No. 23-126732-A

Date Ready
12/15/23

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BRENDA ZARAGOZA

Plaintiff/Appellant,

v.

BOARD OF COMMISSIONERS OFTHE COUNTY OF JOHNSON

Defendant/Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
THE HONORABLE JUDGE RHONDA K. MASON
Case No. 21CV03636

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TABLE OF CONTENTS

NATURE OF THE CASE 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE FACTS 2

ARGUMENTS AND AUTHORITIES 11

I. **Standard of Review** 11

First Sec. Bank v. Buehne, 314 Kan. 507, 314 P.3d 632 (2021) 11

Hansford v. Silver Lake Heights, 294 Kan. 707, 280 P.3d 756 (2012) 11

Moran v. State, 267 Kan. 583, 985 P.2d 127 (1999) 11

Williamson v. City of Hays, 275 Kan. 300, 64 P.3d 364 (2003) 11, 12

Hare v. Wendler, 263 Kan. 434, 949 P.2d 1141, 1148 (1997) 12

Kansas Supreme Court Rule 141 12

II. **The district court did not err in holding that the County was immune from ordinary negligence claims under the Kansas Tort Claims Act's recreational use immunity** 12

K.S.A. 75-6104 ..... 12, 13, 14, 16, 18, 19, 20, 21, 23, 25, 27, 28, 29, 30, 31, 32

Jackson v. U.S.D. 259, Sedgwick Cnty., 268 Kan. 319, 995 P.2d 844 (2000) 12, 13, 14, 15, 16, 17, 20, 22, 28, 31, 32

Barber v. Williams, 244 Kan. 318, 767 P.2d 1284 (1989) 12

K.S.A. 75-6102 12

Dunn v. Unified Sch. Dist. No. 367, 30 Kan.App.2d 215, 40 P.3d 315 (2002) 13

Poston v. U.S.D. No. 387, Altoona-Midway, Wilson Cnty., 286 Kan. 809, 189 P.3d 517 (2008) 13, 14, 19, 25, 26, 28, 29, 31, 32

Barrett ex rel. Barrett v. U.S.D. No. 259, 272 Kan. 250, 32 P.3d 1156 (2001) 13

Lane v. Atchison Heritage Conf. Ctr., 283 Kan. 439, 153 P.3d 541 (2007) ..... 14, ... 17, 18, 20, 25, 28, 31, 32

Tullis v. Pittsburg State Univ., 28 Kan.App.2d 347, 16 P.3d 971 (2000) 14

Jackson ex rel. Essien v. Unified Sch. Dist. No. 259, 29 Kan.App.2d 826, 31 P.3d 989 (2001). 16, 18, 19, 31, 32

Ozuk v. River Grove Bd. of Ed., 666 N.E.2d 687 (Ill. Ct. App. 1996) 16

Wright v. U.S.D. No. 379, 28 Kan. App.2d 177, 179, 14 P.3d 437 (Kan. Ct. App. 2000) 17

Marks v. Kansas Bd. of Regents, 2007 WL 1461381, (Kan. Ct. App. May 18, 2007)(unpublished) 17

Lane v. Atchison Heritage Conf. Ctr., Inc., 35 Kan. App. 2d 838, 134 P.3d 683, 685 (Kan. Ct. App. 2006), *rev'd*, 283 Kan. 439, 153 P.3d 541 (2007) 18, 25

Soto v. City of Worcester, 2012 WL3005061 at 2 (Mass. June 5, 2012) 20, 21

Johannes v. Idol, 39 Kan.App.2d 595, 181 P.3d 574 (2008) 22

Hare v. Wendler, 263 Kan. 434, 949 P.2d 1141 (1997) 22

Williamson v. City of Hays, 275 Kan. 300, 64 P.3d 364 (2003) 22

Wilson v. Kansas State Univ., 273 Kan. 584, 44 P.3d 454 (2002) 23, 24, 27, 28, 29, 31, 32

Nichols v. Unified Sch. Dist. No. 400, 246 Kan. 93, 785 P.2d 986 (1990) 24, 29, 31

Boaldin v. University of Kansas, 242 Kan. 288, P.2d 811 (1987) 24

Dye v. Shawnee Mission Sch. Dist., 2008 WL 2369847 (Kan. Ct. App. June 6, 2008)(unpublished) 24, 29, 31

Robinson v. State, 30 Kan.App.2d 476, 43 P.3d 821 (2002) 24, 29

Stone v. City of La Cygne, 2003 WL 1961969 (Kan. Ct. App. April 11, 2003) (unpublished) 24, 25, 28, 29

K.S.A. 60-409 26

Cullison v. City of Salina, 2016 WL 3031283 (Kan. Ct. App. May 26, 2016) (unpublished) 27, 28, 30

Annen v. Village of McNabb, 548 N.E.2d 1383, 1384 (Ill. Ct. App. 1990) 28

Sylvester v. Chicago Park Dist., 689 N.E.2d 1119, 1125 (Ill. 1997) 28

Callaghan v. Vill. of Clarendon Hills, 929 N.E.2d 61 (2010) 28

Patterson v. Cowley Cnty., 53 Kan.App.2d 442, 388 P.3d 923 (2017) 30

Barrett ex rel. Barrett v. U.S.D. No. 259, 272 Kan. 250, 32 P.3d 1156 (2001) 31

III. The district court did not err in holding that the County was entitled to summary judgment on Zaragoza's claim for gross and wanton negligence 32

Elstun v. Spangles, Inc., 289 Kan. 754, 217 P.3d 450, 453 (2009) 33

Soto v. City of Bonner Springs, 291 Kan. 73, 238 P.3d 278 (2010) 33, 47

Saunders v. Shaver, 190 Kan. 699, 378 P.2d 70 (1963) 33

Willard v. City of Kansas City, 235 Kan. 655, 681 P.2d 1067 (1987) 33, 35, 40

Lane v. Atchison Heritage Conf. Ctr., 283 Kan. 442 P.3d 541 (2007) 33

Lee v. Orion Mgmt. Solutions, Inc., 2010 WL 3980228 (D. Kan. Oct. 8, 2010)(unpublished) 34, 35

Molina v. Christensen, 30 Kan.App.2d 467, 44 P.3d 1274, 1280 (2001) 34

Tullis v. Pittsburg State Univ., 28 Kan.App.2d 347, 16 P.3d 971 (2000) 34

Lee v. City of Fort Scott, 238 Kan. 421, 710 P.2d 689 (1985) 35, 40, 41, 44, 47

Manley v. Hallbauer, 53 Kan.App.2d 297, 387 P.3d 185 (Kan. Ct. App. 2016) 35

K.S.A. 75–6104 ..... 35, 42

Dunn v. Unified Sch. Dist. No. 367, 30 Kan.App.2d 215, 40 P.3d 315 (2002) 35

K.S.A. 60-215 36

Dutoit v. Bd. of County Comm'rs of Johnson County, 233 Kan. 995, 667 P.2d 879 (1983) 36

Robertson v. Ludwig, 12 Kan. App. 2d 571, 752 P.2d 690 (1988), *rev'd on other grounds*, 244 Kan. 16, 765 P.2d 1124 (1988) 36

Canady v. Midway Denton U.S.D. 433, 42 Kan.App.2d 866, 218 P.3d 446 (Kan. Ct. App. 2009) 36

Thompson v. State, 293 Kan. 704, 270 P.3d 1089 (2011) 39

Kinell v. N.W. Dible Co., 240 Kan. 439, 731 P.2d 245 (1987) 39

Wiles v. American Fam. Life Assurance Co., 302 Kan. 66, 350 P.3d 1071 (2015) .. 39

N. Nat. Gas Co. v. ONEOK Field Services Co., 296 Kan. 906, 296 P.3d 1106 (2013) 39

Lanning By & Through Lanning v. Anderson, 22 Kan.App.2d 474, 921 P.2d 813 (1996) 40, 41, 44, 45, 47, 48

Frazier v. Cities Serv. Oil Co., 159 Kan. 655, 157 P.2d 822 (1945) 41

Boaldin v. University of Kansas, 242 Kan. 288, 747 P.2d 811 (1987) 42

Muxlow v. City of Topeka, 2018 WL 2999618 (Kan. Ct. App. June 15, 2018) (unpublished) 42, 43, 44, 45, 46, 48

Gruhin v. City of Overland Park, 17 Kan.App.2d 388 (Kan. Ct. App. 1992) 43, 44

Robinson v. State, 30 Kan.App.2d 476, 43 P.3d 821 (2002) 44, 47

CONCLUSION 48

CERTIFICATE OF SERVICE 49

APPENDIX 50

NATURE OF THE CASE

On July 18, 2020, Brenda Zaragoza left the Monticello branch of the Johnson County Library and began walking on the sidewalk toward her car. As she neared the parking lot, she left the designated walking path and walked through the mulch in a nearby planting bed, then stepped over the curb and down into a parking space next to the one her car was parked in. When she stepped down, she fell and suffered injuries.

Zaragoza's petition, filed in Johnson County, Kansas district court, brought a single claim against the Johnson County Board of County Commissioners for negligence. The district court granted the County's motion for summary judgment under the Kansas Tort Claims Act's recreational use immunity exception. This appeal followed.

STATEMENT OF THE ISSUES

I. **The district court did not err in holding that the County was immune from ordinary negligence claims under the Kansas Tort Claims Act's recreational use immunity.**

II. **The district court did not err in holding that the County was entitled to summary judgment on Zaragoza's claim for gross and wanton negligence.**

STATEMENT OF THE FACTS

I. Factual Background.

The Board of Directors of the Johnson County Library oversees the Johnson County Library's Monticello Branch ("the Library"), public property located at 22435 W. 66th Street, in Shawnee, Kansas. R. Vol. 3, p. 47. Under K.S.A. 12-1223(b) the Library Board may be sued only in the name of "The Board of County Commissioner of the County of Johnson" ("the "County"). Therefore, although the Library Board owns the Library, the named defendant in this lawsuit is the County.

The County, through employee Georgia Sizemore, approved the plan or design for the Library, exercising her discretionary authority. R. Vol. 3, pp. 45, 52. The Library opened to the public on August 5, 2018. R. Vol. 3, p. 47. Along with allowing patrons to check out books, magazines, movies, music, and other materials for their personal use, the Library features art installations and sculptures by local artists, a dedicated story room for children that is open to the public when not in use, and an outdoor children's story walk. *Id.* The Library also hosts community events like toddler and family story times, tabletop game nights, book clubs, events that allow children to read stories to therapy dogs, an after-hours event called "Teen Takeover," in which teenagers work together to solve a mystery using puzzles and riddles, and yoga for preschoolers. *Id.*

Brenda Zaragoza ("Zaragoza") is a resident of Johnson County, Kansas. R. Vol. 3, p. 35. Before the incident that is the subject of this appeal, she had visited the Library roughly once or twice per month since it opened in 2018. *Id.* at 36. During each such visit, she drove to the Library and parked in the parking lot. *Id.*

On July 18, 2020, Zaragoza drove herself to the Library, arriving a little past 9:00 a.m. *Id.* at 37-38. She testified she "like[s] to look at the . . . books and movies," and went to the Library just to browse, though she eventually did check out some books and movies. *Id.* When Zaragoza finished, she exited the building and began walking back to her car. *Id.* at 39. This was the first time she walked this particular path from the Library to her car. *Id.* at 36.

Zaragoza testified that a packet of photos marked as Deposition Ex. 3, including the photo below, matched her recollection of the area in question as it appeared on July 18, 2018:

Id. at 40; R. Vol. 3, p. 62.

After exiting the Library, Zaragoza walked along a straight concrete path until one of her feet entered a mulch bed, before the other foot stepped down into the parking lot. R. Vol. 3, pp. 41-42. Zaragoza knew, as she was walking, that she was stepping off the curb and down into the parking lot. *Id.* at 43. She testified that when her foot landed, she had

not been expecting a downward slope, which caused her to lose her balance and fall. *Id.* at 41. She circled the area of the "unexpected dip" she encountered:

Id. at 43, 67. Because of her fall, Zaragoza fractured her knee, ankle, and heel. *Id.* at 44.

Documents from the Library's door sensors reflect that between 311,970 and 313,500 people, approximately, passed through its doors between August 2018 and June 2020. R. Vol. 3, pp. 48-51. The Library's branch manager, Christian Madrigal, reviewed every incident report prepared at the Library from the date it opened in 2018 to present. Madrigal determined the Library had no record of any other person suffering a fall at the location where Zaragoza fell, or any record of any other person suffering a fall in the parking lot at or near any other storm drain. *Id.* at 48.

Testifying as the County's corporate representative, Georgia Sizemore was asked why the curb in front of the Library was painted yellow, but there was no yellow paint on the curb near the sewer area. The full answer, after an objection, was:

> "A: Okay. It could be for fire lane. I remember somewhere along the way, I could not tell you when, that I remember Christian Madrigal was saying that there was some folks having trouble in this area here, which is the drop-off area in front of the building. This is a concrete sidewalk here (indicating), and then it's a concrete pull-off as well, and I remember people saying that people were walking off that step, that curb step, without realizing there was a step there because the concrete, there wasn't enough differential. Fresh concrete, it's really hard to tell that curb area, and I'm experiencing that as I get older, so I understand that. So I recall -- I believe Juan and Christian worked up to stripe that, to try to draw attention to the situation so people didn't step off it accidentally."

R. Vol. 1, p. 211.

Sizemore, as corporate representative, also testified that Sheet L4.01 of the design plans, which identified the landscaping plans, called for a 24-inch tall plant to be placed in the mulched area where Zaragoza eventually fell. R. Vol. 1, p. 213. At the same time, she testified that Sheet L4.01 did not depict the storm sewer constructed in the mulch bed, and she "imagin[ed] there was an adjustment made in the field during construction," although "there could have been something planted there and it has failed, for example. I just don't know." *Id.* Sizemore, as corporate representative, ALSO testified she did not know why there were no plants in the mulch bed on the date Zaragoza fell. R. Vol. 1, p. 80.

Zaragoza designated one retained expert, Dr. Claudia Ziegler Acemyan ("Dr. Acemyan"). R. Vol. 3, p. 74. According to Dr. Acemyan, the slope of the parking lot was an intentional design choice made to direct ground water towards the storm drain, rather than a condition created due to lack of maintenance or deterioration. R. Vol. 3, pp. 79-80.

Dr. Acemyan testified that whether the slope, as encountered by Zaragoza, was the same as when the parking lot was constructed fell outside the scope of her opinions. *Id.* at 79. According to Dr. Acemyan, the Library should have erected a barrier or guard rail in front of the sloped area, or used some sort of warning communication, such as striping, messaging, or signage, to warn users about the slope. *Id.* at 82, 97. She also maintained the Library should have used the safety hierarchy method to first evaluate the location for a guarding mechanism and, if they determined guarding was not technically or economically feasible, then used some type of warning or risk communication. *Id.* at 82. Dr. Acemyan believed this evaluation should have occurred when the Library obtained the property, or possibly earlier through discussions with the architect. *Id.* at 82-83. She had no opinion on whether the plans or designs were prepared in conformity with generally recognized and prevailing standards in existence at the time. *Id.* at 78, 81. She also testified she did not intend to offer any opinion on whether the Library was constructed pursuant to its design. *Id.* at 79.

The County designated Laurence C. Fehner, P.E. ("Fehner") as one of two retained experts. R. Vol. 3, p.116. Fehner reviewed the construction documents associated with the Library, and concluded the parking area, sidewalks, curbs, curb inlets, and walkway areas in question were all constructed in conformity with the construction drawings. R. Vol. 3, pp. 121, 128. Fehner opined that neither the construction drawings nor the City of Shawnee's building codes required the curbs to be marked. *Id.* He also concluded that guardrails were not called for in the plans. *Id.* According to Fehner, portions of the submitted plans, along with the construction plans, generally complied with the City of

Shawnee's design and construction manual, and were typical, common, and industrial standard within the Kansas City metro area. *Id.*

II. Procedural Background.

On August 10, 2021, Zaragoza filed suit in Johnson County district court. R. Vol. 1, pp. 5-9. Zaragoza's petition includes one count—premises liability. *Id.* at 7-9. Within the Petition, Zaragoza alleged in ¶ 20:

> "Defendant Board's failure and/or refusal to remedy the dangerous condition it created, and its failure to provide patrons with any notice, warning, barrier, or barricade of the dangerous condition, constituted a breach of Defendant Board's duty of reasonable care owed to patrons of Defendant Board's library and this constitutes negligence."

Id. at 8.

On April 15, 2022, the district court entered a case management order ("CMO"). R. Vol. 1, pp 15-22. The CMO set May 20, 2022, as the deadline for either party to move to amend and expressly stated that "[a]bsent agreement of the parties, no such motions will be granted after this date." *Id.* at 19. Neither party moved to amend before the deadline.

In Interrogatory 7, the County asked for Zaragoza to identify the principal or material facts that supported her claim that the County was negligent. She first responded:

> "ANSWER: Plaintiff objects to this request because it will be the subject of expert testimony and her expert can explain in greater detail how defendant violated its duty of care. Subject to that objection, plaintiff states that defendant's parking lot and surrounding areas were created in a way that did not adequately warn Ms. Zaragoza and other library patrons of the dangerous slope and drop from the sidewalk to the parking lot. As a result of this dangerous condition, plaintiff fell and suffered broken bones and other injuries."

R. Vol. 1, p. 241.

On January 17, 2023, after the close of discovery, the County moved for summary judgment, asserting its entitlement to immunity under the Kansas Tort Claims Act ("KTCA")'s recreational use immunity, K.S.A. 75-6104(a)(15).[1] R. Vol. 3, pp. 6-32. The County argued in its motion that (1) recreational use immunity applied, and (2) Zaragoza had not alleged gross and wanton negligence. R. Vol. 3, p. 6.

On February 3, 2023, Zaragoza responded to the County's motion by moving for leave to amend to allege gross and wanton negligence. R. Vol. 3, pp. 172-201. Zaragoza also served a supplementary response to the County's interrogatories, which changed her response to Interrogatory 7 to add:

> "SUPPLEMENTAL ANSWER: Defendant's corporate representatives admitted that patrons had complained about not being able to detect the step down from the curb to a walking area because of the lack of color differentiation. Defendant testified it painted the curbs close to the building to correct this problem, but they limited their maintenance to the area closest to the building and failed to provide corrective maintenance in the public parking lot used by library patrons. This failure to provide corrective maintenance led to Plaintiff's injury.
>
> Defendant's corporate representatives also admitted that the plans for the Monticello Branch library called for a 24-inch high plant to be placed in the mulched area where Ms. Zaragoza stepped before she stepped into the sloped area of the parking lot. The Library admits that the plant was called for by the plans, admits that it would have prevented Ms. Zaragoza from stepping where she did, and the Library admits it has no idea why there was no plant in that location at the time of Ms. Zaragoza's injury. Defendant had actual knowledge of the dangerous condition that led to Ms. Zaragoza's injury, was aware of appropriate guarding or warning maintenance it could have

[1]Effective July 1, 2023, *i.e.*, after the district court decided this matter, K.S.A. 75-6104 was revised. The KTCA's recreational use immunity is now found in K.S.A. 75-6104(a)(15), whereas during briefing at the district court level (and in prior appellate decisions cited here), the immunity was set forth in K.S.A. 75-6104(m). Although the 2023 amendments did revise the recreation use immunity provision of the KTCA, the revision pertains only to claims of childhood sexual abuse and therefore is not germane to any issue in this appeal. To avoid confusion, all reference to recreational use immunity here are made by reference to the current statute, K.S.A. 75-6104(a)(15).

> performed but, through indifference, inattention, and inaction, failed to warn or guard against that danger."

R. Vol. 3, p. 213-214. Zaragoza also responded in opposition to the County's motion for summary judgment. R. Vol. 1, pp. 172-209.

The County opposed Zaragoza's motion to amend, asserting that it was untimely under the CMO and was made for the improper purpose of avoiding summary judgment. R. Vol. 1, pp. 172-186. The County also moved to strike Zaragoza's supplemental interrogatory response on similar grounds, R. Vol. 3, pp. 202-215, and opposed Zaragoza's reliance on either the proposed amendment or the supplemental response in her opposition to summary judgment, R. Vol. 1, pp. 189-193.

On May 16, 2023, the district court entered an order granting the County's motion for summary judgment. R. Vol. 1, pp. 233-248. In the order, the district court held that because the uncontroverted evidence established that the ancillary activities permitted inside the Library—*e.g.*, family story time events, board game nights, and yoga for preschoolers—were recreational, it was "clear that recreational activities are intended, permitted, and encouraged at the Library." *Id.* at 242-243. The Court further found that because the parking lot where Zaragoza was injured was necessary for the Library to provide its services, both recreational and otherwise, K.S.A. 75-6104(a)(15) applied. *Id.* at 244-245.

Separately, the Court found that "[n]o reasonable jury could find that [Zaragoza's] two bases for gross negligence, (1) that [the County] colored the curb elsewhere on the parking lot and (2) that [the County] contemplated placing a bush by the sewer where

[Zaragoza] fell but ultimately did not, amount to willful and wanton conduct." *Id.* at 245. Turning first to Zaragoza's claim that the County was guilty of gross and wanton conduct, the Court pointed out that even with the curb at issue unpainted, Zaragoza admitted she knew the curb was ending and that she was stepping off the sidewalk and down into the parking lot. *Id.* at 246. Second, the Court found that the curbs the County painted were at the drop-off area, "an area that receives inherently more foot traffic, is too factually distinct from a curb much further away from the entrance that was only accessible after cutting through mulch." *Id.* As the Court explained, "painting a nearby curb is not evidence that [the County] knew that the slope of the parking lot in the location where [Zaragoza] fell was a dangerous condition. Painting the nearby curb also does not suggest that Defendant ignored any known dangers." *Id.* Finally, the Court noted that there was no evidence of any other patron falling (1) in the area Zaragoza had fallen, or (2) in any other area sloped to facilitate drainage, such that the County was on notice, before Zaragoza's fall, of a dangerous condition. *Id.*

Turning next to evidence suggesting that design plans for the Library called for a 24-inch plant to be planted in the mulch bed Zaragoza eventually walked through, the Court focused on the absence of evidence suggesting the County acted, or failed to act, with the requisite state of mind, explaining:

> "Whether the failure to paint the curb or plant a bush constitutes *ordinary* negligence would not have been as clear cut, and summary judgment on an ordinary negligence claim would have likely been denied absent statutory immunity. However, gross and wanton negligence is required to sidestep recreational use immunity, and as a matter of law, there is no reasonable jury that could find that Defendant's actions (and inactions) constitute gross negligence. To allow Plaintiff to thwart summary judgment by simply

> labeling ordinary negligence as gross negligence without the facts to support a claim would allow future plaintiffs to negate certain forms of immunity by always pleading gross negligence, even in the absence of factual support."

Id. at 246-247. The Court separately denied Zaragoza's motion to amend, as both untimely and futile in light of its order granting the County summary judgment. *Id.* at 247.

ARGUMENTS AND AUTHORITIES

I. Standard of Review.

The standard for review from an order granting summary judgment is *de novo*. *First Sec. Bank v. Buehne*, 314 Kan. 507, 510, 314 P.3d 632 (2021).

> "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with 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 issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied."

Hansford v. Silver Lake Heights, 294 Kan. 707, 710-11, 280 P.3d 756 (2012) (internal citations and quotations omitted).

