OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

CHIEF JUDGE:

HON. KAREN ARNOLD-BURGER ..... Overland Park

JUDGES:

HON. HENRY W. GREEN JR. ..... Leavenworth
HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. G. GORDON ATCHESON ..... Westwood
HON. DAVID E. BRUNS ..... Topeka
HON. ANTHONY J. POWELL[1] ..... Wichita
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[1]Retired June 30, 2022

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UNPUBLISHED OPINIONS
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Bank of Commerce & Trust Co. v. BancCentral Nat'l Ass'n	123,420	Harper	08/19/2022	Affirmed in part; reversed in part; remanded with directions
Bhaduri v. L.M.K. Construction, Inc.	123,731	Douglas	08/12/2022	Affirmed in part, reversed in part; remanded with directions
Brice v. State	124,234	Labette	07/22/2022	Affirmed
Carter v. State	123,878	Sedgwick	07/15/2022	Affirmed
City of Eskridge v. McGivern	124,117	Wabaunsee	07/01/2022	Affirmed
Elliott v. State	124,402	Sedgwick	07/29/2022	Affirmed
Fisher v. Kansas Dept. of Revenue	124,169	Johnson	07/22/2022	Affirmed
Garrison v. City of Ottawa	124,309	Franklin	08/12/2022	Affirmed
Garrison v. Ward	124,662	Franklin	07/29/2022	Affirmed
Gormly v. State	123,889	Lyon	07/08/2022	Affirmed
Haywood v. KC Waterpark Management	123,716	Wyandotte	07/08/2022	Affirmed
In re A.M.	124,640	Sedgwick	07/01/2022	Affirmed
In re Care and Treatment of Burch	124,554	Wyandotte	08/19/2022	Affirmed
In re Care and Treatment of Emerson	87,379	Sedgwick	08/19/2022	Affirmed
In re Care and Treatment of Girard	124,687	Clay	08/05/2022	Affirmed
In re E.R.	124,701	Sedgwick	07/22/2022	Appeal dismissed
In re K.H.	124,349	Shawnee	08/19/2022	Affirmed
In re L.B.	124,538	Sedgwick	07/01/2022	Affirmed
In re Marriage of Daon and Stewart	124,487	Johnson	08/12/2022	Reversed; remanded with directions
In re Marriage of English	124,408	Leavenworth	07/22/2022	Affirmed
In re S.C.	124,374	Johnson	07/08/2022	Affirmed
In re Tax Appeal of Kingdom Campground and Faith Community Chapel	123,575	BOTA	07/22/2022	Affirmed in part; reversed in part; remanded with directions
In re Z.S.	124,577	Douglas	08/26/2022	Affirmed
Johnson v. State	123,670	Sedgwick	07/22/2022	Affirmed
Kaw Valley Companies v. Board of Leavenworth County Comm'rs	124,525	Leavenworth	08/26/2022	Reversed in part; vacated in part; remanded with directions
Knighten v. State	124,163	Sedgwick	07/29/2022	Affirmed

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Leek v. Brown	123,711	Reno	07/22/2022	Affirmed
Limburg v. Spiritual Life Center	124,473	Ellsworth	08/26/2022	Affirmed
Macomber v. State	124,289	Shawnee	08/05/2022	Affirmed
Manufacturer's Technical Institutes, Inc. v. Dotson	124,354	Johnson	07/15/2022	Appeal dismissed
Marcus v. Swanson	122,400	Johnson	08/19/2022	Affirmed
Mid-Kansas Wound Specialists, P.A. v. Martin	123,066	Sedgwick	07/01/2022	Appeal dismissed
Neal v. State	124,270	Sedgwick	08/19/2022	Affirmed
Netherland v. State	124,065	Shawnee	07/22/2022	Affirmed
Parks v. State	123,722	Wyandotte	08/05/2022	Affirmed in part; reversed in part; remanded with directions
Penner v. City of Topeka	124,304	Shawnee	08/19/2022	Affirmed
Pesina v. Aegis Processing Solutions	124,677	Workers Comp. Bd	08/12/2022	Appeal dismissed
Pollard v. State	123,920	Sedgwick	08/19/2022	Affirmed
Pulliam v. State	124,239	Wyandotte	07/29/2022	Affirmed
R.W. v. C.M.	123,469	Osage	07/22/2022	Affirmed
Sadeghian v. City of Norton	124,455	Norton	08/19/2022	Affirmed
Samek v. State	124,307	Wyandotte	08/05/2022	Affirmed
Schremmer v. Farmers Insurance Co.	124,485	Ellis	08/05/2022	Affirmed
Smith v. Schnurr	124,435	Reno	08/26/2022	Reversed; remanded with directions
Stallings v. Zmuda	124,797	Butler	08/26/2022	Affirmed
State v. Acevedo	124,658	Finney	07/29/2022	Affirmed
State v. Adams	124,500	Shawnee	08/05/2022	Sentence vacated in part; remanded with directions
State v. Adkins	124,272	Sedgwick	07/29/2022	Affirmed
State v. Banister	124,282	Sumner	07/01/2022	Affirmed
State v. Barrera	124,316 124,317	Seward	07/29/2022	Affirmed; remanded with directions
State v. Beckner	124,464, 124,465	Sedgwick	08/05/2022	Affirmed
State v. Beddingfield	124,091	Douglas	08/26/2022	Affirmed in part; dismissed in part
State v. Belisle	124,799	Jackson	08/12/2022	Affirmed
State v. Berens	124,125	Dickinson	08/05/2022	Affirmed
State v. Brazille	123,841	Sedgwick	08/12/2022	Affirmed
State v. Brooks	124,852	Lyon	08/05/2022	Affirmed

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State v. Brown	123,937	Labette	07/01/2022	Sentence vacated; case remanded with directions
State v. Buchanan	123,100	Johnson	08/26/2022	Affirmed
State v. Busch	123,382	Seward	07/22/2022	Affirmed; remanded with directions
State v. Butler	123,742	Atchison	08/26/2022	Affirmed in part; reversed in part; vacated in part
State v. Campbell	123,190	Douglas	07/01/2022	Reversed; remanded with directions
State v. Cash	124,407	Wyandotte	07/15/2022	Affirmed
State v. Clark	124,204	Geary	07/08/2022	Appeal dismissed in part; sentence vacated in part; case remanded with directions
State v. Collins	124,590	Sedgwick	08/05/2022	Appeal dismissed
State v. Couch	122,156	Finney	08/19/2022	Affirmed in part; vacated in part
State v. Davis	124,680	Rice	07/22/2022	Affirmed
State v. Day	123,758	Jackson	08/05/2022	Affirmed
State v. Dunn	124,086	Sedgwick	07/01/2022	Affirmed
State v. Elliott	124,413	McPherson	08/05/2022	Affirmed; remanded with directions
State v. Forney	123,799	Nemaha	07/22/2022	Affirmed
State v. Fortner	124,202	Shawnee	07/15/2022	Reversed
State v. Garcia	121,045	Finney	07/01/2022	Affirmed
State v. Haggard	124,033	Saline	07/22/2022	Affirmed
State v. Hartfield	124,360	Reno	08/19/2022	Affirmed
State v. Hunter	124,084	Reno	07/08/2022	Appeal dismissed
State v. Jackson	121,827	Wyandotte	08/19/2022	Sentence vacated; case remanded with directions
State v. Jackson	122,822	Wyandotte	07/01/2022	Affirmed; remanded with directions
State v. Johnson	124,064	Shawnee	07/29/2022	Affirmed
State v. Jones	124,617	Anderson	07/15/2022	Reversed; remanded with directions
State v. Jones	124,432	Geary	07/22/2022	Affirmed
State v. Jordan	123,848	Shawnee	07/29/2022	Affirmed
State v. Jordan	124,215	Butler	07/01/2022	Affirmed

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State v. Kemp	122,123	Lyon	07/01/2022	Affirmed
State v. Klahr	124,057	Jackson	08/05/2022	Affirmed
State v. Kriner	123,511	Douglas	07/29/2022	Affirmed
State v. Larsen	122,660	Johnson	07/29/2022	Affirmed
State v. Lomon	124,262	Lyon	07/29/2022	Affirmed
State v. Manning	124,859	Wyandotte	07/22/2022	Affirmed
State v. Masterson	124,257	Shawnee	08/26/2022	Affirmed
State v. Mathenia	124,312	Sedgwick	08/19/2022	Affirmed in part; dismissed in part
State v. McDaniel	124,477	Leavenworth	07/01/2022	Affirmed in part; dismissed in part
State v. McHenry	122,393			
	122,394			
	122,395	Saline	07/22/2022	Affirmed
State v. Morris	124,551	Wyandotte	07/22/2022	Affirmed
State v. Parrish	123,891	Sedgwick	08/05/2022	Appeal dismissed
State v. Pevy	124,045	Riley	07/01/2022	Reversed; remanded with directions
State v. Reid	123,735	Johnson	07/01/2022	Appeal dismissed
State v. Renfro	124,715	Allen	07/08/2022	Affirmed
State v. Renterio	124,673	Lyon	07/22/2022	Appeal dismissed
State v. Reyes	124,808	Montgomery	07/29/2022	Affirmed
State v. Ricker	124,745			Affirmed in part;
	124,746	Sedgwick	08/05/2022	dismissed in part
State v. Ricketts	124,671	Barton	08/05/2022	Affirmed
State v. Ross	122,601	Douglas	08/05/2022	Affirmed
State v. Salazar	124,384	Leavenworth	07/29/2022	Affirmed
State v. Shaffer	123,652	Sedgwick	07/29/2022	Affirmed
State v. Stanford	124,325	Harvey	08/26/2022	Affirmed
State v. Stine	124,568	Sedgwick	08/05/2022	Affirmed; remanded with directions
State v. Stotts	124,502	Saline	07/29/2022	Affirmed
State v. Tiger	124,184	Sedgwick	07/29/2022	Affirmed
State v. Vaughan	124,345	Johnson	08/05/2022	Affirmed
State v. Warden	124,667	Shawnee	08/26/2022	Affirmed
State v. Webb	124,273	Sedgwick	07/01/2022	Affirmed
State v. Woods	124,419			
	124,420	Cloud	07/29/2022	Affirmed
State v. Yotter	124,488	Harvey	07/29/2022	Appeal dismised
Taylor v. State	124,043	Shawnee	08/26/2022	Affirmed
Unified Gov't of Wyandotte Co./KCK v. Abdullah	124,243	Wyandotte	07/22/2022	Affirmed
Unruh v. City of Wichita	124,254	Sedgwick	07/01/2022	Affirmed
Virginia Diesel and Truck Repair v. Werth	124,218	Shawnee	07/29/2022	Affirmed
Ward v. State	123,998	Reno	08/05/2022	Affirmed

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
Wells v. Kansas Corporation Comm'n	124,606	Shawnee	08/19/2022	Affirmed
Wesley Properties Management, Inc. v. Hill	124,428	Leavenworth	07/15/2022	Affirmed
Williams v. State	124,323	Sedgwick	08/26/2022	Affirmed
Winters v. State	124,211	Johnson	07/08/2022	Affirmed
Yoakum v. Cline	124,133	Butler	08/12/2022	Reversed; remanded with directions
Young v. State	124,394	Wyandotte	07/01/2022	Affirmed

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(Cumulative for Advance sheets 1, 2, 3 and 4)
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ADMINISTRATIVE LAW:

Appeal to District Court Providing Trial De Novo—Determination Anew of Both Law and Factual Issues—Burden of Proof. An appeal to the district court providing a trial de novo—whether taken from an agency determination or from a different court—requires issues of both law and fact to be determined anew. The burden of proof in a trial de novo remains with the party who bore the burden in the underlying proceedings.
Dodge City Cooperative Exchange v. Board of Gray County Comm'rs 391*

Final Order Required to Identify Agency Officer Who Receives Service of Petition for Judicial Review—Thirty-Day Period for Filing Petition for Judicial Review. K.S.A. 77-613(e) requires an administrative agency's final order to identify the agency officer who will receive service of a petition for judicial review on behalf of the agency. The 30-day jurisdictional period for filing a petition for judicial review begins to run after service of an order that complies with K.S.A. 77-613(e).
Gilliam v. Kansas State Fair Bd. ……..…. 236

Interpretation of Written Documents by Court—Interpret Written Language in Reasonable Fashion. It is not the function of a court to read sections of a written document in isolation or highlight awkward phrasing. Instead, courts must endeavor to interpret written language in a reasonable fashion that does not vitiate the purpose of the writing or reach an absurd result. *Gilliam v. Kansas State Fair Bd.* ……..…. 236

APPEAL AND ERROR:

Appellate Review of Admission of Evidence—Multistep Analysis. Appellate review of the admission of evidence involves a multistep analysis. First, we consider whether the evidence is relevant. This inquiry contains two components, whether the evidence is material and whether it is probative. The next step requires us to analyze whether the district court erred when weighing the probative value of the evidence against the risk it posed for undue prejudice. *State v. Vazquez* …… 86

Interpretation of Workers Compensation Statutes—Appellate Review. Because the interpretation of workers compensation statutes involves a question of law, appellate review is unlimited. In interpreting a statute, appellate courts are not to give deference to the Board's legal analysis or determination. *Turner v. Pleasant Acres* ……..…….. 122

APPELLATE PROCEDURE:

Cross-Appeal by Appellee to Adverse Decisions of District Court—Failure to Cross-Appeal Prevents Appellate Review. Kansas law requires an appellee to cross-appeal a district court's adverse decisions before

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those rulings may be challenged on appeal. The failure to cross-appeal a district court's adverse decision creates a jurisdictional bar preventing appellate review. *Pretty Prairie Wind v. Reno County* 429*

Cross-Appeal of Adverse Rulings—Not Required if Challenging Decision Subject to Appeal. While a cross-appeal is necessary to bring other adverse rulings before the appellate courts, it is not generally required when a party is merely challenging the district court's reasoning underlying a decision already subject to appeal. *Pretty Prairie Wind v. Reno County* ... 429*

ATTORNEY FEES:

Grandparent Visitation Appeal—Court's Authority to Award Fees under Rule 7.07(b). In the appeal of a decision involving grandparent visitation, an appellate court has authority to award attorney fees under Supreme Court Rule 7.07(b) (2022 Kan. S. Ct. R. at 51) because the district court had authority under K.S.A. 2020 Supp. 23-3304 to award attorney fees in the proceedings below. *Schwarz v. Schwarz* 103

CIVIL PROCEDURE:

Comparative Fault Procedure in Kansas—Policy of Judicial Economy. Kansas law requires defendants seeking to minimize their liability in comparative fault situations not involving a chain of distribution or similar commercial relationship to do so by comparing the fault of other defendants to reduce their own share of liability and damages. If a defendant chooses to settle and obtain release of common liabilities involving other parties whom the plaintiff did not sue, the defendant does not have an action for comparative implied indemnity or postsettlement contribution. Under Kansas comparative fault procedure, such a remedy is not necessary, and such an action defeats the policy of judicial economy, multiplying the proceedings from a single accident or injury.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Doctrine of Comparative Fault—Parties to Occurrence to Have Determination of Fault in One Action. The doctrine of comparative fault requires all the parties to the occurrence to have their fault determined in one action.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Exception to One-Action Rule—Separate Actions by Plaintiffs against Tortfeasors if No Determination of Comparative Fault. An exception to the one-action rule allows plaintiffs to pursue separate actions against tortfeasors where there has been no judicial determination of comparative fault, but this exception does not allow defendants to bring separate actions.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Joinder of Additional Parties—Determination of Percentage of Negligence Attributable to Each Party. The requirement to join additional parties under K.S.A. 2020 Supp. 60-258a(c) does not distinguish between tort and contract claims, but instead focuses on the need for a fact-finder to determine the percentage of negligence attributable to each party.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

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One-Action Rule—In Negligence Claim All Parties Must Be Joined in Original Action. When an injured party asserts a claim for negligence, all parties whose causal negligence contributed to the injury must be joined to the original action, with no distinction between tort claims and contract claims. This is called the one-action rule.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Purpose of K.S.A. 60-258a—Impose Individual Liability for Damages on Proportionate Fault of All Parties to Occurrence. The intent and purpose of the Legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault. It was the intent of the Legislature to fully and finally litigate in a single action all causes of action and claims for damages arising out of any act of negligence.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Service of Process—Restricted Mail Different than Certified Mail Service. Service of process by restricted mail is different from service by certified mail.
In re A.P. 141

CONSTITUTIONAL LAW:

Due Process Protection--Parents Have Fundamental Right to Decisions Regarding Their Children. The Due Process Clause of the United States Constitution provides heightened protection against government interference with the fundamental right of parents to make decisions concerning the care, custody, and control of their children. *Schwarz v. Schwarz* 103

Speedy Trial Assessment—Burden on Defendant to Show Actual Prejudice. To meet the burden to show actual prejudice, the defendant cannot rely on generalities or the passage of time but must show how the delay thwarts his or her ability to defend oneself. *State v. McDonald* 59

— Consideration of Totality of Circumstances—Factors. The speedy trial assessment considers the totality of the circumstances with special emphasis on four factors: length of the delay, reason for the delay, defendant's assertion of his or her right, and prejudice to the defendant. *State v. McDonald* 59

— Evaluation of Actual Prejudice—Three Factors. Courts consider three factors when evaluating actual prejudice: oppressive pretrial incarceration, the defendant's anxiety and concern, and most importantly, the impairment of one's defense. *State v. McDonald* 59

— First Factor—Length of Delay between Charge and Arrest—Presumptively Prejudicial under These Facts. Under the facts of this case, the State's delay of over six years and three months between charging the defendant with child rape and arresting the defendant is presumptively prejudicial.
State v. McDonald 59

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— **Fourth Factor—Actual and Presumed Prejudice from Excessive Delay**. When assessing the fourth factor—prejudice—for a constitutional speedy trial analysis, we consider both actual prejudice and, in a proper case, presumed prejudice flowing from excessive delay. *State v. McDonald* 59

— **Presumed Prejudice if Excessive Delay**. When the State has been negligent, prejudice can be presumed if the delay has been excessive. A delay of over six years attributable to the State is long enough to give rise to a presumption that the defendant's trial would be compromised, and the defendant would be prejudiced. *State v. McDonald* 59

— **Second Factor—Reason for Delay**. When considering the second factor—the reason for the delay—the court assesses responsibility for the delay as between the State and the defendant. The State's inability to arrest a defendant because of the defendant's own evasive tactics is a valid reason for delay. But in that event, the State bears the burden to show that it took reasonably diligent efforts to pursue an evasive defendant. *State v. McDonald* 59

— **State May Mitigate Presumption of Prejudice**. When a defendant relies on a presumption of prejudice to establish the fourth factor and identifies a delay of sufficient duration to be considered presumptively prejudicial, this presumption of prejudice can be mitigated by a showing that the defendant acquiesced in the delay and can be rebutted if the State affirmatively proves that the delay did not impair the defendant's ability to defend oneself. *State v. McDonald* 59

Suit to Challenge Constitutionality of Law—Requirement of Standing to Be Satisfied for Justiciable Controversy to Exist. A plaintiff is not required to expose himself or herself to liability before bringing suit to challenge the constitutionality of a law threatened to be enforced, but the requirement of standing still must be satisfied for a justiciable controversy to exist. *League of Women Voters of Kansas v. Schwab* 310

CONTRACTS:

Claim for Partial Indemnity or Contribution against Third-Party Defendant—Settlor Must Show Paid Damages on Behalf of Third-Party. To prevail on a claim for partial indemnity or contribution against a third-party defendant, the settlor must show that it actually paid damages on behalf of that third party. If the third party was never at risk of having to pay for its own damages, the settlor cannot show it benefited the third-party defendant, and the value of its contribution claim is zero.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Indemnification Provision—Determination of Fault Required to Determine Contractual Liability. When a contract requires a promisor to indemnify another for the promisor's share of negligence, the underlying negligence tort controls the promisor's liability, and it becomes impossible to determine contractual liability without a determination of fault.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

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Indemnification Provision Permitting Indemnity to Maximum Extent Allowed by Applicable Law Is Valid with Limits. When an indemnification provision permits indemnity "to the maximum extent allowed by applicable law," the provision is valid, but it limits the promisor's indemnification liability so that the promisor is not responsible for the promisee's negligence.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Kansas Anti-Indemnity Statute—Indemnification Provision in Construction Contract Void and Unenforceable if Requires Promisor to Indemnify for Negligence or Intentional Acts. Under K.S.A. 2020 Supp. 16-121(b), the Kansas anti-indemnity statute, an indemnification provision in a construction contract is void and unenforceable if it requires the promisor to indemnify the promisee for the promisee's negligence or intentional acts or omissions.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

COURTS:

No Constitutional Authority to Issue Advisory Opinions. Kansas courts lack the constitutional authority to issue advisory opinions.
League of Women Voters of Kansas v. Schwab ……...…….. 310

CRIMINAL LAW:

Booking Photo of Defendant at Trial—Relevancy Determination—In This Case Found to Be Material for Identity Purposes. A booking photo from the current case that illustrated defendant's appearance had changed considerably between the time of his arrest and the time of his trial was material, as required for relevancy determination, for identity purposes, because it explained the confusion by the child witnesses who had difficulty or no longer recognized the defendant due to the changes in his physical appearance. *State v. Vazquez* ……..…… 86

Booking Photo of Defendant from Prior Case May Be Unduly Prejudicial. A booking photo for the current crime does not carry the same potential for an unduly prejudicial impact as a mugshot from a prior case where the latter may suggest the defendant has a history of criminality.
State v. Vazquez …… 86

Booking Photo of Defendant Is Relevant—Admissible as Evidence at Trial. A criminal defendant's booking photo, taken at the time of arrest for the offenses for which he or she is currently on trial is relevant and generally admissible as evidence if it has a reasonable tendency to prove a material fact. *State v. Vazquez* ……..…… 86

No Requirement to Inform Defendant Entering Guilty or Nolo Contendere Plea of Collateral Consequences. Neither due process nor K.S.A. 2021 Supp. 22-3210(a) require the district court to inform defendants of the collateral consequences of entering a guilty or nolo contendere plea to a felony. *State v. Wallace* ……...…….. 420*

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Plea of Guilty or Nolo Contendere to Felony—Loss of Ability to Possess Firearm Is Collateral Consequence. The potential loss of the ability to possess a firearm is a collateral consequence of entering a guilty or nolo contendere plea to a felony. *State v. Wallace* ……..…….. 420*

— Loss of Right to Vote Is Collateral Consequence. The potential loss of the right to vote is a collateral consequence of entering a guilty or nolo contendere plea to a felony. *State v. Wallace* …….. 420*

Sentencing—Burden of Proof on State to Prove Criminal History of Defendant at Sentencing—Requirements. Under K.S.A. 2020 Supp. 21-6814, the State bears the burden to prove criminal history at sentencing. The State can satisfy its burden to establish criminal history by preparing for the court and providing to the offender a summary of the offender's criminal history. If the defendant provides written notice of any error in the summary criminal history report and describes the exact nature of that error, then the State must go on to prove the disputed portion of the criminal history. In the event the offender does not provide the required notice of alleged criminal history errors, then the previously established criminal history in the summary satisfies the State's burden, and the burden of proof shifts to the offender to prove the alleged criminal history error by a preponderance of the evidence. *State v. Hasbrouck* ……..…….. 50

— **Calculation of Criminal History Score under Inclusive Rule**. Under the "inclusive rule" for calculating a criminal history score, "prior convictions" includes multiple convictions on the same date in different cases. Because the convictions in each case are scored against the other case for criminal history purposes, a defendant will face a stiffer sentence if sentenced in multiple cases on the same date than if the defendant were sentenced for the same cases on different dates. *State v. Shipley* ……..……. 272

— **Cases Consolidated for Trial Not Prior Convictions**. Convictions in cases consolidated for trial do not qualify as "prior convictions" for criminal history purposes. K.S.A. 2020 Supp. 21-6810(a). *State v. Shipley* ...….. 272

— Classification of Out-of-State Conviction as Nonperson Crime. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(iii), if the elements of the offense do not require proof of any of the circumstances listed in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i) or (ii), then it must be classified as a nonperson crime. *State v. Hasbrouck* …….. 50

— Classification of Out-of-State Conviction as Person Crime. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(ii), an out-of-state conviction is a person crime if the elements of that felony necessarily prove that a person was present during the commission of the crime. *State v. Hasbrouck* ……..……..…….. 50

— Classification of Person Crime under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)—Elements of Out-of-State Felony Offense—Eight Circumstances. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i), classification of a person crime is determined by looking at the elements of the out-of-state felony offense. The statute then lists eight "circumstances" that if any are found in the elements of the out-of-state

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crime, then the crime will be classified as a person crime in Kansas when a court establishes a criminal history score. The eight circumstances are found in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)(a)-(h). All eight circumstances depict dangerous situations in which innocent people may be harmed. The statute exempts a charged accomplice or another person with whom the defendant is engaged in the sale of a controlled substance or a noncontrolled substance. *State v. Hasbrouck* …….. 50

— **Multiple Complaints—Statutory Requirement of Formal Consolidation by Court**. A constructive consolidation argument is unsupported by the plain language of K.S.A. 2020 Supp. 21-6810(a). That statute requires formal consolidation by court order for multiple complaints to be "joined for trial."
State v. Shipley ……..…….. 272

Sentencing for Out-of-State Felony Convictions under K.S.A. 2019 Supp. 21-6811(e)(3)(B). With the enactment of K.S.A. 2019 Supp. 21-6811(e)(3)(B), the Legislature replaced all the prior rules concerning how out-of-state criminal felony convictions are to be treated as person or nonperson crimes when a sentencing court is setting the offender's criminal history score. *State v. Hasbrouck* …..…. 50

ELECTIONS:

First Amendment Protections—Voter Outreach, Education and Registration Efforts. Voter outreach, education, and registration efforts receive protection under the First Amendment.
League of Women Voters of Kansas v. Schwab ……..……..…….. 310

