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:

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HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. G. GORDON ATCHESON ..... Westwood
HON. DAVID E. BRUNS ..... Topeka
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Burnett v. State	125,607	Wyandotte	03/31/2023	Affirmed
Campbell v. State	123,830	Sedgwick	04/07/2023	Affirmed
Coleman v. State	125,017	Wyandotte	04/14/2023	Affirmed
Curran v. State	125,293	Reno	03/24/2023	Affirmed
First Presbyterian Church of Lawrence v. The City of Lawrence	124,855	Douglas	03/24/2023	Reversed; remanded with directions
Gantt v. State	125,158	Sedgwick	04/21/2023	Affirmed
Green v. State	125,007	Sedgwick	04/28/2023	Affirmed
Hefner v. Deutscher	123,719	Shawnee	03/24/2023	Affirmed
Hess v. Phelps	124,376	Pottawatomie	04/28/2023	Appeal dismissed
Hill v. State	125,348	Wyandotte	04/07/2023	Affirmed
In re Adoption of L.M.	125,070	Shawnee	04/28/2023	Affirmed
In re B.W.	125,480	Johnson	04/28/2023	Affirmed
In re C.T.	125,474	Rawlins	03/24/2023	Affirmed
In re Estate of Ballou	125,433	Miami	04/07/2023	Affirmed
In re Estate of Gray	124,085	Sedgwick	03/31/2023	Affirmed
In re J.T.	125,429	Sedgwick	04/14/2023	Affirmed
In re K.B.	125,601	Franklin	04/28/2023	Affirmed
In re K.D.	125,042	Johnson	03/24/2023	Affirmed
In re Marriage of K.U. and C.U.	124,967	Geary	04/07/2023	Affirmed in part; reversed in part; dismissed in part; remanded with directions
In re Marriage of Nance	125,271	Neosho	03/31/2023	Affirmed
In re Marriage of Stallbaumer	124,259	Shawnee	04/14/2023	Affirmed
In re R.G.	125,813 125,814	Leavenworth	04/21/2023	Affirmed
In re Z.L.	125,674	Bourbon	03/24/2023	Affirmed
In re Z.S.	125,707	Sedgwick	04/21/2023	Affirmed
Jones v. State	124,882	Sedgwick	04/14/2023	Affirmed
Nicholson v. Mercer	124,913	Leavenworth	04/14/2023	Affirmed
Orozco v. State	124,311	Sedgwick	03/31/2023	Affirmed in part; dismissed in part
State v. Albers	124,895 124,896	Saline	04/28/2023	Reversed; remanded with directions
State v. Albin	125,114 125,115	Franklin	04/14/2023	Affirmed

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State v. Baker	124,816 124,817	Reno	04/07/2023	Reversed; sentence vacated; remanded with directions
State v. Boles	125,502	Wilson	03/31/2023	Reversed; remanded with directions
State v. Brown	124,996	Harvey	03/24/2023	Sentence vacated in part; remanded with directions
State v. Burns	124,267	Johnson	04/07/2023	Affirmed
State v. Clark	124,497	Sedgwick	03/24/2023	Affirmed
State v. Conner	124,576	Leavenworth	03/24/2023	Convictions affirmed; sentence affirmed in part; vacated in part; case remanded with directions
State v. Crystal	125,422	Crawford	03/31/2023	Affirmed in part; dismissed in part
State v. Dale	125,704 125,705	Sedgwick	03/24/2023	Affirmed
State v. Davis	125,561	Rice	04/21/2023	Affirmed
State v. Devault	125,099	Reno	03/31/2023	Affirmed
State v. Ecklund	125,228	Shawnee	04/07/2023	Appeal dismissed
State v. Gauger	125,411	Leavenworth	03/31/2023	Affirmed
State v. Hallacy	122,431	Sedgwick	04/14/2023	Affirmed
State v. Hambright	124,878	Sedgwick	04/28/2023	Reversed
State v. Harrison	124,490	Wyandotte	04/07/2023	Affirmed
State v. Haynes	125,418	Sedgwick	03/31/2023	Reversed; remanded with directions
State v. Hinojosa	125,193	Leavenworth	04/07/2023	Reversed; remanded
State v. Holloman	125,062	Sedgwick	04/28/2023	Affirmed
State v. Holmes	125,187	Leavenworth	04/28/2023	Reversed; remanded
State v. Ingwersen	124,783	Riley	04/14/2023	Affirmed
State v. Jefferson	125,159	Sedgwick	04/28/2023	Affirmed
State v. Jones	124,699	Sedgwick	03/31/2023	Affirmed
State v. Kiraly	125,190	Reno	04/14/2023	Affirmed
State v. Lacy	125,559	Sedgwick	04/21/2023	Affirmed

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State v. Lara	125,666			
	125,669	Sedgwick	04/21/2023	Affirmed
State v. Llamas	125,487	Sedgwick	03/31/2023	Affirmed
State v. Martin	125,010	Franklin	04/14/2023	Affirmed
State v. Mattox	125,200	Barton	04/14/2023	Affirmed
State v. McDaniel	124,459	Crawford	04/14/2023	Affirmed
State v. Mendez-Rangel	125,572	Ford	03/31/2023	Affirmed
State v. Money	124,268	Butler	04/28/2023	Affirmed
State v. Montemayor	125,257	Haskell	04/28/2023	Affirmed
State v. Morales	125,648	Geary	04/21/2023	Affirmed
State v. Mukes	124,448	Sedgwick	04/28/2023	Affirmed
State v. Neff	125,392			
	125,393	Sedgwick	03/24/2023	Affirmed
State v. Ontiberos	124,623	Ford	04/21/2023	Affirmed
State v. Panjada	125,259	Wyandotte	04/28/2023	Reversed; remanded with directions.
State v. Phillips	125,020	Sedgwick	04/07/2023	Affirmed
State v. Pruitt	125,526	Sedgwick	04/21/2023	Affirmed
State v. Ransdell	124,628	Wyandotte	03/24/2023	Affirmed
State v. Rayford	125,510	Sedgwick	03/24/2023	Affirmed
State v. Reese	125,676	Sedgwick	04/28/2023	Affirmed
State v. Reyes	124,424			Affirmed in part;
	124,425	Riley	04/28/2023	vacated in part
State v. Rodriguez	125,362			
	125,363	Sedgwick	03/24/2023	Affirmed
State v. Shivers	124,778	Johnson	04/14/2023	Affirmed in part; dismissed in part
State v. Soto	125,291	Sedgwick	04/07/2023	Affirmed
State v. Spicer	125,530			Affirmed in part;
	125,531	Brown	03/24/2023	dismissed in part
State v. Villa	125,470			
	125,471	Sedgwick	03/31/2023	Affirmed
State v. Webb (modified op)	124,815	Wyandotte	04/12/2023	Affirmed
State v. Williams	125,047	Sedgwick	03/31/2023	Sentence vacated in part; case remanded with directions
State v. Zeit	125,207	Jackson	03/24/2023	Affirmed
Stevenson v. State	124,380	Gove	03/31/2023	Affirmed in part; remanded with directions
Strauss v. Bath	125,273	Johnson	04/28/2023	Affirmed
Unified Gov't of Wyandotte Co./KCK v. Hulse	124,153	Wyandotte	04/21/2023	Reversed; remanded with directions

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Wells v. Kansas Corporation Comm'n	124,916	Shawnee	03/24/2023	Affirmed
Wells v. Kansas Corporation Comm'n	124,743	Douglas	03/24/2023	Affirmed
White v. Meyer	125,650	Leavenworth	04/07/2023	Affirmed
Williams v. State	125,183	Reno	03/24/2023	Affirmed
Zuern v. RND Underground, Inc.	124,772	Workers Comp. Bd	03/31/2023	Affirmed

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ADMINISTRATIVE LAW:

Burden of Proof of Invalid Agency Action on Challenging Party. The party challenging the validity of an agency's action bears the burden of proving such invalidity under K.S.A. 77-621(a)(1). *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* ……..……..……. 381*

No Deference to Agency's Statutory Interpretation by Appellate Court. The appellate court does not extend deference to an agency's statutory interpretation. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* ……..……..……. 381*

Statutory Limited Review of Agency's Action by District Court and Appellate Court. Appellate courts exercise the same statutorily limited review of the agency's action as does the district court, as though the appeal had been made directly to the appellate court. K.S.A. 77-601 et seq.
Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n ……..……. 381*

APPEAL AND ERROR:

District Court's Grant of Motion to Dismiss for Failure to State a Claim—Appellate Review. Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. An appellate court will view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly show the plaintiff does not have a claim.
League of Women Voters of Kansas v. Schwab ……..…….. 187

APPELLATE PROCEDURE:

Final Decision in Actions Appealed to Court of Appeals by Statute—Exception if Required to Appeal to Supreme Court. A final decision in any action, except in an action where a direct appeal to the Supreme Court is required by law, may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(4).
League of Women Voters of Kansas v. Schwab ……..…….. 187

Order Involving Kansas Constitution Is Appealed to Court of Appeals by Statute. An order that involves the Constitution of this state may be appealed to the Kansas Court of Appeals as a matter of right under K.S.A. 2021 Supp. 60-2102(a)(3).
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ATTORNEY AND CLIENT:

Attorney Fees Mandated by Statute—Court Must Award Fees Based on Statute. When the language of an attorney fees statute makes an award mandatory, the district court has no discretion and must award attorney fees according to the statute. *Wickham v. City of Manhattan* …… 294*

District Court an Expert in Area of Attorney Fees—Determination of Reasonableness of Fee—Consideration of KRPC 1.5(a) Factors. The district court is considered an expert in the area of attorney fees and can draw on and apply its own knowledge and expertise in evaluating their worth. However, in determining the reasonableness of a requested attorney fee, the factors in Kansas Rule of Professional Conduct 1.5(a) (2023 Kan. S. Ct. R. at 333) should be considered. *City of Atchison v. Laurie* …..... 310*

District Court's Authority to Grant Attorney Fees—Appellate Review. When a district court has the authority to grant attorney fees, its decision whether to award fees is reviewed for an abuse of discretion. *Wickham v. City of Manhattan* ……..… 294*

CITIES AND MUNICIPALITIES:

Conditional-Use Permits Issued by Governing Bodies—Must Be Issued in Compliance with Statute. Since our Supreme Court has held governing bodies must follow the procedures laid out in K.S.A. 2021 Supp. 12-757 when issuing conditional-use permits, conditional-use permits which were not issued in compliance with this statute are void and unenforceable. *American Warrior, Inc. v. Board of Finney* ……..…… 123

Statutory Notice Provision Not Prerequisite to Contract Claim. Substantial compliance with the notice provisions of K.S.A. 12-105b(d) is not a prerequisite to bringing a contract claim against a municipality. *City of Atchison v. Laurie* ……..……. 310*

CIVIL PROCEDURE:

Accrual of Cause of Action under K.S.A. 60-513(b). Under K.S.A. 60-513(b), a cause of action accrues as soon as the right to maintain a legal action arises; that is, when the plaintiff could first have filed and prosecuted his or her action to a successful conclusion. *Lopez v. Davila* ……..……. 147

Actions Are Prosecuted in Name of Real Party in Interest. An action must be prosecuted in the name of the real party in interest. If a city violates a detainee's constitutional rights, then the city is liable to the detainee for damages, not the county sheriff. *City of Atchison v. Laurie* …..……. 310*

Award of Attorney Fees under Statute—Application to Municipalities. The plain language of K.S.A. 2022 Supp. 60-2006, that calls for the award of attorney fees as costs in certain cases, does not bar application of the statute to property damage cases of first impression, or in property damage lawsuits involving municipalities. Cities are not immune from its rule. *Wickham v. City of Manhattan* …….. 294*

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Commencement of Limitations Period under K.S.A. 60-513(b)— Three Triggering Events. Under K.S.A. 60-513(b), we review three triggering events to determine when the limitations period commences: (1) the act which caused the injury; (2) the existence of a substantial injury; and (3) the victim's awareness of the fact of injury. Without the existence of a substantial injury, though, the consideration of the reasonably ascertainable nature of the injury is irrelevant. *Lopez v. Davila* ……... 147

Motion for Dismissal by Defendant—District Court Resolves Factual Disputes in Plaintiff's Favor. When a defendant moves for dismissal under K.S.A. 60-212(b)(6), the district court must resolve every factual dispute in the plaintiff's favor. The court must assume all the allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim based on the plaintiff's theory or any other possible theory. Dismissal is improper when the well-pleaded facts and inferences state *any* claim upon which relief can be granted.
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Motion to Dismiss—District Court's Considerations. In most instances, a district court ruling on a motion to dismiss may only consider the plaintiff's petition and any documents attached to it. But when a petition refers to an unattached document central to the plaintiff's claim, a defendant may submit—and a court may consider—an undisputedly authentic copy of the document without transforming the motion to dismiss into a motion for summary judgment. *Minjarez-Almeida v. Kansas Bd. of Regents* ..….. 225*

Negligence Claims—Accrual of Cause of Action under K.S.A. 60-513(b). Under K.S.A. 60-513(b), the cause of action listed in K.S.A. 60-513(a) "shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party." *Lopez v. Davila* ……...…. 147

— File within Two Years from Negligent Act. Under K.S.A. 60-513(a)(4), a plaintiff must commence his or her negligence claims within two years from the date of the negligent act. *Lopez v. Davila* …..…..…. 147

Notice Pleading in Kansas—Ultimate Decision of Legal Issues and Theories in a Case Is Pretrial Order. Under Kansas' notice pleading, the petition is not intended to govern the entire course of the case. Rather, the ultimate decision as to the legal issues and theories on which the case will be decided is the pretrial order.
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Requirement of Plaintiff's Petition—Statement of Claim Giving Fair Notice to Defendant. The Kansas rules of civil procedure require a plaintiff's petition to include a short and plain statement of a claim that will give

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the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests. *Minjarez-Almeida v. Kansas Bd. of Regents* ……..…. 225*

Substantial Injury Definition—Actionable Injury. The term "substantial injury" in K.S.A. 60-513(b) means the victim must have reasonably ascertainable injury to justify an action for recovery of damages; in other words, an "actionable injury." *Lopez v. Davila* ……..…. 147

Venue Is Procedural Matter—Considerations of Venue. Venue describes the proper or possible place for a lawsuit to proceed. Venue is not a jurisdictional matter, but a procedural one. Considerations of venue involve practical and logistical aspects of litigation—the convenience of the parties and witnesses and the interests of justice. *In re Estate of Raney* ……..….. 43

CONSTITUTIONAL LAW:

Burden of Proof on Party Asserting Takings Claim. The burden of proving that the taking is confiscatory is on the party asserting the takings claim. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* ……..……. 381*

Claim of Excessive Force during Seizure—Analysis under Fourth Amendment's Objective Reasonableness Standard. The United States Supreme Court has held that all claims that law enforcement used excessive force during a seizure should be analyzed under the Fourth Amendment's objective reasonableness standard. *State v. Cline* ……..... 167

Constitutions Do Not Prohibit Use of Evidence Obtained in Violation of Provisions—Exclusionary Rule Created as Deterrent by United States Supreme Court. Neither the Fourth Amendment to the United States Constitution nor section 15 of the Kansas Constitution Bill of Rights expressly prohibits the use of evidence obtained in violation of their respective provisions. Instead, to supplement the bare text of the Fourth Amendment, the United States Supreme Court created the exclusionary rule as a deterrent barring the introduction of evidence obtained in violation of the Fourth Amendment in criminal prosecutions. The exclusionary rule is not an individual right and applies only when it results in appreciable deterrence. *State v. Cline* ……..…….... 167

Determination Whether Reasonable Seizure—Application of Test Balancing Nature and Quality of Intrusion on Individual against Governmental Interest. Determining whether the force used to carry out a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. The proper application of this test requires careful attention to the facts and circumstances of each case. *State v. Cline* ……..... 167

Fifth Amendment's Takings Clause—Application to State and Local Government Entities Through Fourteenth Amendment. The Fifth Amendment to the United States Constitution prohibits the taking of private

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property for public use without just compensation. The protections of the Takings Clause apply to the actions of state and local government entities through the Fourteenth Amendment to the United States Constitution.
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Objective Facts to Support Public-safety Stop Required to Comport with Fourth Amendment. To comport with the Fourth Amendment to the United States Constitution, public-safety encounters must be supported by objective, specific, and articulable facts which suggest the stop is necessary to serve a caretaking function. *State v. McDonald* 75

Presumption State Action Is Constitutional—Dilutes Constitutional Protections. Presuming a state action alleged to infringe a fundamental right is constitutional dilutes the protections established by our Constitution. *League of Women Voters of Kansas v. Schwab* 187

Protection from Unreasonable Searches and Seizures under Both Constitutions. Both the United States and Kansas Constitutions protect against unreasonable searches and seizures. *State v. Cline* 167

Reduction of Utility's Profit or Rate of Return Does Not Establish Taking. The mere reduction of a utility's profit or rate of return by some unproven amount does not, without more, establish an unconstitutional taking. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* 381*

Right to Testify on One Own's Behalf at Criminal Trial—Due Process Right. The right to testify on one's own behalf at a criminal trial is a right essential to due process of law in an adversary process.
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Right to Vote Is Foundation of Representative Government. The right to vote is the foundation of a representative government that derives its power from the people. All basic civil and political rights depend on the right to vote. *League of Women Voters of Kansas v. Schwab* 187

Right to Vote Is Fundamental Right under Kansas Constitution— Application of Rule of Strict Scrutiny. The right to vote is a fundamental right protected by the Kansas Constitution. The rule of strict scrutiny applies when a fundamental right is implicated. The rule of strict scrutiny applies here. *League of Women Voters of Kansas v. Schwab* 187

Supreme Court Holding that Legislature Must Not Deny or Impede Constitutional Right to Vote. The Kansas Supreme Court has held that the Legislature "must not, directly or indirectly, deny or abridge the constitutional right of the citizen to vote or unnecessarily impede the exercise of that right." *State v. Beggs*, 126 Kan. 811, 816, 271 P. 400 (1928).
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CONTRACTS:

Breach of Contract Claim against University—Requirements. To maintain a breach-of-contract claim against a university, a plaintiff must do more than simply allege that the education was not good enough. But contract claims are not educational-malpractice claims when they point to an identifiable contractual promise that the university failed to honor.
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CRIMINAL LAW:

Admissibility of Prior Crimes—Evidence of Sexual Misconduct Must be in 60-455(g) Listing of Acts or Offenses to Be Admissible under 60-455(d). K.S.A. 2021 Supp. 60-455(g) provides an exclusive listing of the acts or offenses which constitute an "'act or offense of sexual misconduct'" as that term is used in K.S.A. 2021 Supp. 60-455(d). Therefore, evidence of the defendant's commission of another act or offense of sexual misconduct must satisfy subsection (g)'s definition before it can be admissible under subsection (d). *State v. Scheetz* ……..……. 1

Claim of Multiple Acts Issue—Challenge to Sufficiency of Evidence. The defendant's claim that the State both submitted evidence of multiple acts but failed to present sufficient evidence from which a jury could unanimously agree on the underlying act supporting each conviction, and that the unanimity instruction did not cure the multiple acts issue, is essentially a challenge to the sufficiency of the evidence and not a constitutional challenge to the unanimity of the verdict. *State v. Ninh* ……..…….. 91

Conviction for Rape and Aggravated Criminal Sodomy—No Evidence Required to Be Presented Defendant Made Verbal Threat of Specific Harm. In convicting a defendant for rape and aggravated criminal sodomy, a rational fact-finder may find that a victim was sufficiently overcome by an expressed fear of specific harm even when no evidence is presented that the defendant ever made verbal threats of that same specific harm.
State v. Ninh …….. 91

Court's Discretion to Order Competency Evaluation for Defendant—Appellate Review. A district court has the discretion to order a competency evaluation for a criminal defendant on its own initiative when it has a real doubt that the offender possesses the sanity or mental capacity to properly defend his or her case. The court's decision on the matter will not be disturbed absent a clearly demonstrated abuse of its sound judicial discretion.
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Mistreatment of Dependent Adult—Criminal Prosecution for Neglect. When a dependent adult living in a private residence is unable to tend to their own needs, and the person caring for them neglects to provide or withholds life-sustaining care, with an awareness that such care is required, that caretaker may be subject to criminal prosecution for such neglect.
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— Neglect to Provide Life-Sustaining Care to Point of Death—Criminal Prosecution for Unintentional Reckless Second-degree Murder. When an individual assumes sole responsibility for the physical and mental health of a dependent adult, but neglects to provide or withholds such life-sustaining care to the point of death, that individual may be subject to criminal prosecution for the unintentional, reckless second-degree murder of that dependent adult. *State v. Burris* ……..……..…….. 250*

— No Requirement that State Prove Independent Legal Duty to Victim. Mistreatment of a dependent adult does not require the State to prove that the offender had any independent legal duty to the victim. Once a person affirmatively assumes the role of caregiver to a dependent adult, and discourages or precludes others from filling that role, that person has the responsibility to act reasonably in fulfilling the obligations required of that role. *State v. Burris* ……..…….. 250*

— Statutory Definition. Mistreatment of a dependent adult includes knowingly omitting or depriving an individual 18 years of age or older, who is cared for in a private residence, of the treatment, goods, or services necessary to maintain their physical or mental health when that individual is unable to protect his or her own interests. *State v. Burris* …...…….. 250*

No Requirement of Explicit Threats to Prove Victim Was Overcome by Force or Fear. The State is not required to prove the defendant made explicit threats of physical force or violence in order to prove the victim of rape or aggravated criminal sodomy was overcome by force or fear. *State v. Ninh* …….. 91

Prosecutorial Error—Misstating Law if Characterize Grooming as Force Sufficient to Sustain Conviction for Rape or Aggravated Criminal Sodomy. It is error for a prosecutor to misstate the law by characterizing "grooming" as a form of force sufficient to sustain a defendant's conviction for rape or aggravated criminal sodomy in violation of K.S.A. 2021 Supp. 21-5503(a)(1)(A) and K.S.A. 2021 Supp. 21-5504(b)(3)(A). *State v. Ninh* …….. 91

Sixth Amendment Right to Jury Trial—Incorporated to State Criminal Prosecutions—Right to Unanimous Verdict in Federal as well as State Court Defendants. The Sixth Amendment right to a jury trial in federal criminal cases is incorporated, via the Fourteenth Amendment, to state criminal prosecutions thus extending the Sixth Amendment right to a unanimous verdict in federal criminal proceedings to state court criminal defendants. *State v. Ninh* …….. 91

Statutory Definition of Aggravated Criminal Sodomy When Victim Is Overcome by Force or Fear—Not Unconstitutionally Vague. K.S.A. 2021 Supp. 21-5503(b)(3)(A), the statute defining aggravated criminal sodomy when the victim is overcome by force or fear, is not rendered unconstitutionally vague by inclusion of language prohibiting a defendant from asserting that they "did not know or have reason to know that the victim did

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not consent to the sexual intercourse, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5504(f). The statute gives fair warning of what is prohibited conduct and avoids arbitrary and unreasonable enforcement by leaving intact the State's burden to prove a victim was overcome by force or fear.
State v. Ninh 91

Statutory Definition of Lewd and Lascivious Behavior—Presence Defined. The term "presence" in the statutory definition of the crime of lewd and lascivious behavior, under K.S.A. 2021 Supp. 21-5513(a)(2), requires exposure of a sex organ within another's physical presence, so the digital transmission of a picture of a sex organ to another would not qualify.
State v. Scheetz 1

Statutory Definition of Rape When Victim Is Overcome by Force or Fear—Not Unconstitutionally Vague. K.S.A. 2021 Supp. 21-5503(a)(1)(A), the statute defining rape when the victim is overcome by force or fear, is not rendered unconstitutionally vague by inclusion of language prohibiting a defendant from asserting that they "did not know or have reason to know that the victim did not consent to the sexual intercourse, that the victim was overcome by force or fear, or that the victim was unconscious or physically powerless." K.S.A. 2021 Supp. 21-5503(e). The statute gives fair warning of what is prohibited conduct and avoids arbitrary and unreasonable enforcement by leaving intact the State's burden to prove a victim was overcome by force or fear. *State v. Ninh* 91

Trial—Prosecutor's Reference to Defendant as Rapist Not Error. The prosecutor's reference to the defendant as a rapist during closing argument was not error when arguing that the evidence presented demonstrates the defendant committed rape. *State v. Ninh* 91

Victim's Fear Family Would Be Harmed Is Sufficient to Find Victim Was Overcome by Force or Fear—Sustained Conviction for Rape or Aggravated Criminal Sodomy. A victim's expressed fear that their family stability or structure would be harmed if they did not submit to being raped or sodomized is sufficient for a rational fact-finder to find the victim was overcome by force or fear to sustain a defendant's conviction for rape or aggravated criminal sodomy. *State v. Ninh* 91

EQUITY:

Equitable Doctrine of Quantum Meruit—Definition and Requirements. Quantum meruit is an equitable doctrine based on a promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to that person. It requires a benefit conferred by the person claiming quantum meruit, an appreciation or knowledge of the benefit by the recipient of the benefit, and the acceptance or retention by the recipient of the benefit under circumstances that make it inequitable for the recipient to retain the benefit without payment of its value.
Krigel & Krigel v. Shank & Heinemann 344*

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ESTOPPEL AND WAIVER:

Waiver Is Intentional Relinquishment of Known Right—Explicit or Implied from Conduct or Inaction of Holder—Requirements. Waiver is the intentional relinquishment of a known right. A waiver can be explicit or it can be implied from the conduct or inaction of the holder of the right. Waiver must be manifested in some unequivocal manner by some distinct act or by inaction inconsistent with an intention to claim a right. While waiver may be implied from acts or conduct warranting an inference of relinquishment of a right, there must normally be a clear, unequivocal, and decisive act of the relinquishing party.
Krigel & Krigel v. Shank & Heinemann 344*

EVIDENCE:

Interlocutory Appeal Proper if Pretrial Order Suppresses or Excludes Evidence—Considerations. An interlocutory appeal by the State is proper when a pretrial order suppressing or excluding evidence substantially impairs the State's ability to prosecute a case. In determining whether evidence substantially impairs the State's ability to prosecute a case, we consider both the State's burden of persuasion and its burden of production.
State v. Martinez-Diaz 363*

Testimonial Hearsay Is Inadmissible—Exception. To protect a defendant's constitutional confrontation rights, testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *State v. Martinez-Diaz* 363*

JURISDICTION:

Kansas District Courts have General Original Jurisdiction over All Civil and Criminal Matters. Kansas district courts have general original jurisdiction over all matters, both civil and criminal, unless otherwise provided by law. This means that a district court has jurisdiction to hear all subject matters unless the legislature provides that it does not or that jurisdiction lies elsewhere. *In re Estate of Raney* 43

Organization Suffers Cognizable Injury if Defendant's Action Impairs Its Ability to Carry Out Activities. An organization has suffered a cognizable injury when the defendant's action impairs the organization's ability to carry out its activities and the organization must divert resources to counteract the defendant's action. *League of Women Voters of Kansas v. Schwab* 187

Party Must Demonstrate Standing—Cognizable Injury and Causal Connection Requirements. To demonstrate standing, a party must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. A cognizable injury occurs when the party personally suffers an actual or threatened injury as a result of the challenged conduct. A threatened injury must be "impending" and "probable."
League of Women Voters of Kansas v. Schwab 187

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Subject Matter Jurisdiction—Court's Power to Hear and Decide Particular Type of Action. Subject-matter jurisdiction is the power of a court to hear and decide a particular type of action. Kansas district courts' general original jurisdiction includes the authority to hear probate proceedings. *In re Estate of Raney* 43

KANSAS CONSTITUTION:

Grant of Judicial Power of State to Courts—Definition of Standing. Article 3, section 1 of the Kansas Constitution grants the "judicial power" of the state to the courts. Judicial power is the power to hear, consider, and determine "controversies" between litigants. For an actual controversy to exist, a petitioner must have standing. Standing "means the party must have a personal stake in the outcome." Standing is a component of subject matter jurisdiction. It presents a question of law and can be raised at any time.
League of Women Voters of Kansas v. Schwab ……..…….…….. 187

KANSAS CORPORATION COMMISSION:

Constitutional Protection for Utilities. The guiding principle in utility cases has been that the Constitution protects utilities from being limited to a charge for the property serving the public which is so unjust as to be confiscatory. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* ……..……..…… 381*

Regulation of Utilities Can Diminish Value Creating Compensable Taking. The government regulation of privately owned utilities can diminish the utilities' value to a degree creating a constitutionally compensable taking. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* ……..……..…… 381*

LEGISLATURE:

Claims Based on Express Contract—Exception to Statutory Procedures. Claims arising from express contracts are not subject to the procedure set forth in K.S.A. 46-903 and K.S.A. 46-907.
Minjarez-Almeida v. Kansas Bd. of Regents ……. 225*

Claims Based on Implied Contracts against the State—Statutory Requirements. The Kansas Supreme Court has interpreted K.S.A. 46-903 and K.S.A. 46-907 to create a statutory requirement that claims based on implied contracts must be submitted to and considered by the Joint Committee on Special Claims before those claims may be presented in a lawsuit.
Minjarez-Almeida v. Kansas Bd. of Regents ……. 225*

KANSAS OFFENDER REGISTRATION ACT:

Crime of Involuntary Manslaughter While Driving under Influence of Alcohol Excluded from Requirement of Registration. Any violation of K.S.A. 2020 Supp. 21-5405(a)(3), as it existed both before and after July 1, 2011, is excluded from the list of enumerated offenses that trigger automatic registration as a violent offender under the Kansas Offender Registration Act. *State v. Buzzini* …...… 335*

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MANDAMUS:

Writ of Mandamus—Definition. A writ of mandamus seeks to enjoin an individual or to enforce the personal obligation of the individual to whom it is addressed and is appropriate where the respondent is not performing or has neglected or refused to perform an act or duty, the performance of which the petitioner is owed as a clear right. *City of Atchison v. Laurie* …….. 310*

MOTOR VEHICLES:

Statutory Definition of Operating Vehicle. A driver who is in actual physical control of the machinery of a vehicle, causing such machinery to move by engaging the transmission and pressing the gas pedal, is operating the vehicle within the meaning of K.S.A. 2020 Supp. 8-1002(a)(2)(A).
Jarmer v. Kansas Dept. of Revenue ……...……...…… 37

PHYSICIANS AND SURGEONS:

Medical Malpractice Action—Requirements for Proof under Kansas Law. Under Kansas law, a patient bringing a medical malpractice action against a physician must prove: (1) the physician owed the patient a duty of care; (2) the physician's actions in caring for the patient fell below professionally recognized standards; (3) the patient suffered injury or harm; and (4) the injury or harm was proximately caused by the physician's deviation from the standard of care.
Miller v. Hutchinson Regional Med. Center ……...…….. 57

Medical Negligence Action—Existence of Physician-Patient Relationship—Question of Fact for Jury. In a medical negligence action, the existence of a physician-patient relationship typically presents a question of fact for the jury to answer. *Miller v. Hutchinson Regional Med. Center* ……...…..... .57

— If No Physician-Patient Relationship Established—Grant of Summary Judgment for Defendant. If a plaintiff is given the benefit of every dispute in the relevant evidence, the district court may grant summary judgment for the defendant in a medical negligence action so long as no reasonable jury could conclude a physician-patient relationship had been established.
Miller v. Hutchinson Regional Med. Center…….. 57

— No Duty of Care if No Legal Physician-Patient Relationship. Without a legally recognized physician-patient relationship, there is no duty of care for purposes of establishing medical negligence.
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— Under These Facts District Court Erred. On the particular facts presented, the district court erred in finding no physician-patient relationship existed and granting summary judgment on that basis.
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POLICE AND SHERIFFS:

Sheriff's Statutory Duty to Keep All Prisoners Safely. The sheriff or the keeper of the jail in any county of the state shall receive all prisoners committed to the sheriff's or jailer's custody by the authority of the United States or by the authority of any city located in such county and shall keep them safely in the same manner as prisoners of the county until discharged in accordance with law. K.S.A. 19-1930(a). *City of Atchison v. Laurie* … 310*

Statutory Requirement of Sheriff to Accept Detainees without Exceptions. K.S.A. 19-1930(a) requires a county sheriff to accept detainees without exceptions. This court cannot rewrite the provision to include an exception where the sheriff of a county believes a detainee requires medical attention prior to being booked into the jail. It is solely within the bailiwick of the Legislature to amend the statute should it see fit to include such an exception. *City of Atchison v. Laurie* …… 310*

PROBATE CODE:

Venue under K.S.A. 59-2203 in Probate Cases. K.S.A. 59-2203 governs venue in probate cases; it does not confer or otherwise affect district courts' subject-matter jurisdiction over probate cases. *In re Estate of Raney* …... 43

PUBLIC HEALTH:

Immunity under Federal PREP ACT—Failure to Obtain Parental Consent by Covered Person before COVID Vaccine Covered under PREP Act. Failure to obtain parental consent by a covered person before administering the Pfizer COVID-19 vaccine to a minor has a causal relationship with the administration of the vaccine and is thus covered under the PREP Act. *M.T. v. Walmart Stores, Inc*. ……..…… 401*

Immunity under Federal PREP Act for Covered Persons from Liability for Claim under Federal Statute. The Public Readiness and Emergency Preparedness (PREP) Act immunizes "covered persons" from liability for any claim for loss that has a causal relationship with the administration of a "covered countermeasure." 42 U.S.C. § 247d-6d(a), (d) (Supp. 2020). *M.T. v. Walmart Stores, Inc*. ……..…… 401*

SEARCH AND SEIZURE:

Legality of Public-Safety Stop—Three-Part Test to Assess Legality. A three-part test is utilized to assess the legality of a public-safety stop: (1) If there are objective, specific, and articulable facts from which an officer would suspect that a person is in need of assistance then the officer may stop and investigate; (2) if an individual requires assistance the officer may take appropriate action to render assistance; and (3) once an officer is assured the individual is no longer in need of assistance or that the peril has been mitigated, any actions beyond that constitute a seizure triggering the protections provided by the Fourth Amendment. *State v. McDonald* ..… 75

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No Reasonable Suspicion of Criminal Activity Required before Public-Safety Stop. A law enforcement officer is not required to possess reasonable suspicion of criminal activity prior to performing a public-safety stop.
State v. McDonald 75

Seizure of Person under Kansas Law—Reasonable Person Not Free to Leave and Submits to Show of Authority. Kansas law is clear that a seizure of a person occurs if there is the application of physical force or if there is a show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is not free to leave, and the person submits to the show of authority.
State v. Cline 167

STATUTES:

Construction of Statute—Intent of Legislature Governs—Appellate Review. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n* 381*

Construction of Statutes—Intent of Legislature Governs—Appellate Review. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first seek to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings.
Wickham v. City of Manhattan 294*

Interpretation of Statute—Appellate Review. Statutory interpretation presents a question of law over which appellate courts have unlimited review.
Blue Valley Tele-Communications, Inc. v. Kansas Corporation Comm'n 381*

Statutory Use of "Shall"—Four Factors to Determine if "Shall" Is Mandatory or Directory. There are four factors to consider in determining whether the use of "shall" is mandatory or directory: (1) legislative context and history; (2) the substantive effect on a party's rights versus merely form or procedural effect; (3) the existence or nonexistence of consequences for noncompliance; and (4) the subject matter of the statutory provision.
City of Atchison v. Laurie 310*

SUMMARY JUDGMENT:

Court Must Resolve Inferences from Evidence in Favor of Defending Party. In summary judgment proceedings the district court must resolve all reasonable inferences drawn from the evidence in favor of the party against whom summary judgment is sought.
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TORTS:

Educational Malpractice Tort Not Recognized in Kansas. Kansas does not recognize a tort of educational malpractice.
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TRIAL:

Denial of Right to Testify Not Structural Error—Appellate Review. Denial of the right to testify is not a structural error requiring reversal. Instead, courts apply a harmless error analysis to determine whether the denial affected the outcome of the trial beyond a reasonable doubt.
State v. Cantu …… 276*

Jury Trial—Prosecutor has Wide Latitude in Closing Argument. A prosecutor is afforded wide latitude in summarizing their case to a jury in closing argument. Discussion of the wedding vows taken between a dependent adult and their caregiver strains the bounds of that latitude to impermissibly play upon the passion and prejudice of the jury. *State v. Burris* 250*

Refusal to Testify by Witness—Unavailable Witness for Purpose of Confrontation Clause. A witness who refuses to testify because he claims his or her trial testimony might subject him or her to a charge of perjury is an unavailable witness for purposes of the Confrontation Clause.
State v. Martinez-Diaz ……..… 363*

Right to Testify in Criminal Case May Be Waived or Forfeited. A defendant may waive or forfeit the right to testify in a criminal case either intentionally or by conduct. *State v. Cantu* ……..…….. 276*

Warning to Disruptive Witness that Testimony May Be Stricken—Factor for Consideration. Although warning a disruptive witness that their testimony may be stricken is not mandatory in Kansas, it is a factor that should be considered as part of the totality of the circumstances.
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(527 P.3d 931)

NO. 124,475

AZRIEL MINJAREZ-ALMEIDA and ANDREA VIERTHALER, Individually and on Behalf of All Others Similarly Situated, *Appellants*, v. KANSAS BOARD OF REGENTS, *Defendant*, and KANSAS STATE UNIVERSITY, *Appellee*.

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Requirement of Plaintiff's Petition—Statement of Claim Giving Fair Notice to Defendant.* The Kansas rules of civil procedure require a plaintiff's petition to include a short and plain statement of a claim that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.

2. SAME—*Motion for Dismissal by Defendant—District Court Resolves Factual Disputes in Plaintiff's Favor.* When a defendant moves for dismissal under K.S.A. 60-212(b)(6), the district court must resolve every factual dispute in the plaintiff's favor. The court must assume all the allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim based on the plaintiff's theory or any other possible theory. Dismissal is improper when the well-pleaded facts and inferences state *any* claim upon which relief can be granted.

3. LEGISLATURE—*Claims Based on Implied Contracts against the State—Statutory Requirements.* The Kansas Supreme Court has interpreted K.S.A. 46-903 and K.S.A. 46-907 to create a statutory requirement that claims based on implied contracts must be submitted to and considered by the Joint Committee on Special Claims before those claims may be presented in a lawsuit.

4. SAME—*Claims Based on Express Contract— Exception to Statutory Procedures.* Claims arising from express contracts are not subject to the procedure set forth in K.S.A. 46-903 and K.S.A. 46-907.

5. CIVIL PROCEDURE—*Motion to Dismiss—District Court's Considerations*. In most instances, a district court ruling on a motion to dismiss may only consider the plaintiff's petition and any documents attached to it. But when a petition refers to an unattached document central to the plaintiff's claim, a defendant may submit—and a court may consider—an undisputedly authentic copy of the document without transforming the motion to dismiss into a motion for summary judgment.

6. TORTS—*Educational Malpractice Tort Not Recognized in Kansas*. Kansas does not recognize a tort of educational malpractice.

7. CONTRACTS—*Breach of Contract Claim against University—Requirements.* To maintain a breach-of-contract claim against a university, a plaintiff must do more than simply allege that the education was not good enough. But contract claims are not educational-malpractice claims when they point to an identifiable contractual promise that the university failed to honor.

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Opinion filed March 24, 2023. Affirmed in part, reversed in part, and remanded with directions.

Larkin Walsh, *W. Greg Wright*, *Rex A. Sharp*, and *Charles T. Schimmel*, of Sharp Law, LLP, of Prairie Village, and *Michael A. Tompkins*, pro hac vice, of Leeds Brown Law, P.C., of Carle Place, New York, for appellants.

Anthony F. Rupp, *Daniel Buller*, and *Nancy Musick*, of Foulston Siefkin, LLP, of Overland Park, and *Holly A. Dyer*, of the same firm, of Wichita, for appellee.

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

WARNER, J.: In March 2020, the COVID-19 pandemic upended everyday life. In Kansas, in an effort to contain the spread of COVID-19, Governor Laura Kelly issued an emergency declaration and later a statewide stay-at-home order. Riley County, the home of Kansas State University's main campus in Manhattan, quickly followed with its own stay-at-home order. Across the country and around the world, offices and shops shuttered, courts closed, and classrooms emptied.

Life at universities was cast into uncharted territory. Colleges closed their campus facilities and residence halls. Students who had paid their tuition and fees for the semester and had attended classes in person for two months were directed to leave the campus and resume their studies online. It is safe to say that almost no one—not the university faculties, students, or administrations—had anticipated this unprecedented shift. Students' experience during the Spring 2020 semester was vastly different from the experience they envisioned when they paid their tuition and fees. But does that mean the students did not get what they paid for?

These consolidated cases present two putative class actions against Kansas State University, or K-State, by former students seeking partial fee and tuition refunds from the Spring 2020 semester because of pandemic-related campus closures. The district

court dismissed the lawsuits, finding the students' petitions did not state any valid claim for relief. After reviewing the record and the parties' arguments, we find that the district court properly dismissed the students' claims for unjust enrichment or money had and received. But the students' petitions stated plausible claims for breach of contract that should have been permitted to proceed. We thus reverse the portion of the district court's decision dismissing the students' breach-of-contract claims and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Azriel Minjarez-Almeida, Andrea Vierthaler, Noah Plank, and John Garfolo are former K-State undergraduate students who were seniors during the Spring 2020 semester. They paid tuition and various university fees for that semester. In March 2020, K-State suspended in-person classes and began transitioning to a remote format as part of its pandemic response. It cancelled other in-person events and activities on campus, moved students out of dorms, and generally shut down campus facilities. K-State's president announced that "[u]ntil further notice," there would be "no in-person, student-facing operations on [K-State] campuses." With few exceptions, students had to leave campus for the remainder of the semester.

Despite these disruptions, Minjarez-Almeida, Vierthaler, Plank, and Garfolo all completed their coursework and graduated at the end of the semester. This appeal follows from two lawsuits the students filed during the months after graduation—one seeking reimbursement of university fees after the March 2020 campus closures and one seeking partial refunds for tuition during the same period.

The Fee Lawsuit

Minjarez-Almeida and Vierthaler—the Fee Plaintiffs—sued K-State and the Kansas Board of Regents (the governing body that oversees Kansas state universities and colleges) in July 2020. The Fee Plaintiffs brought claims for breach of contract, unjust enrichment, conversion, and money had and received against K-State. They also asserted all these claims, except breach of contract,

against the Board of Regents. Broadly speaking, the Fee Plaintiffs alleged that K-State had closed campus facilities and denied access to campus services for roughly half the Spring 2020 semester but had not refunded the student fees for that period.

The Fee Plaintiffs attached to their petition K-State's 2019-2020 Comprehensive Tuition and Fee Schedule, a document the school publishes on its website that outlines the various tuition and fees students must pay. This Schedule has separate sections for "on-campus" students and "online" students, with different fees and costs for each category. Most of the fees listed on the Schedule simply have a fee title and an amount, without an explanation of what the fee is for. That said, the Schedule does include a section outlining "Mandatory Fees" for on-campus students at K-State's three campuses; there are no mandatory fees for online students.

One of the mandatory fees for on-campus students at K-State's Manhattan campus is a "Privilege Fee." The Schedule indicates that students are exempt from paying this fee if they are "only enrolled in on-campus courses held more than 30 miles from campus and residing outside of a 30-mile radius of the Manhattan campus." The Schedule also states that students who do not pay the Privilege Fee are "ineligible to use campus services such as Lafene Health Center and Peters Recreation Complex."

In the Fee Petition's breach-of-contract claim, the plaintiffs alleged that they "entered into contractual agreements" with K-State, in which the plaintiffs "would pay fees for or on behalf of students, and in exchange, K-State would provide facilities, activities, services, and resources to students." They alleged that K-State did not provide the services and facilities they paid fees to access during the second half of the Spring 2020 semester. The Fee Plaintiffs sought—individually and on behalf of other similarly situated students—a pro-rata reimbursement of their Spring 2020 fees for the period when those services and facilities were no longer available.

The Tuition Lawsuit

A couple of months after the Fee Plaintiffs filed their petition, Plank and Garfolo—the Tuition Plaintiffs—also sued K-State and the Board of Regents. The Tuition Plaintiffs' first amended petition generally asserted that the students had enrolled in, and paid

tuition for, in-person coursework for the Spring 2020 semester, but the university had unilaterally altered the nature of their classes in March of that year. The Tuition Plaintiffs asserted that "[t]he online learning options being offered to Kansas State's students are sub-par in practically every aspect" compared to a traditional in-person education. They cited a lack of teacher-student interaction and claimed to "have been deprived of the opportunity for collaborative learning and in-person dialogue, feedback, and critique" because of the shift online, along with losing physical access to campus facilities.

Similar to the Fee Plaintiffs, the Tuition Plaintiffs brought claims for breach of contract, conversion, unconstitutional taking, and unjust enrichment. For their contract claim, the Tuition Petition asserted that K-State had "entered into contractual arrangements with [the plaintiffs] to provide educational services, experiences, opportunities, and related services" for the Spring 2020 semester. They also asserted that K-State treated this agreement as a contract and assessed late fees when the students' tuition was not paid on time. The Tuition Plaintiffs sought pro-rata refunds of the tuition they paid for the Spring 2020 semester after the university ceased in-person instruction and facility access in March 2020.

Consolidation and Motions to Dismiss

The Fee Plaintiffs' and Tuition Plaintiffs' petitions thus alleged the existence of contractual agreements between the students and K-State. The petitions did not provide greater detail about those agreements, including whether the agreements were written or implied from the surrounding circumstances. Instead, the petitions stated more generally that the students "entered into contractual agreements" and "entered into a binding contract" with K-State. Given these and other commonalities, the district court consolidated the two cases over the respective plaintiffs' objections.

K-State and the Board of Regents then moved to dismiss all claims against them, arguing the plaintiffs had failed to state any claim on which relief could be granted under K.S.A. 60-212(b)(6). Relevant here, K-State argued that the students had failed to allege

the existence of a contract and that their contract claims were really impermissible educational-malpractice claims. K-State also argued that any implied-contract claims were barred because they had not first been submitted to a special legislative committee—the Joint Committee on Special Claims—which is a statutory prerequisite for asserting these claims against a state agency.

During its briefing on these motions, K-State produced two documents that were not attached to the plaintiffs' petitions: an excerpt from the online course catalog and a Financial Responsibility Agreement from the university's website. The university asserted that the catalog incorporated the Tuition and Fee Schedule attached to the Fee Petition; the attached excerpt from the catalog cautioned that "[t]he material in this catalog is provided for informational purposes and does not constitute a contract." The catalog went on to state that "courses, curricula, degree requirements, fees, and policies are subject to constant review and change without notice."

The second document K-State produced—the Financial Responsibility Agreement (or FRA)—stated that when students registered for a class or received a service from K-State, they agreed to pay the associated tuition, fees, and costs. It further explained that registration and acceptance of these terms created an agreement under which students paid "tuition, fees, and other associated costs" in exchange for "educational services" from the university. The FRA also contained a merger clause, stating that "[t]his agreement supersedes all prior understandings, representations, negotiations and correspondence between the student and Kansas State University, constitutes the entire agreement between the parties with respect to the matters described, and shall not be modified or affected by any course of dealing or course of performance." It notes, however, that K-State may modify the terms of the FRA "if the modification is signed by" the student.

Neither the Fee Petition nor the Tuition Petition mentioned the FRA. Initially, all plaintiffs urged the district court to disregard that document, as it was outside the pleadings and thus should not be considered at the motion-to-dismiss stage. At oral argument before this court, an attorney for the plaintiffs stated that the plaintiffs were unaware of the FRA when they filed the lawsuits and

only learned of the document when K-State attached it to its motion to dismiss in the Tuition Case and its reply in support of its motion in the Fee Case.

Dismissal for Failure to State a Claim

The district court granted both defendants' motions to dismiss. In the Fee Case, the court found that the Fee Plaintiffs had failed to plead the existence of a contract, noting they had not pointed to a "specific contractual promise" in the Fee Schedule or defined the nature of K-State's fee contract with the students. The court was unpersuaded that the Fee Schedule showed a contract because the schedule was missing "any language suggesting a promise that students would receive in-person access to any particular facility, activity, or service in exchange for payment of a fee."

The court also dismissed the Fee Plaintiffs' unjust-enrichment and money-had-and-received claims against K-State. The court found that Kansas law required the plaintiffs to submit these claims, which are often described as implied-by-law or quasi-contract claims, to the Joint Committee on Special Claims before suing in district court, and their failure to do so required dismissal. Finally, the court dismissed the Fee Plaintiffs' conversion claim, along with all its claims against the Board of Regents.

The district court did not rely on the FRA for these rulings, as that document was not attached to or referenced by the Fee Petition. The court similarly refused to consider the course-catalog excerpt and several internet links in the Fee Petition, including a link to a Frequently Asked Questions page on K-State's website. The court acknowledged that, after many clicks, a person could find a more detailed breakdown of the mandatory Privilege Fee, but it described the general links to K-State's website as a "rabbit hole of information" that would not prevent dismissal.

Turning to the Tuition Case, the district court found the Tuition Plaintiffs' contract claims to be camouflaged educational-malpractice claims, emphasizing general allegations in the Tuition Petition that online education was less effective and less valuable than in-person instruction. The court further found that even if these claims did not allege educational malpractice, the Tuition

Petition—like the Fee Petition—did not identify a specific promise for in-person education in exchange for tuition. The court also noted that, while unnecessary to support its decision, the FRA did not promise in-person learning.

The court dismissed the Tuition Plaintiffs' implied-contract claims against K-State for the same reasons it dismissed the Fee Plaintiffs' implied-contract claims—they had not been submitted to the Joint Committee on Special Claims. And the court dismissed the Tuition Plaintiffs' remaining conversion and taking claims, and all claims against the Board of Regents.

Both groups of plaintiffs then moved together for leave to file an amended petition. They sought to incorporate both petitions into one and to add materials—like statements from K-State's website and the various links the district court refused to consider—to cure any deficiencies in their claims. The district court denied the motion. This appeal followed.

DISCUSSION

This case is one of many in which students are seeking tuition and fee refunds from colleges and universities because of these institutions' responses to the COVID-19 pandemic. A growing number of federal and state appellate decisions have addressed similar claims and have reached varying conclusions. Kansas district courts have also dealt with lawsuits concerning other universities, with differing results. But while these institutions' actions were largely unprecedented before the pandemic, the framework for deciding the legal issues associated with those actions—particularly in the context of a motion to dismiss—are far from new.

The law favors resolving claims on their merits. See *Garcia v. Ball*, 303 Kan. 560, 568, 363 P.3d 399 (2015); *State v. Auman*, 57 Kan. App. 2d 439, 440, 455 P.3d 805 (2019). But not all petitions present questions that should undergo discovery or require a trial. Motions to dismiss under K.S.A. 60-212 allow courts to resolve claims early—before a responsive pleading is filed—when issues can be determined as a matter of law at the outset of a case.

K.S.A. 2022 Supp. 60-212(b)(6) allows a petition to be dismissed if it "fail[s] to state a claim upon which relief can be granted"—that is, when the petition raises no legally supportable claims. But relief under this section is the exception, not the rule.

Kansas courts thus must be careful not to impose overly burdensome pleading requirements. The Kansas rules of civil procedure only require a plaintiff to include "a short and plain statement of the claim showing [the plaintiff] is entitled to relief and a demand for judgment." *John Doe v. M.J.*, 315 Kan. 310, 317, 508 P.3d 368 (2022); see K.S.A. 2022 Supp. 60-208(a)(1). Put another way, the rules merely require a petition to include "'a short and plain statement of a claim that will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rests.'" 315 Kan. at 317.

For this reason, when a defendant moves for dismissal under K.S.A. 60-212(b)(6), the district court "'must resolve every factual dispute in the plaintiff's favor.'" *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019). This means that the court assumes all the allegations in the petition—along with any reasonable inferences from those allegations—are true. The court then determines whether the plaintiff has stated a claim "based on [the] plaintiff's theory or any other possible theory." *Cohen v. Battaglia*, 296 Kan. 542, 546, 293 P.3d 752 (2013). Dismissal is improper when the well-pleaded facts and inferences "'state *any* claim upon which relief can be granted.'" *Kudlacik*, 309 Kan. at 790.

Because motions to dismiss necessarily involve legal questions that must be resolved on the face of the petition, appellate courts employ these same principles and give no deference to the district court's evaluation of the case. *Cohen*, 296 Kan. 542, Syl. ¶ 1. We thus accept the facts the Fee Plaintiffs and Tuition Plaintiffs allege in their respective petitions as true, drawing all reasonable inferences in their favor. 296 Kan. 542, Syl. ¶ 2. And we now must decide "whether those facts and inferences state a claim based on plaintiff's theory or any other possible theory." 296 Kan. 542, Syl. ¶ 2.

The Fee Plaintiffs and Tuition Plaintiffs appeal the district court's dismissal of their claims against K-State for breach of contract, unjust enrichment, and money had and received. They argue that, given Kansas' notice-pleading requirements, the allegations in their petitions were sufficient to allow these claims to continue. And they argue that they should have been permitted to amend

their petitions to address any perceived deficiencies. They do not appeal the decision to dismiss their conversion and taking claims against K-State or any of their claims against the Board of Regents.

We conclude that the district court did not err when it dismissed the plaintiffs' claims for unjust enrichment and money had and received. The Kansas Supreme Court has held that these claims, which are based on theories of implied contract, must be presented to the Joint Committee on Special Claims before they may be included in a lawsuit. But the district court erred when it dismissed the plaintiffs' breach-of-contract claims, as these were claims based on a written agreement that plausibly could be interpreted in their favor.

1. *Kansas law requires people who are asserting implied-contract claims to submit their demands to the Joint Committee on Special Claims before they can file suit.*

As a general rule, the State is immune from incurring civil liability unless it waives this protection. This means that the State can decide when someone may sue it and can set procedural requirements and conditions for lawsuits when they are permitted. As arms of the State, public universities like K-State enjoy this same immunity from suit. See *Wilson v. Kansas State University*, 273 Kan. 584, 586-87, 44 P.3d 454 (2002).

Most often, the legislature defines the contours the State's sovereign immunity—as well as the waiver of immunity and any attendant procedures or conditions for maintaining lawsuits—through statute. *Siple v. City of Topeka*, 235 Kan. 167, 170, 679 P.2d 190 (1984). Between 1970 and 1979, Kansas statutes explicitly declared that the State was immune from "liability and suit" on cases arising from implied (but not express) contracts. See K.S.A. 46-901 (Weeks 1973); L. 1979, ch. 186, § 33 (repealing K.S.A. 46-901, effective July 1, 1979). Unlike express contracts, which are memorialized by oral or written words, implied contracts are established by the parties' conduct or imposed by other equitable considerations. See *Mai v. Youtsey*, 231 Kan. 419, 422, 646 P.2d 475 (1982) (discussing contracts implied in fact through actions or implied in law for equitable reasons). There is no question that the plaintiffs' claims for unjust enrichment and money

had and received fall within this category, as both allege the existence of contracts implied by law. As we discuss later, the parties dispute whether the plaintiffs' breach-of-contract claims involve express or implied contracts.

Beginning in 1979, the legislature recognized a limited waiver of some implied-contract claims while it at the same time established procedures that must be followed before someone could assert those claims against the State. K.S.A. 46-903 implicitly recognizes the possibility that such claims may be permitted but states that the legislature must authorize any payment toward a claim or judgment for breach of implied contract if the funds would come from the state treasury or a special state fund. And K.S.A. 46-907 states that before the legislature can authorize any such payment, any implied-contract claim must be submitted to a special legislative committee—the Joint Committee on Special Claims:

> "All claims proposed to be paid from the state treasury or any special fund of the state of Kansas, which cannot be lawfully paid by the state or any agency thereof except by an appropriation of the legislature shall be submitted to the joint committee on special claims against the state before final action thereon is taken by either house of the legislature." K.S.A. 46-907.

The Kansas Supreme Court has considered the interaction of K.S.A. 46-903 and K.S.A. 46-907 in only two published opinions, both filed in the decade after the statutes were adopted. In both instances, the court held that these two provisions created a condition precedent to filing most implied-contract claims against the State, and the failure to follow these procedures required dismissal of the affected claims.

- In *Wheat v. Finney*, 230 Kan. 217, 221, 630 P.2d 1160 (1981), the court found that K.S.A. 46-903 and K.S.A. 46-907 together create "a statutory requirement that claims based on implied contracts be filed" with the Joint Committee on Special Claims. The *Wheat* court held that filing with the Committee and allowing the Committee to process the claim were "conditions precedent to the maintenance of an action" in court for these claims. 230 Kan. at 221. In other words, "[a]n action may not be maintained

against the State without first filing a claim on which payment is denied." 230 Kan. at 221.

- A few years later, the court reaffirmed this conclusion in *Sharp v. State*, 245 Kan. 749, 754, 783 P.2d 343 (1989). There, the court emphasized that claims based on implied contract in general—and unjust enrichment in particular—must be dismissed unless those claims are submitted to and considered by the Joint Committee on Special Claims before the initiation of the lawsuit.

The students did not follow these procedures before filing this case—neither the Fee Plaintiffs nor the Tuition Plaintiffs submitted any of their claims to the Joint Committee on Special Claims. But the plaintiffs offer three reasons why they believe their claims may proceed despite these procedural deficiencies.

First, the plaintiffs assert that it is unclear whether their claims are subject to these procedural requirements because there remains an open question whether any reimbursement of fees or tuition would come from the state treasury. But Kansas law directs that when a state university receives tuition and fee payments, the money "shall be deposited in the state treasury." K.S.A. 76-719(b). And as K-State points out, the legislature has, at least once, authorized a tuition refund through appropriations legislation. See L. 2011, ch. 118, § 8; see also *Holt v. Wesley Medical Center, LLC*, No. 00-1318-JAR, 2002 WL 1067677, at *4 (D. Kan. 2002) (unpublished opinion) (finding that judgment against state medical school would come from state treasury, not endowment); *Mayer v. Fort Hays State University*, No. 3:05-CV-1123(AVC), 2006 WL 8448069, at *3 (D. Conn. 2006) (unpublished opinion) (applying Kansas law and citing *Holt* for the same proposition).

Second, the plaintiffs point out that there appear to be at least some instances when a university may provide refunds (such as when a student withdraws from a course) without legislative action. But there is no indication that withdrawing from a course raises a claim based on an implied contract. Rather, as we discuss later in this opinion, these claims are governed by a written con-

tract between the university and its students and thus are not required to go through the process identified in K.S.A. 46-903 and K.S.A. 46-907.

Third, the plaintiffs assert that the Kansas Supreme Court's reading of K.S.A. 46-903 and K.S.A. 46-907 in *Wheat* and *Sharpe*—requiring them to file a Joint Committee claim *before* suing—adds a procedural hurdle not otherwise found in those statutes. As they point out, the plain text of the statutes has no language requiring someone to file a claim with the Joint Committee on Special Claims before a lawsuit is filed. Rather, the language only requires someone to file a request with the Committee before the legislature may approve any payment of a claim. The plain language of these statutes does not discuss the timing of a lawsuit within this process.

We acknowledge that the interpretation of K.S.A. 46-903 and K.S.A. 46-907 in *Wheat* and *Sharpe* appears to be rooted more in a practical application of sovereign immunity than in the plain text of those statutes. And "[r]eliance on the plain and unambiguous language of a statute is the best and only safe rule for determining the intent of the creators of a written law." *State v. Spencer Gifts, LLC*, 304 Kan. 755, Syl. ¶ 2, 374 P.3d 680 (2016). But even if we were to agree with the students' reading of these statutes, "[t]he Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the Kansas Supreme Court is departing from its previous position." *Snider v. American Family Mutual Insurance Co.*, 297 Kan. 157, Syl. ¶ 5, 298 P.3d 1120 (2013). While our Supreme Court has had few occasions to consider these statutes, it has given no indication that it is departing from its holdings in *Wheat* and *Sharpe*. See *Karr v. State*, No. 73,111, unpublished opinion filed October 27, 1995, slip op. at 8-10 (reaffirming *Wheat* and *Sharpe*). We therefore must follow the Kansas Supreme Court's interpretation of K.S.A. 46-903 and K.S.A. 46-907.

Because the plaintiffs did not file their implied-contract claims—for unjust enrichment and money had and received—with the Joint Committee on Special Claims before initiating their

lawsuits, *Wheat* and *Sharp* dictate that those claims cannot go forward. The district court properly dismissed those claims under K.S.A. 60-212(b)(6).

2. *The district court erred when it dismissed the plaintiffs' claims for breach of contract at this early stage in the case.*

The question that remains is whether the plaintiffs' respective claims for breach of contract suffer the same fate as their unjust-enrichment and money-had-and-received claims. We conclude they do not.

As we have indicated, both the Fee Plaintiffs and the Tuition Plaintiffs alleged in their petitions that K-State breached its contract with K-State students when it closed its campuses in March 2020 in response to the pandemic. The district court did not specifically rule whether these breach-of-contract claims were based on an express or implied contract. But unlike its discussion relating to the plaintiffs' claims of unjust enrichment and money had and received, the court made no indication that the breach-of-contract claims should have been submitted to the Joint Committee on Special Claims. Rather, the court analyzed—and dismissed—the contract claims on their merits.

On appeal, K-State argues that the plaintiffs' breach-of-contract claims alleged an implied contract based on the conduct and understandings of the university and its students. Thus, it asserts, these claims also required consideration by the Joint Committee on Special Claims. But this assertion is belied by the university's own filings, which included the FRA.

2.1. *The FRA is an express contract.*

The FRA is a written contract between a K-State student and the university, largely focusing on the student's financial responsibilities. In broad terms, the FRA states that a student who registers for classes or receives service from the university agrees to pay all tuition, fees, and costs, and K-State in turn agrees to provide "educational services":

"Payment of Fees/Promise to Pay

"I understand that when I register for any class at Kansas State University or receive any service from Kansas State University, I accept full responsibility

to pay all tuition, fees and other associated costs assessed as a result of my registration and/or receipt of services. I further understand and agree that my registration and acceptance of these terms constitutes a promissory note agreement (i.e., a financial obligation in the form of an educational loan as defined by the U.S. Bankruptcy Code at 11 U.S.C. §523(a)(8)) in which Kansas State University is providing me educational services, deferring some or all of my payment obligation for those services, and I promise to pay for all assessed tuition, fees and other associated costs by the published or assigned due date.

"I understand and agree that if I drop or withdraw from some or all of the classes for which I register, I will be responsible for paying all or a portion of tuition and fees in accordance with the published tuition refund schedule at Kansas State University. I have read the terms and conditions of the published tuition refund schedule and understand those terms are incorporated herein by reference. I further understand that my failure to attend class or receive a bill does not absolve me of my financial responsibility as described above."

The FRA imposes penalties if the student does not hold up his or her financial end of the bargain, establishing late fees and allowing the university to prevent the student from registering for future classes or graduating. And the FRA states that it "constitutes the entire agreement between [the student and K-State] with respect to the matters described" and can only be modified by K-State with the student's signature.

In attaching the FRA to its written arguments concerning its motions to dismiss, K-State has admitted that the parties' relationship is governed by an express contract. Thus, K.S.A. 46-903 and K.S.A. 46-907's procedures for considering claims based on implied contracts do not apply. The question that lingers is whether the FRA provides a potential avenue for relief that should have survived dismissal—that is, whether the FRA can be reasonably interpreted to encompass the plaintiffs' contract claims. If so, the district court's dismissal of those allegations as a matter of law was improper.

2.2. *The parties' arguments regarding the FRA continue to evolve.*

The confusion as to the role the FRA should—or can—play in the plaintiffs' lawsuits is understandable. Our review of the record shows that the parties' positions regarding the FRA have been in a near-constant state of flux as these consolidated cases have progressed through the court system.

K-State attached the FRA to its memorandum supporting its motion to dismiss in the Tuition Case and referenced it in its reply in the Fee Case. K-State asserted that the FRA was an "express agreement" that controlled the parties' relationship. K-State also asserted that although the FRA indicated that K-State was to provide "educational services," it did not specifically require those services to be "'in person,' 'on campus,' or even as outlined in the Comprehensive Tuition and Fee Schedule." The plaintiffs argued that because neither set of plaintiffs attached the FRA to their respective petitions, the district court should not consider this document when analyzing K-State's motion to dismiss. As we have indicated, the district court found that the FRA was unnecessary to resolve K-State's motions to dismiss.

On appeal, the plaintiffs' brief continued to argue that the district court should not have considered the FRA, as it was not attached to or incorporated by the Fee Petition or Tuition Petition. But the plaintiffs also asserted that the FRA "obligates K-State to provide 'services' but does not define them." Thus, the plaintiffs claimed, the FRA raised additional questions regarding the parties' intent and expectations as to what the "educational services" in the FRA were meant to encompass. K-State's brief asserted that the FRA should supersede any other implied contractual agreements that the plaintiffs alleged to exist regarding tuition and fees. It did not specifically address the plaintiffs' argument that the phrase "educational services" was ambiguous, but rather asserted that the absence of any indication in the FRA that those services would be provided in a particular format (such as in person, remote, or asynchronous) showed that these details were not part of the contract. And K-State continued to argue that the breach-of-contract claims in the plaintiffs' petitions were for implied, not express, agreements.

As this case awaited oral argument, these positions shifted again. The plaintiffs alerted the court to a recent decision by the United States Court of Appeals for the Fifth Circuit—*King v. Baylor University*, 46 F.4th 344 (5th Cir. 2022)—that analyzed this same FRA language in a similar lawsuit against Baylor University. The district court in *King* had found that Baylor continued to provide "educational services" to students under Baylor's FRA (which essentially contained identical language to K-State's FRA)

even when providing remote instruction and thus granted Baylor's motion to dismiss the plaintiffs' breach-of-contract claim. 46 F.4th at 360. The appellate court reversed. The *King* court emphasized that at the motion-to-dismiss stage, the district court must resolve all factual questions in favor of the plaintiff. *King* thus held that the district court should have given the plaintiff's claims the benefit of the doubt if the FRA could be reasonably interpreted to support her argument. See 46 F.4th at 361-63.

The Fee Plaintiffs and Tuition Plaintiffs urged this court during oral argument to analyze the language of the FRA as the Fifth Circuit did in *King*. K-State argued that the *King* decision was an outlier among courts who had considered this question and should not play a role in our analysis, particularly because the plaintiffs had not attached the FRA to their petitions or presented their argument regarding the interpretation of "educational services" to the district court.

These evolving arguments highlight a tension between two principles that guide our appellate process. As a court of review, we ordinarily do not consider arguments that were not first raised to the district court; the plaintiffs here urged the district court to disregard the FRA since it was not attached to the petition and did not raise arguments regarding its interpretation. *State v. Shopteese*, 283 Kan. 331, 339, 153 P.3d 1208 (2007). At the same time, Kansas law is clear that dismissal is improper if a plaintiff's petition states "'*any* claim upon which relief can be granted.'" *Kudlacik*, 309 Kan. at 790.

We are also cognizant that the shifting nature of the parties' arguments is shaped by the timing of when K-State introduced the FRA into the litigation. K-State attached the FRA to its memorandum supporting its motion to dismiss in the Tuition Case and referenced it in its reply supporting its dismissal motion (after both parties had already submitted lengthy written arguments) in the Fee Case. Thus, it is not surprising that the arguments regarding this document have morphed as the case has proceeded. Indeed, this timeline provides an example of why a district court should exercise caution in dismissing a party's claims too early in a case.

In most instances, a district court ruling on a motion to dismiss may only consider the plaintiff's petition and any documents attached to it. See *Sperry v. McKune*, 305 Kan. 469, 480, 384 P.3d 1003 (2016); see K.S.A. 2022 Supp. 60-210(c). But when a petition "refers to an unattached document central to the plaintiff's claim, a defendant may submit—and a court may consider—an undisputedly authentic copy of the document without transforming the motion to dismiss into a motion for summary judgment." *Crosby v. ESIS Insurance*, No. 121,626, 2020 WL 6372266, at *2 (Kan. App. 2020) (unpublished opinion), *rev. denied* 314 Kan. 854 (2021). No one argues that the FRA is not a valid contract or asserts that the document attached to K-State's motion to dismiss the Tuition Petition is not an authentic representation of that agreement. Thus, the district court should have considered the language of the express contract between the parties before concluding that the plaintiffs' breach-of-contract claims failed to state a valid claim for relief.

2.3. *The FRA's reference to "educational services" can be reasonably interpreted to support the plaintiffs' breach-of-contract claims, as they are pleaded.*

We now turn to the language of the FRA, in comparison with the plaintiffs' allegations in the Fee Petition and Tuition Petition. The plaintiffs' petitions alleged that they had entered into contracts with K-State:

- The Fee Plaintiffs alleged in their petition that they "entered into contractual agreements with . . . K-State, which provided [they] would pay fees for or on behalf of students, and in exchange, K-State would provide facilities, activities, services, and resources." The petition alleges that the Fee Plaintiffs paid these fees, but K-State "breached its contracts . . . when it moved classes online, cancelled on-campus events and activities, closed campus and stopped providing facilities, activities, services, and resources for which the fees were intended to pay."

- The Tuition Plaintiffs alleged in their first amended petition that K-State "agreed to . . . provide an in-person and

> on-campus live education as well as the services and facilities to which the tuition they paid pertained throughout those semesters." The Tuition Petition indicated that K-State "held the timely payment of tuition out as a contract and enforced the same against students for non-payments," including a late fee if they failed to make timely tuition payments. The plaintiffs alleged that they made the required tuition payments, but K-State breached the contract when it closed the campus and required online coursework in the second half of the Spring 2020 semester.

Contrary to K-State's assertions, the allegations in these petitions relating to the parties' contracts do not exclude an express-contract claim. The allegations are not, as a matter of law, inconsistent with the FRA—the express contract governing the payment of tuition and fees. And contrary to K-State's assertions in its brief, there is no requirement under Kansas law for the plaintiffs to attach the FRA to their petitions or quote the FRA's language to survive a motion to dismiss. See K.S.A. 2022 Supp. 60-209(h). The better course, when a written contract is produced as part of a dismissal motion at the earliest stages in the litigation, is to allow plaintiffs to amend their petition so they may conform their allegations to the written agreement.

Under the FRA, students agree to pay tuition, fees, and costs in exchange for "educational services" from K-State. There is no question that this agreement is an enforceable contract between the plaintiffs and the university. But it is unclear what the parties intended these "educational services" to include. We are not persuaded by K-State's argument that "educational services" is synonymous with credit hours or recites an even more amorphous responsibility to provide "educational services" in the abstract. Presumably, the term connotes some meaningful agreement. For example, the FRA does not indicate that the "educational services" the university is agreeing to provide include the specific classes a student registers for. But if a student enrolls in a three-hour calculus course, it would be unreasonable to suppose that the university

could unilaterally transform that course to a linguistics class midway through the semester. Rather, the students enroll in particular classes and reasonably expect to take those classes.

Nevertheless, it is unclear—and indeterminate at this stage in the case—whether the "educational services" the students contracted to receive included things like facility access or in-person instruction. The plaintiffs point to various statements in K-State publications and on the K-State website to support their argument regarding the services they expected to receive. K-State points to other statements disclaiming additional contractual terms. But at the motion-to-dismiss stage, a district court must resolve these inferences in favor of the petition and must consider whether a petition states a claim based on "any . . . possible theory." *Cohen*, 296 Kan. 542, Syl. ¶ 2.

Because the FRA's reference to "educational services" can be reasonably interpreted to encompass the plaintiffs' claims, the district court erred when it dismissed the petitions for failure to state a claim. See *King*, 46 F.4th at 363 (examining agreement with identical language and remanding for district court to consider whether "educational services" is ambiguous). Additional facts are necessary to determine what the parties intended to be included as the "educational services" K-State was providing under that contract. We thus reverse the decision to dismiss the breach-of-contract claims and remand for further factual development.

2.4. *The breach-of-contract claims, as they are pleaded, do not allege claims of educational malpractice.*

The district court also noted in its order dismissing the case that the allegations in the Fee Petition and Tuition Petition more resembled an attack on their education and university operations than contract claims, and thus actually attempt to recover for educational malpractice. In particular, the court noted that the Tuition Plaintiffs' allegations focused on the quality of their education during the Spring 2020 semester, not any contractual promise.

Kansas does not recognize a tort of educational malpractice. *Finstad v. Washburn University of Topeka*, 252 Kan. 465, 477, 845 P.2d 685 (1993). An educational-malpractice claim "almost exclusively centers on a school's failure to provide an effective education." *Florez v. Ginsberg*, 57 Kan. App. 2d 207, 212, 449

P.3d 770 (2019). Kansas law does not permit a student to sue a university over issues with "classroom methodology, theories of education, or the quality of education he received," or for dissatisfaction over "academic performance or the lack of expected skills." 57 Kan. App. 2d at 212. And a student cannot bring a claim questioning the "internal operations, curriculum or academic decisions" of a university. 57 Kan. App. 2d at 212; see *Jamieson v. Vatterott Educational Center, Inc.*, 473 F. Supp. 2d 1153, 1159-61 (D. Kan. 2007).

There are myriad public-policy reasons why Kansas refuses to recognize such a tort. These claims would lack a measurable standard of care. There would be inherent uncertainty about damages. Recognizing educational malpractice could cause a flood of litigation. And courts should not oversee day-to-day school operations. *Finstad*, 252 Kan. at 477. But these considerations do not mean any student lawsuit against a university is automatically an educational-malpractice claim. When a claim does not implicate these policy concerns, courts are less likely to construe it as an educational-malpractice claim. *Florez*, 57 Kan. App. 2d at 213-14.

Courts have applied this principle in the contract context, too. "[W]hen students allege that educational institutions have failed to provide specifically promised services—for example, a failure to offer any classes at all or a failure to deliver a promised number of hours of instruction—such claims have been upheld on the basis of the law of contracts." *Jamieson v. Vatterott Educational Center, Inc.*, 259 F.R.D. 520, 538 (D. Kan. 2009). To state a contract claim, a student must allege the school failed "to provide some objective, specifically promised service," not just attack "the general quality of [the school]'s educational services." 259 F.R.D. at 539.

And courts considering pandemic-related refund claims have drawn this same distinction. For example, the Seventh Circuit noted that "to maintain a breach of contract claim against a university, a plaintiff must do more than simply allege that the education was not good enough." *Gociman v. Loyola University of Chicago*, 41 F.4th 873, 882 (7th Cir. 2022). But the *Gociman* court

did not characterize students' contract claims as educational-malpractice claims when they "point[ed] to an identifiable contractual promise that the university failed to honor—the promise to provide in-person classes and access to on-campus facilities and resources." 41 F.4th at 882.

Whether the students adequately pleaded such a promise in their petitions is a separate question. Breach-of-contract claims allege that "the university contractually promised to provide students an in-person educational experience," and "the university breached that promise." 41 F.4th at 882. Resolution of these allegations "does not require a court to evaluate the reasonableness of the university's conduct in providing remote educational services during the pandemic, or second-guess the professional judgment of the university." 41 F.4th at 882.

Here, the Fee Plaintiffs did not plead educational-malpractice claims. They do not attack the quality of their education or question the wisdom of university operations. Rather, these students allege that K-State failed to provide services they paid for—access to campus services and facilities. In other words, at this stage in the proceedings, they allege a contract claim.

The Tuition Plaintiffs' claim presents a closer question. Parts of the Tuition Petition undoubtedly assail the quality of their remote education, calling it "sub-par" and asserting it lacked "collaborative learning and in-person dialogue, feedback, and critique." See *Lindner v. Occidental College*, No. CV 20-8481-JFW(RAOx), 2020 WL 7350212, at *7 (C.D. Cal. 2020) (construing claims with identical language as educational-malpractice claims). And the Tuition Plaintiffs lament that online classes "do not require memorization or the development of strong study skills given the absence of any possibility of being called on in class."

But our focus at this early stage is not on the Tuition Petition generally, but on the viability of the Tuition Plaintiffs' breach-of-contract claim. And the Tuition Plaintiffs have pleaded enough to survive a motion to dismiss. The core of their claim is that they contracted to pay tuition in exchange for an in-person education, and they paid, but K-State did not fully deliver on its promise. Ultimately, the Tuition Plaintiffs claim not just "that their educa-

tion was *bad*, but that [the university] breached a promise to provide a specific type of education." *Ninivaggi v. University of Delaware*, 555 F. Supp. 3d 44, 52 (D. Del. 2021).

We pause to emphasize the narrowness of this decision. With the deference that Kansas law requires courts to give petitions when evaluating a motion to dismiss, we conclude that the educational-malpractice doctrine does not bar the plaintiffs' breach-of-contract claims—as they are pleaded—as a matter of law. As the nature of the plaintiffs' allegations and claimed damages are discovered, it may become evident that plaintiffs are pursuing educational-malpractice claims masquerading as contract claims. For example, if the damages sought require the district court to assess the quality of the educational experience, methods, and instruction, those facts would tend to show that the claims are really impermissible educational-malpractice claims. Claims that merely allege that the plaintiffs did not receive what they were contractually promised and seek a refund of the difference between the cost of online and in-person education are not.

Finally, in oral argument, members of this court expressed some skepticism regarding whether the Tuition Plaintiffs suffered any damages from K-State's alleged breach of contract. After all, the Tuition Plaintiffs note that they received credit for the courses they took during the Spring 2020 semester and graduated from the university with their degrees. The Tuition Plaintiffs do not allege that those degrees should not have been conferred or that the course credits they received were unearned. And the Tuition and Fee Schedule attached to the Fee Petition shows that the cost per credit hour for courses taken by Kansas residents on K-State's campuses is actually lower than the cost of online coursework. The district court expressed similar misgivings in its decision. But other than speculating as to the nature of the plaintiffs' contractual damages as part of its educational-malpractice discussion, K-State's motions to dismiss do not assail the nature of the plaintiffs' damages. Thus, this matter is not before us at this time.

In short, we limit our consideration to the allegations in the Fee Petition and Tuition Petition and the parties' arguments. The

district court erred to the extent it interpreted the plaintiffs' contract claims, as they are pleaded, as claims of educational malpractice.

3. *We do not address the parties' remaining claims.*

The plaintiffs also argue that the district court should have allowed them to amend their petitions, rather than dismiss their claims outright. But amendment would not change the fact that the plaintiffs had not submitted their implied-contract claims to the Joint Committee on Special Claims before filing suit. And because we are reversing the district court's decision dismissing the students' breach-of-contract claims and remanding the case so litigation of this claim may proceed, it is unnecessary to determine whether the district court should have granted the students' postjudgment motion to amend their petitions. While the district court's refusal to allow an amendment may have been precipitous given that the students only received the FRA partway through the motion-to-dismiss briefing, their original petitions stated claims for breach of contract.

As a final aside, K-State makes a passing argument in its brief that if the plaintiffs are asserting claims based on an express contract, those claims should have been brought as administrative actions governed by the Kansas Judicial Review Act (KJRA), not in an independent lawsuit against the university. The KJRA applies to breach-of-contract claims and requires claimants to exhaust their administrative remedies before suing. K.S.A. 77-612; *Schall v. Wichita State University*, 269 Kan. 456, 482-83, 7 P.3d 1144 (2000). A court can excuse this requirement "to the extent that the administrative remedies are inadequate" or do not exist at all. K.S.A. 77-612(d); *Colorado Interstate Gas Co. v. Beshears*, 18 Kan. App. 2d 814, 821, 860 P.2d 56 (1993), *rev. denied* 256 Kan. 994 (1994).

Other than broadly noting that K-State is a state entity, the university offers no explanation for what administrative procedure the plaintiffs should have followed to pursue claims under the KJRA. (In fact, the petitions allege that students sought refunds from the university for the second half of the Spring 2020 semester, but those requests were denied.) The district court did not address this argument in its decision. And the single paragraph K-

State devotes to this issue in its brief is insufficient to apprise us of any error or defect. See *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017) (points raised incidentally in a brief are deemed abandoned).

4. *We summarize our conclusions.*

We affirm the district court's dismissal of the plaintiffs' claims for unjust enrichment and money had and received because these claims were not presented to the Joint Committee on Special Claims before the plaintiffs filed their respective lawsuits.

We reverse the district court's dismissal of the plaintiffs' claims for breach of contract and remand for further proceedings, including a determination as to what the parties intended to be included as the contracted-for "educational services" under the Financial Responsibility Agreement.

We conclude that these claims for breach of contract, as they are currently pleaded, are not educational-malpractice claims. But if it appears as the case progresses that the plaintiffs are truly seeking damages for alleged educational malpractice, those claims must be dismissed.

The Kansas rules of civil procedure require a petition to include "a short and plain statement of the claim showing [the plaintiff] is entitled to relief and a demand for judgment." *John Doe*, 315 Kan. at 317. The plaintiffs have met that pleading threshold for their breach-of-contract claims. The district court erred when it granted K-State's motion to dismiss those claims under K.S.A. 60-212(b)(6).

Affirmed in part, reversed in part, and remanded with directions.

(528 P.3d 565)

No. 123,650

STATE OF KANSAS, *Appellee*, v. CAROL SUE BURRIS, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Mistreatment of Dependent Adult—Statutory Definition.* Mistreatment of a dependent adult includes knowingly omitting or depriving an individual 18 years of age or older, who is cared for in a private residence, of the treatment, goods, or services necessary to maintain their physical or mental health when that individual is unable to protect his or her own interests.

2. SAME—*Mistreatment of Dependent Adult—No Requirement State Prove Independent Legal Duty to Victim*. Mistreatment of a dependent adult does not require the State to prove that the offender had any independent legal duty to the victim. Once a person affirmatively assumes the role of caregiver to a dependent adult, and discourages or precludes others from filling that role, that person has the responsibility to act reasonably in fulfilling the obligations required of that role.

3. SAME—*Mistreatment of Dependent Adult—Criminal Prosecution for Neglect.* When a dependent adult living in a private residence is unable to tend to their own needs, and the person caring for them neglects to provide or withholds life-sustaining care, with an awareness that such care is required, that caretaker may be subject to criminal prosecution for such neglect.

4. SAME—*Mistreatment of Dependent Adult—Neglect to Provide Life-Sustaining Care to Point of Death—Criminal Prosecution for Unintentional Reckless Second-degree Murder.* When an individual assumes sole responsibility for the physical and mental health of a dependent adult, but neglects to provide or withholds such life-sustaining care to the point of death, that individual may be subject to criminal prosecution for the unintentional, reckless second-degree murder of that dependent adult.

5. TRIAL—*Jury Trial—Prosecutor has Wide Latitude in Closing Argument*. A prosecutor is afforded wide latitude in summarizing their case to a jury in closing argument. Discussion of the wedding vows taken between a dependent adult and their caregiver strains the bounds of that latitude to impermissibly play upon the passion and prejudice of the jury.

6. CRIMINAL LAW—*Court's Discretion to Order Competency Evaluation for Defendant—Appellate Review*. A district court has the discretion to order a competency evaluation for a criminal defendant on its own initiative when it has a real doubt that the offender possesses the sanity or mental

capacity to properly defend his or her case. The court's decision on the matter will not be disturbed absent a clearly demonstrated abuse of its sound judicial discretion.

Appeal from Coffey District Court; TAYLOR J. WINE, judge. Opinion filed March 31, 2023. Affirmed.

Caroline M. Zuschek and *Kasper Schirer*, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

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

ISHERWOOD, J.: Michael Burris, a man who suffered from dementia and other significant health issues, died in 2017. A medical examiner later determined pneumonia to be the official cause of death with severe emaciation as a significant underlying factor. Soon after, the State charged his wife, Carol Sue Burris, with mistreatment of a dependent adult and reckless second-degree murder. A jury convicted Carol on both counts and the district court sentenced her to 125 months in prison. On appeal, Burris makes four arguments: (1) She had no legal duty to care for Michael, so her failure to provide adequate care did not violate the statutes under which she was convicted; (2) the State failed to present sufficient evidence to support a conviction of reckless second-degree murder; (3) the prosecutor committed reversible error during closing argument; and (4) the district court abused its discretion when it refused to order a competency evaluation for Carol. After carefully filtering each issue through their respective legal frameworks we decline to find reversal is warranted. Thus, both of Carol's convictions are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Carol's neglect and Michael's deteriorating health*

In April 2016, two paramedics were dispatched to the home of Carol and Michael Burris after receiving a report that Michael fell and needed assistance. When paramedics arrived, Carol directed them to a back room of the home where they found Michael on the floor in underwear stained yellow, smelling of urine, and

with sores on his legs that suggested he lay on the floor for an extended period of time. One of the paramedics, Roy Rickel, also observed that Michael was very thin, appeared to be dehydrated, and had several cuts across his arms in various stages of healing. After Carol left the room, Michael told Rickel that he remained on the floor for about two weeks after falling and resorted to cutting himself with the hope it would induce Carol to call for help. He said Carol provided him with doughnuts and water and occasionally cleaned his urine and feces off the floor.

Michael was transported to the hospital where doctors diagnosed an infection in his leg, an ulcer caused by a pressure sore, low potassium levels, and dehydration. Michael informed a nurse that he had not eaten recently because Carol would not cook for him, but he could not call for help because Carol took his cell phone away. He also told his sister, Terry Taylor, that Carol refused to give him his cell phone and left him on the floor for several days after he asked her to call for help. Michelle Gast, a social worker for the Department for Children and Families, investigated allegations that Carol subjected Michael to neglect. Carol told Gast she felt responsible for caring for Michael, providing his meals, assisting with his toileting needs, and transporting him to medical appointments. Yet when Gast asked whether Carol gave Michael his prescribed medications, Carol said she gave him her own medications instead because she could not get him out of the house to see the doctor. Carol acknowledged Michael remained on the floor for an unknown duration after his fall but remarked that it was not possible for her to move him given the disparity in their respective sizes. When Gast inquired why Michael cut himself Carol refused to answer.

Dr. John Shell recommended Michael be discharged to Life Care Center, a nursing home facility, so he could increase his strength, ambulate on his own, and care for himself more independently before returning home. Michael believed that Life Care presented a good option but told Lucas Markowitz, a social worker, that he wanted to speak with Carol first. Following his conversation with Carol, Michael expressed a change of heart about his care and requested to return home immediately. He did agree to receive home health services.

Michael remained in the hospital for nine more days and was then transported home by paramedic Aaron Williams. Upon their arrival, Carol cautioned Williams to not disturb their dogs and to get Michael inside as quietly as possible. Williams tried to give Carol the necessary instructions for Michael's care, but she grew annoyed and spoke over him. The hospital's home health department called the Burrises to speak with Williams while he was at the house, but Carol refused to allow the communication. Williams left the residence fearing that Michael was at risk of neglect, so he filed a report with the Kansas Department for Children and Families.

Paramedics returned to the home nine days later in response to a call from Carol that Michael fell again. Roy Rickel was again among the responders and found Michael in a position much like that he was in following his first fall. This time, Michael apparently fell out of his chair three or four hours before the paramedics arrived. They transported him back to the hospital, and Dr. Shell diagnosed him with high levels of potassium. Michael was discharged to Life Care Center and treated for elevated potassium levels, diabetes, and hypothyroidism. He was also diagnosed with mild-to-moderate dementia. The facility discharged Michael roughly three weeks later and sent him home with prescriptions for Synthroid, Metformin, Mirtazapine, and Amlodipine to be taken daily. Carol told Life Care that home health assistance was unnecessary because she planned to care for Michael herself.

Michael's sister, Terry, called from time to time to check on his health after he returned home, but no one answered her calls for days at a time, so she finally left a message in which she threatened to call the police for a welfare check. About 10 minutes after Terry left that message, Carol called back and permitted her to speak with Michael. Terry offered to allow the couple to move into her guest house so they could be closer to her, but Carol declined. Carol also complained to Terry that she could not even take care of herself well because of the constant care and attention Michael required from her. Terry encouraged her to explore government-funded home healthcare programs, but Carol dismissed the suggestions because neither she nor her dogs liked when healthcare professionals visited the home.

Around this time, Gast visited the Burris' home to check on Michael's well-being, but Carol slammed the door in her face. As Gast returned to her car, Carol yelled from the porch that they were tired of people coming to their house and wanted to be left alone. Gast again requested to see Michael, but Carol claimed he did not have any clothing on. When Gast suggested that she simply cover him with a blanket, Carol asserted that if Gast came inside she did not have a place to put her dogs. Gast persisted but Carol remained steadfast in her refusal and then claimed that a visit was not possible because Michael was asleep, and she needed to leave to get his medication. Gast finally left without seeing Michael. She advised Adult Protective Services (APS) that she substantiated the allegations of Carol's abuse of Michael, and that Carol "failed to obtain medical services for [Michael] after he fell on the floor despite his request for assistance and [that he cut] himself to get medical attention."" APS sent notices of the report to Carol and Michael.

B. *Michael's third trip to the hospital and death*

Paramedics were ultimately dispatched to the Burris' home for a third and final time. When they entered Michael's room at the back of the house, they were overwhelmed by the stench of stale urine and feces. When one of the paramedics, Jared Saiz, reached for a light switch, Carol shoved his hand away and told him not to turn the light on. Michael was lying on the couch wrapped in layers of blankets, with his eyes closed, and mouth open gasping for air. Saiz peeled back the blankets and observed that Michael was severely thin with his flesh sucked up under his rib cage. He assessed Michael for a possible intubation and noticed Michael's mouth was completely dry. Carol claimed that Michael ate four meals—which consisted of her pouring juice into his mouth—and spoke with her just the day before. When Saiz loaded Michael onto the stretcher to take him to the hospital, he noticed Michael's blankets were caked in feces.

Dr. Christopher Jarvis treated Michael at Coffey County Hospital and immediately observed Michael was extremely emaciated and covered in human waste. Jarvis, who had practiced medicine in the area for 20 years, had never witnessed a person as emaciated as Michael. Once Michael was stabilized, Jarvis ordered his transfer to

Stormont Vail Hospital in Topeka as it was equipped to provide a higher level of care. A charge nurse who examined Michael upon his arrival at Stormont Vail noted a litany of health problems including several pressure injuries, open peeling areas on his back, dirt covering his body, matted hair on his head, foul-smelling exposed necrotic tissue, round open wounds on his buttocks and legs, bruises on his right forearm, and severe emaciation. Terry traveled to Topeka to visit Michael and then called Carol who remarked that she thought Michael had already passed. Carol never visited Michael before he died.

Michael died only a few hours after his arrival in Topeka. He was returned to the Coffey County Hospital, where Dr. Jarvis declared pneumonia to be the official cause of death and that it was the product of his critically emaciated state. Michael's driver's license reflected he weighed 250 pounds in 2012; at his autopsy, he weighed only 124 pounds. Jarvis classified Michael's death as a homicide because given his severe emaciation "it seemed appropriate that whoever was caring for him would have sought care long before he reached that point so [*sic*] neglect." Dr. Erik Mitchell, a forensic pathologist, later found a breakdown of Michael's skin surface consistent with long periods of immobility and determined that he failed to sustain an adequate caloric intake over a significant period of time as required to maintain his physical structure.

C. *Criminal investigation, pretrial proceedings, and trial of Carol Burris*

The Coffey County Sheriff's Department executed a search warrant on the Burris' home and Undersheriff Thomas Johnson interviewed Carol. During their discussion, Carol was consistently distracted by her dogs' need to be kenneled and commented that she refused home healthcare services because her dogs did not like them. Carol also told Johnson that she did not give Michael his prescribed medications because she could not get to the doctor to have them filled. Officers recovered Michael's discharge summaries and care instructions from Carol's bedroom.

In September 2018, the State charged Carol with one count each of mistreatment of a dependent adult and reckless second-degree murder. During a pretrial hearing the district court inquired whether either party intended to request a competency evaluation. Defense counsel

responded that he initially considered requesting one but ultimately concluded it was unnecessary because he did not intend to raise mental impairment as a defense. The prosecutor remarked that the State also did not intend to request an evaluation.

The case proceeded to trial, and the State presented testimony from paramedics, hospital staff, medical examiners, Michelle Gast, Terry Taylor, and law enforcement personnel. It also admitted the photographs from Michael's autopsy and various items obtained from the search of the Burris' home into evidence.

During closing arguments, the prosecutor summarized the State's evidence and commented on what he perceived to be a lack of evidence from Carol:

> "You heard no evidence from her. She had two and a half hours. You heard that she said—well, there was questions from the defense insinuating that he said that he had a loss of appetite, refused food, right? You heard no evidence of that. None. Not one person testified to that, that that happened."
>
> The prosecutor then closed with the following remarks:
>
> "She absolutely had the capability of making a phone call and asking someone for help. And the fact that she didn't under these circumstances is reckless indifference, extreme indifference. Reckless extreme indifference to human life. There is just no other way to see it. The evidence is overwhelming just like the smell was when those EMTs went into that room."

The jury returned guilty verdicts for both charged offenses, and the district court sentenced Carol to a prison term of 125 months.

Carol timely brings the case to us for an analysis of her allegations that various trial errors demand reversal of her convictions.

LEGAL ANALYSIS

Carol's failure to provide life-sustaining care for Michael after unequivocally assuming the responsibility to do so properly subjected her to prosecution for both charged offenses.

In her first claim of error, Carol contends that she was under no legal obligation to care for Michael and, therefore, neither her failure to address his needs, nor his death, subject her to criminal liability. She relies on K.S.A. 2022 Supp. 21-5201(b) as the foundation for her assertion. That provision states that "[a] person who omits to perform an act does not commit a crime unless a law provides that the omission is an offense or otherwise provides that such person has a duty to perform the act." K.S.A. 2022 Supp. 21-5201(b). The district court was not

given the opportunity to analyze this issue, but we may consider issues raised for the first time on appeal when the newly asserted claim is a purely legal one. *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021).

Standard of Review

The issue we must resolve is whether Carol's extreme neglect of Michael places her within the scope of K.S.A. 2016 Supp. 21-5417, mistreatment of a dependent adult, and ultimately, K.S.A. 2016 Supp. 21-5403(a)(2), reckless second-degree murder. Statutory interpretation involves a question of law over which we exercise unlimited review. *State v. King*, 297 Kan. 955, 971, 305 P.3d 641 (2013). When a statute is plain and unambiguous, a court merely interprets the language as it appears; it is not free to speculate and cannot read language into the statute which is not readily found therein. *State v. Brown*, 295 Kan. 181, Syl. ¶ 5, 284 P.3d 977 (2012). "[I]n construing statutes, statutory words are presumed to have been and should be treated as consciously chosen, with an understanding of their ordinary and common meaning and with the legislature having meant what it said." *State v. Bennett*, 26 Kan. App. 2d 157, 162, 980 P.2d 597 (1999) (quoting *International Ass'n of Firefighters v. City of Kansas City*, 264 Kan. 17, 31, 954 P.2d 1079 [1998]).

Carol was charged and convicted under K.S.A. 2016 Supp. 21-5417(a)(3) which defines mistreatment of a dependent adult as the knowing "omission or deprivation of treatment, goods or services that are necessary to maintain the physical or mental health of such dependent adult." She contends that the provision fails to specifically identify *who* bears the responsibility to act, thus it failed to impose any duty upon her and, in the absence of such a duty, she cannot be held criminally liable for failing to ensure Michael received life-sustaining care.

We begin by looking at who the statute is intended to protect. The Legislature clarified that with its definition of a "dependent adult," which states, as relevant for our precise inquiry, that it means "an individual 18 years of age or older who is unable to protect the individual's own interests," and specifically includes

persons, such as Michael, who are "cared for in a private residence." K.S.A. 2016 Supp. 21-5417(g)(2)(B).

Next, we consider the conduct it is intended to address, the "omission" or "deprivation" of life-sustaining care. "Omission" is understood to mean "apathy toward or neglect of duty." Webster's Third New International Dictionary 1574 (3d ed. 1993). "Deprivation" is "a withholding of something that one needs, esp. in order to be healthy." Black's Law Dictionary 556 (11th ed. 2019).

Finally, we note that the neglect must occur or the care must be withheld knowingly. K.S.A. 2022 Supp. 21-5202(i) defines 'knowing' conduct in the following manner:

> "A person acts 'knowingly,' or 'with knowledge,' with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts 'knowingly,' or 'with knowledge,' with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result."

Thus, according to the plain language of K.S.A. 2016 Supp. 21-5417(a)(3), when an adult living in a private residence is unable to tend to their own needs, and the person caring for them neglects to provide or withholds life-sustaining care, with an awareness that such care is required, that caretaker may be subject to prosecution.

Next, we filter the facts of this case through that framework. It is undisputed that Michael was just shy of 70 years old, lived at home with only his wife, and suffered from a variety of health issues including moderate dementia and the inability to ambulate independently. He required daily physical and medical assistance, together with the standard human necessities of nutrients, hydration, and hygiene.

The record before us also reflects that not only did Carol refuse to allow Michael to reside in a nursing facility where he could receive the necessary care, she likewise rejected offers for assistance in their home from either a family member or home health services agencies. Thus, by her own design, Carol was the individual solely responsible for ensuring Michael's needs were met.

Finally, the evidence established acts of neglect on Carol's part or decisions to otherwise withhold the care Michael required, with an awareness of the nature of her actions. On two separate

occasions, Carol called paramedics to the home after Michael suffered a fall but only after Michael lay in the position in which he had fallen for a significant number of days. On both occasions it was clear to paramedics that Carol scarcely fed or moved Michael and left him to languish in his own waste. The evidence further bears out that Michael was admitted to the hospital following both incidents and upon discharge received specific care instructions as well as multiple prescriptions to be taken daily. Yet, Carol made the conscious decision to administer her own medication to him instead. There is every indication that each time Michael went home to Carol, she returned him to the same room, closed the door, and turned her back on all responsibilities associated with his care. Michael eventually succumbed to complications arising out of Carol's extreme neglect.

When Carol insisted on acting as the sole resource for Michael's needs, she had the responsibility to ensure those needs were adequately met. Her failure to honor her obligation properly subjected her to prosecution under K.S.A. 2016 Supp. 21-5417 for mistreatment of a dependent adult.

We find support for our conclusion in *State v. Young*, 26 Kan. App. 2d 680, 684, 11 P.3d 55 (1999), where Young was convicted of the mistreatment of John, a dependent adult, in violation of the prior version of the statute, K.S.A. 21-3437 (Furse 1995). That provision stated, in pertinent part, that the offense occurred when a caretaker or another person knowingly and intentionally omitted or deprived a dependent adult of treatment, goods, or services necessary to maintain their physical or mental health. On appeal, Young challenged the sufficiency of the evidence to support her conviction. Similar to the facts before us, John resided in Young's home and she admitted to being John's caretaker. The reviewing court found those two factors offered compelling evidence to establish that Young knowingly acted or failed to act. It then went on to find that photographic evidence and testimony from the paramedics, the emergency room nurse, treating physicians, and law enforcement officers which detailed John's physical condition and living situation supported a finding that Young deprived John of treatment, goods, or services that were necessary to his health.

An argument similar to what Carol presents to us was before the Supreme Court for consideration in *State v. Walker*, 244 Kan. 275, 768 P.2d 290 (1989), although in relation to the offense of child endangerment. In that case, Walker was the stepmother of two young boys and tasked with the responsibility of caring for them during the day while their father was at work. Unfortunately, Walker exploited that time with the boys to inflict physical abuse on one of the children. She also forced them to perform oral sex on her. Finally, she failed to properly clothe, bathe, or feed the children and refused to ensure they received proper medical care or their necessary medications. A jury ultimately convicted her of two counts each of endangerment of a child, among other things.

On appeal, Walker alleged there was insufficient evidence to sustain her convictions because the State failed to prove that, as a stepmother, she had a legal duty to care for the children. To sustain a conviction for endangerment under the statute in effect at the time, the State needed to prove that Walker willfully and unreasonably caused or permitted a child under the age of 18 years to be placed in a situation in which its life, body, or health may be injured or endangered. K.S.A. 21-3608(1)(b) (Ensley 1981) (currently K.S.A. 2022 Supp. 21-5601[a]). According to Walker, as a mere stepparent she was not legally required to care for the children and, therefore, could not be convicted of child endangerment despite her actions towards and actual relationship to the children, including her voluntary assumption of the role of caregiver. The Supreme Court was not persuaded and noted that the statute does not require the State to prove that the offender had any independent legal duty to the victim, only that her conduct was willful and unreasonable. Thus, because Walker undertook the responsibility to care for the children, she had the duty to carry out that task reasonably and avoid the creation of circumstances injurious to the boys. *Walker*, 244 Kan. at 281.

The court revisited *Walker* roughly a decade later while distinguishing it from *State v. Wilson*, 267 Kan. 550, 562, 987 P.2d 1060 (1999). In doing so, the court observed that *Walker* presented a very specific situation where Walker asserted that she was not legally required to care for the children and, therefore, was arguably insulated from a claim of child endangerment. The court found

this argument "untenable" and noted that because Walker affirmatively undertook the responsibility to care for the children she had the obligation to carry out those tasks reasonably and not create a situation which posed a risk of harm to the children. *Wilson*, 267 Kan. at 562. In support of its conclusion the court highlighted the principles articulated by LaFave and Scott, 1 Substantive Criminal Law § 3.3(a)(1), (4), and (5), pp. 282-88 (1986) ("Absent a special relationship, one generally has no legal duty to aid or care for another person; once a person steps into the role of caregiver, such that others are discouraged or precluded from filling that role, that person has a duty to act reasonably in fulfilling the adopted role."). *Wilson*, 267 Kan. at 562.

We see no reason not to extend that concept to the protection of other vulnerable victims in the context of mistreatment of a dependent adult. The plain language of that provision likewise imposes no independent duty, but when an individual assumes that responsibility, he or she has an obligation to ensure that the needs of the individual, for whom they are solely responsible, are reasonably met. We note that such an application has been made in other jurisdictions. In *State v. Gargus*, 462 S.W.3d 417, 422 (Mo. Ct. App. 2013), Gargus was convicted of elder abuse in the first degree for subjecting her elderly mother to neglect to the point of death. On appeal, Gargus argued the evidence was not sufficient to sustain her conviction, in part, because she owed no duty of care to her mother.

Elder abuse in the first degree under Mo. Rev. Stat. § 565.180.01, provides: "A person commits the crime of elder abuse in the first degree if he attempts to kill, knowingly causes or attempts to cause serious physical injury . . . to any person sixty years of age or older . . . ." Criminal liability is premised on conduct involving voluntary acts which include "[a]n omission to perform an act of which the actor is physically capable." Mo. Rev. Stat. § 562.011.2(2). Nevertheless, a "person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law." Mo. Rev. Stat. § 562.011.4. In resolving the question of whether the law im-

posed a duty to act to preserve the life of another, the court observed that the provision's commentary included an example of liability for manslaughter "'based on the failure to perform some act, such as supplying medical assistance to a close relative.'" 462 S.W.3d at 422. Thus, the court determined that when the legislation was drafted, the legislature explicitly contemplated the circumstances present in Gargus' case. Mo. Rev. Stat. § 562.011, Comment to 1973 Proposed Code, Subsection 4. *Gargus*, 462 S.W.3d at 422. Once it found the duty existed, the court determined that it was triggered in Gargus' case solely by her voluntary assumption of her mother's care, where her mother was a vulnerable person dependent on Gargus for basic life-sustaining measures including food, clothing, shelter, and medical care. 462 S.W.3d at 423-24.

Gargus was preceded by a somewhat similar finding in *State v. Shrout*, 415 S.W.3d 123, 125 (Mo. Ct. App. 2013). In that case, Shrout argued she could not be held criminally liable for involuntary manslaughter following the death of her mentally handicapped adult son because, while the law imposed an obligation on parents to protect and care for their minor children, no such duty of care existed for adult children. The court rejected this argument and found that a duty of care arose when Shrout voluntarily sought out custody of her son in juvenile court and accepted the same with a full awareness of his physical and mental challenges and the care required for those conditions. See also *Woods v. State*, 361 Ga. App. 259, 263, 863 S.E.2d 738 (2021) (Evidence was sufficient to support Woods' conviction for neglect of a disabled person, despite Woods' argument that he, as the son of victim's longtime caretaker, lacked a legal duty to obtain medical care for the victim; there was evidence that Woods voluntarily offered some level of care to the victim and interfered with efforts by others to seek medical treatment for her.); *State v. Stubbs*, 271 N.C. App. 778, 785, 845 S.E.2d 125 (2020) (Sufficient evidence supported finding that Stubbs voluntarily assumed responsibility for her mother, so as to be mother's caretaker, to support conviction for neglect of elder adult by caretaker resulting in serious physical injury.).

Carol and Michael were the sole occupants of their private residence, and Carol was keenly aware of the care Michael required. Carol demanded to be solely responsible for his needs and refused assistance from various medical providers. When she did so, it came with the obligation to ensure he received that care. Correspondingly, when she neglected to provide those services and withheld the food, hydration, and medical care he required to survive, she was properly subject to criminal prosecution.

Carol reiterates the same argument with respect to her conviction for reckless second-degree murder—that she cannot be held responsible for failing to perform a duty that no law or contract imposed upon her. And where she never assumed the duty to provide life-sustaining care for Michael, she cannot be held criminally liable when a lack of care led to his death. "Reckless" conduct is present when the offender "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A. 2022 Supp. 21-5202(j). A formal duty of care is unnecessary to sustain a conviction under K.S.A. 2022 Supp. 21-5403(a)(2). The statute simply defines the offense as "the killing of a human being . . . recklessly under circumstances manifesting extreme indifference to the value of human life," and a failure to act is included within its reach. K.S.A. 2022 Supp. 21-5403(a)(2).

State v. Davidson, 267 Kan. 667, 987 P.2d 335 (1999), offers some measure of guidance in addressing Carol's claim. In that case, Davidson was convicted of reckless second-degree murder and endangering a child after her Rottweiler dogs attacked and killed a young boy. On appeal she argued her conduct did not constitute reckless second-degree murder as a matter of law because she merely failed to confine the dogs, an act better characterized as a negligent omission sufficient to support a charge of involuntary manslaughter, as opposed to the manifestation of an extreme indifference to human life required for reckless second-degree murder.

An assessment of her actual conduct reflected that she owned several dogs with the potential for aggressive behavior and she

fostered such behavior by failing to properly train them. Various experts attempted to offer assistance with training the dogs and instructing Davidson on what measures to take to head off potentially troublesome situations, but Davidson rebuffed their efforts. Thus, she was aware of the risks inherent to her situation, had access to information that would help her establish a safe environment, and ignored various warning signs that emerged as a result of her failure to properly train and confine the dogs.

Similarly, Carol knew from conversations with various medical professionals, as well as Michael's hospital discharge papers, what precise medical needs must be met. As a fellow human being she was aware of the basic components required to sustain life—nourishment, hydration, and hygiene. Yet, she failed or refused to act in accordance with that information despite its clearly evident catastrophic results. Carol, like Davidson, was properly prosecuted for reckless second-degree murder as her conduct undeniably meets the classification of an extreme indifference to the value of human life.

As a final matter in this issue, Carol argues, for the first time on appeal, that she cannot be held criminally liable for breach of an implied legal duty to care for Michael because to do so would violate her 14th Amendment due process right to fair warning. Generally, constitutional issues cannot be raised for the first time on appeal. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018) (citing *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 [2015]). There are several exceptions to this general rule, including: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) resolution of the question is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019).

Kansas Supreme Court Rule 6.02(a)(5) (2022 Kan. S. Ct. R. at 36) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. *Johnson*, 309 Kan. at 995. Our Supreme Court has repeatedly warned that Rule 6.02(a)(5) would be strictly enforced, and litigants who failed to comply with this rule risked a finding that the issue was improperly briefed, and it would then be deemed waived

or abandoned. See *Daniel*, 307 Kan. at 430 (citing *Godfrey*, 301 Kan. at 1043-44; *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 [2014]).

Carol does not even acknowledge that the issue is being raised for the first time on appeal, thus there is no corresponding analysis for how one or more of the exceptions enables her to clear the procedural hurdles she faces. As an appellate court, our decision to review an unpreserved claim is a prudential one, and even if one of the exceptions were satisfied, we are under no obligation to review the newly asserted claim. *State v. Robison*, 314 Kan. 245, 248, 496 P.3d 892 (2021); see also *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (Declining to reach an unpreserved claim and finding the failure to present the argument to the district court "deprived the trial judge of the opportunity to address the issue in the context of this case and such an analysis would have benefitted our review."). Finding Carol's constitutional claim is not preserved, we decline to exercise our appellate jurisdiction to address it for the first time on appeal.

The resolution Carol requests from us in this overall issue constrains the reach of both statutes under which she was convicted. Because Carol insisted upon independently managing Michael's caretaking needs, separate and apart from her relationship as his spouse, she fell within the ambit of the statute. She is not entitled to the relief she seeks.

The State presented sufficient evidence to prove beyond a reasonable doubt that Carol committed reckless second-degree murder.

In her next claim of error, Carol contends the State failed to sustain its burden to prove that she "'consciously disregarded a substantial and unjustifiable risk' that Michael would die." This court reviews challenges to the sufficiency of evidence to determine whether, considering the entire record and viewed in the light most favorable to the prosecution, a reasonable fact-finder could have found the accused guilty beyond a reasonable doubt. *State v. Woods*, 301 Kan. 852, 874, 348 P.3d 583 (2015). In doing so, we do not reweigh the evidence, resolve evidentiary conflicts, or make witness credibility determinations. *State v. Gonzalez*, 307 Kan. 575, 586, 412 P.3d 968 (2018).

Carol stands convicted of unintentional, reckless second-degree murder for Michael's death. Such killings are not purposeful, willful, or knowing, but result from an act performed with knowledge that the victim is in imminent danger, although the death is not foreseen. *State v. Johnson*, 304 Kan. 924, Syl. ¶ 5, 376 P.3d 70 (2016). Under K.S.A. 2022 Supp. 21-5403(a)(2), the result—the killing—must be unintentional, but borne out of reckless conduct. See *State v. Deal*, 293 Kan. 872, 883-84, 269 P.3d 1282 (2012). Carol asserts that reversal of her conviction is warranted because she was never made aware of "the severity of Michael's condition, or the dangers of not doing more."

The State presented a significant amount of evidence which indicated Carol was on notice, or otherwise aware, that Michael required greater care than she was providing. First, the discharge statement from Michael's first hospital visit, that Carol kept on the dresser in her bedroom, ordered that Michael receive a "diabetic diet" consisting of "regular texture, regular liquids," and outlined the six different medications he needed to take each day. Yet Michael lost over half of his body weight in the four years preceding his death, and Carol chose to not fill the listed prescriptions but simply administer her own medications to him instead. Additionally, those documents directed that Michael needed to visit his treating physician and secure physical therapy, occupational therapy, and speech therapy through outpatient services. Carol took none of those steps.

Additionally, paramedic Roy Rickel testified that Michael only told him about Carol's neglect after she left the room, suggesting his awareness that it would upset Carol if he told others about her lack of care. Michelle Gast testified that Carol slammed the door in her face and offered several excuses for why Gast could not speak with Michael, which arguably indicates Carol did not want Gast to witness Michael's poor health and the conditions in which he existed. Also, after Gast reported her allegations of neglect to APS, a copy of the report, in which Carol was specifically identified as a perpetrator of abuse and neglect, was sent to the Burris' home. That report noted that Carol "failed to obtain medical services for the involved adult after he fell on the floor despite his request for assistance and cutting on himself to get medical attention."

Finally, Carol's awareness of or appreciation for "the severity of Michael's condition, or the dangers of not doing more" was not merely readily ascertainable through the aforementioned formal measures, but also from a fundamentally human level. At the time of his death, Michael was severely emaciated and catastrophically dehydrated. By contrast, Carol's dogs were well cared for and enjoyed meals courtesy of Carol's bi-weekly Schwan's delivery. Thus, she possessed a general understanding of how to provide life-sustaining care to other living things.

A plaque of dirt and a crust of urine and feces coated Michael's body, and he had patches of necrotic tissue and suffered from multiple deep tissue injuries. The latter of these afflictions is incredibly painful and likely induced cries of discomfort. Importantly, none of these conditions develop within a day or two but manifest over a period of several weeks. The room he was relegated to was dark, filthy, and bore every indication Carol simply closed the door and left Michael to die.

Viewing the evidence in a light most favorable to the State, as we are required to do under our governing standard of review, it does not indicate Carol simply failed to ask for help. Rather, it is a remarkable illustration of someone who exhibited extreme indifference to the value of human life, and another person died as a result of that neglect. Carol's conviction for reckless second-degree murder is affirmed.

The prosecutor's closing argument does not contain reversible error.

Carol next contends the prosecutor committed reversible error during closing arguments. She first accuses him of resorting to an inflammatory line of argument that impermissibly focused on their wedding vows. Next, she claims improper comments were uttered about her choice to not testify. Her final claim of error is that the prosecutor improperly commented on the strength of the State's evidence against her.

We review allegations of prosecutorial error using a two-step process. First, we must determine whether an error occurred. Next, if an error is identified, we consider whether it requires reversal.

State v. Sherman, 305 Kan. 88, 109, 378 P.3d 1060 (2016). A prosecutor errs when he or she exceeds the wide latitude they are afforded by misstating the law or arguing facts not based in evidence. *State v. Wilson*, 309 Kan. 67, 78, 431 P.3d 841 (2018). An error requires reversal if, after an application of the constitutional harmless error inquiry, it is apparent the challenged remarks prejudiced the accused's due process rights to a fair trial. *Sherman*, 305 Kan. at 109. This means the State must prove there is "no 'reasonable possibility'" the errors contributed to the verdict. *State v. Berkstresser*, 316 Kan. 597, 606, 520 P.3d 718 (2022). We will address each of Carol's allegations in turn.

A. *The prosecutor's comment on wedding vows*

This claim of error arises out of the following portion of the prosecutor's closing argument:

> "I take thee to be my wedded husband, to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish till death do us part.
>
> . . . .
>
> "But here's the thing, whether you're married 45 years, 30 years, or ten minutes, a marriage is defined by certain things. Lot of people think it's defined by that wedding day, right, when the dress is so pretty, when the suit is all pressed, when the flowers smell so good, and the cake tastes so sweet, right. The reality is the marriage isn't defined by that day.
>
> "The marriage is defined by when one is at their lowest, the darkest moments, when they are in despair, when they are vulnerable, and when they are in their most need. That's when a marriage is defined because then the question is those hands that held each other on that wedding day, are they still holding each other. That's a question you should ask as you deliberate when considering whether Miss Burris had extreme indifference to the human life of Mr. Burris."

Carol claims this passage illustrates an effort by the prosecutor to inflame the passion of the jury and distract from the proper matter at hand. Closing remarks from a prosecutor which serve to inflame the emotions or prejudices of a jury and shift its focus from its duty to decide the case on the evidence and controlling law are barred. *State v. Nesbitt*, 308 Kan. 45, 56, 417 P.3d 1058 (2018).

As part of the closing arguments in *Nesbitt*, the prosecutor described the 100-year-old victim of rape and felony murder as her family's "treasure." 308 Kan. at 56. The Kansas Supreme Court

held these remarks were erroneous because they "had no purpose other than inflaming the passions of jurors, distracting them from their task." 308 Kan. at 57. Carol also directs us to *State v. Henry*, 273 Kan. 608, 44 P.3d 466 (2002), where Henry was on trial for the rape and murder of a woman. After the victim's mother testified, the prosecutor told the jury to "think about Mother's Day yesterday, her mom how she must have felt. How [the victim] will never have a chance to be a mother, this young professional sharp, security conscious woman . . . ." 273 Kan. at 640. The Kansas Supreme Court again found that the comments were irrelevant to the jury's fact-finding duties, and the prosecutor clearly intended to fan the flame of passion and prejudice. 273 Kan. at 641. Carol analogizes the prosecutor's comments in her case with those in *Nesbitt* and *Henry* and asserts that whether the hands that held each other on the Burris wedding day were still holding one another was irrelevant to a determination of whether the State satisfied its burden of proof.

The State argues the prosecutor's comments were distinguishable from those deemed problematic in the aforementioned cases because here, the prosecutor explicitly told the jury not to make its determination based on sympathy for the victim and directed it to the jury instruction that contained the same order. The State also highlights the prosecutor's comment which advised the jury to confine its deliberations to only the facts presented and asserts that statement is a salve to any error attributable to the challenged comments. We are not persuaded. The allusion to the couple's wedding day had no bearing on the matter at hand. Rather, the prosecutor's comments conflated the vows Carol took on her wedding day with her responsibility to ensure that Michael received the care she assured him, his sister, and medical professionals that she would provide. The jury's task was not to determine whether Carol violated her vows—it was to determine whether Carol violated the law. The prosecutor's inflammatory remarks strayed beyond the latitude he was allowed in presenting his case and distracted the jury from its obligation.

In accordance with our dual pronged standard of review, having identified an error, we must now assess whether it necessitates reversal of Carol's convictions. An error does not require reversal

if the State shows "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict." *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011). Carol contends the prosecutor's comments amount to reversible error because they essentially asked the jury to subject Carol's behavior to a moral judgment.

Returning to *Nesbitt*, after finding the prosecutor's "treasure" comment erroneous, the court addressed reversibility. 308 Kan. at 56. It concluded that the State's argument was otherwise "entirely appropriate" and noted that, following closing arguments, the district court reminded the jury that the statements made by counsel in closing arguments were not evidence for the jury to consider. 308 Kan. at 57. The court held that "[g]iven the limited nature of the prosecutor's mistake, it would be unreasonable to believe that the comment caused reversible prejudice." 308 Kan. at 57. Similarly, in *State v. Lowery*, 308 Kan. 1183, 1208, 427 P.3d 865 (2018), the Kansas Supreme Court found that the prosecutor made an improper "golden rule" argument when they suggested the jury place themselves in the victim's position. On reversibility, the court found the single error was but a small part of a two-week trial and noted that the prosecutor also reminded the jury that it could only consider those things testified to by witnesses and exhibits admitted into evidence. Then, following closing arguments, the district court informed the jury it must disregard statements made by counsel that were not supported by the evidence. For those collective reasons, the court determined the prosecutor's lone error did not require reversal. 308 Kan. at 1212. Finally, in *State v. McGee-Darby*, No. 118,776, 2019 WL 1868323, at *7-9 (Kan. App. 2019) (unpublished opinion), a panel of this court held the prosecutor erred when he told the jury to consider the fact that the victim was "broken" during her testimony, characterizing it as an improper appeal to the jurors' emotions which distracted from the facts of the case. But in its reversibility analysis, the panel noted that the district court instructed the jury to disregard statements by counsel that were not supported by the evidence. Moreover, in the defendant's closing, he rebutted the State's erroneous

comments and provided an alternative interpretation of the victim's demeanor. Thus, the State's "broken" comment was harmless and did not warrant reversal. 2019 WL 1868323, at *10.

Many of the curative factors from *Nesbitt*, *Lowery*, and *McGee-Darby* are also present here. First, the comment was a small part of a lengthy closing argument that occurred at the end of a four-day trial and, after it was made, the prosecutor told the jury it must confine its decision making to the facts presented. This reminder, much like the prosecutor's comments in *Lowery*, helped clarify the jury's duties and dilute any prejudicial effects associated with the erroneous comment. Next, the record reflects that Carol's counsel rebutted the prosecutor's wedding vow comments when he told the jury, "You are presented with a woman who took on the care of her husband *for better or for worse* after 45 years of marriage. She did the best she could. She tried. Maybe she didn't do a very good job. . . . But she did not see alternatives." (Emphasis added.) This responsive remark, like the prosecutor's, also invoked the couple's wedding vows and, in that regard, creates a parallel with *McGee-Darby*, where defense counsel addressed the State's erroneous comments about the victim's appearance and provided an alternative explanation. Finally, the district court informed the jury that counsel's statements were not evidence and "[i]f any statements are made that are not supported by evidence, they should be disregarded." This instruction, like the instructions in *Nesbitt*, *Lowery*, and *McGee-Darby*, favors the State. Each of these factors weighs in the State's favor and supports a finding that there is "no 'reasonable possibility'" the error contributed to the verdict. See *Berkstresser*, 316 Kan. at 606.

B. *The prosecutor's comment on Carol's right to not testify*

In her next claim of error Carol contends the prosecutor improperly commented on her choice not to testify when he stated, "You heard no evidence from her." The State asserts that in making this argument Carol extracts the comment from its proper context but that once the two are reunited, its innocuousness is evident.

When analyzing a prosecutor's statements for error, we do not isolate the challenged comments but consider them in the context

in which they were made. *State v. Butler*, 307 Kan. 831, 865, 416 P.3d 116 (2018). Fair comment on trial tactics and interpretation of evidence is allowed, so long as care is taken by the State not to inappropriately denigrate opposing counsel or inject personal evaluations of the honesty of witnesses. *State v. Crum*, 286 Kan. 145, 150, 184 P.3d 222 (2008).

The prosecutor's comment that the jury "heard no evidence" from Carol occurred during the following portion of his closing argument:

"*You heard no evidence from her*. She had two and a half hours. You heard that she said—well, there was questions from the defense insinuating that he said that he had a loss of appetite, refused food, right? You heard no evidence of that. None. Not one person testified to that, that that happened. And more importantly if that had happened, in two and a half hours she talked about everything. In two and a half hours, don't you think that would have been the first thing, look, he wanted to die. Look, he didn't want to eat. Look, he had a loss of appetite. She doesn't say that. She says he didn't have a problem other than his teeth but I just chopped it up into small bits." (Emphasis added.)

Viewing the comment in its broader context, the State's remark simply served to highlight for the jury that Carol's counsel merely stated or insinuated that Michael experienced a loss of appetite or refused food, it had no foundation in the evidence and amounted to nothing more than comments from counsel. Such remarks do not constitute error. Jury deliberations are restricted to consideration of the evidence presented and the law governing the issues. The challenged remark was simply a reminder to the jury of that responsibility.

C. *The comment concerning the strength of the evidence*

Carol's third objection emanates from the prosecutor's final comment, when he stated, "The evidence is overwhelming just like the smell was when those EMTs went into [Michael's] room." According to Carol, this amounts to an impermissible airing of the prosecutor's personal opinion about the weight of the evidence.

The wide latitude permitted a prosecutor in discussing the evidence during closing argument in a criminal case includes at least limited room for rhetoric and persuasion, even for eloquence and modest spectacle. *State v. Chandler*, 307 Kan. 657, 688, 414 P.3d 713 (2018). But prosecutors may not share their personal opinion

about the guilt or innocence of the accused. *State v. Peppers*, 294 Kan. 377, 399, 276 P.3d 148 (2012). Carol claims a similar remark was determined to be problematic in *Peppers*. There, the prosecutor told the jury that it should find Peppers guilty of murder "because he did it." 294 Kan. at 399. On appeal, the Supreme Court classified it as an improper expression of personal opinion because prosecutors are restricted to "something akin to 'the evidence shows defendant's guilt' in order to make a statement merely directional." 294 Kan. at 400.

The prosecutor's comment here is distinctly different from that at issue in *Peppers*. There, the prosecutor shared his opinion on the ultimate factual question in the case—whether Peppers was the perpetrator—without referring to the weight of supporting evidence. By contrast, the prosecutor here said the evidence of Carol's guilt was overwhelming—almost the precise comment the *Pepper*s court recommended that prosecutors make.

In sum, the prosecutor erred when he conflated Carol's duty under her wedding vows with her legal duty of care, but this error was harmless. The remaining two comments with which Carol takes issue were not erroneous.

The district court did not abuse its discretion when it failed to independently order a competency evaluation for Carol.

Carol's fourth and final contention of error consists of a claim that the district court should have taken the initiative to order a competency evaluation for her. She asserts the court failed to appreciate the power and obligation it possessed to order the evaluation "even though both her attorney and the State elected not to do so."

Carol never entered such an objection when she was in front of the district court. But she argues we should still review her claim because it implicates her fundamental due process rights. As stated earlier in this opinion, constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review, but there are exceptions: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental

rights; and (3) the district court is right for the wrong reason. *State v. Ortega-Cadelan*, 287 Kan. 157, 159, 194 P.3d 1195 (2008). Carol, citing *State v. Davis*, 277 Kan. 309, 322, 85 P.3d 1164 (2004), argues her claim falls under the second exception because her competency to stand trial implicates her fundamental rights.

The law presumes the defendant is competent to stand trial. *State v. Groschang*, 272 Kan. 652, 659, 36 P.3d 231 (2001). It is the trial court in whose mind a real doubt of sanity or mental capacity to properly defend must be created before that court can order an evaluation solely on its own initiative. The necessity for such an inquiry lies within the discretion of the court, and its decision will not be disturbed without demonstrated abuse of its sound judicial discretion. *State v. Harkness*, 252 Kan. 510, 516-17, 847 P.2d 1191 (1993).

Carol cites *State v. Gregor*, No. 96,021, 2007 WL 4158072, at *1 (Kan. App. 2007) (unpublished opinion), where Gregor's counsel told the district court that Gregor had "'a mental defect and part of her brain is missing,'" but neither the parties nor the district court ordered a competency evaluation. On appeal, a panel of this court acknowledged Gregor's claim was unpreserved, but held that it was "inappropriate to determine that a defendant waived a competency claim when, if incompetent, the defendant would not have the capacity to waive a competency defense." 2007 WL 4158072, at *2 (citing *Pate v. Robinson*, 383 U.S. 375, 384, 86 S. Ct. 836, 15 L. Ed. 2d 815 [1966]). Unlike *Gregor* though, Carol's counsel never mentioned her possible lack of competency to the district court judge. Rather, her counsel told the court that he did not intend to raise her mental impairment as a defense. One would think such a statement was the product of a calculated, informed decision made following interactions with the client. The district court, speaking about Carol's apparent competency in her recorded interview, later said, "[S]he appeared to be distracted regarding her canines and not a mental type condition, in other words, she was concerned with her dogs." So here, unlike in *Gregor*, the record contains no evidence that the district court ignored concerns about Carol's competence. To that end, resolution of the claim is unnecessary to preserve Carol's fundamental rights.

CONCLUSION

A person who voluntarily assumes the responsibility of providing a resident in their home with the services necessary to maintain their physical and mental health, such as food and medical assistance, but then fails to adequately meet those needs may be held liable for harm resulting to the resident as a result of the caretaker's failure to act.

The evidence adduced at trial was sufficient to sustain a conviction for reckless second-degree murder. This was not a case where Carol simply refused to seek help in meeting Michael's needs. Rather, she neglected to provide for his basic needs and medical care for an extended period of time and, in so doing, exhibited an extreme indifference toward human life.

A prosecutor is afforded wide latitude in presenting their case to the jury but may not stray into arguments that encourage the jury to arrive at a verdict based on factors outside the evidence and beyond the controlling law. Highlighting the wedding vows taken between the victim and defendant was improper and irrelevant to the issue of whether Carol committed the charged offenses.

K.S.A. 2018 Supp. 22-3302(a) permits the district court to request a competency evaluation. There is no indication from the record that the judge in this case abused his discretion by failing to appreciate the authority he had to make such a request on his own initiative.

Affirmed.

(528 P.3d 265)

No. 124,303

STATE OF KANSAS, *Appellee*, v. JOHN R. CANTU, *Appellant*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Right to Testify on One Own's Behalf at Criminal Trial—Due Process Right.* The right to testify on one's own behalf at a criminal trial is a right essential to due process of law in an adversary process.

2. TRIAL—*Right to Testify in Criminal Case May Be Waived or Forfeited.* A defendant may waive or forfeit the right to testify in a criminal case either intentionally or by conduct.

3. SAME—*Warning to Disruptive Witness that Testimony May Be Stricken—Factor for Consideration.* Although warning a disruptive witness that their testimony may be stricken is not mandatory in Kansas, it is a factor that should be considered as part of the totality of the circumstances.

4. SAME—*Denial of Right to Testify Not Structural Error—Appellate Review*. Denial of the right to testify is not a structural error requiring reversal. Instead, courts apply a harmless error analysis to determine whether the denial affected the outcome of the trial beyond a reasonable doubt.

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed March 31, 2023. Affirmed in part and reversed in part.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Kimberly A. Rodebaugh, senior assistant district attorney, *Thomas R. Stanton*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GARDNER and CLINE, JJ.

ARNOLD-BURGER, C.J.: John R. Cantu was charged and convicted of two counts of felony stalking, two counts of violation of a protection from stalking order, one count of criminal damage to property, and one count of felony criminal threat. His case was tried before a jury, and he testified in his own defense. During the State's cross-examination of Cantu, Cantu asked the district court questions and ignored some admonishments from the district judge. The district judge removed Cantu from the witness stand and struck his testimony from the record.

Cantu argues on appeal that there was insufficient evidence to show that he was served or provided notice of the protective orders. Thus, he argues, he could not be convicted of knowingly violating a protection from stalking order as required by K.S.A. 2020 Supp. 21-5924(a)(6); nor could he be convicted of felony stalking under K.S.A. 2020 Supp. 21-5427(a)(3) because it also requires that he be served the orders or that he received notice of the orders through some other means. We agree, and for the reasons set forth herein we reverse his convictions for those charges.

Cantu next argues that the district court committed reversible error when it denied him his right to testify and struck his testimony. We find that the district court erroneously denied Cantu's constitutional right to testify by striking his direct testimony. But based on a review of the evidence as a whole, we find beyond a reasonable doubt that even if the jury disregarded Cantu's testimony, it did not affect the outcome of the trial.

Affirmed in part and reversed in part.

FACTUAL AND PROCEDURAL HISTORY

In June 2020, D.H. requested protection from stalking orders against Cantu for herself and her daughter, F.H. Her request was granted on July 7, 2020.

On September 27, 2020, D.H. was at her home with her two children and getting ready to go to sleep. She heard a loud knocking on her back door and, after looking at her video camera monitor, saw that Cantu was on her back porch knocking on the door. The camera was not saving its recordings at the time. D.H. heard Cantu saying something but could not make out what he was saying. D.H. called the police.

D.H.'s oldest child entered the room around the same time and asked who was at the door. D.H. instructed her to call a relative, A.H., who lived next door.

D.H. stayed on the phone with police while her daughter stayed on the phone with A.H. A short time later, the knocking on the door stopped. Soon after, D.H. heard glass breaking. She and her children screamed and were telling the police and A.H. to hurry. D.H. and her children waited in her bedroom until dispatch

told her that the police were outside and knocking on her door. She went to the door and let an officer in to search the house.

After searching the house and finding no one, the officer determined that the sound of breaking glass was caused by a cinder block going through the window.

While the officer was searching the house and talking to D.H., A.H. was outside speaking with another officer. After talking with the police, A.H. boarded up the broken window. The police left the area without finding Cantu. A.H. stayed in the area and after a while went to an alley connected to the house to look around. While searching the alley, A.H. found Cantu hiding behind a large utility pole.

Cantu began moving quickly towards A.H., screaming, cursing, and trying to take off his belt. Cantu would then walk away for a bit before returning and continuing to yell. According to A.H., this happened for a few minutes. Eventually Cantu left and the police arrested him a few blocks away.

Cantu was eventually charged with two counts of felony stalking, two counts of violation of a protection from stalking order, one count of criminal damage to property, one count of criminal trespass in defiance of a restraining order, and one count of felony criminal threat.

A jury trial was held where D.H. and A.H. testified about their experience that night. During D.H.'s testimony, the district court admitted the previously granted protection from stalking orders that D.H. requested against Cantu. Cantu did not object to their admission. Nor did he request a limiting instruction. No limiting instruction was given.

Before their testimony, during jury selection, the district court brought Cantu and counsel to chambers and admonished Cantu for inappropriate conduct during jury selection.

"THE COURT: . . . Mr. Cantu, I noticed when a question was asked, would you be willing to vote not guilty, you raised your hand. That's not appropriate. Ms. Rodebaugh was not speaking to you. So you just need to remember not to make any gestures. Alright? Do you understand?

"MS. CRANE: Do you understand what she's saying?

"[THE DEFENDANT]: I didn't mean to be inappropriate.

"THE COURT: I'm sure you didn't but that's why I'm telling you outside of the jury.

"[THE DEFENDANT]: I was doing that at the end that specific gesture.

"THE COURT: Any gesture by you is not appropriate.

"[THE DEFENDANT]: Like can you explain? Like would that be one? What about like—

"THE COURT: I'm not going to go through all the probable things you can do.

"MS. CRANE: I believe what she's trying to tell you, John, is she wants you to sit there and not make a lot of gestures whether you're approving to something or disapproving to something.

"THE DEFENDANT: I told her I did not do so in a forceful manner. I thought it was neutral.

"MS. CRANE: She's telling you that's not appropriate.

"THE DEFENDANT: Like that?

"MS. CRANE: No gestures whatsoever.

"THE DEFENDANT: Can we object then?

"THE COURT: Mr. Cantu.

"THE DEFENDANT: Not to say I'm going to.

"THE COURT: Just listen to me.

"THE DEFENDANT: But just for—

"THE COURT: Will you listen to me please.

"THE DEFENDANT: For purposes of appeal. Apparently you won't listen. Like I proved my point. Thank you.

"THE COURT: Well, if you think you're going to prove points here today, we're going to have problems. You need to listen to me.

"THE DEFENDANT: Is this all taken down? Thank you.

"THE COURT: Do you understand that?

"THE DEFENDANT: Yes, ma'am.

"THE COURT: You are not to make any gestures in action to anything anyone says in the courtroom. If you do, I will have you removed from your own trial. Do you understand that?

"THE DEFENDANT: Not in the way you term it but I will not—you see what I'm saying? I feel like you're being very forceful and I would like to be on the record.

"THE COURT: Let's go back in the courtroom.

"THE DEFENDANT: Thank you."

After the State rested its case, Cantu testified in his own defense. Cantu's testimony was largely a general denial of the allegations. According to Cantu, he was not at D.H.'s residence, he did not throw a brick through her window, and was not present in the alley near the house.

On cross-examination, the State first asked whether Cantu "agree[d] that there was a protection from stalking that was filed" against him. Cantu disagreed. The State then tried to ask another question, which Cantu interrupted. The following exchange then happened between the district court and Cantu:

"[THE DEFENDANT]: For the record, for the record—
"THE COURT: You need to wait for a question.
"[THE DEFENDANT]: I didn't finish.
"THE COURT: You need to wait for a question.
"[THE DEFENDANT]: I didn't finish answering the first one.
"THE COURT: I said it two times now. You need to wait for a question.
"[THE DEFENDANT]: She asked if I agreed.
"THE COURT: Sit back and wait for a question.
"[THE DEFENDANT]: May I be allowed to explain? Do I have to say yes or no?
"Q: Mr. Cantu?
"THE COURT: Mr. Cantu, if you don't cooperate I'm going to ask you to go back to the table.
"[THE DEFENDANT]: May I ask a question?
"THE COURT: You need to listen to the questions.
"[THE DEFENDANT]: Am I supposed to respond yes or no?
"THE COURT: Go sit at the table right now. Absolutely right now.
"[THE DEFENDANT]: I don't understand. Can I object to this?
"THE COURT: Sit at your table.
"[THE DEFENDANT]: I mean, she asked me a question.
"THE COURT: Officers, would you remove Mr. Cantu from the courtroom?
"[THE DEFENDANT]: Is this going to be on the record? [D.H.]—my water. You—
. . . .
"MS. CRANE: Is that sufficient, Your Honor?
"THE COURT: If Mr. Cantu will remain compliant it is. Otherwise I will require his removal. He's indicating by his posture and returning to his seat that he will remain compliant. Do you have any other evidence?
"MS. RODEBAUGH: Your Honor, are we striking everything from the record, if I don't have an opportunity to cross-examine.
"THE COURT: Is that what you are requesting?
"MS. RODEBAUGH: If I don't have an opportunity to cross-examine, yes, I would ask for everything he testified to be struck from the record.
"THE COURT: Ms. Crane, any response to that request?
"MS. CRANE: It's an unusual situation, Your Honor. The questions I asked were pretty general. It's a general denial. He's already issued a general denial by pleading not guilty. So I don't think his testimony needs to be stricken at this point.
"THE COURT: Mr. Cantu would not cooperate when I told him to only answer questions on cross-exam. I believe the State's request is valid. His testimony is stricken."

The defense then rested their case. Before the district court had an opportunity to read the jury instructions to the jury, Cantu

interrupted to state that his attorney was "refusing to communicate" with him and that he wanted to claim ineffective assistance of counsel. The district court asked Cantu to be quiet and then read the jury instructions to the jury.

The jury found Cantu guilty on every count except criminal trespass. Cantu timely appealed.

ANALYSIS

Cantu raises five issues on appeal. First, Cantu argues that there was insufficient evidence to convict him of felony stalking or knowingly violating a protection from stalking order. Second, Cantu argues that the jury instructions for felony stalking did not include a required culpable mental state. Third, Cantu argues that the district court erred by failing to give a limiting instruction relating to the use of prior bad acts evidence. Fourth, Cantu argues that the district court erred when it determined that Cantu forfeited the right to testify in his own defense. Finally, Cantu argues that cumulative error deprived him of a fair trial. We will address each claim in turn.

I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT CANTU OF FELONY STALKING OR OF KNOWINGLY VIOLATING A PROTECTION FROM STALKING ORDER

Cantu argues that there was insufficient evidence to convict him of felony stalking or knowingly violating a protection from stalking order.

We review the evidence in the light most favorable to the State.

"'When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses.' [Citations omitted.]" *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

There was insufficient evidence to find that Cantu was served with, or otherwise provided notice of, any protective order.

Cantu was charged with two counts of felony stalking under K.S.A. 2020 Supp. 21-5427(a)(3) which required the State to

prove that Cantu recklessly engaged in prohibited conduct "after being served with, or otherwise provided notice of, any protective order." Cantu was also charged with two counts of violating a protection from stalking order under K.S.A. 2020 Supp. 21-5924(a)(6) which required the State to prove that Cantu "knowingly violat[ed] . . . a protection from stalking . . . order."

On appeal, Cantu argues that there was insufficient evidence to show that he was served or provided notice of the protective orders. Thus, he argues, he could not be convicted of knowingly violating a protection from stalking order as required by K.S.A. 2020 Supp. 21-5924(a)(6); nor could he be convicted of felony stalking under K.S.A. 2020 Supp. 21-5427(a)(3) because it also requires that he be served the orders or that he received notice of the orders through some other means.

Based on the record before this court, Cantu's argument is persuasive. Both of the final orders of protection from stalking were filed in July 2020 and would be effective until July 2021. There is a stamp saying that the orders were received by the sheriff's office in July 2020, but nothing to show that the orders were served on Cantu. Nor was Cantu present at the hearing where the orders were given. Nothing in the record shows that Cantu knew that the final orders had been issued.

Perhaps realizing this, the State points to the text on the final orders that states that "Plaintiff filed a written verified petition on 22 June, 2020 requesting an Order of Protection . . . . Prior to [the final] hearing, Defendant was given reasonable notice of the date set for the hearing, together with a copy of the petition and *any ex parte order of protection from stalking* . . . on 25 June, 2020." (Emphasis added.) The State argues because Cantu was given a copy of the petition and "any" ex parte order then he necessarily knew that a protection from stalking order was in place, and he then violated it. But there is no evidence that an ex parte order was ever put in place. The district court was not required to enter ex parte orders upon the filing of the petition. See K.S.A. 2020 Supp. 60-31a05(b) (court may enter ex parte temporary order on presentation of a verified petition).

With no evidence that an ex parte temporary order was entered, we cannot presume that Cantu was provided notice of any order of protection from stalking. Without evidence showing that

Cantu was served or provided notice of a temporary order or the final order, he could not be convicted under K.S.A. 2020 Supp. 21-5427(a)(3) (requiring Cantu to be "served with, or otherwise provided notice of, any protective order" that prohibited his contact with the targeted person).

The same considerations apply to Cantu's conviction under K.S.A. 2020 Supp. 21-5924(a)(6) which required the State to prove that Cantu "knowingly" violated a protection from stalking order. Because Cantu was not present at the hearing when the final order was put in place and because there is no evidence that a temporary order was granted, a jury could not find that Cantu knowingly violated a protection from stalking order.

For these reasons, Cantu's stalking and violation of a protective order convictions must be reversed. We therefore do not need to reach Cantu's objection to the felony stalking instruction that was provided to the jury. Nor do we need to address his claim that an unrequested limiting instruction as it relates to the admission of prior bad acts to establish his propensity to violate protection orders requires reversal of those same convictions.

We are then left to examine Cantu's claims of error as they relate to the remaining charges of misdemeanor criminal damage to property based on damage to the window and felony criminal threat based on threats made to A.H.

II. THE DISTRICT COURT ERRED BY DETERMINING THAT CANTU FORFEITED HIS RIGHT TO TESTIFY BY HIS CONDUCT, BUT THE ERROR WAS HARMLESS

While acknowledging that an accused may forfeit the right to testify through their conduct, Cantu argues that his behavior did not warrant such a finding by the district judge. As a result, he asserts that his remaining convictions must be reversed because his fundamental right to testify under the United States Constitution Fourteenth Amendment Due Process Clause and the Compulsory Process Clause of the Sixth Amendment was violated. See *Rock v. Arkansas,* 483 U.S. 44, 50-52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

The facts prompting Cantu's removal from the witness stand are not in dispute. When Cantu asked the district court some questions during the State's cross-examination, the court ordered him to leave the witness stand and ordered his direct testimony stricken. Cantu's direct testimony was brief. It consisted of an absolute denial that he had been at D.H.'s residence at any time that evening, he did not damage her window, and he had no contact with A.H.

We review an allegation of a constitutional volitation de novo.

We review de novo whether a trial court's ruling violated a criminal defendant's right to due process. *State v. Robinson*, 293 Kan. 1002, 1030, 270 P.3d 1183 (2012).

We examine the constitutional right to testify in general.

The United States Supreme Court has long recognized that the "right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution" and is "one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock*, 483 U.S. at 51. But the right to present testimony is not without limitation. "The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" 483 U.S. at 55. For example, "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*." *Nix v. Whiteside*, 475 U.S. 157, 173, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986).

And a defendant may waive the right either intentionally or by their conduct. *United States v. Panza*, 612 F.2d 432, 438 (9th Cir. 1979). Like the right to testify, the right to be present at trial can be lost if, "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). If a defendant can lose their right to be present at trial, it follows that they may also lose their right to testify. See *Rock*, 483 U.S. at 55-56.

While Kansas courts have not addressed whether a defendant can be barred from testifying, other jurisdictions have. For example, in *State v. Anthony*, 361 Wis. 2d 116, 147, 860 N.W.2d 10 (2015), the Wisconsin Supreme Court held that a defendant could forfeit their right to testify if the defendant displayed "stubborn and defiant conduct that presented a serious threat to both the fairness and reliability of the criminal trial process as well as the preservation of dignity, order, and decorum in the courtroom." In *Anthony*, the district court observed, on the record, that the defendant was "'quite animated,'" "'speaking very forcefully' with 'a good deal of anger in his voice,'" and seemed close to his "'breaking point'" while trying to testify to irrelevant matters. 361 Wis. 2d at 151. Before barring his testimony, the district court in *Anthony* warned him—many times—that he would not be allowed to testify if he continued to disobey orders and misbehave. The defendant made it clear that his conduct would continue, even after being warned multiple times, and the district court determined that he would not be allowed to testify and had him removed from the courtroom. As the Wisconsin Supreme Court put it, the district court "was not required to put Anthony on the stand and wait for the fireworks. The criminal trial process deserves better." 361 Wis. 2d at 155.

The law related to striking a defendant's testimony is cautionary.

Striking the testimony of a witness is a drastic remedy not lightly invoked. *United States v. McKneely*, 69 F.3d 1067, 1076 (10th Cir. 1995). When possible, courts should only strike portions of the testimony. *United States v. Esparsen*, 930 F.2d 1461, 1470 (10th Cir. 1991). Judges often have several options in the situation of a disruptive defendant, the selection of which is subject to an abuse of discretion analysis. *United States v. Rosario Fuentez*, 231 F.3d 700, 704-05 (10th Cir. 2000) (holding that appellate courts review the district court's decision to strike testimony for abuse of discretion); see *State v. Wilkins*, 220 Kan. 735, 741, 556 P.2d 424 (1976) (recognizing that a trial court exercises discretion in ruling on a motion to strike).

"Whether to strike a witness' testimony or resort to some other procedure (for instance, a contempt proceeding) must be determined in part by the extent to which each alternative would disrupt the trial. The trial judge is uniquely well-suited to make this determination, and we see no good reason to require that a particular process be followed in making it. Excusing a jury in order to make special findings regarding the propriety of various procedures may be disruptive in itself. Were we to require the interruption of a trial each time a defendant refuses to answer a proper question, we have little doubt that this would become a familiar tactic. Such a procedure would certainly be open to abuse.

"Not only would actions of contumacious defendants be able to severely limit the government's right of cross-examination, but the orderly conduct of trials would be seriously impaired. We cannot impose on a trial court a rule which could so significantly disrupt the administration of justice.

"We also reject the suggestion that striking testimony is necessarily a last resort, to be used only when all other sanctions appear ineffective. Other measures may be appropriate. But we leave this determination to the trial judge in the exercise of a reasoned discretion. Whether it is better to excuse the jury to conduct a contempt proceeding or to continue with an uninterrupted trial by striking testimony is for the trial judge to decide. Here the defendant was permitted to give his direct testimony to the jury. We can only speculate as to the effect on the jury of the striking of the testimony." *Panza*, 612 F.2d at 439.

Several jurisdictions have upheld the district court's decision to strike a defendant's testimony and many of those decisions note that the trial court warned the defendant that continued misbehavior would result in their testimony being stricken. See *Williams v. Borg*, 139 F.3d 737, 740, 743 (9th Cir. 1998) (district court did not err by striking defendant's testimony after defendant was warned or admonished on at least three separate occasions that his failure to answer cross-examination questions would result in his testimony being stricken); *Panza*, 612 F.2d at 439 (holding district court did not abuse its discretion by striking defendant's testimony after defendant was expressly warned that the testimony would be stricken if he refused to answer questions on cross-examination); *Wright v. State*, 278 So.3d 805, 812 (Fla. Dist. App. 2019) (affirming decision to strike defendant's testimony after warning defendant that his testimony would be stricken, and lesser sanctions, did not correct the misbehavior); *People v. Figueroa*, 308 Ill. App. 3d 93, 101, 719 N.E.2d 108 (1999) ("trial court also warned defendant several times that his testimony would be stricken"); *State v. Clausen*, 307 Neb. 968, 985, 951 N.W.2d 764 (2020) (finding no plain error in striking defendant's testimony after trial court

warned defendant that his testimony would be stricken "if he had another outburst").

In addition, although it relates to the right to be present, Federal Rule of Criminal Procedure 43(c)(1)(C) states that a defendant waives the right to be present "when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom." Kansas does not have a similar rule.

Here, although Cantu was threatened with removal from the witness stand, he was not advised that his behavior would result in his testimony being stricken. And although we do not find that such a warning is mandatory in Kansas, it is a factor that should be considered as part of the totality of the circumstances.

Cantu's behavior was not so disruptive as to warrant striking his testimony.

In this case, Cantu was not being egregiously disruptive in his back-and-forth with the district judge. The State asks this court to look at the entire record to get a more complete picture of Cantu's conduct, but Cantu behaved appropriately for most of the trial. The one major issue—prior to his conduct during cross-examination—was during voir dire where Cantu raised his hand when the jury was asked if anyone would be willing to vote not guilty. While that was clearly inappropriate behavior, the district court warned Cantu—in chambers—that it was not acceptable. It appears Cantu took the warning to heart because there was no other mention of similar inappropriate behavior.

The next incident occurred after the State rested and Cantu's counsel advised the court that Cantu wanted to testify "against Counsel's advice." The district court then advised Cantu that he had the right to not testify and asked if he had enough time to talk to his attorney about testifying. In response, Cantu said that he had

"spoken with Mrs. Crane in effect that I wouldn't have any issue going forward with any negotiations to herself but I have also been told that I need to say this on the record that as part of my testimony it is within our trace and action that we—"

He continued by saying that he "just wanted to make sure we get that. That it's called an arbitration action right."

The district court expressed confusion over what Cantu was trying to say and asked if he had any questions. Cantu did not respond to her question and instead talked about his belief that he had a "corporate arbitration action." The court adjourned for the day.

The next day was Cantu's direct testimony and interaction with the district court during cross-examination. The only warning given during that exchange was when the district court said to Cantu "if you don't cooperate I'm going to ask you to go back to the table." Cantu then asked if he could ask a question and if he was supposed to respond "yes or no" to the State's questions. The court then ordered Cantu to return to the table. A short time later, Cantu's direct testimony was stricken from the record.

We find the district court's decision to strike Cantu's testimony was error. Cantu's behavior was not so "stubborn and defiant . . . that [it] presented a serious threat to both the fairness and reliability of the criminal trial process as well as the preservation of dignity, order, and decorum in the courtroom." See *Anthony*, 361 Wis. 2d at 147.

Nothing in the record shows whether Cantu seemed sincere in his questions, if he was angry or shouting, or if his behavior went beyond the questions asked. This court has nothing beyond the cold record to judge his conduct. Although we recognize that we should view the record through a deferential lens—recognizing that the veteran trial judge was in a better position to assess whether the defendant's courtroom demeanor was an unusual circumstance that needed to be addressed—judges and litigants must be ever conscious of noting on the record behavior that is not otherwise discernable from a review of the transcript. See *State v. Williams*, 299 Kan. 1039, 1044, 329 P.3d 420 (2014). This is particularly true when the action taken in response impacts a fundamental right, like the right to testify.

Here, even reviewing the conduct through a deferential lens, Cantu was not overly disruptive in the context of the entire trial. Based on our review of the record, it was a short exchange, and the judge lost her temper after dealing with a, presumably, frustrating defendant. Moreover, Cantu was put on notice that he may

have to return to his table, but he was never placed on notice that his testimony may be stricken if he did not cooperate. So we find the district judge did abuse her discretion by unreasonably ordering Cantu's direct testimony stricken—thus violating his constitutional right to testify.

We turn next to the remedy.

Denial of the right to testify is not a structural error requiring reversal.

The next question is whether the denial of Cantu's right to testify warrants reversal of his convictions or must we first apply a harmless error analysis to the facts. Cantu argues that his denial of a right to testify in his own defense should be considered a structural error. "A structural error is one that is so pervasive it defies 'analysis by "harmless-error" standards.'" *State v. Johnson*, 310 Kan. 909, 913, 453 P.3d 281 (2019) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed 2d 302 [1991]).

Courts are split as to whether the denial of the fundamental right to testify qualifies as a structural error. Our Supreme Court has noted that a "majority of courts that have considered the issue have applied a constitutional harmless error standard to denial of a defendant's right to testify." *State v. Carr*, 300 Kan. 1, 211, 331 P.3d 544 (2014), *rev'd and remanded on other grounds*, 577 U.S. 108, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016). And that remains the case today.

Anthony, which Cantu cites heavily, held that it is not a structural error and is therefore subject to a harmless error analysis. *Anthony*, 361 Wis. 2d at 156. The court reasoned that the denial of the right to testify is more like a trial error, which occurs during the presentation of the case to the jury and can be assessed in the context of the trial as a whole to determine whether the error was harmless. "The fact that a defendant's testimony may be significant to the issues in the case does not mean that its absence is incapable of assessment." 361 Wis. 2d at 158. When determining whether the denial of a right to testify is harmless, Wisconsin instructs reviewing courts to consider:

"'(1) [T]he importance of the defendant's testimony to the defense case; (2) the cumulative nature of the testimony; (3) the presence or absence of evidence corroborating or contradicting the defendant on material points; and (4) the overall strength of the prosecution's case.'" 361 Wis. 2d at 159.

See also *United States v. Books*, 914 F.3d 574, 580 (7th Cir. 2019) (applied harmless error analysis to denial of the right to testify case without discussing whether it was structural error); *Palmer v. Hendricks*, 592 F.3d 386, 394, 399 (3d. Cir. 2010) (noting that defendant's proffered testimony "can be evaluated in the context of the remainder of the evidence in order to assess the impact of the constitutional violation"); *State v. Nelson*, 355 Wis. 2d 722, 738 (2014) (distinguishing structural as errors that permeate the entire process like the denial of the right to counsel, a biased judge, or denial of self-representation to errors like denial of a defendant's right to testify which occurs at a discrete point much like trial errors); *United States v. Smith*, 433 Fed. Appx. 847, 851 (11th Cir. 2011) (unpublished opinion) (holding that the denial of a defendant's right to testify was not structural error because "[i]t is not impossible, or all that difficult, to assess the effect of the claimed error on the outcome of the trial"); *Soloman v. Curtis*, 21 Fed. Appx. 360, 362-63 (6th Cir. 2001) (unpublished opinion) (holding that there is a strong presumption that harmless error analysis is appropriate if the defendant has counsel and was tried by an impartial adjudicator).

In contrast, other courts have held that the denial of a defendant's right to testify in their own defense is a structural error. See *State v. Hampton*, 818 So. 2d 720, 729 (La. 2002) (holding that "whenever a defendant is prevented from testifying, after unequivocally expressing his desire to do so, the defendant has been denied a fundamental right and suffers detrimental prejudice"); *State v. Rivera*, 402 S.C. 225, 249-50, 741 S.E.2d 694 (2013) (finding that the right to testify is no different from the right to self-representation—which is structural error and not subject to harmless error analysis).

We choose to follow the majority rule our Supreme Court highlighted in *Carr*—the denial of the right to testify is not structural error and is subject to a harmless error analysis.

The striking of Cantu's testimony by the district court was harmless error.

When an error infringes on a party's federal constitutional right, a court will declare a constitutional error harmless only when the party benefiting from the error persuades the court "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, proves there is no reasonable possibility that the error affected the verdict." *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011), *cert. denied* 565 U.S. 1221 (2012) (citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, *reh. denied* 386 U.S. 987 [1967]). Kansas statutes also address the importance of finding that the court must disregard all errors and defects that do not affect any party's substantial rights. K.S.A. 60-261.

The State argues that because Cantu pleaded not guilty, his testimony that generally denied the charges against him was unnecessary and that the removal of his testimony had no impact on the verdict. We agree.

The State presented several witnesses who placed Cantu at D.H.'s residence. D.H. had a relationship with Cantu in the past. Protection from stalking orders on file related to Cantu and D.H. were admitted into evidence without objection. D.H. saw Cantu through her security camera knocking at her door. She recognized him and she recognized his voice as he spoke loudly in an aggressive manner and paced outside. While she was on the phone with the police reporting that Cantu was trying to get in, she heard glass breaking. The jury heard that D.H. and Cantu had a volatile history with dispatch relaying to the two officers that there were two protection from stalking orders on file related to Cantu.

A.H. arrived at the residence after receiving a call from his niece. She was screaming and she said Cantu was at the house. A.H. testified he knew Cantu. After the police left D.H.'s house, A.H. remained and saw Cantu hiding near the house after the police left. Cantu had a confrontation with him. Cantu was angry and aggressive and shouting what he planned to do to D.H. and A.H. Someone reported to the police that Cantu had returned. Police went to Cantu's residence, but he was not there. When Cantu was

located a few blocks away from his home, he was angry, shouting racial insults and repeating D.H.'s name.

Cantu testified that he was not there that evening and that D.H. and A.H. were lying. He said he was jogging around his home and then went home to shower and watch NASCAR. He did not speculate as to why they would lie. After answering the first question put to him in the negative, he asked to explain his response. A discussion with the judge began that led him to be removed from the witness chair, but not the courtroom. There was no other testimony after that from Cantu. When the district court ordered Cantu's testimony stricken, the conversation took place in front of the jury. We pause to note that it is preferable that such conversations occur outside the presence of the jury. Although the judge made the finding that Cantu's testimony would be stricken, she did not explain what that meant to the jury. She did not admonish it not to consider Cantu's direct testimony. And the State did not ask her to. In addition, there was no instruction given to the jury or requested by the State advising it to disregard Cantu's testimony. Accordingly, since it was never instructed not to consider Cantu's direct testimony, we cannot conclude beyond a reasonable doubt that the jury did not consider it. It is equally as likely that the jurors did consider it, since they were not told otherwise.

Next, the judge read the instructions to the jury. She advised the jury that it must presume Cantu to be not guilty and that he pleaded not guilty to each alleged crime.

Finally, in closing, defense counsel was able to relay Cantu's theory of the case to the jury—it was not him. Counsel pointed out the lack of evidence that it was Cantu at D.H.'s house. She told them that he maintained his innocence. Counsel pointed out that police had seen Cantu earlier in the day wearing a red hoodie and when he was picked up later that evening by police, he was wearing a red hoodie. But D.H.'s daughter described the person at the back of her house as dressed all in white, no red hoodie. Counsel argued that D.H. may have believed it was Cantu at the door due to their history, but she was mistaken. She did not see who broke the window, she only heard it break. She did not know if more than one person was present. So here, if we treat Cantu's stricken testimony as a proffer and review it in the context of the evidence

as a whole, we are convinced beyond a reasonable doubt that striking Cantu's testimony did not affect the outcome of the trial.

Cantu's convictions for stalking and violation of a protective order are reversed. His remaining convictions of misdemeanor criminal damage to property and criminal threat are affirmed.

Affirmed in part and reversed in part.

(528 P.3d 996)

No. 124,833

MARTI WICKHAM and WILLIAM FRANZ, *Appellees*, v. CITY OF MANHATTAN, *Appellant*.

SYLLABUS BY THE COURT

1. ATTORNEY AND CLIENT—*District Court's Authority to Grant Attorney Fees—Appellate Review.* When a district court has the authority to grant attorney fees, its decision whether to award fees is reviewed for an abuse of discretion.

2. SAME—*Attorney Fees Mandated by Statute—Court Must Award Fees Based on Statute.* When the language of an attorney fees statute makes an award mandatory, the district court has no discretion and must award attorney fees according to the statute.

3. STATUTES—*Construction of Statutes—Intent of Legislature Governs—Appellate Review*. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first seek to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings.

4. CIVIL PROCEDURE—*Award of Attorney Fees under Statute—Application to Municipalities.* The plain language of K.S.A. 2022 Supp. 60-2006, that calls for the award of attorney fees as costs in certain cases, does not bar application of the statute to property damage cases of first impression, or in property damage lawsuits involving municipalities. Cities are not immune from its rule.

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

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

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

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

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

that a City snowplow pushed snow into their stone mailbox, cracking its base.

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

About a month later, on February 18, 2020, Wickham and Franz sent a letter to the City's legal analyst requesting $3,261 in damages for the mailbox because of the negligent operation of the City's snowplow. The letter shows that Wickham and Franz included photos and a witness affidavit as evidence, but these attachments were not included in the record on appeal.

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

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

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

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

The judge tried this case. The court heard the testimony of Wickham, Franz, the Public Works Director for the City, the street

department crew leader for the Public Works who investigated the claim, and the City snowplow operator who cleared Plymouth Road—the street in front of the property at issue. The court found for Wickham and Franz and awarded them $3,219.94 in damages. This award is a few dollars less that what they had requested in their letter to the City.

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

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

The City appeals only the award of attorney fees.

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

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

We must address some preliminary concerns.

Before we begin our analysis, we must note that our inquiry is hampered somewhat because the City did not include everything in the record on appeal. Instead, the City tried to include certain items in an appendix to its brief as a substitute for the record. That does not work. See *Rodriguez v. U.S.D. No. 500*, 302

Kan. 134, 351 P.3d 1243 (2015). In *Rodriguez*, the court held that including documents in the appendix of a brief does not make those documents part of the record that can be considered for appellate review. 302 Kan. at 144; see Supreme Court Rule 6.02(b) (2023 Kan. S. Ct. R. at 36). We will not consider those documents as part of the record on appeal.

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

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

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

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

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

Based on this record of the motions hearing, the City argues it preserved this argument for appeal because "a 'pragmatic reading' of the record on appeal shows that the parties and the court recognized

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

But even if this showing by the City is insufficient, we will still reach the issue of whether attorney fees are proper in cases of first impression because the issue involves only a question of law that arose out of admitted facts determinative of the case. The parties acknowledge that this issue is one of first impression. And resolution of the issue determines the case because it would affirm or vacate the district court's attorney fee award. See *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008), *cert. denied* 555 U.S. 1178 (2009). We will therefore consider the issue.

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

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

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

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

The City argues the district court erred in awarding attorney fees to Wickham and Franz because such an award involving an issue of first impression is not appropriate. This is like saying,

since it has never been done before, it cannot be done here. In addition, since this statute is not a part of the insurance code, we doubt that the cases cited by the City apply.

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

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

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

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

Here, we deal with a statute that awards attorney fees in cases with more modest judgments for property damage. This statute focuses on a very small subset of damage claims. The district court awarded attorney fees under K.S.A. 2019 Supp. 60-2006. Note the limitations exposed in this statute:

"(a) In actions brought for the recovery of *property damages only of less than $15,000* sustained and *caused by the negligent operation of a motor vehicle*, the prevailing party *shall be allowed reasonable attorney fees* which *shall be taxed as part of the costs* of the action unless:

(1) the prevailing party recovers no damages; or

(2) a tender equal to or in excess of the amount recovered was made by the adverse party before the commencement of the action in which judgment is rendered.

"(b) For the plaintiff to be awarded attorney fees for the prosecution of such action, a written demand for the settlement of such claim containing all of the claimed elements of property damage and the total monetary amount demanded in the action shall have been made on the adverse party at such party's last known address not less than 30 days before the commencement of the action. For the defendant to be awarded attorney fees, a written offer of settlement of such claim shall have been made to the plaintiff at such plaintiff's last known address not more than 30 days after the defendant filed the answer in the action.

"(c) This section shall apply to actions brought pursuant to the code of civil procedure and actions brought pursuant to the code of civil procedure for limited actions." (Emphases added.)

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

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

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

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

In this statute, there are no limitations such as those found in K.S.A. 2019 Supp. 60-2006. This insurance code statute is not limited to just automobile negligence causation, nor is it limited to just property claims, nor is it limited to claims under $15,000.

Instead, the carrier must have "just cause" to refuse to pay a claim. Therefore, to decide whether that refusal to pay is proper, the judicial inquiry focuses on "just cause."

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

K.S.A. 40-3111(b), also analyzed and relied on in *Whitaker*, provides that an insurer is liable for fees if it "unreasonably refused" to pay a claim for personal injury protection benefits. See *Whitaker*, 13 Kan. App. 2d at 285. Our Supreme Court interpreted this subsection to find attorney fees were not warranted when the court "cannot say the defendant [insurer] unreasonably refused to pay plaintiff's claim." *Armacost v. State Farm Mut. Auto. Ins. Co.*, 231 Kan. 276, 280, 644 P.2d 403 (1982).

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

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

The City asks us to extend *Whitaker*'s policy to attorney fees under K.S.A. 2022 Supp. 60-2006. We decline. It is clear from the

wording of this statute that the Legislature intended for small property damage claims in automobile cases to be negotiated and settled promptly or attorney fees would be awarded. We must honor that intent.

This court has previously held that the purpose of K.S.A. 60-2006 is to "promote prompt payment of small but well-founded claims and to discourage unnecessary litigation of certain automobile negligence cases." *Chavez v. Markham*, 256 Kan. 859, 868, 889 P.2d 122 (1995). The intent of the statute is "to require defendants to inquire, to investigate, and, if warranted, to make an offer to settle the claim." 256 Kan. at 868.

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

The City's argument on this point fails.

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

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

We are not persuaded.

If the Legislature wanted to exempt cities from the application of this general statute, it would have said so. This statute, K.S.A. 2022 Supp. 60-2006—found in the section of our laws defining court costs—taxes attorney fees as costs in smaller actions only involving negligent motor vehicle operation. There is no mention in the statute that municipalities are exempt. Indeed, in the preceding statute, K.S.A. 2022 Supp. 60-2005, the Legislature has specifically exempted municipalities from depositing court costs. If the Legislature wanted to exempt municipalities from this law, it knew how to do so and it did not.

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

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

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

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

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

We think the question the City is raising now is whether the K.S.A. 12-105b notice filing could constitute a "written demand

for . . . settlement" under K.S.A. 2022 Supp. 60-2006. The written demand is required to contain "all of the claimed elements of property damage and the total monetary amount demanded in the action." The statute also requires the written demand to be made "on the adverse party at such party's last known address." K.S.A. 2022 Supp. 60-2006(b).

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

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

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

Put another way, the K.S.A. 12-105b notice is a condition precedent that resolves whether the need for a written demand of

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

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

The City's argument on this point fails.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We reiterate. When the language of an attorney fees statute makes an award of fees possible, the amount of fees awarded is within the sound discretion of the district court and is reviewed under the abuse of discretion standard. *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 169, 298 P.3d 1120 (2013). A judicial

action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018).

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

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

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

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

We award attorney fees for this appeal.

In addition to the attorney fees awarded by the district court, Wickham and Franz are entitled to attorney fees for the prosecution of this appeal. Consistent with the purposes of K.S.A. 2022 Supp. 60-2006 and Supreme Court Rule 7.07(b)(1) (2023 Kan. S. Ct. R. at 52), we will award attorney fees to Wickham and Franz.

We award attorney fees in the amount of $300 per hour for 61.5 hours, plus the expenses listed in Wickham and Franz' motion for attorney fees. The City did not oppose their motion for attorney fees on appeal.

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

Affirmed.

(528 P.3d 1007)

No. 125,223

CITY OF ATCHISON, *Appellee*, v. JACK LAURIE, in His Official Capacity as Sheriff of Atchison County, *Appellant*.

SYLLABUS BY THE COURT

1. MANDAMUS—*Writ of Mandamus—Definition.* A writ of mandamus seeks to enjoin an individual or to enforce the personal obligation of the individual to whom it is addressed and is appropriate where the respondent is not performing or has neglected or refused to perform an act or duty, the performance of which the petitioner is owed as a clear right.

2. POLICE AND SHERIFFS—*Sheriff's Statutory Duty to Keep All Prisoners Safely.* The sheriff or the keeper of the jail in any county of the state shall receive all prisoners committed to the sheriff's or jailer's custody by the authority of the United States or by the authority of any city located in such county and shall keep them safely in the same manner as prisoners of the county until discharged in accordance with law. K.S.A. 19-1930(a).

3. STATUTES—*Statutory Use of "Shall"—Four Factors to Determine if "Shall" Is Mandatory or Directory.* There are four factors to consider in determining whether the use of "shall" is mandatory or directory: (1) legislative context and history; (2) the substantive effect on a party's rights versus merely form or procedural effect; (3) the existence or nonexistence of consequences for noncompliance; and (4) the subject matter of the statutory provision.

4. POLICE AND SHERIFFS—*Statutory Requirement of Sheriff to Accept Detainees without Exceptions.* K.S.A. 19-1930(a) requires a county sheriff to accept detainees without exceptions. This court cannot rewrite the provision to include an exception where the sheriff of a county believes a detainee requires medical attention prior to being booked into the jail. It is solely within the bailiwick of the Legislature to amend the statute should it see fit to include such an exception.

5. CIVIL PROCEDURE—*Actions Are Prosecuted in Name of Real Party in Interest.* An action must be prosecuted in the name of the real party in interest. If a city violates a detainee's constitutional rights, then the city is liable to the detainee for damages, not the county sheriff.

6. CITIES AND MUNICIPALITIES—*Statutory Notice Provision Not Prerequisite to Contract Claim.* Substantial compliance with the notice provisions of K.S.A. 12-105b(d) is not a prerequisite to bringing a contract claim against a municipality.

7. ATTORNEY AND CLIENT—*District Court an Expert in Area of Attorney Fees—Determination of Reasonableness of Fee—Consideration of KRPC 1.5(a) Factors*. The district court is considered an expert in the area of attorney fees and can draw on and apply its own knowledge and expertise in evaluating their worth. However, in determining the reasonableness of a requested attorney fee, the factors in Kansas Rule of Professional Conduct 1.5(a) (2023 Kan. S. Ct. R. at 333) should be considered.

Appeal from Atchison District Court; DAVID J. KING, judge. Opinion filed April 14, 2023. Affirmed in part, reversed in part, and remanded with directions.

Patric S. Linden, *Kevin D. Case*, and *Cory R. Buck*, of Case Linden Kurtz Buck P.C., of Kansas City, Missouri, for appellant.

Curtis L. Tideman, of Lathrop GPM LLP, of Kansas City, Missouri, and *Robert D. Campbell*, of Campbell Law Office, PA, of Atchison, for appellee.

Before ARNOLD-BURGER, C.J., BRUNS and ISHERWOOD, JJ.

ISHERWOOD, J.: The City of Atchison (City) filed a petition for writ of mandamus asking the district court to compel Jack Laurie, the Sheriff of Atchison County, to accept all prisoners committed to him by the City police as required by K.S.A. 19-1930(a) ("The sheriff or the keeper of the jail in any county of the state shall receive all prisoners committed to the sheriff's or jailer's custody by the authority . . . of any city located in such county."). Laurie claimed that K.S.A. 19-1930 afforded him with the discretion to reject detainees from the City when he believed the detainees required a medical evaluation. Laurie accused the City of acting with deliberate indifference towards the medical needs of its detainees in violation of the detainees' constitutional rights and advanced four counterclaims seeking to enjoin the City from committing such further violations and to obtain an order for the City to pay the expenses incurred by the county in maintaining detainees for the City. The district court dismissed Laurie's counterclaims, granted summary judgment to the City, and awarded attorney fees to the City for prosecution of the successful mandamus claim.

We affirm the district court's dismissal, grant of summary judgment, and decision to award attorney fees. However, we remand the case for the court to analyze whether the amount of attorney fees awarded was reasonable and to provide an explanation for its findings.

FACTUAL AND PROCEDURAL BACKGROUND

The City filed a petition for writ of mandamus in December 2020 which alleged that City police officers arrested Sidney Kye Jr. for felony aggravated domestic battery the previous day. Officers for the Atchison Sheriff's Department were monitoring the police radio traffic around the time of Kye's arrest and heard that Kye was naked and appeared to be intoxicated. When the police brought Kye to the county jail, Captain Travis Wright refused to accept Kye as a prisoner because of Kye's bizarre behavior. According to the City, Captain Wright claimed he could refuse a prisoner for any reason because he wrote the jail policy. As a result, police officers were forced to transport Kye to the Doniphan County jail instead.

The City's petition argued that the county jail was required to accept Kye under K.S.A. 19-1930, which provides, in part:

> "(a) The sheriff or the keeper of the jail in any county of the state shall receive all prisoners committed to the sheriff's or jailer's custody by the authority of the United States or by the authority of any city located in such county and shall keep them safely in the same manner as prisoners of the county until discharged in accordance with law. The county maintaining such prisoners shall receive from the United States or such city compensation for the maintenance of such prisoners in an amount equal to that provided by the county for maintenance of county prisoners and provision shall be made for the maintenance of such prisoners in the same manner as prisoners of the county. The governing body of any city committing prisoners to the county jail shall provide for the payment of such compensation upon receipt of a statement from the sheriff of such county as to the amount due therefor from such city." K.S.A. 19-1930(a).

The City requested a writ of mandamus be issued to Laurie as Sheriff of Atchison County to compel him to accept all prisoners committed to his custody by the authority of any city located in Atchison County. The district court promptly issued a peremptory order per K.S.A. 60-802(b) requiring Laurie to accept Kye into county custody.

Laurie responded with an answer and counterclaims. He alleged that the City engaged in a practice that he named "detour and dump" rather than assessing whether arrestees required medical care and providing such care when necessary. Laurie asserted that "City police officers detour sick or injured persons in their custody to the Atchison County Jail to dump them there and

thereby unlawfully impose those costs upon the County." See K.S.A. 2022 Supp. 22-4612(a) (the cost of providing care for a person in custody falls upon the agency having custody of the person at the time the decision to seek medical treatment is made). As sheriff, Laurie believed he had the right and duty to set reasonable regulations for the operation of the jail. See K.S.A. 19-811 ("The sheriff shall have the charge and custody of the jail of his county, and all the prisoners in the same, and shall keep such jail himself, or by his deputy or jailer, for whose acts he and his sureties shall be liable.").

Regarding Kye, Laurie alleged that he required immediate medical attention and that the City officers who brought him to the jail lacked any personal knowledge as to Kye's medical history, the identity and health impact of any intoxicants he consumed, or whether Kye sustained an injury during the arrest. Additionally, Kye was acting "'bizarrely'" when he arrived at the jail, though Laurie did not explain what he meant by that term.

Laurie further noted that the United States Constitution protects detainees from deliberate indifference to serious medical needs and that Kansas law, K.S.A. 2022 Supp. 21-5416, also makes the knowing neglect of a confined person by a police officer a class A misdemeanor. Laurie argued that the City failed to uphold its legal duties towards detainees simply so it could "avoid the financial consequences of a determination that such a person needs medical care." Given these circumstances, he did not believe mandamus was appropriate.

Laurie also made four counterclaims which offered a more expansive factual basis than that set forth in the City's petition as Laurie included several examples of what he perceived to be the City's "dump and detour" policy in action. These fell into three categories.

The first category highlighted instances where the City allegedly deliberately disregarded medical needs of detainees or actively concealed information about the detainees' health before delivering them to the County jail. The incident with Kye fell under this umbrella. Another example involved the City police arresting the driver of a vehicle for DUI. After crashing the vehicle into a rock wall, which caused the airbags to deploy, the driver could not

exit the vehicle under his own strength. He had blood on his face and could not maintain his balance. But rather than transport him for a medical evaluation, the City officers took him to the jail. Jail officials took the detainee to the hospital where he spent multiple nights in the Intensive Care Unit for bleeding in his brain.

The second category of allegations involved situations where the City would purportedly "unarrest" people in its custody to avoid incurring the cost of medical evaluation and treatment. As an example, Laurie recounted a situation where City officers arrested someone on an outstanding warrant. They took the detainee to the jail at which time she stated she was high on drugs and planned to hang herself. She then repeatedly banged her head against the wall of the intake area resulting in a cut on her forehead. When the jail informed the City that the detainee needed medical treatment, the arresting officer called EMS and "unarrested" the detainee. The detainee refused the offered medical treatment and, despite the fact she had an outstanding warrant, officers did not arrest her after she declined treatment. The following week, officers again arrested the woman on the same warrant. While in the patrol vehicle, she slammed her head against the dashboard and window which caused her head to bleed. The police "unarrested" her when emergency medical services arrived.

The third category encompassed cases where City officers declined to arrest someone who needed medical treatment in order to avoid the costs associated with the treatment. Laurie's example involved the same woman as in the second category of cases. Three days after "unarresting" the woman, police officers again attempted to arrest her. After leading them on a chase, the woman tried hiding in a vehicle. She then slammed her head against the window of the vehicle again which caused her head to bleed again. The officers contacted EMS but did not arrest the woman despite the chase and outstanding warrant.

Laurie argued that the City's practice deprived detainees of their constitutional right to receive medical treatment. He also asserted that the practice was a threat to public safety because it allowed persons accused of crimes to go free when they should be in police custody. Finally, Laurie contended that the conduct resulted in harm to the county by shifting the cost of the detainees' medical treatment to the county sheriff's budget.

Laurie's first counterclaim included a request for injunctive relief. He asked the district court to enjoin the City from transferring custody of detainees to the county without first fulfilling their obligation to address the medical needs of the detainees. He also asked the court to enjoin the City from actively concealing relevant medical information about such detainees from jail personnel.

The second count of the counterclaim alleged a violation of Laurie's statutory right to recovery. He cited K.S.A. 19-1930(a) and argued a city must compensate a county for maintaining prisoners. Laurie alleged that the City violated this provision when it failed to pay him for the expenses he incurred in maintaining the prisoners. While he said discovery was necessary to ascertain the precise amount the City owed, he believed the amount likely exceeded $10,000.

The third count asserted a breach of implied contract. Laurie argued an implied contract was formed when the jail accepted detainees from the City, and that acceptance was based on a reasonable belief that the City fulfilled its legal obligations to address the medical needs of the detainees and inform jail officials of any pertinent medical information. According to Laurie, acceptance was also based on the belief that the City would pay the county for the expenses the jail incurred in keeping the detainees. Thus, the City breached this implied contract by failing to uphold its obligations which resulted in damages to the county.

The fourth and final counterclaim was for quantum meruit and was similar to the claim for breach of implied contract. Laurie noted that the county conferred a benefit on the City by accepting detainees and covering medical costs that the City should have paid. Laurie argued it was unfair for the City to retain the benefit without paying the cost of maintaining and treating the detainees.

The City responded with a motion to dismiss Laurie's counterclaims and argued that Laurie was not the real party in interest for any of the counterclaims. It pointed out that K.S.A. 2022 Supp. 60-217 requires an action to "be prosecuted in the name of the real party in interest," thus, any constitutional claims belonged to the detainees, and claims regarding amounts owed to the county would belong to the county, not Laurie. The City also argued that

Laurie failed to adhere to K.S.A. 12-105b, which required Laurie to serve written notice of his claims on the City as a prerequisite to bringing any claims against it. The district court dismissed the counterclaims with prejudice for the reasons set forth in the City's motion to dismiss.

The City next moved for summary judgment on its petition for writ of mandamus and argued that K.S.A. 19-1930 required Laurie to accept detainees from the City with no exceptions. It also requested attorney fees as damages. See *Link, Inc. v. City of Hays*, 268 Kan. 372, 375, 997 P.2d 697 (2000) ("K.S.A. 60-802[c] authorizes an award of attorney fees in mandamus actions on a finding that refusal to perform a duty was unreasonable.").

The City included its own details about the Kye incident in its memorandum in support of the motion for summary judgment. The facts were derived from an affidavit by Captain Travis Eichelberger with the City police and a narrative report he made just after the incident. The City also included a narrative report from Captain Wright with the Atchison County Sheriff's Office. Captain Wright's report stated that he overheard radio traffic from the City police that they had Kye in custody and he was naked and intoxicated. Captain Eichelberger called Captain Wright before bringing Kye to the jail and Wright informed Eichelberger that bizarre behavior was an indicator of a health issue and was listed on the jail's medical screening questionnaire so it would not accept custody of Kye. Captain Eichelberger disputed the jail's authority to refuse custody of a detainee and brought Kye to the jail anyway. Captain Wright brought out the questionnaire and read the relevant question to Captain Eichelberger, "'Does the arrestee act/talk in a strange manner?'" and explained that because the answer was yes, the City police needed to have a medical provider clear Kye. The City denied that Kye ever required medical attention but, nevertheless, there was no exception to K.S.A. 19-1930 for detainees who needed medical treatment.

The district court granted summary judgment to the City and found that Laurie "failed to offer any valid reason for his refusal to accept prisoners from the City of Atchison as required by K.S.A. 19-1930." The court instructed the City to submit its claim for attorney fees to the court for review and stated that once damages were determined the court would issue a final judgment.

The City claimed that it incurred $96,700.50 in attorney fees and $4,598 in costs. Laurie argued that the City should not receive attorney fees for obtaining the writ of mandamus because his actions were not unreasonable and the City had no basis for recovering fees expended to defend against his counterclaims. The district court ordered the City to designate which attorney fees were incurred prosecuting the mandamus claim and which were incurred defending against Laurie's counterclaims. After reviewing the City's response, the district court awarded the City $42,537.25 in attorney fees for prosecuting the mandamus claim. This amount represented half of the amount of fees claimed for time that was related to both the prosecution of the mandamus claim and defense of the counterclaims and all of the fees claimed after dismissal of Laurie's counterclaims.

Laurie appealed.

ANALYSIS

The district court properly granted the City's request for summary judgment.

Laurie first argues that the district court erred in granting summary judgment to the City on its petition for writ of mandamus. He asserts that despite the mandatory language of K.S.A. 19-1930, he has discretion to defer acceptance of a detainee when he believes the detainee is in need of immediate medical evaluation or treatment.

Appellate courts review the district court's denial of a motion for summary judgment de novo, viewing the facts in the light most favorable to the party opposing summary judgment. If reasonable minds could differ about the conclusions drawn from the evidence—meaning there is a genuine issue about a material fact—then summary judgment should be denied. *John Doe v. M.J.*, 315 Kan. 310, 313, 508 P.3d 368 (2022). An issue of fact is not genuine unless it has legal force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary judgment. In other words, if the disputed fact, however resolved, could not affect the judgment, it does not present a "genuine issue" for purposes of summary judgment. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 934, 296

P.3d 1106, *cert. denied* 571 U.S. 826 (2013). Resolution of this issue also involves statutory construction, an issue over which we exercise unlimited review. *Ambrosier v. Brownback*, 304 Kan. 907, 911, 375 P.3d 1007 (2016).

"Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law." K.S.A. 60-801. A "writ of mandamus seeks to enjoin an individual or to enforce the personal obligation of the individual to whom it is addressed." *State ex rel. Stephan v. O'Keefe*, 235 Kan. 1022, 1024, 686 P.2d 171 (1984). It is proper where "the respondent is not performing or has neglected or refused to perform an act or duty, the performance of which the petitioner is owed as a clear right." 235 Kan. at 1024.

Laurie's first argument is that there was a material dispute between the parties regarding whether Kye needed medical evaluation which precluded summary judgment. The City disagrees that it mistreated arrestees, but asserts that the factual dispute is immaterial because there are no exceptions to K.S.A. 19-1930. The crux of this case is whether K.S.A. 19-1930 is mandatory or whether it permits the discretion Laurie claims. If the statute is mandatory, then the disputed fact is not material.

K.S.A. 19-1930(a) states that the sheriff "shall receive all prisoners committed to" his custody by the City. "[T]he word 'shall' can have different meanings in different provisions." *Ambrosier*, 304 Kan. at 912. In some contexts, the word is used to create a mandatory duty whereas in others it is used in a directory manner. A directory provision creates a discretionary duty, and "[m]andamus cannot be invoked to compel a discretionary act." 304 Kan. at 907. "Because the word's meaning is not plain, statutory construction rather than statutory interpretation is necessary." 304 Kan. at 912. The Kansas Supreme Court has identified four factors to consider in determining whether the use of "shall" is mandatory or directory: "(1) legislative context and history; (2) substantive effect on a party's rights versus merely form or procedural effect; (3) the existence or nonexistence of consequences for noncompliance; and (4) the subject matter of the statutory provision." *State*

v. Raschke, 289 Kan. 911, 921, 219 P.3d 481 (2009). Though neither party explicitly analyzes these factors, they provide a helpful framework for discussion of the issue.

K.S.A. 19-1930 has been in effect since 1963. L. 1963, ch. 174, § 1. The operative provision has remained substantially the same. The enacting legislation repealed three similar statutes which had been part of Kansas law since the 1800s. L. 1963, ch. 174, §§ 1-2. There is no helpful legislative history to guide our analysis and neither party discusses the history of the statute. However, it is worth noting that although this statutory language, or at least a similar version of it, has been a part of Kansas law for 150 years, Laurie can point to no authority interpreting the language as merely directory.

The next factor examines whether a statute has a substantive or procedural effect on a party's rights. A directory provision creates "'a mode of proceeding and a time within which an official act is to be done and is intended to secure order, system and dispatch of the public business.' [Citation omitted.]" *Raschke*, 289 Kan. at 916. Kansas courts have held that statutes are procedural, despite using the word shall, in cases where a statute dictated that a ministerial task had to be completed within a certain amount of time, such as issuing a final order, certifying various filings, or endorsing witnesses. See 289 Kan. at 919-20. This provision is substantive. It is not simply a mode of procedure that is intended to aid in the dispatch of public business. It does not set timelines for ministerial tasks. Rather, it requires the sheriff to immediately accept any prisoner committed to his custody by the City. If county sheriffs refuse to comply with the statute, for whatever reason, city police may lack the resources to keep custody of any detainees which would have a substantive impact on the city.

The third factor asks whether there are consequences for noncompliance. K.S.A. 19-1930 does contain a consequence for noncompliance as it provides: "If any sheriff or jailer neglects or refuses to perform the services and duties required by the provisions of this act, the sheriff or jailer shall be subject to the same penalties, forfeitures and actions as if the prisoners had been committed under the authority of this state." K.S.A. 19-1930(f). This factor

clearly weighs in favor of interpreting K.S.A. 19-1930(a) as mandatory.

The Kansas Attorney General came to the same conclusion in a 2007 opinion. Att'y Gen. Op. No. 2007-39. The District Attorney of Wyandotte County asked the Attorney General for advice regarding the duties of the Wyandotte County sheriff and jail to accept custody of arrestees from the Kansas City Police Department (KCPD). The dispute arose because neither the KCPD nor the Wyandotte County Sheriff's Office wanted to incur the cost of having custody of an arrestee at the hospital. The KCPD wanted to transfer custody to the sheriff as soon as possible, but the sheriff had "adopted a screening process at the county jail that utilizes the assistance of a trained nurse and refuses to accept certain arrestees without first obtaining a doctor's written medical clearance." Att'y Gen. Op. No. 2007-39. The District Attorney provided several scenarios, which included the following examples:

"Scenario Three: An individual appears before a municipal judge for sentencing on a misdemeanor charge but is determined to be under the influence and the judge cannot enter a sentence. The municipal judge therefore orders the individual to be incarcerated in the county jail until he or she is sober and can again be brought before the court. You ask whether the sheriff may refuse to accept such a prisoner into the jail until such time as the prisoner receives a complete medical evaluation (at a hospital) or their blood alcohol level is lower. Scenario Four: City police officers arrest a person, either on a warrant or for probable cause, but the person is obviously under the influence, as confirmed by a nurse from the jail. If the arrestee's blood alcohol is beyond a certain level, the jail will not accept the prisoner until after receiving a written medical clearance from a physician. You ask if the detention center (sheriff) may set such standards for admission of all arrestees under the influence. Scenario Five: City police officers arrest a person, either on a warrant or for probable cause, and the prisoner needs medical attention for some reason. The city police officer takes that person to the hospital for treatment where the person is examined and eventually given a medical release and taken to jail for incarceration. However, the jail refuses to accept the prisoner because of the level of examination given by hospital staff or takes issue with the form of release given by the hospital. You ask if this refusal is lawful." Att'y Gen. Op. No. 2007-39.

These examples bear several similarities to the case before us. Here, too, Laurie adopted a policy under which his officers refused to accept detainees (or in Laurie's words, defer acceptance of detainees) from the City unless the detainee first received what the sheriff, in his sole discretion, deems to be necessary medical

evaluation or treatment. The Attorney General concluded that the word "shall" in K.S.A. 19-1930 was mandatory because the statute carried a penalty for noncompliance. Accordingly, a county sheriff cannot refuse "to take custody of persons arrested by city law enforcement officers and presented to the sheriff or jailer at a county jail, no matter the circumstances." Att'y Gen. Op. No. 2007-39.

Kansas courts are "not bound by the conclusions of attorney general opinions; however, the opinions are persuasive authority." Data Tree v. Meek, 279 Kan. 445, 455, 109 P.3d 1226 (2005). In this case, there is no reason to disagree with the Attorney General's opinion. K.S.A. 19-1930 clearly carries a penalty for noncompliance, a factor which strongly suggests that the word "shall" is mandatory.

The final factor is the subject matter of the statutory provision. Laurie's arguments primarily fall under this umbrella. The subject matter of the statute deals with custody of arrestees and compensation for the counties who maintain prisoners for a city or the federal government. Laurie acknowledges that the statute creates a duty for the sheriff to accept proffered detainees into the county jail but argues that the duty established in K.S.A. 19-1930(a) "must be construed alongside other statutory provisions dealing with the same or related subjects."

Laurie references several duties which he believes render K.S.A. 19-1930(a) merely directory. He notes that Kansas law imposes a duty on law enforcement agencies to address a detainee's immediate medical needs. *University of Kan. Hosp. Auth. v. Board of Comm'rs of Unified Gov't*, 301 Kan. 993, 1005, 348 P.3d 602 (2015). Mistreatment of a confined person, defined as "knowingly abusing, neglecting or ill-treating any person, who is detained or confined by any law enforcement officer or by any person in charge of or employed by the owner or operator of any correctional institution," is a class A person misdemeanor. K.S.A. 2022 Supp. 21-5416. Kansas law also prohibits law enforcement officers from releasing a "person from custody merely to avoid the cost of necessary medical treatment" unless the health care provider consents to such a release or a court orders it. K.S.A. 22-4613(a).

The United States Supreme Court has also held that deliberate indifference to a prisoner's serious medical needs constitutes cruel and unusual punishment in violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). The City does not dispute that it owes these duties to arrestees but argues that even if it failed to satisfy its duties to arrestees, it did not excuse Laurie from complying with K.S.A. 19-1930.

We do not find Laurie's argument persuasive. He asserts that his policy of refusing detainees until the City takes them for medical evaluation promotes the welfare of the detainees by ensuring they are treated in a constitutional fashion. But the facts of this case demonstrate that this is not what truly occurs. Jail officials refused to accept Kye because, in Laurie's opinion, he was suffering from a potentially life-threatening condition. Yet rather than accept custody of Kye and address his medical needs, Laurie turned him away and left him with the very agency that Laurie believed was violating his rights. Kye was ultimately taken to the Doniphan County jail and did not receive a medical evaluation. A policy like Laurie's which leaves detainees with agencies that are allegedly violating the detainees' constitutional rights does not accomplish Laurie's proffered goal of promoting the detainees' health and constitutional rights. Laurie also cites no legal support for the proposition that a county sheriff is excused from performing his statutory duties when city police violate a detainee's rights.

Another problem with Laurie's argument is that it would give total discretion to the sheriff to determine when a detainee's rights were violated. This means that Laurie would be the sole arbiter of whether a detainee had medical needs and whether his or her rights were violated. It would not matter if, as in this case, there was a substantial disagreement over whether the detainee needed medical treatment. If K.S.A. 19-1930 was intended as directory, then it likely would have included guidance on how sheriffs were to exercise the discretion granted by the statute. Missouri has such a law, which provides:

"1. It shall be the duty of the sheriff and jailer to receive, from constables and other officers, all persons who shall be apprehended by such constable or other officers, for offenses against this state, or who shall be committed to such jail by any competent authority; and if any sheriff or jailer shall refuse to receive any

such person or persons, he or she shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in the discretion of the court.

"2. The sheriff and jailer shall not be required to receive or detain a prisoner in custody under subsection 1 of this section until the arresting constable or other officer has had the prisoner examined by a physician or competent medical personnel if the prisoner appears to be:

(1) Unconscious;
(2) Suffering from a serious illness;
(3) Suffering from a serious injury; or
(4) Seriously impaired by alcohol, a controlled substance as defined in section 195.017, a drug other than a controlled substance, or a combination of alcohol, a controlled substance, or drugs.

"3. The cost of the examination and resulting treatment under subsection 2 of this section is the financial responsibility of the prisoner receiving the examination or treatment." Mo. Rev. Stat. § 221.040.

The absence of such language to guide the sheriff's discretion in K.S.A. 19-1930 supports a finding that the statute is mandatory and not directory. The general statutes grant Laurie discretion in many aspects of operating the jail, but they do not authorize him to violate other, more specific statutory mandates. See *In re Guardianship of Sokol*, 40 Kan. App. 2d 57, 63, 189 P.3d 526 (2008) ("When a court is presented with a general statute and a specific statute governing the same circumstances, the court should attempt to read the statutes together in harmony with one another. If the statutes cannot be read in harmony, the specific statute will generally control over the general statute, unless a contrary intent is clearly expressed by the legislature."). For example, if Laurie had provided his inmates "icy cold Bohemia-style beer" as a reward for free tax advice, as the guard did in The Shawshank Redemption, he would be in violation of K.S.A. 19-1907 (declaring it a misdemeanor for a jailer to provide intoxicating liquor to an inmate). See *The Shawshank Redemption* (Warner Brothers Pictures 1994). If we accepted Laurie's argument that the sheriff has full discretion over jail operations, our decision would render K.S.A. 19-1907 meaningless. "[W]e assume the legislature does not enact useless or meaningless legislation." *Ft. Hays St. Univ. v. University Ch., Am. Ass'n of Univ. Profs.*, 290 Kan. 446, 464, 228 P.3d 403 (2010). Laurie's argument that K.S.A. 19-811 or K.S.A.

19-1903 provides sheriffs with complete discretion over jail operations is not persuasive.

Laurie makes one other argument that warrants discussion. The first sentence of K.S.A. 19-1930(a) states: "The sheriff . . . shall receive all prisoners committed to the sheriff's . . . custody by the authority of . . . any city located in such county and shall keep them safely in the same manner as prisoners of the county until discharged in accordance with law." Laurie directs our attention to the phrase "in the same manner as prisoners of the county" and asserts that if county officers had brought a detainee to the jail who, in Laurie's opinion, needed medical evaluation, then the jail would have refused to accept them as well. Therefore, he treated detainees from the City "in the same manner as prisoners of the county" and fulfilled the requirements of K.S.A. 19-1930.

We do not find Laurie's contention compelling because he fails to consider the other primary dictate of K.S.A. 19-1930—to "receive all prisoners." When construing statutes to determine legislative intent, appellate courts must consider various provisions of an act *in pari materia* with a view of reconciling and bringing the provisions into workable harmony if possible. *Miller v. Board of Wabaunsee County Comm'rs*, 305 Kan. 1056, 1066, 390 P.3d 504 (2017). Laurie's interpretation of the statute ignores the other operative language. Compliance with the second duty listed in K.S.A. 19-1930(a) does not equal compliance with the first duty listed in K.S.A. 19-1930(a).

This court cannot rewrite K.S.A. 19-1930(a) to include an exception where the sheriff of a county believes a detainee needs medical attention. If the Legislature wishes to amend the statute to address Laurie's concerns, it is free to do so. But in its current form, the statute requires a county sheriff to accept detainees without exceptions. For these reasons, we affirm the district court's grant of summary judgment to the City.

The district court properly dismissed Laurie's counterclaims.

Next, Laurie argues that the district court erred in dismissing his counterclaims. He asserts that he had standing to bring the counterclaims and they were not subject to K.S.A. 12-105b.

"Whether a district court erred by granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited

review." *Jayhawk Racing Properties v. City of Topeka*, 313 Kan. 149, 154, 484 P.3d 250 (2021). We view the well-pleaded facts in a light most favorable to the plaintiff and assume as true those facts and any inferences reasonably drawn from them. If those facts and inferences state any claim upon which relief can be granted, then dismissal is improper. Dismissal is proper only when the allegations in the petition clearly demonstrate the plaintiff does not have a claim. *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 790, 440 P.3d 576 (2019); see K.S.A. 2022 Supp. 60-212(b)(6).

The district court's ruling on this point was somewhat unclear. In the journal entry granting the City's motion for summary judgment, the district court simply said that it ruled in favor of the City "for the reasons set forth in the [City's] Motion to Dismiss and supporting suggestions." See *Breedlove v. State*, 310 Kan. 56, 60, 445 P.3d 1101 (2019) ("[A]lthough we have frowned on the practice of a district court adopting a party's findings in their entirety, we have declined to adopt a bright-line rule that to do so is automatic error."). When ruling orally on the motion after hearing argument, the district court suggested additional bases for its order. Because "a district court's journal entry of judgment in a civil case controls over its prior oral statements from the bench," we will examine the City's filings to determine the bases upon which the district court seemingly ruled. *Uhlmann v. Richardson*, 48 Kan. App. 2d 1, 10, 287 P.3d 287 (2012).

The City believed dismissal of Laurie's counterclaim was warranted for two reasons: (1) Laurie was not the real party in interest under K.S.A. 2022 Supp. 60-217; and (2) Laurie failed to comply with K.S.A. 12-105b, which is a prerequisite for suing the City. On appeal, Laurie argues that he was the real party in interest under K.S.A. 2022 Supp. 60-217. He also argues that he was not obligated to provide written notice consistent with K.S.A. 12-105b(d) because he was not bringing tort claims.

A. K.S.A. 2022 Supp. 60-217

K.S.A. 2022 Supp. 60-217(a)(1) states that "[a]n action must be prosecuted in the name of the real party in interest." However, Laurie notes that the statute allows "a party authorized by statute"

to "sue in their own names without joining the person for whose benefit the action is brought." K.S.A. 2022 Supp. 60-217(a)(1). Though Laurie cites the rule permitting a party authorized by statute to sue without joining the real party in interest, his argument seems to focus on the assertion that he is the real party in interest.

In his first counterclaim, Laurie requested injunctive relief preventing the City from bringing detainees to the jail without providing medical evaluation and preventing the City from actively concealing pertinent medical information about detainees from jail personnel. The City argued that, insofar as there was a violation of any detainee's right to medical treatment, the detainee would be the real party in interest. Laurie does not dispute that the detainees could bring claims, but he argues that he should also be considered a real party in interest.

Laurie begins by again noting the general statutes providing the sheriff with authority over jail operations. See K.S.A. 19-811; K.S.A. 19-1903; *Robinson v. State*, 198 Kan. 543, 546, 426 P.2d 95 (1967) ("We believe [the sheriff] has the right, as well as a duty, to set reasonable regulations for the operation of the jail and the conduct of his prisoners."). Laurie asserts that he had standing to bring his counterclaims because the City's actions infringed upon his ability to uphold his statutory and constitutional duties. He asserts that the sheriff has had to expend resources treating the medical needs of detainees that the City should have paid for. He also complains that the City's actions expose the sheriff to "legal liability for injuries a detainee may suffer as a result of the City's non-disclosure or failure to promptly deliver the detainee to a medical care provider for treatment."

We affirm the district court's decision on this point. Laurie's claim that the City's actions expose him to liability is not convincing. If the City violates a detainee's constitutional rights, then the City is liable to the detainee for damages, not Laurie. So long as Laurie and jail officials treat detainees appropriately the City's actions should not matter. Additionally, the sheriff is not responsible for payment of the medical expenses for detainees; that obligation lies with the board of county commissioners. See K.S.A. 19-1910(a) ("When a prisoner is committed to a county jail in a criminal action, the board of county commissioners shall allow the sheriff reasonable charges for maintaining such prisoner.").

For similar reasons, we find that the district court properly dismissed Laurie's other three counterclaims. The second counterclaim was for violation of the statutory right to recovery in K.S.A. 19-1930. The statute provides that a city must compensate the county for maintaining prisoners. Payment is due "upon receipt of a statement from the sheriff of such county as to the amount due therefor from such city." K.S.A. 19-1930(a). There is no indication that Laurie provided a statement to the City as to the amount due. In fact, Laurie said "[t]he precise amount of the City's unpaid maintenance costs will require discovery to ascertain." In any event, the City does not pay Laurie, it pays the county. This means the county is the real party in interest, not Laurie.

The final two counterclaims were for breach of implied contract and quantum meruit. Again, these sought the cost of maintaining prisoners brought to the county jail by the City. As stated, the right to maintenance belongs to the county, not Laurie, so Laurie is not the real party in interest.

"'The meaning and object of the real party in interest provision would be more accurately expressed if it read: An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced.' [Citation omitted.]" *Torkelson v. Bank of Horton*, 208 Kan. 267, 270, 491 P.2d 954 (1971). Laurie alleges that the City has violated the rights of detainees and the rights of the county, but he has failed to demonstrate that his rights were impacted by the City's alleged actions. Therefore, we affirm the district court's decision to dismiss Laurie's counterclaims.

B. K.S.A. 12-105b

The district court had an alternate basis for its ruling—Laurie failed to comply with K.S.A. 12-105b. Subsection (a) of this statute says that "[a]ll claims against a municipality must be presented in writing with a full account of the items, and no claim shall be allowed except in accordance with the provisions of this section." K.S.A. 12-105b(a). This court has previously explained that "Subsection (a) applies to *all* claims a person may have against cities." *Wiggins v. Housing Authority of Kansas City*, 19 Kan. App. 2d 610, 611, 873 P.2d 1377 (1994). Subsection (d) of the statute creates additional notice requirements when a person has a claim

against a city which could give rise to an action brought under the Kansas Tort Claims Act. K.S.A. 12-105b(d).

Due to the district court's lack of specific findings, it is difficult to ascertain whether the court ruled under K.S.A. 12-105b(a) or (d). The district court ruled "for the reasons set forth in the Motion to Dismiss and supporting suggestions." The City's motion said, "[t]here has been no written claim made under K.S.A. 12-105b, which is a prerequisite for a claim against the City of Atchison." The City's suggestions in support only mentioned K.S.A. 12-105b(d), not K.S.A. 12-105b(a). After Laurie filed his response, the City filed a reply in which it discussed the language in K.S.A. 12-105b(a). In his appellate brief, Laurie highlights the fact the City did not raise any issue concerning K.S.A. 12-105b(a) in the initial memorandum it filed in support of its motion to dismiss. He does not address K.S.A. 12-105b(a) in his appellate brief.

Regardless of which subsection the district court relied upon, error ultimately occurred. It is true that substantial compliance with the notice provisions of K.S.A. 12-105b(d) is a prerequisite to bringing a tort claim against a municipality, but Laurie did not bring a tort claim against the City so the provision is inapplicable.

The City asserts that K.S.A. 12-105b(a) also requires written notice of non-tort claims as a prerequisite to filing suit against a municipality. However, this is not evident from the language of the statute. K.S.A. 12-105b(d) states that written notice is required before commencing an action. K.S.A. 12-105b(a) contains no such requirement. In contrast to the plentiful caselaw on K.S.A. 12-105b(d), there is very little guidance on K.S.A. 12-105b(a) and none that supports the City's position. This court did have an opportunity to examine the distinction between the two subsections in *Wiggins*, 19 Kan. App. 2d 610, and following an examination of the language and history of the statute, we concluded that people "with contract claims are *not* required to give notice before filing suit." 19 Kan. App. 2d at 611.

Although we find that the district court erred on this particular point, we still affirm the district court's decision dismissing Laurie's counterclaims because Laurie did not have standing to bring those claims.

The amount of attorney fees the district court awarded to the City was erroneous.

In his final argument on appeal, Laurie argues that the district court erred in awarding attorney fees to the City. He challenges both the district court's authority to award the fees as well as the amount of the award.

The issue of the district court's authority to award attorney fees is a question of law over which appellate review is unlimited. *In re Estate of Oroke*, 310 Kan. 305, 317, 445 P.3d 742 (2019). Here, the district court claimed authority to award attorney fees under K.S.A. 60-802(c). This statute "authorizes an award of attorney fees in mandamus actions on a finding that refusal to perform a duty was unreasonable." *Link, Inc.*, 268 Kan. at 375. When the district court is authorized to award attorney fees, "[t]he amount of an attorney fee award is within the sound discretion of the district court and will not be disturbed on appeal absent a showing that the district court abused that discretion." 268 Kan. at 381.

A. Did Laurie act unreasonably, thus warranting an award of attorney fees?

The first question is whether the district court was authorized to award attorney fees to the City. This question turns on whether Laurie's refusal to accept Kye as a prisoner was unreasonable. Analysis of this issue "requires a consideration of the motives of the actor in failing to act." *Corder v. Kansas Bd. of Healing Arts*, 256 Kan. 638, 661, 889 P.2d 1127 (1994).

The language of K.S.A. 19-1930(a) is clear—Laurie "shall receive all prisoners" committed to his custody by the authority of any city located in Atchison County. Despite this clear directive, Laurie argues that his violation of the statute was reasonable because "he was operating under the good-faith belief that Kansas law did not permit the [City police] to ignore Kye's immediate medical needs before bringing him to the Jail and releasing custody of him to the Jail." He asserts that he was motivated to reject Kye because he could not "stand back and let the City continue to deliberately cause its detainees to receive delayed treatment (in a

clear effort by the City to attempt to evade the costs of such treatment) for their immediate medical needs . . . ."

For several reasons, Laurie's argument is not persuasive. There is simply no authority to support the idea that one agency's alleged violation of a detainee's constitutional rights excuses another agency's duty to act under a statute. As explained earlier, this is not a good public policy. Laurie claims to be motivated by his concern that detainees are not receiving proper medical treatment but his refusal to accept Kye did nothing to help Kye receive medical treatment. Instead of helping Kye, Laurie's decision left him in the custody of an agency that allegedly disregarded his serious medical needs. Thus, as the district court noted, Laurie's response was not reasonable and did nothing to protect constitutional rights of detainees. Laurie could have filed his own mandamus or declaratory judgment action, or he could have referred the offending police officers for discipline or prosecution. He could have assisted detainees who wished to sue the City for violation of their constitutional rights. But there was no reasonable basis, either in policy or in the language of the statute, for Laurie to refuse custody of Kye. Consequently, we affirm the district court's decision to award attorney fees to the City.

B. Did the district court abuse its discretion in setting the amount of the attorney fee award?

The second issue is whether the district court abused its discretion in determining the amount of attorney fees. A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018).

The district court is considered "an expert in the area of attorneys' fees and can draw on and apply its own knowledge and expertise in evaluating their worth." *Buchanan v. Employers Mutual Liability Ins. Co.*, 201 Kan. 666, Syl. ¶ 9, 443 P.2d 681 (1968). However, the Kansas Supreme Court has directed that in determining the reasonableness of an attorney fee, the factors in Kansas Rule of Professional Conduct 1.5(a) (2023 Kan. S. Ct. R. at 333) "should be considered." *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, Syl. ¶ 6, 135 P.3d 1127 (2006). This rule provides:

"(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent." KRPC 1.5(a) (2023 Kan. S. Ct. R. at 333).

There were few references to KRPC 1.5 throughout the case. Initially, the parties focused their arguments on whether the City could claim fees that were generated while defending the counterclaim or whether the City's award should be limited to fees generated solely on the City's mandamus claim. When the City first moved for attorney fees, it requested fees for all the time spent on the case. In response, Laurie objected on the basis that the City was requesting fees spent on defense of his counterclaims. The City replied that the counterclaim issues were indistinguishable from the mandamus issues. When the district court heard arguments on the matter, most of the discussion focused on this dispute. At the end of the hearing, the court did ask the City to categorize its fees based on whether the fee was generated prosecuting the mandamus action or defending against counterclaims.

Just under a month after the hearing, Laurie moved the court to enter an order without attorney fees because the City had not yet submitted a categorization. Laurie also complained that the City "failed to provide a statement of the fees at the prevailing rate for such mandamus litigation work in Atchison County, Kansas. Rather, the City has provided a statement of fees calculated at the rate for an attorney in Kansas City, Missouri." The City filed an affidavit from its attorney shortly thereafter. The affidavit stated that the firm billed one attorney at $535 per hour and another attorney at $445 per hour, which constituted a discount from both attorneys' standard rates. The City also conclusively asserted that

its charges were reasonable under factors 1, 3, 4, and 7 in KRPC 1.5. The affidavit separated the claimed fees into three categories: time spent defending against the counterclaim, time spent prosecuting the mandamus claim, and time that was spent on both claims when issues were related. The fees in this third category, time spent simultaneously working on the mandamus claim and counterclaims, were "overwhelmingly discovery related." Laurie's response noted that the City failed to address all eight factors in KRPC 1.5. He also claimed that discovery was not necessary for the City to prevail on its mandamus claim, so fees related to discovery should not be recoverable.

The district court's ruling did not mention KRPC 1.5 and it awarded the City the full requested amount for time spent litigating the case after dismissal of the counterclaims ($22,095.50). The court awarded the City half of the fees that it claimed were related to both prosecution of the mandamus claim and defense of the counterclaims ($20,441.75). It denied the City's request for the cost of deposition transcripts and in so doing, noted that discovery was not needed for summary judgment because there were no material facts in dispute and resolution of the City's mandamus claim was a question of law.

On appeal, Laurie argues that the district court abused its discretion by failing to consider the KRPC 1.5 factors. He notes that the City provided no factual support for its conclusory assertion that its fees was reasonable under factors 1, 3, 4, and 7 of the Rule. He also contends the City failed to support its assertion that rates of $445 and $535 per hour were fees customarily charged in Atchison County for similar legal services. Finally, he questions the district court's award of attorney fees for time spent on discovery matters, especially given its explicit finding that the City did not utilize any meaningful discovery in moving for summary judgment. The City relies on the proposition that the district court is considered an expert in assessing attorney fees and asserts that the content of the court's order was sufficient.

There is no bright-line rule that the district court must specifically address the KRPC 1.5 factors. See *State ex rel. SRS v. Cleland*, 42 Kan. App. 2d 482, 496, 213 P.3d 1091 (2009) (affirming attorney fee award even though district court did not explicitly mention the KRPC 1.5 factors because it was obvious from the

court's ruling that it considered the reasonableness of the claimed fees); see also *In re Marriage of Strieby*, 45 Kan. App. 2d 953, 975, 255 P.3d 34 (2011) ("Although the trial court did not expressly address the factors in KRPC 1.5[a] in its initial award of attorney fees, the court did generally discuss some of the factors, including the results obtained, the reasonableness of the fee, and counsel's expertise. Based on the record before us, and in light of our standard of review, we cannot say that the trial court abused its discretion in awarding fees of $5,500 to Linda.").

In this case, in contrast to *Cleland* and *In re Marriage of Strieby*, it is *not* obvious that the district court considered the KRPC 1.5 factors in exercising its discretion on the attorney fee award. Instead, it looks like the district court accepted the City's claimed fees at face value. While it is true that the court only awarded half of the fees that were generated for activities that assisted in prosecuting the mandamus claim and defending against the counterclaims, the district court's reasoning for this seemed to be that the City had no lawful basis to claim fees generated while defending against the counterclaims. Nothing in the record indicates that consideration of the KRPC 1.5 factors led the district court to this reduction. The district court granted the City's full request for $22,095.50 in attorney fees generated after dismissal of Laurie's counterclaims without question.

There are a couple troubling aspects of the district court's lack of analysis in the attorney fee award. For example, the first factor under KRPC 1.5 is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." (2023 Kan. S. Ct. R. at 333). The City's claim that Laurie had to accept the prisoner was a relatively straightforward one: K.S.A. 19-1930(a) required it, no exceptions. Laurie replied that the statute was discretionary. As the district court noted, the City's claim presented only a question of law. In fact, the district court specifically declined to award costs for depositions to the City because there were no material facts in dispute for the purposes of the City's motion for summary judgment and the only question presented was one of law. Yet, a significant portion of the attorney fees awarded by the district court were for discovery matters. The district court's decision to award attorney fees

for discovery that the district court did not believe was necessary to resolve the case is concerning. There was no evidence presented or reason offered by the district court as to why these discovery-related fees should be included in the time and labor required to litigate the mandamus claim. At the time the City incurred the costs, the district court had already issued a peremptory order under K.S.A. 60-802(b) which it can only do "[w]hen the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it." The City could have moved for summary judgment before discovery and avoided a bulk of the costs.

Another troubling part of the district court's decision is its failure to demonstrate that it considered "the fee customarily charged in the locality for similar legal services." KRPC 1.5 (2023 Kan. S. Ct. R. at 333). The City's attorneys stated that they offered a discounted rate of $535 per hour for one attorney and $445 per hour for another attorney. The attorneys are from a Kansas City firm, but the case was litigated in Atchison County. Clearly, these hourly rates are significantly higher than the hourly rate claimed in *Cleland* (only $210 per hour). Neither the City nor the district court made any showing that the claimed fees in this case are customarily charged in the locality for similar legal services.

The district court's failure to discuss the KRPC 1.5 factors, the lack of evidence regarding the factors, and the court's seemingly contradictory decision to award fees for discovery the court did not think was necessary leads to the conclusion that the district

court abused its discretion in ordering the attorney fee award. We remand this case to the district court so it can reconsider the reasonableness of the attorney fee request within the framework of KRPC 1.5 and explain its findings.

Affirmed in part, reversed in part, and remanded with directions.

(528 P.3d 1024)

No. 124,591

STATE OF KANSAS, *Appellee*, v. BENJAMIN E. BUZZINI, *Appellant*.

SYLLABUS BY THE COURT

KANSAS OFFENDER REGISTRATION ACT—*Crime of Involuntary Manslaughter While Driving under Influence of Alcohol Excluded from Requirement of Registration.* Any violation of K.S.A. 2020 Supp. 21-5405(a)(3), as it existed both before and after July 1, 2011, is excluded from the list of enumerated offenses that trigger automatic registration as a violent offender under the Kansas Offender Registration Act.

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed April 21, 2023. Reversed.

Corrine E. Gunning, of Kansas Appellate Defender Office, for appellant.

Kimberly A. Rodebaugh, senior assistant district attorney, *Thomas R. Stanton*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., BRUNS and ISHERWOOD, JJ.

ARNOLD-BURGER, C.J.: Benjamin E. Buzzini entered a guilty plea to one count of involuntary manslaughter while driving under the influence of alcohol. The sole question on appeal is whether, based on the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq., and the statements made by the district judge, Buzzini must register as a violent offender. We find based on his crime of conviction and the failure of the district court to make the necessary findings to override the statutory exemption to registration, the order that he register as a violent offender must be reversed.

FACTUAL AND PROCEDURAL HISTORY

The facts of this case, though tragic, have no bearing on the sole issue raised in this appeal. But in summary, in April 2017, Buzzini, while traveling 150 miles per hour and under the influence of alcohol and drugs, rolled his vehicle, killing his passenger.

Buzzini subsequently entered a guilty plea to involuntary manslaughter while under the influence of alcohol and any drug

in violation of K.S.A. 2016 Supp. 21-5405(a)(3). In exchange, the State agreed to recommend a mitigated sentence for the severity level 4 felony offense, which was expected to result in a 38-month prison sentence based on Buzzini having a criminal history score of I.

At sentencing, the district court declined to grant Buzzini's requests for a dispositional or durational departure:

"The Kansas Legislature has dictated this offense is a presumptive prison offense. That means I must follow that requirement unless I find substantial and compelling reasons to depart. I do not find substantial and compelling reasons here. There are four recognized purposes of the criminal justice system; incapacitation, rehabilitation, deterrence and punishment. The most significant factor here is purely punishment. This was an egregious incident that took a life. [The] Court has no hesitancy finding there was not substantial and compelling reason to depart. Deterrence is another factor in the Court's mind enters in. Hopefully the example the Court is setting if you choose to get behind the wheel of a dangerous instrument, you do not drive impaired. You do not drive recklessly, and the resulting loss of life is an example of what can happen if that occurs."

The district court further announced it was imposing a controlling prison sentence of 38 months.

The presentence investigation (PSI) form prepared and filed before Buzzini's sentencing showed "Offender Registration Required (K.S.A. 22-4902)." Likewise, the confidential portion of the PSI report showed that Buzzini would be subject to a 15-year registration period based on a conviction for "Involuntary Manslaughter - K.S.A 21-5405(a)(l), (a)(2) or (a)(4)."

Following the sentencing, the district judge filed a journal entry of judgment, which included a check in a box labeled "Yes" signifying that Buzzini committed the crime with a deadly weapon. Yet, under the "Miscellaneous Provisions" section, the court did not check the box signifying Buzzini was informed of a duty to register. And a review of the transcript from the sentencing hearing confirms that offender registration was not discussed. The supplement attached to the journal entry reflected only that Buzzini had to register as a "VIOLENT OFFENDER" for 15 years because of his conviction for "Involuntary Manslaughter – K.S.A. 21-5405(a)(1), (a)(2), or (a)(4)." Contrary to the first page of the sentencing journal entry, the box signifying that he must register because of a finding by the court "that such felony was committed with a DEADLY WEAPON" was not checked.

Buzzini now appeals.

ANALYSIS

Buzzini argues the district court's order requiring him to register under KORA is invalid because his crime of conviction does not require registration. We have jurisdiction over this appeal, even though it results from a guilty plea, because Buzzini is challenging the district court's order requiring him to register as a violent offender under KORA. See *State v. Marinelli*, 307 Kan. 768, 788, 415 P.3d 405 (2018) (holding that defendants can appeal an order to register under KORA even if they pleaded guilty).

Deciding this case requires that we examine KORA to determine whether Buzzini is correct. The statute we will be examining is the 2020 version of KORA. As further explanation, although the crime occurred in April 2017, Buzzini was not sentenced until April 2021. Typically, a defendant is punished according to the law in effect at the time of their crime, but the Kansas Supreme Court has held that KORA is not considered punishment. See *State v. Stoll*, 312 Kan. 726, 730-31, 480 P.3d 158 (2021). Because the 2020 version of KORA was the version in effect at the time of sentencing, it is the version we must apply. *State v. Harkins*, No. 108,614, 2015 WL 5458665, at *1 (Kan. App. 2015) (unpublished opinion).

We examine the rules of statutory construction.

Again, resolving this appeal requires statutory interpretation, which presents a question of law subject to unlimited review. *Stoll*, 312 Kan. at 736.The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. *State v. Ayers*, 309 Kan. 162, 164, 432 P.3d 663 (2019). Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *State v. Pulliam*, 308 Kan. 1354, 1364, 430 P.3d 39 (2018).

Buzzini does not meet the statutory definition of a "violent offender" based on his crime of conviction.

A "violent offender" required to register under KORA is:

"(e) . . . [A]ny person who: (1) [o]n or after July 1, 1997, is convicted of . . . (E) involuntary manslaughter, as defined in . . . K.S.A. 2020 Supp. 21-5405(a)(1), (a)(2) or (a)(4), and amendments thereto. The provisions of this paragraph shall not apply to violations of K.S.A. 2020 Supp. 21-5405(a)(3), and amendments thereto, which occurred on or after July 1, 2011, through July 1, 2013." K.S.A. 2020 Supp. 22-4902(e)(1)(E).

Buzzini pleaded guilty to K.S.A. 2016 Supp. 21-5405(a)(3). The parties focus their dispute on the meaning of the second half of K.S.A. 2020 Supp. 22-4902(e)(1)(E), which purports to exempt "violations of K.S.A. 2020 Supp. 21-5405(a)(3) . . . which occurred on or after July 1, 2011, through July 1, 2013," from registration. This crime occurred in April 2017, well outside the statutory window.

In Buzzini's view, this language is an attempt by the Legislature to clarify its intent—that individuals convicted of involuntary manslaughter-DUI should never have been subject to KORA registration. As support, he details the legislative history of the 2011 recodification of the involuntary manslaughter statutes and the later KORA revisions that incorporated those changes.

In contrast, the State contends that the second half of subsection (e)(1)(E) only exempts from registration the individuals convicted of involuntary manslaughter-DUI "on or after July 1, 2011, through July 1, 2013." K.S.A. 2020 Supp. 22-4902(e)(1)(E). Because Buzzini was convicted after July 1, 2013, Buzzini must register. As the State puts it, adopting Buzzini's interpretation "would make the time frame designated in the statute meaningless." See *State v. Smith*, 311 Kan. 109, 114, 456 P.3d 1004 (2020) (courts construe statutes to avoid unreasonable or absurd results and presumes Legislature does not intend to enact meaningless legislation).

We find that the statute is ambiguous. Does it mean that involuntary manslaughter-DUI was exempt from registration only if committed from 2011 to 2013 (meaning it is not exempt now) thus negating the first sentence of the statute or does it mean that involuntary manslaughter convictions after 2013 are also exempt

from registration requirements—seemingly negating the need for any time-frame exemption?

Accepting Buzzini's invitation to review the legislative history, we find his argument to be persuasive.

Before recodification of the Kansas Criminal Code in 2011, Kansas law provided three ways to commit involuntary manslaughter, which is the unintentional killing of a human being committed:

> "(a) Recklessly;
>
> "(b) in the commission of, or attempt to commit, or flight from any felony, other than an inherently dangerous felony as defined in K.S.A. 21-3436 and amendments thereto, that is enacted for protection of human life or safety or a misdemeanor that is enacted for the protection of human life or safety, including acts described in K.S.A. 8-1566 and subsection (a) of 8-1568, and amendments thereto, but excluding the acts described in K.S.A. 8-1567 and amendments thereto; or
>
> "(c) during the commission of a lawful act in an unlawful manner." K.S A. 21-3404.

A separate statute covered the offense of involuntary manslaughter while driving under the influence of alcohol or drugs, defined as "the unintentional killing of a human being committed in the commission of, or attempt to commit, or flight from an act described in K.S.A. 8-1567." K.S.A. 21-3442. Although all three forms of involuntary manslaughter convictions required registration, the offense of involuntary manslaughter-DUI was not listed as a crime requiring registration and never had been.

Effective July 1, 2011, the statutes were recodified/merged and involuntary manslaughter-DUI was brought under the mantle of the other three involuntary manslaughter crimes. So, effective July 1, 2011, by incorporation into the involuntary manslaughter statute it was, by definition, included as a crime that required registration. K.S.A. 2011 Supp. 22-4902(e)(l)(E). On July 1, 2013, the Legislature changed the statute to its current form, exempting violations of K.S.A. 2020 Supp. 21-5405(a)(3). If left unaddressed in the 2013 statute, there would have been an anomaly for the time after July 1, 2011, and before July 1, 2013, where registration was required for violating K.S.A. 2011 Supp. 21-5405(a)(3).

We agree with Buzzini that the only way to reconcile the insertion of that particular date range is to recognize that the Legislature was trying to clarify that it *never* intended violations of K.S.A. 2020 Supp. 21-5405(a)(3) to be included in the definition of violent offenses requiring registration. This interpretation is strengthened because K.S.A. 2020 Supp. 21-5405(a)(5)—a more severe form of involuntary manslaughter-DUI that requires the offender to have committed the offense while their driving privileges are already restricted because of a DUI is also omitted from the definition of violent offenses requiring registration. K.S.A. 2020 Supp. 22-4902(e)(1)(E). It would not make sense that the Legislature omitted a more serious offense from registration requirements, but required Buzzini to register for a crime that carried a lesser penalty.

In sum, because K.S.A. 2020 Supp. 21-5405(a)(3) is excluded from the list of enumerated offenses that trigger automatic registration as a violent offender under KORA, the district court erred in requiring Buzzini to register as a violent offender because of his conviction of involuntary manslaughter-DUI.

The district court did not make sufficient findings on the record that a deadly weapon was used in commission of Buzzini's crime to override the statutory exemption in K.S.A. 2020 Supp. 22-4902(e)(1)(E).

The State asserts in the alternative that Buzzini should still have to register as a violent offender because the district court exercised its discretion to make a "deadly weapon" finding. K.S.A. 2020 Supp. 22-4902(e)(2) (defining "'violent offender'" as "any person who . . . is convicted of any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony"). As support, the State references the comments made by the district court judge at Buzzini's sentencing:

"This was an egregious incident that took a life. [The] Court has no hesitancy finding there was not substantial and compelling reason to depart. Deterrence is another factor in the Court's mind enters in. Hopefully the example the Court is setting if you choose to get behind the wheel of a dangerous instrument, you do not drive impaired. You do not drive recklessly, and the resulting loss of life is an example of what can happen if that occurs."

In the State's view, the judge's statement that Buzzini used a "dangerous instrument" to cause Futrell's death equates to a finding that he used a "deadly weapon" to commit the crime. As support, the State references recent decisions in which the Kansas Supreme Court has upheld registration orders based on a district court's oral statements combined with findings made on a sentencing journal entry. See *State v. Carter*, 311 Kan. 206, 209, 459 P.3d 186 (2020); *Marinelli*, 307 Kan. at 784.

In *Carter*, a jury convicted the defendant of aggravated robbery after he robbed a Dollar General brandishing a Taser. At sentencing, after the State brought up a duty to register, the district court ordered defendant to register under KORA after making an oral finding that "'there was a *dangerous weapon involved*.'" 311 Kan. at 208. The sentencing journal entry reflected—with a checked box in the appropriate section—that Carter had to register because the court determined the offense was committed with a deadly weapon under K.S.A. 2019 Supp. 22-4902(e)(2). Carter challenged the registration order on appeal. The Kansas Supreme Court determined that even though the court used different language—"'dangerous'" instead of "'deadly,'" the journal entry was enough to comply with the statute. 311 Kan. at 212.

In *Marinelli*, the defendant pleaded no contest to one charge of aggravated assault after head-butting and swiping at the victim with a knife. The acknowledgment of rights form showed he would not be subject to KORA registration. When the State brought up registration at sentencing, Marinelli objected since he was not informed about any registration requirement when the district court accepted his plea and because there was no necessary finding on the record. The court determined these to be procedural violations that could be remedied by seeking to withdraw his plea—which Marinelli declined to do—so the court directed that Marinelli would need to register under KORA. On the sentencing journal entry, the court checked boxes and completed forms signifying that Marinelli was subject to registration because he committed the offense with a deadly weapon. On appeal, the Kansas Supreme Court found the judge made the necessary findings based on the contents of the sentencing journal entry and because the

record supported a deadly weapon finding. *Marinelli*, 307 Kan. at 788-89.

Another case the State cites is more instructive. See *State v. Thomas*, 307 Kan. 733, 415 P.3d 430 (2018). In *Thomas*, a jury convicted the defendant of aggravated battery with a deadly weapon after she hit another woman in the forehead with a stiletto heel. At sentencing, the district court informed Thomas of her duty to register but made no specific finding that she committed the offense with a deadly weapon. A panel of this court determined that the district court's failure to make the deadly weapon finding warranted vacating the registration order and remanding for additional findings. *State v. Thomas*, No. 109,951, 2014 WL 3020029, at *12 (Kan. App. 2014) (unpublished opinion). The Kansas Supreme Court agreed that the absence of a specific deadly weapon finding meant the registration order was issued in error but disagreed with the panel's chosen remedy to remand the case. Instead, it vacated the registration order. 307 Kan. at 749-50.

As in *Thomas*, the district court's error here was that it failed to make a specific deadly weapon finding on the record. And to support our conclusion that the court was not considering the vehicle to be a deadly weapon, the record shows that the court failed to notify Buzzini of any duty to register. Although lack of notice alone does not automatically invalidate an order to register under KORA, we find it is a factor to consider when trying to discern the judge's intent from an otherwise ambiguous record. See *Marinelli*, 307 Kan. at 790 ("No provision in KORA creates a consequence for the failure to inform a defendant at the appropriate time."). Unlike in *Carter* and *Marinelli*, there was no discussion of registration requirements at any point during the sentencing. The full context of the district court's comment about a "dangerous instrument" shows that it was merely ruling on whether substantial and compelling reasons existed to depart from the presumptive sentence. In other words, nothing about the court's statements conveyed it was trying to make a deadly weapon finding that required Buzzini to register as a violent offender under K.S.A. 2020 Supp. 22-4902(e)(2).

In addition to the ambiguity of the court's oral statements, it is also not entirely clear from the sentencing journal entry that the court used a deadly weapon finding to order Buzzini to register

under KORA. Admittedly, the court checked the box labeled "Yes" in answer to the question: "Did offender, as determined by the Court, commit the current crime with a deadly weapon?" Yet the offender registration supplement that the court was required to attach reflected only that Buzzini had to register for 15 years because of the involuntary manslaughter conviction. The judge did not check the box on the supplemental form signifying that Buzzini committed the offense with a deadly weapon. One could argue that the initial checkbox is enough to constitute the deadly weapon finding, but the fact that the court did not mark the same checkboxes on the offender registration supplement and instead relied solely on Buzzini's crime of conviction, suggests otherwise. Put simply, if the court believed Buzzini committed his crime with a deadly weapon, the supplement would reflect those findings clearly by having the checkboxes for those findings filled in. It is just as likely that the judge erroneously checked the box on one form as it is that she erroneously failed to check the same box on a supplemental form. Without a clear statement from the bench specifically related to the registration requirement, we cannot find that the court made a discretionary finding that Buzzini used a deadly weapon requiring registration.

Because we find that based on defendant's crime of conviction and the failure of the district court to make the necessary findings to override the statutory exemption to registration, the order that he register as a violent offender must be reversed.

Reversed.

(528 P.3d 1030)

No. 125,277

KRIGEL & KRIGEL, P.C., *Appellee*, v. SHANK & HEINEMANN, LLC, *Appellant*.

SYLLABUS BY THE COURT

1. SUMMARY JUDGMENT—*Court Must Resolve Inferences from Evidence In Favor of Defending Party.* In summary judgment proceedings the district court must resolve all reasonable inferences drawn from the evidence in favor of the party against whom summary judgment is sought.

2. EQUITY—*Equitable Doctrine of Quantum Meruit—Definition and Requirements*. Quantum meruit is an equitable doctrine based on a promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to that person. It requires a benefit conferred by the person claiming quantum meruit, an appreciation or knowledge of the benefit by the recipient of the benefit, and the acceptance or retention by the recipient of the benefit under circumstances that make it inequitable for the recipient to retain the benefit without payment of its value.

3. ESTOPPEL AND WAIVER—*Waiver Is Intentional Relinquishment of Known Right—Explicit or Implied from Conduct or Inaction of Holder—Requirements.* Waiver is the intentional relinquishment of a known right. A waiver can be explicit or it can be implied from the conduct or inaction of the holder of the right. Waiver must be manifested in some unequivocal manner by some distinct act or by inaction inconsistent with an intention to claim a right. While waiver may be implied from acts or conduct warranting an inference of relinquishment of a right, there must normally be a clear, unequivocal, and decisive act of the relinquishing party.

Appeal from Johnson District Court; ROBERT J. WONNELL, judge. Opinion filed April 21, 2023. Reversed and remanded with directions.

Kirk T. May and *William D. Beil*, of GM Law PC, of Kansas City, Missouri, for appellant.

Stephen J. Moore, *Ivan L. Nugent*, and *Lara Krigel Pabst*, of Krigel & Krigel, P.C., of Kansas City, Missouri, for appellee Krigel & Krigel, P.C.

Before CLINE, P.J., ISHERWOOD, J., and PATRICK D. MCANANY, S.J.

MCANANY, S.J.: This case arises from a dispute between two

law firms over attorney fees obtained upon settlement of a contingent fee case. Shank & Heinemann, LLC, what with the comings and goings of various attorneys, has been known over the years as Shank, Laue & Hamilton, P.C.; Shank & Hamilton, P.C.; Shank & Moore, LLC; and Shank & Heinemann, LLC. For convenience we will simply refer to the firm as "Shank" without regard to its various iterations over the years. The other firm is Krigel & Krigel, P.C. (Krigel). Stephen Moore started out as an associate at Shank and ultimately became one of three owners of the firm. He eventually left Shank and joined Krigel, taking with him one of Shank's contingent fee cases. When the contingent fee case settled, Shank issued notice of its attorney's lien based upon quantum meruit. Krigel responded with this action for declaratory judgment, seeking a determination that Shank has no interest in the settlement proceeds. Shank countered with its own summary judgment motion. It is the district court's rulings on those matters that brings this case to us.

FACTUAL AND PROCEDURAL HISTORY

Moore was hired as an associate at Shank in 2008. In 2016, he became part owner of the firm with a 35% interest. In 2019, Trudi Shouse hired the Shank firm on a contingent fee basis to pursue her claim in an employment dispute. She acknowledged in her engagement agreement with the firm that Shank would have an attorney's lien against any award or settlement in the matter.

In 2021, Moore left Shank and took the Shouse litigation with him to Krigel. A few days after Moore joined Krigel, Shouse's employment litigation was settled and Krigel refused to honor Shank's attorney lien. This action followed. Krigel sought a declaratory judgment against Shank seeking to invalidate Shank's attorney lien claim in order to avoid sharing the contingent fee with Shank. The two firms filed competing motions for summary judgment. The district court entered judgment in favor of Krigel and against Shank, resulting in Krigel being entitled to retain the entire contingent fee from the Shouse litigation to the total exclusion of Shank.

In its analysis of the parties' competing summary judgment motions, the district court focused on Shank's operating agreement, which was entered into when Moore became an owner of the firm in 2016, long before Shouse came along. The agreement stated: "This Operating Agreement (this 'Agreement') is effective [on] the Conversion Date (as defined below), among the persons set forth on Schedule A." Schedule A listed Moore and the other two owners, Christopher Shank and David Heinemann. Only those three signed the operating agreement.

One of the provisions in the agreement established a method of calculating the share in the firm's net assets to which an owner would be entitled upon departing from the firm, either by death, withdrawing from the firm, being expelled from the firm, or being disbarred from the practice of law. The relevant section provided:

"**7.10 Redemption of Interest upon Death, Separation from Service, or Disbarment.**

In the event that any Member dies, withdraws or is expelled pursuant to Section 7.7(a), or becomes disbarred from practicing law in any state where such Member is required to be licensed under applicable law in order to practice law in such state, the Company shall redeem, and such Member shall sell, such Member's Interest, in accordance with the following terms and conditions:

"(a) The redemption price for such Interest shall be an amount equal to the Book Value multiplied by the Percentage Interest represented by such Interest."

The operating agreement defined "Book Value" as "the aggregate amount of the Members' equity in the Company as reflected in the books and records of the Company, as determined by the accountants retained by the Company at the time that Book Value is to be determined."

The company accountants were to include Shank's hard assets: company-owned real estate, buildings, improvements, fixtures, and equipment at their depreciated value as shown on the company books. As a general rule, the accountants were not to consider "goodwill or any similar intangible asset." But they were to include in their valuation Shank's accounts receivable already billed, which were to be discounted by "an appropriate reserve for bad debts." The accountants were not to place a value on unbilled fees and expenses and any pending contingent fee cases for which the firm had performed legal services.

One of the contingent fee matters pending when Moore left Shank was Shouse's employment-related claim. Shouse had entered an engagement agreement with Shank in 2019, which provided that Shank would be compensated on a contingent fee basis. The agreement also stated that Shank would have an attorney's lien on any recovery obtained in connection with the representation, which would continue even if the firm withdrew or was discharged as counsel for Shouse.

Shank pursued the matter on Shouse's behalf. Shank filed suit on Shouse's behalf in September 2020 in the federal district court in Kansas, asserting a claim for retaliation under the federal False Claims Act, 31 U.S.C. § 3730(h) (2018). Shank pursued discovery in the matter and eventually sought to add a claim for whistleblower retaliation under Kansas common law.

On January 28, 2021, the district court granted Shank's motion to amend the complaint to add the whistleblower claim. *Shouse v. Catholic Charities of Northeast Kansas, Inc*., No. 20-2462-EFM-ADM, 2021 WL 289314, at *1 (D. Kan. 2021). The next day, January 29, Moore announced his intention to leave the Shank firm effective March 1, 2021.

On March 1, when Moore left Shank and joined Krigel, Shouse elected to leave Shank and to have the Krigel firm represent her in her ongoing employment litigation under a separate contingency fee agreement with Krigel. Shank was discharged as counsel for Shouse effective that date. Shank contended that the firm had invested 229.2 hours of lawyer time on the Shouse case before Moore moved to Krigel.

On March 9, 2021, after a day-long mediation session, Shouse and her former employer agreed to settle her employment claim. The parties entered into a written settlement agreement and, on May 24, 2021, filed with the court a joint stipulation of dismissal with prejudice. Shank contended that Krigel's records indicated that Moore spent between 39.3 and 53.1 hours working on the matter after leaving Shank.

On March 24, 2021, Shank issued a Notice of Attorneys' Lien in Shouse's case. The notice claimed that under the engagement agreement Shank had with Shouse, it was entitled to costs, expenses, and attorney fees incurred prior to March 1, 2021, when

Shouse discharged the firm. It later issued a Supplemental Notice of Attorney's Lien expressly stating that the lien was limited to settlement proceeds payable for fees and expenses in Shouse's case.

Thereafter, Shank continued to assert the right to recover expenses it advanced in Shouse's case and the quantum meruit value of the legal services it performed in the case prior to Moore's departure.

Krigel responded by filing the present declaratory judgment action in the Johnson County district court. In its petition, Krigel contended that Shank was entitled to nothing from Shouse's settlement because the Shank operating agreement "placed a fixed value of zero dollars ($0) on all of the firm's contingent fee matters (including the *Shouse* Action) regardless of whether the cases stayed with or left the firm upon a member's departure." Thus, according to Krigel, the operating agreement waived any claim of quantum meruit and Shank had no claim to any portion of the settlement proceeds from Shouse's suit.

Shank answered and asserted a counterclaim, contending that by entering into the operating agreement it had not waived its right to recover in quantum meruit on its attorney's lien claim to a portion of Shouse's settlement proceeds.

Krigel and Shank both moved for summary judgment. The district court found that Krigel was entitled to summary judgment on all claims. The court found that the following uncontroverted facts controlled the outcome of the competing motions:

"Moore was an owner of Shank and Moore with a 35 percent interest. That the firm and Mr. Moore executed an operating agreement that was in place at the time of Mr. Moore's notice of withdrawal and ultimately governed his withdrawal.

"In January of 2021, Mr. Moore gave notice of withdrawal pursuant to Section 7.7(a). This triggered a redemption of his interest under Section 7.10. At this point, upon notice of withdrawal, Moore was required to settle up and finalize with the firm based on the buy/sell analysis that was contained within the operating agreement.

"Part of that analysis was to determine the book value of this case pursuant to Section 1.1. The book value definition in the operating agreement did not just contain basic boilerplate language, but a specific definition of the value of contingent-fee cases which was specifically set at zero.

"Notably, all accounts receivable that were not yet billed were also set at zero. Some clients went with Mr. Moore. Some clients went with Shank and

Heinemann. Moore worked on cases and was responsible for his share of expenses associated with the contingency of the cases. Both the ones that went with him and the ones that stayed at his former firm.

"I realized that in the response the defendant controverted this particular fact, but as an owner with a 35 percent interest, Mr. Moore was indirectly paying his share of litigation expenses. Ultimately . . . the Shouse case . . . was settled after Mr. Moore left the firm. The fees paid from the client are remaining in trust subject to resolution of this dispute."

The court reasoned that under the general rule, when there is a dispute between a former firm and a departing attorney over a contingency fee, quantum meruit determines each party's share of the settlement. But there is an exception to quantum meruit when a contract controls; and here, the exception controlled because the operating agreement set the value of contingency fee cases at zero. Holding otherwise, the court theorized, could lead to quantum meruit proceedings in each of the other contingency fee cases Moore worked on while at Shank. This is "[t]he result that the parties presumably sought to avoid when they set the contingency case book value at zero." In its ruling the district court, having found that "Moore was required to settle up and finalize with the firm based on the buy/sell analysis that was contained within the operating agreement," determined that *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 220 P.3d 333 (2009), was controlling.

Shank's appeal brings the matter to us. Neither party contends that the district court's ruling on the competing summary judgment motions was premature because there remained genuine issues of material fact. The parties' appellate briefs focus solely on the district court's legal reasoning that led to its rulings.

ANALYSIS

Shank argues on appeal that the operating agreement was not a waiver of its right to recover in quantum meruit for the reasonable value of the services it performed for Shouse or the expenses it advanced while prosecuting her case.

Standard of Review

The standard of review applied to summary judgment decisions is well-settled:

"Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and supporting affidavits show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. The district court must resolve all facts and reasonable inferences drawn from the evidence in favor of the party against whom the ruling is sought. When opposing summary judgment, a party must produce 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 issue in the case. Appellate courts apply the same rules 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. [Citation omitted.]" *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

This case also involves contract interpretation, a matter over which we have unlimited review. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425 P.3d 297 (2018). "The primary rule for interpreting written contracts is to ascertain the parties' intent." *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, Syl. ¶ 3, 298 P.3d 250 (2013). In doing so, we do not isolate one particular portion of a contract but rather construe and consider the entire document. Likewise, we seek an interpretation that is reasonable and not one which would vitiate the purpose of the agreement or which results in an absurdity. 296 Kan. at 963.

Quantum Meruit

The district court recognized the central role the equitable doctrine of quantum meruit can play in a dispute such as this. As stated in *Haz-Mat Response, Inc. v. Certified Waste Services Ltd.*, 259 Kan. 166, Syl. ¶ 5, 910 P.2d 839 (1996): "Unjust enrichment/quantum meruit is an equitable doctrine. . . . The substance of an action for unjust enrichment lies in a promise implied in law that one will restore to the person entitled thereto that which in equity and good conscience belongs to that person." As a general rule "an attorney employed under a contingency fee contract who is discharged without cause is limited to a quantum meruit recovery for the reasonable value of the services rendered." *Consolver v. Hotze*, 306 Kan. 561, 569, 395 P.3d 405 (2017). A claim of quantum meruit has three elements:

"(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention

by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value." *Haz-Mat Response*, 259 Kan. 166, Syl. ¶ 6.

The parties agree that Shank typically would be entitled to compensation based on quantum meruit by virtue of its contract with Shouse and the legal work Shank performed on Shouse's behalf. But here, Krigel contends—and the district court agreed—that in establishing the Shank operating agreement several years before Shouse engaged Shank to represent her, Shank waived its right to seek quantum meruit when Moore left the firm and Shouse followed the departing Moore to Krigel and engaged Krigel as her new counsel.

Shank did not Waive its Right to Quantum Meruit

The waiver that the district court necessarily relied on is defined as "the intentional relinquishment of a known right." *Prather v. Colorado Oil & Gas Corp.*, 218 Kan. 111, 117, 542 P.2d 297 (1975). A waiver can be explicit: I hereby waive my right to X; or it can be implied from the conduct or inaction of the holder of the right. Waiver must be manifested in some unequivocal manner by some distinct act or by inaction inconsistent with an intention to claim a right. *Patrons Mut. Ins. Ass'n v. Union Gas System, Inc.*, 250 Kan. 722, 725-26, 830 P.2d 35 (1992).

When Shank's three owners entered into the operating agreement, they clearly anticipated that the firm would take on contingent fee matters. The operating agreement itself makes that clear. The history of every group of lawyers who band together to practice law, including the Shank firm, reflects that over time lawyers come and go in one manner or another. