

Spring 2016

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**Kansas Defense Journal:**

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## THE FUTURE OF THE STATUTORY CAP ON NONECONOMIC DAMAGES AFTER MILLER V. JOHNSON AND HILBURN V. ENERPIPE, LTD.

Over the past several years the plaintiffs' bar has devoted substantial attention and resources to contesting the constitutionality of statutory caps on damages. The argument the plaintiffs' bar has used successfully in at least eight states<sup>1</sup> is that statutory caps infringe upon the common law right to jury trial as it existed at the time the state constitution was ratified.<sup>2</sup> The issue of the constitutionality of the statutory cap on damages in medical malpractice cases reached the Kansas Supreme Court in *Miller v. Johnson*.<sup>3</sup> *Miller v. Johnson* held that K.S.A. 60-

19a02 encroaches upon the constitutional right to a jury trial under Section 5 of the Kansas Constitution, but the encroachment was not unconstitutional because the Kansas Health Care Provider Insurance Availability Act provided an adequate substitute remedy for modification of a medical malpractice plaintiff's right to

(Continued on page 13)



**Peter G. Collins**  
*Hinkle Law Firm, LLC*

## SUPREME COURT HOLDS THAT UNACCEPTED RULE 68 OFFERS DO NOT MOOT A PLAINTIFF'S CLAIM

Most defense attorneys are generally quite familiar with Rule 68 of the Federal Rules of Civil Procedure and the protections it provides to defendants against plaintiffs determined to go to trial. No later than 14 days before trial, a defendant may submit an offer of judgment, and if the plaintiff refuses to accept that offer and thereafter receives a verdict less than the amount offered pursuant to Rule 68, the plaintiff must pay all of the defendant's costs incurred after the date the offer was made.<sup>1</sup> Until recently, the Circuit Courts of Appeals were divided over whether an unaccepted Rule 68 offer which purported to satisfy the entirety of a

plaintiff's claim would moot the claim. On January 20, 2016, the United States Supreme Court, in *Campbell-Ewald Company v. Gomez*<sup>2</sup>, settled this dispute by finding that an unaccepted Rule 68 offer does not moot a plaintiff's claim. This article will address the holding of *Campbell-Ewald* on the issue of Rule 68 offers and mootness.

(Continued on page 15)



**Lisa M. Brown**  
*Goodell, Stratton, Edmonds & Palmer, LLP*

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The *Kansas Defense Journal* is a quarterly publication of the Kansas Association of Defense Counsel. If you have any questions, comments, or ideas for future articles, please contact: KADC.

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## PRESIDENT'S MESSAGE: THE JUDICIARY—ADVOCACY, KADC AND YOU

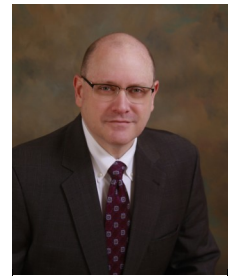
"... [T]o work for the administration of justice and to increase the quantity and quality of the service and contribution which the legal profession renders to the community, state and nation." Kansas Association of Defense Counsel Articles of Association, art 2.

Advocacy for the defense bar is one of the cornerstones of KADC. Two of our standing committees, the Legislative and *Amicus* Committees dedicate their skills to persuading the legislature and courts on issues that affect our practices and our clients. Lately, our advocacy has centered on issues far more fundamental to what we do than improvements to civil procedure and evidentiary rules. Our advocacy has focused on nothing less than the nature and quality of the courts in which we appear. Kansas courts have been challenged by the legislative and executive branches—challenged in arenas where judges are not able to advocate for themselves and the courts in which they serve. So KADC and others in the bar have risen to advocate for a fair and impartial judiciary, for courts bound by law rather than shifting public sentiment, and for judges who serve justice free from the politics that consume the other branches of government. The great names of our nation's history—Hamilton, Madison, and Marshall—litigated the same issues more than two centuries ago; but time has not diminished their importance to the system of justice we serve—or to our clients who rely on that system to resolve disputes free from bias and fear.

The greatest part of KADC's legislative effort during the first part of 2016—and the first part of every year of recent memory—has been devoted to protecting the judiciary. As the sun rises on each new legislative session, KADC waits to see what boulder lies at the bottom of the mountain. Will it be a proposed amendment to the Kansas Constitution? Or maybe a bill that intrudes on judicial

functions? Or perhaps a piece of legislation that underfunds the courts? Or all of the above? And then our Legislative Committee pushes the boulder up the mountain—often in concert with the Kansas Bar Association and the Kansas Association for Justice. This year, the Kansas legislature considered a proposed constitutional amendment that would have dramatically altered the composition of the Supreme Court Nominating Commission. KADC opposed the amendment, and it was defeated. However, the legislature passed a bill—over KADC's opposition—that reduced the privacy safeguards in the nomination process for Supreme Court justices, while treating applicants for the Court of Appeals more favorably. The legislature considered a bill raising the salaries for state judiciary staff and judges. KADC supported the bill noting that compensation for staff and judges has been essentially stagnant for ten years even though the staff and officials in other branches of government have received raises, and that Kansas judges are, by far, the lowest paid judges in the region. Unfortunately, the bill was not enacted. The Senate took up a bill that proposed to extend the grounds for impeaching Supreme Court justices and district court judges seated by the merit selection process. KADC opposed the bill, which was passed by the Senate but not the House.

To say that this session's legislative initiatives demonstrated a significant level of antipathy against the judiciary would be a diplomatic understatement. It has been a test of KADC's advocacy; but it will not be the only test, and the Capitol in Topeka will not be the only forum. This year in November, in



**Mark D. Katz**  
*Coronado Katz LLC*

(Continued on page 17)

## EXECUTIVE DIRECTOR'S REPORT

It's hard to believe it is already June! KADC had been busy the first half of 2016.

We are celebrating KADC's 50<sup>th</sup> Anniversary this year and plan to have a special celebration at the Conference in December, more to come. Zach Chaffee-McClure is chairing the Annual Conference and his committee has a great speaker/program lined up which will offer 12 hours of CLE including two hours of Ethics. The Young Lawyers committee will hold their second community service project this year following the Trial Skills Workshop and are planning a breakout during the Annual Conference. Mark your calendar for December 2-3, 2016 and watch for registration soon. If your firm is interested in sponsoring the Annual Conference please let me know.

