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The Right to Be Let Alone: The Kansas Right of Privacy

J. Lyn Entrikin*

*“The heart of our liberty is choosing which parts of our lives shall become public and which parts we shall hold close.”*¹

*“The state of the law [of privacy] is still that of a haystack in a hurricane.”*²

I. INTRODUCTION

By nature, Kansans value their privacy and solitude. From the state’s humble beginnings in 1861, Kansas homesteaders were an independent lot, fiercely defending the right to stake their claims on the lonely tallgrass prairie.³ Given the pioneering spirit of those who survived drought and harsh winters to tame the wild prairie into farmland, it is no wonder that Kansas was one of the earliest states to recognize the common law right of privacy: a constellation of rights collectively known as the right to be let alone.⁴

Not long after Kansas achieved statehood, the transcontinental railroad was completed in 1870, making coast-to-coast transportation affordable and interstate commerce feasible. The explosion of science and technology that characterized the late nineteenth century eventually led to the recognition and evolution of state privacy rights. The hand camera became widely available in the late 1880s,⁵ providing opportunities for journalists and others to capture

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1. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998).

2. *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956).

3. *See, e.g., WES JACKSON, CONSULTING THE GENIUS OF THE PLACE: AN ECOLOGICAL APPROACH TO A NEW AGRICULTURE* 25–29 (2010) (discussing the Kansas-Nebraska Act of 1854 and its aftermath). *See generally* DAVID BOUCHARD, *IF YOU’RE NOT FROM THE PRAIRIE . . .* (1995); JOHN MADSON, *WHERE THE SKY BEGAN: LAND OF THE TALLGRASS PRAIRIE* (1995); *Homestead Act Sewed Its Way Into U.S. Fabric*, NAT’L PUB. RADIO WEEKEND EDITION (Sept. 16, 2012), <http://www.npr.org/2012/09/16/161228294/homestead-act-sewed-its-way-into-u-s-fabric>.

4. *See infra* note 28 and accompanying text. “[The four distinct kinds of privacy tort] are tied together by a common name, but otherwise have almost nothing in common except each protects against interference with the right to be let alone.” *Froelich v. Adair*, 516 P.2d 993, 995 (Kan. 1973).

5. *See infra* note 22 and accompanying text.

private poses on film. The camera was soon followed by the invention of the phonograph⁶ and moving pictures,⁷ and later radio⁸ and finally television.⁹ Media celebrities, virtually unknown at common law, took their place in public life as a result of the technological developments of the late nineteenth and early twentieth centuries.¹⁰ By the mid-twentieth century, state courts and legislatures began to recognize the pecuniary interest in controlling the commercial use of celebrities' professional personas.¹¹

In the early years of the twentieth century, Kansas was among the states that took the lead in recognizing a common law right of privacy.¹² Since then, Kansas courts have generally followed the *Restatement (Second) of Torts* in defining and recognizing actionable invasion of privacy claims.¹³ With limited exceptions,¹⁴ however, the Kansas Legislature has been slow to recognize the right of privacy by statutory enactment. And both the Kansas and federal courts have repeatedly recognized a variety of absolute and qualified defenses to Kansas common law privacy claims. The result is a well-established common law right of privacy, but with several traps for the unwary. A look behind the curtain reveals that what in 1918 appeared to be a remarkably progressive approach to the right of privacy has evolved over time to a constrained set of privacy rights relative to those most other states recognize.

The literature addressing the Kansas common law right of privacy is notably sparse. In an effort to fill the gap, this Article synthesizes the law recognizing invasion of privacy claims under Kansas common law and Kansas statutes.¹⁵ It does not address rights of privacy grounded in the U.S. or Kansas Constitutions, nor does it attempt to explore specialized privacy rights protected by federal enactments or regulations. Except to the extent that violations of Kansas criminal statutes may give rise to actionable civil claims for invasion of privacy,¹⁶ this Article also does not address criminal

6. See *Waring v. WDAS Broad. Station*, 194 A. 631, 632 (Pa. 1937).

7. See *Kunz v. Allen*, 172 P. 532, 532 (Kan. 1918).

8. See *Waring*, 194 A. at 632 (addressing legal issues involving phonograph records and radio broadcasts that "challenge the vaunted genius of the law to adapt itself to new social and industrial conditions and to the progress of science and invention").

9. See *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 487 (3d Cir. 1956) (taking judicial notice of more than seventeen million television sets in use in the United States in 1956).

10. See *Waring*, 194 A. at 632-33 (noting that *Waring's* orchestra initially performed in dance halls and vaudeville stage, later in live radio broadcasts, and finally on phonograph records).

11. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *Ettore*, 229 F.2d at 491-92.

12. See *Kunz*, 172 P. at 532-33.

13. See *Nicholas v. Nicholas*, 83 P.3d 214, 228 (Kan. 2004) (quoting *Dotson v. McLaughlin*, 531 P.2d 1, 6 (Kan. 1975)); see also *Rinsley v. Brandt*, 446 F. Supp. 850, 854 (D. Kan. 1977) (citing *Froehlich v. Adair*, 516 P.2d 993, 995-96 (Kan. 1973)).

14. See KAN. STAT. ANN. § 22-2523(a) (2013) (imposing civil liability for violation of statutes prohibiting strip searches and body cavity searches); cf. *id.* § 21-4015a (Kansas Funeral Privacy Act of 2007) (repealed by ch. 136, § 307 (2010)).

15. Although this Article focuses primarily on claims for money damages, the availability of equitable relief is briefly discussed in Part V.B.

16. *E.g.*, KAN. STAT. ANN. § 22-2523.

and constitutional law dealing with unlawful searches. Rather, the focus is on the amorphous civil right of privacy aptly characterized by one American jurist as a “haystack in a hurricane.”¹⁷

Part II of this Article briefly addresses the history of the common law right of privacy in the United States. Part III discusses the evolution of the Kansas right of privacy, beginning with *Kunz v. Allen*,¹⁸ the leading Kansas case. Part IV addresses each of the four privacy claims as they have evolved over time in Kansas, together with the specific defenses that courts have recognized with respect to each variation. Part V addresses available remedies and proof of damages. Part VI addresses Kansas statutory enactments that may implicate the Kansas right of privacy, either directly or indirectly. Part VII identifies unresolved issues, including some that other states have struggled to resolve but that Kansas courts have yet to address. Part VIII concludes.

II. HISTORY OF THE COMMON LAW RIGHT OF PRIVACY

Not often does a law review article lead the way for United States courts to recognize a novel legal right that went unrecognized at common law.¹⁹ But the earliest cases debating the existence of the personal right of privacy were a direct outgrowth of an 1890 article co-authored by two law partners and published in the law review of their alma mater.²⁰ The trigger for the article was the proliferation of news media commentary on the social events of the day, facilitated by invasive new technologies.²¹

By the close of the nineteenth century, photography had become

17. *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 485 (3d Cir. 1956), *quoted in* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 407 (1960). Some scholars have categorized these claims as “privacy torts” to distinguish them from constitutional rights to privacy in the context of criminal law, search and seizure, or constitutional privacy interests such as procreation and reproductive rights. *E.g.*, DAVID A. ELDER, *PRIVACY TORTS* ix (2002).

18. 172 P. 532 (Kan. 1918).

19. RAYMOND WACKS, *PRIVACY: A VERY SHORT INTRODUCTION* 57, 63 (2010); *see also* FREDERICK S. LANE, *AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT* 61–62 (2009) (“‘The Right to [sic] Privacy’ was that rarest of law review articles: a treatise so well reasoned and so compellingly argued that it helped to reshape American legal theory.”). Although most American states have judicially recognized the right of privacy, “other common law jurisdictions languish in a quagmire of indecision and hesitancy.” WACKS, *supra*, at 63. Underscoring the increasing worldwide interest in privacy rights is the recent controversy in Great Britain about reporters employed by now-defunct *News of the World* hacking into the voice mail of cell phone users, including Prince William and Prince Andrew. *See* James Poniewozik, *The Humbling of Rupert Murdoch*, TIME MAGAZINE Aug. 8, 2011, at 32. *See generally* ABA PRIVACY & COMPUTER CRIME COMM., *INTERNATIONAL GUIDE TO PRIVACY* (2004).

20. *See* Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 196 (1890); *see also* Benjamin C. Bratman, *Brandeis and Warren’s The Right of Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 624 (2002); Amy Gajda, *What if Samuel D. Warren Hadn’t Married a Senator’s Daughter?: Uncovering the Press Coverage that Led to “The Right to Privacy”*, 2008 MICH. ST. L. REV. 35, 35–36.

21. JON L. MILLS, *PRIVACY: THE LOST RIGHT* 5 (2008) (citing Warren & Brandeis, *supra* note 20); *see also* Bratman, *supra* note 20, at 624, 626; Gajda, *supra* note 20, at 59–60. *See generally* MILLS, *supra*, at 29–35 (describing the evolution of increasingly intrusive technology and resulting challenges for protection of personal privacy).

ubiquitous in the United States.²² George Eastman patented the Kodak box camera on September 4, 1888, making photography accessible to the general public.²³ The portable Kodak camera enabled surreptitious photography,²⁴ triggering legal actions for violating “the right of circulating portraits.”²⁵

In 1890, Samuel D. Warren and his former law partner, future Supreme Court justice Louis D. Brandeis, co-authored an article calling for a new cause of action for invasion of privacy.²⁶ The motivation for the article may have been “a series of articles in a Boston high-society gossip magazine, describing Warren’s swanky dinner parties.”²⁷ In the age of “yellow journalism,” the co-authors famously observed:

[T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.²⁸

During the next decade, New York trial courts issued a series of decisions enjoining defendants from publishing photographs of individuals without their consent.²⁹ But in 1902, in *Roberson v. Rochester Folding Box*,³⁰ a deeply-divided New York Court of Appeals reversed a judgment

22. See Robert E. Mensel, “Kodakers Lying in Wait”: *Amateur Photography and the Right of Privacy in New York, 1885–1915*, 43 AM. Q. 24, 28 (1991).

23. MICHAEL S. MALONE, *THE GUARDIAN OF ALL THINGS: THE EPIC STORY OF HUMAN MEMORY* 187–88 (2012). Eastman also originated the advertising slogan, “You Push the Button, We Do the Rest.” The Brownie camera, introduced in 1901 and advertised to sell for one dollar, was enormously popular. *Id.*

24. Dorothy Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U. L. REV. 401, 409–17 (1990) (describing an uncontested 1890 injunction secured by renowned comic opera star Marion Manola, barring a theater manager from distributing flash photographs taken during her performance); see *Schuyler v. Curtis*, 15 N.Y.S. 787, 789 (N.Y. Spec. Term 1891), *aff’d*, 19 N.Y.S. 264 (N.Y. Gen. Term 1892) (reciting the facts from *Manola v. Stevens & Myers* (unpublished)); see also *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 288 (Mich. 1899) (“We are not satisfied that . . . one has a right of action either for damages or to restrain the possessor of a camera from taking a snap shot at the passer-by for his own uses.”).

25. Warren & Brandeis, *supra* note 20, at 196.

26. *Id.*

27. WACKS, *supra* note 19, at 53; see Prosser, *supra* note 17, at 383.

28. Warren & Brandeis, *supra* note 20, at 205. Warren and Brandeis drew from Professor Thomas Cooley’s treatise, first published in 1878, which sketched the outlines of the general right of “personal immunity” that would later become known more specifically as the right of privacy. “The right to one’s person may be said to be a right of complete immunity, to be let alone.” *Henry v. Cherry & Webb*, 73 A. 97, 99–100, 109 (R.I. 1909) (emphasis added) (quoting THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 29 (2d ed. 1888)) (declining to judicially recognize a right of privacy absent legislative action); see also *Barber v. Time, Inc.*, 159 S.W.2d 291, 294 (Mo. 1942) (“The basis of the right of privacy is the right to be let alone.”) (citing THOMAS M. COOLEY, *COOLEY ON TORTS* 444, § 135 (4th ed. 1932)).

29. *E.g.*, *Marks v. Jaffa*, 26 N.Y.S. 908, 909 (N.Y. Spec. Term 1893) (enjoining a defendant newspaper editor from publishing a photograph of a plaintiff actor-law student without his consent). *But cf.* *Murray v. Gast Lithographic & Engraving Co.*, 28 N.Y.S. 266, 268–69 (N.Y. Spec. Term 1894), *aff’d*, 31 N.Y.S. 17 (Ct. of C.P. 1894) (declining to enjoin an unauthorized distribution of photos of a plaintiff’s infant daughter absent a claim to vindicate property rights belonging to the plaintiff); see also *Schuyler v. Curtis*, 42 N.E. 22, 26 (N.Y. 1895) (declining to enjoin defendants from erecting a statue of a plaintiff’s decedent, a private philanthropist, on grounds that the subject of the alleged invasion of privacy was deceased). Note that the earliest recognition of the right of privacy was by courts sitting in equity. See *Roberson v. Rochester Folding Box*, 64 N.E. 442, 444–47 (N.Y. 1902).

30. 64 N.E. 442 (N.Y. 1902) (4-3 opinion) (holding that New York does not recognize the common law right of privacy), *rev’g* 71 N.Y.S. 876 (App. Div. 1901). *But see* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009) (enacted 1903) (recognizing the civil right of privacy for using one’s name or likeness, without written consent, for trade or advertising purposes).

awarding money damages to Abigail Roberson, an eighteen-year-old whose photograph had been displayed without her consent on 25,000 posters advertising baking flour.³¹ The court's refusal to recognize a cause of action drew criticism from across the country.³² In response to the public outcry, the 1903 New York Legislature hastily enacted a statutory right to privacy, narrowly framed to provide a civil remedy for those whose names or likenesses were appropriated for trade or advertising purposes without their written consent.³³

Like New York, other state appellate courts declined to recognize a common law right to privacy, instead deferring the issue to their respective state legislatures.³⁴ A few states followed suit, enacting legislation similar to New York's.³⁵ But several other states, by judicial declaration, recognized a more sweeping right to privacy.³⁶

The first to do so was Georgia. In *Pavesich v. New England Life Insurance Co.*,³⁷ the Georgia Supreme Court held that the plaintiff had stated a claim against an insurance company for printing his photograph in a newspaper advertisement without his consent.³⁸ In recognizing a civil remedy for invasion of privacy, the court drew from natural law principles, state and federal constitutional protections for individual liberty interests, and a Georgia statute authorizing any court to "frame" a remedy, if necessary, for a violation of any right within its jurisdiction.³⁹ In the end, the Georgia Supreme Court boldly (and accurately) predicted that one day the right of privacy would be generally recognized in the United States:

So thoroughly satisfied are we that the law recognizes, within proper limits . . . the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view

31. *Roberson*, 64 N.E. at 442. For a fascinating and humorous account of the aftermath of this decision for Ms. Roberson and Chief Judge Parker, who authored the decision (and later ran for public office), see Daniel J. Kornstein, *The Roberson Privacy Controversy*, HIST. SOC'Y OF CTS. OF ST. OF N.Y. NEWSL., 2006, at 3, available at <http://www.courts.state.ny.us/history/pdf/HSNLVol.4.pdf>; LANE, *supra* note 19, at 64–70 (discussing *Roberson* controversy).

32. Bratman, *supra* note 20, at 648–50.

33. N.Y. CIV. RIGHTS LAW § 51; see 1903 N.Y. Laws 308. The companion criminal statute, section 50, defined the conduct as a misdemeanor. Section 51 created a private cause of action for a violation of the criminal statute. N.Y. CIV. RIGHTS LAW § 50; see 1903 N.Y. Laws 308.

34. See *Henry v. Cherry & Webb*, 73 A. 97, 99–100, 109 (R.I. 1909) (declining to judicially recognize a right of privacy absent legislative action); *Yoeckel v. Samonig*, 75 N.W.2d 925, 927 (Wis. 1956) (declining to judicially recognize the right because the state legislature had recently failed to enact bills that would have done so).

35. Bratman, *supra* note 20, at 641 (citing Ken Gormley, *One Hundred Years of Privacy*, 1992 Wis. L. REV. 1335, 1354 n.90). Examples are Virginia (enacted in 1904) and Utah (enacted in 1909). See Note, *The Virginia "Right of Privacy" Statute*, 38 VA. L. REV. 117, 117 (1952).

36. See *infra* notes 37–40, 43 and accompanying text.

37. 50 S.E. 68 (Ga. 1905).

38. *Id.* at 80–81.

39. *Id.* at 69–70 (quoting GA. CIV. CODE § 4929 (1895)).

was ever entertained by judges of eminence and ability. . . .⁴⁰

After *Pavesich*, other state and federal courts adopted varied perspectives on the question.⁴¹ The Rhode Island Supreme Court, following the New York Court of Appeals, rejected the common law right of privacy in 1909, noting that it was “unable to discover the existence of the right of privacy contended for.”⁴² But in 1911, the Missouri Court of Appeals, relying on *Pavesich*, recognized a five-year-old boy’s cause of action against a Kansas City jewelry store for using his image in a newspaper advertisement without consent.⁴³ Just a year later, a federal district court in Missouri, sitting in equity, pointedly sidestepped what it called “the irreconcilable conflict of opinions and views of courts of last resort in various jurisdictions”⁴⁴ on the question, observing that even if a right of privacy exists, it would surely not extend to public educational institutions.⁴⁵ Thus, Vassar College was denied an injunction against a Kansas City biscuit company for marketing “Vassar Chocolates” in packaging that displayed knock-offs of the college seal, pennant, and motto.⁴⁶

The nascent popularity of the cinema further complicated the privacy issue. By the mid-1890s, the development of film projection systems enabled vaudeville theaters across the country to exhibit moving pictures.⁴⁷ The early “actuality” films, which peaked in popularity in 1903, depicted the events of the day, much like contemporary news documentaries.⁴⁸ By 1918, the cinema had reached Kansas City, Kansas, triggering a neighborhood dispute that would soon lead the Kansas Supreme Court to recognize the common law right of privacy.

40. *Id.* at 80–81; see ELDER, *supra* note 17, at § 1:1, at 1–7 (nearly all jurisdictions recognize a right of privacy).

41. See *Henry v. Cherry & Webb*, 73 A. 97, 109 (R.I. 1909) (refusing to judicially recognize a right of privacy following *Roberson*); *Hillman v. Star Publ'g Co.*, 117 P. 594, 596 (Wash. 1911) (rejecting a right of privacy absent legislation outlining parameters). But see *Pritchett v. Bd. of Comm'rs of Knox Cnty.*, 85 N.E. 32, 35 (Ind. App. 1908) (following *Pavesich*); *Foster-Milburn, Co. v. Chinn*, 120 S.W. 364, 366 (Ky. 1909) (same); *Munden v. Harris*, 134 S.W. 1076, 1080 (Kan. C. Ct. App. 1911) (same).

42. *Henry*, 73 A. at 109.

43. *Munden*, 134 S.W. at 1077. “If a man has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent.” *Id.* at 1078.

44. *Vassar Coll. v. Loose-Wiles Biscuit Co.*, 197 F. 982, 985 (W.D. Mo. 1912) (bill in equity).

45. See *id.* at 984–85. The college sought to enjoin the biscuit company’s commercial use of the college name and emblems, contending that they were private property. *Id.* at 985. The federal district court distinguished cases involving private persons suing for invasion of privacy, observing that a public corporate institution depends on publicity to fulfill its role as an institution of higher education. *Id.* “Where a person is a public character, the right of privacy disappears.” *Id.* (citing *Corliss v. E.W. Walker Co.*, 57 F. 434 (D. Mass. 1893)). This early perspective denying the right to privacy to public figures and entities on the theory of waiver later evolved to recognize that public figures have a property interest in controlling the use of their identities, notwithstanding that by definition they give up a good degree of privacy.

46. *Id.* at 984–85.

47. RICK ALTMAN, *SILENT FILM SOUND* 96–102 (2004).

48. PAUL BURNS, *THE HISTORY OF THE DISCOVERY OF CINEMATOGRAPHY* ch. 15 (1997), available at <http://www.precinemahistory.net/1895.htm>; DOUGLAS GOMERY, *SHARED PLEASURES: A HISTORY OF MOVIE PRESENTATION IN THE UNITED STATES* 7 (1992). For an example of an 1897 actuality film directed by Auguste and Louis Lumière, see *ARRIVAL OF A TRAIN* (1897), available at http://www.fandor.com/films/arrival_of_a_train.

III. THE BEGINNINGS OF THE KANSAS RIGHT OF PRIVACY

One day in the early 1900s, Stella Kunz⁴⁹ was shopping for dry goods in Allen & Bayne's store in Kansas City, Kansas.⁵⁰ Without her knowledge, store employees took moving pictures of her for use in advertising clips later exhibited in a local movie theater. Stella sued the store, claiming damages for public humiliation and embarrassment. She alleged harm to her reputation because her acquaintances believed that she had willingly allowed her photograph to be used for commercial purposes. She successfully appealed the judgment of the Wyandotte County District Court sustaining the store's demurrer.⁵¹ In deciding *Kunz v. Allen* in Stella's favor, Kansas joined a small number of other states that had already judicially recognized a civil cause of action for invasion of privacy.⁵²

Quoting at length from *Pavesich*,⁵³ the Kansas Supreme Court implicitly held that Kunz had a privacy right and that a jury trial could vindicate its violation.⁵⁴ The court rejected defendants' principal argument that Stella Kunz had failed to prove damages, reasoning that the amount to compensate her for pain, suffering, and humiliation was for the jury to decide.⁵⁵ The court relied upon persuasive authority from Georgia⁵⁶ and Missouri⁵⁷ holding that an individual has a property right in one's own picture and may sue for unauthorized invasion of the right.⁵⁸ Furthermore, the court concluded that Kunz could recover for invasion of privacy even without asserting and offering evidence of special damages.⁵⁹ While available if proved, special damages need not be alleged to state a claim for invasion of privacy.⁶⁰

49. In 1910, Stella Kunz, age 31, lived with her husband Jacob and her three young children in Kansas City, Kansas. U.S. CENSUS BUREAU, WYANDOTTE CNTY. KAN. (1910).

50. *Kunz v. Allen*, 172 P. 532, 532 (Kan. 1918). In a short article, an industry periodical observed: A court in Kansas City, Kan., is going to have to decide whether or not the face of Mrs. Stella Kunz, who lives on a rural route out of that city, is worth \$2,000 in a moving picture advertising the department store owned by Wilfred H. Allen and Charles H. Bayne, 642 Minnesota [A]venue. Mrs. Kunz has brought suit for that amount against the store proprietors, saying her picture was taken while she was in the store and now is being used in moving picture films advertising it. She sat for the films, without her knowledge, she declares, and is sure \$2,000 wouldn't be too small a remuneration for the use of herself.

An Interesting Suit, 27 MOVING PICTURE WORLD 114, 114 (Chalmers Publ'g Co. 1916), available at http://books.google.com/books?id=sAMbAQAAAMAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

51. *Kunz*, 172 P. at 532.

52. See *supra* notes 37–40, 43 and accompanying text.

53. *Kunz*, 172 P. at 532 (quoting *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 68, Syl. ¶ 11 (Ga. 1905)).

54. *Id.* at 533.

55. *Id.* at 532–33 (quoting *Pavesich*, 50 S.E. at 68 Syl. ¶ 11). In effect, the court held that emotional injury is presumed as a matter of law once the plaintiff establishes the other elements of the privacy claim. *Id.*

56. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

57. *Munden v. Harris*, 134 S.W. 1076 (Kan. C. Ct. App. 1911).

58. *Id.* at 1079.

59. *Kunz*, 172 P. at 532–33.

