent unfairness by either party. Each side can ask for motions in limine to regulate the manner in which the evidence is offered, and the fair comment upon the

evidence. Judicial instructions can help the jury decide how best to consider such evidence.[6]

We either believe in the jury system, or we don't. KBA happens to believe in that system. We think the jury's common sense will listen to this evidence and come up with the appropriate verdict.

Regarding the issue of coming up with accurate damages if you show that there is a new spouse with different earning capacity, the Pape court indicated their belief it would be too difficult for the jury to determine how best to apply this evidence. In the Pape case, however, Kathleen Pape's own expert economist indicated in his deposition that the calculation of benefits received from the second marriage could be established as easily as those of the decedent, Terry Pape.[7]

There is a quote from a great old case which says, "No verdict is right which more than compensates, and none is right which fails to compensate."[8] HB 2458 tries to strike an equilibrium. The issue here is letting the jury decide the facts and damages based on relevant evidence. That is their role.

HB 2458 is an appropriate statutory modification of collateral source rule. KBA urges its passage.

Footnotes

1. FACTS: Terry Pape worked for a feedlot, and was electrocuted and fell 20 feet after a pole he was using came in contact with a 7,200 volt KP&L line. He lived eight days, with mortal head and neck injuries. The feedlot was immune from liability because worker's compensation payments were its only statutory obligation. It was a statutory codefendant, however, for apportionment of damages. KP&L sought to introduce evidence of the wife's remarriage, which was denied by the trial court and upheld by the Supreme Court.

2. See "Death Action -- Evidence of Remarriage," 88 A.L.R.3rd 926 for a list of cases.

3. The Collateral Source rule simply states that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.

4. Giancontieri v. Pan American World Airways, Inc. et al, 767 F2d 1151 (5th Cir., La., August, 1985)

5. Caldarera v. Eastern Airlines, 705 F2d 778 (5th Cir., La., May, 1983)

6. Evidence of remarriage of a surviving spouse within, say, 2 weeks after the decedent's death is going to impact the jury differently than evidence that the remarriage occurred 3 years after decedent's death. Juries are smart. They don't expect people to remain celibate the rest of their lives just because a husband or wife is lost. They know that people who have been married might want to remarry, and common sense should not hold it against the plaintiff that the plaintiff remarrys.

7. Appellate Brief of KP&L counsel, at page 17. The expert was not called as a witness at trial. Besides, there are cases indicating that such evidence does not confuse the jury. Campbell v. Schmidt, 195 So.2d 87 (Miss. 1967); Jensen v. Heritage Mutual Ins. Co., 23 Wis.2d 344 (1964); also see Shields & Giles Remarriage and the Collateral Source Rule, 36 Ins. Counsel Journal 356 (1969).

8. Domann v. Pence, 183 Kan. 135, at 141 (1958)

231 Kan. 441

Michelle PAPE, a minor, by Kathleen Pape Johansen, Guardian and Conservator, and Kathleen Pape Johansen, individually and as Executrix of the Estate of Terry Dwayne Pape, Deceased, Appellees,

v.

The KANSAS POWER AND LIGHT COMPANY, Appellant,

and

Michael Pape, a minor, by Pamela Pape, Conservator, Intervenor-Appellee.

No. 53346.

Supreme Court of Kansas.

June 11, 1982.

Widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with uninsulated power line brought wrongful death and survivorship actions against power company, and power company brought in as a party decedent's employer. The Wyandotte District Court, William M. Cook, Jr., J., entered judgment for plaintiffs, and defendant appealed. The Supreme Court, Prager, J., held that: (1) trial court did not err in giving instruction on presumption of due care exercised by deceased person; (2) trial court did not err in admitting defendant's official accident investigation report; (3) trial court did not err in allowing plaintiffs' expert witnesses to express their opinions that the power line installation was a hazard; (4) trial court did not err in excluding evidence that decedent's widow had remarried in less than seven months after decedent's death; (5) evidence sustained award of $2,000 for conscious pain and suffering of decedent prior to his death; and (6) plaintiffs could recover damages where decedent's negligence was less than combined causal negligence of all persons found by trier of fact to have been causally at fault.

Affirmed.

