No. 124,833

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MARTI WICKHAM and WILLIAM FRANZ,
Appellees,

v.

CITY OF MANHATTAN,
Appellant.

SYLLABUS BY THE COURT

1.

When a district court has the authority to grant attorney fees, its decision whether to award fees is reviewed for an abuse of discretion.

2.

When the language of an attorney fees statute makes an award mandatory, the district court has no discretion and must award attorney fees according to the statute.

3.

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first seek to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings.

4.

The plain language of K.S.A. 2022 Supp. 60-2006, that calls for the award of attorney fees as costs in certain cases, does not bar application of the statute to property damage cases of first impression, or in property damage lawsuits involving municipalities. Cities are not immune from its rule.

Appeal from Riley District Court; JOHN F. BOSCH, judge. Opinion filed April 7, 2023. Affirmed.

Katharine J. Jackson, city attorney, and *Michelle R. Stewart*, of Hinkle Law Firm LLC, of Lenexa, for appellant.

Joseph A. Knopp, of Knopp & Biggs P.A., of Manhattan, for appellees.

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

HILL, J.: After a snow on December 15, 2019, the City of Manhattan cleared the City's streets with a snowplow. Marti Wickham and William Franz reside in their home in Manhattan. After that snow, the two filed a claim with the City, contending that a City snowplow pushed snow into their stone mailbox, cracking its base.

The City investigated the claim and the City Attorney's Office denied their request for damages. The City officials were not convinced that the damage to the mailbox was caused by a City snowplow. The City's denial stated it would reconsider Wickham's claim if she provided evidence of the City's negligence.

About a month later, on February 18, 2020, Wickham and Franz sent a letter to the City's legal analyst requesting $3,261 in damages for the mailbox because of the negligent operation of the City's snowplow. The letter shows that Wickham and Franz

included photos and a witness affidavit as evidence, but these attachments were not included in the record on appeal.

In response, the City attorneys denied Wickham and Franz' request for damages. In their view, the evidence revealed the mailbox was improperly installed and maintained before the incident, and the evidence did not show a City snowplow hit the mailbox and caused the damage. The City made no offer to settle this property damage claim.

After the City's denial, Wickham and Franz sued the City, claiming its employee acted negligently "by allowing the blade of the snowplow to leave the roadway and strike [their] mailbox which destroyed the mailbox's ability to function." Wickham and Franz sought $3,262 in damages and the award of "reasonable attorney fees" under K.S.A. 2019 Supp. 60-2006.

The City answered, arguing that Wickham and Franz had failed to state a claim for which relief could be granted. The City also argued their claims are barred by the exceptions to the Kansas Tort Claims Act, K.S.A. 75-6101 et seq.

During a summary judgment hearing on motions filed by both parties, the district court held that K.S.A. 2019 Supp. 60-2006 applied here and found Wickham and Franz could be awarded attorney fees if their claim prevailed. The district court did not at that time rule that the Tort Claims Act applied to their claim, as Wickham and Franz had alleged in their motion for partial summary judgment.

The judge tried this case. The court heard the testimony of Wickham, Franz, the Public Works Director for the City, the street department crew leader for the Public Works who investigated the claim, and the City snowplow operator who cleared Plymouth Road—the street in front of the property at issue. The court found for

Wickham and Franz and awarded them $3,219.94 in damages. This award is a few dollars less that what they had requested in their letter to the City.

After that, the district court heard arguments about awarding attorney fees. Counsel for Wickham and Franz requested $10,060.25 in attorney fees based on a statement he had submitted at trial. Counsel for the City objected to the fees on several grounds. The City's counsel again objected under K.S.A. 2019 Supp. 60-2006, but she also argued for the opportunity to file a memorandum in opposition to the requested attorney fees because she was not given a chance to review the fee statement before trial.

In the end, the court awarded $10,010.25 in attorney fees—reducing the amount on the fee statement by $50 for a duplicate charge identified by Wickham's counsel. The court also found the reported 50 hours of work was reasonable.

The City appeals only the award of attorney fees.

