OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

CHIEF JUDGE:

HON. KAREN ARNOLD-BURGER …… Overland Park

JUDGES:

HON. HENRY W. GREEN, JR. ..... Leavenworth
HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. G. GORDON ATCHESON ..... Westwood
HON. DAVID E. BRUNS ..... Topeka
HON. KIM R. SCHROEDER ..... Hugoton
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HON. SARAH E. WARNER ..... Lenexa
HON. AMY FELLOWS CLINE……..……...Valley Center
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Antalek v. State	126,254	Sedgwick	06/14/2024	Affirmed
Breitenbach v. State	125,751	Sedgwick	05/24/2024	Affirmed
Castro v. State	126,352	Wyandotte	05/24/2024	Affirmed
Coppage v. State	126,354	Wyandotte	07/05/2024	Affirmed
Equity Bank, N.A. v. Pourmemar	125,954	Johnson	06/14/2024	Reversed; remanded
Everette v. State	126,047	Seward	06/07/2024	Affirmed
I-135 Auto Auction v. McMaster	125,458	Sedgwick	07/05/2024	Affirmed in part; reversed in part; vacated in part
In re Equalization Appeal of HD Development	124,621	BOTA	06/07/2024	Reversed; remanded with directions
In re H.W.	126,727	Sedgwick	05/17/2024	Affirmed
In re K.M.L.	126,758	Crawford	05/17/2024	Affirmed
In re L.S.	126,508	Shawnee	05/24/2024	Affirmed
In re Marriage of Elfgren and Hendrickson	126,458	Wyandotte	05/31/2024	Affirmed in part; reversed in part; remanded with directions
In re Marriage of K.C. and C.C.	126,566	Johnson	06/28/2024	Affirmed
In re Marriage of L.S. and D.J.	125,656	Leavenworth	05/31/2024	Reversed; vacated
J.C. v. YMCA	125,349	Finney	06/07/2024	Affirmed in part, reversed in part; remanded with directions
Johnson v. State	126,526	Sedgwick	05/31/2024	Affirmed
Logan v. State	126,217 126,218	Saline	06/07/2024	Affirmed
Lucas v. Lucas	125,694	Johnson	06/07/2024	Affirmed
Manning v. Easley	126,698	Pawnee	06/07/2024	Affirmed
Moeder v. U.S.D. No. 512	126,644	Johnson	06/28/2024	Affirmed
Paczkowski v. Dawson	126,108	Wabaunsee	07/05/2024	Affirmed
Parkwood Hills Homes Ass'n. v. Ramakrishnan	126,318	Johnson	05/31/2024	Affirmed
Restum v. Hawthorne Master Homeowners' Ass'n	125,567	Sedgwick	05/24/2024	Reversed; remanded with directions
Reverse Mortgage Solutions, Inc. v. Goldwyn	125,372	Riley	05/17/2024	Appeal dismissed

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Reynolds v. Geither	126,726	Leavenworth	06/21/2024	Reversed; remanded with directions
Robl v. Carson	125,927	Sedgwick	05/17/2024	Reversed; remanded with directions
Smith-Parker v. State	126,403	Saline	05/17/2024	Affirmed
State v. Alexander	125,771	Finney	05/24/2024	Affirmed
State v. Arthur	126,179	Sedgwick	06/21/2024	Affirmed
State v. Baggett	125,597	Reno	07/05/2024	Affirmed in part; vacated in part; remanded with directions
State v. Baker	126,151	Barton	06/07/2024	Affirmed
State v. Chandler	126,031	Sedgwick	05/31/2024	Affirmed
State v. Collins	125,971	Sedgwick	06/21/2024	Convictions affirmed; sentence vacated in part; case remanded with directions
State v. Collins	125,761	Sedgwick	06/07/2024	Affirmed
State v. Curnutt	126,041	Saline	06/07/2024	Affirmed
State v. Davidson	126,360	Sedgwick	06/14/2024	Affirmed
State v. Davis	126,235	Sedgwick	05/24/2024	Affirmed
State v. Dayvault	126,224	Sedgwick	06/14/2024	Conviction affirmed; sentence vacated; case remanded with directions
State v. Decaire	125,486	Sedgwick	05/17/2024	Affirmed
State v. Dirksen	126,324	Saline	06/21/2024	Sentence affirmed in part; vacated in part; remanded with directions
State v. Dobbs	125,974	Atchison	06/07/2024	Affirmed
State v. Extine	126,552	Pottawatomie	06/07/2024	Affirmed
State v. Fitzmaurice	126,378	Shawnee	06/07/2024	Affirmed
State v. Franklin	125,324	Reno	07/05/2024	Reversed in part; dismissed in part; remanded with directions
State v. Galloway	126,591	Douglas	06/14/2024	Affirmed
State v. Gibson	125,769	Douglas	06/28/2024	Affirmed
State v. Gibson	125,642	Sedgwick	07/05/2024	Affirmed
State v. Goddard	125,501	Sedgwick	05/31/2024	Appeal dismissed

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
State v. Griggs	126,215	Sedgwick	05/24/2024	Appeal dismissed
State v. Harrison	125,633	Shawnee	06/21/2024	Affirmed
State v. Johnson	126,040	Sedgwick	05/31/2024	Appeal dismissed
State v. Jones	126,154	Sedgwick	06/07/2024	Affirmed
State v. Kain	125,749	Reno	06/28/2024	Affirmed
State v. Lewis	126,268	Trego	05/17/2024	Affirmed
State v. Loggins	125,302	Sedgwick	06/07/2024	Affirmed
State v. May	126,398	Norton	06/14/2024	Affirmed
State v. McCulley	125,347	Shawnee	06/28/2024	Reversed; sentence vacated; case remanded with directions
State v. McFarland	125,891	Johnson	05/24/2024	Affirmed
State v. McLaughlin	124,221	Jackson	06/21/2024	Affirmed
State v. Morris	125,537	Johnson	06/28/2024	Affirmed
State v. Neil	125,591	Russell	06/07/2024	Affirmed
State v. Novak	125,945	Seward	06/28/2024	Affirmed in part; dismissed in part
State v. Palacio	126,220	Sedgwick	05/17/2024	Affirmed
State v. Pando	126,330	Sedgwick	07/05/2024	Affirmed
State v. Perales	126,551	Sedgwick	06/07/2024	Affirmed
State v. Perez	125,215	Sedgwick	05/17/2024	Affirmed in part; reversed in part; remanded with directions
State v. Powell	126,408	Geary	06/21/2024	Affirmed
State v. Powell	126,413	Sedgwick	07/05/2024	Affirmed
State v. Rosenberg	125,810	Barton	06/21/2024	Affirmed
State v. Ross	125,604	Sedgwick	06/14/2024	Reversed; remanded with directions
State v. Schartz	126,420	Butler	07/05/2024	Affirmed
State v. Scott	125,733	Reno	07/05/2024	Affirmed
State v. Seymour	125,961	Sedgwick	05/24/2024	Reversed; remanded
State v. Smalling	125,357	Crawford	07/05/2024	Dismissed in part; vacated in part; remanded with directions
State v. Smith	125,463	Sedgwick	05/24/2024	Affirmed in part; vacated in part; remanded with directions
State v. Sorrells	125,565	Reno	06/21/2024	Reversed; remanded with directions

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
State v. Springsteen	126,214	Douglas	05/31/2024	Affirmed in part; dismissed in part
State v. Stuart	124,489	Wabaunsee	05/17/2024	Affirmed in part; dismissed in part
State v. Sweet	125,858	Leavenworth	05/17/2024	Affirmed
State v. Turner	125,337	Wyandotte	06/28/2024	Affirmed
State v. Vazquez-Carmona	124,801	Wyandotte	06/14/2024	Affirmed
State v. Weber	126,376	Montgomery	05/31/2024	Affirmed
State v. Wilkerson	125,570	Reno	07/05/2024	Affirmed in part; remanded with directions
State v. Wilson	125,918	Shawnee	07/05/2024	Affirmed
State v. Wojtczuk	125,760	Rooks	05/17/2024	Affirmed
T.R. v. University of Kansas Med. Ctr	126,536	Wyandotte	07/05/2024	Affirmed
Washburn South Apartments v. Zou	126,735	Shawnee	06/28/2024	Affirmed
Zou v. Washburn South Apartments	126,652	Shawnee	06/28/2024	Appeal dismissed

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APPEAL AND ERROR:

Appeal of Trial Verdict as Contrary to Evidence—Appellate Review. When a verdict is attacked on the ground it is contrary to the evidence, appellate courts do not reweigh the evidence or reassess the credibility of the witnesses. Appellate courts will not disturb the jury's verdict if the evidence and all reasonable inferences drawn from the evidence, considered in the light most favorable to the successful party, support the jury's findings.
Ashley Clinic v. Coates 53

No Interlocutory Appeal from Order Suppressing Evidence—Exception. The State may not take an interlocutory appeal from an order suppressing evidence unless the exclusion of such evidence substantially impairs the State's ability to prosecute its case.
State v. Harris 432*

Preserving Claim for Appeal Requires Objection or Motion to Alter or Amend Judgment under K.S.A. 60-252 and Rule 165. Under K.S.A. 2023 Supp. 60-252 and Supreme Court Rule 165 (2024 Kan. S. Ct. R. at 232), a party seeking to preserve a claim for appeal that a district court's judgment lacks sufficient factual findings or conclusions of law must object to such or move to alter or amend the judgment based on such inadequacy. However, when a district court sufficiently states its factual findings and conclusions of law, a party need not file a motion under K.S.A. 2023 Supp. 60-252 to preserve a claim that the trial court erroneously applied the stated legal theory to the specifically stated factual findings.
In re Marriage of Meek..... 270*

Trespass Claim—Remedy to Make Injured Party Whole—Appellate Review. When a district court fashions a remedy designed to make an injured party whole, an appellate court does not determine whether the remedy is the best remedy but considers whether the remedy fails to follow the applicable law or otherwise breaches judicial discretion.
Drouhard v. City of Argonia 246*

CIVIL PROCEDURE:

District Courts Are Courts of General Jurisdiction—Lawsuits May Proceed if Facts State Any Claim upon Which Relief Can Be Granted. Kansas district courts are courts of general jurisdiction. This means, among other things, that Kansas courts presume that they may hear whatever claims a plaintiff pursues. A lawsuit filed in Kansas may proceed as long as the facts included in the petition and the reasonable inferences that can be drawn from those facts state any claim upon which relief can be granted.
Rogers v. Wells Fargo Bank, N.A. 290*

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Lawsuits Filed in Kansas Governed by Kansas Law—Burden on Party to Persuade Court Other Law Applies. Courts presume that lawsuits filed in Kansas are governed by Kansas law. The party seeking the application of a different state's law bears the burden of persuading the courts that the other law should apply. *Rogers v. Wells Fargo Bank, N.A.* 290*

Motion for Dismissal under K.S.A. 60-212(b)(6)—Court Considers Plaintiff's Petition and Attached Documents—Exception. A district court faced with a motion to dismiss under K.S.A. 60-212(b)(6) ordinarily may only consider the plaintiff's petition and any documents attached to it. A rare exception arises when a plaintiff asserts a claim based on a written instrument; courts may consider an undisputedly authentic copy of that written instrument attached to a motion to dismiss without converting the motion to a request for summary judgment. But courts will not resolve factual questions surrounding those instruments as part of a K.S.A. 60-212(b) motion. Nor will courts consider documents attached to a motion to dismiss that are not central to the plaintiff's claim or when there is a reasonable question about their applicability or authenticity.
Rogers v. Wells Fargo Bank, N.A. 290*

---Determination by Court Whether Plaintiff Has Stated Claim. When a defendant moves for dismissal under K.S.A. 60-212(b)(6), the district court must resolve every factual dispute in the plaintiff's favor. The court must assume all the factual allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim based on the plaintiff's theory or any other possible theory.
Rogers v. Wells Fargo Bank, N.A. 290*

Motion for Relief under K.S.A. 60-260(b). On motion and just terms, the court may relieve a party from a final judgment for any of the reasons set forth in K.S.A. 60-260(b)(1)-(6).
Stout v. KanEquip, Inc. 405*

—District Court's Considerations. When ruling on a motion to set aside an order under K.S.A. 60-260(b), the district court should consider all the facts, including (1) whether the motion was filed within a reasonable time, (2) whether the motion will prejudice the other party, and (3) whether the moving party has good cause to move to set aside an order.
Stout v. KanEquip, Inc. 405*

---Discretion of District Court—Appellate Review. A ruling on a motion for relief from judgment under K.S.A. 60-260(b) rests within the sound discretion of the district court. Abuse of discretion occurs when the district court's decision is based on a legal or factual error or if no reasonable person would agree with it.
Stout v. KanEquip, Inc. 405*

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Motion for Relief under K.S.A. 60-260(b)(1)—Limits. K.S.A. 60-260(b)(1) permits relief by a party because of mistake, inadvertence, surprise, or excusable neglect. The motion must be filed within a reasonable time not more than one year from the date of judgment.
Stout v. KanEquip, Inc. 405*

Motion for Relief under K.S.A. 60-260(b)(6)—Catchall Provision—Liberal Construction. K.S.A. 60-260(b)(6) is a catchall provision providing relief from final judgment for any other reason justifying it. This provision is to be liberally construed to preserve the delicate balance between the conflicting principles that litigation be brought to an end and that justice be done in light of all the facts. *Stout v. KanEquip, Inc*. 405*

Notice Pleading in Kansas Initiates a Lawsuit. To initiate a lawsuit in Kansas, a petition need only include a short and plain statement that gives the defendant fair notice of the plaintiff's claim and the ground upon which it rests. Courts commonly refer to this practice as notice pleading.
Rogers v. Wells Fargo Bank, N.A. 290*

Petition May Be Dismissed under K.S.A. 60-212(b)(6)--Dismissal Is the Exception Not the Rule—Federal Plausibility Standard Not Used in Kansas Courts. K.S.A. 60-212(b)(6) allows a petition to be dismissed if it fails to state a claim upon which relief may be granted. Dismissal under K.S.A. 60-212(b)(6) is the exception, not the rule. Kansas courts do not use the plausibility standard for pleadings employed by federal courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure.
Rogers v. Wells Fargo Bank, N.A. 290*

CONSTITUTIONAL LAW:

Privilege against Self-incrimination—District Court Properly Permitted Witness not to Testify at Criminal Trial under These Facts. In the circumstances of this case, the district court properly permitted a witness to assert her constitutional privilege against self-incrimination to avoid testifying at the defendant's criminal trial after the State charged her with perjury based on her preliminary hearing testimony. The State's offer of statutory immunity under K.S.A. 22-3415 was insufficient to shield the witness from the real risk she would face an additional perjury charge if she were compelled to testify. *State v. Adams* 132

Review of Equal Protection Claim—Three-Step Process. A court engages in a three-step process when reviewing an equal protection claim. First, it considers whether the legislation creates a classification resulting in different treatment of similarly situated individuals. If the statute treats "arguably indistinguishable" individuals differently, the court determines next the appropriate level of scrutiny to assess the classification by examining its nature or the right at issue. Then, the court applies that level of scrutiny to the statute. *State v. Wooldridge* 314*

Warrantless Searches and Seizures are Invalid—Exception. Under both the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights, warrantless searches and seizures by

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law enforcement officers are deemed unreasonable and invalid unless a recognized exception to the warrant requirement applies.
State v. Dixon 1

CONTRACTS:

Claim of Tortious Interference with Contract—Knowledge of Existing Contract and Intentional Inducement to Breach Agreement—Damages Caused to Claimant. A party claiming tortious interference with a contract must show that the offending party knew of an existing contractual relationship and nevertheless intentionally induced one of the contracting parties to breach that agreement, causing damages to the claimant. A person intentionally induces a breach when they act with actual or legal malice.
Ashley Clinic v. Coates 53

Employment Contract—Continued Employment Is Sufficient Consideration to Support Employment Contract. Continued employment can be sufficient consideration to support an employment contract, including one that adds a covenant not to compete. *Ashley Clinic v. Coates* 53

Interference with Contract—Establishing Damages—Reasonable Basis for Computation Must Be Shown with Reasonable Certainty. Damages need not be established with absolute certainty. Instead, a party claiming that it has been injured as a result of another's wrongful acts must show the extent of its injury—that is, the amount of damages it suffered—with reasonable certainty. This requires some reasonable basis for computation that will enable the jury to arrive at an approximate estimate of the damages.
Ashley Clinic v. Coates 53

— Whether Justified Depends on Factual Questions. Interference with a contract may be justified—and thus not tortious—in certain instances, including if the interference occurs for a legitimate business purpose. Whether such a justification exists turns on several factual questions, including the defendant's motives, the proximity of the defendant's conduct to the interference, and the means employed. *Ashley Clinic v. Coates* 53

Presumption that Written Contracts are Valid and Supported by Adequate Consideration. Kansas courts presume that written contracts are valid and supported by adequate consideration. The jury is entitled to presume that a written contract is valid unless the party contesting its validity proves it is not. *Ashley Clinic v. Coates* 53

COURTS:

Court of Appeals Must Follow Supreme Court Precedent—Exception. This court is duty-bound to follow Kansas Supreme Court precedent absent some indication our Supreme Court is departing from its previous position.
State v. Harris 432*

Jurisdiction of Appellate Courts Provided by Statute. Appellate courts only have jurisdiction as provided by statute. Where an appeal is not taken

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consistent with this statutory authority, it must be dismissed for lack of jurisdiction. *State v. Harris* 432*

CRIMINAL LAW:

Criminal Use of Weapons Violation—Proof That Defendant Knowingly Possessed Firearm and Was Convicted of Domestic Violence Offense within Five Years. In a prosecution for criminal use of weapons in violation of K.S.A. 2019 Supp. 21-6301(a)(18), the State must prove beyond a reasonable doubt not only that the defendant knowingly possessed a firearm, but also that the defendant did so while knowingly convicted of a domestic violence offense within the preceding five years. The "knowingly" culpable mental state applies to each element of the crime.
State v. Beasley 203

Culpable Mental State Discussed in K.S.A. 21-5202(g). "If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided." K.S.A. 21-5202(g).
Johnson v. Bass Pro Outdoor World 217

Culpable Mental State of at Least Recklessness an Essential Element of Every Crime under Statute. Generally, a culpable mental state of at least recklessness is an essential element of every crime. K.S.A. 21-5202(a). Where the statute defining the crime does not prescribe a culpable mental state, one is nevertheless required unless the definition of the crime "plainly dispenses with any mental element."
Johnson v. Bass Pro Outdoor World 217

DNA Testing under K.S.A. 21-2512—Limits of Application to Certain Crimes. The plain language of K.S.A. 21-2512 limits its application solely to those convicted of first-degree murder or rape. Because individuals who are convicted of attempted rape are not similarly situated to those convicted of rape, the application of K.S.A. 21-2512 should not be extended on equal protection grounds to include DNA testing for individuals convicted of attempted rape. *State v. Wooldridge* 314*

Kansas RICO Act—Compulsory Joinder Rule Not Required When Predicate Cases Used to Establish Pattern of Racketeering Activity. Under the Kansas RICO Act, the compulsory joinder rule does not require the State to bring the RICO charge when it brings the predicate cases used to establish the pattern of racketeering activity in the RICO charge.
State v. Dixon 82

— Double Jeopardy Clause Does Not Prohibit Using Prior Adjudications and Convictions to Prove Charge. The Double Jeopardy Clauses of the United States Constitution and section 10 of the Kansas Constitution Bill of Rights do not prohibit the use of the defendant's prior adjudications and convictions to prove a charge under the Kansas RICO Act. *State v. Dixon* 82

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— Juvenile Adjudications Included in Racketeering Activity. The Kansas RICO Act's definition of racketeering activity includes juvenile adjudications. *State v. Dixon* 82

— — A Kansas RICO offense is a continuing offense. Under the Kansas RICO Act, the State can charge the defendant as an adult when some of the alleged predicate racketeering activity occurred when the defendant was a juvenile provided that the final alleged predicate racketeering activity occurred when the defendant was an adult. *State v. Dixon* 82

— Predicate Offenses Not Lesser Included Crimes of RICO Offense. Under the Kansas RICO Act, the defendant's predicate offenses used to establish a pattern of racketeering activity are not lesser included crimes of the RICO offense. *State v. Dixon* 82

RICO Act K.S.A. 21-6327 et seq.—Similar to Federal RICO Act 18 U.S.C. § 1961. The Kansas Racketeer Influenced and Corrupt Organization (RICO) Act, K.S.A. 21-6327 et seq., is substantially similar to the federal Racketeer Influenced and Corrupt Organization (RICO) Act, 18 U.S.C. § 1961 et seq., both in its purpose and the specific conduct it proscribes. *State v. Dixon* 82

Sexual Exploitation of a Child for Possession of Child Pornography—Requirements. To convict a defendant of sexual exploitation of a child for possession of child pornography under K.S.A. 2018 Supp. 21-5510(a)(2), the State must prove that a defendant had knowledge of the nature of the visual depiction—meaning, that defendant either knew the essential character or the identity of the visual depiction and that defendant had joint or exclusive control over the visual depiction with knowledge of or intent to have such control or that the defendant knowingly kept the visual depiction in a place where the defendant had some measure of access and right of control. See K.S.A. 2018 Supp. 21-5202(i). *State v. Ballantyne* 14

Statute of Limitations Begins to Run When Victim Determines Criminal Conduct. Under K.S.A. 1998 Supp. 21-3106(8)(f)(ii), the statute of limitations begins to run when the victim becomes able to determine the criminal nature of the conduct. *State v. Bolinger* 115

Statute of Limitations for Prosecution—Tolling Provisions in Statute Provide Certain Time Periods Excluded from Count. The tolling provisions listed in K.S.A. 1998 Supp. 21-3106(8)(f) do not indefinitely extend the statute of limitations for prosecution. Rather, they provide that certain time periods are excluded from the count. When the statute of limitations contains an exception or condition that tolls its operation, courts deduct a specified period of time when there is substantial competent evidence that two or more of the statutory factors are present. *State v. Bolinger* 115

Statutory Definition of Possession under K.S.A. 2018 Supp. 21-5111(v). Possession, as that term is used in K.S.A. 2018 Supp. 21-5510(a)(2), in-

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cludes knowingly accessing and viewing child pornography when a defendant has joint or exclusive control over a visual depiction with knowledge of or intent to have such control or knowingly keeps the visual depiction in a place where the defendant has some measure of access and right of control over it on the internet. See K.S.A. 2018 Supp. 21-5111(v).
State v. Ballantyne 14

DIVORCE:

Determination of Marital Property—Appellate Review. In an action for divorce, annulment, or separate maintenance, the district court's determination about which property is defined as marital property pursuant to K.S.A. 23-2801(a) is a question of law subject to de novo review.
In re Marriage of Meek 270*

Division of Property—All Property Becomes Marital Property under K.S.A. 23-2801(a) Once Action Is Commenced--Exception. In Kansas when the parties' property is not subject to division under some other agreement, upon commencement of divorce, annulment, or separate maintenance actions all property owned by married persons—whether maintained or defined as separate property under K.S.A. 23-2601 or not—becomes marital property pursuant to K.S.A. 23-2801(a).
In re Marriage of Meek 270*

— Broad Discretion of District Court to Make Equitable Division unless Other Agreement—Appellate Review. In actions for divorce, annulment, and separate maintenance when the parties' property is not subject to division under some other agreement, the district court has broad discretion to equitably divide all property owned by married persons pursuant to K.S.A. 23-2802(c). This court reviews the district court's division of property pursuant to K.S.A. 23-2802 for an abuse of discretion.
In re Marriage of Meek 270*

Marital Property Includes Personal Injury Awards or Settlements under K.S.A. 23-2801(a). When no other agreement dictates otherwise, personal injury awards or settlements received during marriage are marital property under K.S.A. 23-2801(a). *In re Marriage of Meek* 270*

DAMAGES:

No Duplicative Damages Recoverable Where Damages Arise from Same Injury or Loss. Kansas law does not prohibit a district court from awarding duplicative damages against separate defendants based on different conduct and different theories of recovery. But Kansas law prohibits a party from recovering duplicative damages from separate defendants where the damages arise from the same injury or loss. *Ashley Clinic v. Coates* 53

EQUITY:

Claim for Unjust Enrichment— Requirements. To succeed on a claim for unjust enrichment, a person must show that they have conferred a benefit

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upon another party; that the other party knew of or appreciated that benefit; and that the circumstances surrounding the benefit make it inequitable for the other party to retain it without payment for its value.
Ashley Clinic v. Coates 53

JURISDICTION:

Territorial Jurisdiction—Broad Interpretation of Statute. The territorial jurisdiction statute is to be interpreted broadly in determining whether a crime may be prosecuted in Kansas. *State v. Merrill* 322*

— Governed by Statute. Whether territorial jurisdiction exists is a question of law governed by the provisions of K.S.A. 21-5106.
State v. Merrill 322*

— Requirements for Criminal Prosecution. If one or more material elements of a crime occurs wholly or partly within this state, then Kansas has territorial jurisdiction to prosecute a criminal defendant.
State v. Merrill 322*

MOTOR VEHICLES:

Implied Consent Notice Requirements—Substantial Compliance Is Generally Sufficient. Substantial compliance with the implied consent notice requirements set forth in K.S.A. 8-1001 et seq. is generally sufficient provided that the notice conveys the essentials of the statute and does not mislead the driver. *State v. Merrill* 322*

Reasonable Grounds Required of Law Enforcement to Request Breath Test—Proof Shown by Using DC-27 Form or Through Competent Testimony. Law enforcement officers must have reasonable grounds to request a breath test. In later administrative driving license proceedings considering the reasonableness of making this request, or in subsequent judicial review of such requests, the State can prove reasonable grounds by using a completed DC-27 form, or through competent testimony, or both. Technical errors like checking or not checking a particular box on the form do not bar the form's use as evidence.
Davis v. Kansas Dept. of Revenue 107

Sentencing Enhancement Statute—Not Violation of Ex Post Facto Clause. K.S.A. 21-6811(c)(3) does not violate the Ex Post Facto Clause of the United States Constitution. *State v. Merrill* 322*

PARENT AND CHILD:

Children's Right to Permanency within Reasonable Time Frame—Difference between Adult Time and Child Time. Children have a right to permanency within a time frame reasonable to them. The Legislature recognized the difference between adult and child time because a child perceives time differently than adults. Consequently, the Kansas Code for Care of Children, K.S.A. 38-2201 et seq., specifically sets out an essential objective: CINC proceedings should be disposed of without any unnecessary delay. *In re B.H.* 480*

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Due Process Clause---Parent's Relationship with Child Is Protected Liberty Interest---Fundamental Right Continues Throughout CINC Case. The Due Process Clause of the Fourteenth Amendment to the United States Constitution recognizes a parent's relationship with his or her child is a protected liberty interest. This liberty interest acknowledges a parent's right to make decisions regarding the child's care, custody, and control. This fundamental right remains intact during a child in need of care (CINC) case. Even if a parent has his or her child removed from the parent's custody during a CINC case, the parent's liberty interest is upheld unless a court terminates parental rights. Consequently, throughout a CINC case, a parent's fundamental liberty interest requires procedural due process.
In re B.H. 480*

Due Process Requirements—Notice and Opportunity to Be Heard. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. This is particularly important in an adversarial setting such as a parental rights termination hearing. These two facets of due process—notice and an opportunity to be heard—ensure that a parent's fundamental rights are not terminated without procedural due process. *In re B.H.* 480*

Parent's Motion for New Counsel or Motion to Withdraw by Attorney—Heightened Scrutiny by Court to Ensure Unnecessary Delay. Courts should thoroughly inquire about a parent's motion for new counsel or an attorney's motion to withdraw from representing a parent to ensure that the case proceeds toward a timely resolution for the child. This heightened scrutiny works in harmony with the Kansas Code for Care of Children's expressed policy of disposing of proceedings without unnecessary delay. *In re B.H.* 480*

Right of Indigent Parent to Appointed Counsel—Focus of Justifiable Dissatisfaction Inquiry with Attorney—Factors for Court to Review. In determining whether a court should appoint new counsel in a CINC proceeding, an indigent parent must show justifiable dissatisfaction with his or her appointed counsel. The focus of a justifiable dissatisfaction inquiry is the adequacy of counsel in the adversarial process, not the parent's perception or view of his or her attorney. As such, a party demonstrates justifiable dissatisfaction by showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communications between client and counsel. In making this determination, the district court must conduct some sort of investigation. *In re B.H.* 480*

Statutory Right to Counsel of Indigent Parents—Courts Required to Appoint Lawyers for Indigent Parents in CINC Cases. Indigent parents have a statutory right to counsel. As such, courts are statutorily required to appoint lawyers for indigent parents in a child in need of care case. This statutory right to counsel remains with the parent facing the termination of their parental rights. *In re B.H.* 480*

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POLICE AND SHERIFFS:

Traffic Stop Must Not Be Extended Beyond Reason. Officers must be careful to ensure that any inquiries of matters beyond the reason for the traffic stop occur concurrently with the tasks permitted for such stops so they will not measurably extend the time it would otherwise take. This is called multitasking. If an officer is not effectively multitasking, these unrelated inquiries—without reasonable suspicion, probable cause, or consent—impermissibly expand the stop beyond what the United States Constitution permits.
City of Overland Park v. LaGuardia 465*

PRODUCTS LIABILITY:

Protection of Lawful Commerce in Arms Act—Precludes Civil Actions against Manufacturers and Sellers of Firearms—Qualified Civil Liability Action. The Protection of Lawful Commerce in Arms Act precludes civil actions for damages against manufacturers and sellers of firearms "resulting from the criminal or unlawful misuse of" a firearm. That type of action is known as a "qualified civil liability action" in the Act. 15 U.S.C. § 7902(a); 15 U.S.C. § 7903(4), (5)(A).
Johnson v. Bass Pro Outdoor World 217

Qualified Civil Liability Actions May Not Be Brought in Federal or State Court under Federal Arms Act. The Protection of Lawful Commerce in Arms Act provides that qualified civil liability actions "may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). This provision expressly preempts state tort actions that are included in the definition of "qualified civil liability actions." The scope of the preemption is determined by the plain language of that definition and the exceptions listed in 15 U.S.C. § 7903(5). *Johnson v. Bass Pro Outdoor World* 217

REAL PROPERTY:

Proof of Trespass— Recovery of Damages. A plaintiff who proves trespass can recover for any loss sustained. *Drouhard v. City of Argonia* 246*

Rights under Easement—Injunction May Be Granted by District Court. When an aggrieved landowner has clearly defined rights under an easement that are recognized and protected by law, the district court may grant an injunction without applying the traditional four-part balancing of equities test.
Drouhard v. City of Argonia 246*

Rights of Easement Holder—Trespass Committed if Exceeds Rights. An easement holder commits a trespass by exceeding the rights provided under the easement. *Drouhard v. City of Argonia* 246*

Trespass Claim—Calculation of Damages. No set measure of damages is required for a trespass claim. *Drouhard v. City of Argonia* 246*

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Trespass Claim—No Recovery for Both Actual and Nominal Damages for Same Claim. A plaintiff who fails to prove actual loss may recover nominal damages, but a plaintiff cannot recover both actual and nominal damages for the same claim. Nominal damages are to be assessed in a trivial amount. *Drouhard v. City of Argonia* 246*

SEARCH AND SEIZURE:

Emergency Aid Exception—Circumstances When Warrantless Search of Personal Property Allowed. The emergency aid exception allows the warrantless search of personal property, such as a purse, when a person is found unconscious or in a semi-conscious condition and the intent of law enforcement's reasonably limited search is to discover the person's identity or other information that may provide medical assistance. *State v. Dixon* 1

Emergency Aid Exception to Warrant Requirement—Application. The emergency aid exception to the warrant requirement applies when (1) law enforcement officers have an objectively reasonable basis to believe someone is seriously injured or imminently threatened with serious injury, and (2) the manner and scope of any ensuing search is reasonable. *State v. Dixon* 1

Justification of Delay of Stop---Focus on Specific Facts That Criminal Activity Taking Place. The prosecution does not meet its burden by simply proving that the officer believed the circumstances could have formed a reasonable suspicion. Rather, something more than an unparticularized suspicion or hunch must be articulated by the officer. Consistent with this long-standing caselaw, we find that the prosecution does not meet its burden by pointing to factors not articulated by the officer that could have formed a reasonable suspicion in an effort to justify the delay after the fact. The focus must be on the factors, if any, articulated by the officer.
City of Overland Park v. LaGuardia 465*

Officer's Authority to Provide Assistance—Ends When no Longer Reasonable. A law enforcement officer's limited authority to reasonably determine whether a person needs assistance and to provide such assistance ends when it is no longer reasonable to believe the person needs assistance. *State v. Dixon* 1

Traffic Stops—No Extension of Time unless Reasonable Suspicion or Probable Cause. Traffic stops cannot be measurably extended beyond the time necessary to process the infraction that prompted the stop unless there is a reasonable suspicion of or probable cause to believe the detainee is involved in other criminal activity.
City of Overland Park v. LaGuardia 465*

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STATUTES:

Application of Rule of Lenity if Reasonable Doubt of Meaning of Statute. The rule of lenity arises only when there is any reasonable doubt of the statute's meaning. *State v. Bolinger* 115

Construction of Statutes—Determination of Legislative Intent—Appellate Review. When construing statutes to determine legislative intent, appellate courts must consider various provisions of an act *in pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible. *State v. Bolinger* 115

Express Preemption Provision in Federal Protection of Lawful Commerce in Arms Act—Determination of Scope of Preemption. When a federal statute contains an express preemption provision like the one used in the Protection of Lawful Commerce in Arms Act, we look to the plain language of that provision to determine the scope of the preemption. That is the best evidence of congressional intent. *Johnson v. Bass Pro Outdoor World* 217

Scope of Express Preemption Provision in Federal Statute—Interpretation of Language—Two Principles. An analysis of the scope of any express preemption provision in a federal statute must begin with the text. The interpretation of that language is guided by two principles about the nature of that preemption: (1) the presumption against preemption of the historic police powers of the states and (2) Congress' purpose in enacting the legislation. *Johnson v. Bass Pro Outdoor World* 217

Strict Construction of Criminal Statutes in Favor of Accused. Criminal statutes are strictly construed in favor of the accused. This rule is subordinate to the rule that the interpretation of a statute must be reasonable and sensible to effect the legislative design and intent of the law.
State v. Bolinger 115

To Resolve Text of Ambiguous Federal Statute—Courts Rely on Principles of Federalism. When a federal statute's text is ambiguous, courts can rely on the basic principles of federalism to resolve any ambiguity in a way that does not broadly intrude on the police power of the states.
Johnson v. Bass Pro Outdoor World 217

SUMMARY JUDGMENT:

Motion for Summary Judgment. A party cannot avoid summary judgment based on speculation or the hope that something may develop later during discovery or at trial. *Conge v. City of Olathe* 383*

— Burden on Opposing Party. The party opposing a motion for summary judgment must come forward with evidence that establishes a genuine dispute regarding a material fact. A factual dispute is not material unless it has legal force as to a controlling issue. *Conge v. City of Olathe* 383*

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— District Court's Consideration. In ruling on a motion for summary judgment, a district court must resolve all facts and reasonable inferences from the evidence in favor of the party against whom judgment is sought. *Conge v. City of Olathe* 383*

-- Granted When No Genuine Issue of Material Fact Remains. Summary judgment is appropriate in the district court when all the available evidence demonstrates that no genuine issue of material fact remains, entitling the moving party to judgment as a matter of law.
Conge v. City of Olathe 383*

Review of Trial Court's Ruling of Summary Judgment De Novo—Appellate Review. Appellate courts review a trial court's ruling on a motion for summary judgment de novo, meaning we are unconstrained by the lower court's ruling because we are in the same position as the lower court. We must view the facts in the light most favorable to the party opposing summary judgment. If reasonable minds could disagree about the conclusions to be drawn from the evidence—if there is a genuine issue about a material fact—summary judgment is inappropriate.
Johnson v. Bass Pro Outdoor World 217

TORTS:

Claim of Retaliatory Discharge for Whistleblowing—Burden of Claimant. A person claiming retaliatory discharge for whistleblowing has the burden of establishing every element of the claim by clear and convincing evidence. *Conge v. City of Olathe* 383*

—Burden of Proof Shifts Between Parties. If an employee can demonstrate a prima facie case of retaliatory discharge based on whistleblowing, the burden of proof shifts to the employer to come forward with evidence establishing that the employee was terminated for a legitimate nonretaliatory reason. If the employer is able to come forward with such evidence, the burden shifts back to the employee to come forward with evidence to show that the reason given by the employer for the termination of employment was pretextual. *Conge v. City of Olathe* 383*

— Elements for Proof. To establish a prima facie case of unlawful retaliatory discharge for whistleblowing, one must prove the following elements: (1) a reasonable person would conclude that the employer or the employee's coworker was engaged in activity that violated rules, regulations, or the law pertaining to public health, safety, and welfare; (2) the employer knew about the reporting of the violation before discharging the employee; (3) the employer discharged the employee in retaliation for reporting the violation; and (4) the employee acted in good faith based on a legitimate concern about the wrongful activity. *Conge v. City of Olathe* 383*

— Summary Judgment Appropriate if Plaintiff Fails to Establish Case. Summary judgment is appropriate in a retaliatory discharge case when an employee fails to establish a prima facie case. It is also appropriate when the employer has come forward with evidence of a legitimate nonretaliatory

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reason for the termination and the employee fails to come forward with evidence establishing that the reason given was pretextual.
Conge v. City of Olathe 383*

Kansas Tort Claims Act—Application. The Kansas Tort Claims Act, K.S.A. 75-6101 et seq., distinguishes between traditional governmental functions—such as legislative, judicial, and executive enforcement actions—and other circumstances when a governmental entity is carrying out actions that could also be performed by private individuals. *Ashley Clinic v. Coates* 53

— Applicable to Claim of Tortious Interference under these Facts. The Kansas Tort Claims Act, K.S.A. 75-6101 et seq., applies to a claim of tortious interference with a contract against a county hospital.
Ashley Clinic v. Coates 53

— Definition of Wantonness under the Act. To constitute wantonness the act must indicate 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.
Zaragoza v. Board of Johnson County Comm'rs 358*

— Exception Depends on Character of Property and Not Activity Performed. The recreational use exception to the Kansas Tort Claims Act depends on the character of the property in question and not the activity performed at any given time; the plain wording of the statute 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.
Zaragoza v. Board of Johnson County Comm'rs 358*

— Immunity under Statute Extends to Parking Lots. Immunity under K.S.A. 75-6104(o) extends to a parking lot integral to public property intended or permitted to be used as a park, playground, or open area for recreational purposes, including a library.
Zaragoza v. Board of Johnson County Comm'rs 358*

— Recreational Use Exception Not Limited to Outdoor Areas. The recreational use exception to the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., is not limited to outdoor areas or to areas intended for physical activity.
Zaragoza v. Board of Johnson County Comm'rs 358*

Kansas Tort Claims Act's Damages Limitations—No Violation of Right to Jury Trial. The Kansas Tort Claims Act's damages limitations, including K.S.A. 75-6105(a)'s cap on total damages and K.S.A. 75-6105(c)'s prohibition of punitive damages, do not violate the right to a jury trial enshrined in section 5 of the Kansas Constitution Bill of Rights. *Ashley Clinic v. Coates* 53

Legal Malice—Definition. Legal malice is the intent to do harm without any reasonable justification or excuse. *Ashley Clinic v. Coates* 53

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TRIAL:

Jury Instructions—No Meaningful Distinction between Using "No Reasonable Doubt" or "Beyond a Reasonable Doubt" Terminology. A district court's jury instruction that states: "If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty," is legally appropriate. Using the terminology "no reasonable doubt" does not lower the State's burden of proof to a lesser standard than "beyond a reasonable doubt" as there is no meaningful distinction between the terms. *State v. Beasley*..... 203

VENUE:

Venue Required to Establish Jurisdiction. Venue is a question of fact that must be proved to establish jurisdiction. *State v. Merrill* 322*

WORKERS COMPENSATION ACT:

Motion to Modify Award—Determining if Good Cause Exists to Review. Determining whether good cause exists to review a workers compensation award under K.S.A. 44-528(a) is different from the discretionary decision to modify the award or reinstate an award. As part of this threshold inquiry, the ALJ should consider the entire record and what is reasonable under the totality of the circumstances.
Jackson v. Johnson County ……345*

— --- ALJ's Considerations. In determining whether a motion to modify a workers compensation award will be granted under K.S.A. 44-528(a), the Administrative Law Judge (ALJ) must make a threshold discretionary determination of whether good cause exists to review the award. It is only if the ALJ finds that good cause supports review that the matter will proceed to a final determination on modification of the award or reinstatement of a prior award.
Jackson v. Johnson County 345*

ZONING:

Applications for Multi-family Residential Developments May Be Treated as Zoning Amendments. State zoning statutes do not prohibit zoning authorities from treating applications for multi-family residential planned unit developments as zoning amendments governed by K.S.A. 12-757. *Austin Properties v. City of Shawnee, Kansas* 166

Broad Zoning Ordinances May Be Enacted by Cities and Counties. Cities and counties may enact broad zoning ordinances and procedures so long as they do not violate state zoning statutes.
Austin Properties v. City of Shawnee, Kansas 166

Factors in *Golden v. City of Overland Park* May Be Considered When Zoning Authorities Evaluating Zoning Amendments. Zoning authorities are strongly encouraged, although not required, to consider and document the factors enumerated in *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978), when

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evaluating zoning amendments. Zoning authorities may consider some *Golden* factors more important than others and are not limited to the factors enumerated in *Golden* for their zoning decisions.
Austin Properties v. City of Shawnee, Kansas 166

Protest Provisions of Statute Apply to Multi-family Residential Development Applications. Zoning authorities are not prohibited from applying the protest provisions of K.S.A. 12-757(f)(1) to multi-family residential planned unit development applications. *Austin Properties v. City of Shawnee, Kansas* 166

Resubmission of Failed Zoning Amendments Inapplicable if Protested Zoning Amendment Not Approved by 3/4 Majority Vote. If a zoning authority fails to approve a protested zoning amendment by 3/4 majority vote, the protested zoning amendment is denied, and the processes for resubmission of failed zoning amendments in K.S.A. 12-757(d) are inapplicable. *Austin Properties v. City of Shawnee, Kansas* 166

Valid Protest Petition Filed against Zoning Amendment—3/4 Majority Vote Required for Zoning Authority to Approve. When neighbors file a valid protest petition against a zoning amendment pursuant to K.S.A. 12-757(f), the zoning authority can only approve the amendment by a 3/4 majority vote. *Austin Properties v. City of Shawnee, Kansas* 166

Zoning Decisions May Not Be Based on Unsupported Generalities. Zoning authorities cannot rely on unsupported generalities or a plebiscite of neighbors when making zoning decisions.
Austin Properties v. City of Shawnee, Kansas 166

(551 P.3d 156)

No. 126,102

SHAWN DROUHARD, *Appellee*, v. CITY OF ARGONIA, *Appellant*.

SYLLABUS BY THE COURT

1. REAL PROPERTY—*Rights of Easement Holder—Trespass Committed if Exceeds Rights*. An easement holder commits a trespass by exceeding the rights provided under the easement.

2. SAME— *Proof of Trespass— Recovery of Damages*. A plaintiff who proves trespass can recover for any loss sustained.

3. SAME—*Trespass Claim—Calculation of Damages*. No set measure of damages is required for a trespass claim.

4. APPEAL AND ERROR—*Trespass Claim—Remedy to Make Injured Party Whole—Appellate Review*. When a district court fashions a remedy designed to make an injured party whole, an appellate court does not determine whether the remedy is the best remedy but considers whether the remedy fails to follow the applicable law or otherwise breaches judicial discretion.

5. REAL PROPERTY—*Trespass Claim—No Recovery for Both Actual and Nominal Damages for Same Claim*. A plaintiff who fails to prove actual loss may recover nominal damages, but a plaintiff cannot recover both actual and nominal damages for the same claim. Nominal damages are to be assessed in a trivial amount.

6. SAME—*Rights under Easement—Injunction May Be Granted by District Court*. When an aggrieved landowner has clearly defined rights under an easement that are recognized and protected by law, the district court may grant an injunction without applying the traditional four-part balancing of equities test.

Appeal from Sumner District Court; GATEN T. WOOD, judge. Oral argument held March 5, 2024. Opinion filed May 17, 2024. Affirmed in part and reversed in part.

Robert Almanza, of Law Offices of Robert Almanza, of Argonia, for appellant.

Martin J. Peck, of Wellington, for appellee.

Before GARDNER, P.J., MALONE, J., and TIMOTHY G. LAHEY, S.J.

GARDNER, J.: This case asks whether the City of Argonia exceeded the scope of a water easement. Shawn Drouhard's father granted the City an easement to produce and transport water on his property by wells, pumps, and lines. The City used the water for years without incident until the City installed a water vending machine (the Water Salesman) on the easement property. Drouhard then tried to preclude third-party purchasers from using the Water Salesman by placing a car in front of it, but the City towed the car. Drouhard then sued the City for trespass and for two claims of conversion—for taking Drouhard's car and taking her underground water. The district court denied Drouhard's claim for conversion of water but granted summary judgment against the City for the conversion of her car and for trespass. The district court awarded Drouhard actual and nominal damages for both claims and issued a permanent injunction based on the City's trespass.

The City appeals the district court's orders granting Drouhard summary judgment on her trespass claim, awarding actual and nominal damages, and granting injunctive relief. Drouhard cross-appeals the district court's denial of her request to use a rental value approach in measuring her damages for the City's trespass. For the reasons explained below, we reverse the awards of nominal damages and affirm in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001 Shawn Drouhard's father granted the City of Argonia and its successors and assigns an easement to produce and transport water from Drouhard's property. The easement granted the City and "its successors or assigns" the right to "enter upon" Drouhard's property for these purposes: "to place, construct, operate, maintain, relocate and replace thereon, water wells, lines, pumps and appurtenances thereto, as shall be desirable for the production and transport of water on said property, together with the right of ingress and egress thereto." In exchange, Drouhard, his successors, and assigns received the right to use up to 10,000 gallons of city water per month without charge, as long as the City exercised its rights under the easement.

The City used the easement to pump water by using water lines from 2002 to 2017, without incident. But in October 2017, the City installed the Water Salesman—a coin-operated machine used to pump and sell bulk amounts of untreated water directly to the public at the pump site.

Members of the public used the Water Salesman from 2017 to 2019. Drouhard did not live on the easement property during that time but still saw big trucks hauling water off her property. In 2019, Drouhard towed her inoperable car and placed it in the way of the Water Salesman to preclude purchasers from using it. Although Drouhard's car and property were outside city limits, the City issued her a parking ticket and had her car towed. Members of the public once again used the Water Salesman.

In February 2020, Drouhard sued the City, the towing company, and other parties for trespass, conspiracy, aiding and abetting, and conversion. Drouhard's two conversion claims were based on the City's taking of her car and its taking of the underground water on her property. The towing company eventually waived impound and storage costs and returned Drouhard's car to her, so Drouhard withdrew her claims against that company and the district court dismissed it from this suit.

The parties then cross-moved for summary judgment on the issue of liability on Drouhard's remaining claims of conversion and trespass. Drouhard argued that the uncontroverted facts showed that the City's installation and use of the Water Salesman exceeded the terms of the easement and constituted trespass. Analogizing the City's use of the easement to an oil and gas lease, Drouhard aptly argued "[w]hen a landowner signs an oil and gas lease permitting oil exploration and pumping, he does not thereby grant a right to the lessee to operate a gas station . . . ." As for her conversion claim, Drouhard argued that the City lacked contractual authority to remove her car, and it lacked authority to ticket or tow her car because it was parked on her property outside city limits.

The City argued that it was immune from prosecution for each claim, that the easement should be considered a blanket, rather than a specific, easement, and that the Water Salesman should be

classified as a "pump, line[,] or well" permitted in the easement. The City argued against Drouhard's conversion claims as well.

Summary Judgment on Liability

The district court summarily denied Drouhard's claim of conversion of the water but granted her summary judgment on her claims of conversion of her car, and trespass. As for the trespass claim, the district court found that the City's installation and use of the Water Salesman exceeded the permissible scope of the easement so was trespassory. The district court granted Drouhard temporary injunctive relief barring use of the Water Salesman and ordered the City to file a complete accounting of all sales by the Water Salesman for purposes of determining damages at a later hearing.

As for conversion of Drouhard's car, the district court denied the City's claim of immunity. It found the City had improperly ordered law enforcement to cite Drouhard for illegal parking because the property on which the car sat was outside city limits. The district court likewise found the City had improperly directed the towing company to remove the car from Drouhard's property.

Trial on Damages

Drouhard did not present expert testimony at trial but relied on her own testimony to establish damages for both her conversion and trespass claims. For the conversion claim, the district court found that the fair market value of the car was $4,000 when towed and $500 when returned, so it awarded actual damages of $3,500 for the City's conversion. It also awarded nominal damages of $2.50 per day for the 1,034 days that Drouhard did not have the car, totaling $2,585 for lost use, non-access, and possible "damages" and repair.

For the trespass claim, the district court awarded Drouhard actual damages of $1,481.60. The district court also awarded nominal damages for trespass at $2.50 per day for 1,385 days, totaling $3,462.50, and it ordered a permanent injunction barring use of the Water Salesman. The City moved to reconsider, which the district court denied.

The City does not appeal the district court's grant of summary judgment on Drouhard's conversion claim. The City timely appeals the district court's summary judgment ruling on liability for Drouhard's trespass claim, its damages awards for conversion and trespass, and its grant of injunctive relief. Drouhard cross-appeals, alleging the district court erred by denying her request to base trespass damages on rental value.

I. THE DISTRICT COURT CORRECTLY GRANTED DROUHARD PARTIAL SUMMARY JUDGMENT ON HER TRESPASS CLAIM.

The City first argues that the district court erred in finding it liable for trespass.

Basic Legal Principles

This court's standard of review on summary judgment is well known:

> "'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.'" *Schreiner v. Hodge*, 315 Kan. 25, 30, 504 P.3d 410 (2022).

"Appellate courts apply the same rules. And if the reviewing court determines reasonable minds could differ as to the conclusions to be drawn from the evidence, it must deny summary judgment. [Citation omitted.]" *Unruh v. Wichita*, 318 Kan. 12, 19, 540 P.3d 1002 (2024).

In considering whether the district court's grant of summary judgment—or, as here, partial summary judgment—was appropriate, this court considers the evidence before the district court at the time the court granted the motion. See *Antrim, Piper, Wenger, Inc. v. Lowe*, 37 Kan. App. 2d 932, 939-40, 159 P.3d 215 (2007). Here, the parties do not dispute the governing facts. Rather, their dispute is whether the district court properly applied the law of trespass. "Appellate review of the legal effect of undisputed facts

is de novo. [Citation omitted.]" *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

"[A] trespass claim arises when a person intentionally enters another's property 'without any right, lawful authority, or express or implied invitation or license.' *Armstrong v. Bromley Quarry & Asphalt, Inc.*, 305 Kan. 16, 22, 378 P.3d 1090 (2016)." *Ross v. Nelson*, 63 Kan. App. 2d 634, 644, 534 P.3d 634 (2023). Trespass requires an "'intention to enter upon the particular piece of land in question, irrespective of whether the actor knows or should know that he is not entitled to enter.'" *United Proteins, Inc. v. Farmland Industries, Inc.*, 259 Kan. 725, 730, 915 P.2d 80 (1996).

This dispute involves the scope of an easement. An easement holder commits a trespass by exceeding the rights provided under the easement. See *TFMCOMM, Inc. v. Dultmeier Development Co.*, No. 95,515, 2006 WL 2443940, at *2-4 (Kan. App. 2006) (unpublished opinion) (affirming district court's finding defendant trespassed where defendant intentionally built a structure on the plaintiff's property without express authority to do so under the parties' easement); see also 75 Am. Jur. 2d Trespass § 66. To determine the parties' rights under an easement, courts examine the language of the easement and the extent of the dominant tenant's use of the easement when it was granted. *Potter v. Northern Natural Gas Co.*, 201 Kan. 528, 531, 441 P.2d 802 (1968); *Brown v. ConocoPhillips Pipeline Co.*, 47 Kan. App. 2d 26, 33, 271 P.3d 1269 (2012). Appellate courts exercise unlimited review over the interpretation and legal effect of written instruments, including whether a written instrument is ambiguous, and are not bound by the lower courts' interpretations or rulings. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018).

The easement is unambiguous.

The crucial language of this easement "expressly grants" to the City and "its successors and assigns" the right to "place, construct, operate, maintain, relocate and replace thereon water wells, lines, pumps and appurtenances thereto, as shall be desirable for the production and transport of water on said property, together with the right of ingress and egress thereto."

The City's overarching complaint is that the district court found the easement was unambiguous so it should have considered solely the language of the easement, yet it erroneously considered the City's past use of the easement (citing *City of Arkansas City v. Bruton*, 284 Kan. 815, 833-34, 166 P.3d 992 [2007]). But in *Bruton*, our Supreme Court noted the general rule that a court should consider the parties' use of an easement when discerning the parties' rights under the easement. See also *Brown*, 47 Kan. App. 2d at 33 ("Courts determine the character and extent of each parties' rights under the easement by examining the language of the grant and the extent of the dominant tenant's use of the easement at the time it was granted. *Cunning*, 37 Kan. App. 2d at 812."). The City focuses instead on *Bruton*'s emphasis of the well-established rule that "if a written instrument has clear language and can be carried out as written, rules of construction are not necessary. [Citations omitted.]" 284 Kan. at 829.

We need not decide whether the district court erred in its analysis. Our de novo review of the easement is unaffected by the lower courts' interpretations or rulings. *Russell v. Treanor Investments L.L.C.*, 311 Kan. 675, 680, 466 P.3d 481 (2020). We find the easement unambiguous and confine our review to the plain meaning of its language. See 311 Kan. at 680 ("'If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction.'").

The Water Salesman is a pump.

To win her motion for partial summary judgment on her trespass claim, Drouhard had to prove that the City's addition and use of the Water Salesman to her property exceeded the scope of its rights under the easement. See *Ross*, 63 Kan. App. 2d at 643 (trespass is intentional entering of another property "without any right, lawful authority, or express or implied invitation or license"); cf. *Bruton*, 284 Kan. at 833-34 (trespass claim required proof that improvements to a dike did not constitute maintenance in accordance with specific plan requirements defined in the easement and express purpose of the easement).

Because the easement allows the City to "place" or "construct" certain water-related parts on Drouhard's property, we first ask whether the Water Salesman constitutes one of the "wells, lines, pumps[,] [or] appurtenances" permitted by the easement. The City notes Drouhard's admission in her statement of uncontroverted facts that the Water Salesman is a "pump." There, Drouhard describes the Water Salesman as a point-of-sale pump, describing the machine as "a water pump that pumps water when people insert money into it. A person inserts $3 to start the pump and for every quarter you insert into it, it continues to fill." A "pump" is generally broadly defined as "any of various machines that force a liquid or gas into or through, or draw it out of, something, as by suction or pressure." Webster's New World College Dictionary 1179 (5th ed. 2014). Based on Drouhard's admission and the broad definition of a pump, we find the Water Salesman is a pump as that term is used in the City's easement. Cf. *Bruton*, 284 Kan. at 846 (concluding that various definitions were broad enough to encompass the improvements that a city made to a dike within the maintenance provision of the parties' easement). We need not determine whether use of the pump solely by the City would have violated the scope of the easement, since the facts show that the Water Salesman was designed for public use and was used solely by the public.

Water Salesman users are not the City, its successors, or assigns.

We next ask whether the easement gives the City the right to permit the public to access and use the Water Salesman. The easement specifies that the only parties authorized to use the easement are the City and its "successors or assigns," yet the record shows that members of the public used the Water Salesman. And the City did not argue to the district court that it alone used the Water Salesman, or that the persons who did so were its successors or assigns. The City admitted in the district court that it did not have "any contracts" with persons who used the Water Salesman, and that it did not know any person who had bought water from the Water Salesman. And on appeal, the City admits that the easement

is exclusive and it does not contend that the persons who purchased water from the Water Salesman were its successors or assigns.

Instead, the City invites us to find that the exclusive easement nonetheless gives the City the authority to grant "third-party access" to the Water Salesman to transport water. It argues that exclusive easements can be apportioned to others if doing so does not materially alter the scope of the easement. In support, the City references two state court decisions from other jurisdictions—*Ex parte Lightwave Technologies, L.L.C.*, 971 So. 2d 712, 715 (Ala. 2007), and *Hemmelgarn v. Huelskamp & Sons, Inc.*, 138 N.E.3d 1199, 1209 (Ohio Ct. App. 2019).

But the first case teaches that where an easement is created by conveyance, "'apportionability depends upon the intention of the parties to the conveyance.'" *Ex parte Lightwave Techs., LLC*, 971 So. 2d 712, 716-17 (Ala. 2007). Under that principle, an express easement may be apportioned when two conditions are met: (1) the language in the document creating the easement conveys an intention to convey or to grant the right to apportion; and (2) the apportionment is not an additional servitude. *Lightwave Technologies*, 971 So. 2d at 717. The City points to no such language in its easement granted by Drouhard and we find none.

The second case cited is broader, citing several Ohio courts finding that an easement holder may grant use of the easement to guests and invitees as long as their access and use remains reasonable and does not unduly burden the land on which the easement is located. *Hemmelgarn*, 138 N.E.3d 1199. But that court found it persuasive "that the easement language contained in the deed does not grant exclusive or limited use of the easement to the easement holders," and that the evidence showed that the third parties' use of the easement adhered to the overall purpose of the easement. 138 N.E.3d at 1209. By contrast, the easement here is exclusive and expressly permits only the City and its successors or assigns the right to use it. Successors or assigns are different, legally speaking, from guests or invitees. See Black's Law Dictionary 147 (11th ed. 2019) (defining "assignee" as "[s]omeone to whom property rights or powers are transferred by another"). And the City points to no evidence that the public's purchase of water from the

Water Salesman adhered to the overall purpose of the easement. Thus we are unpersuaded to adopt and apply *Hemmelgarn*'s broad standard here.

The City's open invitation to third parties to use the Water Salesman rendered the City liable for the trespass its invitation caused. We reach this conclusion by a plain reading of the unambiguous easement. The City exceeded the scope of the easement by installing the Water Salesman and by inviting and enabling non-successors and non-assignees to use it.

The material interference rule for obstruction of easements does not apply.

The City also asserts that Drouhard's trespass claim requires proof that the City's new or additional use of the easement materially increased or created a new or additional burden on the servient estate. The City points out that the district court did not make such a finding and claims that this is reversible error (citing *Aladdin Petroleum Corporation v. Gold Crown Properties*, 221 Kan. 579, 588, 561 P.2d 818 [1977]). But as that case clarifies, this theory has no application here.

The rule of law that the City relies on applies when a servient tenant obstructs or disturbs the dominant tenant's easement:

"28 C.J.S. Easements s 96, pp. 778-779, discusses what constitutes an obstruction:

'An obstruction or disturbance of an easement is anything which wrongfully interferes with the privilege to which the owner of the easement is entitled by making its use less convenient and beneficial than before. To constitute an actionable wrong it must, however, be of a material character such as will interfere with the reasonable enjoyment of the easement . . . .'" *Aladdin*, 221 Kan. at 588.

The City is the owner or holder of the easement, or the dominant tenant. Drouhard, the landowner, is the servient tenant. *Potter*, 201 Kan. at 530-31.

"An obstruction or disturbance of an easement is something that wrongfully interferes with the privilege to which the dominant tenant is entitled by making its use of the easement less convenient and beneficial. *Mid-America Pipeline Co. v. Wietharn*, 246 Kan. 238, 243, 787 P.2d 716 (1990). However, an obstruction or disturbance of an easement is not actionable unless it is of such a material char-

acter as to interfere with the dominant tenant's reasonable enjoyment of the easement. *Aladdin Petroleum Corporation v. Gold Crown Properties, Inc.*, 221 Kan. 579, 588, 561 P.2d 818 (1977)." *Brown*, 47 Kan. App. 2d at 33.

The requirement of a "material" interference with the City's "reasonable" enjoyment of the easement has no application here because the City never claimed that Drouhard wrongfully interfered with the City's privilege under the easement.

Drouhard, the servient tenant, had no need to show the City materially interfered with her servient estate to prove trespass. For trespass, "the mere breaking and entering gives rise to a cause of action." *McMullen v. Jennings*, 141 Kan. 420, 426, 41 P.2d 753 (1935). Based on the undisputed facts, we agree that the City is liable for trespass for directly causing individuals not named in the easement to enter Drouhard's property.

II. THE DISTRICT COURT DID NOT ERR IN ITS ACTUAL DAMAGES AWARD FOR TRESPASS.

The City next challenges the damages, both actual and nominal, that the district court awarded on Drouhard's trespass claim. The district court awarded Drouhard $1,481.60 in actual damages and $3,462.50 ($2.50 per day for 1,385 days) in nominal damages.

Actual Damages Principles

When calculating damages for a trespass, the general rule is that a plaintiff can recover for any loss sustained. *Mackey v. Board of County Commissioners*, 185 Kan. 139, 147, 341 P.2d 1050 (1959) (in trespass action, "wrongdoer should compensate for all the injury naturally and fairly resulting from [the] wrong"); see also 87 C.J.S., Trespass § 116 ("The measure of damages in trespass actions is the sum that will compensate the person injured for the loss sustained."); Restatement (Second) of Torts § 929 (1979) (available damages include loss in value or in certain cases, the plaintiff may elect cost of restoration). See *Ross*, 63 Kan. App. 2d at 652.

To recover damages, there must be a reasonable basis for computation that allows a fact-finder to make an approximate estimate of the damages. Claims for damages that are conjectural

and speculative cannot form a sound basis for an award. See *Peterson v. Ferrell*, 302 Kan. 99, 106-07, 349 P.3d 1269 (2015). Yet appellate courts do not reweigh evidence or pass upon the credibility of witnesses. When deciding whether the evidence is not enough to support a claim of damages because it is too conjectural or speculative, appellate courts examine the evidence in a light most favorable to the prevailing party. 302 Kan. at 106-07.

Sufficient Evidence of Actual Damages for Trespass

The City accurately notes that at the hearing on damages, Drouhard presented two forms of evidence to support her request: (1) proffered evidence about the rental value of a storage shed that she kept on her property and rented a portion of to her cousin; and (2) an accounting of the sales from the Water Salesman. The district court rejected Drouhard's proffer, finding the rental value approach factually inapplicable. But the district court adopted the values provided in Drouhard's accounting of the water sales to measure actual damages.

The City first challenges Drouhard's facts as insufficient and untrustworthy. But the evidence that Drouhard presented on her claim for damages was uncontradicted. Generally, uncontradicted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and such uncontradicted evidence should ordinarily be regarded as conclusive. *Home Life Ins. Co. v. Clay*, 13 Kan. App. 2d 435, Syl. ¶ 3, 773 P.2d 666 (1989). Although Drouhard provided little evidence to support her claim, nothing suggests that Drouhard's accounting information was unreliable, since it was based on the City's own records of water sales by the Water Salesman through December 2021. Sufficient evidence thus supports the figures the district court used for its award of actual damages.