A defendant is entitled to summary judgment when it establishes the absence of evidence necessary to support an essential element of a plaintiff's case. *Moran v. State*, 267 Kan. 583, 589, 985 P.2d 127 (1999). Mere allegations cannot defeat a properly supported motion for summary judgment. *Williamson v. City of Hays*, 275 Kan. 300, 307, 64 P.3d 364 (2003). Rather, an adverse party must come forward with "something of

evidentiary value to establish a disputed material fact." *See Hare v. Wendler*, 263 Kan. 434, 444, 949 P.2d 1141, 1148 (1997); *see also*, Kansas Supreme Court Rule 141(b) (requiring a party attempting to controvert a statement of fact to "concisely summarize the conflicting testimony or evidence . . . ."). "Evidentiary value" means "a document or testimony . . . probative of [the opposing party's] position on a material issue of fact." *Williamson*, 275 Kan. at 444.

II. The district court did not err in holding that the County was immune from ordinary negligence claims under the Kansas Tort Claims Act's recreational use immunity.

The district court correctly held the County was immune from Zaragoza's ordinary negligence claim under the Kansas Tort Claims Act ("KTCA")'s recreational use immunity exception, K.S.A. 75-6104(a)(15). Under the KTCA, governmental liability is the rule and immunity is the exception. *Jackson v. U.S.D. 259, Sedgwick Cnty.*, 268 Kan. 319, 322, 995 P.2d 844 (2000) ("*Jackson* I"). Governmental entities have the burden to prove they fall within one of the KTCA's enumerated exceptions. *Barber v. Williams,* 244 Kan. 318, 320, 767 P.2d 1284 (1989). The County is a governmental entity. *See* K.S.A. 75-6102(b)-(c)(defining "governmental entity" and "municipality").

The KTCA's "recreational use immunity" exception states that a governmental entity is not liable for any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity (or an employee) is guilty of gross and wanton negligence. K.S.A. 75-6104(a)(15). "K.S.A. 75–6104[(a)(15)] is a complete defense to actions where the plaintiff alleges only ordinary negligence." *Dunn v. Unified Sch. Dist.*

No. 367, 30 Kan.App.2d 215, 225, 40 P.3d 315 (2002). The Kansas Supreme Court has explained:

> "The purpose of K.S.A. 75–6104[(a)(15)] is to provide immunity to a governmental entity when it might normally be liable for damages which are the result of ordinary negligence. This encourages governmental entities to build recreational facilities for the benefit of the public without fear that they will be unable to fund them because of the high cost of litigation. The benefit to the public is enormous. The public benefits from having facilities in which to play such recreational activities as basketball, softball, or football, often at a minimal cost and sometimes at no cost. The public benefits from having a place to meet with others in its community . . . ."

Jackson I, 268 Kan. at 331.

Recreational use immunity is "broadly applied to accomplish the legislative purpose of the exception." *Poston v. U.S.D. No. 387, Altoona-Midway, Wilson Cnty.*, 286 Kan. 809, 812, 189 P.3d 517 (2008). Courts break K.S.A. 75-6104(a)(15) into two basic requirements: the property must be: (1) public, and (2) intended or permitted to be used for recreational purposes. *Id.* Here, the public nature of the Library is not in dispute. The first element is therefore met.

When evaluating the second element, immunity "depends on the character of the property in question and **not** the activity performed at the time." *Barrett ex rel. Barrett v. U.S.D. No.* 259, 272 Kan. 250, 257, 32 P.3d 1156 (2001) (emphasis added). "[K.S.A. 75-6104(a)(15)] only requires that the property be intended or permitted to be used for recreational purposes, not that the injury occur as the result of recreational activity." *Id.* (citing *Jackson* I, 268 Kan. at 319, Syll. ¶ 6). Resolving whether recreational use immunity applies involves a question of statutory interpretation, over which appellate

courts have unlimited review. *Lane v. Atchison Heritage Conf. Ctr.*, 283 Kan. 439, 443, 153 P.3d 541 (2007).

a. The Library's core services are recreational.

The Library's core services—allowing patrons to read and borrow books and other media—are undisputed. Brief of Appellant, p. 6. Although Zaragoza argues that whether those services are recreational presented a question of fact, determining how K.S.A. 75-6104(a)(15) applies to undisputed facts presents a pure question of law. *See Lane*, 283 Kan. at 443.

"Recreation," as used in K.S.A. 75-6104(a)(15), means "refreshment of the strength and spirits after toil: DIVERSION, PLAY." *Jackson* I, 268 Kan. at 330. "Play" "suggests an opposition to work; it implies activity, often strenuous, but emphasizes the absence of any aim other than amusement, diversion, or enjoyment." *Id.* Although K.S.A. 75-6104(a)(15) refers to "park[s], playground[s] or open area[s]," the Kansas Supreme Court has recognized it "defies common sense" to limit this exception to only outdoor facilities. *See Jackson*, 268 Kan. at 325. Courts therefore have not limited recreational use immunity to injuries suffered outdoors, at sporting events, or during physical activity. *See, e.g., Tullis v. Pittsburg State Univ.*, 28 Kan.App.2d 347, 16 P.3d 971 (2000)(applying the KTCA to injuries sustained during a play at an indoor theater); *Poston,* 286 Kan. at 815 (applying recreational use immunity to injuries in an area connected to an indoor gymnasium).

Under K.S.A. 75-6104(a)(15), "the correct test . . . is 'whether the property [at issue] has been used for recreational purposes in the past or whether recreation has been encouraged.'" *Lane*, 283 Kan. at 447. Accordingly, the first question that must be

answered here is: are recreational activities intended or permitted at the Library? As the district court correctly found, the answer is undisputedly "yes."

The district court declined to decide whether the Library's "traditional" offerings—allowing patrons to read and borrow books and media—were recreation. That notwithstanding, these functions, alone, are more than adequate to establish the Library has been and is used for recreational purposes. The thrust of Zaragoza's argument is that the Library's purpose must be categorized in binary terms, as either "educational" or "recreational," but not both. From that flawed premise, she argues that because documents she found online describing the Library's strategic vision reference education, but not recreation, recreational use immunity does not apply. Setting aside the questionable admissibility of the evidence Zaragoza relies on,[2] and disregarding the commonsense fact that the purpose of the Library's strategic plan was not to establish all affirmative defenses available to the Library in civil litigation, this argument misses the mark.

This issue is controlled by *Jackson* I, 268 Kan. 319, 995 P.2d 844 (2000) and its progeny. In that case, a student was injured during P.E. class when he jumped onto a wood springboard to try to slam dunk a basketball. *See* 268 Kan. at 321-322. On review, the Kansas Supreme Court held that using a gymnasium for compulsory physical education classes was not a recreational purpose. *See id.* at 330 ("[Compulsory physical education and recreation have different aims: whereas the former seeks to instruct, the latter aspires merely to amuse."). Yet contrary to Zaragoza's argument here, the Court also recognized

[2]To establish that the Library characterizes its uses as educational, Zaragoza relies on an affidavit from a paralegal at her legal counsel's law firm, who attests to substance of information prepared by others, which she read on the internet.

that public property may have more than one use and held that if the evidence showed the gym was used for *other* recreational, noncompulsory activities, immunity would apply, as long as the recreational use was "more than incidental." *Id.* The Court then remanded the case for development of the record. *Id.* at 333. In a second appeal following the remand, the Court of Appeals held that recreational use still applied because the gym was used on other occasions for basketball tournaments, YMCA-sponsored activities, and other community activities that were "beyond incidental." *Jackson ex rel. Essien v. Unified Sch. Dist. No. 259*, 29 Kan.App.2d 826, 832, 31 P.3d 989 (2001) ("*Jackson* II").

Jackson I and II illustrate several key principles, each of which Zaragoza has ignored. First, although Zaragoza frames the issue as requiring this Court to place a single label—educational or recreational—on the Library, *Jackson* I explicitly recognizes public property may have more than one use. *See* 268 Kan. at 330 (quoting and adopting *Ozuk v. River Grove Bd. of Ed.*, 666 N.E.2d 687 (Ill. Ct. App. 1996) ("Because public property may have more than one intended use . . . the fact that the gymnasium was used for physical education is not dispositive of whether [recreational use] immunity applies."). In fact, the Court of Appeals applied K.S.A. 75-6104(a)(15) to the gymnasium in *Jackson* I and II, despite mixed—educational (P.E. class) and recreational (basketball tournaments, etc.)—uses. *Jackson* II, 29 Kan.App.2d at 832.

Second, Zaragoza's overbroad attempt to label the Library as exclusively educational glosses over the key facts of the cases where a distinction between "education" and "recreation" has been made. *Jackson* I, along with the subsequent cases interpreting it, establish that when deciding whether a use is recreational, the key factor is whether a

property is used exclusively for compulsory or mandatory activities that take place during the school day (educational), or whether non-compulsory extracurricular activities (recreational) are also permitted. *See Jackson* I, 268 Kan. at 330; *Wright v. U.S.D. No. 379*, 28 Kan. App.2d 177, 179, 14 P.3d 437 (Kan. Ct. App. 2000) (applying recreational use immunity to wrestling room, regardless of its use during P.E. classes, because it was also used for non-compulsory activities like wrestling practice); *Marks v. Kansas Bd. of Regents*, 2007 WL 1461381, *3 (Kan. Ct. App. May 18, 2007)(unpublished) ("noncompulsory extracurricular activities" are recreational for KTCA purposes).

Zaragoza's attempt to label the Library as exclusively educational is unavailing because unlike the school setting of every other case touching on this issue, the Library's services and programs are non-compulsory. Some patrons presumably use the Library to further academic pursuits. But, by the same token, it is beyond debate that the Library's basic services—loaning books, movies, and other materials—also serve non-compulsory, recreational purposes. For example, Zaragoza herself was at the library not for any academic pursuit, but because she enjoyed browsing the books and movies. Conspicuously absent from Zaragoza's brief is any claim that she was engaging in an educational pursuit when she checked "The Jungle Book" on DVD.

Third, Zaragoza's attempt to convince this Court that any recreational use of this property is incidental misinterprets the phrase "beyond incidental" as used in *Jackson* I and II. The Kansas Supreme Court directly addressed this issue in *Lane*, which involved the Atchison Heritage Conference Center ("AHCC"), an indoor conference center owned by the City and leased to a for-profit entity. 283 Kan. at 440-441. The AHCC was used as a

meeting space with catering and banquet facilities, and its uses included public school dances, hosting card games, theater events, and beauty pageants. *See id.* at 440. In 1999, the AHCC hosted a dance open to the public. The plaintiff, a hired musician, slipped on ice at a loading dock outside, then sued for his injuries. *See id.* at 441.

Between 1999 and 2004, the AHCC hosted meetings on 424 dates, retreats on 113 days, parties, or reunions on 82 dates, and weddings or wedding receptions on 70 dates. *Lane v. Atchison Heritage Conf. Ctr., Inc.*, 35 Kan. App. 2d 838, 840, 134 P.3d 683, 685 (Kan. Ct. App. 2006), *rev'd*, 283 Kan. 439, 153 P.3d 541 (2007). From this data, the Court of Appeals reached the same conclusion Zaragoza argues for here—that because the "overwhelming purpose" of the conference center was non-recreational, any recreational was the type of "incidental" use *Jackson* I warned would fall outside the scope of K.S.A. 75-6104(a)(15). 35 Kan.App.3d at 846-847.

The problem for Zaragoza is that the Kansas Supreme Court rejected this analysis. The Court made clear that the phrase "more than incidental" "does not equate with the language adopted by the Court of Appeals that the use must be *the primary purpose* in maintaining a facility." *Lane v. Atchison Heritage Conf. Ctr., Inc.*, 283 Kan. 439, 447 153 P.3d 541 (2007). As the Court pointed out, in *Jackson* II, the Court applied K.S.A. 75-6104(a)(15) to a school gym because assorted community events were permitted there, even though a non-recreational use—mandatory education classes—was the undisputed primary purpose. *See* 283 Kan. at 448-449. In other words, recreational use immunity still applied, even though "[t]here [was] no indication that the recreational activities listed were given preference over school-related uses, or that the use of the gym by these groups was

more than mere 'happenstance.'" *Id.* Adopting this logic, the Court repeated that the correct test is whether the property has been used for recreational purposes in the past or whether recreation has been encouraged. *Id.* Because the AHCC had been used several times for recreational events and activities, the Kansas Supreme Court affirmed summary judgment on recreational use immunity grounds. *Id.*

In *Poston v. Unified Sch. Dist. No. 387, Altoona-Midway, Wilson Cnty.*, 286 Kan. 809, 815, 189 P.3d 517, 522 (2008), the Kansas Supreme Court also addressed whether a school commons area, used primarily for student dining and to provide access to various areas of the school, served a recreational purpose because it was also used (1) to provide tickets and refreshments during sporting events, and (2) to provide access to the gym. Ultimately, the Court held that because both uses were integrally tied to the gymnasium's recreational purpose and that these recreational uses were "beyond incidental." 286 Kan. at 819.

Read in concert, these cases illustrate that where a facility is used *exclusively* for compulsory educational activities, K.S.A. 75-6104(a)(15) does not apply. For example, if a student was injured in a school library, and the evidence showed the library was not open to the public and was only used for compulsory school classes, K.S.A. 75-6104(a)(15) would not apply. On the other hand, if, like the situation in *Jackson* II, the evidence showed that a school library was used for compulsory school activities *and* non-compulsory recreational activities, K.S.A. 75-6104(a)(15) applies. *See Jackson* II, 29 Kan.App.2d at 832; *see also, Poston v,* 286 Kan. at 815 (applying K.S.A. 75-6104(a)(15) to a school commons area mostly used for nonrecreational activities that was also used to sell

refreshments and tickets to basketball games and provide a means of access to the gym). "[T]he correct test to be applied under K.S.A. 75-6104[(a)(15)] is 'whether the property has been used for recreational purposes in the past or whether recreation has been encouraged.'" *Lane*, 283 Kan. at 452 (quoting *Jackson* I, 268 Kan. at 330). *Lane* further makes clear that this Court should not engage in a protracted analysis of whether the Library's service are primarily educational or recreational. *See* 283 Kan. at 447 ("The language in *Jackson I* that the use must be 'more than incidental' does not equate with the language adopted by the Court of Appeals that the use must be *the primary purpose* in maintaining a facility.").

If Zaragoza's injuries occurred in the parking lot of the DMV, and the County claimed the property was recreational because it hung art on the wall for patrons to look at while they wait, perhaps there would be a good argument that any recreational purpose served by the decorations was not beyond incidental. But, as the district court recognized, recreational use immunity is decided case-by-case, and those are not the facts here. *See Jackson* I, 268 Kan. at 325 ("Each case brought pursuant to [K.S.A. 75-6104(a)(15)] must be evaluated on a case-by-case basis."). That the Library allows patrons, like Zaragoza, to use and borrow materials for their own amusement, diversion, or enjoyment is more than adequate to establish a recreational use that is beyond incidental.

Finally, Zaragoza argues that the district court improperly relied on *Soto v. City of Worcester*, 2012 WL3005061 at *2 (Mass. June 5, 2012) as support for its decision. To begin with, the district court's ruling was correct, and is controlled by the binding Kansas appellate decisions discussed above, whether it also found *Soto* persuasive or not.

Moreover, even though the Massachusetts statute at issue in *Soto* is broader than K.S.A. 75-6104(a)(15), Zaragoza fails to articulate the relevance of this distinction. If, as in the hypothetical discussed above, the Library was not open to the public and was only used for compulsory school classes, perhaps the Library would be treated differently under Kansas and Massachusetts law. But under the actual facts, Zaragoza identifies no relevant distinction that suggests the Court's consideration of *Soto* constitutes reversible error. The Library's uncontroverted "core" offerings establish that the Library has been used for recreations purposes that are beyond incidental.

b. <u>The Library's additional programming is recreational.</u>

Separate from the Library's core services, the County proffered evidence that the Library (1) features art installations and sculptures by local artists, (2) has a dedicated story room for children which is open to the public when not in use, and (3) has an outdoor children's story walk, and (4) hosts community events like toddler and family story times, tabletop gaming nights, book clubs, events that allow children to read stories to therapy dogs, an after-hours event called "Teen Takeover," in which teenagers work together to solve a mystery using puzzles and riddles, and yoga for preschoolers. R. Vol. 3, p. 47. Based on these events, the district court held it was "clear that recreational activities are intended, permitted, and encouraged at the Library." R. Vol. 1, pp. 242-243.

On appeal, Zaragoza does not dispute that events such as yoga for preschoolers or tabletop game nights are recreational. Instead, she makes the dubious argument that there was a question of fact as to whether the Library intended or permitted these types of events before her injury. The County proffered evidence through the affidavit of the Library's

branch manager, Christian Madrigal, who has managed the Library since it opened in 2018. R. Vol. 3, p. 47. In the affidavit, Madrigal attested to his personal knowledge of the fact that the Library hosts each of the extra programs listed above.

"[M]ere speculation is insufficient to avoid summary judgment." *Johannes v. Idol*, 39 Kan.App.2d 595, 603, 181 P.3d 574 (2008). When opposing a motion for summary judgment, an adverse party must come forward with "something of evidentiary value to establish a disputed material fact." *Hare v. Wendler*, 263 Kan. 434, 444, 949 P.2d 1141 (1997). "Evidentiary value" means "a document or testimony . . . probative of [the opposing party's] position on a material issue of fact." *Williamson v. City of Hays*, 275 Kan. 300, 307, 64 P.3d 364 (2003). Zaragoza has not pointed and cannot point to any evidence from which a reasonable trier of fact could find that the Library's additional programming began only after her fall. She has therefore been forced to resort to attempting to manufacture a genuine dispute of material fact where none exists.

Zaragoza argues that the fact Madrigal's affidavit is stated in the present tense makes it unclear whether the Library began offering additional programming upon opening, or instead began offering these services only after her fall. There are myriad problems with this argument. First, because there is no dispute the Library was offering its core services on (and before) the date of Zaragoza's fall, this entire argument is moot. Second, the issue is whether "the property was ***intended*** or permitted to be used for recreational purposes." *Jackson* I, 268 Kan. at 329 (emphasis added). Madrigal's affidavit identifies several spaces—the children's story walk and story room—which were constructed for recreational purposes, whether used for that purpose before Zaragoza's fall

or not. Third, Madrigal's affidavit specifically attests that his testimony derives from his personal knowledge, derived from serving as the Library's branch manager since it opened in August 2018. As the district court correctly found, no genuine issue of material fact can derive from the facts set forth in Madrigal's affidavit. Ample, uncontroverted evidence established the Library was intended to be, has been, and continues to be, used for recreational purposes.

c. The Library's parking lot is near to, and integral to the Library.

Setting aside the debate over whether the Library serves a recreational purpose, Zaragoza separately argues that K.S.A. 75-6104(a)(15) does not apply because her injuries took place in the parking lot, rather than inside the Library. It is undisputed the recreational activities outlined above took place inside or just outside the Library, rather than in the parking lot. That said, Kansas law does not limit the scope of recreational use immunity strictly to the area of a property where recreation occurs.

The seminal case on this issue is *Wilson v. Kansas State Univ.*, 273 Kan. 584, 44 P.3d 454 (2002). There, a woman sued Kansas State University for burns she suffered from contact with chemicals on a toilet seat in the restroom inside a football stadium. Although she argued the restroom served no recreational purpose, the Kansas Supreme Court found that K.S.A. 75-6104(a)(15) provides immunity for "any public property" used for recreational purposes, and is not limited to "*any portion* of public property" used for that purpose. 273 Kan. at 592. Because the restroom was "necessarily" connected to a recreational facility, the Court held that recreational use immunity applied. *Id.* at 590 ("A facility servicing large numbers of people must include restrooms.").

In *Nichols v. Unified Sch. Dist. No. 400*, 246 Kan. 93, 785 P.2d 986 (1990), a football player was injured while running across a "grassy swale" between a practice field and locker room. The Kansas Supreme Court reiterated that recreational use immunity "is not limited to areas expressly designated as recreational," and affirmed summary judgment. 246 Kan. at 97 (citing *Boaldin v. University of Kansas*, 242 Kan. 288, 747 P.2d 811 (1987)). Similarly, in *Dye v. Shawnee Mission Sch. Dist.*, 2008 WL 2369847 (Kan. Ct. App. June 6, 2008)(unpublished), a mother was walking from a fenced-in soccer field through a grassy area containing a sewer inlet, when she fell into a hole. The Court of Appeals cited *Wilson* and *Nichols* for the position that the recreational use exception applies "to property integral to *or near* a recreational facility" and, again, affirmed summary judgment. *Id.* at *2 (emphasis added). The same logic applied to a wet hallway between a swimming pool and locker room in *Robinson v. State*, 30 Kan.App.2d 476, 479, 43 P.3d 821 (2002).

In *Stone v. City of La Cygne*, 2003 WL 1961969 (Kan. Ct. App. April 11, 2003) (unpublished), a plaintiff was injured inside a shed near a swimming pool, which housed chemicals and water cleaner. The plaintiff argued recreational use immunity did not apply because the shed was not a recreational area and was not open to the public. The Court of Appeals disagreed, comparing the case to *Wilson*:

> "Just as the restrooms facilitated the recreational purpose of the stadium by permitting spectators to remain at the stadium, so too, the machines and chemicals housed by the pool shed facilitate the recreational use of the pool. The pool could not be used at all if the water were not cleaned. Consequently, the pool shed is an integral part of the recreational use intended by the development of the city pool. Moreover, unlike restrooms attached to a recreational facility, the pool shed possesses no viable purpose apart from the swimming pool; its only function is to facilitate the use of the recreational property."

2003 WL 1961969, at *2. Relying on its classification of the shed as integral to the pool, the Court ultimately determined that the recreational use exception applied. *Id.*

In *Lane*, discussed *supra*, the Kansas Supreme Court focused on whether the conference center had historically been used for recreational purposes. Although not analyzed by the Supreme Court, the injuries in *Lane* occurred on a loading dock outside of the facility. *See* 283 Kan. at 440. The Court of Appeals found that

> "the loading dock . . . while possessing no independent recreational purpose, is merely instrumental in providing access to the conference center for the delivery of supplies or . . . equipment. Therefore, the mere fact that plaintiff's injury occurred in an area not specifically intended for recreation does not bar AHCC from claiming immunity under 75–6104[(a)(15)], if the intended purpose of the conference center is recreation."

Lane v. Atchison Heritage Conf. Ctr., Inc., 35 Kan.App.2d 838, 846, 134 P.3d 683 (2006).

In *Poston*, discussed *supra*, a parent arrived to pick up his child from practice at a middle school. He entered the main doors of the school, walked through an indoor commons area at the front of the school, and opened the door to the gymnasium to let his child know he was there. He then exited the same way he entered. As he left the building, a bracket from the main entry door came loose and hit his head. 286 Kan. at 809-810.

