



RECREATIONAL USE IMMUNITY: *Play at Your Own Risk*

By Wm. Scott Hesse and Christopher F. Burger

While some schoolchildren are playing tag in a playground, one of them slips while being chased by another child and gets severely injured from broken glass on the ground. In the same way that the child may have been immune from “getting tagged” by confining himself to “base,” the location where the child suffered his injury may be a governmental entity’s “base” and prevent it from being “tagged” with any liability for the injury.

The location where an injury occurred can have *everything* to do with whether there can be a recovery for an injury. The subject of this article is to review the coverage and development of the recreational use immunity provision of the Kansas Tort Claims Act (K.S.A. 75-6101 *et seq.*) that permits governmental entities to construct, operate, own, and use property that is used by the public for recreational purposes with little fear of liability.¹

I. Immunity in General

Governmental entities have immunities not available to private entities. “State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected.”² “Absent violation of constitutional rights, the [L]egislature

may control governmental immunity,”³ and a state may therefore waive any or all aspects of its sovereign immunity.

Immunity from suit is a fundamental aspect of the sovereignty that states, including the state of Kansas, enjoy.⁴ Governmental entities can be absolutely immune from suit or can be immune from liability. The difference between immunity from suit and immunity from liability is significant. When a sovereign is immune from suit, it is immune from all the rigors of litigation, including discovery, and is entitled to have a case immediately dismissed. When a sovereign is immune from liability, it may have to participate in specific litigation until the sovereign can satisfy its burden to the court that it meets the conditions necessary for immunity from liability.

The state of Kansas, through the Legislature, has waived its sovereign immunity from suit in state court by passing the Kansas Tort Claims Act (KTCA).⁵ The KTCA is an open-ended act where liability is the rule and immunity the exception.⁶ After passage of the KTCA, governmental entities are not immune from suit; however, governmental entities may still be immune from *liability* under the right circumstances. In order to avoid liability, a governmental entity now has the burden of proving that the claim falls within one of the enumerated circumstances listed in K.S.A. 75-6104.⁷

FOOTNOTES

1. K.S.A. (2006 Supp.) 75-6104(g). All references to the recreational immunity provisions of the Kansas Tort Claims Act shall be to the 2006 Supplement. See annotations to former K.S.A. 75-6104(f) for early cases involving recreational use immunity.

2. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 682, 119 S.Ct. 2219, 144 L.Ed. 2d 605 (1999); see also *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed. 2d 636 (1999); *Schall v. Wichita State Univ.*, 269 Kan. 456, 7 P.3d 1144 (2000).

3. *Brown v. Wichita State Univ.*, 219 Kan. 2, 7, 547 P.2d 1015, 1021 (1976).

4. *Alden*, 527 U.S. at 713, 119 S.Ct. at 2247.

5. K.S.A. 75-6103(a).

6. *Hopkins v. State of Kansas*, 237 Kan. 601, 609, 702 P.2d 710, 318 (1985).

7. *Barber v. Williams*, 244 Kan. 318, 320, 767 P.2d 1284, 1286 (1989).

II. Recreational use Immunity Under the Kansas Tort Claims Act

In K.S.A. 75-6104, the Legislature has retained specific types of immunity from liability. The Legislature has also extended sovereign immunity under the KTCA to include other governmental entities. In the exception that is the subject of this article, the Kansas Legislature has retained immunity from liability for governmental entities and their employees for injuries to persons and property resulting from the recreational use of public property, absent gross and wanton negligence.⁸ K.S.A. § 75-6104(o) states:

75-6104. Liability of governmental entities for damages caused by employee acts or omissions, when; exceptions from liability. A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

(o) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury.

A. Immunity from liability for negligence occurring on recreational use property – Location, location, location.

Recreational use immunity applies to all activity located on recreational use property, regardless of the location of the property. For example, the immunity has been applied to injuries at indoor⁹ and outdoor¹⁰ facilities, on a school playground,¹¹ at swimming facilities,¹² on a green space open to the public used for unsupervised sledding,¹³ on a city-owned baseball diamond during a supervised baseball game,¹⁴ to fans¹⁵ and players at NCAA sporting events,¹⁶ and in a wrestling room used for noncompulsory wrestling practice.¹⁷ The application centers around the location of the injury.