The Legislature has kept the legislative committee, chaired by Nathan Leadstrom, busy this session. Be sure to read Nathan's report on page nine. Weekly bill updates are available on the KADC website under the Governmental Affairs tab.

KADC leaders traveled to Branson in May to attend the DRI Mid Region Meeting where they joined other leadership from Colorado, Iowa, Missouri, Nebraska and Utah. This is a great event where Kansas representatives have the opportunity to share ideas with other SLDOs.

KADC will be joining MODL for the 2<sup>nd</sup> Annual Across State Lines Seminar on September 9<sup>th</sup> at Sporting Park in Kansas City. Registration includes four hours of CLE and tickets to the Sporting KC game. Registration for this event is available now, but limited, so register early! Please see page four for more information.


A special thank you to Lora Jennings for her work as Editor of the *Journal*. If you have article suggestions please let Lora or me know. ▲



**Brandy Johnson**  
**KADC**  
**Executive Director**

### JOIN KADC ON SOCIAL MEDIA


KADC created a LinkedIn group for members. We anticipate utilizing this group to share ideas, tips, experts, and answer questions. We would like to transition all content sharing from the old Yahoo list serve format to the LinkedIn Group. This is a closed group for members only. If you are not already a member of the group, please [join](#)! While you're at it, like us on [Facebook](#) and follow us on [Twitter](#).



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Presented by Missouri Organization of Defense Lawyers  
and Kansas Association of Defense Counsel

Friday, September 9, 2016

Sporting Kansas City Stadium

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Kansas City, KS

Registration is \$225 for KADC members and includes the seminar, reception and a game ticket. Additional game tickets may be purchased for \$44. The seminar offers 4.3 hours of Missouri CLE and 4 Hours Kansas CLE (includes 1 hour ethics).

A registration form and agenda can be found [here](#). Please mail your completed form to:

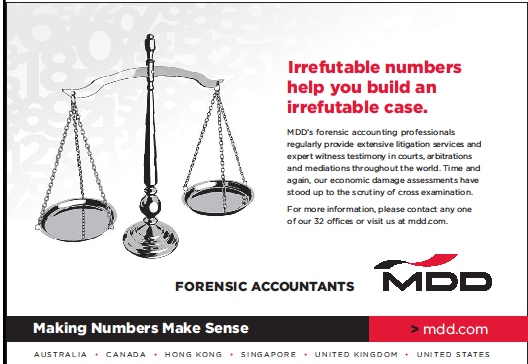
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## SAVE THE DATE FOR THE 2016 KADC ANNUAL MEETING



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## DRI 2016 Seminars

June 21  
**Investigating  
Construction Incidents**

Webinar

June 23  
**Marijuana Law**

Boulder, CO

June 27  
**The Ethical Pitfalls of  
Advising Friends and  
Family**

Webinar

June 29  
**OPERATION:  
Procedural Mastery**

Webinar

July 21  
**Class Actions**

Washington D.C.

September 8  
**Nursing Home/ALF  
Litigation**

Scottsdale, AZ

September 20  
**Defending Drug and  
Medical Device  
Litigation Primer**

Chicago, IL

September 21  
**Data Management  
and Security**

Atlanta, GA

September 22  
**Managing Partners  
Conference**

Chicago, IL

October 19  
**2016 Annual Meeting**

Boston, MA

November 10  
**Asbestos Medicine**

New Orleans, LA

## DRI REPORT: TAP THE RESOURCES

DRI has a wealth of resources to improve our practices and professional lives. Go to <http://www.dri.org/> and get logged in. If you are not yet a DRI member, use [this link](#) to get going, or just email or call me and I'll get you what you need.

From the expert witness database to the expert profiler to help you vet your own expert candidates, great help is available right there at your keyboard. You can't afford not to use it. From traditional CLE conferences to webcasts and podcasts, legal education of all types is right there.

From the DRI Neutrals Database to the discounted law firm security audit, things you might not have expected are there for further benefit.

From the myriad publications to committees to unparalleled networking and referral opportunities, DRI is what you need.

Don't forget that if you belong to KADC but haven't been a DRI member before, you can have one free year of membership in DRI. And if you're a young lawyer upon joining DRI, even when using the free membership, you get registration credit for a free DRI seminar, which alone is worth far more than the membership fee for the next year when you renew.

Your KADC leadership delegation also just attended this year's meeting of the five State and Local Defense Organizations

(SLDOs) in our Mid-Region: Iowa, Missouri, Nebraska, Colorado, Utah and Kansas. KADC President Mark Katz, President-Elect Sarah Warner, Secretary Bill Townsley and I (as your state rep) all attended the two-day meeting at the beautiful Big Cedar

Lodge on Table Rock Lake on May 20-21, 2016. We were also honored with the presence of the current President of DRI: Laura Proctor from Nashville, TN. The Missouri SLDO was a great host and we had super meetings talking about recruiting and engaging the millennial generation in our organizations. This region is very strong with well-run SLDOs in each of the five states. But after comparing notes yet again, we all came away feeling very good about the health and outlook for the KADC in particular. We've been doing for some time many of the things that are reported as needed to keep an organization like ours stable, strong and relevant. ▲



**Michael G. Jones**  
*Martin, Pringle, Oliver,  
Wallace & Bauer, LLP*

## KADC MISSION

The Kansas Association of Defense Counsel (KADC) is a statewide non-profit organization of Kansas lawyers who devote a substantial part of their practice to the civil defense of litigated cases, and has a membership of over 230 attorneys. The goal of KADC is to enhance the knowledge and improve the skills of defense lawyers, elevate the standards of trial practice, and work for the administration of justice.





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## “OH, THE PLACES YOU WILL GO... WITH KADC!”