In considering recreational use immunity, the Court noted that the commons area was integral to the gymnasium because it allowed the school to sell concessions and tickets to events. *Id.* at 815. Additionally, the area where the injury occurred was "necessarily connected by plan to the gymnasium as a principal means for the public to gain physical access to the gym . . . ." *Id.* at 816. "Indeed [plaintiff's] use of the commons at the time of his injury resulted from a use that was consistent with the plan; he walked to and from

the gymnasium . . . by using a route of access intended for public use." *Id.* Finally, the court dismissed the argument that the recreational use exception did not apply because plaintiff's injury occurred outside the recreational facility. "The problem with this reasoning . . . is that the commons . . . was used as a multipurpose room, not simply a cafeteria, and some uses were an integral part of the recreational purpose of the gymnasium. The incentive to open the gymnasium to the public for recreational use necessitates opening those areas integral to the gymnasium's use; in this case that included the commons." *Id.*

This Court may take judicial notice that the Library's parking lot serves as the principal location for the public to park their vehicles when visiting the Library. *See* K.S.A. 60-409(a) (allowing the court to take judicial notice, without request from either party, of specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute). Therefore, the parking lot is integral to the Library. *See Poston*, 286 Kan. at 816 ("[T]he commons was not incidentally connected to the gymnasium but was necessarily connected by plan as a principal means for the public to gain physical access to the gym . . . ."). In the same way Kansas law recognizes that recreational facilities such as football stadiums must include restrooms, that pools must have mechanical rooms, and that walkways to-and-from recreational facilities are integral and necessary, the parking lot of a recreational facility is, by logical necessity, integral and necessary to the Library. *See, e.g., Wilson*, 273 Kan. at 590 ("A facility servicing large numbers of people must include restrooms.").

Zaragoza argues that whether the parking lot here was integral to the Library was a question of fact. This argument rings hollow because Zaragoza conceded to the district court that the parking lot was integral to the Library's everyday services, and further conceded that if those services were recreational, K.S.A. 75-6104(a)(15) applied. R. Vol. 1, pp. 55-56. This argument also fails because both of the cases Zaragoza relies on are distinguishable.

Zaragoza first cites to *Cullison v. City of Salina*, 2016 WL 3031283 (Kan. Ct. App. May 26, 2016) (unpublished). In that case, the plaintiff suffered injuries when she stepped on an electrically charged junction box located "at the mouth of an entrance to [a "pocket park,"] but in an area that corresponds to part of the sidewalk that extends down [the public street.]" 2016 WL 3031283, at *4. Evidence reflected that the junction box provided electricity to (1) decorative lights inside the park, and (2) electrical outlets which park visitors could use for their convenience. *Id.* at *5-6. Ultimately, the Court of Appeals held that a jury could have found that these uses did not make the junction box integral to the park because the park could be used during daylight and twilight hours without the decorative lights, or any time without the electrical outlets. *Id.*

Cullison is distinguishable on several grounds. Zaragoza testified that every time she visited the Library, she drove there by car and parked her car in the parking lot. R. Vol. 3, p. 36. There are presumably some areas of the country where patrons may walk or take public transportation to libraries. But, as Zaragoza's testimony illustrates, a parking lot is essential to *this* library, located in Shawnee, Kansas. The Library's reliance on the parking lot as the principal means for the public to park their vehicles while using the

Library is therefore a far cry from the junction box in *Cullison*, which only provided electricity to decorative lights and outlets in an outdoor pocket park. Again, Zaragoza has readily conceded this fact. R. Vol. 1, pp. 55-56.

Moreover, the unpublished *Cullison* decision, which equated "integral" with "essential," is at direct odds with published caselaw. For example, in *Wilson*, the district court likened its case to *Annen v. Village of McNabb*, 548 N.E.2d 1383, 1384 (Ill. Ct. App. 1990),[3] where the Illinois Court of Appeals held:

> "A restroom facility located within a park is a part of the park. While a restroom building itself is not intended to be used for recreational purposes, it allows a park user to continue using the park without having to leave the park to use restroom facilities. This **increases the usefulness of the park** and advances the legislative purpose."

Wilson, 273 Kan. at 589 (emphasis added). The Kansas Supreme Court affirmed, noting: "The restrooms allow people to continue enjoying the recreational purposes provided by the football games at the stadium without leaving. Likewise, **the usefulness of the park is increased** and the legislative purpose is advanced." *Id.* (emphasis added).

Similarly, in *Poston* the district court held that the commons area was "integral" to the adjacent gymnasium because it was used for various gym-related purposes, such as selling concessions and tickets. The Kansas Supreme Court affirmed, quoting its language in *Wilson* regarding increased usefulness. *See id.* at 815. The Court added:

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[3] Because of its similarity to K.S.A. 75-6104(a)(15), Kansas courts have relied on interpretations of Illinois' recreational use immunity statute, 745 Ill. Comp. Stat. 10/3-106, on a number of occasions. *See Wilson,* 273 Kan. at 589; *Jackson* I, 268 Kan. at 328; *Stone*, 2003 WL 1961969, at *2; *Lane*, 283 Kan. at 449. Illinois courts have extended immunity to structures that increase the usefulness of a recreational facility. *See Sylvester v. Chicago Park Dist.*, 689 N.E.2d 1119, 1125 (Ill. 1997) (applying immunity to a walkway from a parking lot to Soldier Field); *Callaghan v. Vill. of Clarendon Hills*, 929 N.E.2d 61 (2010) (applying recreational use immunity to a sidewalk leading to a park).

> "Although the commons was not used exclusively for recreational use, it was an integral part of the use of the gymnasium. Like the restrooms [in *Wilson*], the use of the commons to serve concessions allowed patrons to enjoy the recreational events conducted in the gymnasium. Additionally, ticket sales were integral to the public being invited into the gymnasium for many of the events."

286 Kan. at 815-16. The Court did not address whether concession stands or a space for selling tickets were "essential" to a gymnasium, though there can be little debate that a gymnasium can operate without either service. *See id.*

Kansas courts have, in myriad other instances, applied K.S.A. 75-6104(a)(15) to locations ancillary to or even simply *near* a recreational facility, without consideration of whether the location was "essential." *See Nichols*, 246 Kan. at 97 (applying K.S.A. 75-6104(a)(15) to a "grassy swale" between a practice field and locker room, without discussion for whether the grassy swale was essential); *Robison v. State*, 30 Kan.App.2d 476, 43 P.3d 821 (2002) (applying K.S.A. 75-6104(a)(15) to a hallway between a locker room and pool); *Dye*, 2008 WL 2369847 (applying recreational use immunity to a sewer inlet *near* a soccer field); *Stone*, 2003 WL 1961969 (holding that a pool shed was integral to a public swimming pool, without discussion of whether the shed was necessary to the pool's operation). Again, no reasonable jury could find that the parking lot at issue was not essential to the Library. But, as *Wilson, Poston*, and the other above cases illustrate, the issue to be resolved is not whether Library required a parking lot to operate, but whether the parking lot increased the Library's usefulness. *See Wilson*, 273 Kan. at 589; *Poston*, 286 Kan. at 815-16. Because the parking lot increased the Library's usefulness, *Cullison* is not on point.

The second case Zaragoza cites is *Patterson v. Cowley Cnty.*, 53 Kan.App.2d 442, 471, 388 P.3d 923 (2017). There, two people drowned when their vehicle drove off an unpaved rural road that ran through a wildlife area before ending abruptly at a riverbank. On appeal, the Court of Appeals held that recreational use immunity did not apply because the unpaved rural road existed for over 100 years before the wildlife area was created and was not the only road for accessing the wildlife area. 52 Kan.App.2d at 471. The Kansas Supreme Court held that because Cowley County was entitled to summary judgment under the KTCA's separate discretionary function immunity, it was unnecessary to rule on the Court of Appeals' holding regarding recreational use immunity. 307 Kan. at 638. Like *Cullison*, *Patterson* is factually inapposite. Again, there is a vast difference between the Library's parking lot, built specifically for the Library, and the rural road in *Patterson*, which (a) was not built to access the recreational site, and (b) was not the only access road to the recreational site. Neither *Cullison* nor *Patterson* have any applicability here.

Finally, Zaragoza argues that even if the parking lot is integral to the Library, K.S.A. 75-6104(a)(15) only applies to locations that are nearby, or integral to recreational facility, if recreational activities are in progress. *See* Brief of Appellant, p. 21. This argument fails for two critical reasons. First, Zaragoza conceded at the district court level that the parking lot was integral to the Library's everyday services, and further conceded that if those services are recreational, K.S.A. 75-6104(a)(15) applies. R. Vol. 1, pp. 55-56. In other words, the uncontroverted evidence establishes that recreation *was* ongoing at the time of Zaragoza's fall.

Second, but equally as important, no Kansas appellate court has ever grafted such a requirement into K.S.A. 75-6104(a)(15). The primary case Zaragoza relies on for support is *Poston*. The injury in *Poston* occurred at the front door to a middle school common area. 286 Kan. at 809-810. As the Court explained, the common area's primary purpose was non-recreational. *Id.* at 819. But the common area also served multiple recreational purposes, including (1) acting as an area to sell tickets and refreshments for sporting events, and (2) serving as a walkway for the public to access the gym. *Id.* Although the injuries in *Poston* occurred while the gym was being used for recreational purposes, nothing within the decision ascribed any legal significance to that fact. Nor do any of the cases discussed by either party in their briefing—*Wilson, Nichols, Lane, or Dye*—impose such a requirement. This is because Kansas courts have repeatedly held there is no requirement under K.S.A. 75-6104(a)(15) that an injury take place during a recreational activity. *See Jackson* I, 268 Kan. 319-320 ("The plain wording of K.S.A. 75–6104[(a)(15] only requires that the property be intended or permitted to be used for recreational purposes, not that the injury occur as the result of a recreational activity."); *Barrett ex rel. Barrett v. U.S.D. No.* 259, 272 Kan. 250, 257, 32 P.3d 1156 (2001) (explaining that recreational use immunity "depends on the character of the property in question and **not** the activity performed at the time.") (emphasis added).

For example, in *Jackson* I and II, Kansas appellate courts applied recreational use immunity to injuries suffered by a student during activities the Kansas Supreme Court explicitly held were not recreational, because the gym was used for recreational purposes on separate, unrelated occasions. *See Jackson* I, 268 Kan. at 330 (holding that mandatory

P.E. class was not a recreational activity); *Jackson* II, 29 Kan.App.2d at 832 (affirming application of recreational use immunity to injuries suffered during non-recreational activity because gym where injuries occurred was permitted to be used by community for recreational activities).

The purpose of the KTCA's recreational use immunity is to encourage governmental entities to build recreational facilities for the benefit of the public. *See, e.g., Poston v. U.S.D. No. 387, Altoona-Midway, Wilson Cty.*, 286 Kan. 809, 812-13, 189 P.3d 517 (2008). The Kansas Supreme Court has routinely acknowledged that K.S.A. 75-6104(a)(15) should be interpreted broadly to accomplish this objective. *See id.*; *see also, Wilson*, 273 Kan. at 592; *Lane*, 283 Kan. at 445. There can be no serious debate that in much the same way football stadiums must include restrooms and pools must have mechanical rooms, libraries must have parking lots for patrons to park their vehicles while using the Library. To rule otherwise would conflict with the KTCA's broad goal of encouraging governmental entities to build libraries. Because the parking lot is integral and necessarily connected to the Library, every element of K.S.A. 75-6104(a)(15) is met here, and district court's order granting the County summary judgment should be affirmed.

III. The district court did not err in holding that the County was entitled to summary judgment on Zaragoza's claim for gross and wanton negligence.

The district court correctly held the County was entitled to summary judgment on Zaragoza's claim for gross and wanton negligence for three reasons: (1) Zaragoza did not plead a claim for gross and wanton negligence; (2) her motion to amend was untimely; and (3) no jury could find the County liable for gross and wanton negligence.

a. **Zaragoza did not plead a claim for gross and wanton negligence.**

The district court did not err in finding that Zaragoza failed to plead a claim for gross and wanton negligence. Negligence is the lack of ordinary care or, more specifically, the failure of a person to do something a reasonably careful person would do, or doing something a reasonably careful person would not do, measured by the existing circumstances. *Elstun v. Spangles, Inc.*, 289 Kan. 754, 756, 217 P.3d 450, 453 (2009). A wanton act, by contrast is "something more than ordinary negligence, and yet . . . something less than willful injury . . . ." *Soto v. City of Bonner Springs*, 291 Kan. 73, 82, 238 P.3d 278 (2010) (quoting *Saunders v. Shaver*, 190 Kan. 699, 701, 378 P.2d 70 (1963)). The KTCA's recreational use immunity bars claims for ordinary negligence, but does not apply to claims for gross and wanton negligence. *See Lane*, 283 Kan. at 442.

Zaragoza's petition (R. Vol. 1, pp. 5-9) did not allege gross and wanton conduct, which dooms her claim. In *Willard v. City of Kansas City*, 235 Kan. 655, 681 P.2d 1067 (1987), a plaintiff appealed an order granting a city summary judgment in a case derived from allegations that the city was negligent in installing a specific kind of fencing around a baseball diamond. In detailing the case, the Kansas Supreme Court emphasized that "[i]n his petition the plaintiff alleged the defendant City's *negligent* installation or maintenance of the fencing was the proximate cause of his injuries." *Willard*, 235 Kan. at 656 (emphasis in original). When discussing recreational use immunity, the Court again reinforced that "the plaintiff alleged in his petition that the defendant City was *negligent* in installing or maintaining the particular fence here involved." *Id.* at 659 (emphasis in original). Ultimately, the Court concluded that "[m]ere negligence on the part of the City, which was

all that was alleged by the plaintiff in his pleadings, was insufficient to establish a basis for liability under the KTCA." *Id.* at 660; *see also, Lee v. Orion Mgmt. Solutions, Inc.*, 2010 WL 3980228 (D. Kan. Oct. 8, 2010)(unpublished)("[T]here are several Kansas cases where the plaintiff's failure to plead gross and wanton negligence was fatal to the plaintiff's action against a governmental entity where the governmental entity claimed immunity under the recreational use exception."); *Tullis*, 28 Kan.App.2d at 352 (affirming the district court's denial of plaintiff's motion to amend her complaint to allege gross and wanton conduct after the close of discovery and defendant's filed motion for summary judgment); *Molina v. Christensen*, 30 Kan.App.2d 467, 474, 44 P.3d 1274, 1280 (2001)(affirming summary judgment under the recreational use exception where plaintiff only alleged ordinary negligence and first raised gross and wanton negligence on appeal).

In her brief, Zaragoza does not dispute that she needed to plead gross and wanton negligence. Yet, her petition references only a claim for ordinary negligence. R. Vol. 1, pp. 5-9, ¶¶ 36, 37. Likewise, in response to interrogatories seeking information about the principal or material facts supporting her claim, Zaragoza specifically referenced the County's alleged violation of its duty of care but did not assert any claim that the County engaged in gross or wanton conduct. R. Vol. 3, p. 1401.

Zaragoza argues that although she may not have expressly alleged gross and wanton conduct, she met her burden by alleging that the County was aware of the dangerous condition of its premises before her fall. This argument fails for two reasons. First, Zaragoza responded to the County's motion for summary judgment, which pointed out she had not alleged gross and wanton negligence, by filing an untimely motion seeking leave

to amend her petition to raise those allegations. To state the obvious, if those allegations had already been made, no amendment would have been necessary.

Second, gross and wanton conduct requires more than mere knowledge of a dangerous condition; it requires "a realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act." *Lee v. City of Fort Scott*, 238 Kan. 421, 423, 710 P.2d 689 (1995); *Willard v. City of Kansas City*, 235 Kan. 655, 658, 681 P.2d. 1067 (1984). Knowledge of a dangerous condition, alone, does not even establish a legal duty that can support an ordinary negligence claim. *See, e.g., Manley v. Hallbauer*, 53 Kan.App.2d 297, 387 P.3d 185 (Kan. Ct. App. 2016) (explaining that landowners do not owe a duty to protect guests from dangers that are open and obvious). In other words, alleging the County knows of the dangerous condition did not establish even ordinary negligence, let alone gross and wanton conduct.

"K.S.A. 75–6104[(a)(15)] is a complete defense to actions where the plaintiff alleges only ordinary negligence." *Dunn v. Unified Sch. Dist. No. 367*, 30 Kan.App.2d 215, 225, 40 P.3d 315 (2002). Because Zaragoza's sole claim was for ordinary negligence from injuries suffered on property used for a recreational purpose, K.S.A. 75-6104(a)(15) barred the claim, and the district court did not err in granting the County summary judgment. *See, e.g., Lee*, 2010 WL 3980228 (granting summary judgment based on failure to plead gross and wanton conduct).

b. <u>The district court did not err by refusing to grant Zaragoza's untimely and improper motion to amend.</u>

The district court's alternate finding that Zaragoza's motion to amend should be denied as untimely was also within its broad discretion and should be upheld. K.S.A. 60-215(a)(1) allows a party to amend his or her pleadings once as a matter of course within 21 days after serving it. After that time, a party may only amend its pleadings with opposing counsel's written consent or leave of the court, which "shall be freely given when justice so requires." *Id.* Although this standard is liberally interpreted, that does "not mean that leave will be granted in all cases." *Dutoit v. Bd. of County Comm'rs of Johnson County*, 233 Kan. 995, 1002, 667 P.2d 879 (1983). A district court is within its discretion to deny a motion to amend based on a finding of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Id.* "Whether an amendment will be allowed is within the broad discretion of the trial court." *Robertson v. Ludwig*, 12 Kan. App. 2d 571, 582, 752 P.2d 690 (1988), *rev'd on other grounds*, 244 Kan. 16, 765 P.2d 1124 (1988).

District courts control the course and schedule of pretrial activities through a case management order ("CMO"). *Canady v. Midway Denton U.S.D. 433*, 42 Kan.App.2d 866, 218 P.3d 446 (Kan. Ct. App. 2009). Zaragoza's petition was filed on August 10, 2021. R. Vol. 1, p. 5. The district court entered a CMO here on May 10, 2022. R. Vol. 1, p. 22. The CMO expressly stated that after **May 20, 2022**, "[a]bsent agreement of the parties, no [motion seeking leave to amend] will be granted . . . ." R. Vol. 1, p. 19 (emphasis added). The County moved for summary judgment on January 17, 2023. R. Vol. 3, p. 6. Zaragoza's motion seeking leave to amend was not filed until February 3, 2023, eight

months after the deadline to do so, and only after the County moved for summary judgment. R. Vol. 3, p. 172.

Zaragoza argues that her dilatory attempt to allege gross and wanton conduct was a late disclosure of evidence by the County. That argument is misleading, at best. The petition was filed on August 10, 2021. Zaragoza therefore had more than nine months before the May 20, 2022, deadline for moving to amend to conduct any written discovery or take any depositions she felt were necessary to assess whether it would be appropriate to allege gross and wanton negligence. Zaragoza learned about the County's corporate representative's testimony after the deadline to amend because she chose to take that deposition at the end of the discovery period, after the deadline to amend, and not because the County "hid the ball." This was a strategic decision of Zaragoza's own making.

Furthermore, the suggestion that the County somehow misled Zaragoza about the operative facts is inaccurate. Zaragoza chose not to serve requests for admission on the County until November 15, 2022, well after the deadline to amend. The County timely responded on December 15, 2022, the day before the discovery deadline. R. Vol. 5, pp. 3-7. Although Zaragoza tries to create the impression that she relied on the County's responses to her requests for admission throughout the case, only to discover conflicting information when it was too late, that is hardly the case.

Moreover, the County's response to the request for admission did not directly conflict with subsequent testimony from its corporate representative. In Request for Admission No. 16, the County was asked to admit that the Library premises "had yellow paint on the curbs in the locations represented in Exhibit 1 [depicted below]":

R. Vol. 1, p. 232. The County responded, "Admitted, although the yellow paint depicted in Exhibit 1 denotes a no-parking zone, not [] a warning as to the existence of a curb or as to the slope of the walking space." R. Vol. 5, p. 5. The County later produced multiple corporate representatives for deposition. One representative was asked why the curbs depicted above were painted yellow. Over objection, she testified:

> "A: Okay. **<u>It could be for fire lane.</u>** I remember somewhere along the way, I could not tell you when, that I remember Christian Madrigal was saying that there was some folks having trouble in this area here, which is the drop-off area in front of the building. This is a concrete sidewalk here (indicating), and then it's a concrete pull-off as well, and I remember people saying that people were walking off that step, that curb step, without realizing there was a step there because the concrete, there wasn't enough differential. Fresh concrete, it's really hard to tell that curb area, and I'm experiencing that as I get older, so

> I understand that. So I recall -- I believe Juan and Christian worked up to stripe that, to try to draw attention to the situation so people didn't step off it accidentally."

R. Vol. 1, p. 211, Sizemore 65:2-66:20 (emphasis added).

At most, this testimony reflects uncertainty as to whether the curb in front of the Library was painted yellow to warn patrons they could not park there, or to warn them of the curb. Regardless, the district court properly assumed the latter was true for purposes of summary judgment, *see infra*, and Zaragoza could have conducted discovery on why other curbs were painted yellow during the nine months between when suit was filed and deadline to amend expired, but chose not to do so.

When reviewing a district court's decision on motions to amend, appellate courts apply an abuse of discretion standard of review. *Thompson v. State*, 293 Kan. 704, 709, 270 P.3d 1089 (2011); *Kinell v. N.W. Dible Co.*, 240 Kan. 439, 444, 731 P.2d 245 (1987). Judicial discretion is abused only if (1) no reasonable person would take the view adopted by the district court; (2) the decision is based on a legal error; or (3) the decision is based on a factual error. *Wiles v. American Fam. Life Assurance Co.*, 302 Kan. 66, 74, 350 P.3d 1071 (2015). The party claiming an abuse of discretion—in this case, Zaragoza—bears the burden of proving it. *N. Nat. Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013). The district court warned the parties that "[a]bsent agreement of the parties, no [motion to amend the pleadings] will be granted after [May 20, 2022.]" R. Vol. 1, p. 19. Zaragoza has not met her burden to prove that no reasonable person would take the view adopted by the district court here, that the parties needed to adhere to the

clearly stated deadlines set for in the CMO. The district court's order granting summary judgment should be upheld.

c. <u>The district court correctly ruled there was no evidence of gross and wanton conduct.</u>

Finally, the district court correctly held that even if Zaragoza had properly alleged gross and wanton conduct, summary judgment would still have been appropriate because "no facts exist that could allow a jury to find [the County] liable for gross negligence." R. Vol. 1, p. 246.

Wantonness involves "a realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act." *Lee v. City of Fort Scott*, 238 Kan. 421, 423, 710 P.2d 689 (1995); *Willard v. City of Kansas City*, 235 Kan. 655, 658, 681 P.2d. 1067 (1984). Correspondingly, the Court has required evidence to establish a realization by the defendant of the imminence of danger. *See Lee*, 238 Kan. at 423-424.

In *Lanning By & Through Lanning v. Anderson*, 22 Kan.App.2d 474, 476, 921 P.2d 813 (1996), a student was struck in the head by a discus during track practice. The school district appealed a jury verdict, arguing the court erred in denying its motion for directed verdict based on the absence of evidence of gross and wanton conduct. *Id.* at 477. On appeal, the Court of Appeals explained that "[t]he keys to a finding of gross and wanton negligence are the knowledge of a dangerous condition and indifference to the consequences." *Id.* at 481. "For an act to amount to wantonness, the actor must have *reason to believe* that his act may injure another and commit the act anyway, with

indifference to whether it injures another. *Id.* (quoting *Frazier v. Cities Serv. Oil Co.,* 159 Kan. 655, 157 P.2d 822 (1945)) (emphasis in *Lanning*). The Court then cited the following from Prosser and Keeton:

> "The usual meaning assigned to 'wilful,' 'wánton,' or 'reckless,' . . . is that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences. Since, however, it is almost never admitted, and can be proved only by the conduct and the circumstances, an objective standard must of necessity in practice be applied. The 'willful' requirement, therefore, breaks down and receives at best lip service, where it is clear from the facts that the defendant, whatever his state of mind, has proceeded in disregard of a high and excessive degree of danger, either known to him *or apparent to a reasonable person in his position.*"

Id. at 482 (emphasis added in *Lanning*).