60. *Id.* at 533 (quoting *Munden*, 134 S.W. at 1076 Syl. ¶ 4). The Kansas Supreme Court's holding in *Kunz* concerning the minimum proof of damages was later clarified by the Tenth Circuit in a diversity case applying Kansas law. See *Manville v. Borg-Warner Corp.*, 418 F.2d 434, 436 (10th Cir. 1969). *Manville* had

Notably, the court sidestepped whether it had the authority to create a right not previously recognized, either at common law or by legislative enactment.⁶¹

Kunz was thus among the earliest of the state appellate court decisions to recognize invasion of privacy as a common law tort,⁶² repudiating the decision of the New York Court of Appeals in *Roberson v. Rochester Folding Box*.⁶³ Yet *Kunz* squarely embraced but one of the four distinct claims for invasion of privacy that would ultimately be recognized by courts and scholars⁶⁴: (1) appropriation of plaintiff's name or likeness,⁶⁵ (2) intrusion upon seclusion,⁶⁶ (3) publicity given to private facts,⁶⁷ and (4) publicity casting plaintiff in a false light.⁶⁸ Viewed narrowly based on the facts in *Kunz*, the court recognized a privacy claim for misappropriation of name or likeness, but no others. Several decades would elapse before the Kansas Supreme Court recognized the other three common law claims for invasion of privacy.⁶⁹

IV. FOUR DISTINCT CAUSES OF ACTION FOR INVASION OF PRIVACY

Since *Kunz*, the common law right of privacy has evolved to include the four distinct categories first elucidated by Professor Prosser in 1960.⁷⁰ All

agreed to pose for a photograph for a *Wall Street Journal* feature article, but he told the defendant's agents that he wanted no part in any advertising. *Id.* at 435. When his photo later appeared in a newspaper advertisement, the plaintiff objected and later filed suit. *Id.* The Tenth Circuit affirmed a judgment notwithstanding the verdict for the defendant, reasoning that no evidence was offered to show that the advertisement had caused the plaintiff any embarrassment or mental anguish. *Id.* at 435, 437. As the Tenth Circuit interpreted *Kunz*, "Kansas law requires a plaintiff in privacy cases to show some general damages even though he is not required to prove either their amount or that there were special damages." *Id.* at 436. The court refused to infer general damages as a matter of law: "without showing some general damages, [a plaintiff] is entitled to recover only nominal damages." *Id.* at 437. The court's holding implicitly confirms the *Kunz* holding that injury is presumed, but clarifies that some evidence of compensable injury must be offered for a plaintiff to recover anything more than nominal damages for the presumed injury.

61. The reasoning may have been implicit. The Kansas Constitution guarantees every citizen access to the courts to remedy every wrong. KAN. CONST. bill of rights § 18 ("All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.") Thus, it may be more accurate to say that the right to a judicial remedy was a *fait accompli* once the court recognized that Stella Kunz had suffered a legal harm as a direct result of the defendants' conduct. *Cf.* *Schmeck v. City of Shawnee*, 647 P.2d 1263, 1266 (Kan. 1982) (observing that § 18 does not create rights of action, but rather requires Kansas courts to afford a remedy for legally-recognized wrongs).

62. *See* *Pritchett v. Bd. of Comm'rs of Knox Cnty.*, 85 N.E. 32, 35 (Ind. Ct. App. 1908) (following *Pavesich*); *Munden v. Harris*, 134 S.W. 1076, 1079 (Kan. C. Ct. App. 1911) (same); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364, 366 (Ky. Ct. App. 1909) (same); *Itzkovitch v. Whitaker*, 39 So. 499, 500 (La. 1905) ("Every one who does not violate the law can insist upon being let alone (the right of privacy). In such a case the right of privacy is absolute."); *Edison v. Edison Polyform Mfg. Co.*, 67 A. 392, 394 (N.J. Ch. 1907) (same).

63. *See supra* notes 29–30 and accompanying text (discussing *Roberson*).

64. Prosser, *supra* note 17, at 389; *see also* *Froelich v. Adair*, 516 P.2d 993, 995–96 (1973) (listing and defining four distinct privacy tort claims); RESTATEMENT (SECOND) OF TORTS §§ 652A–652E (1977).

65. *Kunz*, 172 P. at 533; *see infra* Part IV.A.

66. *See infra* Part IV.B.

67. *See infra* Part IV.C.

68. *See infra* Part IV.D.

69. The Kansas Supreme Court first recognized claims for intrusion on seclusion in 1973, publicity given to private facts in 1972, and false light publicity in 1977. *See infra* Part IV.

70. Prosser, *supra* note 17, at 389. The *Restatement (First) of Torts* recognized only one claim for

four are now well-established in Kansas law.⁷¹ Each cause of action has developed largely independent of the others, although several cases address more than one category of privacy claim. This Part addresses each of the four in turn, including specific defenses that Kansas courts have recognized over the years. We begin with the classic version of invasion of privacy: the unconsented use of a plaintiff's image or likeness for the defendant's benefit.

A. Appropriation of Name or Likeness

Thirty-five years would elapse before the Kansas Supreme Court had another opportunity to address a claim along the lines of the one asserted by Stella Kunz. In *Johnson v. Boeing Airplane Co.*,⁷² a former employee alleged that Boeing had published his photograph without his authorization in an advertisement printed in various nationally circulated weekly news magazines.⁷³ After reviewing authorities addressing the right of privacy, the court observed that “inherent in the rule is an elasticity which must take into account the particular circumstances of each case.”⁷⁴ Because the photo had been taken in the workplace with the plaintiff's consent while employed by Boeing, the court concluded that he had “impliedly at least, consented to the publication of his photograph.”⁷⁵ When posing for the photo, Johnson knew it would likely be published but neither objected nor imposed any conditions on its publication. Further, no evidence was presented at trial that Boeing had engaged in any coercion.⁷⁶ In short, while explicitly reaffirming *Kunz*, the court concluded that Johnson had waived his privacy right by impliedly consenting to Boeing's use of the photograph.⁷⁷

invasion of privacy. See RESTATEMENT (FIRST) OF TORTS § 867 (1939) (imposing liability on one who “unreasonably and seriously interferes with another's interest in not having his affairs *known to others* or his likeness *exhibited to the public*” (emphasis added)). Note that each alternative recognized by the *Restatement* in 1939 required some degree of publication.

71. See PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.61 (4th ed. 2012) (Right of Privacy). Kansas follows the *Restatement (Second) of Torts* in defining and recognizing actionable invasion of privacy claims. E.g., *Nicholas v. Nicholas*, 83 P.3d 214, 228 (Kan. 2004) (quoting *Dotson v. McLaughlin*, 531 P.2d 1, 6 (Kan. 1975)). The Kansas Supreme Court has left open the possibility that other causes of action for invasion of privacy may be recognized in Kansas beyond the scope of the *Restatement*. See *Werner v. Kliever*, 710 P.2d 1250, 1257 (Kan. 1985) (“Under the facts of this case we need not determine whether such a cause of action might exist under other circumstances.”).

72. 262 P.2d 808 (Kan. 1953).

73. *Id.* at 810.

74. *Id.* at 813.

75. *Id.*

76. *Id.*

77. See *id.* at 813–14. The court's reasoning apparently ignored the fact that Johnson had no reason to anticipate the commercial use of the photograph in Boeing advertisements as opposed to its noncommercial publication in internal business communications, to which he had implicitly acquiesced while employed there. But even if a plaintiff consents during the term of employment, other courts have acknowledged that the defendant's use after plaintiff's resignation or termination may not exceed the scope of the consent given. See *Colgate-Palmolive Co. v. Tullos*, 219 F.2d 617, 618 (5th Cir. 1955) (applying Georgia law); cf. *Dry v. Boeing Co.*, No. 99-1402-WEB, 2002 WL 31730924, at *3 (D. Kan. Sept. 3, 2002) (unpublished) (distinguishing *Johnson*; genuine issue of fact whether consent was limited to term of plaintiff's employment and whether prior implied consent was limited or revoked). The *Restatement (Second) of Torts* endorses this view. “[C]onsent to any publication, either of matter that is personally defamatory or of matter that invades

In the alternative, the court in *Johnson* reasoned that the allegations failed to show compensable injury. The testimony suggested that he filed suit only after friends and relatives who had seen his photo began kidding him about how much Boeing had paid him for its use.⁷⁸ Calling his lawsuit an “afterthought,” the court reasoned that “[t]o permit recovery under these facts would expand the doctrine of privacy beyond all logical reasoning and stretch it almost to the point of absurdity.”⁷⁹ The court’s alternative reasoning, while more plausible than the implied consent rationale, also undercuts the holding in *Kunz* that injury is presumed when the other elements of misappropriation are proved.⁸⁰

In *Johnson*, the Kansas Supreme Court reaffirmed its recognition of a cause of action for invasion of privacy by appropriation of a plaintiff’s likeness, but without clearly articulating the elements of the claim. The court also recognized that the plaintiff’s consent, whether express or implied, defeats a claim for misappropriation. However, the opinion did not clearly delineate whether consent is an affirmative defense, or whether a plaintiff has the burden to prove that a defendant’s use was unauthorized.⁸¹ The fact that the Kansas Supreme Court affirmed the trial court’s demurrer in *Johnson* suggests the latter view correctly describes the court’s holding.⁸²

Since *Johnson* was decided in 1953, the Kansas appellate courts have addressed a privacy claim for misappropriation on only one other occasion.⁸³ In *Haskell v. Stauffer Communications, Inc.*,⁸⁴ the plaintiff, who was not a public figure, sued the publisher of a Dodge City newspaper for reporting that “wanted” posters had appeared around town displaying his photograph. The text of the “wanted” poster, which was reprinted in the article, described Haskell as frequently carrying weapons in public view and suggested that his

privacy, creates an absolute privilege *so long as the publication does not exceed the scope of the consent*. The consent given may be narrowly limited.” RESTATEMENT (SECOND) OF TORTS § 652F cmt. b (1977) (emphasis added).

78. *Johnson*, 262 P.2d at 812, 814.

79. *Id.* at 814.

80. See *supra* notes 55, 58 and accompanying text.

81. But see PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.62 (4th ed.2012) (citing *Johnson* as authority for the rule that consent is a defense to invasion of privacy); cf. *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1041 (D. Kan. 1998) (quoting *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 757 (N.D. Cal. 1993)) (“As with any intentional tort, consent is an absolute defense, even if improperly induced.”).

82. The relevant syllabus paragraph of *Johnson* explains that the trial court properly granted defendant’s demurrer to the claim for “unauthorized publication . . . of an advertisement . . . in which . . . appeared a photograph of plaintiff[]” because the plaintiff at least impliedly “waived such right” and because the “plaintiff’s evidence wholly failed to establish a cause of action.” *Johnson*, 262 P.2d at 809. If consent were an affirmative defense, it would have been improper for the trial court to grant a demurrer before trial, and “unauthorized publication” would not be an element of the claim.

83. On occasion, state and federal district courts have addressed misappropriation claims in unpublished opinions, always acknowledging *Kunz* as the seminal Kansas case. See *Dry v. Boeing Co.*, No. 99-1402-WEB, 2002 WL 31730924, at *2–4 (D. Kan. Sept. 3, 2002) (distinguishing *Johnson* and denying a defendant’s motion for summary judgment in a terminated employee’s misappropriation claim for using his photo one year later in a Boeing newspaper advertisement); *Hofer v. Cramer*, No. 99C-00914, 1999 WL 34804096 (D. Kan. June 9, 1999) (rejecting a misappropriation claim because the mere use of name and likeness in profitable media broadcast does not qualify as commercial use).

84. 990 P.2d 163 (Kan. Ct. App. 1999).

incarceration or commitment might be warranted. A photograph of the poster accompanied the text of the article, which acknowledged that the plaintiff lawfully carried weapons and that he was not actually “wanted” by law enforcement.⁸⁵

The jury awarded Haskell \$2,500 in damages against the newspaper for misappropriating his name and likeness. The Kansas Court of Appeals reversed, observing that Kansas appellate courts had never addressed whether a newspaper’s noncommercial publication pertaining to a matter of public interest was privileged, thus defeating a misappropriation claim.⁸⁶ The court reasoned that in this case, the jury instruction had failed to explain that the newsworthiness privilege is a complete defense to a misappropriation claim.⁸⁷ Further, the trial court failed to define the element of “appropriation” in the jury instruction so as to limit its meaning to commercial use.⁸⁸ Reasoning that the news article pertained to carrying weapons, a matter of legitimate public concern, the court concluded that the defendant had not used the plaintiff’s name and likeness for “commercial” purposes.⁸⁹

Relying on the policy justifications underlying *Time, Inc. v. Hill*,⁹⁰ the Kansas Court of Appeals explained that invasion of privacy claims must give way when the press publishes material of public concern.⁹¹ The newsworthiness privilege applies as a matter of law when a person’s name and image are published in a news article, as long as the article pertains to a

85. *Id.* at 164.

86. *Id.* at 165.

87. *See id.* Many states recognize newsworthiness as a qualified privilege to appropriation of name or likeness rather than an absolute defense. *See* ELDER, *supra* note 17, § 6:9. “The privilege is an absolute one where the matter is true or the fault-re-falsity standards have not been met.” *Id.* § 6:9 n.1 (citing cases and statutes). This is especially so when the plaintiff, as in *Haskell*, does not qualify as a public figure. *See id.* § 6:9. The *Haskell* court held that “[t]he privilege extends to matters about private individuals that are of interest to the public.” *Haskell*, 990 P.2d at 166. However, it cited only two district court cases, both applying the law of other jurisdictions. *Id.* The Kansas Supreme Court has not addressed the issue and has never cited *Haskell*.

88. *Haskell*, 990 P.2d at 165–66. *But see* PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.61 (4th ed. 2012) (commercial use not required); RESTATEMENT (SECOND) OF TORTS § 652C & cmt. b (1977) (stating that absent a limiting statute, the common law misappropriation rule does not require commercial use).

89. *Haskell*, 990 P.2d at 166–67 (quoting RESTATEMENT (SECOND) OF TORTS § 652C cmt. d). Just because the defendant profited from the newspaper business, the court reasoned, did not transform the newspaper’s incidental publication of the plaintiff’s name and likeness into a commercial use of the kind that would support liability. *Id.* The court’s reasoning was questionable at best. First, its out-of-context reference to comment d failed to acknowledge comment b, which expressly disclaims any commercial use requirement in the absence of a limiting statute. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. b. Second, Kansas has never enacted a statute limiting misappropriation claims to commercial uses. Third, while *Kunz* and *Johnson* both involved uses of the plaintiffs’ likenesses for the defendants’ advertising purposes, the Kansas Supreme Court has never held that commercial use is an essential element of the misappropriation claim. Nor has it ever had occasion to directly review or consider the intermediate appellate court’s reasoning in *Haskell*.

90. 385 U.S. 374 (1967).

91. *Time, Inc. v. Hill* was later undermined by *Gertz v. Robert Welch, Inc.*, which rejected the public interest analysis for determining whether the *New York Times v. Sullivan* rule applies, at least in a false light invasion of privacy context. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974). As noted by the Kansas federal district court in *Rinsley v. Brandt*, *Gertz* signaled the Supreme Court’s return to the public official/public figure standard in deciding whether *New York Times* applies. *See Rinsley v. Brandt*, 446 F. Supp. 850, 855 (D. Kan. 1977).

matter of public interest and plaintiff's name and likeness are used in relation to that newsworthy subject.⁹² Under these circumstances, the court reasoned, the newspaper article pertained to a matter of public concern, and because Haskell was the subject of the poster that was pictured in the news article, the jury should have been instructed on the newsworthiness privilege.⁹³

In summary, to prove a claim for appropriation of name or likeness under Kansas common law, the plaintiff must prove that the defendant used the plaintiff's name or likeness without consent for defendant's benefit.⁹⁴ Like the counterpart definition in the *Restatement (Second) of Torts*,⁹⁵ liability does *not* require use for a commercial purpose.⁹⁶ While the Kansas Court of Appeals in *Haskell* suggested that a noncommercial use cannot support a claim for misappropriation, that language was mere dicta because the court held that the newsworthiness privilege applied as a matter of law.

The plaintiff's identifying information or likeness used for the defendant's benefit need not be private in nature; in this respect a claim for appropriation of name or likeness differs from other "privacy" claims.⁹⁷ At least when a plaintiff's identity is used in relation to a matter of public interest and concern, the defendant may avoid liability by asserting and proving the newsworthiness privilege, although it is unclear whether the privilege is absolute or qualified.⁹⁸ In dicta, the Kansas Supreme Court has suggested that a claim for appropriation of name or likeness survives the death of the plaintiff, unlike the other three common law privacy claims.⁹⁹

Defenses: *Johnson* was the first of several cases demonstrating that Kansas law recognizes consent as a defense, not only to claims for misappropriation of likeness, but also other common law claims for invasion of privacy.¹⁰⁰ However, scholars have observed that the absence of consent is more accurately described as an element of the claim that the plaintiff must assert and prove.¹⁰¹ While the distinction may appear to be academic,

92. *Haskell*, 990 P.2d at 166 (citations omitted).

93. *Id.* at 166-67.

94. See PATTERN INSTRUCTIONS IN KANSAS-CIVIL 127.61 (4th ed. 2012).

95. "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." RESTATEMENT (SECOND) OF TORTS § 652C (1977). In the absence of statute, the *Restatement* provision does not require proof that the defendant's use was for commercial purposes. *Id.* at cmt. b. "[T]he rule . . . applies . . . when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, *even though the use is not a commercial one*, and even though the benefit sought to be obtained is not a pecuniary one." *Id.* (emphasis added). Kansas has never enacted such a limiting statute, and the Kansas pattern jury instructions do not require commercial use as an element of the claim. See PATTERN INSTRUCTIONS IN KANSAS-CIVIL 127.61.

96. See PATTERN INSTRUCTIONS IN KANSAS-CIVIL 127.61.

97. ELDER, *supra* note 17, § 6:10 & n.10.

98. See *Haskell*, 990 P.2d at 166.

99. *Nicholas v. Nicholas*, 83 P.3d 214, 228 (Kan. 2004) (dicta) (citing RESTATEMENT (SECOND) OF TORTS § 652I).

100. See PATTERN INSTRUCTIONS IN KANSAS-CIVIL 127.62; see also *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1041-42 (D. Kan. 1998).

101. See ELDER, *supra* note 17, §§ 2:12, 3:9, 4:8, 6:6; see also *Leggett v. First Interstate Bank of Or., N.A.*, 739 P.2d 1083, 1086 (Or. Ct. App. 1987) ("Strictly speaking, consent is not a defense to invasion of privacy. Rather, *lack of consent* is an element of the tort."). But see *Green v. Penn-Am. Ins. Co.*, 242

treating consent as an affirmative defense eases the pleading burden on the plaintiff and precludes pre-answer dismissal of a complaint for failure to allege non-consent. If non-consent is an element of the claim, the burden of proof is on the plaintiff to establish that the defendant's use was unauthorized.

Unlike some other states,¹⁰² Kansas law does not require written or even express consent to avoid liability—a plaintiff's consent may be implied.¹⁰³ Some authority suggests that the plaintiff's consent is vitiated if the defendant's use of the plaintiff's identity exceeds the scope of the consent granted.¹⁰⁴

As discussed earlier, the newsworthiness privilege may allow a defendant to avoid liability for appropriation of name or likeness, although the Kansas courts have not clearly addressed whether the privilege is absolute or qualified. And while Kansas courts have not addressed the issue, many courts have recognized an exception for incidental use of one's name or likeness,¹⁰⁵ suggesting that *de minimis* use negates the requirement that the defendant must have used the plaintiff's name or likeness deliberately to exploit its value.¹⁰⁶

The statute of limitations applicable to a claim of appropriation of name or likeness is two years, based on the catchall provision for actions involving "injury to the rights of another, not arising on contract," and not otherwise enumerated in the Kansas statutes of limitation.¹⁰⁷

B. Intrusion Upon Seclusion

Invasion of privacy by intrusion on seclusion occurs when a person intentionally intrudes on the plaintiff's solitude or seclusion, or his private affairs or concerns, if a reasonable person would consider the intrusion highly offensive.¹⁰⁸ According to Professor Prosser, "the interest protected by this branch of the tort is primarily a mental one."¹⁰⁹

S.W.3d 374, 379 n.6 (Mo. Ct. App. 2007) (declining to hold that "lack of consent" is an element of a claim for appropriation of name or likeness).

102. An example is New York. See N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009) (stating that, to avoid liability, a defendant must establish plaintiff's written consent).

103. PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.62 (citing *Johnson v. Boeing Airplane Co.*, 262 P.2d 808 (Kan. 1953)) ("Consent may be shown from (his)(her) conduct and the surrounding circumstances.").

104. See *Manville v. Borg-Warner Corp.*, 418 F.2d 434, 435 (10th Cir. 1969) (dicta) (stating that a plaintiff's verbal consent to be photographed for news article while expressly opposing advertising use did not preclude judgment for using his photo for commercial advertising); cf. *Johnson*, 262 P.2d at 813 (failing to recognize limited scope of a plaintiff's consent); see *supra* notes 75–77 and accompanying text.

105. See ELDER, *supra* note 17, § 6:8.

106. See, e.g., *Tropeano v. Atl. Monthly Co.*, 400 N.E.2d 847, 850 (Mass. 1980).

107. KAN. STAT. ANN. § 60-513(a)(4) (2013); see also *Newcomb v. Ingle*, 827 F.2d 675, 678 (10th Cir. 1987); *Rinsley v. Brandt*, 446 F. Supp. 850, 858 (D. Kan. 1977). The discovery rule applies to claims for invasion of privacy. See KAN. STAT. ANN. § 60-513(b), (c).

108. *Froelich v. Adair*, 516 P.2d 993, 995 (Kan. 1973) (quoting RESTATEMENT (SECOND) OF TORTS § 652B, at 103 (Tentative Draft No. 13 1967)).

109. Prosser, *supra* note 17, at 392.

Other states recognized this distinct form of invasion of privacy as early as 1881.¹¹⁰ While the Kansas Supreme Court generally recognized the common law right of privacy in 1918, not until 1973 did the court have an opportunity to squarely recognize intrusion on seclusion as a distinct cause of action.¹¹¹

In *Froelich v. Adair*,¹¹² an agent of the defendant, a divorcée, asked a hospital orderly to obtain hair samples from William Froelich's hospital room. Defendant's motive for obtaining the hair samples was to establish that Froelich and her ex-husband were lovers, which would have defeated her ex-husband's pending defamation claim against her.¹¹³ Upon learning that the defendant had secured strands of his hair from his hospital room, the plaintiff sued for intrusion upon seclusion.¹¹⁴ In defense, Adair argued that the hairs were absolutely privileged information because she had obtained them in connection with the defamation proceeding.¹¹⁵ The trial court entered judgment for the defendant. On appeal, the court reversed and remanded for a new trial, reasoning that publication is not a required element of intrusion on seclusion. Therefore, it was no defense to the claim that the intrusion had yielded information that might be absolutely privileged if disclosed or "published" in the context of another judicial proceeding.¹¹⁶

After *Froelich*, the Kansas courts have several times recognized invasion of privacy claims for intrusion on seclusion against "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable man."¹¹⁷ However, the courts have been generous in recognizing various exceptions that offer opportunities to assert affirmative defenses.

Under certain circumstances, for example, a creditor may defeat a claim for intruding on a debtor's seclusion based on the plaintiff's implied consent. Soon after deciding *Froelich*, the Kansas Supreme Court considered a claim

110. See *De May v. Roberts*, 9 N.W. 146 (Mich. 1881) (recognizing a cause of action against a physician for allowing an associate to assist in home childbirth without the plaintiffs' knowledge that he lacked medical credentials or training; cf. *Moore v. N.Y. Elevated R.R.*, 29 N.E. 997 (N.Y. 1892) (holding a defendant liable for consequential damages for constructing a train station adjacent to the third floor of the plaintiff's building, depreciating its rental value).

111. See *Froelich*, 516 P.2d at 996 ("[A]n action for intrusion upon seclusion is one of first impression in this state.")

112. 516 P.2d 993 (Kan. 1973) (5-2 opinion).

113. *Id.* at 995. Truth is an affirmative defense to a defamation claim. *Turner v. Halliburton Co.*, 722 P.2d 1106, 1112 (Kan. 1986) (4-3 opinion).

114. *Froelich*, 516 P.2d at 995-96.

115. *Id.* at 995; see RESTATEMENT (SECOND) OF TORTS § 652F (1977) (adopting absolute privileges in defamation actions for invasion of privacy claims); see also *id.* §§ 583-592A (providing for absolute judicial immunity).

116. *Froelich*, 516 P.2d at 997. Two justices dissented on the basis that the plaintiff failed to adequately allege that the nature of the intrusion (as opposed to the information obtained) was so highly offensive as to cause a reasonable person emotional harm. *Id.* at 998 (Fromme, J., dissenting).

117. *Id.* at 994 Syl. ¶ 2.

for intrusion upon seclusion against a creditor who had repeatedly called the plaintiff after chronic illness caused her to default on her automobile loan. In *Dawson v. Associates Financial Services Co. of Kansas*,¹¹⁸ the court concluded that the plaintiff debtor failed to state a cause of action for intrusion. The court pointedly observed that the “right to be let alone is qualified by the rights of others.”¹¹⁹ Specifically, when borrowing from a creditor, a debtor “impliedly consents for the creditor to take reasonable steps to pursue payment even though it may result in actual, though not actionable, invasion of privacy.”¹²⁰ In other words, a debtor’s right to privacy is subject to the creditor’s right to take reasonable steps¹²¹ to collect the debt.¹²²

A plaintiff is unlikely to prevail on a claim that investigating his criminal history amounts to intrusion on seclusion. In *Robison v. Board of County Commissioners of Rush County*,¹²³ the Kansas Court of Appeals rejected the plaintiff’s claim that a sheriff’s deputy had intruded on his seclusion by investigating court records and then disclosing to a city swimming pool manager that plaintiff had once been charged with (but not convicted for) indecent liberties with a child.¹²⁴ The court reasoned that Robison had at best a “limited privacy interest” in his criminal history record.¹²⁵ Moreover, the criminal charges were part of public court records, which were readily discoverable by anyone. Thus, Robison failed to show any intrusion into a private concern.¹²⁶

The federal courts, applying Kansas law, have several times elaborated on the elements of a claim for intrusion on seclusion.¹²⁷ To prove intrusion

118. 529 P.2d 104 (Kan. 1974).

119. *Id.* at 110 (citation omitted).

120. *Id.* The fact that the invasion was deemed “not actionable” also suggests that it is the plaintiff’s duty to assert non-consent (express or implied) in order to state a claim. See *supra* notes 81, 100–101 and accompanying text.

121. See RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977). The *Restatement (Second) of Torts* states:

there is no liability for knocking at the plaintiff’s door, or calling him to the telephone on one occasion or even two or three, to demand payment of a debt. It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded.

Id.

122. *Dawson*, 529 P.2d at 110. That said, a creditor may be liable on other grounds: *i.e.*, for extreme and outrageous conduct that intentionally or recklessly causes the debtor emotional distress and resulting bodily harm. *Id.* at 111. The *Dawson* court ultimately reversed a directed verdict on a plaintiff’s outrage claim, holding that the trial court erred by excluding from evidence the creditors’ dunning calls to plaintiff’s parents. *Id.* at 113.

123. No. 93,992, 2007 WL 518829 (Kan. Ct. App. Feb. 16, 2007), *rev. dismissed as moot* (June 21, 2007).

124. *Id.* at *6.

125. *Id.* at *7.

126. *Id.* The Kansas Supreme Court addressed a related issue in *Wichita Eagle & Beacon Publishing Co. v. Simmons*, 50 P.3d 66 (Kan. 2002), a mandamus action against the Kansas Secretary of Corrections. While acknowledging that KAN. STAT. ANN. § 22-4707 (2013) restricts dissemination of certain criminal history and arrest information, the court expressly held that “a public agency may disclose court records, information concerning an arrest, or the status of a pending investigation.” *Id.* at 80 (citing *Stephens v. Van Arsdale*, 608 P.2d 972 (Kan. 1980) and Kan. Att’y Gen. Op. No. 98-38 (1998)).

127. *E.g.*, *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1040 (D. Kan. 1998). The defendant must place itself

on seclusion, a plaintiff must show that the defendant (1) intentionally intruded upon (2) plaintiff's solitude, seclusion, or private affairs or concerns, and (3) that the intrusion would be highly offensive to a reasonable person.¹²⁸

Neither Kansas caselaw nor the *Restatement* directly addresses what precisely constitutes an "intrusion."¹²⁹ An intrusion may be committed by either (a) physically intruding or (b) using one's sensory faculties to intrude on the plaintiff's right to be left alone.¹³⁰ Publication is neither necessary nor sufficient to establish the intrusion element, but the intrusion itself must implicate the plaintiff's privacy or seclusion.¹³¹ Moreover, the nature of the intrusion must be sufficiently substantial. For example, odors from a neighbor's cattle feedlot do not amount to an actionable intrusion on seclusion, even if the smell from the livestock operation would be highly offensive to a reasonable person.¹³²

The intrusion must be intentional, but malice is not a necessary element.¹³³ "The precise motives for invasion of privacy are unimportant. Defendant's action, rather than precise motives accompanying the act or conduct, is the criterion of liability."¹³⁴

The defendant must intrude upon a plaintiff's solitude or private affairs or concerns. Thus, a plaintiff does not state a claim if the alleged intrusion occurred in a public place, such as open court.¹³⁵ Nor does the defendant

physically, or by means of its senses, within the plaintiff's zone of privacy. *Id.* (citing *Ali v. Douglas Cable Commc'ns*, 929 F. Supp. 1362, 1382 (D. Kan. 1996)).

128. *Id.* at 1040 (citing *Ali*, 929 F. Supp. at 1381).

129. *Peterson v. Moldofsky*, No. 07-2603-EFM, 2009 WL 3126229, at *3 (D. Kan. Sept. 29, 2009). By statutory enactment, strip searches and body cavity searches in violation of the constraints imposed by section 22-2521(a)-(b) or section 22-2522 qualify as intrusions upon seclusion as a matter of law. *See* KAN. STAT. ANN. § 22-2523; *see also infra* notes 388-391 and accompanying text. Whether a violation of recently enacted criminal "breach of privacy" statutes may also support a private cause of action for damages remains an open question in Kansas. *See infra* notes 383-423, 464-465 and accompanying text.

130. *Peterson*, 2009 WL 3126229, at *3 (citing *Finlay v. Finlay*, 856 P.2d 183, 189 (Kan. Ct. App. 1993)). The defendant "must 'place [it]self physically, or by means of [its] senses, within the plaintiff's zone of privacy.'" *Frye*, 15 F. Supp. 2d at 1040 (quoting *Ali*, 929 F. Supp. at 1382) (alteration in original). In *Gretencord v. Ford Motor Co.*, the federal district court granted summary judgment to a defendant automobile manufacturer for a plaintiff employee's failure to meet the intrusion element. *See Gretencord v. Ford Motor Co.*, 538 F. Supp. 331, 333 (D. Kan. 1982). The plaintiff sued his former employer for discharging him for refusing to comply with a random security search of his vehicle as he left the employer's parking lot, consistent with the employer's written policy. *Id.* at 332. The court granted summary judgment, holding that the plaintiff failed to establish that any intrusion had occurred. *Id.* at 333.

131. *Peterson*, 2009 WL 3126229, at *3 (citing *Froelich v. Adair*, 516 P.2d 993, 996 (Kan. 1973)). In *Hartman v. Meredith Corp.*, bail bondsmen sued a broadcaster for airing photographs of them in open court with their clients, who had been charged with unlawful gambling, while the announcer named the individuals charged. *See Hartman v. Meredith Corp.*, 638 F. Supp. 1015, 1016 (D. Kan. 1986). The court dismissed the bondsmen's claim for intrusion upon seclusion for failure to state a claim, reasoning that the broadcast occurred in a public place—open court. *Id.* at 1018.

132. *Finlay v. Finlay*, 856 P.2d 183, 189 (Kan. Ct. App. 1993). "The nature of the intrusion involved [here—the smell caused by the activities conducted on defendant's property—is] distinguishable from that contemplated under Kansas law or the Restatement." *Id.* The holding could have simply turned on the fact that the defendants neither physically intruded nor used their sensory faculties to intrude on plaintiff's seclusion; ironically, the plaintiff unsuccessfully argued that the defendants' conduct was highly offensive to the plaintiff's sensory faculties.

133. *See Froelich*, 516 P.2d at 997 (rejecting the implied argument that malice is a required element).

134. *Id.*

135. *Hartman*, 638 F. Supp. at 1018 (holding that bail bondsmen who were standing with their clients in

intrude on the plaintiff's private affairs by investigating information, such as prior criminal charges, already a matter of public record.¹³⁶ Further, a plaintiff who has voluntarily disclosed information that the defendant has publicized to others cannot state a claim for intrusion on seclusion.¹³⁷

Finally, the nature of the defendant's intrusion must have been offensive to an ordinary reasonable person as a result of conduct to which a reasonable person would strongly object.¹³⁸ Both the manner of the intrusion and the nature of the information sought must be highly offensive.¹³⁹ The plaintiff's subjective reaction to the defendant's conduct is therefore not dispositive because the test is an objective one.¹⁴⁰

As observed earlier, creditors appear to receive favorable consideration when charged with invasion of privacy, including intrusion on seclusion.¹⁴¹ In *Moore v. R.Z. Sims Chevrolet-Subaru, Inc.*,¹⁴² a prospective purchaser sued a dealership for intrusion on seclusion based on an unsuccessful attempt to repossess a truck from plaintiff's place of business, a McPherson café, after she was unable to secure financing. The dealership's agent entered the café kitchen and office area to speak with her. The Kansas Supreme Court reversed the trial court's judgment for plaintiff, reasoning that because of the parties' debtor-creditor relationship, the café kitchen was plaintiff's business location, not an area of seclusion or solitude. Therefore, the agent's entry did not amount to a substantial intrusion that a reasonable person would find highly offensive.¹⁴³

Employers also appear to fare favorably when discharged employees sue for intrusion on seclusion. In *Frye v. IBP, Inc.*,¹⁴⁴ the federal district court held that when an employer demanded a urine sample from an employee for the purpose of drug testing, consistent with the employer's stated purpose of

open court could not sue a broadcaster for intrusion upon seclusion).

136. *Robison v. Bd. of Cnty. Comm'rs of Rush Cnty.*, No. 93,992, 2007 WL 518829, at *7 (Kan. Ct. App. Feb. 16, 2007). *But see* *Data Tree, LLC v. Meek*, 109 P.3d 1226, 1233, 1237, 1238 (Kan. 2005) (indicating that agencies have the discretion to disclose personal identifying information contained in public records under KAN. STAT. ANN. § 45-221(a)(30) (2013)).

137. *Peterson v. Moldofsky*, No. 07-2603-EFM, 2009 WL 3126229, at *4 (D. Kan. Sept. 29, 2009) (citing *C.L.D. v. Wal-Mart Stores, Inc.*, 79 F. Supp. 2d 1080, 1083 n.1 (D. Minn. 1999)). "[U]nder Kansas law the disclosure of properly obtained information does not constitute an intrusion sufficient to make out a claim of invasion of privacy under the theory of intrusion upon seclusion." *Id.* at *3.

138. *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1040 (D. Kan. 1998) (citing *Ali v. Douglas Cable Commc'ns*, 929 F. Supp. 1362, 1382 (D. Kan. 1996)).

139. *Id.* In retrospect, this holding may have been a basis for denying recovery in *Froehlich*. See *supra* notes 111-117 and accompanying text. Although the nature of the intrusion into the plaintiff's hospital room may have been offensive, the nature of the information secured (combing from the plaintiff's hairbrush and discarded bandage) certainly was not. See *Froehlich v. Adair*, 516 P.2d 993, 995 (Kan. 1973).

140. *Frye*, 15 F. Supp. 2d at 1041 (citation omitted).

141. *E.g.*, *Dotson v. McLaughlin*, 531 P.2d 1, 7 (Kan. 1975) (finding no actionable invasion of privacy based on the frequency of a creditor's calls to a debtor's business to collect on a note absent evidence of intrusion into a private place).

142. 738 P.2d 852 (Kan. 1987).

143. *Id.* at 858.

144. 15 F. Supp. 2d 1032 (D. Kan. 1998). This was an issue of first impression applying section 652B of the *Restatement (Second) of Torts* to employer drug-testing policies and procedures. *Id.* at 1040.

maintaining a safe place to work, the nature of the information sought was not unreasonable. Therefore, the intrusion could not be viewed as “highly offensive” by a reasonable jury.¹⁴⁵ This was true even if, as the plaintiff alleged, the employer had acted on unreliable reports or lacked an objectively reasonable suspicion that the employee had engaged in drug use.¹⁴⁶

A claim for intrusion upon seclusion does not survive the plaintiff.¹⁴⁷ In *Nicholas v. Nicholas*,¹⁴⁸ for example, a husband filed suit against his estranged wife for invasion of privacy for breaking into his home and taking documents and financial records. He died while the proceeding was pending. The court acknowledged that invasion of privacy is not among the claims listed in Kansas Statutes Annotated section 60-1802 that abate upon a party’s death, nor is it listed in section 60-1801 as an action that survives the death of a party.¹⁴⁹ In the absence of any statute expressly authorizing survival, the court held that the decedent’s claim did not survive.¹⁵⁰ The court reasoned that the emotional injuries triggered by intrusion on seclusion are so personal in nature that a jury would have to resort to speculation in the absence of plaintiff’s trial testimony.¹⁵¹

Finally, a police officer’s entry into a private home or apartment without a warrant or a legally recognized exception to the warrant requirement may amount to an invasion of privacy; unless justified by legal privilege, the officer’s entry will support an inhabitant’s action for invasion of privacy.¹⁵² Probable cause alone is not a sufficient justification for a warrantless search or entry into a private residence: to avoid liability, officers must show exigent circumstances justifying an immediate warrantless search.¹⁵³ As might be expected, the sanctity of one’s home is a common theme in cases alleging intrusion on seclusion.¹⁵⁴

Defenses: As noted earlier,¹⁵⁵ Kansas law generally recognizes consent as a defense to any cause of action for invasion of privacy,¹⁵⁶ although more accurately the absence of consent is an element of the claim that the plaintiff must assert and prove.¹⁵⁷ Under Kansas law, a plaintiff’s consent to an

145. *Id.* at 1042.

146. *Id.*

147. *Nicholas v. Nicholas*, 83 P.3d 214, 226–27 (Kan. 2004).

148. 83 P.3d 214 (Kan. 2004).

149. *Id.* at 226–27.

150. *Id.* at 228–29.

151. *Id.* at 228.

152. *Monroe v. Darr*, 559 P.2d 322, 327–28 (Kan. 1977) (citing KAN. CONST. bill of rights § 15; *Dotson v. McLaughlin*, 531 P.2d 1 (Kan. 1975); *Froelich v. Adair*, 516 P.2d 993 (Kan. 1973); RESTATEMENT (SECOND) OF TORTS § 652B (1977)). If an officer searches with a warrant, however, the search is privileged. *See id.* at 328.

153. *Id.*

154. *See* ELDER, *supra* note 17, § 2:5.

155. *See supra* notes 100–104 and accompanying text.

156. PATTERN INSTRUCTIONS IN KANSAS—CIVIL § 127.62 (4th ed. 2012).

157. ELDER, *supra* note 17, §§ 2:12, 3:9, 4:8, 6:6; *see also* *Leggett v. First Interstate Bank of Or., N.A.*, 739 P.2d 1083, 1086 (Or. App. 1987); *supra* note 101.

intrusion may be either express or implied.¹⁵⁸ However, if the plaintiff proves that the defendant fraudulently secured the plaintiff's consent, the defense evaporates.¹⁵⁹

As with privacy claims for appropriation of name or likeness, the plaintiff's consent is an absolute defense to a claim for intrusion on seclusion.¹⁶⁰ Moreover, consent may be inferred. For example, when an employee agrees at hiring to provide a urine sample upon request, the inference of consent is not negated just because his refusal to comply might result in an adverse employment action.¹⁶¹ And when an employee knowingly accepts employment in a workplace that requires drug testing, the employee implicitly consents, at least to the extent that the testing is consistent with the employer's policy and protocol.¹⁶² However, implied consent is negated if the employer exceeds the scope of that policy.¹⁶³

Even if an unconsented intrusion occurs, a plaintiff thereafter may waive or relinquish the right of privacy either explicitly or implicitly.¹⁶⁴ In *Vespa v. Safety Federal Savings & Loan Association*,¹⁶⁵ the court held that a plaintiff's conduct amounted to a waiver of her right of privacy.¹⁶⁶ There, a banker visited the plaintiff's home to discuss her options after the bank had purchased the home at a foreclosure sale. After the banker identified himself and presented his business card, the plaintiff neither refused him permission to enter the home nor asked him to leave. His visit lasted three hours. Even considering the evidence in the light most favorable to the plaintiff, the court concluded that she suffered no actionable invasion of privacy.¹⁶⁷

While the newsworthiness privilege, if applicable, is at least a partial defense to a claim for appropriation of name or likeness,¹⁶⁸ it is not a viable defense to a claim for intrusion on seclusion because neither publication nor publicity is a necessary element of the claim.¹⁶⁹ However, a county or district

158. PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.62 (“Consent may be shown from (his)(her) conduct and the surrounding circumstances.”) (citing *Johnson v. Boeing Airplane Co.*, 262 P.2d 808 (Kan. 1953)).

159. See *Belluomo v. KAKE TV & Radio, Inc.*, 596 P.2d 832, 844 (Kan. Ct. App. 1979) (dicta) (“If the purported consent was fraudulently induced, there was no consent.”).

160. *Frye v. I.B.P., Inc.*, 15 F. Supp. 2d 1032, 1041 (D. Kan. 1998) (citing *Curtright v. Ray*, No. 90-2034-V, 1991 WL 179385, at *7 (D. Kan. Aug. 23, 1991)).

161. *Id.*

162. *Id.* at 1041–42.

163. *Id.* at 1042. Once again, this reasoning suggests that implicit consent is vitiated if a defendant's conduct exceeds the scope of the consent. *But see Johnson*, 262 P.2d at 813–14.

164. *Vespa v. Safety Fed. Sav. & Loan Ass'n*, 549 P.2d 878, 881 (Kan. 1976) (citing *Johnson*, 262 P.2d at 809). In Kansas, waiver is an affirmative defense. See KAN. STAT. ANN. § 60-208(c) (2013).

165. 549 P.2d 878.

166. See *id.* at 881.

167. *Id.* (affirming summary judgment for defendant).

168. See *supra* notes 87, 91–93 and accompanying text.

169. *Froelich v. Adair*, 516 P.2d 993, 996 (Kan. 1973) (stating that the qualified privilege that is applicable to defamation claims does not apply to a claim for intrusion upon seclusion, for which publication is not an element). This position has been criticized as “dubious” and inconsistent with the consensus in other states that the set of qualified privileges that is applicable to defamation law generally applies to claims for invasion of privacy. See ELDER, *supra* note 17, § 2:13.

attorney enjoys absolute immunity for investigating a plaintiff's private and business affairs¹⁷⁰ based on "[t]he same policy considerations requiring absolute immunity for communications made during the course of a prosecution"¹⁷¹

The two-year statute of limitations applies to claims for intrusion upon seclusion, consistent with the catchall provision for actions not otherwise enumerated involving "injury to the rights of another, not arising on contract."¹⁷²

C. Publicity Given to Private Facts

At about the same time the Kansas Supreme Court recognized an action for intrusion on seclusion, it also expressly acknowledged the possible existence of a third privacy tort. In 1972, in *Munsell v. Ideal Food Stores*,¹⁷³ the Kansas Supreme Court first recognized the possibility of a privacy claim based on publicity given to private facts.¹⁷⁴ The *Restatement* defines the claim as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.¹⁷⁵

Munsell, a truck driver who formerly worked for the defendant, was discharged after he admitted in writing to having knowingly padded his time slips and trip reports over a ten-year period.¹⁷⁶ Consistent with its union contract, the employer provided a copy of plaintiff's signed statement to his union, triggering *Munsell's* suit alleging defamation and invasion of privacy, among other claims.¹⁷⁷ The jury awarded some \$30,000 in actual damages,¹⁷⁸ and the defendant appealed.

170. *Sampson v. Rumsey*, 563 P.2d 506, 511 (Kan. Ct. App. 1977).

171. *Id.* "[T]he power of the district attorney to investigate alleged violations within his jurisdiction is unquestionable and his motive in so doing may not be the subject of a lawsuit against him." *Id.*

172. KAN. STAT. ANN. § 60-513(a)(4) (2013); *Rinsley v. Brandt*, 446 F. Supp. 850, 858 (D. Kan. 1977).

173. 494 P.2d 1063 (Kan. 1972).

174. *Id.* at 1075 (dicta). Long before *Munsell*, a federal district court in New York considered whether Kansas law recognized a claim of publicity given to private facts. See *Sidis v. F-R Publ'g Corp.*, 34 F. Supp. 19, 20-21 (S.D.N.Y. 1938), *aff'd*, 113 F.2d 806 (2d Cir. 1940). In that case, *The New Yorker* had published two biographical articles and a photograph of the plaintiff, who had become known as a child prodigy years before when, at the age of eleven, he lectured to Harvard professors on the fourth dimension. *Id.* at 19-20. The plaintiff claimed that the nationally-circulated magazine violated his common law right of privacy in several states that by then had recognized such a right. Noting that Kansas courts had not yet considered a claim for public disclosure of private facts, the court declined to speculate as to whether Kansas or any other state would do so. See *id.* at 20-21. As noted in this Article, the Kansas Supreme Court would eventually recognize the claim, but not until the mid-1970s.

175. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

176. *Munsell*, 494 P.2d at 1066-67. Recall that in 1972, the *Restatement (First) of Torts* recognized only one form of invasion of privacy. See *supra* note 70. With respect to *Munsell's* privacy claim, the jury was instructed on wrongful intrusion of one's private activities (the equivalent of intrusion upon seclusion), even though the facts alleged suggested publicity given to private facts. See *Munsell*, 494 P.2d at 1072.

177. *Id.* at 1068-69.

178. *Id.* at 1066, 1072.

While recognizing a privacy claim for what would later be known as giving publicity to private facts,¹⁷⁹ the Kansas Supreme Court reversed, holding that “only *unwarranted* invasions of the right of privacy are actionable.”¹⁸⁰ In this instance, the employer had justifiably inquired about the plaintiff’s padded time slips. Further, the privacy claim for communicating relevant facts to the union was subject to qualified privilege to the same extent as plaintiff’s defamation claim.¹⁸¹ Under the circumstances, qualified immunity applied as a matter of law because the employer had a contract obligation to report disciplinary actions against union members.¹⁸² Therefore, the plaintiff could not recover for either defamation or invasion of privacy unless the employer had acted with actual malice, and the jury should have been so instructed.¹⁸³

Soon after *Munsell*, the Kansas Supreme Court addressed a rapid succession of claims alleging facts that would soon be categorized in the *Restatement* as giving publicity to private facts.¹⁸⁴ Each elucidated a distinct element of the claim.

First, the facts given publicity must be *private* facts. In *In re Atchison, Topeka & Santa Fe Railway Co.*,¹⁸⁵ a divided Kansas Supreme Court enforced a subpoena *duces tecum* issued by the Kansas Commission on Civil Rights while investigating a complaint alleging employment discrimination

179. The *Munsell* court observed that *Johnson* “suggested that the right of privacy is violated where there is . . . the publicizing of one’s private affairs with which the public has no legitimate concern.” *Munsell*, 494 P.2d at 1074–75 (citing *Johnson v. Boeing Airplane Co.*, 262 P.2d 808 (Kan. 1953)).

180. *Munsell*, 494 P.2d at 1075 (emphasis added).

181. *Id.* at 1075. In considering the defamation claim, the court discussed the qualified privilege defense at length. *Id.* at 1073. It noted:

[A]bsolute privilege is recognized as applying to cases in which the public service or the administration of justice requires complete immunity as in legislative, executive or judicial proceedings. . . . A qualified privileged publication is one made on an occasion which furnishes a prima facie legal excuse for making it unless some additional facts are shown which alter the character of the publication. It comprehends communications made in good faith, without actual malice and with reasonable or probable grounds for believing them to be true. Where a defamatory statement is made in a situation where there is a qualified privilege[,] the injured party has the burden of proving not only that the statements were false, but also that the statements were made with actual malice—with actual evil-mindedness or specific intent to injure. . . . *The question whether or not a publication is privileged is a question of law to be determined by the court.*

Id. (emphasis added) (citing *Stice v. Beacon Newspaper Corp.*, 340 P.2d 396 (Kan. 1959)). The court equated the qualified privilege defense to a “prima facie legal excuse” for making the defamatory statement absent the plaintiff’s showing of actual malice.

