ADVANCE SHEETS

OF

# The Kansas Court of Appeals

2d Series

**OFFICIALLY SELECTED**
**CASES ARGUED AND DETERMINED**

**IN THE**

# COURT OF APPEALS

**OF THE**

## STATE OF KANSAS

Reporter:
SARA R. STRATTON

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*For the use and benefit of the State of Kansas*

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COURT OF APPEALS

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126,523

# KANSAS GOVERNMENTAL ETHICS COMMISSION, *Appellee*, v. FABIAN SHEPARD and CHERYL REYNOLDS, *Appellants*.

SYLLABUS BY THE COURT

1. ELECTIONS—*Kansas Governmental Ethics Commission Investigates Matters under Kansas Campaign Finance Act—Complaint Not Required to Have Been Filed*. The Kansas Governmental Ethics Commission is statutorily authorized to investigate any matter to which the Kansas Campaign Finance Act applies, regardless of whether a complaint has been filed.

2. SAME—*Kansas Campaign Finance Act—Commission's Subpoena Power Not Limited.* The Kansas Campaign Finance Act does not limit the Commission's subpoena power to known or suspected violators. It can subpoena witnesses or records when it reasonably suspects that someone violated the Act and can require the production of any other documents or records which it deems relevant or material to the investigation.

3. CONSTITUTIONAL LAW—*Kansas Public Speech Protection Act—Motion to Strike Filed after Complaint Served.* Under the Kansas Public Speech Protection Act, a motion to strike is filed after service of a complaint. A First Amendment privilege is premature when no complaint has been filed, no affirmative defense has been raised, and no discovery order has been issued.

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Oral argument held July 9, 2024. Opinion filed September 6, 2024. Affirmed.

*T. Chet Compton* and *Lyndon W. Vix*, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, for appellants.

*Kaitlyn R. Bull-Stewart*, general counsel, of Kansas Governmental Ethics Commission, for appellee.

Before GREEN, P.J., HILL and GARDNER, JJ.

GARDNER, J.: When investigating whether certain campaign contributions violated the Kansas Campaign Finance Act (KCFA), K.S.A. 25-4142 et seq., the Kansas Governmental Ethics Commission issued administrative subpoenas to Fabian Shepard

and Cheryl Reynolds (Appellants). When Appellants had not responded to the subpoenas after five months, the Commission filed applications with the district court to enforce them. Appellants then unsuccessfully moved to strike the enforcement applications under the Kansas Public Speech Protection Act (the Act), K.S.A. 2022 Supp. 60-5320, alleging the subpoenas violated their rights under the First Amendment to the United States Constitution. Now, on interlocutory appeal, Appellants claim the district court erred by finding the Commission met its burden to prove that it would likely prevail on its requests to enforce the subpoenas. Finding no error, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In February 2022, the Kansas Governmental Ethics Commission issued subpoenas to Appellants and several other individuals to produce communications and documents related to the Commission's investigation about campaign contributions to and from various political committees or parties. The subpoenas allege that Appellants and several others volunteered as members of three central committees when these committees made allegedly illegal contributions to the Kansas Republican Party, in violation of the KCFA. Shepard was the chairperson for the Johnson County central committee and Reynolds was the chairperson and treasurer for the Shawnee County central committee during the relevant investigatory period.

While acting in these roles, Appellants allegedly participated in or obtained information related to an alleged passthrough scheme. The subpoenas allege that the passthrough scheme involves a separate party who made two large contributions to two political action committees (PACs), which then contributed the money to the three central committees. When the central committees received those contributions, they allegedly agreed to transfer them to the Kansas Republican Party upon request. The subpoenas also listed several provisions of the KCFA and said that the central committees illegally contributed to the Kansas Republican Party for some other person or entity. The subpoenas also suggest that

several parties made and accepted contributions in amounts exceeding statutory contributions limits, including a $5,000 limit imposed under K.S.A. 25-4153(d).

Appellants did not respond to the subpoenas, so after several months the Commission moved the district court to enforce them and compel the production of the information requested. Appellants then moved to strike the Commission's applications under the Act, asserting that the subpoenas stifled their exercise of their First Amendment rights.

The district court held a hearing on Appellants' motions to strike and later denied them. The district court found that Appellants had made a prima facie showing under the first prong of the test—that the subpoenas targeted communications that concerned issues protected under the First Amendment. See *T&T Financial of Kansas City v. Taylor*, No. 117,624, 2017 WL 6546634, at *4 (Kan. App. 2017) (unpublished opinion) (statutory two-part test for deciding Act motions to strike first requires movant to make prima facie showing that the claim against which the motion is based concerns a party's exercise of right of free speech, right to petition, or right of association). The district court found the communications occurred "among individuals connected by common political interests" and concerned Appellants' First Amendment rights.

The court then addressed the second prong of the test—whether the Commission could establish a likelihood that the court would grant its application to enforce the administrative subpoenas. See K.S.A. 2022 Supp. 60-5320(d). The district court found the Commission had shown reasonable suspicion that a campaign finance violation had occurred, and that the statute did not require a showing that the recipients of the subpoenas, here Appellants, had violated the statute. See K.S.A. 25-4158. The district court also found that Appellants' assertion of a First Amendment privilege was premature.

Next, the district court analyzed whether the subpoenas requested information "reasonably relevant" to the alleged violations, as required under the KCFA subsection authorizing this kind of investigatory subpoena, K.S.A. 25-4158(d). It found the subpoenas sought two categories of information. The district court

found the first category impermissibly overbroad because although the requests were limited by time, they were not limited by subject matter. The district court explained that if Appellants later objected to the breadth of this provision, the court would sustain an overbreadth objection unless the provision were modified. The district court thus concluded that it "would not compel a response to [the first] request . . . as written." But the district court found a second category of requests, seeking communications limited to a specific subject matter, "much more tailored to information . . . reasonably relevant to the violations alleged." The district court thus held that it would likely enforce five of six requests in this second category. As a result, it denied Appellants' motions to strike, finding substantial competent evidence showed a likelihood that the Commission would prevail on its motions to enforce the subpoenas.

Finally, the district court denied the Commission's motion for attorney fees because it found no showing that Appellants had filed their motions frivolously or solely to delay the Commission's investigation. See K.S.A. 2022 Supp. 60-5320(g) ("If the court finds that the motion to strike is frivolous or solely intended to cause delay, the court shall award to the responding party reasonable attorney fees and costs related to the motion."). The district court did not address Appellants' requests for attorney fees, as K.S.A. 2022 Supp. 60-5320(g) permits such an award only when a motion to strike is successful.

Appellants filed timely interlocutory appeals under K.S.A. 2022 Supp. 60-5320(f)(2). Our motions panel granted Appellants' unopposed motion to consolidate these cases on appeal.

## THE DISTRICT COURT PROPERLY DENIED APPELLANTS' MOTIONS TO STRIKE

In determining whether the district court erred by denying Appellants' motions to strike the subpoenas, we begin by reviewing the relevant statutes.

### *Overview of the Act*

The Kansas Legislature adopted the Kansas Public Speech Protection Act, K.S.A. 60-5320, in 2016. L. 2016, ch. 58, §1.

Sometimes referred to as an anti-SLAPP statute, the Act is intended to prevent meritless lawsuits that inhibit free speech, known as SLAPPs, or "'strategic lawsuits against public participation.'" *Taylor*, 2017 WL 6546634, at *3. The purpose of the Act is to "encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely, in connection with a public issue or issue of public interest to the maximum extent permitted by law while . . . protecting the rights of a person to file meritorious lawsuits for demonstrable injury." K.S.A. 2022 Supp. 60-5320(b). The Act is "applied and construed liberally to effectuate its general purposes." K.S.A. 2022 Supp. 60-5320(k).

The Act "provides a procedural remedy early in the litigation for those parties claiming to be harassed by a SLAPP lawsuit." *Taylor*, 2017 WL 6546634, at *4. The Act broadly defines a "claim" as "any lawsuit, cause of action, claim, cross-claim, counterclaim or other judicial pleading or filing requesting relief." K.S.A. 2022 Supp. 60-5320(c)(1). It allows a party to move to strike a claim if the claim "is based on, relates to or is in response to [that] party's exercise of the right of free speech, right to petition or right of association." K.S.A. 2022 Supp. 60-5320(d). The movant must make a prima facie showing that one or more of the claims asserted in the filing concerns the exercise of freedom of speech, freedom to petition, or freedom of association. If the moving party meets that burden, the burden shifts to the responding party to establish a likelihood of prevailing on the claim by presenting substantial competent evidence to support a prima facie case. K.S.A. 2022 Supp. 60-5320(d).

Appellants argue that the district court erred by denying their motions to strike under the Act. They assert that the Commission did not sufficiently prove that the district court would grant its applications to enforce the subpoenas because: (1) the subpoenas do not limit the requests for information to items reasonably relevant to the alleged violations and thus exceed the statutory authority granted the Commission under K.S.A. 25-4158(d); (2) the information requested is constitutionally protected under the First Amendment; and (3) the Commission did not show that it reasonably suspected that a violation of the KCFA had occurred.

This court exercises unlimited review of a district court's order granting or denying a motion to strike under the Act. See *Doe v. Kansas State University*, 61 Kan. App. 2d 128, 137, 499 P.3d 1136 (2021). Similarly, to the extent this analysis requires statutory interpretation, our review is unlimited. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019); *Doe*, 61 Kan. App. 2d at 137.

A. *Step One of the Anti-SLAPP Test: Appellants' Prima Facie Showing*

The district court looked to K.S.A. 2022 Supp. 60-5320(c)(1)'s definition of a "claim" as including a "filing requesting relief," and found that the Commission's application to enforce an administrative subpoena was a claim. The Commission did not cross-appeal the district court's findings that the Act applies to the Commission's action to enforce its subpoenas or that Appellants successfully carried their burden of establishing a prima facie case under the Act. Those holdings are thus not subject to review. *Williams v. GEICO General Ins. Co.*, 311 Kan, 78, 80, 456 P.3d 222 (2020); see K.S.A. 60-2103(h).

B. *Step Two of the Anti-SLAPP Test: The Merits of the Commission's Claim*

The burden thus shifts to the party asserting the claim, the Commission, to establish a likelihood of prevailing on the merits by coming forward with substantial competent evidence to establish a prima facie case. K.S.A. 2022 Supp. 60-5320(d). The district court found that "prevailing on the claim" in the context of this request to enforce a pre-complaint subpoena meant "that the [Commission] must establish a likelihood that the Court would grant its application to enforce the administrative subpoena . . . supported by substantial competent evidence of the elements necessary to compel enforcement of the subpoena." Both parties agree with the district court's framing of the issue, but Appellants disagree with its conclusion that the Commission met its burden. We thus consider whether substantial competent evidence shows the Commission would likely succeed on its requests to enforce the pre-complaint subpoenas. See K.S.A. 2022 Supp. 60-5320(d).

1. *Some Overbroad Requests Do Not Compel the Court to Grant the Motion to Strike.*

The district court found that one of the two categories of information requested by the subpoenas was impermissibly overbroad—not reasonably relevant to the alleged campaign finance violations—because the Commission did not limit it by subject matter. Appellants argue for the first time on appeal that the district court should have found that the impermissible broadness of some requests in the subpoenas rendered the subpoenas completely unenforceable, so the court should have granted its motion to strike. We generally do not consider matters not raised before the district court, absent an argument supporting our application of a recognized exception. See *Gannon v. State*, 303 Kan. 682, 733, 368 P.3d 1024 (2016). And appellants argue no such exception here. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) (listing three recognized exceptions). Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). In *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015), and *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014), our Supreme Court warned that Supreme Court Rule 6.02(a)(5) would be strictly enforced, and that litigants who failed to comply with this rule risked a ruling that the issue is improperly briefed and will be deemed waived or abandoned. See *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018). This new issue is thus unpreserved.

Nor do Appellants cite any legal authority for this "all or nothing" claim, so we may dismiss it on that basis as well. See *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018) (dismissing for failure to support point with pertinent authority). We find guidance in K.S.A. 2022 Supp. 60-5320(d), which states: "If the responding party meets the burden, the court shall deny the motion." The district court, having found that the Commission met its burden, complied with this statutory directive by denying the motion to strike. The Commission established a likelihood of succeeding on a substantial portion of its requests to enforce the administrative subpoenas. That other requests may later be found

objectionable or privileged does not defeat the Commission's showing at this stage of the proceedings.

Appellants also point to *Caranchini v. Peck*, 355 F. Supp. 3d 1052 (D. Kan. 2018), where the federal district court granted some motions to strike and denied others. The court later awarded fees under K.S.A. 2016 Supp. 60-5320(g) for the claims on which it granted the motions to strike. *Caranchini v. Peck*, No. 18-2249-CM-TJJ, 2019 WL 4168801 (unpublished opinion). But that case contradicts their argument that some overbroad requests compel the court to grant the motion to strike. And even if the district court could have done as the *Caranchini* court did, it chose not to, and that is the decision we must review. Appellants cite no precedent compelling the district court to grant its motion to strike when it finds some requests in a subpoena may later be found overbroad.

We also find this argument premature, as the district court has not yet decided whether to enforce or modify the subpoenas. True, as Appellants note, some cases have granted anti-SLAPP motions to strike when the court found a claim error could not be remedied by a modification. See, e.g., *Microsoft Corp. v. M. Media*, No. CV-17-347-MWF (AJWx), 2018 WL 5094969, at *7 (C.D. Cal. 2018) (unpublished opinion) (granting anti-SLAPP motion to strike because claim was barred by litigation privilege so leave to amend would be futile); *Grant & Eisenhofer, P.A. v. Brown*, No. CV-5968 PSG (PJWx), 2017 WL 6343506, at *6-7 (C.D. Cal. 2017) (unpublished opinion) (same). But in such cases, a pleading had been filed setting forth claims before any motion to strike was made, as is the norm for anti-SLAPP motions, and the courts found any modification or amendment of the claims would be futile.

Not so here. This anti-SLAPP motion to strike is unusual and problematic because no pleading has yet been filed. Like all anti-SLAPP statutes, the Act is intended to prevent meritless lawsuits that chill individuals' exercise of their rights of free speech, association, and to petition. *Doe*, 61 Kan. App. 2d at 145. Consistently, the Act contemplates that a motion to strike is filed *after* service of a complaint, not before: "The motion to strike made under this subsection may be filed within 60 days of the service of the most recent complaint or, in the court's discretion, at any later time upon

terms it deems proper." K.S.A. 2022 Supp. 60-5320(d). Nothing in the statute permits an earlier motion to strike, as Appellants filed here. To the contrary, the rest of the statute contemplates that a pleading has been filed. See, e.g., K.S.A. 2022 Supp. 60-5320(d) (allowing affidavits to shore up factual contentions in petition); K.S.A. 2022 Supp. 60-5320(e)(2) (referring to post-pleading matters—"all discovery, motions or other pending hearings shall be stayed upon the filing of the motion to strike").

In contrast, the Commission is statutorily authorized to investigate any matter to which the KCFA applies, regardless of whether a complaint has been filed. K.S.A. 25-4158(c) ("The commission may investigate, or cause to be investigated, any matter required to be reported upon by any person under the provisions of the campaign finance act, or any matter to which the campaign finance act applies irrespective of whether a complaint has been filed in relation thereto.").