Statutory Requirement of Prosecution of Individuals Who Knowingly Engage in Prohibited Conduct under Statute. In adopting K.S.A. 2021 Supp. 25-2438, the Legislature sought to subject only those individuals to prosecution who "knowingly" engaged in the conduct prohibited by the provision. *League of Women Voters of Kansas v. Schwab* ……..…….. 310

EMINENT DOMAIN:

No Private Right of Action for Relocation Benefits under Eminent Domain Procedure Act. K.S.A. 2020 Supp. 26-518 is part of the Eminent Domain Procedure Act (EDPA). The EDPA does not provide third-party displaced persons a private right of action for relocation benefits under K.S.A. 2020 Supp. 26-518. Third-party displaced persons can pursue relocation benefits under the Kansas Relocation Act, K.S.A. 58-3501 et seq., or through another cause of action outside the EDPA.
Kansas Fire and Safety Equipment v. City of Topeka ……..……..…. 341

Eminent Domain Procedure Act Limits Amount of Compensation Owed under K.S.A. 26-513. The Eminent Domain Procedure Act, K.S.A. 26-501 et seq., limits judicial review to the amount of compensation owed under K.S.A. 26-513. It provides no mechanism for judicial review of a denial of relocation benefits under K.S.A. 2020 Supp. 26-518.
Kansas Fire and Safety Equipment v. City of Topeka ……...……..……. 341

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ESTATES:

Decedent's Will Required to Be Delivered to District Court in County Where Decedent Resided. After the decedent's death, the person having custody of the decedent's will shall deliver the will to the district court in the county where the decedent resided. *In re Estate of Lessley* …….….. 75

Petition for Probate and Will Required to Be Filed Within Six Months of Decedent's Death. A petition for probate of a will and the will itself must be filed with the district court within six months of the decedent's death. *In re Estate of Lessley* ……..……..….. 75

Probate Process Requires Timely Filing of Will. In order to probate a will, the district court must have the will. Timely filing of the will is a required step in the probate process. *In re Estate of Lessley* ……..…….. 75

Requirement of Filing of Petition for Probate of Will Within Six Months of Death of Testator. No will of a testator who died while a resident of this state shall be effectual to pass property unless a petition is filed for the probate of such will within six months after the death of the testator, except as provided by statute. *In re Estate of Lessley* ……..….. 75

Will Ineffective and Not Admissible if Not Timely Filed. The untimely filing of a will causes the will to become ineffective and not subject to admission to probate. *In re Estate of Lessley* ……..…….. 75

EVIDENCE:

Admission of Probative Evidence—Appellate Review. Evidence is probative if it has any tendency to prove any material fact and its admission will be examined on appeal for an abuse of discretion by the district court judge. *State v. Vazquez* ……..… 86

Material Fact Has Bearing on Decision in Case—Appellate Review. A material fact is one that has some real bearing on the decision in the case and presents a question of law over which an appellate court exercises unlimited review. *State v. Vazquez* …… 86

INSURANCE:

Liability of Insurer for Judgment in Excess of Policy Limit—Requirement of Causal Connection. Kansas law is clear that for an insurer to be liable for a judgment in excess of the policy limit, there must be a causal connection between the insurer's conduct and the excess judgment. *Granados v. Wilson* ……...……. 10

No Affirmative Duty of Insurer to Initiate Settlement Negotiations before Third Party Makes Claim. Although an insurer must exercise diligence and good faith in its efforts to settle a claim within the policy limits, an insurer owes no affirmative duty to initiate settlement negotiations with a third party before the third party makes a claim for damages. *Granados v. Wilson* …… 10

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JUDGES:

Abuse of Judicial Discretion—Determination. A district court judge commits an abuse of discretion by (1) adopting a ruling no reasonable person would make, (2) making a legal error or reaching an erroneous legal conclusion, or (3) reaching a factual finding not supported by substantial competent evidence. *State v. Vazquez* ……..…….. 86

JURISDICTION:

Establishment of Standing Requires Concrete Injury in Fact Element—Self-censorship May Satisfy Concrete Injury in Fact Element. Self-censorship in response to a law's passage may satisfy the concrete injury in fact element required to establish standing when (1) there is evidence that, in the past, the individual engaged in the type of conduct that is affected by the challenged government action; (2) affidavits or testimony are available that evidence a present desire, though no specific plans, to engage in such conduct; and (3) the individual can articulate a plausible claim that they presently have no intention to engage in such conduct because of a credible threat that to do so would subject them to adverse consequences. *League of Women Voters of Kansas v. Schwab* ……...…… 310

Standing—Pre-enforcement Inquiry—Requirement of Objectively Reasonable Perceived Threat of Prosecution. The perceived threat of prosecution must be one that is objectively reasonable. A subjective fear is not sufficient to satisfy the third prong of the pre-enforcement inquiry. *League of Women Voters of Kansas v. Schwab* ……..…….…… 310

— Requirement of Injury in Fact Cannot Be Merely Conjectural. The injury in fact requirement is not satisfied where the complained of injury is merely conjectural. *League of Women Voters of Kansas v. Schwab* …… 310

— Requirement of Justiciable Controversy or Case Dismissed. If a person does not have standing to challenge an action or request a particular type of relief, then a justiciable controversy does not exist and the case must be dismissed. *League of Women Voters of Kansas v. Schwab* ……..… 310

Standing Inquiry for Pre-enforcement Questions—Requirements to Satisfy the Injury in Fact Component. In pre-enforcement questions the injury in fact component of the standing inquiry is satisfied when a party establishes an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and the party faces a credible, substantial threat of prosecution under the challenged provision. *League of Women Voters of Kansas v. Schwab* ……..……...… 310

Standing Requirement—Demonstrate Injury and Causal Connection between Injury and Challenged Conduct. To demonstrate standing in Kansas, the traditional test is twofold: a person must demonstrate that he or she suffered a cognizable injury, also known as an injury in fact, and that there is a causal connection between the injury and the challenged conduct. *League of Women Voters of Kansas v. Schwab* ……..…...…… 310

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— Three-Prong for Association to Sue on Behalf of Its Members. An association has standing to sue on behalf of its members when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires participation of individual members. *League of Women Voters of Kansas v. Schwab* ……..… 310

JUVENILE JUSTICE CODE:

Review of Presumptive Sentence by Appellate Court if Lack of Specific Finding as Required by Statute. An appellate court has jurisdiction to review a presumptive sentence under K.S.A. 2019 Supp. 38-2380(b)(5), when a trial judge imposes a sentence under K.S.A. 2019 Supp. 38-2369(a)(1)(B), that lacks a specific finding in a written order stating that the juvenile offender poses a significant risk of harm to another or damage to property. *In re S.L.* ……..…… 1

Sentencing of Juvenile Offender—Requirement of Specific Finding in Written Order by Trial Judge. Before a trial judge under K.S.A. 2019 Supp. 38-2369(a)(1)(B) directly commits a juvenile offender to a juvenile correctional facility, the trial judge must make a specific finding in a written order stating that the juvenile offender poses a significant risk of harm to another or damage to property. *In re S.L.* ……..…… 1

KANSAS OPEN RECORDS ACT:

Enforcement of Kansas Open Records Act under Statute. The Kansas Open Records Act may be enforced by injunction, mandamus, declaratory judgment, or other appropriate order. K.S.A. 2020 Supp. 45-222(a). *Hammet v. Schwab* ……..…….…. 406*

Public Policy That Public Records Are Open for Public Inspection—Exceptions under Act. The public policy of the State of Kansas expressed in the Kansas Open Records Act, K.S.A. 45-215 et seq., is that public records shall be open for public inspection by any person unless the records are within one of the exceptions created in the Act. The Act is to be liberally construed and applied in order to promote the policy of openness. K.S.A. 45-216(a). *Hammet v. Schwab* ……..…. 406*

Reasonable Fees for Copies of Records Furnished by Public Agencies—Limitation. A public agency can ask for reasonable fees for providing access to or furnishing copies of public records. The fees for copies of records shall not exceed the actual cost of furnishing copies, including the cost of staff time required to make the information available. K.S.A. 2020 Supp. 45-219(c)(1). The fees for providing access to records maintained on computer facilities shall include only the cost of any computer services including staff time required. K.S.A. 2020 Supp. 45-219(c)(2). *Hammet v. Schwab* ……..……..……. 406*

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Requirement of State Agencies to Maintain Register for Public Information. State agencies are required to maintain a register, open to the public, that describes the information that the agency maintains on computer facilities, and the form in which the information can be made available using existing computer programs. K.S.A. 2020 Supp. 45-221(a)(16). *Hammet v. Schwab* ……..……..……. 406*

Statutory Definition of Public Records. Public records include any recorded information, regardless of form, characteristics, or location, which is made, maintained, or kept by or is in the possession of any public agency. K.S.A. 2020 Supp. 45-217(g)(1)(A). *Hammet v. Schwab* ……. 406*

KANSAS TORT CLAIMS ACT:

Definition of Municipality under Kansas Tort Claims Act. The Kansas Tort Claims Act (KTCA) defines "municipality" to include "any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution, or other instrumentality thereof." K.S.A. 75-6102(b). The KTCA does not define the term "instrumentality." *R.P. v. First Student, Inc*. ……..……. 371*

Governmental Entity Definition under Act Includes Both State and Municipalities. The Kansas Tort Claims Act (KTCA) defines "governmental entity" as encompassing both the state and municipalities. K.S.A. 75-6102(c). "State" under the KTCA is defined as "the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof." K.S.A. 75-6102(a). *R.P. v. First Student, Inc*. ……..……. 371*

Requirement of Private Entity to Qualify as Instrumentality under Kansas Tort Claims Act. To qualify as an instrumentality under the Kansas Tort Claims Act, a private entity that contracts with a governmental entity must either be an integral part of or controlled by a governmental entity. *R.P. v. First Student, Inc*. ……..……. 371*

LEGISLATURE:

Amendment of Statute by Legislature—Presumption of Intent to Change Prior Law. When the Legislature amends a statute, Kansas courts presume that it intended to change the law that existed prior to the amendment. *State v. Hasbrouck* …….. 50

PARENT AND CHILD:

Court's Jurisdiction Ends When Child Reaches Majority Age. A district court's jurisdiction over custody and parenting time ends once the child reaches the age of majority. *In re Marriage of Bush* …….. 284

Request for Grandparent Visitation under Statute—Factors for Consideration by Court. When considering a request for grandparent visitation, in addition to considering under K.S.A. 2018 Supp. 23-3301(b), the

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best interests of the child and whether a substantial relationship exists between grandparent and child, the court must presume that a fit parent is acting in the child's best interests and must give special weight to a fit parent's proposed grandparent visitation plan. The court cannot adopt a grandparent's conflicting plan without first finding that the parent's proposed plan is unreasonable. The burden is on the grandparent to rebut the presumption that a fit parent's proposed visitation plan is reasonable. Reasonableness is assessed in light of the totality of the circumstances.
Schwarz v. Schwarz 103

Statutory Authorization for Service of Notice of Hearing—Individual Not Required to Personally Sign for Delivery. K.S.A. 2020 Supp. 38-2267(b) authorizes service of the notice of a hearing concerning the termination of parental rights by return receipt delivery, which includes service by certified mail. The law does not restrict the delivery of the notice to the person served or otherwise require that individual to personally sign for its delivery. *In re A.P.* 141

Statutory Grandparent Visitation Rights—Findings of Best Interests and Substantial Relationship. K.S.A. 2018 Supp. 23-3301(b) allows for grandparent visitation when "visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established." *Schwarz v. Schwarz* 103

— No Statutory Exclusion of Visitation Rights Following Death of Parent. K.S.A. 2018 Supp. 23-3301(a), which permits a provision for grandparent visitation rights in a pending divorce action, does not preclude a separate and independent action for grandparent visitation rights following the death of a parent. *Schwarz v. Schwarz* 103

REAL PROPERTY:

Improvement to Real Property Is Valuable Addition to Property or Amelioration in Condition. An improvement is a valuable addition made to real property or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty, or utility or to adapt it for new or further purposes. An improvement need not involve structural additions and need not necessarily be visible as long as it enhances the value of the property.
Claeys v. Claeys 196

Partition Proceedings—Broad Discretion of District Courts for Determining Division of Interests. Partition proceedings, which seek to fairly divide ownership interests in real property, are equitable in origin. District courts have broad discretion to determine how best to fairly divide those interests. When a cotenant has made improvements to the property, the court may adjust the division to apply a credit to that cotenant for his or her efforts, measured by the extent the improvement enhances the value of the land. *Claeys v. Claeys* 196

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STATUTES:

Construction—Determination of Legislative Intent—Appellate Review. The fundamental rule of statutory construction is to determine the Kansas Legislature's intent. If a statute is plain and unambiguous, appellate courts are not to speculate about the legislative intent behind the language used and must refrain from reading something into the statute that is not readily found in its words. *Turner v. Pleasant Acres* ……..…….. 122

TAXATION:

Challenge to Valuation of Real Property—Statutory Requirement of Proper Classification of Property by County or District Appraiser—Burden of Proof on County or District Appraiser. When a taxpayer challenges the valuation of real property for commercial and industrial purposes, K.S.A. 79-1606(c) and K.S.A. 79-1609 require the county or district appraiser to "initiate the production of evidence to demonstrate, by a preponderance of the evidence," that the property has been properly classified. These statutes establish a quantum of proof—"preponderance of the evidence"—and designate who bears the burden of proof during the proceedings—the county or district appraiser.
Dodge City Cooperative Exchange v. Board of Gray County Comm'rs ……. 391*

Equipment Rental Expenses Necessary to Perform Taxable Services Are Not Tax Exempt. Equipment rental expenses which are necessary to perform taxable services are materially different from hotel and meal expenses incurred by employees who perform the taxable services. As such, equipment rental expenses are not tax exempt under *In re Tax Appeal of Cessna Employees Credit Union*, 47 Kan. App. 2d 275, 277 P.3d 1157 (2012).
In re Tax Appeal of Capital Electric Line Builders, Inc. …..……..……. 251

Exemption of Commercial and Industrial Machinery and Equipment from Property and Ad Valorem Taxes—Real Property Not Exempt. Kansas law exempts commercial and industrial machinery and equipment from property and ad valorem taxes, but this exemption does not extend to real property. Real property includes land, buildings, and fixtures—personal property affixed to and considered part of the real estate.
Dodge City Cooperative Exchange v. Board of Gray County Comm'rs 391*

Machinery and Equipment are Taxable Fixtures When Three Elements Met. Machinery and equipment are taxable fixtures if they (1) are annexed to real property; (2) are adapted to the use of and serve the real property; and (3) were intended by the party attaching the equipment to be permanently affixed to the property. All three elements must be met for equipment to be a fixture.
Dodge City Cooperative Exchange v. Board of Gray County Comm'rs 391*

No Exemption under Retailers' Sales Tax Act for Equipment Rental Expenses. The Kansas Retailers' Sales Tax Act, K.S.A. 79-3601 et seq., does not exempt equipment rental expenses incurred to perform taxable services from taxation.
In re Tax Appeal of Capital Electric Line Builders, Inc. ……...…. 251

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Property Tax Exemptions Effective January 1 of Tax Year in Which Mineral Lease Produced at Exempt Levels. Since property tax exemptions are effective from the date of the first exempt use (K.S.A. 79-213[j]), and mineral leases are appraised as of January 1 each year (K.S.A. 79-301), a property tax exemption under K.S.A. 79-201t is effective January 1 of the tax year in which the mineral lease produced at exempt levels.
John O. Farmer, Inc. v. Board of Ellis County Comm'rs 262

Refund of Property Tax Paid on Mineral Lease When Lease Produced at Exempt Levels. A taxpayer is entitled to a refund of property taxes paid on a mineral lease for the tax year in which the mineral lease produced at exempt levels under K.S.A. 79-201t. K.S.A. 79-213(k).
John O. Farmer, Inc. v. Board of Ellis County Comm'rs 262

TORTS:

Comparative Implied Indemnity—Cause of Action by Tortfeasor for Recovery of Damages Proportional to Joint Tortfeasor's Fault. Comparative implied indemnity, or as it is more accurately termed postsettlement contribution, describes the cause of action initiated by a tortfeasor in a negligence lawsuit to recover from a joint tortfeasor the share of the damages proportional to the joint tortfeasor's fault.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Comparative Implied Indemnity or Claim of Contribution against Joint Tortfeasor as Third Party—Must Assert Timely Claim. For a tortfeasor to pursue a claim of contribution or comparative implied indemnity against a joint tortfeasor who was not sued by the plaintiff, the tortfeasor must join the joint tortfeasor as a third party under K.S.A. 2020 Supp. 60-258a(c) and assert a timely claim against the joint tortfeasor.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

Determination of Percentage of Fault in One Lawsuit--Submission to Jury of Causal Fault or Negligence of All Parties to Occurrence. The causal fault or negligence of all parties to the occurrence, including the negligence of the injured plaintiff and any third parties, should be submitted to the jury and the percentage of fault of each determined in one lawsuit.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

TRIAL:

Booking Photo of Defendant—Preventative Measures Required to Minimize Prejudicial Effect. The district court should take preventive measures to minimize any potentially prejudicial effect the photograph might have. *State v. Vazquez* 86

Consolidation of Criminal Cases for Trial—Applying Base Sentence Rules Separately to Convictions Violates Equal Protection Clause. When two or more criminal cases are consolidated for trial because all the charges could have been brought in one charging document, then applying the base sentence rules under K.S.A. 2020 Supp. 21-6819(b) separately to the defendant's convictions in each case violates the Equal Protection

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Clause of the Fourteenth Amendment to the United States Constitution. *State v. Myers* ……..…….. 149

— Conviction of Multiple Charges—Compliance with Equal Protection Clause. For K.S.A. 2020 Supp. 21-6819(b) to comply with the Equal Protection Clause of the Fourteenth Amendment, when two or more cases are consolidated for trial because all the charges could have been brought in one charging document, and the defendant is convicted of multiple charges at trial, the defendant shall be sentenced using only one primary crime of conviction and one base sentence, as though all the charges had been brought in one complaint. *State v. Myers* ……..…….. 149

TRUSTS:

Beneficiary of Trust May Void Transaction if Conflict of Trustee's Fiduciary and Personal Interest—Exception. Generally, a trust beneficiary may void a transaction involving trust property which is affected by a conflict between the trustee's fiduciary and personal interest, without further proof. But an exception to that rule applies when the terms of the trust expressly or impliedly authorize the transaction. K.S.A. 2021 Supp. 58a-802(b)(1). *Culliss v. Culliss* ……. 293

Court Has Discretion to Award Reasonable Attorney Fees to Any Party. In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, has broad discretion to award reasonable attorney fees to any party, to be paid by another party or from the trust that is the subject of the controversy. K.S.A. 58a-1004. *Culliss v. Culliss* ……..…… 293

WORKERS COMPENSATION:

Decisions of Workers Compensation Appeals Board--Appellate Review under KJRA. Appellate courts review decisions from the Kansas Workers Compensation Appeals Board under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. In doing so, appellate courts must review the record to determine whether the decision of the Board is supported by evidence that is substantial when viewed in light of the record as a whole. It is not the role of the appellate courts to reweigh the evidence or to make credibility determinations. *Turner v. Pleasant Acres* ……. 122

Dual Capacity Doctrine – Exception to Exclusive Remedy Provision of Workers Compensation Act. The dual capacity doctrine, first recognized in *Kimzey v. Interpace Corp.*, 10 Kan. App. 2d 165, 167, 694 P.2d 907 (1985), is a judicially recognized exception to the exclusive remedy provision of the Workers Compensation Act. Under this exception, an employer may be liable to its employee as a third-party tortfeasor if the employer has obligations to the employee independent of those imposed on it as an employer. *Jefferies v. United Rotary Brush Corp.* ……. 354*

– – When Machine Manufactured by Employer Injures Employee—No Application of Doctrine. The dual capacity doctrine does not apply when

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a machine manufactured by the employer injures the employee since the employer has a duty to its employees to maintain a safe work environment. *Jefferies v. United Rotary Brush Corp.* 354*

Dual Purpose of K.S.A. 44-504. The Kansas Legislature enacted the provisions of K.S.A. 44-504 to serve a dual purpose. First, K.S.A. 44-504(a) preserves an injured worker's right to assert a claim to recover damages caused by third parties. Second, K.S.A. 44-504(b) prevents an injured worker from receiving a double recovery for the same injuries.
Turner v. Pleasant Acres 122

Employer's Subrogation Rights—Legislative Determination. The nature and extent of an employer's subrogation rights under the Kansas Workers Compensation Act are matters for legislative determination.
Turner v. Pleasant Acres 122

Injured Worker's Recovery under K.S.A. 44-504(b)—Subrogation Rights of Employer against Duplicative Recovery. Under K.S.A. 44-504(b), if an injured worker receives a judgment, settlement, or other recovery in a claim asserted against any person or entity—other than the employer or a co-employee—who caused the injury for which compensation is payable under the Kansas Workers Compensation Act, the employer is subrogated to the extent of the compensation and medical benefits provided and has a lien against any duplicative recovery. The subrogation lien does not include any amount paid by a third party for loss of consortium or loss of services to an injured worker's spouse.
Turner v. Pleasant Acres 122

No Distinction between Types of Recovery in K.S.A. 44-504(b). K.S.A. 44-504(b) does not distinguish between the types of recovery to which the workers compensation subrogation lien attaches.
Turner v. Pleasant Acres 12

ZONING:

Statutes Applicable to Election Petitions Not Applicable to Zoning Protest Petitions. The requirements of K.S.A. 25-3601 through K.S.A. 25-3608 do not apply to zoning protest petitions. Those petitions are governed by K.S.A. 2021 Supp. 12-757(f)(1). *Pretty Prairie Wind v. Reno County* 429*

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No. 124,140

JASON L. JEFFERIES, *Appellant*, v. UNITED ROTARY BRUSH CORPORATION, et al., *Appellees*.

SYLLABUS BY THE COURT

1. WORKERS COMPENSATION – *Dual Capacity Doctrine – Exception to Exclusive Remedy Provision of Workers Compensation Act.* The dual capacity doctrine, first recognized in *Kimzey v. Interpace Corp.*, 10 Kan. App. 2d 165, 167, 694 P.2d 907 (1985), is a judicially recognized exception to the exclusive remedy provision of the Workers Compensation Act. Under this exception, an employer may be liable to its employee as a third-party tortfeasor if the employer has obligations to the employee independent of those imposed on it as an employer.

2. SAME—*Dual Capacity Doctrine – When Machine Manufactured by Employer Injures Employee—No Application of Doctrine*. The dual capacity doctrine does not apply when a machine manufactured by the employer injures the employee since the employer has a duty to its employees to maintain a safe work environment.

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed July 1, 2022. Affirmed.

Michael W. Blanton, of Gerash Steiner P.C., of Evergreen, Colorado, *John M. Parisi*, of Parisi Law Firm, of Overland Park, and *Jim Lemonds*, of Brown & Crouppen, of St. Louis, Missouri, for appellant.

Lee M. Baty and *Morgan L. Simpson*, of Baty Otto Coronado PC, of Kansas City, Missouri, for appellees.

Before BRUNS, P.J., CLINE, J., and JAMES L. BURGESS, S.J.

CLINE, J.: Jason L. Jefferies received workers compensation benefits from his employer, United Rotary Brush Corporation (URBC), after he was injured at work while operating a convoluted press machine. He then filed a civil suit against URBC (and several related entities) alleging negligent design and manufacture of the press machine. Jefferies claimed URBC was civilly liable under the dual capacity doctrine, a judicially recognized exception to the exclusive remedy provision of the Workers Compensation Act. See *Kimzey v. Interpace Corp.*, 10 Kan. App. 2d 165, 166-67, 694 P.2d 907 (1985). Under this exception, an employer may

be liable to its employee as a third-party tortfeasor if the employer has obligations to the employee independent of those imposed on it as an employer. 10 Kan. App. 2d at 167.

The district court dismissed Jefferies' case on summary judgment after finding URBC manufactured the press machine. The dual capacity doctrine does not apply when a machine manufactured by the employer injures the employee since the employer has a duty to its employees to maintain a safe work environment. 10 Kan. App. 2d at 167-68. As a result, Jefferies was barred from another recovery out of URBC. It also denied Jefferies' untimely motion to amend his petition to add another party, which he filed while the summary judgment motion was pending. Jefferies appeals both decisions. After a careful review of the record, we find no error and affirm.

Jefferies' Civil Suit

On March 7, 2019, Jefferies filed a civil suit against URBC and five related entities (Defendants). He alleged that on March 8, 2017, while operating a press machine on the job for URBC in Lenexa, Kansas, a brush wafer became lodged. As he tried to dislodge it, the machine activated and crushed his left arm and hand. He sued for negligence, breach of warranty, and strict liability based on the design and manufacture of the machine. He claimed Defendants were subject to civil tort liability for his injury under K.S.A. 44-504(a) and the dual capacity doctrine because he alleged URBC had acquired the entity that manufactured the machine "through an asset purchase, stock purchase and/or merger with a predecessor corporation or business entity that designed, manufactured, built, or assembled the machine."

Summary Judgment Motion

In August 2020, Defendants moved for summary judgment, on the basis that the claims against URBC were barred by the exclusive remedy provision of the Workers Compensation Act.

URBC merged with another company in 2008 (URB Sub., Inc.). Defendants claimed the press machine was manufactured after the merger and Jefferies claimed it was manufactured before the merger. The district court found this dispute immaterial since

it found URBC survived the 2008 merger, meaning it was the same company before and after the merger. Thus, no matter when the press machine was manufactured, URBC (Jefferies' employer) was the manufacturer, so the dual capacity doctrine did not apply.

