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**Summary of the Kansas Supreme Court Decision in**

***Hilburn v. Enerpipe Ltd.*, issued June 14, 2019**

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Summary

The Kansas Supreme Court issued a decision in *Hilburn v. Enerpipe Ltd.* holding that the cap on noneconomic damages imposed by K.S.A. 60-19a02 is facially unconstitutional because it violates section 5 of the Kansas Constitution Bill of Rights.<sup>1</sup> Section 5 states that “[t]he right of trial by jury shall be inviolate.” K.S.A. 60-19a02 applies to “any action seeking damages for personal injury or death” and restricts the total amount recoverable by each party from all defendants for all claims for noneconomic loss. K.S.A. 60-19a02(d) provides that “the court shall not instruct the jury on the limitations of this section” and requires the court to enter judgment for the statutory limitation if the jury’s verdict for noneconomic loss exceeds that amount. **The Court held that the statute violates the right protected by section 5 because it intrudes upon the jury’s determination of the compensation owed to plaintiffs to redress their injuries.**<sup>2</sup>

Factual and Procedural Background

Plaintiff Diana K. Hilburn was injured in an automobile accident with a semi-truck and sued Enerpipe Ltd., the owner of the semi-truck, alleging that the truck driver’s negligence caused the collision and that Enerpipe was vicariously liable for its driver’s actions. Enerpipe admitted the driver’s negligence, conceded its vicarious liability, and went to trial on damages. A jury awarded Hilburn \$335,000 in damages, itemized as \$33,490.86 for medical expenses and \$301,509.14 for noneconomic losses. The district court reduced the judgment for noneconomic damages to \$250,000 pursuant to K.S.A. 60-19a02(d), as in effect at the time of the verdict, and entered a journal entry of judgment against Enerpipe for \$283,490.86.<sup>3</sup>

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<sup>1</sup> *Hilburn v. Enerpipe Ltd.*, No. 112,765 at 29 (Kan. Sup. Ct. June 14, 2019).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.* at 3-4.

Hilburn appealed and a Court of Appeals panel affirmed the district court’s decision in *Hilburn v. Enerpipe, Ltd.*, 52 Kan. App. 2d 546, 370 P.3d 428 (2016). The Supreme Court granted Hilburn’s petition for review.<sup>4</sup> The Supreme Court reversed the decision of the Court of Appeals affirming the district court, reversed the district court’s judgment, and remanded the case to the district court for further proceedings.<sup>5</sup> The Supreme Court’s decision was split: Justice Beier wrote the lead opinion holding that K.S.A. 60-19a02 is facially unconstitutional, and was joined by Justice Rosen and Justice Johnson; Justice Stegall wrote a concurring opinion and agreed that K.S.A. 60-19a02 is facially unconstitutional; Justice Luckert dissented and was joined by Justice Biles; and Chief Justice Nuss did not participate.

### Standard of Review

The issue presented in this case was whether K.S.A. 60-19a02 is constitutional, which is a question of law. The Court explained that it has often said a statute is presumed to be constitutional and all doubts are resolved in favor of upholding it.<sup>6</sup> However, the Court noted that it has recently held the presumption of constitutionality does not apply “in cases dealing with ‘fundamental interests’ protected by the Kansas Constitution.” The Court decided “the right protected by section 5 is a ‘fundamental interest’ expressly protected by the Kansas Constitution Bill of Rights” and did not apply a presumption of constitutionality in this case.<sup>7</sup>

Justice Stegall, concurring in part and concurring in the judgment, agreed “to abandon our clear error standard of review in favor of de novo review in this case,” but disagreed with exercising “different standards of review depending on which part of the Constitution we are interpreting or enforcing.”<sup>8</sup> Justice Stegall then questioned “whether the clear error rule should be retained for any species of constitutional review in Kansas”, noted that “resolving it in this case is unnecessary under the current precedent of this court,” and provided “a skeletal discussion of the question which, by necessity, must arise in earnest sometime soon.”<sup>9</sup>

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<sup>4</sup> *Id.* at 4-5.

<sup>5</sup> *Id.* at 29.

<sup>6</sup> *Id.* at 7-8.

<sup>7</sup> *Id.* at 8-9.

<sup>8</sup> *Id.* at 35.

<sup>9</sup> *Id.* at 36.