Drouhard adequately proved her loss. She testified that the City's trespass deprived her of the peaceful enjoyment of her property, as preserved to her in the easement. Drouhard proved her annoyance and discomfort. She testified that the wellhouse is next to her house. And although she did not live on that property, she saw strangers use the wellhouse 11 or 12 times when she was on her property working on the house to make it livable. She did not like

strangers being so close to her house and pulling into her private driveway to use the Water Salesman:

> "I apologize if this sounds persnickety. It's not supposed to be. But for the public to approach this wellhouse, they have to pull into my private driveway that is not part of the easement. Now, do I care if the City uses that public driveway? Absolutely not. Because I am not persnickety. But they still have to cross my private driveway. And I don't appreciate strangers being within a football field from my windows, because I've caught strangers at my window before."

All but one of the persons whom Drouhard saw use the Water Salesman were strangers to her, and they came and went on her property without limitation. And when identifying Exhibits 7 and 8 as photos of a stranger's truck with a big water tank on her property, Drouhard volunteered, "I was very upset." Drouhard also testified that she "put up a cease and desist letter, also, because the City was . . . inviting the public on my property. And I said—and I complained quite often—why you were not following the easement."

Drouhard's act of moving her car in front of the Water Salesman provides additional circumstantial evidence of her annoyance and discomfort. She placed the car in front of the Water Salesman on purpose, to make it less convenient to access. And after the City towed that car, Drouhard asked the towing company to return her car to that same place, yet the towing company returned the car to a location where it did not block the wellhouse.

The evidence meets Drouhard's burden to prove by a preponderance of the evidence that she was damaged by trespass from strangers repeatedly entering her property without her consent. Actual damages for trespass were warranted.

Correct Measure of Damages for Trespass

The City also contends that the district court committed legal error by using an incorrect measure of damages. Appellate courts examine the correct measure of damages de novo, viewing the record in the light most favorable to the prevailing party. *Ferrell*, 302 Kan. at 106-07. The City contends that the district court should have used the difference between the fair market value of the property before and after the trespass. See *Crawford v. Frazee*, 144 Kan. 278, 282, 58 P.2d 1141 (1936); *Miller v. Cudahy Co.*, 858

F.2d 1449, 1456 (10th Cir. 1988) (explaining measure of damages for a temporary injury to real property in Kansas is the reasonable cost of repairing the property, including the value of the loss of use of the property, or the diminution of the rental value of the property).

But Drouhard did not allege any injury to her real property because of the City's installation or the public's use of the Water Salesman, which would have made this measure of damages appropriate. As the time-honored case of *Chicago, K. & W. R. Co. v. Willets*, 45 Kan. 110, 114, 25 P. 576 (1891), held:

> "'In actions for injury to real property, *where the injury is done to the realty itself*, the measure of damages is the difference in the value of the land before and after the trespass, or in some cases the amount necessary to restore the property to the condition in which it was before the trespass was committed.'" (Emphasis added.)

Yet, in a trespass action, that measure of damages is not always required. See *Mackey*, 185 Kan. at 147.

Still, the measure of damages was unusual for a trespass claim. The actual damages for trespass were in the same amount that the City had earned by selling water to the public from the Water Salesman. Awarding damages in the same amount as the benefit the Water Salesman conferred on the City seems more appropriate for a claim of unjust enrichment than trespass. See *Hurtig v. Mattox*, No. 117,544, 2017 WL 6542803, at *8 (Kan. App. 2017) (unpublished opinion) (the measure of damages in a claim of unjust enrichment focuses upon the amount of benefit to the defendant which would be unjustly retained); *In re WorldCom, Inc.*, 320 B.R. 772, 781 (Bankr. S.D.N.Y. 2005) (applying Kansas precedent in finding a defendant's benefit from trespass is not relevant when measuring damages suffered by the plaintiff), *aff'd* 339 B.R. 836 (S.D.N.Y. 2006), *aff'd* 546 F.3d 211 (2d Cir. 2008).

But there is no set measure of damages for a trespass claim. The general rule for calculating damages for trespass is that a plaintiff can recover for any loss sustained. The "'wrongdoer should compensate for all the injury naturally and fairly resulting from [the] wrong.'" *Armstrong v. Bromley Quarry & Asphalt, Inc.*, 305 Kan. 16, 35, 378 P.3d 1090 (2016) (quoting *Mackey*, 185 Kan.

at 147). Thus, in *Ross*, 63 Kan. App. 2d at 651-52, our court recently found no error in using the "cost of removal" as the measure of damages for trespass when Nelson trespassed by installing pipes in the right-of-way and the cost of removing the pipes was the only evidence of damages presented at trial.

As in *Ross*, the district court here tailored the measure of damages to the facts before it. The City trespassed by installing the Water Salesman and inviting the public to use it. Drouhard saw trucks taking water off her property and was upset by strangers using her property. Yet no evidence showed how often or to what extent third parties had trespassed on Drouhard's land other than the City's records of the times users had bought water from the Water Salesman. The district court thus used that amount to compensate Drouhard for the injury naturally and fairly resulting to her from the City's wrong. The court awarded the funds from the Water Salesman as actual damages to compensate Drouhard for her loss based on the number of times that strangers had trespassed on her property, not to prevent the City from being unjustly enriched. This distinguishes this award from the typical unjust enrichment award, although it is in the same amount.

When, as here, a district court fashions a remedy designed to make an injured party whole, an appellate court does not determine whether the remedy is the best remedy but considers whether the remedy fails to follow the applicable law or otherwise breaches judicial discretion. *Ferrell*, 302 Kan. at 106. See *In re Conservatorship of Huerta*, 273 Kan. 97, 99-100, 41 P.3d 814 (2002) (quoting *Gillespie v. Seymour*, 250 Kan. 123, Syl. ¶ 10, 823 P.2d 782 [1991]). Under the unusual circumstances noted by the district court, we find no error of law in the measure of actual damages for the City's trespass.

III. THE DISTRICT COURT PROPERLY DENIED DROUHARD'S REQUEST FOR RENTAL VALUE AS THE MEASURE OF TRESPASS DAMAGES.

We detour to address Drouhard's cross-appeal because it also alleges that the district court erred in its measure of actual damages for trespass. She contends that her actual damages for trespass should be $2,400 per year based on the fair rental value of the shed that housed the Water Salesman. We choose to address

this issue on its merits, overlooking the procedural deficiencies of Drouhard's brief noted by the City.

Drouhard first relies on K.S.A. 58-2520, which states that an "occupant without special contract, of any lands, shall be liable for the rent to any person entitled thereto." Drouhard then summarily claims that "[a]n occupant without a contract would include a trespasser like the City," thus the City is liable for rent. But Drouhard did not make any argument under this statute to the district court, so this claim is unpreserved.

And this argument fails on its merits as well. This statute is part of the Residential Landlord and Tenant Act, so likely relates to tenancy at sufferance or hold-over tenants, unlike the City. As an easement holder, the City is not an occupant or tenant as defined in the Act and does not pay "rent" to Drouhard. See K.S.A. 58-2543(o) (defining "'[t]enant'" as "a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others"); K.S.A. 58-2543(j) (defining "'[r]ent'" as "all payments to be made to the landlord under the rental agreement, other than the security deposit"; (k) (defining "'[r]ental agreement'" as "the terms and conditions concerning the use and occupancy of a dwelling unit and premise"). This statute does not apply to this easement case.

But Drouhard also relies more generally on tort law (citing *Gross v. Capital Elec. Line Builders, Inc.*, 253 Kan. 798, 805, 861 P.2d 1326 [1993]). That case cites the general rule that "'"the measure of damages for wrongfully depriving the plaintiff of the use of his property is the rental value or the reasonable rental value of the use of the property during the time he is deprived thereof." (52 American Jurisprudence, 874, Section 49.)'" 253 Kan. at 803-05. The City properly distinguishes this case, emphasizing that *Gross* did not deal with excessive use of an easement. We add that the court in *Gross* based its determination on the "extent of the trespass" and facts significantly different than ours. 253 Kan. at 805. Drouhard did not live on the property when the public used her driveway to access the Water Salesman, and she did not allege that the public's use of the Water Salesman barred her from using her property.

Drouhard cites two other opinions affirming awards based on fair rental value. *McCullough v. Lukens*, No. 61,663, unpublished opinion filed July 8, 1988 (Kan.); *Farmers State Bank v. Randall*, No. 79,487, 1999 WL 35814176 (Kan. App. 1999) (unpublished opinion). Yet Drouhard fails to show us that these are easement cases or that they find that the measure of damages in an easement case must be based on rental value. These cases do not persuade us that the district court should have used rental value as its measure of damages.

The district court aptly explained why it rejected Drouhard's proposal to use rental value to measure damages for trespass. It reasoned that (1) the Water Salesman was attached to the wall of a preexisting structure on the easement and did not use any more footage than that permitted by the easement; and (2) the Water Salesman, per the City's accounting, was used only 44 times, a "far cry" from the consistent use of one's shed to store property. These are good reasons not to use rental value as the measure of damages.

Although Drouhard's testimony on the fair rental value of the City's "expanded use of the easement" was uncontradicted, we disagree that this had to be the measure of damages. Had Drouhard proved that the installation of the Water Salesman required a greater footprint than did the easement, or that the shed housing the Water Salesman had not been previously constructed to hold the equipment necessary for the City's proper use of the easement, or that the installation or use of the Water Salesman otherwise deprived Drouhard of the use of her property, rental value may have been the most appropriate measure of damages. But based on the uncontroverted facts, we cannot find that the district court's consistent refusal to use this measure of damages fails to follow the applicable law or otherwise breaches judicial discretion. *Ferrell*, 302 Kan. at 106. We thus deny Drouhard's cross-appeal.

IV. THE DISTRICT COURT ERRED BY AWARDING NOMINAL DAMAGES FOR TRESPASS.

We return to the City's appeal. The City next claims that the district court's "nominal damages" award for trespass is not nominal but compensatory, as shown by the district court's statements

when granting the award. It also claims that the award is excessive and disproportionate to the amount of actual damages, as the district court awarded nominal damages of $2.50 a day for 1,385 days, totaling $3,462.50, for the City's trespass, while its actual damages award for that same claim was $1,481.60.

"From every direct invasion of the person or property of another, the law infers some damage, without proof of actual injury." *Longenecker v. Zimmerman*, 175 Kan. 719, 721, 267 P.2d 543 (1954). Thus a trespass plaintiff who can show no actual loss may still recover nominal damages. *Gross*, 253 Kan. at 800. This is true even if the plaintiff benefitted from the defendant's act. But nominal damages are not a measure of damages suffered by a party. "Nominal damages, as opposed to pecuniary damages, are awarded when the plaintiff's evidence fails to show an actual monetary amount of loss, even though there has been a real injury or technical violation of a legal right." *Newton v. Am.'s Tele-Network Corp.*, No. 84,575, 2000 WL 36746640, at *2 (Kan. App. 2000) (unpublished opinion); *Meinhart v. Farmers State Bank*, 124 Kan. 333, 338, 259 P. 698 (1927). This is underscored by the definition of the term "nominal damages":

"A trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated.

. . . .

"'Nominal damages are awarded if the plaintiff establishes a breach of contract or a tort of the kind that is said to be "actionable *per se*" but fails to establish a loss caused by the wrong.' . . . S.M. Waddams, *The Law of Damages* 477-78 (3d ed. 1997)." Black's Law Dictionary 490-91 (11th ed. 2018).

So nominal damages are appropriate only when a plaintiff fails to prove actual damages. Drouhard proved actual loss yet shows us no case holding that a plaintiff may receive both actual and nominal damages for the same claim.

We also agree with the City that the district court's award of $3,462.50 is not nominal in amount. Nominal damages are to be assessed in a trivial amount. "While nominal damages are awarded without proof of actual injury, they imply the smallest appreciable quantity, with one dollar being the amount frequently awarded. [Citations omitted.]" *Kraisinger v. Liggett*, 3 Kan. App. 2d 235,

238, 592 P.2d 477 (1979). We are guided by our courts finding nominal damages in the amount of $200 excessive:

"We have stated that '[nominal damages] imply the smallest appreciable quantity . . . with one dollar being the amount frequently awarded.' *Kraisinger v. Liggett*, 3 Kan. App. 2d 235, 238, 592 P.2d 477, *rev. denied* 226 Kan. 792 (1979). Because there was no credible evidence of actual damages produced at trial, defendants were entitled to recover only nominal damages. The amount of $200 is not nominal. We therefore reverse the judgment of the trial court and remand with directions to enter a judgment for the defendant in the amount of one dollar in nominal damages." *Amoco Production Company v. Morgan*, No. 65,117, 1990 WL 10859473, at *3 (Kan. App. 1990) (unpublished opinion).

See *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1264-65 (10th Cir. 2004) (McConnell, J., concurring) ("'Nominal damages are damages in name only, trivial sums such as six cents or $1.' Dan B. Dobbs, *Dobbs Law of Remedies* § 3.3[2], at 294 [2d ed.1993].").

We also agree that the district court's statements as to how it determined the amount of nominal damages show that it made this award to compensate Drouhard for her losses. The district court based the amount on Drouhard's damages for the City's "use" and "invitation" of third parties to use the Water Salesman. Such damages are not nominal, but compensatory or actual, as the City argues. Because Drouhard proved actual damages, she is not entitled to nominal damages in the amount awarded. We thus reverse the award of nominal damages for the City's trespass.

V. THE DISTRICT COURT DID NOT ERR BY GRANTING ACTUAL DAMAGES FOR THE CITY'S CONVERSION.

The City next challenges the court's actual and nominal damages awards for the City's conversion, attacking the sufficiency and accuracy of Drouhard's testimony on the fair market value of her car.

Standard of Review & Basic Legal Principles

"Conversion is the 'unauthorized assumption or exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the other's rights.' Damages are ordinarily the property's value when converted plus interest. [Citations omitted.]" *Armstrong*, 305 Kan. at 22.

"The purpose of awarding damages to an injured party is to make that party whole by restoring the party to his or her position before the injury." *Evenson v. Lilley*, 295 Kan. 43, 46, 282 P.3d 610 (2012). Generally, courts have measured damages for conversion by using the "'before-and-after rule.'" 295 Kan. at 47. "Under Kansas law, the general rule is that the measure of damages based upon a claim for conversion is the fair and reasonable market value of the property converted at the time of the conversion. *Mohr v. State Bank of Stanley*, 241 Kan. 42, 55, 734 P.2d 1071 (1987)." *Millennium Fin. Services, LLC v. Thole*, 31 Kan. App. 2d 798, 809, 74 P.3d 57 (2003).

Appellate courts apply a de novo review of the district court's legal conclusion, but we review underlying factual findings not based on stipulations or documentary evidence for substantial competent evidence. See *Evenson*, 295 Kan. at 46. "When examining whether the evidence is insufficient to support a claim of damages because it is too conjectural or speculative, we examine the record in the light most favorable to the prevailing party." *Ferrell*, 302 Kan. at 107.

Evidence of Actual Damages for Conversion

The City alleges that Drouhard was unqualified to estimate the fair market value of her car, was unreasonably uninformed, and improperly calculated the car's depreciation, thus the district court acted unreasonably in accepting her proposed values.

The district court measured the damages caused by the City's conversion by using the difference between the fair market value of Drouhard's car when taken and when returned.

"The fair market value of converted or stolen property generally means that amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell but does not need to sell. See *State v. Hall*, 297 Kan. 709, 713, 304 P.3d 677 (2013) ('The fair market value of inventory is the price that a willing seller and a willing buyer would agree upon in an arm's length-transaction.')." *Ringneck Farms LLC v. Steuwe*, No. 121,879, 2020 WL 5268234, at *12 (Kan. App. 2020) (unpublished opinion).

Drouhard, as the moving party, had the burden to prove damages. *Cerretti v. Flint Hills Rural Elec. Co-op. Ass'n*, 251 Kan. 347, 362, 837 P.2d 330 (1992). She sought to meet this burden by

testifying to the value of the car. An owner may testify to the amount paid for a property. See *Ultimate Chem. Co. v. Surface Transp. Int'l, Inc.*, 232 Kan. 727, 729-30, 658 P.2d 1008 (1983); *In re Tax Appeal of Lipson*, 44 Kan. App. 2d 515, 522, 238 P.3d 757 (2010). A property owner may also testify about the fair market value of their property based on their familiarity with the property and the values in the neighborhood. See *Doug Garber Construction, Inc. v. King*, 305 Kan. 785, 789, 388 P.3d 78 (2017).

Drouhard testified extensively to the condition of her car. She owned the car, had bought it for $3,800, and she spent around $500 on replacement parts for it shortly after she bought it. Drouhard estimated that the car was worth around $4,000 when the City had it towed. But she admitted that she had not used any formal method of valuing the car and did not know how she arrived at that price. Drouhard testified that she offered to sell the car for $500 after the towing company returned it, but her offer was rejected, and she did not offer to sell it for a lower amount. She later rejected an offer of $100 for the car.

The City notes that despite having had the car for around eight years, Drouhard did not know how many miles the car had. She explained, however, that she did not drive the car for very long—just three weeks—before it started to have mechanical issues. She also could not describe the state of the interior of the car after it was returned. She chose not to look inside but she knew that the car must have been stored outside with its windows down, given its apparently diminished state. Based on this testimony, the district court adopted Drouhard's valuations of $4,000 when it was towed and $500 when it was returned and awarded the difference—$3,500—as damages.

Drouhard's testimony could have been more informed and was "less than brimming with detail." *State v. Pullins*, No. 106,527, 2012 WL 4121116, at *2 (Kan. App. 2012) (unpublished opinion). Still, Drouhard's testimony was facially reasonable and was unrebutted, and related to the appropriate measure of damages. The City towed her car although it was on her own property and stored it outside with its windows down for 2 years and 10 months before having it returned to Drouhard. Her testimony sug-

gests that her car sustained significant damage at the storage facility. Viewing the record in the light most favorable to Drouhard, we find her testimony provided a reasonable basis for computation which enabled the district court to arrive at an approximate estimate of her actual damages for the City's conversion of her car. See *Stewart v. Cunningham*, 219 Kan. 374, 381, 548 P.2d 740 (1976). No more is necessary.

VI. THE DISTRICT COURT ERRED BY AWARDING NOMINAL DAMAGES FOR CONVERSION.

The City separately challenges the district court's nominal damages award of $2.50 for 1,034 days ($2,585) for Drouhard's lost use, access, repair, and "damages that may have been sustained" to her car during storage. The City claims that the so-called "nominal damages" are consequential damages which require specific proof.

We agree. The court stated that its award was "to compensate" Drouhard for her losses despite labeling these as nominal damages. And as detailed in our discussion above of nominal damages for trespass, this amount of nominal damages is excessive and Drouhard cannot receive both actual and nominal damages for the same claim. We thus reverse the award of nominal damages for the City's conversion.

We note the City's additional argument that the district court prejudiced it by using at trial a different measure of damages than it had said it would use. But that argument targets only the court's awards of nominal damages and is thus mooted by our rulings reversing those awards.

VII. THE DISTRICT COURT PROPERLY GRANTED INJUNCTIVE RELIEF.

Lastly, the City contends that the district court committed legal error by granting a permanent injunction.

Appellate courts review the grant or denial of an injunction for an abuse of discretion. *Downtown Bar and Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012). Typically, the party asserting the injunction error has the burden to establish an abuse of discretion. *Steffes v. City of Lawrence*, 284 Kan. 380, 393, 160

P.3d 843 (2007). A court abuses its discretion if the judicial decision is based on an error of law. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022).

The City contends that the district court abused its discretion by granting an injunction without making the required findings to support its decision. See, e.g., *Empire Mfg. Co. v. Empire Candle, Inc.*, 273 Kan. 72, 86-87, 41 P.3d 798 (2002) (finding an abuse of discretion in district court's granting injunctive relief without regard to the criteria set out in *Sampel v. Balbernie*, 20 Kan. App. 2d 527, 530-31, 889 P.2d 804 [1995]). In general, to obtain injunctive relief, the movant must prove four elements, known as the balancing of equities test:

> """(1) [A] substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) a showing that the injunction, if issued, would not be adverse to the public interest."'" *Friess v. Quest Cherokee*, 42 Kan. App. 2d 60, 64, 209 P.3d 722 (2009).

True, the district court did not make any of these findings that are typically prerequisites for an injunction. But the City has not shown that those findings are necessary here. "Where there has been shown an ongoing or continuing violation of a landowner's rights by the construction of trespassing structures, the general rule is that legal remedies are inadequate and that injunctive relief is appropriate." *Friess*, 42 Kan. App. 2d at 65. "This principle is consistent with the general principle that legal remedies are inadequate to redress ongoing or continuing violations. See *Mid-America Pipeline Co. v. Lario Enterprises, Inc.*, 942 F.2d 1519, 1528-30 (10th Cir.1991)." *Friess*, 42 Kan. App. 2d at 65. Thus in *Friess*, the trespasser who proceeded with knowledge of its encroachment was entitled to no balancing of equities. 42 Kan. App. 2d at 67. Drouhard showed an ongoing or continuing violation of her rights by the installation of the Water Salesman and by the City's invitation for the public to use it.

In *Mid-America Pipeline Co.*, when a party trespassed by exceeding the scope of its easement, our Supreme Court found that the district court erred by using the four elements: "Since Mid-

America [the aggrieved landowner] has clearly defined rights under the easement that are recognized and protected by law, the district court should not have balanced the equities." *Mid-America Pipeline Co. v. Wietharn*, 246 Kan. 238, 251, 787 P.2d 716 (1990). There, the construction of buildings on another's easement created a continuing violation that did not cease with the completion of the construction, so an injunction was appropriate regardless of the balancing of equities test.

"In establishing this exception to the general rule requiring a balancing of equities for injunctive relief, our Supreme Court considered cases from other jurisdictions that held: '"The benefit of the doctrine of balancing the equities, or relative hardship, is reserved for the innocent defendant who proceeds without knowledge or warning that he is encroaching upon another's property rights."' 246 Kan. at 247. Where the landowner has done nothing to mislead the trespasser or has warned the trespasser that construction would violate the landowner's rights and the trespasser has actual and constructive knowledge of the terms of an express easement with clear rights, there need not be any balancing of equities before issuing a mandatory injunction. See 246 Kan. at 248. In *Wietharn*, the court stated that to rule otherwise would render the terms of the easement 'meaningless and Mid-America's rights thereunder illusory.' 246 Kan. at 250-51." *Friess*, 42 Kan. App. 2d at 66-67.

The City's installation of the Water Salesman on Drouhard's property falls within this rule. Drouhard, the landowner, did not mislead the City but warned it repeatedly that the Water Salesman exceeded the scope of the City's easement. The City had actual knowledge of the terms of the express easement agreement, thus the district court did not abuse its discretion by not balancing the equities before issuing an injunction.

The district court's award of actual damages made Drouhard whole for her previous losses, and its issuance of a permanent injunction prevented future trespass by persons seeking to use the Water Salesman. We find no abuse of discretion in its issuance of an injunction.

We affirm the district court's rulings except for its awards of nominal damages, which we reverse.

Affirmed in part and reversed in part.

(551 P.3d 127)

No. 124,904

In the Matter of the Marriage of NANCY KARANJA-MEEK, *Appellee,* and AARON MARSHALL MEEK, *Appellant*.

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Preserving Claim for Appeal Requires Objection or Motion to Alter or Amend Judgment under K.S.A. 60-252 and Rule 165*. Under K.S.A. 2023 Supp. 60-252 and Supreme Court Rule 165 (2024 Kan. S. Ct. R. at 232), a party seeking to preserve a claim for appeal that a district court's judgment lacks sufficient factual findings or conclusions of law must object to such or move to alter or amend the judgment based on such inadequacy. However, when a district court sufficiently states its factual findings and conclusions of law, a party need not file a motion under K.S.A. 2023 Supp. 60-252 to preserve a claim that the trial court erroneously applied the stated legal theory to the specifically stated factual findings.

2. DIVORCE—*Determination of Marital Property—Appellate Review*. In an action for divorce, annulment, or separate maintenance, the district court's determination about which property is defined as marital property pursuant to K.S.A. 23-2801(a) is a question of law subject to de novo review.

3. SAME—*Division of Property—Broad Discretion of District Court to Make Equitable Division unless Other Agreement—Appellate Review*. In actions for divorce, annulment, and separate maintenance when the parties' property is not subject to division under some other agreement, the district court has broad discretion to equitably divide all property owned by married persons pursuant to K.S.A. 23-2802(c). This court reviews the district court's division of property pursuant to K.S.A. 23-2802 for an abuse of discretion.

4. SAME—*Division of Property—All Property Becomes Marital Property under K.S.A. 23-2801(a) Once Action Is Commenced–Exception*. In Kansas when the parties' property is not subject to division under some other agreement, upon commencement of divorce, annulment, or separate maintenance actions all property owned by married persons—whether maintained or defined as separate property under K.S.A. 23-2601 or not—becomes marital property pursuant to K.S.A. 23-2801(a).

5. SAME—*Marital Property Includes Personal Injury Awards or Settlements under K.S.A. 23-2801(a).* When no other agreement dictates otherwise, personal injury awards or settlements received during marriage are marital property under K.S.A. 23-2801(a).

Appeal from Johnson District Court; K. CHRISTOPHER JAYARAM, judge. Oral argument held September 20, 2023. Opinion filed May 31, 2024. Reversed and remanded with directions.

Joseph W. Booth, of Lenexa, for appellant.

Jonathan Sternberg, of Jonathan Sternberg, Attorney, P.C., of Kansas City, Missouri, for appellee.

Before ATCHESON, P.J., ISHERWOOD and HURST, JJ.

HURST, J.: Nancy Karanja-Meek and Aaron Marshall Meek were married for about eight years before Nancy filed for divorce. After resolving many issues in their divorce proceeding, Nancy and Aaron went to trial to seeking resolution of the division of their property, including two large personal injury awards with future payments. At the core of this appeal is how the district court categorized and divided those personal injury awards. Aaron claims that the district court erred by identifying Nancy's personal injury award as her separate property not subject to equitable division in their divorce. Nancy disagrees, arguing that the district court properly identified both of their personal injury awards as separate property not subject to equitable division.

Neither party's arguments are availing. The district court erroneously characterized both personal injury awards—not just Nancy's—as separate property. That means the district court should have included both Aaron's and Nancy's personal injury awards as marital property under K.S.A. 23-2801 subject to equitable division pursuant to K.S.A. 23-2802. While the district court erroneously classified the personal injury awards as separate property, such misclassification might not affect the district court's equitable property division. However, because the district court erred in classifying the property subject to division, this case must be remanded for consideration of whether the court's equitable property division must be adjusted when both personal injury awards are included as marital property under K.S.A. 23-2801(a).

FACTUAL AND PROCEDURAL BACKGROUND

Nancy Karanja-Meek and Aaron Marshall Meek were married in November 2009. In February 2013, while still married, Aaron suffered serious, catastrophic injuries in an explosion in Kansas

City, Missouri. Later that year, Aaron brought two personal injury claims against several defendants alleging negligence and strict liability. Nancy also brought a claim against the same defendants for loss of consortium.

On July 13, 2015, Aaron and Nancy settled their personal injury claims for a substantial sum through a confidential settlement agreement. Aaron and Nancy were each awarded large lump-sum payments with the remaining amount placed in annuities with monthly and periodic payments for the remainder of their lives with guaranteed payments until 2045.

In December 2017 Nancy filed for divorce. At the time of filing, they had two children and Nancy was pregnant with their third. Among other things, Nancy and Aaron disagreed about how the future annuity payments from their personal injury award settlements should be divided. Nancy and Aaron failed to settle their divorce through mediation, and in January 2021 the district court appointed a special master because the district court believed their property division presented complex issues.

At a pretrial conference in August 2021, the parties agreed that the special master's report would be submitted to the court for review. The court's pretrial order documented the parties' positions related to division of the personal injury award annuities. Nancy argued that at the time of settlement she and Aaron agreed that the annuities were awarded individually and would not be subject to division. Even so, she agreed that the monthly income from the separate annuities to each party should be treated as income for calculating support and maintenance. Aaron disagreed and claimed that Nancy had received a substantial amount for her consortium claim and "that the gross inequity in the settlement payout should be taken into account in this divorce proceeding." Therefore, Aaron claimed the court should order all, or the vast majority, of Nancy's future annuity payments to him.

The special master distributed their report shortly after the August pretrial conference in which they explained that the analytical approach should be used to divide the property and "wife's loss of consortium settlement would be compensating her for her loss of companionship, cooperation, aid, affection and sexual relations, as well as compensating her for her pain and suffering,

and as such, would be designated as her separate property." The special master's report explained:

> "Black's Law dictionary defines loss of consortium as '[a] loss of the benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations. Black's Law dictionary (8th ed. 2004). This type of claim refers to the pain-and-suffering experienced by a spouse as a result of an injury to that spouse's partner. Brett indicates that, 'if the uninjured spouse receives an award for loss of consortium, however, that award it is also compensation for pain-and-suffering, and thus the separate property of the uninjured spouse.' Brett R. Turner, Equitable Distribution of Property §6:54 (3rd ed. 2005).
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> . . . .
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> "The Court of Appeals' decisions in *Powell*, *Buetow*, and *Lash*, clearly indicate that in Kansas, when an injured spouse receives a personal injury award, it is marital property, subject to division, utilizing the *analytic approach*. Such approach requires an examination of each separate component of the settlement recovery, to determine the purpose of each component, to determine if each said component is marital property or separate property." (Emphasis added.)

The special master conceded it had "no way of knowing how the parties and their attorney arrived at how the settlement proceeds were going to be assigned to each party . . . ."

Divorce Trial

Aaron and Nancy resolved child custody and support issues before trial. As part of the trial and settlement efforts both parties prepared documents identifying the marital property. Nancy did not include her annuity as marital property in her worksheet. At trial, Nancy confirmed she and Aaron both received a monthly annuity payment from their personal injury awards in addition to any regular income and that Aaron's annual income was $67,344 less than her annual income. As such, Nancy agreed to pay a spousal maintenance obligation to Aaron calculated using her annuity income.

Nancy testified that the annuities arose through litigation where Aaron suffered a personal injury and she suffered a continuing loss of consortium. She stated, "I lost the man I loved. I lost Aaron, the Aaron that was there before he got injured." Aaron testified that in the divorce he was "requesting that things be clarified and that monies that were paid out for my life and wellbeing and loss of work be redirected my direction." Aaron was troubled that

his wife had been given an approximately equal personal injury award even though he was severely physically injured and she was not. Aaron testified that Nancy "was supposed to be my caretaker and make sure they're looking out for my best interest." He later testified that at the time of the settlement that he "was still getting over [his] injury and [he] was still highly medicated, and Nancy was making the decisions." Aaron also confirmed that he was alleging he was forced or coerced into the settlement agreement because he felt he did not have control of anything at the time.

Ultimately Aaron's and Nancy's personal injury settlements and the conditions for which they received payment are irrelevant to this court's review.

District Court's Journal Entry and Decree of Divorce

The district court issued its Journal Entry and Decree of Divorce on January 3, 2022. It granted Aaron spousal maintenance at the parties' agreed rate and noted that the parties included the annuity payments as "'income'" when arriving at the agreed amount. The court explained that "in a vacuum, the structured payments to each party are likely more properly characterized as a 'property right' and not 'income' for support or taxation purposes," but still granted Aaron the agreed upon maintenance.

The district court then concluded that it should apply the analytical approach used by Kansas appellate courts to classify the parties' personal injury awards and associated annuities as either marital or separate property. It then found that the annuities were "'separate property' that should be maintained by and set aside to each litigant respectively."

"The Court notes that the parties previously agreed, years ago, upon a division of the total settlement compensation from their personal-injury litigation, which was done with the advice, input, and oversight of a very capable and skilled trial counsel. At that time, the parties agreed that all proceeds (including the funds that purchased the annuities at issue) were compensation for what are essentially 'non-economic' (and thus, non-taxable) losses that each sustained. It would be inherently unfair to now relitigate the nature of such payments and re-cast the resulting annuity as something else, such as an income-stream replacement or any other similar measure of apportionable losses of 'consortium,' as Respondent would request."

In a footnote, the district court rejected Aaron's contention that he was coerced, misled, or fraudulently induced into executing the settlement agreement. The court found Aaron's testimony "self serving and, at best, a dubious attempt to now relitigate the nature and extent of such settlement proceeds—in contravention of basic legal principles of res judicata and of fundamental interests of finality, justice, and certainty."

Aaron appeals and Nancy requests appellate attorney fees.

DISCUSSION

Aaron appeals the district court's determination that Nancy's personal injury award was "separate property" not subject to equitable division in their divorce proceeding. Specifically, Aaron asserts that the district court failed to correctly apply the analytical approach and the district court erred in finding res judicata applied. Courts across the country have commonly applied two approaches—the mechanical or analytical—to determine whether personal injury awards obtained during marriage are considered marital property. See, e.g., *In re Marriage of Buetow*, 27 Kan. App. 2d 610, 611, 3 P.3d 101 (2000) (explaining the two approaches and applying the analytical approach); see also *Parde v. Parde*, 258 Neb. 101, 108-09, 602 N.W.2d 657 (1999) (explaining the two approaches). Under the mechanical approach, personal injury awards are per se classified as marital property consistent with the relevant statutory language. See *Drake v. Drake*, 555 Pa. 481, 497, 725 A.2d 717 (1999) (applying the mechanical approach). But under the analytical approach—as explained more fully below—the court determines whether a personal injury award is marital or separate property by evaluating the nature and underlying reason for the award. See, e.g., *In re Marriage of Buetow*, 27 Kan. App. 2d at 611-12.

Before reviewing the substantive issues, this court must address Nancy's contention that Aaron's claim of error is unpreserved.

I. AARON'S CLAIMS ARE PRESERVED FOR APPEAL

Nancy asserts that Aaron failed to preserve his argument that the trial court erroneously applied the law because he either failed

to object to the district court's decision or failed to move to alter or amend the district court's judgment. Whether Aaron's claim is preserved is a question of law over which this court exercises unlimited review. *Johnson v. Board of Directors of Forest Lakes Master Assn.*, 61 Kan. App. 2d 386, 393, 503 P.3d 1038 (2021).

First, Nancy argues that Aaron's claim on appeal was not raised before the district court and is thus unpreserved. See *Gannon v. State*, 303 Kan. 682, 733, 368 P.3d 1024 (2016) (noting that generally matters not raised before the district court cannot be raised for the first time on appeal). Aaron correctly notes that the district court addressed whether and how to apply the analytical approach to distribute the parties' personal injury awards. The parties raised the issue of how to categorize the annuities—as marital or separate property—in their property spreadsheets. The pretrial order also identified the division of the annuities as "[t]he main issues in this trial." The special master's report, which was provided to the court and included as an exhibit at trial, encouraged the court to use the analytical approach. At trial, Aaron argued Nancy's annuity should be considered marital property, although he did not specifically argue for use of the analytical approach. However, the district court addressed the issue and applied the analytical approach to the facts in its Journal Entry and Decree of Divorce. "[R]ule 6.02 does not require an appellant to be the party who raised an issue below in order to claim error on appeal." *Russell v. Treanor Investments, L.L.C.*, 311 Kan. 675, 682, 466 P.3d 481 (2020) (finding appellant did not raise legal issue for the first time on appeal because the district court initiated the question sua sponte). Clearly, the parties and court addressed how to categorize the personal injury awards, including use of the analytical approach, and it is not being argued for the first time on appeal.

Second, Nancy argues that Aaron needed to file a postjudgment motion under K.S.A. 2023 Supp. 60-252 to preserve his claim that the district court erroneously applied the analytical approach. When an action is tried to the court and not a jury, the district court's judgment must include specific findings of fact and conclusions of law. K.S.A. 2023 Supp. 60-252(a)(1); Kansas Supreme Court Rule 165 (2024 Kan. S. Ct. R. at 232). The district court must "find the facts specially and state its conclusions of law

separately. The *findings* and conclusions may be stated on the record after the close of evidence, or may appear in an opinion or a memorandum of decision filed by the court." (Emphasis added.) K.S.A. 2023 Supp. 60-252(a)(1). "This requirement is in part for the benefit of the appellate courts in facilitating review," because meaningful review is precluded "[w]here the trial court's findings of fact and conclusions of law are inadequate to disclose the controlling facts or the basis of the court's findings . . . ." *Tucker v. Hugoton Energy Corp.*, 253 Kan. 373, 378, 855 P.2d 929 (1993).

In *In re Marriage of Bradley*, the court addressed this issue and explained:

"In all actions under K.S.A. 60-252 and Rule 165, when the trial court has made findings, it is not necessary to object to such findings to question the sufficiency of the evidence on appeal. However, if the findings are objectionable on grounds other than sufficiency of the evidence, an objection at the trial court level is required to preserve the issue for appeal. If, however, the appellate court is precluded from extending meaningful appellate review, the case may be remanded although no objection was made in the trial court." *In re Marriage of Bradley*, 258 Kan. 39, 50, 899 P.2d 471 (1995).

The *Bradley* court explained that appellate challenges "that pertain to the form and specificity of the oral or written *findings*" are not preserved when the appellant fails to make a postjudgment objection to such inadequacy. (Emphasis added.) 258 Kan. at 48.

Nancy misinterprets the court's statement in *Bradley* to mean that "challenges to the legal reasoning or methodology in a trial court's divorce judgment are not preserved where the appellant did not file a postjudgment motion raising his objections" because such challenges are "on grounds other than sufficiency of the evidence." On the contrary, in *Bradley* the court refers to the district court's *findings*—which in the context of applying K.S.A. 2023 Supp. 60-252 means *factual findings*—not legal analysis. 258 Kan. at 47-48 (explaining the rules requiring more specific findings).

Following *Bradley*, panels of this court have held that a party seeking to preserve an argument for appeal that the district court's judgment is based on insufficient or inadequate factual findings or conclusions of law must object to the inadequacy or move to alter or amend the judgment. See *In re Marriage of Poggi*, No. 121,012,

2020 WL 5268841, at *3-4 (Kan. App. 2020) (unpublished opinion) (appellant challenged adequacy of trial court's findings, where he argued the court did not make the required written findings for the appellate court to review whether it used appropriate factors); *In re Marriage of Rodrock*, No. 115,078, 2017 WL 2494704, at *4-5 (Kan. App. 2017) (unpublished opinion) (appellant did not preserve issue for appeal when trial court failed to account for significant marital debt and there were no factual findings related to the debt in trial court's judgment); *In re Marriage of Friars*, No. 113,512, 2016 WL 2609622, at *4 (Kan. App. 2016) (unpublished opinion) (appellant argued trial court failed to make sufficient findings of fact and conclusions of law but failed to move for additional findings before appeal).

Aaron does not claim the district court's Journal Entry and Decree of Divorce lacks factual findings or legal conclusions. Rather, he asserts that the district court improperly applied the stated law to the stated facts. An appellant need not file a motion under K.S.A. 2023 Supp. 60-252(b) to preserve a claim that the district court erroneously applied the law to sufficiently stated factual findings and legal conclusions. Unlike the cases Nancy relied on, here the parties argued to the district court regarding the specific distribution of those assets; the district court had all the information necessary to make its judgment; and the district court fully described the factual findings, legal reasoning, and conclusion in its order. Thus, Aaron's claims are preserved for appellate review.

Moreover, this court has prudential authority to review unpreserved claims which involve only a question of law that arise from proven facts. See *State v. Great Plains of Kiowa County, Inc.*, 308 Kan. 950, 953-54, 425 P.3d 290 (2018) ("The rule that an issue must be submitted to the district court or to the Court of Appeals before we may consider it is prudential in character."). As explained above, Aaron's claims were thoroughly presented to and addressed by the district court in its Journal Entry and Decree of Divorce. Thus, nothing prevents appellate review of the issue. See 308 Kan. at 953-54 ("This court will exercise its discretion to address such an argument when failure to acknowledge the argument would tend to create bad precedent or mislead parties attempting to navigate the complexities of legal rights and duties.").

II. THE DISTRICT COURT ERRED BY NOT INCLUDING AARON'S AND NANCY'S PERSONAL INJURY SETTLEMENTS AS MARITAL PROPERTY

In Kansas, property division in divorce proceedings is governed by statute. In an action for divorce, annulment, or separate maintenance the district court must first identify the property subject to division, and then it has broad discretion to equitably divide that property. See K.S.A. 23-2801; K.S.A. 23-2802. The district court's identification of marital property subject to division in a divorce, annulment, or separate maintenance proceeding is a question of law subject to unlimited appellate review. See *In re Marriage of Monslow*, 259 Kan. 412, 414, 420-21, 912 P.2d 735 (1996); see also *In re T.S.*, 308 Kan. 306, 309, 419 P.3d 1159 (2018) (appellate courts exercise unlimited review of statutory interpretation).

This court exercises unlimited review over statutory interpretation. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). When interpreting statutes, the most fundamental rule "is that the intent of the legislature governs if that intent can be ascertained." *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 557, 276 P.3d 188 (2012). Statutory interpretation begins with the "plain language of the statute, giving common words their ordinary meaning," and when that plain language is clear and unambiguous this court "refrain[s] from reading something into the statute that is not readily found in its words." *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021). This court also considers the statutory provisions together to "give effect, if possible, to the entire act" and read the provisions "so as to make them consistent, harmonious, and sensible." *State v. Bee*, 288 Kan. 733, Syl. ¶ 4, 207 P.3d 244 (2009).

During a Divorce Proceeding, Kansas Defines All Property Owned by the Married Parties as Marital Property

In Kansas, during the marriage a married person's "separate property" is not subject to disposal by the other spouse and generally may not be used to satisfy the other spouse's debts. K.S.A. 23-2601. Separate property is defined as:

"The property, real and personal, which any person in this state may own at the time of the person's marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to a person by descent, devise or bequest, and the rents, issues, profits or proceeds thereof, or by gift from any person . . . ." K.S.A. 23-2601.

A married person's "separate property" "shall remain the person's sole and separate property, notwithstanding the marriage, and not be subject to the disposal of the person's spouse or liable for the spouse's debts . . . ." K.S.A. 23-2601.

However, upon the commencement of a divorce, annulment, or separate maintenance action, all property owned by either spouse—including "separate property" defined in K.S.A. 23-2601—becomes marital property. K.S.A. 23-2801(a).

"All property owned by married persons . . . *whether described in K.S.A. 23-2601*, and amendments thereto, or acquired by either spouse after marriage, and whether held individually or by the spouses in some form of co-ownership, such as a joint tenancy or tenancy in common, shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment." (Emphasis added.) K.S.A. 23-2801(a).

This means that the protections keeping "separate property" safe from disposal by the other spouse only apply before commencement of a divorce, annulment, or separate maintenance action. See K.S.A. 23-2801; K.S.A. 23-2601. Moreover, upon the commencement of such actions, each spouse obtains an ownership interest in the entire pot of marital property. K.S.A. 23-2801(b). "Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 23-2802 . . . ." K.S.A. 23-2801(b).

The clear, unambiguous statutory language provides that upon commencement of divorce proceedings, marital property includes any separate property in K.S.A. 23-2601. K.S.A. 23-2801(a); see also *Cady v. Cady*, 224 Kan. 339, 344-45, 581 P.2d 358 (1978) (explaining marital property during divorce). Decades ago, the court in *Cady* explained:

"The filing for divorce, however, has a substantial effect upon the property rights of the spouses. At that moment each spouse becomes the owner of a vested, but undetermined, interest in all the property individually or jointly held. The court

is obligated to divide the property in a just and equitable manner, regardless of the title or origin of the property." 224 Kan. at 344.

Furthermore, in Kansas all property owned by married persons is subject to equitable division during a divorce. In a dissolution of marriage, the court "shall divide the real and personal property of the parties, including any retirement and pension plans, whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts." K.S.A. 23-2802(a).

The Kansas Law and Practice treatise describes property division in divorce proceedings as follows:

"Kansas as a common law jurisdiction follows equitable distribution rather than community property principles. In community property states and some common law states with marital property concepts, property acquired before marriage and that acquired by gift, bequest or devise after marriage are classed as separate property not subject to division by the court. All property acquired after the marriage is presumed to be 'marital' property which the spouses co-own and is subject to division. Therefore, tracing ownership is crucial in community property states but commingling of premarital and marital assets over time may make 'origin' or contribution difficult to ascertain.

"Since 1963, Kansas has been a 'total divisibility' state which means that the trial judge can divide all of the real property and personal property owned at the time of filing in a just and reasonable manner regardless of its source or the manner of its acquisition. When dividing the property, the court is not obligated to award each party the property owned by the party prior to the marriage or received by gift or inheritance during the course of the marriage.

"In an equitable distribution state, inability to trace the exact origins will not be as important as in a community property state. The Kansas court can divide property owned by either spouse in his or her own right before or after marriage as well as property acquired by joint efforts—not just the net increase in the parties' assets during the marriage." 2 Elrod, Kansas Law and Practice: Kansas Family Law § 10:1 (2022-2023 ed.).

"In Kansas, separate property is recognized prior to filing for divorce, annulment or separate maintenance. Once a petition is filed, all property becomes 'marital' and subject to equitable division by the trial judge." 2 Elrod, Kansas Law and Practice: Kansas Family Law § 10:1.

The Analytical Approach Cannot Be Used to Identify Marital Property in Kansas

Despite a clear statutory requirement that upon commencement of a divorce, annulment, or separate maintenance action all property

owned by the married parties is defined as marital property—the district court applied the analytical approach to find that both personal injury awards were separate property not subject to equitable division in the divorce. Aaron claims that under the analytical approach, the district court should have identified Nancy's personal injury award as marital property and reapportioned all or most of the future annuity payments to him. Aaron correctly notes that panels of this court have applied the analytical approach to determine whether personal injury awards during marriage are marital property during divorce. See *In re Marriage of Smith*, No. 109,901, 2014 WL 3907092, at *2-3 (Kan. App. 2014) (unpublished opinion) (discussing the analytical approach in determining whether a FELA award is marital or separate property); *In re Marriage of Buetow*, 27 Kan. App. 2d at 611 (explaining the two approaches and applying the analytical approach); *In re Marriage of Powell*, 13 Kan. App. 2d 174, 180, 766 P.2d 827 (1988) (finding personal injury settlement marital property by analyzing the nature of the underlying loss).

Under the analytical approach, the purpose of the personal injury award dictates whether the court identifies the award as marital or separate property. Applying the analytical approach, the personal injury award is classified as marital or separate property depending "'upon the nature of the underlying loss.'" *In re Marriage of Buetow*, 27 Kan. App. 2d at 611-12. The court looks to the nature and circumstances of the personal injury award and determines whether the payment is for a particular spouse, both spouses, or the family. 27 Kan. App. 2d at 611-12; see also *Parde*, 258 Neb. at 108-09 (explaining the two approaches).

In *In re Marriage of Buetow*, the panel was persuaded by Colorado and Nebraska's reliance on the analytical approach to determine whether a personal injury award should be separate or marital property. 27 Kan. App. 2d at 612-13. The panel explained that Colorado had found workers compensation benefits were marital property when they compensated for lost earnings and medical expenses incurred during marriage but were separate property when they compensated for post dissolution loss of earning capacity even if the injury occurred during the marriage. 27 Kan. App. 2d at 612 (analyzing *In re Marriage of Smith*, 817 P.2d 641, 644 [Colo. App. 1991], which adopted the analytical approach). But

the applicable Colorado statutes differ from Kansas in how courts must dispose of property upon dissolution of marriage. In Colorado, the court "shall set apart to each spouse his or her property and shall divide the marital property . . . in such proportions as the court deems just after considering all relevant factors . . . ." Colo. Rev. Stat. § 14-10-113(1); see also Colo. Rev. Stat. § 14-10-113(2) (stating nonmarital property includes gifts, bequests, devises or descents, property acquired before marriage, and property acquired in exchange for property acquired before marriage).

Similarly, in Nebraska, "the marital estate should include only property created by the marital partnership." *Parde*, 258 Neb. at 108. In Nebraska they "classify as a threshold matter the parties' property as either marital or nonmarital" which is known as "dual classification." *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582, 592 (2017); see also *Parde*, 258 Neb. at 108-09. In *Parde*, the Nebraska court explained:

> "Compensation for purely personal losses is not in any sense a product of marital efforts. We, therefore, hold that compensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate. On the other hand, compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate as they properly replace losses of property created by the marital partnership." *Parde*, 258 Neb. at 109-10.

The Nebraska Supreme Court explained that reliance on the analytical approach is "more consistent with the basic rule that the marital estate should include only property created by the marital partnership." 258 Neb. at 108. The Colorado and Nebraska approaches to property division in divorce proceedings are antithetical to the Kansas procedure. The Kansas Legislature clearly intends that upon commencement of divorce, annulment, or separate maintenance proceedings, all property—whether separate or not—becomes "marital property" subject to the court's equitable property division. See K.S.A. 23-2801.

Other states applying the analytical approach to determine whether personal injury awards are defined as marital or separate property have distinct statutory schemes from Kansas. See *Rizzo v. Rizzo*, 120 A.D.3d 1400, 1402, 993 N.Y.S.2d 104 (2014) (citing N.Y. Domestic Relations Law § 236.B.1.c., d.[2]) (noting that personal

injury settlements typically constitute at least partially separate property, but the purchase of the annuity with right of survivorship converted personal property to marital property where under the applicable statute, "[m]arital property shall not include separate property" and "[t]he term separate property shall mean: . . . compensation for personal injuries"). In Alabama the parties in divorce actions may retain separate property estates and the court generally "may not take into consideration any property acquired prior to the marriage of the parties *or by inheritance or gift* unless" the judge finds the property has been used to benefit the parties during marriage. (Emphasis added.) Ala. Code § 30-2-51(a); see also *Kaufman v. Kaufman*, 934 So.2d 1073, 1080 (Ala. Civ. App. 2005); *Smith v. Smith*, 959 So.2d 1146, 1148-49 (Ala. Civ. App. 2006). Mississippi appellate courts also adopted the analytical approach, where the court's property division in divorce proceedings requires that "[f]irst, the character of the parties' assets, i.e., marital or nonmarital, must be determined" and "[t]he marital property is then equitably divided, . . . in light of each part[y's] nonmarital property." *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994); see also *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss. 1994) (applying the analytical approach to identifying marital property).

States with statutory schemes like Kansas apply the mechanical approach which essentially means they follow the statutory definitions that require personal injury awards be classified as marital property regardless of their purpose. See *Drake*, 555 Pa. at 491 n.6, 497 (applying the mechanical approach to find a personal injury award is marital property when the applicable statute states that "[a]ll . . . property acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by the parties . . . ." 23 Pa. Stat. § 3501[b]). Additionally, in New Hampshire the appellate court applied the mechanical approach noting that its statutory scheme is not like dual classification jurisdictions. *In re Preston*, 147 N.H. 48, 49-50, 780 A.2d 1285 (2001). New Hampshire defines property subject to division in divorce as "all tangible and intangible property and assets, real or personal, belonging to either or both parties, whether title to the property is held in the name of either or both parties." N.H. Rev. Stat. Ann. § 458:16-a(I). These states applying

the mechanical approach have statutory provisions similar to Kansas in which all property, no matter how owned or held, becomes marital property during a divorce action.

Unlike states that employ the analytical approach to identify marital or separate property in divorce actions, Kansas does not have a dual classification statutory scheme. During a divorce action in Kansas, all property owned by married persons is combined into one pot of *marital property*. See K.S.A. 23-2801 (in a divorce action, marital property includes property identified as separate property in K.S.A. 23-2601); K.S.A. 23-2802 (describing how the district court must divide property in a divorce proceeding); see also *Cady*, 224 Kan. at 344-45 (explaining that all property is marital property during divorce proceedings). Rather than considering the origin, purpose, or use of the personal injury awards and annuities to determine whether they are marital property, Kansas law requires the district court to define the personal injury awards and associated annuities as marital property subject to equitable division. As Nancy notes, this applies to both annuities—not just hers—and both Aaron's and Nancy's personal injury awards and annuities are marital property under K.S.A. 23-2801.

This outcome is consistent with precedent, follows the clear statutory language, and adheres to the Legislature's intent, but it may differ from how courts have addressed personal injury awards in practice. See *In re Marriage of Smith*, 2014 WL 3907092, at *2-3 (discussing the analytical approach in determining whether a FELA award is marital or separate property); *In re Marriage of Buetow*, 27 Kan. App. 2d at 611-12; *In re Marriage of Powell*, 13 Kan. App. 2d at 180. However, this difference may have little effect on the district court's ultimate property division because many of the concepts underlying the analytical approach are included when dividing the marital property pursuant to K.S.A. 23-2802(c). Here, the district court applied an amorphous standard to identify the marital property that was inconsistent with the clear statutory obligations. On remand, after applying the correct statutory criteria, the district court might reach the same property division—but this court cannot assume such an outcome. Nor can this court impose its view of how the marital property should be divided and

find the error harmless because doing so would usurp the district court's authority to divide marital property.

This Court Cannot Address Whether the District Court Abused Its Discretion in Its Property Division

After the court identifies marital property under K.S.A. 23-2801, it must then determine how to equitably divide that property. Such division can be in kind, by awarding property to one party and requiring the other to pay a just and proper sum, or by ordering the property sold and the parties to divide the proceeds. K.S.A. 23-2802(a). After appropriately identifying the marital property "in conformity with the statute, the district court has wide discretion in adjusting the financial obligations of the parties in a divorce action." *In re Marriage of Monslow*, 259 Kan. at 414. In deciding how best to divide the marital property, the district court shall consider:

"(1) The age of the parties; (2) the duration of the marriage; (3) the property owned by the parties; (4) their present and future earning capacities; (5) *the time, source and manner of acquisition of property*; (6) family ties and obligations; (7) the allowance of maintenance or lack thereof; (8) dissipation of assets; (9) the tax consequences of the property division upon the respective economic circumstances of the parties; and (10) such other factors as the court considers necessary to *make a just and reasonable division of property*." (Emphases added.) K.S.A. 23-2802(c).

The district court has wide discretion to make a "just and reasonable division of property." *In re Marriage of Rodriguez*, 266 Kan. 347, Syl. ¶ 1, 969 P.2d 880 (1998); see K.S.A. 23-2802(c)(10); see also *In re Marriage of Traster*, 301 Kan. 88, 97-98, 339 P.3d 778 (2014) (The "statute includes a list of factors the district court should review and further allows consideration of 'such other factors as the court considers necessary to make a just and reasonable division of property'").

As Professor Linda D. Elrod explained:

"The concept of 'marital' property gives a spouse a vested interest in the other spouse's property from the time of filing for divorce, annulment or separate maintenance. The extent of that interest is determined by the court. As a practical matter, however, to divide the property 'equitably' will require a determination of how and when property was acquired, and sometimes marital/community

property principles are often found to be equitable." 2 Elrod, Kansas Law and Practice: Kansas Family Law § 10:1.

Kansas is an "equitable division state rather than a community property state" that does not require an equal split of marital property but rather "'gives the court discretion to consider all of the property, regardless of when acquired, to arrive at a just and reasonable division.'" *In re Marriage of Rodriguez*, 266 Kan. at 352-53.

On appeal, this court reviews the district court's equitable division of property for an abuse of discretion, which occurs when the decision "is based on a legal or factual error or if no reasonable person would agree with the court's decision." *In re Marriage of Thrailkill*, 57 Kan. App. 2d 244, 261, 452 P.3d 392 (2019). Here, this court cannot review the district court's property division because it erroneously categorized the parties' annuities as "'separate property' that should be maintained by and set aside to each litigant respectively." Therefore, the district court made an error of law in identifying the marital property subject to division which must be corrected before evaluating its property division under K.S.A. 23-2802. However, requiring the district court to reclassify the parties' personal injury awards does not necessarily require the district court to change its equitable property division.

Aaron asked the district court to "re-apportion a significant percentage of [Nancy's] future payments from the annuity issued to her as an equitable division of their property." The district court noted that Aaron was already receiving increased maintenance based on including Nancy's annuity as her income. Thus "it would be similarly unfair, unjust, and inequitable to permit [Aaron] to benefit from a significant award of spousal maintenance that was calculated based upon monthly payments from the annuity (as 'income') while at the same time reapportioning the amounts of those payments and redirecting that same 'income' stream back to [Aaron]." The court explained that awarding Aaron the annuity proceeds and maintenance calculated from including the annuity payments in Nancy's income "would, indeed, result in a 'double-dipping' windfall" to Aaron.

While this court cannot review the district court's property division, it appears the court considered all the property—marital

and separate—in making its division. Therefore, recategorizing Nancy's and Aaron's annuities as marital property rather than separate property does not necessarily require any change in the result of the court's equity analysis. However, that remains the purview of the district court. See *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002) ("[T]he district court is vested with broad discretion in adjusting the property rights of parties involved in divorce actions" and "that discretion will not be disturbed on appeal absent a clear showing of abuse.").

III. THE DISTRICT COURT'S STATEMENTS DO NOT CREATE AN ERROR

Finally, Aaron argues that the district court erred in finding he was "'relitigating'" the settlement and that res judicata applied. The court's comment on this issue was included in a footnote to the Journal Entry and Decree of Divorce and stated:

> "The Court also rejects [Aaron]'s contention that he was in any way coerced into the agreement at that time; nor does the Court believe that he was misled or fraudulently induced into executing the agreement—as he indicated at trial. The Court finds such testimony self serving and, at best, a dubious attempt to now relitigate the nature and extent of such settlement proceeds—in contravention of basic legal principles of res judicata and of fundamental interests of finality, justice, and certainty."

The court's comment about res judicata was unrelated to its analysis addressed herein, but was a rebuke of Aaron's tactics. Aaron also argues that the district court erred in chastising him for not including his own annuity as property the court should divide. The district court's comments about Aaron's tactics are unrelated to its thorough analysis and Journal Entry and Decree of Divorce and Aaron fails to show any error associated with the comments.

IV. NANCY'S MOTION FOR APPELLATE ATTORNEY FEES IS DENIED

On January 19, 2024, this court received Nancy's motion seeking appellate attorney fees, arguing such an award was warranted because Aaron's appeal was unreasonable. This court may award attorney fees if it "finds that an appeal has been taken frivolously, or only for the purpose of harassment or delay." Supreme Court

Rule 7.07(c) (2024 Kan. S. Ct. R. at 52). For the reasons discussed herein, Aaron's appeal was not frivolous and Nancy's motion for appellate attorney fees is denied.

CONCLUSION

Upon commencement of an action for divorce, annulment, or separate maintenance when no other agreement applies, Kansas courts must identify all property—including any designated as separate property before the action—as marital property subject to equitable division. As such, courts may not use the analytical approach to determine whether property is defined as marital or separate property in such actions. The district court erred in defining the parties' personal injury awards and associated annuity payments as separate property during their divorce proceedings.

This case is reversed and remanded. On remand, the district court must treat both annuities as marital property and make an equitable distribution of the marital property consistent with the considerations in K.S.A. 23-2802(c) for a just and reasonable property division.

Reversed and remanded with directions.

(551 P.3d 142)

No. 126,127

REGINA M. ROGERS, as Administratrix of the ESTATE OF CRAIG ROGERS, SR., *Appellant*, v. WELLS FARGO BANK, N.A., *Appellee.*

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SYLLABUS BY THE COURT

1 CIVIL PROCEDURE—*District Courts Are Courts of General Jurisdiction—Lawsuits May Proceed if Facts State Any Claim upon Which Relief Can Be Granted*. Kansas district courts are courts of general jurisdiction. This means, among other things, that Kansas courts presume that they may hear whatever claims a plaintiff pursues. A lawsuit filed in Kansas may proceed as long as the facts included in the petition and the reasonable inferences that can be drawn from those facts state any claim upon which relief can be granted.

2. SAME—*Notice Pleading in Kansas Initiates a Lawsuit.* To initiate a lawsuit in Kansas, a petition need only include a short and plain statement that gives the defendant fair notice of the plaintiff's claim and the ground upon which it rests. Courts commonly refer to this practice as notice pleading.

3. SAME—*Petition May Be Dismissed under K.S.A. 60-212(b)(6) –Dismissal Is the Exception Not the Rule—Federal Plausibility Standard Not Used in Kansas Courts.* K.S.A. 60-212(b)(6) allows a petition to be dismissed if it fails to state a claim upon which relief may be granted. Dismissal under K.S.A. 60-212(b)(6) is the exception, not the rule. Kansas courts do not use the plausibility standard for pleadings employed by federal courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

4. SAME—*Motion for Dismissal under K.S.A. 60-212(b)(6)—Determination by Court Whether Plaintiff Has Stated Claim.* When a defendant moves for dismissal under K.S.A. 60-212(b)(6), the district court must resolve every factual dispute in the plaintiff's favor. The court must assume all the factual allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim based on the plaintiff's theory or any other possible theory.

5. SAME—*Motion for Dismissal under K.S.A. 60-212(b)(6)—Court Considers Plaintiff's Petition and Attached Documents—Exception.* A district court faced with a motion to dismiss under K.S.A. 60-212(b)(6) ordinarily may only consider the plaintiff's petition and any documents attached to it. A rare exception arises when a plaintiff asserts a claim based on a written instrument; courts may consider an undisputedly authentic copy of that writ-

ten instrument attached to a motion to dismiss without converting the motion to a request for summary judgment. But courts will not resolve factual questions surrounding those instruments as part of a K.S.A. 60-212(b) motion. Nor will courts consider documents attached to a motion to dismiss that are not central to the plaintiff's claim or when there is a reasonable question about their applicability or authenticity.

6. SAME—*Lawsuits Filed in Kansas Governed by Kansas Law—Burden on Party to Persuade Court Other Law Applies*. Courts presume that lawsuits filed in Kansas are governed by Kansas law. The party seeking the application of a different state's law bears the burden of persuading the courts that the other law should apply.

Appeal from Butler District Court; CHAD M. CRUM, judge. Oral argument held October 17, 2023. Opinion filed June 7, 2024. Reversed and remanded with directions.

Kenneth H. Jack, of Davis & Jack, L.L.C., of Wichita, for appellant.

Michael Rudd, of Fox Rothschild, LLP, of Kansas City, Missouri, for appellee.

Before WARNER, P.J., ATCHESON, J., and MARY E. CHRISTOPHER, S.J.

WARNER, J.: Kansas law favors resolving claims on their merits. In general, this means that a plaintiff may seek redress in Kansas courts if they file a petition that includes a short and plain statement that provides notice of the plaintiff's claim and a description of the relief sought. But not all petitions present questions that require discovery or trial. Motions to dismiss under K.S.A. 60-212 allow courts to resolve claims early, before a defendant files an answer. In particular, K.S.A. 60-212(b)(6) allows a defendant to ask the court to dismiss a petition that raises no legally supportable claims.