The district court relied on Section 2.1 of the 2008 merger agreement to support this finding:

"'**The Merger**. On the terms and subject to the conditions contained in this Agreement, at the Effective Time, in accordance with this Agreement and the KGCC, Merger Sub shall merge with and into the Company, ***the Company shall continue as the Surviving Corporation*** and the separate corporate existence of Merger Sub shall cease.'"

The merger agreement defined URBC as the "Company."

Motion to Amend to Add URB of Canada

At the December 2, 2020 hearing on Defendants' motion for summary judgment, Jefferies' attorney mentioned he had learned during depositions taken in August 2020, that the individual who designed the press machine (Harry Vegter) was an employee of URB of Canada, a wholly owned subsidiary of the holding company that also owns URBC. The attorney mentioned he intended to file a motion to amend the complaint to bring in URB of Canada. And, on December 23, 2020 (while the court's summary judgment decision was still pending), Jefferies moved for leave to file his first amended petition to add URB of Canada as a defendant under K.S.A. 2020 Supp. 60-215(a)(2) and (c)(3). Defendants opposed the motion. The district court heard Jefferies' motion on February 3, 2021, and took the matter under advisement. Jefferies then filed a new motion on February 4, 2021, titled "Plaintiff's Motion for Leave to File First Amended Petition to Add United Rotary Brush of Canada as a Party Out of Time." Defendants opposed this motion as well.

The district court denied Jefferies' motions to amend on the same day it issued its summary judgment order. The court determined that Jefferies' proposed amendment would not relate back to the original pleading date because it did not find Jefferies mistakenly named the wrong defendant when he filed his petition. And if he was mistaken, the court found he should have moved to

amend sooner. The case management order deadline for amendments to pleadings was November 2, 2020, and Jefferies never sought to extend it. The court pointed out that Jefferies received documents through discovery referencing URB of Canada's existence and potential involvement long before this deadline ran. Without relation back, the court found it would be futile to name URB of Canada now as a defendant since the claims were barred by the statutes of limitations.

It also held that allowing the belated amendment would be prejudicial to URB of Canada and the other defendants, since it would require more discovery regarding URB of Canada's potential involvement in manufacturing the press machine years after the injury occurred, when memories had faded. And, last, it denied Jefferies' claim that the Kansas Supreme Court administrative orders suspending statutes of limitations and statutory deadlines during the COVID-19 pandemic extended Jefferies' deadline to name additional parties.

The district court correctly granted summary judgment to Defendants.

Jefferies argues the district court erred in granting summary judgment because he claims URBC emerged from the 2008 merger a new company, so the dual capacity doctrine applies. He claims the court misconstrued the 2008 merger documents when it found URBC remained intact through the merger. He also contends Defendants admitted in their summary judgment briefing that URBC emerged as a new company from the merger.

To begin, URBC correctly notes that Jefferies did not object to the entry of summary judgment as to the remaining defendants in his brief, and so he has abandoned any such arguments. See *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017) ("Issues not adequately briefed are deemed waived or abandoned."). We will thus only address the arguments against URBC.

Standard of Review

We consider appeals from a district court's ruling on a motion for summary judgment de novo, applying the same standards the district court applied:

"'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and *where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment* must be denied.' [Citations omitted.]" *Hammond v. San Lo Leyte VFW Post #7515*, 311 Kan. 723, 727, 466 P.3d 886 (2020).

In a negligence action, summary judgment is proper if the only question presented is a question of law. *Manley v. Hallbauer*, 308 Kan. 723, 726, 423 P.3d 480 (2018) ("Generally, granting summary judgment in negligence cases must be done with caution. But '[a]n exception . . . applies when the only question presented is one of law.'"). The overall question here is a question of law—whether the dual capacity doctrine applies. And this court exercises de novo review over questions of law. 308 Kan. at 726. We must also interpret the 2008 merger agreement, which is another matter of law over which we have unlimited review. See *First Security Bank v. Buehne*, 314 Kan. 507, 510, 501 P.3d 362 (2021) ("'Our review over the interpretation and legal effect of written instruments is unlimited, and we are not bound by the lower courts' interpretations of those instruments.'").

The Exclusive Remedy Provision of the Workers Compensation Act

The exclusive remedy provision of the Workers Compensation Act, K.S.A. 2020 Supp. 44-501b(d), provides:

"Except as provided in the workers compensation act, *no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for which compensation is recoverable under the workers compensation act* . . . ." (Emphasis added.)

Kansas courts interpret this provision to mean that an injured employee cannot maintain a civil action against his or her employer or another employee for damages based on common-law

negligence if that injured employee could have recovered compensation for their injury under the Workers Compensation Act. *Hawkins v. Southwest Kansas Co-op Svc.*, 313 Kan. 100, 103, 484 P.3d 236 (2021) (referencing K.S.A. 2019 Supp. 44-501b[d], providing, "if an injured worker could have recovered compensation for an injury under the Act, the worker cannot bring an action against the employer or another employee for damages based on common-law negligence"); *Endres v. Young*, 55 Kan. App. 2d 497, 500, 419 P.3d 40 (2018) ("K.S.A. 2015 Supp. 44-501b[d] states clearly that no civil suit is permitted if 'compensation is recoverable under the workers compensation act.'").

The Dual Capacity Doctrine

One exception to the exclusive remedy provision, permitting civil claims against the employer, is the dual capacity doctrine. This doctrine was first recognized in Kansas in *Kimzey*, 10 Kan. App. 2d 165.

In *Kimzey*, David Kimzey was injured while operating a pyramid roll machine in the course of his employment with Interpace Corporation, Inc. After receiving workers compensation benefits from Interpace, Kimzey then brought a products liability action against Interpace based on the design and manufacture of the roll machine. He claimed his injury was because of the machine manufacturer's negligence, design defect, and breach of warranty in designing and manufacturing the machine. Interpace was not the manufacturer of the machine—Lock Joint Pipe Co. was. But Kimzey claimed Interpace was liable to him under the dual capacity doctrine because Lock Joint had dissolved and merged into another corporation, which later merged into Interpace, and "[a]s a part of the merger agreement, Interpace contracted to assume 'all debts, liabilities, restrictions, duties, and obligations' of Lock Joint." 10 Kan. App. 2d at 165. The district court granted Interpace's motion for summary judgment because Kimzey's exclusive remedy against his employer was under the Workers Compensation Act. 10 Kan. App. 2d at 166.

The Court of Appeals began by discussing the dual capacity doctrine's origin. The court explained that under the exclusive remedy provision, if an employee recovered benefits under the act,

he could not maintain a common-law negligence action against his employer for damages. 10 Kan. App. 2d at 166. But the court noted that if the negligence of a "*third person* not in the same employ as the injured worker" caused the injury, the worker could pursue workers compensation and also pursue an action against the third person. (Emphasis added.) 10 Kan. App. 2d at 167 (basing allowance of civil claim against third person on K.S.A. 1983 Supp. 44-504[a]); see also K.S.A. 44-504(a) (current version of the statute supporting same proposition). The allowance of third-party liability under these circumstances led to the dual capacity doctrine:

"According to the dual capacity doctrine, an employer who is generally immune from tort liability to an employee injured in a work-related accident may become liable to his employee as a third-party tortfeasor if he occupies, in addition to his capacity as an employer, a second capacity that confers upon him obligations independent of those imposed upon him as an employer. It is in this second capacity that liability to an employee may be imposed." 10 Kan. App. 2d at 167.

The *Kimzey* court then quoted a discussion from the Oklahoma Supreme Court on when it was appropriate to apply the dual capacity doctrine:

"'This concept of duality, which confers third party status upon the employer, is more meaningful when viewed in terms of an employer having a dual persona. An employer may become a third person if he possesses a second persona so completely independent from and unrelated to his status as an employer, that by established standards, the law recognizes it as a separate legal person.'" 10 Kan. App. 2d at 167.

Significant here, the *Kimzey* court also noted:

"The [Oklahoma Supreme] [C]ourt, in accordance with the great weight of authority in this country, rejected application of the dual capacity doctrine under a products liability theory in cases where *the employer manufactures, distributes or installs a product used in the employee's work* on the ground that *the employer's duty to provide a safe workplace for its employee* and its duty as a manufacturer to make a safe product are so inextricably intertwined that it cannot logically be separated into two distinct legal persons." (Emphases added.) 10 Kan. App. 2d at 167-68.

The *Kimzey* court began its analysis by first noting: "*If the roll machine involved in this case had been manufactured by defendant Interpace, it is clear that workers' compensation would be*

plaintiff's exclusive remedy." (Emphasis added.) 10 Kan. App. 2d at 168. The court also noted that if Lock Joint was still in existence, the plaintiff could sue it as a third-party tortfeasor. But the court held these were not the issues at hand, because the plaintiff was asserting that his employer, Interpace, was liable based on the tortious conduct *of a third party*, Lock Joint. 10 Kan. App. 2d at 168. Because this was an issue of first impression in Kansas, the *Kimzey* court turned to a factually similar case from New York, *Billy v. Consolidated Mach. Tool Corp.*, 51 N.Y.2d 152, 432 N.Y.S.2d 879, 412 N.E.2d 934 (1980), which held:

"[W]here the employer's liability is alleged to arise solely by reason of its independent assumption, by contract or operation of law, of the obligations *of a third-party tortfeasor*, the exclusivity provisions of the workers' compensation law do not bar a common law action by an employee against his employer for injuries sustained in the course of his employment." (Emphasis added.) 10 Kan. App. 2d at 169 (citing *Billy*, 51 N.Y.2d at 156).

The *Kimzey* court held that applying the dual capacity doctrine would be appropriate under certain exceptional circumstances, explaining:

"The doctrine should not be used for the purpose of simply evading the exclusivity provision of the Workmen's Compensation Act. When properly applied, it will be limited to those exceptional situations where the employer-employee relationship is not involved because the employer is acting as a second persona unrelated to his status as an employer, that confers upon him obligations independent of those imposed upon him as an employer. As such, it will not defeat the purposes or policies of the act. *Nor, in our view, will it erode the employer's immunity under the exclusivity provision of the act where the claim of liability is properly within the purview of the act*. [Citations omitted.]" (Emphasis added.) 10 Kan. App. 2d at 170.

After noting the "Plaintiff's action [was] essentially an attempt to recover from a *third-party manufacturer* of a defective machine through a suit against its successor corporation," the *Kimzey* court ultimately held:

"Interpace, the successor corporation, by reason of the merger and its agreement to assume the liabilities of Lock Joint, *the third-party* manufacturer, stands in the shoes of Lock Joint with respect to the question of liability. Since Lock Joint had no basis to invoke the exclusivity provision of the Workmen's Compensation Act against plaintiff, Interpace is similarly precluded here." (Emphases added.) 10 Kan. App. 2d at 170.

In total, there are only two Kansas cases in which an injured employee tried to use the dual capacity doctrine in *Kimzey* to avoid the exclusive remedy provision—but in both cases, the court declined to apply the doctrine. See *Scott v. Wolf Creek Nuclear Operating Corp.*, 23 Kan. App. 2d 156, 157-58, 161-62, 928 P.2d 109 (1996) (declining to apply the doctrine to confer tort liability on employer and physician's assistants employer hired to treat employees when physician's assistants negligently treated employee for non-work-related injury); *Hill v. Wenger Manufacturing, Inc*., No. 71,288, 1995 WL 18252810, at *2-3 (Kan. App. 1995) (unpublished opinion) (declining to extend doctrine to employer-manufactured product intended for sale to the public). Thus, to date, we have found no cases where the Kansas courts have extended the dual capacity doctrine to any factual situation other than that presented in *Kimzey*.

The district court correctly found the dual capacity doctrine does not apply.

Jefferies raises two arguments on why the dual capacity doctrine applied here: (A) the 2008 transaction was a consolidation that created a new entity rather than a merger, or the 2008 agreement was at best ambiguous as to whether the parties intended for the transaction to be a merger or a consolidation, making it a question for the jury; and (B) even treating the 2008 transaction as a merger, the dual capacity doctrine applies because the key factor is not whether it was a merger or a consolidation, but whether the emerging entity assumed the liabilities of the pre-existing entities, and here it was undisputed that URBC assumed the liabilities of the merging entities.

The district court correctly found the 2008 transaction was a merger.

As to this first point, Jefferies presents three arguments on how the record shows that a new entity was formed in the 2008 transaction: (1) one of Defendants' proposed uncontroverted statements of fact is effectively an admission that a new entity was formed in the 2008 transaction; (2) the entity that emerged from

the 2008 transaction was a new entity because it had different articles of incorporation, bylaws, directors, and officers than the pre-merger URBC; and (3) there would have been no reason for the 2008 agreement's language conveying that the emerging corporation would assume the liabilities of the pre-existing entities if the URBC that emerged was the same as the prior URBC. Like the district court, we are unpersuaded.

1. *Defendants' uncontroverted statement of fact*

Jefferies claims URBC "admitted that a new company was formed as a result of the 2008 transaction" in its summary judgment brief. Jefferies is referring to paragraph five of Defendant's statement of uncontroverted facts: "5. On August 29, 2008, United Rotary Brush Corporation merged with URB Merger Sub, Inc. to form United Rotary Brush Corporation." But this statement does not support the notion that a new entity was formed in the 2008 transaction. Quite the opposite since the post-merger company had the same name as the pre-merger company. We agree with the district court that this statement does not say or mean URBC ceased to exist or emerged as a new company. And such a reading conflicts with the clear language of the 2008 merger agreement. Thus, we agree Defendants did not make the admission Jefferies claims.

2. *Different articles of incorporation, bylaws, directors, and officers*

Second, Jefferies argues the post-merger entity was a new entity despite having the same name because the post-merger entity had different articles of incorporation, bylaws, directors, and officers than the pre-merger entity. First, he cites no legal authority to support the proposition that the surviving entity from a merger is a different entity than it was before the merger if it amended its articles of incorporation and bylaws and changed its directors and officers in the merger. He has abandoned this argument by failing to support it with any legal authority. See *Russell*, 306 Kan. at 1089 ("Issues not adequately briefed are deemed waived or abandoned.").

Next, the district court correctly found that Kansas corporate law does not support Jefferies' argument. The Kansas statute on mergers and consolidations provides that with a merger, the agreement of merger must state: "such amendments or changes in the articles of incorporation of the surviving corporation as are desired to be effected by the merger, which amendments or changes may amend and restate the articles of incorporation of the surviving corporation in their entirety." K.S.A. 2020 Supp. 17-6701(b). In other words, the surviving corporation can change its articles of incorporation while remaining the same entity following the merger—evident from the fact that it is called the "*surviving* corporation" in the statute's language. (Emphasis added.) K.S.A. 2020 Supp. 17-6701(b). Again, we agree this change does not mean the parties intended post-merger URBC to be a new entity.

3. *Assumption of liabilities of pre-existing entities*

Another reason why Jefferies claims the 2008 merger created a new entity is because the post-merger entity agreed to assume the liabilities of the pre-existing entities. The specific sections of the agreement the parties raised on this issue provide:

"2.1. **The Merger.** On the terms and subject to the conditions contained in this Agreement, at the Effective Time, in accordance with this Agreement and the KGCC, Merger Sub shall merge with and into the Company, the Company shall continue as the Surviving Corporation and the separate corporate existence of Merger Sub shall cease.

"2.2 **Effect of the Merger.** Immediately following the Merger, the Surviving Corporation shall, with the effect set forth in the KGCC and this Agreement, (a) possess all the rights, privileges, immunities and franchises, both public and private, of the Constituent Entities, (b) be vested with all property (whether real, personal or mixed), all debts due on whatever account, all other causes of action and all and every other interest belonging to or due to each of the Constituent Entities, and (c) be responsible and liable for all the obligations and liabilities of each of the Constituent Entities."

Jefferies argues the language in Section 2.2(c) evidences the parties intended to create a new entity because "[t]here would be no reason to include this language if the corporation which emerged was the same as the prior corporation that shared the same name." We disagree. It is reasonable to assume the parties included this provision to clarify that URBC would still be liable

for its pre-merger liabilities or obligations along with any pre-merger liabilities and obligations of URB Merger Sub., Inc. That is, the purpose of the merger was not to shed pre-merger liabilities and obligations of either entity.

More importantly, when this provision is viewed in context, we do not find the parties intended to create a new entity with the merger. We cannot read this contractual provision in isolation; we must interpret it in the context of the entire 2008 merger agreement. *Russell v. Treanor Investments L.L.C.*, 311 Kan. 675, 680, 466 P.3d 481 (2020) ("'[I]nterpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing and considering the entire instrument from its four corners.'"). To that end, we note the agreement is entitled, "Agreement and Plan of Merger." The introductory paragraph of the agreement specifies that URBC is known as "the 'Company'" throughout the agreement and that URB Merger Sub., Inc. is known as "Merger Sub." And Section 2.1 specifies that "the Company [URBC] shall continue as the Surviving Corporation." The statement in Section 2.1 that "the separate corporate existence of Merger Sub shall cease" also supports this conclusion because there is no equivalent statement providing that URBC's existence shall cease after the merger.

When viewed in context, we do not find the parties intended post-merger URBC to be a new entity, nor do we find the agreement ambiguous in that regard.

Jefferies misconstrues Kimzey *and overstates the significance of the assumption of liability language.*

Jefferies contends that even if the 2008 transaction was a merger, the dual capacity doctrine still applies because URBC assumed the liabilities of the merging entities. To support this contention, he claims "the key factor in applying the dual capacity doctrine is not the nature of the underlying transaction (i.e., merger or consolidation), but the fact that the emerging entity assumes the liabilities of the pre-existing entities." He gleans this statement from *Kimzey*'s discussion of a New York case, *Billy v. Consolidated Mach. Tool Corp.*: "As a part of the merger, the defendant corporation contracted to assume the liabilities and obligations of

the predecessor corporations, including those of the corporation that had designed and manufactured the defective machine." *Kimzey*, 10 Kan. App. 2d at 169.

Jefferies misconstrues this statement and *Kimzey*'s holding. As discussed earlier, it is not enough for the employer to merely assume the liabilities of "the pre-existing entities" to trigger application of the dual capacity doctrine. The employer had to assume the liabilities of the *third-party tortfeasor*. And again, this is because the employer must be sitting in the shoes of a third-party to get around the exclusive remedy provision in the Workers Compensation Act. See *Kimzey*, 10 Kan. App. 2d at 170 ("Interpace, the successor corporation, by reason of the merger and its agreement to assume the liabilities of Lock Joint, the *third-party* manufacturer, stands in the shoes of Lock Joint with respect to the question of liability." [Emphasis added.]); K.S.A. 44-504(a) (permitting injured worker to take compensation under the act and pursue civil action against third party not "in the same employ" that caused worker's injury). Under the facts here, the employer, URBC, would have had to assume the liabilities of a third-party entity that manufactured the machine. See *Kimzey*, 10 Kan. App. 2d at 168, 170 ("If the roll machine involved in this case had been manufactured by defendant Interpace, it is clear that workers' compensation would be plaintiff's exclusive remedy. . . . Nor, in our view, will [the dual capacity doctrine] erode the employer's immunity under the exclusivity provision of the act where the claim of liability is properly within the purview of the act."). But that did not happen—URBC assumed its *own* liabilities and that of URB Sub. Inc. (which no one identifies as a manufacturer of the press machine).

Jefferies continues down his misguided path by claiming that after *Kimzey*, "Kansas Courts have continued to recognize that where a claim arises by virtue of 'an independent contractual obligation voluntarily assumed' by the employer, the exclusivity provisions do not apply to bar that claim," citing to *Estate of Bryant v. All Temperature Insulation, Inc.*, 22 Kan. App. 2d 387, 396, 916 P.2d 1294 (1996). But Jefferies misrepresents the holding in *Estate of Bryant* by neglecting to include the second half of the court's holding: "The 'exclusive remedy' provision of K.S.A. 44-501(b) does not bar the enforcement of an independent contractual

indemnification obligation voluntarily assumed *by a statutory employer in favor of a third party where the claim of liability is outside the purview of and bears no relationship to the Workers Compensation Act*." (Emphasis added.) 22 Kan. App. 2d 387, Syl. ¶ 6. Unlike *Estate of Bryant*, the claim of liability here is within the purview of the Act.

After the *Estate of Bryant* court determined the claim was not barred by the exclusive remedy provision, it stated: "That statute is *intended to protect employers from liability while operating under the provisions of the Workers Compensation Act*. In this case, neither the claim of [the injured worker] nor the claim of [the third party] against [the employer] have any relationship whatsoever to the Workers Compensation Act." *Estate of Bryant*, 22 Kan. App. 2d at 396. That is not the case here, since URBC, Jefferies' employer, operated under the Act, providing Jefferies with a settlement award for his injury. Thus, according to *Estate of Bryant*, the situation here is exactly the one the exclusive remedy was designed to protect against.

It was undisputed that URBC manufactured the convoluted press. The district court correctly concluded the factual dispute about *when* the subject press machine was manufactured was immaterial. There was thus no genuine dispute as to any material fact and URBC was entitled to summary judgment as a matter of law: Under *Kimzey*, the dual capacity doctrine does not apply because Jefferies' employer manufactured the machine. The district court did not err in granting summary judgment to URBC.

The district court did not abuse its discretion in denying Jefferies leave to amend his petition.

Jefferies bears the burden of showing the district court abused its discretion in denying his motion for leave to file a first amended petition to add URB of Canada as a party. *Smith v. Philip Morris Companies, Inc.*, 50 Kan. App. 2d 535, 586-87, 335 P.3d 644 (2014). The court abuses its discretion if "'(1) no reasonable person would take the view adopted by the trial judge; (2) the ruling is based on an error of law; or (3) substantial competent evidence does not support a finding of fact on which the exercise of discretion was made.'" *Luckett v. Kansas Employment Security*

Board of Review, 56 Kan. App. 2d 1211, 1221, 445 P.3d 753 (2019).

The Kansas Supreme Court has recognized five valid reasons for denying a motion to amend a pleading: "(1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility of [the] amendment." *Smith*, 50 Kan. App. 2d at 587 (citing *Johnson v. Board of Pratt County Comm'rs*, 259 Kan. 305, 327, 913 P.2d 119 [1996]). Here, the district court denied Jefferies' motion as futile. It also found Jefferies had unduly delayed in seeking to amend and that the proposed amendment would unduly prejudice URB of Canada.

The district court found Jefferies' proposed amendment would be futile since the statute of limitations on the claim against URB of Canada had run, and the amendment would not relate back to the date of his original pleading. Under K.S.A. 2020 Supp. 60-215(c)(3), Jefferies' amendment to his pleading would only relate back if, within the statute of limitations on his claim against URB of Canada, Jefferies could show URB of Canada "(A) [r]eceived such notice of the action that it will not be prejudiced in defending on the merits; and (B) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

Kansas courts have repeatedly held the relation back doctrine under K.S.A. 2020 Supp. 60-215(c)(3) applies when "'the plaintiff intended from the outset to sue the correct defendant but through some error did not actually have the exact name of the defendant.'" *In re CEC Entertainment, Inc., Shareholder Litigation*, No. 120,234, 2019 WL 4725289, at *9 (Kan. App. 2019) (unpublished opinion) (quoting *Martindale v. Robert T. Tenny, M.D., P.A.*, 250 Kan. 621, 642, 829 P.2d 561 [1992]). And regarding this holding, our court recently noted:

"[F]or more than 25 years, Kansas courts—both state and federal—have looked to the *Martindale* decision when addressing relation back issues under K.S.A. 2018 Supp. 60-215(c). See *Srivastava v. University of Kansas*, No. 118,329, 2018 WL 1770325, at *9-10 (Kan. App. 2018) (unpublished opinion) (plaintiff cannot use the 'relation-back provision because the provision does not exist to

give relief to plaintiffs who make errant strategic decisions'); *Hoover v. St. Francis Health Center*, No. 97,175, 2007 WL 2695840, at *4 (Kan. App. 2007) [(unpublished opinion)] (K.S.A. 60-215[c] does not provide relief for a plaintiff who made a conscious decision not to sue a party); *Pedro v. Armour Swift-Eckrich*, 118 F. Supp. 2d 1155, 1159 (D. Kan. 2000) (quoting *Martindale* in finding that there is no support for the suggestion 'that Kansas courts would ignore the mistaken identity requirement in applying K.S.A. § 60-215[c]'); *Gardner By & Through Gardner v. Toyota Motor Sales, U.S.A., Inc.*, 793 F. Supp. 287, 289 (D. Kan. 1992) (citing *Martindale* in concluding that '[r]elation back to add an omitted party is appropriate only where the party seeking the amendment was prevented from bringing the action against the omitted party due to a mistake of identity')." *In re CEC Entertainment, Inc., Shareholder Litigation*, 2019 WL 4725289, at *9.

The district court found Jefferies pointed to no evidence in the record reflecting a mistake about the proper identity of the defendants when he filed his lawsuit. Nor does Jefferies claim on appeal that he was mistaken about URB of Canada's existence. Instead, he argues that while he was aware of URB of Canada's existence, he was not aware it was potentially liable for his injuries. But that is not the test. Indeed, if it were, the statute of limitations would be meaningless because a potential defendant could be brought in at any time. That Jefferies did not know of URB of Canada's potential liability until after the statute of limitations had run is of no consequence. See *Osborn v. Kansas Dept. for Children and Families,* No. 122,662, 2022 WL 1511255, at *17 (Kan. App. 2022) (unpublished opinion) (finding the plaintiff's "lack of knowledge of [a new party's] involvement differs from a mistake about the identity of the proper party that a plaintiff intended to name from the beginning of the case").

Similarly, Jefferies offers no evidence that URB of Canada "knew or should have known that . . . but for a mistake concerning the proper party's identity," it would have been sued. K.S.A. 2020 Supp. 60-215(c)(3)(B). While Jefferies argued he delayed in joining URB of Canada because he relied on Defendants' denials of URB of Canada's involvement, he offers no evidence to support URB of Canada's awareness of his claim.