182. *Id.* at 1073.

183. *Id.* The *Munsell* court carefully distinguished claims for defamation from claims for invasion of privacy based upon the nature of the injury. *Id.* at 1075. Although defamation redresses injuries to reputation, invasion of privacy compensates “injured feelings or mental suffering.” *Id.* Later courts would distinguish the two causes of action on other, more-nuanced grounds: specifically, the facts required to establish the “publication” element of defamation are not sufficient to support the “publicity” element required for two of the four kinds of invasion of privacy claims. Moreover, to support invasion of privacy, the matter publicized must be highly offensive to a reasonable person, while for defamation it is sufficient that the plaintiff show falsity and harm to reputation.

184. RESTATEMENT (SECOND) OF TORTS § 652D (1977); see *supra* notes 175–176 and accompanying text.

185. 531 P.2d 455 (Kan. 1975) (4-3 decision).

based on the complainant's Mexican-American national origin. The employer alleged that the complainant had been lawfully terminated after his background investigation revealed numerous criminal convictions, all for relatively minor offenses. The Commission's subpoena sought arrest and conviction records of others hired for the same job to determine whether the employer's stated reason for plaintiff's termination was merely a pretext.

The employer objected to the subpoena, arguing that releasing arrest and conviction records of other employees would subject it to claims for invasion of privacy.¹⁸⁶ The court disagreed, holding that a successful claim for giving publicity to private facts, which was expressly recognized,¹⁸⁷ requires that the disclosed facts were indeed private ones.¹⁸⁸ Kansas law does not protect an employee's arrest and conviction records from disclosure;¹⁸⁹ nor does it protect the confidentiality of an applicant's communications to a prospective employer.¹⁹⁰ Therefore, the trial court should have enforced the Commission's subpoena because the information sought concerning other Santa Fe employees was public, not private information, and therefore did not implicate their privacy rights.¹⁹¹

Later in 1975, the Kansas Supreme Court reiterated the same principle in *Rawlins v. Hutchinson Publishing Co.*¹⁹² The plaintiff, a former police officer, alleged that a newspaper had invaded his privacy when it published allegations of misconduct initially made ten years earlier while he was a public employee.¹⁹³ The court affirmed summary judgment for the defendant,¹⁹⁴ reasoning that the plaintiff did not claim the published information was false; moreover, the news accounts pertained to his conduct while a public official.¹⁹⁵ The court observed once again that "[o]nly unwarranted invasions of the right of privacy are actionable,"¹⁹⁶ and as a matter of policy, public debate may include criticism of government officials, including police officers.¹⁹⁷

Therefore, the plaintiff had no right of privacy with respect to his

186. *Id.* at 461, 468.

187. *Id.* at 469.

188. *Id.*

189. *See Robison v. Bd. of Cnty. Comm'rs of Rush Cnty.*, No. 93,992, 2007 WL 518829, at *7 (Kan. Ct. App. Feb. 16, 2007) (holding that the disclosure of criminal charges involving indecent liberties that did not result in convictions did not violate a plaintiff's right of privacy).

190. *In re Atchison, Topeka, & Santa Fe Ry. Co.*, 531 P.2d at 469.

191. *Id.* at 469-70. Three justices dissented on the basis that the criminal records of other employees were not discoverable because they were not reasonably relevant to the plaintiff's complaint. *Id.* at 470 (Fromme, J., dissenting).

192. 543 P.2d 988 (Kan. 1975).

193. *Id.* at 989-90.

194. *Id.* at 996.

195. *Id.* "The purpose of the tort is to protect an individual against unwarranted publication of *private* facts. Once facts become public the right of privacy ceases. We do not see how public facts, once fully exposed to the public view, can ever become private again." *Id.* at 995-96.

196. *Id.* at 992-93 (quoting *Munsell v. Ideal Food Stores*, 494 P.2d 1063, 1065-66 (Kan. 1972)).

197. *Id.* at 992 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

conduct while in public office. Borrowing “principles . . . established in the field of defamation law, [which] have a direct bearing on the closely related field of privacy,”¹⁹⁸ the court reasoned that the defendant newspaper had an absolute privilege to communicate truthful matters concerning public officials.¹⁹⁹ The time elapsed since the plaintiff left office did not confer a right of privacy with respect to the incidents in question, for which he had waived his privacy rights.²⁰⁰ The court specifically rejected plaintiff’s reliance on California’s “test of ‘current newsworthiness,’ requiring a case-by-case evaluation of the current public interest, at least where the facts published are public facts concerning one who is or was a public official.”²⁰¹

Similarly, the Kansas Supreme Court held that disclosure of facts that are a matter of public record, even if potentially embarrassing, cannot support a claim for giving publicity to private facts. In *Vespa*, the vice-president of defendant bank, which had purchased plaintiff’s home at a foreclosure sale, discussed related matters with a realtor. The court rejected plaintiff’s argument that the disclosure invaded her right of privacy by disclosing private facts, reasoning that the details of the foreclosure were not private:

The orders of the court . . . decreeing foreclosure, ordering a sale and fixing the redemption rights of the owners were a part of [the] public record. A discussion of those matters between [the banker] and a realtor invade[d] no right of privacy of the plaintiff, and cannot be the basis for her claim against [the bank].²⁰²

But a defendant does not necessarily avoid liability under Kansas law for disclosure of personal identifying information just because the facts happen to be in public records. Facts do not automatically lose their private character when they become part of a public record.²⁰³ In *Data Tree, LLC v. Meek*,²⁰⁴ a case of first impression, the Kansas Supreme Court affirmed an order denying injunctive and declaratory relief to a data-mining business²⁰⁵ that challenged

198. *Id.* “That is to say, if the circumstances are such that there is a qualified privilege to communicate even defamatory falsehoods about an individual, so long as it is done without actual malice [as with public figures], there is an absolute privilege to communicate matters which are true.” *Id.* (citing *Munsell*, 494 P.2d at 1065–66 Syl. ¶ 4).

199. *See id.* at 993. In dicta, the court distinguished situations not involving public officials, observing that under *Gertz*, private individuals are entitled to greater protection from defamatory falsehoods than public officials. *Rawlins*, 453 P.2d at 992 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Gobin v. Globe Publ’g Co.*, 531 P.2d 76 (Kan. 1975)).

200. *Id.* at 996.

201. *Id.* (rejecting *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34 (Cal. 1971) (*en banc*); *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931)). *See generally* ELDER, *supra* note 17, § 3:18 (discussing the newsworthiness privilege and the effect of the passage of time and noting California’s minority rule).

202. *Id.* at 880.

203. *See* ELDER, *supra* note 17, § 3:15 n.31 (“cases are divided as to whether all matters of public record may be freely publicized with impunity or only those involving matters of legitimate public concern”); *see also id.* § 2:17 (discussing public records with respect to claims for intrusion upon seclusion).

204. 109 P.3d 1226 (Kan. 2005).

205. The plaintiff sought the information in conjunction with its business of collecting and providing real estate information from public records and disseminating the information to its commercial clients. *Id.* at 1230. The commercial nature of the plaintiff’s desired use of the information was a significant factor in the court’s balancing analysis. *Id.* at 1238. For an overview of the market for data collection, aggregation, and dissemination, and the multiple uses of data for credit reporting, insurance underwriting, and direct marketing, *see* PAUL H. RUBIN & THOMAS M. LENARD, *PRIVACY AND THE COMMERCIAL USE OF PERSONAL*

redaction fees assessed by the Sedgwick County Register of Deeds. The defendant argued that the fees were justified under the Kansas Open Records Act (“KORA”) to redact personal identifying information, including Social Security numbers, mothers’ maiden names, and dates of births, from the bulk public records that the plaintiff sought. The trial court granted summary judgment, and the Supreme Court affirmed, observing that KORA carved out a limited discretionary exception from disclosure for “[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”²⁰⁶

The court observed that the KORA exception did not prohibit a record custodian from disclosing personal information, but rather granted discretion whether to release information within its scope.²⁰⁷ The court held that the information in question was “of a personal nature” within the meaning of the statutory exception and that the plaintiff had requested it for the commercial purpose of selling it to clients, not for a public purpose. Because disclosure in this instance would not serve KORA’s principal public purpose, the court balanced the respective interests in favor of protecting privacy.²⁰⁸ Specifically, the register of deeds “did not abuse his discretion in determining that public disclosure of the personal information within the documents requested constituted a clearly unwarranted invasion of personal privacy.”²⁰⁹

Even if the facts disclosed by the defendant are private, the court may deem the disclosure subject to qualified privilege as a matter of law, thus shielding the defendant from liability unless the plaintiff establishes malice as that term was defined in *Munsell*.²¹⁰ For example, in 1975, the Kansas Supreme Court rejected a privacy claim against a life insurance company for publicizing a prospective insured’s medical information to a private, nonprofit trade association for the purpose of determining the underwriting risk.²¹¹ Health insurance companies routinely used the trade association to exchange confidential medical information among its 700 insurer members. The plaintiff sued after the defendant denied his application for a life insurance

INFORMATION 15–16, 24–26 & fig. 1 (2002).

206. KAN. STAT. ANN. § 45-221(a)(30) (2013). A similar exception appears in the federal Freedom of Information Act (“FOIA”). See 5 U.S.C. § 552(b)(6) (2012).

207. *Data Tree, LLC*, 109 P.3d at 1234.

208. The court rejected the plaintiff’s efforts to apply principles dealing with the tort of invasion of personal privacy to the analysis of what would constitute a ‘clearly unwarranted invasion of personal privacy.’ [T]his would divorce the analysis from the underlying public purpose of the KORA. It appears that courts generally analyze the issue by balancing the privacy interests of the individual with the public’s need to know.

Id. at 1237 (citations omitted). The court’s reasoning appears to undercut any argument that the “clearly unwarranted invasion of privacy” clause might require a public agency to sort out the nuances of privacy law (and its various qualified privileges) in exercising its discretion whether to release personal information from public records.

209. *Id.* at 1238.

210. See *supra* note 181.

211. *Senogles v. Sec. Benefit Life Ins. Co.*, 536 P.2d 1358 (Kan. 1975).

policy, arguing that the insurer violated his right of privacy by disclosing his health information to a third-party trade association.²¹²

While the plaintiff had agreed on the life insurance application that the defendant insurer could *acquire* information about his health, he did not consent to its disclosure to others. Nevertheless, the court held the alleged invasion was justified, observing once again that a “warranted” invasion of privacy is not actionable.²¹³ The court concluded that communicating the plaintiff’s health information to the trade association was subject to qualified privilege as a matter of law, so the plaintiff could not recover absent proof that defendant acted with malice in disseminating the information.²¹⁴

The court’s rationale was based on the same policy justifications underlying its earlier privacy decisions holding that certain disclosures by creditors and former employers are subject to qualified privilege as a matter of law. Once again drawing from defamation law, the court reiterated the common law definition of qualified privilege it had adopted and approved in *Faber v. Byrle*²¹⁵:

A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation. The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.²¹⁶

If the court determines as a matter of law that the qualified privilege applies, a plaintiff cannot recover without proving malice as defined in traditional defamation law.²¹⁷

Even if the facts are private and their disclosure is not warranted or conditionally privileged, the private facts are privileged if they pertain to a matter of legitimate public concern.²¹⁸ Kansas law is less than clear whether newsworthiness amounts to a qualified or an absolute privilege. In *Werner v. Kliewer*,²¹⁹ a patient sued her psychiatrist for disclosing private facts about her unstable mental condition in a letter to the court in which her divorce

212. *Id.* at 1359–60.

213. *Id.* at 1361 (quoting *Munsell v. Ideal Food Stores*, 494 P.2d 1063, 1075 (Kan. 1972)).

214. *See id.* at 1364.

215. 229 P.2d 718 (Kan. 1951).

216. *Senogles*, 536 P.2d at 1363 (quoting *Faber*, 229 P.2d at 721).

217. *See id.* at 1363; *infra* note 309 and accompanying text (discussing the common law definition of “malice”).

218. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

219. 710 P.2d 1250 (Kan. 1985).

action was then pending.²²⁰ The court rejected her claim for publicity given to private facts on alternative grounds.²²¹ First, the disclosed facts could not be considered highly offensive to a reasonable person under the circumstances, and it was doubtful that the letter was given the required widespread publicity to support the claim.²²² In this case, the defendant's letter was disclosed only to the court services officer, judge, and counsel, all officers of the court.²²³ Second, the court rejected the plaintiff's argument that the facts did not pertain to any legitimate public concern, noting the strong public policy in favor of child welfare in custody proceedings.²²⁴ Thus, the court concluded that the plaintiff failed to state a claim for giving publicity to private facts.²²⁵

Werner's rationale is somewhat puzzling because the court need not have reached the public interest question. Furthermore, because the plaintiff was not a public official or even a public figure, any such privilege would be less than absolute under the *Rawlins* dicta, even if the private information pertained to a matter of public concern. Nevertheless, the information was included in a letter from a prospective medical witness sent to the district court and was disclosed solely to officers of the court. The court may have sidestepped the question of absolute privilege based on judicial immunity²²⁶ because the information in the defendant's letter was subject to the physician-patient privilege,²²⁷ and therefore would not have been discoverable or even admissible in evidence. However, the court specifically held under the circumstances that the plaintiff had waived any physician-patient privilege.²²⁸

Unlike the publication element of a defamation claim, widespread publicity of private facts is generally required to impose liability for giving publicity to private facts.²²⁹ In *Fields v. Atchison, Topeka & Santa Fe Railway Co.*,²³⁰ Fields claimed that his employer had improperly publicized allegations that he had been having an affair with a coworker. Four agents of

220. *Id.* at 1252–53.

221. *Id.* at 1256.

222. *Id.*

223. *Id.*; see also *id.* at 1253.

224. See *id.* at 1256–57 (citations omitted).

225. *Id.* at 1257.

226. See RESTATEMENT (SECOND) OF TORTS § 588 (1977).

Testimony to be privileged need not be material or relevant to the issues before the court, nor does the fact that the testimony is offered voluntarily and not in response to a question prevent it from being privileged if it has some reference to the subject of the litigation. If the defamatory [or private] matter is published in response to a question put to the witness by either counsel or by the judge, that fact is sufficient to bring it within the protection of the privilege, notwithstanding the fact that it is subsequently adjudged to be inadmissible.

Id. at § 588 cmt. c.

227. See KAN. STAT. ANN. § 60-427(d) (2013).

228. *Werner*, 710 P.2d at 1255.

229. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a. *But see* Peterson v. Moldofsky, No. 07-2603-EFM, 2009 WL 3126229, at *1, 4 (D. Kan. Sept. 29, 2009) (relaxing widespread dissemination requirement when sexually-explicit photos of a plaintiff were sent by email to “a handful” of the plaintiff's family and friends).

230. 985 F. Supp. 1308 (D. Kan. 1997).

the employer received the private information on audiotape from an unknown third party, and in turn communicated it to two other persons.²³¹ The court rejected the claim, reasoning that the employer's agents had not publicized the allegations widely enough to support the "publicity" element.²³² Unlike defamation, a claim for giving publicity to private facts requires proof that the information was disseminated to so many individuals, or in such a manner, as to virtually ensure that the information will "become [a matter] of public knowledge."²³³ Here, the plaintiff failed to establish that the disclosure was sufficiently widespread.²³⁴

Since 1991, the only reported cases addressing privacy claims for giving publicity to private facts under Kansas law have been decided by federal district courts.²³⁵ Like *Fields*, several of those cases address the requirement that the publicity given to private facts must be widespread.²³⁶ With one exception, the recent cases raise no new legal issues.

But in 2009, an unpublished federal district court opinion addressed a novel claim.²³⁷ Peterson sued her former boyfriend after he sent an email message to a few of plaintiff's family members and friends.²³⁸ Attached to the email were digital copies of sexually explicit photos of plaintiff, which the defendant had previously taken with Peterson's consent.²³⁹ The court denied the parties' cross-motions for summary judgment with respect to Peterson's claim for publicity given to private facts.²⁴⁰ It was a genuine issue of fact whether the email attachments the defendant had sent to just a few of plaintiff's friends and family members were "substantially certain" to become

231. *Id.* at 1310.

232. *Id.* at 1312.

233. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. a).

234. *Id.*; see also *Robison v. Bd. of Cnty. Comm'rs of Rush Cnty.*, No. 93,993, 2007 WL 518829, at *7 (Kan. Ct. App. Feb. 16, 2007) (citing *Werner v. Kliewer*, 710 P.2d 1250, 1256 (Kan. 1985)) (stating that publicity means a communication to the public at large, or at least so many persons that the matter is substantially certain to become public knowledge, and that one or two persons is not sufficient); *Zhu v. St. Francis Health Ctr.*, No. 94,900, 2007 WL 316805, at *5 (Kan. Ct. App. Feb. 2, 2007) (unpublished) (holding that an allegation that a plaintiff's medical report was provided to an opposing party in car accident litigation was not enough to meet the publicity element).

235. See, e.g., *Harris v. Neff*, No. 88-1650, 1991 WL 42294, at *6-7 (D. Kan. Mar. 25, 1991) (dismissing a claim against a former employer for disclosing a plaintiff employee's termination and decision to undergo substance abuse treatment because the plaintiff consented and because the disclosure's content was not highly offensive to a reasonable person).

236. See *Doe v. Unified Sch. Dist.*, 255 F. Supp. 2d 1239, 1250 (D. Kan. 2003) (holding that a plaintiff mother's allegations did not amount to "publicity" as a matter of law because a defendant school board member disclosed the plaintiff's accusations of sex abuse against her daughter's school only to his wife); *Fields v. Atchison, Topeka & Santa Fe Ry. Co.*, 985 F. Supp. 1308, 1312 (D. Kan. 1997) (holding that an alleged disclosure of private facts was not so widespread as to support the "publicity" element); *Ali v. Douglas Cable Commc'ns*, 929 F. Supp. 1362, 1383 (D. Kan. 1996) (denying a claim because no private facts were "publicized," i.e., disclosed to the public at large or to so many persons that the disclosures were substantially certain to become public knowledge).

237. See generally *Peterson v. Moldofsky*, No. 2:07-cv-2603-EFM, 2009 WL 3126229 (D. Kan. Sept. 29, 2009).

238. *Id.* at *1. The plaintiff and her mother also sued the former boyfriend for intentional infliction of emotional distress. *Id.*

239. *Id.*

240. *Id.* at *6.

public knowledge sufficient to meet the “publicity” element of the claim.²⁴¹

Cognizant of the purpose behind recognizing the tort of publicity of private facts, the trend in sister jurisdictions, the prevalence of the Internet, and the relative ease in which information can be published over the Internet, the Court concludes that Kansas does not, as a matter of law, preclude a privacy claim simply because the defendant communicated the private fact to a small group of people. Courts must look to the context of the communication—e.g., its medium and content—before making its determination.²⁴²

The federal district court’s reasoning in *Peterson v. Moldofsky*²⁴³ suggests some willingness to relax the widespread publicity element, at least when the defendant uses email or other digital technology to publicize private, sexually explicit images.²⁴⁴

Defenses: As noted above, Kansas law generally recognizes consent as a defense to any cause of action for invasion of privacy.²⁴⁵ Kansas law does not require written or even express consent; the plaintiff’s consent may be either express or implied.²⁴⁶

Absolute and qualified privilege defenses generally apply to claims for publicity given to private facts to the same extent they apply to actions for defamation.²⁴⁷ In addition, the Kansas courts have recognized qualified privileges for employers who report the reasons for a former employee’s discharge to union officials consistent with a contract obligation,²⁴⁸ for insurance companies that disclose medical information to a nonprofit, private trade association about a prospective insured for underwriting purposes,²⁴⁹ and for health care providers who disclose information to court officials about the mental health of a parent in a child custody proceeding.²⁵⁰

However, the Kansas Supreme Court has taken a relatively conservative approach to the “public records privilege” recognized by several other

241. *Id.* at *5.

242. *Id.* at *5; accord RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

243. No. 07-2603-EFM, 2009 WL 3126229 (D. Kan. Sept. 29, 2009).

244. The case went to trial in November 2009, ending in a jury verdict and judgment for each of the plaintiffs, including punitive damages. Judgment in a Civil Case, *Peterson v. Moldofsky*, No. 2:07-cv-2603-EFM (D. Kan. Nov. 6, 2009), ECF No. 89.

245. “In an action for invasion of the right of privacy, it is a defense that the individual consented to the act. Consent may be shown from (*his*)/(*her*) conduct and the surrounding circumstances.” PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.62 (4th ed. 2012).

246. *Id.* at 127.62 (citing *Johnson v. Boeing Airplane Co.*, 262 P.2d 808 (Kan. 1953)) (“Consent may be shown from (*his*)/(*her*) conduct and the surrounding circumstances.”); see *supra* notes 81–82 and accompanying text. The facts in *Peterson* suggest that consent is not a complete defense. Although the plaintiff initially consented to be photographed by her former boyfriend, she certainly could not be assumed to have consented to the distribution of the sexually-explicit photos by email to her family and friends. See *Peterson*, 2009 WL 3126229, at *3. On the other hand, her consent to the photographs did defeat her claim for intrusion upon seclusion. See *id.* (finding no evidence of intrusion based on the manner in which the information was obtained).

247. *Munsell v. Ideal Food Stores*, 494 P.2d 1063, 1075 (Kan. 1972) (“the right of privacy does not prohibit the communication of any matter though of a private nature, when the publication is made under circumstances which would render it a privileged communication according to the law of libel and slander”).

248. *Id.* at 1073.

249. *Senogles v. Sec. Benefit Life Ins. Co.*, 536 P.2d 1358, 1364 (Kan. 1975).

250. *Werner v. Kliewer*, 710 P.2d 1250, 1256–57 (Kan. 1985).

jurisdictions,²⁵¹ at least when the information sought is not used for a public purpose consistent with the underlying policy of KORA.²⁵² In general, the court has held that only “unwarranted” publication of private facts is actionable, allowing considerable room for courts to recognize other defenses under the broad umbrellas of justification and privilege.²⁵³

Under a Kansas statute first enacted in 1995, employers have a qualified privilege to disclose matters pertaining to current or former employees, including an absolute privilege to disclose certain matters in writing in response to a written request from a prospective employer.²⁵⁴ The statutory privilege is consistent with the common law qualified privilege “with respect to business or employment communications made in good faith and between individuals with a corresponding interest or duty in the subject matter of the communication.”²⁵⁵

Like other privacy claims, publicity given to private facts is subject to the two-year catchall statute of limitations applicable to actions involving “injury to the rights of another, not arising on contract,” and not otherwise enumerated in the Kansas statutes of limitation.²⁵⁶

D. False Light Invasion of Privacy

The fourth variation of the right of privacy is closely aligned with defamation, but redresses different injuries.²⁵⁷ Under the *Restatement*,

[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.²⁵⁸

While defamation redresses injuries to reputation, false light claims provide a remedy for emotional and mental suffering.²⁵⁹ But there are other important distinctions between the two claims, and while they share some important elements, others are mutually exclusive.

First, a cause of action for defamation requires “false and defamatory words communicated to a third person which result in harm to the reputation of the person defamed.”²⁶⁰ Defamatory words tend to “expose another living

251. See ELDER, *supra* note 17, § 3:15 n.31.

252. Data Tree, LLC v. Meek, 109 P.3d 1226, 1238 (Kan. 2005).

253. See, e.g., Rawlins v. Hutchinson Publ'g Co., 543 P.2d 988, 992–93 (Kan. 1975) (quoting Munsell v. Ideal Food Stores, 494 P.2d 1063, 1065–66 Syl. ¶ 4 (Kan. 1972)) (“Only unwarranted invasions of the right of privacy are actionable.”).