The first place was Kansas City. We were the newest lawyers at the Foulston firm—Jim Armstrong, Jim Oliver, Jerry Green, and I. The firm had made sure we all joined the KADC, and our reward was to attend the December meeting in Kansas City. The road trip up was a blast: four young guys who had somehow gotten liberty cards from their spouses for the overnight jaunt up the Turnpike. If we had a dead spot in the conversation over those three hours on the road, I don't remember it. We crossed the I-70 viaduct pretty deep into the dinner hour; and when someone suggested the Savoy Grill for dinner, we all jumped on the idea. That Friday night was my first encounter with the Savoy, a fine restaurant in a remarkable building that had been in business for more than 80 years. The maître'd apologized for not seating us in Harry Truman's booth; but we found another to our liking, and we had a great time. Another first that evening was Pouilly-Fuisse, a lovely white burgundy we all liked immediately. I prefer to remember we made it up the next morning for the program.

Next in line is the Marriott on the Plaza, which has become a frequent home of our annual meeting. The KADC tradition of a Friday dinner with friends that first weekend in December, begun so well at the Savoy, has carried on at the Marriott. Sometimes we eat there; more often we begin the evening with the cocktail reception and move out of the hotel for dinner. But that “first Friday” in December gets noted to the calendar very early in the year. These days, Dru and I are likely to share that dinner with Fred and Linda Starrett, Dru's friends from college at Nebraska and my friends since I met Dru, and with Bob

Shively, recently the DRI board member for the Mid-Region, and his wife Carmen.

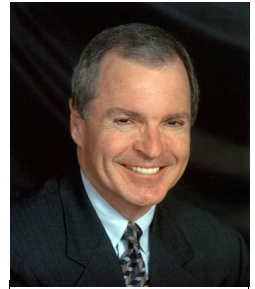
The December meeting, in fact, evokes many more memories than dinner on Friday night. And that gets me to the next KADC “place”—the KADC as a place of education, and of professional opportunity. The CLE offerings at the annual meeting continue to be first-rate. Members can become educated on the topics that will assuredly come up in their practice, if not next week, then the week after. They can also be entertained, as nowhere else, while Steve Kerwick takes us through the footnotes and the foibles of our appellate courts. And if they want the opportunity to present—to an audience that is both discerning and supportive, they can have it. 30 years ago, the KADC asked me to do a paper on the defenses available for products actions in Kansas. With Jerry Elliott, who had his own KBA Journal article to write, I holed up in Barkley Clark's Colorado cabin for a week reading the cases that would make their way into the presentation. Then I gave it—to a December audience stunned by the idea I might know anything about the topic. When I had finished, that same audience gave me a round of applause I will never forget, one that has sustained decades of teaching.

The third “place”? A place to make friends that last a lifetime. When I came back from the Navy I joined the Wichita Bar Association and the KADC; and though I have moved my practice to Kansas City, I am still a member of both. When I think of the lawyers who have made a difference in my life, and who still do, there is hardly a one who did not join the KADC. George Powers put me in the Wichita Bar Show; Bob

Howard taught me how to write; Gene Balloun and Mike Stout taught me nearly everything else. It was Bob Wise who gave me the chance to be involved with DRI, and

Dick Honeyman who taught me how to get along in the Russian Tea Room in New York City . . . and in the district court of Pratt County. As a brand new Kansas lawyer, I argued my first motion against Aubrey Linville in Salina. After I had lost, Aubrey took me to the Court's chambers to introduce me, ensuring I heard more from the judge than “Denied.” And on my first trip to Liberal, I was warmly greeted by Gene Sharp and Kerry McQueen and Dan Diepenbrock. In settings that both do and don't relate to golf, Jim Armstrong taught me hitting the ball off the fairway is just as important as hitting it off the tee. Jim Oliver exemplifies what it is to be an all-rounder—as a lawyer and as a person. Jerry Green, to complete the circle at the Savoy, was not just the best center fielder I ever played with. He taught us there are hard choices out there for everyone, and no way to tell when you'll have to make them. But if you keep in mind just who you are making them for, you'll make the right one.

A hallmark of our organization is that we continue to make choices for one another. We're proud of each other. We support each other. In Kansas, or anywhere else, the KADC is as good a place as you will go. ▲



**William R. Sampson**  
**Shook, Hardy &**  
**Bacon LLP**

## KANSAS BAR FOUNDATION UPDATE

The Kansas Bar Foundation Board of Trustees held its quarterly meeting on April 15<sup>th</sup> at the Brown v. Board of Education Museum in Topeka. In addition to the regular items of business, the Board approved the 2016 budget. It also discussed its long range planning initiative to help define direction for the future of KBF as well as created a bylaws review task force to review and update its bylaws. Nominees were considered for the Robert K. Weary Award given by the

Board. The Board also discussed nominees to fill upcoming vacancy on the Board. The Board initially approved a grant request to give \$8,500 to the Kansas Values Institute for the Kansans for Fair Courts education campaign; however, that decision was reconsidered at a special meeting due to potential tax implications to be sure there is no use of the funds for lobbying or other non-tax-exempt activities. At the special meeting in May, the Board instead allocated

resources to fund its own public education website and public education initiatives that would mirror the Kansans for Fair Courts campaign thereby supporting the efforts without any potential tax consequences. ▲



**Nathan D. Leadstrom**  
Goodell, Stratton,  
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## KADC AMICUS COMMITTEE UPDATE

The KADC *Amicus* Committee is watching the appellate case of *Hillburn v. Enerpipe LTD*, Case No. 14-112765-A at the request of Enerpipe counsel Andrew Holder. This appeal evaluates the constitutionality of K.S.A. 60-19a02 . . . a new installment of the *Miller v. Johnson* caps decision under a different set of facts.

In *Hillburn*, the plaintiff was injured in a motor vehicle accident. Plaintiff prevailed at trial and was awarded \$301,509 in non-economic damages, which the trial court reduced to \$250,000 pursuant to K.S.A. 60-19a02. Among the issues is whether mandatory vehicle insurance is an adequate quid pro quo for the cap.

The *Amicus* Committee chose not to participate at the Court of Appeals level because the request came less than a week before the deadline to file *amicus* briefs. The KsAJ attempted to participate as *amicus* but was denied as the deadline had passed.

The Court of Appeals affirmed the trial court's reduction of non-economic damages. *Hillburn* counsel then filed a Petition for Review on April 11, 2016, and *Enerpipe* has filed its response. If the Supreme Court accepts review of this matter, the *Amicus* Committee will revisit whether to seek leave to participate in this matter.