Based on our review of the record, we conclude that it was reasonable for the district court to find Jefferies made a deliberate choice not to sue URB of Canada when he filed his lawsuit, which did not result from a mistake about the proper party's identity.

Since his amendment would not relate back, the district court did not abuse its discretion in finding it to be futile. We need not address the rest of Jefferies' arguments, since futility of amendment is a sufficient legal basis to deny the motion.

Jefferies has not indicated the district court's decision to deny his motion to amend stemmed from a legal error or that substantial competent evidence does not support its findings of fact. We also cannot say that no reasonable person would take the view adopted by the district court. As a result, we find the district court did not abuse its discretion in denying Jefferies' motion for leave to file an amended petition to add URB of Canada as a party, nor did it err in granting summary judgment to URBC.

Affirmed.

515 P.3d 283

No. 124,197

R.P., as guardian for A.P., and A.P., *Appellees*, v. FIRST STUDENT INC., d/b/a/ FIRST STUDENT MANAGEMENT, LLC, and NELDA PIPER, *Appellants*.

SYLLABUS BY THE COURT

1. KANSAS TORT CLAIMS ACT—*Governmental Entity Definition under Act Includes Both State and Municipalities*. The Kansas Tort Claims Act (KTCA) defines "governmental entity" as encompassing both the state and municipalities. K.S.A. 75-6102(c). "State" under the KTCA is defined as "the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof." K.S.A. 75-6102(a).

2. SAME—*Definition of Municipality under Kansas Tort Claims Act*. The Kansas Tort Claims Act (KTCA) defines "municipality" to include "any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution, or other instrumentality thereof." K.S.A. 75-6102(b). The KTCA does not define the term "instrumentality."

3. SAME—*Requirement of Private Entity to Qualify as Instrumentality under Kansas Tort Claims Act*. To qualify as an instrumentality under the Kansas Tort Claims Act, a private entity that contracts with a governmental entity must either be an integral part of or controlled by a governmental entity.

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed July 1, 2022. Affirmed.

Jeremy K. Schrag and *Alan L. Rupe*, of Lewis Brisbois Bisgaard & Smith LLP, of Wichita, for appellants.

Michael L. Brooks, pro hac vice, of The Brooks Law Firm, of Oklahoma City, Oklahoma, and *Rachel E. Smith*, *Michael P. Waddell*, and *Oscar P. Espinoza*, of Smith Mohlman Injury Law, LLC, of Kansas City, Missouri, for appellees.

James R. Howell and *Jakob Provo*, of Prochaska, Howell & Prochaska LLC, of Wichita, for amicus curiae Kansas Trial Lawyers Association.

Andrew Foulston, of McDonald Tinker PA, of Wichita, for amicus curiae The Kansas Association of Defense Counsel.

Before BRUNS, P.J., CLINE, J., and JAMES L. BURGESS, S.J.

CLINE, J.: This case addresses whether a private company that provides bussing services under contract with a school district qualifies as a governmental entity under the Kansas Tort Claims Act (KTCA). We agree with the district court—under the circumstances presented in this case—the private company providing contractual services to the school district is not a governmental entity under the KTCA. Thus, we affirm its summary judgment ruling.

FACTUAL BACKGROUND

First Student, Inc. is a private, for-profit corporation incorporated under the laws of Delaware and headquartered in Ohio. During the 2015-2016 school year, First Student provided bussing services for students in the Shawnee Mission U.S.D. 512 school district under a contract with the district.

The contract identified First Student as an independent contractor and specified that neither First Student nor its employees were to be considered employees or agents of the school district. In line with this designation, the contract required First Student to supply and maintain all school busses and personnel necessary to serve the school district's needs. First Student controlled the hiring and firing of all operations personnel and drivers, subject to the school district's right to request removal of any unsuitable employee. First Student similarly controlled the planning of all stops and schedules, subject to school district approval, as well as the licensing and training of drivers. First Student was also required to maintain its own liability insurance and agreed to indemnify the school district from claims or demands "arising from or caused by any act of neglect, default or omission of" First Student in the performance of the contract.

In April 2016, A.P., a special-needs student in the school district, was sexually assaulted by another student while riding on a bus owned and operated by First Student and driven by Nelda Piper, a First Student employee. A.P. and her father, R.P., filed a negligence claim against First Student and later Piper, alleging that First Student and Piper (Defendants) failed to stop or prevent the assault. A.P. and R.P. (Plaintiffs) later moved to amend their petition to add a claim for punitive damages against First Student

based on its failure to employ sufficient staff to monitor activity on the bus, as well as its failure to properly train Piper.

Defendants moved for summary judgment, arguing First Student qualified as a governmental entity under the KTCA because it was an instrumentality of the school district. As such, they contended Plaintiffs' claims should be dismissed for failure to provide pre-suit notice under K.S.A. 2021 Supp. 12-105b. Plaintiffs responded by arguing this notice was not required since First Student was an independent contractor and thus not covered by either the KTCA or K.S.A. 2021 Supp. 12-105b.

The district court denied Defendants' motion, finding it was "highly doubtful the Kansas Legislature intended to call a contracting for-profit Delaware corporation operating from its home base in Ohio, *i.e.*, a foreign entity that had agreed in [its] contract with a school district that it is an independent contractor, a Kansas 'municipality' or any other such governmental entity subject to the KTCA protections and K.S.A. 12-105b notice." At Defendants' request, the district court certified four issues of law for interlocutory appeal under K.S.A. 2021 Supp. 60-2102(c):

"(1) Whether as a matter of law the Defendants are instrumentalities of the school district as defined by the [KTCA]; (2) If the Defendants are instrumentalities, whether they are entitled to receive a K.S.A. 12-105b pre-suit notice; (3) Whether Defendants received a K.S.A. 12-105b notice; and (4) Whether First Student, if it is an instrumentality of the governmental entity as a matter of law, should be exempt from punitive damages under K.S.A. 75-6105(c)."

This court granted Defendants' application for interlocutory appeal on August 12, 2021. Although the district court certified four issues for appeal, we find that resolving the first issue controls the outcome here. Since we find Defendants are not covered by the KTCA, we need not address the remaining three issues.

ANALYSIS

Standard of review

Resolution of this appeal requires us to interpret both the parties' contract and Kansas statutes. This exercise involves questions of law over which we have unlimited review. *Born v. Born*, 304 Kan. 542, 554, 374 P.3d 624 (2016).

Rules of statutory and contractual interpretation

The parties' intent governs our interpretation of the contract, and the Legislature's intent governs our interpretation of Kansas statutes. *Russell v. Treanor Investments*, 311 Kan. 675, 680, 466 P.3d 481 (2020) (contract interpretation); *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 659, 367 P.3d 282 (2016) (statutory interpretation). We ascertain that intent by examining the plain language used in the contract and statutes, giving common words their ordinary meanings. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). When doing so, we must consider statutory provisions *in pari materia* with a view of reconciling and bringing them into workable harmony if possible. *Southwestern Bell Tel. Co. v. Beachner Constr. Co.*, 289 Kan. 1262, 1270, 221 P.3d 588 (2009). Likewise, we cannot isolate a sentence or provision of the parties' contract but must instead construe and consider the entire contract. *Russell*, 311 Kan. at 680. Last, we must avoid unreasonable or absurd results when interpreting both the parties' contract and Kansas statutes. 311 Kan. at 680 (construing contracts); *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918, 296 P.3d 1106 (2013) (construing statutes).

The Kansas Tort Claims Act

The KTCA applies to tort claims brought against governmental entities and their employees. See, e.g., K.S.A. 75-6103; K.S.A. 75-6104. The KTCA defines "governmental entity" as encompassing both the state and municipalities. K.S.A. 75-6102(c). "State" under the KTCA is defined as "the state of Kansas and any department or branch of state government, or any agency, authority, institution or other instrumentality thereof." K.S.A. 75-6102(a). The KTCA defines "municipality" to include "any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution or other instrumentality thereof." K.S.A. 75-6102(b). The KTCA does not define the term "instrumentality."

The KTCA specifically excludes from its coverage "any independent contractor under contract with a governmental entity except those contractors specifically listed in [the definition of 'employee']." K.S.A. 75-6102(d)(2)(B). The KTCA does not provide

a definition for "independent contractor," but relies on agency principles to define the term. See *Mitzner v. State Dept. of SRS*, 257 Kan. 258, 261, 891 P.2d 435 (1995).

Under the KTCA, governmental entities are not liable for punitive damages or prejudgment interest. K.S.A. 75-6105(a), (c). It also caps liability for compensatory damages at $500,000 per occurrence or the amount of the governmental entity's insurance coverage, if greater than $500,000. K.S.A. 75-6105(a); K.S.A. 75-6111(a). The KTCA grants governmental entities complete immunity from liability when engaged in certain enumerated activities. This immunity extends to the governmental entity's employees when they act within the scope of their employment. See K.S.A. 75-6104.

K.S.A. 2021 Supp. 12-105b imposes a pre-suit notice requirement for claims against municipalities.

Before suing a municipality or employee of a municipality under the KTCA, a plaintiff must provide the municipality with written notice of its claim, along with certain information about the claim specified by law. K.S.A. 2021 Supp. 12-105b(d). No action can be commenced against the municipality or its employee until after the municipality notifies the plaintiff that it has denied the claim or 120 days has passed after filing the notice of claim. K.S.A. 2021 Supp. 12-105b(d). Plaintiffs admit they did not provide pre-suit notice of their claim to First Student. Our Supreme Court has held the failure to substantially comply with the pre-suit notice statute deprives the court of subject matter jurisdiction over the claim. *Sleeth v. Sedan City Hospital*, 298 Kan. 853, 871, 317 P.3d 782 (2014).

This case calls us to decide whether Defendants are instrumentalities of the school district as defined by the KTCA.

The dispositive question on appeal is whether First Student qualifies as a governmental entity under the KTCA. If it does, then both First Student (as a governmental entity) and Piper (as an employee of a governmental entity) fall under the Act. See K.S.A. 75-6103. Defendants say First Student qualifies because it is an "instrumentality" of the school district. As noted above, the KTCA

defines "governmental entity" to include a "municipality," which is defined as "any county, township, city, school district or other political or taxing subdivision of the state, or any agency, authority, institution or other instrumentality thereof." K.S.A. 75-6102(b) and (c). Thus, the district court certified the question of whether, as a matter of law, Defendants are instrumentalities of the school district as defined by the KTCA.

The ejusdem generis *interpretive canon provides guidance because the meaning of instrumentality is unclear.*

Plaintiffs argue the syntax of the KTCA's definition of municipality calls for application of the *ejusdem generis* canon of statutory construction. This canon instructs that where a more general word or phrase follows the enumeration of specific things, the general word or phrase should usually be understood to refer to things of the same kind or within the same classification as the specific terms. See *Rockers v. Kansas Turnpike Authority*, 268 Kan. 110, 115, 991 P.2d 889 (1999); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 199 (2012). For example, if one speaks of "Eric Church, Luke Combs, Ashley McBride, and other famous artists," the last noun does not reasonably refer to Pablo Picasso (a renowned painter) or Auguste Rodin (a well-known sculptor). It refers to other famous *musical* artists.

Here, the definition of "municipality" includes two specific enumerations followed by more general phrases: The first specific enumeration, "any county, township, city, school district," is followed by the more general phrase "or other political or taxing subdivision of the state." K.S.A. 75-6102(b). The second specific enumeration, "or any agency, authority, institution," is followed by the more general phrase "or other instrumentality thereof." K.S.A. 75-6102(b). What is more, these two sets of enumerations and general phrases are nested within one another, with the second set acting as a sort of generic phrase to the first set's more specific enumeration of terms.

Applying *ejusdem generis*, we can interpret the general phrase "any agency, authority, institution or other instrumentality thereof" to mean something within the same classification as "any county, township, city, school district or other political or taxing

subdivision of the state." K.S.A. 75-6102(b). And we can interpret the general phrase "other instrumentality thereof" to mean something within the same classification as "any agency, authority, [or] institution." K.S.A. 75-6102(b). As Plaintiffs note, each specifically enumerated entity in K.S.A. 75-6102(b) is a division of a larger governmental entity or a body organized by a governmental entity to perform a government function. They contend application of this statutory canon narrows the meaning of instrumentality to a public entity or arm of the state, and the determination of whether an entity qualifies thus turns on governmental control of the entity at issue.

Defendants resist application of this interpretive canon, claiming that, because the statutory text is plain and unambiguous, "extratextual considerations" are prohibited. But this canon is not extratextual since it relies on the statute's text to provide the context for interpreting the words used. And while the language is plain, the meaning of the term instrumentality, in the context of the KTCA, is ambiguous enough to call for this canon's application. See *Rockers*, 268 Kan. at 115 ("Moreover, when there is doubt as to the particular meaning of a word taken by itself, doubt may be removed by reference to associated words."). As Plaintiffs note, "[w]hen taken in context, a word may have a broader or narrower meaning than it might have if used alone." *Jones v. Kansas State University*, 279 Kan. 128, 149, 106 P.3d 10 (2005).

Plaintiffs analogize this situation to the one facing our Supreme Court in *Rockers*. There, the court used *ejusdem generis* to determine whether the Kansas Turnpike Authority (KTA) was a "municipality" under K.S.A. 12-105b (the statute requiring presuit notice of KTCA claims). The question in *Rockers* was whether the KTA qualified as an "other political subdivision" as that term was used in the definition of "municipality" in K.S.A. 12-105b. The court examined the specific political subdivisions listed in that definition before the phrase "other political subdivision" and found the KTA did not fit within the list (i.e., "county," "township," "school district," "drainage district"). *Rockers*, 268 Kan. at 115.

Similarly, Plaintiffs argue First Student does not fit within the list of instrumentalities in K.S.A. 75-6102(b). First Student is not

a governmental "agency," "authority," or "institution," nor is it a "county, township, city, school district or other political or taxing subdivision of the state." K.S.A. 75-6102(b). Instead, it is a multi-state, for-profit private company whose own contract prohibits its consideration as an agent of the school district.

The Kansas Supreme Court has previously defined the term "instrumentality" in the context of the Kansas Open Records Act.

Defendants, on the other hand, argue we should look at the services First Student contracted to perform, rather than its private corporate status. They contend the Kansas Supreme Court looked at the function of the entity rather than who controlled it when determining whether an entity qualified as a "public agency" under the Kansas Open Records Act (KORA), which also includes the term instrumentality in this definition. See *State v. Great Plains of Kiowa County, Inc.*, 308 Kan. 950, 954, 425 P.3d 290 (2018). They argue the definition of instrumentality adopted by the court for KORA should be applied here.

In *Great Plains of Kiowa County, Inc.*, the Kiowa County Commission sought public records under KORA from a private not-for-profit corporation (Great Plains). Great Plains was formed to operate the county hospital under a lease agreement with the County, and that agreement allowed Great Plains to request that the County levy an ad valorem tax to support the hospital's operations. In 2012, one such levy contributed $300,000 to the hospital's operations; in 2013, $950,000; and, in 2014, around $1,050,000. These funds constituted 14%, 16%, and 20% of Great Plains' budget for those years.

After these significant increases, the County sought information under KORA about the hospital's budget to answer public interest questions about the hospital's finances and use of taxpayer dollars. Great Plains resisted the County's request, claiming it was not a "public agency" under KORA and was thus exempt from KORA's requirements. The County, designated as the State of Kansas, petitioned in district court seeking enforcement of KORA and access to the requested records. Both the district court and our court found Great Plains was subject to KORA. The Supreme Court agreed.

KORA provides for public access to records maintained by "public agencies" and defines that term to include

"the state or *any political or taxing subdivision of the state* or any office, agency *or instrumentality thereof*, or any other entity receiving or expending and supported in whole or in part by the public funds appropriated by the state or by public funds of any political or taxing subdivision of the state." (Emphases added.) K.S.A. 2021 Supp. 45-217(i)(1).

In interpreting this language, the Supreme Court relied on Black's Law Dictionary to define "instrumentality" as "'a thing used to achieve an end or purpose, or a means or agency through which a function of another entity is accomplished.'" *Great Plains of Kiowa County, Inc.*, 308 Kan. at 954. The court held that Great Plains met this definition. In explaining this decision, the court noted that Kansas law authorizes counties to establish county hospitals operated by county boards. Kansas law also provides that a county board may enter into a lease agreement to allow a private entity to carry out the regular management of a county hospital established under this authority. In such a case, the court explained, the private entity becomes an instrumentality of the board. "Instead of managing the Hospital directly through an elected board, Kiowa County chose to have Great Plains manage the Hospital. Great Plains thus became the instrumentality for fulfilling the will of the voters of Kiowa County that they should have access to hospital facilities." 308 Kan. at 954.

Since both KORA and the KTCA use the term instrumentality (in KORA's definition of public agency and the KTCA's definition of municipality), Defendants contend we should apply the Kansas Supreme Court's definition of that term as it is used in KORA. They argue that, based on the similarities in statutory language between KORA and the KTCA, the term "instrumentality" should have the same meaning under both statutes. In Defendants' view, because First Student provides the means by which the school district accomplishes its statutorily mandated function of transporting students, First Student is an instrumentality of the school district. But there are important distinctions in both the language and purposes of the Acts which prevent transposing the definition of instrumentality in KORA to the KTCA.

KORA and the KTCA differ in purpose and scope.

When examining the language of the two statutes, we must keep in mind the context in which that language is used. *Reading Law: The Interpretation of Legal Texts*, 56 ("words are given meaning by their context"). "The subject matter of the document

(its purpose, broadly speaking) is the context that helps to give words meaning—that might cause *draft* to mean a bank note rather than a breeze." *Reading Law: The Interpretation of Legal Texts*, 56. Here, the KTCA's purpose infuses the meaning of its text, just as KORA's purpose infuses the meaning of its text.

KORA is a "sunshine law," designed to promote transparency in government activity by "shining the sun" into the way public services are performed. Nuckolls, *Kansas Sunshine Law; How Bright Does it Shine Now?*, 72 J.K.B.A. 28, 28-29 (May 2003). KORA mandates that all "public records shall be open for inspection by any person," subject to certain exceptions. K.S.A. 45-216(a); K.S.A. 45-218(a). The Legislature also specified that KORA "shall be liberally construed and applied to promote" this stated public policy. K.S.A. 45-216(a). Under KORA, access to governmental activity is the rule and shielding the governmental agency from such access is the exception. See 72 J.K.B.A. at 29. Thus, in *Great Plains of Kiowa County, Inc.*, our Supreme Court broadly interpreted the term "instrumentality" under KORA, since such a construction expanded access to records of the county hospital's operations.

The KTCA, on the other hand, has a different purpose. It was enacted to waive the common-law doctrine of sovereign immunity of the state and impose liability on governmental entities for their employees' torts just like a private employer is liable for its employees' torts (with limited exceptions outlined in the Act). Westerbeke, *The Immunity Provisions in the Kansas Tort Claims Act: The First Twenty-Five Years*, 52 U. Kan. L. Rev. 939, 944 (2004). Thus, expanding the KTCA's application to all nongovernmental entities that provide contractual services to a governmental entity would not fulfill the Act's purpose since private entities do not enjoy common-law sovereign immunity.

Applying the KTCA to private entities would restrict liability, rather than expand it. As Plaintiffs note, the KTCA's immunity waiver is limited since the Act carves out several exceptions to the general rule of governmental liability. K.S.A. 75-6104; *Schreiner v. Hodge*, 315 Kan. 25, 37, 504 P.3d 410 (2022) (recognizing "the exceptions to the general rule of liability are numerous and confirm 'there has been no wholesale rejection of immunity by the

Kansas Legislature'"). It also contains damages limitations which do not apply to suits against private entities. K.S.A. 75-6105.

In addition, governmental entities are protected by the pre-suit notice requirement, which gives them "'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) (quoting *U.S.D. No. 457 v. Phifer*, 729 F. Supp. 1298, 1306 [D. Kan. 1990]); see K.S.A. 2021 Supp. 12-105b(d). We find that—as a general rule—allowing private entities to seek refuge under these exceptions, limit their damages liability, or protect them from liability altogether if no pre-suit notice was provided would not serve the KTCA's purpose. Such a construction would limit private entity liability and provide them with immunities which are not found under common law and were not intended by the Kansas Legislature.

Our Legislature recognizes in the text of the KTCA that private entities are generally not entitled to the same protections afforded to governmental entities under the Act by carving out an independent contractor exception from its provisions. K.S.A. 75-6102(d)(2)(B). Here, the parties' contract expressly identified First Student as an independent contractor and stated that neither First Student nor any of its employees "shall be held or deemed in any way to be an agent, employee or official of" the school district. Thus, the district court found First Student was excluded from the Act.

First Student's status as independent contractor under its contract with the school district is instructive here.

Defendants ask us to ignore the parties' contract because they claim our Supreme Court ignored a similar provision in *Great Plains of Kiowa County, Inc.* when it found Great Plains was an instrumentality under KORA. The parties' contract in *Great Plains of Kiowa County, Inc.* noted:

"Relationship of the Parties. Relationship between the parties is solely that of Lessor/Lessee. Lessee shall not represent that it is Lessor's agent and shall not incur liabilities or obligations in the name of Lessor. Lessee shall conduct its operations of the Hospital and Clinic facility in its corporate name, though it may show on its letterhead, 'Kiowa County Hospital, Operated by Great Plains of Kiowa County, Inc.'"

We do not find Defendants' argument persuasive. First, the language of the *Great Plains of Kiowa County, Inc.* contract was not as strong as the language of the contract here, which specifically identified First Student as an independent contractor. And, more importantly, whether Great Plains was an independent contractor was not relevant to our Supreme Court's analysis under KORA. This is because the language of KORA does not exclude independent contractors from its coverage. On the other hand, the KTCA does.

The court in *Great Plains of Kiowa County, Inc.* examined the parties' relationship and found the parties intended the hospital managed by Great Plains "to be an arm of the county government," which "requested and received substantial funds from a public tax levy." 308 Kan. at 954-55. The parties here demonstrated no such intention that First Student act as an "arm" of the school district, nor does our review of the contract lead us to such a conclusion.

Defendants contend that excluding them from the protections provided by the KTCA because they are an independent contractor would cause a governmental entity to lose its status as a governmental entity by contracting with another governmental entity, since the entity would then qualify as an independent contractor. We do not find this argument to be persuasive because, as explained above, we do not find First Student to be a governmental entity, to be an arm of a governmental entity, or to be under the control of a governmental entity. Moreover, a governmental entity would not lose its KTCA protections simply by contracting with another governmental entity because it would still be a governmental entity.

The purpose and language of the KTCA suggest the definition of instrumentality should turn on governmental control of the entity at issue.

Certainly, the function of a private entity contracting with a governmental entity is important to determining whether its records should be open to the public. As our Supreme Court found in *Great Plains of Kiowa County, Inc.*, records of private entities performing government services should be open to the public under KORA where they serve as an arm of a governmental entity. And

while what actions or services the private entity performs may be relevant in determining whether one of the exceptions from KTCA liability applies, those actions or services do not control whether the private entity qualifies as an instrumentality protected by the KTCA. See K.S.A. 75-6104.

This focus on governmental control over the entity also aligns with the KTCA's purpose, which is to waive immunity for governmental entities in certain situations. As a private for-profit corporation, First Student enjoys no common-law protection from liability for its actions. And it makes little—if any—sense to subjectively immunize it, based solely on the type of services it contracts with governmental entities to provide. Such a transient immunity status would provide no predictability or guidance to claimants desiring to sue a private entity contracting with a governmental entity.

Historically, Kansas courts have relied on governmental control over the entity and not what the entity does when determining whether it is an instrumentality under the KTCA. While Defendants lean on *Shriver v. Athletic Council of KSU*, 222 Kan. 216, 564 P.2d 451 (1977), and *Gragg v. Wichita State Univ.*, 261 Kan. 1037, 934 P.2d 121 (1997), claiming these cases hold that a private corporation acting at the direction of a state entity is subject to the KTCA, a closer look reveals these findings turned on governmental control of the entities, not the services they provided.

In *Shriver*, the Kansas Supreme Court looked at whether the Athletic Council of Kansas State University was an instrumentality of KSU and thus subject to the KTCA's predecessor statute, K.S.A. 46-901. In *Gragg*, it looked at whether Wichita State University's athletic association (WSUIAAI) was an instrumentality of WSU under the KTCA. And in both situations the court found the entities subject to the KTCA since they were each an "integral part" of their respective universities and each entity was dominated or controlled by those universities. *Shriver*, 222 Kan. at 219 (finding KSU's Athletic Counsel was "completely dominated by and [was] operated as an integral part of the University" and was "subject to the policy and control of the University" "in its every activity and function"); *Gragg*, 261 Kan. at 1058 (finding WSUIAAI was "an integral part of WSU, as it is controlled and

operated by its employees and enjoys the same privileges as WSU") (citing *Shriver)*.

Plaintiffs similarly point to *Lane v. Atchison Heritage Conference Center, Inc*., 35 Kan. App. 2d 838, 134 P.3d 683 (2006), as another case where whether an entity qualified as an instrumentality under the KTCA turned on control of the entity. In *Lane*, this court found Atchison Heritage Conference Center, Inc. (AHCC), an entity incorporated to manage a conference center owned by the City of Atchison, was an instrumentality under the KTCA. Relying on *Gragg*, our court noted AHCC was "substantially controlled by the City of Atchison through the terms of its annual lease, the composition of AHCC's Board, and the control over capital improvement funds for the conference center facilities," and was thus an instrumentality of the city. 35 Kan. App. 2d at 843-44.

