Washburn University School of Law
Presents

RECENT DEVELOPMENTS IN THE LAW

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Recent Developments in Contract Law

by
David Pierce

Section A

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I. THE CONTRACT FORMATION PROCESS

A. Offer & Acceptance: *Wilkinson v. Shoney's Inc.*, 2000 WL 502505, Case No. 82,611 (Kansas Supreme Court, April 28, 2000).

Wilkinson was an employee of Shoney's Inc. who was fired. When Wilkinson applied for unemployment benefits, Shoney's, through its agent NEC, Inc., contested the award of benefits. Benefits were ultimately awarded to Wilkinson. Wilkinson then sued Shoney's and NEC for wrongful discharge/breach of implied contract, negligent misrepresentation, outrage, negligent infliction of emotional distress, defamation, and malicious prosecution (defense). The jury awarded Wilkinson $158,271 against Shoney's for wrongful discharge and negligent misrepresentation, $300,000 against Shoney's (and $75,000 against NEC) for malicious prosecution, and $800,000 in punitive damages against Shoney's for malicious prosecution.

1. "Malicious Defense" Not Encompassed by Malicious Prosecution.

    a. Essential element of malicious prosecution is that the defendant initiated, continued, or procured the action against the plaintiff. In this case Shoney's and NEC merely responded to the unemployment compensation proceeding initiated by Wilkinson.

    b. The court refuses to recognize a new cause of action for malicious defense.

    c. Therefore, the damages associated with Wilkinson's malicious prosecution claim were improper, including the $800,000 in punitive damages.

2. The Employment Contract was Created in Kansas, Not Missouri.

   a. The parties' apparently agreed that if the employment contract was made in Missouri, Wilkinson could not rely upon his implied employment contract theory that incorporated Shoney's rehire policy, fair treatment guarantee, progressive discipline procedures, Shoney's Owner and Operator Guide to Employees Relations and the Law, the Employee Handbook, and the Welcome to Shoney's poster.

   b. Wilkinson contended the contract was made in Kansas; Shoney's contended it was made in Missouri.

   c. The court follows the basic rule that: "A contract is made at the time when the last act necessary for its formation is done, and at the place where the final act is done." Restatement of Contracts § 74.

   d. The trial court found the last act in the formation of the Shoney's/Wilkinson employment contract was when Wilkinson met with the person that he would be working for at the Shoney's in Kansas City, Kansas (Tucker). As the Supreme Court noted, in affirming the trial court's finding:

      "Although the parties had substantial negotiations in Missouri, the terms of employment were still indefinite as to salary, position, and schedule, and the issue of whether Tucker and Wilkinson wanted to work with each other was unsettled until the meetings and commencement of employment at the State Avenue store in Kansas City, Kansas."

      2000 WL 502505 at *14.

3. Implied Employment Contract Terms.

   a. The court will look to all the surrounding circumstances to determine whether the employee has as an "implied in fact" employment contract as opposed to an employment-at-will situation.

   b. The surrounding circumstances relied upon by Wilkinson included Shoney's rehire policy (Wilkinson was a rehire), fair treatment guarantee, progressive discipline procedures, Shoney's Owner and Operator Guide to Employees Relations and the Law, the Employee Handbook, and the Welcome to Shoney's poster.

c. The surrounding circumstances relied upon by Shoney's to establish an employment-at-will relationship were various disclaimers written into Shoney's poster and manuals.

(i) The "Welcome to Shoney's Inc." poster stated:

"The procedures, practices, and policies set forth are not intended to be and shall not be considered contractual commitments or guarantees. . . . Notwithstanding these practices or procedures, any employee or the company can, at any time, for any or no reason, with or without notice, terminate the employment relationship."

2000 WL 502505 at *16.

(ii) The impact of the disclaimer is addressed by the court as follows:

"While there was evidence Wilkinson had read the disclaimer on the poster, he said he did not understand it, and there was no evidence that this disclaimer or any other disclaimer was specifically drawn to his attention by Shoney's prior to or during his employment. Furthermore, it was not established at trial that the disclaimer was intended to create an unqualified employment-at-will relationship in light of the other contradictory provisions in Shoney's written materials, the attitudes of various Shoney's managers, and the Shoney's practice during new employee orientation and during manager training of encouraging employees and managers to follow and rely on the policies stated in these materials."

2000 WL 502505 at *16.

d. The court concluded: The disclaimer language was not determinative but was merely a factor to be considered by the jury.

4. "Negligent Misrepresentation" Does Not Apply to Shoney's Stated Intent to Comply with its Employment Policies.

a. "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them

by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Restatement (Second) of Torts § 552(1).

b. Kansas law has noted that the tort of negligent misrepresentation does not apply to misrepresentation of an intention to perform an agreement. "The tort only applies to cases of misrepresentation of factual, commercial information, not to statements of future intent." Citing *Bittel v. Farm Credit Services of Central Kansas, P.C.A.*, 265 Kan. 651, Syl. ¶ 7, 962 P.2d 491 (1998).

c. The court held the Shoney's employment information was not factual and directed at him as an employee and was more in the nature of an intention to perform in the stated manner.

d. "'The tort only applies to cases of misrepresentation of factual, commercial information, not to statements of future intent.'" Quoting from *Bittel*. 2000 WL 502505 at *21.

B. Fraudulent Inducement: *Ramada Franchise Systems, Inc. v. Tresprop Ltd.*, 2000 WL 290349, Case No. 98-2511-DJW (U.S. District Court of Kansas, March 10, 2000).

Ramada Franchise Systems, Inc. personnel were negotiating a franchise agreement with Tresprop Ltd. Tresprop refused to enter into a franchise agreement until Ramada assured Tresprop the downtown Ramada Inn franchise held by Cal Cohen was in the process of being permanently terminated and would not be permitted to reenter the Ramada system. Ramada personnel gave Tresprop the assurances it requested and Tresprop entered into a franchise agreement on April 8, 1996. On April 9, 1996 Ramada issued a third notice of default to Cohen but also indicated Ramada "looked forward to assisting the facility in curing the default." Ramada terminated Cohen's license agreement on April 30, 1996 but on May 16, 1996 sent Cohen a "proposed work out plan to assist in bringing [the facility] to a minimum passing score." On June 18, 1996 Cohen entered into a Reinstatement Agreement and sometime following September 8, 1996 the Cohen Ramada Inn was reinstated to Ramada's national reservations system.

When Tresprop learned Cohen's Ramada Inn was still part of the Ramada system, it refused to honor the terms of the franchise agreement and Ramda sued Tresprop for liquidated damages and unpaid franchise and royalty fees. Tresprop defended

asserting it had been fraudulently induced by Ramada to enter the franchise agreement and counterclaimed for damages associated with Ramada's fraud. The court entered judgment for Tresprop but denied some of the damages sought by Tresprop.