"In order for a location to fall within the scope of K.S.A. 75-6104(o), the location must merely be 'intended or permitted to be used ... for recreational purposes.' The injury need not be the result of 'recreation.'"¹⁸ As explained in more detail

below, recreational use immunity protects a governmental entity and its employees from simple negligence on recreational use property. Stated another way, a person who is injured on recreational use property will not recover damages for his or her injuries caused by simple negligence, period.

The leading cases on recreational use immunity are the *Jackson v. U.S.D. 259* cases.¹⁹ In *Jackson* several junior high students were horsing around after physical education class, but prior to hitting the showers. The students were using a springboard to dunk a basketball. The plaintiff fell and suffered compound fractures in his right forearm. The plaintiff successfully argued that the gymnasium where he was injured was used at the time of the injury for physical education classes. However, this argument was insufficient for the plaintiff to avoid immunity under the recreational use exception to the KTCA. Under K.S.A. 75-6104(o), if a school gymnasium is used for recess, extracurricular events, or other recreational, noncompulsory activities, K.S.A. 75-6104(o) applies, provided that the recreational use was more than incidental.²⁰ The case was remanded back to the district court for a factual determination whether the school gymnasium is intended or permitted to be used for recreational purposes.²¹ Upon remand, the defendant school district moved for summary judgment. The school district presented substantial competent evidence the gymnasium in question was used for noncompulsory recreational purposes, such as basketball, soccer, arts, crafts, and cheerleading, even though the injury occurred during a compulsory physical education class. The district court found the gymnasium was permitted to be used for more than incidental "recreational purposes."²² On appeal,²³ the Court of Appeals affirmed the district court decision finding the gymnasium where Jackson was injured was a "recreational use" facility.

The Supreme Court took its ruling in *Jackson* one step further in *Wilson v. Kansas State University*,²⁴ where the Court held immunity under the recreational use exception of the KTCA extends to restrooms integral to public property intended or permitted to be used as a park, playground, or open area for recreational purposes. The plaintiff in *Wilson* alleged that she was injured while sitting on a toilet seat in a Kansas State University stadium while taking a pause from spectating at an intercollegiate football game. The high court concluded

8. K.S.A. 75-6104(o).

9. *Jackson v. Unified Sch. Dist. No. 259*, 268 Kan. 319, 995 P.3d 844 (2000); *Wright v. Unified Sch. Dist. No. 379*, 28 Kan. App. 2d 177, 14 P.3d 437 (2000).

10. *Nichols v. Unified Sch. Dist. No. 400*, 246 Kan. 93, 785 P.2d 986 (1990).

11. *Lanning v. Anderson*, 22 Kan. App. 2d 474, 921 P.2d 813 (1996).

12. *Gonzales v. Bd. of Shawnee County Commrs.*, 247 Kan. 423, 799 P.2d 491 (1990); *Robinson v. State of Kansas*, 30 Kan. App. 2d 476, 43 P.2d 821 (2002).

13. *Boaldin v. Univ. of Kansas*, 242 Kan. 288, 747 P.2d 811 (1987).

14. *Willard v. City of Kansas City*, 235 Kan. 655, 681 P.2d 1067 (1984).

15. *Wilson v. Kansas State Univ.*, 273 Kan. 584, 44 P.3d 454 (2002).

16. *Molina v. Christensen*, 30 Kan. App. 2d 467, 44 P.3d 1274 (2002).

17. *Wright*, 28 Kan. App. 2d at 177, 14 P.3d at 437.

18. *Jackson*, 268 Kan. at 326, 995 P.3d at 849. Justices Lockett and

Allegretti dissent from this part of the holding. The dissent would require the property be intended or permitted to be used for recreational purposes and further require the injury occur as the result of a recreational activity. The dissent contends that under the majority opinion a governmental entity is immune in the case of a worker injured fixing a light bulb at a recreational facility. *Jackson*, 268 Kan. at 335, 995 P.3d at 854 (Lockett & Allegretti, JJ., concurring in part and dissenting in part).

19. *Jackson v. Unified Sch. Dist. No. 259*, 26 Kan. App. 2d 141, 979 P.2d 151 (1999), *rev'd*, 268 Kan. at 319, 995 P.3d at 844; *Jackson v. Unified Sch. Dist. No. 259*, 29 Kan. App. 2d 826, 31 P.3d 989 (2001) (appeal following remand).