And, last, Plaintiffs claim *Lee v. Orion Management Solutions, Inc*., No. 08-2242-DJW, 2010 WL 4106696 (D. Kan. 2010), is instructive. There, the United States District Court for the District of Kansas considered whether Orion, a private corporation which managed golf courses, including one owned by the City of Leawood, was an instrumentality of Leawood under the KTCA. That court looked to *Lane* and *Gragg*, noting both decisions turned on the amount of control the governmental entity exercised over the private entity or whether the private entity was an integral part of the governmental entity. *Lee*, 2010 WL 4106696, at *12. And when examining the facts in *Lane*, it found Orion did not establish it was an instrumentality. When reaching this decision, the court noted that, unlike AHCC in *Lane*, Orion was not incorporated to manage Leawood's golf course, it was not a wholly owned subsidiary of a Leawood-affiliated corporation, its purpose was not the economic development of Leawood, and its Board of Directors was not comprised of representatives of Leawood. Rather, Orion was a private, outside management company engaged in the business of operating golf courses in general (including three other golf courses). The court also found it significant that Orion was paid a monthly management fee and no evidence suggested that Leawood advised or controlled Orion. Rather, under the agreement between Orion and Leawood, Orion managed and controlled

its day-to-day management activities. And, last, the agreement between Orion and Leawood specified that Orion was an independent contractor and not an agent of Leawood. *Lee*, 2010 WL 4106696, at *12-13.

Defendants do not address *Lane* or *Lee*, and the amicus curiae brief filed by the Kansas Association of Defense Counsel simply asks us to ignore these cases (as well as *Shriver* and *Gragg*) because it claims each of those entities was "unquestionably a municipality under the KTCA." But this argument begs the question since the reason these entities were all found to be instrumentalities (and thus municipalities) is because they were integral parts of or controlled by a governmental entity. Here, First Student does not fall into either of these categories.

As Plaintiffs correctly note, First Student was not incorporated by a governmental entity to provide transportation services but was incorporated by private citizens to do business for the benefit of its owners and shareholders. It is a private corporation serving many clients in addition to the school district. Nor is there any evidence that any owner, shareholder, officer, director, or employee of First Student is employed or otherwise affiliated with the school district. Although the school district exercises limited control over First Student through the right to approve routes, review certain reports, and request that First Student personnel be reassigned or busses taken out of service, the school district does not exercise significant control over how First Student performs its contractual obligations. Thus, when looking at control of the entity, First Student does not qualify as an instrumentality under the KTCA.

Finally, Defendants argue that adopting the "governmental control" test applied in *Shriver* and *Gragg* ignores the KTCA's clear language and leads to a circular and illogical reading of the Act. But restricting the meaning of instrumentality under the KTCA to those entities which are an integral part of or controlled by a political subdivision of the state does not supplant the independent contractor exclusion. Instead, it incorporates this definition, consistent with our directive to consider various provisions of an act *in pari materia* with a view of reconciling and bringing those provisions into workable harmony if possible. See *Beachner*

Constr. Co., 289 Kan. at 1270. That is, if an entity is subject to the control of, or integral to, a political subdivision of the state, it is an instrumentality. If not, it is an independent contractor excluded from the Act's coverage.

A private entity is not an instrumentality under the KTCA just because it contracts with a municipality to provide statutory services.

While Defendants ask us to ignore their contract's identification of First Student as an independent contractor, they ask us to heed the contractual description of the services they agreed to perform. Since First Student contracted to provide statutorily mandated transportation services for the school district, it argues it is an instrumentality of the school district and thus a governmental entity under the KTCA. Defendants again rely on *Great Plains of Kiowa County, Inc.*, since that interpretation of instrumentality under KORA depended on the fact that Great Plains provided a traditional government service—managing a county-run hospital.

As explained above, we find that an interpretation of instrumentality which looks at the control or status of the entity—and not simply to what it does—is more aligned with the KTCA's language and purpose. And we find the facts of *Great Plains of Kiowa County, Inc.* to be distinguishable from the facts of this case. While First Student provided a discrete service and was not controlled by the school district, Great Plains' relationship with the county was so intertwined that our Supreme Court considered it to be an arm of the county.

Our courts regularly employ the same well-established standards for determining whether someone is an employee or independent contractor under the KTCA as they use to answer this question in other contexts. See *Nash*, 56 Kan. App. 2d at 600-01. The "right of control" test is primarily used, but sometimes the facts of a case call for a more in-depth examination (looking at several factors, most of which address control of the employer over the employee or independent contractor's work). See *Olds-Carter v. Lakeshore Farms, Inc.*, 45 Kan. App. 2d 390, 401-03, 250 P.3d 825 (2011). We see no reason to adopt a different test to determine whether a private entity is an instrumentality of a governmental entity under the KTCA.

Defendants' argument also ignores other KTCA language, which extends the Act's protections to certain independent contractors by including them within the definition of "employee." This includes individuals working for private nonprofit programs providing services to inmates in the custody of the secretary of corrections, employees of indigent healthcare clinics, and various independent contractors performing duties authorized by statute. See K.S.A. 75-6102(d)(1)(B), (d)(1)(D), (d)(1)(E), (d)(1)(G), (d)(1)(I), (d)(1)(J). If our Legislature meant to include these entities within the definition of instrumentality, it had no need to specifically exclude them from the definition of independent contractor under the KTCA.

We find that Plaintiffs persuasively argue Defendants' overbroad interpretation of instrumentality (which would include independent contractors) conflicts with K.S.A. 75-6102(d)(2)(B) and renders the enumerated list of subcontractors in K.S.A. 75-6102(d)(1) redundant and meaningless. Appellate courts are required to avoid construing statutes in such a manner if possible. See *State v. Smith*, 311 Kan. 109, 114, 456 P.3d 1004 (2020).

As Plaintiffs note, the Oklahoma Supreme Court persuasively dispatched a similar argument in *Sullins v. Am. Med. Response of Oklahoma, Inc.*, 23 P.3d 259 (2001). There, the court was asked to determine whether a private corporation which had contracted with a public trust to provide emergency medical services qualified as a "political subdivision" under Oklahoma's Governmental Tort Claims Act (GTCA). 23 P.3d at 263. While Defendants correctly note there are important differences between the GTCA and the KTCA, these differences do not dilute the Oklahoma court's point that simply contracting with a public entity to provide services to the public is insufficient to qualify for governmental immunity. 23 P.3d at 264.

Similar to the Oklahoma court, we conclude that our Legislature did not intend to transform a private entity into a governmental entity simply because it contracts to provide services to the state or a municipality. Likewise, we conclude that our Legislature did not intend to confer governmental immunity and other KTCA protections on independent contractors who are neither arms of a governmental entity or under the control of a governmental entity.

Indeed, if we were to hold otherwise, it would likely lead to inconsistent application of the KTCA and unfairly impede a plaintiff's ability to predict whether a pre-suit notice of claim is required under K.S.A. 2021 Supp. 12-105b.

Here, we find that First Student expressly represented in the contract that it is an independent contractor and not "in any way" "an agent, employee or official" of the school district. Just as we must consider all portions of a statute together when construing its provisions, we must construe and consider the terms of the entire contract. *Russell*, 311 Kan. at 680. In other words, we cannot look at the services First Student agreed to provide in isolation, ignoring the rest of the parties' agreement.

Looking to First Student's contractual status as an independent contractor is in line with our Supreme Court's consistent interpretation of the KTCA.

Plaintiffs also mention that the Kansas Supreme Court has found a private corporation providing bussing for a school district was not a governmental entity under the KTCA. See *Kansas State Bank & Tr. Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 368, 819 P.2d 587 (1991). In that case, a special-needs student was allegedly molested by her bus driver. The bus driver worked for Specialized Transportation Services, Inc. (STS), which provided bussing services under a contract with the school district. Representatives of the student sued the driver for intentional battery and against STS and the school district on theories of respondeat superior, negligent hiring, and negligent retention and supervision of the driver. After the jury returned a verdict imposing liability on all three defendants, the school district and STS appealed. One issue on appeal was whether the school district should have been granted immunity under the KTCA's discretionary function exception. The school district argued that its failure to follow its own incident reporting procedures was a discretionary decision subject to immunity. Our Supreme Court found this exception did not apply.

When describing the purpose of the KTCA, the court found:

"In K.S.A. 75-6102(c), the term 'governmental entity' is defined to include a school district. Employee does not include an independent contractor under

contract with the governmental entity. K.S.A. 75-6102(d). Therefore, S.T.S. is not subject to the KTCA." 249 Kan. at 364.

Defendants correctly note the finding that STS was not a governmental entity under the KTCA is obiter dictum and does not control here. "'Obiter dictum'" is defined as "'[w]ords of a prior opinion entirely unnecessary for the decision of the case.'" *State v. Fortune*, 236 Kan. 248, 251, 689 P.2d 1196 (1984). At no point in the case did STS argue that it was subject to the KTCA, and the finding that STS was an independent contractor and not a governmental entity played no part in the court's analysis of the issue on appeal, which was application of the discretionary function exception. *Kansas State Bank & Tr. Co.*, 249 Kan. at 366-68. Yet while this finding is not determinative, we do find our Supreme Court's view of whether a private bussing contractor is a governmental entity to be persuasive. This is especially true because the court recognized the importance of STS's status as an independent contractor in determining whether it was subject to the KTCA.

We acknowledge the KTCA does not provide that a private entity can never be considered an instrumentality entitled to protections under the Act. The KTCA only excludes independent contractors that are neither arms of a governmental entity nor under the control of a governmental entity. But this does not mean First Student is protected by the KTCA under the circumstances presented in this case. This is because there is nothing in the contractual agreement between the parties to suggest that First Student is an integral part of or controlled by the school district. Instead, the contract establishes that First Student is an independent contractor providing contractual services to the school district.

We also appreciate Defendants' desire for consistency in the law when they advocate for adopting our Supreme Court's definition of the term instrumentality under KORA. But, as noted above, we find that differences in the language and context of KORA and the KTCA justify giving this term a narrower meaning under the KTCA. See *Great Plains of Kiowa County, Inc.*, 308 Kan. at 957 ("Relying on the plain language selected by the legislature is the best and only safe rule for determining legislative intent, and such plain language takes priority over both judicial decisions and policies advocated by the parties.") (citing *State v. Spencer Gifts*, 304

Kan. 755, 761, 374 P.3d 680 [2016]). This restrictive interpretation also aligns with Kansas courts' consistent reading of the KTCA in *Gragg* and *Lane* (and our Supreme Court's reading of the KTCA's predecessor statute in *Shriver*).

In conclusion, we find that under the circumstances presented in this case, First Student does not qualify as an instrumentality under the KTCA because it is not an integral part of or controlled by the school district. Rather, we find that First Student is an "independent contractor under contract with a governmental entity." K.S.A. 75-6102(d)(2)(B). Because First Student is not an instrumentality of the school district, it had no right to receive pre-suit notice from the plaintiffs under K.S.A. 2021 Supp. 12-105b. Likewise, although we take no position on whether the district court should allow the plaintiffs to pursue a claim for punitive damages, we find that First Student is not exempt from such a claim under K.S.A. 75-6105(c). For these reasons, we affirm the district court's denial of summary judgment and remand this action to the district court for further proceedings.

Affirmed.

No. 122,499

DODGE CITY COOPERATIVE EXCHANGE, *Appellee/Cross-appellant*, v. BOARD OF COUNTY COMMISSIONERS OF GRAY COUNTY, KANSAS, *Appellant/Cross-appellee*.

SYLLABUS BY THE COURT

1. TAXATION—*Challenge to Valuation of Real Property—Statutory Requirement of Proper Classification of Property by County or District Appraiser—Burden of Proof on County or District Appraiser*. When a taxpayer challenges the valuation of real property for commercial and industrial purposes, K.S.A. 79-1606(c) and K.S.A. 79-1609 require the county or district appraiser to "initiate the production of evidence to demonstrate, by a preponderance of the evidence," that the property has been properly classified. These statutes establish a quantum of proof—"preponderance of the evidence"—and designate who bears the burden of proof during the proceedings—the county or district appraiser.

2. ADMINISTRATIVE LAW—*Appeal to District Court Providing Trial De Novo—Determination Anew of Both Law and Factual Issues—Burden of Proof*. An appeal to the district court providing a trial de novo—whether taken from an agency determination or from a different court—requires issues of both law and fact to be determined anew. The burden of proof in a trial de novo remains with the party who bore the burden in the underlying proceedings.

3. TAXATION—*Exemption of Commercial and Industrial Machinery and Equipment from Property and Ad Valorem Taxes—Real Property Not Exempt*. Kansas law exempts commercial and industrial machinery and equipment from property and ad valorem taxes, but this exemption does not extend to real property. Real property includes land, buildings, and fixtures—personal property affixed to and considered part of the real estate.

4. SAME—*Machinery and Equipment are Taxable Fixtures When Three Elements Met*. Machinery and equipment are taxable fixtures if they (1) are annexed to real property; (2) are adapted to the use of and serve the real property; and (3) were intended by the party attaching the equipment to be permanently affixed to the property. All three elements must be met for equipment to be a fixture.

Appeal from Gray District Court; VAN Z. HAMPTON, judge. Opinion filed July 22, 2022. Affirmed in part and vacated in part.

Michael Giardine, assistant county attorney, for appellant/cross-appellee.

Marc E. Kliewer and *Klint A. Spiller*, of Kennedy Berkley Yarnevich & Williamson, Chartered, of Salina, for appellee/cross-appellant.

Before ATCHESON, P.J., WARNER, J., and ANTHONY J. POWELL, Court of Appeals Judge, Retired.

WARNER, J.: This appeal involves the classification for tax purposes of various equipment associated with grain storage bins in Gray County. The County assessed ad valorem taxes for tax years 2013 and 2014 for the equipment, which was bolted to the storage bins to allow for transfer and monitoring of grain, based on its conclusion that the pieces of equipment were taxable fixtures rather than personal property.

The owner of the equipment—the Dodge City Cooperative Exchange (the Co-op)—appealed this assessment to the Board of Tax Appeals. When the Board affirmed the County's assessment, the Co-op petitioned for judicial review by the district court, seeking a trial de novo under K.S.A. 2016 Supp. 74-2426(c)(4)(B). After considering the parties' arguments and the evidence presented, the district court reversed the taxing authorities. The court ordered the County to refund the taxes collected based on the equipment's value for both the 2013 and 2014 tax years and all subsequent tax years.

The County has now appealed the district court's decision, arguing the court imposed an incorrect burden of proof and erred in concluding that the various pieces of equipment were not fixtures. The Co-op has cross-appealed, claiming some of the district court's findings were not supported by the record but asking this court to affirm the district court's ultimate conclusion. After carefully considering the parties' arguments and reviewing the record before us, we affirm the district court's finding that the equipment was not taxable property. We vacate the district court's prospective judgment regarding tax years after 2014, as that judgment went beyond the scope of the Co-op's petition for judicial review.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, the Co-op built two grain storage bins at its facility in Ensign. It also purchased equipment to move, blend, aerate, monitor, and dispense the stored grain. The additional pieces of equipment included:

- An 80-foot, 45,000 bushels per hour (bph) Essmueller drag conveyor;
- A 107-foot, 45,000 bph Essmueller drag conveyor;
- A 235-foot, 40,000 bph Hi Roller belt conveyor;
- Two 18-inch by 57-foot bin unloading screw conveyors;
- Two 18-inch by 35-foot belt feeder square spouts;
- Two 18-inch square transitions;
- Two 24-inch by 15-foot square unloading spouts with side draw slide gates;
- Two overhead connecting bridges;
- Aeration-system components;
- Temperature-monitoring system components; and
- A Compuweigh Train Loadout remote communications module and components.

These pieces of equipment were assembled at the site of storage bins and were installed by bolting the equipment either to the bins or to the ground. Fred Norwood, whose company installed the equipment, explained that the equipment could be removed for repair or replacement with "relative ease." According to Jerald Kemmerer, the Co-op's CEO, the Co-op had removed similar equipment from other grain elevators in the past for use in other locations. When the equipment was moved, it would not damage the storage bin (though there might be an open hole where a conveyor or some other equipment had been).

For the 2011 tax year, the Gray County Appraiser assessed ad valorem taxes for the various pieces of equipment based on its finding that the equipment had become affixed to (and thus become part of) the real property. Apparently, the Co-op contested this classification and brought its claims before the Board. The record and disposition of that case are not before us, however.

This appeal involves a similar classification in tax years 2013 and 2014. During those years, the Gray County Appraiser again classified the Co-op's various equipment as fixtures and assessed ad valorem taxes based on the equipment's value. The Co-op again contested the County's classification, appealing the County's assessment to the Board of Tax Appeals.

Our review of the proceedings before the Board is hampered by the fact that the record on appeal does not include the administrative record. Instead, we must rely on the summary contained in the Board's final order and the parties' later submissions to the district court to ascertain what occurred there.

The Board's order indicates that an evidentiary hearing was held on both years' assessments in April 2015. During the hearing, Kemmerer, Norwood, and Jerry Denney, the Gray County Appraiser, testified. According to the Board's summary, Norwood explained that the equipment could easily be removed from the storage bins, but the bins could not operate properly without the equipment. Kemmerer described how similar pieces of equipment had been removed from and installed on other bins. And the County Appraiser discussed why he classified the equipment as fixtures.

After considering the evidence, the Board issued its order in September 2015 affirming the County's classification of all equipment, except the temperature-monitoring system, as taxable fixtures to the real estate. To reach this conclusion, the Board first found that the Co-op—not the County—bore the burden of proving that the various pieces of equipment were personal property. The Board then applied a three-part test to determine whether the various equipment were fixtures. The Board found that the equipment became annexed to the realty when it was bolted to the bins, was adapted to the bins' function of moving and storing grain, and—given the size and weight of the equipment—was intended to be annexed until the equipment broke or became obsolete. The Board thus affirmed the County's assessment of all equipment except the temperature-monitoring system.

The Co-op petitioned for judicial review of the Board's decision, filing its petition with the district court and requesting a trial de novo under K.S.A. 2016 Supp. 74-2426(c)(4)(B). In its petition, the Co-op challenged all aspects of the Board's decision, except its analysis of the temperature-monitoring system (which the Board found to be personal property) and the overhead connecting bridges.

Though K.S.A. 2016 Supp. 74-2426(c)(4)(B) contemplates a "trial de novo" before the district court, the parties did not conduct a new evidentiary hearing. Instead, after a series of delays in the

litigation, the parties submitted testimony by affidavit from Kemmerer, as well as various stipulations. The parties did not dispute the short summary of the evidence provided to the Board, with both parties referencing the Board's decision in their respective factual recitations. In addition to this written evidentiary record, the parties submitted written argument on the appropriate burden of proof and the application of the fixture test to the equipment in question.

In his affidavit, Kemmerer explained in detail how each piece of equipment subject to the assessment could be easily removed and how removal would not affect the bins' value because similar replacement equipment could be installed. He also described three instances when similar pieces of equipment had been removed and installed on a different bin at some of the Co-op's other locations.

In November 2018, the district court reversed the Board's decision. The court's decision regarding the burden of proof and its fixture analysis are both subject to significant discussion by the parties on appeal.

- *First*, the district court found that the taxing authority—here, the County—not the taxpayer bore the burden of proving the various pieces of equipment were taxable fixtures. In doing so, the district court acknowledged that K.S.A. 79-223(b) describes commercial and industrial machines and equipment as "exempt" from taxation, and a person seeking an exemption has the burden of proving property is exempt from taxation. But relying on K.S.A. 79-1609, the court determined the County bore the burden before the Board and in the trial de novo of proving that otherwise-exempt equipment is a taxable fixture.

- *Second*, the district court concluded—based on Kemmerer's written testimony and the undisputed facts summarized by the Board—that the County had not met this burden. The court interpreted the evidence to indicate the equipment was annexed to the bins and adapted to the processing of grain. But the court found that the County failed to prove the Co-op *intended* to permanently affix the equipment to the bins; the equipment processed the

grain, rather than stored it, and could be removed and installed on different bins. Thus, the County had not established that the equipment was a fixture under Kansas law.

Based on these conclusions, the district court ordered the County to refund any ad valorem taxes collected based on the equipment's value from the 2013 and 2014 tax years. The court also indicated that its order should apply to any subsequent years involving this equipment.

DISCUSSION

The County now appeals the district court's decision, challenging its assignment of the burden of proof, its fixture analysis, and its dispositional remedy. The Co-op has cross-appealed, contesting the district court's conclusions—as part of its fixture analysis—that the equipment had been sufficiently attached and adapted to the storage bins for purposes of the fixture analysis.

Each of these assertions is rooted, in part, in Kansas' taxation statutes and requires their interpretation. Courts interpret statutes to effect the legislature's intent. *State v. Queen*, 313 Kan. 12, 17, 482 P.3d 1117 (2021). Our review begins with the statute's plain language. *State v. Dinkel*, 314 Kan. 146, 155, 495 P.3d 402 (2021). If that language is unambiguous, courts apply it as written. Only when an ambiguity exists do courts look to other sources, such as legislative history or canons of construction, for clarification. 314 Kan. at 155. The interpretation of statutes and the allocation of the burden of proof present legal questions appellate courts review de novo. 314 Kan. at 155 (statutory interpretation); *In re G.M.A.*, 30 Kan. App. 2d 587, Syl. ¶ 7, 43 P.3d 881 (2002) (burden of proof). With these principles in mind, we turn to the parties' claims.

1. *The district court correctly concluded that the County—not the Co-op—bore the burden of proving the various pieces of equipment were taxable fixtures.*

We first consider the County's assertion that the district court erred when it found that the County bore the burden to prove the various equipment were fixtures subject to taxation. The County claims that the district court should have concluded, as the Board

had previously, that the Co-op was required to prove the pieces of equipment were personal property exempt from taxation.

Challenges to taxation decisions involve multiple levels of review. A dispute must first be addressed at an informal meeting with the county appraiser, where the appraiser presents evidence supporting the tax assessment. K.S.A. 79-1448. If this meeting does not resolve the dispute, the taxpayer may appeal the assessment to a hearing officer or panel and then to the Board of Tax Appeals. K.S.A. 79-1606(c); K.S.A. 79-1609. After exhausting these administrative remedies, a taxpayer may petition a court—either the Court of Appeals or the district court where the property is located—for judicial review of the Board's decision. K.S.A. 2016 Supp. 74-2426(c)(4)(A)-(B).

These petitions are generally governed by the Kansas Judicial Review Act (KJRA). See K.S.A. 2016 Supp. 74-2426(c); see also K.S.A. 77-621(a)(2). But there are exceptions to this general rule. Relevant here, when a party seeks review of a Board's decision by the district court, K.S.A. 2016 Supp. 74-2426(c)(4)(B) states the appeal must include a "trial de novo." The statute contemplates that this "trial de novo" will include "an evidentiary hearing at which issues of law and fact shall be determined anew." K.S.A. 2016 Supp. 74-2426(c)(4)(B). These proceedings must be followed "[n]otwithstanding K.S.A. 77-619," which otherwise limits courts' evidentiary decisions in administrative appeals under the KJRA. K.S.A. 2016 Supp. 74-2426(c)(4)(B).

Our analysis begins with identifying who carries the burden of proof in the initial stages of the administrative action (before the hearing officer and the Board). In its order, the Board found that the taxpayer bore the burden of establishing that the various pieces of equipment were personal property, finding the Co-op's claims were "essentially tax exemption requests." In doing so, the Board relied on K.S.A. 79-223(b), which states that certain commercial and industrial equipment is "exempt from all property or ad valorem taxes." In its brief to this court, the County argues that this was the proper assignment of the evidentiary burden based on the general principle that a person claiming a tax exemption must prove that the exemption applies. See *In re Tax Appeal of Collingwood Grain, Inc.*, 257 Kan. 237, Syl. ¶ 4, 891 P.2d 422 (1995).

This discussion by the Board, reiterated by the County on appeal, fails to recognize that the primary issue in this case is whether the Co-op's equipment was taxable *at all*—that is, whether the various pieces of equipment were nontaxable personal property or whether they were taxable as fixtures to the real property. And Kansas law is clear that as the taxing authority, the County bore the burden to prove the equipment was taxable real property in the administrative proceedings before the hearing officer and the Board. See K.S.A. 79-1606(c); K.S.A. 79-1609; *In re Equalization Appeal of Kansas Star Casino*, 52 Kan. App. 2d 50, 67, 362 P.3d 1109 (2015), *rev. denied* 307 Kan. 987 (2017).

When a challenge involves the valuation of real property used for commercial and industrial purposes, Kansas law requires the county or district appraiser—whether before a hearing officer or the Board—to "initiate the production of evidence to demonstrate, by a preponderance of the evidence," that the property has been properly classified. K.S.A. 79-1606(d) (hearing officer); K.S.A. 79-1609 (Board of Tax Appeals).

The County argues that this language describes the production of documents during discovery or the order of evidentiary production during a hearing, not a burden of proof. But the County's position would have us ignore the plain language of the statute, which requires the appraiser "to demonstrate, by a preponderance of the evidence," that the classification was correct. K.S.A. 79-1609. This provision establishes a quantum of proof—"preponderance of the evidence"—and designates who bears the burden of proof during the proceedings—"the county appraiser." K.S.A. 79-1609. In other words, this language evinces a legislative intent that the taxing authority must prove the correctness of its classification. See *In re Camp Timberlake, LLC*, No. 111,273, 2015 WL 249846, at *6-7 (Kan. App. 2015) (unpublished opinion) (in valuing land for tax purposes, K.S.A. 79-1609 requires county to prove land should be classified as commercial rather than agricultural); see also *Kansas Star Casino*, 52 Kan. App. 2d at 67-68 (applying this analysis to fixture determination). The Board thus erred when it placed the burden on the Co-op—not the County—to prove the equipment's status as personal property.

As the County points out, however, K.S.A. 79-1606(c) and K.S.A. 79-1609—which respectively assign the burden and quantum of proof for classification proceedings before the hearing officer and the Board—do not directly resolve who bore the burden of proof when the Co-op petitioned for judicial review of the Board's decision before the district court. In 2021, the legislature amended K.S.A. 74-2426(c)(4)(B) to include the same language as K.S.A. 79-1606(c) and K.S.A. 79-1609, clarifying that the burden of proof rests with the appraiser. L. 2021, ch. 58, § 4. But at the time the district court heard this case, K.S.A. 2016 Supp. 74-2426 did not specifically indicate who bore the burden of proof when a petition for judicial review was filed with the district court, beyond describing the proceedings as a "trial de novo."