Discussion

Section 5 of the Kansas Constitution Bill of Rights states that “[t]he right of trial by jury shall be inviolate.” The Court explained that this section preserves the jury trial right as it historically existed at common law when the Kansas Constitution was ratified in 1859.<sup>10</sup> The Court found that “the determination of noneconomic damages was a fundamental part of a jury trial at common law and protected by section 5.”<sup>11</sup> The Court then examined whether K.S.A. 60-19a02 impairs the jury trial right “by interfering with the jury’s fundamental function” and held that “the statute necessarily infringes on the constitutional right.”<sup>12</sup> Ultimately, the Court found that “the noneconomic damages cap under K.S.A. 60-19a02 violates Hilburn’s right protected by section 5 because it intrudes upon the jury’s determination of the compensation owed her to redress her injury.”<sup>13</sup>

The Court acknowledged that a majority of the Court held in *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012), that any impairment of the right to jury trial under section 5 or the common-law right to remedy under section 18 of the Kansas Constitution Bill of Rights was permissible if a two-part due process-based quid pro quo test was satisfied.<sup>14</sup> The test requires a showing that the impairment was “reasonably necessary in the public interest to promote the public welfare” and that the Legislature provided an “adequate and viable substitute” for the impaired right.<sup>15</sup> However, the Court found that the *Miller* holding should not be followed, leading the Court to “abandon the quid pro quo test for analyzing whether the noneconomic damages cap is unconstitutional under section 5 of the Kansas Constitution Bill of Rights.”<sup>16</sup>

The Court also addressed what it called a fact-law or fact-policy distinction that “has been relied on in varying degrees by almost all courts that have upheld damages caps in the face of jury trial-based challenges.”<sup>17</sup> Essentially, a jury’s primary function is fact-finding, including damages, while a court’s primary function is to apply the law to facts; the cap on damages relates to the remedy available for a plaintiff, which is a matter of law for the court, and it is applied after the jury has made its findings and assessed the damages.<sup>18</sup> The Court found that the decisions from the other states were not persuasive because the practical effect of the cap on damages results in

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<sup>10</sup> *Id.* at 9-10.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.* at 10-11.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 2-3, 11.

<sup>15</sup> *Id.* at 4-5, 11.

<sup>16</sup> *Id.* at 23.

<sup>17</sup> *Id.* at 23-25.

<sup>18</sup> *Id.*

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“substituting juries’ factual determinations of actual damages with an across-the-board legislative determination of the maximum conceivable amount of actual damages.”<sup>19</sup> Thus, even if the cap on damages “is technically or theoretically applied as a matter of law, the cap’s effect is to disturb the jury’s finding of fact on the amount of the award” and “[a]llowing this substitutes the Legislature’s nonspecific judgment for the jury’s specific judgment.”<sup>20</sup>

Justice Stegall, concurring in part and concurring in the judgment, agreed that the *Miller* holding should not be followed and rejected the quid pro quo test as applied in the context of a challenge under section 5 of the Kansas Constitution Bill of Rights. Further, after considering whether K.S.A. 60-19a02 implicates section 5, Justice Stegall concluded that the statute “does in fact invade the historic province of the jury to decide a contested matter...and violates section 5.”<sup>21</sup>

Justice Stegall then focused on distinguishing section 5 and section 18 of the Kansas Constitution Bill of Rights: section 5 applies to procedural measures affecting who decides a question while section 18 applies to substantive measures affecting what is being decided.<sup>22</sup> Justice Stegall found that “the damage cap has some markings of both a procedural (who decides) and a substantive (what gets decided) measure.”<sup>23</sup> Thus, while concluding that K.S.A. 60-19a02 violates section 5, Justice Stegall noted that the Legislature could pursue the policy goal in another way: “The Legislature remains free—within the bounds of section 18—to limit or otherwise modify the common law cause of action for damages. But it must do so clearly and straightforwardly.”<sup>24</sup>

Justice Luckert, dissenting, and joined by Justice Biles, would follow the *Miller* holding and apply the quid pro quo test to K.S.A. 60-19a02. Applying the two-part test, Justice Luckert found that: “(1) the various statutes and regulations mandating motor carrier liability insurance and K.S.A. 60-19a02 are reasonably necessary in the public interest to promote the public welfare; and (2) the Legislature has substituted an adequate statutory remedy for Hilburn’s right to have a jury determine her damages.” Accordingly, Justice Luckert concluded that the statute does not violate Hilburn’s rights under either section 5 or section 18 of the Kansas Constitution Bill of Rights.<sup>25</sup>

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<sup>19</sup> *Id.* at 26-27.

<sup>20</sup> *Id.* at 29.

<sup>21</sup> *Id.* at 30.

<sup>22</sup> *Id.* at 30-31.

<sup>23</sup> *Id.* at 33, 43.

<sup>24</sup> *Id.* at 43.

<sup>25</sup> *Id.* at 44.