The City makes three arguments why the district court erred in granting Wickham and Franz' request for attorney fees. All three issues deal with statutory interpretation:

- First, the district court erred because other courts have found an award of attorney fees involving an issue of first impression is inappropriate.
- Second, the district court erred in interpreting the statute permitting attorney fees—K.S.A. 2019 Supp. 60-2006—because such statute should not apply to a municipality.
- And third, the district court erred in interpreting K.S.A. 2019 Supp. 60-2006 because the statute should not apply to hit-and-run incidents.

We must address some preliminary concerns.

Before we begin our analysis, we must note that our inquiry is hampered somewhat because the City did not include everything in the record on appeal. Instead, the City tried to include certain items in an appendix to its brief as a substitute for the record. That does not work. See *Rodriguez v. U.S.D. No. 500*, 302 Kan. 134, 351 P.3d 1243 (2015). In *Rodriguez*, the court held that including documents in the appendix of a brief does not make those documents part of the record that can be considered for appellate review. 302 Kan. at 144; see Supreme Court Rule 6.02(b) (2023 Kan. S. Ct. R. at 36). We will not consider those documents as part of the record on appeal.

Next, Wickham and Franz contend the City has improperly raised two issues for the first time on appeal—that an attorney fee award is improper for issues of first impression and that K.S.A. 2022 Supp. 60-2006 does not apply to municipalities.

The City contends both issues were raised to the district court. In its response brief, the City correctly points out that at the motions hearing—held before the bench trial—the district court suggested that this was an issue of first impression, but it did not resolve the issue. At the end of the motions hearing, counsel for Wickham and Franz sought clarification on the issue of an attorney fee award:

> "Your honor, let me clarify one thing for the trial so we don't bring it up. In the event—in the event the plaintiff is successful, the issue of attorney's fees, would that—would you anticipate that that would be heard at a later date upon providing records and information, or would you prefer that information to be made available at the time of trial to include the trial preparation and trial."

The district court said it was "interesting" that this was a case of first impression, and the issue was a "good question," but it made no findings on the issue:

> "Well, Mr. Knopp, that's a good question. I like to take care of matters while I'm at it and while I'm thinking about it and get matters resolved so we don't have to keep back—coming back and determine issues that have been taken under advisement. I'd like to have that—if that is going to be an issue—have that taken care of that day so when I'm done with making my ruling that day, it's up to you guys to decide if you wish to appeal it.
>
> "It's interesting that this would be a case of first impression on the interpretation of attorney fees under that statute for a one-vehicle accident, so I don't know. The attorney fees—if the case gets appealed, then the question is whether the cost of the appeal would be—would have to be paid by the losing party, assuming that you would prevail. I don't know. That's a good question."

Based on this record of the motions hearing, the City argues it preserved this argument for appeal because "a 'pragmatic reading' of the record on appeal shows that the parties and the court recognized that this was a case of first impression, and that, as such, it would impact the award of attorney's fees." See *Cude v. Tubular and Equipment Services, LLC*, 53 Kan. App. 2d 287, 388 P.3d 170 (2016). In *Cude*, our court held that a pragmatic reading of the appellant's argument below was "the functional equivalent" to his argument on appeal. 53 Kan. App. 2d at 290-91. This is close enough for us.

But even if this showing by the City is insufficient, we will still reach the issue of whether attorney fees are proper in cases of first impression because the issue involves only a question of law that arose out of admitted facts determinative of the case. The parties acknowledge that this issue is one of first impression. And resolution of the issue determines the case because it would affirm or vacate the district court's attorney fee

award. See *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008), *cert. denied* 555 U.S. 1178 (2009). We will therefore consider the issue.

A review of the general rules about awarding attorney fees helps our analysis.

In Kansas, a court may not award attorney fees in the absence of statutory authority or an agreement of the parties. *In re Marriage of Williams*, 307 Kan. 960, 982, 417 P.3d 1033 (2018). The issue of the district court's authority to award attorney fees, as challenged by the City, is a question of law over which appellate review is unlimited. *In re Estate of Oroke*, 310 Kan. 305, 317, 445 P.3d 742 (2019).

But where the district court has the authority to grant attorney fees, its decision whether to award fees is reviewed under the abuse of discretion standard. *Consolver v. Hotze*, 306 Kan. 561, 568, 395 P.3d 405 (2017). When the language of an attorney fees statute makes an award mandatory, as Wickham and Franz argue, the question of whether to award fees is not within the district court's discretion. *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 169, 298 P.3d 1120 (2013).