20. See *Jackson*, 268 Kan. at 333, 995 P.3d at 853 (Lockett & Allegretti, JJ., concurring in part and dissenting in part).

21. *Jackson*, 268 Kan. at 333, 995 P.2d at 853.

22. *Jackson v. Unified Sch. Dist. 259*, No. 96-C-2325 (Sedgwick County, Kan., Dist. Ct., Oct. 13, 2000).

23. *Jackson*, 29 Kan. App. 2d at 826, 31 P.3d at 989.

24. *Wilson*, 273 Kan. at 584, 44 P.3d at 454.

while restrooms independently have a nonrecreational usage, they serve no purpose but for the recreational nature of the public property, and thus, they are "necessarily" connected to the property by plan, rather than being "incidentally" connected.

In *Lane v. Atchison Heritage Conference Center*,²⁵ the Kansas Supreme Court reversed a decision of the Court of Appeals that would have raised additional hurdles to recreational use immunity.²⁶ The Atchison Heritage Conference Center (AHCC) is a multi-use facility. On the night of the accident that spawned the lawsuit, the AHCC was used for a New Year's Eve dance, a clearly recreational use. The plaintiff was a member of the band who slipped and fell on ice while loading his equipment after the dance. The allegations were that a negligent employee of the facility dumped water on the loading dock that froze and caused the plaintiff to slip and fall. The district court found recreational use immunity was applicable and granted summary judgment. The Court of Appeals

reversed holding the "primary purpose" of the AHCC was not recreational.

On review, the Kansas Supreme Court refused to follow the "primary purpose" doctrine articulated by the Court of Appeals. The Court stated the recreational use immunity statute should be read "broadly" and "Kansas courts should not impose additional hurdles to immunity that are not specifically contained in the statute."²⁷ A particular facility must be viewed collectively to determine whether it is used for recreational purposes, so that the facility qualifies for recreational use exception to tort liability under the KTCA.²⁸ It found immunity under K.S.A. 75-6104(o) does not depend upon the "primary use" of the property but rather depends on the character of the property in question.²⁹ The correct test to be applied is whether the property has been used for recreational purposes in the past or whether recreation has been encouraged.³⁰

The Kansas Court of Appeals has taken the rebuke of the Kansas Supreme Court in *Lane*³¹ to heart with its latest ruling. In *Poston v. Unified School District No. 387*,³² a parent of a child who was playing basketball at a school gymnasium came to school to pick up the child from practice when one of the brackets on a door located at the entrance to the school came loose, and the door fell on the plaintiff as he left the building injuring him. The door, located between the outside of the building and the school commons area, was not the entrance to the gym. The district court reasoned, and the Court of Appeals affirmed, that the commons area was "an 'appendage' to the gymnasium such that it qualified under the recreational use exception."³³ The Court of Appeals concluded it was following the Supreme Court ruling in

*Wilson*³⁴ and the Court of Appeals ruling in *Robison*³⁵ when finding that the commons area was essentially part of the recreational use area.

Judge Patrick D. McAnany issued a respectful dissent.³⁶ He concluded that recreational use immunity should not apply because the plaintiff was injured going through a door that was between the outside of the school and the school commons area, neither of which were used for recreational purposes. In his opinion, the fact the person was injured in an area "adjacent" to a recreational area was not sufficient to invoke the protections of K.S.A. 75-6104(o). Based on the tone of his dissent, McAnany may have come to a different conclusion if the injury had occurred in a doorway between the commons area and the gymnasium where the property was used for recreational purposes.

In *Wright v. U.S.D. 379*³⁷ the issue was whether a wrestling room at the Clay Center Community High School was used for recreation or for educational purposes. The plaintiff was a member of the school wrestling team who was injured during wrestling practice. The wrestling room, weight room, and gymnasium were part of the high school's physical education facility. During the school day, these facilities were used by the school for physical education activities. When the facilities were not used for physical education, the wrestling room, weight room, and gymnasium were open to the public for weightlifting, aerobics, and wrestling. The facilities were used for professional wrestling matches, twirling, alumni basketball, kids' wrestling, and pep rallies. Being a member of the school wrestling team was found to be a noncompulsory, extracurricular, and recreational activity. The Court of Appeals

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25. *Lane v. Atchison Heritage Conf. Ctr.*, 283 Kan. 439, 153 P.3d 541 (2007).

26. *Lane v. Atchison Heritage Conf. Ctr.*, 35 Kan. App. 2d 838, 134 P.3d 683 (2006), *rev'd*, 283 Kan. 439, 153 P.3d 541 (2007).

27. *Lane*, 283 Kan. at 445, 153 P.3d at 546.

28. *Id.*

29. *Id.*

30. *Id.*, 283 Kan. at 447, 153 P.3d at 547.

31. *Id.*, 283 Kan. at 445, 153 P.3d at 545.

32. *Poston v. Unified Sch. Dist. No. 387*, 37 Kan. App. 2d 694, 156 P.3d 685 (2007).

33. *Id.*, 37 Kan. App. 2d at 695, 156 P.3d at 687.

34. *Wilson*, 273 Kan. at 584, 44 P.3d at 454.

35. *Robison v. State of Kansas*, 30 Kan. App. 2d 476, 43 P.3d 824 (2002).

36. The Kansas Supreme Court will hear oral arguments in *Poston* on Jan. 29, 2008 at 9 a.m.

37. *Wright*, 28 Kan. App. 2d at 177, 14 P.3d at 437.

concluded "that the wrestling room was permitted to be used for recreational purposes and that such use was more than incidental."³⁸ Recreational use immunity, therefore, applied.

The *Poston* case illustrates the difficulty posed when the injury occurs on property with multiple uses, including recreational use. The Supreme Court rejected the "primary purpose" test suggested by the Kansas Court of Appeals. On the other hand, *Wright* suggests the analysis litigants should use when determining whether recreational use immunity applies to multiple use property. The litigants and the courts will have to review the issues on a case by case basis to determine whether K.S.A. 75-6104(o) is applicable. The participants will have to sift through every fact involving recreational use of the property for the court to determine if recreational use immunity is applicable. Only when the recreational use of the property is "incidental" to the property's overall use can plaintiffs make a claim for simple negligence.

B. Unsuccessful attempts to limit the scope of recreational use immunity.

Attempts to limit recreational use immunity have not been well received by the Kansas Supreme Court. Many attempts have been made, but very few have gained any traction in our highest state court.

1. "Public property" is "public" even if it is not open to all.

Recreational use immunity is granted to public property for the public to use for recreational purposes. A governmental entity may restrict access in various ways without altering its public character. For example, public swimming beach operators can charge an admission fee, yet the beach remains a public area under K.S.A. § 75-6104(o);³⁹ a baseball field is public under the recreational use

immunity statute, even though the "public is excluded from the field while games are in progress";⁴⁰ theaters charging admission are eligible for immunity;⁴¹ and user fees do not prevent a governmental entity from asserting immunity pursuant to K.S.A. 75-6104(o).⁴²

2. "Open areas" can be confined, closed spaces.

Plaintiffs have unsuccessfully attempted to limit recreational use immunity by urging the courts to define the words "open area" in K.S.A. § 75-6104(o) to include only accidents that occur out of doors. The appellate courts have ruled that recreational use immunity applies to all public recreational property whether inside or out. Examples include enclosed school gymnasiums,⁴³ wrestling rooms,⁴⁴ theaters owned by governmental entities,⁴⁵ and swimming pools.⁴⁶

3. Recreational use immunity is not limited to "sporting events."

Most people assume that recreational immunity applies only to incidents involving athletic or sporting events. Such is not the case. Recreational use immunity is not restricted to incidents where the participant is involved in athletic contests. The Kansas Court of Appeals has applied the recreational use exception to include theaters where a thespian was stabbed in the buttocks with a ginsu knife during a 1997 Halloween performance of the play "The Persecution and Assassination of Jean-Paul Marat as Performed by the Inmates of the Asylum of Charenton under the Direction of the Marquis de Sade."⁴⁷ The plaintiff was an actor participating in a play, for fun, who received neither college credit nor pay for her performance. The play took place on an inside stage. The court did not have any difficulty applying recreational use immunity to an injury, which occurred during a stage performance.

4. The "condition of the property" need not cause the injury.

The injury need not have been caused by a condition of the property. In *Nichols v. U.S.D. 400*⁴⁸ the plaintiff argued that recreational use immunity should be limited to instances where a person is injured based on the condition of the property. In rejecting the plaintiff's argument, the Supreme Court found:

The plain language of the statute makes it clear that immunity exists for any claim for negligently caused injuries resulting from the use of public property intended for recreational purposes. ... Where a statute is plain and unambiguous, this [C]ourt must give effect to the intention of the [L]egislature as expressed rather than determine what the law should or should not be.⁴⁹

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38. *Id.*, 28 Kan. App. 2d at syl 2, 14 P3d at syl 2.

