

HOUSE BILL No. 2473

By Committee on Judiciary

1-18

1 AN ACT concerning civil procedure; relating to pleadings and discovery;
2 amending K.S.A. 2011 Supp. 60-208 and 60-226 and repealing the
3 existing sections.

4
5 *Be it enacted by the Legislature of the State of Kansas:*

6 Section 1. K.S.A. 2011 Supp. 60-208 is hereby amended to read as
7 follows: 60-208. (a) Claim for relief. A pleading that states a claim for
8 relief must contain:

9 (1) A short and plain statement of the claim showing that the pleader
10 is entitled to relief; and

11 (2) a demand for the relief sought, which may include relief in the
12 alternative or different types of relief. Except in contract actions, every
13 pleading demanding relief for money damages in excess of \$75,000,
14 without demanding a specific amount of money, must state only that the
15 amount sought as damages is in excess of \$75,000. Every pleading
16 demanding relief for money damages in an amount of \$75,000 or less must
17 specify the amount sought as damages.

18 (b) Defenses, admissions and denials. (1) In general. In responding to
19 a pleading, a party must:

20 (A) State in short and plain terms its defenses to each claim asserted
21 against it; and

22 (B) admit or deny the allegations asserted against it by an opposing
23 party.

24 (2) Denials; responding to the substance. A denial must fairly respond
25 to the substance of the allegation.

26 (3) General and specific denials. A party that intends in good faith to
27 deny all the allegations of a pleading, including the jurisdictional grounds,
28 may do so by a general denial. A party that does not intend to deny all the
29 allegations must either specifically deny designated allegations or
30 generally deny all except those specifically admitted.

31 (4) Denying part of an allegation. A party that intends in good faith to
32 deny only part of an allegation must admit the part that is true and deny the
33 rest.

34 (5) Lacking knowledge or information. A party that lacks knowledge

1 or information sufficient to form a belief about the truth of an allegation
2 must so state, and the statement has the effect of a denial.

3 (6) Effect of failing to deny. An allegation, other than one relating to
4 the amount of damages, is admitted if a responsive pleading is required
5 and the allegation is not denied. If a responsive pleading is not required, an
6 allegation is considered denied or avoided.

7 (c) Affirmative defenses. (1) In general. In responding to a pleading,
8 a party must affirmatively state any avoidance or affirmative defense,
9 including:

10 (A) Accord and satisfaction;

11 (B) arbitration and award;

12 (C) assumption of risk;

13 (D) contributory negligence or comparative fault;

14 ~~(E) discharge in bankruptcy;~~

15 ~~(F) (E)~~ duress;

16 ~~(G) (F)~~ estoppel;

17 ~~(H) (G)~~ failure of consideration;

18 ~~(I) (H)~~ fraud, illegality;

19 ~~(J) (I)~~ injury by fellow servant;

20 ~~(K) (J)~~ laches;

21 ~~(L) (K)~~ license;

22 ~~(M) (L)~~ payment;

23 ~~(N) (M)~~ release;

24 ~~(O) (N)~~ res judicata;

25 ~~(P) (O)~~ statute of frauds;

26 ~~(Q) (P)~~ statute of limitations; and

27 ~~(R) (Q)~~ waiver.

28 (2) Mistaken designation. If a party mistakenly designates a defense
29 as a counterclaim or a counterclaim as a defense, the court must, if justice
30 requires, treat the pleading as though it were correctly designated, and may
31 impose terms for doing so.

32 (d) Pleading to be concise and direct; alternative statements;
33 inconsistency. (1) In general. Each allegation must be simple, concise and
34 direct. No technical form is required.

35 (2) Alternative statements of a claim or defense. A party may set out
36 two or more statements of a claim or defense alternately or hypothetically,
37 either in a single count or defense or in separate ones. If a party makes
38 alternative statements, the pleading is sufficient if any one of them is
39 sufficient.

40 (3) Inconsistent claims or defenses. A party may state as many
41 separate claims or defenses as it has, regardless of consistency.

42 (e) Construing pleadings. Pleadings must be construed so as to do
43 justice.

1 Sec. 2. K.S.A. 2011 Supp. 60-226 is hereby amended to read as
2 follows: 60-226. (a) Discovery methods. Parties may obtain discovery by
3 one or more of the following methods: Depositions on oral examination or
4 written questions; written interrogatories; production of documents or
5 things or permission to enter onto land or other property under K.S.A. 60-
6 234, subsection (a)(1)(A)(iii) of K.S.A. 60-245 or K.S.A. 60-245a, and
7 amendments thereto; physical and mental examinations; and requests for
8 admission.