Nothing in the plain and unambiguous language of K.S.A. 2022 Supp. 60-2006 bars an award of attorney fees in cases of first impression.

The City argues the district court erred in awarding attorney fees to Wickham and Franz because such an award involving an issue of first impression is not appropriate. This is like saying, since it has never been done before, it cannot be done here. In addition, since this statute is not a part of the insurance code, we doubt that the cases cited by the City apply.

It is true that this court has reversed attorney fee awards based on insurance claims that have raised a matter of first impression. In *Whitaker v. State Farm Mut. Auto. Ins. Co.*, 13 Kan. App. 2d 279, 285, 768 P.2d 320 (1989), which the City provides as authority, a panel interpreted two insurance code statutes permitting attorney fees to find "the presence of a genuine issue raised in good faith bars an award of attorney fees under K.S.A. 256 and K.S.A. 40-3111(b)."

Relying on *Whitaker* and the insurance code attorney fee statutes, other panels have come to the same conclusion. See *O'Donoghue v. Farm Bureau Mut. Ins. Co., Inc.*, 30 Kan. App. 2d 626, 635-36, 49 P.3d 22 (2002); *Garrison v. State Farm Mut. Auto. Ins. Co.*, 20 Kan. App. 2d 918, 931, 894 P.2d 226 (1995); *Farmers Ins. Co., Inc. v. Gilbert*, 14 Kan. App. 2d 395, 409, 791 P.2d 742 (1990).

But all of the cases the City relies on deal with statutes permitting attorney fee awards in actions brought under the insurance code. This distinction is important since there is a difference in the plain language of the insurance code statutes compared to the plain language of K.S.A. 2022 Supp. 60-2006. A simple comparison of the statutes shows a dramatic difference.

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first seek to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Montgomery v. Saleh*, 311 Kan. 649, 654-55, 466 P.3d 902 (2020).

Here, we deal with a statute that awards attorney fees in cases with more modest judgments for property damage. This statute focuses on a very small subset of damage

claims. The district court awarded attorney fees under K.S.A. 2019 Supp. 60-2006. Note the limitations exposed in this statute:

> "(a) In actions brought for the recovery of *property damages only of less than $15,000* sustained and *caused by the negligent operation of a motor vehicle*, the prevailing party *shall be allowed reasonable attorney fees* which *shall be taxed as part of the costs* of the action unless:
>
> (1) the prevailing party recovers no damages; or
>
> (2) a tender equal to or in excess of the amount recovered was made by the adverse party before the commencement of the action in which judgment is rendered.
>
> "(b) For the plaintiff to be awarded attorney fees for the prosecution of such action, a written demand for the settlement of such claim containing all of the claimed elements of property damage and the total monetary amount demanded in the action shall have been made on the adverse party at such party's last known address not less than 30 days before the commencement of the action. For the defendant to be awarded attorney fees, a written offer of settlement of such claim shall have been made to the plaintiff at such plaintiff's last known address not more than 30 days after the defendant filed the answer in the action.
>
> "(c) This section shall apply to actions brought pursuant to the code of civil procedure and actions brought pursuant to the code of civil procedure for limited actions." (Emphases added.)

The important limitations are: property damage claims caused only by the negligent operation of an automobile; claims under $15,000; with attempts at pretrial settlement; and either party can receive attorney fees as costs.

A fair reading of this statute leads us to believe that the Legislature is saying, "We want these cases settled promptly and do not want you to clog the courts with smaller claims. If there is an award of damages and if you don't try to settle and you lose, then either the defendant or the plaintiff shall pay attorney fees."

Contrast that clear expression of policy with these provisions under the insurance code. K.S.A. 40-256 provides an insurer is liable for fees if it denies coverage "without just cause or excuse," stating:

> "That in all actions hereafter commenced, in which judgment is rendered against any insurance company as defined in K.S.A. 40-201, . . . if it appear from the evidence that such company, society or exchange has refused without just cause or excuse to pay the full amount of such loss, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action, including proceeding upon appeal, to be recovered and collected as a part of the costs: *Provided, however*, That when a tender is made by such insurance company, society or exchange before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed."

