IN THE COURT OF APPEALS OF THE STATE OF KANSAS

No. 125,144

ISMAEL LOPEZ,
Appellant,

v.

STEVE M. DAVILA,
Appellee.

SYLLABUS BY THE COURT

1.

Under K.S.A. 60-513(a)(4), a plaintiff must commence his or her negligence claims within two years from the date of the negligent act.

2.

Under K.S.A. 60-513(b), the cause of action listed in K.S.A. 60-513(a) "shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party."

3.

The term "substantial injury" in K.S.A. 60-513(b) means the victim must have reasonably ascertainable injury to justify an action for recovery of damages; in other words, an "actionable injury."

4.

Under K.S.A. 60-513(b), a cause of action accrues as soon as the right to maintain a legal action arises; that is, when the plaintiff could first have filed and prosecuted his or her action to a successful conclusion.

5.

Under K.S.A. 60-513(b), we review three triggering events to determine when the limitations period commences: (1) the act which caused the injury; (2) the existence of a substantial injury; and (3) the victim's awareness of the fact of injury. Without the existence of a substantial injury, though, the consideration of the reasonably ascertainable nature of the injury is irrelevant.

Appeal from Johnson District Court; RHONDA K. MASON, judge. Opinion filed March 3, 2023. Affirmed in part, reversed in part, and remanded with directions.

Stephen P. Weir, of Stephen P. Weir, P.A., of Topeka, for appellant.

Justen P. Phelps, Shannon L. Holmberg, and *Michelle M. Watson*, of Gibson, Watson, Marino, LLC, of Wichita, for appellee.

Before MALONE, P.J., HURST and COBLE, JJ.

COBLE, J.: After a car accident in 2019 left him injured, Ismael Lopez attempted to access the personal injury protection (PIP) coverage he believed he purchased in 2013 as part of an umbrella policy from Steve M. Davila, an agent with Farmers Insurance. When Farmers denied his PIP claim for lack of coverage, Lopez sued Davila and made claims in both contract and tort. Davila filed a motion for summary judgment contending Lopez' claims were barred by the statutes of limitations, and the district court granted Davila's motion. Lopez appeals, arguing the district court erred by ignoring his motion for summary judgment and granting Davila's motion for summary judgment because the

district court did not consider his alleged facts or give him the benefit of reasonable inferences, and it made insufficient findings of fact and conclusions of law.

On review, we find that, although the district court appropriately applied Kansas Supreme Court Rule 141 (2022 Kan. S. Ct. R. at 223) and Supreme Court Rule 165 (2022 Kan. S. Ct. R. at 234) from a technical standpoint, the district court erred in granting summary judgment to Davila by finding the statute of limitations prevented Lopez' tort claims from moving forward. Although we affirm the district court's grant of summary judgment on Lopez' contract claim, we reverse the district court's grant of summary judgment on Lopez' tort claims and remand for further proceedings on those tort claims.

FACTUAL AND PROCEDURAL BACKGROUND

Since 1998, Davila has been an insurance agent affiliated with Farmers Insurance. Around 2007, Lopez became Davila's client. In 2013, Lopez contacted Davila to request an increase to his underlying auto coverages, to obtain an umbrella policy, and to discuss life insurance. While discussing an umbrella policy, Davila advised Lopez the umbrella policy included excess coverage for all of Lopez' underlying home and auto coverages. Davila indicated to Lopez that the personal umbrella policy included excess PIP coverage.

Davila did not recall Lopez requesting to increase his PIP coverage on his underlying auto policy during this meeting. Davila also did not recall Lopez asking for the umbrella policy specifically because he wanted more PIP coverage.

After the meeting, Lopez' wife applied for the personal umbrella policy. The application did not specifically request excess PIP coverage, but it did ask for excess uninsured motorist and underinsurance motorist coverage. After the increased policies were issued, Lopez and Davila spoke a few times a year. From 2013 until 2019, Davila

and Lopez spoke occasionally about Lopez' policies, but most of the communication related to upcoming renewal dates. The parties did not discuss whether excess PIP coverage was included in the umbrella policy. And neither Lopez nor Davila remember specifically discussing PIP coverage after the 2013 meeting.

Lopez received annual renewal offers from Farmers for all policies, which included a declaration page, detailing the coverages. Lopez acknowledged that while his auto policy declaration pages listed PIP coverage, his umbrella policy declaration page did not, and if he had reviewed his declaration pages each year, he would have seen that PIP was not listed on the umbrella policy.