1. Statute of Limitations Runs from Date Fraud Discovered or Should Have Been Discovered.

   a. Kan. Stat. Ann. § 60-513(a)(3) imposes a two-year statute of limitations for fraud claims.

   b. A fraud cause of action accrues when the claimant discovers, or reasonably should have discovered, the facts necessary to know of the fraud.

   c. The fraud counterclaim was filed on February 9, 1999 and the evidence indicated the Tresprop parties were not aware of the falsity of the Ramada statements until March 1997--at the earliest. The court indicates: "Defendants seemingly did not become aware until the discovery stage of this litigation that RFS [Ramada] knew at the time it made the statement that the statement was false." 2000 WL 290349 at *6.

   d. In discussing when a fraud cause of action accrues, the court states:

   "[A] cause of action for fraud accrues when the claimant discovers or reasonably should have discovered the facts necessary to know of the fraud. To know of the fraud, a claimant must know the perpetrator made an untrue statement of fact and knew when he made it that the statement was untrue or made it with reckless disregard for its truth. . . . A cause of action for fraud has not accrued at the time the claimant discovers or reasonably should have discovered facts establishing a broken promise or a contract breached. . . . Notice that a contract has been breached is not tantamount to notice that a fraud has been perpetrated."

   2000 WL 290349 at *5.

2. Parol Evidence Rule Does Not Apply to Fraudulent Inducement.

   a. The parol evidence rule prohibits use of evidence of prior or contemporaneous statements that contradict the terms of a written agreement.

b. If the contract expressly addresses the matter at issue, so that the oral promise directly contradicts the final written promise, "'the oral promise[s] cannot be construed as fraudulent' and 'cannot, as a matter of law, establish fraudulent inducement or misrepresentation.'" 2000 WL 290349 at *7 (quoting *Edwards v. Phillips Petroleum Co.*, 187 Kan. 656, 660, 360 P.2d 23, 27 (1961)).

c. However, there is an exception to the parol evidence rule when the evidence concerns a fraudulent inducement to enter into the contract which relates to some independent fact that is not a promise in direct conflict with the final writing evidencing the contract.

d. In this case, the written contract was silent concerning the status of the Cohen Ramada franchise and the factual representation made to Tresprop–that the Cohen franchise had been terminated and would not be offered reinstatement. Therefore, evidence of the facts relating to the fraudulent inducement is not barred by the parol evidence rule.

3. Tresprop Established the Required Elements for Fraudulent Inducement.

a. The elements for fraudulent inducement, which Tresprop must establish by clear and convincing evidence, are:

(1) Ramada made an untrue statement of fact;

(2) Ramada knew the statement was untrue or made it in reckless disregard for the truth;

(3) Ramada made the statement with the intent to induce Tresprop to act on the statement;

(4) Tresprop justifiably relied on the statement to its detriment;

(5) Tresprop sustained injury as a result of its reliance.

2000 WL at 290349 at *8.

b. The court concludes Tresprop established each of the elements by clear and convincing evidence.

c. One of the Ramada arguments was that its statements concerning termination of the Cohen franchise related to future course of conduct. The court rejects this argument, noting an exception to the

exception:

> "Although there is a general rule providing that a claim of fraud predicated upon promises relating to future actions is not actionable . . . the misrepresentation becomes actionable if the promise concerning a future act is coupled with a present intention not to fulfill the promise."

2000 WL 290349 at *10.

d. Applying the exception to the exception, the court holds: "The evidence . . . supports the position that when RFS [Ramada] stated to Tresprop in early April 1996 that Site 1040 [the Cohen Ramada Inn] currently was in the process of being permanently terminated from the RFS system, RFS had no intention of permanently terminating Site 1040 from the RFS system." 2000 WL 290349 at *10.

e. The court concludes that because of Ramada's fraudulent inducement, the Ramada/Tresprop franchise agreeement was void and must be rescinded.

4. Burden of Proof Associated with Rescission Damages.

a. Rescission attempts to put the parties in the same condition they would have been had no contract existed.

b. Tresprop argued it expended $482,571.80 remodeling its facility to meet Ramada's standards and $82,122.65 paid Ramada in franchise and royalty fees.

c. The court found there was insufficient evidence to identify how much of the $482,571.80 Tresprop spent in general remodeling as opposed to specific improvements directly associated with Ramada's activity. Also, remodeling began in 1995 before the fraudulent representations were made. The proof was insufficient to establish that Ramada's tortious act caused Tresprop to spend some or all of the $482,571.80 in renovation costs. 2000 WL 290349 at *13.

d. However, Tresprop established it would not have expended $82,122.65 in franchise and royalty fees but for Ramada's tortious conduct.

e. Ramada argued it should be reimbursed for benefits conferred on

Tresprop associated with Ramada's national reservation system, marketing, advertising, and related franchise benefits from April 1996 through December 1997. The court agrees that equity requires Tresprop to restore to Ramada the value of any benefits it received in return for reimbursement of franchise fees and royalties paid. But the court concludes: "There was no evidence presented at trial, however, regarding the value of the referenced benefits received by Defendants [Tresprop]." 2000 WL 290349 at *14.

II. WHO CAN CONTRACT?

A. Stockholder of Corporation can Contract with the Corporation: *Matney v. Matney Chiropractic Clinic*, 268 Kan. 336 (2000).

Larry J. Matney, a chiropractor, inured his back while working for his employer, Matney Chiropractic Clinic, P.A. Matney owned all the stock of the corporation. Matney, acting for his employer, Matney P.A., designated Dr. Fore as the treatment provider for his injuries. The insurance carrier designated Dr. Wertzberger as the authorized treatment provider. The Workers Compensation Board found: "that where a corporate employer employs an individual who owns all the stock of the corporation and the employer and employee are the same person, the employer's insurance carrier has a statutory right to designate the health care provider." The court of appeals affirmed the Board.

1. The employer corporation is distinct from the sole shareholder employee. The court observes:

   "A corporation is an entity having authority under the law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely. A corporation is a group or succession of persons established in accordance with legal rules into a legal or juristic person that has a legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it."

   268 Kan. at 341.

2. The court holds:

   "The Board and the Court of Appeals in their analysis of 44-510(a) failed to note that a corporation must be thought of without reference to members who compose it.... In addition, a stockholder of a corporation may contract with

the corporation like any other individual."