9 (b) Discovery scope and limits. (1) Scope in general. Unless
10 otherwise limited by court order, the scope of discovery is as follows:
11 Parties may obtain discovery regarding any nonprivileged matter that is
12 relevant to the subject matter involved in the action, whether it relates to
13 any party's claim or defense, including the existence, description, nature,
14 custody, condition and location of any documents or other tangible things
15 and the identity and location of persons who know of any discoverable
16 matter. Relevant information need not be admissible at the trial if the
17 discovery appears reasonably calculated to lead to the discovery of
18 admissible evidence.

19 (2) Limitations on frequency and extent. (A) On motion, or on its
20 own, the court may limit the frequency or extent of discovery methods
21 otherwise allowed by the rules of civil procedure and must do so if it
22 determines that:

23 (i) The discovery sought is unreasonably cumulative or duplicative,
24 or can be obtained from some other source that is more convenient, less
25 burdensome or less expensive;

26 (ii) the party seeking discovery has had ample opportunity to obtain
27 the information by discovery in the action; or

28 (iii) the burden or expense of the proposed discovery outweighs its
29 likely benefit, considering the needs of the case, the amount in
30 controversy, the parties' resources, the importance of the issues at stake in
31 the action and the importance of the proposed discovery in resolving the
32 issues.

33 (B) A party need not provide discovery of electronically stored
34 information from sources that the party identifies as not reasonably
35 accessible because of undue burden or cost. On motion to compel
36 discovery or for a protective order, the party from whom discovery is
37 sought must show that the information is not reasonably accessible
38 because of undue burden or cost. If that showing is made, the court may
39 nonetheless order discovery from such sources if the requesting party
40 shows good cause, considering the limitations of subsection (b)(2)(A). The
41 court may specify conditions for the discovery.

42 (3) Insurance agreements. A party may obtain discovery of the
43 existence and contents of any insurance agreement under which an

1 insurance business may be liable to satisfy part or all of a possible
2 judgment in the action or to indemnify or reimburse for payments made to
3 satisfy the judgment. Information concerning the insurance agreement is
4 not by reason of disclosure admissible in evidence at trial. For purposes of
5 this paragraph, an application for insurance is not a part of an insurance
6 agreement.

7 (4) Trial preparation; materials. (A) Documents and tangible things.
8 Ordinarily, a party may not discover documents and tangible things that
9 are prepared in anticipation of litigation or for trial by or for another party
10 or its representative, including the other party's attorney, consultant, surety,
11 indemnitor, insurer or agent. But, subject to subsection (b)(5), those
12 materials may be discovered if:

13 (i) They are otherwise discoverable under paragraph (1); and

14 (ii) the party shows that it has substantial need for the materials to
15 prepare its case and cannot, without undue hardship, obtain their
16 substantial equivalent by other means.

17 (B) Protection against disclosure. If the court orders discovery of
18 those materials, it must protect against disclosure of the mental
19 impressions, conclusions, opinions or legal theories of a party's attorney or
20 other representative concerning the litigation.

21 (C) Previous statement. Any party or other person may, on request
22 and without the required showing, obtain the person's own previous
23 statement about the action or its subject matter. If the request is refused,
24 the person may move for a court order, and K.S.A. 60-237, and
25 amendments thereto, applies to the award of expenses. A previous
26 statement is either:

27 (i) A written statement that the person has signed or otherwise
28 adopted or approved; or

29 (ii) a contemporaneous stenographic, mechanical, electrical or other
30 recording, or a transcription of it, that recites substantially verbatim the
31 person's oral statement.

32 (5) Trial preparation; experts.

33 (A) *Deposition of an expert who may testify.* A party may depose any
34 person who has been identified as an expert whose opinions may be
35 presented at trial. If a disclosure is required under subsection (b)(6), the
36 deposition may be conducted only after the disclosure is provided.

37 (B) *Trial-preparation protection for draft disclosures.* Subsections (b)
38 (4)(A) and (b)(4)(B) protect drafts of any disclosure required under
39 subsection (b)(6), ~~and a report signed by the witness which is~~
40 ~~disclosed~~ **and drafts of a disclosure by an expert witness provided** **in**
41 **lieu of the disclosure required by subsection (b)(6), regardless of the**
42 **form in which the draft is recorded.**

43 (C) *Trial-preparation protection for communications between a*

1 party's attorney and expert witnesses. Subsections (b)(4)(A) and (b)(4)(B)
2 protect communications between the party's attorney and any witness
3 about whom disclosure is required under subsection (b)(6), regardless of
4 the form of the communications, except to the extent that the
5 communications:

- 6 (i) Relate to compensation for the expert's study or testimony;
- 7 (ii) identify facts or data that the party's attorney provided and that
8 the expert considered in forming the opinions to be expressed; or
- 9 (iii) identify assumptions that the party's attorney provided and that
10 the expert relied on in forming the opinions to be expressed.