1. Death ⇐104(2)

In wrongful death action, in which there were no eyewitnesses and which was based on circumstantial evidence, trial court did not abuse its discretion in instructing jury that it was presumed that decedent, at the time of his injury, was exercising due care to avoid injury, but that the presumption was rebuttable.

2. Evidence ⇐215(1)
Witnesses ⇐392(1)

In wrongful death action brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's uninsulated power line, trial court did not err in admitting power company's official accident investigation report which identified the date and circumstances of workers' injuries and declared that power line's clearance above catwalk was eight feet, since, at time of trial, defendant contended the clearance was ten feet, and the report was thus admissible as an admission and to test credibility of defendant's witnesses.

3. Electricity ⇐19(4)

In wrongful death action brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's uninsulated power line, evidence of previous power company accidents involving contact between metal poles and electrical lines was admissible on the issue of foreseeability.

4. Evidence ⇐506

Opinion testimony of expert witness on an ultimate issue in a case is admissible if it will be of special help to jury on technical subjects as to which the jury is not familiar if it will assist the jury in arriving at a reasonable factual conclusion from the evidence.

5. Evidence ⇐506

In wrongful death action brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's uninsulated power line, trial court did not err in permitting plaintiffs' expert witnesses to express their opinions that the power line installation at issue was a hazard, that defendant's employee should have recognized and corrected the hazard, and that defendant failed to comply with requirements pertaining to minimum clearance, warning signs, and mandatory inspections.

6. Damages ⇐59

The collateral source rule provides that benefits received by plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from wrongdoer.

7. Death ⇐104(1)

In wrongful death action brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's uninsulated power line, trial court did not err in excluding evidence that decedent's widow had remarried less than seven months after decedent's death.

8. Marriage ⇐42

In wrongful death action brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's insulated power lines, trial court did not err in excluding defendant's proffered evidence as to purported common-law marriage of decedent which allegedly occurred prior to decedent's marriage with plaintiff, since there was no evidence to support the claim of common-law marriage.

9. Death ⇐99(2)

In consolidated wrongful death and survivorship actions brought by widow and children of deceased worker who suffered fatal injuries when metal pole he was using came in contact with defendant power company's uninsulated power line, evidence was sufficient to support award of $2,000 for decedent's pain and suffering between the time of the accident and his death.

10. Negligence ⇐98

For purposes of statute which permits recovery only if decedent's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, "parties against whom a claim for recovery is made" include all persons whose claimed causal negligence is submitted for determination to the trier of fact; therefore, plaintiff in wrongful death action could recover damages, because decedent's negligence was less than the combined causal negligence of all persons found by trier of fact to have been causally at fault. Rules Civ.Proc., K.S.A. 60–258a(a).

Syllabus by the Court

1. In a wrongful death action where there are no eyewitnesses and plaintiff's action is based on circumstantial evidence, a trial court may submit an instruction on the presumption of due care of a decedent.

2. Expert opinion testimony is admissible if it will be of special help to the jury on technical subjects as to which the jury is not familiar, if such testimony will assist the jury in arriving at a reasonable factual conclusion from the evidence.

3. Damages for wrongful death are determined as of the date of death, and the fact that the surviving spouse has remarried is not a factor for the jury to consider in assessing the damages suffered by the surviving spouse.

4. In applying K.S.A. 60–258a(a), the plaintiff's individual negligence should be compared with the collective causal negligence of all persons found by the trier of fact to have been causally negligent.

Robert D. Ochs of Fisher, Ochs & Heck, P. A., Topeka, argued the cause, and Frederick K. Starrett and Gregory A. Whittmore, Topeka, were on the brief for appellant.

Donald W. Vasos of Vasos, Kugle Dickerson, Kansas City, argued the c and was on the brief for appellees.

Dan Dykstra of Dykstra & Grill, Kansas City, Mo., and Robert W. Harris of Harris & Harris, Kansas City, were on the brief for intervenor-appellee.

PRAGER, Justice:

This is an action brought by the widow and children of Terry Pape against the defendant, Kansas Power and Light Company (KP&L), to recover damages for his wrongful death. Pape suffered fatal injuries on February 10, 1978, when a metal pole which he was using came in contact with KP&L's uninsulated 7200 volt power line at the Fairview Elevator, Fairview, Kansas. Pape's employer, Brockhoff Feed Yards, Inc., paid workmen's compensation to the plaintiffs. Terry Pape died on February 20, 1978. Kathleen Pape, as executrix of the estate of Terry Pape, brought a survivorship action for the damages which occurred prior to Pape's death. It was consolidated with the wrongful death action in plaintiffs' petition.