Almost six years after Lopez purchased the umbrella policy, on February 14, 2019, he was injured in a single-car accident while driving his son's truck. Lopez subsequently submitted claims under both his auto and umbrella policies. Farmers Insurance denied Lopez' excess PIP claim under his umbrella policy and specifically noted that the umbrella policy did not provide PIP coverage.

In January 2021, Lopez filed a petition against Davila alleging claims of negligent misrepresentation, breach of contract, and breach of professional duty. Lopez claimed that he requested, and Davila represented to provide, umbrella coverage that included $1,025,000 for PIP. But after relying on Davila's representations, procuring the represented insurance policy, and subsequently getting in a car accident that resulted in injuries, Lopez' insurance provider denied his claim for excess PIP coverage. Davila admitted he mistakenly believed and represented to Lopez that the personal umbrella policy applied to all underlying auto coverages, including PIP benefits.

Lopez moved for partial summary judgment based on liability in May 2021. Davila responded and filed his own motion for summary judgment a few months later.

On October 6, 2021, the district court held a hearing on the motions for summary judgment. The transcript of this hearing is not included in the record on appeal. In an order filed a few months later, the district court granted Davila's motion for summary judgment. The district court found Lopez' claims in contract and tort were barred by the statute of limitations because the "lack of excess PIP coverage within [Lopez'] personal umbrella policy was reasonably ascertainable from the time that it was first issued in 2013." Because of the nearly eight-year time lapse between the issuance of the policy in 2013 and the filing of the action in 2021, the district court found Lopez' "claims in either contract or tort are barred by the applicable statute of limitation." Because the district court found Lopez' claims were barred, the court entered summary judgment in favor of Davila on all claims and found all other issues raised by the parties to be moot.

A few weeks later, Lopez moved to alter or amend the district court's summary judgment order. Lopez argued the district court erred in resolving facts and inferences in favor of Davila, the defendant, rather than in favor of Lopez, the plaintiff. Lopez also argued the district court legally erred in finding the lack of excess PIP coverage in the umbrella policy was reasonably ascertainable in 2013, erred in finding Lopez had some obligation to review and understand his insurance policy, and erred when it made no findings of fact or law regarding Davila's duty to notify Lopez of Davila's lack of procurement of PIP coverage.

The district court held a hearing on Lopez' motion to alter or amend the district court's summary judgment order in March 2022. The court granted Lopez' motion, in part, because it had not previously stated its findings of fact and conclusions of law on which it denied Lopez' motion for partial summary judgment. Even so, the district court found Lopez did not meet his burden of controverting the facts set out in Davila's motion for summary judgment and it reaffirmed Lopez' minimum duty to read the insurance policy. The district court concluded by again finding the lack of excess PIP coverage was

reasonably ascertainable when the coverage was initially procured in 2013 and therefore the claims were barred by the statutes of limitations.

Lopez appeals.

DID THE DISTRICT COURT ERR IN GRANTING DAVILA'S MOTION FOR SUMMARY JUDGMENT?

Lopez argues the district court erred in granting Davila's motion for summary judgment by challenging multiple aspects of the court's decision. Primarily, he argues the court erred by finding his claims are barred by the statutes of limitations. He also argues the court did not make sufficient findings of fact and conclusions of law on his motion for partial summary judgment, and in that vein, he argues the district court erred in relying only on Davila's factual statements when granting summary judgment and not relying on his purported facts for consideration of the summary judgment motions.

In response, Davila argues the district court did not err in granting summary judgment because Lopez did not controvert the facts set out in Davila's motion for summary judgment, the court made adequate findings of fact and conclusions of law, and Lopez' causes of action were barred by the statutes of limitations.

The standard of review for appeals from an order of summary judgment is well settled:

> "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce evidence to establish a dispute as to a material

> fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. Appellate courts apply the same rules and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo." *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

An "issue of fact is not genuine unless it has legal controlling force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary judgment." *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 934, 296 P.3d 1106 (2013). In other words, "if the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue" for purposes of summary judgment. 296 Kan. at 934.

As noted, Lopez makes multiple arguments contending the district court erred in granting Davila's motion for summary judgment. On review, however, only one question is dispositive. The controlling question on appeal is whether the applicable statutes of limitations barred Lopez' claims, as a matter of law. First, though, we briefly address the parties' arguments related to the district court's technical findings of fact and conclusions of law under Kansas Supreme Court Rules 141 and 165.

The parties' arguments under Kansas Supreme Court Rule 141 and Rule 165 are not determinative of this appeal.

The district court did not abuse its discretion in relying on Davila's statement of uncontroverted facts under Supreme Court Rule 141, and the court's orders adequately included findings of fact and conclusions of law under Supreme Court Rule 165.