268 Kan. at 341.

3. Note the strict construction the court uses when the issue is whether a statute intended to disregard the corporate form:

> "K.S.A. 1992 Supp. 44-510(a) authorizes the employer to designate a treatment provider for an employee. When adopting this statute, the legislature was well aware of the fact that individuals form corporations and corporations purchase workers compensation insurance for their employees. If the legislature meant to prohibit a corporation from designating a treatment provider for employees who own stock in the corporation, it could have easily done so."

268 Kan. at 341.

B. Agents as Parties to the Contract: *Dimension Graphics, Inc. v. Liebowitz*, 26 Kan. App.2d 722 (1999).

Dimension is a printer. In December of 1995 Paradise Magazine, Inc. sought to have Dimension print Paradise Magazine. Dimension's president notified Paradise that it would not do business with Paradise. Ted Liebowitz and Bruce Jacobson, who were in fact acting on behalf of Paradise, sought to hire Dimension indicating they were acting for Worldwide Communications. Unknown to Dimension, Worldwide was merely a front for Paradise. Dimension contracted with Worldwide and printed the magazine at a cost of $78,857.83. Worldwide failed to pay and Dimension brought suit which was ultimately removed to federal court where Dimension discovered Worldwide was in fact Paradise. Dimension obtained summary judgment against Paradise. The federal judge held Paradise liable as an undisclosed principal.

Dimension next filed suit in state court against Liebowitz and Jacobson contending they were jointly and severally liable as agents for a partially disclosed principal. The state trial judge held the federal court finding that Paradise was an undisclosed principal was binding in the action against the agents and found Dimension had elected to proceed against the principal instead of the agents. The court of appeals reverses finding the defendants were agents for a partially disclosed principal and could be jointly and severally liable for the contract.

1. The odd difference in rules for a disclosed vs. partially disclosed principal.

    a. If Dimension had no notice that Liebowitz and Jacobson were acting

for a principal, the principal would be "undisclosed." However, if Dimension knew they were acting for a principal–but did not know the identity of the principal, then it is a partially disclosed principal situation. We know they are agents, we just don't know for whom they are acting. Note here Dimension knew they were agents, and knew they purported to act for Worldwide, but in fact Worldwide was not the principal–the principal remained undisclosed: Paradise. Under these facts the court concludes that Liebowitz and Jacobson were acting for an undisclosed principal.

b. The distinction (disclosed/undisclosed) is important because the rules of agent liability are different.

(1) "Where the principal is a partially disclosed principal, both the agent and the principal are considered parties to the contract, and both the principal and the agent have separate liability to, and may be sued by, a third party without joinder of the other. . . . Moreover, an agent of a partially disclosed principal is not relieved from liability by the fact that the third party obtains a judgment against the principal, where the judgment remains unsatisfied." 26 Kan. App.2d at 725.

(2) "However, liabilities of a principal and agent are not the same where the principal is an undisclosed principal. As with a partially disclosed principal, the agent of an undisclosed principal becomes a party to the contract. . . . But, the liabilities of the undisclosed principal and the agent to a third party are alternate rather than joint and several." *Id.*

(3) The court notes that Kansas has not addressed the issue of whether the distinction should be recognized and even the Restatement questions the validity of the distinction. [NOTE: the American Law Institute is in the process of preparing a Restatement (Third) of Agency. Tentative Draft No. 1 was released on March 20, 2000 for consideration by the Institute at its May 2000 meeting. However, it will be several years before the project is complete and the final work comes up for Institute approval.]

2. The court concludes the defendants were agents for a partially disclosed principal.

a. "[A]n agent for an undisclosed principal or partially disclosed

principal becomes a party to the contract." 26 Kan. App.2d at 726.

b. "As Paradise was a partially disclosed principal, both Paradise and its agents, Liebowitz and Jocobson, have separate liability to and may be sued by Dimension without joinder of the other. . . . Moreover, Liebowitz and Jacobson, as agents of Paradise, were not relieved from liability by the fact that Dimension obtained a judgment against Paradise, where the judgment remains unsatisfied." *Id.*

3. The court holds: "[T]he judgment obtained against Paradise in the United States District Court for the District of Kansas does not absolve agents Liebowitz and Jacobson of their liability under the contract." 26 Kan. App.2d at 727.

III. CONTRACT INTERPRETATION AND ENFORCEMENT ISSUES

A. The Omitted Term: *NEA-Coffeyville v. U.S.D. No. 445*, 268 Kan. 384 (2000).

The School District received a refund from Blue Cross and Blue Shield of Kansas ("BCBS") on group health insurance policies it purchased as a benefit for its teachers. The refund resulted from lower than anticipated use of insurance benefits by the insured teachers. The dispute concerns whether the refund should be retained by the District or distributed to the teachers. The district court, applying equitable principles, determined the refund belonged to the teachers. The supreme court treated the matter as an omitted contract term, supplied a reasonable term, which gave the refund to the teachers.

1. The court concluded that the negotiated agreements between the teachers' union and the District simply failed to address the issue. Therefore, the court found it had an "omitted term" case and applied Restatement (Second) Contracts § 204 which provides:

   "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."

2. To determine what term is "reasonable in the circumstances" the court notes:

   a. "[W]here there is in fact no agreement [on the matter at issue], the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical

model of the bargaining process." Restatement (Second) of Contracts § 204, comment d.

b. "Thus, it is left to this court to decide, as a matter of community standards of fairness and policy, which of the parties is entitled to the divisible surplus." 268 Kan. at 401.

3. Applying its reasonableness test, the court holds:

"[T]here is no dispute that the divisible surplus was created by the actions of the subscriber-teachers in filing fewer and/or smaller claims than were anticipated when BCBS set the premiums. The divisible surplus is wholly a product of their actions rather than anything that may be attributed to the District. [W]e conclude that in the absence of a contract provision addressing the rights of the parties in this situation, those whose conduct generated the refund, the teachers, are entitled to the refund." 268 Kan. at 402.

4. Justice Six, in a dissenting opinion:

a. Makes the interesting observation that neither of the parties asserted a breach of contract and the trial court, and the parties, had tried the case under an unjust enrichment theory. 268 Kan. at 402.

b. Justice Six would only permit those teachers who actually paid part of their own premiums (those electing family coverage and retired employees who paid 100% of their single premium coverage) to share under an unjust enrichment theory. To the extent the teacher did not pay any of the premiums, it would not be unjust for the District to retain these since it paid the premiums. 268 Kan. at 406.

B. Inability to Deliver Contracted Grain: *Clark v. Wallace County Cooperative Equity Exchange*, 25 Kan. App.2d 463 (1999).