Most of the essential facts in the case were undisputed and are as follows: In October of 1957, KP&L installed a pole, transformer and three strands of uninsulated wire carrying 7200 volts of electricity on the premises of the Fairview Elevator. In 1972, the owner of Fairview Elevator installed six 8-ton Butler bulk feed bins, and a metal access ladder was bolted to the side of a bin and welded at the top. On February 10, 1978, Terry Pape, an employee of Fairview Elevator, was standing on the catwalk cleaning out one of the bins with a 20-foot metal pole. The pole somehow came in contact with the 7200 volt uninsulated wire. Pape fell to the ground approximately 20 feet below the bins, causing fatal head and neck injuries.

After the case was filed, Brockhoff Feed Yards, Inc., Pape's employer, was brought in as a party by KP&L to establish its percentage of causal negligence along with that of Pape and KP&L. The jury returned the following special verdicts:

"FAULT

Terry Pape, deceased	36⅔%
Kansas Power & Light	35⅓%
Brockhoff Feed Yards, Inc.	27⅔%

"DAMAGES

Survivorship:	
Pain and Suffering	$2,000.00
Loss of Time	450.00
Medical & Hospital	8,700.00
	$11,150.00
Wrongful death:	
Pecuniary Loss	$320,000.00
Nonpecuniary Loss	30,000.00
Funeral Expenses	3,704.75
	$353,704.75"

The court entered judgment in the survivorship against KP&L and for Kathleen Pape, executrix, in the amount of $4,037.39. The court entered judgment in favor of the widow and children for damages in the wrongful death action in the amount of $126,152.33. Defendant's post-trial motions were overruled, and defendant appealed to this court.

It would serve no useful purpose to set forth in detail all of the evidence presented by the parties in the case. Suffice it to say, the case was well tried by able counsel and the issues of both liability and damages were hotly contested. On the issue of liability, the plaintiffs' evidence disclosed that the manager of Fairview Elevator talked to defendant's foreman on three or four occasions *before* Pape's fatal injury and requested that the line be raised or rerouted and the pole cleaned up. According to this witness, KP&L's foreman also thought something should be done, but nothing was done. A number of employees of KP&L testified that it is foreseeable and known in the industry that persons using metal poles make contact with 7200 volt power lines. KP&L's division manager and division supervisor in Hiawatha testified that they were aware of the proximity of the grain bins to the electrical line before Pape was injured. They knew that the wires carried 7200 volts of electricity and had a potential of causing severe injury or death. They admitted it was feasible to raise or relocate the line. No warning sign was placed on the wire, bins, or pole either before or after Pape's injuries.

There was evidence from KP&L's general foreman that, on the date of Pape's injury, the electrical line did not meet the vertical clearance from the bins required by the National Electrical Safety Code. KP&L's construction manual required a vertical clearance of 15 feet between 7200 volt lines and balconies, roofs, and areas accessible to pedestrians. The evidence in the case was that the line was in fact from 8 to 10 feet from the top of the grain bins. Other KP&L employees, who came upon the premises periodically to read the meter, observed the bins and knew the catwalk had been installed thereon. Other testimony showed that KP&L supervisors knew of numerous incidents involving lengths of metal pipes contacting KP&L's uninsulated power lines which resulted in serious injury or death. Plaintiffs presented the testimony of experts in the electrical distribution field who inspected the premises in question after the fatal accident. They testified that the close proximity of the power line to the catwalk presented an extremely hazardous situation and that KP&L had failed to comply with the safety standards prescribed by the National Electrical Safety Code. Based upon this testimony, the jury brought in the verdicts favorable to the plaintiffs as set forth above.