As always, please help us spread the word that the *Amicus* Committee is willing to entertain requests for KADC participation in matters involving issues of substantial interest to the defense bar. The *Amicus* Brief Request Form is available on the KADC website. ▲



**Anne Kindling**  
Stormont-Vail  
HealthCare, Inc.



## KADC LEGISLATIVE COMMITTEE REPORT

As expected this has been a particularly active year for the Legislative Committee. We started with the repeal of the non-severability clause in the judicial budget after the Supreme Court's decision in *Solomon v. Kansas* late last year. Since then, KADC provided opposition to HCR 5013 which proposed to amend the Kansas Constitution to change the merit selection judicial nominating committee based upon the so-called 4-5-6 plan. Given the political and partisan nature of the change, and reasons therefore, we strongly opposed the proposal. After a series of party caucus conferences, it was put to a floor vote rather than passed out of committee. We initiated a call to action campaign against the resolution which then failed to reach the required supermajority 2/3 vote required for passage. KADC also opposed the judiciary impeachment bill, SB 439, that sought to impeach Supreme Court justices for, among other things, "attempting to usurp the power of the legislative or executive branch of government," "attempting to subvert fundamental laws and introduce arbitrary power," and "exhibiting discourteous conduct toward litigants, jurors, witnesses, lawyer or others with whom the justice deals in an official capacity." The bill was later amended to include references to the executive branch in response to the strong opposition to the anti-judiciary sentiment underlying its

proposal but it has sat in hiatus since that time. The KADC has spoken in favor of HB 2704 which is designed to increase salaries to the judiciary staff and judges. Currently, Kansas ranks 50<sup>th</sup> in the nation in terms of judicial salary mostly due to the lack of any cost of living increases since FY 2009. However, as expected in a year with continuing budget shortfalls, the issue has not been moved forward since its original hearing.

At the end of the session, there were a few measures seeking changes to the merit selection process including attorney voter registration tracking requirements as well as subjecting the nominating committee to open meetings and open records laws. Unfortunately, despite our opposition to SB 128, the bill was passed with amendments requiring registration and eligibility requirements for all attorneys voting for the nomination commission. SB 128 also opened up the judicial nominating commissions to KOMA and KORA requirements, as well as requiring the Governor to make each applicant's name and city of residence available publically once applications are no longer accepted and at least 10 days before making the appointment. With the legislative session now closed, the efforts now shift to the judicial retention elections and identification of issues for next year's legislative session. Lastly,

after the Supreme Court issued the Gannon decision striking down the school funding as unconstitutional, a special session has been called to address the issue. As of this

writing, a joint meeting of the Senate and House Judiciary Committees is being held to discuss possible work arounds including a potential Constitutional Amendment to strip the Supreme Court of its jurisdiction or remedies it can order over the funding issue. KADC has filed an opposition to any amendments to the Kansas Constitution that in any way limits the Supreme Court's power to review legislation and issue appropriate orders to require conformity with constitutional requirements. However, as this session has shown so far, the fight to protect our courts from unfounded attacks has just begun as we enter the election cycle where numerous judges and justices are up for retention election.

As always, if there are any bills or issues of concern to our members that you would like to see KADC take a stance on, please feel free to give us a heads up or weigh in on a particular issue. ▲



**Nathan D. Leadstrom**  
Goodell, Stratton,  
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**Michael G. Jones**  
KADC PAST PRESIDENT & DRI REPRESENTATIVE  
Products Liability  
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## DEFENSE VERDICT UPDATE

### 1. Case Caption: **Melisa Beauchamp v. QuikTrip Corporation**

Docket No.: 2013-CV-003358  
(Sedgwick County, Judge Timothy Lahey)

Plaintiff's Attorneys: Ryan Hodge,  
Ray Hodge & Associates, LLC  
(Wichita)

Defendant's Attorneys: Stephen H.  
Netherton and Richard L.  
Honeyman, Hite, Fanning &  
Honeyman L.L.P. (Wichita)

Type of Claim: Premises liability and  
negligent training/supervision

Plaintiff alleged that she tripped

over a sign on defendant's premises. Plaintiff alleged that the sign's base had a prong protruding into the walkway and was a dangerous condition. Plaintiff claimed that defendant negligently maintained the sign and negligently trained and supervised its employees to inspect the premises for tripping hazards. Plaintiff was 25 weeks pregnant and was hospitalized for two weeks after she fell. Plaintiff claimed damages for past and future pain and suffering, past and future mental anguish, future medical expenses, and past wage loss.



**Richard L.  
Honeyman**  
*Hite, Fanning &  
Honeyman, LLP*



**Stephen H.  
Netherton**  
*Hite, Fanning &  
Honeyman, LLP*

Verdict or Settlement Amount: The jury found no fault. ▲

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## DEFENSE VERDICT UPDATE

2. Case Caption: **The Estate of Gregory Milton Coggs, By and Through Tyszu D. Coggs v. Overland Park Nursing and Rehab Center, Inc. d/b/a Overland Park Nursing and Rehab Center**

Docket No.: 13CV05731

Judge: David W. Hauber

Plaintiff's Attorney: Margaret Farley, Margaret Farley, Attorney at Law, P.A. (Lawrence)

Defendant's Attorneys: John Hicks and Samuel Bennett, Norris & Keplinger, LLC (Overland Park)

Type of Claim: Medical Malpractice.

Mr. Coggs was 61 year old African American who died from Pancreatic Cancer shortly after being discharged from defendant's facility. While a resident of the facility Mr. Coggs told his wife that he had been molested. The wife reported the statement to Mr. Coggs' nurse but dismissed the allegation because

she believed her husband was confused. The next day, Mr. Coggs became agitated and aggressive with the staff prompting the facility to call for a medical transport for Mr. Coggs to a local hospital. Prior to placing Mr. Coggs on a gurney an EMS worker asked Mr. Coggs if he was in any pain. Mr. Coggs said no but then said that he had been "kicked" by the CNA who was providing one-to-one care for Mr. Coggs. At the hospital Mr. Coggs repeated the allegation but also claimed to have been choked and thrown against the wall.