In this statute, there are no limitations such as those found in K.S.A. 2019 Supp. 60-2006. This insurance code statute is not limited to just automobile negligence causation, nor is it limited to just property claims, nor is it limited to claims under $15,000. Instead, the carrier must have "just cause" to refuse to pay a claim. Therefore, to decide whether that refusal to pay is proper, the judicial inquiry focuses on "just cause."

Just cause, according to our Supreme Court, exists where an insurer has raised a genuine issue in good faith. *Friedman v. Alliance Ins. Co., Inc.*, 240 Kan. 229, 239, 729 P.2d 1160 (1986). The *Whitaker* panel relied on *Friedman* and the "without just cause or excuse" language of K.S.A. 40-256 to reach its conclusion. See *Whitaker*, 13 Kan. App. 2d at 284-85.

K.S.A. 40-3111(b), also analyzed and relied on in *Whitaker*, provides that an insurer is liable for fees if it "unreasonably refused" to pay a claim for personal injury protection benefits. See *Whitaker*, 13 Kan. App. 2d at 285. Our Supreme Court

interpreted this subsection to find attorney fees were not warranted when the court "cannot say the defendant [insurer] unreasonably refused to pay plaintiff's claim." *Armacost v. State Farm Mut. Auto. Ins. Co.*, 231 Kan. 276, 280, 644 P.2d 403 (1982).

The plain language of K.S.A. 2022 Supp. 60-2006 has no language which courts have relied on to find attorney fees awards inappropriate for issues of first impression. The insurance code does not apply in this case, nor do the cases that interpret the insurance code.

Unlike the insurance code, the plain language of K.S.A. 2022 Supp. 60-2006 does not provide for award or denial of attorney fees based on the good faith, just cause, or reasonableness of the liable party. The statute unambiguously states the prevailing party "shall be allowed reasonable attorney fees" unless the prevailing party does not recover damages, or the adverse party made "a tender equal to or in excess of the amount recovered" before the action began. K.S.A. 2022 Supp. 60-2006(a). The statute provides for no other exceptions such as permitting the denial of attorney fees based on the "good faith" or "just cause" of the person liable. See K.S.A. 40-256; K.S.A. 45-222(d). Moreover, the statute unambiguously states that its terms "shall apply to actions brought" under the Code of Civil Procedure, such as the action brought by Wickham and Franz. K.S.A. 2022 Supp. 60-2006(c).

The City asks us to extend *Whitaker*'s policy to attorney fees under K.S.A. 2022 Supp. 60-2006. We decline. It is clear from the wording of this statute that the Legislature intended for small property damage claims in automobile cases to be negotiated and settled promptly or attorney fees would be awarded. We must honor that intent.

This court has previously held that the purpose of K.S.A. 60-2006 is to "promote prompt payment of small but well-founded claims and to discourage unnecessary

litigation of certain automobile negligence cases." *Chavez v. Markham*, 256 Kan. 859, 868, 889 P.2d 122 (1995). The intent of the statute is "to require defendants to inquire, to investigate, and, if warranted, to make an offer to settle the claim." 256 Kan. at 868.

The accident that gives rise to this claim touches all the bases. The claim is only for property damage under $15,000 and is claimed to come from the negligent operation of a motor vehicle. Wickham and Franz in their letter of February 18, 2020, well before they filed suit, asked for $3,261 for the damages to their mailbox. That offer was turned down by the City.

The City's argument on this point fails.

Nothing in the Kansas Tort Claims Act bars the application of K.S.A. 2022 Supp. 60-2006 to the City.

The City, in a strained argument, suggests that K.S.A. 2022 Supp. 60-2006 is a general statute and does not apply here. Instead, the Tort Claims Act, which specifically deals with claims made against Kansas municipalities, does apply. Therefore, since there is no mention of attorney fee awards in the Tort Claims Act, then we should rule K.S.A. 2022 Supp. 60-2006 does not apply to cities.

We are not persuaded.