254. See KAN. STAT. ANN. § 44-119a (2013).

255. Turner v. Halliburton Co., 722 P.2d 1106, 1112–13 (Kan. 1986).

256. KAN. STAT. ANN. § 60-513(a)(4); see Rinsley v. Brandt, 446 F. Supp. 850, 858 (D. Kan. 1977).

257. See *infra* note 259 and accompanying text.

258. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

259. Munsell v. Ideal Food Stores, 494 P.2d 1063, 1075 (Kan. 1972) (citations omitted).

260. Luttrell v. United Tel. Sys., Inc., 683 P.2d 1292, 1293 (Kan. Ct. App. 1984) (citations omitted); see

person to public hatred, contempt or ridicule” or “deprive another of the benefits of public confidence and social acceptance.”²⁶¹ While defamation and false light invasion of privacy both require a false statement to another, a false light claim does not require the false statement to be defamatory in nature.²⁶²

The two claims differ in other respects as well. Publication of a defamatory statement to just one other person is sufficient for defamation, but a false light claim requires more—widespread publicity.²⁶³ Defamation requires proof of injury to reputation or one’s social standing in the community, while false light requires only some evidence of emotional or mental injury.²⁶⁴ Proof of malice is not required to establish the essential elements of a defamation claim,²⁶⁵ but the elements of a false light claim require, at minimum, “constitutional malice”—defined as “knowledge of or [action] in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed.”²⁶⁶ Finally, defamation does not require proof that the false statement was objectively offensive; in contrast, a false light claim requires proof that a defendant’s statement cast a plaintiff in a false light that “would be highly offensive to a reasonable person.”²⁶⁷

The Kansas Supreme Court first acknowledged the possibility of a claim for false light invasion of privacy in 1972 in *Munsell*, but held that the trial court should have instructed the jury on the defense of qualified privilege.²⁶⁸

PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.51 (4th ed. 2012). Note that malice (constitutional or otherwise) is not an element of defamation unless the defendant asserts qualified privilege in defense. *See id.*

261. PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.51 (italics omitted); *see* *Gobin v. Globe Publ’g Co.*, 649 P.2d 1239, 1242–43 (Kan. 1982) (quoting WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 737, 739, 761 (4th ed. 1971)) (defining “defamatory statement”). A similar definition appeared in the recently repealed Kansas criminal defamation statute, which defined defamation as:

communicating to a person orally, in writing, or by any other means, information, knowing the information to be false and with actual malice, tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends.

KAN. STAT. ANN. § 21-4004(a) (2007) (repealed 2011).

262. *See* RESTATEMENT (SECOND) OF TORTS § 652E.

263. RESTATEMENT (SECOND) OF TORTS § 652E; *see* *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1043 (D. Kan. 1998) (“The difference between defamation and false light claims lies in the expanded publicity requirement [for false light claims].”).

264. *See Munsell*, 494 P.2d at 1075.

265. *Lindemuth v. Goodyear Tire & Rubber Co.*, 864 P.2d 744, 751 (Kan. Ct. App. 1993); *see* PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.51; *cf.* KAN. STAT. ANN. § 21-4004(a) (requiring proof of actual malice for criminal defamation). Kansas has abandoned the traditional distinction between defamation *per se* and defamation *per quod*. Traditionally, damages were conclusively presumed for defamation *per se*, which included statements charging a crime or otherwise unequivocally impugning a plaintiff’s integrity. *See* *Bennett v. Seimiller*, 267 P.2d 926, 929 (Kan. 1954) (“From such words malice is implied and damages are conclusively presumed to result.”). For defamation *per quod*, neither malice nor damages were presumed, and a plaintiff was required to plead and prove both to recover. *See* *Zoeller v. Am. Family Mut. Ins. Co.*, 834 P.2d 391, 393 (Kan. 1992) (citing *Gobin v. Globe Publ’g Co.*, 649 P.2d 1239 (Kan. 1982)).

266. RESTATEMENT (SECOND) OF TORTS § 652E; *see* PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.53 cmt (distinguishing “*New York Times v. Sullivan* malice” from “common-law malice”).

267. RESTATEMENT (SECOND) OF TORTS § 652E.

268. *Munsell v. Ideal Food Stores*, 494 P.2d 1063, 1073 (Kan. 1972).

The plaintiff in that case combined a claim for libel and slander with a claim for invasion of privacy, and following a jury trial and single verdict, the trial court entered judgment in his favor.²⁶⁹ The Supreme Court reversed, holding that defendant employer's communication to others that plaintiff had confessed to falsifying his time and trip reports as the basis for his termination was subject to qualified privilege. The employer had made the statement in good faith to union officials without actual malice and with grounds for believing that the communication was true, even though the communication had alleged the commission of a criminal offense.²⁷⁰ Therefore, the trial court committed reversible error by failing to instruct the jury on the qualified privilege defense.²⁷¹

Five years later, the Kansas Supreme Court squarely acknowledged the existence of a false light claim in *Rinsley v. Frydman*,²⁷² holding that the trial court erred in dismissing the plaintiff's complaint for "publicity placing person in false light" as defined in *Restatement (Second) of Torts*.²⁷³ Dr. Rinsley, a nationally-recognized psychiatrist, sued a university professor for making statements in published accreditation reports concerning Topeka State Hospital, where Rinsley was employed as a program director. The Supreme Court reversed and remanded for trial, holding that Rinsley's allegations sufficiently stated a claim for false light invasion of privacy.²⁷⁴

While a false light claim is distinct from a defamation claim because the two require different elements and redress different cognizable injuries, the Kansas courts have applied many of the same principles and defenses to both claims.²⁷⁵ For example, true statements and matters of opinion cannot support a defamation claim because neither can be proved false.²⁷⁶ The same rule applies to false light privacy claims.²⁷⁷ Similarly, qualified and absolute privileges recognized in defamation law also apply to false light claims.²⁷⁸

The U.S. Court of Appeals for the Tenth Circuit, applying Kansas law,

269. *Id.* at 1072.

270. *Id.* at 1073 (citing *Stice v. Beacon Newspaper Corp.*, 340 P.2d 396 (Kan. 1959), for its discussion of absolute and qualified privilege). The court's reference to alleging a criminal offense acknowledged the traditional distinction between defamation *per se* and defamation *per quod*. A communication falsely alleging commission of a criminal offense would have supported a claim for defamation *per se*, thus presuming damages without the need for proof. See *supra* note 265.

271. *Id.* By statute, employers now have a qualified privilege to disclose matters pertaining to current or former employees, including an absolute privilege to disclose certain matters in writing in response to a written request from a prospective employer. See KAN. STAT. ANN. § 44-119a (2013).

272. 559 P.2d 334 (Kan. 1977).

273. *Id.* at 339 (quoting with approval RESTATEMENT (SECOND) OF TORTS § 652E (Tentative Draft No. 13 (1967))).

274. *Id.*

275. See *Dominguez v. Davidson*, 974 P.2d 112, 121 (Kan. 1999); *Munsell*, 494 P.2d at 1075; see also *Rinsley v. Brandt*, 446 F. Supp. 850, 854 (D. Kan. 1977); cf. *Hartman v. Meredith Corp.*, 638 F. Supp. 1015, 1018 (D. Kan. 1986) ("[E]stablishing conditions of liability for invasion of the right of privacy requires harmonizing individual rights with community and social interest[s].").

276. See *Dominguez*, 974 P.2d at 121 (citing *Castleberry v. Boeing Co.*, 880 F. Supp. 1435, 1442 (D. Kan. 1995)).

277. *Id.*

278. See *id.*

addressed a false light invasion of privacy claim in *Rinsley v. Brandt*.²⁷⁹ Rinsley, a psychiatrist employed by Topeka State Hospital, sued a book author and publisher for portraying him in a false light. Analogizing the false light claim to defamation, the district court granted summary judgment for the author and publisher, holding that the challenged statements were either truthful or statements of opinion, thus providing a complete defense.²⁸⁰ Even if some of the published statements were false, the district court held in the alternative that the plaintiff, as a state-employed psychiatrist, was a public figure who could not prevail without showing that the defendants had acted with actual malice.²⁸¹

The Tenth Circuit affirmed on the first rationale, holding that a false statement of fact is a common element for both defamation and false light invasion of privacy.²⁸² Thus, to support a false light claim, the plaintiff must prove the defendant made a false statement of fact.²⁸³ But the falsity need not be a private one: “[t]he key to a false light privacy claim is the falsehood, not any element of secrecy.”²⁸⁴ As with defamation, a statement of mere opinion will not support either claim.²⁸⁵ Whether a statement asserts a fact or an opinion is a question of law,²⁸⁶ but whether a statement of fact is true or false is a question of fact for the jury.²⁸⁷

The alleged falsity of defendant’s statement must be considered in context.²⁸⁸ Once again borrowing from defamation law, the Tenth Circuit

279. 700 F.2d 1304 (10th Cir. 1983); see also *Rinsley*, 446 F. Supp. at 859 (denying a pretrial motion to dismiss a plaintiff’s false light claim). The plaintiff in this case was the same psychiatrist who filed the complaint in *Rinsley v. Frydman*, 559 P.2d 334 (Kan. 1977). See *supra* notes 272–274 and accompanying text.

280. *Rinsley*, 700 F.2d at 1305; see *supra* note 277 and accompanying text.

281. *Rinsley*, 700 F.2d at 1305. The Tenth Circuit did not reach this alternative holding on appeal. *Id.* at 1310. For a discussion of malice as defined by Kansas privacy law, see *infra* notes 331–334 and accompanying text.

282. *Rinsley*, 700 F.2d at 1307 (citing RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977)). “[T]he courts have consistently treated false light privacy in essentially the same way that they have treated defamation. The Kansas Supreme Court has expressly noted the applicability of defamation principles to the field of privacy.” *Rinsley*, 446 F. Supp. at 854 (internal citations omitted).

283. See *Hartman v. Meredith Corp.*, 638 F. Supp. 1015, 1018 (D. Kan. 1986) (reasoning that a broadcast showing bail bondsmen with their clients in open court was not a false portrayal); see also *Rawlins v. Hutchinson Publ’g Co.*, 543 P.2d 988, 993 (Kan. 1975) (holding that a truthful account of charges of a public official’s misconduct cannot support a false light claim).

284. *Rinsley*, 446 F. Supp. at 854. Therefore, a public figure or public official does not waive a false light claim by virtue of reaching some degree of public prominence. *Id.*

285. *Rinsley*, 700 F.2d at 1307 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974)).

286. *Id.* at 1309.

287. *Id.* at 1307 (citing RESTATEMENT (SECOND) OF TORTS § 617 (discussing defamation)). Although one of the defendants’ statements in *Rinsley* was technically false, the court held that any deviation from the truth was too minor to be actionable. *Id.* at 1308; see *Hein v. Lacy*, 616 P.2d 277, 284 (Kan. 1980) (imposing no liability if published statements are substantially true). “Slight inaccuracies of expression are immaterial provided the defamatory charge is true in substance.” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 581A cmt. f).

288. A court should examine all surrounding circumstances in determining whether a statement is one of opinion or fact. See *Tomson v. Stephan*, 699 F. Supp. 860, 862 (D. Kan. 1988) (citing *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir. 1986)). Factors to be considered include “1) the precision or specificity of the statement in question, 2) the verifiability of the statement, 3) the literary context in which the statement is made, and 4) the public context in which the statement is made.” *Id.* at 862–63 (citing

held that “a court should not consider words or elements in isolation, but should view them in the context of the whole [publication] to determine if they constitute an invasion of privacy.”²⁸⁹ Nevertheless, “[t]he proscription against reading statements out of context does not relieve a plaintiff from identifying particular statements or passages that are false and invade his privacy.”²⁹⁰ Thus, the plaintiff still has the burden at the pleading stage to identify specific statements made by the defendant that are false.

As required for a claim for giving publicity to private facts,²⁹¹ the alleged false statement must be given widespread publicity.²⁹² While defamation and false light both have in common the false statement element, the “publicity” required to support a false light claim is distinct from the “publication” required for defamation²⁹³:

[P]ublication is a word of art, which includes any communication . . . to a third person. “Publicity,” on the other hand, means . . . communicating [a matter] to the public at large, or to so many persons that [it] must be regarded as substantially certain to become one of public knowledge.²⁹⁴

For example, communicating a matter to no more than six or seven individuals is insufficient as a matter of law to sustain a false light claim.²⁹⁵

By their nature, published written statements and mass media broadcasts are more likely to meet the widespread publicity element²⁹⁶:

[A]ny publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the

Janklow, 788 F.2d at 1302)).

289. *Rinsley*, 700 F.2d at 1310 (citations omitted).

290. *Id.*

291. *See supra* notes 229–234 and accompanying text. The publicity element is common to privacy claims for publicity given to private facts and publicity portraying a plaintiff in a false light. *Ali v. Douglas Cable Commc'ns*, 929 F. Supp. 1362, 1383 (D. Kan. 1996) (citing RESTATEMENT (SECOND) OF TORTS §§ 652D, 652E); *see* *Fields v. Atchison, Topeka & Santa Fe Ry. Co.*, 985 F. Supp. 1308, 1311 (D. Kan. 1997) (holding that communication to two persons is not sufficient for “widespread disclosure as required by sections 652D and 652E”).

292. *Ali*, 929 F. Supp. at 1383 (“widespread disclosure of private matters . . . constitute[s] publicizing”).

293. *Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1043 (D. Kan. 1998). “To support a claim for defamation, communication of the allegedly false information to a single third person is sufficient publication.” *Id.* (citing *Ali*, 929 F. Supp. at 1383).

294. *Le v. Hy-Vee, Inc.*, 385 F. Supp. 2d 1111, 1118 (D. Kan. 2005) (citations omitted) (quoting *Ali*, 929 F. Supp. at 1383), *aff'd* 180 Fed. App'x. 34 (10th Cir. 2006); *see also Dominguez v. Davidson*, 974 P.2d 112, 121 (Kan. 1999) (quoting with approval *Ali*, 929 F. Supp. at 1383). In *Le*, the plaintiffs alleged that a defendant’s employees falsely accused them of theft on three separate occasions, during which no more than four or five other customers were present. *Le*, 385 F. Supp. 2d at 1118. The court held that this evidence was insufficient to qualify as widespread publicity and therefore could not support a false light claim. *Id.*

295. *Id.*; *Green v. City of Wichita*, 47 F. Supp. 2d 1273, 1279 (D. Kan. 1999) (holding that “only a handful” of persons who might have received the allegedly false information was insufficient to support a false light invasion of privacy claim); *Frye*, 15 F. Supp. 2d at 1043 (holding that communications in an unemployment compensation hearing to a plaintiff, his counsel, the hearing officer, and his employer’s management officials were not “widely publicized,” nor were communications to three prospective employers sufficient publicity); *see also Hunter v. Buckle, Inc.*, 488 F. Supp. 2d 1157, 1180 (D. Kan. 2007) (concluding that handcuffing plaintiffs and escorting them one-hundred yards outside of a retail store in view of more than twenty observers, without more, was not widespread publicity); *Watson v. City of Kan. City*, 185 F. Supp. 2d 1191, 1209–10 (D. Kan. 2001) (holding that complaint adequately alleged that the defendants’ uniformed officers publicized false accusations to a crowd of bystanders and passersby while seeking to execute a search warrant allegedly obtained with a false affidavit).

296. *Cf. Peterson v. Moldofsky*, No. 07-2603-EFM, 2009 WL 3126229, at *5 (D. Kan. Sept. 29, 2009).

radio, or statement made in an address to a large audience, is sufficient to give publicity [within the meaning of the term].²⁹⁷

The *Restatement* recognizes the risk of widespread publicity when a false statement is broadcast via mass media or publicized in print.²⁹⁸ As one example, a federal district court, applying Kansas law, held that publication of false statements in the annual report of a publicly traded company was sufficient to allow a reasonable person to conclude that the allegations were “publicized.”²⁹⁹

The Kansas Supreme Court directly addressed the publicity requirement for a false light claim in the employment context in *Dominguez v. Davidson*.³⁰⁰ Dominguez sued his former supervisor and others on several grounds after he was terminated for playing baseball while on medical leave for a work-related back injury.³⁰¹ Among other claims, he alleged false light invasion of privacy. The court affirmed summary judgment for the defendants, in part because “plaintiff did not present any evidence to show such widespread disclosure of private matters as to constitute publicizing. [T]he alleged offensive statements had not become common knowledge in the business community or in any other public arena.”³⁰²

In addition to the other elements, the false representation concerning the plaintiff must be highly offensive to a reasonable person.³⁰³ The *Restatement* defines a statement as highly offensive if it makes a “‘major misrepresentation’ of a plaintiff’s ‘character, history, activities or beliefs’ so that ‘serious offense may reasonably be expected to be taken by a reasonable man in his position.’”³⁰⁴ Whether a false statement is highly offensive to a reasonable person is a question for the jury, unless the evidence is so one-sided that the court may decide the issue as a matter of law.³⁰⁵

297. *Le*, 385 F. Supp. 2d at 1118 (quoting *Ali*, 929 F. Supp. at 1383); see also RESTATEMENT (SECOND) OF TORTS § 652D cmt. A (1977) (defining “publicity” for purposes of a claim for publicity given to private facts). Note that the publicity element is common to both giving publicity to private facts and false light invasion of privacy. *Ali*, 929 F. Supp. at 1383 (citing RESTATEMENT (SECOND) OF TORTS §§ 652D, 652E); see *Fields v. Atchison, Topeka & Santa Fe Ry. Co.*, 985 F. Supp. 1308, 1312 (D. Kan. 1997) (stating that a communication to two persons is not sufficient for “widespread disclosure as required by sections 652D and 652E”).

298. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.

299. *Carson v. Lynch Multimedia Corp.*, 123 F. Supp. 2d 1254, 1263 (D. Kan. 2000) (citing *Ali*, 929 F. Supp. at 1382).

300. 974 P.2d 112 (Kan. 1999).

301. *Id.* at 115.

302. *Id.* at 121. As an alternative ground, though the plaintiff conceded that the qualified privilege defense applied, he failed to prove that the defendants acted with malice. *Id.*

303. *Dow v. Terramara, Inc.*, No. 90-1412-PFK, 1992 WL 403093, at *8 (D. Kan. Dec. 4, 1992) (granting partial summary judgment for a counterclaimant’s failure to allege the “necessary element [of a false light claim] that the statements were highly offensive to a reasonable person”).

304. *Carson*, 123 F. Supp. 2d at 1265 (quoting RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (1977)) (alleging false statements about a plaintiff in a defendant’s annual report). “On the other hand, . . . ‘minor errors, such as a wrong address for his home, or a mistake in the date when he entered his employment or similar unimportant details of his career, would not in the absence of special circumstances give any serious offense to a reasonable man.’” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652E cmt. c).

305. See *id.*

Kansas law is not entirely clear whether “malice” in some degree is always a necessary element of a false light claim,³⁰⁶ or only when the court determines that the defendant is entitled to assert qualified privilege in defense.³⁰⁷ The confusion results from the distinction between “actual malice,” as defined in *New York Times Co. v. Sullivan*³⁰⁸ to accommodate First Amendment concerns, and “common law malice,” as defined in Kansas defamation law.³⁰⁹ Under *New York Times*, a false statement of fact is made with “actual malice” when the evidence demonstrates that it was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”³¹⁰ According to the *Restatement* definition of false light publicity, “actual malice” is a necessary element of any false light claim.³¹¹ Yet no Kansas case has ever held that “common law malice” is an essential element of a false light invasion of privacy claim.³¹² Moreover, the Kansas courts have repeatedly cited and quoted the *Restatement* definitions as the basis for common law invasion of privacy claims in Kansas.³¹³ The latest revision of

306. See *Pfannenstiel v. Osborne Publ'g Co.*, 939 F. Supp. 1497, 1503 (D. Kan. 1996) (“The Kansas courts have not expressly considered whether actual malice is always an element in a false light claim.”); see also RESTATEMENT (SECOND) OF TORTS § 652E.

The Institute takes no position on whether there are any circumstances under which recovery can be obtained under this Section if the actor did not know of or act with reckless disregard as to the falsity of the matter publicized and the false light in which the other would be placed but was negligent in regard to these matters.

RESTATEMENT (SECOND) OF TORTS § 652E.

In *Tomson v. Stephan*, the federal district court observed that one element of the claim under section 652E is that “the defendant had knowledge of the falsity of his statement or reckless disregard for whether the statement was true.” *Tomson v. Stephan*, 699 F. Supp. 860, 866 (D. Kan. 1988). Note that the “actual malice” element as defined in the *Restatement* differs substantially from the Kansas definition of common law “malice” drawn from the law of defamation: “actual evil-mindedness or specific intent to injure.” *Munsell v. Ideal Food Stores*, 494 P.2d 1063, 1073 (Kan. 1972); see *infra* notes 373–374 and accompanying text.

307. Whether a communication is privileged is a question of law. See *Castleberry v. Boeing Co.*, 880 F. Supp. 1435, 1443 (D. Kan. 1995) (citing *Turner v. Halliburton Co.*, 722 P.2d 1106, 1113 (Kan. 1986)).

308. 376 U.S. 254 (1964). “Actual malice,” also known as “constitutional malice,” is so named to distinguish it from “presumed malice.” At common law, a plaintiff who sued for defamation *per se* was not required to prove actual malice because the derogatory nature of the false statement itself was deemed to be presumptively malicious. See *supra* notes 265–266 and accompanying text. Further, damages were conclusively presumed to result from statements that were *per se* defamatory. Only plaintiffs who sued for defamation *per quod* were required to prove “actual malice” and damages. See *Gobin v. Globe Publ'g Co.*, 649 P.2d 1239, 1242 (Kan. 1982). But in 1982, following *Gertz*, the Kansas Supreme Court abolished these distinctions and held that reputational damages are no longer presumed in any defamation claim; a plaintiff must prove injury to reputation in order to recover damages. *Gobin*, 649 P.2d at 1243 (“[I]n this state, damage to one’s reputation is the essence and gravamen of an action for defamation. Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander, under our law.”). Now that the traditional distinctions have been abolished in Kansas, the term “actual malice” is easily confused with other definitions of malice adopted for entirely different reasons than the First Amendment considerations in *New York Times*. See *infra* notes 368–373 and accompanying text.

309. The common law definition of malice in Kansas defamation law is “actual evil-mindedness or specific intent to injure.” *Munsell*, 494 P.2d at 1073.

310. *New York Times*, 376 U.S. at 279–80.

311. See RESTATEMENT (SECOND) OF TORTS § 652E & cmt. d.

312. However, proof of both actual malice and common law malice is required to overcome a qualified privilege defense to false light invasion of privacy. See *infra* notes 373–375 and accompanying text.

313. E.g., *Werner v. Kliever*, 710 P.2d 1250 (Kan. 1985). The court in *Werner* considered an argument that a privacy claim may exist outside the scope of *Restatement (Second) of Torts* section 652. See *id.* at 1257. In that case, the plaintiff argued that breach of physician-patient privilege would support a claim. *Id.*

the *Pattern Instructions in Kansas* also refers to the *Restatement* provisions in enumerating each of the four variations of invasion of privacy.³¹⁴ Therefore, it appears settled in Kansas that “actual malice” as defined by *New York Times* is a necessary element of a false light claim.

At least for communications with respect to public figures such as law enforcement officers, claims for false light invasion of privacy are subject to a qualified privilege defense.³¹⁵ Whether a plaintiff is a public or private figure is a question of law for the court.³¹⁶ Because the qualified privilege defense applies, a public figure³¹⁷ who seeks recovery for false light publicity must prove that the defendant acted with common law malice, defined in Kansas as “actual evil-mindedness or specific intent to injure.”³¹⁸ Whether malice is presumed is a question of law, but whether malice is established by the evidence is generally a jury question.³¹⁹ However, if extrinsic evidence of actual malice is lacking, and if the content of the communication and the circumstances of its publication are just as consistent with a negative finding of malice as with its existence, the defendant is entitled to a directed verdict.³²⁰ Thus, the burden of proof is on the public figure plaintiff to show common law malice by at least a preponderance of the evidence to overcome a defendant’s qualified privilege.