39. *Gonzales v. Bd. of County Comm'rs of Shawnee County*, 247 Kan. at 423, 799 P.2d at 491.

40. *Bonewell v. City of Derby*, 236 Kan. 589, 693 P.2d 1179 (1985).

41. *Tullis v. Pittsburg State Univ.*, 28 Kan. App. 2d 347, 16 P3d 971 (2000).

42. *Gruhn v. City of Overland Park*, 17 Kan. App. 2d 388, 836 P.2d 1222 (1992).

43. *Jackson*, 268 Kan. at 319, 995 P.3d at 844.

44. *Wright*, 28 Kan. App. 2d at 177, 14 P3d at 437.

45. *Tullis*, 28 Kan. App. 2d at 347, 19 P3d at 971.

46. *Roberson*, 30 Kan. App. 2d at 476, 43 P3d at 821.

47. *Tullis*, 28 Kan. App. 2d at 347-348, 19 P3d at 972-973. We cannot make up facts like this. We only litigate them.

48. *Nichols*, 246 Kan. at 93, 785 P.2d at 986.

49. *Id.*, 246 Kan. at 95, 785 P.2d at 988.

The Supreme Court ruled on the argument the injury must occur because of the condition of the premises in a similar manner. "To require an injury to be the result of a condition of the premises is too restrictive a reading of the recreational use exception statute. K.S.A. 75-6104(o)."⁵⁰

5. "Supervision" of an injured person is immaterial.

The fact a person was supervised or unsupervised at the time of injury is immaterial to the scope of recreational use immunity. In *Nichols*, the plaintiff argued that recreational use immunity should be restricted to instances where the injured person is not being supervised by a third person, such as a coach. "Nowhere in the statute does the language distinguish between activities, which are supervised or unsupervised. Where a statute is plain and unambiguous, this [C]ourt must give effect to the intention of the [L]egislature as expressed rather than determine what the law should or should not be."⁵¹ Recreational use immunity protects a governmental entity and its employees who supervise persons using recreational use property from liability based on allegations of simple negligence.

6. Recreational use immunity is not restricted to "personal injury."

The injury to the plaintiff need not be a personal injury. Recreational use immunity has been applied to property loss. The Ellis County District Court was faced with alleged damage to "Dunny," the world's smartest cutting horse.⁵² A professor at Fort Hays State University (FHSU) was floating the horse's teeth in a stall at the FHSU Rodeo Pavilion when Dunny reared up and the professor rammed a file through the top of Dunny's mouth, breaking several teeth. The plaintiff claimed both physical and emotional damages to the horse. The FHSU Rodeo Pavilion is the arena where competitive intercollegiate rodeos are held and the team practices. There are bleachers for fans to watch rodeo action. The court ruled that Dunny was injured in the locker room of the FHSU Rodeo Pavilion and the university was entitled to recreational use immunity.

7. "Recreation" is nearly anything diverting.

"Recreational purposes" have been identified in a multitude of factual situations involving numerous activities at various sites. The identification generally begins with the meaning of "recreation." The Kansas Supreme Court states:

Recreation is defined as 'refreshment of the strength and spirits after toil: DIVERSION, PLAY' Webster's Third New International Dictionary, 1889 (1986). Play 'suggests an opposition to work; it implies activity, often strenuous, but emphasizes the absence of any aim other than amusement, diversion, or enjoyment.'⁵³

Obviously, this definition is very broad.

8. Governmental entities and their employees are immune for simple negligence.

The Legislature intended for the state,⁵⁴ cities,⁵⁵ counties,⁵⁶ school districts,⁵⁷ and all other governmental entities that have property intended or permitted to be used for recreational purposes to be immune from simple, ordinary, or mere negligence.⁵⁸ Employees of a governmental entity acting within the scope of their employment are also afforded immunity under K.S.A. § 75-6104(o).⁵⁹ The exception, however, does not afford protection to either governmental entities or their employees when an injury arises from gross and wanton conduct.