As the circumstances of this case illustrate, relief under K.S.A. 60-212(b)(6) is the exception, not the rule. When Craig Rogers, an Andover resident, died, he had about $38,000 in his checking and savings accounts at Wells Fargo Bank. Shortly after his death, a Wells Fargo branch in California dispersed Rogers' money to a person named Bryan Greenelsh. Rogers' estate sued Wells Fargo for wrongfully dispersing those funds and requested Wells Fargo to reimburse the money. Wells Fargo moved to dismiss under K.S.A. 60-212(b)(6), asserting facts that were not in-

cluded in the Estate's petition, and presented three documents relevant to the Estate's claim. The district court granted Wells Fargo's motion and dismissed the case.

The Estate now appeals. It argues the court should not have considered matters outside its petition when evaluating a motion to dismiss under K.S.A. 60-212(b)(6). Rather, it should have allowed the Estate an opportunity to conduct discovery on Wells Fargo's assertions and to meaningfully respond to the bank's factual allegations. The Estate also argues that the district court erred when it determined that its claim was barred as a matter of law. After carefully reviewing the parties' arguments and the Estate's petition, we agree the district court erred. We thus reverse the district court's dismissal and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Rogers died in January 2022 and had been living in Andover for some time. Rogers' estate was probated in Butler County District Court, but that probate case is not part of this appeal.

In June 2022, Rogers' daughter—acting as the administrator of her father's estate—filed a lawsuit against Wells Fargo. The petition indicated that Rogers had previously held savings and checking accounts at the bank. According to the petition, someone named Bryan Greenelsh arrived at a Wells Fargo branch in March 2022, seeking to withdraw $38,260.28 from Rogers' accounts, and Wells Fargo wrongfully dispersed those funds to Greenelsh. The petition alleged that the Estate had subpoenaed Wells Fargo in the probate case, requesting documentation relating to those payments, but Wells Fargo had not complied with its request. The Estate sought repayment of the wrongfully distributed funds and other relief.

Wells Fargo moved to dismiss the Estate's petition under K.S.A. 60-212(b)(6). The bank's motion included several factual statements not contained in the petition:

- Rogers opened checking and savings accounts at Wells Fargo while he was living in Utah in 2008.

- In March 2022, Greenelsh presented a Utah Affidavit of Collection of Estate Assets to a Wells Fargo branch in California. This affidavit said that Greenelsh was entitled to the funds in Rogers' accounts and that no estate had been opened in any state. (These statements in Greenelsh's affidavit were false.)

- This affidavit caused the Wells Fargo branch in California to disperse the requested approximately $38,000 to Greenelsh.

Wells Fargo attached two documents to its motion—the Utah Affidavit Greenelsh had presented to the California branch and an account application Rogers filled out in 2008.

Citing Kansas choice-of-law principles, Wells Fargo argued that Utah law should govern this case, as the account agreement was filled out in Utah and the original bank account was opened there. The bank claimed that it would not be liable to the Estate under Utah law, as Utah imposed no obligation on persons receiving affidavits such as the one Greenelsh provided to ascertain the truth of that information. Instead, Wells Fargo asserted, the Estate's only remedy was to pursue a claim against Greenelsh for wrongfully claiming and accepting the funds.

The Estate responded that the allegations in Wells Fargo's motion to dismiss were improper because they included allegations and documents that were not part of the petition. The Estate argued that Wells Fargo's motion should be treated as a motion for summary judgment, and the Estate should be given an opportunity to conduct discovery regarding the allegations and documents there, along with any other matters material to the case. Alternatively, the Estate argued that if the district court declined to treat the motion as one for summary judgment, it should be permitted to amend its petition to include other allegations and clarify its claims.

Wells Fargo filed a reply, attaching an account agreement covering all Wells Fargo consumer accounts that had been updated in October 2021. The account agreement, which was roughly 40 pages long, contained a choice-of-law provision in a section titled, "Laws governing your account." This provision stated: "This

Agreement, your accounts, services and any related disputes are governed by United States law and (when not superseded by United States law) the laws of the state where you opened your account (without regard to conflict of laws principles)." Wells Fargo asserted that under this provision, Utah law must govern Wells Fargo's handling of Rogers' accounts, including its payment of the account funds to Greenelsh by way of the Utah Affidavit. Wells Fargo argued that it would be futile to allow the Estate to amend its petition because the court would be faced with these same arguments and defenses regardless of the claims raised.

After a hearing, the district court granted Wells Fargo's motion and dismissed the case. The court first concluded that it need not treat the bank's request as one for summary judgment. The court found that it could consider the documents attached to Wells Fargo's motion and reply—the 2008 account application, the 2021 account agreement, and Greenelsh's affidavit—in deciding Wells Fargo's motion to dismiss, as those documents were "simply the contractual documents" and thus "not matters outside of the pleadings." Thus, the court concluded that Wells Fargo's motion was not required to comply with the procedural safeguards applicable to the summary-judgment stage.

After reviewing these documents, the district court ruled that Utah law applied. It then found, based largely on Wells Fargo's allegations, that Utah law released Wells Fargo from all liability for dispersing funds to Greenelsh. Based on this finding, the court concluded the Estate's petition did not state a claim for relief. The court also denied the Estate's motion to amend its petition, agreeing with Wells Fargo that any amendment would be futile. The court thus dismissed the Estate's petition.

The Estate moved to set aside the judgment, disputing the district court's dismissal and the procedure leading up to that ruling. The court again denied the Estate's motion. It found that even if the Estate had not received some of the documents attached to Wells Fargo's filings until after the bank filed its reply (in the case of the account agreement), the Estate had that agreement at the time of the hearing on the motion to dismiss and for purposes of the postjudgment filings. And the court reiterated its ruling that

Utah law governed this case and, in the court's assessment, immunized Wells Fargo from any liability for its payments to Greenelsh. The Estate appeals.

DISCUSSION

Kansas district courts are courts of general jurisdiction. This means that a person filing a lawsuit in Kansas does not need to affirmatively demonstrate that they may pursue their claims in our courts for a case to proceed. Instead, the Kansas Rules of Civil Procedure merely require a petition to include "[a] short and plain statement of the claim showing [the plaintiff] is entitled to relief" and "a demand for judgment." K.S.A. 2023 Supp. 60-208(a)(1); *John Doe v. M.J.*, 315 Kan. 310, 317, 508 P.3d 368 (2022). In other words, to initiate a lawsuit in Kansas, a petition need only include "'a short and plain statement of a claim that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.'" 315 Kan. at 317. Courts commonly refer to this practice as notice pleading. See 315 Kan. at 317-18.

K.S.A. 2023 Supp. 60-212(b)(6) allows a petition to be dismissed if it "fail[s] to state a claim upon which relief can be granted." Under this provision, a district court may dismiss a petition at the outset of litigation—before any responsive pleading is filed and before any discovery takes place—when the petition raises no legally cognizable claims. Kansas appellate courts have repeatedly cautioned, however, that dismissal under this provision "is the exception, not the rule." *Minjarez-Almeida v. Kansas Bd. of Regents*, 63 Kan. App. 2d 225, 232, 527 P.3d 931 (2023).

When a defendant requests dismissal under K.S.A. 60-212(b)(6), the district court "'must resolve every factual dispute in the plaintiff's favor.'" *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019). In doing so, the court must assume all the factual allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim "based on [the] plaintiff's theory or any other possible theory." *Cohen v. Battaglia*, 296 Kan. 542, 546, 293 P.3d 752 (2013). Dismissal is

only appropriate when the well-pleaded facts and inferences therefrom fail to support "'*any* claim upon which relief can be granted.'" *Kudlacik*, 309 Kan. at 790.

Because the appropriateness of dismissal under K.S.A. 60-212(b)(6) is a legal question based solely on the petition, appellate courts give no deference to the district court's assessment of a defendant's dismissal motion. Instead, we apply these same standards on appeal—resolving factual disputes in the plaintiff's favor and affirming dismissal only when the facts in the petition do not support any claims for relief. See *Jayhawk Racing Properties v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250 (2021).

The Estate argues the district court erred in two broad ways when it granted Wells Fargo's motion to dismiss.

- The Estate asserts that the procedure leading to that dismissal was improper, as the motion alleged—and depended on—facts beyond the petition, including the documents Wells Fargo attached to its motion and reply. The Estate asserts that under Kansas law, the district court should have subjected that motion to the rigors of the summary-judgment procedure. The Estate claims that it never had the opportunity to conduct discovery in this case, and the only documents before the court were the limited documents that Wells Fargo provided.

- The Estate also asserts that dismissal of the claims in its petition was improper, as questions remain as to whether Utah law should govern the outcome in this case. And even if Utah law does apply, the Estate questions whether the Utah statute cited by Wells Fargo—a statute whose scope has not been meaningfully interpreted by Utah courts—compels the outcome the district court followed here.

Wells Fargo responds that the allegations contained in the Estate's petition were minimal, and the Estate should not be permitted to avoid dismissal by excluding facts that would resolve the case in the bank's favor. Wells Fargo also asserts that the district court did not err in consulting and relying on the documents it at-

tached to its various filings; it argues that the Estate did not meaningfully dispute the authenticity of those documents, and those documents, read together, showed the Estate could not prevail on its claim.

For the reasons we explain here, we agree with the Estate's procedural argument and thus need not reach its substantive challenge to the district court's ruling.

1. *Kansas courts continue to use a notice-pleading standard—not the federal plausibility standard—to evaluate the legal sufficiency of plaintiffs' petitions.*

Before analyzing the parties' respective arguments about the district court's dismissal of the Estate's complaints, we must address a preliminary question about the continued viability of the standard Kansas courts use to evaluate motions to dismiss under K.S.A. 60-212(b)(6).

In its briefing, Wells Fargo acknowledges that Kansas courts use a notice-pleading standard for evaluating the sufficiency of a petition. But it cites a handful of federal decisions that have affirmed the dismissal of federal lawsuits under an approach like the one the district court used here—reviewing account agreements and applications and concluding the respective plaintiffs had not demonstrated they were entitled to relief. Wells Fargo urges us to follow these rulings, which are based on the standard federal courts now use for analyzing motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). Wells Fargo reiterated this request during oral argument, noting that the Kansas notice-pleading standard is overly onerous on defendants, as it allows a plaintiff to file a barebones placeholder petition without providing information about the ultimate claims the plaintiff plans to pursue.

Kansas courts were faced with a similar argument in *Williams v. C-U-Out Bail Bonds*, 310 Kan. 775, 784, 450 P.3d 330 (2019)—that Kansas courts should "adopt and apply a federal standard for review of motions to dismiss that is more difficult for plaintiffs to meet than the traditional Kansas standard." The Kansas Court of Appeals rejected that request, concluding it was bound by longstanding Kansas Supreme Court precedent holding that Kansas courts only require notice pleading. See *Williams v. C-U-Out*

Bail Bonds, 54 Kan. App. 600, 605, 402 P.2d 558 (2017), *rev'd on other grounds by* 310 Kan. 775. On review, the Kansas Supreme Court similarly declined the invitation to adopt the federal standard. *Williams*, 310 Kan. at 785.

Our discussion could end here. Like the panel in *Williams*, we are duty-bound to follow Kansas Supreme Court precedent unless the court has signaled an intention to depart from its previous caselaw. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). But we also note that the history of our notice-pleading standard demonstrates why a distinction exists between dismissals under Kansas and federal law and explains the wisdom of maintaining a more permissive standard under state law.

In the late 1800s, Kansas courts, like our federal counterparts, followed a rigorous pleading standard known as code (or form) pleading. *Auld and Auld v. Butcher and Butcher*, 2 Kan. 135, 141, 143, 1863 WL 319 (1863); *Zane v. Zane*, 5 Kan. 134, 137-38, 1869 WL 414 (1869). Code pleading relied heavily on the allegations and claims in the plaintiff's petition throughout the proceedings, using it to govern the entire course of the lawsuit. *Auld and Auld*, 2 Kan. at 141, 143. Petitions were limited to one "distinct and definite theory" of relief, and plaintiffs could not pursue recovery under "a theory essentially different from the one [the petition] alleged." *Grentner v. Fehrenschield*, 64 Kan. 764, 766, 769, 68 P. 619 (1902). Petitions under the code-pleading standard were required to contain "*every* fact that [was] essential" to the claim that the plaintiff had pre-selected. *Auld and Auld*, 2 Kan. at 141.

Courts enforced this code-pleading standard strictly, finding a failure to state all essential facts of a cause of action as "'an incurable defect.'" 2 Kan. at 142. A defendant could "take advantage of this defect" at any time and have the case dismissed, even after a verdict for the plaintiff had been rendered—known as an arrest of judgment. 2 Kan. at 140. Even the most meticulous plaintiffs struggled to comply with code pleading's burdensome requirements, driving courts themselves to admit that the code resulted in an "obnoxious practice." 2 Kan. at 141.

In the early 1900s, Kansas courts shifted to a new pleading system that was rooted in providing a defendant notice of a plaintiff's claims and allowing investigation during the lawsuit to fill in

details. *Brooks v. Weik*, 114 Kan. 402, 407-09, 219 P. 528 (1923). The *Brooks* court explained that under this new standard, it was "enough fairly to inform the defendant what the suit is about, and even if inconsistencies appear, they are not fatal if, on any theory, the plaintiff states a cause of action." 114 Kan. at 408; see also *Railway Co. v. Murphy*, 75 Kan. 707, 710, 90 P. 290 (1907); *Grenola State Bank v. Lynam*, 123 Kan. 275, 276-77, 255 P. 44 (1927); *Parkhurst v. Investors Syndicate*, 138 Kan. 7, 10-11, 23 P.2d 589 (1933) (all applying a similar standard). Courts also began allowing plaintiffs to amend their petitions more liberally. *Snehoda v. National Bank*, 115 Kan. 836, 839-40, 224 P. 914 (1924). And courts no longer required plaintiffs to plead a single, pre-selected cause of action. See *Pratt v. Barnard*, 159 Kan. 255, 257-58, 154 P.2d 133 (1944).

The Kansas Rules of Civil Procedure, which were patterned after the Federal Rules of Civil Procedure and became effective in 1964, codified this new approach. Both K.S.A. 1963 Supp. 60-212 and Federal Rule of Civil Procedure 12 adopted the principle that a "'complaint should not be dismissed merely because [a] plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.'" *Monroe v. Darr*, 214 Kan. 426, 430, 520 P.2d 1197 (1974).

For years, both Kansas and federal courts continued to use this notice-pleading standard. But a little over 15 years ago, federal courts began to move toward a more demanding pleading requirement. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Under the *Twombly-Iqbal* standard now used in federal courts, a plaintiff's initial pleading must include a short, plain statement of the claim and "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The

plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." 556 U.S. at 678. Our Kansas Supreme Court has recognized that the federal plausibility standard is "more difficult for plaintiffs to meet than the traditional Kansas standard." *Williams*, 310 Kan. at 784.

This more stringent pleading standard is rooted, in part, in the recognition that federal courts are courts of limited jurisdiction. See *Galvin v. Del Toro*, 586 F. Supp. 3d 1, 8 (D.D.C. 2022); *Morgan v. Cochise County Board of Supervisors*, 487 F. Supp. 3d 789 (D. Ariz. 2020); *Garcia v. Jones*, No. 6:22-cv-00118-AA, 2022 WL 2754853, at *3 (D. Or. 2022) (unpublished opinion). Federal courts "possess only that power authorized by [the United States] Constitution and [federal] statute." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). This means, as a practical matter, that federal courts presume that a plaintiff's claim "lies outside this limited jurisdiction," and the plaintiff bears the burden of proving otherwise. 511 U.S. at 377. In other words, a plaintiff in a federal case must plead their way *into* federal court, demonstrating the case presents a plausible claim that a federal court may consider.

Kansas courts do not have these same limitations or their corresponding pleading requirements. State courts, as courts of general jurisdiction, have nearly "unlimited jurisdiction" over most claims. See *Turner v. Bank of North America*, 4 U.S. 8, 10, 1 L. Ed. 718 (1799); see also *Chalmers v. Burrough*, 314 Kan. 1, Syl. ¶ 2, 494 P.3d 128 (2021) (Kansas district courts are courts of "general jurisdiction unless otherwise provided by law."). Unlike their federal counterparts, Kansas district courts presume that a claim "is within [their] jurisdiction unless the contrary appears." *Turner*, 4 U.S. at 10. That is, we presume Kansas courts may hear whatever claims a plaintiff pursues. And instead of requiring a plaintiff to demonstrate that a claim belongs in a Kansas court, a lawsuit filed in Kansas may proceed as long as the facts included in the petition and the reasonable inferences that can be drawn from those facts "state *any* claim upon which relief can be granted." *Williams*, 310 Kan. 775, Syl. ¶ 2.

Thus, as the Kansas Supreme Court reiterated in *Williams*, Kansas courts have "'sound reasons for exercising judicial skepticism towards dismissal of a petition for failure to state a claim prior to the completion of discovery.'" 310 Kan. at 785. Our Supreme Court has not indicated a willingness to depart from this century-old standard. And the history and breadth of Kansas courts' jurisdiction demonstrate the wisdom of continuing to evaluate petitions under a notice-pleading approach. We decline Wells Fargo's invitation to adopt the federal courts' plausibility analysis for motions to dismiss.

2. *The district court erred when it dismissed the lawsuit based on allegations and documents outside the Estate's petition.*

As we have indicated, K.S.A. 2023 Supp. 60-208(a) requires a petition to include a "short and plain statement" showing the plaintiff is entitled to relief and a description of the relief sought. The petition merely commences the lawsuit—it "is not intended to govern the entire course of the case." *Berry v. National Medical Services, Inc.*, 292 Kan. 917, 918, 257 P.3d 287 (2011). The "theory on which the modern lawsuit is tried is shaped by the facts [that] are unveiled through the discovery process." *Noel v. Pizza Hut, Inc.*, 15 Kan. App. 2d 225, 233, 805 P.2d 1244 (1991). And the "legal issues and theories on which the case will be decided" are "ultimate[ly]" defined by the final pretrial order. *Unruh v. Purina Mills*, 289 Kan. 1185, 1191, 221 P.3d 1130 (2009).

The Estate's petition alleged that Rogers had a checking account and a savings account with Wells Fargo and that Wells Fargo "wrongfully" distributed over $38,000 out of those accounts to Greenelsh. The Estate argued that Wells Fargo should be required to return those funds, plus interest and the costs of the lawsuit.

Wells Fargo asserts that the nature of the Estate's claim (or claims) was unclear from these allegations. We note, however, that Wells Fargo did not ask the district court to order the Estate to amend its petition to include a more definite statement of its claim. See K.S.A. 2023 Supp. 60-212(e). Instead, Wells Fargo asked the district court to dismiss the petition entirely, asserting it failed to state any claim for relief.

Although Wells Fargo fashioned its motion as requesting dismissal under K.S.A. 60-212(b)(6), it did not really assert—beyond recitation of the statutory standard—that the Estate failed to state a claim in its petition. Rather, the motion asserted that the Estate *should not prevail* in its lawsuit against Wells Fargo. Wells Fargo essentially sought judgment as a matter of law based on its defense that Utah law should govern the Estate's claim and its belief that Utah law immunized the bank's actions. To support these defenses, Wells Fargo asserted several matters outside the petition—that Rogers originally opened his Wells Fargo accounts in Utah, that these accounts were governed by Utah law, that Greenelsh provided a Utah Affidavit to a bank branch in California, and that Utah law required the bank to pay Greenelsh without taking any further precautionary measure and immunized it from suit.

In granting Wells Fargo's motion, the district court inverted the standards governing K.S.A. 60-212(b)(6) motions. Instead of presuming the facts in the petition were true and evaluating the petition to see whether it stated any claim for relief, the court presumed that the facts in *Wells Fargo's motion* were correct. Rather than allowing the Estate an opportunity to conduct discovery based on these allegations and controvert any of those facts through the summary-judgment procedure, the court's journal entry dismissing the case stated the court had "made findings of fact" based on the record before it. This procedure is fundamentally at odds with longstanding Kansas caselaw and requires reversal. See *Kudlacik*, 309 Kan. at 790; *Cohen*, 296 Kan. at 546.

On appeal, Wells Fargo acknowledges that Kansas courts ordinarily may not venture outside the petition when evaluating a motion to dismiss. But it points out that Kansas caselaw allows district courts to consider some documents that are not attached to the petition but are "central to the plaintiff's claim" without converting a motion to dismiss to a motion for summary judgment. *Crosby v. ESIS Insurance*, No. 121,626, 2020 WL 6372266, at *2 (Kan. App. 2020) (unpublished opinion), *rev. denied* 314 Kan. 854 (2021). The Estate argues that the district court could rely on this exception to consider the three documents that Wells Fargo attached to its motion and reply to support its defenses.

It is well settled that a district court faced with a motion to dismiss may only consider the plaintiff's petition and any documents attached to it. See *Minjarez-Almeida*, 63 Kan. App. 2d at 242. As Wells Fargo notes, however, we have recently recognized a rare exception to this rule that applies in some cases founded on written instruments. See 63 Kan. App. 2d at 242; *Crosby*, 2020 WL 6372266, at *2-3. In these cases, when the plaintiff's claim hinges on the language of a written instrument not attached to the petition, Kansas courts may consider an undisputedly authentic copy of that written instrument attached to a motion to dismiss without converting that request to one for summary judgment.

This limited exception is an extension of a special pleading rule reserved for written instruments. K.S.A. 2023 Supp. 60-209(h) allows a plaintiff asserting a claim that arises from a written instrument—like a claim for breach of a written contract—to describe the contents of that document in their petition or to attach the document to the pleading. We found in *Crosby* that a plaintiff "should not be permitted to circumvent dismissal" by thwarting this rule—that is, "by failing to attach or accurately describe a written contract on which a lawsuit is based when no one disputes a contract's authenticity." 2020 WL 6372266, at *3.

The circumstances in *Crosby* illustrate when this narrow exception applies. Tywana Crosby's petition alleged that she and ESIS Insurance had a written contract to rent a car and that ESIS had breached that contract, causing Crosby damages. Crosby did not provide any more information about the alleged contract and did not attach it to her petition. ESIS moved to dismiss the lawsuit under K.S.A. 60-212(b)(6) and attached a copy of a written contract between Crosby and a car rental company—not ESIS. ESIS alleged that Crosby did not have a contract with it and had sued the wrong party. In response, Crosby did not dispute the authenticity of the contract or ESIS's assertion that her contract was with a different company. Under those limited facts, we found that Crosby should have attached the contract to her petition, and the failure to do so did not prevent the court from considering that contract when assessing whether Crosby's petition stated a claim against ESIS. 2020 WL 6372266, at *3.

We also applied this rule in *Minjarez-Almeida*, but with a different outcome. There, students claimed that Kansas State University had breached its contract with them in various ways during the COVID-19 pandemic. The university claimed that it had no contract with the students to provide the services they claimed were lacking. At the same time, it attached to its motion to dismiss an undisputedly authentic—but ambiguous—written agreement saying the university would provide "educational services" in exchange for tuition and fees. 63 Kan. App. 2d at 243. We found the district court should have considered this written agreement when it ruled on the university's motion to dismiss. But because factual questions remained as to what the written agreement meant by "educational services," dismissal was improper. 63 Kan. App. 2d at 244.

More recently, we declined to apply this exception in *Employers Mut. Cas. Co. v. Jayhawk Fire Sprinkler Co.*, No. 124,001, 2024 WL 136654 (Kan. App. 2024) (unpublished opinion). In that case, the petition alleged that Jayhawk had negligently installed a fire protection system in 2013 for a company the plaintiff insured, causing that company—and eventually the plaintiff—damages. Jayhawk moved to dismiss the petition under K.S.A. 60-212(b)(6), claiming that the plaintiff's insured had waived the right to collect for damages in a contract. Jayhawk then attached a copy of a 2017 work invoice for the inspection of the insured's system that contained a waiver of liability. Jayhawk asserted that this same waiver language appeared in all invoices for any work Jayhawk performed for the company. The district court concluded it could consider this invoice, along with Jayhawk's allegation that the same language appeared in all other contracts, and dismissed the lawsuit.

This court reversed the district court's dismissal. We noted that the plaintiff asserted that Jayhawk's negligence damaged the plaintiff's insured in 2013—not 2017—and we disagreed with the district court's finding that it could consider the 2017 invoice because it was "'referenced'" in the petition. 2024 WL 136654, at *3. Rather, "the mere reference to a document in a petition does not make the document '"central to the plaintiff's claim"' or proper for

submission by a defendant and consideration by the court in a motion to dismiss." 2024 WL 136654, at *3. And Jayhawk's assertion that the waiver appeared on all invoices for any work it performed for the insured was an allegation outside the petition. 2024 WL 136654, at *3. Because this allegation and the 2017 invoice were matters outside the petition, we found the district court erred by dismissing the case under K.S.A. 60-212(b)(6). 2024 WL 136654, at *4.

These decisions demonstrate that when a plaintiff asserts a claim based on a written instrument, courts will consider an undisputedly authentic copy of that written instrument attached to a motion to dismiss without converting the motion to a request for summary judgment. But courts will not resolve factual questions surrounding those instruments as part of a K.S.A. 60-212(b) motion. Nor will courts consider documents attached to a motion to dismiss that are not central to the plaintiff's claim or when there is a reasonable question about their applicability or authenticity. To date, we have only used this rule to affirm the district court's dismissal of *Crosby*'s breach-of-contract claim.

The district court's actions here were similar to those requiring reversal in *Employers Mut. Cas. Co.* The court concluded that it could consider the three documents Wells Fargo attached to its motion to dismiss and reply in support of that motion—the 2008 account application, the 2021 account agreement, and Greenelsh's Utah Affidavit—because those documents *helped resolve* the Estate's claim, not because the claim *arose out of* those documents. In other words, the documents provided evidence relevant to the Estate's claim; they were not foundational written instruments giving rise to the Estate's claim.

As in *Employers Mut. Cas. Co.*, the district court found it could consider Greenelsh's affidavit because it was "reference[d]" in the Estate's petition. The court then found that Rogers' bank accounts were opened in Utah in 2008, even though the checking account number on that application differed from the account number listed in the Estate's petition; the court resolved this discrepancy by accepting Wells Fargo's assertion that the account number had changed over time. And the court found it could con-

sider the account agreement attached to Wells Fargo's reply in support of its motion to dismiss because the Estate had time to consider its contents and address it at the oral argument on Wells Fargo's motion.

Thus, instead of basing its ruling on the petition and resolving factual disputes in the Estate's favor, the district erred by accepting *Wells Fargo's* factual allegations—which were not included in the petition—as true. The court erred by considering documents that may have been relevant from an evidentiary standpoint but were not *central* to the Estate's claim in the manner discussed in *Crosby*. The court then exacerbated these procedural errors by refusing to allow the Estate more time to evaluate the evidentiary merit of these assertions and treat Wells Fargo's request as a motion for summary judgment. See K.S.A. 2023 Supp. 60-212(d). As in *Employers Mut. Cas. Co.*, these actions require us to reverse the district court's dismissal of the Estate's petition.

3. *The district court erred when it dismissed the Estate's petition for failure to state a claim.*

The Estate also challenges the district court's legal conclusion that the documents attached to Wells Fargo's filings, as well as the bank's factual assertions, demonstrate that the Estate cannot succeed on its claim. In particular, it asserts the district court erred when it found that the Estate's claim against Wells Fargo was governed by Utah law and that Utah law provided a complete defense for the bank's distribution of the funds to Greenelsh.

Because we have concluded that the district court erred in considering these documents, and by refusing to permit the Estate to conduct discovery so it could assess the accuracy of Wells Fargo's assertions, it would be premature to address those documents and assertions without first allowing the Estate the opportunity to provide further context. We pause, however, to comment on the path the district court employed in concluding that Utah law governed—and foreclosed—the Estate's claim and to provide some instruction on the contours of that question for the court to consider on remand.

Courts presume that lawsuits filed in Kansas are governed by Kansas law. See *Layne Christensen Co. v. Zurich Canada*, 30 Kan.

App. 2d 128, 144, 38 P.3d 757 (2002); see also *AT&SF Ry. Co. v. Stonewall Ins. Co.*, 275 Kan. 698, 731, 71 P.3d 1097 (2003) (district court's decision to apply Kansas law in the absence of a conflict of laws was sound). The party seeking the application of a different state's law bears the burden of persuading the courts that the other law should apply. *Layne Christensen Co.*, 30 Kan. App. 2d at 143-44.

With few exceptions, Kansas courts follow the principles articulated in the Restatement (First) of Conflict of Laws (1934) to determine which state's substantive law should govern. *Brenner v. Oppenheimer & Co.*, 273 Kan. 525, 538, 44 P.3d 364 (2002). But see *In re K.M.H.*, 285 Kan. 53, 60-62, 169 P.3d 1025 (2007) (using a multifactor interest-analysis similar to the Restatement [Second] of Conflict of Laws §§ 6, 287[1] & comment d [1969], for a conflict arising in a parentage case). In general, we defer to the parties' contractual selection as to which law should apply, so long as that selection bears some connection to the transaction and the law chosen does not violate Kansas public policy. *Brenner*, 273 Kan. 525, Syl. ¶ 5. Courts are not compelled to give effect to a choice-of-law clause if the law the parties have chosen "contravenes the settled public policy" of this state. 273 Kan. 525, Syl. ¶ 6.

On remand, the district court should remain mindful that Kansas courts begin with the presumption that Kansas law governs the Estate's claim. Wells Fargo must show that the law of a different state—such as Utah—applies. This requires a showing that there is a meaningful conflict between Kansas and Utah law and that the facts support a conclusion that Utah law should govern (including, but not limited to, a determination that the Estate's claim fell within the scope of any choice-of-law clause). See *AT&SF Ry. Co.*, 275 Kan. at 762 (concluding that no choice-of-law issue arose when Kansas and Illinois law were not in conflict). This burden normally cautions against dismissal under K.S.A. 60-212(b)(6), as it often requires a defendant seeking the application of a different law to assert and sufficiently prove additional facts outside of the petition, as Wells Fargo's motion attempted to do in this case.

If the district court concludes that Utah law applies to the Estate's claim, it must then ascertain how the issues in the case would be resolved under Utah law. In its motion, the bank cited the Utah

statute concerning small estate affidavits, Utah Code Ann. § 75-3-1202, and the district court applied this statute in isolation to dismiss the case. A complete choice-of-law analysis is not so reductive.

Rather, if Utah law applies, the district court must determine how a Utah court would treat the Estate's claim. Parties cannot expand a state statute's express geographical reach by merely including a choice-of-law clause in a contract. See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1064-65 (N.D. Cal. 2014) (concluding a choice-of-law clause in a contract does not support the extraterritorial expansion of a state statute when the geographical limitations in the statute exclude one of the parties). Consistent with this principle, several questions must be answered before the Utah limitations on liability can come into play.

The statute cited by Wells Fargo is part of the Utah Probate Code, which only applies to nonresident decedents if they have property located in Utah. See Utah Code Ann. § 75-1-301(2). Thus, Utah Code Ann. § 75-3-1202 would only apply if the funds in the Estate's bank accounts were deemed—under Utah law—to be located within Utah. The district court made no finding to this effect when it dismissed the Estate's claim, nor has either party cited to a Utah statute or judicial decision supporting such a conclusion. The sole Utah decision cited by Wells Fargo on this point held that intangible property can be treated as though it is located in Utah when, regardless of the domicile of the owner, a probate action is properly commenced in that state. See *In re Thourot's Estate*, 52 Utah 106, 172 P. 697, 699 (1918). But the Utah Supreme Court observed in that case that this principle was an exception to the more general rule in that state that "all intangible property is presumed to have its situs at the domicile of its owner." 172 P. at 699. Rogers was residing in Kansas at the time of his death. His estate was probated in Kansas.

The district court may perhaps conclude, following discovery, that the facts alleged in Wells Fargo's motion are accurate and govern the outcome of this case. The court may eventually conclude that the Estate cannot prevail on its claims. But as our discussion here demonstrates, several factual and legal questions must be resolved before any such conclusion would be appropriate. And

most important, these questions cannot be determined at this stage, based on the Estate's petition.

The district court erred when it dismissed the Estate's petition for failure to state a claim on which relief can be granted under K.S.A. 60-212(b)(6). We reverse that judgment and remand the case for further proceedings.

Reversed and remanded with directions.

* * *

ATCHESON, J., concurring: Although I agree that the Butler County District Court precipitately dismissed this action the Estate of Craig W. Rogers brought against Wells Fargo Bank to recover about $38,000 the bank delivered to an apparently roguish interloper, I would jump through one more hoop than the majority does in reversing and remanding. The Bank has asserted—with little in the way of supporting authority—that it is effectively immunized under Utah law for the payout. Neither in the district court nor here has the Bank marshalled a persuasive legal argument for relief, especially given the exceptionally abbreviated factual record. So I would send the case back for further proceedings to more fully develop both the relevant facts and the governing legal principles.

When Rogers, a resident of Andover, died, he had a checking account and a savings account with the Bank. In its two-page petition, Rogers' Estate alleged the Bank wrongfully gave the money in those accounts to Bryan T. Greenelsh in response to "written claims" he presented; the Estate, therefore, sought damages from the Bank equivalent to the account balances, interest, and other relief. Greenelsh appears as a spectral presence in the abbreviated record in this case—having neither an identifiable association with Rogers nor a claim to the money in the accounts beyond the audacious demand for payment itself. Maybe some of that will become clearer (and less remarkable) on remand.

In response to the petition, the Bank filed a motion to dismiss for failure to state a claim under K.S.A. 60-212(b)(6). In briefing the motion to the district court, the Bank submitted three documents: (1) a form showing Rogers opened the accounts in Utah;

(2) a bank agreement saying the law of the state in which an account was opened governs any legal disputes; and (3) an affidavit from Greenelsh representing that he is a successor to or acting on behalf of Rogers and requesting that the Bank pay him the account balances in accordance with Utah Code Ann. § 75-3-1201, governing the collection of certain personal property upon the owner's death. Relying on a companion Utah statute, the Bank argued it had been "discharged and released" from any liability to Rogers' Estate by paying in accordance with the affidavit, so the Estate's remedy lay in an action against Greenelsh. Utah Code Ann. § 75-3-1202. The district court agreed and dismissed the Estate's action against the Bank.

The Estate has appealed, and in response, the Bank makes essentially the same argument to us.

The majority ably describes both the especially stringent standard for granting a motion to dismiss and the Kansas appellate courts' continued adherence to traditional notice pleading despite the federal courts' ongoing drift toward requiring more detailed factual allegations in an opening pleading. Concomitantly, as the majority explains, a district court considering a motion to dismiss under K.S.A. 60-212(b)(6) typically should look only at the well-pleaded allegations of the petition. And as a general rule, the district court converts a motion to dismiss to one for summary judgment if it considers documents or other evidence outside the petition. The district court must then give the parties an opportunity to submit additional evidentiary materials and legal arguments before ruling. K.S.A. 2023 Supp. 60-212(d).

But there is an exception to those principles. The district court may consider a document that has not been submitted with the petition if it is integral to the plaintiff's core claims and its authenticity is otherwise undisputed. *Minjarez-Almeida v. Kansas Bd. of Regents*, 63 Kan. App. 2d 225, 242, 527 P.3d 931 (2023); *Employers Mut. Cas. Co. v. Jayhawk Fire Sprinkler Co.*, No. 124,001, 2024 WL 136654, at *3 (Kan. App. 2024) (unpublished opinion). For example, if the plaintiff alleges a breach of contract, they must either set forth with particularity the relevant terms of the contract in the petition or append a copy of the written agreement. See K.S.A. 2023 Supp. 60-209(h). If the plaintiff fails to do so, the

defendant may submit the contract with a motion to dismiss. The contours of the exception aren't especially well defined, and how the exception applies to documents less central than a contract in a breach-of-contract action often devolves into a case specific determination unsuited to some overarching rule.

For purposes of this appeal, the document showing Rogers opened the accounts in Utah and the bank agreement setting out the terms and conditions that apply to checking and savings accounts are integral to the contractual relationship between the two. The banking relationship defines the foundation for the Estate's claim. Assuming authenticity, the district court, then, properly considered those documents in ruling on the motion to dismiss without converting it to one for summary judgment.

The Greenelsh affidavit is a closer question. But the petition specifically identifies "written claims" from Greenelsh as the device prompting the Bank's allegedly wrongful disbursement of the account balances. The specificity of the allegation makes the affidavit, as the instrument containing the claims, central to the Estate's action. And, in turn, the district court properly could review the affidavit in deciding the motion to dismiss. So I part ways with the majority on that narrow point.

Consistent with notice pleading, the Estate could have alleged simply that the Bank wrongfully disbursed the money to a third party. If the petition had stated no more, I would be inclined to agree the affidavit would not be so obviously integral to the core allegations of the petition that the Bank could have submitted it in support of a motion to dismiss. In that circumstance, the Bank arguably could have sought a more definite statement under K.S.A. 60-212(e) or, more likely, could have filed an answer and promptly sought summary judgment with minimal discovery. By pleading more than what was strictly necessary, the Estate opened a procedural door for the Bank. See *Thomas v. Farley*, 31 F.3d 557, 558-59 (7th Cir. 1994) (Under traditional notice pleading, "if a plaintiff does plead particulars, and they show that he has no claim, then he is out of luck—he has pleaded himself out of court.").

But the Bank stepped through the door to offer a legal argument in the district court and again on appeal built on presumptuousness rather

than proof. And that isn't good enough to prevail on a motion to dismiss. Rogers appears to have opened the accounts in Utah. The savings account, which had just over $34,000 in it, continued unchanged through the payout to Greenelsh. But the checking account had a different identification number than the checking account Rogers first opened. I put this unexplained discrepancy in account numbers aside for now; it would simply be another consideration favoring reversing and remanding. Under the terms and conditions for the accounts, the law of the state where an account was opened governs. The Bank says Utah law applies, and that appears to be correct for the savings account and maybe for the checking account.

But the Bank's argument falters on its premise that Utah Code Ann. § 75-3-1201 authorized the disbursement of the money in the accounts to Greenelsh when he presented the affidavit for collection of estate assets. The statute covers "tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action belonging to the decedent" in an estate with a value "not exceed[ing] $100,000." Utah Code Ann. § 75-3-1201(1). And, as we have outlined, a party relinquishing possession of covered personal property to someone presenting an affidavit conforming to Utah Code Ann. § 75-3-1201 is relieved of any further obligation to a personal representative of the decedent, such as the administrator of the estate. Utah Code Ann. § 75-3-1202. The Bank has asserted the shield in Utah Code Ann. § 75-3-1202 as a legal bar to the Estate's action.

But traditional bank accounts may be considered intangible rather than tangible personal property, and they do not obviously seem to be instruments otherwise identified in Utah Code Ann. § 75-3-1201(1). See *Nemariam v. Federal Democratic Republic of Ethiopia*, 400 F. Supp. 2d 76, 83-84 (D.D.C. 2005) (collecting cases finding bank accounts to be intangible property); Simowitz & Silberman, *Nonparty Jurisdiction*, 55 Vand. J. Transnat'l L. 433, 451 n.83 (2022) ("Bank accounts are classic intangible assets."); 84 C.J.S., Taxation § 422 (characterizing bank accounts as "property of an intangible nature"); 30 Am. Jur. 2d, Executions § 471 (characterizing bank accounts as intangible personal property of debtor for collection purposes); 76 Am. Jur. 2d, Trusts § 176 (bank

accounts considered intangible personal property subject to constructive trusts). The Bank has presented no persuasive argument to the contrary based on Utah authority or more general legal principles.

Rather, the Bank has pointed us to *In re Thourot's Estate*, 52 Utah 106, 172 P. 697 (1918), a case that largely undermines its position. The narrow question in that case turned on whether an account in a Salt Lake City bank was subject to personal property tax there, although the deceased depositor lived in Nevada. The court seemed to recognize the bank account to be intangible personal property that typically would be treated as "hav[ing] its situs at the domicile of the owner." 172 P. at 699.

That rule cuts against the Bank here. In *Thourot's Estate*, the court held that because an estate had been opened for the deceased depositor in Utah with a Utah resident serving as executor, the account then became taxable Utah property. The holding on those particular facts in no way suggests Rogers' accounts should be considered tangible personal property or should otherwise come within the scope of Utah Code Ann. § 75-3-1201. And, in turn, *Thourot's Estate* doesn't support the Bank's argument for protection under Utah Code Ann. § 75-3-1202.

In sum, the Bank has failed to offer a sufficient legal basis for granting its motion to dismiss the Estate's action. The district court erred in doing so. I would reverse and remand for further proceedings with the understanding that on a more fully developed factual record and a retooled legal argument from the Bank, the district court would be free to reconsider whether those Utah statutes apply.

(550 P.3d 1268)

No. 126,409

STATE OF KANSAS, *Appellee*, v. JAMES H. WOOLDRIDGE JR., *Appellant*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Review of Equal Protection Claim—Three-Step Process*. A court engages in a three-step process when reviewing an equal protection claim. First, it considers whether the legislation creates a classification resulting in different treatment of similarly situated individuals. If the statute treats "arguably indistinguishable" individuals differently, the court determines next the appropriate level of scrutiny to assess the classification by examining its nature or the right at issue. Then, the court applies that level of scrutiny to the statute.

2. CRIMINAL LAW—*DNA Testing under K.S.A. 21-2512—Limits of Application to Certain Crimes*. The plain language of K.S.A. 21-2512 limits its application solely to those convicted of first-degree murder or rape. Because individuals who are convicted of attempted rape are not similarly situated to those convicted of rape, the application of K.S.A. 21-2512 should not be extended on equal protection grounds to include DNA testing for individuals convicted of attempted rape.

Appeal from Wilson District Court; DANIEL D. CREITZ, judge. Submitted without oral argument. Opinion filed June 14, 2024. Affirmed.

Michael Jilka, of Graves & Jilka, P.C., of Lawrence, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., MALONE and WARNER, JJ.

MALONE, J.: James H. Wooldridge Jr. was convicted in 1983 of several felonies, including attempted rape. In 2016, Wooldridge moved for postconviction DNA testing under K.S.A. 21-2512. That statute expressly authorizes persons convicted of either first-degree murder or rape to seek postconviction DNA testing. The district court at first dismissed Wooldridge's motion for his failure to comply with the court's order of filing restrictions, but that decision was reversed. *State v. Wooldridge*, No. 117,284, 2019 WL 1303247, at *2, 4 (Kan. App. 2019) (unpublished opinion).

On remand, Wooldridge argued in district court that K.S.A. 21-2512 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because there is no rational basis for authorizing DNA testing for those convicted of rape, but not authorizing DNA testing for those convicted of attempted rape. The district court rejected Wooldridge's equal protection argument, and we do the same. Thus, we affirm the district court's denial of Wooldridge's application for postconviction DNA testing.

FACTUAL AND PROCEDURAL BACKGROUND

In 1983, a jury convicted Wooldridge of aggravated burglary, aggravated robbery, attempted rape, aggravated battery, aggravated assault, and criminal destruction of property. The district court sentenced Wooldridge under the Habitual Criminal Act to a controlling indeterminate sentence of 99 years to life imprisonment. Those convictions were upheld on appeal. *State v. Wooldridge*, 237 Kan. 737, 703 P.2d 1375 (1985). Wooldridge's aggravated assault conviction was later reversed, and the sentence vacated as being multiplicitous with his aggravated robbery conviction. *Wooldridge v. State*, No. 73,137, unpublished opinion filed November 17, 1995 (Kan. App.). Over the years, Wooldridge filed eight K.S.A. 60-1507 motions and a federal habeas corpus motion. As a result, the district court imposed filing restrictions on Wooldridge's ability to seek postconviction relief. *Wooldridge*, 2019 WL 1303247, at *2.

In 2016, Wooldridge moved for postconviction DNA testing under K.S.A. 21-2512. More specifically, Wooldridge asked for forensic DNA testing of a hair sample found at the scene of his 1983 crimes. The district court at first dismissed Wooldridge's motion for failing to comply with the filing restrictions. Wooldridge appealed, and this court reversed and remanded with directions for the district court to consider the merits of the motion under the statute. 2019 WL 1303247, at *5.

On remand, the district court asked the parties to brief several questions including whether the court had authority to grant Wooldridge's motion for DNA testing under the applicable statute. Wooldridge argued to the district court that denying DNA testing

to defendants convicted of attempted rape but allowing it for those convicted of rape "is to draw an arbitrary, artificial and meaningless distinction between two classes of defendants who are similarly situated. There is no rational basis for such a distinction."

The State argued: "The plain language of K.S.A. 21-2512 limits DNA testing pursuant to that statute to the offenses of murder in the first degree and rape. However, in the present case, the defendant was convicted of attempted rape." The State concluded that the offenses of rape and attempted rape "are distinguishable, there is a rational basis for the differing treatment of these crimes, and there is no equal protection basis for extending or applying the provisions of K.S.A. 21-2512 to the Wooldridge case."

The district court held a hearing on the motion on January 3, 2020. After taking the matter under advisement, the district court filed a written order rejecting the equal protection argument and denying the motion. The district court's analysis stated, in part:

> "More importantly, as the State argues the elements of rape and attempted rape are 'distinguishable from the other.' There must be sexual intercourse to be convicted of rape. On the other hand, for attempted rape, no sexual intercourse is required. There must only be 'the commission of an act toward the offense of rape.'
>
> "Like first-degree murder and attempted first-degree murder, rape and attempted rape are clearly distinguishable offenses. There is a rational basis for treating these crimes differently, and there is no equal protection basis for expanding the provisions of 2018 K.S.A. 21-2512(a) to [Wooldridge's] conviction of attempted rape."

ANALYSIS

On appeal, Wooldridge claims the district court erred in denying his motion for postconviction DNA testing. He renews his argument that K.S.A. 21-2512 violates the Equal Protection Clause of the Fourteenth Amendment because he asserts there is no rational basis for authorizing DNA testing for those convicted of rape, but for not authorizing DNA testing for those convicted of attempted rape. The State contends that the district court properly denied Wooldridge's motion for postconviction DNA testing.

Resolution of Wooldridge's claim requires statutory interpretation. Statutory interpretation presents a question of law over which appellate courts have unlimited review. *State v. Betts*, 316

Kan. 191, 197, 514 P.3d 341 (2022). Moreover, an appellate court has unlimited review when deciding whether a statute creates an unconstitutional classification and violates the Fourteenth Amendment's Equal Protection Clause. *State v. Salas*, 289 Kan. 245, 248, 210 P.3d 635 (2009).

The statute at issue, K.S.A. 21-2512, states, in part:

> "(a) Notwithstanding any other provision of law, a person in state custody, at any time after conviction for murder in the first degree as defined by K.S.A. 21-3401, prior to its repeal, or K.S.A. 21-5402, and amendments thereto, or for rape as defined by K.S.A. 21-3502, prior to its repeal, or K.S.A. 21-5503, and amendments thereto, may petition the court that entered the judgment for forensic DNA testing (deoxyribonucleic acid testing) of any biological material that:
>
> (1) Is related to the investigation or prosecution that resulted in the conviction;
>
> (2) is in the actual or constructive possession of the state; and
>
> (3) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results."

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. See *Betts*, 316 Kan. at 198. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent, and it should avoid reading something into the statute that is not readily found in its words. *Keys*, 315 Kan. at 698. Only when the statute's language is unclear or ambiguous does the court use canons of construction or legislative history to construe the legislative intent. See *Betts*, 316 Kan. at 198.

K.S.A. 21-2512(a) is unambiguous. It provides that only those convicted of first-degree murder or rape are eligible for postconviction DNA testing, a point Wooldridge concedes. But the thrust of Wooldridge's argument is that K.S.A. 21-2512(a) violates the Fourteenth Amendment's Equal Protection Clause because he asserts there is no rational basis for authorizing DNA testing for those convicted of rape, but for not authorizing DNA testing for those convicted of attempted rape.

"A court engages in a three-step process when reviewing an equal protection claim. First, it considers whether the legislation creates a classification resulting in different treatment of similarly situated individuals. If the statute treats '"arguably indistinguishable"' individuals differently, the court determines next the appropriate level of scrutiny to assess the classification by examining its nature or the right at issue. Then, the court applies that level of scrutiny to the statute. [Citations omitted.]" *State v. LaPointe*, 309 Kan. 299, 316, 434 P.3d 850 (2019).

"[T]he first step of analysis is to determine the nature of the legislative classifications and whether the classifications result in arguably indistinguishable classes of individuals being treated differently. Only if there is differing treatment of similarly situated individuals is the Equal Protection Clause implicated." *Salas*, 289 Kan. at 248. "[T]he United States Supreme Court has held that an individual complaining of an equal protection violation has the burden to demonstrate that he or she is 'similarly situated' to other individuals who are being treated differently." *Salas*, 289 Kan. at 249 (citing *Heller v. Doe*, 509 U.S. 312, 319-21, 113 S. Ct. 2637, 125 L. Ed. 2d 257 [1993]).

To support his argument, Wooldridge relies on *State v. Denney*, 278 Kan. 643, 101 P.3d 1257 (2004). In that case, our Supreme Court found that Denney's act of committing aggravated criminal sodomy by penetrating the victims' anuses with his male sex organ was arguably indistinguishable from the act of committing rape with the male sex organ. 278 Kan. at 653. The court also found there was no rational basis for allowing DNA testing for a defendant convicted of rape but not for a defendant convicted of aggravated criminal sodomy under circumstances like *Denney*. 278 Kan. at 656. Thus, the court held that K.S.A. 2003 Supp. 21-2512 was unconstitutional as applied to Denney. 278 Kan. at 656. To remedy the violation, the court extended the statute's application to include postconviction DNA testing for aggravated criminal sodomy. 278 Kan. at 660.

Wooldridge asserts that rape and attempted rape are arguably indistinguishable for purposes of applying K.S.A. 21-2512. In June 1983, when Wooldridge committed his crimes, rape was defined by K.S.A. 21-3502(1) (Ensley 1981) as:

"[T]he act of sexual intercourse committed by a man with a woman not his wife, and without her consent when committed under any of the following circumstances:

(a) When a woman's resistance is overcome by force or fear; or

(b) When a woman is unconscious or physically powerless to resist; or

(c) When the woman is incapable of giving her consent because of mental deficiency or disease, which condition was known by the man or was reasonably apparent to him; or

(d) When the woman's resistance is prevented by the effect of any alcoholic liquor, narcotic, drug or other substance administered to the woman by the man or another for the purpose of preventing the woman's resistance, unless the woman voluntarily consumes or allows the administration of the substance with knowledge of its nature."

"Sexual intercourse" was defined as "any penetration of the female sex organ by the male sex organ." K.S.A. 21-3501(1) (Ensley 1981). An "attempt" to commit a crime was defined as "any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime." K.S.A. 21-3301(1) (Ensley 1981).

No Kansas case has addressed whether the crimes of rape and attempted rape are arguably indistinguishable for purposes of applying K.S.A. 21-2512. But our Supreme Court has determined that when analyzing the comparability of two crimes for purposes of the DNA testing statute, there must be an "identity of elements" in order for the two crimes to be indistinguishable. *Salas*, 289 Kan. at 250. The *Salas* court was comparing first-degree murder to intentional second-degree murder, and it found that the crimes were not identical because first-degree murder contains an element—premeditation—that is missing from intentional second-degree murder. 289 Kan. at 250-51. The *Salas* court distinguished that situation from *Denney*, where both crimes being compared for purposes of the DNA testing statute in that case "involved something less than voluntary consent to penetration of a female bodily orifice by the male sex organ. Hence, the required elements were arguably indistinguishable." *Salas*, 289 Kan. at 250.

Wooldridge tries to distinguish *Salas* by arguing there is no difference in the mental state required to commit rape and that required to commit attempted rape—unlike the difference in the mental state required to commit first-degree murder and second-degree murder. But this argument is unavailing. The *Salas* and *Denney* courts made it clear that the required elements of the two crimes being compared must be arguably indistinguishable for

purposes of DNA testing. *Salas*, 289 Kan. at 250-51; *Denney*, 278 Kan. at 653-54. Here there is no identity of elements, and the crimes are not arguably indistinguishable. For rape to occur, there must be sexual intercourse. For attempted rape, all that is needed is an overt act towards the perpetration of rape. And, as the State points out, an overt act for attempted rape does not require attempted penetration or even that the defendant be in close proximity to the victim. See *State v. Peterman*, 280 Kan. 56, 61, 64, 118 P.3d 1267 (2005) (holding the defendant's arrival at the crime scene with the intent to commit rape was a sufficient overt act to support a conviction of attempted rape).

A case that is even more damaging for Wooldridge is *State v. Gaither*, No. 103,232, 2011 WL 588509, at *3 (Kan. App. 2011) (unpublished opinion), where the court considered whether an attempt to commit a crime is distinguishable from the completed crime for purposes of applying the DNA testing statute under an equal protection analysis. In *Gaither*, this court found that "first-degree murder and attempted first-degree murder have different elements and are not identical crimes. Accordingly, Gaither has failed to meet his burden of establishing that he is similarly situated to those who have a right to DNA testing under K.S.A. 21-2512. His equal protection argument fails." 2011 WL 588509, at *3. The district court here found *Gaither* to be on point.

Finally, Wooldridge argues that DNA testing should be allowed for attempted rape convictions because in both rape and attempted rape, the defendant must be present at the crime scene to commit the offense, which "is the very point of DNA testing." But this type of comparison would make almost all crimes indistinguishable for the purpose of DNA testing. The district court found this argument "problematic":

"[A]s a practical matter, a floodgate would be opened since all defendants convicted of an attempt to commit any crime could arguably request and obtain post-conviction DNA testing of the evidence to determine whether that defendant was present at the scene of that particular crime. Such a broad interpretation of K.S.A. 21-2512 would fundamentally eviscerate the statutory limitations for post-conviction DNA testing well beyond first-degree murder and rape."

We agree with the district court's analysis. In sum, K.S.A. 21-2512 does not treat "arguably indistinguishable" individuals differently, and Wooldridge fails to satisfy the first step of his equal protection claim. Because individuals who are convicted of attempted rape are not similarly situated to those convicted of rape, the application of K.S.A. 21-2512 should not be extended on equal protection grounds to include DNA testing for individuals convicted of attempted rape. As a result, the district court did not err in denying Wooldridge's postconviction motion for forensic DNA testing under K.S.A. 21-2512 following his conviction of attempted rape.

Affirmed.

(551 P.3d 202)

No. 126,146

STATE OF KANSAS, *Appellee*, v. BETH MERRILL, *Appellant*.

SYLLABUS BY THE COURT

1. JURISDICTION—*Territorial Jurisdiction—Governed by Statute*. Whether territorial jurisdiction exists is a question of law governed by the provisions of K.S.A. 21-5106.

2. VENUE—*Venue Required to Establish Jurisdiction*. Venue is a question of fact that must be proved to establish jurisdiction.

3. JURISDICTION—*Territorial Jurisdiction—Requirements for Criminal Prosecution*. If one or more material elements of a crime occurs wholly or partly within this state, then Kansas has territorial jurisdiction to prosecute a criminal defendant.

4. SAME—*Territorial Jurisdiction—Broad Interpretation of Statute*. The territorial jurisdiction statute is to be interpreted broadly in determining whether a crime may be prosecuted in Kansas.

5. MOTOR VEHICLES—*Implied Consent Notice Requirements—Substantial Compliance Is Generally Sufficient*. Substantial compliance with the implied consent notice requirements set forth in K.S.A. 8-1001 et seq. is generally sufficient provided that the notice conveys the essentials of the statute and does not mislead the driver.

6. SAME—*Sentencing Enhancement Statute—Not Violation of Ex Post Facto Clause*. K.S.A. 21-6811(c)(3) does not violate the Ex Post Facto Clause of the United States Constitution.

Appeal from Johnson District Court; MICHAEL P. JOYCE, judge. Oral argument held April 16, 2024. Opinion filed June 21, 2024. Affirmed.

Jonathan Laurans, of Kansas City, Missouri, for appellant.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before BRUNS, P.J., GARDNER and ISHERWOOD, JJ.

BRUNS, J.: Beth Merrill appeals after being convicted in Johnson County District Court of two counts of felony aggravated battery while driving under the influence. On appeal, Merrill contends that the State of Kansas does not have territorial jurisdiction

to prosecute this case. In addition, she contends that the district court erred in admitting certain evidence at trial relating to the issue of territorial jurisdiction. She also contends that the district court erred in admitting evidence of her refusal to take a breathalyzer test. Finally, Merrill contends that the district court's application of K.S.A. 2016 Supp. 21-6811(c)(3) in calculating her criminal history score violates the Ex Post Facto Clause of the United States Constitution. For the reasons set forth in this opinion, we affirm Merrill's convictions and sentence.

FACTS

On the morning of November 18, 2016, Merrill was driving in the southbound lanes of State Line Road when she struck two vehicles from behind that were stopped at a traffic signal at the intersection of 128th Street and State Line Road. An eyewitness reported that shortly before the collision, he observed Merrill leaving a neighborhood in Leawood, driving eastbound on 124th Street, and turning southbound on State Line Road. Eyewitnesses also reported that Merrill failed to slow down as she approached the vehicles stopped at a red light at the intersection.

One of the vehicles that Merrill hit was driven by Sandra Dillard, who was transporting her 83-year-old mother home from a doctor's appointment in Leawood. Dillard and her mother suffered significant injuries and both were hospitalized. Dillard's car was totaled in the crash. The second vehicle that Merrill struck was driven by Barbara Shull. Although her car was damaged, Shull was not injured.

Leawood Police Officer Cody Shields was the first to respond to the scene of the crash. He spoke to several eyewitnesses who told him that Merrill had been driving erratically for several blocks in the southbound lanes of State Line Road immediately prior to hitting the Dillard and Shull vehicles from behind. One of the eyewitnesses indicated that Merrill was having trouble remaining in her lane and at one point, she briefly veered into the northbound lanes before returning to the southbound lanes.

One of the eyewitnesses reported to Officer Shields that he could smell alcohol on Merrill's breath when he spoke to her after

the crash and stated that she appeared to be intoxicated. In speaking with Merrill at the scene, Officer Shields also smelled the odor of alcohol on her breath, and she admitted to him that she had been drinking. The officer also noticed that Merrill seemed to be confused and slurred her words as she spoke.

According to Officer Shields, Merrill repeatedly asked about her dog but did not appear to realize the seriousness of what had happened nor did she express concern about those injured in the crash. Although the officer repeatedly asked for her driver's license, Merrill was unable to provide it and insisted that she had already given it to him. Officer Shields and another officer who had arrived at the scene also noticed that Merrill was having a difficult time maintaining her balance.

When asked by Officer Shields to perform field sobriety tests, Merrill was unable to complete them and had difficulty following simple commands. She also refused to submit to a preliminary breath test when asked to do so. Accordingly, Officer Shields arrested Merrill and transported her to the Leawood Police Department for further processing.

At the police station, Officer Shields gave Merrill a copy of the implied consent advisory form and also read it to her out loud. As he read the advisory to her, Merrill continued to talk about her dog. After he was finished reading, Officer Shields asked Merrill to submit to a breathalyzer test, but she refused. Merrill was then placed in a holding cell while Officer Shields began the process of applying for a search warrant in order to obtain a sample of Merrill's blood for testing.

After the search warrant was acquired, Officer Shields transported Merrill to Menorah Medical Center where a blood sample was obtained. The blood sample was submitted to the Kansas Bureau of Investigation (KBI) for testing in its laboratory. Subsequently, the KBI laboratory issued a report revealing that Merrill's blood alcohol level was .31 grams per 100 milliliters, which is nearly four times the legal limit to drive a vehicle in Kansas.

On June 15, 2017, the State charged Merrill with two counts of aggravated battery while driving under the influence in violation of K.S.A. 8-1567 and K.S.A. 21-5413(b). The first count arises out of the injuries suffered by Dillard and the second count

arises out of the injuries suffered by her elderly mother. The State also charged Merrill with one count of misdemeanor refusal of a preliminary breath test, but that count was dismissed before trial.

Subsequently, Merrill filed motions to suppress statements that she made to police and to suppress evidence of the results of her blood alcohol test. In response the State agreed that it would not use the statements Merrill made while in police custody at trial. Although the district court suppressed the results of Merrill's blood alcohol test, this decision was reversed in an interlocutory appeal filed by the State. See *State v. Merrill*, No. 121,912, 2020 WL 5083528, at *11 (Kan. App. 2020) (unpublished opinion).

Merrill waived her right to a jury trial and the district court held a one-day bench trial on June 7, 2022. At trial, the State presented 14 witnesses and introduced 28 exhibits that were admitted into evidence. After the State rested, Merrill exercised her right not to testify or present any witnesses. Merrill admitted three maps as exhibits that purportedly showed the location of the Kansas-Missouri border on State Line Road near 128th Street. Much of the evidence presented at trial related to where the collision and other events occurred in relationship to the Kansas-Missouri border.

Dillard testified that the accident occurred in the left southbound lane as she was stopped at a traffic signal located at the intersection of 128th Street and State Line Road. She described seeing Merrill's car in her rearview mirror as it sped toward her. Dillard also testified about the injuries she suffered in the crash, which included multiple broken ribs. According to Dillard, she was off work for several months as a result of the collision and continued to suffer from ongoing discomfort in the chest.

Likewise, Dillard testified about the injuries that her mother—who died in 2018—had suffered when they were rear-ended by Merrill. These injuries included multiple broken ribs and a fractured sternum. Dillard also testified that her mother had previously lived independently but needed assistance to care for herself after the accident.

Similarly, Shull testified that she was stopped in the left lane at the intersection of 128th Street and State Line Road waiting for a red light when the crash occurred. The State also presented the

testimony of Timothy Peters who testified that he first saw Merrill's vehicle turning from eastbound 124th Street in Leawood onto southbound State Line Road. He explained that Merrill's vehicle caught his attention because it pulled out in front of him as he was driving south on State Line Road. Peters further testified that he saw the crash occur in the southbound lane of State Line Road. Peters spoke with Merrill at the scene of the crash, and he testified that he detected a "slight odor" of alcohol.

Jeremiah Buck testified that he also saw Merrill's vehicle as it pulled out of a neighborhood traveling eastbound on 124th Street and turned onto southbound State Line Road. He testified that he noticed that her vehicle was being driven "erratically" prior to the accident. Buck observed her vehicle crossing between the northbound and southbound lanes of State Line Road. Although Buck did not see the actual collision, he confirmed that he saw the wreckage in the left southbound lane of State Line Road as he was driving south toward the intersection of 128th Street and State Line Road. Additionally, Pedro Arrieta Martinez testified that he saw the crash occur in the left lane of southbound State Line Road near 128th Street.

Several police officers from the Leawood Police Department also testified at trial regarding the events on November 18, 2016, and their investigation of the collision. Officer Shields testified about responding to the scene of the crash, his interactions with Merrill, and his investigation. Video footage from Officer Shields' body camera documenting his interaction with Merrill at the scene was admitted into evidence during his testimony.

In addition, Officer Shields testified about his training and experience with the Leawood Police Department. Officer Shields testified that his training included understanding the location of the Kansas-Missouri border in Leawood. He testified that the Leawood Police Department provides officers with a paper copy of a map showing the boundary and ensures officers have this map downloaded on the computer in their patrol vehicles. Officer Shields stated that he also carries a copy of the map on his motorcycle. The district court admitted a copy of this map into evidence only to show where officers of the Leawood Police Department understood the state boundary to be located. Based on this map,

Officer Shields testified that his understanding—based on his training with the Leawood Police Department—was that the Kansas-Missouri border in the area in which the crash occurred ran down the middle of the left southbound lane of State Line Road.