A more difficult question is whether actual malice is a required element even when the plaintiff is not a public figure but the communication pertains to a matter of public concern. In *Pfannenstiel v. Osborne Publishing Co.*,³²¹ the plaintiff sued a newspaper for false light invasion of privacy after it erroneously reported that plaintiff had been arrested for stealing a vehicle and other property from his employer.³²² In fact, the local chief of police had advised the defendant’s reporter that plaintiff’s vehicle had been stolen, and that the accused perpetrator had been arrested outside of the state with the stolen property.³²³ Observing that Kansas courts had not addressed whether

Although the court did not rule out the possibility, it held that the facts in *Werner* did not merit “the adoption of a cause of action for invasion of privacy separate and distinct from those contained in § 652 of the *Restatement*.” *Id.*

314. See *PATTERN INSTRUCTIONS IN KANSAS—CIVIL* § 127.61 (4th ed. 2012).

315. *Busey v. Bd. of Cnty. Comm’rs*, No. 93,358, 2005 WL 1805418, at *5 (Kan. App. July 29, 2005) (unpublished) (citing *Rawlins v. Hutchinson Publ’g Co.*, 543 P.2d 988, 993 (Kan. 1975)).

316. *Tomson v. Stephan*, 699 F. Supp. 860, 867 (D. Kan. 1988) (citations omitted).

317. Like other issues pertaining to false light claims, determining whether a plaintiff qualifies as a public figure is not clearcut. As observed in *Tomson*, “[d]efining public figures is much like trying to nail a jellyfish to the wall.” *Id.* (quoting *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976)).

318. *Busey*, 2005 WL 1805418, at *5 (quoting *Turner v. Halliburton Co.*, 722 P.2d 1106, 1113 (Kan. 1986) (internal quotation omitted)). The federal district court, applying Kansas law, appropriately rejected the “converse proposition that a candidate for public office and/or a public official may disparage a *private* individual in the press without consequence.” *Tomson*, 699 F. Supp. at 863 (emphasis added).

319. *Busey*, 2005 WL 1805418, at *6 (citing *Turner*, P.2d at 1113).

320. *Dominguez v. Davidson*, 974 P.2d 112, 117 (1999).

321. 939 F. Supp. 1497 (D. Kan. 1996).

322. *Id.* at 1499.

323. *Id.*

actual malice is always a required element of a false light claim, the federal district court concluded that, at least when the false communication deals with a matter of public concern, even a *private* individual must prove actual malice.³²⁴

Kansas law does not require the plaintiff to specifically plead mental suffering or emotional distress to support a claim for false light publicity. General damages are thus presumed.³²⁵

Defenses: Both truth and privilege are defenses to claims for defamation and false light invasion of privacy.³²⁶ A defendant is entitled to a qualified privilege, at least with respect to false light claims filed by public figures and perhaps those involving communications about matters of public concern.³²⁷ It is unclear whether the newsworthiness privilege is always a defense to a false light claim.³²⁸ Arguably, “newsworthiness” applies to both public figures and matters of public concern.

When a qualified privilege applies,³²⁹ Kansas law significantly raises the burden for plaintiffs alleging false light invasion of privacy by requiring proof of not only “actual malice” as defined in the *Restatement*³³⁰ and *New York Times*, but also common law malice.³³¹ To overcome a qualified privilege defense, it is not enough in Kansas for a plaintiff claiming false light invasion of privacy to prove that the defendant knowingly made the false statement, or that the defendant made the statement with reckless disregard as to its truth or falsity, consistent with the definition of “actual malice” in *New York Times*³³²

324. *Id.* at 1503. In part, the court anticipated that Kansas would join the majority of states that had considered the issue reserved in the *Restatement (Second) of Torts* section 652E by requiring a plaintiff to prove actual malice when alleging a false statement of fact pertaining to a matter of public concern. *Id.* at 1504. But it is unclear whether *Pfannenstiel* was applying the *Restatement* definition referring to actual malice, or whether it was invoking a qualified privilege defense on behalf of the newspaper. Curiously, the court did not hold that the defendant was entitled to a “newsworthiness privilege,” although the subject—theft of an automobile—was surely a matter of public concern. *See supra* notes 87, 199–201 (describing newsworthiness privilege as a defense to the appropriation of name or likeness and publicity given to private facts).

325. *Carson v. Lynch Multimedia Corp.*, 123 F. Supp. 2d 1254, 1263–64 (D. Kan. 2000).

326. *Castleberry v. Boeing Co.*, 880 F. Supp. 1435, 1442 (D. Kan. 1995) (citing *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983); *Froelich v. Adair*, 516 P.2d 993, 996 (Kan. 1973)). More accurately, truth is not a defense but rather negates the false statement element of the claim.

327. *See supra* notes 315–324 and accompanying text.

328. *See supra* note 324 and accompanying text.

329. The notion of “qualified privilege” in defamation actions recognizes that the circumstances surrounding some kinds of publications are sufficient to negate a presumption of malice as a matter of law, thus shifting the burden of proof to the plaintiff to affirmatively plead and prove the defendant acted with malice in addition to the falsity of the publication itself. *Stice v. Beacon Newspaper Corp.*, 340 P.2d 396, 399 (Kan. 1959) (citing *Richardson v. Gunby*, 127 P. 533 (Kan. 1912); *Kirkpatrick v. Eagle Lodge*, No. 32, 26 Kan. 384 (1881)).

330. *See* RESTATEMENT (SECOND) OF TORTS § 652E cmt. d (1977) (defining the “actual malice” requirement for the purposes of overcoming a qualified privilege defense to a false light publicity claim as “clear and convincing evidence that the defendant had knowledge of the falsity of the statement or acted in reckless disregard of its truth or falsity”).

331. *Dominguez v. Davidson*, 974 P.2d 112, 117 (Kan. 1999).

332. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (citing with approval *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908)); *see* RESTATEMENT (SECOND) OF TORTS § 652E cmt. d.

and echoed in the *Restatement*. Nor is it enough to show actual malice.³³³ The plaintiff must also prove “common law malice,” defined in Kansas defamation law as “actual evil-mindedness or specific intent to injure.”³³⁴

Under a Kansas statute first enacted in 1995, employers now have a qualified privilege as a matter of statute to disclose matters pertaining to current or former employees, including an absolute privilege to disclose certain matters in writing in response to a written request from a prospective employer.³³⁵ The statutory privilege for oral disclosures³³⁶ is consistent with the common law qualified privilege “with respect to business or employment communications made in good faith and between individuals with a corresponding interest or duty in the subject matter of the communication.”³³⁷ But the statutory privilege entirely insulates an employer from liability for disclosing information in writing about a former employee in response to a written request from a prospective employer.³³⁸

The “dual standard” required to overcome a qualified immunity defense to a false light invasion of privacy claim requires the plaintiff to prove common law malice by a preponderance of the evidence. In most instances, when a defendant acts with evil-mindedness or unjustified intent to do harm by publicizing a false statement concerning a plaintiff, the defendant at the very least will have acted knowingly or with reckless disregard as to the falsity of the statement.³³⁹ In theory, however, a defendant could act with evil-mindedness or unjustified intent to do harm (common law malice) by portraying another to the public in a negative light, but without knowing or believing that the portrayal is false or acting with reckless disregard as to its truth or falsity (constitutional malice).³⁴⁰ In any event, a plaintiff must

333. RESTATEMENT (SECOND) OF TORTS § 652E cmt. d; *see supra* note 331.

334. *Turner v. Halliburton Co.*, 722 P.2d 1106, 1113 (Kan. 1986) (quoting with approval *Munsell v. Ideal Food Stores*, 494 P.2d 1063, 1074 (Kan. 1972)), *see also Dominguez*, 974 P.2d at 117; PATTERN INSTRUCTIONS IN KANSAS—CIVIL § 127.53 (4th ed. 2012) (“The effect of *Turner* is to require proof of what is usually called common-law malice as well as *New York Times v. Sullivan* malice [to overcome qualified privilege].”).

335. *See* KAN. STAT. ANN. § 44-119a(b), (c) (2013); *see supra* note 271.

336. *See* KAN. STAT. ANN. § 44-119a(a).

337. *See, e.g., Turner*, 722 P.2d at 1112–13. In some instances courts have treated this point as negating the publicity element, but the policy considerations are more consistent with invoking qualified privilege as a matter of law. To illustrate, federal courts have held that disclosing information to large groups of persons who have a legitimate responsibility and “need to know” the information is not sufficient to meet the “publicity” requirement. *Ali v. Douglas Cable Commc’ns*, 929 F. Supp. 1362, 1383 (D. Kan. 1996); *see also Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1043 (D. Kan. 1998). In *Ali*, two former employees sued their former employer, challenging the monitoring, recording, and disclosure of telephone conversations the plaintiffs had while at work. *Ali*, 929 F. Supp. at 1371, 1383. In other cases, federal courts have reasoned that communicating information about the reasons for terminating an employee to another with a legitimate interest in the information, if made in good faith in a manner that does not exceed the scope of the third party’s interest, is entitled to qualified privilege. *E.g., Castleberry v. Boeing Co.*, 880 F. Supp. 1435, 1444 (D. Kan. 1995).

338. *See* KAN. STAT. ANN. § 44-119a (b), (c).

339. *But cf. Turner*, 722 P.2d at 1118 (Herd, J., dissenting) (“I think publication of a false defamation statement knowing it to be false or publication of such statement with reckless disregard for the truth is actual evil-mindedness and evidence of a specific intent to injure the victim.”).

340. “Actual malice refers to a constitutional standard that is something other than malice in its usual

establish both common law malice *and* constitutional malice to overcome a qualified immunity defense. As the United States Supreme Court has made clear, constitutional malice (“actual malice”) cannot be inferred from evidence of common law malice alone.³⁴¹

Although a false light publicity claim is similar in nature to a defamation claim, the federal courts, applying Kansas law, have rejected the argument that the one-year statute of limitations for slander and libel claims³⁴² should also apply to false light claims.³⁴³ Kansas recognizes false light invasion of privacy as a separate and distinct tort from defamation, and no specific statute of limitations has been enacted for invasion of privacy claims. Therefore, unless the Kansas appellate courts hold otherwise,³⁴⁴ the two-year catchall limitation period applies to false light claims to the same extent it applies to the other three forms of invasion of privacy.³⁴⁵

V. AVAILABLE REMEDIES

Whether to litigate a claim for invasion of privacy ultimately depends on the remedies available to the aggrieved plaintiff. Under the *Restatement*, both compensatory and punitive damages may be recovered, as well as equitable remedies.³⁴⁶ Because plaintiffs have prevailed in so few published Kansas state court cases, it is difficult to predict whether a successful plaintiff would recover a substantial award of damages in Kansas. But one recent case litigated in federal district court, involving particularly egregious facts, resulted in a jury verdict awarding both actual and punitive damages for giving publicity to private facts concerning the plaintiff.³⁴⁷

A. Damages

The focus of a common law privacy action is to secure compensation for

sense of ill will. It is a term of art meaning knowledge of falsity or reckless disregard of truth or falsity.” PATTERN INSTRUCTIONS IN KANSAS—CIVIL § 127.50 (4th ed. 2012).

341. See *Harte-Hanks Commc’n, Inc. v. Connaughton*, 491 U.S. 657, 667 n.7 (1989) (noting the confusion caused by the phrase “actual malice” because it has nothing to do with bad motive or ill will).

342. KAN. STAT. ANN. § 60-514(a).

343. *Rinsley v. Brandt*, 446 F. Supp. 850, 858 (D. Kan. 1977). Although the holding in *Rinsley* regarding the applicable statute of limitations has not been cited with approval by any Kansas appellate court, several federal courts have followed its reasoning. See *Newcomb v. Ingle*, 827 F.2d 675, 678 (10th Cir. 1987) (hearing a federal claim alleging the interception of telephone call in violation of 18 U.S.C. § 2520 (2012)); *Jones v. H.C.A. Health Servs. of Kan., Inc.*, No. CIV.A. 94-1412-JTM, 1998 WL 159505, at *17 (D. Kan. Mar. 9, 1998); *Masters v. Daniel Int’l Corp.*, No. 87-1290-C, 1992 WL 190722, at *4 (D. Kan. July 28, 1992); *Hoover v. Stauffer Commc’ns, Inc.*, No. 88-2073, 1989 WL 84511, at *3 (D. Kan. July 24, 1989); see also RESTATEMENT (SECOND) OF TORTS § 652E cmt. e, ¶¶ 2–3 (1977).

344. See *Sports Unlimited, Inc. v. Lankford Enters., Inc.*, 275 F.3d 996, 1002 (10th Cir. 2002) (applying a one-year statute of limitations to a claim alleging tortious interference with prospective business relations based on facts that would support defamation, absent evidence that the Kansas Supreme Court would hold otherwise).

345. *Id.*

346. RESTATEMENT (SECOND) OF TORTS § 652H.

347. *Peterson v. Moldofsky*, No. 07-2603-EFM, 2009 WL 3126229, at *1 (D. Kan. Sept. 29, 2009); see *supra* notes 237–243 and accompanying text.

“direct wrongs of a personal character”³⁴⁸ that result in injured feelings or mental suffering.³⁴⁹ In order to recover compensatory damages for invasion of privacy, the plaintiff must produce some evidence of mental anguish, emotional harm, or anxiety as a result of the defendant’s conduct.³⁵⁰ However, the plaintiff is not required to show general damages in specific amounts and need not prove special damages before the claim is submitted to the jury.³⁵¹ It is not necessary for expert witnesses to testify concerning the plaintiff’s mental suffering, nor is it necessary to introduce evidence to show the pecuniary value of the plaintiff’s mental distress.³⁵² The amount of damages to be awarded the plaintiff for mental distress as a result of the invasion is a question for the jury.³⁵³

As the Kansas Supreme Court has noted, the elements of damages that may be awarded for invasion of privacy are set forth in the *Restatement* as follows:

One who has established a cause of action for unreasonable invasion of his privacy is entitled to recover damages for (a) The harm to his interest in privacy resulting from the invasion; (b) His mental distress proved to have been suffered if it is of a kind which normally results from such an invasion; and (c) Special damage of which the invasion is a legal cause.³⁵⁴

The first Kansas Supreme Court case to acknowledge a common law right of privacy, *Kunz*,³⁵⁵ addressed whether the plaintiff was required to allege and prove special damages.³⁵⁶ The defendant demurred to the plaintiff’s evidence, arguing that she failed to prove any actual damages, and the trial court agreed. The Supreme Court reversed, holding that the evidence established an invasion of privacy when the defendant dry goods store used her image in an advertising film without her consent, and Stella Kunz had produced sufficient evidence to warrant submitting her claim to the jury without proof of special damages.³⁵⁷ Thus, once the essential elements of the

348. *Monroe v. Darr*, 559 P.2d 322, 327 (Kan. 1977).

349. *Munsell v. Ideal Food Stores*, 494 P.2d 1063, 1075 (Kan. 1972).

350. In the absence of proof of general damages, a plaintiff who prevails in establishing the elements of invasion of privacy may recover only nominal damages. *Manville v. Borg-Warner Corp.*, 418 F.2d 434, 437 (10th Cir. 1969).

351. *Monroe*, 559 P.2d at 327 (citing with approval the “correct statement of the Kansas law” in *Manville*).

352. *Id.*

353. *Id.*

354. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 652H (Tentative draft No. 21) (1975)).

355. *Kunz v. Allen*, 172 P. 532, 532 (Kan. 1918). See *supra* notes 49–62 and accompanying text.

356. The definition of “special damages” is somewhat elusive in the Kansas privacy cases and is no longer part of common legal parlance. More familiar synonyms include pecuniary or economic damages, which can be quantified and specifically proved with evidence. See *Kerns ex rel. Kerns v. G.A.C., Inc.*, 875 P.2d 949, 959 (Kan. 1994) (citing *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541, 542 Syl. ¶ 6 (Kan. 1990)) (distinguishing economic from noneconomic damages). “Special damages” are those “alleged to have been sustained in the circumstances of a particular wrong,” and must be specifically claimed and proved. BLACK’S LAW DICTIONARY 396 (7th ed. 1999). In contrast, “general damages” are presumed to follow from the particular cause of action and need not be specifically alleged or proved in order to recover. *Id.* at 394–95.

357. *Kunz*, 172 P. at 532; PATTERN INSTRUCTIONS IN KANSAS—CIVIL § 127.63 (4th ed. 2012). But see *Johnson v. Boeing Airplane Co.*, 262 P.2d 808, 814 (Kan. 1953) (holding in the alternative that a plaintiff’s

invasion of privacy claim are established, general damages are presumed without any proof of quantifiable specific loss.³⁵⁸ Special damages may be recovered as well if demanded and proved, but a plaintiff need not do so to sustain the essential elements of a claim.³⁵⁹

In addition to general and special damages, punitive (or exemplary) damages are available, but only if the plaintiff first establishes actual damages and the right to recover them.³⁶⁰ In 1987, the Kansas Legislature codified the threshold showing a plaintiff must satisfy to qualify for an award of punitive damages.³⁶¹ Prior to the statutory enactment, a prevailing plaintiff in a privacy action was required to establish that the defendant had acted with “malice” in order to support a jury award of punitive damages.³⁶² Just how the meaning of “punitive damages malice” compared with “common law malice” and “actual malice” was difficult to discern.³⁶³

Under the statute, the general threshold for punitive damages is considerably relaxed as compared to the Kansas common law standard: A plaintiff may recover punitive damages upon clear and convincing evidence that a defendant acted willfully, wantonly, or fraudulently.³⁶⁴ Malice, while

evidence negated any emotional injury due to the defendant’s advertisement).

358. *Kunz*, 172 P. at 533 (citing *Munden v. Harris*, 134 S.W. 1076 (Mo. Ct. App. 1911)).

359. *Id.* (citing *Munden*, 134 S.W. 1076).

360. *Lindquist v. Ayerst Labs., Inc.*, 607 P.2d 1339, 1347 (Kan. 1980) (“A verdict of actual damages is essential to a recovery of punitive damages.”); *see also Dold v. Sherow*, 552 P.2d 945, 949–50 (Kan. 1976) (“[F]ailure to recover actual damages precludes the recovery of punitive damages.”) (citations omitted); *Dotson v. McLaughlin*, 531 P.2d 1, 9 (Kan. 1975) (citing *Reeder v. Guaranteed Foods, Inc.*, 399 P.2d 822 (Kan. 1965)); *Shore v. Shore*, 205 P. 1027, 1028 (Kan. 1922). It is not clear how this rule applies when general damages for emotional injury are presumed, as in invasion of privacy actions. In 1978, for example, the Eighth Circuit applying Kansas law held that a trial court did not commit plain error by instructing the jury that it could award punitive damages without also awarding actual damages, on the theory that for defamation *per se*, actual damages were presumed. *Mid-America Food Serv., Inc. v. ARA Servs., Inc.*, 578 F.2d 691, 696–97 (8th Cir. 1978). By analogy, the same principle would apply to an invasion of privacy claim to the extent that actual or general damages are presumed.

361. KAN. STAT. ANN. § 60-3701 (2013).

362. *Rinsley v. Brandt*, 446 F. Supp. 850, 859 (D. Kan. 1977) (citing *Monroe* in rejecting a defendant’s argument that punitive damages should not be recoverable for false light invasion of privacy); *see also Monroe v. Darr*, 559 P.2d 322, 326 (Kan. 1977) (“A plaintiff seeking to recover punitive damages has the burden of proving malice on the part of the defendant.”). *But see Froelich v. Adair*, 516 P.2d 993, 997 (Kan. 1973) (stating that “[m]alice may become material on the issue of damages,” but it is not an element of an intrusion upon seclusion claim).

363. *See Mid-America Food*, 578 F.2d at 701 (applying Kansas law) (equating “punitive damage malice” with the less stringent *New York Times* fault standard).

Our review of Kansas law convinces us, however, that there is no functional distinction between ‘knowledge of falsity or reckless disregard’ and the traditional common law punitive damages standard employed in Kansas. . . . ‘[P]unitive damage malice’ under Kansas law contemplates the same reckless or intentional acts reflected in the *New York Times* standard for ‘First Amendment malice’ and its progeny.

Id. at 700–01. It is dubious whether this passage accurately recited Kansas common law. The commentary to section 127.53 of the *Pattern Instructions in Kansas* suggests that “actual malice” and common law malice are distinguishable. *See* PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.53 (4th ed. 2012). The term is not defined in statute, and Kansas cases are not always consistent in defining the term.

364. The terms of section 60-3701(c) of the Kansas Statutes Annotated are essentially incorporated in the *Pattern Instructions in Kansas*. “In any civil action where claims for exemplary or punitive damages are included, the plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice.” *Compare* KAN. STAT. ANN. § 60-3701(c) (2013), with PATTERN INSTRUCTIONS IN KANSAS—CIVIL

sufficient, is no longer a prerequisite.³⁶⁵ The jury resolves the threshold issue of whether punitive damages are warranted. If so, the court holds a separate proceeding to determine the amount of punitive damages to award.³⁶⁶

Each of the alternative standards, “willful conduct, wanton conduct, fraud or malice” has been separately defined in the *Pattern Instructions in Kansas*.³⁶⁷ “Malice” is specifically defined as “the intent to do harm without any reasonable justification or excuse.”³⁶⁸ It is unclear whether this general definition of malice is intended to supersede the Kansas common law definition of malice traditionally required to recover punitive damages. Also unclear is whether a plaintiff must still prove malice, as defined by the common law of defamation, to overcome a qualified privilege defense to a false light claim.³⁶⁹ Finally, it is unclear whether Kansas courts will continue to apply the traditional malice requirement (“evil-mindedness or intent to do harm”) before awarding punitive damages in privacy claims, once the jury has determined that the minimum statutory threshold is met.

The U.S. Supreme Court, in *Cantrell v. Forest City Publishing Co.*,³⁷⁰ cautioned that “actual malice,” constitutionally required to overcome a qualified immunity defense to certain defamation claims by public officials, is distinct from the “common-law standard” generally required by state tort law to recover punitive damages.³⁷¹ The Court signaled that a plaintiff may meet the “actual malice” standard for constitutional purposes without necessarily meeting the more demanding state common law definition of “malice”

171.44.

365. See KAN. STAT. ANN. § 60-3701(c). The statutory threshold for punitive damages is consistent with the standard imposed by other jurisdictions. See, e.g., RESTATEMENT (SECOND) OF TORTS § 908 cmts. b & d (1977) (requiring an evil or bad motive or a reckless or wanton indifference to others’ rights).

366. KAN. STAT. ANN. § 60-3701(a), (b). The constitutionality of this bifurcated proceeding was upheld by the Kansas Supreme Court in *Smith v. Printup*, 866 P.2d 985 (Kan. 1993).

367. See PATTERN INSTRUCTIONS IN KANSAS—CIVIL 103.03, 103.04, 103.05, 127.40 (4th ed. 2012).

368. PATTERN INSTRUCTIONS IN KANSAS—CIVIL 103.05; see also *Sweeney v. United Loan & Fin. Co.*, 468 P.2d 124, 131 (1970) (“intentional doing of a *wrongful act with [full] knowledge of its character, and without just cause or excuse*”) (emphasis added). In *Werdann v. Mel Hambelton Ford, Inc.*, the Kansas Court of Appeals addressed the standard of “malice” for punitive damages, defining the term as “a state of mind characterized by intent to do a harmful act without a reasonable justification or excuse.” *Werdann v. Mel Hambelton Ford, Inc.*, 79 P.3d 1081, 1090 (Kan. Ct. App. 2003) (citing BLACK’S LAW DICTIONARY 968 (9th ed. 1999)). The *Pattern Instructions in Kansas*’s definition of malice appears to have been drawn from *Werdann*, although the wording of each differs from the dictionary definition: “[t]he intent, without justification or excuse, to commit a *wrongful act*.” BLACK’S LAW DICTIONARY 268 (9th ed. 1999) (emphasis added).

369. In Kansas, it appears that the “dual standard” of malice applies. PATTERN INSTRUCTIONS IN KANSAS—CIVIL 127.53 cmt. But note that the *Pattern Instructions in Kansas* defines “malice” in a manner entirely different from the common law definition drawn from defamation law. See PATTERN INSTRUCTIONS IN KANSAS—CIVIL 103.05 (“Malice is the intent to do harm without any reasonable justification or excuse.”).