Applying this definition, the Court reversed, finding no evidence the school's coaches realized the imminence of danger or had reason to believe someone would be injured. *Id.* "There [wa]s no evidence of the coaches' disregard of a known or obvious risk that was so great as to make it highly probable that harm could follow. The facts do not support a conclusion that practice was held in disregard of a high and excessive degree of danger known or apparent to a reasonable person in the position of either coach." *Id.*

In *Lee v. City of Fort Scott,* 238 Kan. 421, 710 P.2d 689 (1985), a plaintiff died when his motorcycle collided with steel cables strung between trees in a park to deter vehicles from driving on the golf course. The plaintiff claimed the City was wanton in failing to post signs (a) disclosing the presence of the cables, or (b) prohibiting motor vehicles in the area. 238 Kan. at 424. The district court granted the City summary judgment. The plaintiff appealed, claiming a jury could have found the City's conduct to

be wanton from evidence the City knew motorcycles and other vehicles had driven off the roadway and been cited for traffic violations. *See id.* at 424. The Kansas Supreme Court rejected the argument, finding that no evidence established the City "realized the imminence of danger and exhibited a complete disregard for the consequences." *Id.* at 425. To the contrary, "the evidence showed that at the time the accident occurred, the steel cables had been in place for seven years. The cables were erected to deter vandalism to the golf course and were located off the roadway. No other accidents involving the steel cables had been reported to the City." *Id.* There was therefore "no evidence of a reckless disregard of a known danger and thus no gross and wanton negligence." *Id.*

The Kansas Supreme Court revisited the issue in *Boaldin v. University of Kansas*, 242 Kan. 288, 747 P.2d 811 (1987), which involved injuries suffered by a student who struck a tree while sledding. The plaintiff argued a jury could have found gross and wanton negligence from evidence the University knew students sledded in the area and that prior accidents had occurred. 242 Kan. at 293. The Kansas Supreme Court, again, rejected the argument, explaining that "[i]f permitting recreational activity to occur knowing that injury may result is to be considered gross and wanton conduct, then every governmental entity in this state would be guilty of gross and wanton conduct. To adopt plaintiff's argument would render meaningless the exception from liability as contained in K.S.A. 75–6104[(a)(15)]." *Id.* at 294-295.

In *Muxlow v. City of Topeka*, 2018 WL 2999618 (Kan. Ct. App. June 15, 2018) (unpublished), a pedestrian fell into an unmarked culvert while walking through a grassy area between a city park and the adjacent street. After the district court granted the city

summary judgment, the plaintiff appealed, arguing there was a question of fact as to whether the City's conduct was wanton. *See* 2018 WL 299618, at *1. The plaintiff argued a jury could have found gross and wanton conduct based on (1) the minimal cost to install a guardrail around the culvert; (2) the fact that many of the City's other culverts had guardrails or were covered; (3) the opinion of Plaintiff's expert that the culvert was "roughly the same size as an open grave," and, without warning signs or safety measures, posed a serious hazard to pedestrians; and (4) an affidavit from the plaintiff's husband claiming the City had been grossly and wantonly negligent. *Id.* at *5. Ultimately, the Court of Appeals held that none of the evidence showed the City knew the culvert presented a danger, but chose not to address it. *Id.* at *5-6. Rather, "[s]ince the time the culvert was first installed in the 1960's, no one alerted the City to any injuries involving the culvert." *Id.*at *6. Accordingly, the Court affirmed summary judgment.

On the other end of the spectrum, in *Gruhin v. City of Overland Park*, 17 Kan.App.2d 388 (Kan. Ct. App. 1992), a golfer was injured when he drove his golf cart into a hole that was several feet deep, when (a) the City knew another person had been injured in the same location several weeks earlier, and (b) the area around the hole had been marked over with chalk lines. 17 Kan.App.2d at 389. The Court of Appeals held that the fact that reasonable minds could differ as to whether the preventive actions taken before the injury—chalk lines which, at the time of the injury, were barely perceptible—showed a reckless disregard for the danger posed by the hole, in light of the prior accident in the same area. *See id.* at 392-393.

Zaragoza's overarching theory is that her fall was caused by the uneven slope of the area of the parking lot where she fell. The cases cited above make clear that when evaluating whether Zaragoza proffered evidence of gross and wanton conduct, the Court must first evaluate whether there is evidence the County knew or had reason to believe that the location, in its condition at the time, constituted a dangerous condition. *Lanning*, 22 Kan.App.2d at 481 ("Without knowledge of a dangerous condition, indifference to the consequences does not become a consideration."); *Muxlow*, 2018 WL 2999618, at *4 (To amount to gross and wanton negligence under the Kansas Tort Claims Act, there must be some evidence that the government *knew* of the *danger* the condition presented and chose not to address it."); *see also, Robison v. State*, 30 Kan.App.2d 476, 479, 43 P.3d 821 (2002) ("Wanton conduct is established by the mental attitude of the wrongdoer rather than by the particular negligent acts.").

Zaragoza failed to present any such evidence. It is uncontroverted that the design plans for the Library did not call for guard rails or warnings in the area where Zaragoza fell. R. Vol. 3, pp. 121, 128. The Library opened to the public on August 5, 2018. R. Vol. 3, p. 47. Documents from the library's door sensors suggest that between 311,970 and 313,500 people, approximately, passed through the library's doors between August 2018 and June 2020 (the last complete month before Plaintiff's fall). R. Vol. 3, pp. 48-51. During this nearly two-year period, and notwithstanding the fact there were no guard rails or warnings, like both *Lee* and *Muxlow*, there is no evidence anyone other than Zaragoza fell in the area in question or, for that matter, in any other area sloped to facilitate rainwater runoff. R. Vol. 3, p. 48. Nor, as was the case in *Gruhin*, is there evidence the County took

prior insufficient or ineffective actions before Zaragoza's fall that would suggest a recognition that the slope of the parking lot presented an imminent danger.

For purposes of summary judgment, it was undisputed the County painted a curb in front of the Library yellow, to differentiate the color of the curb from the color of the parking lot, after receiving a report that some patrons were accidentally stepping off the curb without realizing it. If Zaragoza had fallen because she was unable to see where the curb ended and the parking lot began, this evidence might have had relevance. But, in reality, it is uncontroverted that Zaragoza knew, as she was walking, that she was stepping off the curb and into the parking lot, even though the curb was unpainted. R. Vol. 3, p. 43. Moreover, as the district court reasoned, the curb near the entrance to the Library receives inherently more foot traffic than any isolated parking space. Although Zaragoza complains that the district court made this assumption without evidence, it is self-evident that all Library patrons must walk through the Library's entrance to access the facility, while not all patrons park in the same area.

According to Zaragoza, she fell because she was not expecting the area of the parking lot where she stepped to be sloped. R. Vol. 3, pp. 41-42. This is a different "danger" altogether from the identified risk of patrons being unable to tell the curb was ending. The relevant question is whether Zaragoza proffered evidence that the County knew *the slope of the parking lot* was a dangerous condition and chose not to address it. *See Lanning By & Through Lanning v. Anderson*, 22 Kan.App.2d 474, 476, 921 P.2d 813 (1996) ("Without knowledge of a dangerous condition, indifference to the consequences does not become a consideration."); *Muxlow v. City of Topeka*, 2018 WL 2999618 (Kan.

Ct. App. June 15, 2018) (unpublished) ("To amount to gross and wanton negligence under the Kansas Tort Claims Act, there must be some evidence that the government *knew* of the *danger* the condition presented and chose not to address it."). On that subject, the uncontroverted evidence showed that (1) somewhere between 311,970 and 313,500 people, approximately, passed through the library's doors between August 2018 and June 2020; and (2) there was **zero** evidence of any other patron failing to recognize the slope of the parking lot, any other patron falling in the area Zaragoza fell, or any other patron falling in any other area sloped to facilitate rainwater runoff into a storm drain. Evidence that the County was aware of and responded to a different problem in a different location is irrelevant. *See Muxlow*, 2018 WL 2999618, at *5 (affirming summary judgment on claim for gross and wanton negligence, notwithstanding evidence that other City culverts included guard rails, because no evidence showed the City knew culvert was a danger).

Separately, Zaragoza argues a jury could have found the County liable for gross and wanton negligence because landscaping plans called for a 24-inch plant to be planted in the mulch bed she walked through before stepping down into the parking lot, but no such plants were there on the date she fell. There are myriad problems with this argument. While it is true the County, through its corporate representative, agreed that a plant would have discouraged patrons from cutting through the mulch bed, there is no evidence that (1) the plant was in the plans for that purpose; or (2) the County knew the plans called for a plant in the mulch bed to discourage patrons from walking in the sloped area of the parking because they might fail to recognize the slope.

It is undisputed there was no plant in the area of the mulch bed at issue on July 18, 2020. Even so, gross and wanton conduct requires evidence of the mental attitude of the wrongdoer, rather than the particular negligent act. *Robinson v. State*, 30 Kan.App.2d 476, 479, 43 P.3d 821 (Kan. Ct. App. 2002). A wanton act is one showing the defendant realized the imminence of injury to others but took no steps to prevent the injury because of indifference to the probable outcome. *Soto v. City of Bonner Springs*, 291 Kan. 73, 82, 238 P.3d 278 (2010). There is no evidence in the record of how long the plant was missing from in the mulch bed, if one was ever planted at all. Correspondingly, there was no evidence the County knew, before Zaragoza's injury, that a plant was missing from the mulch bed. Without question, there was no evidence the County knew that because there was no plant in the mulch bed, it was probable that a patron would likely to cut through the mulch, then intentionally step off the curb and into the parking lot, but fail to recognize the slope and suffer an injury. To the contrary, the uncontroverted evidence showed that the County welcomed more than 300,000 patrons to the Library in a little less than two years, but never received any report of a patron failing to recognize the slope of the parking lot.

Although Zaragoza seemingly argues the County *should have* foreseen that the combination of the parking lot's slope and the absence of a plant would lead to injuries, a finding of wantonness requires a state of mind showing indifference to *known circumstances*. "Without knowledge of a dangerous condition, indifference to the consequences does not become a consideration." *Lanning*, 22 Kan.App.2d at 481. Because there was no evidence the County *knew* of any danger and chose not to address it, the district court correctly granted the County summary judgment. *See Lee v. City of Fort*

Scott, 238 Kan. 421, 425, 710 P.2d 689 (1985) (affirming summary judgment on claim for gross and wanton negligence where no prior injuries alerted City to danger); *Lanning*, 22 Kan.App.2d at 480 (holding that a failure to foresee a combination of elements leading to an accident is not gross and wanton negligence, as wantonness shows an indifference to *known* circumstances); *Muxlow*, 2018 WL 2999618, at *5-6 (affirming summary judgment where no prior injuries alerted City to danger associated with culvert).

CONCLUSION

For all of the reasons set forth above, the district court's order granting Johnson County's motion for summary judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 2023, the foregoing was filed via hand-delivery with the Clerk of the Circuit Court with a service copy sent via email to the following:

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APPENDIX

A. *Marks v. Kansas Bd. Of Regents,* 2007 WL 1461381, *3 (Kan. Ct. App. May 18, 2007) (unpublished).

B. *Dye v. Shawnee Mission Sch. Dist.,* 2008 WL 2369847 (Kan. Ct. App. June 6, 2008) (unpublished).

C. *Stone v. City of La Cygne,* 2003 WL 1961969 (Kan. Ct. App. April 11, 2003) (unpublished).

D. *Cullison v. City of Salina,* 2016 WL 3031283 (Kan. Ct. App. May 26, 2016) (unpublished).

E. *Lee v. Orion Mgmt. Solutions, Inc.,* 2010 WL 3980228 (D. Kan. Oct. 8, 2010) (unpublished).

F. *Muxlow v. City of Topeka,* 2018 WL 2999618 (Kan. Ct. App. June 15, 2018) (unpublished).

APPENDIX A

157 P.3d 1129 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

Nicole MARKS, Appellant,
v.
THE KANSAS BOARD OF REGENTS and the University of Kansas, Appellees.

No. 96,162.
May 18, 2007.

Synopsis

Background: State university student, who allegedly slipped and fell while walking from locker room to university's pool for lifeguard training class, brought negligence action against university and board of regents. The Douglas District Court, Paula B. Martin, J., granted summary judgment in favor of university and board. Student appealed.

The Court of Appeals held that for purposes of recreational-use exception to Kansas Tort Claims Act (KTLA), university's health and education center was recreational facility.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Appeal from Douglas District Court; Paula B. Martin, judge. Opinion filed May 18, 2007. Affirmed.

Attorneys and Law Firms

James L. Wisler, of Wisler Law Office, of Lawrence, for appellant.

Sara L. Trower, associate general counsel and special assistant attorney general, of University of Kansas, of Lawrence, for appellees.

Before MCANANY, P.J., GREEN and CAPLINGER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Nicole Marks, a student at the University of Kansas (KU) who was enrolled in a lifeguard training class, was injured when she slipped and fell on her way from the locker room to the pool in the Robinson Health and Education Center (Robinson) on the KU campus. Marks filed a negligence suit against KU and the Board of Regents. KU and the Board of Regents asserted immunity from liability under the recreational use exception of the Kansas Tort Claims Act (KTLA), K.S .A.2006 Supp. 75–6104(o). The trial court granted summary judgment. Marks appeals from the trial court's application of the recreational use exception to Robinson. We affirm.

Robinson is an education and recreation center owned and operated by KU and located on the KU campus. Robinson contains faculty offices, an indoor swimming facility with two pools, gymnasium courts, racquetball courts, fitness and exercise facilities, locker room facilities, and classrooms. In addition to being used by students, Robinson is used by faculty, staff, and members of the public including spouses of faculty and staff and university retirees and their spouses. The KU women's swim team trains and competes at Robinson. General public groups can schedule the facility for events, such as fraternity fundraisers and summer camps for children. Lawrence Parks and Recreation has used Robinson's facilities for community fitness classes. KU has established a rate schedule for renting Robinson's facilities and uses the income generated from these rentals in part to fund the salary of Robinson's director of operations.

On April 21, 2003, Marks enrolled in a lifeguard training class, slipped in water on the floor, and fell on her way from the Robinson locker room to the pool. Marks suffered injuries to her left elbow and her side.

Marks sued KU and the Board of Regents for negligence. Marks sought monetary damages for medical expenses and pain and suffering. KU and the Board of Regents moved for summary judgment, asserting immunity from liability under the recreational use exception of the KTCA. The trial court granted summary judgment, and Marks now appeals the trial court's application of the recreational use exception.

On appeal, Marks argues that the trial court erred in finding that KU and the Board of Regents are immune from liability under the KTCA recreational use exception. Marks maintains that summary judgment was not appropriate and that her claim should be allowed to proceed.

> " " 'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with 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 issues in the case. On appeal, [appellate courts] apply the same rules and where ... reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied." [Citation omitted.]' [Citation omitted.]" *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 788, 107 P.3d 1219 (2005).

***2** When there is no factual dispute, appellate review of an order regarding summary judgment is de novo. *Roy v. Young*, 278 Kan. 244, 247, 93 P.3d 712 (2004).

The resolution of the question whether the recreational use exception to the KTCA renders KU and the Board of Regents immune from liability involves a question of statutory interpretation, over which an appellate court exercises unlimited review. *Wilson v. Kansas State University*, 273 Kan. 584, 586–87, 44 P.3d 454 (2002).

K.S.A.2006 Supp. 75–6104(o) provides that a governmental entity shall not be liable for damages resulting from any claim for injuries resulting from: (o) ... the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury.

Unless the above statutory exception to liability applies, a governmental entity "shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state." K.S.A.2006 Supp. 75–6103(a). "Under the KTCA, governmental liability is the rule and immunity is the exception. [Citation omitted.] In order to avoid liability, the governmental entity has the burden of proving that it falls within one of the enumerated exceptions found in K.S.A. 75–6104. [Citation omitted.]" *Jackson v. U.S.D. 259*, 268 Kan. 319, 322, 995 P.2d 844 (2000).

Marks argues that the KTCA recreational use exception does not apply because Robinson is primarily used for the education of KU students, secondarily for KU employees' wellness and fitness, and only incidentally for the public. To support her argument, Marks cites *Lane v. Atchison Heritage Conf. Center, Inc.*, 35 Kan.App.2d 838, 134 P.3d 683 (2006), *rev'd* 283 Kan. 439, 153 P.3d 541 (2007). In *Lane*, the Court of Appeals stated that the recreational use exception of the KTCA did not apply where the facility's recreational use was only incidental to its primary function. 35 Kan.App.2d at 848, 134 P.3d 683. Our Supreme Court, however, granted review of the Court of Appeals application of the recreational use exception in *Lane* and reversed. 283 Kan. at —— (slip op. at 13). In rejecting this court's holding, our Supreme Court stated:

> "The clear statutory language of K.S.A.2006 Supp. 75–6104(o) provides that the recreational use exception to the KTCA applies when property is 'intended or permitted' to be used for recreational purposes, and the correct test to be applied under this statute is 'whether the property has been used for recreational purposes in the past or whether recreation has been encouraged.' [Citation omitted.]" 283 Kan. at —— (slip op. at 13).

"[T]he statutory language granting immunity to governmental facilities 'intended or permitted' to be used for recreational purposes should be read broadly, and Kansas courts should not impose additional hurdles to immunity that are not specifically contained in the statute." 283 Kan. at —— (slip op. at 10).

***3** In order for a location to fall within the scope of the recreation exception, the location must merely be intended or permitted to be used for recreational purposes—the injury need not be the result of recreation. *Jackson*, 268 Kan. at 326, 995 P.2d 844. Our Supreme Court has recognized that swimming facilities qualify as a recreational use under the recreational use exception. *Gonzales v. Board of Shawnee County Comm'rs*, 247 Kan. 423, 430, 799 P.2d 491 (1990). Noncompulsory extracurricular activities, such as practices for an athletic team, are considered recreational activities as

well. *Wright v. U.S.D. 379*, 28 Kan.App.2d 177, 180, 14 P.3d 437, *rev. denied* 270 Kan. 904 (2000).

Here, KU and the Board of Regents both intended and permitted Robinson to be used for recreational purposes. Robinson has been used for recreational purposes in the past, including fundraising events, children's summer camps, KU women's swim team practices and competitions, and community-sponsored fitness classes. KU and the Board of Regents encourage groups to rent Robinson's facilities so that they can use the rental income to pay in part the operation director's salary. Marks does not allege that KU and the Board of Regents are guilty of gross and wanton negligence. Thus, Robinson is a recreational facility within the meaning of the recreational use exception of the KTCA, and KU and the Board of Regents are protected by immunity from Marks' negligence suit. Because summary judgment in favor of KU and the Board of Regents was appropriate, the trial court properly granted summary judgment in this matter.

Affirmed.

All Citations

157 P.3d 1129 (Table), 2007 WL 1461381, 219 Ed. Law Rep. 790

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APPENDIX B

184 P.3d 993 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Carla DYE, Appellant,
v.
SHAWNEE MISSION SCHOOL DISTRICT, Appellee.

No. 98,379.
|
June 6, 2008.
|
Review Denied Nov. 4, 2008.

Appeal from Johnson District Court; Janice D. Russell, Judge.

Attorneys and Law Firms

Scott C. Long and Michael L. Hughes, of Long, Luder & Gordon, P.A ., of Overland Park, for appellant.

Curtis L, Tideman, Matthew S. Corbin, and David R. Frye, of Lathrop & Gage, L.C., of Overland Park, for appellee.

Before MARQUARDT, P.J., CAPLINGER and LEBEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Carla Dye appeals from the district court's order granting summary judgment in favor of the Shawnee Mission School District (District). Because we conclude the district court properly found (1) the District is immune from liability for Dye's injuries under the recreational use exception to the Kansas Tort Claims Act (KTCA), K.S.A. 75–6101 *et seq.*, and (2) Dye has not demonstrated gross and wanton negligence on the part of the District as a matter of law, we affirm the district court's grant of summary judgment.

Factual and procedural background

On the evening she was injured, Dye attended her daughter's soccer game at the Shawnee Mission School District Soccer Complex. Afterward, Dye walked from the fenced-in soccer fields to the area where she regularly met her daughter following soccer games, *i.e.,* a sewer inlet located in a grassy area between the fields and an adjacent parking lot. Though an asphalt trail led from the parking lot to the soccer fields, this grassy area often was used as an alternative route to the parking lot.

As Dye walked through the grassy area near the sewer inlet, she slipped and fell into a hole, injuring her knee and wrist. Before she slipped, Dye did not see the hole, nor did she notice anyone else having difficulty walking through that area. The District's maintenance workers were unaware of the hole before Dye's accident, and the Districts manager of operations and maintenance testified he had difficulty finding the hole after Dye's accident. Neither Dye nor the maintenance crew was aware of any similar accidents occurring at the complex, including the area near the sewer inlet.

Dye filed the instant action alleging the District was negligent in failing to make repairs to dangerous conditions on its property and in failing to warn of such conditions. The District moved for summary judgment, arguing it was immune from liability under the KTCA's recreational use exception, K.S.A.2007 Supp. 75–6104(o). The district court agreed, finding as a matter of law that the District was entitled to immunity and that Dye had failed to prove gross and wanton negligence.

Dye timely appeals the district court's order granting the District summary judgment.

Application of the recreational use exception

Dye contends the district court erred in applying the recreational use exception to exempt the District from liability under the KTCA. That exception, found in K.S.A.2007 Supp. 75–6104(o), provides:

> "A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:
>
> ...
>
> (o) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty

of gross and wanton negligence proximately causing such injury."

K.S.A.2007 Supp. 75–6104(o) does not provide absolute immunity; rather, it permits recovery only when a government entity or employee commits gross and wanton negligence.

***2** Whether the exception applies in this case is a question of statutory interpretation over which we exercise unlimited review. *Lane v. Atchison Heritage Conf. Center, Inc.*, 283 Kan. 439, 443, 153 P.3d 541 (2007).

" 'Under the KTCA, government liability is the rule and immunity is the exception. [Citation omitted.]' " *Lane*, 283 Kan. at 444. However, the recreational use exception is broadly applied. 283 Kan. At 445; see *Wilson v. Kansas State University*, 273 Kan. 584, 592, 44 P.3d 454 (2002) (noting the intent of the legislature to "establish a broad application of recreational use immunity").

The purpose of the recreational use exception, was described in *Jackson v. U.S.D.* 259, 268 Kan. 319, Sly. ¶ 10, 995 P.2d 844 (2000):

> "The purpose of K.S.A. 75–6104(o) is to provide immunity to a governmental entity when it might normally be liable for damages which are the result of ordinary negligence. This encourages governmental entities to build recreational facilities for the benefit of the public without fear that they will be unable to fund them because of the high cost of litigation. The benefit to the public is enormous. The public benefits from having facilities in which to play such recreational activities as basketball, Softball, or football, often at a minimal cost and sometimes at no cost. The public benefits from having a place to meet with others in its community."