At trial Plaintiff's expert, Arif Nazir, M.D., testified that the facility fell below the standard of care by not taking the first allegation of abuse seriously. Dr. Nazir testified that had the facility begun an investigation it would have had a "chilling" effect on the staff and thus would have prevented the subsequent abuse.

Defendant's expert, Daniel Swagerty, M.D. testified that the



John Hicks  
Norris &  
Keplinger, LLC



Sam Bennett  
Norris &  
Keplinger, LLC

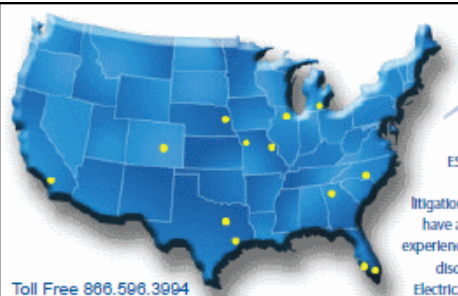
facility met the standard of care in their handling of the first allegation. Dr. Swagerty further testified that there was no physical evidence that Mr. Coggs was ever abused.

Plaintiff claimed Mr. Coggs suffered increased pain and suffering as a result of the abuse but acknowledged that the abuse did not cause Mr. Coggs' death. Plaintiffs requested a total of \$250,000 in economic and non-economic damages.

Verdict or Settlement Amount: On June 11, 2015, after a four-day trial, the jury returned a verdict for the defense. ▲



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*The Future of the Statutory Cap on Noneconomic Damages After Miller v. Johnson and Hilburn v. Enerpipe, LTD.*  
(Continued from page 1)

trial by jury. In reaching this conclusion the Court undertook a thorough and informative review of the precedent from various challenges to the legislative modifications of the right to jury trial under Section 5 of the Kansas Constitution in contexts ranging from the exclusive remedy of the Workers' Compensation Act, to automobile accidents and medical malpractice cases. Implicit in this review was the Supreme Court's desire to create a clear, analytical framework for courts to use in future constitutional challenges to legislative modifications to the right to jury trial.

The analytical framework which resulted from the court's analysis of precedent is a two prong test: first, whether the modification to the constitutional right to jury trial as it existed at common law "reasonably necessary in the public interest to promote the public welfare"; and, second, whether the legislature substituted an adequate statutory remedy for the modification to the individual right at issue.<sup>4</sup> In other words, is there a legislatively created remedy that provides an adequate quid pro quo for modifying the right to jury trial.<sup>5</sup> The majority in *Miller* concluded that the

statutory cap on damages in concert with the legislation requiring health care providers to maintain professional liability insurance and creating the Health Care Stabilization Fund served a valid public interest and satisfied the first prong of the test.<sup>6</sup> The Court then determined that the requirement that all health care providers maintain professional liability insurance is an adequate quid pro quo for the statutory cap on noneconomic damages.<sup>7</sup> Thus, in the context of medical malpractice plaintiffs, the Kansas Supreme Court concluded K.S.A. 60-19a02 is a constitutional modification of the constitution right to jury trial.<sup>8</sup>

Because *Miller* was decided in the narrow context of a medical malpractice claim, it was inevitable that the plaintiffs' bar would challenge the constitutionality of K.S.A. 60-19a02 in cases outside of the medical malpractice context. The first of these challenges made it to the Court of Appeals in *Hilburn v. Enerpipe, LTD.*<sup>9</sup> Mrs. Hilburn was injured when the car in which she was a passenger was rear-ended by a commercial truck. The case was tried to a jury in Sedgwick County and resulted in a plaintiff's verdict which included an award for noneconomic damages of approximately \$300,000.<sup>10</sup> The trial court reduced the noneconomic portion of the award to \$250,000 in

accordance with K.S.A. 60-19a02.<sup>11</sup>

In analyzing the constitutional challenge to K.S.A. 60-19a02 the Court of Appeals in *Hilburn* applied the two prong quid pro quo test.<sup>12</sup> The Court of Appeals determined that the statutory cap in the broader context of the Kansas Automobile Reparations Act, like the Kansas Health Care Provider Access to Insurance Act, served a legitimate public interest and satisfied the first prong of the test.<sup>13</sup> Further, the court concluded that the Act's requirement that all individuals operating an automobile on the streets of Kansas maintain automobile insurance was an adequate quid pro quo for the modification to common law right to unlimited damages.<sup>14</sup>

In determining K.S.A. 60-19a02 was constitutional, the Court of Appeals focused upon the role of insurance in compensating people injured due to the negligent operation of automobiles. The Court of Appeals concluded, "because the cap operates in the broader scheme of mandatory insurance and the State maintains an interest in that insurance remaining available and affordable to compensate accident victims, the first step of the quid pro quo test was satisfied."<sup>15</sup> The Court then concluded the mandatory insurance requirements of the

(Continued on page 14)



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*The Future of the Statutory Cap on Noneconomic Damages After Miller v. Johnson and Hilburn v. Enerpipe, LTD.*  
(Continued from page 13)

Kansas Automobile Reparations Act provided an adequate substitute remedy for the modification of a plaintiff's common law right to unlimited damages.<sup>16</sup>

The inevitable next challenge to K.S.A. 60-19a02 will be a tort action where there is no mandatory insurance requirement. Defending an attack on the constitutionality of the statutory cap on noneconomic damages in that context will require creativity and analytical thinking on the part of defense counsel.

Does the statutory cap on noneconomic damages serve a public interest to promote the public welfare if it is not tied to a mandatory insurance requirement? Neither *Miller* nor *Hilburn* required the Court to address this question directly so neither provides a clear answer or binding precedent on this point. However, both address the state's interest in creating an environment in which insurance is both available and affordable.<sup>17</sup> The public policy underlying court actions affecting the insurance environment in the state should be no different regardless of whether the purchase of insurance is mandatory or voluntary. The public interest and public welfare are best served by an environment in which insurance is both available and affordable so as to encourage business owners and individuals to obtain insurance with limits adequate to compensate Kansans injured by their negligence. It is perhaps more important to the public welfare for insurance to be available and affordable to those

businesses and individuals not otherwise compelled by state law to purchase insurance.