Detective Curtis Rice—who was assigned to follow up with the eyewitnesses after the crash—testified that he had been taught during his training with the Leawood Police Department that the southbound lanes of State Line Road near the intersection of 128th Street are in Kansas. Although Merrill's counsel objected to this testimony, the district court overruled the objection and ruled that Detective Rice could "testify about his understanding as a law enforcement officer about the boundary." Officer Phil Goff—who was dispatched to the accident scene—testified that he also believed based on his training and experience with the Leawood Police Department that the accident occurred in Kansas.

Officer Mark Chudik—who is an accident reconstructionist for the Leawood Police Department—testified about his work on the case. In particular, he testified about producing a diagram depicting the location of the vehicles based on his reconstruction of the crash from his body camera footage. Officer Chudik testified that he determined Merrill's vehicle struck Dillard's vehicle in the rear while traveling in the center of the left southbound lane of State Line Road. In addition, he testified that Merrill's vehicle collided with Shull's vehicle in the same lane. Officer Chudik further testified that he saw nothing to suggest to him that the crash occurred in the northbound lanes of State Line Road.

Additionally, Corporal Matthew Schroeder testified about his role in reconstructing and investigating the accident. Corporal Schroeder testified that the diagram he created—and which was admitted into evidence—utilized Officer Chudik's measurements taken at the scene of the collision. This diagram also depicted Merrill striking both vehicles in the left southbound lane of State Line Road.

As for the location of the Kansas-Missouri border, the State called Travis Wagner—an Automated Information Mapping System (AIMS) and Geographic Information System Supervisor for the Johnson County Department of Technology—as a witness.

Wagner explained that Johnson County's AIMS team uses a specialized subscription automated mapping software to provide mapping solutions for county departments, municipalities, utility companies, and citizens. He also testified about the various types of data kept and maintained by the AIMS team.

During Wagner's testimony, the State introduced a map—which was marked as Exhibit 28—showing the Kansas-Missouri border near the scene of the collision. The map showed the location of the Kansas-Missouri border—depicted by a red line—as running north and south down the center of the left southbound lane of State Line Road. Wagner testified that the map was created using Johnson County's automated mapping software. Wagner explained that the Johnson County Public Works department had retained the engineering firm Shafer, Kline & Warren (SKW) in 2011 to survey the state line based on "the geographic section corners for the state line." He stated that the AIMS team relied on SKW for survey data regarding the location of the Kansas-Missouri border. Wagner testified that to generate the map in Exhibit 28, he simply overlayed the 2011 survey data over an aerial image taken by the AIMS team in 2020. He described his role in the process to be "connect[ing] the dots based on [the] survey information."

Wagner further testified that the data reflected in Exhibit 28 regarding the Kansas-Missouri border had been stored in the Johnson County AIMS database since 2011 or 2012. He also testified that the data reflected in Exhibit 28 "is the best information we have available to represent the state line." Furthermore, Wagner testified that he was unaware of any changes in the survey data for the area in which the accident occurred since 2011.

Merrill objected to the admission of Exhibit 28 and Wagner's testimony solely on the grounds that Exhibit 28 was not produced nor was a summary or report of Wagner's testimony provided as part of expert discovery under K.S.A. 22-3212. Specifically, Merrill's counsel argued that the statute requires the State to give "a report or a summary [of] what [an expert is] going to say." In response, the State argued that it was not seeking to elicit expert opinions from Wagner. Rather, it argued that he was testifying as a records custodian to authenticate and lay the foundation for the

exhibit. The district court agreed and overruled Merrill's objection.

On cross-examination, Merrill's counsel asked Wagner about four other maps kept and maintained by the AIMS team. Three of these maps were admitted into evidence, each of which showed the Kansas-Missouri border in different locations from that shown on Exhibit 28. Merrill's counsel introduced Exhibit A—a publicly available map on the AIMS website created from Google Maps imagery—which was not admitted into evidence because of a lack of foundation. Merrill's counsel then introduced and admitted into evidence Exhibit B—a publicly available map on the AIMS website produced by a third-party, OpenStreetMap. Exhibit B showed the Kansas-Missouri border to be west of all the southbound lanes of State Line Road.

Merrill's counsel then introduced and admitted into evidence Exhibit C—another publicly available map on the AIMS website created with AIMS imagery taken in 2000. Exhibit C showed the Kansas-Missouri border to be in the middle of the right southbound lane of State Line Road. Finally, Merrill's counsel introduced and admitted into evidence Exhibit D—a publicly available map on the AIMS website created with AIMS imagery taken in 2006. Wagner testified that these other maps were not as reliable as the map in Exhibit 28 because Exhibit 28 was created with the 2011 survey and 2020 imagery, which were the most up to date and accurate data to show the Kansas-Missouri border on State Line Road.

After both parties rested and their counsel presented closing arguments, the district court took the case under advisement. The next day, the district court announced its verdict from the bench. In finding Merrill guilty of both counts of aggravated battery while driving under the influence, the district court recognized that the most difficult questions presented were "whether the Court is the proper venue for Ms. Merrill to be prosecuted and whether this Court has jurisdiction over Ms. Merrill and the subject matter of this even[t] and the aggravated . . . batteries that occurred on November 18, 2016."

In resolving the questions of venue and jurisdiction, the district court found:

"Various maps with perceived lines of the dividing line between Kansas and Missouri along State Line Road were admitted into evidence. This Court chooses to conclude that *the evidence established beyond a reasonable doubt that Exhibit 28 reflects the most accurate location of the actual state line dividing Kansas and Missouri at or around the area of 124th to 128th Streets along State Line Road. Exhibit 28 shows that the boundary divider effectively runs down the middle of the left southbound lane of State Line Road. This map was completed as part of a survey performed for Johnson County in late 2011 or early 2012, and the evidence showed that the red dividing line referencing the state line was inserted upon the map based upon the data provided within the survey.* Mr. Wagner testified that the boundary lines have not changed much after the survey and the map were completed before 2017, *thus Ms. Merrill was operating her vehicle in both Kansas and Missouri while she returned to the left southbound lane and collid[ed] into M*[*s*]*. Dillard's and Ms. Shull's vehicles.*

"Notwithstanding the Court's conclusions that the left southbound lane is located at least partially within Leawood, Johnson County, Kansas. *This court is the proper venue based on . . .* [*K.S.A.*] *22-2603 or 22-2604, which I read earlier. And jurisdiction is based on 21-5106 and that the evidence establishes that a material element of the offense, operating a vehicle while under the influence of alcohol, occurred within Johnson County, Kansas.*

"Missouri state statute R.S.M.O. 541.033 has similar language as the Kansas statute on venue. When an offense is partly committed in one county and partly in another, or if the elements of the crime occur in more than one county, the prosecution may proceed that any of the counties where any element of the offense occurred. As a result, the Court finds the defendant, Beth Janice Merrill, guilty beyond a reasonable doubt on Counts I and II of DUI aggravated battery." (Emphases added.)

Prior to sentencing, Merrill filed a motion for judgment of acquittal as well as a motion for dispositional and/or durational departure. At the sentencing hearing held on December 29, 2022, the district court denied both motions. In denying the motion for judgment of acquittal, it found that a material element of Merrill's crimes occurred at least partly in Kansas when she drove in Kansas under the influence of alcohol immediately prior to the collision. In addition, the district court found that even if Exhibit 28 had been admitted in error, the map in Exhibit 28 was consistent with other testimony as to the location of the Kansas-Missouri border on State Line Road.

Although the State requested that a controlling sentence of 94 months of imprisonment be imposed, the district court exercised its discretion to impose a mid-range presumptive prison sentence of 57 months on the first count. The district court then imposed a concurrent 32-month sentence on the second count. In addition,

the district court ordered 24 months of postrelease supervision. Even so, it did not order the payment of restitution because a claim for damages was being handled in a civil action.

ANALYSIS

Territorial Jurisdiction

On appeal, Merrill contends that Kansas lacked territorial jurisdiction to prosecute her in this case. Whether territorial jurisdiction exists is a question of law over which we have unlimited review. See *State v. Rupnick*, 280 Kan. 720, 741, 125 P.3d 541 (2005). Interpretation of a statute is also a question of law over which we have unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021). On the other hand, venue—which also must be proven to establish jurisdiction—is a question of fact. See *State v. Hillard*, 315 Kan. 732, 775, 511 P.3d 883 (2022).

In Kansas, territorial jurisdiction is governed by the provisions of K.S.A. 21-5106. The statute provides that Kansas courts have territorial jurisdiction if a defendant commits "a crime wholly or partly within this state." K.S.A. 21-5106(a)(1). In turn, K.S.A. 21-5106(b) sets out the circumstances under which a crime is considered to be committed partly in Kansas:

> "(b) A crime is committed partly within this state if:
> (1) An act which is a constituent and material element of the offense;
> (2) an act which is a substantial and integral part of an overall continuing criminal plan; or
> (3) the proximate result of such act, occurs within the state."

In other words, "[t]he State of Kansas has jurisdiction in a criminal case in which any element or the result of the crime occurs in Kansas . . . ." *State v. Grissom*, 251 Kan. 851, Syl. ¶ 5, 840 P.2d 1142 (1992).

It is also important to recognize that although a person cannot be convicted of the same crime in more than one state, it is possible for Kansas and a bordering state to have "concurrent jurisdiction" to prosecute the same conduct. "The concept of concurrent jurisdiction entails two different courts having jurisdiction over the subject matter of the controversy and either court being a proper forum for its resolution." *State v. Russell*, 229 Kan. 124,

131, 622 P.2d 658 (1981). Accordingly, K.S.A. 21-5106(e) provides that "[i]t is not a defense that the person's conduct is also a crime under the laws of another state or of the United States or of another country."

Although the ultimate issue of whether Kansas has territorial jurisdiction over a criminal case is a question of law, K.S.A. 21-5106(g) instructs that the determination of whether a crime occurred wholly or partly within Kansas can involve factual questions that must "be determined by the court by the preponderance of the evidence." As the Kansas Supreme Court has found, it is necessary to examine the evidence in light of the statutory territorial jurisdictional provisions. See *State v. Rozell*, 315 Kan. 295, 299, 508 P.3d 358 (2022). Our Supreme Court has also found it is appropriate for the State to rely on circumstantial evidence to establish territorial jurisdiction. See *Rupnick*, 280 Kan. 720, Syl. ¶ 17.

In *State v. Grissom*, 251 Kan. at 889, the Kansas Supreme Court found that a broad interpretation of the territorial jurisdiction statute is appropriate. In reaching this conclusion, our Supreme Court discussed the similarities between the territorial jurisdiction statute and venue statutes:

"Although jurisdiction and venue are different, an analogy can be made to the venue statutes. For example, if a crime is committed in two counties, either county has venue. K.S.A. 22-2603. If a crime is committed on or so near the boundary of two counties that it cannot be determined in which county the crime occurred, either county has venue. K.S.A. 22-2604." 251 Kan. at 889.

Here, the district court was faced with the question of whether Merrill's criminal conduct occurred in Kansas, in Missouri, or in both states. If any material element of Merrill's crimes occurred wholly or partly in this state, then Kansas had territorial jurisdiction to prosecute. See K.S.A. 21-5106(a)(1), (b)(1). As a result, only if all the material elements of her crimes of conviction occurred solely in Missouri would Kansas not have jurisdiction to prosecute Merrill for her crimes.

After hearing the evidence presented at the bench trial and considering the arguments of counsel, the district court determined that territorial jurisdiction in Kansas was appropriate under K.S.A. 21-5106. A review of the record confirms that in reaching this determination, the district court correctly recognized that

"[v]enue is a question of fact for the factfinder" while "[j]urisdiction is a question of law." Moreover, in analyzing where the material elements of the crimes occurred in relationship to the Kansas-Missouri border, the district court appropriately considered and weighed the evidence presented at trial in reaching its decision.

Based on our review of the record on appeal, we find that the district court correctly applied the law regarding the interrelated questions of venue and territorial jurisdiction. After weighing the conflicting evidence, the district court ultimately determined that "the evidence established *beyond a reasonable doubt* that Exhibit 28 reflects the most accurate location of the actual state line dividing Kansas and Missouri at or around the area of 124th to 128th Streets along State Line Road." (Emphasis added.) As discussed above, Exhibit 28 shows the Kansas border runs down the middle of the left southbound lane of State Line Road where the collision in this case occurred.

We find the district court's determination that the material element of where the crash occurred was at least partially in Kansas is supported by the evidence. Likewise, there is sufficient evidence in the record to support the district court's determination that Merrill was "operating or attempting to operate any vehicle within this state" while intoxicated. K.S.A. 8-1567(a). As the State points out, this is also a material element of the offense of aggravated battery while driving under the influence—as set forth in K.S.A. 21-5413(b)(3) and K.S.A. 8-1567. In ruling on the motion for judgment of acquittal the district court again found that one or more material elements of the crime of aggravated battery while driving under the influence were committed in Kansas. The district court explained that the evidence established that Merrill participated in "continuing criminal activity from the time she was driving the car in Kansas, turned onto State Line Road, was weaving back and forth before the accident took place, which was less than four blocks away" from the scene of the crash.

Consequently, we conclude that the district court appropriately applied Kansas law in determining that territorial jurisdiction was proper in this state because one or more material elements of

the offense of aggravated battery while driving under the influence occurred wholly or partly within this state.

Constitutionality of K.S.A. 21-5106(g)

Merrill briefly argues that K.S.A. 21-5106(g) "may be unconstitutional." Without developing this argument, she suggests that "the statute may have a constitutionality problem in the second clause, where 'preponderance' is employed by the Kansas Legislature as the evidentiary burden, rather than 'beyond a reasonable doubt.'" Yet this issue was not presented to the district court, and Merrill has offered no reason why we should consider it for the first time on appeal. See *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022) (holding that issues not raised before the district court cannot be raised on appeal); see also Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36) (requiring an appellant to explain why an issue that was not raised below should be considered for the first time on appeal). Because this issue was not raised below nor is it developed in Merrill's brief, we decline the invitation to consider it for the first time on appeal.

Admission of Evidence at Trial

Merrill also contends that the district court should have found some of the State's evidence regarding the location of the Kansas-Missouri border to be inadmissible because it was based on hearsay. But a review of the record reveals that Merrill did not assert a contemporaneous hearsay objection to either the testimony of the AIMS Supervisor or to the admission of Exhibit 28 into evidence. As indicated above, the district court primarily relied on this exhibit in determining the location of the border between Kansas and Missouri. Specifically, the district court found that "the evidence established beyond a reasonable doubt that Exhibit 28 reflects the most accurate location of the actual state line dividing Kansas and Missouri around the area of 124th to 128th Streets along State Line Road." As a result, the district court determined that "Merrill was operating her vehicle in both Kansas and Missouri" when the accident occurred.

"The contemporaneous objection rule is set forth in K.S.A. 60-404, which generally precludes an appellate court from reviewing

an evidentiary challenge absent a *timely and specific objection* made on the record." (Emphasis added.) *State v. Showalter*, 318 Kan. 338, 345, 543 P.3d 508 (2024) (citing *State v. Ballou*, 310 Kan. 591, 613-14, 448 P.3d 479 [2019]). This is true even when constitutional rights are in question. *State v. Solis*, 305 Kan. 55, 63-64, 378 P.3d 532 (2016). As our Supreme Court has found, an evidentiary objection must not only be timely asserted but also must be specific. Furthermore, a party may not object to the admission of evidence on one ground at trial and then attempt to assert a different ground on appeal. *State v. George*, 311 Kan. 693, 701, 466 P.3d 469 (2020).

Here, the record shows that Merrill only objected to Exhibit 28 on the ground that the State had failed to produce Exhibit 28 "pursuant to K.S.A. 22-3212, the expert discovery [statute]." Significantly, Merrill does not challenge the district court's ruling regarding her K.S.A. 22-3212 objection, which was overruled by the district court. Consequently, Merrill is attempting to assert an evidentiary challenge on appeal that is different from the one she asserted at trial. Because she did not make a contemporaneous and specific hearsay objection at trial as to the admission of Exhibit 28 or as to the testimony of the AIMS Supervisor, we find that her hearsay challenge to this exhibit is not preserved for appeal.

Merrill did assert a hearsay objection to the testimony of Detective Rice when he was asked about his training and experience regarding what he had been taught on the location of the Kansas and Missouri border. She also objected to this evidence on the ground that it violated her right to confront the witnesses against her under the Confrontation Clause of the Sixth Amendment to the United States Constitution. See U.S. Const. amend. VI; see also Kan. Const. Bill of Rights, § 10. However, even if we assume that Detective Rice's testimony regarding what he was taught about the Kansas-Missouri border was inadmissible, we find that any such error was harmless because there was sufficient admissible evidence presented at trial on territorial jurisdiction. See K.S.A. 2023 Supp. 60-261; see also *State v. Williams*, 306 Kan. 175, 202-03, 392 P.3d 1267 (2017).

Even an error that infringes on a party's constitutional rights is considered to be harmless if the party benefiting from the error—

in this case the State—persuades us "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011), *cert. denied* 565 U.S. 1221 (2012) (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 [1967]). As addressed above, the district court primarily relied on Exhibit 28 to determine the location of the Kansas-Missouri border near the intersection of 128th Street and State Line Road. Relying on this exhibit and other evidence indicating that the collision occurred in the left southbound lane of State Line Road, the district court concluded that Merrill committed her crimes of conviction at least partially in Kansas.

In denying Merrill's motion for judgment of acquittal, the district court explained that it also found territorial jurisdiction was appropriate in Kansas because Merrill was observed driving erratically in Kansas in the moments before the collision. As discussed above, eyewitnesses testified that they observed her leaving a neighborhood in Johnson County, driving eastbound on 124th Street in Johnson County toward State Line Road, turning south on State Line Road, having difficulty keeping her vehicle in her lane, and striking two vehicles from the rear without slowing down. Moreover, Merrill did not object when Officer Shields testified that witnesses told him they saw her driving on 124th Street only moments before the crash, and he stated that 124th Street and State Line Road is in Johnson County. Based on this evidence as well as on the evidence showing that Merrill's blood alcohol content was still nearly four times the legal limit two hours after the crash, it was reasonable for the district court to conclude that the material elements of the crime of aggravated battery while driving under the influence of alcohol occurred at least partly in Kansas. See K.S.A. 21-5106(a)(1), (b)(1). Thus, we conclude based on a review of the entire record that there is no reasonable possibility that the alleged errors affected the outcome of the bench trial.

Breath Test Refusal

Next, Merrill contends that evidence of her refusal to submit to a breath test should have been excluded because the implied consent advisory—also known as a DC-70 form—that she received from Officer

Shields did not comply with the statutory requirements in effect at the time of her arrest. In response, the State contends that the DC-70 form substantially complied with Kansas law. We agree.

K.S.A. 2016 Supp. 8-1001(k)—which was in effect at the time of Merrill's arrest—required law enforcement officers to provide a driver with an implied consent advisory or DC-70 form before requesting a driver to submit to a breathalyzer test. Our Supreme Court has ruled that substantial compliance with the implied consent advisory statute is sufficient. Substantial compliance in this context means that law enforcement officers are to provide information to drivers that is adequate to inform them of the essential components of the statute. See *City of Overland Park v. Lull*, 51 Kan. App. 2d 588, 591, 349 P.3d 1278 (2015) (citing *Barnhart v. Kansas Dept. of Revenue*, 243 Kan. 209, 213, 755 P.2d 1337 [1988]).

The Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights prohibit unreasonable searches and seizures by government officials. When reviewing a motion to suppress evidence, a district court's factual findings are reviewed for substantial competent evidence and its ultimate legal conclusion is reviewed de novo. Because the parties do not dispute the material facts surrounding Merrill's breath test refusal in this case, our review of this issue is unlimited. *State v. Cleverly*, 305 Kan. 598, 604, 385 P.3d 512 (2016).

Among other things, K.S.A. 2016 Supp. 8-1001(k)(2) required an officer to advise a driver that he or she had no constitutional right to refuse consent to the requested test. In addition, K.S.A. 2016 Supp. 8-1001(k)(4) required an officer to advise that a test refusal may subject the driver to a separate criminal penalty. But the Kansas Supreme Court found both of these statutory notices to be unconstitutional. See *State v. Ryce*, 303 Kan. 899, Syl. ¶ 9, 368 P.3d 342 (2016) (*Ryce I*), *aff'd on reh'g* 306 Kan. 682, 396 P.3d 711 (2017) (*Ryce II*); *State v. Nece*, 303 Kan. 888, 889, 897, 367 P.3d 1260 (2016) (*Nece I*), *aff'd on reh'g* 306 Kan. 679, 396 P.3d 709 (2017) (*Nece II*).

Our Supreme Court handed down the decisions in both *Ryce I* and *Nece I* on February 26, 2016. On the same day, the Kansas Attorney General and Kansas Department of Revenue issued a re-

vised DC-70 form that conformed to the holdings in those decisions. The revised DC-70 form—which was read aloud and provided to Merrill in this case—did not include the statutory notices that our Supreme Court had declared unconstitutional. See *State v. Barta*, No. 117,990, 2018 WL 1883878, at *3 (Kan. App. 2018) (unpublished opinion).

It is undisputed that on November 18, 2016, Officer Shields arrested Merrill at the scene of the crash and transported her to the Leawood Police Department. At the police station, Officer Shields provided Merrill with the revised DC-70 form and read it to her out loud. Nevertheless, Merrill refused to submit to the breathalyzer test. As a result, a search warrant was obtained and Merrill was transported to Menorah Medical Center where a blood sample was collected. Later, the blood sample was delivered to the KBI for testing. Based on this testing, it was determined that Merrill's blood alcohol content was .31 grams per 100 milliliters, or nearly four times the legal limit for operating a motor vehicle within this state.

The revised DC-70 form provided and read aloud to Merrill contained the following notices:

"1. Kansas law (K.S.A. 8-1001) requires you to submit to and complete one or more tests of breath, blood or urine to determine if you are under the influence of alcohol or drugs or both.

. . . .

"3. If you refuse to submit to and complete any test of breath, blood or urine hereafter requested by a law enforcement officer, your driving privileges will be suspended for 1 year.

"4. If you submit to a breath or blood test requested by a law enforcement officer and produce a completed test result of .15 or greater, your driving privileges will be suspended for 1 year.

"5. If you submit to a breath or blood test requested by a law enforcement officer and produce a completed test result of .08 or greater, but less than .15, the length of suspension will depend upon whether you have a prior occurrence.

. . . .

"8. Refusal to submit to testing may be used against you at any trial on a charge arising out of the operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both."

Notwithstanding the holdings in *Ryce I* and *Nece I*, Merrill argues on appeal that the revised DC-70 form provided to her on

November 18, 2016, should have continued to include the statutory notice provisions found in K.S.A. 2016 Supp. 8-1001(k)(2) and (4) that were previously found to be unconstitutional. Merrill contends that the advisory was thus not in substantial compliance with the statute, and as such, her breath test refusal was coerced. Significantly, this court has previously rejected similar arguments on multiple occasions. See *State v. Barta*, 2018 WL 1883878, at *3-5 ("[T]he provisions of the [revised] DC-70 advisory . . . remain valid and do not amount to unconstitutional coercion of a suspect driver's consent to testing.").

In *State v. Barta*, the panel explained:

"Here, Barta was given the statutory warnings contained in a revised DC-70 form which eliminated the provisions found unconstitutionally coercive in *Ryce*. He contends that the officer's failure to give the complete advisories set forth in the statute renders the revised warnings unconstitutional and required suppression of the test results.

"But in enacting the Kansas implied consent law, the Legislature provided a severability clause which provided that the remaining provisions of the Act should be enforced in the event that provisions of the law are declared unconstitutional. K.S.A. 8-1007 states:

"'This act shall be construed as supplemental to existing legislation; and if any clause, paragraph, subsection or section of this act shall be held invalid or unconstitutional, it shall be conclusively presumed that the legislature would have enacted the remainder of this act without such invalid or unconstitutional clause, paragraph, subsection or section.'

"Pursuant to this statute, the Kansas Attorney General amended the DC-70 to delete its unconstitutional provisions. As stated in *State v. Limon*, 280 Kan. 275, 304, 122 P.3d 22 (2005): '"[T]he enactment of a severability clause in a statute or series of statutes evidences the intent of the legislature that if some portion or phrase in the statute is unconstitutional, the balance shall be deemed valid." [Citation omitted.]' Here, the Legislature unequivocally expressed its intent that if a portion of the Kansas implied consent law was found to be unconstitutional, the remaining provisions of the statute survive.

"*Substantial Compliance*

"Because K.S.A. 8-1001 et seq. is remedial in nature and is to be liberally construed, '"it is generally recognized that substantial compliance with statutory notice provisions will usually be sufficient" when advising a driver of his or her rights under the Kansas implied consent law, provided that the notice in question "conveyed the essentials of the statute and did not mislead the appellant." [Citation omitted.]' *Hoeffner v Kansas Dept. of Revenue*, 50 Kan. App. 2d 878, 883, 335 P.3d 684 (2014), *aff'd* No. 110,323, 2016 WL 6248316 (Kan. 2016) (unpublished opinion). In deleting the unconstitutionally coercive provisions of the statute and the original DC-70 advisory, the officer who arrested Barta substan-

tially complied with our implied consent law in advising him. Substantial compliance did not require the officer to misadvise Barta of the possible adverse consequences of withdrawing his consent." *Barta*, 2018 WL 1883878, at *4-5.

Although we will not discuss each of the cases in detail, we find it to be significant that numerous panels of this court have consistently concluded that the revised DC-70 form—with the omission of the statutory notice provisions invalidated by *Ryce I* and *Nece I*—substantially complies with the statutory implied consent advisory requirements. See *City of Hutchinson v. Smith*, No. 119,403, 2020 WL 2091077, at *2 (Kan. App. 2020) (unpublished opinion) ("Failing to inform someone of an unconstitutional statute can't be an irregular performance of an obligation to provide a substantially accurate statement of the relevant law."); *Leivian v. Kansas Dept. of Revenue*, No. 119,249, 2019 WL 166541, at *5 (Kan. App. 2019) (unpublished opinion) (finding that the notices provided in the revised DC-70 form "substantially comply with the statutory requirements"); *Ackerman v. Kansas Dept. of Revenue*, No. 118,128, 2018 WL 3673168, at *3 (Kan. App. 2018) (unpublished opinion) ("The language within the revised DC-70 substantially complies with the notices that are required post-*Ryce*."), *rev. denied* 310 Kan. 1061 (2019); *Bynum v. Kansas Dept. of Revenue*, No. 117,874, 2018 WL 2451808, at *4 (Kan. App. 2018) (unpublished opinion) ("We find the analysis and conclusions set forth in *Barta* and *White* to be pertinent, persuasive, and determinative of the issues herein."); *White v. Kansas Dept. of Revenue*, No. 117,956, 2018 WL 1769396, at *5 (Kan. App. 2018) (unpublished opinion) (Finding the revised DC-70 form the driver "was provided did not vitiate her consent to the test. Her consent to the test was voluntary and free from the coercion condemned in *Ryce* and *Nece*.").

We find the reasoning of these decisions in addressing this issue to be sound, and we find their consistency to be persuasive. Although in some cases the driver consented to take the requested breath test while in other cases the driver refused, we do not find this to be a material distinction because "the arguments presented [in each case] are virtually indistinguishable." *Bynum*, 2018 WL 2451808, at *4. Consequently, like other panels before us, we find

that the revised DC-70 form delivered and read to Merrill on November 18, 2016, substantially complied with the statutory implied consent advisory notices in effect at the time she committed her crimes.

Hence, we also find that Merrill has failed to establish that the revised DC-70 form was coercive or that she suffered prejudice. Accordingly, we conclude that the district court did not err in denying Merrill's motion to suppress or her objection to the evidence admitted at trial regarding her refusal to submit to a breath test.

Application of K.S.A. 2016 Supp. 21-6811(c)(3) at Sentencing

Merrill's final contention on appeal is that the district court erred in applying K.S.A. 2016 Supp. 21-6811(c)(3)—known as special sentencing rule 44—in imposing her sentence. She argues that the statute is unconstitutional as applied to her because it violates the Ex Post Facto Clause of the United States Constitution. In support of this argument, Merrill asserts that K.S.A. 2016 Supp. 21-6811(c)(3) improperly reclassified her prior DUI offenses for which she had completed her diversion requirements. In response, the State contends that the statute does not violate the Ex Post Facto Clause because it does not increase the penalties imposed in her prior criminal cases but only increases the penalty for her current crimes of conviction.

On May 7, 2018, Merrill filed a pretrial motion challenging the constitutionality of K.S.A. 2016 Supp. 21-6811(c)(3). It is unclear from a review of the record on appeal whether the district court ever expressly ruled on the motion. Regardless, the State candidly conceded at oral argument that the issue was preserved because the district court applied K.S.A. 2016 Supp. 21-6811(c)(3) in determining Merrill's criminal history score at sentencing.

In Kansas, "[t]he legislature alone has the authority to define crimes and prescribe punishments." *State v. Todd*, 299 Kan. 263, 276, 323 P.3d 829 (2014). But this power is not unlimited. Pursuant to Article 1, § 10 of the United States Constitution, states are prohibited from passing any ex post facto laws. For a criminal law to be deemed ex post facto, "'it must be retrospective, that is it

must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. [Citations omitted.]'" *Todd*, 299 Kan. at 278.

The United States Supreme Court has held that enhancement statutes—including criminal history and recidivist provisions—do not violate the Ex Post Facto Clause of the United States Constitution. This is because enhancement statutes "do not change the penalty imposed for the earlier conviction" and "penaliz[e] only the last offense committed by the defendant." *Nichols v. United States*, 511 U.S. 738, 747, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994). Our Supreme Court has also recognized this legal principle. See *State v. Keel*, 302 Kan. 560, 589, 357 P.3d 251 (2015); see also *State v. Overton*, 279 Kan. 547, 561, 112 P.3d 244 (2005) ("[T]he fundamental rule for sentencing is that the person convicted of a crime is sentenced in accordance with the sentencing provisions in effect at the time the crime was committed.").

In 2015, the Kansas Legislature passed House Bill 2055 which amended K.S.A. 21-6811. This amendment added subsection (c)(3) which addresses the calculation of a defendant's criminal history score when the current crime of conviction is aggravated battery while driving under the influence. L. 2015, ch. 90, § 2. This amendment took effect on July 1, 2015, which was more than a year prior to Merrill committing the crimes for which she was convicted in this case. See L. 2015, ch. 90, § 2; see also *State v. Murphy*, No. 115,260, 2017 WL 2001598, at *3 (Kan. App. 2017) (unpublished opinion).

K.S.A. 2016 Supp. 21-6811(c)(3) provided:

"(3) If the current crime of conviction is for a violation of K.S.A. 21-5413(b)(3), and amendments thereto:

(A) The first prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for the following shall count as one nonperson felony for criminal history purposes: (i) Any act described in K.S.A. 8-2,144 or 8-1567 or K.S.A. 8-1025, and amendments thereto; or (ii) a violation of a law of another state or an ordinance of any city, or resolution of any county, which prohibits any act described in K.S.A. 8-2,144 or 8-1567 or K.S.A. 8-1025, and amendments thereto; and

(B) each second or subsequent prior adult conviction, diversion in lieu of criminal prosecution or juvenile adjudication for the following shall count as one person felony for criminal history purposes: (i) Any act described in K.S.A. 8-2,144 or 8-1567 or K.S.A. 8-1025, and amendments thereto; or (ii) a violation of

a law of another state or an ordinance of any city, or resolution of any county, which prohibits any act described in K.S.A. 8-2,144 or 8-1567 or K.S.A. 8-1025, and amendments thereto."

Kansas appellate courts have not previously addressed whether K.S.A. 2016 Supp. 21-6811(c)(3) violates the Ex Post Facto Clause. However, this court has found that by enacting the 2015 amendment, "[t]he Kansas Legislature has specifically and unambiguously spoken out regarding how a defendant convicted of aggravated battery while DUI should have his [or her] prior DUI convictions scored for criminal history purposes." *State v. Obiero*, No. 121,341, 2022 WL 1205982, at *7 (Kan. App.) (unpublished opinion), *rev. denied* 316 Kan. 762 (2022). Further, this court has upheld a prospective enhancement of driving under the influence conviction under K.S.A. 8-1567. *State v. Campbell*, 9 Kan. App. 2d 474, 476-77, 681 P.2d 679 (1984).

In *State v. Campbell*, the panel found that "[t]he provisions of K.S.A. 8-1567, as amended, which provide for mandatory increased penalties for repeat offenders, do not make the statute an ex post facto law even though a defendant's prior convictions were for violations of statutes or ordinances which contained no similar provisions." 9 Kan. App. 2d 474, Syl. ¶ 3; see also *State v. Jones*, 214 Kan. 568, 570, 521 P.2d 278 (1974) ("A repeating offender is not punished for the prior offense or offenses, but the Legislature has declared that repeated violations justify the enhanced penalty.") Likewise, in *City of Norton v. Hurt*, 275 Kan. 521, 522-24, 66 P.3d 870 (2003), our Supreme Court held that a 2001 amendment to K.S.A. 8-1567—that became effective before the defendant's second DUI offense—was not an ex post facto law because it "did not operate retroactively to increase the penalty for [the] driver's prior DUI offense. . . . [A]nd [it] increased the penalty for the second violation only."

Because the 2015 amendment to K.S.A. 21-6811(c)(3) became effective more than a year before Merrill committed her crimes of conviction in this case, we find that she had reasonable notice of the change in the law. As a consequence of the amendment, Merrill's current convictions for aggravated battery while driving under the influence triggered the application of the enhancement of her criminal history score under K.S.A. 2016 Supp.

21-6811(c)(3). Although the application of K.S.A. 2016 Supp. 21-6811(c)(3) increased Merrill's penalty for her current crimes of conviction, it did not operate retroactively to increase the penalty for her prior DUI offenses.

In other words, the terms of her prior diversions did not change nor have the penalties for her 2006 and 2012 DUIs increased. Rather, the 2015 amendment to K.S.A. 21-6811 only increased the penalty for her current aggravated battery while driving under the influence convictions. We therefore conclude that K.S.A. 2016 Supp. 21-6811(c)(3) is not unconstitutional as applied to Merrill and that it was appropriately used by the district court in this case to determine her criminal history score. Thus, K.S.A. 21-6811(c)(3) does not violate the Ex Post Facto Clause of the United States Constitution.

CONCLUSION

A review of the record before us shows that the district court properly exercised territorial jurisdiction over this case. In determining that Kansas has territorial jurisdiction as a matter of law, the district court appropriately applied the provisions of K.S.A. 21-5106 to the evidence presented at the bench trial. Furthermore, Merrill failed to preserve some alleged errors for appeal, and we find that any error in admitting the testimony of law enforcement regarding their training on the location of the Kansas-Missouri border was harmless.

We also find that the district court did not err in admitting evidence of Merrill's breath test refusal because the implied consent advisory provided to her by law enforcement substantially complied with the provisions of K.S.A. 2016 Supp. 8-1001. Additionally, we find that the district court's application of K.S.A. 2016 Supp. 21-6811(c)(3) at sentencing did not violate the Ex Post Facto Clause of the United States Constitution because it only increased the penalty for her current convictions. We, therefore, affirm Merrill's convictions and the sentence imposed.

Affirmed.

(551 P.3d 217)

No. 126,441

KIMBERLY JACKSON, *Appellant*, v. JOHNSON COUNTY and BOARD OF JOHNSON COUNTY COMMISSIONERS, *Appellees*.

SYLLABUS BY THE COURT

1. WORKERS COMPENSATION ACT—*Motion to Modify Award—Determining if Good Cause Exists to Review.* In determining whether a motion to modify a workers compensation award will be granted under K.S.A. 44-528(a), the Administrative Law Judge (ALJ) must make a threshold discretionary determination of whether good cause exists to review the award. It is only if the ALJ finds that good cause supports review that the matter will proceed to a final determination on modification of the award or reinstatement of a prior award.

2. SAME—*Motion to Modify Award—Determining if Good Cause Exists to Review – ALJ's Consideration.* Determining whether good cause exists to review a workers compensation award under K.S.A. 44-528(a) is different from the discretionary decision to modify the award or reinstate an award. As part of this threshold inquiry, the ALJ should consider the entire record and what is reasonable under the totality of the circumstances.

Appeal from Workers Compensation Appeals Board. Submitted without oral argument. Opinion filed June 21, 2024. Affirmed.

Daniel L. Smith, of Ankerholz and Smith, of Overland Park, for appellant.

Frederick J. Greenbaum and *Aaron J. Greenbaum*, of McAnany, Van Cleave, & Phillips P.A., of Kansas City, for appellees.

Before ARNOLD-BURGER, C.J., ATCHESON, J., and TIMOTHY G. LAHEY, S.J.

ARNOLD-BURGER, C.J.: Kimberly Jackson appeals the Workers Compensation Appeals Board (Board) decision denying her request for modification of her workers compensation award. She sought modification on the grounds that her award was inadequate and that her permanent disability and impairment had increased.

The Administrative Law Judge and the Workers Compensation Appeals Board found Jackson had failed to show "good cause" as a threshold requirement under K.S.A. 44-528(a) for

modification of her award and denied the request for that reason. Jackson has appealed.

Because we find that a finding of good cause is required before the ALJ can modify a prior award and the Board did not abuse its discretion in finding under these facts there was no good cause to review the award, we affirm the Board's decision.

FACTUAL AND PROCEDURAL HISTORY

Because our decision rests primarily on the interpretation of a statute and the procedural posture of this case, a detailed recitation of the facts surrounding Jackson's injury and various medical findings is not necessary. Jackson was injured while she was an employee of Johnson County. Johnson County contended that Jackson's injuries were covered by the Kansas Workers Compensation Act, K.S.A. 44-501 et seq., (Act) and paid her accordingly. Jackson asked the Division of Workers Compensation (Division) to find that her injury was not compensable under the Act because, she asserted, a colleague injured her on purpose during Jackson's unpaid lunch hour. After failing to present any medical evidence, challenge the disability award, or appeal it, she sought to later modify the award by challenging its adequacy.

The facts will be established as they relate to each issue examined.

ANALYSIS

I. A CLAIM WITH THE DIRECTOR OF WORKERS COMPENSATION IS MADE WHEN THERE IS A DISPUTE ABOUT BENEFITS

When an employee suffers personal injury arising out of and in the course of employment, the employer must pay compensation to the employee in accordance with and subject to the Act. This includes, for example, medical bills and resultant wage loss. Not every work-related injury goes to a hearing before an ALJ. It is only when the employer or insurance company and the employee disagree upon anything related to workers compensation benefits that an application is filed with the director of workers compensation (Director) for a determination of compensation or benefits. K.S.A. 44-534(a). The burden of proof is on the claimant to establish the claimant's right to an award of compensation and

to prove the conditions on which the claimant's right depends. K.S.A. 44-501b(c).

Once a request for a determination is filed with the Director, it is assigned to an ALJ for a hearing. The ALJ is required to "hear all evidence in relation thereto and to make findings concerning the amount of compensation, if any due to the worker." K.S.A. 44-534(a). There is also a statute of limitations for filing a request for determination or claim. The claim must be on file "within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later." K.S.A. 44-534(b).

II. JACKSON FILED A CLAIM WITH THE DIRECTOR CLAIMING HER INJURY WAS TO THE "BODY AS A WHOLE"

Jackson's injury occurred on August 11, 2016. She applied for a hearing, as described above, on February 10, 2017. In filling out the form, she stated that her foot and ankle were injured by assault and that her injury was of the "Body as a whole." Nothing on the face of her claim suggested she was asking the Director to decide whether she should be covered by the Act at all.

A preliminary hearing was held on March 8, 2017. At that hearing the ALJ stated that "Claimant alleges that she met with personal injury from an accident arising out of and in the course of her employment" and that she was only seeking a change in the authorized health care provider. The ALJ granted the request.

Another preliminary hearing was held over a year later, on May 23, 2018. At this hearing Jackson claimed for the first time that her injury was not compensable under the Act. She claimed the injury was caused by an assault during her unpaid lunch hour. Jackson also asserted that she still needed additional medical treatment, but not within the workers compensation system. After reviewing the record provided by the parties, the ALJ declined to rule on whether the claim was compensable under the Act. He found that the issue could be addressed at the regular hearing, but the *preliminary* hearing, as outlined in K.S.A. 44-534a(a), is limited to the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation. There was no dispute that Johnson County had paid

Jackson 16.57 weeks of temporary total disability compensation which it even voluntarily supplemented. So Jackson saw no reduction in her monthly income. There is also no dispute that all medical expenses were paid up to that time, so there was nothing to resolve by preliminary hearing.

III. JACKSON ASSERTS THAT HER INJURIES ARE NOT COVERED BY THE ACT AND ABANDONS ANY CLAIM OF BENEFITS RELATED TO HER INJURIES

The "[r]egular" or final hearing was held on January 29, 2019. At the start of the hearing, the ALJ stated that the issues to be decided were whether the incident was the prevailing factor in Jackson's injuries and whether Jackson's injuries were compensable under the Act. This was the only hearing scheduled on Jackson's claim and there was no stipulation or even request that it be bifurcated. This was the only opportunity for Jackson to bring forward any dispute about benefits to be paid. And, as already stated, she bore the burden of proof to establish her right to an award of compensation and to prove the conditions on which her right depends. K.S.A. 44-501b(c).

Yet, Jackson's counsel stated that it was unnecessary for the ALJ to make a prevailing factor determination because Jackson was "not seeking any benefits" and was simply asking the ALJ "to find that the case is not compensable." Jackson's counsel also stated that the ALJ need not determine the nature and extent of Jackson's disability. For these reasons, Jackson's attorney said, "medical evidence [was] irrelevant to any of the issues before the court." This appears to be a concession that Jackson had no disagreements with Johnson County over benefits, only over whether her injuries fell under the Act.

Accordingly, the only evidence the ALJ considered at the hearing—because Jackson presented none—was a deposition of Jackson taken in May 2018. In her deposition, Jackson described the August 2016 workplace incident and the later problems with her foot, ankle, knee, and lower back—including several surgeries. Jackson also testified that she sustained a mental injury because of the incident. She described feeling a lot of anxiety and

experiencing panic attacks and regularly seeing a counselor. Jackson stipulated that she was not seeking temporary disability benefits (she had received them), stipulated that her medical expenses had been paid, and that she was not seeking any future medical treatment.

The ALJ found that Jackson's injuries were compensable under the Act and awarded no permanent disability benefits or future medicals because Jackson did not request any.

IV. DECISIONS OF THE ALJ MAY BE APPEALED TO THE BOARD AND JACKSON DID SO

The Board was established by statute to sit as an appellate tribunal over decisions by the ALJ under the Act. The Board has jurisdiction to review all decisions, findings, orders, and awards of compensation by the ALJ. And, just as this court does, the Board reviews questions of law and fact by simply reviewing the record before the ALJ. K.S.A. 44-555c(a).

Jackson appealed the ALJ ruling to the Board, but only asked the Board to review whether the injury arose out of and in the course of her employment. She also asked the Board to find that limiting her ability to sue violated her due process rights. By only appealing one issue, Jackson abandoned any claim related to the ALJ's award regarding benefits or any claim to a disability determination different from the one awarded by the ALJ. See *Garcia v. Tyson Fresh Meats, Inc.*, 61 Kan. App. 2d 520, 525, 506 P.3d 283 (2022) ("A party has an obligation to advance a substantive argument in support of their position and buttress it with pertinent authority or risk a ruling that the issue is waived or abandoned.").

The Board agreed with the ALJ and held that Jackson's injury arose out of her employment. It also found that it could not consider constitutional issues. Jackson did not appeal the Board's decision.

V. JACKSON MOVED TO MODIFY THE ALJ AWARD, WHICH WAS DENIED BY BOTH THE ALJ AND THE BOARD

Modification of a workers compensation award is governed by K.S.A. 44-528(a), which provides that any award may be reviewed by the ALJ "for good cause shown" upon application of the employee. Once reviewed, and after a hearing, the ALJ may modify the award.

The statute seeks to recognize that a worker's situation may change after an award is ordered. The worker may get considerably better, justifying a modification on behalf of the employer or may get considerably worse, justifying modification on the part of the employee. "'The statute was enacted to meet such [a] situation and its provisions safeguard the welfare of the workman as well as the employer.'" *Gile v. Associated Co., Inc.* 223 Kan. 739, 740, 576 P.2d 663 (1978).

A few months after the Board denied her appeal from the ALJ's decision, Jackson filed a request for modification and review of the award under K.S.A. 44-528(a). She sought modification on the grounds that her award was inadequate and that her permanent disability and impairment had increased. Jackson presented evidence that she suffered a 25% permanent physical disability and a 50% permanent psychological disability. A hearing was held on the motion, and both Jackson and Johnson County submitted additional medical testimony and Jackson testified in person.

The ALJ found that Jackson failed to establish good cause to modify her original award. The ALJ rejected Jackson's argument that good cause is shown whenever an award is inadequate and permanent disability and impairment have increased. Instead, as a matter of statutory interpretation, the ALJ concluded that the good cause requirement was separate and distinct from the other criteria listed in the statute (such as adequacy or increased impairment) and that the good cause determination was a threshold determination left to the court's discretion. The ALJ concluded there was no good cause under the facts presented that would warrant a modification of the award.

The Board agreed with the ALJ incorporating much of the ALJ's reasoning and found, after a thorough analysis, that Jackson had not established good cause to modify the award. Jackson filed this appeal.

VI. GOOD CAUSE IS A THRESHOLD INQUIRY FOR MODIFICATION OF AN AWARD UNDER K.S.A. 44-528(a)

Jackson argues that the Board erred in interpreting K.S.A. 44-528(a) as containing a threshold review for good cause before proceeding to a modification determination. Resolution of this issue requires statutory interpretation. Interpretation of the Act presents a question of law subject to unlimited review. *EagleMed v. Travelers Insurance*, 315 Kan. 411, 420, 509 P.3d 471 (2022).

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should avoid reading something into the statute that is not readily found in its words. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language is ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *Johnson v. U.S. Food Service*, 312 Kan. 597, 600-01, 478 P.3d 776 (2021).

A. *The plain language of the statute reveals a legislative intent to create a threshold determination of good cause before granting a hearing on a motion to modify an award.*

The statute informs us that any award "may be reviewed" by the ALJ "for good cause shown" upon application of the employee. The statute then explains the review process.

"In connection with such review, the [ALJ] may appoint one or two health care providers to examine the employee and report to the [ALJ]. The [ALJ] shall hear all competent evidence offered and if the [ALJ] finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the [ALJ] may modify such award, or reinstate a prior award." K.S.A. 44-528(a).

Jackson argues that good cause exists any time one of the factors listed in the third sentence of the statute exists. In her case, that would include her assertions that the award was inadequate and that her impairment increased. In other words, as long as Jackson pleads that the award was inadequate or her impairment has increased, she has a right to proceed to a hearing and a ruling on modification. We disagree.

We start with the plain language of the statute. Examination reveals that it uses different modal auxiliary verbs in each sentence—a difference that aids us in determining legislative intent. See Webster's New World College Dictionary 939 (5th ed. 2018) (modal auxiliary is "an auxiliary verb that is used with another

verb to indicate its mood, as *can*, *could*, *may*, *might*, *must*, *shall*, *should*, *will*, and *would*").

In the first sentence, the statute says that the ALJ "may" review an award for good cause. K.S.A. 44-528(a). "The word 'may' in a statute typically signals that the decision is a discretionary one, not an entitlement." *Caporale v. Kansas Behavioral Sciences Regulatory Bd.*, 50 Kan. App. 2d 1155, 1159, 338 P.3d 593 (2014).

The statute then provides that "[i]n connection with such review" the ALJ can appoint health care workers to examine the employee and report to the ALJ. K.S.A. 44-528(a). This sentence would be a follow up to the discretionary action by the ALJ in the first sentence. So if the ALJ decides to review the award, then the ALJ is allowed to appoint health care workers to examine the employee.

In the third sentence, the statute says the ALJ "shall hear all competent evidence offered." K.S.A. 44-528(a). The word shall is generally interpreted as mandatory. See *City of Atchison v. Laurie*, 63 Kan. App. 2d 310, 318, 528 P.3d 1007 (2023) (listing factors to consider when determining whether the use of the word "shall" is mandatory or directory). Only if the ALJ finds, as it applies here, that the initial award was inadequate or that the claimant's disability increased does the statute provide that the ALJ "may" modify the award. K.S.A. 44-528(a).

In summary, the ALJ *may* review an award and the ALJ *may* then modify an award. But it may only exercise its discretion to modify an award if it finds (as it relates to these facts), after a mandatory review of all the evidence, that the award was inadequate, or the impairment has increased.

To interpret the statute as Jackson suggests—requiring the ALJ must review an award when there is merely a claim that it is, for example, inadequate—renders the first sentence meaningless. There would be no purpose for the first sentence and the interpretation would be the same if it were completely omitted. To reach the interpretation used by Jackson, the statute need only provide the circumstances upon which an award can be modified at the discretion of the ALJ. "The court should avoid interpreting a statute in such a way that part of it becomes surplusage." *State v. Van*

Hoet, 277 Kan. 815, 826-27, 89 P.3d 606 (2004); see *Bicknell v. Kansas Dept. of Revenue*, 315 Kan. 451, 479, 509 P.3d 1211 (2022).

In sum, the Legislature's decision to use "may" in some places and "shall" in others in K.S.A. 44-528(a) is significant. The use of both "may" and "shall" in the same statute is an indicator that the Legislature intended the word "may" to carry its ordinary meaning—a discretionary decision, not an entitlement. See *Caporale*, 50 Kan. App. 2d at 1160. Moreover, to interpret the statute in the way suggested by Jackson renders the first sentence meaningless or mere surplusage.

This leads us to conclude that the plain language of the statute reveals a legislative intent that the ALJ make a threshold inquiry as to whether there is good cause to review the case for possible modification. Granted, a claimant may submit evidence to the ALJ that the award was inadequate or based on fraud as a path to the finding of good cause to review the claim, but merely making the claim does not mandate that the ALJ review the award and set it for an evidentiary hearing. There may be other factors that demand consideration that are included in this discretionary determination of good cause. Those will be discussed later in this opinion.

B. *This interpretation also aligns with the Act as a whole.*

The legislative decision to set a threshold good cause inquiry for modification of a final award also makes sense in terms of the Act as a whole. The Act provides "a comprehensive set of statutes that define the rights of employees to compensation for workplace injuries and the procedures they must follow to obtain compensation." *Cincinnati Insurance Co. v. Karns*, 52 Kan. App. 2d 846, 849, 379 P.3d 399 (2016). To that extent, the Act is a self-contained legislative scheme. While employers must pay compensation to employees whose injuries are covered by the Act, the employee has the burden of proof in "establish[ing] the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-501b(c).

Under this scheme, the payment of a compensation award is a final judgment that cannot later be modified or dissolved by judicial fiat. *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 394,

44 P.3d 330 (2002). The good cause requirement serves as a gatekeeper to protect the finality of judgments and discourage the piecemeal determination of claims. See *Dunlap v. State*, 221 Kan. 268, 270, 559 P.2d 788 (1977) ("The time consumed and wasted by piecemeal litigation impedes the dispatch of business in the courts.").

This is further supported by the statutory appeal process. The Act not only provides an employee or employer the right to file a claim if there is a disagreement over benefits, but it also provides them with the opportunity for a comprehensive hearing and review of medical records. And if a party is dissatisfied with an ALJ's determination of the worker's benefits, they may appeal to the Board. K.S.A. 44-551(l)(1). If a party is dissatisfied with the Board's decision, they may appeal to this court. K.S.A. 44-556. This procedure would be meaningless if a claimant could simply use the modification process to replace an appeal. Requiring the ALJ to make a threshold determination of good cause ensures that the claim is not one that could have been raised at the time of the regular hearing or the subject of a timely appeal, even if the allegation is one of the listed bases for modification.

For these reasons, the Board did not err in its interpretation of K.S.A. 44-528(a)'s good cause requirement. Jackson was required to show good cause for review and modification before the Board considered whether her initial award was inadequate or that her impairment increased.

VII. THE BOARD DID NOT ABUSE ITS DISCRETION IN DENYING JACKSON'S MODIFICATION REQUEST

After finding that good cause is a threshold inquiry, we must address whether the Board erred in finding that Jackson did not establish good cause to proceed to a hearing on her claim.

Because the good cause inquiry is discretionary, we review the Board's decision for an abuse of discretion. Decisions by the Board are reviewed under the Kansas Judicial Review Act, which provides that relief shall be granted if an agency's discretionary decision is "unreasonable, arbitrary or capricious." K.S.A. 77-621(c)(8).

A. *What is good cause?*

Good cause is a phrase common in the Kansas statutes. It is usually not given any further definition, although at times what constitutes good cause is set out in detail in a statute. See K.S.A. 16-1306 (what constitutes good cause to cancel outdoor power equipment agreements). The phrase suggests a desire to give a court flexibility in decision making. Black's Law Dictionary defines "good cause" as simply "[a] legally sufficient reason." Black's Law Dictionary 274 (11th ed. 2019). The United States Supreme Court has noted that the term "cause" is a broad and general standard and a more specific definition would be impracticable given the "infinite variety of factual situations [that] might reasonably justify" a judicial action based on cause. *Arnett v. Kennedy*, 416 U.S. 134, 161, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974). The Tenth Circuit has defined cause by what it is not. "A discharge for cause is one which is not arbitrary or capricious, nor is it unjustified or discriminatory." *Weir v. Anaconda Co.*, 773 F.2d 1073, 1080 (10th Cir. 1985).

The Board considered the definition of good cause adopted in other types of cases and adopted a standard of review for good cause that "considered the entire record and all circumstances, including fairness, the interest of justice, reasonableness, good faith and the ALJ's discretion in the first instance" before finding that Jackson failed to establish good cause. We find no fault with the Board's approach to defining good cause.

B. *The Board found that Jackson failed to establish good cause for the ALJ or the Board to review her motion to modify her workers compensation award.*

The Board independently and through its incorporation and affirmance of the ALJ's decision then determined whether Jackson had established good cause for the ALJ to review her award.

But first, the Board noted that Jackson presented no argument before it as to why good cause existed to review her appeal. Likewise, on appeal, Jackson devotes only one sentence regarding the Board's discretionary decision: "The failure of the Board's order to modify the 2019 award and grant compensation benefits to

claimant for permanent disability for the injuries for the 2016 assault constitutes an abuse of discretion." She makes no effort to argue how the Board or the ALJ erred in its rejection of a finding of good cause if it is, in fact, a threshold determination. Generally, we declare issues that are not adequately briefed to be waived or abandoned. *In re Marriage of Williams*, 307 Kan. 960, 977, 417 P.3d 1033 (2018). And we continue that practice here. The Board held that Jackson was "using the review and modification proceeding to do what she should have done in the regular hearing. The review and modification process is not meant to be a 'redo' or a second regular hearing." This finding is supported by the evidence.

Through the regular hearing process, Jackson not only had the opportunity to present evidence on permanency, but she was *required* to do so. K.S.A. 44-523(b) (claimant must submit all evidence in support of their claim no later than 30 days after the regular hearing unless a continuance is granted). Jackson knew that her claim was potentially covered by the Act, and she had the burden of proof if it was. But she took a strategic risk and chose not to present any evidence of benefits due. If she felt the Board misunderstood her request and that she was entitled to the benefits she now alleges are due, she could have appealed the Board's decision to this court.

An ill-conceived or poorly executed litigation strategy yielding unsatisfactory results does not amount to good cause to modify a workers compensation award under K.S.A. 44-528(a). The law typically imputes a lawyer's strategic decisions—good or bad—and their attendant consequences to the client. See *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962); *Meyer v. Meyer*, 209 Kan. 31, 39, 495 P.2d 942 (1972); *Myers v. Kansas Bd. of Healing Arts*, No. 121,767, 2020 WL 6815540, at *33 (Kan. App. 2020) (unpublished opinion) (Atcheson, J., concurring). To allow what amounts to a do-over here would both deviate from that rule and stray far from the purpose of K.S.A. 44-528(a) as a check on the vagaries of medical prognostication. And that is enough to affirm the Board.

CONCLUSION

In sum, we find that determining whether good cause exists to review a workers compensation award under K.S.A. 44-528(a) is different from the discretionary decision to modify the award or reinstate an award. As part of this threshold inquiry, the ALJ should consider the entire record and what is reasonable under the totality of the circumstances. Under these facts, and in the absence of any argument related to whether good cause existed, we find that the Board did not abuse its discretion in denying Jackson's request to modify the award.

The decision of the Board denying Jackson's request for modification of her 2019 workers compensation award is affirmed.

Affirmed.

(551 P.3d 175)

No. 126,732

BRENDA ZARAGOZA, *Appellant*, v. BOARD OF JOHNSON COUNTY COMMISSIONERS, *Appellee*.

SYLLABUS BY THE COURT

1. TORTS—*Kansas Tort Claims Act—Recreational Use Exception Not Limited to Outdoor Areas.* The recreational use exception to the Kansas Tort Claims Act, K.S.A. 75-6101 et seq., is not limited to outdoor areas or to areas intended for physical activity.

2. SAME—*Kansas Tort Claims Act—Exception Depends on Character of Property and Not Activity Performed.* The recreational use exception to the Kansas Tort Claims Act depends on the character of the property in question and not the activity performed at any given time; the plain wording of the statute 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.

3. SAME—*Kansas Tort Claims Act—Immunity under Statute Extends to Parking Lots.* Immunity under K.S.A. 75-6104(o) extends to a parking lot integral to public property intended or permitted to be used as a park, playground, or open area for recreational purposes, including a library.

4. SAME—*Kansas Tort Claims Act—Definition of Wantonness under the Act.* To constitute wantonness the act must indicate 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.

Appeal from Johnson District Court; RHONDA K. MASON, judge. Oral argument held April 9, 2024. Opinion filed June 21, 2024. Affirmed.

Richard W. Morefield, Jr., of Morefield Speicher Bachman, LC, of Overland Park, for appellant.

Andrew D. Holder, of Fisher, Patterson, Sayler & Smith, LLP, of Overland Park, for appellee.

Before BRUNS, P.J., GARDNER and ISHERWOOD, JJ.

GARDNER, J.: Brenda Zaragoza fell in the parking lot of the Monticello Branch of the Johnson County Library when she stepped off the curb onto a parking surface sloped toward a drain. As a result, she broke her knee, ankle, and heel. Zaragoza sued the

Johnson County Board of Commissioners (the County), alleging that her injuries were caused by the County's negligence in creating and maintaining a dangerous condition in the library parking lot. The Johnson County District Court entered summary judgment for the County, holding that the library and its parking lot had recreational use immunity under K.S.A. 75-6104(o) and that Zaragoza did not sufficiently plead or prove gross and wanton negligence, as is necessary to defeat immunity. The district court also denied Zaragoza's motion to file an amended petition adding gross and wanton negligence. Zaragoza appeals, but after carefully considering the record, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Zaragoza is a Johnson County resident who has visited the Monticello Branch of the library roughly once or twice a month since it opened in 2018. When visiting, she drives to the library and parks in its adjacent parking lot. When the library first opened, all the curbs were unpainted. But patrons complained that they were having trouble distinguishing the step down from the sidewalk's curb to the parking lot in front of the building, so before Zaragoza's fall, the curbs by the library's entrance were painted yellow. The curbs in the rest of the parking lot remained unpainted.

On July 18, 2020, Zaragoza drove to the library and arrived around 9 a.m. She borrowed some books and movies from the library and then left, walking along a paved sidewalk that she had not taken before. As she neared the parking lot, she placed one foot in a mulch bed next to the sidewalk, then stepped down into the parking lot with her other foot. That foot landed on a downward slope leading toward the storm drain which she had not anticipated, causing her to lose her balance and fall. As a result, she broke her knee, ankle, and heel, which required surgery and then time at a rehabilitation center.

Zaragoza sued the County for premises liability. She alleged that the County'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." The County's answer asserted the affirmative defense that Zaragoza's claims are barred by the Kansas Tort Claims Act (KTCA).

Facts from Discovery

The library branch manager's affidavit states that between August 2018 and June 2020 about 313,500 people passed through the library's doors. The library's branch manager reviewed every incident report prepared at the library from the date it opened in August 2018 through January 2023, and found no record of any other person falling where Zaragoza fell or any record of any other person falling in the parking lot at or near a storm drain. The library tracks only reported injuries. He testified that no recreational activity was occurring in the library's parking lot on the day of Zaragoza's fall.

Georgia Sizemore approved the library branch's plans on behalf of the county, and she was deposed as the County's corporate representative. In requests for admissions, the County had stated that the yellow paint on the library's front curb was unrelated to safety and signified no-parking zones. But in her deposition, when she was asked why the curb in front of the library was painted yellow but the curb near the drain where Zaragoza fell was not, regarding the painted front curb, she responded:

> "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 [the architectural project manager and library branch manager] worked up to stripe that, to try to draw attention to the situation so people didn't step off it accidentally."

She agreed it would have been feasible to paint the curb yellow where Zaragoza fell but said it was more likely a pedestrian would have seen the slope where she fell unlike near the library's entrance where the change from curb to parking lot was not "conspicuous enough" for "some people who might be distracted on their devices." She agreed that the slope might not be conspicuous if there were a car parked in the space.

Sizemore also testified that the original design plans called for a 24-inch-tall plant to be placed in the mulched area where Zaragoza fell and the plans did not depict the top of the storm drain there. She "imagin[ed] there was an adjustment made in the field during construction." She stated that there could have been a plant there when the library opened that had since died, but she did not know why there was no plant in the mulch bed on the date Zaragoza fell. She agreed that a plant there would have "basically prevented somebody from cutting the sidewalk and stepping into that parking space" that Zaragoza stepped into just before she fell.

Zaragoza designated Dr. Claudia Ziegler Acemyan as a human factors expert.

Acemyan testified that the slope of the parking lot was an intentional design choice to direct ground water toward the storm drain. According to her, the library should have erected a barrier or guard rail in front of the sloped area, or used some sort of warning communication, like striping, messaging, or signage, to warn people about the slope. She believed an object, such as the plant on the original plans but not present when Zaragoza fell, would have prevented Zaragoza's injuries.

The County designated Laurence Fehner, a professional engineer, as one of its two experts. Fehner reviewed the construction documents associated with the library and concluded that the parking area, sidewalks, curbs, curb inlets, and walkway areas in question were all constructed in conformity with the construction drawings. Fehner stated that neither the construction drawings nor the City of Shawnee's building codes required the curbs to be marked. The County's other expert testified that when the County identifies an unreasonable hazard, it should mitigate that hazard before someone gets hurt.

The Summary Judgment Motions and Ruling

After discovery, the County moved for summary judgment, asserting that the suit was barred by recreational use immunity under K.S.A. 75-6104(o) of the KTCA, K.S.A. 75-6101 et seq. It also asserted that Zaragoza did not plead and could not prove gross and wanton negligence.