First, in its order granting summary judgment, the district court referenced Rule 141 and the progeny of cases that indicate the importance of comporting with the rule.

Although the district court did not explicitly apply Rule 141 to its initial summary judgment order, its reference to the rule and statement of facts—which largely follows Davila's—suggest the district court found Lopez' brief in opposition to Davila's motion for summary judgment did not properly controvert Davila's facts. And the district court's later order denying Lopez' motion to alter or amend explicitly found "many times" that Lopez did not controvert the facts set out in Davila's motion for summary judgment.

Supreme Court Rule 141 outlines the requirement for briefing summary judgment motions and related filings, and in particular requires a brief opposing summary judgment to "concisely summarize" the conflicting evidence and "provide precise references as required in subsection (a)(2)" to the record. Supreme Court Rule 141(b)(1)(C) (2022 Kan. S. Ct. R. at 224). Lopez cut corners in his response to Davila's summary judgment motion. In the response, Lopez did not cite to specific facts in the record. Instead, his controverted facts section in large part referenced either his own earlier motion for partial summary judgment or his reply to Davila's response to that same motion. This would, no doubt, require the district court to repeatedly refer back to Lopez' earlier briefing to discover the locations in the record which he contended supported his factual statements.

This briefing technique likely frustrated the district court's ability to determine whether facts were controverted, and our courts have found that a party fails to comply with Supreme Court Rule 141 at its own peril. *Slaymaker v. Westgate State Bank*, 241 Kan. 525, 531, 739 P.2d 444 (1987) ("A party whose lack of diligence frustrates the trial court's ability to determine whether factual issues are controverted falls squarely within the sanctions of Rule 141."); *Business Opportunities Unlimited, Inc. v. Envirotech Heating & Cooling, Inc.*, 26 Kan. App. 2d 616, 618, 992 P.2d 1250 (1999) ("A party ignores Rule 141 at its peril."). Supreme Court Rule 141(f) grants the district court the discretion to deem the party opposing summary judgment as having admitted the uncontroverted facts in the movant's statement, which "will not be disturbed on appeal

without a clear showing of abuse." *Ruebke v. Globe Communications Corp.*, 241 Kan. 595, 604, 738 P.2d 1246 (1987).

Although the Rule 141 issue is mentioned in both the district court's rulings and Davila's appellate briefing, Lopez fails to present any argument on the issue in his appellate briefing. So, Lopez fails to meet his burden to demonstrate any abuse of discretion in the district court's recitation of the facts.

Likewise, we fail to find any abuse of discretion in how the district court outlined its findings of fact and conclusions of law under Supreme Court Rule 165. Lopez complains the court did not adequately make findings of fact and conclusions of law in its order granting summary judgment and in its order denying his motion to alter or amend.

Supreme Court Rule 165 and K.S.A. 2021 Supp. 60-252 impose on the district court the primary duty to provide adequate findings of fact and conclusions of law to explain the court's decision on contested matters. The district court's findings should sufficiently resolve the parties' issues, and the findings should adequately advise the parties which standards the court applied and what reasons persuaded the court to arrive at its decision. See *Gannon v. State*, 305 Kan. 850, 875, 390 P.3d 461 (2017). In other words, "'the court's findings and conclusions should reflect the factual determining and reasoning processes through which the decision has actually been reached.'" 305 Kan. at 875.

The district court's initial order granting summary judgment specified that it considered "the briefs and attached exhibits filed and arguments made by the parties." The order identified 24 findings of fact, and the 15 conclusions of law reflected the standards for summary judgment, Supreme Court Rule 141, and the statutes of limitations. The order concluded by making findings applying the law to the factual statements. The district court's identified conclusions of law show the district court

understood its burden and requirements for resolving alleged factual disputes and evaluating the appropriateness of summary judgment.

The order goes on to state the statutes of limitations for contract and tort, noting there is no tolling provision in the contract statute of limitations. K.S.A. 60-512. The order identified the statute that requires the period of limitation for tort to not commence "until the fact of injury becomes reasonably ascertainable to the injured party." K.S.A. 60-513(b). The district court also noted that Kansas courts have recognized "some obligation on the insured to review and understand an insurance policy." See *Jones v. Reliable Security, Inc.*, 29 Kan. App. 2d 617, 632, 28 P.3d 1051 (2001). Applying the findings of fact to the conclusions of law, the district court determined the applicable statutes of limitations bar consideration of Lopez' claims under contract or tort because the lack of excess PIP coverage—the injury—was reasonably ascertainable to the injured party—Lopez—when he received the policy in 2013.