In the absence of a legislatively created mandatory insurance program, the question of whether the legislature has provided an adequate substitute remedy is a more difficult question. When faced with this argument it is important to recall that for purposes of this analysis, the common law right to jury trial is frozen in time in 1859 prior to the ratification of the Kansas Constitution.<sup>18</sup> Thus, an argument that the legislature has created an adequate substitute remedy should consider all legislative action taken since that time which has benefitted the plaintiff in prosecuting its case or collecting a judgment against an individual or entity. Types of legislative action to be considered as a possible quid pro quo include mandatory registration of business entities with the secretary of state and designation of a resident agent which provide simple and effective means of service of process, the Uniform Enforcement of Foreign Judgments Act<sup>19</sup>, the Uniform Interstate Deposition and Discovery Act<sup>20</sup>, and any number of legislative actions which have improved access to the court, simplified civil procedure and discovery, and benefitted plaintiffs. The focus should be to place the common law right to a jury trial as it existed prior to the ratification of the Kansas Constitution in proper historical prospective, and to illustrate to the court the quid pro quo of the cumulative effect of over one hundred and fifty years of legislative actions specifically designed to improve tort plaintiffs' ability to

quickly and efficiently obtain redress for their injuries. Only when the right to trial by jury is separated from all of the legislative advancements that have improved access to the courts and orderly administration of justice since 1859 can the court properly weigh the quid pro quo of the numerous legislative actions that have occurred since then.

Protecting the constitutionality of the statutory cap is of significant importance to the defendants. Defending against the attacks from the plaintiffs' bar will require creativity on the part of defense counsel.

1. The state supreme courts of Florida, Alabama, Georgia, Illinois, Missouri, New Hampshire, Oregon and Washington have struck down statutorily enacted medical malpractice caps.
2. See *Miller v. Johnson*, 295 Kan. 636, 648, 289 P.3d 1098 at 1108 (2012) (citing *Kimball and Others v. Connor, Starks, and Others*, 3 Kan. 414, 432 (1866)).
3. *Id.*
4. *Id.* at 4.
5. The quid pro quo test first appeared in Kansas case law in the context of legislative changes to the right to jury trial in *Rajala v. Doresky*, 233 Kan. 440, 441, 661 P.2d 1251 (1983), which challenged the exclusive remedy of the Workers' Compensation Act and in the context of co-employee liability. *Miller*, 295 Kan. at 670.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Hilburn v. Enerpipe, LTD.*, No.112,765, 2016 WL 92953 (Kan. Ct. App. Mar. 11, 2016).
10. *Id.* at 5.
11. *Id.*
12. *Id.* at 10.
13. *Id.* at 17.
14. *Id.* at 25.
15. *Id.* at 25.
16. *Id.* at 17.
17. *Miller*, 289 P.3d at 1115-16; *Hilburn*, 2016 WL 92953 at \*16.
18. *Miller*, *supra* note 2, at 696.
19. K.S.A. 60-3002.
20. K.S.A. 60-228a. ▲



***Supreme Court Holds That Unaccepted Rule 68 Offers Do Not Moot A Plaintiff's Claim***  
(Continued from page 1)

### **I. Factual and Procedural History**

*Campbell-Ewald* arose out of purported violations of the Telephone Consumer Protection Act<sup>3</sup> (“TCPA”). Jose Gomez received a mass-generated text message sent by Campbell-Ewald Company (“Campbell”), a marketing and advertising company who had contracted with the United States Agency. Gomez, alleging that he had never agreed to receive such mass-marketing messages, filed a class-action suit on behalf of a nationwide class of individuals who had not consented to receive such messages. Gomez sought treble statutory damages, costs, and attorney’s fees for the class as well as an injunction against Campbell.<sup>4</sup>

Prior to Gomez seeking class certification, Campbell made a Rule 68 offer of judgment to Gomez.<sup>5</sup> Campbell offered to pay Gomez’s costs<sup>6</sup> as well as \$1,503<sup>7</sup> for every text message Gomez could demonstrate he had received.<sup>8</sup> Campbell also agreed to an injunction wherein it would not send messages which violated the TCPA. Gomez did not accept the offer, and the offer lapsed after 14 days.<sup>9</sup>

As a result of this unaccepted offer, Campbell moved to dismiss the action for lack of subject-matter jurisdiction, arguing that no case or controversy existed because its offer had mooted Gomez’s claim by offering him complete relief.<sup>10</sup> Furthermore, Campbell also asserted that, because Gomez had not yet moved for class certification, the class action was also moot. The District Court denied Campbell’s

motion, finding that the Rule 68 offer of judgment could not be used to pick off the named plaintiff’s in a class action prior to certifying the class.<sup>11</sup> The Court later granted Campbell’s motion for summary judgment on unrelated immunity grounds.

On appeal, the Ninth Circuit reversed the summary judgment in Campbell’s favor but found that Gomez’s claim had not been mooted.<sup>12</sup> Relying on its recent decision, the Ninth Circuit held that an unaccepted Rule 68 offer does not moot the plaintiff’s claim even if the offer would fully satisfy the plaintiff’s claim, and the offer would similarly not moot the class action.<sup>13</sup>

The Supreme Court granted certiorari to resolve a circuit split “over whether an unaccepted offer can moot a plaintiff’s claim, thereby depriving federal courts of Article III jurisdiction.”<sup>14</sup>

### **II. The Court’s Analysis**

Justice Ginsburg, writing for Justices Kennedy, Breyer, Sotomayor, and Kagan<sup>15</sup>, held that an unaccepted Rule 68 offer, like any unaccepted offer, does not have any legally binding effect.<sup>16</sup> Specifically, the Court identified the issue as whether a Rule 68 offer which purports to satisfy the plaintiff’s entire claim would deprive the Courts of Article III jurisdiction because there would no longer be any “case or controversy.”<sup>17</sup> Adopting the analysis in a dissent authored by Justice Kagan in the 2013 case *Genesis Healthcare Corp. v. Symczyk*<sup>18</sup> and the basic principles of contract law, the Court found that an unaccepted Rule 68 offer does not deprive the Court of jurisdiction.