Courts do not segregate parts of the property to determine whether the recreational use exception applies; instead, they examine the collective character of the property in question. *Wilson*, 273 Kan. at 587–88. "In order for a location to fall within the scope of K.S.A. 75–6104(o), the location must merely be 'intended or permitted to be used ... for recreational purposes.' The injury need not be the result of 'recreation." ' *Jackson*, 268 Kan. at 326; see *Boaldin v. University of Kansas*, 242 Kan. 288, 289, 747 P.2d 811 (1987) (plaintiff injured while sledding on hill at the University of Kansas); *Lane*, 283 Kan. at 440 (plaintiff injured after slipping on city conference center's loading dock).

Further, our Supreme Court has broadly construed the exception to apply to property integral to or near a recreational facility. See *Wilson*, 273 Kan. at 590 (holding the exception applies to restrooms located in a football stadium); *Nichols v. U.S.D*, No. 400, 246 Kan. 93, 785 P.2d 986 (1990) (applying exception where plaintiff was injured in a grassy area near football field).

Here, the District concedes the grassy area where plaintiff was injured was not specifically designated or intended for recreational activities. Nevertheless, the District argues the exception was properly applied because Dye was injured in an area which surrounded, accommodated, or was an integral part of a recreational facility. Dye, on the other hand, suggests the facts of this case distinguish it from those cases extending the recreational use exception. Further, Dye argues the approach advocated by the District exceeds the plain language of K.S.A.2007 Supp. 75–6104(o) and results in "broad brushed immunity."

***3** We recognize some disagreement in recent case law regarding the breadth of the recreational use exception. See *Poston v. U.S.D.* 387, 37 Kan.App.2d 694, 697–99, 156 P.3d 685 (2007) (McAnany, J., dissenting) (arguing recreational use exception should not apply when plaintiff was injured in school commons area which incidentally provided direct access to the gym).

However, *Poston* is on review to our Supreme Court and we cannot predict or anticipate the resolution of that case, which was argued January 29, 2008. Moreover, the facts of this case are closely aligned with the facts of *Nichols*, 246 Kan. 93, and we believe that case controls our decision here.

The plaintiff in *Nichols* was injured following high school football practice when the coach ordered the team to run from the field to the locker rooms. The plaintiff fell as he crossed a "grassy swale" or waterway located between the field and the locker rooms, injuring his back. 246 Kan. at 93–94. The plaintiff brought a negligence action against the school district

alleging the coach was negligent in ordering the players to run to the locker room in darkness and in failing to properly supervise the players.

Nichols appealed the district court's grant of summary judgment to the school district, arguing the district court erred in applying the recreational use immunity exception and in concluding the plaintiff had failed to prove gross or wanton negligence. This court affirmed the application of the immunity exception, and our Supreme Court granted review. *Nichols,* 246 Kan. at 94, 98.

The *Nichols* court found that the recreational use exception, by its plain language, applies to injuries resulting from the ***use*** of public property intended for recreational purposes, regardless of whether the activity was supervised by the school district. 246 Kan. at 95. Further, the court noted that the exception is not limited to injuries occurring in areas expressly designated as recreational, or as a result of conditions on the premises. 246 Kan. at 97.

While we recognize that the issue now before the court was not expressly considered in *Nichols,* we need not speculate as to the scope of that opinion, as our Supreme Court has subsequently interpreted *Nichols* broadly. In *Jackson,* 268 Kan. 319, the court noted that under *Nichols,* "[s]chool districts are not liable for injuries which are the result of ordinary negligence and which occur on *or near* a football playing field." (Emphasis added.) 268 Kan. at 324; see also *Wilson,* 273 Kan. at 591 (reaffirming the *Jackson* court's interpretation of *Nichols*).

Here, as in *Nichols,* the plaintiff's injuries occurred *near* the soccer field in a grassy area traversed by soccer players and fans to get from the soccer field to a parking lot which served the soccer field as well as the school. Under these circumstances, we hold the district court properly applied K.S.A.2007 Supp. 75–6104(o) to find the school district immune from liability for Dye's injuries.

Gross and Wanton Negligence

***4** Alternatively, Dye contends that if the recreational use exception applies, the district court nevertheless erred in granting summary judgment because Dye presented evidence of the District's gross and wanton negligence.

> " " "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with 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 issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.' [Citations omitted.]" ' [Citation omitted.]" *Korytkowski v. City of Ottawa,* 283 Kan. 122, 128, 152 P.3d 53 (2007).

When, as here, there is no factual dispute, our review of an order regarding summary judgment is de novo. *Botkin v. Security State Bank,* 281 Kan. 243, 248, 130 P.3d 92 (2006).

"Wanton conduct is established by the mental attitude of the wrongdoer rather than by the particular negligent acts. [Citation omitted.] [It] requires that there be a realization of imminent danger and reckless disregard, indifference, and unconcern for probable consequences. [Citation ommited]" *Robison v. State,* 30 Kan.App.2d 476, 479, 43 P.3d 821 (2002).

Citing *Gruhin v. City of Overland Park,* 17 Kan.App.2d 388, 392, 836 P.2d 1222 (1992), Dye contends she must show only an act of omission in order to prove wanton negligence. We find Dye's reliance on *Gruhin* to be misplaced.

In *Gruhin,* the plaintiff was injured at a city golf course when he drove a golf cart into a hole several feet deep. The evidence showed that golf club personnel were aware of the hole at the time of Gruhin's injury because another person had been injured at the same location several weeks earlier. While employees had marked the area around the hole with chalk lines, they had failed to take any steps to repair the hole. 17 Kan.App.2d at 389.

Gruhin sued the city for negligence, and the district court granted the city's motion for summary judgment, finding the plaintiff had failed to show gross and wanton negligence as required under the recreational use exception. 17 Kan.App.2d at 391. Noting that the club employees had prior knowledge of the hole, this court held that the district court erred in granting summary judgment because reasonable minds could differ

as to whether "the preventative measure taken [by the club] showed a reckless disregard for the danger posed by the hole." 17 Kan.App.2d at 393.

***5** Unlike *Gruhin,* there is simply no evidence in this case that District employees were aware of the hole into which plaintiff stumbled. In fact, employees found the hold difficult to locate even after Dye's injury. While Dye accurately notes the District admitted the hole was dangerous and required repair, this admission occurred *after* her injury and does not demonstrate prior knowledge.

Additionally, Dyes claim that the District should have known about the hole because it was readily observable is, at best, evidence of negligence rather than of gross and wanton negligence. See *Jackson v. City of Norwich,* 32 Kan.App.2d 598, 601, 85 P.3d 1259 (2004) (holding that plaintiff failed to show gross and wanton negligence because she had failed to present any evidence that the city had knowledge of any dangerous condition); *Robison,* 30 Kan.App.2d at 480 (summary judgment proper when plaintiff failed to present evidence that the "defendant's employees knew about an excess amount of water in the hallway which might cause a fall"); *Boaldin,* 242 Kan. at 293–94 (holding that the university's knowledge that students went sledding on a campus hill was not sufficient to establish gross and wanton negligence).

Since Dye failed to present evidence that the District acted with gross and wanton negligence in the maintenance of the property, the district court did not err in finding that, as a matter of law, the District was not liable for gross and wanton negligence.

Affirmed.

All Citations

184 P.3d 993 (Table), 2008 WL 2369847

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APPENDIX C

2003 WL 1961969
Only the Westlaw citation is currently available.

Court of Appeals of Kansas.

Scott STONE, a Minor, By and Through his Natural Father and Next Friend Ricky V. Stone, and Ricky V. Stone, Individually, Appellants,
v.
CITY OF LA CYGNE, Kansas, A Kansas Municipality, Appellee.

No. 88,996.
|
April 11, 2003.

Appeal from Linn District Court; Richard M. Smith, judge. Opinion filed April 11, 2003. Affirmed.

Attorneys and Law Firms

Gregory M. Dennis, of Kent T. Perry & Co., L.C., of Overland Park, and Carston C. Johannsen, of Gould Law Offices Chtd., L.L.C., of Lenexa, for appellants.

J. Steven Pigg and Kristine A. Polansky, of Fisher, Patterson, Sayler & Smith, L.L.P., of Topeka, for appellee.

Before RULON, C.J., LEWIS and GREEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Plaintiffs, Scott Stone and Ricky Stone, appeal a summary judgment ruling in favor of the defendant, the City of La Cygne, Kansas. The plaintiffs contend the recreational use exception of the Kansas Tort Claims Act (KTCA) is inapplicable in this case and the district court improperly found there was insufficient evidence of gross and wanton conduct to submit the case to a jury.

A detailed discussion of the underlying facts is not necessary for this court to resolve the issues presented.

The plaintiffs challenge the district court's interpretation of the recreational use exception to the KCTA, K.S.A.1999 Supp. 75-6104(o), arguing the exception should not extend immunity from liability to nonpublic facilities tangential, although perhaps instrumental, to recreational property. This issue involves an interpretation of the statute, which is a question of law. This court has unlimited review of such questions. See *Tullis v. Pittsburg State Univ.*, 28 Kan.App.2d 347, 350, 16 P.3d 971 (2000).

In pertinent part, K.S.A.1999 Supp. 75-6104 provides:
"A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

....

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

Under the KCTA, government liability is the rule, and a government entity bears the burden of proving that such entity falls into one of the enumerated exceptions. See *Jackson v. U.S.D. 259,* 268 Kan. 319, 322, 995 P.2d 844 (2000). Immunity under the recreational use exception depends entirely upon the character of the property upon which the injury occurred, not upon the nature of the activity performed. Thus, if the intended or permitted use of the property is recreational, the government entity is immune from liability for ordinary negligence, even if the activity occurring at the time of the injury was not recreational. See *Barrett v. U.S.D. No. 259,* 272 Kan. 250, 257, 32 P.3d 1156 (2001).

Here, the property, broadly defined, is a public swimming pool. Although the pool is sometimes used to provide swimming instruction, its primary and intended purpose is recreation. However, the plaintiffs attempt to define the property at issue more narrowly. The plaintiffs contend that Scott Stone's injury occurred in the pool shed, access to which was restricted to only authorized personnel. Arguing that a member of the public did not have access to the pool shed absent authorization of city employees or negligence, the

plaintiffs urge this court to distinguish between the public swimming pool property and the property of the pool shed, for purposes of applying the recreational use exception.

While not entirely analogous, the reasoning of *Wilson v. Kansas State University,* 273 Kan. 584, 44 P.3d 454 (2002), is instructive. In *Wilson,* our Supreme Court considered whether the university was immune from tort liability arising from an injury occurring to a patron of the football stadium within a stadium restroom. Recognizing that the restroom was not intended for recreational purposes, our Supreme Court emphasized the relationship of the restroom to the stadium, which clearly did possess a recreational purpose. *Wilson,* 273 Kan. at ----.

***2** "The restrooms are part of the stadium. The restrooms allow people to continue enjoying the recreational purposes provided by the football games at the stadium without leaving. Likewise, the usefulness of the park is increased and the legislative purpose is advanced. As the trial court in this case noted, the restrooms are 'an integral part of a football stadium.' To the extent the legislature intended to encourage the building of recreational facilities with K.S.A.2001 Supp. 75-6104(o), extending immunity to cover negligent acts in restrooms is consistent with the legislative intent because such extension further increases the incentive to build recreational facilities." *Wilson,* 273 Kan. at ----.

Just as the restrooms facilitated the recreational purpose of the stadium by permitting spectators to remain at the stadium, so too, the machines and chemicals housed by the pool shed facilitate the recreational use of the pool. The pool could not be used at all if the water were not cleaned. Consequently, the pool shed is an integral part of the recreational use intended by the development of the city pool. Moreover, unlike restrooms attached to a recreational facility, the pool shed possesses no viable purpose apart from the swimming pool; its only function is to facilitate the use of the recreational property.

Granted, in *Wilson,* the restrooms were intended for public use, and the recreational, public use of the stadium was enhanced by the nonrecreational, public use of the on-site restrooms. In contrast, here, the public was generally prohibited from entering the pool shed. The public's access to the shed was not necessary to promote the recreational use of the pool.

In *Lewis v. Jasper Co. Comm. Unit. Sch. Dist.,* 258 Ill.App.3d 419, 196 Ill.Dec. 383, 629 N.E.2d 1227 (1994), cited with approval by our Supreme Court in *Wilson,* the Illinois Court of Appeals considered whether the recreational use exception to tort liability under the Illinois statute extended to a pump house located on a playground. Even though the pump house possessed no recreational use, the *Lewis* court determined that the exemption to tort liability should extend to an injury caused by falling against the pump house because the pump house was located on recreational property. 258 Ill.App.3d at 424.

The plaintiff attempts to distinguish *Lewis* on the basis of the location of the injuries; Lewis had fallen against the exterior of the pump house, while Scott Stone was injured by entering the pool shed. In considering the legislative purpose behind the recreational use exception, however, this distinction becomes meaningless.

Government entities are provided with immunity with respect to recreation areas in the belief that holding a government entity liable for ordinary negligence with respect to such property will discourage the creation of public recreation areas. See *Jackson v. U.S.D. 259,* 268 Kan. at 330, 995 P.2d 844. The rule proposed by the plaintiffs undermines this legislative purpose by holding government entities liable for ordinary negligence related to restricted areas of recreational property which are integral to the recreational use of that property.

***3** In *Spencer v. City of Chicago,* 192 Ill.App.3d 150, 139 Ill.Dec. 216, 548 N.E.2d 601 (1989), the plaintiff contended the city was subject to an ordinary negligence standard, rather than the heightened negligence standard under the immunity statute, because signs posted around a lagoon in the park clearly designated the lagoon was not intended to be used for recreational purposes. Rejecting the plaintiffs arguments, the *Spencer* court held the lagoon was part of the park and the city was immune from suit for ordinary negligence. The court then considered whether the plaintiff had alleged sufficient facts to demonstrate willful or wanton negligence. *Spencer,* 192 Ill.App.3d at 155-56, 139 Ill.Dec. 216, 548 N.E.2d 601.

Similarly, although the City of La Cygne had barred the general public from access to the pool shed, the restriction does not affect the nature of the pool shed as an integral part of the recreational use of the pool. Rather, the circumstances leading to an injury by a member of the public should be taken into consideration when determining whether the City's conduct constituted gross and wanton negligence.

The plaintiffs contend their evidence regarding the City's conduct in this case established a prima facie case for gross and wanton negligence and the district court should have allowed the question to be presented to a jury instead of granting summary judgment in favor of the defendant.

Summary judgment is only appropriate when a court, after reviewing the record in a light most favorable to the nonmoving party, is convinced that the case presents no issues of disputed material fact and that judgment as a matter of law is appropriate. See *Bergstrom v. Noah,* 266 Kan. 847, 871-72, 974 P.2d 531 (1999). Ordinarily, because the presence or absence of negligence in any degree is a question of fact for the jury, summary judgment should not be entered in negligence cases. See *Gruhin v. City of Overland Park,* 17 Kan.App.2d 388, 392, 836 P.2d 1222 (1992).

However, where no reasonable person could reach a different legal conclusion from the evidence available, the case may be decided as a matter of law. See *Gruhin,* 17 Kan.App.2d at 392, 836 P.2d 1222 (citing *Smith v. Union Pacific Railroad Co.,* 222 Kan. 303, 306, 564 P.2d 514 [1977]).

In order to prevail on a claim of gross and wanton negligence, the plaintiff must demonstrate "something more than ordinary negligence but less than a willful act. [Wantonness] indicates a realization of the imminence of danger and reckless disregard and indifference for the consequences." *Gruhin,* 17 Kan.App.2d at 392, 836 P.2d 1222. A plaintiff must show that a defendant had knowledge of existing conditions that would probably cause injury to another, yet acted, or refused to act, with reckless disregard as to whether that injury would occur. See *Reeves v. Carlson,* 266 Kan. 310, 315, 969 P.2d 252 (1998).

A plaintiff's knowledge of a dangerous condition may be either actual or constructive. However, evidence demonstrating an individual's failure to exercise ordinary diligence to obtain the necessary knowledge to prevent injury does not constitute wanton misconduct but merely negligence. See *Railway Co. v. Baker,* 79 Kan. 183, 187, 98 Pac. 804 (1908); 57A Am.Jur.2d, Negligence § 273, p. 304.

***4** Moreover, it is insufficient to support a claim of wanton misconduct to allege that a person knew that their conduct might place another person in danger. "The probability must be so great ... that they must be deemed to realize the likelihood that a catastrophe is imminent and yet to omit reasonable effort to prevent it because indifferent to the consequences." *Railway Co. v. Baker,* 79 Kan. at 187, 98 P. 804; see 7A Am.Jur.2d, Negligence § 281, pp. 310-11.

In the present case, the plaintiffs allege the City possessed actual knowledge that chlorine was a hazardous material and the City possessed constructive knowledge, via the Red Cross lifeguard training manual, that chlorine gas is extremely corrosive and is occasionally generated in the pump rooms of swimming pool facilities. The plaintiffs further contend the City subjected Scott Stone to the unreasonable risk of chlorine inhalation without taking proper precautions to mitigate against this known danger by providing him with protective clothing.

Knowledge that chlorine is a toxic substance does not, in itself, demonstrate a disregard or indifference to a dangerous situation. Before being combined with water, the chlorine is generally stored as a solid in tablets or sticks. There is no evidence that Scott Stone was required or expected to handle any chlorinated substances.

While the lifeguard training manual warns that chlorine gas generated by pool machinery can collect in pump or filter rooms, this warning statement is insufficient to provide notice to a reasonable person that injury by chlorine inhalation is probable. Such warning presents notice of a possibility that chlorine gas is present, but failure to take precautionary measures against possible consequences is a lack of due diligence, which is ordinary negligence, not wanton recklessness. See *Railway Co. v. Baker,* 79 Kan. at 187, 98 P. 804.

The defendant's evidence regarding the absence of chlorine gas in the pump shed in the past is not controverted. The pool attendant testified that she refilled the machine 3 or 4 times a day. Never had she seen or smelled chlorine gas when the lid of the chlorinator was removed, even on those occasions in which the lid was difficult to remove. Nothing within the lifeguard training manual, or in the cautionary statements posted on the machines and storage containers in the pump shed, indicates a probability that chlorine gas generated by the chlorinator will be released upon opening the lid.

Consequently, the plaintiffs cannot produce any evidence which demonstrates the defendant knew or reasonably should have known that there was a high risk that chlorine gas would escape from the chlorinator when Scott Stone helped the pool attendant open the chlorinator. Because the evidence, presented in a light most favorable to the plaintiff, fails

to establish that from the information available to the defendant, a reasonable person would have perceived that the pool attendant was placing Scott Stone in an unreasonably dangerous situation in which injury was probable, the district court properly granted summary judgment in favor of the defendants.

*5 Affirmed.

All Citations

Not Reported in P.3d, 2003 WL 1961969

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APPENDIX D

371 P.3d 374 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

Jonni CULLISON, et al., Appellants,
v.
CITY OF SALINA, KANSAS, Appellee.

No. 114,571.
|
May 27, 2016.
|
Review Denied June 2, 2017.

Appeal from Saline District Court; William B. Elliott, Judge.

Attorneys and Law Firms

Michael C. Rader and Michelle L. Marvel, of Bartimus, Frickleton and Robertson, P.C., of Leawood, for appellants.

James P. Nordstrom and Andrew D. Holder, of Fisher, Patterson, Sayler & Smith, L.L.P., of Topeka, for appellee.

Before HILL, P.J., STANDRIDGE and ATCHESON, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** This is a tort action arising out of the death of 12–year–old Jayden Hicks, who suffered catastrophic injuries when she slipped and fell on an electrical junction box on a main street in Salina. Wires in the box had shorted out, and the absence of a ground wire caused the metal housing to become electrified. The Saline County District Court granted summary judgment to Defendant City of Salina based on the recreational use exception to the Kansas Tort Claims Act, K.S.A. 75–6101 *et seq.*, because the junction box is located at the mouth of a small downtown park and provides electricity for lights in the park and along the street. We find disputed issues of material fact as to the applicability of the exception and, therefore, reverse and remand for further proceedings.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Given the narrowness of the issue on appeal, we may briefly state the pertinent facts. We do so favorably to Plaintiffs Jonni Cullison and Jaymie Hicks, Jayden's parents, who have sued on behalf of their daughter's estate and her heirs. Looking at the evidentiary record that way conforms to our standard of review for summary judgments. *See Bouton v. Byers*, 50 Kan.App.2d 35, 36–37, 321 P.3d 780 (2014).

During the early evening of May 29, 2013, Jayden was playing with her two siblings and two of their friends in and around Campbell Plaza in downtown Salina. Campbell Plaza is described as a "pocket park" adjacent to Santa Fe Avenue and includes a stage and an open area for people to mingle. Jayden apparently slipped in a puddle that had formed after a rainstorm. She fell on a junction box that is flush with the sidewalk at an entrance to Campbell Plaza. The metal cover of the junction box had become electrically charged with a high voltage. Jayden's body absorbed the charge, and several people trying to rescue the child were severely jolted when they touched her. Firefighters called to the scene were able to pry Jayden from the junction box. Although Jayden then received immediate medical care, her injuries were fatal. She died on December 31, 2013.

The junction box had been installed in the 1980s by a company the City hired to do electrical work in the downtown area. The record evidence indicates the City did not inspect the wiring inside the box then and had not done so until just after Jayden was hurt. An inspection at that time showed that two live wires within the box had come into contact with each other, causing the electrical current to flow into the metal housing of the box. The inspection also revealed no ground wire had been installed. The evidence on summary judgment indicates that use of a ground wire would have conformed to accepted standards for electrical work at the time the junction box was placed and that had a ground wire been included, the charge created when the live wires came into contact would have tripped a breaker cutting off power to the junction box.

The junction box is located on a strip of concrete forming part of the sidewalk on Santa Fe. The concrete strip runs along the entrance to Campbell Plaza and the storefronts on Santa Fe. Closer to the street, the sidewalk consists of decorative bricks. Campbell Plaza also appears to be surfaced with the same type of decorative brick. A photograph showing the junction

box, the entrance to Campbell Plaza, and the sidewalk and storefronts on Santa Fe was submitted to the district court as part of the evidentiary record on summary judgment. The junction box provides electricity for decorative lights in the Plaza and along Santa Fe. One or more electrical outlets on a concrete planter and bench framing part of Campbell Plaza are powered through the junction box.

***2** Plaintiffs filed their tort action on February 19, 2014, and they amended the petition twice. They sued the City of Salina, the manufacturer of the junction box, and the company that installed it. Plaintiffs and the private defendants reached a confidential out-of-court disposition, so those companies have been dismissed from the case. The City has asserted various grounds that would limit or defeat liability, including the recreational use immunity under the KTCA, K.S.A. 75–6104(o). Following extensive discovery, Plaintiffs filed a motion and supporting memorandum for partial summary judgment asking the district court to find the City was not entitled to recreational use immunity as a matter of law. The City filed a memorandum in opposition and a cross-motion requesting that it be granted immunity as a matter of law. The district court later issued a written decision granting the City's cross-motion and entering judgment in its favor. Plaintiffs have timely appealed the judgment in favor of the City.