Zaragoza opposed the motion and moved the same day for leave to file an amended petition. She argued that no evidence showed that the library was being used for recreational purposes at the time of or before her fall, so recreational use immunity could not apply. And she argued that facts recently admitted by the County showed its gross and wanton negligence and this negligence was the proximate cause of her injuries, defeating recreational use immunity.

The County replied that Zaragoza's petition claimed only ordinary negligence and did not allege gross and wanton negligence. And regardless of whether Zaragoza had pleaded or could amend to plead a claim for gross and wanton negligence, the County was entitled to summary judgment because no evidence supports such a claim.

After a hearing on both motions, the district court granted the County's motion for summary judgment and denied Zaragoza's motion to file an amended petition. The district court found that the library and its parking lot had recreational use immunity under K.S.A. 75-6104(o), which barred Zaragoza's ordinary negligence claim. It then found that this immunity was not defeated by gross and wanton negligence, as Zaragoza had not asserted that claim in her petition and lacked the facts to prove it. The district court also denied Zaragoza's motion to file an amended petition as futile and untimely.

Zaragoza timely appeals, challenging each of the conclusions above.

I. DID THE DISTRICT COURT ERR IN GRANTING THE COUNTY'S MOTION FOR SUMMARY JUDGMENT?

We first review the legal principles that apply to the district court's entry of summary judgment.

Summary Judgment and Our Standard of Review

After the parties to a civil action have had a chance to discover evidence, but before their case goes to trial, a party may move for summary judgment. K.S.A. 2023 Supp. 60-256(a). The party seeking summary judgment must show, based on the evidence, that there is no dispute about any significant fact and that they are

entitled to judgment as a matter of law. *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019). So the County must show that there is 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).

Appellate courts review a trial court's ruling on a motion for summary judgment de novo, meaning we are unconstrained by the lower court's ruling because we are in the same position as the lower court. We must view the facts in the light most favorable to the party opposing summary judgment. If reasonable minds could disagree about the conclusions to be drawn from the evidence—if there is a genuine issue about a material fact—summary judgment is inappropriate. *John Doe v. M.J.*, 315 Kan. 310, 313, 508 P.3d 368 (2022). So a disputed question of fact which is immaterial to the issue does not preclude summary judgment. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 934, 296 P.3d 1106 (2013).

Resolution of this appeal also requires statutory interpretation, which is a question of law over which we have unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

The KTCA and Recreational Use Immunity Generally

"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." *Muxlow v. City of Topeka*, No. 117,428, 2018 WL 2999618, at *2 (Kan. App. 2018) (unpublished opinion). The KTCA waives Kansas' sovereign immunity and statutorily permits negligence claims against the government, but it also provides several exceptions to a governmental entity's liability. K.S.A. 75-6103(a). The parties do not dispute that this suit is subject to the KTCA because the County is clearly a governmental entity, as defined by the KTCA. See K.S.A. 75-6102(b), (c).

Under the KTCA, government liability is the rule and immunity is the exception. Accordingly, governmental entities have the

burden to prove they fall within one of the KTCA's listed exceptions from liability. *Keiswetter v. State*, 304 Kan. 362, Syl. ¶ 3, 366, 373 P.3d 803 (2016). One of these exceptions is "recreational use immunity." See K.S.A. 75-6104(o). This exception is now codified under K.S.A. 2023 Supp. 75-6104(a)(15), but because K.S.A. 75-6104(o) was in effect at the time of the district court's ruling, we cite to that subsection.

Under this exception, an individual cannot 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. 75-6104(o).

The legislative purpose of this recreational-use exception is to encourage the development and maintenance of parks, playgrounds, and other recreational areas.

> "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." *Jackson v. U.S.D. 259*, 268 Kan. 319, 331, 995 P.2d 844 (2000).

We read this recreational use immunity statute broadly to accomplish this legislative purpose. *Poston v. U.S.D. No. 387*, 286 Kan. 809, 813, 189 P.3d 517 (2008); *Lane v. Atchison Heritage Conf. Center, Inc.*, 283 Kan. 439, 445, 153 P.3d 541 (2007) (stating recreational use immunity statute "should be read broadly, and Kansas courts should not impose additional hurdles to immunity that are not specifically contained in the statute").

A. *The library is entitled to recreational use immunity.*

Zaragoza challenges the district court's holding that K.S.A. 75-6104(o)'s recreational use immunity applies to the library and its parking lot, barring her claim of ordinary negligence. Zaragoza argues that the library does not qualify for recreational use immunity because the County failed to establish that the library is an

open area intended or permitted to be used for nonincidental recreational purposes at the time of Zaragoza's injuries. In response, the County argues that the library qualifies for recreational use immunity because its core functions and additional programing are recreational.

To qualify for recreational use immunity, the property must be (1) public, and (2) intended or permitted to be used for recreational purposes. *Poston*, 286 Kan. at 813. The parties do not dispute that the library is public. K.S.A. 75-6104, which contains the recreational use immunity exception to liability, applies to governmental entities, as does the KTCA itself. K.S.A. 75-6102(c). The first requirement for recreational use immunity is thus met.

It is the second requirement that is disputed—whether the property is intended or permitted to be used for recreational purposes. Immunity "depends on the character of the property in question and not the activity performed at any given time. The plain wording of the statute 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." *Barrett v. U.S.D. No. 259*, 272 Kan. 250, 257, 32 P.3d 1156 (2001). See *Jackson*, 268 Kan. at 326 (same). When that exception is not met, the government may be liable. Thus, in *Gonzales v. Kansas Dept. of Corrections*, No. 93,135, 2005 WL 824181, at *2 (Kan. App. 2005) (unpublished opinion), a panel of this court held that the visitation area of Lansing Correctional Facility, although it looked like a park, was not intended for recreational purposes because "family members and friends do not visit correctional facilities for recreational purposes. One does not go to the prison to have a good time."

At first blush, a library may seem to be educational rather than recreational in its intended purpose and use. Yet our cases have applied recreational use immunity to locations that are not facially recreational. See *Lane*, 283 Kan. at 440 (recreational use immunity barred suit by musician injured by falling on loading dock of city's conference center); *Boaldin v. University of Kansas*, 242 Kan. 288, 291, 747 P.2d 811 (1987) (recreational use immunity barred suit by plaintiff injured while sledding on hill at the University of Kansas).

In support of its argument that this library is used for recreational purposes, the County points to the library's core services and its supplemental offerings. Determining how undisputed facts apply to K.S.A. 75-6104(o) is a question of law. See *Lane*, 283 Kan. at 443. The parties do not dispute that the library's core service is allowing patrons to read and borrow books and other media.

Borrowing a definition from the Illinois Appellate Court, the Kansas Supreme Court has defined "recreation" as

"'refreshment of the strength and spirits after toil: DIVERSION, PLAY.' Webster's Third New International Dictionary 1899 (1986). Play "suggests an opposition to work; it implies activity, often strenuous, but emphasizes the absence of any aim other than amusement, diversion, or enjoyment." Webster's Third New International Dictionary 1737 (1986).'" *Jackson*, 268 Kan. at 330 (quoting *Ozuk v. River Grove Board of Education*, 281 Ill. App. 3d 239, 243-44, 666 N.E.2d 687 [1996]).

A more recent definition of "recreation" is "refreshment in body or mind, as after work, by some form of play, amusement, or relaxation" and "any form of play, amusement, or relaxation used for this purpose, as games, sports, or hobbies." Webster's New World College Dictionary 1215 (5th ed. 2018).

Zaragoza does not argue that the library's core functions are not recreational. Instead, she argues that a library is not an "open area" as used in K.S.A. 75-6104(o) (barring suits "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"). But the immunity provided under this statute is not limited to outdoor areas. As our Supreme Court stated: "It defies common sense to hold that K.S.A. 75-6104(o) provides immunity from injuries which occur on a football field, a baseball field, a track and field area, and a sledding area, but not on an indoor basketball court solely because it is indoors." *Jackson*, 268 Kan. at 325; see *Wright v. U.S.D. No. 379*, 28 Kan. App. 2d 177, 180, 14 P.3d 437 (2000). The library is an area open to the public.

And courts have not limited the phrase "open area for recreational purposes" to areas intended for physical activity. See K.S.A. 75-6104(o). Recreational use immunity has been applied to nonstereotypical recreational spaces such as a school commons area

near the gymnasium, a conference center, a university stadium's bathroom, and a university's indoor theater. See *Poston*, 286 Kan. at 819-20 (applying recreational use immunity to school's commons area adjoining the gymnasium when a father was injured while picking his child up from practice after school); *Lane*, 283 Kan. at 440 (applying recreational use immunity to city's conference center when musician hired for a public dance slipped and fell on ice on the loading dock); *Wilson v. Kansas State University*, 273 Kan. 584, 590, 44 P.3d 454 (2002) (applying recreational use immunity to the state football stadium's bathroom where a spectator was injured by chemical burns from the toilet seat); *Tullis v. Pittsburg State Univ.*, 28 Kan. App. 2d 347, 350-51, 16 P.3d 971 (2000) (applying recreational use immunity to state university's indoor theater when an actress was injured by an accidental stabbing during a play).

A property is not bound to only one use—educational or recreational. This is shown in *Jackson.* There, our Supreme Court found that using a gymnasium for compulsory P.E. classes was an educational purpose, but if the gymnasium were also used for recreational, noncompulsory activities, then recreational use immunity would apply as long as the recreational use was "'more than incidental.'" 268 Kan. at 321-22, 330. And on remand, recreational use immunity applied to the school gymnasium because the facts showed that it was used outside school hours for basketball tournaments, YMCA-sponsored activities, and other community activities that were "beyond incidental." *Jackson v. U.S.D. No. 259*, 29 Kan. App. 2d 826, 832, 31 P.3d 989 (2001); see also *Marks v. Kansas Bd. of Regents*, No. 96,162, 2007 WL 1461381, at *3 (Kan. App. 2007) (unpublished opinion) (holding noncompulsory extracurricular activities are recreational under KTCA).

Research has revealed no Kansas cases designating a library as a recreational space. But, "[t]here must always be a 'first case.'" *Jackson*, 268 Kan. at 325. This library's core services are noncompulsory, as no one is required to use its services or to check out its materials. Although some may use the library for educational purposes, others may use the library's basic services for recreational purposes. "[T]he correct test to be applied under K.S.A. 2006

Supp. 75-6104(o) 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*, 268 Kan. at 330). *Lane* reversed a Kansas Court of Appeals decision that the primary use of the property had to be recreational. 283 Kan. at 447. Thus the recreational use needs to be more than incidental, but need not be the primary use of the property.

The library's core functions of allowing patrons to read and borrow books and other media meet that test. The library offers materials that facilitate the recreational hobbies of reading and watching movies. The items that patrons check out serve as a form of refreshment and amusement. Because the library's core services are recreational, recreational use immunity applies.

But even if the library's core services were not recreational, the library provides other services and offerings to the public. Zaragoza does not dispute that these offerings as stated in the branch manager's affidavit are recreational: art installations and sculptures by local artists; a dedicated story room for children, which is open to the public when not in use; an outdoor children's storywalk; and community events such as toddler and family story times, tabletop gaming nights, book clubs, events that allow children to read stories to therapy dogs, an after-hours mystery-solving event for teens, and yoga for preschoolers. Zaragoza does not contend that these offerings are merely incidental to the library's core functions. Zaragoza asserts solely that no evidence shows that this kind of programing was ongoing at the time of her injury, as the branch manager spoke only to the library's offerings on the date of his affidavit, or his deposition on January 6, 2023—years after her injury.

The affidavit from the library's branch manager states that he has been the library's branch manager since it opened, and he has personal knowledge that the library offers the programs, events, and activities we noted above. And in his deposition he similarly testified that the library puts on various programs such as performances, story times, outdoor programming, outdoor story times on the terrace, and tabletop gaming at the library.

Zaragoza argues that because the branch manager's affidavit was in the present tense, it fails to show that the library offered

such additional programming at the time of her fall. But his deposition clarifies that these were standard programs at the library. When asked about the factual basis for the library's claim of immunity, he replied:

"A. So for that one, Johnson County Library provides programming such as we have performers that come. We've had—we have tabletop programming. We have story times, outdoor programming. We've had outdoor story times on the terrace, just various different programming that we—that we have on site.

"Q. Are you suggesting that Ms. Zaragoza was making a recreational use of the parking lot when she was injured?

"A. I'm not sure—I'm not sure if I'm suggesting that, but I'm just saying that that's what we—we do have those things.

"Q. Okay. Do you have a factual basis for believing that Ms. Zaragoza was engaged in recreation when she was walking from the library building to her car?

"A. I'm not sure that I'm claiming that. I'm just kind of stating that's what we provide at the library.

. . . .

"Q. Are you talking about inside the library building?

"A. Inside the library building, and we have used—we have used the parking lot. Not the parking—we have used the sidewalks to do like some various different programming, such as when we did the opening of Monticello, we had a poem that we dedicated out there, a time capsule out there on the sidewalks as well, and then with the extent of the exterior, we have used the terrace to do story times.

"Q. That wasn't going on on the date that Ms. Zaragoza was injured though, was it?

"A. The activities outside were not going on."

It is a reasonable inference from this testimony that the library's indoor activities that the branch manager earlier referenced were "going on"—were ongoing or continual, meaning that kind of activity was offered before and at the time of Zaragoza's fall. Given that testimony, Zaragoza 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). Zaragoza does not point to any evidence from which a reasonable trier of fact could find that the library's additional programming began only after her fall.

But even if the library offered certain programs only after Zaragoza's injuries, the inquiry is whether "the property was *intended* or permitted to be used for recreational purposes." (Emphasis added.) *Jackson*, 268 Kan. at 329. The branch manager

identified several spaces—the children's storywalk area and the story room—which were constructed and intended for recreational purposes. That is sufficient, as Zaragoza does not contend that the library's recreational offerings are merely incidental to its educational functions.

Uncontroverted evidence establishes that the library was intended to be, has been, and continues to be used for recreational purposes, qualifying the library for recreational use immunity.

B. *The library's recreational use immunity extends to the parking lot.*

Zaragoza next argues that even if the library qualifies for recreational use immunity, that immunity cannot extend to the library's parking lot because it was not being used for a recreational purpose when she fell and is not integral to the library.

Recreational use immunity "is not limited to areas expressly designated as recreational." *Nichols v. U.S.D. No. 400*, 246 Kan. 93, 97, 785 P.2d 986 (1990). "[F]acilities integral to the functioning of a public and open area used for recreational purposes are also covered by the recreational use exception, despite possessing a nonrecreational character in themselves." *Lane v. Atchison Heritage Conf. Center, Inc.*, 35 Kan. App. 2d 838, 845, 134 P.3d 683 (2006), *rev'd on other grounds* 283 Kan. 439, 153 P.3d 541 (2007). Our Supreme Court observed that a facility must be viewed "collectively" to determine whether it is used for recreational purposes, noting that the restrooms in *Wilson* were immune from liability because they were "'necessarily connected'" to property that had a recreational use. *Lane*, 283 Kan. at 446 (citing *Wilson*, 273 Kan. at 590); see also *Nichols*, 246 Kan. at 94 (recreational use exception applied to "grassy swale or waterway" near public school's football field). See *Poston*, 286 Kan. at 819.

We find guidance in *Wilson*. In that case, a woman sued Kansas State University for burns she suffered from chemicals on the toilet seat in the bathroom inside the University's football stadium. Wilson argued that the bathroom served no recreational purpose, so the University was not exempt from liability under recreational use immunity. The Kansas Supreme Court disagreed, finding the

statute does not limit the exception to the portion of the property used for recreation:

> "The plain language of the recreational use exception reaches the restrooms, not because of what the statutory language provides, but because of what the language does not provide. K.S.A. 2001 Supp. 75-6104(o) contains the language 'any public property intended or permitted to be used as a park, playground, or open area for recreational purposes,' and is not limited to '*any portion* of public property utilized for recreational activities.' Further, the use of 'any' to modify 'public property' shows an intent on the part of the legislature to establish a broad application of recreational use immunity." 273 Kan. at 591-92.

The court held the bathrooms were not incidentally connected to the stadium but were necessary and connected to the stadium by design. The recreational use immunity extended to the bathrooms because they were necessarily connected to the property. 273 Kan. at 590 ("A facility servicing large numbers of people must include restrooms."). Similarly, a library branch in Johnson County serves large numbers of people and must have a parking lot.

Other cases apply similar logic. In *Nichols*, a football player was injured while running across a grassy swale between the practice field and the locker room. The Kansas Supreme Court held that recreational use immunity applied, and "is not limited to areas expressly designated as recreational." 246 Kan. at 97. In *Dye v. Shawnee Mission School District*, No. 98,379, 2008 WL 2369847, at *1 (Kan. App. 2008) (unpublished opinion), a mother fell into a hole near a sewer inlet while walking from a soccer field through a grassy area to pick up her child. Relying on *Wilson* and *Nichols*, a panel of this court affirmed summary judgment for the school district based on recreational use immunity, which applies "to property integral to or near a recreational facility." 2008 WL 2369847, at *2-3; see also *Robison v. State*, 30 Kan. App. 2d 476, 479, 43 P.3d 821 (2002) (relying on *Nichols* to reject plaintiff's argument that the hallway in which the plaintiff fell, near the swimming pool area, did not qualify as a recreational area for purposes of recreational use immunity).

Similarly, in *Stone v. City of La Cygne*, No. 88,996, 2003 WL 1961969, at *1 (Kan. App. 2003) (unpublished opinion), the plaintiff was injured in a shed which housed machines, chemicals, and water cleaner for a nearby public swimming pool. The plaintiff

argued that recreational use immunity did not apply because the shed was not a recreational area and was not open to the public, yet a panel of this court disagreed. Relying on *Wilson*, that panel held

> "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.

Zaragoza conceded to the district court that the library parking lot is integrally connected to the library's educational use, but she contends that the parking lot is not integrally connected to its recreational use. But it defies logic to assert that the library's parking lot is integral to some of the library's offerings, but not others. The library's parking lot serves as the primary location for patrons to park their vehicles while visiting the library, regardless of their purpose in going there. See K.S.A. 60-409(a) (permitting court to take judicial notice, without request from either party, of specific facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute). And the parking lot has no viable purpose apart from the library; its only function is to facilitate the use of the library, be it recreational or educational.

Based on these well-reasoned cases, we find that the library's parking lot is integral to the library just as bathrooms are to stadiums, mechanical rooms are to pools, loading docks are to conference centers, and walkways to and from recreational areas are to those recreational areas. See *Wilson*, 273 Kan. at 591-92 (stadium bathrooms); *Stone*, 2003 WL 1961969, at *2 (pool mechanical room); *Lane*, 35 Kan. App. 2d at 846 (conference center loading dock); *Nichols*, 246 Kan. at 97 (walkway to recreational area); *Robison*, 30 Kan. App. 2d at 479 (same); *Dye*, 2008 WL 2369847, at *3 (same).

In support of her argument that the library's recreational use immunity does not extend to its parking lot, Zaragoza relies on *Cullison v. City of Salina*, No. 114,571, 2016 WL 3031283, at *1

(Kan. App. 2016) (unpublished opinion). There, a child was injured by stepping on an electrically charged junction box located "at the mouth of an entrance to [the 'pocket park'] but in an area that corresponds to part of the sidewalk that extends down [a public street] in front of the stores." 2016 WL 3031283, at *4. The junction box provided electricity to decorative lights in the park and to electrical outlets that park visitors could use for their convenience. 2016 WL 3031283, at *5-6. The *Cullison* panel held that summary judgment was not proper because a jury could have found that these uses did not make the junction box integral to the park; the park could be used during daylight and twilight without the decorative lights and at any time without the electrical outlets. 2016 WL 3031283, at *5-6.

We find *Cullison* distinguishable. Zaragoza testified that every time she visited the library she drove there and parked in the library's parking lot. While public transportation may be available for some libraries and some patrons may walk, the parking lot is integral to this branch because patrons drive to it and need a place to park their vehicles when visiting it, as did Zaragoza. The parking lot increases the library's usefulness because more patrons are able to use the public property, which allows recreational use immunity to extend to the parking lot. See *Poston*, 286 Kan. at 815-16; *Wilson*, 273 Kan. at 589.

Zaragoza also relies on *Patterson v. Cowley County, Kansas*, 53 Kan. App. 2d 442, 471, 388 P.3d 923 (2017), *aff'd* 307 Kan. 616, 413 P.3d 432 (2018). There, two people drowned in a river after driving off an unpaved road that ran through a wildlife preserve before abruptly ending at a riverbank. The *Patterson* panel rejected recreational use immunity because the unpaved road had existed for over 100 years before the wildlife preserve had been created and it was not the only road by which to access the wildlife area. 52 Kan. App. 2d at 471-72. *Patterson* is not factually applicable here. Unlike the road there, which existed before the recreational area and was not the only means of access to it, the library's parking lot was designed and constructed in tandem with the library to support the library's function and its accessibility for patrons, and we have no evidence of any other parking area its patrons could use.

Zaragoza lastly argues that even if the parking lot is integral to the library, recreational use immunity applies only when recreational activities are in progress. We disagree, finding no authority for that proposition. Kansas courts have repeatedly held that there is no requirement under K.S.A. 75-6104(o) that an injury occur during a recreational activity for recreational use immunity to apply. See, e.g., *Jackson*, 268 Kan. 319, Syl. ¶ 6 ("The plain wording of K.S.A. 75-6104(o) 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.").

The library's parking lot is integral to the library. Thus, the library's recreational use immunity extends to its parking lot, as the district court properly found.

C. *Gross and wanton negligence can defeat recreational use immunity.*

Assuming K.S.A. 75-6104(o)'s recreational use immunity applies to the library and its parking lot, Zaragoza argues that the district court still erred in granting summary judgment because she proved the County's gross and wanton negligence. She also argues that the district court made improper inferences for the County when finding no gross and wanton negligence was shown. But because we review the evidence without regard to the district court's findings, we need not address that argument separately.

We begin by reviewing the applicable law. Even though recreational use immunity applies, the County can still be liable for Zaragoza's injuries if the County "is guilty of gross and wanton negligence proximately causing such injury." K.S.A. 75-6104(o). The Kansas Supreme Court follows the dictionary definition of "gross" in the employment law context:

> "'[G]laringly noticeable usually because of inexcusable badness or objectionableness.' Webster's New Collegiate Dictionary 507 (1973). Black's Law Dictionary 702 (6th ed. 1990), defines 'gross' as '[o]ut of all measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice, gross carelessness, or negligence.'" *Jones v. Kansas State University*, 279 Kan. 128, 150, 106 P.3d 10 (2005).

We use that same definition in the context of recreational use immunity.

Wanton conduct "is distinct from negligence and differs in kind." *Bowman v. Doherty*, 235 Kan. 870, 876, 686 P.2d 112 (1984). The *Bowman* court elaborated that "[w]anton conduct is distinguished from a mere lack of due care by the fact that the actor realized the imminence of injury to others from his acts and refrained from taking steps to prevent the injury. This reckless disregard or complete indifference rises substantially beyond mere negligence." 235 Kan. at 876. Unlike simple negligence, "[w]anton conduct is established by the mental attitude of the wrongdoer rather than by the particular negligent acts." *Robison*, 30 Kan. App. 2d at 479 (citing *Friesen v. Chicago, Rock Island & Pacific Rld.*, 215 Kan. 316, 322, 524 P.2d 1141 [1974]). Wantonness requires both a realization of imminent danger and a "reckless disregard, indifference, and unconcern for probable consequences." 30 Kan. App. 2d at 479 (citing *Friesen*, 215 Kan. at 322).

To successfully show gross and wanton negligence, a plaintiff must demonstrate "something more than ordinary negligence but less than a willful act. [Wantonness] indicates a realization of the imminence of danger and a reckless disregard and indifference for the consequences." *Gruhin v. City of Overland Park*, 17 Kan. App. 2d 388, 392, 836 P.2d 1222 (1992). Because wantonness derives from "the mental attitude of the wrongdoer[,] . . . acts of omissions as well as acts of commission can be wanton." *Gould v. Taco Bell*, 239 Kan. 564, 572, 722 P.2d 511 (1986). "When the meanings of 'gross' and 'wanton' are placed into the words used in K.S.A. 75-6104(o), the burden on a plaintiff to establish liability is very high." Hesse & Burger, *Recreational Use Immunity: Play at Your Own Risk*, 77 J.K.B.A. 28, 33 (Feb. 2008).

To avoid summary judgment, a plaintiff must show that, based on the facts, reasonable persons could disagree that a defendant knew 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, 314, 969 P.2d 252 (1998) (keys to finding gross and wanton negligence are knowledge of dangerous condition and indifference to consequences).

The first step in our analysis is the defendant's knowledge of the danger. Knowledge may be actual or constructive and can be

established by direct or circumstantial evidence. See *Wagner v. Live Nation Motor Sports, Inc.*, 586 F.3d 1237, 1244-45 (10th Cir. 2009). The second step in the analysis is whether the defendant acted with reckless disregard or indifference to its probable consequences. 586 F.3d at 1244-45. When assessing if wanton conduct is established, the court must carefully apply both prongs of this test to the same alleged risk, whether that risk is described narrowly or broadly. See *Reeves*, 266 Kan. at 314.

"In other words, if the first part of Kansas's two-part inquiry asks whether the defendant had knowledge of a broadly described dangerous condition, the second part of that inquiry must ask whether the defendant recklessly disregarded or was indifferent to the *same* broadly described risk." *Wagner*, 586 F.3d at 1245.

D. *Zaragoza's petition did not plead gross and wanton negligence.*

When granting summary judgment, the district court held that Zaragoza did not plead a claim for gross and wanton negligence and that, even if she had, no jury could find the County liable for gross and wanton negligence. On appeal, Zaragoza does not allege that she pleaded gross and wanton negligence; she argues that she pleaded that the County created a dangerous condition that caused her injuries, and that the County knew of that condition.

As the County points out, Zaragoza did not use the term "gross and wanton negligence" in her petition. But a plaintiff need not use these exact words—"[t]he test is whether the facts alleged disclosed the essential elements of wantonness." *Kniffen v. Hercules Powder Co.*, 164 Kan. 196, 209, 188 P.2d 980 (1948). Zaragoza argues that she impliedly pleaded gross and wanton conduct by alleging that the County was aware of the dangerous condition of its parking lot before her fall.

But 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 (1985). Knowledge of a dangerous condition, alone, does

not establish a legal duty that can support even an ordinary negligence claim. See *Manley v. Hallbauer*, 53 Kan. App. 2d 297, 307-08, 387 P.3d 185 (2016).

Having reviewed Zaragoza's petition, we agree that it did not plead gross and wanton negligence. She alleged that the County'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." In the petition, no allegation is made that the County realized an imminent danger or had a reckless disregard or a complete indifference or an unconcern for the probable consequences of its wrongful act. And it includes no other language or factual assertions that could put a reasonable defendant on notice of a claim for gross and wanton negligence.

Zaragoza's sole claim was for ordinary negligence from injuries suffered on property used for a recreational purpose. And "K.S.A. 75-6104(o) is a complete defense to actions where the plaintiff alleges only ordinary negligence." *Dunn v. U.S.D. 367*, 30 Kan. App. 2d 215, 225, 40 P.3d 315 (2002); see *Willard v. City of Kansas City*, 235 Kan. 655, 660, 681 P.2d 1067 (1984) ("[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."); *Tullis*, 28 Kan. App. 2d at 351 (absence of gross and wanton negligence in the plaintiff's pleading rendered the university immune from liability under KTCA's recreational use immunity); see also *Molina v. Christensen*, 30 Kan. App. 2d 467, 474, 44 P.3d 1274 (2001) (same). Thus, K.S.A. 75-6104(o) bars Zaragoza's claim, and the district court did not err in granting the County's motion for summary judgment.

E. *The facts do not show gross and wanton negligence.*

But even if Zaragoza had pleaded gross and wanton negligence, no reasonable jury could find the County liable for it. Zaragoza argues that the County's decision to paint the curb elsewhere in the parking lot and its failure to plant a bush or other plant by the drain where she fell amounts to gross and wanton

negligence. Yet to show gross and wanton negligence, Zaragoza had to show more—that the County knew or had reason to believe that the location, in its condition at the time, constituted a dangerous condition, and failed to address the danger. Zaragoza's theory of the case is that her fall was caused by the uneven slope of the pavement near the rainwater drain in the parking lot where she fell. To survive summary judgment, she must proffer evidence that the government knew of that dangerous condition and chose not to address it. Yet Zaragoza has failed to do so.

At the time of Zaragoza's injury, the library branch had been open for nearly two years and over 300,000 people had passed through its doors. No evidence showed that any other patron had fallen in the parking lot because of the slope of a rainwater drain. Unlike in *Gruhin* and *Deaver*, no evidence suggests that the library knew of the existing danger, nor does evidence show prior insufficient or ineffective measures to address an existing danger that could reveal the County knew of the danger. In *Gruhin*, 17 Kan. App. 2d at 389, 393, the city knew of the hole and drew chalk around it to draw attention to it after someone fell into the hole a few weeks earlier. In *Deaver v. Board of Lyon County Comm'rs*, No. 110,547, 2015 WL 715909, at *1-4 (Kan. App. 2015) (unpublished opinion), the fair board altered the vehicles participating in the mud race and the track itself after a car participating in the mud race left the track. But here, no evidence shows that the County knew of the danger of the slope where Zaragoza fell.

Zaragoza relies on two facts to meet her burden: The library had painted curbs yellow as a safety measure in other areas of the parking lot; and the library failed to install a plant in the mulch bed that she stepped in before stepping down onto the sloped parking lot.

It is undisputed that the curbs in front of the library were painted yellow at some point after the library opened. Those curbs were in areas specifically designated for pedestrians and were not landscaped areas. They were painted to help patrons differentiate the sidewalk from the parking lot which had similar color, making the step down from the sidewalk to the parking lot less obvious. This evidence would have been material if Zaragoza had fallen because she did not realize that she was stepping down from the

curb or sidewalk to the parking lot. But the record shows that Zaragoza knew she was stepping off the curb and into the parking lot, even though the curb was unpainted.

Zaragoza fell because she was not expecting the slope, not because she was not expecting to leave the sidewalk and step down into the parking lot. This is a different danger than the previously identified and remediated risk other library patrons experienced. To show gross and wanton negligence, the government entity must know about the precise hazard that caused the injury. Yet Zaragoza points to no evidence that the County knew this slope leading to the rainwater drain was a dangerous condition and then was indifferent towards it or refused to address it. And "[w]ithout knowledge of a dangerous condition, indifference to the consequences does not become a consideration." *Lanning v. Anderson*, 22 Kan. App. 2d 474, 481, 921 P.2d 813 (1996); see *Muxlow*, 2018 WL 2999618, at *1, 5.

Zaragoza also argues that an originally planned plant in the landscaping area she stepped into before falling would have prevented her fall, so its absence shows gross and wanton negligence. True, testimony shows that the plant would have discouraged patrons from stepping into the mulch bed and down into the parking lot by the drain. But no evidence suggests that the plant was planned for that purpose or that a plant would have made patrons aware of the drain's slope. No evidence suggests that the County knew that the plant was missing or that its absence posed any danger to library patrons. Yet both are necessary to show gross and wanton negligence, as this requires evidence of the mental attitude of the wrongdoer, not merely a negligent act. See *Robison*, 30 Kan. App. 2d at 479.

Because no evidence showed that the County knew of the danger that caused Zaragoza's injury yet failed to sufficiently address it, the district court correctly concluded Zaragoza failed to raise a material question of fact about the County's gross and wanton negligence.

F. *Did the district court improperly resolve facts in favor of the County?*

Throughout her brief, Zaragoza argues the district court made assumptions and inferences and improperly resolved factual issues in favor of the County. Even if we assume, without deciding, that the district court improperly resolved factual disputes in favor of the County when

granting summary judgment, our standard of review owes no deference to the district court's findings, and our holdings are based on the uncontroverted facts determined after a review of the summary judgment motion, the response thereto, and the evidence. See *Adams v. Board of Sedgwick County Comm'rs*, 289 Kan. 577, 584, 214 P.3d 1173 (2009).

The only argument we have not already addressed is Zaragoza's assertion that the slope near the drain was inconspicuous. But the facts do not support that conclusion. True, the County's representative testified that it was more likely a pedestrian would have seen the slope instead of the flat difference closer to the library entrance where the change was not "conspicuous enough" for "some people who might be distracted on their devices." But that testimony addressed the inconspicuousness of the curb-to-parking lot transition near the library's entrance, not of the slope where Zaragoza fell. And Zaragoza's assertion that the slope where she fell was inconspicuous cuts against a showing that the library knew of its danger yet failed to address it, so it is immaterial.

Summary judgment for the County is warranted because recreational use immunity applies to the library, and by extension, to the parking lot and Zaragoza failed to show evidence of gross and wanton negligence to overcome the library's statutory immunity.

II. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING ZARAGOZA'S MOTION TO FILE AN AMENDED PETITION?

Finally, Zaragoza argues that the district court abused its discretion by denying her motion to amend her petition to add a claim of the library's gross and wanton negligence.

The district court denied this motion as futile and untimely:

> "[Zaragoza] seeks to amend to add facts that she claims support gross negligence. The Court finds the facts that [Zaragoza] seeks to add via amendment do not rise to gross negligence, and thus the motion to amend is denied as futile. Even if the facts did support gross negligence, the motion to amend would be denied because the motion to amend deadline had long passed, trial is imminent, and the motion appears to be in response to arguments properly raised by [the County] at summary judgment."

We review the district court's denial of a motion to amend a petition under K.S.A. 2023 Supp. 60-215 for an abuse of discretion. See

Adamson v. Bicknell, 295 Kan. 879, 887, 287 P.3d 274 (2012). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *In re Spradling*, 315 Kan. 552, 590, 509 P.3d 483 (2022). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *Bicknell v. Kansas Dept. of Revenue*, 315 Kan. 451, 466, 509 P.3d 1211 (2022).

Once the time to amend a pleading as a matter of course has passed, a party may amend its pleading only with the opposing party's written consent, or the court's leave. K.S.A. 2023 Supp. 60-215(a)(2). In April 2022, the district court entered a case management order which complied with this statute. It set May 20, 2022, as the deadline for either party to move to amend its petition and responsive filing, and stated, "[a]bsent agreement of the parties, no such motions will be granted after this date." Neither party moved to amend before that deadline, nor did the parties agree to a late amendment.

Zaragoza moved to amend her petition on February 3, 2023, after the County moved for summary judgment on January 17, 2023, long after the May 20, 2022 deadline for amending a pleading. She contends that she did so because she had just learned during a January 5, 2023 deposition that the yellow paint on the library's curb was not to designate a no-parking zone, but to help patrons distinguish between the curb and the parking lot at the library's entrance. She did not receive transcripts from that deposition until January 19, 2023. Yet Zaragoza fails to explain how the library's notice of this safety issue near its entrance put it on notice of the dangers of a sloped drain in the parking lot which caused her injuries.

"The court should freely give leave [to amend] when justice so requires." K.S.A. 2023 Supp. 60-215(a)(2). Yet Kansas courts have held that denying a motion to amend was proper when plaintiffs moved to amend only after the entry of summary judgment. See *Kinell v. N. W. Dible Co.*, 240 Kan. 439, 444, 731 P.2d 245 (1987); *Tullis*, 28 Kan. App. 2d at 351-52 (denying amendment to add claim of gross and wanton negligence after university filed motion for summary judgment based on recreational use immunity). We find no abuse of discretion in the district court's refusal to permit Zaragoza to add a claim of gross and wanton negligence to her petition, given the court's broad authority to manage its cases

efficiently, Zaragoza's long notice that the County was asserting recreational use immunity, and her delay in moving to amend until after the County had moved for summary judgment.

But even assuming an abuse of discretion, any error is harmless. The district court considered all of Zaragoza's evidence of gross and wanton negligence offered in response to the County's motion for summary judgment, and found it failed to show gross and wanton negligence. We agree. So even had the district court granted Zaragoza's motion to amend the petition, summary judgment would still have been proper based on the library's recreational immunity. See *In re L.M.B.*, 54 Kan. App. 2d 285, 309, 398 P.3d 207 (2017) (noting that, as for statutory harmless error, this court "must find that there is no reasonable probability that the error affected the outcome").

Affirmed.

(551 P.3d 225)

No. 126,979

BRITTANY CONGE, *Appellant*, v. CITY OF OLATHE, *Appellee*.

SYLLABUS BY THE COURT

1. SUMMARY JUDGMENT—*Motion for Summary Judgment – Granted When No Genuine Issue of Material Fact Remains*. Summary judgment is appropriate in the district court when all the available evidence demonstrates that no genuine issue of material fact remains, entitling the moving party to judgment as a matter of law.

2. SAME—*Motion for Summary Judgment—District Court's Consideration*. In ruling on a motion for summary judgment, a district court must resolve all facts and reasonable inferences from the evidence in favor of the party against whom judgment is sought.

3. SAME—*Motion for Summary Judgment—Burden on Opposing Party*. The party opposing a motion for summary judgment must come forward with evidence that establishes a genuine dispute regarding a material fact. A factual dispute is not material unless it has legal force as to a controlling issue.

4. SAME—*Motion for Summary Judgment.* A party cannot avoid summary judgment based on speculation or the hope that something may develop later during discovery or at trial.

5. TORTS—*Claim of Retaliatory Discharge for Whistleblowing—Burden of Claimant*. A person claiming retaliatory discharge for whistleblowing has the burden of establishing every element of the claim by clear and convincing evidence.

6. SAME—*Claim of Retaliatory Discharge for Whistleblowing—Elements for Proof.* To establish a prima facie case of unlawful retaliatory discharge for whistleblowing, one must prove the following elements: (1) a reasonable person would conclude that the employer or the employee's coworker was engaged in activity that violated rules, regulations, or the law pertaining to public health, safety, and welfare; (2) the employer knew about the reporting of the violation before discharging the employee; (3) the employer discharged the employee in retaliation for reporting the violation; and (4) the employee acted in good faith based on a legitimate concern about the wrongful activity.

7. SAME—*Claim of Retaliatory Discharge for Whistleblowing—Burden of Proof Shifts Between Parties.* If an employee can demonstrate a prima facie case of retaliatory discharge based on whistleblowing, the burden of proof shifts to the employer to come forward with evidence establishing that the

employee was terminated for a legitimate nonretaliatory reason. If the employer is able to come forward with such evidence, the burden shifts back to the employee to come forward with evidence to show that the reason given by the employer for the termination of employment was pretextual.

8. SAME—*Claim of Retaliatory Discharge for Whistleblowing—Summary Judgment Appropriate if Plaintiff Fails to Establish Case.* Summary judgment is appropriate in a retaliatory discharge case when an employee fails to establish a prima facie case. It is also appropriate when the employer has come forward with evidence of a legitimate nonretaliatory reason for the termination and the employee fails to come forward with evidence establishing that the reason given was pretextual.

Appeal from Johnson District Court; K. CHRISTOPHER JAYARAM, judge. Submitted without oral argument. Opinion filed June 21, 2024. Affirmed.

Albert F. Kuhl, of Law Offices of Albert F. Kuhl, of Overland Park, for appellant.

Tara Eberline, of Foulston Siefkin LLP, of Overland Park, for appellee.

Before BRUNS, P.J., HILL, J., and MARY E. CHRISTOPHER, S.J.

BRUNS, J.: Brittany Conge appeals the district court's decision to grant summary judgment in favor of the City of Olathe on her claim of retaliatory discharge. On appeal, Conge contends that the district court erred in granting the City summary judgment as a matter of law because she came forward with sufficient evidence to establish a prima facie case for retaliatory discharge. Conge also contends that despite the City coming forward with evidence establishing that she was terminated for violating the Olathe Police Department's policy on dishonesty, the reason given by the City was pretextual. Based on our review of the record on appeal in light of Kansas law, we conclude that the district court's granting of summary judgment in favor of the City was appropriate. Thus, we affirm.

FACTS

Background Information

Conge was employed by the City of Olathe's police department beginning in June 2014. As part of her onboarding with the police department, Conge received information about and acknowledged receipt of various City policies. Significantly, she

received the police department's policy manual that included specific policies on "Dishonest or Untruthfulness," "Information Technology Use," and "Protected Information."

The police department's "Dishonest or Untruthfulness" policy states:

"Members shall not lie, omit information, give misleading information or half-truths, or falsify written or verbal communications in official reports or in their statements or actions with supervisors, another person, or organization when it is reasonable to expect that such information may be relied upon because of the member's position or affiliation with this organization."

Likewise, the police department's "Protected Information" policy provides that: "Members of the Olathe Police Department will adhere to all applicable laws, orders, regulations, use agreements and training related to the access, use, dissemination and release of protected information." In addition, the "Information Technology" policy provides that access to technology and resources provided by the police department "shall be strictly limited to department-related activities." The section on "OFF-DUTY USE" states that "[m]embers shall only use technology resources provided by the Department while on-duty or in conjunction with specific on-call assignments unless specifically authorized by a supervisor."

Besides the training that Conge received when she was hired, she annually completed the police department's security awareness training. This training included the appropriate use of the Kansas Criminal Justice Information System (KCJIS) to conduct records checks. In particular, it included how to appropriately run a license plate check. As part of this training, Conge acknowledged that the use of information from KCJIS "must be necessary for work assignments to be completed or for proper dissemination and cannot be obtained for a personal desire to know."

The City has a zero-tolerance policy for dishonesty or untruthfulness for its officers. Likewise, the police department has a policy requiring the disclosure of evidence favorable to a defendant that is either exculpatory or impeaching the credibility of an officer involved in a case. These policies are based on the decisions of the United States Supreme Court in *Giglio v. United States*, 405

U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

In June 2017, Conge applied for and was selected to the police department's hostage crisis negotiation team. The following year, she was selected for a rotation-based detective position. In February 2019, Conge received a permanent, detective position. It is undisputed that the Olathe Police Department is managed by a Chief of Police. At all times relevant to the issues presented in this appeal, Mike Butaud served as Chief of Police, and he was ultimately responsible for making the decision to terminate Conge's employment.

Events Leading to Termination

The record reflects that Conge was involved in a romantic relationship with another officer of the Olathe Police Department—Detective Justin Leach—that ended in early October 2019. While off duty on October 20, 2019, Conge drove to Detective Leach's residence around 3 a.m. and observed a vehicle in the driveway that she did not recognize. Conge called the police department and spoke with the on-duty officer—Kristoffer Ranaig—to ask him to run a KCJIS record check on the vehicle's license plate. Although Officer Ranaig did not know it at the time, Conge did not have a work-related reason for her request.

Officer Ranaig then used the KCJIS system to run the license plate. After doing so, he notified Conge of the vehicle's registered owner. Conge used this information to look up the registered owner on Facebook. She then exited her vehicle, rang Detective Leach's doorbell, and engaged in a verbal confrontation with him at the front door of his residence. The incident was recorded on Detective Leach's Ring doorbell, and the videos were subsequently provided to the police department.

Detective Leach closed the door to his residence while he retrieved a box of Conge's personal items from his vehicle. After receiving her personal belongings, Conge returned to her vehicle and called Sergeant Kevin Dornes who was on duty at the time. Sergeant Dornes told Conge that she could come to the police station if she wanted to speak with him. At about 4 a.m., Conge arrived at the station to speak with Sergeant Dornes. When she met

with him, Sergeant Dornes was working and wearing his police uniform. During their conversation, Conge told Sergeant Dornes that she had run a record check on the vehicle parked in Detective Leach's driveway by using her cell phone before looking at the registered owner's profile on Facebook.

When Sergeant Dornes questioned Conge about how she ran the record check using her cell phone, she told him she used her cell phone "all the time" for KCJIS purposes while working in the field. During an interview with internal affairs and again during her deposition in this case, Conge admitted that she told Sergeant Dornes that she had "ran the tag"—referring to a KCJIS records search. Conge also admitted that she did not tell Sergeant Dornes that she had called Officer Ranaig to run the tag for her.

Conge does not dispute that she has never run a KCJIS search on her cell phone as she had claimed when speaking to Sergeant Dornes. Moreover, it is undisputed that she had not used her City-issued security token required to run a KCJIS search on a computer for several months. It is also undisputed that it is not possible to access the KCJIS database from cell phones.

After speaking with Conge on the morning of the incident, Officer Dornes notified the on-duty Watch Commander, Captain Ryan Henson, about his conversation with her. At Captain Henson's request—and before his shift ended—Sergeant Dornes prepared a two-page memorandum describing his interaction with Conge. At the time Sergeant Dornes wrote up his report, he simply believed that Conge had misused police department resources for personal use and did not know that Conge's statement about running the check of the license plate herself was false. Conge does not dispute the reason Sergeant Dornes made the report.

Around 7:30 a.m. the day of the incident, Captain Henson emailed Sergeant Dornes' report to Major Grant Allen. In the email, Captain Henson stated that Conge had claimed to have used her cell phone to run the vehicle tag through KCJIS. The next day, at the request of her direct supervisor, Sergeant Courtney Totte-Boyd, Conge drafted a memorandum about the incident. After completing the memorandum, Conge submitted it to Major Allen. When she did so, Conge admitted that she had actually called the station and asked the duty officer to run the license plate.

When Major Allen asked Conge why she did not tell Sergeant Dornes the truth, she said that she did not want to get anyone else involved or to put Officer Ranaig in a bad situation. In her response to the City's motion for summary judgment in this case, Conge claimed she never admitted any wrongdoing to Major Allen. She also claimed that she never made a statement about not involving Officer Ranaig. But her deposition testimony reveals otherwise.

The following day, Major Allen prepared a memorandum on his understanding of the events that took place at Detective Leach's residence, Conge's conversation with Sergeant Dornes, and his own conversation with Conge. In his memorandum, Major Allen recommended that the matter be referred to internal affairs for investigation based on Conge's admission that she had not been truthful with Sergeant Dornes. The memorandum mentioned no other incidents regarding Conge's employment with the police department. Also, at the request of Major Allen, both Officer Ranaig and Detective Leach submitted written statements about their knowledge of the events.

Deputy Chief Shawn Reynolds and Chief Butaud concurred with Major Allen's recommendation that the matter be referred to internal affairs for investigation. Chief Butaud testified in his deposition taken in this case about his suspicion—after reviewing the memoranda submitted regarding the incident—that there "was a high likelihood there was a veracity concern involved." In his deposition, Chief Butaud also testified that "[a]ny time that there is a question of truthfulness with an employee, it goes to internal affairs."

On October 22, 2019, the police department officially opened an internal affairs investigation into the incident and Conge was placed on administrative leave. Sergeant Carl Anderson was assigned to conduct the investigation. During his investigation, Sergeant Anderson reviewed the videos from the Ring doorbell, documents from Conge's most recent KCJIS Security Awareness Training, and the various memoranda that were submitted by witnesses. Additionally, Sergeant Anderson conducted recorded interviews with Major Allen, Sergeant Dornes, Officer Ranaig, Detective Leach, and Conge.

After completing his investigation, Sergeant Anderson prepared an investigation report in which he summarized his findings. However, Sergeant Anderson did not make a recommendation as to any potential discipline that should be imposed. Neither Conge's involvement with any other cases nor her performance at work were mentioned in the report. No other issues were discussed in Sergeant Anderson's report besides those relating to this incident.

After reviewing Sergeant Anderson's report, Major John Roland found that Conge violated the police department's policies on (1) "Dishonest or Untruthfulness," (2) "Information Technology Use," and (3) "Protected Information." Major Roland determined that Conge was aware of the police department's policies governing the appropriate use of KCJIS and that the license plate check was performed for her personal use to determine who Detective Leach was with rather than for official business. In addition, Major Roland concluded that Conge "purposefully omitted relevant information when speaking with Sgt. Dornes."

Furthermore, Major Roland found that Conge committed the following instances of dishonesty or untruthfulness:

- During her internal affairs interview, Conge reported that she told Sergeant Dornes: "I ran the tag," which was "proven to be a lie."
- In her internal affairs interview, Conge claimed she did not care who was in the house with Detective Leach, but the videos show that Conge had a "clear interest in who was inside." In addition, the report indicated that Conge "was not forthcoming about her intentions while at Detective Leach's house."
- In her internal affairs interview, Conge justifies the act of calling into the station to have the tag run by stating that "she's done it occasionally for others calling in to make the same request." In the same interview, Conge later admits that she has not used the system in months and does not even know where her token is to get into the system.
- In her internal affairs interview, Conge denied that jealousy was a motivating factor for looking up the owner of

the vehicle tag. Conge stated that if jealousy was a factor, she would have done something crazy such as tried to look in a window or enter the house. The report pointed out that Conge's "statements contradict her actions and interaction with Detective Leach that morning," and noted that Conge did "try to enter Detective Leach's house."

- In her memo, Conge wrote that she responded to the station and confided everything that happened to Sergeant Dornes. The report stated this was false because Conge "omitted the relevant fact" that she called the station office to have the records check done.
- During Sergeant Dornes' internal affairs interview, he stated that Conge told him that she used her cell phone to access the KCJIS database to conduct the records check. When Sergeant Dornes questioned her about that story, Conge told him that it was possible to use her cell phone to access the information on a website, and we "'do it all the time.'" The report indicated this was a lie because "it is not possible to access the database by phone."

Based on his findings, Major Roland recommended that Conge's employment with the police department be terminated. His recommendation mentioned no other alleged incidents nor did it mention Conge's involvement with any other case. After reviewing the report and the investigation file, Chief Butaud made the decision to terminate Conge for the reasons set forth in Major Roland's report.

On February 18, 2020, Chief Butaud provided Conge with a Disciplinary Decision. In the decision, Chief Butaud advised Conge of her termination from the Olathe Police Department. He explained that the primary grounds for her termination was a violation of the police department's zero-tolerance policy on dishonesty. Nowhere in the Disciplinary Decision is there a reference to any other cases or incidents other than the one that led to the internal affairs investigation. After Conge's discharge, Chief Butaud notified the district attorney's office in a letter that she had been terminated from the police department "with a *Giglio* status," but did not include any details about her termination.

Retaliatory Discharge Lawsuit

On November 16, 2021, Conge filed a petition for damages against the City of Olathe. In her petition, Conge alleged that her termination was wrongful and done in retaliation for her exercising "rights and privileges consistent with department policies to protect the rights of crime victims and/or those accused of crimes." In the lawsuit, Conge alleged that she participated in three instances of purported whistleblowing during her employment with the police department before her termination.

The three instances of alleged whistleblowing identified were:

1. *High-profile Domestic Violence Case*

Conge claims she engaged in whistleblowing by complaining about her caseload. Specifically, she referred to her assignment to a high-profile domestic violence case. In her written statement—dated October 21, 2019—regarding the events that led to her termination, Conge stated:

> "I received a high profile [domestic violence] case involving a Johnson County Deputy in May of this year. This case occupied most, if not all, of my time for approximately 3 months and the case is still being worked. I was told to focus on this case because it was considered high profile, and so I focused most of my attention on it. I only deviated from this case if there was another more pressing/life threatening case that arose and needed immediate attention.
>
> "I expressed my concerns about my increasing case load and the stress of this specific case to multiple co-workers throughout the summer. I also spoke with Sergeant Anderson about the victim in this case becoming too much to handle. The victim would call me non-stop, had sent over a hundred emails and text messages, and left multiple 5 minute voicemails for me almost every day. Eventually, around July 4th, I reached out to Sergeant Anderson to contact the victim because it was becoming too much for me and impeding my performance on the case. Sergeant Anderson did reach out, but this only made it worse. From that point on the phone calls and emails increased, but I also started receiving calls from patrol officers because the victim began calling 911 non-stop. I would receive calls from patrol officers on my days off as well as late at night when I was already home. I did not hide any of this and made it very clear at work that this was becoming too much for me. I also spoke with Sergeant Anderson about working overtime on the weekends to get caught up. I was hesitant to do this because I needed to keep my personal time to have time to detach from work and keep my mind clear."

Yet in her deposition she testified that she never complained about this domestic violence case to Chief Butaud. Nor could she

recall whether she raised any complaints to Major Roland. Instead, Conge claimed she told several of her coworkers—including Major Allen and Sergeant Anderson—that she was overwhelmed with the volume of work related to this case.

It is undisputed that Conge does not believe any employee of the police department involved in this domestic violence case violated the law. Similarly, when asked in her deposition whether a police department employee involved in this case had violated any rules or regulations, Conge stated that she believed that the City should have used a mental health co-responder to assist the victim. But Conge was unaware of any police department policy that was not followed, nor did she make any complaints about not having a mental health co-responder assigned to the domestic violence case. While the police department has discretion to use mental health co-responders as needed, it is undisputed that there is no rule, regulation, or law requiring them to be used.

2. *Wrongful Arrest Case*

For her second instance of alleged whistleblowing, Conge points to a case involving a suspect accused of domestic violence stalking, telephone harassment, and blackmail to which she was assigned in September 2019. After reviewing the details of the suspect's arrest, Conge believed it resulted from a dishonest victim, a lack of evidence, and poor decision-making by one or more of her fellow officers. As a result of her investigation, Conge sought permission to and was able to have the suspect's arrest reversed.

In her deposition, Conge could not identify any specifics about the case. In particular, she could not recall the name of the suspect, the victim, or the officers involved in the arrest or investigation. Conge believed that Overland Park police officers had picked up the suspect on an arrest warrant, that Sergeant Tim Sweany may have approved the arrest, and that she may have discussed the case with Sergeant Anderson at one point. But neither Sergeant Sweany nor Sergeant Anderson recalled the matter, nor did they remember any discussion that they had with Conge about such a case. We note that Sergeant Sweany played no role in the internal affairs investigation of Conge leading to her termination,

and there is no evidence in the record to suggest that Sergeant Anderson considered this matter in his investigation of Conge in this case.

Conge admitted in her deposition that she never complained about this matter to Chief Butaud or to Major Roland. Conge also has not identified complaints she made to anyone about this domestic violence case, nor has she identified any law, rule, or regulation that was allegedly violated. Instead, Conge simply asserts that the unknown arrest was "bad," and she sought to correct it because the officers involved "did not perform their job properly." Although she stated that there is "probably a standard of how you perform investigations," she admitted she did not know what that procedure would be. In any event, Conge has identified no complaints she made about this matter nor has she identified any law, rule, or regulation that the arrest purportedly violated.

3. *Removal from Hostage Crisis Negotiation Team*

In October 2019, Conge was informed that she was being removed from the hostage crisis negotiation team. The stated purpose of Conge's removal from the hostage crisis negotiation team was to allow her to focus on reducing her caseload. It is undisputed that her removal from the team was not a demotion and she remained in her position as a detective. In her deposition, Conge claimed her removal from the team was a disciplinary action. But once again Conge has identified no complaints she made following her removal from the hostage crisis negotiation team, nor does she identify how her removal from that assignment violated any laws, rules, or regulations.

Summary Judgment Motion

After extensive discovery, the City moved for summary judgment on March 17, 2023. In the motion, the City asked the district court to grant summary judgment in its favor because there are no genuine issues of material fact. The City supported its motion with a statement of uncontroverted facts and a memorandum of law. In response, Conge filed a memorandum in which—as the district court observed—she loosely complied with Supreme Court Rule

141 (2023 Kan. S. Ct. R. at 223) and in which she stated several additional facts.

On August 14, 2023, the district court granted the City summary judgment as a matter of law on Conge's sole claim of retaliatory discharge. The district court determined that based on the uncontroverted material facts, "no reasonable fact finder could conclude that [Conge] has met her burden." The district court explained that Conge had failed to come forward with evidence to establish a prima facie claim of retaliatory discharge. Likewise, the district court explained that even if she had done so, Conge had failed to come forward with evidence to demonstrate that the reason given by the City for her termination was pretextual. Finally, the district court concluded that the City had shown a "valid and non-discriminatory basis for Conge's termination."

Thereafter, Conge filed a timely notice of appeal.

ANALYSIS

On appeal, Conge contends that the district court erred in granting the City's motion for summary judgment. She argues that she has identified at least three incidents of protected activity that would support her prima facie claim of retaliatory discharge. In response, the City contends that the district court properly granted summary judgment in its favor. The City asserts that the district court correctly found that Conge failed to establish a genuine issue of material fact to justify her retaliatory discharge claim proceeding to trial. The City argues that Conge's allegations "rely on nothing more than her personal beliefs, immaterial facts, and misrepresented or unsupported assertions of fact not found in the record."

Standard of Review

Summary judgment is appropriate in the district court when all the available evidence demonstrates that no genuine issue of material fact remains, entitling the moving party to judgment as a matter of law. In resolving a motion for summary judgment, a district court must resolve all facts and reasonable inferences from the evidence in favor of the party against whom judgment is sought. Then, the party opposing a motion for summary judgment must come forward with evidence that establishes a dispute to a

material fact, meaning a fact material to the conclusive issues of the case. *First Security Bank v. Buehne*, 314 Kan. 507, 510, 501 P.3d 362 (2021).

To preclude summary judgment, the facts subject to the dispute must be material to the conclusive issue in the case. When reasonable minds could differ as to the legal conclusions drawn from the evidence, the district court must deny the motion for summary judgment. On appeal, we apply the same standards as the district court applied. *Jeffries v. United Rotary Brush Corp.*, 62 Kan. App. 2d 354, 357-58, 515 P.3d 743 (2022).

When reasonable minds could differ as to the legal conclusions drawn from the evidence and the motion has been granted by the district court, the appellate court must reverse the ruling granting summary judgment. See *First Security Bank*, 314 Kan. at 510. But if Conge failed to come forward with evidence sufficient to reach a jury on each element of her claim—as the district court found in this case—summary judgment would be appropriate.

A factual dispute is not genuine unless it has legal force as to a controlling issue. In other words, a disputed question of fact which is immaterial to the issue presented does not preclude summary judgment. If the disputed fact could not affect the judgment, it does not present a "genuine issue" for purposes of summary judgment. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 934, 296 P.3d 1106, *cert. denied* 571 U.S. 826 (2013). Furthermore, a "'party cannot avoid summary judgment on the mere hope that something may develop later during discovery or at trial. Mere speculation is similarly insufficient to avoid summary judgment.' [Citations omitted.]" *Geer v. Eby*, 309 Kan. 182, 190, 432 P.3d 1001 (2019).

Elements of Claim for Retaliatory Discharge

A plaintiff claiming retaliatory discharge has the burden of establishing every element of the claim by clear and convincing evidence. *Shaw v. Southwest Kansas Groundwater Mgmt. Dist. 3*, 42 Kan. App. 2d 994, 999, 219 P.3d 857 (2009). To be clear and convincing, the truth of the evidence must be highly probable. *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020). In ruling on

a summary judgment motion, the court does not weigh the evidence but determines only whether the evidence is sufficient to establish the claim. See *Esquivel v. Watters*, 286 Kan. 292, 296, 183 P.3d 847 (2008); see also *Ingram v. Martin Marietta Long Term Disability Income Plan*, 244 F.3d 1109, 1114 (9th Cir. 2001) ("On summary judgment, the proper task is not to weigh conflicting evidence, but rather to ask whether the non-moving party has produced sufficient evidence to permit the fact finder to hold in his favor.").

Failure to Establish a Prima Facie Case

As a general rule, employers and employees in Kansas can terminate the employment relationship at any time and for any reason unless the parties have an express or implied contract regarding the terms of employment. This legal doctrine is known as employment-at-will. See *Hill v. State*, 310 Kan. 490, 500, 448 P.3d 457 (2019) (citing *Lumry v. State*, 305 Kan. 545, 562, 385 P.3d 479 [2016]; *Campbell v. Husky Hogs*, 292 Kan. 225, 227, 255 P.3d 1 [2011]). As such, at-will employees may generally be discharged for "good cause, for no cause, or even for the wrong cause." *Goodman v. Wesley Medical Ctr., L.L.C.*, 276 Kan. 586, 589, 78 P.3d 817 (2003).

An exception to the at-will employment doctrine prohibits an employer from discharging an employee in retaliation for the employee's exercise of certain statutory or common-law rights as a matter of public policy. Here, Conge asserts the "whistleblower" exception to the employment-at-will doctrine. This exception protects employees from retaliatory discharge for reporting violations of laws, rules, or regulations that pertain to public health, safety, or welfare. See *Hill*, 310 Kan. at 500-01 (citing *Pfeifer v. Federal Express Corp.*, 297 Kan. 547, 554-56, 304 P.3d 1226 [2013]); *Husky Hogs*, 292 Kan. at 228; *Palmer v. Brown*, 242 Kan. 893, 900, 752 P.2d 685 (1988).

To establish a prima facie case of unlawful retaliatory discharge for whistleblowing, a plaintiff must come forward with evidence to support the following elements: (1) a reasonably prudent person would have concluded the employee's coworker or employer was engaged in activity that violated rules, regulations,

or the law pertaining to public health, safety, and the general welfare; (2) the employer knew about the employee's reporting of such violation before discharge of the employee; (3) the employer discharged the employee in retaliation for making the report; and (4) the employee engaged in whistleblowing in good faith based on a concern about the wrongful activity rather than for a corrupt motive. *Goodman*, 276 Kan. at 589-90 (citing *Palmer*, 242 Kan. at 900).

If an employee can come forward with evidence to establish a prima facie case of retaliatory discharge based on whistleblowing, the burden then shifts to the employer to come forward with evidence to establish that the employee was terminated for a legitimate nonretaliatory reason. If the employer is able to come forward with such evidence, the burden then shifts back to the employee to show that the reason given by the employer for terminating their employment is simply pretextual. *Goodman*, 276 Kan. at 590.

A pretext is a false reason that is given to conceal the true intentions for an action. So, a pretext is a "mere cover-up" for the true reason that the employee was discharged. *Bracken v. Dixon Industries*, 272 Kan. 1272, 1276, 38 P.3d 679 (2002). Pretext can be shown by: (1) evidence that the employer's stated reason for discharge was false; (2) evidence that the employer acted in contradiction to company policy; and (3) evidence that the employee was treated differently than other similarly situated employees. *DeWitt v. Southwestern Bell Telephone Co.*, 845 F.3d 1299, 1307-08 (10th Cir. 2017).

Here, in order to meet her burden to come forward with evidence sufficient to establish a prima facie case of retaliatory discharge, Conge must first show that a reasonable person would have concluded that one of her coworkers at the Olathe Police Department or her superiors were engaged in activity that violated rules, regulations, or laws pertaining to public health, safety, and the general welfare. As discussed above, Conge makes three claims that she suggests are sufficient to establish a prima facie case of retaliatory discharge.

In reviewing the record on appeal, we find no evidence that any of Conge's coworkers or her supervisors at the police department engaged in an activity that violated rules, regulations, or the law pertaining to public health, safety, or the public welfare. Although Conge claims she requested a co-responder, asked for help, and raised questions about the size of her caseload, none of these actions are protected as a whistleblower. See *Palmer*, 242 Kan. at 900.