The district court's initial summary judgment order did not, however, specifically address why it denied Lopez' motion for partial summary judgment, aside from noting all remaining issues were moot. But acknowledging its failure, the court granted Lopez' motion to alter or amend, in part, to make the appropriate findings. The district court amended its order granting summary judgment to find Lopez' argument in his motion for partial summary judgment contending Davila failed to procure the excess PIP coverage could not overcome the expiration of the applicable statutes of limitations. The district court noted that although Davila did not make the procurement, the statute of limitations "began to run when the breach occurred in 2013." The district court concluded Lopez' claims were barred by the statutes of limitations because Lopez failed to bring his claims within two or three years. The district court's order goes on to find Lopez did not controvert Davila's facts because Lopez' brief did not comply with Supreme Court Rule 141.

Lopez has not shown the district court erred in its application of Rule 165 and K.S.A. 2021 Supp. 60-252 because the district court met its duty of providing adequate findings of fact and conclusions of law to explain its decision. See *Gannon*, 305 Kan. at 875. And the district court's findings have not prevented this court from adequately reviewing the district court's decision.

Although Lopez does not meet his burden to demonstrate an abuse of discretion in either the way the district court relied on Davila's statement of uncontroverted facts under Rule 141 or announced its findings of fact and conclusions of law under Rule 165, these concerns are not determinative of this appeal.

Ultimately, despite the parties' disagreements regarding how Lopez' briefing or the district court's recitation of its findings affected the court's final decision, the facts critical to this appeal remain uncontroverted. Davila himself acknowledged that during his conversation with Lopez in early 2013, he misstated to Lopez that the umbrella policy included excess PIP coverage, and Davila mistakenly believed the personal umbrella policy included excess PIP coverage. This conversation between Davila and Lopez occurred before Lopez' 2013 application for the umbrella policy. Between 2013 and 2019, Davila and Lopez did not specifically discuss whether excess PIP coverage was included in the personal umbrella policy. Lopez did receive annual renewal offers, which included a declaration page, with a summary of the insurance coverages, limits, and deductibles. The declaration page of his umbrella policy included "General Liability, Uninsured and Underinsured Motorist coverages, but not PIP." Lopez first attempted to access excess PIP coverage after his February 2019 car accident, and his claim was denied because there was no excess PIP coverage through the umbrella policy. Lopez then filed this lawsuit in January 2021.

Based on these uncontroverted facts, we find no error in the district court's grant of summary judgment on the contract claim, but find the court erred in granting summary judgment on the tort claims by misapplying the law to those facts.

Lopez argues that the district court erred in granting summary judgment on both his contract and tort claims based on the expiration of the limitations period for both types of claims. He argues the sole breach of contract was not in 2013, but that "[e]ach year was a new representation and new contract." We find his arguments lacking substance and are unpersuasive. Regarding his tort claims, Lopez contends the district court made an error of law by finding he could have reasonably ascertained his injury in 2013 after Davila initially failed to procure excess PIP coverage. Below, and now on appeal, Lopez contends his injury was not reasonably ascertainable until the time of his car accident in 2019. Although we find Lopez' arguments too narrow, we agree the district court erred in applying the law to the facts before it on the tort claims.

To reiterate, "[s]ummary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law." *GFTLenexa, LLC*, 310 Kan. at 981-82. "Appellate review of the legal effect of undisputed facts is de novo." 310 Kan. at 982. To the extent resolution of this issue requires statutory interpretation, appellate review is unlimited. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

Applicable statutes of limitations

The claim Lopez presents is for Davila's failure to procure specific insurance coverage. In *Marshel Investments, Inc. v. Cohen*, 6 Kan. App. 2d 672, 683, 634 P.2d 133 (1981), this court explained:

> "It has been explicitly stated an action for the breach of this duty may be brought in contract or in tort. Although no Kansas cases reveal particular exposition of legal analysis for the ability to bring the action on these alternative theories, it might be said the duty is both an implied contractual term of the undertaking (contract duty) and a part of the fiduciary duty owed the client by reason of the principal-agent relationship arising out of the undertaking (tort duty)."

Here, Lopez' petition alleged both contract and tort causes of action, arguing: "The Plaintiff has demanded payment for his medical expenses and loss of income damages which should have been covered under an umbrella PIP policy but for Defendant's Negligent Misrepresentations; Breach of Contract and Breach of Duty to the Plaintiff owed by the Defendant Professional."