370. 419 U.S. 245 (1974).

371. See *id.* at 251–52 (reinstating a jury award of compensatory damages on the grounds that the plaintiffs met the *New York Times* standard to submit a false light claim to the jury, although the trial court properly withdrew the punitive damages claim for failure to meet the state law standard of malice for punitive damages). “In a false-light case, common-law malice—frequently expressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff’s rights—would focus on the defendant’s attitude toward the plaintiff’s privacy, not toward the truth or falsity of the material published.” *Id.* at 252.

required to recover punitive damages.³⁷² *Cantrell* foreshadowed the current state of the law in Kansas, at least for false light invasion of privacy claimants seeking punitive damages. Under Kansas law, when qualified privilege defenses apply to other privacy claims, only “actual malice” in the constitutional sense is required to overcome the defense. But to overcome a qualified privilege defense to a false light publicity claim, because of its close relationship to defamation, a plaintiff must prove *both* actual malice and common law malice.³⁷³ The rationale is that false light invasion of privacy is so closely related to defamation that the same privileges and defenses apply to both.

In Kansas, “common law malice” was traditionally defined as “actual evil-mindedness or specific intent to injure.”³⁷⁴ It remains an open question whether the common law meaning of malice, or the more recent definition included in the *Pattern Instructions in Kansas*, applies to punitive damages claims. The comments to the current version of the *Pattern Instructions in Kansas* suggest that the common law malice standard for purposes of false light publicity is distinct from the actual malice standard as defined by the United States Supreme Court. However, it is unclear whether “punitive damages malice” is sufficient to meet either the “common law malice” standard or the constitutional “actual malice” standard.

The law is clear that to support a false light claim over a qualified immunity defense, the plaintiff must establish not only common law malice, which requires “evil-mindedness or specific intent to do harm,” but also constitutional or “actual malice.” Taken together, it appears that satisfying this “dual standard”³⁷⁵ of malice to overcome the qualified immunity defense would also meet the statutory threshold for recovering court-awarded punitive damages. However, Kansas courts have not addressed the issue.

B. Equitable Remedies

In the late nineteenth century, when invasion of privacy was still unknown at common law, a number of state courts awarded equitable relief to plaintiffs who alleged facts that would later support a claim in law.³⁷⁶ Kansas cases addressing invasion of privacy claims have not considered the availability of injunctive or other equitable relief. As a general rule, if an adequate remedy is available at law, an aggrieved party is expected to pursue

372. *Id.*

373. PATTERN INSTRUCTIONS IN KANSAS—CIVIL 171.44 cmt.

374. *Turner v. Halliburton Co.*, 722 P.2d 1106, 1113 (quoting *Munsell v. Ideal Food Stores*, 494 P.2d 1063, 1074 (Kan. 1972)).

375. PATTERN INSTRUCTIONS IN KANSAS—CIVIL 171.44 cmt. In *Dominguez*, the Kansas Supreme Court affirmed summary judgment in favor of a defendant employer for a plaintiff’s failure to overcome the defense of qualified immunity. The court found “no evidence of evil motive or a specific intent to injure plaintiff on the part of defendants.” *Dominguez v. Davidson*, 974 P.2d 112, 119 (Kan. 1999).

376. *See supra* note 28 (citing cases).

that remedy. Beginning in 1918, Kansas courts have repeatedly recognized a legal remedy for invasion of privacy. On the other hand, they have limited the common law right of privacy in many ways by recognizing a number of qualified privileges favoring employers, creditors, publishers, and other defendants, as well as a variety of rather sweeping affirmative defenses. Therefore, a plaintiff seeking a common law remedy for invasion of privacy might be well-advised to assert a claim for equitable relief in the alternative.

Other jurisdictions have awarded plaintiffs injunctive relief, particularly for appropriation of name or likeness for commercial use.³⁷⁷ Several states specifically provide for injunctive relief by statute.³⁷⁸ The *Restatement (Second) of Torts* generally provides for injunctive relief under certain circumstances, in addition to damages.³⁷⁹ With respect to privacy actions in particular, the *Restatement* also suggests that a plaintiff may have a right to restitution for the value of any benefits that a defendant unlawfully obtained by virtue of the invasion of privacy.³⁸⁰

In seeking injunctive relief for privacy claims other than intrusion on seclusion, one important consideration is whether a prohibitory injunction might trigger concerns about the defendant's First Amendment rights. For example, if a public figure were to ask a court to issue an injunction barring publication of embarrassing photos, the defendant might contend that the requested injunction would amount to a prior restraint.³⁸¹ While the Kansas courts have not addressed the issue, they have been generous in recognizing newsworthiness defenses asserted by publishers. For that reason, a prospective plaintiff seeking equitable remedies should consider the likelihood that the courts would entertain a prior restraint argument grounded in either the First Amendment, the Kansas Bill of Rights, or both.

VI. STATUTORY PROTECTION OF PRIVACY INTERESTS

Unlike many other states,³⁸² Kansas has never enacted a statute generally authorizing a private cause of action for invasion of privacy. Ironically, the Kansas Criminal Code prohibits "breach of privacy," broadly defined to include conduct that would support a common law claim for

377. See ELDER, *supra* note 17, § 6:15. See generally *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914 (N.D. Ohio 2004).

378. ELDER, *supra* note 17, § 6:15; see also, e.g., IND. CODE § 32-36-1-12(2) (2013).

379. RESTATEMENT (SECOND) OF TORTS § 951 cmt. a (1977). "[T]he court is not put into the dilemma of choosing between injunction alone and damages alone, but can properly grant an injunction supplemented by damages." *Id.*

380. *Id.* § 652H cmt. e (citing RESTATEMENT (FIRST) OF RESTITUTION § 136 (1937)).

381. *Cf.*, e.g., *Doe v. Roe*, 638 So. 2d 826, 827 (Ala. 1994) (reversing an injunction barring the distribution of a defendant's book discussing a well-publicized murder as an invasion of the privacy rights of the children of the victim and murderer). See generally ELDER, *supra* note 17, § 2:11 (discussing injunctive relief as a prior restraint).

382. See CAL. CIV. CODE §§ 1708.8, 3344, 3344.1 (West 2009 & Supp. 2013); NEB. REV. STAT. §§ 20-201 to 20-210 (2012); N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009).

intrusion on seclusion or giving publicity to private facts.³⁸³ Also prohibited are the equivalent of criminal defamation,³⁸⁴ as well as the related offense of circulating false statements disparaging the financial status of any individual or business.³⁸⁵ The Legislature has recently strengthened civil and criminal laws to protect consumers against computer data security breaches.³⁸⁶ But the Legislature generally has not authorized private claims for invasion of privacy, except under very narrow circumstances involving violations of specific criminal procedure statutes.³⁸⁷ Whether or not violations of other criminal or civil statutes might persuade Kansas courts to recognize new or expanded civil rights of privacy is highly debatable.

Two provisions in the Kansas Code of Criminal Procedure specifically authorize civil causes of action for violations relating to personal privacy interests. A third may support an implied cause of action for invasion of privacy, although the issue is debatable based on limited published authority.

First, the Code of Criminal Procedure pointedly authorizes claims against law enforcement officials for violating statutory restrictions on conducting strip searches and body cavity searches.³⁸⁸ The statute allows recovery of actual and punitive damages, a civil penalty of up to 2,000 dollars per violation, and even an award of costs in the court's discretion.³⁸⁹ While common law claims for invasion of privacy are subject to the two-year statute of limitations for tort actions not otherwise enumerated,³⁹⁰ the Kansas Supreme Court has specifically held that a statutory privacy claim under section 22-2523 is subject to the three-year limitations period that applies to statutory causes of action.³⁹¹

Second, a provision in the Kansas Wiretap Act, specifically section 22-2518, expressly authorizes a civil claim for damages by any person whose wire, oral, or electronic communications are intercepted, disclosed, or used in violation of the statute.³⁹² The statute authorizes recovery of the higher of actual or liquidated damages, as well as punitive damages, attorney fees, and litigation costs. However, the statute provides a complete defense for good faith reliance on a court order authorizing the interception of any

383. See KAN. STAT. ANN. § 21-6101 (2013).

384. *Id.* § 21-6103(a)(1).

385. *Id.* § 21-6103(a)(2).

386. See generally *id.* §§ 50-7a01 to -7a04; 2006 Kan. Sess. Laws ch. 149.

387. See KAN. STAT. ANN. §§ 22-2518, 22-2523; see also *infra* notes 388–398 and accompanying text.

388. See KAN. STAT. ANN. § 22-2523 (imposing civil liability for violations of sections 22-2521(a)–(b) and 22-2522); *McCormick v. City of Lawrence*, 104 P.3d 991, 994 (2005) (“K.S.A. 22-2523, which incorporates K.S.A. 22-2521 and K.S.A. 22-2522, is substantive and provides a cause of action when a search is conducted in violation of these statutes.”).

389. KAN. STAT. ANN. § 22-2523.

390. *E.g.*, *Newcomb v. Ingle*, 827 F.2d 675, 678 (10th Cir. 1987) (citing *Rinsley v. Brandt*, 446 F. Supp. 850, 858 (D. Kan. 1977)).

391. *McCormick*, 104 P.3d at 997.

392. KAN. STAT. ANN. § 22-2518(1).

communication within the scope of the statute.³⁹³

Third, the Criminal History Record Information Act limits disclosure of criminal history record information except in strict compliance with rules and regulations adopted by the Kansas Bureau of Investigation.³⁹⁴ In particular, the statutes preclude a criminal justice agency from requesting criminal history information absent a “legitimate need for the information.”³⁹⁵ An individual who violates the statute’s prohibitions commits a Class A nonperson misdemeanor, and upon conviction a public employee is subject to termination for good cause.³⁹⁶ The same statute expressly provides that those remedies are “[i]n addition to any other remedy or penalty authorized by law.”³⁹⁷ While the statute does not expressly authorize a private cause of action by a person aggrieved by its violation, some authority suggests that an alleged violation may support a state law privacy claim, presumably for giving publicity to private facts.³⁹⁸

Turning to the substantive criminal law, the Kansas Criminal Code comprehensively prohibits conduct that implicates various privacy interests. In particular, the 2006 Legislature responded to political concerns about data breaches and the resulting potential for identity theft by enacting new legislation and strengthening several existing laws.³⁹⁹ The legislation was part of a nationwide effort, beginning with California in 2003, to enact laws requiring businesses to notify consumers when security breaches occur involving personal identifying information, to enable them to take proactive steps to avoid identity fraud.⁴⁰⁰ Modeled after the California statutes,⁴⁰¹ the Kansas statutes generally require individuals, businesses, and government agencies that own, license, or maintain computerized data that includes personal information to promptly notify affected individuals of any security breach.⁴⁰² Unlike some states,⁴⁰³ the Kansas statute does not expressly

393. *Id.* § 22-2518(2); *see also* *Fields v. Atchison, Topeka & Santa Fe Ry. Co.*, 985 F. Supp. 1308, 1313 (D. Kan. 1997).

394. KAN. STAT. ANN. §§ 22-4701(e), 22-4704, 22-4707; *see also* KAN. ADMIN. REGS. §§ 10-12-1 to -12-3 (2014).

395. KAN. STAT. ANN. § 22-4707(a).

396. *Id.* § 22-4707(c).

397. *Id.*

398. In *Patrick v. City of Overland Park*, the federal district court retained supplemental jurisdiction over a state law invasion of privacy claim based on an alleged violation of this statute. *Patrick v. City of Overland Park*, 937 F. Supp. 1491, 1501–03 (D. Kan. 1996). In *Patrick*, a candidate for public office alleged that the defendant’s chief of police, for improper political purposes, received and later disclosed private information from criminal history records concerning a sexual relationship between the plaintiff’s former stepdaughter and a church minister. *Id.* at 1494–95. The author’s research has not unearthed the ultimate disposition of the state law claim.

399. *See, e.g.*, KAN. STAT. ANN. §§ 50-7a01 to -7a04. *See generally* 2006 Kan. Sess. Laws ch. 149.

400. JOHN P. HUTCHINS ET AL., U.S. DATA BREACH NOTIFICATION LAW: STATE BY STATE xi (2007).

401. *See id.* at 96–99. Compare CAL. CIV. CODE §§ 1798.80–1798.84 (2009), with KAN. STAT. ANN. § 50-7a01 to -7a04.

402. KAN. STAT. ANN. § 50-7a02. “Security breach” is defined as “unauthorized access and acquisition of unencrypted or unredacted computerized data that compromises the security, confidentiality or integrity of personal information maintained by an individual or a commercial entity and that causes, or such individual or entity reasonably believes has caused or will cause, identity theft to any consumer.” *Id.* § 50-7a01(h).

authorize a private cause of action for damages against one who violates the statute.⁴⁰⁴ But other states, including Kansas, authorize the state attorney general to file an action in law or equity to redress violations “and for other relief that may be appropriate.”⁴⁰⁵

Prior to its recodification in 2010, the Kansas Criminal Code defined and prohibited criminal eavesdropping⁴⁰⁶ and criminal breach of privacy,⁴⁰⁷ both Class A nonperson misdemeanors.⁴⁰⁸ In addition, the Code prohibited “computer crime,” defined to include unauthorized access to information or electronically-stored data on a computer system or network.⁴⁰⁹ When recodified in 2010, the former statutes were merged and reenacted as section 21-6101, which now comprehensively prohibits “breach of privacy.”⁴¹⁰ The

403. *E.g.*, CAL. CIV. CODE § 1798.84(b) (West Supp. 2013) (stating that an injured customer may bring a civil action and recover damages).

404. On the other hand, the statute expressly provides that its remedies are not exclusive and “do not relieve an individual or a commercial entity subject to this section from compliance with all other applicable provisions of law.” KAN. STAT. ANN. § 50-7a02(g). This savings clause would allow the courts to recognize a common law duty based on a violation of the statute’s proscriptions.

405. *Id.* In Kansas, the Insurance Commissioner is exclusively authorized to enforce the statute with respect to licensed insurance companies. *Id.* § 50-7a02(h).

406. *Id.* § 21-4001. The statute prohibited, among other things, the unconsented interception or divulging of private communications. *Id.* In 1983, in the absence of a “peeping Tom” statute, the Kansas Supreme Court liberally interpreted the eavesdropping statute to include photographing a person in a “private place” with a hidden camera. *State v. Martin*, 658 P.2d 1024, 1024 Syl. ¶ 2 (Kan. 1983), *overruled on other grounds*, *State v. Berreth*, 273 P.3d 752 (Kan. 2012). Some years later, the statute was amended to prohibit visual “eavesdropping” as well as surreptitious listening. *See* KAN. STAT. ANN. § 21-4001(a).

407. KAN. STAT. ANN. § 21-4002. The former “breach of privacy” statute prohibited, among other things, unconsented intercepting or divulging of private communications. *Id.* The Kansas Court of Appeals recently reversed a conviction under the former statute, holding that accessing e-mail messages months after they were composed and sent to an addressee did not qualify as “intercepting” communications contrary to section 21-4002(a). *State v. Brooks*, 265 P.3d 1175, 1192 (Kan. Ct. App. 2011).

408. KAN. STAT. ANN. §§ 21-4001(d), 21-4002(c).

409. *Id.* § 21-3755; *see Brooks*, 265 P.3d at 1191-92 (discussing the potential applicability of section 21-3755 to unauthorized copying of stored email messages).

410. Under the current version of the statute, a defendant commits breach of privacy by knowingly and unlawfully:

- (1) intercepting, without the consent of the sender or receiver, a message by telephone, telegraph, letter or other means of private communication;
- (2) divulging, without the consent of the sender or receiver, the existence or contents of such message if such person knows that the message was illegally intercepted, or if such person illegally learned of the message in the course of employment with an agency in transmitting it;
- (3) entering with intent to listen surreptitiously to private conversations in a private place or to observe the personal conduct of any other person or persons entitled to privacy therein;
- (4) installing or using outside or inside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in such place, which sounds would not ordinarily be audible or comprehensible without the use of such device, without the consent of the person or persons entitled to privacy therein;
- (5) installing or using any device or equipment for the interception of any telephone, telegraph or other wire or wireless communication without the consent of the person in possession or control of the facilities for such communication;
- (6) installing or using a concealed camcorder, motion picture camera or photographic camera of any type, to secretly videotape, film, photograph or record by electronic or other means, another, identifiable person under or through the clothing being worn by that other person or another, identifiable person who is nude or in a state of undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy; or
- (7) disseminating or permitting the dissemination of any videotape, photograph, film or image obtained in violation of subsection (a)(6).

2011 Legislature further amended the merged statute to expand its scope and to enhance certain violations from misdemeanors to person felonies.⁴¹¹ Both sets of amendments took effect on July 1, 2011. The specific conduct enumerated in the broad statutory definition of criminal “breach of privacy” could certainly support common law claims for invasion of privacy, either for intrusion on seclusion or for publicity given to private facts. But the new criminal statutes do not expressly authorize private causes of action.

Kansas law also prohibits identity theft and identity fraud, each defined in section 21-6107.⁴¹² Criminal false communication, similar to what was formerly known as criminal defamation, includes communicating information to another knowing the information to be false that tends to harm a victim’s reputation.⁴¹³ The same statute also prohibits “recklessly making, circulating or causing to be circulated any false report, statement or rumor with intent to injure the financial standing or reputation of any bank, financial or business institution or the financial standing of any individual in [Kansas].”⁴¹⁴ However, none of these statutes authorizes a private cause of action by a victim of the crime.

Given the increasing attention the Kansas Legislature has devoted to strengthening criminal statutes related to individual privacy concerns, the expanded scope of these statutes arguably may support a private cause of action against a violator for resulting damages sustained by a victim. Indeed, the Kansas Criminal Code expressly preserves “any civil right or remedy, authorized by law to be enforced in a civil action, based on conduct which this code makes punishable. The civil injury caused by criminal conduct is not merged in the crime.”⁴¹⁵ Yet in the absence of express legislative authority, Kansas courts have generally declined to recognize a private cause of action for violation of a criminal statute, at least without some indication that the Legislature intended to do so when it enacted the statute.⁴¹⁶ Scholars have

KAN. STAT. ANN. § 21-6101.

411. See 2011 Kan. Sess. Laws ch. 63, § 1.

412. “Identity theft is obtaining, possessing, transferring, using, selling or purchasing any personal identifying information, or document containing the same, belonging to or issued to another person, with the intent to defraud that person, or any one else, in order to receive any benefit.” KAN. STAT. ANN. § 21-6107(a). “Identity fraud is: (1) Using or supplying information the person knows to be false in order to obtain a document containing any personal identifying information; or (2) altering, amending, counterfeiting, making, manufacturing or otherwise replicating any document containing personal identifying information with the intent to deceive.” *Id.* § 21-6107(b).

413. *Id.* § 21-6103(a)(1).

414. *Id.* § 21-6103(a)(2).

415. *Id.* § 21-5105; see *id.* § 21-3103 (repealed 2011).

416. Pullen v. West, 92 P.3d 584, 597 (Kan. 2004) (“Kansas appellate courts generally will not infer a private cause of action where a statute provides criminal penalties but does not mention civil liability.”) (citations omitted); see, e.g., Shirley v. Glass, 241 P.3d 134 (Kan. Ct. App. 2010), *aff’d in part and rev’d in part on other grounds*, 308 P.3d 1 (Kan. 2013). The Kansas Court of Appeals has noted that:

Kansas courts generally use a two-part test to determine whether the legislature’s intention was to create a private right of action in a statute. First, the party must show that the statute was intended to protect a specific group of people instead of to protect the general public. Second, the court must review the legislative history of the statute to determine whether the legislature intended to create a private right of action.

observed that Kansas is unique among the states in its conservative approach to authorizing civil causes of action based on violations of criminal statutes.⁴¹⁷

The Tenth Circuit considered the issue in a privacy context a few years ago in *Peoples v. CCA Detention Centers*.⁴¹⁸ Sitting *en banc*, the evenly divided court upheld a three-judge panel's split decision holding that a Kansas prisoner could have sued a private prison facility under Kansas law for invading his privacy by monitoring phone calls to his attorney without consent.⁴¹⁹ The Tenth Circuit panel opinion cited the former criminal breach of privacy statute in support of its reasoning that the prisoner had a state law civil remedy for invasion of privacy.⁴²⁰ However, no Kansas appellate court decision to date has endorsed the Tenth Circuit's reasoning, nor has the author's research located any Kansas case holding that a violation of a criminal privacy statute would support a civil claim for damages.⁴²¹

Scholars have correctly noted that in Kansas, "clear expressions of legislative intent in favor of a civil action based on a violation of a criminal statute or administrative regulation are rare, [although] courts occasionally attempt to find such an intent where none likely exists."⁴²² Whether Kansas courts will recognize a "private attorney general" cause of action based on a violation of a criminal privacy statute remains an open question. In any event, the breadth and scope of the Kansas criminal statutes, as recently recodified and expanded, offer private citizens a legal alternative to the expense of filing a civil claim against the perpetrator. At least for conduct that falls within a criminal prohibition, a victim can report the offense to the county or district

Shirley, 241 P.3d at 150 (citing *Estate of Pemberton v. John's Sports Ctr., Inc.*, 135 P.3d 174, 180 (Kan. Ct. App. 2006)). "[T]he statute must . . . display . . . an intent to create not only a private right, but also a private remedy." *Goodman v. Kan. Dep't of Transp.*, 113 P.3d 822, 823 Syl. ¶ 5 (Kan. Ct. App. 2005); *see also Droge v. Rempel*, 180 P.3d 1094, 1097 (Kan. Ct. App. 2008) (declining to infer a civil cause of action by a *pro se* inmate against a complaining witness after a county attorney and an attorney general declined to prosecute the witness for perjury).

417. *See* William E. Westerbeke & Stephen R. McAllister, *Survey of Kansas Tort Law: Part I*, 49 U. KAN. L. REV. 1037, 1053 (2001) ("In Kansas, the doctrine of negligence *per se* appears to differ from the negligence *per se* doctrine recognized in every other state."). At the urging of The Honorable Tom Malone, a respected Kansas Court of Appeals judge, the Kansas Supreme Court may be reconsidering its position on implied civil causes of action. *See Shirley*, 241 P.3d at 157–61 (Malone, J., concurring).

418. 422 F.3d 1090 (10th Cir. 2005), *aff'd en banc by an equally divided court*, 449 F.3d 1097 (10th Cir. 2006).

419. *Id.* at 1107 (citing section 21-4002(a)(1), the former criminal statute prohibiting "breach of privacy"). However, the prisoner may well have sought redress under Kansas common law for invasion of privacy for intrusion upon seclusion. *See supra* notes 108–154 and accompanying text.

420. *Peoples*, 422 F.3d at 1107–08.

421. The exceptions, of course, are sections 22-2518 and 22-2523, the only Kansas statutes that expressly authorize private causes of action for violating criminal statutes. In *Ellibee v. Biggs*, the court rejected a prisoner's claims against his prosecutor for statements that a plaintiff claimed were false. *See Ellibee v. Biggs*, No. 104,368, 2011 WL 1878153 (Kan. Ct. App. May 6, 2011). Among other arguments, the prisoner sought to recover for negligence *per se* based on the defendant's alleged violation of section 21-4004, the former criminal defamation statute. *Id.* at *4. Relying on *Shirley*, the court held that the criminal statute did not create civil liability; even if it did, the plaintiff could not demonstrate that the defendant had violated the statute. *Ellibee*, 2011 WL 1878153, at *4–5; *see supra* note 417 (noting that the Kansas Supreme Court granted review in *Shirley* on September 21, 2011).

422. Westerbeke & McAllister, *supra* note 417, at 1055 (citations omitted).

attorney, or to the Kansas Attorney General.

If the Legislature, as a matter of public policy, wishes to deter criminal breaches of privacy without imposing undue burden on the public coffers, a more pragmatic approach would be to expressly authorize a private cause of action against those who violate criminal breach of privacy statutes.⁴²³ That is exactly what the Legislature did when it enacted sections 22-2518 and 22-2523, the lone criminal statutes in Kansas that expressly authorize a private cause of action as a means of enforcement.