We must therefore examine the statutes to determine who the legislature intended to bear the burden of proof during the trial before the district court. The County is correct that under the KJRA, the party challenging an agency's decision generally bears the burden of invalidating the agency action. K.S.A. 77-621(a)(1). Courts have applied this provision to decisions by the Board of Tax Appeals, concluding that the party challenging a Board decision bears the burden of proving its invalidity. See, e.g., *Bicknell v. Kansas Dept. of Revenue*, 315 Kan. 451, 468, 509 P.3d 1211 (2022). In those cases, courts have found that the burden of proof remains with the challenger throughout the proceedings on appeal. 509 P.3d at 1229.

But while the KJRA contains this broad assignment of the burden of proof, the legislature is free to depart from this default rule and assign the burden to a different party as it finds appropriate. See K.S.A. 77-621 (placing the burden on the party asserting invalidity "[e]xcept to the extent [the KJRA] or another statute provides otherwise"). The district court found that this case involved one such legislative departure, concluding that K.S.A. 2016 Supp. 74-2426(c)(4)(B)'s reference to a "trial de novo" continued to place the burden to prove the proper classification of the equipment on the County—not the Co-op—since the County bore the initial burden of proof before the Board. We agree.

Kansas courts have long recognized that a trial de novo—whether in an appeal from an agency determination or from a different court—requires "issues of both law and fact to be determined anew." *Nurge v. University of Kansas Med. Center*, 234 Kan. 309, 317, 674 P.2d 459 (1983). And we have consistently found that the burden of proof in a trial de novo remains with the party who bore the burden in the underlying proceedings. See, e.g., *State v. Legero*, 278 Kan. 109, 114, 91 P.3d 1216 (2004) (government has the burden to prove defendant's guilt in a municipal case and in the appeal de novo to the district court); *In re Park's Estate*, 151 Kan. 447, 452, 99 P.2d 849 (1940) (administrator of the estate had burden to prove correctness of the estate accounting before the probate court and in a trial de novo to the district court); see also *Janda v. Kansas Dept. of Revenue*, No. 118,677, 2018 WL 4263321, at *8 (Kan. App. 2018) (Atcheson, J., concurring) (noting that K.S.A. 2017 Supp. 8-1020, which governed appeals from driver's license suspensions, "does not recast the substantive issues or the burden of proof").

Though the County cites numerous decisions in its brief where we have observed that the party challenging a Board decision must prove its invalidity, those cases are not analogous to the assignment of burdens here. In other words, none involved a situation where the county appraiser—not the taxpayer—bore the initial burden before the Board, and the taxpayer exercised his or her right to a trial de novo before the district court. See, e.g., *Bicknell*, 509 P.3d at 1229-30 (concluding that the taxpayer bore the burden to prove a change in domicile, both before the Board of Tax Appeals and before the district court). Nor does the fact that the parties in this case waived a new evidentiary hearing and proceeded on a written record somehow transfer the County's burden. See *Frick v. City of Salina*, 289 Kan. 1, 22-23, 208 P.3d 739 (2009) (trial de novo can be conducted on written record).

The fact that the County would continue to bear the burden throughout these proceedings—before the hearing officer, the Board, and the district court—makes practical sense, as the district court judge in a trial de novo "stands in the shoes" of the previous decision maker. *City of Shawnee v. Patch*, 33 Kan. App. 2d 560, 562, 105 P.3d 727 (2005). And it is consistent with our caselaw indicating that the same party should bear the burden of proof

throughout the proceedings. See *Bicknell*, 509 P.3d at 1229. Here, that means the district court stood in the position of the Board, where the County bore the burden to prove that the Co-op's various pieces of equipment were taxable real estate. The district court correctly found that the County—not the Co-op—continued to bear the burden of proof before the district court to show the correctness of its taxing classification.

2. *The district court correctly concluded that the various pieces of equipment are not fixtures.*

Having determined that the district court correctly placed the burden of proof with the County to prove the various pieces of equipment were taxable fixtures, we turn to the substance of the court's analysis.

Generally speaking, Kansas law exempts commercial and industrial machinery and equipment from property and ad valorem taxes. K.S.A. 79-223(b), (d)(2). This exemption does not extend, however, to real property. See K.S.A. 79-261. Real property includes land, buildings, and fixtures—personal property affixed to and considered part of the real estate. K.S.A. 79-102; see *City of Wichita v. Denton*, 296 Kan. 244, 258, 294 P.3d 207 (2013). There is no question that the Co-op's *storage bins* at its Gray County grain elevator were taxable real property. The central question here is whether the Co-op's various *equipment* that had been bolted to the bins were personal property exempt from taxation or had been permanently affixed to the realty (and thus were taxable).

Kansas law has long employed a three-part test—codified by K.S.A. 79-261(b)—to determine whether equipment is a fixture. See *In re Equalization Appeals of Total Petroleum, Inc.*, 28 Kan. App. 2d 295, 300, 16 P.3d 981 (2000). Under this test, machinery and equipment are taxable fixtures only if they (1) are annexed to real property; (2) are adapted to the use of and serve the real property; and (3) were intended by the party attaching the equipment to be permanently affixed to the property. K.S.A. 79-261(b)(2)(A)-(C). This test is fact-dependent, and all three elements must be met for equipment to be a fixture. K.S.A. 79-261(b)(3).

The first element concerns how permanently the item is attached to the real property. *City of Wichita*, 296 Kan. 244, Syl. ¶ 2. Fixtures are generally more difficult to remove than personal property and may result in damage to the item or real property if removed. See *Total Petroleum*, 28 Kan. App. 2d at 300; *In re Equalization Appeal of Coffeyville Resources Nitrogen Fertilizers*, No. 117,045, 2018 WL 4655648, at *10-11 (Kan. App. 2018) (unpublished opinion) (assets that were readily removable were not fixtures). The second element addresses an item's use and purpose in relation to the real property. See K.S.A. 79-261(b)(2)(B); *In re Equalization Appeal of Prairie Tree*, No. 117,891, 2019 WL 493062, at *8 (Kan. App. 2019) (unpublished opinion) (evidence that item improves real property indicative of fixture); see also *Coffeyville Resources*, 2018 WL 4655648, at *11 (looking at whether item is adapted to and benefits real property, rather than another interest). And the third element assesses the party's intent at the time the item was affixed. See *Total Petroleum*, 28 Kan. App. 2d at 301. To ascertain this intent, courts examine various considerations, such as the nature of the equipment, how it was annexed, the purpose of the annexation, and the annexing party's relation and situation. K.S.A. 79-261(b)(2)(C).

As this summary indicates, the analysis of whether an item is a fixture requires courts to make factual findings and then draw legal conclusions based on those facts. *City of Wichita v. Eisenring*, 269 Kan. 767, 783, 7 P.3d 1248 (2000). We defer to the district court's factual findings if they are supported by substantial competent evidence, viewing the evidence in the light most favorable to the prevailing party without reweighing the evidence. *In re Estate of Moore*, 310 Kan. 557, 566, 448 P.3d 425 (2019). But see *Telegram Publishing Co. v. Kansas Dept. of Transportation*, 275 Kan. 779, 784, 69 P.3d 578 (2003) (when controlling facts are based solely on written evidence, court reviews facts de novo). We exercise unlimited review over a district court's legal conclusions. See *State v. Dooley*, 313 Kan. 815, 819, 491 P.3d 1250 (2021).

In this case, the district court found the equipment met the annexation and adaptation requirements of the fixture test, but it concluded that the County had not shown that the Co-op intended for

the equipment to be permanently affixed to its bins. The court explained that even though the equipment was designed to be removable, the Co-op had fastened the various pieces to the storage bins with bolts. And the court found that the equipment was adapted to the use of processing grain in the bins. But it concluded the Co-op had not intended to permanently affix the equipment; the equipment was not unique to these storage bins, could be easily removed and installed on other bins, removal would not damage the bins, and the equipment was attached to process grain—not to simply store it, as the bins do. Because the Co-op did not intend for the equipment to be affixed to the storage bins, the court found the County had erred when it classified the various equipment as taxable fixtures.

The parties' briefs, taken together, now challenge the district court's analysis of all three fixture elements. The Co-op contends in its cross-appeal that though the district court's ultimate conclusion was correct, it erred when it found the equipment was attached to the bins or adapted to their use. And the County asserts that the evidence as a whole showed that the Co-op intended to annex the equipment to the bins; although the Co-op may decide to replace the equipment, the evidence suggested the Co-op intended to keep the equipment in place until it wore out or required an upgrade.

We need not examine each of these elements in detail, however, because we agree with the Co-op that the various pieces of equipment are not fixtures, as they were not sufficiently annexed to the storage bins. For annexation, courts look to "the degree of permanency with which the property is attached to the realty." *City of Wichita*, 296 Kan. at 258. This requires examining various details surrounding an item's physical attachment and removability. See *Total Petroleum*, 28 Kan. App. 2d at 300. A readily replaceable item is less likely to be annexed. *Coffeyville Resources*, 2018 WL 4655648, at *10. In *Total Petroleum*, the panel found that refinery tanks were annexed because of their large size and weight, they had to be constructed on-site, parts were welded together and built into the ground, and removal would require cutting them down piece-by-piece. 28 Kan. App. 2d at 300.

In contrast, another panel found that a metal building was not annexed when, although it was attached to a concrete slab by metal bolts, removal would simply require detaching the bolts and would not damage the realty. *Stalcup v. Detrich*, 27 Kan. App. 2d 880, 886-87, 10 P.3d 3 (2000). And with little discussion of annexation, our Supreme Court found a billboard was not a fixture despite being attached to a concrete foundation for 20 years because the evidence that the billboard was intended to be removable was "undisputed and overwhelming." *City of Wichita*, 296 Kan. at 259.

Applying these principles here demonstrates that the various equipment is more akin to the removable property we examined in *Stalcup* than the permanently annexed tanks discussed in *Total Petroleum*. It is true that the equipment is large and bolted to the storage bins, as the district court indicated. But the undisputed evidence also showed that the equipment could be easily removed, and removal would not damage the bins. No evidence indicates that removal would be unduly complicated or costly. See *Total Petroleum*, 28 Kan. App. 2d at 301 (finding "exceedingly laborious and complicated" task of removing property indicated property was a fixture). And Kemmerer stated that similar pieces of equipment had been removed and placed on different bins, indicating that doing so is feasible. See *Coffeyville Resources*, 2018 WL 4655648, at *10-11 (readily movable assets not fixtures).

Since the equipment was not attached—or affixed—to the real estate with the requisite degree of permanency, it cannot be classified as a fixture. K.S.A. 79-261(b)(3). We therefore need not consider the questions of the equipment's adaptation and the Co-op's intent. We note, however, that the district court found the same removability aspects of the equipment that we find dispositive in our review of the annexation element also demonstrated that the Co-op did not intend the items to be permanently affixed to the storage bins. We find this analysis persuasive. See *Coffeyville Resources*, 2018 WL 4655648, at *13 (intent can be determined from the circumstances surrounding the installation of the item and the "'structure and mode'" of annexation).

The evidence before the district court showed that the various pieces of equipment were not permanently annexed to the storage bins. Based on this record, the County did not prove that the pieces

of equipment were fixtures. Thus, the district court properly reversed the Board's decision upholding the County's contrary classification. We affirm the district court's conclusion and its order that the County refund the ad valorem taxes levied against those items for the 2013 and 2014 tax years.

3. *The district court erred when it included in its refund order tax years beyond 2013 and 2014.*

In its final claim on appeal, the County asserts the district court exceeded its authority by ordering the County to refund any taxes collected based on the equipment beyond the 2014 tax year. The Co-op agrees because it only challenged assessments from the 2013 and 2014 tax years.

Because taxes are levied annually, a taxpayer may only challenge a taxing decision once the tax has been imposed. See K.S.A. 2021 Supp. 79-1460; *KNEA v. State*, 305 Kan. 739, 743, 746-48, 387 P.3d 795 (2017) (standing and ripeness, both elements of subject matter jurisdiction, require an injury that is concrete). But before challenging a taxing decision, a taxpayer must exhaust available administrative remedies. See *Dean v. State*, 250 Kan. 417, 420-21, 826 P.2d 1372 (1992); see also K.S.A. 2021 Supp. 79-1448 (informal meeting is condition precedent to appeal to hearing panel).

Here, the Co-op challenged only its 2013 and 2014 tax assessments. When the Board considered the Co-op's appeal in 2015, the Co-op could not challenge assessments in future years. Accord *Shipe v. Public Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, Syl. ¶ 8, 210 P.3d 105 (2009) (courts cannot engage in premature adjudication of questions that have yet to take shape). And no evidence shows the Co-op attempted to challenge future assessments, when they were made, by exhausting its administrative remedies. Because no evidence indicates the Co-op challenged or took the steps to challenge those future assessments, the district court erred by ordering the County to refund taxes collected after the 2014 tax year. We thus vacate that portion of its order.

Affirmed in part and vacated in part.

No. 124,679

DAVIS HAMMET, *Appellant*, v. SCOTT SCHWAB, Secretary of State, *Appellee*.

SYLLABUS BY THE COURT

1. KANSAS OPEN RECORDS ACT—*Public Policy That Public Records Are Open for Public Inspection—Exceptions under Act.* The public policy of the State of Kansas expressed in the Kansas Open Records Act, K.S.A. 45-215 et seq., is that public records shall be open for public inspection by any person unless the records are within one of the exceptions created in the Act. The Act is to be liberally construed and applied in order to promote the policy of openness. K.S.A. 45-216(a).

2. SAME—*Requirement of State Agencies to Maintain Register for Public Information*. State agencies are required to maintain a register, open to the public, that describes the information that the agency maintains on computer facilities, and the form in which the information can be made available using existing computer programs. K.S.A. 2020 Supp. 45-221(a)(16).

3. SAME—*Statutory Definition of Public Records*. Public records include any recorded information, regardless of form, characteristics, or location, which is made, maintained, or kept by or is in the possession of any public agency. K.S.A. 2020 Supp. 45-217(g)(1)(A).

4. SAME—*Enforcement of Kansas Open Records Act under Statute*. The Kansas Open Records Act may be enforced by injunction, mandamus, declaratory judgment, or other appropriate order. K.S.A. 2020 Supp. 45-222(a).

5. SAME—*Reasonable Fees for Copies of Records Furnished by Public Agencies—Limitation*. A public agency can ask for reasonable fees for providing access to or furnishing copies of public records. The fees for copies of records shall not exceed the actual cost of furnishing copies, including the cost of staff time required to make the information available. K.S.A. 2020 Supp. 45-219(c)(1). The fees for providing access to records maintained on computer facilities shall include only the cost of any computer services including staff time required. K.S.A. 2020 Supp. 45-219(c)(2).

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Opinion filed July 22, 2022. Reversed and remanded with directions.

Joshua M. Pierson, of ACLU Foundation of Kansas, for appellant.

Clayton L. Barker, general counsel, of Kansas Secretary of State's office, for appellee.

Teresa A. Woody, of Kansas Appleseed Center for Law and Justice, Inc., of Lawrence, for amicus curiae Kansas Appleseed Center for Law and Justice, Inc.

Before ARNOLD-BURGER, C.J., HILL and COBLE, JJ.

HILL, J.: Public records in Kansas are held in trust for the public by our elected officials and state agencies. By law, under the Kansas Open Records Act, those records must remain open and accessible for the use of the public. A deliberate action taken by a public official that denies reasonable access to public records violates the Act. The Secretary of State here directed his computer software vendor to turn off a computer report feature called the provisional ballot detail report. That report had, in previous litigation between these parties, been held by the district court to be a public record. By turning off the report capability, the Secretary denied reasonable public access to that public record and the information within it. That action—choosing to conceal rather than reveal public records—violates KORA. We must reverse the district court's ruling to the contrary.

These parties have battled over public records before.

Davis Hammet appeals a district court's grant of summary judgment to the Secretary of State, Scott Schwab, and the denial of Hammet's motion for summary judgment. We have gleaned these facts from the competing motions filed in district court. We focus on one computer-generated report: the provisional ballot detail report.

Whenever a voter casts a provisional ballot in any Kansas election, local election officials usually note this fact, along with other details, and transmit that information to the office of the Secretary via computer software used in all elections. This software is called the Election Voter Information System, often called ELVIS. ELVIS is the statewide voter registration database for the State of Kansas and is maintained by the Secretary's office. This software is owned by Election Systems and Software, and the Secretary contracts with the company to run and maintain ELVIS. The provisional ballot detail report is one of many reports ELVIS can generate.

That report accumulates the information contained in the provisional ballot data received by ELVIS. To be clear about the source of this data, county election officials input the data for their counties and send it to the Office of the Secretary via ELVIS. No one in the Secretary's office inputs, modifies, or deletes the information that county officials enter into ELVIS. Counties are not legally required to keep track of provisional ballot information, but many do. The counties that do track it will input the data at different times and in different manners.

This provisional ballot data is perishable. It is not permanently stored anywhere. With each election cycle, new data replaces the old data. Thus, the data displayed in a provisional ballot detail report depends on when it is generated in relation to a particular election. Each election will produce different data.

The subject of this case is Hammet's KORA request to the Secretary for a provisional ballot detail report. Hammet is the founder of Loud Light, an organization that works to promote civic participation among young people and mobilize underrepresented Kansas communities. Hammet and Loud Light use the provisional ballot detail report to identify individuals who cast provisional ballots and help them cure the deficiencies in their ballots to ensure that their vote is counted. They also use the report to conduct election research so they can inform the public and advise state and local officials how policies and laws impact voters.

In their first lawsuit, the district court ordered the Secretary to print the report.

This case is not the first time Hammet has requested the report. In September 2019, Hammet made a KORA request for the 2018 general election provisional ballot detail report. After the Secretary denied his request, Hammet sued the Secretary in June 2020. During that lawsuit, Hammet announced that he would seek the same report for the 2020 primary and general elections. The Secretary resisted the request, arguing that the report contained confidential information and that it was not a public record subject to a KORA request.

The district court resolved the dispute a month later by ordering the Secretary to produce the 2018 report, after ruling the report

was a public record under KORA and not subject to any exceptions. The Secretary had claimed that until Hammet made his September 2019 request, he did not know that ELVIS was programmed to create a provisional ballot detail report. The report was disclosed at no extra cost to Hammet. There was no appeal of that district court's ruling, decision, or order.

After that, Hammet requested updated provisional ballot detail reports for the 2020 primary election on August 4, 2020, and August 11, 2020. The Secretary fulfilled both requests at no charge.

But two days later, on August 13, 2020, the Secretary asked ES&S, the software vendor, to remove his office's access to the provisional ballot detail report feature. This software change was not implemented immediately, so when Hammet requested another provisional ballot detail report for the 2020 primary election on September 9, 2020, the Secretary provided a copy of the report the same day, again at no charge.

Finally, on September 13, 2020, ES&S turned off the provisional ballot detail report option from the ELVIS system in the Secretary's office, at the direction of the Secretary. This change was not the result from a software upgrade nor any malfunction in the software. The data remained in ELVIS, but the report could no longer be produced easily without the appropriate software commands.

This time, the Secretary denied Hammet access to the report.

Hammet's next KORA request for a provisional ballot detail report for the 2020 primary election—the request that is the basis of this lawsuit—was made on October 6, 2020. Hammet and the Secretary exchanged several emails over the course of the next week.

At first, the Secretary said it sent Hammet's request to the elections division to run the report. After that, he said that his office could no longer ask for the provisional ballot detail report. The Secretary suggested that Hammet could request the reports from all 105 counties since they still had access to the feature that would generate reports. The county reports would be limited to each county's information.

Hammet and the Secretary continued to communicate about Hammet's record request. Hammet clarified that his request was not limited to the provisional ballot detail report, but more generally for the provisional ballot data related to the 2020 primary election. Hammet suggested that the Secretary could accomplish this by restoring the provisional ballot detail report feature, creating a custom report, or, as a last resort, by pulling each individual voter file.

The parties have stipulated that the Secretary could ask ES&S to simply restore the Secretary's ability to create a provisional ballot detail report. In other words, turn back on the report feature.

Rather than restore the feature, the Secretary had a different idea. Hammet could, instead, pay ES&S to gather the data. The company would require a data specialist to write a script to pull the data. The job would take about three hours at a contractual rate of $174 per hour. ES&S could not say when the data specialist could begin the job because the 2020 election was creating an unpredictable workflow. The Secretary told Hammet that he would need to pay $522 before the Secretary would ask ES&S to begin the job. The Secretary did not ask for prepayment for the time his employees would expend to honor Hammet's request.

The Secretary's idea was for Hammet to pay $522 for a report that Hammet had received before at no charge.

This suggestion was not agreeable to Hammet. He believed that waiting for ES&S to pull the data would make him lose access to the data. The provisional ballot data for the primary election would be cleared so county officials could begin to input provisional ballot data for the general election. So Hammet decided to send individual KORA requests to each county asking for the provisional ballot detail reports. Only 13 counties complied with his request before the canvass. Hammet did not obtain the data he wanted before the general election.

Hammet sued the Secretary a second time. Once again he was seeking the same report that he had received in his prior lawsuit. The district court decided the matter on competing motions for summary judgment. In support of his motion for summary judgment in district court, Hammet included an email from a county clerk in which the clerk claimed that they were advised at a statewide conference not to respond to Hammet's KORA request until

"the Mandated State Requirements that are placed on the election officer has been completed." The Secretary denied that it instructed counties to delay their responses to Hammet's KORA requests but asserted that the facts were not material and thus the dispute should not preclude summary judgment. The district court held that the provisional ballot detail report ceased being a public record subject to KORA when ES&S removed the Secretary's ability to produce the report. While the court found it understandable that Hammet questioned the Secretary's motives, it stated that the Secretary's motives were immaterial to the legal questions presented in the parties' motions for summary judgment.

The Kansas Open Records Act controls this appeal.

The Act is found at K.S.A. 45-215 et seq., Kansas Open Records Act. KORA defines public records, establishes the public policy that the Legislature intends to promote through KORA's enforcement, and creates ways to enforce its provisions. KORA also creates procedures on how requests for public records are to be processed. All of those procedures are to be guided by reasonableness. There are several parts of KORA that are pertinent.

The Act defines public records—what is open and what is not—and chisels out a broad statement of public policy. This stated policy provides a context for how courts, public officials, state agencies, and the public should interpret this Act. The policy is one of openness. Found in K.S.A. 45-216(a), the statute says:

> "It is declared to be the public policy of the state that public records shall be open for public inspection by any person unless otherwise provided by this act, and this act shall be liberally construed and applied to promote such policy."

This policy means that public officials and agencies must reveal public records and not conceal them, unless there is a legal reason that prevents disclosure of the information.

And there are many records that are not open to the public. For example, there are 55 types of records mentioned in K.S.A. 2020 Supp. 45-221 that are not open and are not subject to a KORA request. But those records can be disclosed at the discretion of the records custodian. Our Supreme Court has cautioned, however, that these "exceptions are to be narrowly interpreted," and the burden of proving that an exception applies is on the

agency opposing disclosure. *Data Tree v. Meek*, 279 Kan. 445, 454-55, 109 P.3d 1226 (2005). This interpretation by the court promotes the stated policy of openness. But one of those exceptions requires some elaboration.

That exception is computer software programs. A public agency need not disclose software programs for electronic data processing and any accompanying documentation. K.S.A. 2020 Supp. 45-221(a)(16). We take this to mean that, for example, the software code that creates ELVIS itself is not subject to a KORA request. But even though an agency need not provide the actual software programs to fulfill a KORA request, state agencies are required to "maintain a register, open to the public, that describes: (A) The information that the agency maintains on computer facilities; and (B) the form in which the information can be made available using existing computer programs." K.S.A. 2020 Supp. 45-221(a)(16).

The parties here agree that none of those 55 exceptions apply here.

KORA broadly defines public records. They are more than paper and ink pages shoved into file folders or heavy old bound volumes hoisted onto roller shelves. The definition of public record includes, "any recorded information, regardless of form, characteristics or location, which is made, maintained or kept by or is in the possession of . . . [a]ny public agency." K.S.A. 2020 Supp. 45-217(g)(1)(A). In our view, this definition includes the data that is encoded in the ELVIS software.

Finally, KORA is to be enforced by the Kansas courts. District courts have jurisdiction to enforce KORA "by injunction, mandamus, declaratory judgment or other appropriate order." K.S.A. 2020 Supp. 45-222(a). A district court may also award attorney fees if it finds that an "agency's denial of access to the public record was not in good faith and without a reasonable basis in fact or law." K.S.A. 2020 Supp. 45-222(d). Civil penalties may be assessed against a public agency according to K.S.A. 2020 Supp. 45-223 for knowingly violating the Act or not intentionally furnishing the information as required by KORA. The Legislature means what it says: open records in Kansas are to remain open.

We must approach these summary judgment motions just as the district court did.

The district court entered judgment based on competing motions for summary judgment. It granted one and denied the other. We are not bound by that legal judgment. We are in the same position as the district court. Our standard of review for summary judgment is often mentioned and well-established:

"Appellate courts apply the same rules [as the district court] and, where they find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo." *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 982, 453 P.3d 304 (2019).

Therefore, we must consider both Hammet's and the Secretary's motions for summary judgment anew.

We have two questions to answer in this appeal. First, did the Secretary violate KORA when he directed ES&S to turn off the provisional ballot report feature? Second, did the $522 fee charged by the Secretary violate KORA because it was excessive? The answer to both questions is yes.