The parties agree that the contract limitations period is provided by K.S.A. 60-512 which states: "The following actions shall be brought withing three (3) years: (1) All actions upon contracts, obligations or liabilities expressed or implied but not in writing." The parties likewise agree that the limitations period for the tort claims is governed by K.S.A. 60-513(a)(4): "An action for injury to the rights of another, not arising on contract," must be brought within two years.

Lopez' breach of contract claim is barred by the statute of limitations.

Lopez' argument regarding the district court's finding that the statute of limitations bars his breach of contract claim is essentially that Davila made a new representation for PIP coverage every year through the policy renewals, and a new breach then occurred with each new representation. Lopez does not elaborate, but his argument seems to assume that each alleged annual representation created a new oral contract that Davila subsequently breached.

Even so, Lopez does not benefit this court with an analysis of precisely which actions by Davila constituted a new oral contract each time the policy was renewed, nor does he even outline basic contract principles. He simply argues summarily that "[e]ach year was a new representation and new contract." He made a similar imprecise argument in his motion for partial summary judgment.

But these vague assertions are not enough. A plaintiff bringing a cause of action based on an oral contract bears the burden of proving the contract's existence by a preponderance of the evidence. *U.S.D. No. 446 v. Sandoval*, 295 Kan. 278, 282, 286 P.3d 542 (2012). No doubt, the question of whether a contract was formed is a question of fact that depends on the intention of the parties, and the existence of a contract is generally inappropriate for decision on summary judgment. See *In re Estate of Hjersted*, 285 Kan. 559, 589, 175 P.3d 810 (2008); *Reimer v. Waldinger Corp*., 265 Kan. 212, 214, 959 P.2d 914 (1998). But even so, the minuscule argument Lopez presented in his motion for partial summary judgment, and now on appeal, contending a new contract was formed for each annual renewal, is not persuasive to meet even his most minimal burden.

The only support Lopez provides for his claim that "[e]ach year was a new representation and new contract" is his factual assertion that Davila "continued to assert [Lopez] had excess PIP coverage even after the 2019 accident and all the way up to the denial letter from the insurance company." But this assertion is not persuasive for two reasons. First, the fact is not supported by the record. The uncontroverted facts found by the district court state that "[d]uring the time period between 2013 and 2019, [Davila and Lopez] did not specifically discuss whether excess PIP coverage was included in his personal umbrella policy." And more pointedly, "After the policy was issued in early 2013 up through the time of [Lopez'] accident in 2019, Defendant Davila did not make any representations to [Lopez] regarding whether the personal umbrella policy contained excess PIP coverage."

And second, even if Lopez had met his burden of properly controverting Davila's facts under Supreme Court Rule 141 with his own factual allegations, he provides no analysis to meet his burden of demonstrating that a new contract arose from each annual renewal. He simply presses the point without providing supporting authority or showing why it is sound despite a lack of authority. This is not persuasive, and we find the argument waived or abandoned. See *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018) (failing to support a point with pertinent authority or failing to show why a point is sound despite a lack of supporting authority is like failing to brief the issue).

The uncontroverted facts do, however, support the district court's finding that Lopez' breach of contract claim is barred by the statute of limitations. "Under the provisions of K.S.A. 60-512 a cause of action for breach of contract not in writing must be instituted within three years. It is axiomatic that the three-year period commences to run from the date of the breach of the contract." *Wolf v. Brungardt*, 215 Kan. 272, 279, 524 P.2d 726 (1974). The *Wolf* court opined that "[t]he crucial inquiry" is whether the plaintiff's cause of action for breach of contract was "instituted within three years of the date of the breach of the oral agreement." 215 Kan. at 279. And of relevance here: "A cause of action for breach of contract accrues when a contract is breached by the failure to do the thing agreed to, irrespective of any knowledge on the part of the plaintiff or of any actual injury it causes." *Pizel v. Zuspann*, 247 Kan. 54, 74, 795 P.2d 42 (1990), *modified on other grounds* 247 Kan. 699, 803 P.2d 205 (1990).

The record is silent on a specific date that any oral contract was formed, but the uncontroverted facts show Davila and Lopez allegedly entered into an oral contract for Davila to procure an umbrella insurance policy with excess PIP coverage in early 2013. Davila admits he did not procure such policy at any point after their conversation in early 2013. Thus, the cause of action for the alleged breach of oral contract accrued when Davila ostensibly did not procure the agreed-upon coverage. The record is also silent as to an exact date Davila failed to procure the excess PIP coverage, but the resulting policy

was issued on March 22, 2013. Lopez did not initiate this cause of action until January 26, 2021, nearly eight years later.