Yet the Commission does not claim on appeal that Appellants' motions to strike were filed too early, see K.S.A. 2022 Supp. 60-5320(d), so we do not rule on that basis. Still, under the unique pre-complaint status of Appellants' motions to strike, the district court was not determining the likely failure or success of a claim in a complaint, as is typical in anti-SLAPP litigation. It was merely determining the likelihood that it would grant the Commission's application to enforce its administrative pre-complaint subpoenas. The district court implicitly found that the overbreadth in the Commission's first requests for information did not affect the rest of the subpoenas and could later be corrected through modification. And unlike in the California cases above, Appellants have not shown that modification or amendment would be futile. We are thus not persuaded by those California cases or other post-complaint cases.

As the Commission correctly notes, when deciding whether to enforce a subpoena, a district court generally has discretion to modify a subpoena. See K.S.A. 2022 Supp. 60-245(c)(3)(A)(iii), (iv) (authorizing quashing or modification of subpoena to protect witnesses from misuses of subpoena powers). As our Supreme Court stated in *Cessna Aircraft Co. v. Kansas Comm'n on Civil Rights*, 229 Kan. 15, 27, 622 P.2d 124 (1981):

"'[A] district court has power to modify a subpoena and thus remove any objectionable features from it while preserving the remainder. We know of no reason why a district court should not, a fortiori, have the same power with respect to a subpoena duces tecum issued by [the Kansas Commission on Civil Rights] and we so hold.' [Citations omitted.]"

Similarly, the district court here has the power to modify a subpoena duces tecum issued by the Commission. The district court may thus decide to modify or enforce only part of the subpoenas when addressing this issue in a future proceeding. But for now, we dismiss Appellants' argument—that the Commission had to prove that the subpoenas are enforceable as written to survive Appellants' motions to strike under the Act—as unpreserved, unsupported, and premature.

2. *Appellants' Asserted First Amendment Privilege Does Not Defeat the Commission's Claim.*

Appellants next argue that the information demanded in the Commission's subpoenas is barred by their First Amendment privilege, so the court should have granted their motions to strike. The Commission counters that this claim is premature.

Appellants contend that the Commission must come forward with substantial competent evidence not only to establish the elements of its various claims but also to defeat Appellants' defenses to those claims—their First Amendment privilege. In making this assertion, Appellants rely primarily on California law, citing *McGarry v. University of San Diego*, 154 Cal. App. 4th 97, 108, 64 Cal. Rptr. 3d 467 (2007), where the court stated that in considering whether plaintiff has met its evidentiary burden, it must consider pleadings and evidence. But *McGarry* held that the court cannot weigh the evidence; the court must simply determine whether the plaintiff's evidence would, if credited, be sufficient to meet the burden of proof, analogous to the standard applicable to a motion for a directed verdict. 154 Cal. App. 4th at 108.

California law generally requires that a court assesses the defendant's evidence only to determine whether it defeats the plaintiff's claim *as a matter of law*:

"Because the Court concludes that Defendants' conduct constitutes protected activity for purposes of the anti-SLAPP statute, G&E must establish 'a probability that [it] will prevail on the claim.' *Simpson Strong-Tie*, 49 Cal. 4th at

21. In assessing this probability, the Court does not 'weigh credibility' or 'evaluate the weight of the evidence,' but instead 'accept[s] as true all evidence favorable to the plaintiff and assess[es] the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law.' *Grewal v. Jammu*, 191 Cal. App. 4th 977, 989 (2011) (quoting *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 699-700 [2007])." *Grant & Eisenhofer, P.A. v. Brown*, No. CV-17-5968-PSG (PJWx), 2017 WL 6343506, at *5 (C.D. Cal. 2017) (unpublished opinion).

See also *Trinity Risk Management, LLC v. Simplified Labor Staffing Solutions, Inc.*, 59 Cal. App. 5th 995, 1003, 273 Cal. Rptr. 3d 831 (2021) ("[W]e accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of law. [*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal. 4th 260, 269, fn. 3, 46 Cal. Rptr. 3d 638, 139 P.3d 30.]").

As for Kansas law, the Act states: "In making its determination, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based." K.S.A. 2022 Supp. 60-5320(d). Kansas law is largely undeveloped on this point. Cf. *Kemmerly v. Wichita Eagle*, No. 124,220, 2022 WL 1436399, at *3 (Kan. App. 2022) (unpublished opinion) ("[T]o avoid the motions to strike after the defendants met their initial burden of showing the claims concerned their exercise of free speech, [the plaintiff] needed to present to the district court substantial competent evidence that he would prevail on his . . . claim."). Kansas cases have not often applied this anti-SLAPP statute in analyzing a defense, raised to defeat the plaintiff's evidentiary burden. See *Doe*, 61 Kan. App. 2d at 148-49 (finding district court, in considering second prong of anti-SLAPP test, improperly considered motion to dismiss because it is not a "pleading" as defined in K.S.A. 2020 Supp. 60-207). Our cases have thus not clarified whether the court's review of an answer or affidavits stating a defense is merely to determine whether the defendant's evidence defeats the opposing party's evidence *as a matter of law*. But here, because Appellants moved to strike before any complaint was filed, the district court had no pleadings to consider. No party points us to any affidavits either, so the district court could

not apply K.S.A. 2022 Supp. 60-5320(d) (requiring court to consider pleadings and supporting and opposing affidavits stating facts upon which liability or defense is based).

Appropriately, the district court did not wade into the depths of the standard of proof for this second prong; it rejected Appellants' First Amendment privilege as procedurally premature. First, it found that Appellants never asserted a First Amendment privilege in response to the subpoenas because Appellants did not respond to the subpoenas at all, choosing instead to seek relief under the Act. Second, the district court found that despite the lengthy opportunity for the parties to do so, the parties had not conferred about any objections or raised any non-Act objections, such as overbreadth, to the court.

Third, the district court addressed the Appellants' primary authority on this issue—*Grandbouche v. Clancy*, 825 F.2d 1463, 1466-67 (10th Cir. 1987)—and found it inapplicable. *Grandbouche* referenced a balancing test federal courts use when the subject of a discovery order claims a First Amendment privilege not to disclose certain information:

> "In *Silkwood,* this court announced that when the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure. *Silkwood,* 563 F.2d at 438. Among the factors that the trial court must consider are (1) the relevance of the evidence; (2) the necessity of receiving the information sought; (3) whether the information is available from other sources; and (4) the nature of the information. *See id.* The trial court must also determine the validity of the claimed First Amendment privilege. Only after examining all of these factors should the court decide whether the privilege must be overborne by the need for the requested information." 825 F.2d at 1466-67.

The district court found that because it had not yet ordered Appellants to comply with the subpoenas, this test could not be easily applied. It thus made no attempt to apply the *Grandbouche* factors.

Even so, Appellants ask this court to apply the *Grandbouche* factors for the first time on appeal. Appellants contend that *Grandbouche* applies "[w]hen a First Amendment privilege is invoked in response to a subpoena," and that all four factors weigh in their favor, so the Commission failed to show a likelihood of defeating their First Amendment privilege. The Commission counters that

we should not apply the *Grandbouche* factors, but if we do, the factors favor it, on balance. But the Commission mainly agrees with the district court that weighing Appellants' alleged First Amendment privilege is premature.

We agree, as well, that weighing Appellants' alleged First Amendment privilege is premature. First, *Grandbouche* established that "*when the subject of a discovery order* claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure." (Emphasis added.) 825 F.2d at 1466. Appellants are not yet subject to any discovery order, nor are they named in any lawsuit, so they have not raised an affirmative defense of a First Amendment privilege. We thus decline Appellants' invitation to apply *Grandbouche* more broadly and to weigh the four factors ourselves—any such weighing is legally unsupported and is procedurally premature.

Second, the *Grandbouche* factors are heavily fact-based, and the alleged facts are largely disputed. We are a court of review, not a fact-finding court, and we cannot resolve this issue in the first instance. To resolve this issue on the merits would require us to consider facts outside the scant record but "[f]act-finding is simply not the role of appellate courts." *State v. Nelson*, 291 Kan. 475, 488, 243 P.3d 343 (2010) (citing *State v. Thomas*, 288 Kan. 157, 161, 199 P.3d 1265 [2009]). We thus dismiss as premature Appellants' assertion that the information demanded in the Commission's subpoenas is barred by their First Amendment privilege. Cf. *State v. Stuart*, No. 124,489, 2024 WL 2229961, at *8-9 (Kan. App. 2024) (unpublished opinion) (dismissing equal protection claim, finding additional factual findings necessary to consider constitutional claim). We find no error in the district court's findings on this issue.

3. *We Find Reasonable Suspicion of KCFA Violations*

Finally, Appellants assert that the Commission failed to allege facts showing a violation under the KCFA. Appellants argue that the Commission "has not described the basis for th[e] [alleged] violation. It simply concludes that if a transfer occurred in the con-

text of mere suggestions by political actors, there must be a violation." Appellants also challenge the factual and legal findings in the subpoenas as conclusory and overly broad, and they claim the subpoenas must be issued only to those suspected of having violated the KCFA.

*Reasonable suspicion that Appellants violated the KCFA is unnecessary.*

We address this latter assertion first. Appellants claim and the Commission disputes that to meet the Commission's burden of proof under the second step of the Act analysis, the subpoenas must be issued only to persons suspected of having violated the KCFA.

K.S.A. 25-4158(d)(1) is written broadly. It grants the Commission the authority to issue investigatory subpoenas and to require the production of certain documents and communications upon "a reasonable suspicion that a violation of the campaign finance act has occurred":

> "After a preliminary investigation of any matter reported to the commission pursuant to subsection (c), and upon specific written findings of fact and conclusions of law by the commission that there is a reasonable suspicion that a violation of the campaign finance act has occurred, the commission or any officer designated by the commission may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the commission deems relevant or material to the investigation. . . . Subpoenas duces tecum shall be limited to items reasonably relevant to such alleged violations. Upon the request of any person subpoenaed to appear and give testimony or to produce books, papers or documents, the commission shall provide a copy of the written findings of facts and conclusions of laws relating to the alleged violation committed by such person." K.S.A. 25-4158(d)(1).

Contrary to Appellants' argument, the statute does not limit the Commission's subpoena power to individuals accused of committing crimes—it can subpoena witnesses or records when it reasonably suspects that someone violated the KCFA and can require the production of any other documents or records which it deems relevant or material to the investigation.

True, the last sentence of this statute requires the Commission, upon request, to provide a suspected violator a copy of the facts and laws related to their violation. Here, as the district court found, a copy was given to Appellants, regardless of whether they were suspected violators. But that sentence does not control the rest of the paragraph,

which is broadly stated in plain terms. The Legislature has given the Commission the power to investigate any matter to which the KCFA applies and even before a complaint has been filed. K.S.A. 25-4158(c). And the statute does not require the Commission to limit its investigation to known or suspected violators.

*The subpoenas requested reasonably relevant items.*

Still, the Commission had to provide substantial competent evidence that it met the statutory requirements, including that it limited its requests for information "to items reasonably relevant to [the] alleged violations." K.S.A. 25-4158(d)(1). Appellants assert that the Commission's requests failed this restriction and that "a court may not enforce a subpoena that exceeds the authority of the administrative agency issuing the subpoena." *State ex rel. Brant v. Bank of America*, 272 Kan. 182, 185, 31 P.3d 952 (2001).

The district court found that the first category of information requested in the Commission's subpoenas was impermissibly overbroad because the requests were not limited by subject matter. Those requests were not reasonably relevant to the alleged violations. Neither party challenges that ruling, so we do not address it.

Appellants challenge the district court's finding that the second category of information requested in the Commission's subpoenas largely meets the "reasonably relevant" requirement of this statute. That second category requests:

"At any time, all communications and shared documents, including but not limited to email, text, and social media messages, not otherwise produced that discuss or concern any of the following:

- "Any and all transfers/contributions to The Right Way Kansas PAC for Economic Growth or Lift Up Kansas PAC from the Republican State Leadership Committee;

- "Transfers/contributions of $5,000 each to the Johnson County Republican Central Committee, Shawnee County Republican Central Committee, Sedgwick County Republican Central Committee, Kansas Republican Party, and Republican House Campaign Committee, from The Right Way Kansas PAC for Economic Growth and Lift Up Kansas PAC, occurring on or about September 2020;

- "Transfers/contributions to the Johnson County Republican Central Committee of $5,000 from Ty Masterson for Kansas Senate on or about October

12, 2020, and $5,000 from Dan Hawkins for Kansas House on or about October 14, 2020;

- "Transfers/contributions from the Johnson County Republican Central Committee of $4,500 to the Republican House Campaign Committee on or about October 19, 2020, and $9,000 to the Kansas Republican Party on or about September 29, 2020;

- "Transfers/contributions from the Johnson County Republican Central Committee of $5,000 to Mike Thompson for Kansas Senate on or about October 14, 2020, $4,000 to Beverly Gossage for Kansas Senate on or about October 14, 2020, and $1,000 to Beverly Gossage for Kansas Senate on or about October 17, 2020;

- "Any other transfers/contributions or expenditure, known to be provided to the Johnson County Republican Central Committee with the intention or communicated desire for the funds to be subsequently given to another specific person, committee, or entity."

Appellants assert that this category, like the first, is impermissibly overbroad. But other than citing K.S.A. 25-4158's "reasonably relevant" standard, Appellants do not provide a legal basis for their argument.

The district court properly considered the breadth of the subpoenas and made factual findings which conflict with Appellants' assertions on appeal. The district court found that the first five bullet points in this second category are appropriately limited by time and subject matter—only the sixth is objectionable. Based on our independent analysis, we reach the same result. The district court correctly found that "for the most part, the second category of information contains requests for information that, at least on their face, appear to be enforceable and would likely be enforced."

*Factual and legal findings support a reasonable suspicion of a violation.*

Lastly, we address Appellants' assertion that the Commission failed in its burden to show a reasonable suspicion of a violation of the KCFA. See K.S.A. 25-4158(d)(1). Appellants contend that the Commission's theories about "giving in the name of another" and "a known pass-through scheme" are novel and speculative.

In its response to Appellants' motions to strike, the Commission explained that it suspected two KCFA violations: one for giving a contribution in the name of another, contrary to K.S.A. 25-4154, and one for making and accepting contributions in excess of the contribution limit provided in K.S.A. 25-4153(d).

The Commission alleged that the Republican State Leadership Committee made two $37,500 payments to two PACs, and then several entities distributed these funds in facially improper ways and in statutorily excessive amounts:

> "On September 23, 2020, and September 25, 2020, two nearly inactive PACs (Lift Up Kansas PAC and The Right Way PAC for Economic Growth, collectively 'the passthrough PACs') gave $10,000 each to three central committees: the Johnson County Republican Central Committee, the Shawnee County Republican Central Committee, and the Sedgwick County Republican Central Committee, (collectively 'the central committees'). Within days most or all of these funds were contributed to the state Republican Party. On the same day the passthrough PACs gave to the central committees, the passthrough PACs also gave $5,000 to the state Republican Party. The statutory limit was $5,000. K.S.A. [25-]4153(d).
>
> "Given the consistency of the timing of all contributions at each stage including the nearly identical timing of funds passing through the central committees, the similar funding for both PACs, the substantial inactivity of the PACs, the quick turnaround of assets from one fund to the next, and the ultimate disposition of the assets in the state party committee that would have been an illegal overcontribution if directly contributed by the RSLC or the PACs individually, the scheme is apparent."

After reviewing this information, the additional information in the parties' briefs, and the subpoenas and their attached findings and conclusions, the district court found that "the existence, amounts, and timing of the contributions set forth in the [Commission's] findings and conclusions give rise to a reasonable suspicion that a campaign finance violation occurred."