"Public policy requires that citizens in a democracy be protected from reprisals for performing their civil duty of reporting infractions of rules, regulations, or the law pertaining to public health, safety, and the general welfare. Thus, we have no hesitation in holding termination of an employee in retaliation for the good faith reporting of a serious infraction of such rules, regulations, or the law by a co-worker or an employer to either company management or law enforcement officials (whistle-blowing) is an actionable tort." *Palmer*, 242 Kan. at 900.

To support a whistleblower retaliation claim, the public policy at issue "'should be so thoroughly established as a state of public mind so united and so definite and fixed that its existence is not subject to any substantial doubt.'" *Goodman*, 276 Kan. at 592 (quoting *Palmer*). Public policy violations cannot be based on an employer's subjective opinion. 276 Kan. at 592. As our Supreme Court has stated: "It would be both troublesome and unsettling to the state of the law if we were to allow a retaliatory discharge claim to be based on personal opinion of wrongdoing." 276 Kan. at 592.

General workplace disagreements—which appear to be what Conge is asserting—do not give rise to a public policy violation. See *Cain v. Kansas Corp. Comm'n*, 9 Kan. App. 2d 100, 104-05, 678 P.2d 451 (1983) (public policy exception does not apply to a plaintiff's opinion that the Kansas Corporation Commission should comply with the Kansas Securities Act); *Aiken v. Business & Industrial Health Group, Inc.*, 886 F. Supp. 1565, 1573-74 (D. Kan. 1995) (plaintiff's personal views are not public policy).

In support of her claim, Conge cites *Mattice v. City of Stafford*, No. 122,907, 2021 WL 4227730 (Kan. App. 2021) (unpublished opinion). In that case, Mattice alleged specific viola-

tions of rules, regulations, or laws, including the failure to investigate an alleged crime and the violation of the statute requiring law enforcement officers to report suspected instances of child abuse. See K.S.A. 2020 Supp. 38-2223(a)(1)(D), (c)(1). In reviewing whether the district court appropriately granted the City's motion to dismiss, a panel of our court found that requiring the "whistleblower to seek to 'stop unlawful conduct' distinguishes a mere workplace dispute from those disputes related to legal requirements that could constitute whistleblowing. [Citation omitted.]" 2021 WL 4227730, at *5. Once again, it is important to recognize that Conge did not assert that any rule, regulation, or law had been violated. Likewise, she did not report that any of her coworkers or supervisors at the police participated in such conduct. Accordingly, we find the facts in this case distinguishable from *Mattice*.

Conge concedes no policy requires the assignment of a mental health co-responder under these circumstances, and the decision whether to use one is discretionary. Conge also concedes that she did not complain to anyone in her chain of command that the City or any of its employees violated the law, a regulation, or a policy by not assigning a mental health co-responder to the high-profile domestic violence case or about how her caseload was handled. Under these circumstances, Conge has not met her burden of coming forward with evidence to establish a prima facie case for her claim about the domestic violence case.

Next, Conge points to her actions to reverse a domestic violence arrest that she believed was improper. Yet the allegations she provides about this event are vague and not supported with any evidence substantiating her claim. Because arrests are supported by records, Conge should have been able to support her claim with evidence. As the district court found, Conge "was unable to identify the name of the suspect, the dates of these incidents, or the co-worker/officer purportedly involved and could only provide a vague and generic reference to the suspect's description."

Even if Conge could provide proof of the arrest, she again fails to assert that either the City or its employees violated any law, rule, or regulation relating to public health or safety with respect

to the arrest that allegedly occurred months before her termination. Like the district court, we find this assertion of whistleblowing to be "so vague, non-specific, and implausible" that it fails to create a genuine issue of material fact in support of a prima facie case for retaliatory discharge. See *Ball v. Credit Bureau Services, Inc.*, No. 111,144, 2015 WL 4366440, at *12 (Kan. App. 2015) (unpublished opinion) (information submitted by the plaintiff in support of or opposition to motion for summary judgment must manifest "sufficient specificity" to be considered); *Fisher v. Forestwood Co., Inc.*, 525 F.3d 972, 978 (10th Cir. 2008) (information must be specific and not vague, conclusory, or self-serving). As a result, we find that Conge has not come forward with evidence to establish a prima facie case of whistleblowing.

Conge also suggests that her removal from the hostage crisis negotiation team in October 2019 supports her claim that she was a whistleblower. On appeal, she argues that her removal from the team is "evidence of retaliatory treatment after voicing concerns about her excessive caseload." But she admits that her removal from the team was not a demotion in position nor did it result in a reduction in pay. Once again, she fails to identify any law, rule, regulation, or policy that was allegedly violated by her removal from the team. As such, Conge fails to meet her burden of establishing a prima facie case as to this claim.

Generally, Conge claims that some of the people involved in the investigation that led to her termination knew of her complaints about the domestic violence case and the reversal of the arrest. Yet, it is undisputed that Major Roland—who recommended Conge's termination—did not rely on any reason other than the violations of policy occurring on October 20, 2019, and he was not even aware of any allegations that Conge was engaged in whistleblowing when he investigated the incident that led to his recommendation that she be terminated. Conge also fails to allege that Chief Butaud—who ultimately determined that she should be terminated from her employment with the City—was aware of her engaging in whistleblowing or any other protected activity. See *Hinds v. Sprint/United Management Co.*, 523 F.3d 1187, 1203-04 (10th Cir. 2008) (affirming grant of summary judgment for the employer where decisionmaker did not know of alleged protected

activity at the time of the decision to terminate). Without showing evidence that she reported a specific violation or that the decisionmaker knew about it, Conge falls short of establishing a prima facie case of retaliatory discharge.

A review of the record on appeal reveals that Conge failed to come forward with evidence to establish that she was terminated for any reason other than that identified by the City. Nor is there any evidence of a causal connection between the three situations which she identified and the events that led to her termination. In addition, Conge must come forward with evidence to show that she reported a violation of a rule, regulation, or law in good faith based on a legitimate concern about the wrongful activity. Yet there is a dearth of evidence in the record to establish that Conge reported any such violation.

In conclusion, we find that Conge has failed to meet her burden to come forward with evidence sufficient to establish a prima facie case for retaliatory discharge. As a result, she has failed to establish a genuine issue of material fact that would prevent the granting of summary judgment to the City. Conge has neither come forward with evidence to establish that she reported a violation of any law, rule, or regulation, or policy, nor has she come forward with evidence to establish that the City had knowledge that she reported such a violation.

Failure to Come Forward with Evidence of Pretext

Summary judgment is appropriate when an employer has a legitimate, nonretaliatory reason for the termination, and the employee fails to prove a pretext for the termination. *Gonzalez-Centeno v. N. Cent. Kansas Regional Juvenile Detention Facility*, 278 Kan. 427, 437, 101 P.3d 1170 (2004). Even if Conge had come forward with evidence sufficient to establish a prima facie case of retaliatory discharge, the City met its burden by coming forward with evidence that she was terminated for a legitimate, nonretaliatory reason. In addition, Conge failed to come forward with evidence to establish that the reason given by the City for her termination was pretextual.

As addressed above, once a plaintiff establishes a prima facie claim, the burden shifts to the employer to come forward with evidence to establish a legitimate, nondiscriminatory basis for terminating the employment. *Goodman*, 276 Kan. at 590. If the employer does so, then the burden shifts back to the employee to come forward with evidence to establish that the reason given is pretextual. To establish pretext, a plaintiff must show "'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Degraw v. Exide Technologies*, 744 F. Supp. 2d 1199, 1208 (D. Kan. 2010).

The City explained that it terminated Conge for violating its policy on dishonesty and untruthfulness. In support of this explanation for Conge's termination, the City came forward with the police department's "Dishonest or Untruthfulness" policy as well as with evidence showing that Conge was aware of the policy. Notably, Conge does not dispute that she knew about this policy.

The Olathe Police Department's "Dishonest or Untruthfulness" policy provides that its officers "shall not lie, omit information, give misleading information or half-truths, or falsify written or verbal communications in official reports or in their statements or actions with supervisors, another person, or organization . . . ." The policy continues that the prohibition against dishonesty is applicable "when it is reasonable to expect that such information may be relied upon because of the member's position or affiliation with this organization." Conge makes no argument that the policy was inapplicable to the events leading to her termination.

Likewise, Conge makes no argument that she did not violate this policy when she told Sergeant Dornes that she accessed the KCJIS system by using her own cell phone. In fact, Conge did not attempt to controvert this statement of uncontroverted fact presented by the City in its summary judgment motion: "During their conversation, Conge told [Sergeant] Dornes she ran a record check on the vehicle in Detective Leach's driveway using her cellphone and then looked up the owner on Facebook." It is also un-

disputed that Conge later told Major Allen she called into the police department and requested that Officer Ranaig run the record check. Accordingly, the City came forward with sufficient evidence to support its contention that Conge was terminated pursuant to the police department's zero-tolerance policy for untruthfulness.

Once the City established a legitimate basis for terminating Conge's employment, the burden shifted back to Conge to establish that the City's offered reason for employment termination was pretextual. *Goodman*, 276 Kan. at 590. The only arguments asserted by Conge that her termination was pretextual are based on mere speculation and conjecture. Although she may believe that her dishonesty was not the real reason for her termination, she failed to come forward with anything of evidentiary value to support her belief.

Under Kansas law, reliance on inferences, speculation, or conjecture is not enough to survive a summary judgment motion. *Lloyd v. Quorum Health Res., L.L.C.*, 31 Kan. App. 2d 943, 954, 77 P.3d 993 (2003). In addition, a plaintiff's reliance on his or her own subjective beliefs cannot satisfy the burden of establishing pretext for termination. See *Goodman*, 276 Kan. at 595 (affirming summary judgment where the only evidence of an unlawful motive was the employee's opinion or belief).

In its statement of uncontroverted facts, the City asserted—with appropriate citations to the record—that for 30 years it has consistently terminated any police officer when an investigation finds the officer was dishonest or untruthful unless the officer resigned before termination. Conge has come forward with no evidence to contradict this statement of uncontroverted fact and, as a result, it is deemed to be admitted. Moreover, a review of the record reveals that the City's action in this case adheres to this practice. Accordingly, Conge has failed to come forward with evidence to support her allegation to establish that her termination from the Olathe Police Department was pretextual.

CONCLUSION

Based on our review of the record on appeal, we find that there is no genuine issue of material fact and that the City is entitled to

judgment as a matter of law. Resolving all facts and reasonable inferences from the evidence in favor of Conge, we find that she has failed to come forward with evidence that establishes a dispute over any fact material to her claim of retaliatory discharge. Specifically, we find that Conge has failed to come forward with evidence to establish a prima facie case of whistleblowing while the City has come forward with evidence to establish that it had a legitimate and nonretaliatory reason for the termination of her employment for violating its policy on dishonesty by police officers. Lastly, we find that Conge has failed to come forward with evidence to establish that the reason given by the City for her termination was a pretext.

Under these circumstances, we conclude that the district court properly granted the City's motion for summary judgment as a matter of law on Conge's retaliatory discharge claim.

Affirmed.

(551 P.3d 260)

No. 126,501

JOSEPH STOUT and KATELYN STOUT d/b/a STOUT CONSTRUCTION CO., *Appellants*, v. KANEQUIP, INC., *Appellee*.

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Motion for Relief under K.S.A. 60-260(b).* On motion and just terms, the court may relieve a party from a final judgment for any of the reasons set forth in K.S.A. 60-260(b)(1)-(6).

2. SAME—*Motion for Relief under K.S.A. 60-260(b)(1) —Limits.* K.S.A. 60-260(b)(1) permits relief by a party because of mistake, inadvertence, surprise, or excusable neglect. The motion must be filed within a reasonable time not more than one year from the date of judgment.

3. SAME—*Motion for Relief under K.S.A. 60-260(b)(6) – Catchall Provision—Liberal Construction.* K.S.A. 60-260(b)(6) is a catchall provision providing relief from final judgment for any other reason justifying it. This provision is to be liberally construed to preserve the delicate balance between the conflicting principles that litigation be brought to an end and that justice be done in light of all the facts.

4. SAME—*Motion for Relief under K.S.A. 60-260(b) – Discretion of District Court—Appellate Review.* A ruling on a motion for relief from judgment under K.S.A. 60-260(b) rests within the sound discretion of the district court. Abuse of discretion occurs when the district court's decision is based on a legal or factual error or if no reasonable person would agree with it.

5. SAME—*Motion for Relief under K.S.A. 60-260(b)—District Court's Considerations.* When ruling on a motion to set aside an order under K.S.A. 60-260(b), the district court should consider all the facts, including (1) whether the motion was filed within a reasonable time, (2) whether the motion will prejudice the other party, and (3) whether the moving party has good cause to move to set aside an order.

Appeal from Ford District Court; ANDREW STEIN, judge. Submitted without oral argument. Opinion filed June 28, 2024. Reversed and remanded.

Peter J. Antosh, of Garcia & Antosh, LLP, of Dodge City, for appellants.

Patric S. Linden, *Trevor Bond*, and *Ellen C.T. Mathis*, of Case Linden Kurtz Buck P.C., of Kansas City, Missouri, for appellee.

Before COBLE, P.J., GREEN, J., and TIMOTHY G. LAHEY, S.J.

LAHEY, J.: Joseph Stout and Katelyn Stout d/b/a Stout Construction Co. (the Stouts) sued KanEquip, Inc., over a dispute involving KanEquip's unsuccessful attempts to repair the Stouts' skid steer. When the Stouts' expert witness failed to appear for his deposition, KanEquip sought discovery sanctions, including that the Stouts' case be dismissed with prejudice. Between the time the motion was filed and the scheduled hearing date, the Stouts' attorney, Terry J. Malone was suspended from the practice of law by the Kansas Supreme Court. He mailed written notice of his suspension to the Stouts and defense counsel as required by Supreme Court Rule 231, and he withdrew from the case six days before the hearing. When neither Malone nor the Stouts appeared at the sanction hearing, the district court granted KanEquip's motion and dismissed the case with prejudice. Contending they were unaware of the motion or hearing date, the Stouts asked the district court to set aside the dismissal under K.S.A. 2022 Supp. 60-260(b)(1) and (b)(6). Although no evidence was presented refuting the Stouts' lack of actual knowledge of the hearing, the district court denied their motion, concluding that Malone's knowledge of the motion and hearing must be imputed to them. This appeal follows.

Based on the unusual factual circumstances of the case in which the Stouts became involuntarily pro se shortly before the sanctions hearing, along with the unrefuted evidence that the Stouts had no actual knowledge of the existence of the motion or hearing date, we find the district court erred by denying the Stouts' motion to set aside the judgment. We reverse the decision of the district court and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The Stouts brought their skid steer to KanEquip, Inc., a mechanical repair shop, hoping to have engine problems fixed, which they believed were caused by contaminated diesel fuel. The Stouts later retrieved their skid steer from the repair shop—believing that KanEquip had repaired it—and they paid KanEquip $8,952.85 for its work. Almost immediately, though, the Stouts knew that KanEquip had not resolved the engine problems. So a few months later, the Stouts took the skid steer to a different repair shop, which

made some additional repairs, though none involved the engine issues that KanEquip had been tasked with.

Since the skid steer still had engine problems, the Stouts brought it back to KanEquip. After looking at the machine, and attempting to repair it, KanEquip contacted the Stouts, explaining (1) that it could not fix the skid steer and (2) that the Stouts owed $9,007.19 for its attempted repair.

The Stouts initially refused to pay KanEquip, but they ended up paying their outstanding bill and reclaiming their skid steer. Soon after, the Stouts discovered that KanEquip could have fixed their skid steer with "only a simple repair." The Stouts hired Malone as their attorney and, in March 2021, filed this lawsuit against KanEquip for breach of contract, violation of the Kansas Consumer Protection Act (KCPA), fraud, and conversion. For each claim, the Stouts asserted that they sustained damages in excess of $75,000. KanEquip denied the Stouts' claims and raised several affirmative defenses.

KanEquip filed a motion for judgment on the pleadings in June 2021. It was initially granted—Malone filed no response to the motion and failed to appear for the motion hearing. But ultimately, Malone was allowed to file a response out of time, and the motion to dismiss was resolved in January 2022. A status conference was held shortly after.

In June 2022, KanEquip filed a motion to strike expert disclosure for the Stouts' failure to comply with the expert witness disclosure requirement in K.S.A. 2021 Supp. 60-226. In line with KanEquip's request, the district court ordered sanctions against the Stouts on September 12, 2022, in the sum of $1,572.50 in attorney fees and costs to be paid within 30 days.

Less than a month later, on October 5, KanEquip again asked the district court to sanction the Stouts for another discovery violation. According to KanEquip's attorney, after traveling to Colorado Springs, Colorado, for a scheduled deposition of the Stouts' expert mechanic, the expert never appeared. KanEquip explained that the testimony of the expert mechanic involved "a dispositive issue in the case." And it stressed that "alternate sanctions [had] proven ineffective, and [that the expert's] testimony [was] not cumulative nor corroborative." Then KanEquip cited K.S.A. 2022

Supp. 60-237(b)(2)(A)(v), which states that the district court may "dismiss[] the action or proceeding in whole or in part" for discovery violations, and it asked the court to dismiss the Stouts' case for the discovery violations or award them costs and fees related to the Stouts' expert failing to appear at his deposition.

The same day, KanEquip's attorney submitted a notice of hearing stating that there would be a hearing on its motion for sanctions on November 8, 2022, at 11 a.m. The notice stated that it was sent by electronic filing to Malone. Six days before the hearing, on November 2, Malone submitted a notice of withdrawal under Kansas Supreme Court Rule 231 (2024 Kan. S. Ct. R. at 289).

Malone's notice stated that our Supreme Court suspended him for 90 days, starting on October 14, 2022. Malone mailed a certified notice to the Stouts on October 27 explaining his suspension. In a letter dated October 28, Malone notified KanEquip's attorney of his suspension, and stated: "I have notified my former clients accordingly, and will assist in the expeditious transfer of their files to new counsel at their direction. I will do everything within my present ability to minimize the impact of my suspension on the resolution of these cases." The notice does not contain any reference to or suggestion that Malone informed the Stouts about the upcoming November 8 hearing on discovery sanctions.

Neither Joseph nor Katelyn appeared at the November 8 hearing on KanEquip's motion for sanctions, and they had no legal representation at the hearing since Malone was suspended from practicing law. Nonetheless, the district court proceeded with the sanctions hearing.

At the start of the hearing, the district court and KanEquip's attorney discussed what they knew about Malone's suspension. KanEquip's attorney noted that the day before, Malone's assistant left a voicemail asking "whether or not this hearing was still happening." She said that the assistant also said the Stouts were seeking to hire a new attorney but had not yet found one. KanEquip's attorney explained she did not have a chance to return the call because she was out of her office all day, and therefore, did not know she had the voicemail until the end of the day.

The district court ultimately determined that because Malone had been suspended in mid-October, the Stouts should have

known about the suspension and had enough time to decide whether they wanted to continue with their lawsuit against KanEquip. Thereafter, KanEquip's attorney discussed the ongoing discovery issues, argued the Stouts were not meeting the burden to prosecute their case, and asked the district court to dismiss with prejudice.

In the end, the district court agreed with KanEquip and dismissed the Stouts' claims against KanEquip with prejudice:

"So the Court finds that in light of the fact that parties—or [the Stouts are] not here today or made any effort to appear other than apparently a last-minute voicemail from Mr. Malone's office, the Court finds that it is appropriate to grant the motion to dismiss this case with prejudice and it is going to make that its order. I will specifically just note that there are some unusual complications with defense counsel's suspension for 90 days. That's not necessarily attributable to the [Stouts] themselves. However, the Court finds that, you know, from the beginning of this case, they've been free to employ any attorney they wished, have retained and continue to retain Mr. Malone. There have been numerous discovery disputes, some of which have been litigated through motion to compel. Sanctions were originally ordered finally when it came to the Court's attention, and upon the update that those sanctions have not been paid today, the Court finds that those options would be ineffective if that was imposed as the sanction here."

A few weeks later, the Stouts hired a new attorney—Peter J. Antosh—who entered his appearance for the Stouts on November 26, 2022. On March 3, 2023, Antosh moved to set aside the district court's dismissal. That motion is the focus of the Stouts' appeal.

The Stouts' motion to set aside the dismissal of their claims with prejudice

Essentially, the Stouts' motion asserted that they were unaware that a motion for sanctions had been filed or set for hearing on November 8. Rather, the Stouts first learned about these events when they received a copy of the district court's November 9 journal entry dismissing their claims against KanEquip with prejudice in the mail.

Separate but essentially identical affidavits from Katelyn and Joseph were attached to the motion to set aside the dismissal. They asserted that prior to receiving a copy of the court's November 9 order, they were unaware that (1) their lawsuit was in jeopardy of dismissal due to discovery deficiencies, (2) monetary discovery

sanctions were owed in their lawsuit, and (3) their case was set for a motions hearing on November 8.

The affidavits added that had the Stouts been aware of the motions hearing that was set for November 8, they would have attended it. And the Stouts stated that they would have addressed the discovery problems and monetary sanctions had they known about them. Both Katelyn and Joseph expressed that they wished to proceed with the lawsuit.

Citing these facts, Antosh moved to set aside the district court's dismissal of the Stouts' claims under K.S.A. 2022 Supp. 60-260(b)(1) and (b)(6). The motion asserted that the Stouts were entitled to relief under K.S.A. 2022 Supp. 60-260(b)(1)—which allows a court's order to be set aside because of surprise or excusable neglect—because they were "wholly unaware of the hearing that they missed and of the underlying sanctions issues to be addressed therein." Antosh added that excusable neglect was also present since Malone was suspended from practicing law, meaning the Stouts "were placed into a situation where they were left pro se without having been brought up to speed on the proceedings."

Antosh explained that Malone left for a long-planned vacation on October 14 and was suspended from legal practice on October 15. The attorney was largely unreachable following up to and during the two weeks he was gone. In the calamity that ensued with Malone having to withdraw from his pending cases and make appropriate notifications to his clients, courts, and opposing counsel, the Stouts were not provided with notice of hearing or hearing information.

As earlier mentioned, Malone sent the Stouts and KanEquip a notice of withdrawal under Supreme Court Rule 231. This notice did not include (and did not require) information that would have otherwise been required under Rule 1.09, such as "an admonition that the client is personally responsible for complying with all orders of the court and time limitations established by the rules of procedure or by court order" and "notice of the date of any pending hearing, conference, or deadline." Kansas Supreme Court Rule 1.09(b)(1)(B) (2024 Kan. S. Ct. R. at 8) (withdrawal of attorney). Antosh added that the court file does not indicate that KanEquip

notified the Stouts of the hearing upon learning that Malone withdrew.

And under K.S.A. 2022 Supp. 60-260(b)(6)—a catchall provision permitting relief from a judgment—Antosh argued good cause existed to permit the case to proceed on the merits, rather than terminating on procedural grounds, because of the "intervening and highly unusual circumstances surrounding the suspension of [the Stouts'] former counsel, which would otherwise operate as a windfall for the defendants."

KanEquip argued that the Stouts lacked good cause for the district court to set aside its dismissal. KanEquip pointed to the earlier discovery struggles and highlighted that the Stouts had not paid the $1,572.50 discovery sanction. KanEquip claimed that Malone's letter about his suspension notified the Stouts about the hearing and the discovery sanctions. Finally, KanEquip asserted that the Stouts failed to timely file their motion to set aside dismissal and that it would be prejudiced by an order setting aside the dismissal because it would lead to more costs and discovery issues.

As neither party requested oral argument, the district court issued a written order denying the Stouts' motion without a hearing. The court reasoned that the Stouts, through Malone, were present when it granted KanEquip's earlier motion to compel and ordered sanctions. And it noted that the November 8 hearing on KanEquip's motion to dismiss and discovery sanctions had been scheduled since October 5, which was before Malone's suspension in mid-October. For those reasons, it found that the Stouts could not be surprised by the hearing or the discovery sanctions and had not shown good cause to set aside dismissal.

Finally, the district court found that Malone's suspension was unrelated to its decision, stressing that the Kansas Supreme Court's suspension of Malone occurred between the time the district court imposed the initial $1,572.50 discovery sanction and set the November 8 hearing. The district court also stated that the Stouts' "unexplained delay of nearly four months in filing their motion to set aside dismissal further indicate[d] an ongoing inability or unwillingness to prosecute this action promptly."

The Stouts appeal the district court's order denying their motion to set aside the dismissal of its case against KanEquip.

ANALYSIS

A threshold question is whether we have jurisdiction to review the district court's decision to deny the Stouts' motion to set aside the dismissal of their claims against KanEquip. We have a duty to question jurisdiction on our own initiative if the record reveals a potential jurisdictional hurdle. And questions involving jurisdiction are questions of law over which we exercise unlimited review. *Wiechman v. Huddleston*, 304 Kan. 80, 84-85, 370 P.3d 1194 (2016).

The filing of a timely notice of appeal is jurisdictional. *In re Care and Treatment of Emerson*, 306 Kan. 30, 34, 392 P.3d 82 (2017). In civil cases, absent an exception, K.S.A. 2023 Supp. 60-2103(a) requires that a party file a notice of appeal to our court no later than 30 days after the district court's entry of judgment.

Here, the Stouts moved to set aside the district court's dismissal of their case against KanEquip, and the district court entered the order denying that motion on March 22, 2022. The Stouts appealed 28 days later. We thus have no trouble concluding that we have jurisdiction to consider the Stouts' arguments about the district court's denial of their motion to set aside its dismissal as they timely appealed that order.

For clarity, we note that because the Stouts did not timely appeal the district court's November order dismissing their case with prejudice, we lack jurisdiction to review that decision and do not address it on the merits. We consider only whether the district court erred in denying the Stouts' motion for relief from that judgment under K.S.A. 2022 Supp. 60-260(b).

The district court abused its discretion in denying the Stouts' motion to set aside its dismissal with prejudice.

The Stouts moved to set aside the district court's dismissal of their case against KanEquip under K.S.A. 2022 Supp. 60-260(b)(1) and (b)(6). On motion and just terms, the court may relieve a party from a final judgment for any of the reasons set forth in K.S.A. 2023 Supp. 60-260(b)(1)-(6). A person may obtain relief

under K.S.A. 2023 Supp. 60-260(b)(1) if they prove "[m]istake, inadvertence, surprise or excusable neglect." Excusable neglect has no statutory definition and "must be determined on a case by case basis under the facts presented." *Jenkins v. Arnold*, 223 Kan. 298, 299, 573 P.2d 1013 (1978). And under K.S.A. 2023 Supp. 60-260(b)(6), relief may be obtained for "any other reason that justifies relief." As our Supreme Court has mentioned, "'K.S.A. 60-260(b)(6) is to be liberally construed "to preserve the delicate balance between the conflicting principles that litigation be brought to an end and that justice be done in light of all the facts."'" *Garcia v. Ball*, 303 Kan. 560, 570, 363 P.3d 399 (2015) (quoting *In re Estate of Newland*, 240 Kan. 249, 260, 730 P.2d 351 [1986]).

When ruling on a motion to set aside an order under K.S.A. 60-260(b), the district court should consider all the facts, including (1) whether the motion was filed within a reasonable time, (2) whether the motion will prejudice the other party, and (3) whether the moving party has good cause to move to set aside an order. *Morton County Hospital v. Howell*, 51 Kan. App. 2d 1103, 1109, 361 P.3d 515 (2015). On appeal, this court reviews a district court's decision for abuse of discretion, which the party claiming error—here, the Stouts—must prove. 51 Kan. App. 2d at 1109; see also *Bicknell v. Kansas Dept. of Revenue*, 315 Kan. 451, 466, 509 P.3d 1211 (2022). Abuse of discretion occurs when the district court's decision is based on a legal or factual error or if no reasonable person would agree with it. *Morton County Hospital*, 51 Kan. App. 2d at 1112.

This court exercises unlimited review over errors of law and reviews factual errors for substantial competent evidence, which is evidence that possesses relevance and substance. *Roll v. Howard*, 59 Kan. App. 2d 161, 172, 175-76, 480 P.3d 192 (2020). On appeal, we "view the evidence in the light most favorable to the prevailing party, disregarding conflicting evidence or other inferences that might be drawn." 59 Kan. App. 2d at 172; see also *Gannon v. State*, 298 Kan. 1107, 1175-76, 319 P.3d 1196 (2014).

With those principles in mind, our discussion turns to the Stouts' sole complaint—that the district court erred by denying their motion to set aside its dismissal of their claims against KanEquip with prejudice. In short, we agree with the Stouts that

the district court abused its discretion. We explain our reasoning now.

The district court denied the Stouts' motion to set aside its dismissal for two reasons: (1) Malone's knowledge of the discovery hearing—and by extension fault—was to be imputed onto the Stouts under *Overlander v. Overlander*, 129 Kan. 709, 284 P. 614 (1930); and (2) the three months it took the Stouts' new attorney to file their motion to set aside dismissal conveyed an "ongoing inability or unwillingness to prosecute this action promptly." In light of the unique circumstances here, we find neither reason representative of sound discretion.

To begin, the district court erred when it found that Malone's knowledge about the discovery hearing was to be imputed and leveraged against his former clients, the Stouts. The district court erroneously interpreted the Kansas Supreme Court's holding in *Overlander* to be that "[a]ctual knowledge of a client's attorney is imputed to and becomes the knowledge of the client." We agree that the district court cited a valid general rule that notice to counsel is adequate notice to a client. But we disagree with the district court and the dissent's view that this general rule is absolute and binding under all circumstances. The holding in *Overlander* is not that a client is always bound by actions of his or her lawyer, or that knowledge to the lawyer is always knowledge to the client; rather, "[w]hen a party appears in an action by his attorney who conducts proceedings in his behalf, his authority to act in behalf of his client is *presumed, in the absence of any showing to the contrary,* and his acts bind his client." (Emphasis added.) 129 Kan. at 712; see also *Reynolds v. Fleming*, 30 Kan. 106, 111, 1 P. 61 (1883); *Hess v. Conway*, 92 Kan. 787, 142 P. 253 (1914), *aff'd sub nom. Holmes v. Conway*, 241 U.S. 624, 36 S. Ct. 681, 60 L. Ed. 1211 (1916); *Butler v. U.S.D. No. 440*, 244 Kan. 458, 462, 769 P.2d 651 (1989).

Thus, the general rule that notice to counsel is notice to the client is only a presumption. And here, the only *evidence* the district court had about whether the Stouts had notice of the November 8 hearing was from their unrefuted affidavits attached to their motion to set aside dismissal. Those affidavits establish that the Stouts did not have notice of the sanctions hearing, were unaware

that prior sanctions had even been imposed against them, and had no knowledge that they owed outstanding monetary fees. In fact, the affidavits set out that the Stouts only learned about the hearing and prior discovery problems after receiving a copy of the court's November 9 journal entry and order of dismissal with prejudice in the mail. This unchallenged evidence is sufficient to rebut any presumption that the Stouts—through Malone—knew that a discovery sanctions hearing was set to occur.

Nor is there any evidence that Malone told the Stouts about the November 8 hearing. Our review of the record shows that Malone sent two form letters—one to the Stouts and one to KanEquip's attorney—about his suspension from the practice of law. A lawyer is required to send this kind of letter following a suspension. See Kansas Supreme Court Rule 231(a) (2024 Kan. S. Ct. R. at 289) (notice to clients and opposing counsel following suspension). Each of these letters generally states that Malone notified the Stouts of his suspension, but—critical here—neither letter says anything about him specifically notifying the Stouts that a motion for sanctions had been filed or that it was set for hearing in a matter of days.

"The right to adequate notice in judicial proceedings is a fundamental one, guaranteed both by statute and by the Fourteenth Amendment to the Constitution of the United States. . . . Without such notice, due process is denied and any judgment rendered is void." *Sweetser v. Sweetser*, 7 Kan. App. 2d 463, 465, 643 P.2d 1150 (1982); see U.S. Const. amend. 14; Kan. Const. Bill of Rights, § 18. Due process requires that notice is "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *In re H.C.*, 23 Kan. App. 2d 955, 958, 939 P.2d 937 (1997) (quoting *In re L.S.*, 14 Kan. App. 2d 261, 263, 788 P.2d 875 [1990]). Indeed, K.S.A. 2023 Supp. 60-237(c), which authorized the district court to impose discovery sanctions, instructs that a court may order discovery sanctions "on motion *and after giving an opportunity to be heard*." (Emphasis added.) Under the unusual circumstances here, the evidence before the district court demonstrated that the Stouts had no such opportunity.

Malone was suspended from the practice of law, had withdrawn his representation of the Stouts, and the only "notice" evidence the court had to consider was from the Stouts' affidavits. See *Larson Operating Co. v. Petroleum, Inc.*, 32 Kan. App. 2d 460, Syl. ¶ 9, 461, 84 P.3d 626 (2004) ("[Discovery sanctions] must be exercised with restraint and caution and may be imposed only after proper notice and an opportunity for a hearing."). Notice and opportunity to be heard are fundamental due process rights that were lacking here—the result of excusable neglect and surprise.

Practically speaking, the disciplinary suspension of a lawyer operates to protect the public and the lawyer's clients. But the unintended consequence or result of that suspension here is that the Stouts were adversely impacted—left suddenly and involuntarily pro se and unaware of an upcoming court hearing. Under all the circumstances, we conclude that justice here is best served by granting relief from the judgment, and we find K.S.A. 2023 Supp. 60-260(b)(6) applies as well. Justice is not served by saddling the Stouts, who were unrepresented and unaware of the motion or the hearing, with the most extreme sanction available—dismissal of their claims with prejudice. *Boydston v. Kansas Board of Regents*, 242 Kan. 94, 101, 744 P.2d 806 (1987) ("Dismissal with prejudice is a drastic and final action."). By not considering Malone's suspension to be material—despite unrefuted evidence that the Stouts had no actual notice of the hearing—we find the district court abused its discretion in denying the Stouts' motion to set aside the judgment.

Still, citing *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, 595-96, 730 P.2d 1109 (1986), the dissent asserts that this court cannot now "reward" the Stouts for being pro se and claiming they did not know about the November 8 hearing. 64 Kan. App. 2d at 429. We are not persuaded by this argument. For one, this situation is factually different from *Mangiaracina*, a case in which the litigant was voluntarily representing himself. Here, the Stouts did not make that choice—they were rendered pro se when Malone was suspended from practicing law by Supreme Court order.

Moreover, we disagree that the Stouts are being rewarded or receiving some advantage because they were pro se—our decision simply protects their fundamental due process rights.

KanEquip makes two more arguments along these same lines, which we find uncompelling. First, KanEquip points out that in their affidavits, the Stouts acknowledged that they were aware that Malone had withdrawn from their case on November 2 due to his suspension, which was before the hearing. This is true. But KanEquip fails to acknowledge that although the Stouts were aware that Malone withdrew, they were not made aware of the upcoming sanctions hearing or any discovery issues.

Second, KanEquip suggests in its response to the Stouts' motion to set aside dismissal that the Stouts could have contacted the district court clerk or KanEquip's attorney to obtain information on their case. The Stouts could have perhaps done this, but regardless, the evidence showed they were unaware of the hearing. The Stouts were not sitting on their hands, they were, reportedly, actively seeking a new attorney to continue their lawsuit.

As a final note, we are not concerned by the timeframe in which the Stouts brought their motion to set aside the district court's dismissal through their new attorney Antosh. See K.S.A. 2023 Supp. 60-260(c) (a motion to set aside an order under subsection [b] must be brought "within a reasonable time"). Although the motion could have been filed sooner—new counsel obtained the Stouts' affidavits in December yet did not file the motion until March—the Stouts brought their motion well within one year. See K.S.A. 2023 Supp. 60-260(c)(1)-(3) (A party must move to set aside an order "no more than one year after the entry of the judgment or order, or the date of the proceeding."). And we note that the district court did not actually find the delay was "unreasonable." Instead, it found the delay was more evidence of the Stouts' "ongoing inability or unwillingness to prosecute this action promptly." Additionally, we fail to see a reason why KanEquip was prejudiced by the delay.

Morton County Hospital sets out a test for legal prejudice:

"The longer the delay in filing a motion under K.S.A. 2014 Supp. 60-260(b) and the more expenses incurred by the nonmoving party to enforce the judgment

or the more the nonmoving party has relied on the judgment to his or her detriment, the more likely there will be sufficient prejudice to support a finding of unreasonable delay." 51 Kan. App. 2d 1104, Syl. ¶ 5.

The record before us lacks evidence of any expenses incurred by KanEquip to enforce the judgment it obtained, and there is likewise no evidence it detrimentally relied on the judgment. See *Estate of Nilges v. Shawnee Gun Shop, Inc*., 44 Kan. App. 2d 905, Syl. ¶ 2, 242 P.3d 1211 (2010) ("Kansas courts have traditionally asked whether the defendant has suffered from plain legal prejudice other than the continuing prospect of a second suit on the same cause of action."). KanEquip knew that this motion was coming since Antosh sent an email explaining that he intended to set aside the district court's dismissal shortly after the Stouts hired him on November 26. That Antosh theoretically could have brought this motion earlier does not make the intervening time unreasonable.

Moreover, the Stouts' affidavits illustrate a willingness to actively prosecute and participate in their case. Katelyn stated that, "[h]ad I been aware of the discovery problems and monetary sanctions, I would have taken steps to address them." And she added that her "lawsuit was filed because I suffered economic damages due to actions of the Defendant" and that "I wish to proceed with my lawsuit." Joseph's affidavit echoed this message. This is contrary to the district court's decision to deny the Stouts' motion to set aside dismissal because they refused to participate in their case.

In reaching this decision, the district court was unable, or unwilling, to separate Malone from the Stouts. Even though the discovery was delayed while Malone was litigating this case, the district court ignored that Malone had withdrawn, that the Stouts had new counsel, and that the Stouts unequivocally asserted a willingness to proceed with their lawsuit and pay the sanction that they did not previously know they owed. The Stouts should not be punished so extremely without so much as the opportunity to appear, be heard, and defend against the sanction.

The district court abused its discretion by denying the Stouts' motion to set aside its dismissal of their claims against KanEquip. The Stouts are entitled to relief from the judgment under K.S.A. 2023 Supp. 60-260(b)(1) and (b)(6). We thus reverse the district court's denial of

the Stouts' motion and remand the case for further proceedings in line with this opinion.

Reversed and remanded.

* * *

GREEN, J., dissenting: I respectfully dissent from the majority's decision on this appeal.

The Logical Fallacy of Drawing an Affirmative Conclusion from a Negative Premise

One of the basic flaws in the majority analysis is that it has fallen prey to the logical fallacy of drawing an affirmative conclusion from a negative premise. Indeed, Aldisert writes that "[b]ecause it is so obvious in the law we seldom encounter the Fallacy of Drawing an Affirmative Conclusion from a Negative Premise." Aldisert, Logic for Lawyers, pp. 73-74 (3d ed. 1997). For example, the crux of the majority's holding relies on the affidavits of Joseph Stout and Katelyn Stout d/b/a Stout Construction Co. (the Stouts) where each of them claim: "I was unaware that my case was set for a motions hearing on November 8, 2022." For example, out of each of their 11-sentence affidavits, the Stouts both used the word "unaware" three times and used the words, "Had I been aware," twice in each of their affidavits. The majority simply parrots the negative unawareness language of the Stouts' two affidavits to draw an inference that the Stouts were unaware that the district court was having a hearing on November 8, 2022. The majority's argument forms the following categorical syllogism:

Major premise: The right to adequate notice in judicial proceedings is a fundamental one, and without such notice, any judgment rendered by the court is void.

Minor premise: The Stouts did not have notice that the district court was having a hearing on November 8, 2022.

Conclusion: Thus, the district court abused its discretion in denying the Stouts' motion to set aside the judgment.

Under rule five, if either premise of a valid categorical syllogism is negative, the conclusion must be negative. Aldisert, Logic for Lawyers, p. 73 (3d ed. 1997). Accordingly, logic precludes drawing a positive conclusion from a negative premise, as "I was unaware that my case was set for a motions hearing on November 8, 2022."

To prove a negative is sometimes an impossible task. For instance, not knowing that something exists is simply not knowing. In the same way, the Stouts' claim of their unawareness of the November 8, 2022 hearing date does not imply that they did or did not know of that hearing date. In that regard, the fallacy of negative proof is an attempt to sustain a factual proposition merely by negative evidence. See Aldisert, Logic for Lawyers, p. 156 (3d ed. 1997).

On the other hand, in this record of appeal, the district court judge, in his order denying the Stouts' motion to set aside the district court's dismissal of their case, points us to his affirmative or positive evidence of a notice of hearing, electronically filed on October 5, 2022, in the Stouts' case, scheduling a hearing before him on "Tuesday, November 8, 2022, at 11:00 a.m. Central Time." Under Kansas law, as discussed later in this dissent, this notice of hearing gave the Stouts notice of the November 8 hearing date based on an electronic filing served on their attorney, Terry J. Malone. And when Malone was later suspended from the practice of law by our Supreme Court and the Stouts became pro se litigants, this same notice again gave them notice of the November 8, 2022 hearing date.

Order of Dismissal

In its order denying the Stouts' motion to set aside the district court's dismissal, the district court judge set out in scrupulous detail his rulings and findings:

"1. Actual knowledge of a client's attorney is imputed to and becomes the knowledge of the clients. *E.g., Overlander v. Overlander*, 129 Kan. 709[, 284 P. 614] (1930).

"2. On August 23, 2022, Plaintiffs were present through counsel at the hearing where the Court granted Defendant's motion to compel discovery and the Court ordered sanctions.

"3. On September 12, 2022, the Court entered its Order Imposing Sanctions. Plaintiffs, through counsel, received notice of the entry of the order through the electronic filing system. Regardless, Plaintiffs have failed to pay the sanctions.

"4. On October 5, 2022, Plaintiffs, through counsel, received notice of hearing on Defendant's motion for sanctions scheduled on November 8, 2022, through the electronic filing system. The same day, the Court emailed the Zoom hearing information to Plaintiffs' counsel. Plaintiffs did not appear.

"5. On October 14, 2022, the Kansas Supreme Court suspended Plaintiffs' counsel from the practice of law. *In the Matter of Terrence J. Malone*, [316 Kan. 488,]518 P.3d 406, 415 (Kan. 2022). Because the suspension did not arise until after the Court ordered sanctions and set the November 8 hearing, the suspension did not contribute to the discovery issues giving rise to the dismissal of this case.

"6. Because Plaintiffs, through counsel, were aware of the sanctions and hearing date, there is no surprise.

"7. Plaintiffs' unexplained delay of nearly four months in filing their motion to set aside dismissal further indicates an ongoing inability or unwillingness to prosecute this action promptly.

"8. No good cause otherwise exists for the Court to set aside its dismissal of this action."

As the district court judge acknowledged in his order of dismissal, he drew guidance from our Supreme Court's decision in *Overlander v. Overlander*, 129 Kan. 709, 712, 284 P. 614 (1930)—a case where our Supreme Court held that knowledge of an attorney is imputed to the client. Here, the district court judge ruled that at the very least, any knowledge Malone had about the hearing had been imputed onto the Stouts. Indeed, the district court and this court are duty-bound to follow our Supreme Court precedent absent some indication that our Supreme Court is moving away from its previous precedent. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). While the *Overlander* decision that the district court relied on and that the Stouts challenge is from 1930, Kansas appellate courts have continued to follow the rule that an attorney's knowledge imputes to his or her client. See *Butler v. U.S.D. No. 440*, 244 Kan. 458, 462, 769 P.2d 651 (1989), and *Alexander v. Russo*, 1 Kan. App. 2d 546, 555, 571 P.2d 350 (1977). Thus, the district court and this court are duty-bound to apply *Overlander*'s imputation rule. Importantly, the Stouts and the majority proffer no argument suggesting that our Supreme Court intends to depart from its position in *Overlander*, and I find no such indication. As further support for the *Over-*

lander rule, I note that the United States Supreme Court also applies the imputation rule. See *New York v. Hill*, 528 U.S. 110, 115, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000). Yet, the majority never explains why it is not duty bound to follow our Supreme Court's nearly one-hundred year old precedent.

Also, the district court judge emphasized that the Stouts through Malone were present when he granted KanEquip Inc.'s motion to compel discovery responses and to impose discovery sanctions. And he pointed out that the Stouts had failed to pay the sanctions that he had earlier imposed against them because of their dilatory responses to discovery. The district court judge underscored that the November 8, 2022 hearing on KanEquip's motion to dismiss and discovery sanctions had been scheduled since October 5, 2022, before Malone's suspension. For those reasons, the district court judge found that the Stouts could not have been surprised by having had a November 8, 2022 hearing. Likewise, the district court judge found that the Stouts could not be surprised by the discovery sanctions because the October 5, 2022 notice of hearing provided that the November 8, 2022 hearing was on KanEquip's sanctions motion. Significantly, the district court judge found that Malone's suspension was unrelated to his decision, stressing that our Supreme Court suspended Malone after he had already imposed the discovery sanctions and after he had already scheduled the November 8, 2022 hearing on October 5, 2022. Thus, the suspension did not contribute to the discovery issues giving rise to the dismissal of this case. Lastly, the district court judge ruled that the Stouts presented no good cause to reverse his dismissal of their case against KanEquip. In doing so, the district court judge emphasized that the Stouts "unexplained delay of nearly four months in filing their motion to set aside dismissal further indicate[d] an ongoing inability or unwillingness to prosecute this action promptly."

The Motion to Set Aside Dismissal

Turning to the Stouts' underlying arguments about the district court's denial of its motion to set aside its dismissal of their case against KanEquip, I note that while the Stouts have arranged their brief as if they have two separate arguments, the Stouts raise a

single complaint about the district court's motion. They argue that the district court erred by denying their motion to set aside its dismissal of their breach of oral contract and KCPA violation claims against KanEquip because of the "unusual circumstances" in their case. In making this argument, the Stouts compare the dismissal of their case to *Canaan v. Bartee*, 272 Kan. 720, 35 P.3d 841 (2001). Relying on *Canaan*, the Stouts argue that clients should not have to pay for the negligence of an attorney through "the sanction of dismissal." Although their second argument is not entirely clear, the Stouts seemingly make a variation of this same argument. They contend that when the district court relied on *Overlander*, the district court erred by "imput[ing] shortfalls" of Malone onto them.

I have difficulty in concluding, as the Stouts do, that the *Canaan* decision closely parallels their case. The facts in this case are far different from those in *Canaan*. *Canaan* is easily distinguishable from this case because the alleged unprofessional representation that the defendants received from their attorney, James Coder, existed during his entire representation of them. By contrast in this case, Malone's alleged unprofessional representation of the Stouts ended when he was suspended by our Supreme Court. As the record indicates, Malone was suspended from the Stouts' case before the crucial hearing date of November 8, 2022.

The Stouts both acknowledged in their affidavits that they knew Malone had withdrawn from their case on November 2, 2022. And because the Stouts did not retain new counsel until November 26, 2022, they were pro se litigants between Malone's suspension and November 26, 2022. Importantly, the Stouts were pro se litigants on the November 8, 2022 hearing date. On the other hand, unlike the Stouts' case, the defendants in *Canaan* never became pro se litigants during any crucial stage in their case. Thus, the *Canaan* decision is simply not analogous to the facts presented in this case.

KanEquip responds by arguing the facts of this case and the district court's findings support the denial of the Stouts' motion to set aside the district court's dismissal. It responds that the Stouts have misapplied our Supreme Court's precedent in *Canaan* and *Overlander*. Additionally, it responds that the Stouts' arguments

ignore two things: (1) that they did not move to set aside the district court's dismissal of their case with prejudice under K.S.A. 2023 Supp. 60-260(b) within a reasonable time and (2) that the district court dismissed their case with prejudice because of the "ongoing discovery issues [that had] occurred throughout the pendency of [the] case."

When ruling on a motion to set aside an order under K.S.A. 2023 Supp. 60-260(b), the district court is to consider all the facts. This includes considering all of the facts when deciding (1) whether the motion was filed within a reasonable time, (2) whether the motion will prejudice the other party, and (3) whether the moving party has good cause to move to set aside an order. *Morton County Hospital v. Howell*, 51 Kan. App. 2d 1103, 1109, 361 P.3d 515 (2015). Then, when reviewing the district court's decision on a motion to set aside an order under K.S.A. 60-260(b), this court applies the abuse of discretion standard. 51 Kan. App. 2d at 1109; see also *Bicknell v. Kansas Dept. of Revenue*, 315 Kan. 451, 466, 509 P.3d 1211 (2022) (A party claiming an abuse of discretion bears the burden to establish such an abuse occurred.).

Under this standard, this court applies different rules depending on what error is being alleged. *Roll v. Howard*, 59 Kan. App. 2d 161, 175, 480 P.3d 192 (2020). When reviewing an appellant's argument that the district court abused its discretion by making an error of law, this court exercises unlimited review. But when reviewing an appellant's argument that the district court abused its discretion by making a certain fact-finding, this court reviews the fact-finding for substantial competent evidence. 59 Kan. App. 2d at 176. "Substantial competent evidence is '"evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved."' [Citation omitted.]" 59 Kan. App. 2d at 172. And while reviewing the district court's fact-finding for substantial competent evidence, this court "view[s] the evidence in the light most favorable to the prevailing party, disregarding conflicting evidence or other inferences that might be drawn." 59 Kan. App. 2d at 172; see *Gannon v. State*, 298 Kan. 1107, 1175-76, 319 P.3d 1196 (2014).

Most of the Stouts' appellate arguments focus on Malone's suspension in mid-October 2022. Nevertheless, as the district court found when denying the Stouts' motion to set aside the order of dismissal, Malone and the Stouts knew about the November 8, 2022 hearing on KanEquip's motion to dismiss their case with prejudice and impose discovery sanctions before his suspension. The evidence showed that Malone was suspended on October 14, 2022, but the November 8, 2022 hearing was scheduled on October 5, 2022. Although it seems that Malone's assistant left the voicemail on KanEquip's attorney's office phone, the person who left the voicemail clearly indicated (1) that the Stouts knew about the November 8, 2022 hearing and (2) that the Stouts wanted to hire another attorney. Clearly, this voicemail shows that the Stouts were aware of the hearing but simply decided not to attend.

In any case, the majority's analysis hinges on reweighing the evidence in the Stouts' favor. Because our review requires this court to accept the district court's credibility determinations, I would defer to the district court's finding that the Stouts knew that there was a hearing on November 8, 2022, because the hearing had been scheduled since October 5, 2022. See *Roll*, 59 Kan. App. 2d at 173, 176 (holding that this court defers to the district court's fact-findings on appeal when supported by substantial competent evidence). As a result, the Stouts' argument that there was excusable neglect for missing their hearing, or that they were somehow surprised that there was a hearing on November 8, 2022, is fatally flawed. For these same reasons, I would defer to the district court's finding that no other justification supported the Stouts' motion to set aside the dismissal under K.S.A. 2022 Supp. 60-260(b)(6).

As for the "unusual circumstances" that the Stouts argue entitled them to reversal of the district court's dismissal of their case against KanEquip, the Stouts never explicitly say what unusual circumstances supported the district court granting their motion. From the context of the Stouts' other arguments, though, it is apparent that they believe Malone being suspended constituted unusual circumstances that required the district court to grant their motion. The Stouts seemingly assert that clients should never be liable for their attorney's poor representation. Indeed, the Stouts

challenge our Supreme Court's long held precedent that an attorney's knowledge is imputed onto the client. *Overlander*, 129 Kan. at 712. As stated earlier, they contend that their case so closely "parallels" *Canaan*, that we should reach a similar holding, reversing the district court's dismissal of their case based on poor lawyering "per the doctrine of stare decisis."

Yet, the Stouts' argument challenging our Supreme Court precedent about an attorney's knowledge imputing to the attorney's client fails for several reasons. For starters, as just explained, the district court made a credibility determination that the Stouts knew about their November 8, 2022 hearing. Thus, I would accept the district court's fact-finding that the Stouts provided no credible explanation (1) why they had not attended the November 8, 2022 hearing on KanEquip's motion to dismiss and discovery sanctions and (2) why they had not moved for relief from the district court's dismissal of their case against KanEquip with prejudice before March 3, 2023. I would submit that this failing, in and of itself, was evidence enough for the district court to deny the Stouts' motion to set aside its dismissal.

I note that Peter Antosh's email communications with KanEquip's attorney show that the district court did not err. Antosh responded to KanEquip's attorney's email by telling her that he had not worked on the Stouts' case because he hoped that Malone's suspension would be over by the time he had to do anything related to their case. An attorney's admission that he did not work on a client's case because he had hoped that the client's former attorney who had been suspended would return from his suspension before he had to work on that client's case is not excusable neglect. Indeed, why would Antosh believe that the Stouts would have wanted Malone to return as their attorney when they had implicitly accused him in their affidavits that he failed to tell them about the negative things that were occurring in their case? In short, Antosh's hope runs counter to all reason because it is based on an illusory hope. Thus, it cannot be counted as some other reason justifying the district court to alter its decision. Rather, it is inexcusable behavior and definitive proof that the Stouts' motion to set aside the district court's dismissal of their case against

KanEquip under K.S.A. 2022 Supp. 60-260(b) was not filed within a reasonable time because of Antosh's tardiness.

Finally, I also note that because the Stouts hired Antosh on November 26, 2022, Antosh had time to appeal the district court's dismissal of the Stouts' remaining claims against KanEquip based on the November 8, 2022 hearing. For example, the order of dismissal was entered on November 9, 2022. Thus, the Stouts had 30 days to timely file an appeal of that dismissal under K.S.A. 2022 Supp. 60-2103(a). So, when the Stouts hired Antosh on November 26, 2022, Antosh still had time to file an appeal of the November 9, 2022 order of dismissal or move the district court to reconsider its dismissal of the Stouts' claims within 28 days as required under K.S.A. 2022 Supp. 60-259. In both of their affidavits, the Stouts state the following:

> "2. Prior to November 9, 2022, I was unaware that my lawsuit was in jeopardy of dismissal due to discovery deficiencies.
> "3. Prior to November 9, 2022, I was unaware that monetary discovery sanctions were owed in my lawsuit.
> . . . .
> "8. Had I been aware of the discovery problems and monetary sanctions, I would have taken steps to address them."

But obviously the Stouts were aware of these problems with their lawsuit by November 9, 2022, based on (1) the notices they received from Malone and (2) the voicemail Malone's assistant left with KanEquip's attorney the day before the hearing.

I just wonder why no appeal was taken by them from the November 9, 2022 order of dismissal, especially when the district court judge struck the Stouts' sole expert witness from their case under his November 9, 2022 order of dismissal. Indeed, the district court judge concluded before striking the Stouts' expert witness the following: "[S]o I don't see much of a distinction between striking Mr. Fleming [the Stouts' expert] and dismissing this case because without their sole expert being allowed to testify, I don't see what case they would actually be able to bring and prove up at the trial." Here, the majority acknowledges, which I agree with, that because the Stouts did not timely appeal the district court's November 9, 2022 order dismissing their case with prejudice, this court lacks jurisdiction to review the November 9, 2022 order of

dismissal. So, even if the Stouts were successful in this appeal, it would not change the ultimate outcome of this case because they will no longer have any expert witness to call on to prove their damages in this suit.

Based on the preceding evidence, I would affirm the district court's denial of the Stouts' motion to set aside the prejudicial dismissal of their case against KanEquip under K.S.A. 2022 Supp. 60-260(b)(1) and (b)(6).

Self-Represented Litigants

KanEquip points out in its opposition to the Stouts' motion to set aside the district court's order of dismissal an alternative reason why the district court's decision should be affirmed. KanEquip correctly maintains that Malone was suspended from the practice of law on October 14, 2022. Yet, at some point before November 2, 2022, Malone mailed a notice of his suspension to the Stouts on October 27, 2022. For example, Malone filed his notice of withdrawal in the Stouts' case on November 2, 2022. Malone certified that on October 27, 2022, he served his notice of withdrawal by mail on the Stouts. In their affidavits, the Stouts acknowledged that they were aware that Malone had withdrawn from their case on November 2, 2022, due to his disciplinary suspension. Thus, the Stouts became pro se litigants. And as pro se litigants, it would have been their responsibility and obligation to proceed with this case. As KanEquip points out in its response to the Stouts' motion to set aside the order of dismissal, the Stouts could have contacted the district court clerk to obtain information on their case or contacted KanEquip's defense counsel. But they did neither.

In crafting an excuse for the Stouts not contacting the district court clerk or KanEquip's attorney to obtain information about their case, the majority maintains that the "Stouts were not sitting on their hands, they were, reportedly, actively seeking a new attorney to continue their lawsuit." 64 Kan. App. 2d at 417. Nevertheless, the majority's excuse here for the Stouts takes this court beyond the parameters for pro se litigants.

Indeed, contrary to the majority's position, pro se litigants are not excused from the requirement to be aware of and follow rules of procedure, including attending scheduled hearings before the

court. Any doubt on this point vanishes when you consider our Supreme Court decision in *Guillory v. State*, 285 Kan. 223, 229, 170 P.3d 403 (2007) ("As far as the filing of a timely notice of appeal is concerned, a pro se K.S.A. 60-1507 petitioner is in the same position as all other pro se civil litigants, and is required to be aware of and follow the rules of procedure that apply to all civil litigants, pro se or represented by counsel.").

In this record of appeal, there is positive and affirmative evidence of a notice of hearing, electronically filed on October 5, 2022, in the Stouts' case, scheduling a hearing before the Honorable Andrew Stein on Tuesday, November 8, 2022, at 11 a.m. Central Time. Under Kansas law, this notice of hearing gave the Stouts notice of the November 8 hearing date based on an electronic filing served on Malone. And when Malone was later suspended from the practice of law by our Supreme Court and the Stouts became pro se litigants, this same notice again gave them notice of the November 8, 2022 hearing date.

Based on *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, 595-96, 730 P.2d 1109 (1986), this court cannot now reward the Stouts for being pro se and then claiming they did not know about the November 8, 2022 hearing. Indeed, in *Gutierrez*, this court set out the obligation of a pro se litigant:

"A pro se litigant in a civil case is required to follow the same rules of procedure and evidence which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment of all litigants. To have different rules for different classes of litigants is untenable. A party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or see to that his or her case is properly presented to the court. A pro se litigant in a civil case cannot be given either an advantage or a disadvantage solely because of proceeding pro se." 11 Kan. App. 2d at 595-96.

This well-known passage provides the standard by which pro se litigants are to be measured under Kansas law. See *Guillory*, 285 Kan. at 229 (citing this precedent with approval); *Joritz v. University of Kansas*, 61 Kan. App. 2d 482, 498, 505 P.3d 775 (2022); *In re Estate of Broderick*, 34 Kan. App. 2d 695, 701, 125 P.3d 564 (2005).

The crux of the Stouts' argument is that as pro se litigants they were unaware that their case had been set for a motions hearing

on November 8, 2022. Nevertheless, in Kansas, people who are not lawyers tend to be at a significant disadvantage when they represent themselves. See *University of Kansas Hosp. Authority v. Yang*, No. 108,199, 2013 WL 518112 (Kan. App. 2013) (unpublished opinion). Because this court is bound by *Guillory*, and guided by *In re Estate of Broderick*, *Joritz*, and *Yang*, this court cannot reward the Stouts for being pro se and then claiming that they were unaware of the November 8, 2022 hearing. Thus, because this argument is not warranted by the law, the majority and the Stouts' unawareness argument topples like a house of cards.

Here, it seems that the majority wants to have it both ways. On one hand, the majority holds that Malone's knowledge about what is going on in the Stouts' case cannot be imputed to them under the *Overlander* rule because of Malone's suspension by our Supreme Court. Nevertheless, the district court judge ruled that "[b]ecause the suspension did not arise until after the [district] [c]ourt ordered sanctions and set the November 8 hearing, the suspension did not contribute to the discovery issues giving rise to the dismissal of this case." Indeed, neither the majority nor the Stouts point to any evidence in the record on appeal that our Supreme Court suspended Malone for anything he did improperly in their case.

On the other hand, the majority holds that the Stouts' responsibility when they became pro se litigants before the November 8, 2022 hearing did not require them to contact the district court clerk or contact KanEquip's attorney to learn about the status of their case. In making such inconsistent arguments, the majority and the Stouts are obviously attempting to have it both ways: (1) You cannot impute Malone's knowledge about the Stouts' case to them because of Malone's suspension and (2) you cannot hold the Stouts to the measured standards of a pro se litigant because of Malone's suspension. So, the majority's two holdings rest on a legal inconsistency because once the Stouts became pro se litigants, they could no longer continue to be unaware or ignore what was occurring in their case. For this reason, the majority cannot use Malone's suspension to avoid the application of the imputation rule under *Overlander* and then simultaneously use Malone's suspension to

avoid the application of the Kansas pro se litigant rule under *Gutierrez*.

To find comfort in the majority's pro se litigant holding would eclipse the requirements for a pro se litigants under Kansas Law. The majority's pro se litigant holding is a result completely at variance with Kansas law. For example, under the majority's holding, pro se litigants would no longer be required to be aware of or follow the rules of procedure that apply to all civil litigants—pro se or represented by counsel. Because this would be out of step with the current Kansas law standards for pro se litigants, the Stouts should have no other alternative but to have their conduct ranged under the previously cited Kansas law standards for pro se litigants. So, I refuse to water down the present Kansas law standards for pro se litigants to the majority's ambiguous and arbitrary constructions of those standards.

Once again, sometimes simply not knowing that something exists is simply not knowing. For example, the fallacy of negative proof is an attempt to sustain a factual proposition merely by negative evidence. In fact, neither the majority nor the Stouts have pointed to any affirmative evidence in the record that the district court wrongly proceeded with the motion for sanctions hearing on November 8, 2022. In sum, neither the fact-findings made by the district court nor Kansas law supports the majority's previously described holdings. As a result, I would affirm the district court's decision.

(551 P.3d 240)

No. 126,611

STATE OF KANSAS, *Appellant*, v. PATRICK RYAN HARRIS, *Appellee*.

SYLLABUS BY THE COURT

1. COURTS—*Jurisdiction of Appellate Courts Provided by Statute.* Appellate courts only have jurisdiction as provided by statute. Where an appeal is not taken consistent with this statutory authority, it must be dismissed for lack of jurisdiction.

2. APPEAL AND ERROR—*No Interlocutory Appeal from Order Suppressing Evidence—Exception.* The State may not take an interlocutory appeal from an order suppressing evidence unless the exclusion of such evidence substantially impairs the State's ability to prosecute its case.

3. COURTS—*Court of Appeals Must Follow Supreme Court Precedent—Exception.* This court is duty-bound to follow Kansas Supreme Court precedent absent some indication our Supreme Court is departing from its previous position.

Appeal from Johnson District Court; TIMOTHY P. MCCARTHY, judge. Submitted without oral argument. Opinion filed June 28, 2024. Appeal dismissed.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, for appellant.

Kelly R. Driscoll, deputy public defender, of Johnson County Public Defender Office, for appellee.

Before SCHROEDER, P.J., ISHERWOOD and PICKERING, JJ.