It is a well-settled tenet of Constitutional law that Article III Courts only have jurisdiction to decide cases or controversies.<sup>19</sup> “If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot.”<sup>20</sup> However, “[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.”<sup>21</sup>

*Genesis Healthcare*, dealt with a collective action under the Fair Labor Standards Act.<sup>22</sup> There, the plaintiff conceded in the lower courts that the unaccepted Rule 68 offer mooted her claim and did not raise that issue until the case reached the Supreme Court.<sup>23</sup> Therefore, the Court determined the issue was not properly before the Court, and therefore, the Court would assume, without deciding, that the unaccepted offer acted to moot the Plaintiff’s claim.<sup>24</sup>

Justice Kagan, however, criticized the Court’s decision, finding that the Rule 68 offer could not operate in such a manner, and the Court should never have gone any further than that threshold question.<sup>25</sup> Justice Kagan explained, “When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before.”<sup>26</sup> Further, the basic tenets of contract law provide that when an offeree rejects an offer, it is as if the offer had never been made.<sup>27</sup>

After adopting and discussing Justice Kagan’s *Genesis*

(Continued on page 16)

**Supreme Court Holds That Unaccepted Rule 68 Offers Do Not Moot A Plaintiff's Claim**  
(Continued from page 15)

Healthcare's reasoning, the *Campbell-Ewald* Court further noted that the plain language of Rule 68 did not support Campbell's assertion of mootness.<sup>28</sup> An offer of judgment "is considered withdrawn" if not accepted within 14 days of its service.<sup>29</sup> In fact, the only sanction for an unaccepted or withdrawn offer provided by the statutory language is that the plaintiff must pay the costs incurred after the offer was made if the plaintiff's ultimate recovery is less than the amount offered.<sup>30</sup>

Justice Ginsburg concluded by noting that a series of cases relating to tax payments by railroad companies had found that the actual payment of the unpaid taxes fully satisfied the claims and thereby extinguished them; but in the present case, Gomez's claim remained active because Campbell continued to oppose the claim on the merits and Gomez had not received any payment.<sup>31</sup> The Court explicitly did not decide whether the

depositing of the full amount of plaintiff's individual claim into an account payable to the plaintiff, with judgment then being entered in favor of the plaintiff, would have produced a different result.<sup>32</sup>

### III. Conclusion

The Supreme Court's decision in *Campbell-Ewald* foreclosed a narrow tactical approach under Rule 68, which was mostly used in the context of class action lawsuits. However, the decision is a reminder of the benefits available to defense counsel in using Rule 68 to control and mitigate costs in litigation. Furthermore, the assertion by the Court that it was not deciding whether the actual payment of the plaintiff's claim to the plaintiff would moot the action may still be available to defendants as a final Hail Mary to avoid class action certification.

1. See FRCP 68.
2. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), as revised (Feb. 9, 2016).
3. 47 U.S.C. § 227(b)(1)(A)(iii).
4. *Campbell-Ewald*, 136 S. Ct. at 667.
5. *Id.*
6. Campbell did not offer to pay Gomez's attorney's fees because those are not recoverable under the TCPA.

7. The TCPA permits recovery of actual damages or \$500 for each violation, whichever is greater, and treble damages are available for willful violations. Therefore, such an offer would have satisfied Gomez's personal treble-damages claim. *Campbell-Ewald*, 136 S. Ct. at 667-668.
8. *Id.* at 667-668.
9. *Id.* at 668.
10. *Id.*
11. See *id.*; see also 805 F.Supp.2d 923 (C.D.Cal. 2011).
12. *Id.* at 668.
13. *Id.*
14. The Court also addressed the unrelated issue of whether Campbell was entitled to immunity.
15. Justice Thomas authored a concurring opinion, and Chief Justice Roberts, Justices Scalia and Alito dissented.
16. *Id.* at 666.
17. *Id.* at 669.
18. 133 S. Ct. 1523, 1532 (2013) (Kagan, J. dissenting).
19. *Campbell-Ewald*, 136 S.Ct. at 669.
20. *Id.* (quoting *Genesis Healthcare*, 133 S. Ct. at 1528).
21. *Id.* (quoting *Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013)).
22. See 133 S.Ct. 1523.
23. *Id.* at 1529.
24. *Id.*
25. *Id.* at 1533 (Kagan, J. dissenting).
26. *Id.*
27. *Id.*
28. *Id.* at 671.
29. *Id.*; see FRCP 68(a)-(b).
30. *Id.*; see FRCP 68(d).
31. *Id.* at 671-672.
32. *Id.* at 672. ▲



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**President's Message: The Judiciary—  
Advocacy, KADC and You**  
(Continued from page 2)

addition to the Kansas House and Senate elections, five Kansas Supreme Court justices and six Kansas Court of Appeals judges will be on the ballot for retention. In a move that is unprecedented in this state, a major political party has voted to oppose the retention of four out of five of the Supreme Court justices. Whatever the political party's motivation, it is not the function of this message—or of KADC—to comment on the wisdom of making the retention of any one justice a political—much less a partisan—issue, just as it is not our function to take a position on the retention of a particular justice or judge. However, it would be hard to miss that many of the public statements opposing retention of individual justices and judges tend to attack outcomes in specific cases, they do not consider any judge's decisions as an entire body of work, and they fail to address the nature of the act of judging—or how the targeted justices could be

considered deficient in their approaches to judging.