Clark, a farmer, contracted in January to deliver 4,000 bushels of corn after the fall harvest to the Coop. The contract did not specify any particular corn or land from which the 4,000 bushels would be obtained. A September freeze damaged Clark's crop and he delivered only 2,207 bushels of corn. The Coop withheld the value of the undelivered corn and Clark sued. The trial court held for the Coop; the court of appeals affirms.

1. Clark argued the Kansas version of UCC 2-613 excused his performance where "goods identified when the contract is made" are lost.

a. The court holds this statute does not apply because the goods (corn to be delivered at a later date) were not identified at the time the contract was made. The contract did not specify corn grown from a particular tract of land.

b. The could states:

> "We hold that a seller of grain is not excused by K.S.A. 84-2-613 from the delivery performance specified in an agreement of this nature when the grain is not identified by a specific tract of land on which it is to be grown."
>
> 26 Kan. App.2d at 466.

2. Clark also argues he is relieved of his obligations for impracticability under U.C.C. 2-615.

a. Rejecting this argument, the court notes Clark was not prevented from delivering 4,000 bushels of corn to the Coop. He could have easily purchased 4,000 bushels to make delivery.

b. The court notes that K.S.A. 84-2-615 requires objective (as opposed to subjective) impracticability: the thing cannot be done (as opposed to *I* cannot do the thing).

c. The court concludes the event, a freeze in September, was foreseeable, and under 2-615 a foreseeable event cannot form the basis for "the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made." 26 Kan. App.2d at 466.

IV. CONTRACT LITIGATION ISSUES

A. Personal Jurisdiction & Statute of Frauds: *St. Francis Mercantile Equity Exchange, Inc. v. Newton*, 996 P.2d 365 (Kan. App. 2000).

St. Francis Mercantile Equity Exchange, Inc. is a cooperative that buys and sells grain. Newton, a farmer, telephoned the Exchange on April 13, 1995 to obtain prices for corn to be delivered at harvest time in 1995. Newton offered to sell 40,000 bushels of corn; the Exchange quoted Newton a price of $2.45/bushel. Later in the day Newton spoke with the same Exchange employee and offered to sell his corn at

$2.45/bushel. The Exchange indicated the market price was then $2.43/bushel and Newton agreed to sell 40,000 bushels of corn to the Exchange at $2.43/bushel. Corn prices subsequently went up. Newton refused to perform claiming his crop had been "hailed" and could not deliver and that the parties had no binding contract because he had not signed the Exchange's form confirming the sale. Newton sold over 90,000 bushels of corn in 1995. To cover Newton's 40,000 bushels the Exchange purchased corn contracts at a price of $3.2825/bushel. The trial court awarded the Exchange $33,140 for its losses. Newton appealed asserting the trial court lacked in personam jurisdiction over Newton and that the oral sales contract was unenforceable under the statute of frauds.

1. Newton had the Requisite "Minimum Contacts" with Kansas.

   a. There was jurisdiction over Newton because he transacted business in the state of Kansas in an effort to improve his economic conditions and satisfy his desires (relying on Kan. Stat. Ann. § 60-308(b)(1)).

   b. There was jurisdiction over Newton because he entered into a contract with a resident of Kansas "by mail or otherwise" to be performed in whole or in part by either party in Kansas (relying on Kan. Stat. Ann. § 60-308(b)(5)).

   c. Under a constitutional due process analysis there were minimum contacts between Newton and the State of Kansas.

      (1) Newton purposefully took action to consummate the sale of his corn in Kansas;

      (2) The Exchange's claim for relief arises from, and is connected with, Newton's actions to sell his corn;

      (3) Considering the quality, nature, and extent of Newton's activities (when the contract was made and following), and considering the convenience of the parties, the protections offered by Kansas law (to both parties to the contract), and the basic equities of the situation: the exercise of Kansas jurisdiction over Newton does not "offend traditional notions of fair play and substantial justice." Applying *White v. Goldthwaite*, 204 Kan. 82, 88, 460 P.2d 578 (1969).

2. Newton's Admission a Contract Existed Took it Out of the Statute of Frauds.

   a. To enforce a contract for the sale of goods of $500 or more, Kan.

Stat. Ann. § 84-2-201(1) requires a writing evidencing the contract signed by the party to be charged.

b. However, § 84-2-201(3)(b) provides an exception to the signed writing requirement: "if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted."

c. The trial court relied on Newton's deposition testimony: "Newton testified in deposition that he agreed to sell 40,000 bushels of corn at $2.43 delivered at Newton's field and that both he and the Exchange would be bound by the agreement." 996 P.2d at 370.

d. The court of appeals holds:

> "We find there is substantial evidence to support the trial court's decision that even though Newton testified at trial that he felt he was not obligated until he signed a written contract, his deposition testimony indicated there was a meeting of the minds concerning quantity, price, and place of delivery. We agree with the trial court that the Exchange had an enforceable contract, that Newton admitted to the terms of the contract, and that the Exchange, therefore, was entitled to its damages for Newton's breach of contract." 996 P.2d at 370.

B. Statute of Frauds and Landlord/Tenant Act: *Tang v. Loveland*, 2000 WL 263248, Case No. 82,665 (Kansas Court of Appeals, March 10, 2000).

Tang (landlord) sued Loveland, Naughton, Sweeney, and Wood (tenants) asserting breach of a renewal lease agreement; the tenants counterclaimed for return of their original security deposit plus statutory damages. Tenants and landlord entered into a lease that would terminate on July 31, 1997. Prior to July 22, 1997 the tenants indicated they wanted to enter into a second 12-month lease to commence on August 1, 1997 and the landlord presented them with a written lease which the tenants signed–except for Loveland who did not sign. On July 22, 1997 the tenants informed landlord they would vacate their apartment on July 31, 1997 and would not renew their lease. The trial court held there was an enforceable oral lease that could be performed in 12 months or less that would take it out of the statute of frauds under the Kan. Stat. Ann. § 33-106 exception for "any agreement that is not to be performed within the space of one year from the making thereof. . . ."

1. Was the tendering of the signed lease an offer that was revoked before it was accepted by the landlord?

   a. The opinion is unclear, but apparently this was what made the oral agreement to renew the lease so important. The court stated:

      "The important facts here are that the tenants moved to cancel the agreement before it took effect and before it was accepted by the landlord. They never paid any rent for the second year. Therefore, there was no contract since it was canceled by the tenants before any action [acceptance?] was taken on the lease."

      2000 WL 263248 at *3.

   b. Also, since Loveland never signed the renewal lease, her liability depended solely on the prior oral agreement.