LEGAL ANALYSIS

Standard of Review on Summary Judgment

A party seeking summary judgment has the obligation to show, based on appropriate evidentiary materials, there are no disputed issues of material fact and judgment may, therefore, be entered in its favor as a matter of law. *Shamberg, Johnson & Bergman, Chtd. v. Oliver,* 289 Kan. 891, 900, 220 P.3d 333 (2009); *Korytkowski v. City of Ottawa,* 283 Kan. 122, Syl. ¶ 1, 152 P.3d 53 (2007). In essence, the movant argues there is nothing for a jury or a trial judge sitting as factfinder to decide that would make any difference. The party opposing summary judgment must then point to evidence calling into question a material factual representation made in support of the motion. *Shamberg,* 289 Kan. at 900; *Korytkowski,* 283 Kan. 122, Syl. ¶ 1. If the opposing party does so, the motion should be denied so a factfinder may resolve that dispute. In addressing a request for summary judgment, the district court must view the evidence in the light most favorable to the party opposing the motion and give that party the benefit of every reasonable inference that might be drawn from the evidentiary record. *Shamberg,* 289 Kan. at 900; *Korytkowski,* 283 Kan. 122, Syl. ¶ 1. An appellate court applies the same standards in reviewing the entry of a summary judgment. The Kansas Supreme Court has reiterated those principles in *Thoroughbred Assocs. v. Kansas City Royalty Co.,* 297 Kan. 1193, 1204, 308 P.3d 1238 (2013).

Because entry of summary judgment amounts to a question of law—it entails the application of legal principles to uncontroverted facts—an appellate court owes no deference to the trial court's decision to grant the motion and review is unlimited. See *Adams v. Board of Sedgwick County Comm'rs,* 289 Kan. 577, 584, 214 P.3d 1173 (2009); *Golden v. Den–Mat Corporation.,* 47 Kan.App.2d 450, 460, 276 P.3d 773 (2012). Likewise, merely because each party in a case has filed a motion for summary judgment, the district court has no broader authority to grant one of the motions. Each motion must be separately and independently reviewed using the standards we have outlined. *Wheeler v. Rolling Door Co.,* 33 Kan.App.2d 787, 790–91, 109 P.3d 1255 (2005); *Jones v. Noblit,* No. 100,924, 2011 WL 4716337, at **1* (Kan.App.2011) (unpublished opinion). In short, the filing of cross-motions does not afford the district court a license to decide a case on summary judgment.

***3** At trial, a government entity asserting immunity under one of the KTCA exceptions has to prove its entitlement to that protection. *Soto v. City of Bonner Springs,* 291 Kan. 73, 78, 238 P.3d 278 (2010); *Jackson v. U.S.D. 259,* 268 Kan. 319, Syl. ¶ 3, 995 P.2d 844 (2000). A party seeking summary judgment on an issue on which it bears the burden of proof must present uncontroverted facts establishing its right to a judgment as a matter of law. *Golden,* 47 Kan.App.2d at 497 (A party asserting an affirmative defense "has an obligation to come forward with evidence on summary judgment that would allow a jury to find those facts necessary to show" the defense applies.); *Mickelson v. New York Life Ins. Co.,* 460 F.3d 1304, 1311 (10th Cir.2006) (if defendant bears ultimate burden of persuasion on issue, defendant must come forward with facts on summary judgment that would allow a jury finding in its favor). The moving party, then, must do more than argue the opposing party cannot disprove the issue. See *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115–16 (11th Cir.1993) (explaining difference in required showing for summary judgment depending on whether moving party bears burden of proof at trial).

KTCA Legal Principles

As we have indicated, what's before us turns on the proper interpretation and application of the recreational use exception to governmental liability under the KTCA. The exception provides:

> "A government entity ... shall not be liable for damages resulting from:
>
> "(o) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury." K.S.A. 75–6104(o).

Before discussing the district court's ruling in this case, we mention several legal principles guiding judicial consideration of the KTCA.

Under the KTCA, municipal liability is the rule and immunity the exception. *Thomas v. Board of Shawnee County Comm'rs,* 293 Kan. 208, 233, 262 P.3d 336 (2011); *Soto,* 291 Kan. at 78; see K.S.A. 75–6103. As a general proposition, the KTCA exceptions are to be narrowly construed, since they curtail the rule of liability. *Keiswetter v. State,* No. 110,610, 2016 WL 1612922, at *6–7 (Kan .2016); *Jackson v. City of Kansas City,* 235 Kan. 278, 286, 680 P.2d 877 (1984); *Estate of Belden v. Brown County,* 46 Kan.App.2d 247, 290, 261 P.3d 943 (2011). An accepted tenet of statutory construction calls for the narrow application of exceptions. See *Telegram Publishing Co. v. Kansas Dept. of Transportation,* 275 Kan. 779, 785, 69 P.3d 578 (2003); *Broadhurst Foundation v. New Hope Baptist Society,* 194 Kan. 40, 44, 397 P.2d 360 (1964). But the recreational use exception to the KTCA has been afforded a broad reading for reasons that seem mysterious. See *Poston v. U.S.D. No. 387,* 286 Kan. 809, 812–13, 189 P.3d 517 (2008) (recognizing recreational use exception "to be broadly applied" in reliance on *Jackson,* 268 Kan. at 331); 286 Kan. at 820–21 (Johnson, J., dissenting) (noting lack of statutory basis and legislative history supporting broad construction of exception); *Jackson,* 268 Kan. at 331 (exception given generous reading because doing so encourages government entities to develop parks and other recreational areas resulting in public benefit). The *Jackson* court, perhaps in light of that approach, recognized the recreational use exception to be highly fact specific and held its application should be determined on a case-by-case basis. 268 Kan. 319, Syl. ¶ 7.

***4** The Kansas Supreme Court has extended coverage under K.S.A. 75–6104(o) to places outside a park or other recreational area if they are "integral" to its use. *Poston,* 286 Kan. at 817. The court indicated, however, an outside place merely "incidental" to a park's function will not enjoy recreational use immunity. 286 Kan. at 818–19; see *Wilson v. Kansas State University,* 273 Kan. 584, 590, 44 P.3d 454 (2002) (court draws distinction between incidental and integral purposes to find restrooms at football stadium subject to recreational use immunity); *Jackson,* 268 Kan. at 330 (quoting with favor *Ozuk v. River Grove Board of Education,* 281 Ill.App.3d 239, 243–44, 666 N.E.2d 687 [1996] to effect that comparable Illinois statute applicable only if " 'the recreational use was more than incidental' "). Just how the integral-incidental determination is to be made or applied isn't entirely clear. If the classification is binary, then a given outside place must be either incidental or integral to an associated recreational area. There is no middle ground. If, however, a place may fall somewhere in between, the applicability of the recreational use immunity appears unsettled. Is more than incidental use enough for immunity to attach to the place? Or must the use reach or exceed integral to warrant immunizing the place?

On appeal, Plaintiffs submit there are disputed facts as to whether the junction box is within Campbell Plaza and, thus, subject to the recreational use exception. They also say there are disputed facts indicating that if the junction box is outside the park, it should not be considered integral to the use of the park, so no immunity applies. Finally, they say there are disputed facts that would support a finding that the City acted with gross and wanton negligence in failing to retrofit the junction box with a ground wire, thereby nullifying any available immunity.

Location of Junction Box

At least on summary judgment, the parties do not dispute that Campbell Plaza is a park covered by the recreational use exception to the KTCA. The location of the junction box is a known and undisputed fact. But that is not necessarily determinative of the applicability of the recreational use exception because the borders of Campbell Plaza are not clear as a matter of law from this record. *Cf. Burton v. City of Belle Glade,* 178 F.3d 1175, 1187 (11th Cir.1999) (summary judgment may be inappropriate when parties agree on facts but dispute inferences to be drawn). As we have indicated, the junction box is at the mouth of an entrance to Campbell Plaza but in an area that corresponds to part of the sidewalk that extends down Santa Fe in front of the stores. Campbell Plaza has no gate or fence clearly separating it from the street. Nor is there even a sign at the entrance that at least arguably

might indicate where the park begins. The City, of course, owns both Campbell Plaza and the sidewalk. We, therefore, suppose there are no deeds or formal surveys establishing a genuine property line between the two, as there would be for parcels with different owners. The summary judgment record contains no documents of that type.

***5** In its ruling, the district court described the junction box as "located in an indistinct divide between Campbell Plaza and the adjoining South Santa Fe sidewalk." The district court's characterization fosters an impression that there is some sort of area between the sidewalk on Santa Fe and Campbell Plaza. At the very least, that appears to be an inference rather than an unequivocal fact. And it is an impermissible summary judgment inference playing to the City's advantage and Plaintiffs' detriment. We think it considerably more precise to say, based on the summary judgment record, that the divide between Campbell Plaza and the Santa Fe sidewalk is indistinct. The sidewalk abuts Campbell Plaza—what's unclear is where one ends and the other begins.

Those circumstances add up to ambiguities that on summary judgment preclude a finding as a matter of law that the junction box is within Campbell Plaza and subject to recreational use immunity for that reason. Such a conclusion would require drawing inferences adverse to Plaintiffs, contrary to the rules governing the disposition of summary judgment motions. Moreover, since the City would have to prove its entitlement to recreational use immunity at trial, it has to present undisputed facts on summary judgment establishing that entitlement as a matter of law.

On summary judgment, the City submitted evidence that it *treated* the junction box and the concrete strip as part of Campbell Plaza. For example, work crews from the parks department apparently performed routine maintenance on Campbell Plaza and its entrances. But some intragovernmental labeling of a place can't change its physical character or actual use. Otherwise, a municipality could immunize its city hall under the recreational use exception by calling it a park and having employees of the parks department mow the lawn. That would be an ineffective legal fiction.

Incidental or Integral

As the Kansas Supreme Court has held, however, a place integral to a park or other recreational area may be covered under K.S.A. 75–6104(o) even though it is physically outside that area. In arguing for that protection, the City emphasized the junction box carries electrical current used for lighting in Campbell Plaza and on the street. The City has described the lighting in Campbell Plaza as "decorative," a description we accept for purposes of summary judgment. The City also mentioned, more or less in passing, electrical outlets on a concrete bench or planter at the edge of the park. In its decision granting summary judgment, the district court pointed to both the lights and the outlets in explaining why recreational use immunity applies as a matter of law.

The evidence fails to establish the City's entitlement to judgment as a matter of law on the theory the junction box was essential to the use of Campbell Plaza as a recreational area. First, decorative lights are, by definition, just that—decoration. By common meaning, a "decorative" object is "purely ornamental," Merriam–Webster's Collegiate Dictionary 324 (11th ed.2003), or serves to "embellish," The American Heritage Dictionary of the English Language 472 (5th ed.2011). We doubt something ornamental and only ornamental could be integral to the functionality of a park or any other place. Even if the City's decorative lights are more than just pretty, it doesn't follow that they must be "integral" to Campbell Plaza. Obviously, the area can be used during daylight and twilight hours without the lights. The record likewise fails to show as a matter of law that Campbell Plaza would be unusable after dark without those lights or that the street lights along Santa Fe would provide inadequate illumination. Again, on summary judgment, the City is obligated to present undisputed facts establishing its claim for recreational use immunity on this basis. The evidentiary record, however, falls short.

***6** We don't see the electrical outlets on the outskirts of Campbell Plaza as adding much to the City's position. They could be used for all sorts of things from recharging cell phones to plugging in devices for playing recorded music or recording music being played. Most of those kinds of devices, however, also operate with batteries. The outlets may be a convenience for visitors to Campbell Plaza and the Salina downtown generally, but we cannot say as a matter of law they are integral to either. The district court could not have granted judgment to the City because the junction box, though outside Campbell Plaza, was integral to the Plaza's use. The issue must be left for a full airing of the evidence at trial.

Gross and Wanton Negligence

Even if we were mistaken on those points, the City would not be entitled to summary judgment if reasonable jurors could

find Jayden Hicks' death resulted from gross and wanton negligence attributable to the City. As we have outlined, a municipality's gross and wanton negligence negates the recreational use immunity extended in K.S.A. 75–6104(o). That heightened culpability takes away the protection afforded by the exception, restoring the KTCA's general rule of governmental liability. At trial, Plaintiffs would bear the burden of proving gross and wanton negligence. But they may defeat the City's motion for summary judgment by pointing to facts, disputed or otherwise, that would support a jury finding in their favor on the issue. They need not show such a finding to be likely—only that it would be permissible in light of the evidence. *Estate of Belden,* 46 Kan.App.2d at 276 (In reviewing summary judgment granted a defendant, the appellate court asks whether "a reasonable jury ***might*** render a verdict for" plaintiff and "do[es] not consider the probability of such a verdict, only its possibility.").

Typically, whether a party has been negligent, even grossly and wantonly so, presents a question of fact for the jurors. *Vaughn v.. Murray,* 214 Kan. 456, 459, 521 P.2d 262 (1974); *Gruhin v. City of Overland Park,* 17 Kan.App.2d 388, Syl. ¶ 3, 836 P.2d 1222 (1992). A court should presume to decide the issue as a matter of law only in the absence of any evidence favoring the negligence claim. *Vaughn,* 214 Kan. at 459 (gross negligence); *Estate of Belden,* 46 Kan.App.2d at 276 (determination of negligence generally should be for jurors).

Gross and wanton negligence requires more than the mere carelessness or inadvertence of ordinary negligence but does not entail a willful intent to injure. See *Soto,* 291 Kan. at 82. There must be " 'a realization of the imminence of danger and a reckless disregard and complete indifference and unconcern for the probable consequences[.]" ' 291 Kan. at 82 (quoting *Saunders v. Shaver,* 190 Kan. 699, 701, 378 P.2d 70 [1963]); see *Reeves v. Carlson,* 266 Kan. 310, 313–14, 969 P.2d 252 (1998). Culpability depends upon action or inaction " 'indicating indifference to known circumstances.' " *Adamson v. Bicknell,* 295 Kan. 879, 890, 287 P.3d 274 (2012) (quoting *Elliott v. Peters,* 163 Kan. 631, 634, 185 P.2d 139 [1947]); *Gould v. Taco Bell,* 239 Kan. 564, 572, 722 P.2d 511 (1986) (failure to act may constitute gross and wanton negligence).

***7** Plaintiffs highlight two strands of evidence in support of their position that the record permits a reasoned conclusion favoring gross and wanton negligence. First, they offer internal municipal reports from 2007, 2009, and 2011 laying out the declining condition of the City's electrical wiring in downtown Salina and the need for repair. The most recent report described the wiring as poor and noted problems with the decorative lighting working only intermittently. As the City points out, however, none of the reports suggested the deteriorating wiring posed a safety risk.

Based on the summary judgment record, however, the reports would permit a reasonable inference that wires associated with the decorative lighting, including those in the junction boxes, might be prone to coming loose. An errant wire electrified the junction box that Jayden Hicks fell on.

The second strand of evidence comes from Steven Adams, who was the City's master electrician leading up to and at the time of Jayden Hicks' fatal injury. Adams went to Campbell Plaza to inspect the junction box shortly after Jayden Hicks had been taken to the hospital. A police officer overheard Adams telling a firefighter that he knew there was no ground wire in the junction box because if there had been, it would have tripped the breaker every time there was a power surge. During his deposition, Adams testified that he told the firefighter if the junction box had been properly grounded, the breaker would have tripped. Asked about what the police officer recounted, Adams testified he did not recall whether he had said something to that effect. But he disclaimed any knowledge of the municipal reports on the downtown electrical system. Adams agreed that had the junction box been properly grounded, it should not have become electrified. According to Adams, a ground wire would have tripped the breaker, cutting off power to the junction box.

From the police officer's account, jurors could infer that the City, through its trained employees, knew the junction box had no ground wire before Jayden Hicks was electrocuted. Nobody from the City had looked inside the junction box before then. So no one had direct knowledge that a ground wire had not been included when the junction box had been installed. But Adams, who was familiar with electrical circuitry, had already deduced the absence of a ground wire because the junction box had never tripped the breaker—something he would have expected to happen periodically had the box been grounded. A conclusion inferred from telling circumstances is no less knowledge than a conclusion based on direct visual observation. See *State v. McClelland,* 301 Kan. 815, 820, 347 P.3d 211 (2015) ("[T]here is no distinction between direct and circumstantial evidence in terms of probative value.").

Despite his knowledge that the junction box lacked a functional ground, Adams took no action. Jurors could find he, thus, knew or based on his training had reason to know that the junction box could become electrified if the wires dislodged, causing a short circuit. And jurors could find he also understood an electrified junction box posed a substantial danger capable of causing severe or lethal injuries. Those circumstances could support a finding of gross and wanton negligence in failing to take corrective action by retrofitting the junction box with a ground wire. See *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244–45 (10th Cir.2009) (applying Kansas law and recognizing conduct of defendant may support gross and wanton negligence if circumstances show disregard of " 'high and excessive degree of danger ... apparent to a reasonable person' in the defendant's position") (quoting *Lanning v. Anderson*, 22 Kan.App.2d 474, 921 P.2d 813, *rev. denied* 260 Kan. 994 [1996]); *Deaver v. Board of Lyon County Commissioners*, No. 110,547, 2015 WL 715909, at *9 (Kan.App.) (unpublished opinion) *rev. denied* 302 Kan. —— (Sept. 14, 2015). Whether the circumstances depicted in the summary judgment record portray a sufficiently imminent danger amounts to an unresolved question of fact. To turn back a motion for summary judgment, Plaintiffs did not have to show Adams or some other City employee knew the housing of the junction box had actually become electrified. The district court mistakenly confined the dangerous condition to the actual electrification of the housing and failed to consider the absence of a ground wire as a sufficiently dangerous condition.

***8** The district court, therefore, erred in granting summary judgment in favor of the City, effectively finding no gross and wanton negligence as a matter of law. We, of course, say simply that the threads woven in the summary judgment record do not warrant that conclusion. The threads need not be particularly long or strong to do so. Whether they would be sufficiently durable to withstand a full trial is another matter —one on which we express no opinion.

In coming to our conclusion, we have relied only on what we have identified as Plaintiffs' second strand of evidence resting on Adams' knowledge. Our consideration of the record effectively discounts the information in the municipal reports, since Adams testified he didn't know about them. We suppose, however, the two strands really ought to be combined to measure the full knowledge of the City, as a municipal corporation. See *City of Arkansas City v.. Anderson*, 243 Kan. 627, 635, 762 P.2d 183 (1988) (knowledge of agents of corporate entity imputed to entity, giving it a collective "identical knowledge"). That would fortify Plaintiffs' position and our conclusion as to the potential risk and danger.

The City failed to demonstrate entitlement to summary judgment based on the recreational use immunity outlined in K.S.A. 75–6104(o) and the factual record compiled on the parties' cross-motions. The district court erred in granting the City's motion. We reverse and remand for further proceedings consistent with this decision.

All Citations

371 P.3d 374 (Table), 2016 WL 3031283

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APPENDIX E

2010 WL 3980228
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Kwang I. LEE, Plaintiff,
v.
ORION MANAGEMENT SOLUTIONS, INC. and City of Leawood, Kansas, Defendants.

No. 08–2242–DJW.
|
Oct. 8, 2010.

Attorneys and Law Firms

Kirby L. Minor, Russell L. Powell, Monaco, Sanders, Gotfredson, Racine & Barber, LC, Kansas City, MO, for Plaintiff.

J. Philip Davidson, Paul J. Skolaut, Hinkle Elkouri Law Firm LLC, Wichita, KS, Jennifer R. Johnson, Hinkle Elkouri Law Firm LLC, Overland Park, KS, for Defendants.

MEMORANDUM AND ORDER

DAVID J. WAXSE, United States Magistrate Judge.

***1** This matter is before the Court on Defendant City of Leawood, Kansas' Motion for Summary Judgment (ECF No. 67). Defendant City of Leawood, Kansas ("Leawood") asks the Court to enter summary judgment in its favor on Plaintiff's negligence claim. For the reasons set forth below, the Motion is granted.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it "is entitled to judgment as a matter of law."[1] In applying this standard, the court views the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party.[2] "An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way."[3] "An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim."[4]

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[5] In attempting to meet that standard, a moving party that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the moving party need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim.[6] If the moving party carries this initial burden, the nonmoving party may not simply "rest upon his or her pleadings, but must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which he or she carries the burden of proof."[7] To accomplish this, "sufficient evidence [ ] pertinent to the material issue [ ] must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein."[8]

However, where "the moving party has the burden of proof, a more stringent summary judgment standard applies."[9] "Thus, if the moving party bears the burden of proof, to obtain summary judgment, it cannot force the nonmoving party to come forward with specific facts showing there is a genuine issue for trial merely by pointing to parts of the record that it believes illustrate the absence of a genuine issue of material fact."[10] "Instead, the moving party must establish, as a matter of law, all essential elements of the issue before the nonmoving party can be obligated to bring forward any specific facts alleged to rebut the movant's case."[11]

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."[12]

Because jurisdiction over this matter is based on diversity of citizenship between the parties, the court will apply the substantive law of the forum state.[13] The parties agree that Kansas law governs this dispute. Thus, in resolving Leawood's Motion, the Court will apply Kansas law.

II. BACKGROUND

***2** Plaintiff, a resident of South Korea, was visiting his sister-in-law and brother-in-law, Michael Wellington ("Mr.Wellington"), in Leawood, Kansas in 2006. While visiting, Plaintiff played golf at the Ironhorse Golf Club and practiced on the driving range. Plaintiff brought

this negligence action against Leawood and Defendant Orion Management Solutions, Inc. ("Orion") after suffering personal injuries while hitting golf balls on the Ironhorse Golf Club driving range on June 3, 2006.

On the day of Plaintiff's accident, the Ironhorse driving range had two ropes that extended the entire width of the driving range, which delineated where golfers could hit. The ropes were on the ground and were secured by spherical tee markers with a height of approximately three to four inches. Plaintiff was hitting golf balls on the driving range while standing between the two ropes when a ball that he hit struck a spherical tee marker, bounced back, and struck Plaintiff in the left eye. Plaintiff contends that Leawood and Orion both owed Plaintiff a duty "to exercise a reasonable and ordinary degree of care in [ ] making the premises safe in the operation of the Ironhorse Golf Club." [14] Plaintiff further contends that Leawood and Orion breached this duty and he sustained damages as a direct result of Leawood's and Orion's negligence. [15]

Leawood argues that it is entitled to summary judgment on Plaintiff's negligence claim for several reasons, specifically that Leawood (1) is immune from liability under the recreational use exception to the Kansas Tort Claims Act, (2) Leawood did not breach its duty of ordinary care due to the presence of spherical tee markers to hold down a rope on the Ironhorse driving range, and (3) even if Leawood did breach its duty of ordinary care, the tee markers were an open and obvious condition for which Leawood had no duty to remove or to warn Plaintiff.

III. FACTS

As an initial matter, the Court notes that Leawood identifies six new facts in its reply brief which Leawood contends are uncontroverted. However, by inserting these facts for the first time in its reply brief, Leawood has left Plaintiff without the opportunity to respond to Leawood's claim that these additional facts are uncontroverted. The Court concludes that it is unfair to Plaintiff to consider these additional facts provided in Leawood's reply brief because Plaintiff was not afforded the opportunity to respond to these facts. [16]

The Court finds that the following facts are uncontroverted or related in the light most favorable to Plaintiff, the nonmoving party.