11 ~~(B)~~ (D) Expert employed only for trial preparation. Ordinarily, a party
12 may not, by interrogatories or deposition, discover facts known or
13 opinions held by an expert who has been retained or specially employed
14 by another party in anticipation of litigation or to prepare for trial and who
15 is not expected to be called as a witness at trial. But a party may do so
16 only:

- 17 (i) As provided in subsection (b) of K.S.A. 60-235, and amendments
18 thereto; or
- 19 (ii) on showing exceptional circumstances under which it is
20 impracticable for the party to obtain facts or opinions on the same subject
21 by other means.

22 ~~(C)~~(E) Payment. Unless manifest injustice would result, the court
23 must require that the party seeking discovery:

- 24 (i) Pay the expert a reasonable fee for time spent in responding to
25 discovery under subsection (b)(5)(A) or ~~(b)(5)(B)~~(b)(5)(D); and
- 26 (ii) for discovery under subsection ~~(b)(5)(B)~~(b)(5)(D), also pay the
27 other party a fair portion of the fees and expenses it reasonably incurred in
28 obtaining the expert's facts and opinions.

29 (6) Disclosure of expert testimony. (A) ~~In general.~~ Required
30 disclosures. A party must disclose to other parties the identity of any
31 witness it may use at trial to present expert testimony. *The disclosure must*
32 *state:*

- 33 (i) *The subject matter on which the expert is expected to testify; and*
- 34 (ii) *the substance of the facts and opinions to which the expert is*
35 *expected to testify.*

36 (B) ~~Required disclosures.~~ *Witness who is retained or specially*
37 *employed.* Unless otherwise stipulated or ordered by the court, if the
38 witness is retained or specially employed to provide expert testimony in
39 the case, or is one whose duties as the party's employee regularly involve
40 giving expert testimony, the disclosure *under subsection (b)(6)(A) must*
41 *also state:*

- 42 (i) ~~The subject matter on which the expert is expected to testify;~~
- 43 (ii) ~~the substance of the facts and opinions to which the expert is~~

1 ~~expected to testify; and~~

2 ~~(iii)~~ a summary of the grounds for each opinion.

3 (C) Time to disclose expert testimony. A party must make these
4 disclosures at the times and in the sequence that the court orders. Absent a
5 stipulation or court order, the disclosures must be made:

6 (i) At least 90 days before the date set for trial or for the case to be
7 ready for trial; or

8 (ii) if the evidence is intended solely to contradict or rebut evidence
9 on the same subject matter identified by another party under subsection (b)
10 (6)(B), within 30 days after the other party's disclosure.

11 (D) Supplementing the disclosure. The parties must supplement these
12 disclosures when required under subsection (e).

13 (E) Form of disclosures. Unless otherwise ordered by the court, all
14 disclosures under this subsection must be:

15 (i) In writing, signed and served; and

16 (ii) filed with the court in accordance with subsection (d) of K.S.A.
17 60-205, and amendments thereto.

18 (7) Claiming privilege or protecting trial preparation materials. (A)
19 Information withheld. When a party withholds information otherwise
20 discoverable by claiming that the information is privileged or subject to
21 protection as trial preparation material, the party must:

22 (i) Expressly make the claim; and

23 (ii) describe the nature of the documents, communications or things
24 not produced or disclosed, and do so in a manner that, without revealing
25 information itself privileged or protected, will enable other parties to
26 assess the claim.

27 (B) Information produced. If information produced in discovery is
28 subject to a claim of privilege or of protection as trial preparation material,
29 the party making the claim may notify any party that received the
30 information of the claim and the basis for it. After being notified, a party
31 must promptly return, sequester or destroy the specified information and
32 any copies it has; must not use or disclose the information until the claim
33 is resolved; must take reasonable steps to retrieve the information if the
34 party disclosed it before being notified; and may promptly present the
35 information to the court under seal for a determination of the claim. The
36 producing party must preserve the information until the claim is resolved.