2. Was the oral agreement to enter into a second 12-month lease enforceable under the statute of frauds?

   a. No. The the court held the oral agreement could not be performed within one year from its making because it was made prior to July 22, 1997 and performance would not be completed until July 31, 1998.

   b. The court held:

      "In this case, the contract could not be performed within the space of 1 year since the alleged agreement itself was formed before the commencement of the 1-year lease term." 2000 WL 263248 at *2.

   c. The court reversed the trial court's statute of frauds ruling and remanded the case for further proceedings.

V. DAMAGES

A. Party Claiming Breach Must Prove Damages: *Belot v. Unified School Dist. No. 497*, 2000 WL 378222, Case No. 81,990 (Kansas Court of Appeals, April 14, 2000).

Allen Belot, an architect, contracted with the District to provide services associated with construction at Central Junior High School in Lawrence. Midwest Titan, Inc.

was selected by the District as the contractor. Midwest failed to comply with its contract in various respects, including a one-year delay in completing the project. Shortly after the original completion date was missed Belot notified the District that their contractor's delay was causing him to incur additional services under their contract. The District took the position Belot's "additional services" were covered by their basic contract. Belot sued the District seeking $317.65/day for each day the project extended beyond the completion date, totaling $91,165.55. The trial court and court of appeals each held Belot provided "additional services" under their contract, but each court also held Belot had failed to carry his burden of proof concerning the amount due.

1. Plaintiff has the burden of proof concerning its contract damages. The court observed:

   > "Belot did not keep daily time records of the tasks he performed, nor did he have detailed records of his time spent on contingent additional services. Belot's contract did not specify a per diem amount. The District never agreed to an hourly rate schedule for Belot.
   >
   > At trial, Belot submitted an exhibit containing pages from a computer-generated calendar showing the individual days and hours he spent on the school project. However, there were no specific tasks listed. The entries merely say "Construction Contract Administration."

   2000 WL 378222 at *3.

2. Finding Belot failed to carry his burden of proof, the court held:

   > "Belot could not show what time was spent on contingent additional services. Belot's inadequate record-keeping precluded the trial court from evaluating how many hours Belot dedicated to contingent additional services. The trial court did not err in finding that Belot failed to sustain his burden of proof as to his damages."

   2000 WL 378222 at *3.

3. On appeal, Belot sought recovery for the quantum meruit of his services employing an unjust enrichment theory. However, the court of appeals held this issue could not be raised on appeal since it had not been presented to the trial court. 2000 WL 378222 at *3-4.

B. Damages Caused by Failure to Sell Controlling Interest in Corporation: *Jenkins v. T.S.I. Holdings, Inc.*, 2000 WL 263260, Case No. 80,582 (Kansas Supreme Court, March 10, 2000).

A jury found that the T.S.I. Holdings, Inc., and its shareholders Melvyn Paul, Phillip and Barbara Hodes, breached a "best efforts" and "no-shop" clause in a contract with Jenkins to sell a 51% interest in TSI with an option to purchase the remaining 49%. The sale did not close with Jenkins and Jenkins sued seeking the benefit of his bargain; the jury awarded Jenkins $4,000,000 in damages. The case was transferred by the supreme court from the court of appeals to review several damages arguments raised by the defendants.

1. Plaintiffs proved their damages with "reasonable certainty." The damages were based upon the assumption the buyers would ultimately own 100% of TSI. However, the defendants argued it was not certain the plaintiffs would ever be able to raise the money to buy the 49% on which they held an option, nor was it certain all of the parties could raise the money to pay the $1.5 million due on a note for the purchase of the 51%.

    a. The court found there was evidence to support a finding that the parties would have been able to finance the 51% purchase.

    b. Regarding the option to purchase the remaining 49%, the value of the ***option*** could be determined at the time the transaction was entered into.

    c. The court held:

        "The buyers proved their damages with reasonable certainty. The buyers showed Hood [a plaintiff] would have obtained the valuable contract rights at issue (a controlling interest and option) and his damages for not having obtained those rights. Buyers' damage expert testified that TSI was worth in the range of $8 to $14 million. Subtracting the purchase price, the expert testified that damages could be in the range of $3.5 million to $9.5 million. If the deal closed, Hood would have owned the company for all practical purposes. The buyers' expert testified that Hood could have sold TSI to an able buyer. In that respect, Hood owned TSI. The expert's damage estimates were not speculative."

        2000 WL 263260 at *7.

2. The seller's breach "caused" the damages. Defendants argued that regardless

of their breach of the sales contract, the contract could not have been performed because one of the sellers had pledged their stock to Midland Bank and the bank would not release the stock.

a. The court noted the stock was pledged but the jury concluded the stock would have been released had the sellers pursued it with the bank.

b. This presents the "best efforts" issue in yet another context. Testimony by the bank's representative indicated no one from the seller's group indicated the pledge of stock was holding up the sale of TSI. Nobody tried to convince the banker to release the stock. 2000 WL 263260 at *7.

3. Subsequent sale two years later to a different purchaser was relevant damages evidence. The trial court did not err when it allowed evidence concerning a sale to TRIACQ Corp. of 85% of TSI's stock. The court held:

"The amount that a purchaser is willing to pay for a company in the marketplace demonstrates the actual value of the company. Here, a purchaser offered and actually paid money for TSI only 2 years after sellers allegedly breached their contract to sell the company to buyers. The remoteness of the sale goes to the weight of the evidence; not its admissibility. The district court allowed the sellers wide latitude in explaining changes that occurred during the 2-year interim."

2000 WL 263260 at *8.

4. The defendants were jointly and severally liable for the plaintiffs' damages. Some of the defendants sought bankruptcy protection.

a. The terms of the contract will determine whether the parties are jointly and severally liable.

b. The agreement provided:

"TSI, Subsidiaries, Shareholders, Paul and Hodes ***jointly and severally agree*** as follows:

(a) TSI, Subsidiaries, Shareholders, Paul, and Hodes will use their respective best efforts . . . .

(b) None of TSI, Shareholders, nor any of the stockholders, directors,

officers, employees, agents, or representatives of TSI or any of the Subsidiaries, shall . . . discuss, negotiate, or deal with any other corporation, firm, or other person, or entertain, solicit, accept, or consider any inquiries, offers, or proposals relating to the sale of any common stock or assets of TSI or any of the Subsidiaries."

2000 WL 263260 at *8 (emphasis added).

c. The court held the parties were jointly and severally liable stating:

"Parties may well agree to be jointly and severally liable if each respective party does not use his or her best efforts in a transaction. Joint signatories to a contract are often held jointly and severally liable for its breach."