VII. UNRESOLVED ISSUES

Like defamation, the right of privacy is a “fascinating subject,”⁴²⁴ and “the temptation quite naturally exists to write a treatise on the subject.”⁴²⁵ Before concluding, this Part briefly identifies a number of privacy law issues that neither the Legislature nor the Kansas courts have fully resolved.

A. *The Right of Publicity*

In many states, the courts and legislatures have explicitly acknowledged considerable evolution in the common law right of privacy for appropriating one’s name or likeness for the defendant’s benefit. In the early years, only private individuals could pursue a common law action to redress emotional injury for invasion of privacy. Most courts considered public officials and public figures to have waived any right to privacy, or at least to have implicitly consented to invasions of privacy when they elected to join the public arena.⁴²⁶ Beginning in the mid-twentieth century, however, many state courts began to acknowledge the property interests of celebrities in protecting the economic value of their public personas.⁴²⁷ The traditional common law right to recover damages for invasion of “privacy” by misappropriation of one’s identity thus evolved to what is now better known as the right of “publicity.”⁴²⁸

Several scholars have erroneously cited *Johnson* as the basis for concluding that Kansas courts recognize the common law right of publicity.⁴²⁹ But that conclusion reads both the facts and holding of *Johnson*

423. See William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2130 (2004) (“Legislatures create private attorneys general by statute, but before they did and when they have not, courts have created them by judicial decision.”).

424. *Turner v. Halliburton Co.*, 722 P.2d 1106, 1112 (Kan. 1986).

425. *Id.* (quoting *Bennett v. Seimiller*, 267 P.2d 926, 928 (Kan. 1954)).

426. *E.g.*, *Rawlins v. Hutchinson Publ’g Co.*, 543 P.2d 988, 992–93 (Kan. 1975) (police officer).

427. See *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (applying Michigan law); *Ettore v. Philco Television Broad. Co.*, 229 F.2d 481, 491–92 (3d Cir. 1956) (interpreting Pennsylvania, Delaware, New Jersey, and New York law).

428. See generally Richard Ausness, *Right of Publicity: A “Haystack in a Hurricane”*, 55 TEMP. L. Q. 977 (1982) (describing the evolution of the right of publicity).

429. See, *e.g.*, Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 202–03 n.9 (2002).

far too broadly. The plaintiff there was neither a celebrity nor a public figure; he was a former Boeing employee—a private person. He did not seek compensation for the economic value of his photograph as used in Boeing’s national magazine advertisements; he sought damages for emotional injury. Like *Kunz*, *Johnson* was simply a classic case alleging invasion of privacy by misappropriation, except the court acknowledged the affirmative defense of implied consent by a *private* individual.⁴³⁰

While *Kunz* acknowledged in passing the possibility of a property interest in one’s image,⁴³¹ in none of the later Kansas cases dealing with misappropriation have plaintiffs sought compensation for the economic value of their identities used by defendants for commercial purposes. In other states, publicity rights have become such a frequent matter of litigation that several legislatures have enacted specific statutes governing the right of publicity.⁴³² Some states treat the right as an expansion of the privacy right against misappropriation of name or likeness, but in fact it redresses a different kind of injury altogether.⁴³³ Many courts cite the *Restatement (Second) of Unfair Competition*⁴³⁴ as the basis for the common law right of publicity.⁴³⁵ Neither the Kansas Legislature nor the Kansas courts have addressed the issue.

B. Descendibility

A related issue is whether the right of privacy, or any of its variations, survives a plaintiff who dies before securing a judgment awarding damages. Most states recognize privacy as a right personal to the plaintiff.⁴³⁶ Like other personal rights, they do not survive the plaintiff⁴³⁷ and are not heritable unless a statute preserves the right to the plaintiff’s estate.⁴³⁸

The issue of descendibility has been frequently litigated over the last decade as the early generations of mass media celebrities pass away, leaving substantial economic value in their surviving public identities. For example,

430. See *Johnson v. Boeing Airplane Co.*, 262 P.2d 808, 813–14 (Kan. 1953).

431. *Kunz v. Allen*, 172 P. 532, 533 (Kan. 1918) (quoting *Munden v. Harris*, 134 S.W. 1076, 1076 Syl. ¶ 3 (Kan. C. Ct. App. 1911)) (referring to the exclusive right to one’s picture as a property right).

432. E.g., CAL. CIV. CODE § 3344.1 (West Supp. 2013).

433. Alicia M. Hunt, Comment, *Everyone Wants to Be A Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U. L. REV. 1605, 160–07 (2001) (describing the different interests protected by the two torts).

434. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

435. See, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003).

436. ELDER, *supra* note 17, § 1:3. For a very recent case reaffirming the principle against survivability of the personal right of privacy, see *Cannady v. St. Vincent Infirmary Med. Ctr.*, No. 11-1298, 2012 WL 4712205 (Ark. Oct. 4, 2012) (citing *Nicholas v. Nicholas*, 83 P.3d 214 (Kan. 2004)).

437. See, e.g., *Schuyler v. Curtis*, 42 N.E. 22, 25 (N.Y. 1895). “Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us all of rights, in the legal sense of that term; and, when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time.” *Id.*; see also *Clift v. Narragansett Television L.P.*, 688 A.2d 805, 814 (R.I. 1996) (“[T]he right of privacy dies with the person.”); RESTATEMENT (SECOND) OF TORTS § 652I (1977).

438. RESTATEMENT (SECOND) OF TORTS § 652I cmt. b.

Elvis Presley and Marilyn Monroe have been the subjects of extensive litigation and even legislation addressing the issue.⁴³⁹ The legal disputes following Michael Jackson's premature death further illustrate the likelihood that issues involving the descendibility of publicity rights will become more prevalent.⁴⁴⁰

The Kansas Supreme Court directly addressed the survival issue in *Nicholas*, holding that a pending claim for intrusion on seclusion did not survive the plaintiff.⁴⁴¹ The court reasoned that a plaintiff's own trial testimony is critical to keep the jury from speculating as to the personal nature and scope of the emotional injuries sustained.⁴⁴² In dicta, the court observed that the only privacy claim that survives a plaintiff is misappropriation of name or likeness.⁴⁴³ Nevertheless, neither *Nicholas* nor any other Kansas case has directly held that any of the four distinct rights of privacy survive; nor does either Kansas survival statute⁴⁴⁴ squarely address the issue. The court's rationale in *Nicholas*—that an intrusion claim does not survive a plaintiff—applies equally well to a misappropriation claim for emotional injury, notwithstanding the court's reliance on the *Restatement* in suggesting that only misappropriation claims survive the plaintiff.⁴⁴⁵

Several states have enacted legislation to address the descendibility issue.⁴⁴⁶ Those states that allow the right of privacy to survive vary widely as to the length of time the right survives the decedent.⁴⁴⁷ Kansas has yet to address the issue.

C. The Publicity Element in the Internet Age

Two variations of invasion of privacy each require widespread publicity as an element—publicity given to private facts and false light publicity. The Kansas courts have addressed several of these privacy claims in the context of oral or visual communications, repeatedly interpreting the element of “widespread publicity” to require dissemination to more than a handful of

439. See *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980) (Elvis Presley); *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007) (Marilyn Monroe).

440. See Robert C. O'Brien & Bela G. Lugosi, *Update to the Commercial Value of Rights of Publicity: A Picture Is Worth a Thousand Words . . . or Sometimes a Million Dollars*, 27 ENT. & SPORTS LAW. 2 (2009); see also Erin K. Mai, Comment, “ ‘Cause This is Thriller! ”: The True Price of Fame and an Analysis of the Current System for Calculating Estate Taxes on the Post-Mortem Right of Publicity, 3 EST. PLAN. & COMMUNITY PROP. L.J. 1, 1 (2010).

441. *Nicholas v. Nicholas*, 83 P.3d 214, 228–29 (Kan. 2004) (citing *Estate of Benson v. Minn. Bd. of Med. Practice*, 526 N.W.2d 634, 637 (Minn. Ct. App. 1995)).

442. *Id.* at 228.

443. *Id.* (dicta) (quoting RESTATEMENT (SECOND) OF TORTS § 652I).

444. *Id.*; see KAN. STAT. ANN. § 60-1801, 60-1802 (2013).

445. *Nicholas*, 83 P.3d at 228–29.

446. See CAL. CIV. CODE § 3344.1 (West Supp. 2013); NEB. REV. STAT. § 20-208 (2012); OKLA. STAT. tit. 12, § 1448 (2010).

447. Compare CAL. CIV. CODE § 3344.1(g) (70 years), with 42 PA. CONS. STAT. § 8316(c) (2007) (30 years).

third parties.⁴⁴⁸ Unclear, however, is how the Kansas courts will interpret this requirement in the context of email or social media communications.

Applying Kansas law, the federal district court in Kansas recently had the foresight to identify and address the issue. In *Peterson*, the federal district court considered whether the traditional interpretation of the publicity element applies when the offending information is disseminated by email to several third parties.⁴⁴⁹ The number of email addressees in that case was no more than a “handful,” which the Kansas courts have deemed insufficient in more traditional contexts. But the federal district court acknowledged that a single email message sent to a few persons (together with its explicit pictorial attachments) can be readily distributed to millions of computer users with the mere push of a button.⁴⁵⁰

As the Kansas Legislature recently acknowledged with the enactment and recodification of various criminal statutes implicating privacy interests, the rapid growth of digital communication technology poses serious privacy risks of a nature that Samuel Warren and Louis Brandeis could have never contemplated. In Kansas, neither caselaw nor statutes addressing the civil right of privacy adequately address these cutting-edge issues. They will most certainly become more complex as telecommunications and computer technology continue to evolve.

D. Relational Privacy Interests

Kansas courts have not addressed whether an invasion of a plaintiff’s right of privacy may support a cause of action by a close relative. The majority rule disfavors relational privacy claims.⁴⁵¹ However, a small but growing number of states have expressly authorized relatives to recover for invasion of a decedent’s privacy, at least under limited circumstances.⁴⁵² A related issue is whether a relative may bring a derivative action for intentional

448. *E.g.*, *Dominguez v. Davidson*, 974 P.2d 112, 121 (Kan. 1999).

449. *See Peterson v. Moldofsky*, No. 07-2603-EFM, 2009 WL 3126229 (D. Kan. Sept. 29, 2009).

450. *Id.* at *5.

451. *Cordell v. Detective Publ’ns, Inc.*, 419 F.2d 989, 990–91 & n.4 (6th Cir. 1969) (applying Tennessee law) (citing numerous cases); *Bradley v. Cowles Magazines, Inc.*, 168 N.E.2d 64, 65–66 (Ill. App. Ct. 1960) (holding that the right of privacy does not protect a mother from the harm caused by a publication concerning the murder of her son); *see also Gruschus v. Curtis Publ’g Co.*, 342 F.2d 775, 776 (10th Cir. 1965) (applying New Mexico law) (holding that a privacy action does not survive a decedent unless the complaining party’s privacy is also invaded); RESTATEMENT (SECOND) OF TORTS § 652I cmt. b (1977) (“In a smaller number of states there is statutory authorization for an action on the part of surviving relatives for invasion of privacy of one who is already deceased, with the invasion occurring after his death.”).

452. *See Loft v. Fuller*, 408 So. 2d 619, 622 (Fla. Dist. Ct. App. 1981) (citing FLA. STAT. ANN. § 540.08(1)(c) (2013)); *Cox Broad. Corp. v. Cohn*, 200 S.E.2d 127, 131 (Ga. 1973), *rev’d on other grounds*, 420 U.S. 469 (1975); *Douglas v. Stokes*, 149 S.W. 849, 850 (Ky. 1912) (“A man may recover for any injury or indignity done the body [of one’s dead child], and it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation.”); *G.J.D. v. Johnson*, 713 A.2d 1127, 1128 & n.2 (Pa. 1998); *Reid v. Pierce Cnty.*, 961 P.2d 333, 342 (Wash. 1998) (*en banc*) (holding that immediate relatives have a protectable privacy interest in the autopsy records of a decedent); *see also ELDER*, *supra* note 17, § 1.3.

infliction of emotional distress (known in Kansas as the tort of outrage) based on a violation of the right of privacy of another. Although unaddressed in Kansas, a federal court recently confronted this issue in an unpublished decision applying Kansas law.⁴⁵³ The court acknowledged a mother's claim for intentional infliction of emotional distress against her daughter's former paramour, who had emailed sexually explicit photos of the daughter to the mother as well as to other family members and friends.⁴⁵⁴

E. Scope and Applicability of the Newsworthiness Privilege

As Kansas courts have held, whether a privilege defense applies to an invasion of privacy claim is a question of law. The privilege defense, if applicable, may be absolute or qualified. If the privilege is qualified or conditional, the effect is to require the plaintiff to demonstrate actual malice, special damages, or perhaps both. Whether a privilege defense is absolute or qualified is presumably also a question of law.

Kansas courts have occasionally disposed of privacy claims on the basis of the newsworthiness privilege, but the scope and applicability of the privilege is not clear. For example, Kansas appellate courts have at least twice invoked "newsworthiness" as a defense, but they have not clarified its scope. In one of those cases, the plaintiff was not a public figure, although the subject matter of the publication—carrying concealed weapons—was deemed a matter of public concern.⁴⁵⁵ Moreover, that case involved a misappropriation claim. Most states broadly recognize "newsworthiness" as a defense only when the communication involves a matter of public concern, and then only if the information in question has a proper nexus to the subject matter.⁴⁵⁶ Kansas law is unclear when and to what extent the newsworthiness privilege applies. The available caselaw suggests that Kansas courts are magnanimous in recognizing this defense when asserted by news media, even when the plaintiff is not a public figure.⁴⁵⁷

F. Absolute Privilege for Communications in Judicial, Legislative, and Administrative Proceedings

As a matter of public policy, a person who provides information in the

453. *Peterson*, 2009 WL 3126229, at *2.

454. *Id.* The mother eventually recovered both compensatory and punitive damages on her claim. See *supra* notes 237–244 and accompanying text.

455. *Haskell v. Stauffer Commc'ns*, 990 P.2d 163, 165 (Kan. Ct. App. 1999) (complete defense); see also *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 993 (Kan. 1975) (absolute defense).

456. See generally *ELDER*, *supra* note 17, §§ 2:18, 3:17, 6:9 (discussing the newsworthiness privilege).

457. Early cases appeared to rely on *New York Times, Inc. v. Hill*, which was later abrogated by *Gertz*, by focusing not on the public interest of the matter published but rather on the public stature of the plaintiff. But no U.S. Supreme Court cases relating to the newsworthiness defense preclude a finding in favor of a plaintiff when actual malice is shown. Although broad, newsworthiness is generally not considered an "absolute" or "complete" defense. But see *Haskell*, 990 P.2d at 165 (declaring newsworthiness as a "complete defense" to a misappropriation claim).

context of judicial, legislative, and quasi-judicial proceedings is absolutely immune from civil liability.⁴⁵⁸ However, Kansas cases are unclear as to when the privilege applies, and sometimes courts apply qualified immunity defenses when absolute judicial immunity would seem to apply.

In addition to the traditional bases for the absolute privilege, the Kansas Supreme Court has extended prosecutorial immunity to include an investigatory privilege.⁴⁵⁹ While the court appears open to recognizing an absolute judicial privilege in privacy claims, it does not apply to invasions of privacy that do not require publicity as an element.⁴⁶⁰ Therefore, even though judicial privilege is an absolute defense when applicable, it does not defeat a claim for intrusion on seclusion, which does not require publicity or publication as a necessary element.⁴⁶¹ The same principle would appear to apply to claims for misappropriation of name or likeness, except that the scope and underlying policy for the absolute privilege are highly unlikely to apply if the plaintiff asserts a commercial use of name or likeness.

G. Scope and Applicability of Qualified Privilege

As with the complete defense of absolute privilege, cases do not clearly articulate the legal principles for determining when qualified privilege applies as a conditional defense. It is an issue of law whether a defendant's communications are entitled to qualified privilege. When qualified privilege does apply, its effect is to rebut either the presumption that the defendant has acted with actual malice, or that the plaintiff has suffered damages in the form of emotional or mental harm. To overcome the privilege, the plaintiff generally must establish actual malice and special damages in addition to the other elements of the claim.

With respect to a claim for publicity casting plaintiff in a false light, Kansas law requires proof of "actual malice," the term of art descriptive of "constitutional malice." Therefore, a prima facie case for false light invasion requires proof of the familiar elements of "actual malice": knowledge of the falsity of the information publicized, or reckless disregard as to its truth or falsity. But that is not enough to overcome the Kansas qualified privilege to a false light claim. Under Kansas common law, when a defendant is entitled to assert qualified privilege, the false light plaintiff must also prove that the defendant acted with "common law malice" as defined in Kansas defamation law, specifically "evil-mindedness or specific intent to do harm" to the

458. See *Clear Water Truck Co. v. M. Bruenger & Co.*, 519 P.2d 682, 685 (Kan. 1974) (administrative proceeding); *Froelich v. Adair*, 516 P.2d 993, 997 (Kan. 1973) (judicial proceeding). "To facilitate the effective performance of government, absolute privilege is granted by constitution, legislative enactment or case law to those who serve in a legislative, executive or judicial capacity." *Turner v. Halliburton Co.*, 722 P.2d 1106, 1112 (Kan. 1986) (citing *Redmond v. Sun Publ'g Co.*, 716 P.2d 168, 172 (Kan. 1986)).

459. *Sampson v. Rumsey*, 563 P.2d 506, 511 (Kan. Ct. App. 1977).

460. *Froelich*, 516 P.2d at 997.

461. *Id.*

plaintiff.⁴⁶²

What is unclear is the additional burden a plaintiff must meet once a court holds that a defendant has a qualified privilege defense to one of the *other* forms of privacy invasion. The reasoning in *Froelich*, that an absolute immunity defense did not apply to intrusion on seclusion because publication is not an element, suggests by analogy that qualified privilege also does not apply when publication of the information gained is not an element of the claim. How the qualified privilege applies, if at all, to misappropriation of name or likeness is not clear. Further, if qualified privilege does apply, the proof required to overcome the conditional defense is not clearly articulated in Kansas cases.

Finally, the Kansas Supreme Court has not clarified whether a *private* plaintiff must prove "actual malice" in a claim for false light publicity against a *private* defendant involving a matter of public concern. In *Turner v. Halliburton Co.*,⁴⁶³ Justice Holmes explicitly left that question for another day, and that day has apparently not yet come. As a result, the Kansas law on qualified privilege needs clarification.

H. The Various Meanings of "Malice"

Kansas law is in disarray regarding the meaning of the applicable standard of "malice" for three distinct purposes: (1) "actual malice" of the sort necessary to comply with federal constitutional considerations applicable to both false light and defamation claims (at least by public figures); (2) "common law malice," also required to overcome a qualified immunity defense if applicable to a claim for defamation or false light invasion of privacy; and (3) "punitive damages malice," required by Kansas statute as one of four alternative prerequisite jury findings for a court to award punitive damages. The three definitions of "malice" appear to overlap in some respects, but not others. The cases also appear to confuse the terminology, perhaps for understandable reasons given the confusing nomenclature borrowed from Kansas defamation law ("common law malice"), United States constitutional law ("actual malice"), and state statutes governing punitive damages ("punitive damages malice").

The courts are not consistent even in defining "common law malice" for purposes of proving defamation and false light privacy claims, often confusing that definition with the meaning of constitutionally required "actual malice." What is clear is that a plaintiff must prove both "actual malice" and "common law malice," as defined by the Kansas courts, to overcome a qualified privilege defense to defamation or false light publicity.

462. See *supra* notes 306-324 and accompanying text.

463. 722 P.2d 1106 (Kan. 1986) (4-3 opinion).

The *Pattern Instructions in Kansas* define malice, apparently for the purposes of awarding punitive damages, without citing caselaw or statutes. Nor has the term been defined by the Kansas Legislature.

I. Private Causes of Action for Violating Criminal Privacy Statutes

At least since 1980, Kansas courts have taken a constrained approach to interpreting Kansas criminal statutes to authorize private causes of action.⁴⁶⁴ But in September 2011, the Kansas Supreme Court granted a petition for discretionary review in a case that questioned the historical basis for this approach.⁴⁶⁵ In the two years just preceding the split decision by the Kansas Court of Appeals, the Kansas Legislature recodified and expanded the criminal statutes prohibiting interception of communications and other breaches of privacy.

On July 19, 2013, the Kansas Supreme Court clarified its position on the matter in *Shirley v. Glass*,⁴⁶⁶ holding that a civil litigant may indeed use the violation of a criminal statute to establish the breach of a duty of care by a defendant who has violated the statute.⁴⁶⁷ However, the statute must have been enacted to protect public safety, and the character of the plaintiff's injury must be of the sort the Legislature sought to prevent by enacting the statute.⁴⁶⁸ Because the plaintiff in that case had pleaded only common law negligence and not a statutory claim, the court declined to address "what a party must prove in order to state a claim that is created by [a criminal] statute."⁴⁶⁹ However, the court appeared to leave open the possibility that a criminal statute may support a civil claim, even if the criminal statute is silent with respect to civil remedies for its violation.⁴⁷⁰

It remains unclear whether Kansas courts would consider a violation of a criminal invasion of privacy statute sufficient to establish the breach of duty required for a negligence claim, or whether a violation of a criminal invasion of privacy statute would support an independent claim by the victim for civil remedies against the perpetrator.

VIII. CONCLUSION

Sixty years after one jurist referred to the law of privacy as a "haystack in a hurricane," the state of privacy law in Kansas continues to evolve

464. *Shirley v. Glass*, 241 P.3d 134, 157–61 (Kan. Ct. App. 2010) (Malone, J., concurring), *aff'd in part and rev'd in part on other grounds*, 308 P.3d 1 (Kan. 2013).

465. *See Shirley*, 308 P.3d at 1.

466. 308 P.3d 1 (Kan. 2013).

467. *Id.* at 6.

468. *Id.* at 6–7 (holding that the plaintiff, the mother of a murdered child, stated a negligence claim against the child's great-grandmother for knowingly assisting her grandson, a convicted felon, in purchasing the firearm he later used to kill the boy).

469. *Id.* at 6–7.

470. *Id.* at 5 (dicta).

incrementally by judicial decision. Although Kansas courts generally refer to the *Restatement (Second) of Torts* as a guideline for the common law right, they have also recognized numerous exceptions, qualifications, and defenses. Seldom have Kansas courts ruled in favor of a plaintiff in a right of privacy case. The Legislature's recent focused attention to privacy concerns in the Kansas Criminal Code belies the confusion and lack of predictability that still characterize the Kansas common law right of privacy.

In a time of fiscal austerity, it may be unrealistic to expect county and district attorneys, or for that matter state elected officials, to devote scarce financial and personnel resources to prosecuting new and expanded criminal offenses relating to privacy interests. The Legislature should consider authorizing private causes of action to enforce these prohibitions, much like it did to ensure the enforcement of statutory restrictions on strip and body cavity searches. Or perhaps the Kansas Supreme Court should consider relaxing its traditionally conservative approach to judicial recognition of private causes of action for violations of Kansas criminal statutes. The comprehensive criminal statutes the Legislature has recently enacted to prohibit various conduct amounting to invasion of privacy will remain paper tigers in the absence of adequate state and local resources to prosecute these crimes.

The Legislature should consider joining other states by enacting a comprehensive statutory right of privacy. The Kansas common law right of privacy was first recognized in 1918 to redress the emotional harm Stella Kunz suffered when her neighbors recognized her image, photographed without her knowledge, in an advertising filmreel displayed at the neighborhood movie theater. Most Kansans would be proud to learn that Kansas was a leader among states in recognizing the common law right of privacy. Nearly a century later, the Kansas right of privacy has substantially evolved, driven by litigants who have raised novel issues before the courts. But common law developments in privacy law can no longer keep up with the rapid evolution of technology.

Given the technological advances that now enable intrusions on privacy of a nature never contemplated in 1918, Kansas has fallen generations behind other states in acknowledging the privacy rights that most Kansans hold dear. With respect to privacy law, Kansas still has a lot to learn.