37 (c) Protective orders. (1) In general. A party or any person from
38 whom discovery is sought may move for a protective order in the court
39 where the action is pending, as an alternative on matters relating to a
40 deposition, in the district court where the deposition will be taken. The
41 motion must include a certification that the movant has in good faith
42 conferred or attempted to confer with other affected parties in an effort to
43 resolve the dispute without court action and must describe the steps taken

1 by all attorneys or unrepresented parties to resolve the issues in dispute.
2 The court may, for good cause, issue an order to protect a party or person
3 from annoyance, embarrassment, oppression or undue burden or expense,
4 including one or more of the following:

5 (A) Forbidding the disclosure or discovery;

6 (B) specifying terms, including time and place, for the disclosure or
7 discovery;

8 (C) prescribing a discovery method other than the one selected by the
9 party seeking discovery;

10 (D) forbidding inquiry into certain matters, or limiting the scope of
11 disclosure or discovery to certain matters;

12 (E) designating the persons who may be present while the discovery
13 is conducted;

14 (F) requiring that a deposition be sealed and opened only on court
15 order;

16 (G) requiring that a trade secret or other confidential research,
17 development or commercial information not be revealed or be revealed
18 only in a specified way; and

19 (H) requiring that the parties simultaneously file specified documents
20 or information in sealed envelopes, to be opened as the court orders.

21 (2) Ordering discovery. If a motion for a protective order is wholly or
22 partly denied the court may, on just terms, order that any party or person
23 provide or permit discovery.

24 (3) Awarding expenses. The provisions of K.S.A. 60-237, and
25 amendments thereto, apply to the award of expenses.

26 (d) Sequence of discovery. Unless, on motion, the court orders
27 otherwise for the parties' and witnesses' convenience and in the interests of
28 justice:

29 (1) Methods of discovery may be used in any sequence; and

30 (2) discovery by one party does not require any other party to delay
31 its discovery.

32 (e) Supplementing disclosures and responses. (1) In general. A party
33 who has made a disclosure under subsection (b)(6), or who has responded
34 to an interrogatory, request for production or request for admission, must
35 supplement or correct its disclosure or response:

36 (A) In a timely manner if the party learns that in some material
37 respect the disclosure or response is incomplete or incorrect, and if the
38 additional or corrective information has not otherwise been made known
39 to the other parties during the discovery process or in writing; or

40 (B) as ordered by the court.

41 (2) Expert witness. For an expert to whom the disclosure requirement
42 in subsection (b)(6) applies, the party's duty to supplement extends both to
43 information included in the disclosure and to information given during the

1 expert's deposition. Any additions or changes to this information must be
2 disclosed at least 30 days before trial, unless the court orders otherwise.

3 (f) Signing disclosures and discovery requests, responses and
4 objections. (1) Signature required; effect of signature. Every disclosure
5 under subsection (b)(6) and every discovery request, response or objection
6 must be signed by at least one attorney of record in the attorney's own
7 name, or by the party personally, if unrepresented, and must state the
8 signor's address, e-mail address and telephone number. By signing, an
9 attorney or party certifies that to the best of the person's knowledge,
10 information and belief formed after a reasonable inquiry:

11 (A) With respect to a disclosure, it is complete and correct as of the
12 time it is made;

13 (B) with respect to a discovery request, response or objection, it is:

14 (i) Consistent with the rules of civil procedure and warranted by
15 existing law or by a nonfrivolous argument for extending, modifying or
16 reversing existing law or for establishing new law;

17 (ii) not interposed for any improper purpose, such as to harass, cause
18 unnecessary delay or needlessly increase the cost of litigation; and

19 (iii) neither unreasonable nor unduly burdensome or expensive
20 considering the needs of the case, prior discovery in the case, the amount
21 in controversy and the importance of the issues at stake in the action.

22 (2) Failure to sign. Other parties have no duty to act on an unsigned
23 disclosure, request, response or objection until it is signed, and the court
24 must strike it unless a signature is promptly supplied after the omission is
25 called to the attorney's or party's attention.

26 (3) Sanction for improper certification. If a certification violates this
27 section without substantial justification, the court, on motion, or on its
28 own, must impose an appropriate sanction on the signer, the party on
29 whose behalf the signer was acting, or both. The sanction may include an
30 order to pay the reasonable expenses, including attorney's fees, caused by
31 the violation.

32 Sec. 3. K.S.A. 2011 Supp. 60-208 and 60-226 are hereby repealed.

33 Sec. 4. This act shall take effect and be in force from and after its
34 publication in the statute book.

35