SCHROEDER, J.: Patrick Ryan Harris has been charged with multiple crimes, including two counts each of aggravated sexual battery and aggravated criminal sodomy. Prior to trial, the district court ruled certain evidence the State sought to admit was inadmissible: (1) evidence of Harris' other crimes and (2) the testimony of an expert witness, Dr. Daniel Murrie. The State seeks review through an interlocutory appeal. As more fully explained below, we lack jurisdiction to consider either issue; thus, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

We provide limited facts underlying the criminal charges at issue in this appeal which are based upon the victim's testimony at Harris' preliminary hearing.

In late 2016, the victim, S.H., met Harris when she applied for a job at the video store at which Harris managed. The pair eventually developed a sexual relationship, and S.H. wanted to explore a BDSM sexual relationship. The nonromantic, consensual sexual relationship evolved to include acts of BDSM, which S.H. understood to mean bondage, domination, sadism, or masochism and would entail Harris inflicting pain on her. Harris and S.H. had "safe words" to indicate when a participant was approaching or had reached his or her limits. S.H. explained that Harris was initially respectful of the use of these safe words.

During one sexual encounter, Harris inflicted more pain than usual. S.H. used her safe words, and Harris complied. S.H. explained the encounters were becoming more forceful, commanding, and mean—both physically and verbally. After one of the encounters, S.H. took pictures of her buttocks that depicted bruising because she was "trying to figure out a way to get out." These photographs were admitted into evidence at the preliminary hearing.

S.H. eventually told Harris that she was not sure she could continue their sexual relationship. Harris told S.H. that there were three options:

- The pair continue their relationship;
- Harris takes what he wants from S.H.; or
- Harris finds out information about S.H.'s brother and takes what he wants from him.

S.H. interpreted the final option as a threat Harris would harm her brother. Harris reiterated the three options to S.H. while whipping her with a belt. S.H. later chose the first option because she feared what Harris would do. S.H. remained determined to find a way to get out of the relationship. Harris took a picture of S.H.

during this encounter, which was admitted into evidence at the preliminary hearing

At the pair's final encounter, Harris gave S.H. 33 "birthday spankings" on both her buttocks and breasts, causing marks and lumps to appear on S.H.'s breasts. Before leaving, Harris took a picture of S.H.'s photo identification card. S.H. took pictures of her breasts after this incident, which were admitted into evidence at the preliminary hearing.

About a week later, S.H. divulged what had been going on between her and Harris to her friends and brother, who convinced her to call the police. S.H. met with an officer and, later, detectives. S.H. provided law enforcement with a two-page written statement describing what happened. The statement did not claim Harris had forced S.H. to engage in sexual activity with him, but S.H. stated she "didn't know that what he was doing was wrong." S.H. also turned over physical evidence she retained from their BDSM sexual relationship.

The State filed a pretrial motion to determine the admissibility of evidence of other crimes under K.S.A. 2017 Supp. 60-455. Specifically, the State alleged Harris had prior relationships with six women in which he "engaged in similar behavior, and some of it was criminal in nature." According to the State: "The evidence from these women show a pattern, motive, opportunity, plan, preparation, intent and material facts of how the defendant sought women out to inflict pain on them for his sexual gratification. Then how his behavior continued under force or threat to the victim, making it criminal."

Harris filed a response to the State's motion, arguing the evidence of other crimes identified in the State's motion was inadmissible. Specifically, Harris argued:

"[T]he admission of any prior bad acts evidence is not relevant, does not go to any material fact at issue and any probative value that would be obtained by the admission of such evidence would be greatly outweighed by the prejudice caused to Mr. Harris and his right to a fair trial."

The district court later conducted a hearing on the State's motion. At the hearing, the State withdrew its attempt to seek the admissibility of evidence relating to Harris' relationships with four of the six women identified in its motion but continued to seek the

admissibility of evidence relating to Harris' relationship with the remaining two women, K.E. and K.B. The State made a proffer of the evidence from both women it would seek to admit, but, because of the timing of the State's motion to reconsider and this interlocutory appeal, we find it unnecessary to detail the proffer.

The district court ruled the evidence at issue was inadmissible and explained its rationale for denying the requested evidence under K.S.A. 2017 Supp. 60-455(d). The State asked the district court to clarify its ruling: "The Court is denying [the motion] as to K.E. because the ultimate conviction was not a sexual-related conviction. Is that my understanding?" The district court responded, "Correct. . . . Mr. Harris didn't plead to the sexual offense but he pled to aggravated battery 8. That is my ruling and my interpretation of 60-455(d)." After this ruling, the State failed to seek a timely interlocutory appeal.

As the case progressed, the State engaged the services of Dr. Murrie, a forensic psychologist, and asked him to prepare a report expressing his expert opinion on:

- "'The BDSM culture, e.g. standard practices within the culture, what is allowed and what is considered to be outside the bounds."
- "Mr. Harris's 'manner of operating' across offenses, including selection of victims and interactions with victims."
- "The 'victimology of his victims in these situations, e.g. how do they find themselves in these situations, why do they stay as long as they do, and the acute trauma response that a victim will show as well as what trauma exposure will look like long term.'"

Upon receiving a copy of Dr. Murrie's report, Harris filed a motion to exclude Dr. Murrie's testimony, arguing it was inadmissible because it would constitute improper expert opinion testimony. Specifically, Harris argued:

"[T]he proffered expert testimony from Dr. Daniel Murrie should be deemed inadmissible for a number of reasons, including, but not limited to, the fact that Dr. Murrie is (1) not qualified to testify as an expert witness, (2) his opinions will not help the trier of fact to understand the evidence or determine a fact in issue,

(3) his opinions are not based upon sufficient facts or data, (4) his opinions are not the product of reliable principles and methods, (5) he has not reliably applied the principles and methods to the facts of this case; (6) the admittance of such testimony would violate Mr. Harris' right to confront adverse witnesses (potentially), as well as his right to a fair trial, (7) the admittance of such testimony would be cumulative; (8) not relevant, and (9) any probative value of such opinion testimony would be greatly outweighed by the prejudice caused to Mr. Harris."

The district court set the matter for hearing on Harris' motion to exclude Dr. Murrie's testimony, at which Dr. Murrie testified by Zoom. The State clarified it was only pursuing the admission of Dr. Murrie's testimony as it related to the first question posed and addressed in his report: "'BDSM culture, e.g. standard practices within the culture, what is allowed and what is considered to be outside the bounds.'"

Harris subsequently filed a supplemental brief in support of his motion to exclude Dr. Murrie's testimony. The State also filed a motion to reconsider the district court's decision denying the admissibility of the State's evidence of other crimes over 10 months after the district court's ruling. Harris filed a response in which he argued, among other things, that the State's motion should be denied as untimely.

The district court conducted another hearing on both of Harris' challenges to the admission of Dr. Murrie's testimony and the State's motion to reconsider the district court's decision excluding the evidence of other crimes under K.S.A. 2017 Supp. 60-455(d). The State conceded its motion to reconsider was untimely but nevertheless urged the court to reach the merits of its motion. The district court ultimately denied the State's motion to reconsider its decision excluding the evidence of other crimes, reasoning:

"I think that we should try this case as we do every other case: on the facts of this case. And I don't believe there is going to be a different standard for a jury to view as to whether or not somebody consented to sodomy or consented to a sexual act. And I think as the prosecutor ultimately said, there isn't a different standard for them, whether you're in the BDSM culture or not.

. . . .

"But the court is considering the State's motion to reconsider, and it is denied."

The district court also granted Harris' motion to exclude Dr. Murrie's testimony.

The district court later issued a written order reflecting its denial of the State's motion to reconsider and the exclusion of Dr. Murrie's testimony. The State now seeks interlocutory review.

ANALYSIS

We Lack Jurisdiction to Consider the State's Motion to Admit K.S.A. 2017 Supp. 60-455(d) Evidence

Harris first contends this court "does not have jurisdiction to consider the State's interlocutory appeal regarding the denial of the State's Motion to Reconsider the exclusion of [K.S.A.] 60-455 evidence in that such appeal is untimely." According to Harris: "The State's interlocutory appeal was untimely filed regarding the district court[']s exclusion of [K.S.A.] 60-455 evidence and as such, this Court is without jurisdiction to hear the appeal on this issue and such appeal should be dismissed." We agree.

Standard of Review

Whether the district court had subject matter jurisdiction to consider the State's motion to reconsider is a question of law subject to our unlimited review. *State v. Hillard*, 315 Kan. 732, 775, 511 P.3d 883 (2022). Whether appellate jurisdiction exists is likewise a question of law over which we exercise unlimited review. *State v. McCroy*, 313 Kan. 531, 533, 486 P.3d 618 (2021).

Governing Law

Subject matter jurisdiction may be raised at any time, including for the first time on appeal. *State v. Clark*, 313 Kan. 556, 560, 486 P.3d 591 (2021). Indeed, we have a duty to question jurisdiction on our own initiative. *State v. Marinelli*, 307 Kan. 768, 769, 415 P.3d 405 (2018). "'[P]arties cannot confer subject matter jurisdiction [on a court] by consent, waiver, or estoppel.'" *State v. Soto*, 310 Kan. 242, 249, 445 P.3d 1161 (2019). Moreover, if the district court lacked jurisdiction to make a ruling, we likewise lack jurisdiction over the subject matter on appeal. See *Kansas Fire and Safety Equipment v. City of Topeka*, 317 Kan. 418, 434, 531 P.3d 504 (2023).

Motions to reconsider, treated as motions to alter or amend a judgment under K.S.A. 2023 Supp. 60-259(f), apply in criminal cases in the absence of a specific statute to the contrary. See *In re Estate of Lentz*, 312 Kan. 490, Syl. ¶ 2, 476 P.3d 1151 (2020) "A motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment." K.S.A. 2023 Supp. 60-259(f).

The State may appeal from a pretrial order suppressing evidence, but the notice of appeal must be filed within 14 days after the entry of the order. K.S.A. 22-3603. However, the filing of a timely motion to alter or amend the judgment stops the appeal time from running. K.S.A. 2023 Supp. 60-2103(a); *State v. Swafford*, 306 Kan. 537, 540, 394 P.3d 1188 (2017). "'The filing of a timely notice of appeal is jurisdictional.'" *State v. Shelly*, 303 Kan. 1027, 1036, 371 P.3d 820 (2016).

Discussion

The district court ruled the State's evidence of other crimes under K.S.A. 2017 Supp. 60-455(d) was inadmissible on July 12, 2022. The State did not file its motion to reconsider until over 10 months later, on May 26, 2023, well beyond the 28-day time period to file the motion. K.S.A. 2023 Supp. 60-259(f). The State's untimely motion to reconsider therefore did not toll the time to file an appeal. See *Board of Sedgwick County Comm'rs v. City of Park City*, 41 Kan. App. 2d 646, 650, 204 P.3d 648 (2009), *aff'd* 293 Kan. 107, 260 P.3d 387 (2011). And the State did not file its notice of appeal until June 28, 2023, almost a year after the district court's original ruling. The State's notice of appeal was untimely based on the district court's original July 12, 2022 ruling, denying the admissibility of the State's evidence of other crimes. We, therefore, lack jurisdiction to review the district court's decision excluding the State's evidence of other crimes, and the State's interlocutory appeal on that issue must be dismissed. See *State v. Myers*, 314 Kan. 360, 365, 499 P.3d 1111 (2021).

Moreover, the district court itself lacked jurisdiction to entertain the State's untimely motion to reconsider. K.S.A. 2023 Supp. 60-259(f) provides: "A motion to alter or amend a judgment *must* be filed no later than 28 days after the entry of judgment." (Emphasis added.) "Time limits prescribed by statute are jurisdictional

and cannot be waived or forfeited." *Board of Sedgwick County Comm'rs*, 41 Kan. App. 2d 646, Syl. ¶ 2. And because the district court lacked jurisdiction to entertain the State's motion to reconsider, we lack appellate jurisdiction over the issue. See *Kansas Fire and Safety Equipment*, 317 Kan. at 434.

Even if we did possess jurisdiction over the district court's denial of the State's motion to reconsider, and even if the district court did rely upon erroneous grounds in reaching its decision, we would nevertheless affirm the district court's denial of the motion as right for the wrong reason because the motion was untimely. See *Gannon v. State*, 302 Kan. 739, 744, 357 P.3d 873 (2015).

We Find No Substantial Impairment of the State's Ability to Prosecute Its Case

Harris next argues we lack jurisdiction over the State's interlocutory appeal from the district court's order excluding Dr. Murrie's testimony because the order did not substantially impair the State's ability to prosecute its case.

Standard of Review

Whether appellate jurisdiction exists is a question of law over which we exercise unlimited review. *McCroy*, 313 Kan. at 533.

Governing Law

The Kansas Supreme Court has long held a threshold requirement to permit the State to file an interlocutory appeal from a district court's pretrial order suppressing or excluding evidence is whether the ruling "substantially impaired the State's ability to prosecute" its case. *Myers*, 314 Kan. at 366; *State v. Sales*, 290 Kan. 130, 136, 224 P.3d 546 (2010); *State v. Mitchell*, 285 Kan. 1070, 1080, 179 P.3d 394 (2008); *State v. Griffin*, 246 Kan. 320, 324, 787 P.2d 701 (1990); *State v. Newman*, 235 Kan. 29, 35, 680 P.2d 257 (1984).

However, "an order excluding evidence need not completely prevent the State from obtaining a conviction to substantially impair its ability to prosecute." *Myers*, 314 Kan. at 366. As our Supreme Court has explained: "[T]he evidence available to the State

must be assessed to determine just how important the disputed evidence is to the State's ability to make out a prima facie case. . . . [E]vidence subject to a discretionary standard of admission is less likely to substantially impact the State's case." *Sales*, 290 Kan. at 140.

Discussion

The State claims the district court's exclusion of Dr. Murrie's testimony substantially impairs its ability to prosecute its case against Harris:

> "While the State will present the testimony of S.H., no eyewitnesses to the events will testify, nor will the jury view video or other independent evidence evincing that S.H. did not consent. For these reasons, Dr. Murrie's testimony about the boundaries of consent within a BDSM relationship are paramount—particularly when one considers the majority of jurors—if not all jurors—will have no common understanding or experience concerning the BDSM community. Because exclusion of Dr. Murrie's testimony substantially impairs the State's ability to prosecute the case, this Court should address the claim on the merits."

Harris responds the State has ample evidence available to prosecute its case without Dr. Murrie's testimony. Harris identifies the following evidence that is still available to the State:

- The testimony of S.H., who has an associate's degree and has been described by the State as a "cooperative witness";
- the testimony of multiple law enforcement officers involved in the case who can corroborate S.H.'s statements;
- the testimony of lab technicians who can testify about DNA evidence, including that S.H.'s DNA was allegedly found on a recovered taser;
- the testimony of S.H.'s brother and friends to whom she divulged the details of her relationship with Harris immediately before contacting the police;
- recovered communications between S.H. and Harris through email drafts;
- multiple photographs of S.H. depicting the injuries she sustained and the crude names Harris wrote on her body;

- photographs from a BDSM website that S.H. and Harris looked at together;
- S.H.'s written statement to law enforcement, outlining events that took place between her and Harris during the last several months of their relationship;
- a schedule S.H. provided to Harris to facilitate scheduling their encounters;
- a photo lineup in which S.H. identified Harris; and
- physical evidence including two markers, duct tape, and spoons.

Harris argues the State conceded the issue of consent is no different for someone engaged in a BDSM sexual relationship compared to a non-BDSM relationship. Specifically, during the June 16, 2023 hearing, the State admitted to the district court that "consent is still consent. A person can say yes or no to a certain act being perpetrated on them. . . . I don't think that the State has to prove anything different with these crimes versus aggravated criminal sodomy that occurs outside of a BDSM relationship." Harris further contends the State's argument that the jury must hear Dr. Murrie testify about the boundaries of consent within a BDSM relationship is inconsistent with what has been previously argued before the district court. In fact, during a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), Dr. Murrie agreed sexual acts should be consensual whether BDSM or otherwise. Regardless, Harris argues the district court did not abuse its discretion in denying Dr. Murrie's testimony because such testimony was unnecessary and would not help the trier of fact.

The evidence the district court excluded here—Dr. Murrie's testimony—was not based on evidence of the facts underlying the criminal charges at issue in this appeal. Rather, the State sought to admit Dr. Murrie's testimony for the purpose of aiding the jury in *understanding* the facts underlying the charges. Dr. Murrie's testimony would serve an ancillary role in the State's prosecution of its case against Harris. The State is still fully capable of presenting all the evidence at its disposal to prove beyond a reasonable doubt that S.H. did not consent to all the sexual contact at issue. This is

true even if the State cannot present Dr. Murrie's testimony to explain his understanding of consent in a BDSM relationship. In other words, Dr. Murrie's testimony may well *aid* the State in prosecuting its case against Harris; it may be *easier* for the State to prosecute its case if Dr. Murrie is found to be an expert and his expert testimony is allowed. But that is not the standard. The standard is whether the exclusion of Dr. Murrie's testimony substantially impairs the State's ability to prosecute its case against Harris. See *Myers*, 314 Kan. at 366.

The State has fallen woefully short of showing substantial impairment. As previously indicated, the State can provide S.H.'s testimony as well as that of law enforcement officers, lab technicians, and S.H.'s friends and family who were aware of the relationship and circumstances. The State also has physical evidence, including photographs from a BDSM website S.H. viewed with Harris; photographs S.H. took of her injuries; and markers, duct tape, and spoons used during their sexual encounters. The State can also rely on S.H.'s written statement to law enforcement describing her relationship with Harris and the sexual encounters she had with Harris during the last several months of their relationship. That is, the State can provide the victim's firsthand accounts of the incidents and whether she consented to Harris' actions.

Moreover, expert testimony is subject to a discretionary standard of admission by the district court. *State v. Aguirre*, 313 Kan. 189, 195, 485 P.3d 576 (2021); *Sales*, 290 Kan. at 140. The district court exercised its discretion in denying Dr. Murrie's testimony, explaining:

"The Court did review both briefs on this issue as well, and we heard this in [a] previous hearing and heard Dr. Murrie testify by Zoom. Although this was—that was a *Daubert* hearing, I don't doubt that Dr. Murrie has expertise in a number of areas, as [the defense attorney] said, forensic evaluation of sex offenders, but also it appeared expertise in some BDSM cases, as he testified about.

"But I don't think that the Court for this particular issue needs to get to that, whether or not he has expertise in this area, because the basis for my decision is 60-456, which has been cited by both sides.

"In addition to that, *United States vs. Becker*, . . . 230 F.3d 1224. It's a 10th Circuit case from 2000. Expert testimony is admissible where it will help the trier of fact to understand the evidence or determine fact or issue.

"K.S.A. . . . 60-456: If the jury can understand the evidence without needing the expert's specialized knowledge, the expert testimony is inadmissible.

"For that reason, the Court is going to deny the State's request to use Dr. Murrie as an expert in this case.

"And, again, as I stated in the other motion, I think that we ought to try this case based upon the facts in this case. And I don't believe that it would help the jury or that it's necessary for the jury to determine any of the questions that they would be asked at jury trial. And I think it might actually confuse them."

The district court never specifically qualified Dr. Murrie as an expert witness in this case. Because the decision to qualify Dr. Murrie as an expert witness is a discretionary call by the district court, the State's ability to prosecute its case is not substantially impaired.

The dissent recognizes this case is about two consenting adults in a BDSM relationship first initiated by S.H. but asserts the testimony of Dr. Murrie should be allowed to explain the limits of S.H.'s consent after the fact. We see three flaws with this argument. First, as we have both pointed out, the district court acknowledged Dr. Murrie might be an expert in some BDSM cases but never found him to be an expert on the issue of consent in BDSM relationships. The court also found his testimony was not needed and would just confuse the jury, citing K.S.A. 2023 Supp. 60-456 for support. Second, Dr. Murrie has never talked to, consulted with, or counseled S.H. and could only speak about consent generally in other BDSM relationships, not to the specifics of S.H.'s relationship with Harris. Third, neither party has raised, let alone briefed, the issue of whether our Supreme Court improperly interpreted K.S.A. 22-3603 as requiring the State to show substantial impairment of its case in order to take an interlocutory appeal. It is not the role of the appellate courts to fashion additional arguments on behalf of the parties. *State v. Puckett*, 230 Kan. 596, 600-01, 640 P.2d 1198 (1982) ("[O]rdinarily an appellate court will not consider an issue which has not been raised in the trial court or which has not been raised by the parties on appeal."). Rather, our duty is analyzing the arguments actually raised—to the extent we have jurisdiction to consider them—by neutrally applying the controlling points of law to the facts reflected in the record on appeal.

Moreover, we observe there is an eminently valid reason for the State to be subject to the substantial impairment burden; otherwise, appellate courts would be overrun with appeals from the

State whenever it is displeased with the pretrial rulings of the district court. In our view, the Supreme Court's prior determinations that requires substantial impairment to the State's case for it to file an interlocutory appeal soundly reconciles the various provisions governing appeals in criminal cases and is consistent with long-standing judicial principles barring piecemeal appeals. See *Myers*, 314 Kan. at 366 (State may file interlocutory appeal when ruling "substantially impair[s] the state's ability to prosecute" its case); *State v. LaPointe*, 305 Kan. 938, 949-50, 390 P.3d 7 (2017) (piecemeal appeals are disfavored). We recognize interlocutory appeals have a place in our criminal procedure; otherwise, orders of the district court that do substantially impair the State's ability to prosecute—suppression of evidence, as an example—could result in a not guilty verdict from which the State cannot appeal based on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

In contrast, a defendant cannot take an interlocutory appeal under K.S.A. 22-3603. This limitation on a defendant's right to seek an interlocutory appeal reflects his or her right to appeal if found guilty to seek recourse in the event the district court erred. However, if K.S.A. 22-3603 is interpreted to allow the State to appeal from *any* nonfinal order and the defendant cannot, such an application of the statute would likely run afoul of the due process and equal protection concerns discussed in *State v. Burnett*, 222 Kan. 162, 167, 563 P.2d 451 (1977):

> "The distinction between the state and the accused is not unreasoned. It serves a valid and legitimate public purpose to permit the state access to appellate review when matters essential to a prosecution are quashed or suppressed prior to trial. An individual defendant, unlike the state, may secure complete appellate review of all adverse rulings, and may secure effective relief, through a single appeal after trial, without constitutional impediment."

While the dissent suggests this analysis by our Supreme Court adds language not contained in the statute's plain language, our appellate courts are beholden to the principle that statutes must be construed in a constitutional manner whenever possible. *State v. Gonzalez*, 307 Kan. 575, 579, 412 P.3d 968 (2018). Moreover, we are duty-bound to follow Kansas Supreme Court precedent absent some indication our Supreme Court is departing from its prior position. *State*

v. Rodriguez, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). We observe no indication our Supreme Court is departing from its interpretation of K.S.A. 22-3603 limiting the State's right to take an interlocutory appeal to matters which substantially impair the State's case. Appellate courts only have jurisdiction as provided by statute. Where an appeal is not taken consistent with this statutory authority, it must be dismissed for lack of jurisdiction. Accordingly, we decline to accept appellate jurisdiction over the State's interlocutory appeal from the district court's order excluding Dr. Murrie's testimony.

As previously discussed, even if we had jurisdiction, the State would not be entitled to relief because the district court never qualified Dr. Murrie as an expert.

We observe no objection by the State to the district court's decision not to make more specific findings why Dr. Murrie would not be qualified as an expert witness in this matter. Where certain factual determinations by the district court are necessary to resolve the issue on appeal, the appellant must object to a lack of findings or request additional findings from the district court. *State v. Meggerson*, 312 Kan. 238, 249, 474 P.3d 761 (2020) (appellant must designate sufficient record to show error); see *State v. Espinoza*, 311 Kan. 435, 436-37, 462 P.3d 159 (2020) (party claiming error has burden to object to inadequate findings of fact and conclusions of law to give district court opportunity to correct any alleged inadequacies). Therefore, the State failed to properly preserve the issue below. Moreover, because the State has not addressed this point on appeal, we would have to deem it waived or abandoned if we had jurisdiction to consider it on the merits. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (issue not briefed deemed waived or abandoned). But given our conclusion we lack jurisdiction, we, like the district court, "[do not] . . . [need] to get to that."

Appeal dismissed.

* * *

ISHERWOOD, J., dissenting: I respectfully dissent because I reach a distinctly different conclusion regarding the impact of the trial court's exclusion of Dr. Murrie's testimony. I do not take issue with the majority's conclusion that we lack jurisdiction to consider the State's motion to admit prior crimes evidence under K.S.A. 2023 Supp. 60-455(d).

As noted by the majority, S.H. and Harris developed an intimate, BDSM style relationship upon S.H.'s suggestion. What the majority does not include is that with S.H.'s consent, the relationship eventually transitioned to one grounded in master-servant practices with S.H. in the submissive role. The couple's activities gradually intensified, again with S.H.'s consent, until their conduct allegedly exceeded the boundaries of what S.H. contemplated when entering into the relationship. The State charged Harris with the commission of several unlawful sex acts as a direct product of his relationship with S.H. and the parties agree that the only disputed issue is consent. Where roughly only 5% of the population engages in these unconventional practices where words like "no," "stop," and "don't" do not carry force and effect but are replaced with other words, there is a distinct possibility that a lay-person juror lacks the common knowledge or experience, which they are specifically instructed to use, as would be required to undertake reasonable deliberations with respect to the element of consent, particularly where they are largely tasked with resolving a credibility contest between the parties. The district court's ruling deprived them of a critical tool necessary to a fully informed deliberation of the issue. Thus, I find that the district court's exclusion of Dr. Murrie's testimony, which would have explained how consent is viewed and interpreted within the BDSM culture, substantially impairs the State's ability to move forward with the prosecution of its case.

In analyzing the statute governing this case, K.S.A. 22-3603, research reveals that the "substantial impairment" phrase that captures our focus is not now, nor has it ever been, included within the clear and unambiguous statutory language since the Legislature adopted the provision in 1970. Rather, it appears to be the manifestation of arguably unnecessary statutory interpretation. That same research reflects that the statute has been afforded inconsistent treatment for an extended period of time, including instances where the reviewing court undertook an analysis of the merits in the State's interlocutory appeal without first requiring that it clear a jurisdictional hurdle attached to that "substantial impairment" language. Thus, I question whether the State truly bears an obligation to first demonstrate "substantial impairment" before we are vested with the authority to consider the merits of its claim.

To the extent the State does carry such a burden, I believe it has been satisfied here. While I agree that the *element* of consent, in and of itself, is no different for the crimes with which Harris is charged than in any other sexual offense prosecuted under the Kansas Criminal Code, I believe the nuances created by the very unique, particular facts of this case necessitate the introduction of Dr. Murrie's expert testimony to shed a clarifying light for the laypersons of the jury on how consent is viewed within the BDSM culture. Accordingly, I would find we have jurisdiction to consider the State's claim and upon doing so, reverse the decision of the district court and remand with directions for further proceedings consistent with that finding.

I believe the factual recitation set out in the majority opinion is largely accurate. And while I strongly adhere to the principle that we have a responsibility to constrain our usage of graphic details to insulate the privacy and dignity of victims from any further harm, I firmly believe that a thorough analysis of the issue before us demands consideration of additional, critical facts surrounding the manifestation of the relationship between S.H. and Harris and the evolution of the conduct between them. I will endeavor to avoid the inclusion of gratuitous, salacious particulars.

The majority notes that the consensual sexual relationship between S.H. and Harris evolved to include acts of BDSM upon S.H.'s suggestion, and that the couple developed "safe words" for use when "a participant was approaching or had reached his or her limits." 64 Kan. App. 2d at 433. The majority then goes on to recount how the relationship eventually exceeded the bounds of what S.H. contemplated when she first suggested that the two travel down this unconventional road. That body of facts provides the foundation for the majority's ultimate conclusion that the State's ability to prove its case against Harris is not compromised by the district court's exclusion of Dr. Murrie's testimony.

By virtue of S.H.'s preliminary hearing testimony, the record reflects that she and Harris commenced their relationship mid to late 2016, and about a year later, they gradually introduced new BDSM related activities. There is a particularly important phase of the couple's relationship which S.H. testified to that was not referenced by the majority but is one that carries the potential to

play an integral role in the jury's deliberations when weighing the issue of consent which, again, the parties agree is the *only* disputed issue in this case. That phase is the sharp turn the relationship took following S.H.'s inquiry of Harris as to whether the couple could attend BDSM parties. S.H. testified that participation in such gatherings took on greater importance when she encountered financial struggles, because Harris told her they could attend, and she could receive financial compensation for engaging in sex acts with other attendees. According to S.H., Harris informed her that those sexual activities would essentially require her to play the subservient role in a master-servant type relationship. Thus, she would need to learn to endure a measure of pain, withstand verbal abuse, and "act a certain way."

S.H. testified that she agreed to participate, and Harris encouraged her to visit a particular fetish focused website where she could learn more about what to expect from the parties. She stated that their meetings then transitioned from bi-weekly to weekly for her "training" purposes and it was at this time that Harris issued "commandments" for her to memorize as part of that "training"—directives that she would later frequently repeat as a mantra upon his command. Those "commandments" included, but were not limited to, requirements that she would not speak until spoken to, she would serve only him, she would respond to whatever name she was called, and she was required to do whatever Harris demanded. S.H. further explained that Harris directed her to refer to him by a name or term of her choice, so she settled upon the label of "Master." S.H. also provided Harris with a key to her apartment, as well as a copy of her schedule, and they agreed that whenever he arrived, she would be in a submissive position. That meant she would be on her knees, in the hallway, naked, but for a black collar, with her head bowed and her arms outstretched awaiting his command.

S.H. described one particular occasion when Harris brought a gun, a taser, and a knife to her home, laid them out on her table, and inquired whether she knew what they were for. When S.H. responded in the affirmative, Harris then asked whether he had to explain what they meant and, despite her answer of "no," Harris did so anyway. S.H. testified that Harris told her that she needed

to know and understand that if they were going to continue training for the BDSM parties, that he would not hesitate to use those items, and he would not go to jail again, and she was not permitted to contact the police. S.H. stated that despite feeling a bit of apprehension at that point, she did not share those feelings with Harris.

S.H. testified that it was around this time that the couple's activities intensified and that the oral sex she provided Harris at "every single" encounter became more physically aggressive. As it was from the beginning of the relationship, S.H. always filled the submissive role and was frequently given "homework" assignments to better understand her obligations. On one occasion, Harris instructed her to research various breathing techniques that would enable her to withstand the infliction of greater pain.

S.H. stated that following one of their encounters in early December, she had a face-to-face conversation with Harris concerning her ability to go forward with the relationship. She told him that she was "not sure" if she could continue or participate in the parties because the pain was so great. Harris responded by reminding S.H. that she agreed to engage in these activities and encouraged her to stay the course. S.H. testified that she agreed to do so. She explained that the encounters continued and in one instance, despite her desire to use her "safe words," she did not do so because of Harris' "commandment" that she was not to speak unless spoken to. On another occasion when S.H. told Harris to stop, he again reminded her that she agreed to the master-servant training and if she terminated it because of a "little bit of pain" all his time would have been wasted.

S.H.'s direct examination concluded with her decision to report the incidents to law enforcement at the end of December 2017.

On cross-examination, Harris' counsel elicited statements from S.H. by which she affirmed that from the outset, her interest in the relationship was purely sexual and that she got involved with Harris with the hope that he would teach her to become more sexually adventurous and help her explore BDSM activities. S.H. acknowledged that she understood Harris' rules and that she

agreed to be trained as the submissive in the master-servant relationship for the purpose of attending BDSM parties and exchanging sexual acts for money. S.H. denied that she and Harris ever negotiated or outlined precise limitations for their activities and that she specifically understood their behavior needed to intensify to enable her to adapt to the pain. She stated that despite the fact she did not particularly care for his rules and did not want to follow them she continued to do so. Finally, S.H. testified that she still assumed the agreed upon submissive position the final time that Harris visited her home and that when she provided her statement to law enforcement, she did not describe Harris' conduct as acts forced upon her.

Harris did not testify at the preliminary hearing.

The evolution of K.S.A. 22-3603

The State brings this interlocutory appeal to us for consideration under the authority of K.S.A. 22-3603. That provision simply states:

> "When a judge of the district court, prior to the commencement of trial of a criminal action, makes an order quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission an appeal may be taken by the prosecution from such order if notice of appeal is filed within 14 days after entry of the order. Further proceedings in the trial court shall be stayed pending determination of the appeal."

The statute was first added to the Code of Criminal Procedure in 1970, and with the exception of a minor alteration in 2010 to increase the time in which the State has to file its notice of appeal from the original 10 days to the current period of 14 days, the language has remained unchanged.

Approximately seven years after adoption of the statute, the Supreme Court conducted an analysis of a defendant's claim that the provision gave rise to due process and equal protection concerns because it allowed for interlocutory appeals by the State but not the accused. See *State v. Burnett*, 222 Kan. 162, 563 P.2d 451 (1977). The issue was not framed as one requiring statutory interpretation, so the precise scope of the statute and its linguistic components were not technically at issue. Nevertheless, as part of its

analysis of the constitutional claim, the *Burnett* court gratuitously observed that the Judicial Council Comment appended to K.S.A. 22-3603 stated that its purpose was "to permit appellate review of pretrial rulings *which may be determinative of the case*." (Emphasis added.) 222 Kan. at 166. In so doing it seemingly turned a blind eye to the longstanding rule that common words used in statutes must be given their ordinary meanings and it is only when "'the language is less than clear or is ambiguous"' that courts should "'move to statutory construction and use the canons of construction and legislative history and other background considerations to divine the legislature's intent."' *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 850, 397 P.3d 1205 (2017) (quoting *Ambrosier v. Brownback*, 304 Kan. 907, 911, 375 P.3d 1007 [2016]); see also *State v. Foster*, 106 Kan. 852, 189 P. 953 (1920) (The rule of strict construction simply means that ordinary words are to be given their ordinary meaning.).

Three years later, this court was asked to determine whether a pretrial order denying the State's request to introduce evidence of other crimes fell within the scope of the statutory language allowing the State to pursue an interlocutory appeal from an order "suppressing evidence." See *State v. Boling*, 5 Kan. App. 2d 371, 617 P.2d 102 (1980). In so doing, it observed that while the question of jurisdiction was not raised by either party, the court issued a show cause order to address the same and cited the oft stated rule of appellate procedure that "'[i]t is the duty of an appellate court on its own motion to raise the question of its jurisdiction, and when the record discloses a lack of jurisdiction it must dismiss the appeal."' 5 Kan. App. 2d at 372 (quoting *Henderson v. Hassur*, 1 Kan. App. 2d 103, Syl. ¶ 1, 562 P.2d 108 [1977]).

In conducting its analysis, the *Boling* court also turned to the Judicial Council's Comment as authority for the alleged "purpose" of the provision:

"'The foregoing sections are intended to permit Supreme Court review of trial court rulings on pretrial motions which may be *determinative of the case*. The committee believed that in the case of trial court rulings which suppress evidence essential to proof of a prima facie case, the prosecution should have an opportunity for review in the Supreme Court if a substantial question exists as to the correctness of the trial court's decision."' (Emphasis added.) 5 Kan. App. 2d at 373.

To buttress the direction of its impending analysis, the court stated that "all Judicial Council comments" are "persuasive as to legislative

intent" and cited *Arredondo v. Duckwall Stores, Inc.*, 227 Kan. 842, Syl. ¶ 4, 610 P.2d 1107 (1980), and *Burnett*, 222 Kan. at 166-67, as support for that proposition. *Boling*, 5 Kan. App. 2d at 373. Yet, while citing *Burnett* which again, also focused on the phrase from the Judicial Council Comment that the evidence must be "determinative of the case," the *Boling* court shifted another direction and stated that the evidence under scrutiny "will be of a kind which is sufficiently important to the prosecution to warrant an immediate appeal." 5 Kan. App. 2d at 374. Then, despite asserting the court did "not mean to suggest that whether the evidence suppressed is essential to the state's case determines whether an appeal will lie," the court undertook an extensive analysis concerning the jurisdiction Kansas appellate courts have to review an interlocutory appeal and relied on a series of cases from Illinois as its guide, primarily, *People v. Van De Rostyne*, 63 Ill. 2d 364, 349 N.E.2d 16 (1976); *People v. Lara*, 44 Ill. App. 3d 116, 357 N.E.2d 1354 (1976); and *People v. Jackson*, 67 Ill. App. 3d 24, 384 N.E.2d 591 (1979). 5 Kan. App. 2d at 374-75.

The *Boling* court ultimately concluded that the State may properly pursue an appeal from those trial court orders that suppressed evidence obtained in violation of a criminal defendant's constitutional rights but is prohibited from appealing from those orders which merely excluded evidence through operation of the statutory rules of evidence. *Boling*, 5 Kan. App. 2d 377-78. *Boling* also drew this jurisdictional line in the sand despite its observation that three earlier interlocutory appeals by the State were analyzed by our appellate courts without any mention of first satisfying "the jurisdictional question." 5 Kan. App. 2d at 377 (citing *State v. Dotson*, 222 Kan. 487, 565 P.2d 261 [1977]; *State v. Eubanks*, 2 Kan. App. 2d 262, 577 P.2d 1208 [1978]; *State v. Wilkins*, 220 Kan. 735, 556 P.2d 424 [1976]). It attempted to resolve that inconsistency by asserting that those cases "*implicitly recognize* appellate jurisdiction of an interlocutory appeal" and "in each of those cases the order had *a purpose closely akin* to that of the general exclusionary rule." (Emphases added.) *Boling*, 5 Kan. App. 2d at 377. In keeping with its view of K.S.A. 22-3603, the court determined that an order excluding other crimes evidence did not fall within the ambit of one "suppressing evidence" and the appeal was dismissed for a lack of jurisdiction. 5 Kan. App. 2d at 378.

That is to say, at this juncture, despite the absence of any express statement of jurisdictional parameters contained within the plain language of K.S.A. 22-3603, *Burnett* opined that the pretrial ruling appealed from must be "determinative of the case," while *Boling* found "the evidence will be of a kind which is sufficiently important to the prosecution to warrant an immediate appeal." *Burnett*, 222 Kan. at 166; *Boling*, 5 Kan. App. 2d at 374. Thus, there were two differing thresholds at play where the Legislature articulated none. *Burnett* is clear that its finding arises directly from the Judicial Council Comment. 222 Kan. at 166. But the origin of that articulated in *Boling* is less than clear. Perhaps it is an amalgamation of the three different standards set out in the Judicial Council Comment:

"'The foregoing sections are intended to permit Supreme Court review of trial court rulings on pretrial motions which may be *determinative of the case*. The committee believed that in the case of trial court *rulings which suppress evidence essential to proof of a prima facie case*, the prosecution should have an opportunity for review in the Supreme Court *if a substantial question exists as to the correctness of the trial court's decision*.'" (Emphases added.) 5 Kan. App. 2d at 373.

But while the notes and comments of the Kansas Judicial Council may be helpful in determining legislative intent, they are advisory only and do not have the force and effect of law. *State v. McCown*, 264 Kan. 655, 660-61, 957 P.2d 401 (1998). Judicial Council notes are not the equivalent of statutory law. *State v. Schlein*, 253 Kan. 205, 219, 854 P.2d 296 (1993). Despite these clear limitations on the use of the Judicial Council Comment, its contents have been construed to define the jurisdictional boundaries of a statute. In the nearly 50 years that have passed since the court's decision in *Burnett*, the Legislature has never taken any formal steps to alter the language of K.S.A. 22-3603 to include such a jurisdictional requirement. I recognize that when the Legislature fails to modify a statute to avoid a standing judicial construction of the statute, reviewing courts presume the Legislature intended the statute to be interpreted as the courts have done. See *In re Adoption of G.L.V.*, 286 Kan. 1034, 1052, 190 P.3d 245 (2008). Nevertheless, the absence of an official modification has

allowed further ambiguity and inconsistency to develop around the statute's application.

Four years after *Boling*, the Supreme Court revisited the provision in *State v. Newman*, 235 Kan. 29, 680 P.2d 257 (1984), to determine whether the *Boling* court's interpretation of the provision was too narrow. Notably, this court reviewed the matter first and, in an unpublished opinion, deviated from *Burnett* and *Boling* to articulate yet a third jurisdictional standard that must be met to allow a reviewing court to consider an interlocutory appeal pursued by the State under K.S.A. 22-3603:

"'In cases such as this where the evidence excluded may have been determinative of the case, *and* where the State's admissible evidence is so depleted that the State cannot in good conscience continue prosecution, some opportunity to appeal should be available.' [Citation omitted.]" (Emphasis added.) *Newman*, 235 Kan. at 34 (citing underlying ruling from the Court of Appeals).

To resolve the question before it, the *Newman* court followed the lead of *Boling* and returned to Illinois for an analysis of its caselaw. *Newman* observed that when the *Boling* court conducted its research, it did not have the benefit of *People v. Young*, 82 Ill. 2d 234, 412 N.E.2d 501 (1980), which rejected the narrow interpretation of the *Van de Rostyne* case that was ultimately adopted by the *Boling* court. By contrast, *Young* held that the phrase "suppressed evidence" should be afforded a broader interpretation than simply evidence which is illegally obtained, as *Boling* concluded. *Newman*, 235 Kan. at 33. The *Newman* court went on to find that "suppression" as used in K.S.A. 22-3603 should also be interpreted to include "rulings of a trial court which exclude state's evidence so as to *substantially impair* the state's ability to prosecute the case" so as to follow "the rule adopted by the Supreme Court of Illinois in" *Young*. (Emphasis added.) 235 Kan. at 34. The *Newman* court found this broader interpretation was also consistent with the standards adopted by the American Bar Association Project on Standards for Criminal Justice, specifically those relating to criminal appeals. Those standards provide, in part, that:

"'1.4 Prosecution appeals.

"'(a) The prosecution should be permitted to appeal in the following situations:

. . . .

"'(iii) from pretrial orders that seriously impede, although they do not technically foreclose, prosecution, such as orders granting confessions declared involuntary and inadmissible." *Newman*, 235 Kan. at 34-35 (quoting American Bar Association Project on Standards for Criminal Justice, Standards Relating to Criminal Appeals § 1.4 [1970]).

Thus, going forward, post-*Newman*, in pursuing an interlocutory appeal under K.S.A. 22-3603 a prosecutor presumably "should be prepared to make a showing to the appellate court that the pretrial order of the district court appealed from *substantially impairs* the State's ability to prosecute the case." (Emphasis added.) 235 Kan. at 35. The *Newman* court made no mention of what future use, if any, should be made of the previous jurisdictional standard that arose out of the Judicial Council Comment—that the pretrial orders the State may appeal from are limited to those "which may be determinative of the case." 235 Kan. at 33.

An inconsistent approach to the jurisdiction question has materialized in the years following *Newman*. In several cases, it receives no mention or analysis with the reviewing court simply stating it has jurisdiction pursuant to K.S.A. 22-3603. See *State v. Manwarren*, 56 Kan. App. 2d 939, 440 P.3d 606 (2019); *State v. Bowles*, 28 Kan. App. 2d 488, 18 P.3d 250 (2001); *State v. Weas*, 26 Kan. App. 2d 598, 992 P.2d 221 (1999); *State v. Mosier*, No. 123,715, 2021 WL 3573842 (Kan. App. 2021) (unpublished opinion); *State v. Harbacek*, No. 105,391, 2011 WL 5390237 (Kan. App. 2011) (unpublished opinion); *State v. Johnson*, No. 83,773, 2000 WL 36745647 (Kan. App. 2000) (unpublished opinion). At least two cases confine their analysis to whether the ruling concerned a matter that was determinative of the case. See *State v. Clovis*, 248 Kan. 313, 807 P.2d 127 (1991); *State v. Wilson*, No. 117,125, 2017 WL 3948450 (Kan. App. 2017) (unpublished opinion). A fair number of cases use a hybrid analysis with the question often being whether the ruling was determinative of the case with the substantial impairment portion used to inform whether the ruling was truly determinative, including, but not limited to, *State v. Martinez-Diaz*, 63 Kan. App. 2d 363, 369, 372, 528 P.3d 1042 (2023); *State v. Perry*, No. 126,344, 2024 WL 1337476, at *3 (Kan. App. 2024) (unpublished opinion); *State v. Ross*, No. 118,393, 2018 WL 1884722, at *3 (Kan. App. 2018) (unpublished

opinion); *State v. Guy*, No. 116,983, 2017 WL 3202977, at *1 (Kan. App. 2017) (unpublished opinion).

Additionally, there are instances where the reviewing courts acknowledge the substantial impairment standard from *Newman* but fail to review the remaining evidence. In most of these cases, the courts appear to focus on the importance of the suppressed evidence rather than the strength of the remaining evidence. See *State v. Myers*, 314 Kan. 360, 366-67, 499 P.3d 1111 (2021); *State v. Griffin*, 246 Kan. 320, 324-26, 787 P.2d 701 (1990); *State v. Galloway*, 235 Kan. 70, 73-74, 680 P.2d 268 (1984); *State v. Adams*, No. 126,130, 2024 WL 1686160, at *2 (Kan. App. 2024) (unpublished opinion); *State v. Dearman*, No. 110,798, 2014 WL 3397185, at *4 (Kan. App. 2014) (unpublished opinion).

Finally, in *State v. Mooney*, 10 Kan. App. 2d 477, 479-80, 702 P.2d 328 (1985), which was decided shortly after *Newman*, the court found that the requirement imposed upon the State to demonstrate substantial impairment of its ability to prosecute the case was limited to those pretrial orders that result in the suppression of evidence. That is, it had no applicability when the matter at issue involved "'quashing a warrant or search warrant'" or "'suppressing a confession or admission'" and in those instances the State may appeal as a matter of statutory right. A panel of this court followed the path laid by *Mooney* in *State v. Mburu*, 51 Kan. App. 2d 266, 271-72, 346 P.3d 1086 (2015).

Again, when adopting a broader interpretation of the provision, *Newman* drew guidance from the American Bar Association Project on Standards for Criminal Justice, specifically Standards Relating to Criminal Appeals. Section 1.4 of those standards indicate that "'[s]uch judgments are likely to rest upon principles that ought to be clearly and uniformly applied throughout the state.'" 235 Kan. at 35. Given the inconsistent manner in which the statute is seemingly applied by Kansas appellate courts, I am not convinced that goal of uniformity is being met. The majority issues a reminder that we are duty-bound to follow the precedent established by the Kansas Supreme Court until such time as that body expresses its intent to depart from the position at issue. It is not my intent to sidestep that obligation. My point is simply that as evidenced by the chronological case summary set out above,

which includes inconsistent applications by our Supreme Court, it is unclear exactly which one of the iterations of the rule practitioners are expected to satisfy or this court is expected to adhere to when faced with an interlocutory appeal filed by the State under K.S.A. 22-3603.

Substantial Impairment

The question before us was framed by the parties in conformity with *Newman*. That is, whether the pretrial order excluding Dr. Murrie's testimony substantially impaired the State's ability to prosecute the case and that to assess the importance of the excluded evidence we should analyze that evidence which remains available to the State. After conducting this analysis, I find that the State's ability to prosecute Harris is substantially impaired as a result of the district court's pretrial ruling.

In this case, Harris is facing charges for, among other things, two counts each of aggravated sexual battery and aggravated criminal sodomy. Those alleged offenses arise directly from the BDSM relationship he and S.H. were mutually involved in. Both crimes require that the State prove beyond a reasonable doubt that S.H. did not consent to the precise sexual conduct at issue, and both parties agree that consent is the only disputed issue here.

The State sought the admission of Dr. Murrie's testimony for the limited purpose of discussing the BDSM culture generally, including standard practices, what is permitted, and what is outside the bounds of acceptable behavior. It was not contemplated that he would offer any opinions or observations with respect to the particulars of this case. After receiving Dr. Murrie's testimony at the hearing on defendant's motion to exclude the same, the district court declined to allow its admission. Notably, the district court did not articulate any specific ruling with respect to whether Dr. Murrie did or did not qualify as an expert. Rather, it found that while it did not "doubt that Dr. Murrie has expertise in a number of areas," including "expertise in some BDSM cases" it did not "think that the court for this particular issue needs to get to that, whether or not he has expertise in this area, because the basis for [its] ruling is 60-456 . . . ." In support of its conclusion, the district court determined that the testimony would not be of any help to

the jury, may cause confusion, and was not necessary in order for the jury to make a determination concerning the questions they would be asked to resolve. Rather, the case should simply be tried on its facts.

To be clear, as borne out by S.H.'s preliminary hearing testimony, what those undisputed facts for the jury consist of are that S.H. either encouraged or consented to:

- a relationship with Harris that was purely sexual and one where she could explore and become more adventurous with BDSM activities that include oral and anal sex;
- participation in BDSM parties, particularly for the purpose of engaging in sex with others for financial compensation;
- entry into a master-servant relationship with Harris that involved weekly training as a subservient in preparation for those parties, with full understanding that their sexual activities would intensify to enable her to withstand greater amounts of pain;
- adherence to "commandments" issued by Harris that required her to do whatever he asked, endure degradation, and not speak until spoken to;
- sustaining bruises and welts throughout the course of their relationship as a product of their sexual encounters;
- performing oral sex on Harris at the conclusion of each encounter, first so she could "learn more," then as the relationship progressed, she was required to first seek his permission to perform the act and did so to "thank [him] for [his] guidance";
- remaining in the relationship despite the increasing intensity because Harris reminded her it was what she agreed to and because the "commandments" prevented her from speaking until spoken to.

We do not know if or how Harris will testify at trial. But if the very pointed, consent related questions that were posed by his counsel during their cross-examination of S.H. at the preliminary hearing offer any insight, then any testimony Harris provides will

likely focus on the extent to which S.H. willingly engaged in the various activities that transpired between them.

The details set out above should in no way be construed as a reflection of my opinion as to the ultimate element of consent. And in highlighting these facts I am also acutely aware of the two to three instances when Harris ignored S.H.'s use of her "safe words" and the corresponding pain reduced her to tears and hyperventilation. My point is simply that it is against this factual backdrop that the State will be required to ask a jury of laypersons to make a determination regarding consent. Thus, the outlined facts are offered merely to illustrate the complexity of this case and why, truly for the sake of the rights of both parties, a trial that involves more than an evidentiary display of the facts is required.

Highly truncated, Dr. Murrie's statements at the pretrial hearing reflect that he is prepared to testify that the primary focus of BDSM participants is the issue of consent, and they emphatically adhere to the principle that such activities only legitimately occur between consenting adults. Additionally, he would testify that the culture generally observes a number of formal guidelines which distinguish between consent and abuse, and that its advocacy groups publish educational materials for the law enforcement community and justice system which serve to illustrate the distinction between appropriate consensual BDSM activities and abuse. While Dr. Murrie did not spend time one on one with S.H. or Harris in preparing his report, he did review the testimony offered during the preliminary hearing, as well as reports from law enforcement officers, including their interview with S.H., photographs of S.H., and the investigating officers' interview with Harris. Again, the majority highlights that the district court "never found [Dr. Murrie] to be an expert on the issue of consent in BDSM relationships." 64 Kan. App. 2d at 443. It is equally true that it never found he was not qualified as such. Rather, the district court judge ruled, "*I don't think that the Court for this particular issue needs to get to that, whether or not he has expertise in this area, because the basis for* [*its*] *decision*" was that his testimony would not be helpful to the jury. Thus, to be clear, the court never made a finding either way as to whether Dr. Murrie could be qualified as an expert.

In concluding that substantial impairment exists, I found *State v. Quinones-Avila*, No. 120,505, 2019 WL 3210224 (Kan. App. 2019) (unpublished opinion), instructive. That case involved the district court's pretrial exclusion of prior crimes evidence under K.S.A. 2018 Supp. 60-455(d) in a rape case.

At the outset of its analysis, the *Quinones-Avila* court observed that "many sex crime cases reduce to a 'he said she said' battle in which credibility and corroboration are crucial" and which "'lack concrete evidence that a crime was committed.'" 2019 WL 3210224, at *4. The court turned to the evidence that remained available to the State which included statements from Y.Q., as well as testimony from those to whom Y.Q. spoke about the incident, testimony from law enforcement officers, and results of the sexual assault exam which corroborated Y.Q.'s complaints of pain. 2019 WL 3210224, at *5. The *Quinones-Avila* court observed that "[t]he vast majority" of this evidence is simply based on Y.Q.'s statements and that the excluded evidence would "greatly strengthen the State's case by giving the jury more to consider than the credibility of the parties" and it could also serve to counter any assertions made by Quinones-Avila that the rape charges were fabricated. 2019 WL 3210224, at *5. In arriving at its conclusion, the *Quinones-Avila* court highlighted two earlier cases in which panels of this court held that the "exclusion of corroborating evidence in sex abuse cases can substantially impair the State's case even where, as here, the State had clear testimony from the victim." 2019 WL 3210224, at *5 (citing *State v. Bliss*, 28 Kan. App. 2d 591, 594, 18 P.3d 979 [2001]; *State v. Dearman*, No. 110,798, 2014 WL 3397185, at *6 [Kan. App. 2014] [unpublished opinion]). I acknowledge that the opposite conclusion was reached in *State v. Sales*, 290 Kan. 130, 140, 224 P.3d 546 (2010).

Turning to the evidence that remains available to the State in the wake of the district court's exclusion of Dr. Murrie's testimony, the State's case essentially consists of the following:

(1) S.H.'s testimony;
(2) testimony from law enforcement officers;

(3) testimony from S.H.'s brother and friends to whom she disclosed the details of her relationship with Harris and who encouraged her to contact the police;
(4) S.H.'s written statement to police;
(5) testimony from lab technicians who can testify to DNA evidence from S.H. that was allegedly found on a taser;
(6) recovered email drafts between S.H. and Harris;
(7) photographs depicting injuries sustained by S.H. and the crude names Harris wrote on her body;
(8) photos of a BDSM website the couple visited together;
(9) a schedule S.H. provided to Harris to facilitate their encounters;
(10) the photo lineup from which S.H. identified Harris; and physical evidence including markers and wooden spoons.

Again, this case involved a largely consensual relationship between S.H. and Harris alone which spanned several months. The only disputed issue is S.H.'s consent with respect to a limited number of very particular acts between them. For that reason, I do not believe factors 6-11 above serve to advance the State's case on that issue. Given the duration of the relationship and S.H.'s testimony to the presence of the taser on more than one occasion, I believe factor number 5 has the potential to carry limited weight with a jury. That leaves factors 1-4 which include S.H.'s statements and iterations thereof.

As set forth earlier in my opinion, the jury will hear a great deal of evidence concerning what S.H. encouraged or consented to as part of this relationship which, in my mind, makes her statements, and those she made to others, vulnerable to impeachment. Thus, I find that, in line with *Quinones-Avila*, *Bliss*, and *Dearman*, the State's case is substantially impaired by the district court's exclusion of Dr. Murrie's testimony. That evidence could be used to corroborate S.H.'s assertions that the conduct at issue far exceeded the scope of the consented-to portion of the relationship and counter any likely claims made by Harris that the acts fell squarely within the bounds of their mutually agreed upon entry into a master-servant relationship where only S.H. would play the subservient role and agreed to follow his commands and not speak unless spoken to.

A final and rather compelling case worthy of mention is *State v. Martinez-Diaz*, 63 Kan. App. 2d 363, 528 P.3d 1042 (2023). In that case, the State charged Alejandro Martinez-Diaz with attempted first-degree murder of Javier Romero and Caylee Nehrbass. It pursued an interlocutory appeal after Romero refused to testify at trial and the district court denied the State's request to find him unavailable and admit his preliminary hearing testimony at trial. Martinez-Diaz argued this court lacked jurisdiction over the appeal because the State failed to demonstrate the ruling substantially impaired its ability to prosecute the case. As support, he pointed to the fact that Nehrbass' and Romero's testimonies would go to the same facts. Thus, according to Martinez-Diaz, Romero's testimony was merely corroborative evidence. 63 Kan. App. 2d at 369-70.

This court found that Martinez-Diaz' argument "ignores that a substantial impairment of the State's ability to prosecute is more nuanced than the mere production of evidence of the crime." 63 Kan. App. 2d at 371. Rather, the State's burden not only includes the burden of production but also the burden of *persuasion*, and both components must be considered when weighing whether a pretrial ruling substantially impairs the State's ability to move forward with the prosecution of its case. 63 Kan. App. 2d at 371. The court observed that in arguing that Nehrbass could testify to the same events as Romero, Martinez-Diaz' contentions focused on the burden of production. By contrast, the State focused on the burden it carried to persuade the jury of Martinez-Diaz' guilt "'at the beyond-a-reasonable-doubt level of confidence.'" 63 Kan. App. 2d at 371 (quoting *State v. Mukes*, No. 117,082, 2018 WL 4264865, at *6 [Kan. App. 2018] [unpublished opinion]). It found that the State would experience "serious difficulties" in satisfying this burden if forced to rely on Nehrbass' testimony alone. First, her statements were vulnerable to impeachment as a result of her possible inability to accurately perceive and recount the shooting. Further, her testimony could not stand in replacement of Romero's because jurors would conceivably wonder why he was not also testifying against the man alleged to have tried to take his life, and potentially draw a negative inference from that absence—an inference that may in turn cause the jury to penalize the State for its

failure to bring that evidence forward. 63 Kan. App. 2d at 372; see also *State v. Chaney*, 269 Kan. 10, 19, 5 P.3d 492 (2000) ("The jury determination of whether consent was given or was valid requires consideration of all facts surrounding the event, not simply the words spoken.").

A similar analysis informs my decision here. Substantial impairment is not merely a matter of the quantity of the evidence that remains at the State's disposal following the pretrial exclusion, but the *quality* of that evidence. Again, what remains are S.H.'s statements both personally, as well as those made to others on the same subject matter—statements the jury may readily discount when weighed against the considerable number of factors it may perceive as compelling evidence of consent. Thus, going forward with those statements alone may undermine the State's ability to carry its burden of persuasion. The addition of Dr. Murrie's testimony as the only neutral evidence that could possibly be relied upon to determine whether the facts here truly illustrate consensual conduct throughout the duration of the relationship between S.H. and Harris ensures the State is not unfairly compromised in its efforts.

Jurors are instructed that they may rely upon their common knowledge and experience during deliberations, yet Dr. Murrie testified that interest in BDSM relationships exists within only roughly 5% of the population. It is unclear to me how a jury can be tasked with returning a well-deliberated decision on the matter of consent in such an exceptionally unique case when they are deprived of crucial information necessary to yielding the same. I would reverse the decision of the district court.

Some of the earliest cases involving K.S.A. 22-3603 state that it is to enjoy a broad interpretation because "it serves a valid and legitimate public purpose to permit the [S]tate access to appellate review when matters essential to a prosecution are quashed or suppressed prior to trial." *State v. Burnett*, 222 Kan. 162, 167, 563 P.2d 451 (1977); see *Newman*, 235 Kan. at 34. The *Burnett* court further instructed that once avenues of appellate review are established, they "'must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.'" 222 Kan. at 167 (quoting *Williams v. Oklahoma City*, 395 U.S. 458, 459, 89 S. Ct.

1818, 23 L. Ed. 2d 440 [1969]). In my view, the majority's decision fails to honor the broad interpretation the statute was intended to be afforded.

The admission or exclusion of an expert's testimony generally lies within the sound discretion of the district court. *State v. Edwards*, 299 Kan. 1008, 1015, 327 P.3d 469 (2014). A court abuses this discretion if its decision to admit or omit expert testimony is based on an error of law, error of fact, or is so arbitrary that no reasonable jurist would agree. See *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

'"Discretion is the freedom to act according to one's judgment; and judicial discretion implies the liberty to act as a judge should act, applying the rules and analogies of the law to the facts found after weighing and examining the evidence—to act upon fair judicial consideration, and not arbitrarily.'" *Saucedo v. Winger*, 252 Kan. 718, 729-30, 850 P.2d 908 (1993) (quoting *State v. Foren*, 78 Kan. 654, 658-59, 97 P. 791 [1908]). The abuse of discretion '"'is really a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Murray v. Buell et al.*, 74 Wis. 14, 19, 41 N.W. 1010 [1889].)'" *Deeds v. Deeds*, 108 Kan. 770, 774, 196 P. 1109 (1921). I would find the exclusion of Dr. Murrie's testimony is not only unreasonable but runs contrary to the evidence in this case and reverse the decision of the district court.

(551 P.3d 192)

No. 125,566

CITY OF OVERLAND PARK, *Appellee*, v. LEONARD LAGUARDIA, *Appellant*.

SYLLABUS BY THE COURT

1. SEARCH AND SEIZURE—*Traffic Stops—No Extension of Time unless Reasonable Suspicion or Probable Cause*. Traffic stops cannot be measurably extended beyond the time necessary to process the infraction that prompted the stop unless there is a reasonable suspicion of or probable cause to believe the detainee is involved in other criminal activity.

2. POLICE AND SHERIFFS—*Traffic Stop Must Not Be Extended Beyond Reason*. Officers must be careful to ensure that any inquiries of matters beyond the reason for the traffic stop occur concurrently with the tasks permitted for such stops so they will not measurably extend the time it would otherwise take. This is called multitasking. If an officer is not effectively multitasking, these unrelated inquiries—without reasonable suspicion, probable cause, or consent—impermissibly expand the stop beyond what the United States Constitution permits.

3. SEARCH AND SEIZURE—*Justification of Delay of Stop – Focus on Specific Facts That Criminal Activity Taking Place.* The prosecution does not meet its burden by simply proving that the officer believed the circumstances could have formed a reasonable suspicion. Rather, something more than an unparticularized suspicion or hunch must be articulated by the officer. Consistent with this long-standing caselaw, we find that the prosecution does not meet its burden by pointing to factors not articulated by the officer that could have formed a reasonable suspicion in an effort to justify the delay after the fact. The focus must be on the factors, if any, articulated by the officer.

Appeal from Johnson District Court; CHRISTINA DUNN GYLLENBORG, judge. Oral argument held April 11, 2024. Opinion filed July 5, 2024. Reversed and remanded with directions.

Adam D. Stolte, of Stolte Law, LLC, of Overland Park, for appellant.

Melissa Ruttan, assistant city attorney, for appellee.

Before ARNOLD-BURGER, C.J., MALONE and WARNER, JJ.

ARNOLD-BURGER, C.J.: Leonard LaGuardia crashed his car into a guardrail on the highway in snowy conditions. The issue

here is whether the officer had a reasonable suspicion that LaGuardia was intoxicated in order to request that he complete several field sobriety tests in the field. After a review of the evidence and the relevant caselaw, we find that LaGuardia was unlawfully detained and his motion to suppress evidence should have been granted. Accordingly, we reverse his conviction and remand with instructions to suppress, upon retrial, all evidence collected after the officer decided to administer the HGN test.

FACTUAL AND PROCEDURAL HISTORY

In the early morning hours in January 2020, a passerby reported a single-car accident on southbound 69 Highway north of 103rd Street in Overland Park. It had been snowing and sleeting that day, and the roads were slushy and covered with about an inch of snow. Officer Eric Opperman responded to the scene.