Because K.S.A. 60-512 requires an action for breach of oral contract to be filed within three years of the breach, and the statute contains no tolling provision, Lopez has not shown the district court erred in finding the statute of limitations barred consideration of his breach of contract claim.

The district court erred in applying the law to Lopez' tort claims.

Under K.S.A. 60-513(b), the limitations period for Lopez' tort claims does not commence

> "until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party."

That is, the "'statute of limitations starts to run in a tort action at the time a negligent act causes injury if *both* the act and the resulting injury are reasonably ascertainable by the injured person.'" (Emphasis added.) *Bott v. State*, 62 Kan. App. 2d 625, 637, 521 P.3d 740 (2022) (quoting *Roe v. Diefendorf*, 236 Kan. 218, 222, 689 P.2d 855 [1984]).

When applying this statute to Lopez' claims, the district court failed to consider when his injury first caused substantial injury, under the first clause of the statute. Instead, the court solely focused on determining when his injury became reasonably ascertainable. This was a critical misstep. But what is a "substantial injury" under K.S.A. 60-513(b)? To determine this, we look to definitions provided by earlier decisions.

One of the more illuminating and recent decisions is found in *LCL v. Falen,* 308 Kan. 573, 422 P.3d 1166 (2018). In *Falen*, our Supreme Court examined when the statute of limitations began to run on a negligence claim. There, a surface real estate owner brought a quiet title action against Gregory and Julie Falen and others (trustees and beneficiaries of a trust) who had owned mineral rights in the subject land prior to 2008, when the land was conveyed to new owners. Although the mineral rights were intended to be reserved, in the 2008 deed prepared by the closing agent and title insurer, the mineral reservation to the Falens and others was erroneously omitted. But the Falens and others continued receiving royalties and continued to pay property taxes, until the land was sold again in 2014 to LCL. When LCL questioned the mineral rights discrepancies in both the 2008 and 2014 deeds, royalty payments were suspended and LCL filed the quiet title action. The Falens filed a third-party petition against the title company alleging both negligence and contracts claims.

The quiet title action settled, and the title company filed a motion for summary judgment on the Falens' third-party claims on statute of limitations grounds. The district court granted summary judgment, finding the claims untimely. As to the negligence claims, it focused on when the injury became reasonably ascertainable, and found the injury was reasonably ascertainable when the initial erroneous deed was filed in 2008. On appeal, a panel of this court—shifting its focus to the injury itself—examined when the Falens suffered a substantial, actionable injury, and reversed the district court's summary judgment decision, finding no substantial injury occurred until the Falens stopped receiving royalties in 2014. The Court of Appeals found the Falens "had no cognizable monetary damages until the royalties stopped." 308 Kan. at 581.

Our Supreme Court disagreed with both lower courts' analyses, although it also found summary judgment was entered in error and reversed the judgment. The court determined that the Falens "immediately suffered more than a mere paper injury" when the first erroneous deed was recorded in 2008, because a cloud on their title to the

mineral interest arose, equitable relief was immediately available, and seeking that relief was "bound to be a costly process." 308 Kan. at 583-84. It found, though, that disputed evidence existed when the injury became reasonably ascertainable and remanded the case for further proceedings. 308 Kan. at 587-88.

In *Falen*, the Supreme Court restated the definition of "substantial injury" it had defined in earlier cases: The term "substantial injury" in K.S.A. 60-513(b) means "'the victim must have sufficient ascertainable injury to justify an action for recovery of the damages'"; in other words, "'actionable injury.'" 308 Kan. at 583 (quoting *Moon v. City of Lawrence*, 267 Kan. 720, 727-28, 982 P.2d 388 [1999]; *Roe*, 236 Kan. at 222).

Years earlier, in *Pancake House, Inc. v. Redmond*, 239 Kan. 83, 716 P.2d 575 (1986), our Supreme Court examined the definition of "substantial injury." It did so in the context of a legal malpractice action by the Pancake House Inc. (PHI) against the attorneys who represented the corporation for many years, then chose to represent the individual interests of some stockholders in a lawsuit against the corporate client. The court addressed varying theories on the accrual of the limitations period, settling on the "substantial injury" theory. 239 Kan. at 88. Although the attorney defendants argued the tort limitations period accrued when the suit against PHI was filed by its stockholders, the Supreme Court disagreed. The court found that, although the act of alleged malpractice itself was the filing of the suit against PHI, the corporation did not suffer substantial damages until after the trial and resulting judgment against it. 239 Kan. at 88. The court found that PHI did not suffer damages until it had to defend against the suit filed by its former attorneys—when it suffered sufficient damages for the tort to accrue. On that basis, the Supreme Court reversed the district court's dismissal of PHI's tort claims. 239 Kan. at 88-89.