Appellants do not convincingly challenge this finding. As the district court found, a reasonable suspicion, in the criminal context, is a low bar to meet. See Black's Law Dictionary 1740 (11th ed. 2019) (defining reasonable suspicion as "[a] particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity"); *State v. Glover*, 308 Kan. 590, 601, 422 P.3d 64 (2018), *rev'd and remanded* 589 U.S. 376, 140 S. Ct. 1183, 206 L. Ed. 2d 412 (2020) (finding reasonable suspicion a "low burden" in the criminal context). The reasonable

suspicion standard sets a similarly low bar here, in this civil context.

Having reviewed the Commission's factual allegations enumerated in its findings of fact and conclusions of law attached to the subpoenas duces tecum, we agree that they establish a reasonable suspicion that a campaign finance violation occurred. They set forth a particularized and objective basis for believing that a violation of the KCFA has occurred. The Commission thus provided a sufficient factual and legal basis to support its requests to enforce the subpoenas, as the district court found in its well-reasoned and well-written decision.

APPELLANTS ARE NOT ENTITLED TO ATTORNEY FEES

Appellants challenge the district court's denial of their motion for attorney fees under K.S.A. 2022 Supp. 60-5320(g) in the event we reverse. See K.S.A. 2022 Supp. 60-5320(g) (The court shall award attorney fees to the defending party, "upon a determination that the moving party has prevailed on its motion to strike."). Because we are affirming the district court's denial of Appellants' motion to strike, this request is moot.

Appellants' brief also states that they will move for appellate attorney fees under Kansas Supreme Court Rule 7.07(b) (2024 Kan. S. Ct. R. at 52). But no motion for appellate attorney fees has been filed. See Rule 7.07 (b)(2) ("A motion for attorney fees on appeal must be made under Rule 5.01 and be filed no later than 14 days after oral argument.") We thus award no appellate attorney fees.

Affirmed.

(556 P.3d 926)

No. 126,524

# STATE OF KANSAS, *Appellee*, v. MICHAEL COLLINS SMITH, *Appellant.*

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—Reversal of Conviction of Primary Crime in Multiple Conviction Case—Resentencing Is Mandatory.* When an appellate court reverses a conviction designated as the primary crime in a multiple conviction case, resentencing in the district court is mandatory under K.S.A. 21-6819(b)(5), despite whether the reversed charge is retried or dismissed on remand.

2. SAME—*Sentencing—Reversal of Conviction of Primary Crime in Multiple Conviction Case—Mandatory Resentencing—Expectation of Finality under Double Jeopardy Analysis.* When a defendant's original, multiple conviction sentence must be modified under K.S.A. 21-6819(b)(5) due to reversal of a conviction, that defendant lacks a reasonable expectation of finality in his or her sentence under a double jeopardy analysis until the mandated resentencing is completed by the district court.

Appeal from Johnson District Court; THOMAS M. SUTHERLAND, judge. Submitted without oral argument. Opinion filed September 20, 2024. Affirmed.

*Michelle A. Davis*, of Kansas Appellate Defender Office, for appellant, and *Michael C. Smith*, appellant pro se.

*Shawn E. Minihan*, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ISHERWOOD, P.J., WARNER and COBLE, JJ.

COBLE, J.: After a panel of this court reversed Michael Collins Smith's primary conviction in his multiple conviction case, the district court resentenced Smith after redesignating a primary conviction under K.S.A. 21-6819(b)(5). On appeal, Smith argues the district court lacked jurisdiction to resentence him because he had completed the incarceration portion of his sentence before the district court corrected it, and alternatively argues his new sentence violated his right against double jeopardy. But Smith's arguments are contrary to Kansas precedent, and we affirm the district court's sentence based on Smith's new primary conviction.

## FACTUAL AND PROCEDURAL BACKGROUND

In February 2019, a jury convicted Smith of voluntary manslaughter, attempted voluntary manslaughter, aggravated endangerment of a child, and criminal possession of a firearm. As a result of this conviction and consideration of his criminal history and all sentencing factors under the revised Kansas Sentencing Guidelines Act (KSGA), the district court sentenced him to a total of 279 months' imprisonment followed by 36 months' postrelease supervision. This sentence was calculated by categorizing Smith as a criminal history score A and designating his primary crime as the voluntary manslaughter conviction on which he was given 233 months' imprisonment, the standard presumptive sentence under the KSGA. The district court ordered the sentences imposed on the remaining lesser convictions—32, 6, and 8 months, respectively—to run consecutive to the primary term of imprisonment. See *State v. Smith*, No. 121,332, 2021 WL 4501835, at *19 (Kan. App. 2021) (unpublished opinion).

On Smith's direct appeal, our court found the district court erred when it denied Smith's request for a jury instruction on the lesser included offense of imperfect self-defense involuntary manslaughter. Accordingly, our court reversed Smith's conviction for voluntary manslaughter, vacated the corresponding sentence, and remanded the case to the district court for a new trial on the voluntary manslaughter charge. 2021 WL 4501835, at *11-12.

The State did not pursue a retrial on the voluntary manslaughter charge on remand and the district court dismissed the charge with prejudice in February 2023.

Following the dismissal, Smith opposed resentencing of his three remaining convictions affirmed by this court on direct appeal. Smith argued the district court did not have jurisdiction to correct his sentence because he already served his originally imposed prison sentences for those three, non-primary convictions—that is, the 46 months' imprisonment imposed for the three lesser crimes—and he sought immediate release. The Kansas Department of Corrections (KDOC) released him to postrelease supervision on May 10, 2022, and he continued to be held in the Johnson County Detention Center on a detainer.

After some back and forth from the parties, the district court held a hearing on March 24, 2023, and found Smith's sentence was unlawful because it did "not have his criminal history score applied to the base sentence, rendering it illegal due to failure to comply with [K.S.A. 21-6819]." After noting an illegal sentence may be corrected at any time, the district court opined "the issue appears to be whether [Smith] is still serving his sentence. If [he] is still on post-release supervision, he is still serving his sentence." The district court determined it had jurisdiction to correct Smith's sentence because Smith was still serving his postrelease supervision, noting the supervision period ran from May 10, 2022, to May 10, 2024. Smith moved for reconsideration, but the district court denied his request and his motion for immediate release. Ultimately, the district court resentenced Smith to 144 months' imprisonment, designating the attempted voluntary manslaughter conviction as the primary crime on which to apply his criminal history.

Smith appeals.

## THE DISTRICT COURT DID NOT ERR IN RESENTENCING SMITH

Smith offers two primary arguments on appeal. First, he claims the district court lacked jurisdiction to correct his illegal sentence because he had already completed the prison term originally imposed on the three non-primary crimes when the district court resentenced him on remand. Despite acknowledging he had not completed his postrelease supervision—which he also recognizes is part of a "'complete sentence'"—Smith argues that "[t]he only illegal sentence claimed in this case was the prison sentence," therefore the district court lacked jurisdiction to correct the sentence after he completed it. Second, he argues the district court violated his right against double jeopardy when it resentenced him and forced him to serve a sentence he had already served. We find neither argument persuasive but address each in turn.

### *The district court had jurisdiction over Smith's resentencing.*

Smith's first argument is based on K.S.A. 22-3504(a), which authorizes Kansas courts to "correct an illegal sentence at any time *while the defendant is serving such sentence*." (Emphasis added.) According to Smith, he had completed "such sentence" and therefore the district court lacked jurisdiction to correct his sentence under K.S.A. 22-3504(a). But the State argues this is an improper interpretation of the

procedure used upon the reversal of one conviction in Smith's multiple conviction case. Instead, the State argues the district court was required to resentence Smith under K.S.A. 21-6819(b)(5). As a result: "When the State decided to dismiss the reversed charge[], pursuant to K.S.A. 21-6819(b)(5), Smith was awaiting sentencing under K.S.A. 21-6819(b)(5), [so] K.S.A. 22-3504 is inapplicable in this situation."

Resolution of this issue requires us to interpret various sentencing statutes, as "courts have 'no authority to modify a sentence unless plain statutory language provides such authority.'" *State v. McMillan*, 319 Kan. 239, 245-46, 553 P.3d 296 (2024) (quoting *State v. Guder*, 293 Kan. 763, 766, 267 P.3d 751 [2012]). This presents a question of law over which appellate courts have unlimited review. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022). The most fundamental rule of statutory construction is that the intent of the Legislature governs if we can ascertain that intent. And we must first attempt to discover legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022).

Relevant here, when a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. *Keys*, 315 Kan. at 698. Where there is no ambiguity, the court need not resort to statutory construction. *Betts*, 316 Kan. at 198.

As the State argues, K.S.A. 21-6819(b)(5) controls situations where the primary count of conviction in a multiple conviction case is reversed on appeal:

> "In the event a conviction designated as the primary crime in a multiple conviction case is reversed on appeal, the appellate court shall remand the multiple conviction case for resentencing. Upon resentencing, if the case remains a multiple conviction case the court shall follow all the provisions of this section concerning the sentencing of multiple conviction cases."

Given this language, the State argues the district court was required to resentence Smith because (1) his primary crime of conviction was reversed on appeal and (2) the case remains a multiple conviction case. And as a result, the State argues the district court properly proceeded to resentence Smith following the provisions

of K.S.A. 21-6819, which generally controls sentences for multiple convictions. See K.S.A. 21-6819(b)(2) (directing to establish and apply criminal history to primary crime); K.S.A. 21-6819(b)(5) ("Nonbase sentences shall not have criminal history scores applied, . . . but base sentences shall have the full criminal history score assigned."). The State explains: "K.S.A. 22-3504 was enacted to correct a sentence *already imposed*, but illegal. In contrast, upon reversal of his primary conviction, which was subsequently dismissed by the State, Smith was awaiting a new sentencing, not serving an established sentence."

Smith argues the original appellate decision "did not reverse the primary conviction outright, as K.S.A. 21-6819(b)(5) contemplates, but reversed for a new trial, vacating only the sentence for the primary crime." But Smith does not support this point with any pertinent authority to suggest this difference is dispositive. Rather, we emphasize that the plain language of K.S.A. 21-6819(b)(5) requires a defendant be resentenced if (1) the primary conviction is reversed on appeal, and (2) the case includes multiple convictions on remand. Despite dismissal of the reversed count, K.S.A. 21-6819(b)(5) still applies.

When an appellate court reverses a conviction designated as the primary crime in a multiple conviction case, resentencing in the district court is mandatory under K.S.A. 21-6819(b)(5), despite whether the reversed charge is retried or dismissed on remand.

In multiple cases cited by both parties, courts used this procedure after a reversal of the primary crime in a multiple conviction case. For example, in *State v. Montgomery*, 34 Kan. App. 2d 511, 517-18, 120 P.3d 1151 (2005), our court remanded the case and directed the trial court to resentence the defendant using a new primary crime of conviction after his prior primary crime was reversed on appeal. Like here, the State did not pursue a new trial on the dismissed charge on remand and moved to correct the defendant's sentence—by establishing a new primary crime of conviction under the predecessor to K.S.A. 21-6819(b)(5)—after the completion of his imprisonment but while the defendant was serving his postrelease supervision. 34 Kan. App. 2d at 512-13. The district court found the prior statute did not operate retroactively

and denied the State's motion to correct the defendant's sentence, and the State appealed.

On appeal, our court determined the predecessor to K.S.A. 21-6819(b)(5) operated retroactively, and it found the district court retained jurisdiction to correct the defendant's sentence because the defendant was still serving his period of postrelease supervision:

> "Had Montgomery completely served his sentence for attempted rape and been discharged from KDOC custody at the time the State filed its motion, we would question whether the courts retained any jurisdiction over Montgomery to correct his sentence. However, at the time the State filed its motion, Montgomery was still serving his postrelease supervision term which was an integral component of his original sentence." 34 Kan. App. 2d at 517.

More recently, in *State v. Barker*, No. 117,901, 2018 WL 5093294, at *3 (Kan. App. 2018) (unpublished opinion) (*Barker II*), the defendant was convicted of multiple crimes, but the primary crime was reversed by this court on appeal. See *State v. Barker*, No. 81,092, unpublished opinion filed May 26, 2000 (Kan. App.) (*Barker I*). And like here, the State declined to retry the crime on remand. The district court resentenced the defendant based on a new primary conviction and base sentence, and the defendant appealed, arguing the district court lacked jurisdiction to resentence him. *Barker II*, 2018 WL 5093294, at *1. Our court followed *Montgomery* and concluded the district court did not err in resentencing the defendant because the statute required it: "When the court reversed the conviction of Barker's primary crime and the State declined to retry it, the district court had to follow the sentencing provisions of K.S.A. 2000 Supp. 21-4720(b)(5) [the predecessor to K.S.A. 21-6819(b)(5)]." *Barker II*, 2018 WL 5093294, at *3.

Smith unpersuasively tries to distinguish his claim from these cases because of later amendments to the illegal sentence statute. He claims when *Montgomery* and *Barker II* were decided, courts could correct an illegal sentence at any time, citing K.S.A. 22-3504(1) (Torrence). Then, in 2019, the Legislature amended this law, which now permits the courts to modify an illegal sentence only "*while the defendant is serving such sentence*." (Emphasis added.) K.S.A. 2019 Supp. 22-3504(a).

To support his argument, Smith points to the components of a "complete sentence" identified in K.S.A. 21-6804(e)(2): "the complete sentence . . . shall include the: (A) Prison sentence; (B) maximum potential reduction to such sentence as a result of good time; and (C) period of postrelease supervision at the sentence hearing." According to Smith, the plain language of subsection (e)(2) shows a prison sentence is separate and distinct from postrelease.

Based on this interpretation of K.S.A. 21-6804(e)(2), Smith reasons he had completed the prison sentence portion of his sentence before his resentencing. Put simply, Smith argues that K.S.A. 2019 Supp. 22-3504(a)'s use of "such sentence," rather than "complete sentence"—as the phrase is used under K.S.A. 21-6804(e)(2)—directs courts to correct only the illegal portion of the sentence. Here, Smith maintains the only illegal sentence in his case was his prison sentence.

But Smith does not support his point with pertinent authority or show why his argument is sound despite lacking authority. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (failing to support a point with pertinent authority, or failing to show why it is sound despite a lack of supporting authority, is like failing to brief the issue). In *Montgomery*, the panel questioned whether it would have jurisdiction if the defendant had "completely served his sentence for attempted rape and been discharged from KDOC custody at the time the State filed its motion." 34 Kan. App. 2d at 517. Here, Smith neither presents an argument nor designates a record to show he had completely served his sentence and was discharged from KDOC custody; instead, the record shows he was released to postrelease supervision.

Moreover, Smith acknowledges multiple cases in which our Supreme Court found postrelease supervision is part of a defendant's sentence. See *State v. Mossman*, 294 Kan. 901, 907, 281 P.3d 153 (2012) ("[L]iftime postrelease supervision is undeniably part of a defendant's sentence."); *State v. Gaudina*, 284 Kan. 354, 362, 160 P.3d 854 (2007) ("The legislature mandated postrelease supervision as part of the complete sentence . . . ."). But Smith con-

tends the *Gaudina* court supports his argument that "such sentence" under K.S.A. 22-3504(a) refers solely to the prison sentence because that is the only illegal portion of his sentence.

To Smith's point, the *Gaudina* court found a defendant's period of postrelease supervision is separate from the incarceration sentence. 284 Kan. at 362 (in discussing K.S.A. 21-4703[p], "the legislature clearly expressed that the postrelease supervision is a period when the defendant is released into the community—not a period while incarcerated—and occurs after confinement—not during confinement"). But he paints *Gaudina* with too broad a brush. There, the court considered this issue only from the perspective of awarding jail credit to a period of postrelease supervision—which the *Gaudina* court concluded it lacked the statutory authority to award. 284 Kan. at 362-63.

Interestingly, Smith's argument relies on the 2019 amendment to the statutory language of K.S.A. 22-3504(a), but the caselaw he provides to support his argument interprets the prior version of this statute permitting correction of a sentence at any time. So, although he may be able to point to some cases that support his position that postrelease supervision is a period distinct from a defendant's incarceration period under some circumstances, Smith has not shown how this distinction is relevant to the "such sentence" amendment under K.S.A. 22-3504(a).

But even if his argument were persuasive, and his prison sentence were separated from his postrelease supervision period, Smith also fails to show his originally imposed period of postrelease supervision is not also illegal, requiring resentencing. Our court vacated Smith's complete sentence on the reversed primary conviction, and as required by K.S.A. 21-6804(e)(2), Smith's postrelease supervision term is part of his complete sentence. And, under K.S.A. 21-6819(b)(4): "The postrelease supervision term will reflect only the longest such term assigned to any of the crimes for which consecutive sentences are imposed. Supervision periods shall not be aggregated."

Here, the record shows the district court originally ordered 36 months' postrelease supervision given the designation of voluntary manslaughter as his primary crime. But that conviction and related postrelease term was reversed on appeal. The journal entry

also shows a period of 24 months of postrelease supervision imposed on the attempted voluntary manslaughter conviction, with the third and fourth convictions each carrying a 12-month period of postrelease supervision. As such, the district court's order of a 36-month period of postrelease supervision would be illegal because the new primary crime of attempted voluntary manslaughter only carries a 24-month postrelease supervision sentence. Resentencing was necessary to impose a legal sentence—a shorter term of supervision for the new primary crime.

Put simply, Smith has not shown we should depart from the guidance offered in *Montgomery* and *Barker II* indicating the district court properly resentenced Smith based on a new primary crime of conviction under K.S.A. 21-6819(b)(5) after this court reversed the prior primary conviction. Had Smith's complete sentence been finished prior to the resentencing, then Smith's argument under *Montgomery* may be persuasive. But where he was still serving his postrelease supervision term, the district court correctly determined it was required to resentence Smith based on a new primary conviction.

### RESENTENCING DID NOT VIOLATE SMITH'S RIGHT AGAINST DOUBLE JEOPARDY

In Smith's second issue on appeal, raised in his pro se supplemental brief, he argues the district court violated his right against double jeopardy when it resentenced him and forced him to serve a sentence he believes he already served. Smith argues the KDOC provided him a certificate of release, which gave him an expectation of finality in his prison sentence because it was fully completed. However, when a defendant's original, multiple conviction sentence must be modified under K.S.A. 21-6819(b)(5) due to reversal of a conviction, that defendant lacks a reasonable expectation of finality in his or her sentence under a double jeopardy analysis until the mandated resentencing is completed by the district court.

The Fifth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights both offer guarantees that "[n]o person shall . . . be twice put in jeopardy for the same offense." Along with the most-recognizable rights against a second pros-

ecution for the same offense after an acquittal or conviction, the prohibition against double jeopardy also "'protects against multiple punishments for the same offense.'" *State v. Lehman*, 308 Kan. 1089, 1093-94, 427 P.3d 840 (2018) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 [1969]; citing *State v. Freeman*, 236 Kan. 274, 280-81, 689 P.2d 885 [1984] [same test under Kansas Constitution as under United States Constitution]). Whether a double jeopardy violation occurs under either the United States or Kansas Constitutions is a question of law subject to our unlimited review. *Lehman*, 308 Kan. at 1094.

Directing our analysis here is our Supreme Court's 2018 decision in *Lehman*. In that case, our Supreme Court was faced with a situation where the district court extended the defendant's original term of postrelease supervision due to an alleged illegal sentence, but after that originally imposed term of supervision had ended. The *Lehman* court relied on United States Supreme Court precedent to reiterate that "when considering whether a subsequent increase in the severity of a criminal sentence constitutes a double jeopardy violation, the appropriate inquiry is whether the defendant had a legitimate expectation of finality in his or her sentence." 308 Kan. at 1094 (citing *United States v. DiFrancesco,* 449 U.S. 117, 135-36, 101 S. Ct. 426, 66 L. Ed. 2d 328 [1980]).

The court in *Lehman* determined the defendant had completed his "court-ordered judgment of sentence" before the State moved to correct it. 308 Kan. at 1098. But crucial to our analysis, the *Lehman* court opined that if the defendant were "deemed to have remained on postrelease supervision after his [prison] sentence expired but before any other court order, 'he [would] still be under a sentence.'" 308 Kan. at 1098. Yet because Lehman was released from both prison and postrelease supervision, the *Lehman* court concluded that when he completed his original sentence, even if that original sentence was illegal, "he was no longer subject to the jurisdiction of the criminal justice system. Any additional sentence imposed on him for the same offense after completing the original sentence constitutes a multiple punishment proscribed by the double jeopardy provisions of our federal and state constitutions." 308 Kan. at 1099.

As emphasized by our Supreme Court in *Lehman*, our double jeopardy analysis must examine whether Smith had a legitimate expectation

of finality in his original sentence. 308 Kan. at 1094. Here, we find he did not.

Unlike in *Lehman*—where the State, not Lehman, belatedly sought the modification of his sentence after discovery of an error—here, Smith bore no expectation of finality in his sentence pending the conclusion of his direct appeal and resulting resentencing. Smith sought to reverse his conviction, and thus his sentence, on direct appeal and, at least as to count 1, was successful in his endeavor. See *Smith*, 2021 WL 4501835, at *12. Whether the State had decided to retry the case, or whether it dismissed the charge, Smith's criminal proceedings remained unsettled pending complete resolution of the reversed and remanded voluntary manslaughter charge. And, because the charge was reversed, K.S.A. 21-6819(b)(5) mandated his resentencing. Ultimately, his expectation of finality would not have emerged until his resentencing on remand was complete. Put another way, Smith could bear no expectation of finality in his sentence, despite the dismissal of count 1, because under the KSGA, that sentence was illegal so long as no primary crime was designated on which to apply his criminal history. See K.S.A. 21-6819(b)(5); see also *United States v. Rourke*, 984 F.2d 1063, 1066 (10th Cir. 1992) (finding that a defendant "cannot acquire a legitimate expectation of finality in a sentence which is illegal, because such a sentence remains subject to modification").

*Conclusion*

The district court properly resentenced Smith as mandated by K.S.A. 21-6819(b)(5) after a panel of this court reversed his primary conviction on which his sentence was based, and the State declined to pursue a new trial on that reversed charge. The district court retained jurisdiction to resentence Smith because he had not yet completed his total sentence—which included his period of postrelease supervision. Smith's resentencing did not violate double jeopardy either, because he bore no reasonable expectation of finality on his original sentence where his direct appeal was successful and he awaited resolution of his resentencing—again, as required by K.S.A. 21-6819(b)(5)—on remand.

Affirmed.

(556 P.3d 910)

No. 126,699

# JENNIFER HARDING and SAMANTHA RAMIREZ, Individually and on Behalf of All Others Similarly Situated, *Appellants*, v. CAPITOL FEDERAL SAVINGS BANK, *Appellee*.

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Motion to Dismiss for Failure to State a Claim Granted by District Court—Appellate Review.* When evaluating whether a district court erred by granting a motion to dismiss for failure to state a claim, it presents an appellate court with a question of law subject to unlimited review.

2. SAME—*Motion to Dismiss for Failure to State a Claim Granted by District Court—Appellate Review.* When a district court has granted a motion to dismiss for failure to state a claim, an appellate court must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn therefrom. The appellate court then decides whether those facts and inferences state a claim based on plaintiff's theory or any other possible theory. If so, the dismissal by the district court must be reversed.

3. CONTRACTS—*Interpretation of Contract by District Court—Appellate Review*. Whether the district court erred in its interpretation of a contract is a question of law over which an appellate court exercises unlimited review.

4. SAME—*Interpretation of Contract—Intent of Parties Is Primary Rule*. When interpreting a contract, the primary rule is to interpret the contract as the contracting parties intended.

5. SAME—*Interpretation of Contract—Courts Construe Ambiguous Language Against Drafter of Contract*. For ambiguity to exist within a contract, the contract's provisions or language must have doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language. A contract is ambiguous if after applying the rules of contractual construction, a court is genuinely uncertain which one of two or more meanings is the proper meaning. When a court determines that disputed contractual language is ambiguous, a court is required to strictly construe any ambiguous language against the drafter of the contract.

Appeal from Shawnee District Court; MERLIN G. WHEELER, judge. Oral argument held August 8, 2024. Opinion filed October 4, 2024. Reversed and remanded with directions.

*David G. Seeley* and *Lyndon W. Vix*, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, for appellants.

*Kersten L. Holzhueter* and *Bryant T. Lamer*, of Spencer Fane LLP, of Kansas City, Missouri, for appellee.

Before GREEN, P.J., HILL and GARDNER, JJ.

GREEN, J.: We are called on to determine whether the district court was correct in dismissing plaintiffs Jennifer Harding's and Samantha Ramirez' class action suit against Capitol Federal Savings Bank for failure to state a claim upon which relief can be granted. The decision we review was entered on a motion to dismiss. We therefore accept the facts alleged by the plaintiffs as true, along with any inferences that can reasonably be drawn therefrom. And then we ask whether those facts and inferences state a claim based on plaintiffs' theory or any other possible theory. And if so, the dismissal by the district court must be reversed.

On appeal, plaintiffs assert that there are four issues before this court: (1) whether the district court correctly ruled that Capitol Federal's motion to dismiss should be granted based on plaintiffs' pleadings; (2) whether the district court wrongly considered information outside the scope of the parties' pleadings when it granted Capitol Federal's motion to dismiss; (3) whether the notice provision under Section G of the Account Agreement is unconscionable; and (4) whether the district court wrongly denied plaintiffs' motion to further amend their petition to address their compliance with Section G of the Account Agreement. Of these four issues, we find the principal issues presented for decision is whether the district court correctly ruled that Capitol Federal's motion to dismiss should be granted based under plaintiffs' pleadings for breach of contract. Also, we will consider whether the district court correctly considered information outside the scope of plaintiffs' breach of contract claims and breach of the covenant of good faith and fair dealing pleadings when it granted Capitol Federal's motion to dismiss.

Plaintiffs argue that the district court violated Kansas' longstanding precedent on reviewing motions to dismiss and interpreting language within a contract. Capitol Federal responds that the district court correctly granted its motion to dismiss because plaintiffs did not notify Capitol Federal about the disputed fee charges before suing it contrary to the bank's notice provision.

To sustain the district court's granting of Capitol Federal's motion to dismiss, this court would have to conclude that, under plaintiffs' pleadings, they could not produce any evidence justifying some form of relief. We are unable to say with certainty the untenability of plaintiffs' position. Thus, we reverse the district court's dismissal of plaintiffs' breaches of contract claims against Capitol Federal and remand to the district court for further proceedings on their class action suit. Obviously, today we do not decide the merits of plaintiffs' class action suit. That decision must follow from a full factual development of the facts in the district court. We rule only that their breach of contract claims stated in their lawsuit should not have been dismissed on their pleadings as a matter of law.

## BACKGROUND

Plaintiffs each had personal checking accounts with Capitol Federal. In mid-September 2022, Harding filed a class action against Capitol Federal under K.S.A. 2022 Supp. 60-223 for charging her a fee for a purchase that was authorized when she had a positive balance in her checking account. She asserted that this violated Capitol Federal's Disclosure and Agreement for Savings and Transaction Accounts (Account Agreement)—the contract controlling how she could use her Capitol Federal consumer checking account. In early October 2022, Ramirez joined Harding's lawsuit against Capitol Federal. Ramirez argued that Capitol Federal violated their Account Agreement by charging her a fee each time the merchant resubmitted Ramirez' debit card to settle a transaction.

Because the parties' arguments involve complex banking procedures in Capitol Federal's Account Agreement, however, before further addressing the underlying facts of plaintiffs' lawsuit against Capitol Federal, this court will review how those complex banking procedures work. And in short, it is essential to understanding the parties' arguments before the district court and on appeal. So, the ensuing background section of this opinion discusses how those complex banking procedures work before discussing the remaining factual history of plaintiffs' lawsuit against Capitol Federal in the district court.

*Disputed Banking Procedures*

Plaintiffs' breach of contract claims against Capitol Federal involve the bank's decision to impose fees on certain purchases that they attempted to pay with their debit cards associated with their Capitol Federal consumer checking accounts. Harding's claim asserts that Capitol Federal breached its Account Agreement by charging an overdraft fee on a transaction that was authorized on an account with positive funds to cover the transaction but was settled when the account had insufficient funds to cover the transaction. This type of overdraft fee is called an Authorize Positive Purportedly Settle Negative (APPSN) fee. See 58 No. 1 U.C.C. Law Letter NL 4. Typically, a bank imposes an APPSN fee when "a consumer had enough money in their account at the time the consumer used their debit card, but due to intervening transactions or withdrawal authorizations, the bank deemed the consumer's account to be zero or negative at the time the debit card transaction settled." 58 No. 1 U.C.C. Law Letter NL 4.

In *Feyen v. Spokane Teachers Credit Union*, 23 Wash. App. 2d 264, 273, 515 P.3d 996 (2022), *rev. granted* 1 Wash. 3d 1024 (2023), the Washington Court of Appeals used a helpful hypothetical that it labeled the "breakfast charges scenario" to explain how a bank may impose an APPSN fee:

"[The breakfast charges scenario] explains the significance of the difference between the member's actual balance and available balance. According to this hypothetical, the member starts the day with an actual and available $10.00 balance. The member visits Starbucks and buys an $8.00 latte with her debit card. Her [bank's] available balance is now $2.00 and her actual balance is $10.00. The member next visits McDonald's for breakfast and purchases an Egg McMuffin for $2.79 and hash browns for $1.00, for a total of $3.79. Again, the member pays with her debit card. The member now still retains an actual balance of $10.00. But her available balance decreased to a negative $1.79. Assuming McDonald's settles its transaction first with [the bank], the member overdrafts. [The bank] assesses a $29.00 overdraft fee, and the member's available balance tumbles further to negative $30.79. . . . [A] day later, Starbucks settles its transaction. Because of the negative balance, [the bank] charges another overdraft fee to the member. The member's available balance plummets to negative $67.79. Thus, the member pays two overdraft fees despite her account having sufficient funds to pay for the latte at the time of its purchase." 23 Wash. App. 2d at 273.

So, a bank imposes an APPSN fee on a consumer whose account's actual balance showed sufficient funds to pay for an item

when the consumer paid for the item. Also, as stressed in the preceding scenario, if Starbucks had settled the consumer's coffee purchase with the bank first, then the bank could not have imposed an APPSN fee on the consumer for her coffee purchase. As a result, a merchant's discretionary decision when to settle the consumer's transaction with the bank also controls when a bank may impose an APPSN fee on a consumer.

Meanwhile, Ramirez' breach of contract claim challenges Capitol Federal's decision to impose multiple overdraft fees on a single item. This type of fee is called a non-sufficient funds (NSF) fee. 58 No. 1 U.C.C. Law Letter NL 4. Under Capitol Federal's Account Agreement, the bank may impose an NSF fee when a consumer's bank account lacks sufficient funds to pay for an item *and* the bank returns the consumer's transaction unpaid for sufficient funds. Yet, some banks have imposed multiple NSF fees on the same item bought by the consumer and presented for settlement by a merchant. If the merchant reattempts settling the consumer's transaction with the bank while the consumer's bank account still has insufficient funds, the bank will impose another NSF fee on the consumer. 58 No. 1 U.C.C. Law Letter NL 4. Thus, in such situations, a merchant's discretionary choice how many times to reattempt settling a consumer's outstanding payment with the bank determines how many NSF fees the bank imposes on the consumer.

*Proceedings Before the District Court*

In their amended petition, plaintiffs clarified why they filed a class action suit against Capitol Federal. Harding explained that she was suing Capitol Federal for breach of contract, including breaching the covenant of good faith and fair dealing, and for charging her a single $32 APPSN fee. Although it is unclear what Harding bought with her debit card, Harding argued that Capitol Federal should never have charged her the $32 APPSN fee because she had enough money in her bank account to pay for whatever she bought when the bank authorized the purchase.

As for Ramirez, she explained that she was suing Capitol Federal for breach of contract, including the covenant of good faith

and fair dealing, and for charging her multiple NSF fees while attempting to pay her $164.87 AT&T bill. Ramirez explained that after she first tried to pay the AT&T bill, Capitol Federal returned her payment for insufficient funds and penalized her by charging her a $32 NSF fee. Later, when Capitol Federal tried reprocessing her payment two more times without her knowledge, it charged her two more NSF fees. As a result, Capitol Federal charged Ramirez a total of $96 in NSF fees for having insufficient funds to pay her $164.87 AT&T bill. Ramirez argued that Capitol Federal could not impose the multiple re-presentment NSF fees because nothing within the Account Agreement indicated that the bank had the authority to impose such fees.

Although plaintiffs never explicitly addressed Capitol Federal's Account Agreement's rules that a consumer must follow when notifying the bank about problematic charges to his or her bank account, they implicitly argued that the Account Agreement's notice provision did not apply in their case. Part IV, Section G of the Account Agreement stated that if the consumer's account statement "contains any errors or improper charges, [the consumer] agree[s] to notify [Capitol Federal] of any such errors or improper charges within 30 days of the date on which [Capitol Federal] mailed or otherwise made the affected statement available to [the consumer]." It further stated that if a consumer failed to follow its notification procedures, that the consumer was "barred from bringing any action against [it] that is in any way related to the errors or improper charges." Regarding what transactions constituted "errors or improper charges," Section G discussed forged signatures, altered and unauthorized endorsements, as well as a merchant's failure to provide a purchased item to the consumer.

In their amended petition, plaintiffs emphasized that Capitol Federal's APPSN and NSF fee charges "were not errors." Rather, the APPSN and NSF fees "were part of the systematic and intentional assessment of fees according to [Capitol Federal's] standard practices." Based on this, plaintiffs argued that they had no duty to report to Capitol Federal the disputed APPSN and NSF fee charges that the bank intentionally imposed on them under Section G's procedures about reporting errant or improper charges. Then, they argued that because Capitol Federal was imposing the

disputed fees, giving the bank notice of the disputed fees that it imposed would be "futile." Plaintiffs further alleged that they had "performed all of their obligations pursuant to Capitol Federal's agreements."

At the end of their amended petition, plaintiffs, on behalf of themselves and the classes of people charged APPSN fees and multiple re-presentment NSF fees, asked the district court for a jury trial on their claims against Capitol Federal. Plaintiffs also asked the district court to award them restitution for paying the "improper fees," any actual damages established, and any equitable remedies necessary.

Capitol Federal did not answer plaintiffs' petition or amended petition. Rather, Capitol Federal's first filing with the district court was a motion to dismiss plaintiffs' breach of contract claims under K.S.A. 60-212(b)(6). In its motion to dismiss, Capitol Federal primarily argued that the district court should dismiss plaintiffs' case because they failed to state a claim upon which relief could be granted by failing to follow the Account Agreement's notice provision in Section G. Capitol Federal asserted that because plaintiffs argued that the bank could not legally charge them the APPSN and NSF fees, plaintiffs essentially asserted that the fees were improper. Capitol Federal then stressed that in plaintiffs' petition, plaintiffs referred to the disputed fees charged as "improper" twice. It contended that by doing this, plaintiffs admitted that the disputed fees constituted "improper charges" as meant under Section G's plain language. So, Capitol Federal concluded that plaintiffs' breach of contract claims against it were barred because they failed to notify the bank of the disputed fees, which they admitted were improper charges, within 30 days as explained in Section G. In the alternative, Capitol Federal argued that the district court should grant its motion to dismiss plaintiffs' case because the Account Agreement allowed it to assess APPSN fees on Harding and NSF fees on Ramirez.

After Capitol Federal moved to dismiss its case, plaintiffs responded by filing a detailed memorandum with the district court opposing each of the bank's arguments. In their response to Capitol Federal's arguments about them failing to follow Section G's notice provision, plaintiffs reasserted that the bank's intentional

practice of charging APPSN fees and NSF fees meant that the fee charges at issue were not errant or improper charges under Section G. Plaintiffs pointed out that the Account Agreement does not expressly define the terms "'errors'" or "'improper charges.'" But Section G references forged signatures, altered endorsements, unauthorized endorsements, and a merchant's failure to deliver a paid item. Plaintiffs argued that this limited list of consumer transactions supported that Capitol Federal's intentionally imposed APPSN and NSF fees were not improper charges. In making this argument, plaintiffs broadly alleged that in Capitol Federal's motion to dismiss, the bank "attempt[ed] to introduce facts outside the pleadings." In their alternative argument, plaintiffs asserted that their ongoing dispute with Capitol Federal defining the improper charges established that the terms were ambiguous. For this reason, they concluded that at the very least, the district court should deny Capitol Federal's motion to dismiss because the ambiguity within Section G's notice provision meant that a question of fact still existed.

Eventually, the district court held a hearing on Capitol Federal's motion to dismiss plaintiffs' breach of contract claims against it under K.S.A. 60-212(b)(6). At the hearing, plaintiffs and Capitol Federal repeated their respective arguments. A large portion of the hearing concerned whether plaintiffs had to give Capitol Federal notice that they believed it wrongly imposed the APPSN and NSF fees on them. During that part of the hearing, the district court actively questioned plaintiffs' counsel about plaintiffs' notice provision arguments. This included questioning plaintiffs' counsel about whether plaintiffs ever attempted to contact Capitol Federal about the disputed APPSN and NSF fees before suing the bank for breach of contract.

At one point during the district court judge's questioning, the following exchange between the judge and plaintiffs' counsel occurred:

"THE COURT: . . . I have this nasty habit, at least some attorneys would call it a nasty habit, of being the devil's advocate on some things.

"But, when I reviewed the Amended Petition in this case, [counsel], I didn't find any allegation in the Petition of an attempt by the plaintiffs to even comply with the Notice Provision of the Account Agreement. Is there any such allegation in there?

"[COUNSEL]: No, Your Honor.

"THE COURT: So, as far as you know, nothing was done by the plaintiffs to raise an issue with the defendant before filing this suit; is that right?

"[COUNSEL]: I'm not aware of any. Our view is that because the Notice Provision doesn't refer to bank fees, that it wasn't applicable to the dispute.

"THE COURT: Okay. But if I determined that it is, you've got a real problem, don't you?

"[COUNSEL]: If you determine, Your Honor, that it is, we did not alert the bank within 30 days. Yes, that is correct.

"THE COURT: Okay. Isn't the contention in the petition here very simply that [Capitol Federal] made improper charges to the plaintiff[s'] accounts?

"[COUNSEL]: No, Your Honor. The contention is they charged bank fees in violation of their contract. The Notice Provision, Your Honor, never, in any respect, refers to bank fees.

"An improper charge refers to a purchase, a check, a deduction made by someone else. That is the most reasonable reading of the provision. These were not improper charges we're complaining about. Bank fees charged in violation of [a] contract which aren't covered by that Notice Provision, Your Honor.

"THE COURT: Is there any provision in this Account Agreement that would limit the phrase 'improper charges' to a charge made by the bank in these circumstance[s]?

"[COUNSEL]: Well, You Honor, the phrase 'improper charges' is not defined. So what is the most reasonable meaning of 'improper charges'? We think in the context in which it's found in the contract, it's referred to unauthorized surprise charges that account holders, that maybe fraud serviced on an account, or forged accounts.

"But, the fact that term 'improper charges' is undefined means, we think, that at the very least it's an ambiguous term. 'Improper charges' may very well mean what we say, or may possibly mean what the bank says. But the fact that there is such an ambiguity in that phrase 'improper charges' means you can't, Your Honor, respectfully dismiss based on that provision.

"THE COURT: Don't I initially determine ambiguity based on the language contained in the agreement?

"[COUNSEL]: Your Honor determines whether or not the agreement is ambiguous based on the language in the agreement. Yes, Your Honor.

"THE COURT: Can you point to any provision in this contract that specifically draws the distinction between an improper charge, and an intentional charge by [Capitol Federal]?

"[COUNSEL]: The distinction is when [Capitol Federal] refers to bank fees. It calls them fees, Your Honor. It doesn't call them charges. Some of the provisions I read earlier, 'You will be charged a fee,' not a charge. 'You will be charged a fee.'

"Bank fees are a separate animal. They're different from purchases. They're different from checks I write. Bank fees are something the bank imposes on accounts. Takes without asking, without sort of seeking permission. It just does it. It just takes the fees.

"They are a separate animal. They're referred to as fees, separate from charges throughout the agreement.

"The fact that the Notice Provision never once refers to fees, we think, is dispositive. To make a distinction between charges, that is purchases, things that—other deductions from an account, cash withdraw[al]s. The distinction is made by the lack of the word 'fee' anywhere in that Notice Provision.

"THE COURT: Would you agree with me that generally speaking a Notice Provision has a condition precedent to file in the suit is generally upheld?

"[COUNSEL]: Your Honor, generally if the notice period is reasonable it's my understanding they are generally upheld.

"We would say here a 30-day notice provision to file suit, essentially imposing a 30-day, or one month limitations period on any contract dispute with the bank, would not be a reasonable limitations period.

. . . .

"We haven't briefed this really at all yet, but if the Court would like, we [could] submit some supplemental briefing on whether a 30-day limitations period is unconscionable under Kansas Law.

"It would essentially bar any contract dispute from ever being raised against the bank. It would be a very aggressive reading of the Notice Provision that is in, essentially, every bank contract in the country."

Ultimately, the district court judge granted Capitol Federal's motion to dismiss from the bench, providing the following explanation for his ruling:

"If I were ruling on this case solely on the merits of [plaintiffs' breach of contract claims], my ruling on a Motion to Dismiss would be to deny the Motion to Dismiss. Simply because I think that the allegations are sufficient to raise an issue as to whether or not the provisions of these accounts['] documents are sufficiently made that they should be interpreted by a Court.

"Now, however, we reached a point before we get to that point that these account documents contain a very clear Notice Provision that requires an account holder to give notice of any error or improper charge, and if they fail to do so within a defined period of time then they are precluded from bringing an action for breach of contract based upon that error, or improper charge. It's not a statute of limitation, it's simply a notice requirement.

"Now, I've often times been accused of being very literal in my use of the English language. But it strikes me here that the term 'improper charge' has to be viewed from the perspective of the account holder. Because that term is—tells them that if you think there's something improper on your monthly statement you have to bring it to the attention of the bank before you're entitled to, at a later time, allege that the bank breached its obligations to you.

"And I appreciate the attempts on the part of the plaintiffs to distinguish an intentional charge to account from an improper charge. But as I think I've indicated to you, I think that's a distinction without a difference.

"And while I appreciate the effort to argue that that phrase is vague, I don't think it's vague in any way. The bottom line here is that the plaintiffs are alleging

that there is an improper charge made to their accounts. And that charge is, I don't think, subject to any great deal of interpretation. The bank made a charge here. Even if I accept what is true.

"Now, under those circumstances here, and since [plaintiffs have] conceded that they did nothing to bring the alleged violations of the contract to the attention of [Capitol Federal], then in my view, that provision of the contract has been violated.

"Case law in Kansas is very clear that in contract situations Notice Provisions contained within the contracts are upheld. I'm aware of no case law that would indicate to me that any Court in Kansas or otherwise has told me that a 30-day Notice Provision in the Banking Account Agreement is an improper Notice Provision.

"And for those reasons I'm going to find that [plaintiffs have] failed to demonstrate to me that [they have] a cause of action for that reason. I want to expressly make clear that my ruling here today granting the Motion to Dismiss is not based upon any thought upon any—upon the merits of either [plaintiffs' breach of contract claims]. It deals specifically with the Notice Provision."

Plaintiffs timely appealed the district court's dismissal of their breach of contract claims against Capitol Federal for failing to comply with the Account Agreement's 30-day notice provision.

## ANALYSIS

### *Did the district court err by granting Capitol Federal's motion to dismiss plaintiffs' breach of contract claims?*

#### *Applicable Law*

The parties seem to agree on our standard of review when reviewing whether a district court erred by granting a motion to dismiss for failure to state a claim under K.S.A. 60-212(b)(6):

"Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. *Campbell v. Husky Hogs*, 292 Kan. 225, 227, 255 P.3d 1 (2011). Additionally, when a district court has granted a motion to dismiss for failure to state a claim, an appellate court must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn therefrom. The appellate court then decides whether those facts and inferences state a claim based on plaintiff's theory or any other possible theory. If so, the dismissal by the district court must be reversed. *Zimmerman v. Board of Wabaunsee County Comm'rs*, 293 Kan. 332, 356, 264 P.3d 989 (2011)." *Cohen v. Battaglia*, 296 Kan. 542, 545-46, 293 P.3d 752 (2013).

Of note, K.S.A. 2023 Supp. 60-209 addresses specific rules for plaintiffs when pleading special matters. Subsection (c) states that

when pleading a condition precedent, a plaintiff need only "allege generally that all conditions precedent have occurred or have been performed." K.S.A. 2023 Supp. 60-209(c).

Whether the district court erred in its interpretation of a contract is also a question of law over which this court exercises unlimited review. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018). As a result, this court exercises unlimited review when determining whether the district court correctly interpreted a contractual provision as ambiguous. 308 Kan. at 936. But some issues involving interpreting a contract involve questions of fact. For instance, "[w]hether contractual performance is based on a condition precedent is a question of fact." *James Colborn Revocable Trust v. Hummon Corp.*, 55 Kan. App. 2d 120, 125, 408 P.3d 987 (2017).

When interpreting a contract, the primary rule is to interpret the contract as the contracting parties intended. *Peterson v. Ferrell*, 302 Kan. 99, 104, 349 P.3d 1269 (2015). If the plain language of the contract provision at issue is clear and unambiguous, this court should interpret the contract provision as clearly and unambiguously written. 302 Kan. at 104. For ambiguity to exist within a contract, the contract's provisions or language must have "'doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language.'" *Geer v. Eby*, 309 Kan. 182, 192, 432 P.3d 1001 (2019). According to our Supreme Court, a contract is ambiguous if after applying the rules of contractual construction, a court is "'genuinely uncertain which one of two or more meanings is the proper meaning.'" 309 Kan. at 192. When this court determines that disputed contractual language is ambiguous, our Supreme Court's standard requires this court to strictly construe any ambiguous language against the drafter of the contract. *Botkin v. Security State Bank*, 281 Kan. 243, Syl. ¶ 7, 130 P.3d 92 (2006). Interpreting a contract in this manner is also "supported by a common-law rule that a court should construe the terms of a writing against the drafter." *Daggett v. Board of Public Utilities*, 46 Kan. App. 2d 513, 520, 263 P.3d 847 (2011) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63, 115 S. Ct. 1212, 131 L. Ed. 2d 76 [1995]).

At the same time, this court is not to interpret a contract provision in an unreasonable manner. Instead, it should construe the provisions of a contract in a manner that is consistent with the entire contract. *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 963, 298 P.3d 250 (2013). This means that this court should not interpret one provision within a contract in a way that renders other provisions or language within the contract meaningless. 296 Kan. at 963. "'Results which vitiate the purpose or reduce the terms of the contract to an absurdity should be avoided. The meaning of a contract should always be ascertained by a consideration of all pertinent provisions and never be determined by critical analysis of a single or isolated provision.' [Citations omitted.]" *In re Estate of Einsel*, 304 Kan. 567, 581, 374 P.3d 612 (2016).

Lastly, it is worth noting other than citing Kansas' standards for reviewing motions to dismiss and contract interpretation, plaintiffs frequently rely on federal district court decisions. Additionally, one of Capitol Federal's complaints is that plaintiffs discussed no law, state or federal, addressing a contractual notice provision containing the term "improper charges." Nevertheless, the legality of APPSN and NSF fees as charged by banks in certain situations is a developing legal issue. It seems that just one Kansas appellate court has even mentioned either fee. See *Exchange State Bank v. Kansas Bankers Surety Co.*, 39 Kan. App. 2d 232, 236, 177 P.3d 1284 (2008) (a party was charged an NSF fee while addressing a different legal issue). It also seems that just 18 federal district courts have considered this specific issue regarding APPSN and NSF fees when reviewing the legality of those fees charged by different banks.

Nevertheless, plaintiffs' arguments hinge entirely on whether the district court correctly interpreted the term "improper charges" under the Account Agreement's notice provision when ruling on Capitol Federal's motion to dismiss. Kansas' longstanding precedent on reviewing motions to dismiss and interpreting language within a contract is undisputed. Thus, although the federal decisions that plaintiffs cite support that how and when banks impose APPSN and NSF fees on consumers is an ongoing issue of legal interest, those decisions have no bearing on the outcome of this

appeal because plaintiffs' appeal turns on whether the district court correctly interpreted the term "improper charges" as meant under their Account Agreement with Capitol Federal when granting the bank's motion to dismiss.

*Analysis*

The district court granted Capitol Federal's motion to dismiss for one reason—because plaintiffs did not comply with the notice provision in Section G of the Accounting Agreement before suing Capitol Federal. Once again, during its ruling from the bench, the district court stated that it "want[ed] to expressly make clear that [its] ruling . . . granting the Motion to Dismiss is not based upon . . . the merits of either [plaintiffs' breach of contract claims]. It deals specifically with the Notice Provision." So, although Capitol Federal's Account Agreement contains numerous complex provisions, the only provision that we must interpret is the Account Agreement's notice provision.

The disputed portion of the notice provision under Part IV, Section G of the Account Agreement states:

"Except as noted in the Electronic Funds Transfer Disclosures at Part V, Section H or other document applicable to electronic funds transfers, if your account statement contains any errors or improper charges, you agree to notify us of any such errors or improper charges within 30 days of the date on which we mailed or otherwise made the affected statement available to you. If you do not notify us within that time, you are barred from bringing any action against us that is in any way related to the errors or improper charges. If we honor an item drawn on your account that contains a forged signature or endorsement or is altered in any way, you agree to notify us of such forgery or alteration within 30 days of the date on which the forged or altered item was provided to you or, if the item was not provided to you, within 30 days of the date on which we mailed or made available to you the account statement that contained a description of the forged or altered item. If you do not notify us in the time and manner required by this Agreement, you are barred from bringing any action against us that is related in any way to the forgery or alteration. In any case, you are barred from bringing any action against us for multiple unauthorized signatures or alterations by the same wrongdoer if you do not notify us in writing within 30 days after we mailed or made available to you the account statement that contained the description of that same person's first forged or altered item drawn on your account.

"Failure to report a forged or altered item within the time frames set forth above shall be deemed conclusive proof that you failed to exercise reasonable care and promptness in examining the statements and items of your account and in notifying us after discovery of the forgery or alteration. Moreover, because

you are in the best position to discover an unauthorized signature, an unauthorized endorsement, or a material alteration, you agree that we will not be liable for paying such items if these items were drawn without authority or altered so cleverly (as by unauthorized use of a facsimile machine or otherwise) that the lack of authorization or alteration could not be detected by a reasonable person and you were negligent in some respect. An item description appearing in an account statement will be deemed sufficient for purposes of this paragraph if it contains the item's number (or other identifier), amount, and date paid."

Part V, Section H contains additional rules that the consumer must follow when the consumer believes that his or her "consumer deposit account" has been charged with an unauthorized transaction. But neither party addressed this provision before the district court or on appeal. In addition, the plain language of Section H does not contain a notice provision preventing a consumer from suing Capitol Federal if the consumer does not timely notify the bank about "any errors or improper charges." Instead, Section H's plain language explains how much money the consumer may lose for an unauthorized transaction depending on how quickly the consumer notifies Capitol Federal about the unauthorized transaction. So, Section H is irrelevant for purposes of deciding this appeal.

Plaintiffs' overarching argument on appeal is that the district court violated the rules controlling when to grant a motion to dismiss and how to interpret a contract. In fact, although plaintiffs have listed their argument about the district court considering matters outside the scope of the pleadings as a separate argument, this argument is analogous to plaintiffs' first argument outlining each way the district court allegedly violated the rules on reviewing motions to dismiss and contract interpretation. To summarize, plaintiffs argue that the district court violated the following well-established rules of law when it granted Capitol Federal's motion to dismiss: (1) The district court did not accept all of their alleged facts as true; (2) the district court considered matters outside the scope of the pleadings; (3) the district court did not interpret ambiguous language in the notice provision against Capitol Federal—the drafter; and (4) the district court wrongly added language into the notice provision by interpreting it from the perspective of the "accountholder." In making these arguments, plaintiffs

also assert that because it was Capitol Federal's own policy to impose the APPSN and NSF fees, and because the bank insists that it could impose these fees on them, complying with the bank's notice provision would have been futile.

Capitol Federal counterargues that if this court were to reverse the district court and accept plaintiffs' interpretation of the notice provision, this court "would need to rewrite the contract." It argues that the district court correctly ruled that the term "improper charges" was unambiguous because it relied on the ordinary meaning of the words "improper" and "charges" when using the words in the notice provision. So, Capitol Federal argues that any consumer, including plaintiffs, should have known that under the notice provision's plain language, they had to report any complaints about the bank charging them APPSN fees and NSF fees.

Capitol Federal also argues that plaintiffs admitted that the term "improper charges" is unambiguous because in their pleadings and at oral arguments, they sometimes referred to the APPSN and NSF fees as "improper charges" or some variation of the term "improper charges." It contends that plaintiffs' "choice of words . . . illustrates that 'improper' and 'charges' are common, unambiguous terms." Based on this, it also seemingly contends that plaintiffs cannot successfully challenge the district court's alleged failure to accept the facts as alleged in their amended petition as true since they sometimes called the APPSN and NSF fees improper charges. It contests plaintiffs' assertion that the district court had to accept its allegations that they performed all their obligations under the Account Agreement as true because other evidence contradicted this argument.

In addition to the preceding arguments, Capitol Federal rejects plaintiffs' contention that the district court considered matters outside of the pleadings by questioning plaintiffs' counsel about what plaintiffs did to comply with the notice provision. Instead, it argues that because plaintiffs argued that they had no duty to notify them about any issue regarding their APPSN and NSF fee charges before suing them, whether plaintiffs complied with the notice provision was properly before the district court. For this same reason, it argues that plaintiffs invited the alleged error the district

court committed by questioning their counsel about the notice provision. As for plaintiffs' argument that complying with the notice provision would have been futile, Capitol Federal responds that their argument is inadequately briefed and speculative.

But a review of the applicable law as applied to the district court's ruling shows that the district court violated the law controlling when to grant a motion to dismiss and how to construe contracts.

In plaintiffs' amended petition, they alleged that they had "performed all of their obligations pursuant to Capitol Federal's agreements" without ever specifically addressing the notice provision. While alleging that they performed all obligations under Capitol Federal's Account Agreement, they also argued that they had no duty to report the APPSN and NSF fees to the bank, or that doing so would have been futile, because the fees were "part of [Capitol Federal's] systematic and intentional assessment of fees." Thus, in their amended petition, plaintiffs alleged the following: (1) that they had performed their obligations under the Account Agreement; (2) that Capitol Federal systematically and intentionally charged people, including them, with impermissible APPSN and NSF fees; and (3) that reporting the fees as errors to Capitol Federal would have been futile. *Put another way, in their amended petition, plaintiffs pleaded that they had performed all of their required obligations under the Account Agreement before suing Capitol Federal given the specific facts of their case*.

From the bench, after recognizing that it sometimes acted as "the devil's advocate on some things," the district court questioned plaintiffs' counsel about the notice provision at length. The district court's first question to plaintiffs' counsel during this inquisition was about whether plaintiffs had attempted to comply with the notice provision because it had not found such allegation in their amended petition. At this point, plaintiffs' counsel repeated plaintiffs' claim within their amended petition. He responded that plaintiffs never made such an allegation because their position was that the notice provision did not apply to impermissible fees that Capitol Federal intentionally charged them. Their position was that the APPSN and NSF fees did not constitute "errors or improper charges" that they had to notify Capitol Federal about since the

bank, itself, intentionally charged the fees. Later on, the district court also recognized that there is a difference between a statute of limitations and a notice provision in a contract.

A "statute of limitations" is a "law that bars claims after a specified period." Black's Law Dictionary 1707 (11th ed. 2019). So, issues involving statute of limitations are questions of law resolved by two facts that are usually undisputed: (1) when the plaintiff's injury occurred; and (2) when the plaintiff filed suit against the defendant. On the other hand, a notice provision in a contract may not necessarily be a pure question of law. Contracting parties may draft a notice provision with whatever conditions they desire. It is the contractual notice provision's plain language that determines whether the provision is essentially a statute of limitations within a contract or whether the provision includes additional steps that the plaintiff must complete before suing the defendant.

When parties dispute whether the plaintiff followed a contractual notice provision containing additional steps that the plaintiff must follow before suing the defendant, a factual dispute before the district court about whether the plaintiff complied with those additional conditions could arise. Indeed, this is why this court has held whether contractual performance depends on a condition precedent constitutes a question of fact. See *James Colborn Revocable Trust*, 55 Kan. App. 2d at 125.

Here, the condition precedent within Section G's notice provision is whether a consumer's "statement contains any errors or improper charges." This means that Section G's notice provision applied to only a consumer whose statement contained any errors or improper charges. Yet clearly, the parties have always disagreed on whether the APPSN and NSF fees constitute improper charges. This was the main issue addressed in Capitol Federal's motion to dismiss.

As a result, unless the Account Agreement clearly and unambiguously explained that APPSN and NSF fees were improper charges, the district court should have denied Capitol Federal's motion to dismiss because plaintiffs' amended petition alleged that they had performed all their required obligations under the Account Agreement before suing Capitol Federal under the specific

facts of their breach of contract claims. *Put another way, unless the Account Agreement clearly and unambiguously explained that a consumer must challenge APPSN and NSF fees under Section G's notice provision, the district court erred by not accepting the facts as alleged by plaintiffs in their pleadings as true when it granted Capitol Federal's motion to dismiss*. See *Cohen*, 296 Kan. at 545-46 (a court must accept a plaintiff's alleged facts as true when considering a defendant's motion to dismiss).

At this point, it is important to recognize that because plaintiffs attached the Account Agreement to their amended petition, Capitol Federal correctly argues that the district court could rely on the Account Agreement when ruling on its motion to dismiss. See K.S.A. 2023 Supp. 60-210(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). It is also important to recognize that although plaintiffs argue that the district court turned Capitol Federal's motion to dismiss into a motion for summary judgment by directly asking their counsel whether they had provided the bank notice as meant under Section G, Capitol Federal correctly argues that plaintiffs' counsel never objected to the district court's questions about whether they complied with the notice provision. In addition, when given the opportunity by the district court to explain why plaintiffs believed that Capitol Federal had introduced matters outside the pleadings—an argument it made in its response to Capitol Federal's motion to dismiss—plaintiffs' counsel conceded that he did not believe that the bank had introduced facts outside the pleadings to make their arguments. Then, to the extent that plaintiffs' arguments involve either the district court or Capitol Federal raising matters outside the pleadings, those arguments are not properly before this court. Plaintiffs' counsel's failure to object to the district court's questioning and concession that Capitol Federal had not relied on matters outside the pleadings to support its motion to dismiss amounts to invited error. See *Water Dist. No. 1 of Johnson Co. v. Prairie Center Dev.*, 304 Kan. 603, 618, 375 P.3d 304 (2016) (a party cannot invite error and then complain about that error on appeal).

All the same, plaintiffs correctly argue that the term "improper charges" as explained in the Account Agreement is ambiguous.

To review, from the bench, the district court determined that the term improper charges was unambiguous because the term tells an account holder that if the account holder discovers a problematic charge on his or her account statement, the account holder must promptly raise the problem with Capitol Federal. It determined that plaintiffs had to follow Section G's rule about giving Capitol Federal notice of their problems with the APPSN and NSF fees before plaintiffs could sue the bank for charging them those fees. Then, the bank told plaintiffs that it thought their argument why the term improper charges did not include intentional fees charged by a bank was "a distinction without a difference." In essence, the district court adopted the argument that Capitol Federal continues to make on appeal. It ruled that the term "improper charges" is unambiguous because the words "improper" and "charge" are broad enough to include any charge that the consumer believes he or she should not be charged with.

In reaching this ruling, however, the district court violated several rules of law. The term "improper charges," in and of itself, is very broad and ambiguous. Improper charges may result from a variety of consumer transactions—checks, debit cards, or other electronic transactions. Also, the term "improper charges" is not defined under the Account Agreement. Then, the meaning of the term "improper charges" is not inherently clear, which was the district court's ruling. As a result, the district court's reason for granting Capitol Federal's motion to dismiss was erroneous. See *Waste Connections of Kansas, Inc.*, 296 Kan. at 963 (holding that courts should not construe contractual terms by isolating a single sentence or a single provision).

Because the term "improper charges," in and of itself, is ambiguous, the district court should have considered the context of the term "improper charges." But it did not. The district court's decision to grant Capitol Federal's motion to dismiss hinged entirely on its ruling that the term "improper charges" clearly and unambiguously required plaintiffs to notify Capitol Federal of their respective complaints before suing the bank.

If the district court had further analyzed the notice provision's plain language, as it should have, it would have noted that after the language discussing how many days a consumer has to notify

Capitol Federal of an improper charge, Section G addresses transactions involving forgery and alterations. Nothing within the plain language of Section G addresses bank fees. So, in context, the plain language of the notice provision tells a consumer that if the consumer believes that his or her statement shows an improper charge, like a forgery or alteration, that consumer must notify Capitol Federal of the apparent errors or improper charges. See *Waste Connections of Kansas, Inc.*, 296 Kan. at 963 (courts should construe contractual terms in a reasonable manner). So, contrary to the district court's ruling otherwise, nothing within the plain language of the notice provision clearly and unambiguously proves that the disputed bank fees are a type of charge that a consumer must report to Capitol Federal under the Account Agreement.

Also, other nearby sections of the Account Agreement explicitly address fees. Again, Section G falls under Part IV of the Account Agreement. Although Section G never mentions fees of any kind, Section G is surrounded by sections that discuss fees. Section E is a specific provision on Capitol Federal's fees, service charges, and balance requirements. Section F notes that the order in which the consumer makes withdrawals is not necessarily the order in which it posts a consumer's transactions, which "may affect whether or not [the consumer] incur[s] an overdraft or NSF/overdraft fees." And Section H is a specific provision on what happens when a consumer has insufficient funds, uncollected funds, and overdrafts. It provides that in such circumstances, Capitol Federal may impose "NSF/overdraft and other fees."

Simply put, the fact that the provisions surrounding Section G discuss fees and Section G never mentions fees supports that Section G's notice provision does not apply to situations where a consumer challenges a fee that the bank intentionally charged to his or her checking account. If this court were to interpret the term improper charges as applying to Capitol Federal's fee charges, this court would have to ignore that the bank included no language about bank fees in Section G but included specific language about imposing overdraft and NSF fees in Sections E, F, and H. Although on appeal, Capitol Federal repeatedly asserts that plaintiffs'

interpretation of the Account Agreement would require this court to rewrite the notice provision, Capitol Federal's interpretation of the notice provision ignores that Section G never states that a consumer must report a disputed bank fee under the notice provision. Likewise, Capitol Federal's interpretation of the notice provision ignores that because the sections in the Account Agreement expressly address bank fees, it follows that Capitol Federal purposely excluded bank fees that it charged as a transaction that a consumer must report to Capitol Federal under the notice provision.

Hence, if anything, the plain language of Section G's notice provision as well as its context supports that bank fees are not charges that a consumer must timely report to Capitol Federal before suing the bank for charging the bank fees. In turn, although Capitol Federal asserts that the term "improper charges" as well as the entire notice provision clearly directed plaintiffs to tell the bank about their complaints within 30 days, this is wrong. Section G's plain language never addresses charging bank fees that the consumer disagrees with if the consumer fails to timely notify Capitol Federal about those fee charges. The surrounding sections of the Account Agreement address when a consumer may be charged bank fees.

Given the preceding, the district court's conclusion that the term "improper charges" clearly and unambiguously included APPSN and NSF fee charges was error. Although the district court stated that plaintiffs were making a distinction without a difference, there is a clear distinction between the "improper charges" that a consumer must timely report to Capitol Federal under Section G's notice provision and the APPSN and NSF fee charges that the bank imposed as punishment for lacking funds to pay for a transaction. In any case, because Capitol Federal drafted the Account Agreement and the term "improper charges" is ambiguous, the district court had to interpret this ambiguous language against Capitol Federal. See *Botkin*, 281 Kan. 243, Syl. ¶ 7. Thus, as the bank, the burden or obligation was on Capitol Federal to define the important terms contained in the Account Agreement. As quoted by this court in *Daggett* when discussing the United States

Supreme Court's decision *Mastrobuono*, the purpose of the common-law rule to construe disputed contractual language against the drafter "'is to protect the party who did not choose the language from an unintended or unfair result.'" *Daggett*, 46 Kan. App. 2d at 520. To paraphrase the *Daggett* court, in this case, the district court erred in its interpretation of Section G's notice provision because giving Capitol Federal the benefit of its own interpretation would subject consumers to unfair results. See 46 Kan. App. 2d at 520.

## CONCLUSION

When reviewing a motion to dismiss for failure to state a claim, a court must accept the facts alleged by the plaintiff as true, along with any reasonable inferences stemming from those alleged facts. *Cohen*, 296 Kan. at 545-46. And when reviewing contested language in a contract provision, a court must interpret the provision reasonably and in a manner that is consistent with the entire contract. *Waste Connections of Kansas, Inc.*, 296 Kan. at 963. Here, plaintiffs pleaded that they had performed all their contractual obligations to Capitol Federal in their amended petition. Although the district court adopted Capitol Federal's argument that plaintiffs violated the notice provision because the provision clearly told them to contact the bank before suing, a review of the notice provision's language undermines Capitol Federal's argument and the district court's ruling.

The term "improper charges," in and of itself, is ambiguous. Also, the term "improper charges" is ambiguous within the context of the Account Agreement. In a nutshell, (1) because plaintiffs pleaded that they had met this condition precedent under the specific facts of their case and (2) because the term "improper charges" in Section G's notice provision is ambiguous, the district court should not have questioned plaintiffs' attorney about plaintiffs' compliance with the notice provision at the motion to dismiss hearing. Rather, the district court should have accepted the facts as alleged by plaintiffs as true when ruling on Capitol Federal's motion to dismiss. Although the district court had unlimited review to determine whether the notice provision was ambiguous, it never recognized that the term "improper charges" is a condition precedent that required

it to consider whether, in fact, plaintiffs timely notified Capitol Federal about their fee complaints before suing. See *James Colborn Revocable Trust*, 55 Kan. App. 2d at 125 (whether contractual performance is based on a condition precedent constitutes a question of fact); see also K.S.A. 2023 Supp. 60-209(c) (explaining that when pleading conditions precedent, plaintiffs may generally allege that they performed the condition precedent).

So, measured by the standard that the district court must accept plaintiffs' notice pleadings as true, the district court erred when it engaged in fact-finding at the motion to dismiss hearing. It should have accepted plaintiffs' notice pleadings that they followed the Account Agreement's procedures before suing Capitol Federal. The term "improper charges" was ambiguous. In fact, the parties and the district court's extensive discussion of whether Capitol Federal's APPSN fees and NSF fees constituted improper charges proved that the term "improper charges" could be interpreted more than one way. See *Eby*, 309 Kan. at 192 (if a disputed term could reasonably be interpreted to have two or more meanings, then that term is ambiguous). Thus, when evaluating whether plaintiffs had to comply with the condition precedent to timely notify Capitol Federal of improper charges listed on their account statements as required under Section G's Account Agreement's 30-day notice provision, this determination would have obviously involved a question of fact. "Whether contractual performance is based on a condition precedent is a question of fact." *James Colborn Revocable Trust*, 55 Kan. App. 2d at 125.

Then, the district court erred when it engaged in fact-finding at the motion to dismiss hearing. In summary, because the district court made the preceding errors when it granted Capitol Federal's motion to dismiss plaintiffs' breach of contract claims, we reverse the district court's decision and remand for further proceedings consistent with this opinion.

Reversed and remanded with directions.

(556 P.3d 902)

No. 126,141

# S.B. and C.B., Individually and as Parents and Guardians of J.B., *Appellants*, v. SEDGWICK COUNTY AREA EDUCATIONAL SERVICES INTERLOCAL COOPERATIVE #618, *Appellee*.

SYLLABUS BY THE COURT

1. NEGLIGENCE—*Plaintiff's Claim of Direct Negligence—Requirements*. A claim of direct negligence requires the plaintiff to demonstrate that the defendant owed a duty to the injured party, the defendant breached that duty, the breach caused the plaintiff's damages, and that the plaintiff suffered damages.

2. SAME—*Duty of Defendant to Exercise Reasonable Care—Question of Law*. Whether the defendant owes a duty to a third party to exercise reasonable care under the circumstances is a question of law.

3. EMPLOYER AND EMPLOYEE—*Employer of Teachers Owes Duty to Exercise Reasonable Care to Protect Students.* An employer of teachers working in an elementary-aged public education setting owes a duty to exercise reasonable care to protect students from being inappropriately physically restrained and hit by its employees acting within the scope of their employment.

4. SAME—*Employer Owes Third Party a Duty to Exercise Reasonable Care—Duty to Train and Supervise Employees Is Question of Fact.* After determining an employer owes a third party a duty to exercise reasonable care under the circumstances, it is a question of fact whether that duty of reasonable care includes a duty to train and supervise its employees.

5. NEGLIGENCE—*Claim of Negligence—Breach of Duty Must Be Identified by Court to Define Reasonable Standard of Care.* The court must identify the alleged breach to appropriately define the reasonable standard of care under the circumstances.

6. SAME—*Requirement of Expert Witness Usually to Establish Reasonable Standard of Care.* An expert witness is typically required to establish the reasonable standard of care in a case alleging professional liability or when the subject matter is outside the common knowledge, skill, or experience of an average juror.

7. SAME—*Expert Witness Testimony Not Required for Every Breach of Job Function.* Not every alleged breach of a job function requires expert testimony to establish a deviation from the reasonable standard of care in the performance of the job function.

8. SAME—*Expert Testimony Not Required to Establish Causation From Reasonable Standard of Care for Cases of Nonprofessional Services.* It is well established in Kansas that expert testimony is not needed to establish causation or deviations from the reasonable standard of care in cases involving nonprofessional services or subject matter within common knowledge, skill, or experience of the lay juror.

Appeal from Sedgwick District Court; WILLIAM S. WOOLLEY, judge. Oral argument held July 9, 2024. Opinion filed October 11, 2024. Reversed and remanded with directions.

*Chris Dove*, of Dove Law, LLC, of Roeland Park, and *Benjamin C. Fields*, of Fields Law Firm, of Kansas City, Missouri, for appellants.

*Andrew L. Foulston* and *Katy E. Tompkins*, of McDonald Tinker PA, of Wichita, for appellee.

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

HURST, J.: This case turns on the single issue of whether an expert witness is needed to establish a deviation from the reasonable standard of care of an employer to protect a third party from its employees. After a teacher employed by the Sedgwick County Area Educational Services Interlocal Cooperative #618 (Interlocal 618) physically retrained and struck the plaintiffs' four-year-old child in the face, the plaintiffs filed suit against Interlocal 618 for damages. In the case on appeal, the plaintiffs claim that Interlocal 618 deviated from the reasonable standard of care to protect their child from being physically assaulted by its employee. Specifically, the plaintiffs allege that Interlocal 618 negligently trained and supervised the employee who struck their child.

The district court granted Interlocal 618 summary judgment finding that the plaintiffs failed to provide required expert testimony to establish the reasonable standard of care. Contrary to the district court's finding, this case presents no claim of professional liability nor technical, scientific, or uncommon questions involving language or terms outside the knowledge, skill, or experience of the average juror that requires expert testimony. While the plaintiffs' child received special education services, the reasonable standard of care to prevent the plaintiffs' child from being physically assaulted by a teacher was unrelated to the child's specific educational needs.

The plaintiffs' claim that Interlocal 618 breached its duty of reasonable care to protect their four-year-old child from being physically assaulted by its employee, and that breach resulted from inadequate training and supervision of the employee. The plaintiffs' claim does not require expert testimony to establish the reasonable standard of care. The district court's order granting Interlocal 618 summary judgment is reversed, and this case is remanded for further proceedings consistent with this opinion.

## FACTUAL AND PROCEDURAL BACKGROUND

Jessica Alves worked for Interlocal 618 from approximately August 1, 2016, until she was forced to resign because of the incident at issue here, which occurred on January 30, 2018. During that same time, the plaintiffs' child, a four-year-old student with autism, attended special education classes at the elementary school.

The plaintiffs' description of the incident giving rise to this case varies slightly from the defendant's description, but the parties agree regarding the primary points. The agreed conduct is included without the sentiment assigned by either party.

On January 30, 2018, Alves and two paraeducators were in the classroom with the plaintiffs' child and other students when an incident occurred in which Alves physically restrained and struck the plaintiffs' child. When the instructors attempted to transition the plaintiffs' child from one activity to another, he resisted by putting his fingers in his mouth, blowing snot out of his nose, and flailing his arms. While swinging his arms, the plaintiffs' child hit or slapped staff, including hitting Alves in the leg. In response, Alves slapped the child's hand at least twice. After some minutes while the child continued this, Alves placed the child in a physical restraint hold. While Alves held the child in front of her, he knocked his head into Alves' chest and Alves responded by striking the four-year-old child on the face. A short while later, Alves responded to the child's continued actions by placing him in a second restraint hold. Following an investigation, which included reports from the paraeducators present at the incident, Interlocal 618 forced Alves to either resign or have her employment terminated.

Interlocal 618 does not dispute that Alves acted inappropriately when she restrained and struck the plaintiffs' child. According to Interlocal 618, Alves attended trainings on nonviolent crisis intervention and a nonviolent intervention refresher; Emergency Safety Interventions; Universal Design for Learning; a training on Least Restrictive Environment regarding appropriate education of diverse students; training on executive functioning; and training on apps for students with autism spectrum disorder. The elementary school principal, who was not an Interlocal 618 employee, supervised Alves' day-to-day activities.

In October 2020, after originally initiating an action in the United States District Court for the District of Kansas, the plaintiffs filed the negligence action underlying this appeal against Interlocal 618 on their child's behalf. See *Barr v. Sedgwick County Area Educational Services Interlocal Cooperative #618*, No. 19-2556-JWB, 2020 WL 5572692, at *2-8 (D. Kan. 2020) (unpublished opinion) (dismissing the plaintiffs' claims to allow them to refile in State court). The plaintiffs' original suit alleged that Interlocal 618 breached its duty to train and supervise Alves and that Interlocal 618 was vicariously liable for Alves' negligent actions taken while acting within the scope of her employment. The plaintiffs no longer assert a vicarious liability claim.

The plaintiffs timely disclosed two retained expert witnesses—a clinical and forensic neuropsychologist and an occupational therapy, rehabilitation, and life planning expert—and several nonretained experts who treated their child by the district court's April 30, 2021 deadline. Interlocal 618 then disclosed its retained expert regarding the plaintiffs' damage allegations; nonretained medical care provider experts; and all billing and account managers and personnel of the medical providers by its deadline. The plaintiffs did not disclose any rebuttal experts, and discovery closed on August 19, 2022.

On September 18, 2022, the district court entered an agreed pretrial order that described the plaintiffs' theory of recovery as follows:

"1. Plaintiffs claim that the Interlocal breached its duty of care to [the plaintiffs' child], to properly supervise its students and supervise and train its staff in order

to take reasonable steps necessary for the protection of students like [the plaintiffs' child]. Kansas law states this is a special duty of care on the part of schools and educational providers to act *in loco parentis* for the protection of children who are entrusted to their care. The Interlocal failed to act reasonably, in numerous respects, in order to protect [the plaintiffs' child]."

The pretrial order described the plaintiffs' factual issue as, "Did Defendant Interlocal fail to act reasonably in its training and supervision of Jessica Alves and [the plaintiffs' child], which resulted in [the plaintiffs' child's] injuries?"

*Interlocal 618's Motion for Summary Judgment*

On October 5, 2022, Interlocal 618 moved for summary judgment, arguing that the plaintiffs had abandoned their claim of vicarious liability and were solely pursuing a claim of direct negligence against Interlocal 618 for not protecting their child resulting from a failure to adequately train and supervise Alves. Interlocal 618 further argued that the plaintiffs' claim related to the reasonable standard of care for a special education service provider, which required expert testimony because it fell outside the knowledge of a lay juror. Therefore, according to Interlocal 618, the plaintiffs' failure to identify an expert regarding this specialized standard of care required the district court to enter judgment in its favor.

Among other things, the plaintiffs argued that they did not need an expert to establish the reasonable standard of care because the negligence allegation was unrelated to special education services or programs. Instead, the plaintiffs claimed that Interlocal 618 deviated from the reasonable standard of care to protect their child by failing to train and supervise its employee to protect their child from being inappropriately physically restrained and hit. The plaintiffs clarified that their claim is negligent supervision and training, including that Interlocal 618 was responsible for Alves' acts under the Kansas Tort Claims Act (KTCA) without the need to show liability under a theory of respondeat superior. Interlocal 618 responded that the plaintiffs failed to present a claim of vicarious liability under the KTCA for Alves' actions in the pretrial order.

On December 14, 2022, in an oral pronouncement, the district court granted Interlocal 618's motion for summary judgment. The

court found the plaintiffs maintained just one claim of direct negligence alleging the defendants deviated from the reasonable standard of care in training and supervising Alves. The district court then found that the plaintiffs needed an expert to establish the reasonable standard of care, and therefore, granted the defendant's motion for summary judgment for failure to do so. The court explained that "an expert is required to testify as to the level of supervision required by the defendants over Alves' teaching of lower elementary level special education students like [the plaintiffs' child], and whether defendant violated that level of supervision."

The district court's oral ruling left no remaining claims, and the court's written order does not include additional reasoning but incorporates by reference the reasons pronounced at the hearing. The plaintiffs appealed.

## DISCUSSION

The plaintiffs brought a negligence action against Interlocal 618 seeking damages from Alves' inappropriate restraint and physical assault of their four-year-old child. Although the plaintiffs initially pursued several theories of liability—including direct and vicarious—only the direct negligence claim alleging a breach of Interlocal 618's duty to protect their child from physical harm remains. Thus, the only issue on appeal is whether the district court correctly determined that the plaintiffs' claim requires expert testimony to establish the reasonable standard of care under the circumstances.

### I. *Interlocal 618 Owed the Plaintiffs' Child a Duty of Reasonable Care*

The plaintiffs' negligence claim requires them to demonstrate: "(1) defendant owed a duty to the plaintiff; (2) defendant breached that duty; (3) plaintiff's injuries were caused by the defendant's breach; and (4) plaintiff suffered damages." *Reardon v. King*, 310 Kan. 897, 903, 452 P.3d 849 (2019). The first step of a negligence claim requires this court to determine whether Interlocal 618 owed a duty to the plaintiffs' child as a matter of law. As explained be-

low, the parties appear to agree that Interlocal 618 owed the plaintiffs' child a duty of reasonable care to protect him from being physically harmed by its employees. Only after identifying the duty owed to the plaintiffs' child—and allegedly breached by the defendant—can the district court determine whether an expert witness is required to explain the reasonable standard of care required to satisfy that duty.

Even if the parties contend no agreement exists regarding Interlocal 618's duty to the plaintiffs' child, the Kansas Supreme Court has found that a special relationship exists between teachers/administrators and their students in which the employer/administrator owed a duty of reasonable care to protect students. See *Beshears v. U.S.D. No. 305*, 261 Kan. 555, 560, 930 P.2d 1376 (1997) (noting the special relationship that can exist between the school and students in their care); *Sanchez v. U.S.D. 469*, 50 Kan. App. 2d 1185, 1199, 339 P.3d 399 (2014) (schools owe a duty of reasonable supervision and protection to elementary and secondary students, derived in part from the doctrine of *in loco parentis*). "[A]n employer owes a duty of reasonable care under the circumstances to prevent harm to third parties caused by its employees when those employees are acting within the scope of their employment." *Reardon*, 310 Kan. at 904. Interlocal 618's duty to the plaintiffs' child includes its duty as an employer of teachers who encounter students within the scope of their employment.

The plaintiffs allege that Interlocal 618's duty of reasonable care included a duty to train and supervise its employees. However, the duty to train and supervise employees are not separate or distinct causes of action in Kansas. "[E]mployers in Kansas do not have a duty to third parties to train or to supervise their employees," rather those employers "have a duty to exercise reasonable care under the circumstances." *Reardon*, 310 Kan. at 904-05. The court cautioned lower courts against narrowing the definition of a party's duty to invade the purview of the fact-finder. *Reardon*, 310 Kan. at 904. The duty of reasonable care is meant to "set broadly applicable guidelines for public behavior." 310 Kan. at 904. The Kansas Supreme Court explained that "by defining an employer's duty as one of 'reasonable care,' we reserve the question of what

specific acts constitute 'reasonable care' in any of the infinite factual circumstances that could exist to the second element of a negligence claim—breach of the duty." 310 Kan. at 904.

An employer of teachers, as Interlocal 618 is here, must exercise reasonable care under the circumstances to protect the safety of students in the care of those teachers. A fact-finder may determine that Interlocal 618's duty to protect student safety included providing reasonable training and supervision of its employees. See, e.g., *Reardon*, 310 Kan. at 903-04 (explaining the special relationship "between employers and third parties who come into contact with their employees"); *Saunders as next friend of R.S. v. USD 353 Wellington*, No. 19-2538-DDC-TJJ, 2021 WL 1210019, at *13 (D. Kan. 2021) (unpublished opinion) (explaining that *Reardon* did not change the duty of reasonable care owed by school employees to protect school children).

II. *No Expert Was Needed to Establish Reasonable Standard of Care*

After determining that Interlocal 618 owed the plaintiffs' child a duty to exercise reasonable care as a matter of law, it then becomes a question of fact whether Interlocal 618 breached that duty. *Granados v. Wilson*, 317 Kan. 34, 43, 523 P.3d 501 (2023) (while the existence of a duty is a question of law, whether specific conduct breaches that duty is a question of fact). The core issue on appeal derives from this second step—whether Interlocal 618 breached its duty by deviating from the standard of reasonable care under the circumstances. This court must identify the correct standard of reasonable care at issue before determining if an expert is required to establish that standard of care.

Interlocal 618 argues that the standard of care includes the "specific type of training a special education teacher would need before being qualified to teach students like [the plaintiffs' child]." In accordance with Interlocal 618's argument, the district court explained the reasonable standard of care as "the supervision of a special ed teacher over a lower elementary special needs student" or the "level of supervision required . . . over Alves' teaching of lower elementary level special education students like [the plaintiffs' child]." However, the plaintiffs allege that Interlocal 618

breached its duty of reasonable care to prevent Alves from inappropriately physically restraining and assaulting their child—not its duty to train or supervise Alves to be a qualified special education teacher.

The parties argue for significantly different standards of care which could impact the case outcome. When the alleged negligence involves a breach of a professional standard of care outside the common knowledge and skill of an average juror, an expert witness is typically required to establish deviation from that professional standard. See, e.g., *Schlaikjer v. Kaplan*, 296 Kan. 456, 464, 293 P.3d 155 (2013) (expert testimony required in medical malpractice case to establish treatment standard for tracheal stenosis which was outside the common knowledge and experience of the average juror); *Tudor v. Wheatland Nursing*, 42 Kan. App. 2d 624, 633, 214 P.3d 1217 (2009) (expert was necessary in nursing home case regarding care and safety measures provided to a resident). For example, an expert witness is typically required to establish the parameters of the reasonable standard of care in cases involving allegations of medical malpractice, inappropriate accounting practices, or legal malpractice. See, e.g., *Williamson v. Amrani*, 283 Kan. 227, 244, 152 P.3d 60 (2007) ("Expert testimony is generally required in medical malpractice cases to establish the standard of care and to prove causation."); *Battenfeld of America Holding Co., Inc. v. Baird, Kurtz & Dobson*, 60 F. Supp. 2d 1189, 1210-11 (D. Kan. 1999); *Bowman v. Doherty*, 235 Kan. 870, 879, 686 P.2d 112 (1984) ("Expert testimony is generally required and may be used to prove the standard of care by which the professional actions of the attorney are measured and whether the attorney deviated from the appropriate standard."). An expert witness is needed to establish the standard of care or causation in a negligence action when "the subject matter is too complex to fall within the common knowledge of the jury and is 'beyond the capability of a lay person to decide.'" *Williamson*, 283 Kan. at 245 (quoting *Hare v. Wendler*, 263 Kan. 434, 445, 949 P.2d 1141 [1997]).

Interlocal 618 argues that the reasonable standard of care in this case should be likened to the reasonable standard of care in a case alleging negligent care of a disabled resident of a group living

facility. See *Peterson v. Community Living Opportunities, Inc.*, No. 99,545, 2008 WL 5401456 (Kan. App. 2008) (unpublished opinion). In *Peterson*, a disabled patient living in a group intermediate care facility needed several teeth extracted and brought a negligent dental care action against the facility. 2008 WL 5401456, at *1-2. The district court granted summary judgment to the facility because the patient failed to provide expert testimony on the appropriate standard of care for providing dental care to a disabled patient. 2008 WL 5401456, at *3. On appeal, a panel of this court affirmed the district court's decision, noting that although an average juror would understand the mandate to brush, floss, and have regular dental examinations, the reasonable standard of care for providing dental care to disabled patients involves specialized knowledge and terminology outside the common knowledge of a juror. 2008 WL 5401456, at *4. Interlocal 618's reliance on *Peterson* is misplaced because it involves allegations of negligent provision of medical/dental care and services to a disabled patient—not negligent training and supervision of employees to prevent physical assault. Moreover, even if *Peterson* included allegations of negligent supervision, the type and quality of training and supervision required to ensure that disabled patients receive reasonable medical/dental care is distinguishable from the supervision and training required to prevent a teacher from inappropriately physically restraining and hitting a four-year-old student.

"Holdings of an expert testimony requirement outside the area of professional liability, where breach of a standard of care must be proven, are not easily found." *Moore v. Associated Material & Supply Co.*, 263 Kan. 226, 235, 948 P.2d 652 (1997). Professional liability is the legal consequence from the wrongful acts, omissions, mistakes, misstatements, and failures of a person performing professional acts or working within the scope of their professional occupation. While this court does not undertake the arduous and unnecessary task of identifying every job function or activity that could subject a defendant to professional liability claims, there must necessarily be a limit. To find otherwise would mean that any claim of negligence related to an alleged deviation from

the reasonable standard of care in the performance of a job function would require expert testimony. That is simply not accurate. It is well established in Kansas that expert testimony is not required to establish causation and deviations from the reasonable standard of care in cases involving nonprofessional services or subject matter within common knowledge of the lay juror. See, e.g., *Moore*, 263 Kan. at 235 (finding no expert needed to establish causation when the case was unrelated to professional liability); *Sterba v. Jay*, 249 Kan. 270, 283, 816 P.2d 379 (1991) (no expert required to establish deviation from standard of care regarding negligent warning); *Marshall v. Mayflower Transit, Inc*., 249 Kan. 620, 630, 822 P.2d 591 (1991) (no accident reconstruction expert needed to establish causation). "Where the normal experience and qualifications of jurors permit them to draw proper conclusions from given facts and circumstances, expert conclusions or opinions are not necessary." *Sterba*, 249 Kan. at 283.

In *Sterba*, the driver of a truck struck and killed a city employee who was performing road maintenance. The trial proceeded without an expert regarding the city's duty to provide warning signs and devices regarding the road maintenance, and the district court permitted the jury to compare the fault of the deceased, the defendants, and the city. The jury attributed some of the fault to the city for failure to properly warn oncoming drivers about the road maintenance, but the plaintiff argued that an expert was needed to establish whether the city deviated from the reasonable standard of care in its warnings. A city employee testified that the city used part of the Manual on Uniform Traffic Control Devices (MUTCD) for its safety guidelines for street maintenance, but "it was not mandatory" to follow the MUTCD for the maintenance on the day of the accident. 249 Kan. at 273. On appeal, the Kansas Supreme Court explained that "whether the warning signs or devices were sufficient to warn an ordinary observant driver of a construction or maintenance operation . . . falls within the common knowledge and experience of motorists." 249 Kan. at 283.

Interlocal 618 argues that *Tudor* supports the need for an expert witness to establish the reasonable standard of care in a case alleging negligent supervision. In *Tudor*, a nursing home resident

with serious medical conditions that caused him difficulty swallowing, regurgitating, and a risk of aspiration took a sandwich from a snack cart and stuffed it in his mouth, which caused him to choke and die. The patient's estate filed a wrongful death action including claims of failure to properly hire, train, and supervise nursing home staff. 42 Kan. App. 2d at 627. The district court granted the nursing home's summary judgment motion, finding the plaintiff needed an expert to establish the nursing home's alleged deviation from the standard of reasonable care "in its initial assessment or acceptance of [the patient] as a resident and whether [the defendant's] care, treatment, supervision, and monitoring of [the patient] was reasonable." 42 Kan. App. 2d at 627. A panel of this court affirmed, finding the patient's unique symptoms and conditions required an expert's testimony regarding the reasonable standard of care. 42 Kan. App. 2d at 631-32. However, the *Tudor* holding relates to the reasonable standard of care for supervising and providing services to a medically fragile patient—not the reasonable standard of care required to train or supervise the staff who cared for the patient to not physically assault patients. 42 Kan. App. 2d at 631-32. *Tudor* is distinguishable.

While it does not appear that this court has directly addressed whether an expert witness is needed to establish the reasonable standard of care in a case alleging negligent training and supervision, a federal district court applying Kansas law has recently addressed the issue. See *Workman v. Kretzer*, No. 20-2605-JWL, 2021 WL 6049848, at *2-3 (D. Kan. 2021) (unpublished opinion). In *Workman*, the plaintiff alleged that while the defendant's employee drove a tractor-trailer in the course of his employment, the employee made a U-turn on a roadway that caused a collision that killed the plaintiff's mother. The plaintiff alleged the employer negligently hired, retained, supervised, and trained the employee who caused the accident. The defendant sought summary judgment, arguing that the plaintiff needed an expert "concerning the relevant standard of care and its breach" for the plaintiff's negligent hiring, retention, supervision, and training allegations. 2021 WL 6049848, at *2. The federal court concluded that Kansas law did not require expert testimony, even though the trucking industry is heavily regulated, when the defendant did not allege those

regulations applied to its conduct at issue and the plaintiff did not include professional negligence claims. 2021 WL 6049848, at *2.

Contrary to Interlocal 618's assertions, the plaintiffs do not allege that Interlocal 618 deviated from the reasonable standard of care to train and supervise its employees to provide professional services to students with specialized educational, behavioral, or physical needs. Rather, the negligence claim alleges a deviation from the standard of reasonable care to train and supervise Alves to not inappropriately physically restrain or hit the plaintiffs' four-year-old child. Interlocal 618 fails to identify anything about its training or supervision to prevent teachers from physically assaulting students that creates professional liability, requires technical or scientific knowledge, or is outside the common knowledge, understanding, or skill of an average juror. On appeal, Interlocal 618 does not argue that Alves appropriately or justifiably restrained or hit the plaintiffs' child under the circumstances or based on Alves being a special education teacher. Under these circumstances, Interlocal 618's alleged breach of the reasonable standard of care to train and supervise Alves to not inappropriately restrain or physically assault the plaintiffs' child is unrelated to providing specialized educational services to the plaintiffs' child.

## CONCLUSION

Having found that the plaintiffs were not required to provide an expert witness to establish whether Interlocal 618 deviated from the reasonable standard of care to protect the plaintiffs' child from being inappropriately restrained or hit by Alves, the district court's summary judgment decision is reversed. While an expert witness is not required, that does not mean the plaintiffs can establish that Interlocal 618 deviated from the reasonable standard of care or that its actions caused the alleged damages. This case is remanded for further proceedings consistent with this opinion.

Reversed and remanded with directions.