What is missing from the conversation—missing in abundance—is a discussion of what judges do and how they do it. The Supreme Court and individual justices have travelled to individual communities for oral arguments and to open a window to our justice system. These efforts are helpful to the discussion, because they are more in line with show-and-tell rather than argument. And this is where the “you” in the title of this message comes into play. You—and by “you” I mean “we”—are in a unique position to provide the public with a clear understanding of the function of fair and impartial courts in our society. The preamble to the Rules of Professional Conduct charges each of us to “further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.” We are charged to be advocates, not just

for our clients, but for our system of justice and the rule of law. We are charged to educate the public about how the justice system works and why judges are often required to make unpopular decisions. Our advocacy for the system we serve must be transferred out of the courtroom to letters to the editor and op-eds, to chats with our neighbors, and to dinners with friends and relatives. People deserve to be reminded of how the system works for them, how it resolves disputes, and why impartiality is a fundamental component of each and every decision. The oft-cited Federalist Papers were addressed to the public. They advocated for three distinct branches of government, for the separation of powers, and most notably for a judiciary that would render impartial review. It has been observed that the judicial branch is the weakest of the three branches of government. Among its weaknesses is the inability for the judiciary to advocate for itself. This is the function that we must serve during the coming debate.▲



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\_\_\_\_\_

**OPTIONAL:** KADC is committed to the principle of diversity in its membership and leadership. Accordingly, applicants are invited to indicate which one of the following may best describe them:

- ☐ African American ☐ Asian American  
☐ Hispanic ☐ Native American  
☐ Caucasian ☐ Other \_\_\_\_\_

Date of Birth \_\_\_\_\_  
month/day/year

Expected graduation date \_\_\_\_\_ (Student membership expires 6 mos after graduation)

Future area(s) of practice, if known \_\_\_\_\_

Associations, professional organizations or student law societies to which you belong \_\_\_\_\_

\_\_\_\_\_

Bar associations, professional organizations or law societies to which you belong \_\_\_\_\_

\_\_\_\_\_

Are you a student member of DRI, The Voice of the Defense Bar? ☐ Yes ☐ No

Referred by (name of referring KADC member(s), if applicable) \_\_\_\_\_

\_\_\_\_\_

*I have read the above and hereby make application for individual membership. I am currently registered as a student pursuing a J.D. at the school identified above.*

Signature of Applicant \_\_\_\_\_ Date \_\_\_\_\_

### Individual law student membership in KADC – \$20 / yr

This application, together with membership fee, should be mailed to:  
Kansas Association of Defense Counsel,  
825 S. Kansas Ave., Suite 500, Topeka, KS 66612

#### AMOUNT DUE

Total Due \$ 20

#### PAYMENT METHOD

- ☐ My check for \$ 20 is enclosed  
☐ Please bill me (your membership will be inactive until KADC receives payment).  
☐ Please Charge My: ☐ VISA ☐ MASTERCARD

Credit Card Number \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

Expiration Date \_\_\_\_/\_\_\_\_



**dri** The Voice of the  
Defense Bar™

# Individual Membership Application

## Categories for individual membership in DRI:

- ☐ Defense Attorney—\$285 USD/year
- ☐ In-House Counsel—\$285 USD/year (as defined below\*)
- ☐ Government Attorney—\$160 USD/year
- ☐ Young Lawyer—\$165 USD/year (admitted to the Bar for five years or less). **Young Lawyers receive a certificate for FREE attendance at a future DRI seminar! It is valid for as long as you are a member of the Young Lawyers Committee.**
- ☐ National Foundation for Judicial Excellence (NFJE) Contribution—\$25 USD/year

A subscription to *For The Defense* is included in the annual dues for ALL price categories.

**Please note:** Individual membership is **not transferable**. If you have any questions, contact Customer Service at 312.795.1101.

☐ Male ☐ Female Name \_\_\_\_\_

Title \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State/Province \_\_\_\_\_

Zip/Post Code \_\_\_\_\_ Country \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_

Email \_\_\_\_\_

First time admitted to the Bar in

\_\_\_\_\_ in \_\_\_\_\_  
state/province month/day/year

bar number \_\_\_\_\_

I am a member of a state or local defense organization.

☐ Yes ☐ No

Name of organization \_\_\_\_\_

Primary area(s) of practice \_\_\_\_\_

*To maximize educational and networking opportunities for its members, DRI maintains practice area-specific substantive law committees. DRI believes that committee involvement greatly enhances the value of membership and we encourage you to join as many as you wish. Joining a committee is free of charge, requires no additional commitment or responsibility on your part, and is as easy as checking the boxes on the Join a Committee page at the end of this application.*

Number of attorneys in your firm ☐ 1-2 ☐ 3-10 ☐ 11-20 ☐ 21-50 ☐ 51-99 ☐ 100+

**OPTIONAL**

*DRI is committed to the principle of diversity in its membership and leadership. Accordingly, applicants are invited to indicate which of the following may best describe them:*

☐ African American ☐ Asian American ☐ Hispanic ☐ Native American  
☐ Caucasian ☐ Multi-Racial ☐ LGBT ☐ Other \_\_\_\_\_

Date of birth \_\_\_\_\_  
month/day/year

Referred by \_\_\_\_\_  
Name of referring DRI Member attorney (if applicable)

*I devote a substantial portion of my professional time to the representation of business, insurance companies or their insureds, associations or governmental entities in civil litigation. I have read the above and hereby make application for individual membership.*

*I authorize DRI to send me announcements via mail, facsimile and phone about its programs, services and all other offerings that may be of interest to me or my colleagues. I also consent to receipt of notices from DRI in electronic form, including email.*

Signature \_\_\_\_\_

Date \_\_\_\_\_

*All applications must be signed and dated.*

\* In-house counsel is defined as a licensed attorney who is employed exclusively by a corporate or other private sector organization, for the purpose of providing legal representation and counsel only to that corporation, its affiliates and subsidiaries.

\*\* See reverse side for NFJE description and state disclosure information.

\*\*\* See reverse side for Auto Pay Terms and Conditions.

## AMOUNT DUE

Membership \$ \_\_\_\_\_

NFJE Contribution\*\* \$ \_\_\_\_\_

Total Due \$ \_\_\_\_\_

## Please remit payment to: DRI

72225 Eagle Way  
Chicago, IL 60678-7252  
P: 312.795.1101 | F: 312.795.0747  
[membership@dri.org](mailto:membership@dri.org) | [dri.org](http://dri.org)

## PAYMENT METHOD

- ☐ My check for \$ \_\_\_\_\_ (USD) is enclosed.
- ☐ Please bill me. (Your membership will be inactive until DRI receives payment.)
- ☐ Please charge my credit card. (Provide card information below.)
- ☐ **Enroll me in Dues Auto Pay.\*\*\*** (You must check this box and sign below to be officially enrolled. By signing, you agree to Terms and Conditions on reverse side. Provide card information below.)

☐ VISA ☐ MasterCard ☐ American Express

Card #

Exp. Date   -

Authorized signature \_\_\_\_\_