III. Recreational use Immunity Does not Apply to Gross and Wanton Negligence

The recreational immunity exception to the KTCA applies to instances where there is "mere," "ordinary," or "simple" negligence. However, K.S.A. 75-6104(o) provides the immunity shall not apply when "the governmental entity or employee thereof is guilty of gross and wanton negligence proximately causing such injury." "Qualified immunity, as found in K.S.A. § 75-6104(o), means that the defendant is immune, regardless of any common-law duty, absent a showing of gross or wanton negligence."⁶⁰

A. What is "gross and wanton negligence"?

K.S.A. 75-6104(o) does not apply to instances of "gross and wanton negligence." In order for a plaintiff to prove gross and wanton negligence "it is sufficient if the defendant evinced that degree of indifference to the rights of others, which may justly be characterized as reckless."⁶¹ Recklessness is a stronger term than negligence. To be reckless, conduct must be such as to show disregard of or indifference to consequences, under circumstances involving danger to life or safety of others. "Proof of a willingness to injure is not necessary [in establishing gross and wanton negligence] because a wanton act is something more than ordinary negligence but less than willful injury."⁶²

50. *Id.*, 246 Kan. at 97, 785 P.2d at 989.

51. *Id.*, 246 Kan. at 95, 785 P.2d at 988.

52. *Barringer v. Fort Hays State Univ.*, Case No. 00-C-28 (Ellis County, Kan., Dist. Ct., May 7, 2001).

53. *Jackson*, 268 Kan. at 330, 995 P.3d at 851-852, quoting *Ozick v. River Grove Bd. of Educ.*, 281 Ill. App. 3d 239, 243-44, 217 Ill. Dec. 18, 666 N.E. 2d 687 (1996).

54. K.S.A. (2006 Supp.) 75-6102(a); *Gragg v. Wichita State Univ.*, 261 Kan. 1037, 934 P.2d 121 (1997).

55. K.S.A. (2006 Supp.) 75-6102(b), (c); *Grahn*, 17 Kan. App. 2d at 388, 836 P.2d at 1222.

56. K.S.A. (2006 Supp.) 75-6102(b), (c); *Gonzales*, 247 Kan. at 423, 799 P.2d at 491.

57. K.S.A. (2006 Supp.) 75-6102(b), (c); *Jackson*, 268 Kan. at 319, 995 P.3d at 844.

58. Mere negligence is insufficient to establish a basis for liability when a defendant asserts immunity pursuant to K.S.A. 75-6104(o). *Willard*, 235 Kan. at 660, 681 P.2d at 1070.

59. K.S.A. (2006 Supp.) 75-6102(d); *Wright*, 28 Kan. App. 2d at 177, 14 P.3d at 437.

60. *Jackson*, 268 Kan. at 331, 995 P.2d at 851.

61. *Reeves v. Carbon*, 266 Kan. 310, 314, 969 P.2d 252, 256 (1998).

62. *Lanning*, 22 Kan. App. 2d at 474-75, syl. 6, 921 P.3d at 815, syl. 6.

In the employment law context, the Kansas Supreme Court follows the dictionary definition of "gross." The Court defines "gross" as:

'Glaringly noticeable usually because of inexcusable badness or objectionableness.' Webster's New Collegiate Dictionary 507 (1973). Black's Law Dictionary 702 (6th ed. 1990) defines 'gross' as '[o]ut of all measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice, gross carelessness, or negligence ...'

Such conduct as is not to be excused.⁶³

Thus it can be concluded that "gross" conduct in the context of recreational use immunity is of such "inexcusable badness" that "such conduct as is not to be excused."

"Wanton conduct is distinguishable from the mere lack of due care involved in negligence because the actor realizes the imminence of injury to others from his acts but takes no steps to prevent the injury."⁶⁴ "Wantonness refers to the mental attitude of the wrongdoer rather than a particular act of negligence."⁶⁵ Wanton conduct is defined as "an act performed with a realization of the imminence of danger and a reckless disregard or complete indifference to the probable consequences of the act is a wanton act."⁶⁶ "The keys to a finding of gross and wanton negligence are knowledge of a dangerous condition and indifference to the consequences."⁶⁷ "Without knowledge of a dangerous condition, indifference to the consequences does not become a consideration."⁶⁸

When the meanings of "gross" and "wanton" are placed into the words used in K.S.A. 75-6104(o), the burden on a plaintiff to establish liability is very high.