When he arrived, he did not see a vehicle. But he did see some debris, including a passenger car bumper, that appeared to be from the car crash. Soon after, a captain notified Officer Opperman that he saw a damaged vehicle leaving the area on a traffic camera. The officer attempted to find the vehicle, eventually locating it on Mastin Street, which is north of 103rd Street. The vehicle was unoccupied, had heavy damage to its front end, damage to its rear end, and was missing its bumper. It also had a flat tire. The car was not covered in snow, indicating that it had been recently driven.

Before Officer Opperman left the vehicle to locate the driver, a tow truck pulled up to retrieve it. The driver of the tow truck told the officer that the owner of the damaged vehicle had asked him to meet him over by the Shell gas station on 103rd Street.

Officer Opperman eventually located the driver, later identified as LaGuardia, after he had been seen on a traffic camera walking on foot away from his car. LaGuardia was on 103rd Street, about 300 yards away from the wrecked car near the Shell gas station—consistent with the tow truck driver's report. The officer began talking to LaGuardia.

LaGuardia confirmed that he was the driver of the car and had been in an accident. He told the officer that he lost control of his

vehicle after sliding in some snow and hit a guardrail. And he explained that he abandoned his vehicle on Mastin Street because he was not comfortable staying in a residential area in front of people's homes. LaGuardia also mentioned that he called a tow truck to retrieve his car, but hoped to get an Uber because he was not sure if the tow truck was coming. LaGuardia himself never reported the accident to law enforcement—it was called in by a passerby.

Officer Opperman asked for LaGuardia's license because he wanted to start a crash report and LaGuardia complied. Rather than start a crash report, the officer ran LaGuardia's license though dispatch. The results showed that LaGuardia had a valid license and no warrants for arrest.

Officer Opperman continued talking to LaGuardia because he had some questions about why he abandoned his car. The officer testified that LaGuardia's story about why he walked away from his car did not make sense to him. It struck Opperman that LaGuardia was attempting to hide that he was impaired when he was driving since LaGuardia did not report the accident to police, but had a valid license, registration, and no arrest warrants. Opperman testified that he was suspicious because of the time of the crash, no other vehicles being involved, and the fact that LaGuardia left the scene. The officer agreed that unless there were injuries from the collision or damage in excess of $1,000, city ordinance did not require that the collision be reported. And the State offered no evidence regarding the value of the damage, and there was no evidence Opperman was injured in the collision. Opperman told LaGuardia that he did not find it suspicious in and of itself that LaGuardia wrecked his car, but he did find it suspicious that LaGuardia left the parked car to meet an Uber.

It is telling that LaGuardia was not charged with failure to report an accident to police or leaving the scene of an accident. It is not unreasonable to conclude that Opperman did not believe LaGuardia violated the law. Again, this conclusion is bolstered by the bodycam video that was introduced at the suppression hearing. The officer actually doubled down on this point when he verified what was on the bodycam video—that he told LaGuardia that he could understand why LaGuardia did not call the police. During

that same discussion, captured on the bodycam video, Opperman told LaGuardia that the fact that he wrecked his car in slushy weather was not a problem or suspicious. But the officer found it suspicious that LaGuardia left the car to meet an Uber, rather than wait in the relative warmth of the parked car for the tow truck to arrive. Opperman never alleged failing to wait for a tow truck in your car was against the law, he just thought it did not make sense.

With no more than a belief that LaGuardia's story about leaving his car to meet an Uber did not make sense, while observing no signs of impairment, Officer Opperman began a driving under the influence (DUI) investigation. He asked LaGuardia to step in front of his police car and perform the Horizontal Gaze Nystagmus (HGN) test.

While conducting the HGN test, Officer Opperman smelled alcohol on LaGuardia's breath. LaGuardia denied having had any drinks that night. At this point, the officer asked LaGuardia to step over to the gas station canopy to get out of the weather, since it was still snowing.

The officer asked LaGuardia to complete two field sobriety tests—the walk-and-turn and the one-leg stand. On the walk-and-turn test, the officer testified that he observed that LaGuardia showed three clues of impairment—raising his arms for balance, stumbling to his right when he made a turn, and failing once to touch his heel to toe. But LaGuardia passed the second test, the one-leg stand. There was no evidence to dispute LaGuardia's claim to the officer that evening that he had problems with his knee, but Opperman admitted he did not take that into consideration in scoring the walk-and-turn test.

After waiting the appropriate amount of time, Officer Opperman asked LaGuardia to submit to a preliminary breath test (PBT) and LaGuardia agreed. Before taking the breath test, LaGuardia admitted, for the first time, to the officer that he had consumed four Corona beers and a mixed shot at a billiards bar in Shawnee between 8:45 p.m. and 11 p.m. LaGuardia also admitted that he left his car because he was concerned that he might be impaired and was scared to stay. LaGuardia was arrested.

LaGuardia agreed to take a blood test and was transported to a hospital. Officer Opperman issued LaGuardia a DUI citation before the blood results came back. The blood test showed that LaGuardia's blood alcohol content was 0.088.

LaGuardia's Motion to Suppress

Before trial, LaGuardia moved to suppress evidence, asserting Officer Opperman lacked reasonable suspicion to start a DUI investigation and he lacked reasonable suspicion to request a PBT. The City responded, arguing that the officer had reasonable suspicion to believe LaGuardia was impaired and to investigate a possible DUI because LaGuardia crashed his car into a guardrail, acted strangely after the accident, and failed to report the accident to police.

The district court held an evidentiary hearing on the motion where Officer Opperman testified, as previously described. In addition, a video of the encounter was admitted into evidence and viewed by the district judge, but unfortunately the video is not contained in the record on appeal for us to review. There was evidence presented at trial regarding the content of the bodycam video, which was not disputed—the same video shown to the district judge at the suppression hearing.

At the hearing, LaGuardia pointed to a report that the officer made after the DUI investigation noting that LaGuardia's eyes looked normal, his speech and walking was normal, and he had orderly clothing and a cooperative attitude. And LaGuardia argued that it was not unreasonable that he did not report the crash because several weeks before, Overland Park made a public safety announcement instructing people not to report noninjury accidents.

The City highlighted LaGuardia's admission to consuming four alcoholic drinks before the PBT was administered and that he failed the walk-and-turn test. It also pointed to the fact that in the officer's training and experience, it can suggest intoxication when a person leaves the scene and does not stay with their vehicle, which LaGuardia did. The City also stated that LaGuardia did not claim that the public safety announcement meant that he should

not have reported his accident during that time frame and because it occurred around 2 a.m.

After considering this evidence, the district court denied LaGuardia's motion to suppress. It found that, under the totality of the circumstances, the officer had reasonable suspicion to conduct a DUI investigation and request that LaGuardia take a PBT.

A jury convicted LaGuardia of operating a vehicle with a blood alcohol content of 0.08 or more as measured within three hours of operating a vehicle. It acquitted him of operating a vehicle while under the influence of alcohol to a degree that rendered him incapable of safely driving a vehicle. The district court sentenced LaGuardia to a year of probation with a 90-day underlying prison sentence and 48 hours in custody. LaGuardia appeals.

ANALYSIS

When a defendant moves to suppress, the State must prove to the district court that the search and seizure was lawful using a preponderance of the evidence standard. *State v. Porting*, 281 Kan. 320, 324, 130 P.3d 1173 (2006). This court reviews factual underpinnings of a district court's decision on a motion to suppress evidence for substantial competent evidence and its ultimate legal conclusion de novo. *State v. Doelz*, 309 Kan. 133, 138, 432 P.3d 669 (2019). If the facts are not disputed, the suppression issue is a question of law which appellate courts review without restraint. *State v. Bickerstaff*, 26 Kan. App. 2d 423, 424, 988 P.2d 285 (1999).

The Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights prohibits unreasonable searches and seizures. U.S. Const. amend. IV; Kan. Const. Bill of Rights, § 15. The United States Supreme Court has interpreted this prohibition to require law enforcement officers who seize or search an individual to have either a warrant or rely on one of the recognized exceptions to the warrant requirement. *State v. Sanders*, 310 Kan. 279, 285, 445 P.3d 1144 (2019) (citing *Riley v. California*, 573 U.S. 373, 382, 134 S. Ct. 2473, 189 L. Ed. 2d 430 [2014]).

One of those exceptions is that a police officer may "stop and briefly detain an individual without a warrant when the officer has

an articulable and reasonable suspicion, based in fact, that the detained person is committing, has committed, or is about to commit a crime." *Sanders*, 310 Kan. at 286; see K.S.A. 22-2402(1); *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). "Reasonable suspicion is a lower standard than probable cause, and '[w]hat is reasonable depends on the totality of circumstances in the view of a trained law enforcement officer.'" *State v. Sharp*, 305 Kan. 1076, 1081, 390 P.3d 542 (2017); *State v. Martinez*, 296 Kan. 482, 487, 293 P.3d 718 (2013). The totality of the circumstances includes consideration of the quantity and quality of the evidence—in other words, the court must account for the whole picture. *State v. Pollman*, 286 Kan. 881, 890, 190 P.3d 234 (2008); *State v. Toothman*, 267 Kan. 412, Syl. ¶ 5, 985 P.2d 701 (1999).

"[I]n addition to being justified at its inception, a lawful stop must be reasonably related in scope to the circumstances justifying the interference in the first place." *State v. Jimenez*, 308 Kan. 315, 323, 420 P.3d 464 (2018) (citing *Terry*, 392 U.S. at 20). Traffic stops cannot be measurably extended beyond the time necessary to process the infraction that prompted the stop unless there is a reasonable suspicion of or probable cause to believe there is other criminal activity. 308 Kan. at 324. The information required for a traffic investigation usually includes "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Rodriguez v. United States*, 575 U.S. 348, 355, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015). Investigation into other crimes "diverts from that mission and cannot become a permissible *de minimis* intrusion" unless the officers have facts causing them to suspect that some other crime has been committed. *Jimenez*, 308 Kan. at 317 (citing *Rodriguez*, 575 U.S. at 355-57). Officers must be careful to ensure that any inquiries of matters beyond the reason for the traffic stop occur concurrently with the tasks permitted for such stops so they will not measurably extend the time it would otherwise take. 308 Kan. at 326. This is called multitasking. If an officer is not effectively multitasking, these unrelated inquiries—without reasonable suspicion, probable cause, or consent—impermissibly expand the stop beyond what the Constitution permits. 308 Kan. at 325-26.

So once the seizure takes place, an officer may expand the investigative detention beyond the duration necessary to fulfill the purpose of the *initial* stop only if there is an objectively reasonable and articulable suspicion that criminal activity was or is taking place. *State v. Jones*, 300 Kan. 630, 641, 333 P.3d 886 (2014).

The United States Supreme Court has explained that the prosecution does not meet its burden by simply proving that the officer believed the circumstances *could* have formed a reasonable suspicion. Rather, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. "Something more than an unparticularized suspicion or hunch must be articulated." *State v. DeMarco*, 263 Kan. 727, 735, 952 P.2d 1276 (1998). Consistent with this long-standing caselaw, we find that the prosecution cannot meet its burden by pointing to factors not articulated by the officer that *could* have formed a reasonable suspicion in an effort to justify the delay after the fact. The focus must be on the factors, if any, articulated by the officer.

There is no dispute here that the officer had reasonable suspicion to investigate LaGuardia's involvement in the single car crash into the guardrail. The issue is whether the officer unreasonably extended the scope of the stop to include a DUI investigation.

LaGuardia argues that Officer Opperman lacked reasonable suspicion to extend the stop from a crash report to a DUI investigation. He claims that the officer investigated LaGuardia for DUI only because he abandoned his vehicle after the accident in snowy conditions. LaGuardia argues that the officer did not notice any signs of impairment or smell alcohol on his breath before he started the DUI investigation, but only thought he was trying to hide something. In other words, Opperman acted off a hunch, or something less, which falls short of reasonable suspicion. *Pollman*, 286 Kan. at 890 (an unparticularized hunch is not reasonable suspicion). We agree.

At the point the officer extended the stop, the undisputed facts presented at the suppression hearing were as follows.

At 2 a.m., LaGuardia crashed his car into a guardrail, drove his heavily damaged car away from the scene of the accident to a secondary location, called a tow truck, and then abandoned his car

on foot in the snow to meet an Uber driver. Once the police encountered LaGuardia, the officer observed that LaGuardia had a normal attitude and appearance. He did not smell alcohol on LaGuardia's breath. His speech was not slurred, his eyes were not bloodshot, his balance, coordination, and communication skills were all normal. He had not made any other observations regarding LaGuardia's demeanor at that point that would suggest intoxication. LaGuardia had a valid driver's license. No warrants were out for his arrest, and he was taken at his word that he had valid insurance coverage. The officer unequivocally testified that the only reason he continued to detain LaGuardia was "just that his story didn't make sense to me. It appeared that he was hiding something." He continued the detention and investigation because he just wanted to "see." He articulated no other reason.

We must take the officer at his word and not try to point to other reasons after the fact that *could* have justified his continued detention. Although he stated his deep concern that it was suspicious that LaGuardia left the scene, he did not charge LaGuardia with any traffic offenses related to leaving the scene—which would have revealed criminal activity. So it could not be said that the stop could have been extended to issue a traffic ticket—therefore he did not measurably extend the stop to conduct the HGN test—because Opperman did not identify *any* traffic infraction warranting a citation at that point, nor did he indicate any intent to issue one.

The dissent and the State try to articulate a reason for Opperman after the fact to justify the delay. "Opperman's decision to conduct a DUI investigation stemmed from his training and experience and was based on the exercise of his commonsense judgment and inferences about human behavior." 64 Kan. App. 2d at 478. But this is not what Opperman said. There was no testimony that his training and experience led him to believe that if someone does not wait in their car for a tow truck in the cold, when there is no indication about how long it will be before the tow truck can arrive in snowy conditions, that the person must be intoxicated. He did not indicate that he had experienced this situation before and such drivers were intoxicated—thereby justifying his suspicion. He did not testify that his training included this situation. He

said *part* of his job was to investigate traffic accidents. He did not present any testimony regarding how many accidents he had investigated and what percentage of the accidents he investigated involved intoxicated drivers. He said in eight-and-a-half years he had been involved in approximately 30 DUI arrests or—at the most—4 per year. We do not know if those involved accidents or people trying to hide the fact that they were intoxicated by walking away from their car. There was no indication that his limited experience elevated his suspicion to one that was objectively reasonable based on the totality of the circumstances as viewed by a trained law enforcement officer. See *Sharp*, 305 Kan. at 1081.

Officer Opperman acted solely based on a hunch, nothing more. In his own words, he just wanted to "see." Thus, the district court erred in denying LaGuardia's request to suppress all evidence collected after the DUI investigation began. See *Wong Sun v. United States*, 371 U.S. 471, 484-87, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (Evidence obtained as the result of a Fourth Amendment violation is inadmissible and must be suppressed.).

Because we find that there was no basis to expand the lawful seizure into a DUI investigation, we need not consider LaGuardia's alternative argument that the officer had no basis to request that he submit to a PBT.

We reverse and remand with instructions to suppress, upon retrial, all evidence collected after the officer decided to administer the HGN test.

Reversed and remanded with directions.

* * *

MALONE, J., dissenting: I respectfully dissent. Although this case may present a close question, I would find that Officer Eric Opperman had reasonable suspicion to investigate Leonard LaGuardia for driving under the influence (DUI). I would also find that Opperman had reasonable suspicion to request that LaGuardia submit to a preliminary breath test (PBT). Thus, I would affirm the district court's judgment denying LaGuardia's motion to suppress the evidence.

The Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Kan. Const. Bill of Rights, § 15. These rights are fundamental and must be safeguarded by the courts. The Kansas Supreme Court has long held that the search and seizure provisions of the Kansas and United States Constitutions are similar and provide the same rights and protections. See, e.g., *State v. Neighbors*, 299 Kan. 234, 239, 328 P.3d 1081 (2014).

A traffic stop is a seizure triggering Fourth Amendment protections. *State v. Thompson*, 284 Kan. 763, Syl. ¶ 6, 166 P.3d 1015 (2007). In the landmark case of *Terry v. Ohio*, 392 U.S. 1, 20-23, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the United States Supreme Court held that a law enforcement officer may detain and briefly question a person without a warrant if the officer has reasonable suspicion that the person has committed, is committing, or is about to commit a crime. This law is codified in Kansas at K.S.A. 22-2402(1). In *Terry*, a plain-clothed police officer observed two men in the middle of the afternoon pacing back and forth in front of retail stores on a public street. Occasionally, the men peered inside the same store window. This activity went on for about 10 or 12 minutes until the men started to walk away. Although the officer observed no criminal activity, he testified that the men "'didn't look right to me at the time.'" 392 U.S. at 5. The officer suspected the men were "'casing a job, a stick up'" and feared "'they may have a gun.'" 392 U.S. at 6. The officer approached the men, identified himself as a police officer, and asked for their names. When the men "'mumbled something'" in response to his inquiries, the officer patted them down for weapons and found a gun in Terry's pocket. 392 U.S. at 7. Terry was convicted of carrying a concealed weapon, and the United States Supreme Court upheld the conviction finding the officer had reasonable grounds to stop the men and perform a limited search for weapons. 392 U.S. at 30-31.

LaGuardia's case does not focus on whether Opperman had reasonable suspicion to *initiate* a traffic stop, but it involves the *extension* of a traffic stop to investigate criminal activity beyond the initial purpose of the stop. "An officer may extend a traffic

stop beyond the duration necessary to fulfill the purpose of the stop when a detainee's responses and the surrounding circumstances give rise to an objectively reasonable and articulable suspicion that criminal activity is occurring." *State v. Cash*, 313 Kan. 121, Syl. ¶ 4, 483 P.3d 1047 (2021). Thus, the issue here is whether Opperman reasonably extended the initial scope of the traffic stop—to investigate LaGuardia's involvement in the single car crash into a guardrail—to include a DUI investigation.

Reasonable suspicion does not conform to a concise definition or a precise quantification. It is a lower standard than probable cause, and "[w]hat is reasonable depends on the totality of the circumstances in the view of a trained law enforcement officer." *State v. Sharp*, 305 Kan. 1076, 1081, 390 P.3d 542 (2017). The reasonable suspicion analysis requires the use of an objective standard, not a subjective standard based on the officer's personal belief. *Cash*, 313 Kan. at 130. A police officer must point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an investigatory detention. *Terry*, 392 U.S. at 21. "[T]he determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000); see also *Kansas v. Glover*, 589 U.S. 376, 381, 140 S. Ct. 1183, 206 L. Ed. 2d 412 (2020) (holding that deputy's commonsense inference that the owner of a vehicle was likely the vehicle's driver provided reasonable suspicion to initiate a traffic stop). We make our determination with deference to a trained officer's ability to distinguish between innocent and suspicious circumstances. *Sharp*, 305 Kan. at 1081. To show reasonable suspicion for an investigatory stop, the State need not rule out the possibility that the suspect is engaged in innocent conduct. *Wardlow*, 528 U.S. at 125.

Turning to our facts, Opperman is a law enforcement officer with specific training and years of experience in detecting drivers impaired by alcohol consumption. Opperman testified that he first smelled the odor of alcohol on LaGuardia's breath when he began to perform the horizontal gaze nystagmus (HGN) test. But this fact cannot be considered in the reasonable suspicion calculus because the HGN test was already part of the DUI investigation. We must

rely only on articulated facts that existed before Opperman extended the traffic stop to investigate a possible DUI.

The first relevant fact is that LaGuardia had crashed his car into a guardrail in a snowstorm. Opperman later testified that this fact was not suspicious "[i]n and of itself." But it is the first fact to consider under the totality of the circumstances. Next, the accident happened at about 2 a.m. Opperman testified that based on his training and experience, intoxicated driving is more likely to happen at night. This observation is probably also a commonsense deduction.

Next, LaGuardia drove his heavily damaged vehicle with a missing bumper and a flat tire to a different location, rather than remaining at the scene of the accident. LaGuardia did not report his accident to the police, it was reported by a passerby. After LaGuardia parked his wrecked vehicle on a side street, he abandoned his car and walked in a snowstorm toward a gas station to wait for the tow truck he had called. Opperman testified that he thought it was suspicious that LaGuardia drove away from the crash scene, and he thought it was suspicious that LaGuardia did not wait in his car.

When Opperman eventually located LaGuardia, he learned that he had a valid driver's license and registration—all the more reason for LaGuardia not to have been afraid to report the accident. Opperman saw no immediate signs of alcohol impairment from LaGuardia's appearance. But based on Opperman's training and experience, he suspected that LaGuardia was trying to hide the fact that his impaired driving contributed to the accident. These facts lead Opperman to pursue a DUI investigation.

Opperman did not need to observe any criminal activity to investigate LaGuardia for DUI. He only needed to reasonably suspect that LaGuardia had committed a DUI. Perhaps an appellate court finds nothing suspicious about LaGuardia driving his heavily damaged vehicle away from an accident on a flat tire. But Opperman saw it differently. When asked why he began a DUI investigation, Opperman responded:

"Based off of the crash at 2 a.m., no other vehicles involved and leaving the scene. It was clear he was trying to hide something. He had a valid license, the

car was registered to him, he didn't have any warrants. Based on that, I suspected he was trying to hide that he was impaired at the time he was driving."

A hunch is "a guess or feeling not based on known facts." Webster's New World College Dictionary 710 (5th ed. 2018). Opperman's decision to pursue a DUI investigation was based on more than a hunch. He articulated specific facts that caused him to draw a rational inference as to why he suspected LaGuardia of committing a DUI. See *Terry*, 392 U.S. at 21. Even though there may have been an innocent explanation for some of LaGuardia's conduct, Opperman reasonably inferred from the facts before him that LaGuardia was trying to hide the fact that his impaired driving may have contributed to his car accident. Of course, this is precisely what LaGuardia later admitted he was doing, but the fact that Opperman was correct in hindsight cannot justify his actions.

A law enforcement officer needs probable cause that a crime has been committed to make an arrest. But for an officer to briefly detain a suspect to investigate possible criminal activity requires much less. Opperman's decision to conduct a DUI investigation stemmed from his training and experience and was based on the exercise of his commonsense judgment and inferences about human behavior. See *Wardlow*, 528 U.S. at 125. Although courts must decide the constitutional bounds, we should give some deference to a trained officer's ability to distinguish between innocent and suspicious circumstances in determining whether reasonable suspicion exists. See *Sharp*, 305 Kan. at 1081. Considering the totality of the circumstances, I would find that Opperman had a reasonable and objective suspicion to investigate LaGuardia for DUI. This finding is based only on the factors articulated by Opperman and is not based on any other factors that could have formed a reasonable suspicion but were not articulated by the officer.

The second issue is whether Opperman had reasonable suspicion to request that LaGuardia submit to a PBT. This issue is not close. In addition to the suspicious facts that caused Opperman to begin the DUI investigation, by the time Opperman asked LaGuardia to submit to a PBT, Opperman had smelled the odor of alcohol on LaGuardia's breath, LaGuardia had exhibited one clue on the one-leg stand test, and he had exhibited three clues on the

walk-and-turn test, which amounted to a test failure. These facts provided Opperman with reasonable suspicion to request that LaGuardia submit to a PBT. See K.S.A. 8-1012(a).

I would affirm the district court's judgment denying LaGuardia's motion to suppress the evidence.

In re B.H.

(550 P.3d 1274)

No. 126,487

In the Interest of B.H., a Minor Child.

SYLLABUS BY THE COURT

1. PARENT AND CHILD—*Due Process Clause – Parent's Relationship with Child Is Protected Liberty Interest---Fundamental Right Continues Throughout CINC Case*. The Due Process Clause of the Fourteenth Amendment to the United States Constitution recognizes a parent's relationship with his or her child is a protected liberty interest. This liberty interest acknowledges a parent's right to make decisions regarding the child's care, custody, and control. This fundamental right remains intact during a child in need of care (CINC) case. Even if a parent has his or her child removed from the parent's custody during a CINC case, the parent's liberty interest is upheld unless a court terminates parental rights. Consequently, throughout a CINC case, a parent's fundamental liberty interest requires procedural due process.

2. SAME—*Due Process Requirements—Notice and Opportunity to Be Heard.* The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. This is particularly important in an adversarial setting such as a parental rights termination hearing. These two facets of due process—notice and an opportunity to be heard—ensure that a parent's fundamental rights are not terminated without procedural due process.

3 SAME—*Statutory Right to Counsel of Indigent Parents—Courts Required to Appoint Lawyers for Indigent Parents in CINC Cases.* Indigent parents have a statutory right to counsel. As such, courts are statutorily required to appoint lawyers for indigent parents in a child in need of care case. This statutory right to counsel remains with the parent facing the termination of their parental rights.

4. SAME—*Children's Right to Permanency within Reasonable Time Frame—Difference between Adult Time and Child Time.* Children have a right to permanency within a time frame reasonable to them. The Legislature recognized the difference between adult and child time because a child perceives time differently than adults. Consequently, the Kansas Code for Care of Children, K.S.A. 38-2201 et seq., specifically sets out an essential objective: CINC proceedings should be disposed of without any unnecessary delay.

5. SAME—*Right of Indigent Parent to Appointed Counsel—Focus of Justifiable Dissatisfaction Inquiry with Attorney—Factors for Court to Review.* In

determining whether a court should appoint new counsel in a CINC proceeding, an indigent parent must show justifiable dissatisfaction with his or her appointed counsel. The focus of a justifiable dissatisfaction inquiry is the adequacy of counsel in the adversarial process, not the parent's perception or view of his or her attorney. As such, a party demonstrates justifiable dissatisfaction by showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communications between client and counsel. In making this determination, the district court must conduct some sort of investigation.

6. SAME—*Parent's Motion for New Counsel or Motion to Withdraw by Attorney—Heightened Scrutiny by Court to Ensure Unnecessary Delay.* Courts should thoroughly inquire about a parent's motion for new counsel or an attorney's motion to withdraw from representing a parent to ensure that the case proceeds toward a timely resolution for the child. This heightened scrutiny works in harmony with the Kansas Code for Care of Children's expressed policy of disposing of proceedings without unnecessary delay.

Appeal from Jackson District Court; NORBERT C. MAREK JR., judge. Submitted without oral argument. Opinion filed July 5, 2024. Reversed and remanded with directions.

Rebekah A. Phelps-Davis, of Phelps-Chartered, of Topeka, for appellant natural mother.

Kevin M. Hill, assistant county attorney, for appellee.

Before CLINE, P.J., ATCHESON and PICKERING, JJ.

PICKERING, J.: We have recognized without hesitation that a parent's relationship with his or her child is a protected liberty interest. This liberty interest, which stems from the Due Process Clause of the Fourteenth Amendment to the United States Constitution, acknowledges a parent's right to make decisions regarding the child's care, custody, and control. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *In re Cooper*, 230 Kan. 57, 64, 631 P.2d 632 (1981). This fundamental right remains intact during a child in need of care (CINC) case. Even if a parent has his or her child removed from the parent's custody during a CINC case, the parent's liberty interest is upheld unless a court terminates parental rights. Consequently, throughout a CINC case, a parent's fundamental liberty interest requires procedural due process. See *In re J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007).

It is also without question that the essential elements of due process of law are notice and an opportunity to be heard in an orderly proceeding as dictated by the nature of the case. *In re J.D.C.*, 284 Kan. at 166. This is particularly important in an adversarial setting such as a parental rights termination hearing. Indeed, those two facets of due process—notice and an opportunity to be heard—ensure that a parent's fundamental rights are not terminated without procedural due process.

Along with the fundamental rights of a parent is a child's right to permanency and stability. Undoubtedly, "children have a right to permanency within a time frame reasonable to them." *In re M.H.*, 50 Kan. App. 2d 1162, 1170, 337 P.3d 711 (2014). The Legislature recognized and stated the difference between adult and child time, as a child perceives time differently than adults. *In re E.L.*, 61 Kan. App. 2d 311, 328, 502 P.3d 1049 (2021); see K.S.A. 38-2269(a). Consequently, the Kansas Code for Care of Children (Code), K.S.A. 38-2201 et seq., specifically sets out an essential objective: CINC proceedings should be disposed of without any unnecessary delay. K.S.A. 38-2201(b)(4). This objective is met through the orderly procession of hearings within the "timetable of CINC proceedings." See *In re J.A.H.*, 285 Kan. 375, 386, 172 P.3d 1 (2007).

In this case, the district court allowed counsel for K.H. (Mother) to withdraw with minimal inquiry and denied Mother's motion to continue the termination hearing and appoint new counsel. The court then simultaneously ordered the termination hearing to proceed and ordered Mother to serve as her own attorney. This was done despite Mother not waiving her right to counsel, not receiving any notice that she would have to represent herself, and not given time to prepare.

K.H. appeals the district court's termination of her right to parent B.H. (born in 2012). She contends that the district court violated her right to due process because the court allowed her appointed attorney to withdraw based on Mother's allegations of ineffective assistance of counsel, denied her motion to continue to obtain new counsel, and proceeded to conduct an evidentiary hearing on the termination of Mother's parental rights while she was without counsel. Mother further contends that the district court

lacked clear and convincing evidence of her unfitness before it terminated her parental rights. Finally, she argues that the district court abused its discretion in finding that termination of her parental rights was in the best interests of B.H.

A CINC CASE RESULTS IN THE TERMINATION OF MOTHER'S PARENTAL RIGHTS

On March 16, 2021, the Jackson County Attorney filed a petition, alleging that B.H. was a child in need of care (CINC). While the petition and subsequent hearings involved both B.H.'s father, S.A. (Father), and B.H.'s mother, K.H. (Mother), Father is not a party to this appeal, and we focus our discussion only on Mother. The district court ordered B.H. to be placed in the custody of the Department for Children and Families (DCF) in out-of-home placement. The child, B.H., was adjudicated as a CINC on April 15, 2021, and at the following disposition hearing, the court adopted the permanency plan of reintegration, and it ordered B.H. to remain in DCF custody in out-of-home placement. One of the court's orders was for Mother to submit to a comprehensive psychological and parenting evaluation, which was later conducted by Dr. J. Stephen Hazel, a licensed psychologist. At the November 18, 2021 permanency hearing, the district court adopted a dual goal of reintegration/adoption for the permanency plan.

The district court held another permanency hearing on January 20, 2022, at which time it found that reintegration was not a viable option and ordered KVC Behavioral Healthcare, the agency responsible for the care of children served by DCF, to submit a report to the County Attorney outlining factors supporting termination of parental rights. On June 2, 2022, the State filed a motion to terminate both parents' rights and alleged that Mother had failed in achieving her case plan tasks.

The district court scheduled a termination hearing for October 5, 2022. On September 22, 2022, Mother filed a pro se motion requesting new counsel and a motion stating that she wanted to appeal the decision to change the case plan to adoption because she had ineffective assistance of counsel at that time. Mother's attorney moved to withdraw on September 27, 2022, citing a con-

flict, and filed a motion for continuance of the termination hearing. Without a hearing, the district court granted the withdrawal on October 3, 2022. The district court appointed a second attorney for Mother.

The district court rescheduled the termination hearing to January 30, 2023. Two weeks before the hearing, Mother's second attorney moved to withdraw, stating that Mother "persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." Mother's attorney also filed for a continuance of the termination hearing. There was no hearing on the attorney's motion to withdraw. The district court allowed the withdrawal and reset the termination hearing to March 16, 2023. The district court appointed Mother her third attorney on January 30, 2023. At a later point, at the request of Mother's attorney, the termination hearing was rescheduled for May 18, 2023.

On May 17, 2023, Mother filed a pro se motion claiming ineffective assistance of counsel. Her motion stated: "(1) I feel he's not representing me to his best of ability[;] (2) He doesn't want to manage the case, how I want to[;] (3) He fails to prioritize my case."

That same day her third attorney moved to withdraw based on a conflict. At the termination hearing on May 18, 2023, the district court considered Mother's motion to remove her attorney and granted the attorney's motion to withdraw.

In consideration of Mother's motion to remove her third attorney, the district court stated:

"In the Court's view, given what's happened in this case, it appears to be simply another delay tactic by you. You know how to get rid of attorneys, and you've done it. And, so, the Court is forced to say, well, when do we move forward with this case? I appoint another attorney; they are gonna withdraw, because you're gonna pull this again. . . . The attorneys, as I look back, that you have had have all been very experienced in this area of the law, have done numerous cases. So I don't see how I can appoint an attorney that is gonna be satisfactory and us be here in 90 days, because that's what we're talking about, and that lawyer gets relieved of duty, and we continue it again. What, we're gonna just continue this till [B.H.] is an adult?"

When Mother tried to speak, the district court cut her off: "No. You are gonna listen to me for a little bit here because this is

where we are with this. And I will give [your attorney] some choice in this, but I'm inclined to grant his motion, and you can represent yourself in this matter."

The district court did not consider continuing the termination hearing for Mother to obtain new counsel: "I am not going to continue to do this. I don't think I have to when the Court sees this as what I believe to be an obvious technique to continue these matters effectively forever." The court continued, "So I'm just letting you know, if [your attorney] withdraws, you are gonna represent yourself today. We are going to move forward with this case."

Mother attempted to clarify her reasons for wanting her attorneys to be removed, but the district court interrupted her and stated, "One, it's not your attorney's job for them to do exactly what you tell them to do. They have to stay within their ethics, and they have to litigate the case based on their decisions." The court then stated, "Your comments are welcome, but you are not running the case, and you don't get to tell the attorneys, I demand that you do this or that. That's what you're saying in what you filed. You don't understand."

The district court then asked Mother, "So with regard to an attorney, then, are you prepared to proceed without representation today?" Mother said, "No. I don't think it's fair I should have to proceed without proper representation." The district court reiterated that it was not continuing the hearing given that Mother had had three attorneys.

Mother protested, "He doesn't care to represent me, though. I mean his exact words were, 'if I am stuck representing you.'" The district court then asked the attorney if he still felt it was appropriate to withdraw, to which he said, "Yes." The district court excused Mother's attorney and proceeded with the hearing to terminate her parental rights.

The State's first witness was Dr. Hazel, who had provided psychological testing and a parenting assessment on Mother. His findings were contained in a 20-page report, State's exhibit No. 1, which was admitted into evidence. The report mentioned that Mother's history of instability and substance abuse reflected concerns whether she could consistently meet B.H.'s needs and place

his needs above her own. Dr. Hazel had a particular concern that Mother blamed others and minimized her own faults.

When it came time for Mother to cross-examine Dr. Hazel, the district court asked Mother if she had any questions for Dr. Hazel. Mother replied, "This is the first time I've seen this report. I don't know how you expect me to even be able to go over or ask him anything based off his report when this is the first time I've ever even got to see this report." The district court asked again if Mother had any questions to ask the doctor. "Yeah, I do, but I don't know how to ask them," Mother said. The district court replied, "You say you have questions. Then just ask them as they come into your head." Mother said, "I don't see how that's gonna be fair at all." Ultimately, Mother declined to examine Dr. Hazel.

At that point in the hearing, Mother attempted to leave the courtroom. The district court asked, "[Mother], where are you going?" Mother said, "I have to leave. I don't know how to do this. I don't know how to represent myself." To which the district court replied, "Okay. You are not leaving this courtroom." Mother said, "I don't know how to do this. . . . I don't know what to do here to represent myself. I have no idea." The district court stated, "Well, we'll continue."

The State then called its second witness, Zoe Mulkey, a KVC case manager who had been assigned to B.H.'s case since April 2022. Mulkey testified that Mother had not been successful in completing her case plan objectives. While Mother was cross-examining Mulkey, Mother attempted to introduce evidence that she passed a drug test, but the district court told her she would have an opportunity to present evidence later. Mother responded, "I don't know how it works; I'm sorry." To which the district court replied, "Well, I just explained it to you."

At the close of the State's case, the district court asked Mother if she had any witnesses to call. Mother suggested that she wanted to call witnesses, but her attorney had not subpoenaed anyone, and none were present. Mother testified on her own behalf. She was without counsel to object when she provided testimony via cross-examination and did not conduct any redirect testimony. After Mother's testimony, she rested and presented no other witnesses. The parties were offered to present closing arguments. When the

court asked Mother for her closing argument, she responded: "I don't think it matters what I'm gonna say, because people's minds have already made up, so, no." The district court ruled from the bench and terminated Mother's parental rights. Mother now appeals.

WE ANALYZE MOTHER'S DUE PROCESS ARGUMENTS

Preservation

Mother argues on appeal that we can infer from her words that if she was forced to represent herself in the termination hearing, then she would be denied due process. But Mother did not argue to the district court that her constitutional rights were being violated. As a general rule, we do not review constitutional grounds for reversal raised for the first time on appeal. *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014).

There are at least three exceptions to this rule, including "the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; . . . consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights;" and the district court is right for the wrong reason. *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008).

To invoke an exception to the general rule, an appellant is required to explain why an issue was not raised in district court and provide at least one reason why the court should consider the unpreserved issue. See Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36).

Mother argues that this issue was raised in district court when she stated the hearing was unfair and she was unable to act as her own attorney and our consideration of this issue is necessary to serve the ends of justice or to prevent the denial of her fundamental rights. She asserts that the district court's decision to deny a continuance and require that she proceed with the termination hearing without counsel amounted to a denial of a fair hearing, specifically that she was denied her right to be heard at a meaningful time in a meaningful manner. Mother has complied with Rule 6.02(a)(5).

Over 100 years ago, the United States Supreme Court in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." And in 1925, the United States Supreme Court recognized a parent's constitutional rights "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925).
Our highest court has also recognized that a parent has a fundamental liberty interest, protected by the Fourteenth Amendment, in making decisions regarding the care, custody, and control of the parent's child. Before a parent can be deprived of these parental rights, the parent is entitled to due process of law. *Troxel*, 530 U.S. at 65-66. Undoubtedly, a parent has a constitutionally recognized fundamental right to a parental relationship with his or her child. See *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re B.D.-Y.*, 286 Kan. 686, 697-98, 187 P.3d 594 (2008).

The United States Supreme Court has also stated that there was no dispute "'that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause.'" *Santosky*, 455 U.S. at 753; *Lassiter v. Department of Social Services*, 452 U.S. 18, 37, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (Blackmun, J., dissenting). Our Supreme Court agrees. See *In re P.R.*, 312 Kan. 767, 778, 480 P.3d 778 (2021). We find this is a matter of the potential denial of Mother's fundamental rights. Thus, we will consider her arguments.

Standard of Review

"The question of whether due process has been violated in a particular case is one of law, reviewable de novo on appeal." *In re J.D.C.*, 284 Kan. 155, Syl. ¶ 7.

We Analyze Whether Mother's Due Process Rights Were Violated

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *In re J.D.C.*, 284 Kan. at 166. "Due process is not a static concept; instead,

its requirements vary to assure the basic fairness of each particular action according to its circumstances." *Kempke v. Kansas Dept. of Revenue*, 281 Kan. 770, 776, 133 P.3d 104 (2006); *In re J.L.D.*, 14 Kan. App. 2d 487, 490, 794 P.2d 319 (1990).

Mother contends that the district court's denial of her continuation motion, ordering the parental termination hearing to begin that same day, and ordering her to appear pro se despite no waiver of her statutory right to counsel nor any ability for her to effectively participate, resulted in an unfair parental termination hearing and a violation of Mother's due process rights. As such the result of denying the continuance and proceeding to a termination hearing without representation of counsel was a denial of her opportunity to be heard and to defend in her parental termination hearing. The State frames this issue as whether the district court abused its discretion in denying mother's continuation motion.

A Due Process Analysis

When evaluating a due process claim, appellate courts first determine "whether a fundamental liberty or property interest is implicated. If so, [the court] must then determine the nature and extent of process that is due." *In re J.L.*, 57 Kan. App. 2d 60, 64, 449 P.3d 762 (2019).

As referenced above, the Fourteenth Amendment forbids state governments from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Therefore, the question presented is what process is due? What rights are due under the due process clause "depends on the specific circumstances." *In re J.L.*, 57 Kan. App. 2d at 64-65. "A due process violation exists . . . when a claimant is able to establish that he or she was denied a specific procedural protection to which he or she was entitled." *In re J.D.C.*, 284 Kan. at 166. The Due Process Clause gives an indigent parent in a CINC case a right to counsel in some cases. See *Lassiter*, 452 U.S. at 27-28.

In *Lassiter*, the United States Supreme Court stated: "The case of *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 [1976], propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Lassiter*, 452 U.S.

at 27. The *Lassiter* Court instructs that "[w]e must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." 452 U.S. at 27.

Following *Lassiter*, Kansas courts adopted the three-part balancing test from *Mathews* to determine the nature and extent of what due process requires. *In re J.D.C.*, 284 Kan. at 166-67. Accordingly, we apply the *Mathews* factors in this CINC proceeding. The factors in this balancing test are:

"'(1) the individual interest at stake;
"'(2) The risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and
"'(3) The State's interest in the procedures used, including the fiscal and administrative burdens that any additional or substitute procedures would entail. [Citation omitted.]'" *In re J.L.*, 57 Kan. App. 2d at 65.

In applying these factors, we are mindful that a parent has a statutory right to counsel. K.S.A. 38-2205(b)(1). These factors are examined below.

1. *The Individual Interest at Stake*

The United States Supreme Court's decisions "have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter*, 452 U.S. at 27.

Candidly, the *Lassiter* Court recognizes the conflicting interests of the State and the parent: "Here the State has sought not simply to infringe upon that interest but to end it. If the State prevails, it will have worked a unique kind of deprivation." *Lassiter*, 452 U.S. at 27; cf. *May v. Anderson*, 345 U.S. 528, 533, 73 S. Ct. 840, 97 L. Ed. 1221 (1953); *Armstrong v. Manzo*, 380 U.S. 545, 549-50, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one." *Lassiter*, 452 U.S. at 27.

Our own Supreme Court has recognized a parent's fundamental liberty interest in the relationship with his or her children: "We agree that the termination of parental rights is an extremely serious matter and may only be accomplished in a manner which assures maximum protection to all of the rights of the natural parents and of the child involved." *In re A.W.*, 241 Kan. 810, 814, 740 P.2d 82 (1987); see *In re B.D.-Y.*, 286 Kan. at 697-98. And another panel of our court recognized that "the private rights affected by governmental action are very significant and are entitled to the highest protection from unwarranted governmental action." *In re J.L.*, 20 Kan. App. 2d 665, 671, 891 P.2d 1125 (1995). That interest is at stake in parental termination proceedings. This factor thus weighs in Mother's favor.

2. *The Risk of Erroneous Deprivation of the Interest Through the Procedures Used and the Probable Value of Additional or Substitute Procedural Safeguards*

For this next factor, the evident risk here is that Mother will be deprived of her fundamental rights as a parent without proper procedural protections. We will focus on the court's rulings regarding: the attorney's motion to withdraw; Mother's motion for a continuance and to seek new counsel; and the unexpected order that Mother must represent herself.

An indigent parent's statutory right to counsel

In understanding the procedural safeguards in place for parents in a CINC case, particularly a parental termination rights hearing, we must begin with the undeniable rule that an indigent parent in a CINC case has—at minimum—the statutory right to counsel. This right can be found under K.S.A. 38-2205(b)(1), which states in relevant part:

"(b) *Attorney for parent or custodian*. A parent of a child alleged or adjudged to be a child in need of care may be represented by an attorney, in connection with all proceedings under this code. At the first hearing in connection with proceedings under this code, the court shall distribute a pamphlet, designed by the court, to the parents of a child alleged or adjudged to be a child in need of care, to advise the parents of their rights in connection with all proceedings under this code.

(1) If at any stage of the proceedings a parent desires but is financially unable to employ an attorney, the court shall appoint an attorney for the parent. . . . A parent or custodian who is not a minor, a mentally ill person or a disabled person may waive counsel either in writing or on the record."

This statute makes clear that courts are required to appoint lawyers for indigent parents facing the termination of their parental rights.

The court's ruling on Mother's motion for new counsel and the attorney's motion to withdraw

The day before the termination hearing, Mother filed a "Motion of Ineffective Counsel," stating she feels "he's not representing me to his best of ability" and "He doesn't want to manage the case, how I want to" and "He fails to prioritize my case."

Later that same day, Mother's counsel responded by filing a motion to withdraw, stating that due to Mother's motion, which alleged "multiple violations of the Kansas Code of Professional Conduct," he should be allowed to withdraw. Our review of the record indicates that the district court did little to inquire about the nature of the alleged conflict between Mother and her attorney before allowing the attorney to withdraw and ordering Mother to represent herself. The court stated, "No. You are gonna listen to me for a little bit here because this is where we are with this. And I will give [your attorney] some choice in this, but I'm inclined to grant his motion, and you can represent yourself in this matter."

Mother's statements highlight her concerns that her attorney was not advocating on her behalf. She was expressing her dissatisfaction with her assigned counsel and asking for new counsel.

The court's duty to adequately inquire about a parent's dissatisfaction with assigned counsel

In a CINC appeal, we should look to the standards and procedures used in criminal cases when considering a parent's appellate challenge of the district court's denial of a motion for new counsel. See *In re C.D.A.*, No. 108,903, 2013 WL 3491303, at *5 (Kan. App. 2013) (unpublished opinion). We can find guidance from our review of criminal cases discussing what a defendant is required

to show to warrant new counsel as well as a district court's duty to investigate a potential attorney/client conflict.

More profoundly, a criminal case and a CINC case both involve fundamental liberty interests and share in a heightened due process standard. Naturally, because of "the greater interests at stake," criminal cases have the highest standard of proof—beyond a reasonable doubt. *In re B.D.-Y.*, 286 Kan. at 691. Just as important, in a CINC case, "'the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."'" 286 Kan. at 697 (quoting *Santosky*, 455 U.S. at 756). As shown in the required higher standards of proof, each involve the potential loss of a respective liberty interest. See *Santosky*, 455 U.S. at 753. Thus, the district court has a duty to inquire when it becomes aware of a potential attorney/client conflict, which may jeopardize the appointed attorney's ability to provide effective representation. As such, these cases can be useful and appropriately adapted to CINC proceedings.

> *We should look at a court's method of inquiry outlined in criminal cases.*

To begin, in determining whether a court should appoint new counsel, a defendant "'must show "justifiable dissatisfaction" with his or her appointed counsel.'" See *State v. Pfannenstiel*, 302 Kan. 747, 759, 357 P.3d 877 (2015). The focus of a justifiable dissatisfaction inquiry is "'the adequacy of counsel in the adversarial process, not the accused's relationship with his attorney.'" 302 Kan. at 761-62. As such, a party demonstrates "[j]ustifiable dissatisfaction" by showing "a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication" between client and counsel. 302 Kan. 747, Syl. ¶ 3. In making this determination, "the district court must conduct some sort of investigation." *State v. Sappington*, 285 Kan. 158, 169, 169 P.3d 1096 (2007).

Several cases suggest that the duty of investigation requires the district court to "fully" listen to the indigent party's complaints and appointed counsel's responses. See 285 Kan. at 169 (finding district court satisfied duty to investigate when it "fully" heard Sappington's complaints at motion hearing and at trial and "fully" heard his counsel's responses); *State v. Carter*, 284 Kan. 312, 323,

160 P.3d 457 (2007) (finding district court "made an adequate inquiry into" defendant's complaints about counsel, noting judge took more than 20 minutes outside presence of jury to address issues raised by defendant). From a court's inquiry, the court can form a reasonable basis for deciding whether counsel can properly defend the client or whether the relationship has deteriorated such that counsel cannot provide a proper presentation of a defense. *State v. Ferguson*, 254 Kan. 62, 70, 864 P.2d 693 (1993).

Gleaning from these cases, we can see how a district court should be able to efficiently inquire from the parent and parent's counsel. This can be done with either precise questioning of the parties or a "single, open-ended question by the trial court." *State v. Staten*, 304 Kan. 957, 972-73, 377 P.3d 427 (2016). This duty to investigate is not demanding and, thus, should not be especially time consuming or burdensome. A more thorough inquiry was required here but did not occur. See 304 Kan. at 972-73.

As a result, our courts have found that a district court's failure to make a reasonable inquiry into a potential conflict of interest constitutes an abuse of discretion. See, e.g., *State v. Brown*, 300 Kan. 565, 577-78, 331 P.3d 797 (2014). In *State v. Simpson*, 29 Kan. App. 2d 862, 871-72, 32 P.3d 1226 (2001), another panel of this court found that a court's failure to give the defendant an adequate opportunity to explain the problems he perceived with his appointed counsel and to inquire into the alleged problems more fully was an abuse of discretion. And in *Brown*, the district court prevented the defendant from providing further information on the conflict "by demanding that he not speak while the judge gratuitously and strenuously opined on trial counsel's virtues." 300 Kan. at 576. That is similar to the facts here.

Finally, we can look at *In re C.D.A.* There, a mother asserted the district court violated her due process rights by denying her request for new counsel. Although the district court had been aware of a potential attorney/client conflict due to an alleged breakdown in communication, the district court did not investigate or conduct any inquiry. In its analysis on appeal, the panel considered criminal cases that explained a district court's duty to inquire of a potential attorney/client conflict and why a court should look into the possible deterioration of the attorney-client relationship.

The panel held the district court abused its discretion by failing in its duty to inquire about the possible conflict between the mother and her attorney. 2013 WL 3491303, at *5-6.

A court's duty to adequately inquire is heightened in a CINC case.

These cases noted above serve—in part—as the initial guideline for properly ruling on a motion regarding possible termination of an attorney/parent relationship. Yet there is a second guideline to adhere to that is particular to a CINC case—conducting a thorough inquiry to ensure that the case proceeds towards a timely resolution for the child. A parent's motion for new counsel or a claim of ineffectiveness can be reviewed for its validity or—as the district court stated here—as a delay tactic to postpone the termination hearing. This heightened scrutiny works in harmony with the Code's "expressed policy of disposing of proceedings without unnecessary delay." *In re N.A.C.*, 299 Kan. 1100, 1108, 329 P.3d 458 (2014); see K.S.A. 38-2201(b)(4).

Given the course of this case, the district court's frustration was understandable. Mother first filed a pro se motion requesting new counsel and asserted ineffective assistance of counsel. Mother's attorney moved to withdraw, citing a conflict, and the motion was granted without a hearing. As a result, the termination hearing was moved to January 30, 2023, and the court appointed a second attorney for Mother. Two weeks before the rescheduled termination hearing, the new attorney moved to withdraw, stating that Mother "persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." The district court granted the withdrawal motion, again without a hearing. The district court appointed Mother her third attorney on January 30, 2023, and the termination hearing was eventually moved to May 18, 2023. The day before the scheduled hearing, Mother filed a "Motion of Ineffective Counsel."

In support of her motion for new counsel and a continuance, Mother suggested to the district court that she had reasons for being dissatisfied with her appointed attorney to support her continuance motion. She told the court that her counsel told her that he was "'stuck'" with representing her, supporting a finding that there

was good cause to continue the hearing. The district court interrupted Mother's attempt to explain her complaints. The court then told Mother that she would represent herself.

At this point, the district court did not allow Mother to elaborate on the reasons she had for filing motions for ineffective assistance of counsel against two of her court-appointed attorneys. The district judge interrupted Mother and argued with her about whether her attorneys had conflicts, instead of questioning Mother about her complaints about her counsel and seeing if they could be addressed. Here, it cannot be said that the court fully heard Mother's complaints or counsel's responses. Without hearing from Mother, the validity of her motion for new counsel and a continuance cannot be determined, nor can the assumption that Mother's motion was a delay tactic be ruled out.

Regarding the third attorney's motion to withdraw, the attorney did advise the district court that he had met with Mother earlier that morning to discuss her motion. After hearing her "complaints and allegations" against him, he advised the court that he was continuing with his motion to withdraw as Mother's counsel. While the court later asked Mother's counsel if he felt it was appropriate to withdraw, the court asked nothing further. The court did not directly question counsel about the conflict issue during this portion of the hearing. Rather, the district court asked the attorney if it was "still an issue" and later allowed the attorney to withdraw.

Ensuring procedural due process is met in a CINC case

What can be taken away from this opinion is that a deliberate and thorough inquiry is required in a CINC case when ruling upon a parent's motion for new counsel or an attorney's motion to withdraw. This safeguards both the parents' procedural due process while also striving towards disposing of the CINC case without "unnecessary delay." See K.S.A. 38-2201(b)(4); *In re M.S.*, 56 Kan. App. 2d 1247, 1251-52, 447 P.3d 994 (2019) ("This court has previously stressed the importance of the interest at stake and has *required a heightened scrutiny* into the process afforded to a parent in termination proceedings." [Emphasis added.]).

That is, by inquiring further, a court can determine whether the parent's specific concerns with counsel jeopardizes the parent's right to counsel and/or the counsel can explain if there is a conflict and/or a breakdown in communication, and whether steps have been taken to address the parent's concerns. Hearing from each party can assist the court in deciding whether counsel can remain to represent a parent's best interests. Naturally, the court and counsel should "walk a delicate line," and the court must not require counsel to improperly disclose the parent's confidential communications. *Pfannenstiel*, 302 Kan. at 766.

For instance, in *State v. Bryant*, 285 Kan. 970, 179 P.3d 1122 (2008), the defendant, Bryant, filed a complaint against his attorney before he was sentenced. The district court pressed Bryant for a specific reason why his assigned counsel should not continue, stating: "'Well, unless you can give me something specific as to why she's not qualified to represent you in this sentencing, then she will proceed with the sentencing.'" 285 Kan. at 991. Bryant did not identify any specific reason. The court found that Bryant had "'told me absolutely nothing that rises to the level of a factual or legal basis to change counsel.'" 285 Kan. at 991. As a result, the court did not remove Bryant's counsel and proceeded to sentencing.

Thus, when faced with a parent's complaints about assigned counsel or counsel seeking to withdraw from the case due to a parent's allegations, a court should take the necessary time before ruling on the motion. This duty is not demanding as our courts have found that a "single, open-ended question by the trial court" may be sufficient if it provides the party "with the opportunity to explain a conflict of interest, an irreconcilable disagreement, or an inability to communicate with counsel." *Staten*, 304 Kan. at 972-73.

Continuances add procedural safeguards.

Besides failing to investigate the potential conflict between Mother and her counsel, the district court would not consider a continuance. Of course, a court has substantial discretion in controlling the proceedings before it, which includes the discretion to

decide whether to grant a request for a continuance. See *In re Adoption of J.A.B.*, 26 Kan. App. 2d 959, 964, 997 P.2d 98 (2000).

And yet, the district court's discretion in whether to grant a continuance "is bound by due process requirements that interested parties be afforded an opportunity to present their objections, which includes a reasonable time to prepare a defense to the litigation. *In re H.C.*, 23 Kan. App. 2d at 961." *In re L.F.*, No. 124,157, 2022 WL 1122691, at *7 (Kan. App. 2022) (unpublished opinion). Parents are not guaranteed unlimited continuances in a child in need of care case. See 2022 WL 1122691, at *6-7. Additionally, continuances may be granted for good cause shown. K.S.A. 38-2246.

"In ruling on a motion for continuance . . . a court must consider all circumstances, particularly such matters as the applicant's good faith, his showing of diligence, and the timetable of the lawsuit." *In re J.A.H.*, 285 Kan. at 385; *Fouts v. Armstrong Commercial Laundry Distributing Co.*, 209 Kan. 59, 65, 495 P.2d 1390 (1972). The *Fouts* court viewed with "grave concern the denial of a continuance where the effect for all practical purposes deprives a party of his day in court." 209 Kan. at 65; see *In re J.A.H.*, 285 Kan. at 385.

After discussing Mother's motion, the district court ruled against a continuance, noting the prior continuances. The district court did not appear to believe Mother was acting in good faith. It stated, "[T]he Court sees this as what I believe to be an obvious technique to continue these matters effectively forever." Here, Mother's request for a continuance and new counsel the day before the termination hearing explains the court's concerns with the "timetable of CINC proceedings." *In re J.A.H.*, 285 Kan. at 386.

Mother, however, argues that she was acting in good faith when she moved for ineffective assistance of counsel. She wanted to obtain an attorney who would want to represent her. Because the district court did not investigate Mother's previous motions for ineffective assistance of counsel, we cannot be sure that Mother did or did not have a good-faith basis for requesting new counsel.

Mother suggests that her appointed attorney was unprepared for her termination hearing. Later, after the State finished presenting its case, Mother told the district court that she had no witnesses

to call on her behalf because her counsel had not subpoenaed any witnesses. As Mother was obviously unprepared to represent herself, this was another reason to grant the continuance—allowing her to work with new counsel. Prudently, the continuance could have been granted with the advisement to Mother that her motions alleging her counsel were ineffective would be closely scrutinized given her past claims against two prior attorneys.

The court's unexpected order that Mother represent herself

Additionally, the district court ordered Mother to proceed with the termination hearing without any counsel. This is contrary to K.S.A. 38-2205(b)(1), which instructs courts to appoint counsel for indigent parents: "If at any stage of the proceedings a parent desires but is financially unable to employ an attorney, the court shall appoint an attorney for the parent." It is also contrary to the specific requirement of a formal waiver if a parent chooses to waive his or her right to counsel contained in K.S.A. 38-2205(b)(1). This statute clarifies the two alternative actions that the parent must demonstrate should that parent elect to waive that right and represent him- or herself: "[T]he right may be waived in writing or on the record and the parents and/or custodians can proceed pro se." *In re M.M.*, No. 126,539, 2024 WL 1954167, at *4 (Kan. App. 2024) (unpublished opinion); see K.S.A. 38-2205(b)(1).

As an additional procedural safeguard, under K.S.A. 38-2205(b), courts should "advise the parents of their rights in connection with all proceedings under this code." In this case, the district court did not advise Mother that she had a statutory right to counsel.

Moreover, when ordering Mother to proceed without counsel and represent herself, the district court itself did not acknowledge how "many trial techniques, evidence rules, and the presentation of defenses require specialized training and knowledge." See *State v. Burden*, 311 Kan. 859, 864, 467 P.3d 495 (2020). Habitually, courts advise parents of the disadvantages they might face if proceeding pro se at a hearing. See, e.g., *In re J.A.H.*, 285 Kan. at 378.

Instead, as illustrated below, the court advised Mother to conduct her cross-examination of Dr. Hazel by simply asking questions "as they come into your head":

"THE COURT: [D]id you want to ask the doctor questions?

"[MOTHER]: This is the first time I've seen this report. I don't know how you expect me to even be able to go over or ask him anything based off his report when this is the first time I've ever even got to see this report.

"THE COURT: Okay.

"[MOTHER]: I mean, I don't see how that's even fair.

"THE COURT: So do you have any questions for him? This is your opportunity.

"[MOTHER]: Yeah, I do, but I don't know how to ask them.

"THE COURT: You say you have questions. Then just ask them as they come into your head.

"[MOTHER]: I don't see how that's gonna be fair at all."

The State's exhibit No. 1, Dr. Hazel's report, discussed Mother's psychological testing and parenting assessment. Ultimately, Mother declined to examine Dr. Hazel. Frustrated, Mother attempted to leave the courtroom after the State's first witness:

"THE COURT: [Mother], where are you going?

"[MOTHER]: I have to leave. I don't know how to do this. I don't know how to represent myself.

"THE COURT: Okay. You are not leaving this courtroom.

"[MOTHER]: I don't know how to do this. . . .

. . . .

"[MOTHER]: I don't know what to do here to represent myself. I have no idea.

"THE COURT: Well, we'll continue."

Without a continuance and with no voluntary waiver of counsel, Mother was continually left adrift without any assistance, contrary to K.S.A. 38-2205(b)(1). She had no formal legal education; she finished high school and later worked in construction. It remains unclear how she was supposed to prepare—in a moment's notice—for an evidentiary hearing at which her fundamental rights as a parent were at stake.

Mother's need for counsel was demonstrated throughout the hearing. For instance, during her cross-examination by the State, Mother simply answered the questions asked. An attorney would have been able to lodge the necessary objections to the opposing counsel's questions. Nor did she understand how and why she

should have presented redirect testimony on her behalf. Essentially, there was no one advocating for Mother.

Without an attorney, Mother appeared defeated. At the end of the hearing, she offered no closing arguments. Instead, when the district court asked if she had "closing comments," she told the court: "I don't think it matters what I'm gonna say, because people's minds have already made up, so, no." The court did not respond to Mother's statement but instead proceeded to its ruling and terminated her parental rights.

Our Kansas Supreme Court has recognized that a statutory right to counsel "is designed to safeguard parental rights." *In re J.A.H.*, 285 Kan. at 386. The purpose of appointing counsel is to provide the indigent parent a means towards achieving a fair hearing. See *In re Rushing*, 9 Kan. App. 2d 541, 547, 684 P.2d 445 (1984). Indeed, "this court has acknowledged that a parent in termination proceedings has the right to competent legal representation." *In re B.J.*, No. 125,727, 2023 WL 5320946, at *13 (Kan. App. 2023) (unpublished opinion). Yet, as illustrated above, Mother was certainly unable to and could not participate in any meaningful way.

Overall, the denial of Mother's continuation motion without providing her with new counsel and ordering Mother to represent herself without notice or without the statutorily required waiver removed additional procedural safeguards. The probable value of additional procedural safeguards, particularly in a parental termination hearing, is high. Because the risk of erroneous deprivation under these circumstances is also high, this factor supports Mother.

3. *The State's Interest in the Procedure Used*

The State also has an interest. "[T]he Code must be liberally construed to, among other things, ensure that it 'will best serve the child's welfare and the best interests of the state.'" *In re J.A.H.*, 285 Kan. at 384; see K.S.A. 38-2201(b)(1). The Legislature clearly mandated that "[a]ll proceedings under this code [be disposed of] *without unnecessary delay*." (Emphasis added.) K.S.A. 38-2201(b)(4). "Part of protecting the children means ensuring that the children have some stability in their lives, which means

cases need to be completed in a timely manner." *In re M.S.*, 56 Kan. App. 2d at 1254.

Nevertheless, when the State seeks to terminate the relationship between parents and their children, it must do so by fundamentally fair procedures that meet the requisites of due process. *Santosky*, 455 U.S. at 753. The government's interest is "in the procedures used, including the fiscal and administrative burdens that any additional or substitute procedures would entail." *In re J.D.C.*, 284 Kan. at 166-67.

We disagree that the State's interest in concluding the termination hearing quickly was justifiable. Giving Mother time to work with new counsel would ensure her rights are upheld. The State's time preparing for the hearing was not considerable as the State's case-in-chief only included two witnesses and three exhibits. It is understandable that district courts have frustration when they must appoint new court-appointed counsel. Still, under these unique circumstances, this factor weighs in Mother's favor.

Balance test

After analyzing all three *Mathews* factors, we find that Mother has met her burden of proving a due process violation. We find that when the district court denied Mother's motion to continue and appoint new counsel and ordered her to unexpectedly represent herself at the parental termination hearing, Mother was denied notice and the opportunity to be heard in a meaningful manner. We agree with Mother that the district court's rulings resulted in an unfair parental termination hearing and a violation of Mother's due process rights.

Conclusion

We reverse the termination of Mother's parental rights and remand with instructions for the district court to appoint Mother new counsel. With the understanding that the district court continues to have jurisdiction over all issues not specifically appealed, see K.S.A. 38-2273(f), the district court should set this case for a review hearing prior to reinstituting termination proceedings. The remaining issues are moot.

Reversed and remanded with directions.