2000 WL 263260 at *8.

C. Economic Loss Doctrine Extended to Consumer Goods: *Jordan v. Case Corp.*, 26 Kan. App.2d 742 (1999).

Jordan, a farmer, purchased a Case combine with a Cummins engine in 1992. The combine was under an express warranty for one year and the engine was under an express extended warranty for 2 years. Apparently beyond these warranty periods the Cummins engine failed, caught fire, and destroyed the combine. The combine was insured with Farm Bureau which compensated Jordan for the loss and brought suit as Jordan's subrogee. Suit was brought asserting theories of implied warranty, strict liability, negligence, and res ipsa loquitur. Relying upon *Koss Construction v. Caterpillar, Inc.*, 25 Kan. App.2d 200, 960 P.2d 255 *rev. denied* 265 Kan. 885 (1998), the court affirmed the trial court's grant of summary judgment in favor of Case and Cummins.

1. The court first found that the engine was a component of the combine and not a separate product.

2. Second, the court found that the suit was brought to recover for damage to the product (the combine) as opposed to damage caused by the product. In this case the court characterizes the loss of the combine as "a pure economic loss" which cannot be recovered in tort. 26 Kan. App.2d at 744.

3. Although *Koss* applied to commercial buyers, the court holds the *Koss* economic loss doctrine applies as well to consumer buyers. *Id.*

4. The court restates the policies supporting the economic loss doctrine:

   "(a) It encourages the party best situated to assess the risk of economic loss to insure against it; (b) it maintains a distinction between tort and contract law; and (c) it protects a party's freedom to allocate economic risks by contract." *Id.*

5. The court concludes:

   "In this case, the purchaser of the combine bargained for the combine at a certain price and with certain warranty provisions. After he acquired the combine, Jordan insured against its loss. The 'devastating burdens' and 'public injury' suggested by the plaintiff are not found in this case." *Id.*

   a. Will this rule apply when the consumer fails to insure their defective goods that are damaged?

   b. Should it matter whether the party seeking to recover is the consumer or their subrogated insurance carrier?

D. Consumer Protection Act; Mitigation of Damages: *Dealer's Leasing, Inc. v. Allen*, 26 Kan. App.2d 745 (1999).

Sandra Allen did business as The Breakfast Club, a restaurant which she operated as a sole proprietorship. On November 20, 1997 Michael Duranleau came into The Breakfast Club offering to lease Allen a compact disk jukebox. Duranleau produced a blank invoice from the supplier of the jukebox, Billiards & Games, which he completed and Allen signed, agreeing to acquire the jukebox for $3,710. Duranleau also had a "Business Lease Application" from Dealers Leasing, Inc., which Allen also signed. The following day Duranleau presented Allen with a lease/purchase agreement from Dealers, which she signed. The jukebox was delivered on Friday, November 21, 1997; it did not comply in many respects to what was represented by Duranleau. On Tuesday, November 25, 1997 Allen called Dealers and indicated she wanted to cancel the lease. Dealers had paid Billiards & Games $3,710 for the jukebox based upon Allen's agreements. Dealers sold the jukebox and sued Allen for the alleged deficiency ($3,301.67). Allen counterclaimed against Dealers for violations of the Kansas Consumer Protection Act. The trial court found in favor of Dealers and Billiards & Games on all issues. Allen appealed.

1. Allen, as a sole proprietor, was a "consumer" under the Kansas Consumer Protection Act:

"'Consumer' is defined as 'an individual or *sole proprietor* who seeks or acquires property or services for personal, family, household, *business* or agricultural purposes."

26 Kan. App.2d at 748 (emphasis by the court).

2. When Duranleau came to Allen's place of business, it was a "door-to-door sale" under the KCPA which imposed obligations to inform Allen of her 3-day right to cancel the transaction.

   a. The court holds the door-to-door sale provisions are not limited to home solicitations but rather apply to solicitations "made at a place other than the place of business of the supplier." 25 Kan. App.2d at 749.

   b. As a door-to-door sale Duranleau was required to give Allen statutory notices. It is a per se unfair and deceptive act or practice for Duranleau to fail to provide Allen with any of the statutory notices.25 Kan. App.2d at 752.

3. The court also finds that even though Allen was not given the required notice, she in fact acted within three business days to give Dealers and Billiards & Games notice of her intent to cancel. 25 Kan. App.2d at 753.

   a. Allen is entitled to the $414 down payment she made on the juke box plus her attorney fees.

   b. The case was remanded to determine attorney fees and to determine who Duranleau was acting for in soliciting the Dealer's lease and the Billiards & Games sale. This agency issue presents factual issues the trial court must address.

4. Allen also sought $6,600 in lost profits which the court denied because "Allen failed to mitigate her damages . . . ." 25 Kan. App.2d at 753.

   a. It is not clear what she failed to do.

   b. Apparently she failed to take action to replace the jukebox with a functioning machine so she could avoid losing jukebox revenue.

   c. The basic rule the court recites:

   "[D]amages are not recoverable for harm that the plaintiff should

have foreseen and could have avoided by reasonable effort without undue risk, expense or humiliation."

Id.

VI. HOME SWEET HOME: CONSTRUCTION AND REAL ESTATE DISPUTES

A. Effect of a Breach on the Ability to Demand Arbitration Under the Contract: *Alexander v. Everhart*, 2000 WL 353510, Case No. 82,368 (Kansas Court of Appeals, April 7, 2000).

Alexander hired Everhart to build a house. They entered into a contract that provided for arbitration. A dispute arose between the parties and Everhart sought arbitration which Alexander opposed. The arbitrators awarded Everhart $28,072.55 for unpaid draws and $43,421.40 in attorney and witness fees, but deducted $10,000 which was an earnest money deposit paid by Alexander and held by Everhart. Alexander appealed the arbitrator's award asserting when Everhart retained the $10,000 earnest money deposit he had either elected it as damages or it was a breach which repudiated the contract, including the arbitration provision. The trial court held for Alexander; the court of appeals affirmed the trial court.

1. Alexander, by seeking to correct or modify the arbitration award, did not agree to the arbitration. As the court noted, Alexander fought arbitration at every stage of the proceedings and in no way waived his right to request a court to vacate the award.

2. A breach of the underlying contract does not eliminate the obligation to arbitrate. The court states the following rule:

   "A contract for arbitration, as any other contract, may be breached, but not every breach excuses the other party from the promise to arbitrate any more than any breach of a construction contract excuses further performance by the other party.... An asserted breach does not deprive a party of its right to arbitrate unless it includes a repudiation of the arbitration provision itself or other conduct that substantially defeats the purpose of the agreement to arbitrate....

   "A repudiation results when conduct of a party is so inconsistent with the end of the arbitration clause as to indicate that the right has been abandoned. . . . Inconsistency is found from conduct which prevents arbitration, or makes that recourse impossible, or which proceeds 'at all times in disregard of the arbitration clause.'"