Prior to its discussion in *Falen*, our Supreme Court again observed the rule expressed in *Pancake House* in another legal malpractice claim, stating: "'A cause of

action accrues when the right to institute and maintain a suit arises, or when there is a demand capable of present enforcement.'" *Mashaney v. Board of Indigents' Defense Services*, 302 Kan. 625, 633, 355 P.3d 667 (2015) (quoting *Holder v. Kansas Steel Built, Inc.*, 224 Kan. 406, 410, 582 P.2d 244 [1978]).

Our Supreme Court has addressed "substantial injury" in the tort context under other circumstances. In *Keith v. Schiefen-Stockham Insurance Agency, Inc.*, 209 Kan. 537, 544-45, 498 P.2d 265 (1972), the surviving heirs of two deceased workers brought suit against the workers' insurance brokers for failure to procure workmen's compensation coverage for the employer of the decedents, and the brokers moved to dismiss the petition for failure to state a claim upon which relief could be granted. Addressing the limitations period for tort, the court discussed that the action accrues not when the alleged tortious act was committed, but when actual damages resulted from the act. However, the situation in *Keith* and earlier cases on which it relied was that the plaintiffs were effectively prevented from suing the defendants by the pendency of other legal proceedings. 209 Kan. at 543-44 (citing *Price, Administrator v. Holmes*, 198 Kan. 100, 422 P.2d 976 [1967]; *In re Estate of Brasfield*, 168 Kan. 376, 214 P.2d 305 [1950]).

And, in another legal malpractice action, *Webb v. Pomeroy*, 8 Kan. App. 2d 246, 250, 655 P.2d 465 (1982), a Court of Appeals panel found the tort limitations period did not accrue until an underlying lawsuit had resolved because until then, the plaintiff would have suffered no injury.

Other panels of this court have discussed the "substantial injury" question while attempting to cohesively explain the "substantial injury" *or* "reasonably ascertainable" clauses found in K.S.A. 60-513(b). Although analyzing the limitations period for an action for fraud, rather than negligence, in *Bryson v. Wichita State University*, 19 Kan. App. 2d 1104, 1107, 880 P.2d 800 (1994), this court recognized that a cause of action for

fraud accrues under K.S.A. 60-513(b) upon discovery only if the party has suffered an "ascertainable injury" at that point.

In 2013 and 2019, separate panels of this court examined K.S.A. 60-513(b) and tried to clarify the two clauses found in the statute, focusing on the "reasonably ascertainable" question. *Foxfield Villa Assocs. v. Robben*, 57 Kan. App. 2d 122, 128, 449 P.3d 1210 (2019); *Dumler v. Conway*, 49 Kan. App. 2d 567, 576, 312 P.3d 385 (2013). In *Foxfield Villa*, the panel made clear that the "'only "triggering events" under the statute are (1) the act which caused the injury; (2) the existence of substantial injury; and (3) the injured party's awareness of the fact of injury.'" 57 Kan. App. 2d at 128 (quoting *Dumler*, 49 Kan. App. 2d at 576). In *Dumler*, the court explained:

> "The clear language of the statute indicates the limitation period is triggered by both the *act* which causes injury and the existence of substantial injury. It is only when the injured party is unaware of the fact of injury (*i.e.*, unaware that he or she has been injured) that the limitation period starts later." 49 Kan. App. 2d at 576.

More recently, in *Bott*, a panel of this court reviewed the Supreme Court's prior interpretations of "substantial injury" under K.S.A. 60-513(b) in the context of a tort claim for a state employee's wrongful rejection of his request to participate in a deferred retirement option program. 62 Kan. App. 2d at 636-37. Because the panel found both that Bott's injury occurred in 2016, and he could have reasonably ascertained his injury at that same time, the court found his lawsuit filed in 2019 untimely under K.S.A. 60-513. 62 Kan. App. 2d at 637-38.

Synthesizing this caselaw, we must identify three "triggering events" to determine when the limitations period began to run on Lopez' tort claims: (1) the act which caused the injury; (2) the existence of Lopez' substantial injury; and (3) Lopez' awareness of the fact of injury. *Foxfield Villa*, 57 Kan. App. 2d at 128. The parties do not dispute that

Davila's failure to procure the excess PIP coverage was the act, so we proceed to the other two questions. Here, the district court focused exclusively on the final question—Lopez' awareness—but erroneously bypassed the existence of Lopez' substantial injury. The district court failed to consider the substantiality of the injury—when Lopez' injury became actionable—instead solely focusing on determining when Lopez' injury became reasonably ascertainable.