[1] The defendant's first point is that the trial court erred in giving an instruction on the presumption of due care exercised by a deceased person. This is the so-called "love of life" instruction. This instruction, in substance, advised the jury that it is presumed that Terry Pape at the time of contact with KP&L's line was exercising due care to avoid injury but that the presumption was rebuttable. Defendant complains that the instruction was improper, because the instruction was given in spite of the fact that the trial court had previously found Pape guilty of contributory negligence as a matter of law. We find no merit to this contention. We note from the record that, despite defendant's repeated requests, the court refused to hold as a matter of law that Terry Pape was negligent, although the court opined outside the jury's presence that the jury most likely would find him guilty of some negligence. The submission of the instruction in this case was proper, since there were no eyewitnesses to the incident and plaintiffs' case was necessarily based on circumstantial evidence. The rule in Kansas is that, in a wrongful death action where there are no known eyewitnesses and plaintiff's action is based on circumstantial evidence, a trial court may in its discretion submit an instruction on the presumption of due care of a decedent. See *Akin v. Estate of Hill*, 201 Kan. 306, 309, 440 P.2d 585 (1968); PIK Civil 2d 2.70 (1977). Furthermore, in the special verdict in this case, the jury found Terry Pape to be 36⅔% negligent. The jury could not have been misled by the instruction, since the jury chose to follow the language in the court's instruction that the presumption of due care is overcome if the jury is persuaded by the evidence that the contrary is true. We find no error in the giving of the "love of life" instruction.

[2] The defendant raises several points concerning the admission of evidence. Defendant complains that the trial court erred in admitting, over objection, defendant's official accident investigation report which identified the date, hour, and circumstances at the time of Pape's injury and declared the power line's clearance above the catwalk to be 8 feet. At the time of the trial, the defendant contended that the clearance was 10 feet. The report was admissible under K.S.A. 60-460(g) as an admission and also to test the credibility of defendant's witnesses.

[3] Defendant contends that the trial court erred in admitting evidence of previous KP&L accidents involving contact between metal poles and its electrical lines. This evidence was admissible on the issue of the foreseeability of the accident which is present in many negligence situations. The defendant further complains because the trial court allowed plaintiffs' expert witnesses to express their opinions that the power line installation at the Fairview Elevator was a hazard, that defendant's employees should have recognized and correct-

ed the hazard, and that the defendant had failed to comply with requirements pertaining to minimum clearance, warning signs, and mandatory inspections set forth in the National Electrical Safety Code. One of the plaintiffs' experts testified that the hazard could easily have been eliminated by relocating the line. We have no hesitancy in holding that this evidence was properly admissible.

[4, 5] K.S.A. 60–456 provides the authority for asking an expert witness for his opinion on an ultimate issue in the case. That statute provides in pertinent part as follows:

> "(*d*) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact."

Such opinion testimony is admissible if it will be of special help to the jury on technical subjects as to which the jury is not familiar if it will assist the jury in arriving at a reasonable factual conclusion from the evidence. In this regard see *Plains Transp. of Kan. Inc. v. King*, 227 Kan. 17, 578 P.2d 1095 (1978); Gard's Kansas C.Civ.Proc.2d Annot. § 60–456, pp. 205–06 (1979). Under the circumstances in this case, the testimony of expert witnesses in the field of design and construction of electrical distribution systems would be of great assistance to the jury, since that area is not one within the typical juror's common knowledge. Hence, the testimony of plaintiffs' experts on those subjects was admissible.

[6] The defendant next maintains that the trial court erred in not allowing defendant to introduce evidence that the decedent's widow, Kathleen Pape, had remarried in less than seven months after the death of Terry Pape. Defendant argues that, under the Kansas Wrongful Death Act (K.S.A. 60–1901 *et seq.*), evidence of a widow's remarriage is admissible on the question of mitigation of her damages. On this point, we have concluded that the trial court properly excluded evidence of the surviving spouse's remarriage. The overwhelming majority rule throughout the United States is that damages for wrongful death are determined as of the date of death, and the fact that the surviving spouse has remarried is not a factor for the jury to consider in assessing either pecuniary or nonpecuniary damages of the surviving spouse. This subject is thoroughly discussed in an annotation entitled "Death Action—Evidence of Remarriage" in 88 A.L.R.3d 926, where many cases are cited on the subject. The rule which excludes such evidence is simply an application of the collateral source rule which is generally recognized. Simply stated, the collateral source rule is that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. The rule, which excludes evidence of remarriage of the surviving spouse in a wrongful death action, is mentioned in Gard's Kansas C.Civ.Proc.2d Annot. § 60–471, p. 301 (1979).