1. Plaintiff is a resident of South Korea.

2. Leawood is, and at all relevant times was, a municipal corporation organized and incorporated under the laws of the State of Kansas.

3. Leawood is the owner of the Ironhorse Golf Club, a public golf course located in Leawood, Kansas.

4. There are no restrictions on who can play at the Ironhorse Golf Club.

***3** 5. Orion is, and at all relevant times was, a corporation organized under the laws of the State of Kansas, and is engaged in the business of operating golf courses in general, and operates approximately four golf courses.

6. Orion operated the Ironhorse Golf Club pursuant to an Agreement for Management of Ironhorse Golf Club (the "Agreement"), which Agreement ran from November 1, 2003 through December 31, 2006. This Agreement was in place throughout 2006.

7. Christine L. Claxton ("Ms.Claxton") is employed by Leawood as the Director of Parks and Recreation Department of the City of Leawood.

8. Ms. Claxton's job responsibilities include oversight of all of the recreational amenities, recreational programs, recreational facilities, parks, and the greenway system for Leawood.

9. The day-to-day operation of the Ironhorse Golf Club is managed by Orion, a private "outside" management company, and Ms. Claxton oversaw the management of the Ironhorse Golf Club and provided input on an "as necessary" basis, including trips to the Ironhorse Golf Club as necessary.

10. No Leawood employees were involved in the maintenance or work at the Ironhorse Golf Club in 2006.

11. In 2006, Shane Gardner ("Mr.Gardner"), one of Orion's principals, was the general manager of the Ironhorse Golf Club and was responsible for laying out the driving range.

12. Orion managed the day-to-day operations at the Ironhorse Golf Club in 2006, including the laying out of the driving range, and the layout of the driving range was done without input from Leawood.

13. At all times relevant hereto, the back of the Ironhorse driving range had a section of concrete, with artificial mats that were used during inclement weather. The driving range also had a concave curved zoysia grass surface that was approximately 60 to 80 yards wide and 20 to 30 yards deep, where golfers would hit during the summer.

14. The Ironhorse driving range grass was mowed approximately three times a week and was maintained at a height of approximately 1/2 to 3/4 of an inch tall.

15. The Ironhorse driving range had two ropes that extended the entire width of the driving range, which ropes delineated where golfers could hit.

16. The Ironhorse driving range did not have individual hitting stations, and golfers could position themselves from anywhere within the roped boundaries.

17. The ropes on the Ironhorse driving range were moved nearly every day in order to give the driving range grass a chance to recover from the wear it received during the course of a day.

18. The two ropes on the Ironhorse driving range were placed approximately eight to ten feet apart.

19. The ropes on the Ironhorse driving range were anchored on each end by a spherical tee marker with a height of approximately three to four inches.

20. Four tee markers were used on the front rope, and four tee markers were used on the back rope.

21. With each rope, there was a tee marker on each end, and two tee markers in the middle of the rope.

*4 22. Each tee marker was placed approximately the same distance apart.

23. The tee markers on the Ironhorse driving range were also used on the Ironhorse golf course as tee markers for special events.

24. Mr. Gardner got the idea to use the tee markers to hold down the ropes on the Ironhorse driving range because he had seen tee markers used that way on other golf courses.

25. Mr. Gardner acknowledged that it was possible a golf ball could strike one of the tee markers, but never thought a golf ball would strike the tee marker, bounce back, and hit someone on the driving range.

26. Because of the way the tee markers were set up, with there only being two tee markers located on the middle section of the rope, Mr. Gardner would never have imagined that somebody would hit balls close enough to one of those markers such that he or she could hit a tee marker and have the golf ball bounce back and hit someone.

27. Before the subject accident, Mr. Gardner was not aware of any other golfer being injured by a golf ball hit off of a tee marker.

28. Other than the subject accident, Gerald Pirkl ("Mr.Pirkl"), Plaintiff's designated expert, had never heard of a golfer who addressed a golf ball that subsequently struck a tee marker, which golf ball then struck the golfer who initially hit the ball.

29. Before the date of Plaintiff's injuries, Ms. Claxton was aware of three to four incidents in which a person had sustained an injury at the Ironhorse Golf Club. One involved a fall on the No. 13 fairway, another involved a fall while a golfer was retrieving a ball from a creek bed, and one or two involved a golf cart being driven off the cart path.

30. The tee markers used on the Ironhorse driving range are common in the golf industry.

31. Plaintiff began golfing in 1997.

32. Plaintiff was a single level handicap, and on a par 82 course, would typically score between 80 and 85.

33. Plaintiff considered himself a "very good golfer."

34. Plaintiff had been in Overland Park, Kansas for at least 25 days before the subject accident.

35. Before June 3, 2006, Plaintiff played two rounds of golf at the Ironhorse Golf Club and he practiced at the Ironhorse Golf Club every day.

36. Before June 3, 2006, Plaintiff had hit golf balls on the Ironhorse driving range.

37. On June 3, 2006, Plaintiff was positioned on the Ironhorse driving range, approximately halfway between the ropes at the time of the subject accident.

38. Plaintiff was approximately one club length behind the front rope.

39. Plaintiff was positioned approximately eight feet to the left of Mr. Wellington at the time of the subject accident.

40. Plaintiff is a right-handed golfer.

41. Plaintiff was four to five feet to the left of the subject tee marker at the time of the subject accident.

42. Plaintiff was four to six feet from the subject tee marker that he struck at the time he addressed the golf ball, prior to his swing and prior to the subject accident.

*5 43. Plaintiff and Mr. Wellington were standing on the short cut of grass on the Ironhorse driving range at the time of the subject accident.

44. Other than Plaintiff and Mr. Wellington, there was only one other person using the Ironhorse driving range at the time of the subject accident.

45. Plaintiff could have picked any other spot on the Ironhorse driving range to hit golf balls.

46. Upon arriving at the Ironhorse driving range with Mr. Wellington, Plaintiff took approximately 2/3 of the bucket of balls purchased at the driving range.

47. Before the subject accident, Plaintiff and Mr. Wellington had been on the Ironhorse driving range for approximately one hour.

48. Before the subject accident, Plaintiff hit approximately ten shots with his three wood.

49. All of the approximately ten shots hit by Plaintiff with his three wood resulted in the golf ball going in its intended direction.

50. Plaintiff hit his last three shots before the subject accident at the same target he was aiming for at the time of the subject accident.

51. The subject accident occurred when Plaintiff struck the third from the last golf ball.

52. On June 3, 2006, while standing between two ropes being held down by spherical tee markers on the Ironhorse driving range, Plaintiff hit a golf ball which struck a spherical tee marker located on the Ironhorse driving range, resulting in the golf ball coming back and striking Plaintiff in the left eye.

53. Plaintiff believes he hit a "straight shot," but he "might have just shifted a little and then swung and ... that's when it hit the—the yellow ball and ricocheted."

54. Plaintiff acknowledged that a golf ball "usually sometimes does not go exactly where you want it to go."

55. Before the subject accident, Plaintiff saw the ropes on the Ironhorse driving range.

56. Before the subject accident, Plaintiff saw some of the tee markers on the Ironhorse driving range. Plaintiff saw the tee markers on the side of the driving range, but he does not remember them being in the middle.

57. At the time of the subject accident, Plaintiff "wasn't paying attention," and he "wasn't focusing on" the tee markers.

58. Although Plaintiff "knew something was there," he did not know if the tee marker was yellow or some other color because he "just didn't focus on" it.

59. Plaintiff "didn't really notice the yellow ball" because "[i]t wasn't obvious and it's not like [he] looked down."

60. If Plaintiff had "seen the [tee marker], then [he] would have swung away from the [tee marker]."

61. Before the subject accident, Mr. Wellington saw the tee marker Plaintiff hit on the Ironhorse driving range.

62. The tee marker was visible for anyone who looked.

63. The tee marker was brightly colored.

64. Mr. Pirkl, Plaintiff's designated expert, believes Plaintiff could have seen the tee marker before the subject accident.

65. At the time of the subject accident, there were no obstructions on the driving range that would have precluded someone from seeing the tee marker.

***6** 66. Photographs of a tee marker similar to the one struck by Plaintiff are attached to Leawood's Motion as Exhibit 8.

67. There was no signage on the Ironhorse driving range to let golfers know where they were supposed to hit from.

68. Jeffrey Brauer, Orion's expert, could name only one other golf course that used tee markers to hold down rope on the driving range, but stated that he had seen tee markers used to hold down ropes at driving ranges "dozens" of times.

69. Cary Cozby, Orion's other expert, could not name any other golf course that used tee markers to hold down rope on the driving range, even though he worked at a golf course when he was younger and changed or picked the range quite a bit.

70. Bounce back is a consideration in designing a golf course.

71. Ground staples could have been used to tie off the ropes on the Ironhorse driving range.

72. The Ironhorse driving range is near the entrance to the Ironhorse Golf Club.

73. Ms. Claxton has been on the Ironhorse driving range and hit balls there.

74. Plaintiff had never practiced at a driving range before the Ironhorse driving range that had tee markers holding down ropes.

75. Mr. Pirkl has been involved in several cases involving personal injuries caused by ricocheting golf balls.

76. Mr. Pirkl testified that golfers typically tee off between tee markers when teeing off on a golf course.

For the reasons explained below, the Court finds that, even after viewing the evidence and all reasonable inferences drawn from the evidence in the light most favorable to Plaintiff, there are no genuine issues of material fact and Leawood is entitled to summary judgment as a matter of law under the recreational use exception of the Kansas Tort Claims Act.

IV. RECREATIONAL USE EXCEPTION

Under the Kansas Tort Claims Act, unless an exception applies, a "governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of [Kansas]."[17] "In order to avoid liability, the governmental entity has the burden of proving that it falls within one of the enumerated exceptions found"[18] in the Kansas Tort Claims Act. Leawood argues that the Court must grant Leawood summary judgment on Plaintiff's negligence claim because the recreational use exception of the Kansas Tort Claims Act provides Leawood with immunity. The recreational use exception provides,

> A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from: ...
>
> (o) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is *guilty of gross and wanton negligence* proximately causing such injury.[19]

***7** The Kansas Tort Claims Act defines a "governmental entity" as a state or municipality.[20]

The Kansas Supreme Court has explained the policy and purpose behind the recreational use exception as follows:

> The purpose of [the recreational use exception] is to provide immunity to a governmental entity when it might normally be liable for damages which are the result of *ordinary negligence.* This encourages governmental entities to build recreational facilities for the benefit of the public without fear that they will be unable to fund them because of the high cost of litigation. The benefit to the public is enormous. The public benefits from

> having facilities in which to play such recreational activities as basketball, softball, or football, often at a minimal cost and sometimes at no cost. The public benefits from having a place to meet with others in its community. [21]

Under the Kansas Tort Claims Act, "governmental liability is the rule and immunity is the exception." [22]

Because Leawood bears the burden of demonstrating that the recreational use exception provides Leawood with immunity to Plaintiff's claim, [23] Leawood must do more than demonstrate the absence of a genuine issue of material fact. Instead, Leawood must establish, as a matter of law, all essential elements of the recreational use exception before Plaintiff is obligated to bring forward any specific facts alleged to rebut Leawood's claim of immunity under the exception. [24] The parties agree, and the Court finds, that in order to prevail on its defense under the recreational use exception, Leawood has the burden of proving that (1) Leawood is a municipality as defined in the Kansas Tort Claims Act, (2) Plaintiff sustained injuries resulting from the use of public property intended or permitted to be used as a park, playground or open area for recreational purposes, and (3) Plaintiff's injuries were not proximately caused by Leawood's gross and wanton negligence. [25]

The first two factors are not disputed. The Kansas Tort Claims Act defines governmental entity to include a municipality of Kansas, and it is undisputed that Leawood is a municipal corporation organized and incorporated under the laws of the State of Kansas. Further, it is undisputed that the Ironhorse Golf Club constitutes "public property intended or permitted to be used as a park, playground or open area for recreational purposes." In addition, the Court notes that Plaintiff states in his response brief, "*Despite the recreational use exception of the Kansas Tort Claims Act ("KTCA") applying [to] the subject controversy,* Leawood can, and should, still be found liable for gross and wanton negligence." [26] Thus, the only issue before the Court is whether Plaintiff's injuries were proximately caused by Leawood's gross and wanton negligence.

Leawood's argument with respect to the third factor is two-fold. Leawood first argues that Plaintiff only asserts a negligence claim against Leawood and failed to allege that Leawood was guilty of gross and wanton negligence. Thus, Leawood argues that the recreational use exception provides Leawood with a complete defense to Plaintiff's negligence claim. In the alternative, Leawood argues that even if Plaintiff alleged gross and wanton negligence, Plaintiff cannot point to any facts which demonstrate such gross and wanton negligence.

A. Leawood's Arguments

***8** According to Leawood, Plaintiff never alleged that Leawood is guilty of gross and wanton negligence, but rather has only alleged that Leawood was negligent—that Leawood owed Plaintiff a duty of ordinary care and that Leawood breached this duty of ordinary care. Leawood argues that Plaintiff's negligence claim must therefore fail as a matter of law because the recreational use exception immunizes Leawood from claims of ordinary negligence. In support of its argument, Leawood points out that the Pretrial Order (ECF No. 63), which supersedes all pleadings and controls the course of this case, contains no allegations of gross and wanton negligence. Leawood also points out that the Amended Complaint (ECF No. 12) does not contain allegations of gross and wanton negligence. Leawood therefore argues that Plaintiff has not alleged gross and wanton negligence and should not be able to assert that claim now.

The Court's review of the relevant case law supports Leawood's argument. The Kansas Supreme Court has declared, "There is no consideration of ordinary negligence in a case in which the defendant asserts that it is immune pursuant to [the recreational use exception], and, therefore, no consideration of duty or breach. [The recreational use exception] is a *complete defense* to actions where the plaintiff *alleges only ordinary negligence.*" [27] In addition, there are several Kansas cases where the plaintiff's failure to plead gross and wanton negligence was fatal to the plaintiff's action against a governmental entity where the governmental entity claimed immunity under the recreational use exception.

For example, in *Willard v. City of Kansas City, Kansas,* [28] the plaintiff sought damages for injuries he suffered after colliding with a chain link fence around a baseball diamond in a city park in Kansas City. The plaintiff alleged in his petition that the City was negligent in its installation and maintenance of the fence. The trial court granted the City's motion for summary judgment on the grounds that the City

was immune under the recreational use exception. On appeal, the Kansas Supreme Court took care to note that the plaintiff had only alleged negligence in his petition and that the pretrial order stated that there were no amendments to the pleadings. The Kansas Supreme Court further noted that in reply to the City's summary judgment motion, the plaintiff did not dispute the City's assertion of the facts, but merely asserted that "negligence of the defendant is a fact issue to be decided by the jury and therefore not subjected to summary judgment as a matter of law."[29] The Kansas Supreme Court thus affirmed the judgment of the lower court on the grounds that the plaintiff had not produced affidavits or other evidence showing facts and circumstances from which the City's gross and wanton conduct could be inferred.

In *Tullis v. Pittsburg State University,*[30] the plaintiff "sued Pittsburg State University for injuries received during the performance of a university sponsored play."[31] The university filed a motion for summary judgment on the grounds that it was immune from liability under the recreational use exception. The plaintiff then filed a motion seeking to amend her pleadings to allege gross and wanton negligence on the part of a university employee, the director of the play. The Crawford County District Court granted the university's motion for summary judgment and denied the plaintiff's motion to amend her pleadings. On appeal, the Kansas Court of Appeals affirmed the trial court's ruling, finding that the recreational use exception included the university's theater. The court further concluded that the trial court was within its discretion to deny the plaintiff's motion to amend her pleadings to include allegations of gross and wanton negligence, which the court noted the plaintiff only filed after the close of discovery and after the defendant filed its summary judgment motion.

***9** Finally, in *Molina v. Christensen,*[32] the plaintiff filed a negligence action against Wichita State University and Benjamin Christensen for injuries sustained before a regularly scheduled intercollegiate baseball game. The university filed an answer and reserved the defense of immunity under the recreational use exception. The university eventually moved for summary judgment under the recreational use exception, which the trial court granted. The Kansas Court of Appeals affirmed the trial court's decision, finding that the recreational use exception did apply to the university and the university's baseball stadium. In reaching its conclusion, the Kansas Court of Appeals noted that the plaintiff argued for the first time on appeal that there were genuine issues of material fact as to whether the university was guilty of gross and wanton negligence. The court refused to consider this argument on the grounds that a new legal theory cannot be asserted for the first time on appeal. In doing so, the court recognized the need to assert more than simple negligence to survive a defense under the recreational use exception, stating,

> The fact of the matter is that despite how fervently the plaintiff may wish it were not so, his petition alleged simple negligence.... As we have demonstrated, *absent gross and wanton negligence,* WSU is immune from liability under the recreational use exception of the KTCA for events that took place at Rusty Eck Stadium. [ ] This case was framed and tried on the plaintiff's allegations; those allegations were allegations of *simple negligence only,* and that is not sufficient to overcome the recreational use exception of the KTCA. We hold that WSU is immune from liability in this case for that reason.[33]

The Court's review of the relevant law makes it clear that in order to survive Leawood's claim of immunity under the recreational use exception, Plaintiff must have asserted allegations of gross and wanton negligence. As Leawood points out, Plaintiff has not specifically used the term "gross and wanton negligence" in his claim against Leawood. However, that alone does not mean that Plaintiff has not plead gross and wanton negligence. Indeed, Kansas courts have made it clear that it is not necessary for the plaintiff to use these exact words, but rather "[t]he test is whether the facts alleged disclosed the essential elements of wantonness."[34] Thus, the Court will look to Plaintiff's factual allegations to determine whether Plaintiff has made a claim for gross and wanton negligence against Leawood. In examining Plaintiff's allegations, the Court keeps in mind the test for establishing gross and wanton negligence: whether the act indicates "a realization of the imminence of danger and a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act."[35]

The Court looks to the Pretrial Order, which supersedes all pleadings and controls the course of this case, for Plaintiff's allegations. In his factual contentions set forth in the Pretrial Order, Plaintiff contends that he visited his sister-in-law in June 2006, and that during his visit he played golf at the Ironhorse Golf Club, which is owned by Leawood. He further contends that on June 3, 2006, Plaintiff was hitting balls on the Ironhorse driving range when one of the balls he hit then hit a tee marker causing the ball to bounce back and strike Plaintiff in his left eye. Plaintiff contends that this caused him immense

pain and led to the loss of his left eye. This, essentially, is the extent of Plaintiff's contentions. Plaintiff did not make any factual contentions that would go to show that Leawood's conduct constituted gross and wanton negligence.[36] Indeed, other than to contend that Leawood owns the Ironhorse Golf Club, Plaintiff did not make *any* factual contentions regarding Leawood in the Pretrial Order.

***10** In addition, in identifying his theories of recovery in the Pretrial Order, Plaintiff only listed negligence; he did not list gross and wanton negligence.[37] Furthermore, Plaintiff set out the essential elements he believed he needed to prove to recover under a theory of negligence in the Pretrial Order, and these essential elements demonstrate that Plaintiff is only asserting a claim for simple negligence. Plaintiff stated his belief that in order to prevail on his negligence theory of recovery, he has the burden of proving that Leawood owed a duty of *reasonable and ordinary care* to Plaintiff in making the Ironhorse Golf Club safe, that Leawood breached this duty of care, that this breach of duty of care by Leawood was the actual and proximate cause of Plaintiff's injuries, and that Plaintiff sustained damages as a direct result of Leawood's negligence.[38] However, nowhere in the essential elements did Plaintiff identify the element required for wantonness, that is, that Leawood realized the imminent danger to Plaintiff and demonstrated a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act.[39]

Furthermore, even if the Pretrial Order did not supersede all earlier pleadings, the Court cannot find any allegations of gross and wanton negligence in the Amended Complaint (ECF No. 12) either. Rather, Plaintiff's allegations amount to allegations of ordinary negligence. In sum, Plaintiff alleged that the Ironhorse driving range was not reasonably safe as a result of the placement of the tee marker by Orion, that Leawood carelessly and negligently failed to ensure that the Ironhorse driving range was free of hazardous obstacles, that Leawood knew or by using ordinary care could have known of this dangerous condition, that Leawood owed a duty of reasonable care to Plaintiff, that Leawood failed to keep a safe and properly maintained driving range, that Leawood failed to ensure the driving range was free of hazardous obstacles, that Leawood failed to use ordinary care by removing the tee markers from the driving range, that Leawood knew or by the use of a reasonable degree of care could have known that there was a reasonable likelihood an injury would occur if the driving range was not properly maintained, and that the breach of duty of care by Leawood was the actual and proximate cause of Plaintiff's injuries. None of these allegations disclose the essential elements of gross and wanton negligence because none of them amount to claims that Leawood realized imminent danger and demonstrated a reckless disregard or a complete indifference or an unconcern for the probable consequences of the wrongful act.[40]

Having reviewed the Pretrial Order and the Amended Complaint, the Court concludes that Plaintiff failed to assert any allegations that would demonstrate gross and wanton negligence by Leawood. Accordingly, the Court finds that Plaintiff has not asserted a claim of gross and wanton negligence, but has only asserted a claim of ordinary negligence against Leawood. Having reached this conclusion, the Court need not address Leawood's alternative argument for summary judgment under the recreational use exception that even if Plaintiff alleged gross and wanton negligence, Plaintiff cannot point to any facts which demonstrate such gross and wanton negligence.

***11** Because Plaintiff has not asserted a claim of gross and wanton negligence, but has only asserted a claim of ordinary negligence, it appears to the Court that Leawood has met its burden of demonstrating all essential elements for immunity under the recreational use exception. The burden thus shifts to Plaintiff to rebut Leawood's claim of immunity under the recreational use exception in order to avoid summary judgment in favor of Leawood.[41]

B. Plaintiff's Arguments

Plaintiff argues that Leawood never raised this "lack of pleading" argument before and therefore has waived this argument. Plaintiff further argues that his claim of negligence was sufficient to put Leawood on notice of his claim of gross and wanton negligence, and that it is for the trier of fact to determine the level of negligence, if any, based on the facts and circumstances of this case. Finally, Plaintiff argues that the facts in this case support his claim that Leawood is guilty of gross and wanton negligence because the facts demonstrate that Leawood had knowledge of a dangerous condition and was indifferent to the consequences.

1. Waiver

The Court is not persuaded by Plaintiff's argument that Leawood somehow waived its right to argue that Plaintiff failed to plead gross and wanton negligence by not asserting

this claim earlier. First and foremost, it is Plaintiff's responsibility to properly plead his own claim. Furthermore, it appears that Leawood has consistently asserted the recreational use exception as a defense, and that Leawood asserted this defense in the Pretrial Order. Plaintiff certainly had opportunities prior to responding to Leawood's Motion to assert a claim of gross and wanton negligence in response to Leawood's reliance on the recreational use exception as a defense. Thus, the Court concludes that Leawood has not waived its right to pursue this defense.

2. Negligence vs. Gross and Wanton Negligence

The Court is also not persuaded by Plaintiff's argument that by pleading ordinary negligence, Plaintiff put Leawood on notice of his claim of gross and wanton negligence and it is for the trier of fact to determine the level of negligence. Plaintiff appears to be arguing that his claim of ordinary negligence encompasses a claim for gross and wanton negligence, but the case law does not support this argument. Rather, contrary to Plaintiff's arguments, the case law demonstrates that negligence does not include or somehow encompass gross and wanton negligence.