2000 WL 353510 at *5-6.

3. Applying this rule, the court holds:

> "Even if we assume the withdrawal or retention of the $10,000 was not justified, this does not repudiate the arbitration provisions, either expressly or impliedly. . . . The retention or withdrawal of the $10,000 did not defeat the purpose of the arbitration agreement. The arbitrator could, and did, make sure Alexander received proper credit for the $10,000. . . . There was no need to abrogate the arbitration provision."

2000 WL 353510 at *6.

4. The court also held the trial court had properly found Alexander had not been fraudulently induced by Everhart to enter the construction contract.

5. However, Alexander wasn't quite through–as the next case demonstrates.

B. Building a Home is a Consumer Transaction Under the Kansas Consumer Protection Act: *Alexander v. Certified Master Builders Corp.*, 2000 WL 263355, Case No. 83,604 (Kansas Supreme Court, March 10, 2000).

Certified Master Builders Corp. ("CMB") certified Mr. Everhart (see the previous case report) as a "Certified Master Builder." Alexander alleged CMB misrepresented the benefits of contracting with persons it certified. Alexander's case against CMB was filed in the United States District Court for the District of Kansas which certified two questions to the Kansas Supreme Court.

1. Is CMB a "supplier" under the Kansas Consumer Protection Act? Yes.

   a. Kan. Stat. Ann. § 50-624(i) defines a supplier as "a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer."

   b. CMB argued it was merely a trade agency.

   c. The court found CMB operated in the same manner as an advertising agency for its member builders and "solicited" consumers to contract with its member builders.

   d. As the court reasons:

"The building of a home is a consumer transaction. . . . A party may be a supplier whether or not it deals directly with the consumer. Under the particular facts outlined, we conclude that CMB is a supplier under K.S.A. 50-624(9).

CMB did represent to consumers that certain benefits would be obtained as the result of contracting with a CMB member builder and that such builders had met certain standards for membership. Such representations fall within the ambit of the KCPA."

2000 WL 263355 at *11.

2. Under the facts, does the 1-year Kan. Stat. Ann. § 60-514(c) statute of limitations apply ("action upon a statutory penalty or forfeiture") or is it the 3-year Kan. Stat. Ann. § 60-512(2) statute of limitations ("action upon a liability created by statute other than a penalty or forfeiture")? The court finds that the 3-year statute applies. The court reasons:

   a. "K.S.A. 50-634 creates a private right of action nonexistent at common law and, thus, is 'an action on a liability created by statute.'" 2000 WL 263355 at *8.

   b. "At the same time, the statute creating this new right also provides for the recovery for a civil penalty of up to $5,000 as an alternative for actual damages where the penalty would be a greater amount. Thus, the clear language of the statute in providing for a civil penalty calls into question the applicable statute of limitations." *Id.*

   c. "It is significant that the legislature in providing for a remedy did not provide for a penalty separate and distinct from damages. Rather the legislature allowed a consumer aggrieved under the KCPA to recover either damages or a civil penalty, whichever is greater. The KCPA does not provide for a separate civil penalty in addition to the consumer's damages. In this respect, although couched in terms of a penalty, the civil penalty provided by the KCPA is actually more remedial in nature than punitive." 2000 WL 263355 at *9.

   d. "The emphasis in the KCPA is upon providing relief to consumers not primarily through a penalty or forfeiture but rather through the creation of a right of redress against deceptive or unconscionable acts of suppliers in the market place. The object of the act is remedial rather than penal. Application of a 1-year statute of limitations would

be appropriate if the legislature had chosen to provide only a penalty for a violation of the KCPA or if the legislature had provided for a separate penalty in addition to a damage recovery. Instead, the legislature provided alternative recovery of damages or civil penalty, whichever is greater. Under such circumstances, application of a 1-year statute to the civil penalty provision would be contrary to the legislature's intent in creating a remedy for Kansas consumers.

[W]e conclude that actions under K.S.A. 50-634(b) seeking damages and civil penalties are subject to the 3-year statute of limitations found in K.S.A. 60-512(2) rather than the 1-year statute of limitations found in K.S.A. 60-514(c)."

2000 WL 263355 at *10.

C. Land Sale Triggered Usury, Consumer Protection, and Contract Claims: *Beltz v. Dings*, 2000 WL 571386, Case No. 82,140 (Kansas Court of Appeals, May 12, 2000).

In 1992 Dings agreed to sell "Tract 3, Cedar Acres Development, E ½, SE ¼, Sec. 24, Twp. 28S, Rge. 2E" to Beltz. The transaction was structured as a contract for deed with Dings obligated to deliver the deed to Beltz in 30 years; Beltz agreed to pay interest on the balance due at a rate of 1% per month. Dings subsequently discovered the land was not platted and they were paying a usurious rate of interest. The trial court held the contract required Dings to properly plat the property, that Dings committed common-law usury and violated the Kansas Consumer Protection Act. Beltz was awarded a civil penalty of $2,000 plus $10,471 in attorney fees for the KCPA claims. The court of appeals affirmed the trial court.

1. Statute of limitations issues.

   a. Kansas Consumer Protection Act claims: Since Beltz asked for damages as well as civil penalties, the 3-year statute of limitations applies which allows Beltz to seek compensation for claims dating back to March 1995 (suit was filed March 1998).

   b. Breach of Contract claims: Dings is not obligated to deliver a warranty deed under the contract until the end of the 30-year contract -for-deed period. As the court states the issue:

      "The question in this case is whether the contract was complete on the day it was signed, or whether it is a continuing contract that spans

the 30 years during which payments are to be made. The Kansas Supreme Court has not ruled on this issue in the context of contracts for the purchase of real estate."

2000 WL 571386 at *3.

(1) Court examines various cases recognizing the concept of the "continuing contract" that continues until the specified event occurs.

(2) The court concludes:

"The Beltz-Dings contract is a continuing contract. It is not complete until the Beltzes make their last payment and receive the deed. The statute of limitations does not begin to run until the Beltzes make their last payment and receive the deed."

2000 WL 571386 at *3.

c. "A cause of action for usury accrues with each payment made on a continuing contract." 2000 WL 571386 at *4.

2. Dings committed common-law usury. At the time the contract was signed the maximum lawful interest rate was 10.33% per annum; the Dings were charging 12% per annum in their contract. 2000 WL 571386 at *5.