The history between these parties creates a context that guides our decision. Actions are usually legally significant. The Secretary, at first, refused to provide the provisional ballot detail report and fought it out with Hammet in district court to prevent its disclosure. When the district court ordered him to produce the report, ruling that it was an open record, the Secretary did not appeal that ruling. Instead, the Secretary criticized the district court's decision, stating in part that "'[t]he Kansas Judiciary, once again, paid disrespect to the intent of policy.'"

A few days later, knowing that Hammet intended to submit another KORA request for the most recent provisional ballot detail report, the Secretary asked ES&S to remove access to the software commands that creates the report. Naturally, the software company complied with the wishes of its client and turned off the feature.

There is nothing in this record that suggests this request to turn off the report feature was made to improve ELVIS. There is no record that this feature deletion would decrease the expenses of

the Secretary's office. Turning off this feature is not an advanced process. Simply put, the Secretary did not want it.

In fact, the Secretary has never really offered a reason why, a few days after he lost in court on the first report request, he directed ES&S to turn off the report feature. Instead, he argues in his brief that this is a discretionary management decision that balances access of the public with the burdens of a KORA request. In his view, KORA requests should not hold the Secretary hostage. He contends that his motivation to delete the feature is irrelevant because the report software commands are "a functionality" and the function is not a public record.

None of these arguments are persuasive. It is true that, as someone who holds public office, the Secretary does enjoy discretion in how to run that office. Sound discretion implies that one who exercises that discretion has a good reason for choosing one action over another, or for refraining from one action or another. We have never been given the Secretary's reason for turning off the report feature. How can we say, then, that he has exercised sound discretion? We do know that official discretion does not grant the Secretary the right to violate KORA. See K.S.A. 45-218. Deliberate actions have consequences. Public officials must also respect the public policy formulated by the Legislature.

Nor can we see how this KORA request held the Secretary hostage, when all it required was for one of his employees to push a button on the computer. Several such reports were previously provided by his office to Hammet with apparent ease and at no additional expense to Hammet. The only difference between those earlier requests and this request was the Secretary making the report inaccessible to his office and the public by turning the report feature off. We see no evidence that this KORA request placed an onerous burden on the Secretary's office. Any burden here is self-imposed and does not arise from the KORA request.

This report feature may have been of no use to the Secretary but it was useful to Hammet and the public. And that is the point of open public records. Public access is the rule, not the exception.

In passing, we must comment on a case both parties cite, *Roe v. Phillips County Hospital*, No. 122,810, 2022 WL 414402 (Kan. App. 2022) (unpublished opinion), *rev. granted* 315 Kan. 969 (2022), but it does not help our analysis. In *Roe*, a panel of our

court reversed a district court order requiring the hospital to provide some electronic public hospital records in the format of the requester's choice. 2022 WL 414402, at *1. That is factually different than this case. In *Roe*, the hospital would provide the records in a format of the hospital's choosing. Here, the Secretary was not going to provide the provisional ballot detail report at all, even though he could ask ES&S to simply restore the report function.

Turning to the suggested "functionality exception" to KORA, as created by the district court here, we note that what once was a public record—the provisional ballot detail report—as ruled by the district court in the parties' first lawsuit, has now been transformed in that same court a few months later into a mere "functionality." Charmed by the Secretary's argument, the district court has now ruled that the report is not a public record subject to KORA disclosure. What has happened to cause this transformation? There has been only one change that we can see: the Secretary turned the report feature off.

In a strained analysis, the district court began by determining what information was "recorded information" and thus a public record subject to disclosure under KORA. The court noted that "[t]he data regarding provisional ballots input into ELVIS by the various county election officials is recorded information." In other words, the raw data is the only public record.

But then the district court held that the statewide provisional ballot detail report was merely a functionality, describing it as "the result of a set of computer programming commands that can be removed from or added back to ELVIS" and "a way of packaging data that may exist in the ELVIS database with proper programming." The court found that the provisional ballot detail report became "'recorded information' only if [it was] generated by the use of a computer program." Only when it is generated can the report be considered a public record.

With these comments, the district court erroneously tried to create a "functionality exception" to KORA. In other words, the data are the public record but the tools to make sense of that data are not a public record. The district court's ruling allows a public official to say to a KORA requester, "You can have the data because that is recorded information but we are not going to find it

for you because our office cannot access that 'functionality' of the computer and therefore this is not subject to KORA." That ruling nullifies KORA in this age of computer records.

We see no functionality exception to KORA. In truth, we categorically disagree with the district court's holding to the contrary. That ruling would allow all computer records of public information to become inaccessible through the simple manipulation of what the computer system is asked to do. If we hold that the recorded information of public records is limited to just the data that is collected and not the programs that make it useful, there is no other means to access that data—that public record—other than the computer's software. That effectively seals computer records.

We acknowledge that the binary code—that series of zeros and ones—that make up the memories stored in a computer are recorded information, but that information is useless in that form. The fallacy in the district court's ruling is that it makes the recorded information accessible only to the government if the agency deliberately will not use its computer to make that public record accessible to the public. The public cannot reach into ELVIS's computer memories and scoop out handfuls of zeros and ones and thus have access to what KORA says it has a right to. Computers require software commands that render the data contained within them usable. This provisional ballot detailed report is generated from such a computer command. That report feature of ELVIS is a public record, too. It is subject to a KORA request. Just because a public record must be generated by a report function, that does not remove that record from the purview of KORA.

When the district court ruled in the first case that the report was a public record, it was right. The data were rendered into usable form—the provisional ballot detail report.

It is not as if Hammet is forcing the Secretary to create a new software feature to generate and have access to this report. This is a case in which the Secretary deliberately had the software changed so that Hammet, or anyone else in the public, had no access to the report. That denial of access violates the spirit of KORA as expressed in K.S.A. 45-216 that says that public records must be open for inspection to any person. A person cannot inspect public records stored in a computer without the appropriate

software. Deliberately removing that software capability renders the records unopen for inspection and violates KORA.

Hammet is entitled to summary judgment on this point.

The fee the Secretary wanted to charge is unreasonable.

The second issue Hammet raises is whether the district court erred in holding that the Secretary requested a reasonable fee for the provisional ballot data report. He argues that the fee is unreasonable because the Secretary imposed it with the intent to discourage Hammet from following through with his KORA request. Hammet also argues that it is unreasonable for the Secretary to charge $522 for the report when the Secretary could simply restore its access to the provisional ballot detail report. We find Hammet's argument persuasive. From the record, it appears the report feature still exists in ELVIS and the Secretary can ask ES&S for access to it. The Secretary's claim that he no longer can produce the data to generate a report is disingenuous.

KORA allows public agencies to "prescribe reasonable fees for providing access to or furnishing copies of public records," subject to certain rules. K.S.A. 2020 Supp. 45-219(c). The fees for copies of records "shall not exceed the actual cost of furnishing copies, including the cost of staff time required to make the information available." K.S.A. 2020 Supp. 45-219(c)(1). The fees for providing access to records maintained on computer facilities "shall include only the cost of any computer services, including staff time required." K.S.A. 2020 Supp. 45-219(c)(2).

The Secretary's three arguments on this issue are unconvincing. First, he argues that any report generated by ES&S would not be a public record. The definition of "public agency" in K.S.A. 2020 Supp. 45-217(f)(2)(A) does not include "[a]ny entity solely by reason of payment from public funds for property, goods or services of such entity." The Secretary asserts that he lacked the capability to provide the information Hammet requested and, because the Secretary had to contact a private agency to produce the requested information, the fee for the production of the report is not subject to KORA.

The problem with this argument is that the Secretary *does* possess the requested public record—the provisional ballot data. Just

because the Secretary had to contact a third party to produce the public record in response to Hammet's KORA request does not mean that the production of the public record is removed from KORA's requirement that an agency prescribe reasonable fees for providing access to those records.

The Secretary compares this situation to

> "a hypothetical KORA request to the Secretary for access to a historic book, to which the Secretary responds that it no longer has possession of the book but could obtain it for the requester from a specialty book seller, if the requester reimbursed the Secretary for the out-of-pocket cost."

This is a false analogy. In this case, the Secretary *does* possess the "book"—the provisional ballot data—that Hammet requested.

Second, the Secretary argues that the fees it proposed for access to the data were reasonable and less than the actual cost the Secretary would face in fulfilling Hammet's KORA request. This was because the fees did not include the cost of agency staff time, but only included ES&S's quoted fee. The Secretary stresses that agencies may recoup the actual costs of fulfilling KORA requests. But again, this argument fails because the record shows that it would cost the Secretary little to nothing to ask ES&S to restore the report feature and thus have access to the data.

Third, the Secretary notes that Hammet could have sought the information from an alternative source—the counties. Each county had the ability to generate a provisional ballot detail report. The Kansas Supreme Court has already rejected the argument and held that there is no "provision or exemption in KORA allowing a public agency to refuse to produce records because such records are available from another or a more 'appropriate' source." *Wichita Eagle & Beacon Pub. Co. v. Simmons*, 274 Kan. 194, 222, 50 P.3d 66 (2002). The Secretary's argument also ignores the practical reality that requesting a report from each county is much more onerous than requesting a single report from the State. Hammet's experience with such an endeavor failed.

The Secretary also states that it was "above and beyond its statutory duty" to ask ES&S if it could generate the requested information. While a "custodian may refuse to provide access to a public record, or to permit inspection, if a request places an unreasonable burden in producing public records," there is no indication

in the record that contacting ES&S imposed an unreasonable burden on the Secretary. See K.S.A. 45-218(e). Many public agencies may use third-party software to maintain public records. Allowing public agencies to decline KORA requests because they need not work with the companies they have hired to maintain the records software is not supported by the language or spirit of KORA.

The Secretary "admits that he could simply ask ES&S to restore the statewide provisional ballot detail report functionality, but he has not done so." In light of that, we hold that it is not reasonable to charge a fee of $522 when the Secretary could provide the report for no cost. We limit this analysis to the unique facts here where the report feature already existed and the Secretary had it removed. This is not a case in which Hammet is asking for the creation of a new software feature.

Our ruling

What can be turned off can be turned on. When the Secretary directed ES&S to turn off the computer feature that generates the provisional ballot detail report—a report correctly declared to be a public record—he denied reasonable public access to that public record. That denial of public inspection of a public record violates the Kansas Open Records Act. The Secretary cannot now charge a fee for this report in conformity with his prior actions simply because he had the report feature turned off. Under the circumstances presented here, where several reports have been given to Hammet at no charge, to charge a fee now would be unreasonable.

We therefore reverse the district court's grant of summary judgment to the Secretary and its denial of Hammet's motion for summary judgment. We remand to the district court with directions to enter judgment for Hammet over the Secretary. We direct the court to order the Secretary to restore the provisional ballot detail report feature to ELVIS so the public can have access to that public record.

Reversed and remanded with directions.

No. 123,763

STATE OF KANSAS, *Appellee*, v. JUSTIN WAYNE WALLACE, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*No Requirement to Inform Defendant Entering Guilty or Nolo Contendere Plea of Collateral Consequences.* Neither due process nor K.S.A. 2021 Supp. 22-3210(a) require the district court to inform defendants of the collateral consequences of entering a guilty or nolo contendere plea to a felony.

2. SAME—*Plea of Guilty or Nolo Contendere to Felony—Loss of Right to Vote Is Collateral Consequence*. The potential loss of the right to vote is a collateral consequence of entering a guilty or nolo contendere plea to a felony.

3. SAME—*Plea of Guilty or Nolo Contendere to Felony—Loss of Ability to Possess Firearm Is Collateral Consequence*. The potential loss of the ability to possess a firearm is a collateral consequence of entering a guilty or nolo contendere plea to a felony.

Appeal from Morris District Court; MICHAEL F. POWERS, judge. Opinion filed August 19, 2022. Affirmed.

Jennifer C. Bates, of Kansas Appellate Defender Office, for appellant.

Laura E. Viar, county attorney, and *Derek Schmidt*, attorney general, for appellee.

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

HURST, J.: Justin Wayne Wallace pled nolo contendere to felony criminal threat, misdemeanor battery, and misdemeanor criminal damage to property related to an incident in November 2019. Before sentencing, Wallace moved to withdraw his plea—the district court denied the motion for lack of good cause. Wallace appeals, arguing that his pleas were not fairly or understandingly made because the district court failed to inform him that his felony plea would limit his ability to possess firearms and vote. However, the deprivation of the right to possess a firearm or the right to vote are collateral consequences of Wallace's felony nolo contendere plea—not direct consequences—as such, the district court was not required to inform Wallace of these collateral consequences. As

Wallace alleges no other error, this court affirms the district court's denial of Wallace's motion to withdraw his pleas.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2019, the State charged Wallace with felony burglary, felony aggravated battery, felony criminal damage to property, and felony criminal threat for an incident at an apartment in late November 2019. Wallace entered into a plea agreement under which the State agreed to dismiss the burglary charge and amend the felony aggravated battery and criminal damage to property charges to misdemeanors if Wallace entered nolo contendere pleas to the felony criminal threat, misdemeanor battery, and misdemeanor criminal damage to property charges.

Before accepting Wallace's pleas the district court asked if he understood the charges, to which Wallace agreed he did. The court then explained that Wallace had a right to a speedy trial and that he could change his mind about his pleas and proceed to trial any time before the court accepted the pleas—but explained that once the court accepted his pleas, Wallace's ability to withdraw would not be "a sure thing, like it would be today." The court then explained the trial rights Wallace would be waiving by entering a plea together with waiving his right to any defenses to the charges he pled to. Wallace confirmed he had no questions about his trial rights, and that he understood by entering a plea he would be giving up his right to a trial.

The court explained Wallace's charges and the possible sentences for each. Wallace confirmed he understood and did not have any questions about his possible sentences. The court then asked Wallace if he was promised anything beyond the plea agreement terms to get him to plead or if he was forced to plead in any way, and Wallace said he was not. Next, the State summarized the evidence related to Wallace's charges, and Wallace's counsel made no objections. The court asked Wallace if he understood his charges or if he wanted the court to "walk [him] through each of [the charges], bit by bit." Wallace confirmed he understood his charges and declined any additional explanation.

The court then had the following exchanges with Wallace:

"THE COURT: Okay. You're represented by Mr. Bryant. You feel like you've had enough time to talk with him about your case?

"THE DEFENDANT: I do. (Unintelligible.)

"THE COURT: Okay. Have you—has he gone over, with you, the charges against you, the facts and elements that the State would have to prove, what kind of defenses you might have, that sort of thing?

"THE DEFENDANT: Yeah. He's been very thorough, Your Honor.

"THE COURT: Okay. Thank you. Do you—do you need any time to talk with him, today. I mean, I can give you time, right now, if you need to talk with him.

"THE DEFENDANT: Well, I believe I'm okay. He's—he's been—he's been very thorough, and kept up, with me, on everything. I think it's—it's all right, Your Honor.

. . . .

"THE COURT: Okay. Mr. Wallace, the last couple things. Are you taking any medication, right now, that affects your ability to make decisions, and think clearly?

"THE DEFENDANT: No, Your Honor.

"THE COURT: Is—are—are—do you have some medication prescribed for you that, actually, helps you make decisions, but that you haven't taken, today?

"THE DEFENDANT: No, Your Honor.

. . . .

"THE COURT: Do you have any reason, at all, why I shouldn't accept the plea from you?

"THE DEFENDANT: No, Your Honor.

"THE COURT: Okay. The Court finds that Mr. Wallace is alert and intelligent, understands the charges against him, as amended, at Counts 2 and 3, and as originally charged at Count 4; find [*sic*] that he understands the por—potential consequences, and that is a factual basis for those."

Wallace then pled no contest to the three charges against him, and the district court accepted his pleas, finding he made them freely, knowingly, and voluntarily with the advice of counsel.

About two weeks later Wallace had a change of heart and moved to withdraw his pleas—alleging "innocence in relation to the charges." The motion asserted that he "may need to make allegations against Counsel" and that his counsel intended to withdraw from representation. At his plea hearing, Wallace's counsel withdrew from the representation and the court appointed Wallace new counsel.

In November 2020, the district court held a hearing on Wallace's motion to withdraw his pleas. Wallace testified that he did not realize he was pleading to a felony and that he was "not really guilty of this stuff, and I think I can—I can make that known," and

explained that he did not "want to take the plea, because that's really not the way it happened." Wallace then complained about his former counsel's representation—stating that he felt his attorney was not "on [his] team" and did not feel he was there to help him. Wallace's plea withdrawal counsel then asked if he had discussed with his prior counsel what the impact of a plea to a felony would include, and Wallace responded, "Well, maybe briefly, but not really." Wallace and his counsel then had the following exchange about his former counsel's representation:

"Q: Did he talk to you about (unintelligible) such as the issue of ownership of firearms?
"A: No. We never talked about that, I don't think.
"Q: Do you know, is that a concern to you, now?
"A: Absolutely. Absolutely. I—I live in the country, and hunt every year, and have people—relatives come to hunt, and yeah, yeah, that's a big deal.
"Q: Did he talk to you about the fact that a felony conviction may impede your ability to be employed?
"A: I don't remember talking about that, no.
"Q: Did he discuss, with you, the fact that it may impede your ability to vote, under certain circumstances?
"A: I don't remember that either."

Wallace's counsel also called his former counsel to testify and asked if he had discussed the impact Wallace's felony plea could have on his civil rights. Wallace's former counsel testified that he discussed the consequences of the no-contact order with the alleged victim but said, "I don't recall whether I went over firearm possession and voting rights. I, traditional [*sic*], go over, at least, the voting side of things, but I—I honestly don't have recollection whether we discussed those or not." Wallace's counsel asked the court to withdraw Wallace's pleas because, as Wallace testified, his ability to hunt and possess firearms was important and his prior counsel had no recollection of discussing the impact of Wallace's felony plea on his firearm possession and voting rights.

Ultimately, the district court found that Wallace had failed to establish good cause to withdraw his pleas. In denying Wallace's motion, the district court found that Wallace was represented by competent counsel, was not misled or mistreated in any way, and that he was completely advised of his rights. The district court then sentenced Wallace to a controlling 12 months' probation for

his felony criminal threat conviction, with his misdemeanor sentences running concurrent to his felony sentence. Wallace timely appealed.

DISCUSSION

Wallace brings only one issue on appeal—he claims that he was denied due process in entering his pleas because the district court did not inform him that his pleas would result in the loss of his right to possess firearms and the loss of his right to vote. Wallace claims that as a result he did not knowingly and voluntarily enter his pleas and therefore the district court abused its discretion by denying his motion to withdraw pleas.

Wallace moved to withdraw his pleas before sentencing, and a nolo contendere plea "*for good cause shown* and within the discretion of the court, may be withdrawn at any time before sentence is adjudged." (Emphasis added.) K.S.A. 2019 Supp. 22-3210(d)(1). Courts look to these three factors to determine if a defendant has shown good cause to withdraw their plea: (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made. *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006). Although these factors should guide a court's analysis, they are not an exhaustive list. See *State v. Aguilar*, 290 Kan. 506, 512-13, 231 P.3d 563 (2010).

This court reviews a district court's denial of a presentence motion to withdraw a plea for an abuse of discretion. The district court abuses its discretion when its decision is based on an error of fact or law, or if no reasonable person would agree with the decision. Wallace carries the burden of proving the district court abused its discretion in denying his motion, and this court will not reweigh evidence or assess witness credibility in assessing his claim. See *State v. Woodring*, 309 Kan. 379, 380, 435 P.3d 54 (2019).

Wallace's sole argument on appeal is that his pleas were not fairly and understandingly made. Wallace does not allege that he received incompetent counsel during his plea process and hearing, or that he was coerced, mistreated, or misled during his plea hearing—thus Wallace has waived any challenge to the district court's

findings regarding those issues. See *State v. Williams*, 303 Kan. 750, 758, 368 P.3d 1065 (2016) (issues not briefed are deemed waived or abandoned). Wallace has made no claims that he received ineffective assistance of counsel because his attorney failed to inform him that his felony nolo contendere plea could lead to the loss of his right to possess a firearm or vote. He also concedes that Kansas caselaw does not require district courts to inform criminal defendants of the consequences of their pleas that are considered collateral, but he argues that those cases do not apply to "exercising his second amendment right."

In Kansas, district courts have a statutory duty to inform defendants who plead guilty to a felony of the *direct consequences* of their plea—including the possible maximum sentence. Specifically, the court must inform "the defendant of the consequences of the plea, including the specific sentencing guidelines level of any crime committed . . . and of the maximum penalty provided by law which may be imposed upon acceptance of such plea." K.S.A. 2021 Supp. 22-3210(a)(2). These statutory rights stem from constitutional due process requirements that a guilty plea be made voluntarily and intelligently. See, e.g., *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (requiring the trial record to demonstrate the defendant's knowing, voluntary waiver of rights when entering a guilty plea); *State v. Moody*, 282 Kan. 181, 194, 144 P.3d 612 (2006) (K.S.A. 22-3210 "embodies due process requirements as interpreted by the United States Supreme Court . . . ."). A guilty plea is "more than a confession" or admission of certain acts, but "is itself a conviction" and before admitting a confession the court must reliably determine it was voluntarily made in satisfaction of the defendant's constitutional rights. *Boykin*, 395 U.S. at 242. But these constitutional due process and statutory requirements are not boundless.

District courts have no duty to inform criminal defendants of the collateral—not direct—consequences of a felony guilty plea. See, e.g., *Moody*, 282 Kan. at 194; *State v. Sedillos*, 279 Kan. 777, 787, 112 P.3d 854 (2005). Direct consequences are definite, immediate, and typically automatic, whereas collateral consequences do not directly result from the specific criminal offense or sentence, but result from an external source. See *Moody*, 282 Kan. at

195-96; *State v. Johnson*, No. 113,561, 2017 WL 3575649, at *4 (Kan. App. 2017) (unpublished opinion) (finding revocation of driving privileges under habitual violator statute is a collateral consequence).

Potential government restrictions resulting from external sources that restrict a defendant's future rights are not "definite and immediate" results of entering a plea to a felony charge. See, e.g., *State v. Schaefer*, 305 Kan. 581, 592, 385 P.3d 918 (2016) (the mere possibility of involuntary civil commitment resulting from a felony plea constituted a collateral consequence that did not have to be disclosed to the defendant prior to accepting a plea); *State v. LaMunyon*, 259 Kan. 54, 62, 911 P.2d 151 (1996) (the possibility that the defendant's guilty plea could be used to enhance sentencing for later crimes is a collateral consequence); *City of Ottawa v. Lester*, 16 Kan. App. 2d 244, 248, 822 P.2d 72 (1991) (possible suspension of driving privileges was a collateral consequence). Similarly, in discussing the constitutional due process requirements that a plea must be voluntarily, intelligently, and knowingly made, the Tenth Circuit noted that restrictions on firearm ownership and difficulty in obtaining employment, credit, or financial aid are all collateral consequences of entering a plea. *United States v. Muhammad*, 747 F.3d 1234 (10th Cir. 2014).

Although the Kansas Supreme Court has not yet determined the specific issues raised by Wallace, the natural extension of its prior decisions demonstrates that both the right to vote and the right to own or possess firearms constitute collateral—not direct—consequences of pleading nolo contendere to a felony conviction. A panel of this court has found that the "loss of voting rights, jury eligibility, or right to hold office" were all collateral consequences that the district court was not required to disclose to a defendant before accepting their guilty plea. *Cox v. State*, 16 Kan. App. 2d 128, 130-31, 819 P.2d 1241 (1991). While Wallace's right to vote and possess a firearm could be affected by his felony plea, neither are immediate, definite, or automatic. Neither potential consequence stems directly from the charge or sentence—but result from separate government intervention. See *State v. Jackson*, No. 123,286, 2021 WL 4227700, at *2 (Kan. App. 2021) (unpublished opinion) (finding the potential federal firearm prosecu-

tion after a state firearm conviction to be a collateral consequence). Thus, the district court had no duty to inform Wallace about the potential impact his felony plea would have on his right to vote or possess firearms.

At Wallace's plea hearing, the district court informed him of the nature of the charges and of the constitutional rights he was waiving by entering his pleas. The court also reviewed with Wallace the direct consequences of his pleas and the potential sentences for each count. Wallace's responses to the court's questions reflected that he understood the nature of the proceedings and that he was aware of what he was doing. Wallace entered his pleas voluntarily after being informed of the direct consequences of his action, and he affirmatively explained that he was waiving certain trial and appeal rights. Additionally, the same judge that accepted Wallace's pleas also presided over his motion to withdraw those pleas—so the court was in a good position to evaluate whether Wallace understood the nature of the charges against him, the constitutional rights that he would give up, and the consequences. See *Schaefer*, 305 Kan. at 595 ("The district court had the opportunity to view Schaefer's affect and body language and assess whether he was truthfully and unequivocally answering those questions."); see also *State v. Perez-Sanchez*, No. 123,660, 2021 WL 5979308, at *5 (Kan. App. 2021) (unpublished opinion) (finding district court was in the best position to determine whether the defendant fairly and understandingly entered pleas because same judge presided over preliminary hearing waiver, plea hearing, and motion hearing). The district court found Wallace knowingly entered his pleas, and it had no duty to inform Wallace of the collateral consequences of his pleas. Wallace has failed to meet his burden to show that the district court abused its discretion.

CONCLUSION

The district court informed Wallace of the direct consequences of his nolo contendere pleas, and contrary to Wallace's assertions, the district court had no duty to inform him of collateral consequences of his felony plea including his potential loss of his

right to possess firearms and vote. Wallace failed to show the district court abused its discretion when it denied his motion to withdraw his pleas.

Affirmed.

No. 123,277

PRETTY PRAIRIE WIND LLC, et al., *Appellants*, v. RENO COUNTY and BOARD OF RENO COUNTY COMMISSIONERS, *Appellees*.

SYLLABUS BY THE COURT

1. APPELLATE PROCEDURE—*Cross-Appeal by Appellee to Adverse Decisions of District Court—Failure to Cross-Appeal Prevents Appellate Review*. Kansas law requires an appellee to cross-appeal a district court's adverse decisions before those rulings may be challenged on appeal. The failure to cross-appeal a district court's adverse decision creates a jurisdictional bar preventing appellate review.