Indeed, it appears that by definition, negligence does not encompass or include gross and wanton negligence. Kansas courts define negligence as " 'the lack of ordinary care' or more specifically, 'the failure of a person to do something that a reasonably careful person would do, or the act of a person in doing something that a reasonably careful person would not do, measured by all the circumstances then existing [ ].' "[42] "In a personal injury action based upon negligence, the plaintiff must prove the existence of a duty, breach of that duty, injury, and a causal connection between the duty breached and the injury suffered."[43]

***12** However, as Kansas courts have long recognized, gross and wanton negligence is distinct from negligence and differs in kind.[44] Kansas courts have declared, "One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence."[45] Thus, in defining wanton conduct, Kansas courts have held that wanton conduct

> is more than negligence and less than wilfulness, and to constitute wantonness the acts complained of must show not simply lack of due care, but that the actor must be deemed to have realized the imminence of injury to others from his acts and to have refrained from taking steps to prevent the injury because indifferent to whether it occurred or not.[46]

In addition, according to the Kansas Supreme Court, "[W]anton conduct differs not in degree but in kind from negligent conduct, *and such a thing as wanton 'negligence' cannot exist.* If the conduct be wanton, it is not negligent. If it be negligent, it is not wanton."[47] The fact that such a thing as "wanton negligence" cannot exist does not change even where the statute in question refers to "gross and wanton negligence." Indeed, in *Frazier v. Cities Service Oil Co.,*[48] the Kansas Supreme Court explained, "Notwithstanding the fact the legislature used the words 'gross and wanton negligence' in our automobile guest statute, [ ] our decisions have noted the essential difference between negligence and wantonness, as is shown by the reviews made in a number of our decisions."[49] The *Frazier* court thus concluded that the question for the court in a case concerning gross and wanton negligence is whether the allegations charged the defendant with wanton conduct.[50]

Furthermore, the case law discussed by the Court in Section IV.A. above demonstrates that Kansas courts will grant the governmental entity summary judgment based on the recreational use exception when Plaintiff pleads only negligence. In doing so, these courts impliedly recognize that a negligence claim does not necessarily include a claim for gross and wanton negligence.

In light of the Court's review of the relevant Kansas law, the Court concludes that negligence and gross and wanton negligence are distinct from one another, and that Plaintiff's claim for negligence does not include allegations of gross and wanton negligence. The Court further concludes that Plaintiff does not put the issue of gross and wanton negligence before the trier of fact by simply pleading negligence. The Court is therefore unpersuaded by Plaintiff's second argument that his claim of negligence was sufficient to put Leawood on notice of a claim of gross and wanton negligence.

3. Evidence of Gross and Wanton Negligence

Having already concluded that the recreational use exception applies, that the Plaintiff failed to plead gross and wanton negligence, and that the recreational use exception thus provides Leawood with immunity from Plaintiff's claims, the Court need not examine Plaintiff's third argument that the facts uncovered during discovery in this case support

his claim that Leawood was guilty of gross and wanton negligence.

V. CONCLUSION

***13** For the reasons set forth above, the Court concludes that the recreational use exception of the Kansas Tort Claims Act provides Leawood with a complete defense to Plaintiff's claim of ordinary negligence. In so concluding, the Court need not address Leawood's other arguments for summary judgment, that (1) Leawood did not breach its duty of ordinary care due to the presence of spherical tee markers to hold down a rope on the Ironhorse driving range, and (2) even if Leawood did breach its duty of ordinary care, the tee markers were an open and obvious condition for which Leawood had no duty to remove or to warn Plaintiff.

For the reasons set forth above, Defendant City of Leawood, Kansas' Motion for Summary Judgment (ECF No. 67) is granted.

IT IS THEREFORE ORDERED that Defendant City of Leawood, Kansas' Motion for Summary Judgment (ECF No. 67) is granted.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3980228

Footnotes

1 Fed.R.Civ.P. 56(c)(2).

2 *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir .1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Hirase–Doi v. U.S. West Commc'ns, Inc.*, 61 F.3d 777, 781 (10th Cir.1995)).

3 *Thom v. Bristol–Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir.2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

4 *Id.* (citing *Anderson*, 477 U.S. at 248).

5 *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)).

6 *Id.* (citing *Celotex*, 477 U.S. at 325).

7 *Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir.2005).

8 *Diaz v. Paul J. Kennedy Law Firm*, 289 F.3d 671, 675 (10th Cir.2002) (citations and quotations omitted).

9 *Pelt v. Utah*, 539 F.3d 1271, 1280 (10th Cir.2008)

10 *Id.* (citations and quotations omitted).

11 *Id.* (citations omitted).

12 *Celotex*, 477 U.S. at 327 (quoting Fed.R.Civ.P. 1) (quotations omitted).

13 *Thom*, 353 F.3d at 851 (citations omitted).

14 Pretrial Order (ECF No. 63) at ¶ 6(b)(1).

15 *Id.* at ¶ 6(b)(2) and (4).

16 *Oleson v. KMart Corp.*, 189 F.R.D. 636, 637 (D.Kan.1999) ("Because the defendants' statement of uncontroverted facts generally appears for the first time in their reply brief, the court deems it unfair to the non-moving plaintiff to consider those facts to which he does not have an opportunity to respond.").

17 K.S.A. 75–6103(a).

18 *Poston v. Unified Sch. Dist. No. 387, Altoona–Midway, Wilson Cnty.*, 286 Kan. 809, 812 (Kan.2008) (citations omitted).

19 K.S.A. 75–6104(o) (emphasis added).

20 K.S.A. 75–6102(c).

21 *Poston*, 286 Kan. at 812–13 (quotations and citations omitted) (emphasis added).

22 *Jackson v. Unified Sch. Dist. 259, Sedgwick Cnty.*, 268 Kan. 319, 322 (Kan.2000).

23 *Poston*, 286 Kan. at 812.

24 *Pelt*, 539 F.3d at 1280.

25 Pretrial Order (ECF No. 63) at ¶ 7(d).

26 Pl. Kwang I. Lee's Mem. in Opp'n to Def. City of Leawood, Kansas' Mot. for Summ. J. (ECF No. 77) at 10 (emphasis added).

27 *Jackson*, 268 Kan. at 331 (citation omitted) (emphasis added).

28 235 Kan. 655 (Kan.1984).

29 *Id.* at 657 (internal quotations omitted).

30 28 Kan.App.2d 347 (Kan.Ct.App.2000).

31 *Id.* at 347.

32 30 Kan.App.2d 467 (Kan.Ct.App.2001).

33 *Id.* at 474 (citations omitted).

34 *Kniffen v. Hercules Powder Co.*, 164 Kan. 196, 209 (Kan.1948) (citation omitted).

35 *Lee v. City of Fort Scott*, 238 Kan. 421, 423 (Kan.1985) (quotations and citations omitted).

36 Pretrial Order (ECF No. 63) at ¶ 5a.

37 *Id.* at ¶ 6a.

38 *Id.* at ¶ 6b. (emphasis added).

39 *Lee*, 238 Kan. at 423.

40 *Id.*

41 *Pelt*, 539 F.3d at 1280.

42 *Elstun v. Spangles, Inc.*, 289 Kan. 754, 756 (Kan.2009) (citations and quotations omitted).

43 *Id.* at 757 (citations and quotations omitted).

44 *Frazier v. Cities Serv. Oil Co.*, 159 Kan. 655 (Kan.1945).

45 *Atchison, T & S.F. Ry. Co. v. Baker*, 79 Kan. 183 (Kan.1908).

46 *Frazier*, 159 Kan. at 666.

47 *Koster v. Matson*, 139 Kan. 124, 30 P.2d 107, 110 (emphasis added).

48 159 Kan. 655 (Kan.1945).

49 *Id.* at 664(citations omitted).

50 ***Id.***

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APPENDIX F

420 P.3d 503 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Kelly MUXLOW, Appellant,
v.
CITY OF TOPEKA, Appellee.

No. 117,428
|
Opinion filed June 15, 2018

Appeal from Shawnee District Court; TERESA L. WATSON, judge.

Attorneys and Law Firms

Robert E. Keeshan, of Scott, Quinlan, Willard, Barnes & Keeshan, LLC, of Topeka, for appellant.

Nicholas H. Jefferson, assistant city attorney, for appellee.

Before Leben, P.J., Gardner, J., and Burgess, S.J.

MEMORANDUM OPINION

Per Curiam:

***1** Kelly Muxlow was injured when she fell into an unmarked culvert with no guardrails while walking through the grassy area between a Topeka city park and the street beside it. She sued the City of Topeka to recover for her injuries.

The City moved for summary judgment, claiming immunity from liability under the Kansas Tort Claims Act. While the Act generally allows tort suits against state and local governments to proceed, there's an exception for recreational use. Under that exception, a two-part analysis applies. The government is generally immune from claims for injuries resulting from the use of public property intended or permitted to be used as a park, playground, or open area for recreational purposes. But there's no immunity if the governmental entity committed the highest level of negligence, what's called gross and wanton negligence.

The district court found that the recreational-use exception applied because the place where Muxlow fell, which is adjacent to a park, was permitted to be used for recreational purposes. The court separately concluded that Muxlow had not provided sufficient evidence to show gross and wanton negligence by the City. Based on these conclusions, the district court granted the City's motion.

On appeal, Muxlow argues that summary judgment wasn't appropriate for two reasons: First, that the place where she fell wasn't a recreational area, and second, that there was evidence that the City acted with gross and wanton negligence. But neither party disputes that the area was public property permitted to be used for recreational purposes—such as jogging and walking dogs. And gross and wanton negligence requires some evidence that the City knew of the danger the culvert presented, but Muxlow has not presented any evidence that the City knew of any danger. Thus, the district court correctly held that summary judgment was appropriate because the City was immune from Muxlow's claim under the recreational-use exception. We therefore affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Kelly Muxlow took her dogs out for a walk one evening in June 2013 near the Governor's mansion in Topeka, Kansas. Shortly before sundown, Muxlow reached an area along Fairlawn Road that didn't have a sidewalk, so she walked through a grassy area that sits between the road and MacLennan Park. While crossing through, she saw a fox approach. Muxlow picked up one of her dogs and started backing up—she soon fell into a 4-foot deep unmarked concrete culvert that sits in the grassy area. There were no guardrails around the culvert.

Muxlow's fall resulted in cuts and bruising to her face, as well as a heel fracture that required two surgeries. The City placed temporary barricades around the culvert two days after Muxlow's fall, and a few months later it installed metal guardrails.

Muxlow sued the City in June 2015, alleging that the City was negligent for failing to put barriers or signs around the culvert. The City of Topeka argued that the culvert was installed in the 1960's by the State of Kansas, so it wasn't responsible for Muxlow's injuries. Muxlow tried to join the State of Kansas, the Kansas Department of Transportation,

and the Kansas Secretary of Transportation to her lawsuit. But Muxlow brought her claims against the additional defendants outside of the two-year statute of limitations, so the district court granted their motion to dismiss them from the suit.

***2** After discovery (the process in which parties to litigation can learn the facts by exchanging information and deposing witnesses), the City moved for summary judgment. One basis for the motion was recreational-use immunity under the Kansas Tort Claims Act.

After hearing oral arguments on the City's motion, the district court issued a written decision granting the City's motion and entering judgment in its favor. The district court found that one issue was dispositive in the case—that the City of Topeka was immune from suit under the Kansas Tort Claims Act.

Muxlow then appealed to our court. We too have heard oral argument from the parties. We have also reviewed both their filings in the district court and briefs filed on appeal.

ANALYSIS

On appeal, Muxlow argues that the City wasn't entitled to recreational-use immunity because the place where Muxlow fell wasn't a recreational area and there was some evidence that the City acted with gross and wanton negligence. Before we get into Muxlow's arguments, we must first review a bit of procedure.

After parties to a dispute have had a chance to discover evidence, but before their case goes to trial, a party may submit a motion to the trial court seeking summary judgment. K.S.A. 2017 Supp. 60-256(a). The party seeking summary judgment must show, based on both parties' evidence, that there is no dispute as to any significant fact and that they are entitled to judgment as a matter of law. In other words, the moving party must show that there's nothing for a jury or a trial judge sitting as fact-finder to decide that would make any difference to the outcome of the case. See *Armstrong v. Bromley Quarry & Asphalt, Inc.*, 305 Kan. 16, 24, 378 P.3d 1090 (2016).

The party opposing summary judgment must point to evidence calling into question some significant fact—if they do so, summary judgment must be denied so a fact-finder can resolve the dispute. When ruling on a summary-judgment motion, the district court must view the evidence in the light most favorable to the party opposing the motion. On appeal from the grant of summary judgment, we apply the same standards the trial court applied. *Fawcett v. Oil Producers, Inc. of Kansas*, 302 Kan. 350, 358-59, 352 P.3d 1032 (2015).

Because entry of summary judgment amounts to a question of law—it entails the application of legal principles to uncontroverted facts—we owe no deference to the trial court's decision and our review is unlimited. Resolving the summary-judgment issue in this case also involves the interpretation of a statute. That too is a question of law over which we have unlimited review. *Poston v. U.S.D. No. 387*, 286 Kan. 809, 812, 189 P.3d 517 (2008).

We now turn to Muxlow's first argument on appeal—that the district court erred when it found that the City was entitled to recreational-use immunity at all.

Because at common law, the state or national government could not be sued, negligence claims against the government are allowed only as provided by statute. The Kansas Tort Claims Act provides that negligence claims usually may be brought against the government, but the Act also provides several exceptions to liability. K.S.A. 2017 Supp. 75-6103(a). Liability is the rule and immunity the exception, however, and the burden is on the State to show that it is immune from liability under one of the Act's exceptions. *Keiswetter v. State*, 304 Kan. 362, 366, 373 P.3d 803 (2016).

***3** The exception to liability that's central in this case is known as the recreational-use exception. Under the Act, an individual can't bring a claim against the government "for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury." K.S.A. 2017 Supp. 75-6104(o). In other words, the government can't be sued for injuries on public property used for recreational purposes unless it acted with gross and wanton negligence.

The legislative purpose behind the recreational-use exception was explained by our Supreme Court in *Jackson v. U.S.D. 259*, 268 Kan. 319, 331, 995 P.2d 844 (2000):

> "The purpose of K.S.A. 75-6104(o) is to provide immunity to a governmental entity when it might normally be liable for damages which are the result of ordinary negligence. This encourages governmental entities to build recreational facilities for the benefit of the public without fear that

> they will be unable to fund them because of the high cost of litigation. The benefit to the public is enormous. The public benefits from having facilities in which to play such recreational activities as basketball, softball, or football, often at a minimal cost and sometimes at no cost. The public benefits from having a place to meet with others in its community."

Because of the strength of the legislative purpose behind this exception, our Supreme Court has held that recreational-use immunity is to be broadly applied to accomplish that legislative purpose. *Poston*, 286 Kan. at 812; ***Lane v. Atchison Heritage Conf. Center, Inc.***, 283 Kan. 439, 445, 153 P.3d 541 (2007); *Wilson v. Kansas State University*, 273 Kan. 584, 592, 44 P.3d 454 (2002).

Muxlow argues that it would be an absurd result if we considered the place where she fell to be a recreational area subject to the recreational-use exception. The area was not specifically designated or intended by the City to be used for recreational activities. But "[i]n order for a location to fall within the scope of K.S.A. 75-6104(o), the location must merely be 'intended or ***permitted*** to be used ... for recreational purposes.' " (Emphasis added.) *Jackson*, 268 Kan. at 326; see *Lane*, 283 Kan. at 440 (finding recreational-use immunity barred suit by plaintiff injured after slipping on city conference center's loading dock); *Boaldin v. University of Kansas*, 242 Kan. 288, 291, 747 P.2d 811 (1987) (finding recreational-use immunity barred suit by plaintiff injured while sledding on hill at the University of Kansas).

The language of the statute is clear—to be entitled to recreational-use immunity, the public land need only be ***permitted*** to be used for recreational purposes. And here, the evidence shows—and neither party disputes—that the area was permitted to be used for recreational purposes:

- Muxlow testified that people walk dogs, jog, and walk there.
- As Muxlow's attorney recounted at the hearing on the summary-judgment motion, "There's Easter egg hunts, kid fitness, et cetera, which attract large numbers of people."
- Muxlow was injured while enjoying a recreational activity herself—walking her dogs.
- The grassy area where Muxlow was injured runs along the edge of MacLennan Park. See *Lane*, 283 Kan. at 446 (explaining that an area "must be viewed collectively to determine whether it is used for recreational purposes."); *Dye v. Shawnee Mission School District*, No. 98,379, 2008 WL 2369847, at *2 (Kan. App. 2008) (unpublished opinion) ("Courts do not segregate parts of the property to determine whether the recreational use exception applies; instead, they examine the collective character of the property in question."). So you would expect people to use it to access the park, and its location next to the park underscores the testimony that people regularly used it to walk, jog, or to walk a dog there.

4** Muxlow argues that the City wasn't entitled to recreational-use immunity under the Act for three other reasons, none of which are persuasive. First, Muxlow argues that the area can't be considered part of MacLennan Park because it isn't "integral" to the park itself. Kansas appellate courts have extended recreational-use immunity to property ***integral to or near a recreational facility. See *Poston*, 286 Kan. at 817-19; *Wilson*, 273 Kan. at 590-92 (holding that the exception applies to restrooms located in a football stadium); *Nichols v. U.S.D. No. 400*, 246 Kan. 93, 95-97, 785 P.2d 986 (1990) (applying exception where plaintiff was injured in a grassy area near football field); *Dye*, 2008 WL 2369847, at *2-3. But the area itself is an open space permitted to be used for recreational purposes, so it is unnecessary to determine whether it is "integral" to the adjacent park. That the area was adjacent to the park merely reinforces the separate conclusion that the area between the park and the road was itself used recreationally.

Next, Muxlow argues that cities have a common-law duty to maintain safe streets and right-of-ways, and that the City of Topeka breached this duty by constructing an unmarked concrete culvert in that spot. Even assuming that the City owes this duty, it is still immune from claims arising from injuries that occur on public land that the government permits to be used for recreational purposes. K.S.A. 2017 Supp. 75-6104(o).

Last, Muxlow says the district court ignored several important facts when it granted summary judgment—that there are no comparable open culverts in Topeka, that the bulk of the culvert is in the City's right of way, and that an expert concluded in his report that the culvert "was akin to an open grave and that the growth of the neighborhood now compelled the use of safety features." But these facts, even if true, don't go to whether this space was public property permitted to be used for recreational purposes. See *Mitchell v. City of Wichita*, 270 Kan. 56, 59, 12 P.3d 402 (2000) (" 'The disputed question

of fact which is immaterial to the issue does not preclude summary judgment.' ").

So the district court correctly concluded that the recreational-use exception to liability applied here. That meant that the City was immune from claims of ordinary negligence. The City can only be liable here if Muxlow shows that the City's acts amounted to gross and wanton negligence. See K.S.A. 2017 Supp. 75-6104(o).

Normally, whether a party has been negligent (even grossly and wantonly so) is a factual question to be submitted to a jury, but summary judgment is proper if a plaintiff has presented no evidence of gross and wanton negligence. See, e.g., *Vaughn v. Murray*, 214 Kan. 456, 459, 521 P.2d 262 (1974); *Jackson v. City of Norwich*, 32 Kan. App. 2d 598, Syl. ¶ 3, 85 P.3d 1259 (2004). In response to a summary-judgment motion, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. K.S.A. 2017 Supp. 60-256(e)(2).

Gross and wanton negligence requires more than the mere carelessness of ordinary negligence but doesn't require a willful intent to injure. *Soto v. City of Bonner Springs*, 291 Kan. 73, 82, 238 P.3d 278 (2010). Wanton acts are those showing that the defendant realized the imminence of injury to others and still didn't take steps to prevent injury because of indifference to the ultimate outcome. Wanton conduct is established by the mental attitude of the wrongdoer rather than by the particular negligent acts. *Adamson v. Bicknell*, 295 Kan. 879, 890, 287 P.3d 274 (2012); *Soto*, 291 Kan. 73, Syl. ¶ 9; *Jackson*, 32 Kan. App. 2d at 601.

To amount to gross and wanton negligence under the Kansas Tort Claims Act, there must be some evidence that the government ***knew*** of the ***danger*** the condition presented and chose not to address it. See *Lee v. City of Fort Scott*, 238 Kan. 421, 425, 710 P.2d 689 (1985) (finding no evidence of gross and wanton negligence in case involving injury from steel cables strung between trees because there were no prior injuries to alert city to danger); *Jackson*, 32 Kan. App. 2d at 601 (affirming summary judgment in case where woman stepped into a depression around covered-water valve in park because there was no evidence the city realized the danger it presented); see also *Gruhin v. City of Overland Park*, 17 Kan. App. 2d 388, 392-93, 836 P.2d 1222 (1992) (finding that summary judgment was not proper because city knew of prior injury, so city had actual knowledge of the danger). That makes sense because it's the mental attitude of the wrongdoer that's at issue, not whether, as in ordinary negligence, a reasonable person would have realized there was a danger present.

***5** Muxlow points on appeal to several facts to support her claim of gross and wanton negligence: (1) the minimal cost to install a guardrail around the culvert; (2) that many other culverts in the City had guardrails or were covered; (3) that an expert said that the culvert was roughly the same size as an open grave; and without warning signs or safety measures, it posed a serious hazard to pedestrians; and (4) Paul Muxlow's affidavit claiming that the City was grossly and wantonly negligent.

We have also reviewed the specific statements of uncontroverted fact, as supported by evidence, that were supplied by Muxlow on summary judgment to the district court. There is some testimony that city workers doing street sweeping or snow plowing might have noticed the culvert. And there was evidence that the City placed guard rails at some other culverts.

But none of this showed that the City knew that the culvert presented a danger. Since the time the culvert was first installed in the 1960's, no one alerted the City to any injuries involving the culvert. Although Muxlow's husband submitted an affidavit stating that he believed "an open culvert without covering or guard rails in an area frequented by [people] is gross and wanton negligence," a party opposing summary judgment must set forth ***specific facts*** showing that there is a genuine issue for trial—bare opinions or unsupported conclusions will not suffice. K.S.A. 2017 Supp. 60-256(e)(2); *RAMA Operating Co. v. Barker*, 47 Kan. App. 2d 1020, 1031, 286 P.3d 1138 (2012). Thus, Muxlow has failed to present any evidence that the City acted with gross and wanton negligence and summary judgment on this point was also proper. See *Lee*, 238 Kan. at 425; *Jackson*, 32 Kan. App. 2d at 601; *Winn v. City of Leawood*, No. 91,210, 2004 WL 835991, at *3 (Kan. App. 2004) (unpublished opinion) (affirming summary judgment for city when no evidence showed it knew of danger to children from disassembled backstop at city park even though parks officials knew children often climbed various objects in parks).

In sum, there is no evidence that the City's failure to place guardrails or warning signs rose to the level of gross and wanton negligence, and the area where Muxlow fell was public property permitted to be used for recreational purposes. So the district court correctly concluded that the City was immune from liability for Muxlow's injuries under

the recreational-use exception of the Kansas Tort Claims Act as a matter of law.

We therefore affirm the district court's judgment.

All Citations

420 P.3d 503 (Table), 2018 WL 2999618

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