[7] In Kansas, we have no cases exactly on point on the issue of whether evidence of the remarriage of a surviving spouse in a wrongful death action is admissible in mitigation of her damages. Kansas has, however, long recognized the collateral source rule. In *Berry v. Dewey*, 102 Kan. 593, 172 P. 27 (1918), the plaintiff, a mother, brought an action for the wrongful death of her son. The defendant contended that the plaintiff, who was the sole heir of the decedent, received a substantial financial benefit as a result of the death of her son and that the benefit should have been deducted from the amount of the verdict. This court, in the opinion, stated that the proposition was untenable and, although it appears to have standing in the courts of some of the states, the proposition does not address itself to the judgment of this court as being sound, legal, equitable, or fair, and it cannot be permitted to reduce the amount of recovery in any way.

In *Southard v. Lira*, 212 Kan. 763, 512 P.2d 409 (1973), a personal injury action, it was held that the trial court properly applied the collateral source rule in excluding evidence of insurance proceeds received by

plaintiff. The court relied on *Rexroad v. Kansas Power & Light Co.*, 192 Kan. 343, 388 P.2d 832 (1964). More recently in *Negley v. Massey Ferguson, Inc.*, 229 Kan. 465, 625 P.2d 472 (1981), it was held that it would not be proper in a wrongful death action to disclose to the jury the fact that the surviving spouse was receiving workmen's compensation payments as the result of the death of her husband. It should also be noted that the United States District Court of the District of Kansas has followed the rule that, in a wrongful death action, evidence that the wife remarried following the wrongful death of the husband should be excluded. See *Nichols v. Marshall*, 486 F.2d 791 (10th Cir. 1973).

In our judgment, the rule which excludes evidence of the remarriage of the surviving spouse in a wrongful death action is sound and in accord with most of the other jurisdictions. The rationale underlying the majority rule is that the cause of action arises at the time of the death and damages are determinable as of that same time. Furthermore, some courts have observed that the rule providing for mitigation of damages because of the surviving spouse's remarriage is highly speculative, because it involves a comparison of the earnings, services, and contributions of the deceased spouse as compared to those predicated from the new spouse. We find no justification to depart from our long recognition of the collateral source rule, as recognized in the cases discussed above.

[8] The defendant next contends that the trial court erred in excluding defendant's proffered evidence as to a purported common-law marriage of decedent, which defendant argues occurred prior to decedent's marriage with the plaintiff, Kathleen Pape Johansen. The record shows that the only evidence proffered by the defendant on this issue was the deposition of Terry Pape's former wife, Pamela Pape. The substance of the deposition was that, following their divorce, Pamela stayed with Terry Pape in his apartment in *Missouri* during 1974. Pamela Pape's deposition clearly established that there was no holding out of the couple as husband and wife in *Kansas* after their divorce and that the living arrangement was merely a tentative trial run "to see if they could make it" and get along. Pamela Pape denied there was ever any agreement by Pamela and Terry that they were married. Terry Pape subsequently married Kathleen, his surviving spouse and one of the plaintiffs here. This proffered evidence affirmatively negated two essential elements to prove a common-law marriage: (1) a holding out as husband and wife in a state recognizing common-law marriage, and (2) a present marriage agreement between the parties. Under these circumstances, the trial court correctly refused to admit the evidence or submit this issue to the jury because there was no evidence to support the claim of common-law marriage.

[9] It is next contended by the defendant that the plaintiffs' evidence was insufficient to show any conscious pain and suffering of the decedent prior to his death. The jury returned a verdict awarding $2,000 for Terry Pape's pain and suffering between the accident which occurred on February 10, 1978, and Terry Pape's death on February 20, 1978. We have examined the record and concluded that, although not extensive, there was sufficient evidence to justify a finding that Terry Pape suffered conscious pain and suffering from his injuries until his death. When discovered lying at the bottom of the bins, Terry Pape was breathing, had a bloody cut on his head, and was audibly moaning. In response to a request by Kathleen Pape to squeeze her hand if he understood her, Terry Pape squeezed her hand. Notes in the hospital record indicated that Terry Pape was very responsive to pain stimuli. Under the circumstances, we find that there was sufficient evidence to submit to the jury the element of damages of decedent's conscious pain and suffering and to justify an award in the amount of $2,000.