B. A person injured on recreational use property must plead "gross and wanton negligence."

"K.S.A. 75-6104(o) is a complete defense to actions where the plaintiff alleges only ordinary negligence."⁶⁹ This pleading requirement may not be magical, but its absence can be fatal. For example, in *Willard v. Kansas City*,⁷⁰ a plaintiff alleged in his petition that a city's installation of a certain type of fencing around a baseball field was negligent. The Supreme Court affirmed summary judgment in favor of the defendant. Twice in its opinion, the Court emphasized the plaintiff had only alleged the city was "negligent." The reason for this emphasis is reflected in the Court's holding that "mere negligence on the part of the [c]ity, which was all that was alleged by the plaintiff in his pleadings, was insufficient to establish a basis for liability under the KTCA."⁷¹ In theory, a case can be dismissed by a district court for failure of the plaintiff to allege gross and

wanton negligence. In reality, the district courts have exercised their discretion by allowing the plaintiff to amend the pleadings prior to the close of discovery to include allegations of gross and wanton negligence.

Many attorneys are not aware of the need to allege gross and wanton negligence in order to recover damages in the face of K.S.A. 75-6104(o). Numerous claims based on accidents on recreational use property are pleaded as simple negligence and proceed through discovery on that theory. In one case, an attempt by plaintiff to amend her pleadings, after the close of discovery and the submission of dispositive motions, from ordinary negligence to include a count of "gross and wanton negligence" was denied by the district court, and the appellate court held such denial to be within the sound discretion of the district court.⁷² In another case, an attempt by plaintiff to argue "gross and wanton negligence" for the first time on appeal was not allowed by the Court of Appeals.⁷³ Gross and wanton negligence must be pleaded in the petition for any accident that occurs on recreational use property owned by a governmental entity.

C. Evidence of "gross and wanton negligence" is needed to survive a motion for summary judgment.

A plaintiff must establish through evidence in the record the knowledge of employees of the governmental entity that a recreational facility was imminently dangerous in order to survive a motion for summary judgment. While the appellate courts have reversed several cases where the plaintiff lacked evidence to support a claim of gross and wanton negligence, there has been only one instance where the appellate courts have found the standard satisfied.

1. Cases citing lack of evidence to support claim of "gross and wanton negligence."

The facts must be read to be believed. In *Lee v. City of Fort Scott*⁷⁴ the Supreme Court found that the city of Fort Scott did not commit "gross and wanton negligence" when its employees stretched unmarked steel cables between trees to keep persons from trespassing on the municipal golf course. The plaintiff attempted to drive his motorcycle on the golf course. The plaintiff hit the cables, was injured, and later died. In finding the city was immune from liability, the Supreme Court found the plaintiffs "had failed to offer any evidence that the city realized the imminence of danger and exhibited a complete disregard of the consequences."⁷⁵

The Court of Appeals reached a similar decision in *Lanning v. Anderson*.⁷⁶ In *Lanning* the plaintiff was a track athlete who was walking across a playground on the way to the showers after practice. The discus throwers were practicing on the playground and hit the plaintiff on the head with a discus.

63. *Jones v. Kansas State Univ.*, 279 Kan. 128, 150, 106 P.3d 10, 25 (2005).

64. *St. Claire v. Denny*, 245 Kan. 414, 423, 781 P.2d 1043, 1049 (1989).

65. *Reeves*, 266 Kan. at 314, 969 P.3d at 256.

66. PIK 3d 103-03.

67. *Lanning*, 22 Kan. App. 2d at 481, 921 P.3d at 819.

68. *Id.*

69. *Dunn v. Unified Sch. Dist. No. 367*, 30 Kan. App. 2d 215, 225, 40 P.3d 315, 323 (2002).

70. *Willard*, 235 Kan. at 655, 681 P.2d at 1067.

71. *Id.*, 235 Kan. at 660, 681 P.2d at 1071.

72. *Tullis*, 28 Kan. App. 2d at 347, 16 P.3d at 971.

73. *Molina*, 30 Kan. App. 2d at 467, 44 P.3d at 1274.

74. *Lee v. City of Fort Scott*, 238 Kan. 421, 710 P.2d 689 (1985).

75. *Id.*, 238 Kan. at 425, 710 P.2d at 692.

76. *Lanning*, 22 Kan. App. 2d at 474, 921 P.3d at 813.