3. Deceptive acts under the KCPA. The trial court found that Dings represented Tract 3, Cedar Acres Development, as platted and part of a uniform development where all boundary lines were precisely drawn.

a. "Deceptive acts and practices include representations made knowingly, or with reason to know, that characteristics or quantities of property are not factual and oral or written representations made willfully that contain exaggeration, falsehood, innuendo, or ambiguity as to a material fact." 2000 WL 571386 at *5.

b. The court found there was substantial evidence to support the trial court's finding that Dings "presented the contract, along with the deceptive subdivision description, to the Beltzes." 2000 WL 571386 at *6.

4. Breach of contract. The trial court found Dings breached the sales contract

because he refused to do a metes and bounds plat of the property so it could be properly conveyed.

a. Dings is ultimately obligated to deliver "Tract 3, Cedar Acres Development" to the Beltzes. However, the Dings cannot do this because Cedar Acres Development does not exist. Dings continues to argue he is not obligated to plat the Beltzes' land.

b. "Because Dings cannot deliver the land until it is properly platted and he has complied with K.S.A. 19-2633, he had breached the contract." 2000 WL 571386 at *7.

VII. RELEASES AND RELATIONSHIPS

A. Scope of Release: *Kansas Public Employees Retirement System v. Russell*, 2000 WL 502510, Case No. 83,130 (Kansas Supreme Court, April 28, 2000).

In 1993 the Kansas Public Employees Retirement System ("KPERS") sued the Linde Thomson Langworthy Kohn & Van Dyke, P.C. law firm ("Linde Thomson") and Thomas W. Van Dyke, a member of the law firm, and a director, officer, counsel, and shareholder of ETL Corp. ("ETL"), seeking damages for losses it suffered when it invested in Emblem Graphic Systems, Inc. ("Emblem") a wholly owned subsidiary of ETL. The trial court held all of the KPERS claims were covered by a release entered into by the parties in 1988 when California Labels, Inc. agreed to purchase the assets of Emblem.

1. The asset purchase agreement provided:

   "KDF (Kansas Debt Fund, the nominee of KPERS), Merchants, Olofson and Haney (Olofson and Haney together owned 85% of ETL; Merchants Bank was a major creditor) shall execute releases for any claims, damages and liabilities arising out of the operations of Emblem and each other prior to the Closing."

   2000 WL 502510 at *4.

2. The release was executed at the same time as the asset purchase agreement and provided:

   "1. Release and Covenant Not to Sue. KDF and the Investors hereby release, remit, and forever discharge each of the other parties to this agreement together with any officers, directors, partners, stockholders, employees,

principals, agents, counsel, subsidiaries, or controlling persons of the foregoing, together with their heirs, legatees, devisees and personal representatives, (all such affiliated persons being referred to collectively as the 'Indemnified Persons'), from any and all claims, demands, liabilities, obligations, losses, damages and causes of action, whether known or unknown, based on, arising out of, or directly or indirectly relating to either (i) the business, management or operation of the Emblem or ETL Corp.; (ii) the sale, purchase, ownership, exchange or pledge of any of the securities or debt obligations of Emblem or ETL Corp.; (iii) any action taken by any party or Indemnified Person in its or his capacity as a shareholder, creditor, officer or director of Emblem of ETL Corp.; (iv) any personal guarantee of any indebtedness of Emblem or ETL; or (v) any prior negotiations, representations, understandings, agreements, discussions or dealing among any of the parties hereto or other Indemnified Parties (the transactions described in clauses (i) through (v) being collectively referred to as the 'Transactions'). The release granted to any party in the foregoing sentence shall be conditioned upon the closing of the sale contemplated under the Purchase Agreement and the performance by the released party of its obligations under the Agreement. The parties further represent, covenant and warrant that, they have not commenced or prosecuted, nor will any of them commence or prosecute, any form of action or proceeding against any party or any Indemnified Person, based on, arising out of, or directly or indirectly relating to the Transactions."

2000 WL 502510 at *4.

3. The court noted: "The same rules that apply to the construction of contracts and written instruments apply to a release agreement." 2000 WL 502510 at *6. The court agreed with the trial court that "the release agreement includes the claims made by KPERS against the Linde Thomson defendants and indemnification of Van Dyke in his several roles." *Id.*

B. The "Duty of Fair Dealing": *Reynolds-Rexwinkle Oil, Inc. v. Petex, Inc.*, 2000 WL 282338, Case No. 77,396 (Kansas Supreme Court, March 17, 2000).

Reynolds owned an oil and gas lease which it assigned to Petex, reserving to Reynolds "1.5% of 8/8ths of all oil, gas, and casinghead gas produced, saved, and marketed from the described land under the provisions of the aforesaid lease, ***or any extension or renewal thereof***, as an overriding royalty . . . ." While the lease assigned by Reynolds was still in effect, Petex obtained another lease from the landowner (known as a "top lease") that would take effect February 6, 1994, which was one day after the lease assigned by Reynolds would expire. Petex subsequently

drilled a well on the leased land and Reynolds demanded its 1.5% overriding royalty in production from the well. The district court held the top lease taken by Petex while the original lease was still in effect was an "extension or renewal" of the original lease and Reynolds was entitled to summary judgment. The court of appeals reversed and held the top lease would not be subject to the Reynolds overriding royalty unless Petex had obtained the top lease in "bad faith" which required a remand to determine the factual issues of bad faith. The supreme court reverses the court of appeals and affirms the trial court holding the top lease was an extension or renewal of the original lease.

1. Alternative grounds for the court's holding?

   a. The court held:

      "[T]he fact Petex took the second lease while the original lease it held was still in full force and effect requires a ruling that the overriding royalty of Reynolds attaches to the later lease. But, this is because of the extension and renewal language in the assignment and not due to any finding of bad faith on Petex's part."

      2000 WL 282338 at *13.

   b. However, the court also stated:

      "We agree with and follow our statement in *Campbell* that ***a duty of fair dealing exists under the facts of this case. This duty***, coupled with the 'extension or renewal' wording of the assignment, and the taking of the subsequent lease while the first one was in full force and effect compels a ruling, as a matter of law, that the overriding royalty interest of 1.5% of 8/8ths applies to and burdens the second oil and gas lease upon which production was obtained."

      2000 WL 282338 at *14 (emphasis added).

2. Breach of a duty of fair dealing is not an act of bad faith.

   a. The court noted: "There is no bad faith, fraud, or collusion here, and *Campbell* is not helpful except for the statement relied on by Reynolds that 'there seems clearly emerging a duty of fair dealing required on the part of the lessee . . . to which doctrine this court has definitely inclined.'" 2000 WL 282338 at *12.

   b. The court of appeals indicated a breach of the duty of fair dealing

required a showing of "fraud, collusion, or bad faith." 2000 WL 282338 at *4 (quoting court of appeals' opinion).

c. The supreme court makes it clear that a duty of fair dealing can be breached by something less than "bad faith."