[10] The only other point raised by the defendant which requires comment is that the trial court erred in entering judgment in favor of the plaintiffs when the causal

negligence of Terry Pape, when compared with the causal negligence of defendant KP&L, actually equaled 50⅔% as compared with 49⅓% causal negligence of the defendant. The basis of this contention is that the trial court erred in considering the negligence of the employer, which the jury found to be 27⅔%, in calculating causal fault of the parties, since the plaintiffs did not make a claim for recovery *in the action* against Pape's employer, Brockhoff Feed Yards, Inc. Defendant argues that the plaintiffs cannot recover under the provisions of K.S.A. 60–258a(a) which permits recovery only if the decedent's negligence was less than the causal negligence of the party or parties *against whom claim for recovery is made.* This same issue was raised and determined in *Negley v. Massey Ferguson, Inc.*, 229 Kan. 465, 625 P.2d 472. In *Negley*, the plaintiff's husband, an employee of Orrland, Inc., was electrocuted on the job when a forklift he was operating came in contact with overhead power lines owned and maintained by KP&L. The widow of the workman was paid workmen's compensation benefits for herself and the minor children. The widow then brought a wrongful death action against the manufacturer of the forklift and KP&L. The jury found KP&L to be 10% negligent, the deceased employee to be 22% negligent, and the employer 68% negligent. The plaintiffs did not sue the employer for recovery in the action, since it had paid workmen's compensation for the death of the employee. The defendant, KP&L, contended, as it does in this case, that the plaintiff could not recover from KP&L, the third-party tortfeasor, because its causal negligence was less than that of the decedent. Citing *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978), and *Langhofer v. Reiss*, 5 Kan.App.2d 573, 620 P.2d 1173 (1980), the court in *Negley*, held that the defendant's position had no merit and that, in applying K.S.A. 60–258a(a) plaintiff's individual negligence should be compared with the collective causal negligence of all persons found by the trier of fact to have been causally negligent. The same rationale is applicable in this case.

Under the workmen's compensation act the plaintiff was barred from bringing an action against the employer, Brockhoff Feed Yards, Inc. However, the defendant, KP&L, brought in Brockhoff under K.S.A. 60–258a(c). We have held in the past that the negligence of such persons brought in under K.S.A. 60–258a(c) is to be used for comparison purposes, even though these persons may be immune from liability or have previously settled with the plaintiff. *Brown v. Keill*, 224 Kan. 195, Syl. ¶ 6, 580 P.2d 867; *Miles v. West*, 224 Kan. 284, 580 P.2d 876 (1978). We hold that, under K.S.A. 60–258a(a), "parties against whom a claim for recovery is made" include all persons whose claimed causal negligence is submitted for determination to the trier of fact. Thus, the plaintiff can recover damages if his or her negligence is less than the combined causal negligence of all persons found by the trier of fact to have been causally at fault. We have, therefore, concluded that the trial court properly entered judgment in favor of the plaintiffs against defendant KP&L based on the jury's findings of causal negligence, not only as to Pape and KP&L, but also as to Pape's employer.

The judgment of the district court is affirmed.

EVIDENCE OF REMARRIAGE

Issue:

Whether to adopt legislation that would permit the admissibility of remarriage of surviving spouses into evidence in a wrongful death action.

KADC Position:

The Kansas Association of Defense Counsel would support legislative changes in the rules of evidence which would allow the admissibility of remarriage of a surviving spouse.

Rationale:

Under broader rules in favor of admissibility remarriage would be a proper element for a jury to consider in determining damages in a wrongful death action. It would necessarily follow that where the possibility has become an actuality by the time of trial, the jury should be permitted to consider such facts in assessing damages and should not be limited to considering only the facts that existed at the date of death.

Further, the testimony concerning remarriage could be given to show change in conditions on which the suit was based as against rights of person or persons affected. This would prevent the plaintiff from being addressed by name other than that which he or she is currently using, since it would be offensive to the integrity of judicial process if plaintiff, after taking an oath to be truthful, were permitted to misrepresent his or her marital status to a jury.

Therefore, the KADC believes evidence arising from remarriage, which reflects upon the party's present situation, financial and otherwise, should not be withheld from the jury.

Attachment 4
House Judiciary
March 31, 1986