2. SAME—*Cross-Appeal of Adverse Rulings—Not Required if Challenging Decision Subject to Appeal*. While a cross-appeal is necessary to bring other adverse rulings before the appellate courts, it is not generally required when a party is merely challenging the district court's reasoning underlying a decision already subject to appeal.

3. ZONING—*Statutes Applicable to Election Petitions Not Applicable to Zoning Protest Petitions*. The requirements of K.S.A. 25-3601 through K.S.A. 25-3608 do not apply to zoning protest petitions. Those petitions are governed by K.S.A. 2021 Supp. 12-757(f)(1).

Appeal from Reno District Court; TIMOTHY J. CHAMBERS, judge. Opinion filed August 26, 2022. Affirmed.

Timothy J. Sear, of Polsinelli PC, of Kansas City, Missouri, *Alan Claus Anderson*, of Kansas City, Missouri, and *Gerald L. Green*, of Gilliland Green LLC, of Hutchinson, for appellants.

S. Eric Steinle, of Martindell Swearer Shaffer Ridenour LLP, of Hutchinson, and *Joseph P. O'Sullivan*, Reno County Counselor, for appellees.

Patrick B. Hughes and *Susan M. Locke*, of Adams Jones Law Firm, P.A., of Wichita, for intervenors Lynn Thalmann, et al.

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

WARNER, J.: This appeal concerns the statutory requirements for petitions protesting proposed zoning changes. The current dispute began when Pretty Prairie Wind LLC sought a conditional-

use permit from the Board of Reno County Commissioners to operate a wind farm. Several local property owners challenged Pretty Prairie's permit application by filing zoning protest petitions, triggering a heightened voting requirement to approve the permit. The Board of County Commissioners' vote failed to meet this requirement, resulting in the denial of Pretty Prairie's application.

Pretty Prairie filed suit, challenging the form of the protest petitions. The district court concluded that the protest petitions were valid under Kansas law and entered judgment for the County. After carefully reviewing the record before us and the parties' arguments, we agree with the district court's decision to grant judgment in favor of the County, albeit for different reasons. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2019, Pretty Prairie applied for a conditional-use permit to build a wind farm near Haven in Reno County. After receiving a report from county staff, the Reno County Planning and Zoning Commission held several public hearings and received public comments concerning the proposed permit. That April, the Commission recommended to the three-member Board of County Commissioners that the application be denied.

Under Kansas law, the vote needed to overcome a planning commission's recommendation depends on the community's reaction to the recommended outcome. In most instances, a board of county commissioners can overrule a planning commission's recommendation by a two-thirds majority vote. See K.S.A. 2021 Supp. 12-757(d). But when the owners of at least 20% of the land within 1,000 feet of the property at issue sign and file protest petitions within 14 days after the end of the public hearings, a three-fourths majority is needed to overrule the recommendation. K.S.A. 2021 Supp. 12-757(b), (f)(1); Reno County Zoning Regulations § 20-102 (2016).

The Board of Reno County Commissioners has three members. Practically speaking, this means that a vote of two of the three members is necessary to overcome the Reno County Planning and Zoning Commission's recommendations in most circum-

stances. But when a sufficient proportion of landowners file petitions protesting a proposed zoning action, a decision rejecting a recommendation requires the vote of all three Board members.

Reno County residents began organizing to submit protest petitions against the wind farm, holding several community events to mobilize neighboring landowners. The protest petitions provided at these events included the date, the protesting landowner's name, a description or address of the landowner's property, and the landowner's signature. The petitions also included a section for the signature and address of a "circulator," along with a declaration stating, "I declare under penalty of perjury I am a circulator of this petition, duly qualified, and personally witnessed each signature on this page."

Shortly before its June 2019 meeting, the Board determined that 114 valid petitions—from owners representing 46% of the property within the 1,000-foot boundary—had been filed, triggering the three-fourths majority requirement. Of these petitions, approximately 110 included a circulator's signature. The Board voted 2-1 to approve the permit, falling short of the required vote to override the planning commission's recommendation. As a result, the permit was denied.

Pretty Prairie filed a petition in district court challenging this outcome, raising procedural and substantive claims. From a procedural standpoint, Pretty Prairie asserted that the protest petitions were invalid because the circulators failed to comply with K.S.A. 25-3602(b)(4), a statute governing petitions submitted for elections; this statute requires a circulator to verify before a notarial officer that the circulator witnessed each person sign a petition. Pretty Prairie argued that the protest petitions were void because the circulator signatures were not notarized, so the Board's 2-1 vote was sufficient to overrule the Commission's recommendation. Turning to the substance of the Board's decision, Pretty Prairie asserted that the decision to deny the permit was unreasonable.

As the case progressed before the district court, Pretty Prairie sought partial summary judgment on its procedural claim. The County, as well as various adjacent landowners (the Intervenors) who were permitted to intervene as defendants, opposed this re-

quest. The district court denied Pretty Prairie's motion. Most relevant to this discussion, the court found that the notarial-affirmation requirement under K.S.A. 25-3602(b)(4) applied to zoning protest petitions, but the circulators' declaration on the protest petitions substantially complied with that statute.

Following the ruling, Pretty Prairie sought to file an interlocutory appeal, which the court denied. Pretty Prairie then dismissed its outstanding substantive claim and asked that final judgment be entered on its procedural claim. The court granted this request, and Pretty Prairie appealed. Neither the Intervenors nor the County filed a cross-appeal.

DISCUSSION

The primary point of contention in this appeal is the standard that governs petitions protesting potential zoning changes. Pretty Prairie asserts—and the district court found—that protest petitions must comply with Kansas statutes governing election petitions, K.S.A. 25-3601 through K.S.A. 25-3608. The County argues that the protest petitions are governed solely by K.S.A. 2021 Supp. 12-757.

Unraveling these issues turns on the language and interplay of these various statutory provisions. Statutory interpretation is a legal question over which appellate courts' review is unlimited. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). Our primary aim when interpreting statutes is to give effect to the legislature's intent, expressed through the statutory language it adopted. *State v. Spencer Gifts*, 304 Kan. 755, Syl. ¶ 2, 374 P.3d 680 (2016). We thus follow the statutes' plain language—we do not add or ignore statutory requirements, and we give ordinary words their ordinary meanings. 304 Kan. 755, Syl. ¶ 3.

When legislative intent is unclear from the statute's text, courts employ canons of construction to ascertain the legislature's aim. Primary among these is the presumption that the legislature does not intend to enact meaningless legislation, and that statutory language should be construed to avoid unreasonable or absurd results. See *In re Marriage of Traster*, 301 Kan. 88, 98, 339 P.3d 778 (2014). In a similar vein, courts attempt to reconcile conflicting statutes and bring them into workable harmony, if possible.

See *Miller v. Board of Wabaunsee County Comm'rs*, 305 Kan. 1056, 1066, 390 P.3d 504 (2017). Statutes that specifically address a matter tend to control over a more general statutory provision. *State ex rel. Schmidt v. Governor Kelly*, 309 Kan. 887, 898, 441 P.3d 67 (2019).

Applying these principles here, we agree with the County that zoning protest petitions are governed by K.S.A. 2021 Supp. 12-757, not by K.S.A. 25-3601 et seq. While most of the protest petitions filed in this case contained a signature and declaration for the petition circulator, those sections were not required by Kansas law. Because these petitions comply with K.S.A. 2021 Supp. 12-757, the district court correctly granted judgment to the County, even though it employed different reasoning to reach that result. Accord *Gannon v. State*, 302 Kan. 739, 744, 357 P.3d 873 (2015) ("'If a trial court reaches the right result, its decision will be upheld even though the trial court relied upon the wrong ground or assigned erroneous reasons for its decision.'").

1. *The absence of a cross-appeal does not constrain our review of the district court's summary-judgment ruling.*

Before explaining our analysis of these relevant statutes, we must consider a threshold jurisdictional question. Pretty Prairie asserts that we do not have jurisdiction to consider this statutory question—which Kansas statute governs the protest petitions—at all because the County and Intervenors did not cross-appeal that finding. According to Pretty Prairie, in the absence of a cross-appeal, this court is constrained by the district court's conclusion as to which statute applies. Thus, the only issues in this appeal are whether protest petitions must strictly or substantially comply with K.S.A. 25-3602 and whether the petitions here satisfied that level of compliance. We disagree.

In denying Pretty Prairie's summary-judgment motion, the district court found that the zoning protest petitions were valid. To arrive at that ruling, the court made several intermediate determinations. Most notably, the court concluded:

- that K.S.A. 25-3602, not K.S.A. 2021 Supp. 12-757, established the requirements for zoning protest petitions;

- that only substantial compliance (not strict compliance) with K.S.A. 25-3602 was required for the protest petitions to be valid; and
- that the protest petitions substantially complied with that statute.

The County and the Intervenors present two alternative bases for why the district court's ultimate ruling—the zoning protest petitions were valid—was correct. They claim that K.S.A. 2021 Supp. 12-757, not K.S.A. 25-3602, governs the protest petitions. And they assert that if the district court's statutory analysis of K.S.A. 25-3602 was correct, then it correctly determined that the protest petitions complied with that statute.

It is true—as Pretty Prairie indicates—that Kansas law requires an appellee to cross-appeal a district court's adverse decisions before those rulings may be challenged on appeal. *Cooke v. Gillespie*, 285 Kan. 748, 755, 176 P.3d 144 (2008); see K.S.A. 2021 Supp. 60-2103(h) (cross-appeal required when "the appellee desires to have a review of rulings and decisions of which such appellee complains"). The failure to cross-appeal a district court's adverse decision creates a jurisdictional bar preventing appellate review. *Lumry v. State*, 305 Kan. 545, 555, 385 P.3d 479 (2016).

But while a cross-appeal is necessary to bring other adverse *rulings* before the appellate courts, it is not generally required when a party is merely challenging the district court's *reasoning* underlying a decision already subject to appeal. See *Lacy v. Kansas Dental Board*, 274 Kan. 1031, 1044, 58 P.3d 668 (2002); *Williams v. Amoco Production Co.*, 241 Kan. 102, 116, 734 P.2d 1113 (1987). In *Lacy*, for example, the Kansas Supreme Court upheld a district court's decision under a different statutory provision than the one the district court relied on. 274 Kan. at 1044. While the district court's conclusion was correct, its reasoning was not—the provision that it thought resolved the question did not apply, but another provision did and led to the same result. 274 Kan. at 1044.

In its brief, Pretty Prairie cites *Reinecker v. Board of Trustees*, 198 Kan. 715, 722, 426 P.2d 44 (1967), for its assertion that the County and Intervenors were required to cross-appeal the district

court's conclusion that K.S.A. 25-3602—not K.S.A. 12-757—applies to protest petitions. But *Reinecker* is readily distinguishable. In that case, various landowners appealed the denial of an injunction in an eminent-domain action. In its response brief, the appellee argued that although the district court had ultimately ruled in its favor at trial, the court erred in admitting certain trial testimony. The Kansas Supreme Court found that the evidentiary challenge was not properly before the court since no cross-appeal had been filed. 198 Kan. at 722. Thus, the issue barred by the absence of a cross-appeal in *Reinecker* was separate and distinct from the questions on appeal. That is not the case here.

The Kansas Supreme Court revisited the nature of cross-appeals in *Cooke*. That case had yo-yoed between the district and appellate courts several times. In the most recent appeal, the appellant, Cooke, challenged the district court's distribution of settlement proceeds. Cooke argued that the statute of limitations barred the district court's action; the opposing party, Gillespie, asserted that this question was not properly before the court because Cooke had not cross-appealed the district court's adverse ruling on that question during a previous appeal. Our Supreme Court agreed with Gillespie. The court explained that "Cooke failed to cross-appeal an earlier, and clearly adverse, ruling: Judge Kennedy's denial of her summary judgment motion that was based upon the statute of limitations." 285 Kan. at 755.

In reaching this conclusion, the *Cooke* court reviewed several earlier decisions discussing the necessity of a cross-appeal. In each instance, the Supreme Court had held that an issue must be presented through a cross-appeal when it arises from a district court's interim, adverse ruling. See, *e.g.*, *Scammahorn v. Gibraltar Savings & Loan Ass'n.,* 197 Kan. 410, 416 P.2d 771 (1966) (party must file cross-appeal to challenge district court's denial of a motion to dismiss); *James v. City of Pittsburg*, 195 Kan. 462, 407 P.2d 503 (1965) (same); *Chavez v. Markham*, 19 Kan. App. 2d 702, 875 P.2d 997 (1994), *aff'd* 256 Kan. 859, 889 P.2d 122 (1995) (party must cross-appeal denial of a motion for summary judgment).

As these cases illustrate, cross-appeals are always necessary when an appellee is challenging some adverse "ruling" or "judgment" against that party. *Cooke*, 285 Kan. 748, Syl. ¶ 2; *Williams*, 241 Kan. at 116. The law is admittedly less clear as to when a party must cross-appeal some other determination, however.

In many cases, courts have considered alternative reasons supporting the district court's ultimate decision when no cross-appeal was filed. See *Gannon*, 302 Kan. at 744 (denial of motion to intervene was correct for a different reason than that given by the district court because the motion was untimely filed); see also *Atkins v. Webcon*, 308 Kan. 92, 97, 419 P.3d 1 (2018) ("'[W]hen an agency tribunal reaches the right result, its decision will be upheld even though the tribunal relied upon the wrong ground or assigned erroneous reasons for its decision.'"). But in a few cases, appellate courts have found that the absence of a cross-appeal precludes review of a district court's adverse factual finding or of the court's rejection of an alternative basis for its decision. See *Lumry*, 305 Kan. at 554 (because appellee had not cross-appealed district court's factual finding that appellee was an employer, appellate court did not have to consider that question); *State v. Novotny*, 297 Kan. 1174, 1181, 307 P.3d 1278 (2013) (State did not cross-appeal district court's finding that the photo lineup was unnecessarily suggestive). But see *State v. Bates*, 316 Kan. 177, 513 P.3d 483 (2022) (affirming the district court's denial of suppression motion for alternative legal grounds previously rejected by the district court with no mention of need for cross-appeal).

This difference in treatment may be interesting in an academic sense. But we need not finally resolve the scope of all potential cross-appeals here. Instead, we find the facts of this case demonstrate that no cross-appeal is necessary for two reasons.

First, there was no adverse ruling from which the County or Intervenors could seek our review. The district court made two rulings relevant to this appeal. It denied Pretty Prairie's summary-judgment motion, and then it granted the parties' agreed-upon motion to dismiss Pretty Prairie's remaining claims so that Pretty Prairie could appeal the summary-judgment denial. Neither ruling was adverse to the County or the Intervenors—in both instances, judgment was entered in their favor on the merits.

Second, the statutory analysis of K.S.A. 25-3602 and K.S.A. 2021 Supp. 12-757 is key to deciding Pretty Prairie's appeal. Determining whether the district court erred in denying summary judgment—that is, in deciding that the protest petitions were valid—requires determining what statute governs, and in turn what standards govern protest petitions for conditional-use permits. Pretty Prairie apparently perceived the importance of this statutory question, as it presented and pressed the issue in its opening brief. To hold otherwise would require this court to engage in a bizarre and potentially misleading discussion—to conduct a legal analysis under a statute that may not, in actuality, apply. This statutory analysis is thus different from other determinations, which have been involved in case-specific factual findings, where Kansas courts have found cross-appeals necessary. See *Lumry*, 305 Kan. at 554; *Novotny*, 297 Kan. at 1181.

Under these circumstances, we are not persuaded by Pretty Prairie's argument that the absence of a cross-appeal limits our review of the district court's summary-judgment ruling. We thus proceed to our analysis of the relevant statutory provisions.

2. *K.S.A. 2021 Supp. 12-757(f)(1), not K.S.A. 25-3602, governs the zoning protest petitions.*

As we have indicated, the primary question in this appeal is whether K.S.A. 25-3602 applies to zoning protest petitions. The district court found the petition requirements in K.S.A. 25-3602(b) apply to zoning protest petitions under K.S.A. 2021 Supp. 12-757. In reaching this decision, the court noted the absence of many specific requirements in K.S.A. 2021 Supp. 12-757(f)—particularly with regard to circulator certifications—for protest petitions' signatures. The court also noted that K.S.A. 25-3601(c) states the section applies to petitions "protesting" an ordinance or resolution.

On appeal, Pretty Prairie supplements this reasoning by pointing to *Deffenbaugh Disposal Services, Inc. v. City of Kansas City*, No. 63,131, unpublished opinion filed June 6, 1989 (Kan. App.), and Kansas Attorney General Opinion No. 2003-18, which both assumed—without deciding—that K.S.A. 25-3602 applies to zoning protest petitions. The County and Intervenors note that we are

not bound by these decisions. They also argue that K.S.A. 25-3602 relates specifically to petitions in the elections context, and applying K.S.A. 25-3602 to a protest petition would require courts to disregard most of that statute's requirements.

K.S.A. 25-3601 through K.S.A. 25-3608 govern petitions "required or authorized as part of the procedure applicable to the state as a whole or any legislative election district or to any county, city, school district[,] or other municipality." K.S.A. 25-3601(a). A previous panel of this court described K.S.A. 25-3601 as "a procedural statute" that "provides a format for submitting ballot questions and a process for getting official approval of questions before getting citizen signatures on petitions seeking a public vote." *Ramcharan-Maharajh v. Gilliland*, 48 Kan. App. 2d 137, 141, 286 P.3d 216 (2012), *rev. denied* 297 Kan. 1247 (2013). K.S.A. 25-3601 and K.S.A. 25-3602 include several requirements for petitions to be effective. For example:

- K.S.A. 25-3601(c) sets forth the "form of any question in a petition requesting an election on or protesting an ordinance, or resolution, adopted by" the relevant governing body must take.

- K.S.A. 25-3602(b) requires a petition to include various information, such as the question "which petitioners seek to bring to an election" and the political or taxing subdivision "in which an election is sought to be held." K.S.A. 25-3602(b)(1), (2).

- K.S.A. 25-3602(b)(3) requires a petition to include the statement, "'I have personally signed this petition. I am a registered elector of the State of Kansas and of [the relevant political subdivision] and my residence address is correctly written after my name.'"

- If a circulator is involved in the petition process, K.S.A. 25-3602(b)(4) requires the petition contain a recital stating the circulator (as defined by K.S.A. 25-3608) is qualified as a circulator and personally witnessed the signers sign the petition. The circulator's recital must be "verified upon oath or affirmation before a notarial officer in the

> manner prescribed by the revised uniform law on notarial acts." K.S.A. 25-3602(b)(4).

These requirements do not apply to petitions in all contexts. For example, K.S.A. 25-3601(f) explicitly excludes recall petitions and grand-jury petitions from complying with these provisions. And K.S.A. 25-3601(d) states that "[w]hen any other statute imposes specific requirements which are different from the requirements imposed by K.S.A. 25-3601 et seq., and amendments thereto, the provisions of the specific statute shall control."

K.S.A. 12-757 governs zoning decisions. K.S.A. 2021 Supp. 12-757(f)(1) states that protest petitions for a potential zoning decision must be "filed in the office of the city clerk or the county clerk within 14 days after the date of the conclusion" of the planning commission's public hearing. If protest petitions "signed . . . by the owners of record of 20% or more of the total real property within the area required to be notified by this act" are filed, then a three-fourths vote is required to pass the proposed amendment. K.S.A. 2021 Supp. 12-757(f)(1). For zoning outside city limits, all property owners living within at least 1,000 feet of the area to be altered must be notified. K.S.A. 2021 Supp. 12-757(b). Reno County's zoning ordinance contains a similar requirement. See Reno County Zoning Regulations § 20-102 (requiring a protest petition to be "duly signed and acknowledged by the owners").

The County points out several textual indications that the legislature did not intend for K.S.A. 25-3601 through K.S.A. 25-3608 to apply to zoning protest petitions. We agree that the language of these statutes concerns elections and signature requirements for electors. See generally K.S.A. 25-3601 (referencing elections and the county election officers throughout); K.S.A. 25-3602(b) (establishing signature requirements for "electors"); K.S.A. 25-3604 (setting forth the method of verifying that the signatures are provided by registered voters). Even K.S.A. 25-3601(f), which specifically excludes recall petitions and grand-jury petitions from its requirements, concerns petitions that involve elections or electors' signatures. See K.S.A. 25-4301 et seq. (governing recall of elected officials); K.S.A. 2021 Supp. 22-3001(c) (grand jury can be summoned by a petition from a requisite number of qualified "electors").

These "election" and "elector" requirements do not make sense for zoning protest petitions. In the zoning context, people signing protest petitions must own property in or adjacent to the area to be rezoned. K.S.A. 2021 Supp. 12-757(f)(1). There is no requirement that those property owners be registered to vote or even be Kansas residents. Thus, most requirements in K.S.A. 25-3601 and 3602 could not apply. The only potential exception is the circulator verification in K.S.A. 2021 Supp. 25-3602(b)(4), which refences "petition circulator[s]" and does not mention elections or electors. But we cannot read this provision in isolation, nor can we read out or ignore the remainder of that statute. See *Spencer Gifts*, 304 Kan. 755, Syl. ¶ 3.

Our review of other statutes that reference K.S.A. 25-3601 through K.S.A. 25-3608 further underscores our conclusion that those provisions were only intended to apply to election petitions. See K.S.A. 2021 Supp. 12-6a36(d) (requiring election for city to issue full-faith-and-credit bonds if protest petition objecting to issuance is signed by percentage of qualified voters in municipality); K.S.A. 2021 Supp. 12-1774(b)(2) (similar requirement for full-faith-and-credit tax-increment bonds); K.S.A. 41-302(a)-(b) (similar requirement for election questions concerning licensing the retail sale of alcohol in its original packaging). These statutes indicate the types of situations to which K.S.A. 25-3601 applies—petitions requiring signatures from a certain number or percentage of electors to trigger an election. Multiple other statutes reflect this system to prompt an election. See, e.g., K.S.A. 2021 Supp. 2-131b (in counties with fair associations, tax levies for erection and maintenance of fair association buildings); K.S.A. 10-203 (building, purchasing, or repairing of bridges); K.S.A. 12-614 (bonds for resurfacing paved streets); K.S.A. 12-1236 (creating library district); K.S.A. 12-3013 (describing process for proposed ordinances); K.S.A. 24-122 (returning oversight of drainage district to directors) ; K.S.A. 68-598 (abandoning county rural highway system); K.S.A. 72-1143 (establishment of teacherages); K.S.A. 80-1514b (general obligation bonds for fire district).

Zoning protest petitions under K.S.A. 12-757, however, are qualitatively different from election petitions. Unlike statutes concerning elections, rezoning begins by submitting a zoning amendment to a planning commission, not through a petition process.

K.S.A. 2021 Supp. 12-757(b). Protest petitions do not trigger public involvement in the rezoning decision—a successful petition simply increases the threshold required for the Board to pass a rezoning ordinance or resolution. K.S.A. 2021 Supp. 12-757(f)(1). The petition-signing requirement is based on land ownership, not the ability to vote. K.S.A. 2021 Supp. 12-757(f)(1). And petitions are filed with the city or county clerk, not an election officer. K.S.A. 2021 Supp. 12-757(f)(1).

The authorities that Pretty Prairie references on appeal do not persuade us otherwise. In *Deffenbaugh*, a panel of this court found a circulator properly verified signatures on zoning protest petitions under the predecessor to K.S.A. 25-3602(b)(4). *Deffenbaugh* assumed, rather than decided, that K.S.A. 25-3601 applied to zoning protest petitions; that issue was not presented for the panel's consideration, nor was it given any consideration or meaningful discussion in that opinion. Accord *State v. Fleming*, 308 Kan. 689, 706, 423 P.3d 506 (2018) (Court of Appeals panels are not required to follow decisions of previous panels); *Graham v. Herring*, 297 Kan. 847, 861, 305 P.3d 585 (2013) (unpublished opinions are not binding precedent).

Similarly, in Attorney General Opinion No. 2003-18, the attorney general relied on the broad language of K.S.A. 25-3601(a) and (d)—stating the statute applies generally to petitions unless a more specific statute controls—to conclude the signatures of individual petitioners need not be notarized. But we owe no deference to this interpretation. Accord *Willis v. Kansas Highway Patrol*, 273 Kan. 123, 130, 41 P.3d 824 (2002) ("[A]ttorney general opinions are not binding law in Kansas."). And the statutory language, when read in context, shows that K.S.A. 25-3601 applies to election petitions, not zoning petitions.

In short, we conclude that the requirements of K.S.A. 25-3601 through K.S.A. 25-3608 do not apply to zoning protest petitions. K.S.A. 2021 Supp. 12-757(f)(1) requires protest petitions in the zoning context to be signed by a qualifying property owner and submitted to the county clerk within the timeframe provided in that statute. Contrary to the district court's statements in its ruling, the absence of further requirements does not indicate that courts must use other provisions to supplement that statute; it simply

means that the legislature intended zoning protest petitions to be subject to fewer statutory restrictions. Likewise, the fact that most of the protest petitions here included a circulator declaration does not mean such a declaration was required by law, or that the decision to include this declaration somehow transformed the documents into election petitions under K.S.A. 25-3601.

There is no question that the protest petitions here meet the requirements of K.S.A. 2021 Supp. 12-757(f)(1). Thus, the district court correctly concluded that the petitions were valid, albeit for a different reason than that court provided.

Before closing, we observe that the Intervenors urge several procedural reasons why we should not consider Pretty Prairie's appeal. They allege Pretty Prairie invited any error because it asked that final judgment be entered (even though all parties consented to that procedure), and they challenge the way Pretty Prairie brought this case before the district court. We do not find these arguments persuasive. And in light of our conclusion that the protest petitions in this case were valid under K.S.A. 2021 Supp. 12-757(f)(1), we need not address them further.

Affirmed.