If the Legislature wanted to exempt cities from the application of this general statute, it would have said so. This statute, K.S.A. 2022 Supp. 60-2006—found in the section of our laws defining court costs—taxes attorney fees as costs in smaller actions only involving negligent motor vehicle operation. There is no mention in the statute that municipalities are exempt. Indeed, in the preceding statute, K.S.A. 2022 Supp. 60-2005,

the Legislature has specifically exempted municipalities from depositing court costs. If the Legislature wanted to exempt municipalities from this law, it knew how to do so and it did not.

In addition, the Tort Claims Act directs that "each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state." K.S.A. 75-6103(a). And the Act directs that the Code of Civil Procedure—Chapter 60—shall apply "[e]xcept as otherwise provided in this act." K.S.A. 75-6103(b)(1). We point out that K.S.A. 2022 Supp. 60-2006 is a part of that code and applies in this case.

The City contends the notice requirements of the Tort Claims Act, K.S.A. 12-105b(c) and (d), are more specific than the notice requirement in K.S.A. 2022 Supp. 60-2006(b). One statute deals with the specifics of an entire tort claim and the other, 60-2006(b), deals with costs. These are not the same subjects and the rule that a specific statute controls over a general statute simply does not apply.

That the two statutes have different time limits is immaterial as well. K.S.A. 2022 Supp. 60-2006(b) requires the plaintiff to make a written demand for settlement "not less than 30 days before the commencement of the action" that was brought for the recovery of property damages sustained and caused by the negligent operation of a motor vehicle. K.S.A. 2022 Supp. 60-2006(a). At the same time, once a notice of claim is filed under the Kansas Tort Claims Act and K.S.A. 12-105b, "no action shall be commenced" until the municipality has denied the claim or 120 days has passed. K.S.A. 12-105b(d). Appellate courts have interpreted the language of K.S.A. 12-105b(d) as a "condition to be met before a claim for relief against a city may be maintained." *Gessner v. Phillips County Com'rs*, 270 Kan. 78, 82, 11 P.3d 1131 (2000).

Thus, while the applicable timeframe of these statutes differ—the statutes do not conflict.

Since the City does not appeal the damage award and only appeals the question of an award of attorney fees as costs, we have no question before us in this appeal on whether all of the notice requirements of the Tort Claims Act have been complied with.

We think the question the City is raising now is whether the K.S.A. 12-105b notice filing could constitute a "written demand for . . . settlement" under K.S.A. 2022 Supp. 60-2006. The written demand is required to contain "all of the claimed elements of property damage and the total monetary amount demanded in the action." The statute also requires the written demand to be made "on the adverse party at such party's last known address." K.S.A. 2022 Supp. 60-2006(b).

This court has found "service of the notice referred to in 60-2006 may be made either by serving the party at the party's last known address or by serving the attorneys of the party under 60-205." *Wilkerson v. Brown*, 26 Kan. App. 2d 831, 835, 995 P.2d 393 (1999). In *Wilkerson*, the defense attorney wrote a letter making a written demand for settlement that specifically identified K.S.A. 60-2006: "'Pursuant to K.S.A. 60-2006, defendant . . . hereby makes written offer of settlement . . . .'" 26 Kan. App. 2d at 832.

A simple interpretation of a K.S.A. 12-105b notice filing could suggest that such filing may be sufficient to act as a written demand for settlement if the notice contains "all of the claimed elements of property damage and the total monetary amount demanded in the action" and was served on the adverse party more than 30 days before the Tort Claim Act claim was filed. K.S.A. 2022 Supp. 60-2006. Wickham and Franz seem to agree, arguing that "[a]s a practical matter, a claim for property damage under K.S.A. 12-105b and K.S.A. 60-2006 can be made simultaneously."

But the stated purpose of the filing of notice under K.S.A. 12-105b is not to demand settlement, but rather, to "'advise the proper municipality . . . of the time and place of the injury and give the municipality an opportunity to ascertain the character and extent of the injury sustained.'" *Myers v. Board of County Com'rs of Jackson County*, 280 Kan. 869, 874, 127 P.3d 319 (2006). And other courts have found the purpose of K.S.A. 12-105b is to allow for "'the opportunity to investigate the claim, to assess its liability, to attain settlement, and to avoid costly litigation.'" *Nash v. Blatchford*, 56 Kan. App. 2d 592, 613, 435 P.3d 562 (2019). Thus, while settlement is one objective or purpose of K.S.A. 12-105b, it is not the statute's sole purpose.