Again, when reviewing this question, as defined by our Supreme Court in *Falen*, a "'substantial injury'" must be an "'*actionable* injury.'" (Emphasis added.) *Falen*, 308 Kan. at 582-83. Lopez did not suffer an "actionable injury" until all the elements of the cause of action were in place—that is, when he suffered a loss and was unable to realize on his promised policy. See 308 Kan. at 583. In other words, "'a cause of action accrues, so as to start the running of the statute of limitations, as soon as the right to maintain a legal action arises. . . . [A]n action accrues [when] the plaintiff could first have filed and prosecuted his action *to a successful conclusion*.'" (Emphasis added.) *Mashaney*, 302 Kan. at 631 (quoting *Pancake House*, 239 Kan. at 87).

So, we look, then, to the elements of his tort claims, generally, to determine if Lopez could have filed his lawsuit earlier and prosecuted it successfully. Lopez' tort claims for negligent representation and professional negligence, generally combined, require that he show the existence of a relationship between he and Davila, giving rise to a duty; that Davila breached that duty by failing to exercise reasonable care and/or making a false statement regarding the excess PIP coverage; that Lopez justifiably relied on the information Davila provided; and that Davila's breach caused Lopez to suffer damages. See *Stechschulte v. Jennings*, 297 Kan. 2, 22, 298 P.3d 1083 (2013) (citing *Mahler v. Keenan Real Estate, Inc.*, 255 Kan. 593, 604, 876 P.2d 609 [1994]); Restatement (Second) of Torts § 552 (1976); PIK Civ. 4th 127.43; see also *Phillips v. Carson*, 240 Kan. 462, 476, 731 P.2d 820 (1987) (outlining the elements of professional negligence, though in a legal malpractice action).

For our purposes here, we need not focus on Davila's duty of care or the breach but zero in on the final element required for Lopez to successfully pursue his negligence claim—that he suffered damages. The medical expenses and loss of income damages Lopez seeks to recover all stem from his 2019 car accident—none of the damages sought existed prior to that time.

Under these circumstances, Lopez could not justify an action for the recovery of damages based on Davila's failure to procure the excess PIP coverage until he suffered an actionable loss. And Lopez did not suffer a loss until he was unable to realize on his policy. See *Marshel Investments*, 6 Kan. App. 2d at 678-79. Although the district court's analysis focused on when the injury became reasonably ascertainable, the date the injury became ascertainable is only applicable when the actionable injury occurred before the injury was discoverable. Here, Lopez' injury simply did not happen until 2019, so whether he could have considered his potential injury at some date before is irrelevant because Davila could not be liable until Lopez suffered actionable damages.

Based on the foregoing analysis, the limitations period for Lopez' failure to procure insurance claim based on torts law did not commence until Lopez was unable to realize on the policy he believed Davila procured. The precise date of this loss is unclear—which is alone problematic for summary judgment purposes—but the record shows Lopez' car accident occurred on February 14, 2019, and he brought his lawsuit on January 26, 2021. So, it is likely his claim was filed within two years of the loss.

In sum, under K.S.A. 60-513(b) the determining question before us is not when Lopez should have reasonably ascertained Davila's failure to act, but when was Lopez injured by the failure? Finding the district court erred by ignoring this threshold question, it is unnecessary for us to examine the district court's finding, as a matter of law, that the lack of procurement was reasonably ascertainable in 2013. Were we to analyze that

finding, we might address factual questions regarding what conduct would have been reasonable on Lopez' part to investigate the lack of PIP coverage. See *Falen*, 308 Kan. at 585-86 (finding if the Falens signed the 2008 deed without reviewing and understanding it, they did not have notice of its content, which was a genuine issue of material fact preventing summary judgment) (citing *Armstrong v. Bromley Quarry & Asphalt, Inc*., 305 Kan. 16, 378 P.3d 1090 [2016]). But whether the district court improperly converted a question of fact for the jury into a question of law is an inquiry we need not go so far as to answer.

For these reasons, we conclude the district court erred in terminating Lopez' tort claims based upon its erroneous application of K.S.A. 60-513(b). We affirm the district court's grant of summary judgment to Davila on Lopez' contract claim, but we reverse the district court's grant of summary judgment to Davila on Lopez' tort claims and remand for further proceedings on those tort claims.

Affirmed in part, reversed in part, and remanded for further proceedings.