Put another way, the K.S.A. 12-105b notice is a condition precedent that resolves whether the need for a written demand of settlement is necessary under K.S.A. 2022 Supp. 60-2006. Notice provides the municipality with an opportunity to investigate or "ascertain the character and extent of the injury sustained" and determine whether it is liable. *Myers*, 280 Kan. at 874. If the municipality approves the claim, or settles, the claimant cannot sue the municipality. See K.S.A. 12-105b(d).

A "written demand for . . . settlement" under K.S.A. 2022 Supp. 60-2006(b) only becomes necessary once the municipality denies relief under K.S.A. 12-105b and the condition precedent for pursuing claims under the Tort Claims Act is met. If a claimant cannot pursue an action against a municipality because the claimant's claim was accepted or settled under K.S.A. 12-105b(d), then a written demand for settlement to recover attorney fees under K.S.A. 2022 Supp. 60-2006 is unnecessary because the claim is settled.

The City's argument on this point fails.

K.S.A. 2022 Supp. 60-2006 applies to hit-and-run cases.

Finally, the City contends that K.S.A. 2022 Supp. 60-2006 should not apply to a hit-and-run incident, or in this case, a "plow and run" incident. Indeed, there are no reported cases in which K.S.A. 2022 Supp. 60-2006 had been applied to a hit-and-run or single vehicle accident. We are not surprised because the statute deals with the assessment of attorney fees as costs in smaller cases and does not deal with the nature of the automobile negligence.

Kansas courts have interpreted K.S.A. 2022 Supp. 60-2006 many times. In *Rensenhouse v. Bauer*, 33 Kan. App. 2d 148, 150-51, 98 P.3d 668 (2004), this court found the purpose of K.S.A. 60-2006 is to '"promote the prompt payment of small but well-founded claims and to discourage unnecessary litigation of *certain automobile cases*." (Emphasis added.) And the intent of K.S.A. 60-2006 is '"to require defendants to inquire, to investigate, and, if warranted, to make an offer to settle the claim." *Rensenhouse*, 33 Kan. App. 2d at 151. The *Rensenhouse* panel stated that K.S.A. 60-2006 "is clear as applied to two-vehicle collisions." 33 Kan. App. 2d at 151 (citing *Squires v. City of Salina*, 9 Kan. App. 2d 199, 202, 675 P.2d 926 [1984]).

In *Squires*, this court held that K.S.A. 60-2006 only applied to negligent drivers. 9 Kan. App. 2d at 202. In that case, Squires was involved in an auto accident with Burke at an intersection where a stop sign had been removed by workers for Kansas Power and Light and the City of Salina. At trial, the court found Burke was 40 percent negligent, KP&L was 20 percent negligent, and the City of Salina was 20 percent negligent. Squires requested attorney fees under K.S.A. 60-2006, and the district court taxed the entire attorney fee award to Burke.

On appeal, Squires challenged the assessment of the fee against Burke only, and this court addressed whether it was "proper or required under [K.S.A. 60-2006] that a successful party's attorney fee be assessed in part against nondriving parties as well as against the driving party." 9 Kan. App. 2d at 200. Put another way, the issue was whether the attorney fees chargeable to a driving party should be reduced based on the fault of nondriving parties. In answering the question in the negative, the *Squires* court held:

> "In our view, the primary evil sought to be remedied by the statute was the propensity of some drivers, or their insurance carriers, to delay payment of just claims in the hope that the injured party would grow weary of, or short of money to finance, lawsuits for the recovery of small to modest damages. The onus of the statute is on nonsettling *drivers*. Accordingly, we conclude the statute applies to drivers only and that the trial court was correct in refusing to assess attorney fees against KP & L and Salina." 9 Kan. App. 2d at 202.

The City also relies on *Ohlmeier v. Jones*, 51 Kan. App. 2d 1014, 1027, 360 P.3d 447 (2015), where this court found any diminished value loss on an automobile did not qualify as "property damage" under K.S.A. 60-2006. See K.S.A. 2022 Supp. 60-2006(a). The panel reasoned the Legislature's use of "property damage only" does not include the diminished value loss associated with owning a vehicle involved in an automobile accident.

The *Ohlmeier* panel reasoned that since the intent of the statute was to promote settlement, adding diminished value loss into the mix of property damages only claims would be counterproductive to promote the prompt payment for repairs to automobiles involved in accidents. 51 Kan. App. 2d at 1027. Basically, this means that property damage does not include economic loss such as diminished value. We question how this case helps the City.

Citing *Ohlmeier*, the City contends the application of K.S.A. 2022 Supp. 60-2006 to hit-and-run incidents lacks the certainty that the accused driver was involved or even present in a vehicular incident causing property damage. But all cases must be proved. If the plaintiff fails to prove that the City is responsible, then that party cannot receive attorney fees as costs.

The City argues that "[i]n a snow event, the road conditions make it easy to claim that a snowplow passed a certain property, making the governmental entity the best target for any damage a property owner later discovers." The City then argues "[t]his becomes an especially pernicious application when applied to alleged hit-and-run incidents, when a claimant is allowed to simply claim that a government vehicle passed their house and thereafter damages were noticed." But our response is the same. Plaintiffs must prove their case before attorney fees can be assessed as costs.

Put simply, the City has not shown the plain language of the statute supports such interpretation of K.S.A. 2022 Supp. 60-2006. The statute does not prevent a city from arguing that it was not involved, or only partially at fault. Rather, the statute and its precedent authorizes a court to order a liable party to pay attorney fees as costs to the prevailing party. Whether the parties decide to make a demand for settlement to ultimately recoup a potential attorney fee award under the statute is their choice.

This law controls the assessment of court costs in a limited number of cases. We see no legal bar to its use in hit-and-run cases as the City argues.

The City has not shown that the district court abused its discretion in awarding attorney fees.

The City contends that the court abused its discretion by awarding attorney fees for legal work done on the case before the lawsuit was filed.

We reiterate. When the language of an attorney fees statute makes an award of fees possible, the amount of fees awarded is within the sound discretion of the district court and is reviewed under the abuse of discretion standard. *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 169, 298 P.3d 1120 (2013). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018).

The City relies on *Felix v. Turner Unified School Dist. No. 202*, 22 Kan. App. 2d 849, 923 P.2d 1056 (1996). In *Felix*, the school district challenged the district court's denial of its motion for a directed verdict and award of attorney fees under K.S.A. 60-2006. After finding the district court erred in denying the motion for directed verdict, the panel held without much analysis: "Turner [the school district] also argues that the award of attorney fees for work done prior to the filing of the lawsuit is not authorized by K.S.A. 60-2006. The award of attorney's fees is also reversed." 22 Kan. App. 2d at 852.

Felix does not help the City. The court set aside the entire award because the plaintiff failed to show that the school bus driver was an agent of the school district. The court does not analyze or hold that attorney fees for work done before filing a lawsuit cannot be awarded under this statute. Since it reversed the entire judgment, it logically follows that the panel in *Felix* would reverse the award for attorney fees.

A careful reading of the City's argument reveals that it is trying to raise a new issue on appeal without arguing an exception to our rule that appellate courts will not review an issue not brought first before the lower court. The City is not arguing that the fee award is unreasonable. Instead, the City challenges the fees incurred before August 26, 2020—the date when the petition was filed. This is another reason to deny relief to the City on this point. See *Broderick*, 286 Kan. at 1082.

After our review of the record, it is apparent that the district court correctly applied K.S.A. 2022 Supp. 60-2006 when it assessed attorney fees as costs in this lawsuit.

We award attorney fees for this appeal.

In addition to the attorney fees awarded by the district court, Wickham and Franz are entitled to attorney fees for the prosecution of this appeal. Consistent with the purposes of K.S.A. 2022 Supp. 60-2006 and Supreme Court Rule 7.07(b)(1) (2023 Kan. S. Ct. R. at 52), we will award attorney fees to Wickham and Franz. We award attorney fees in the amount of $300 per hour for 61.5 hours, plus the expenses listed in Wickham and Franz' motion for attorney fees. The City did not oppose their motion for attorney fees on appeal.

The district court's award of attorney fees is affirmed.

Affirmed.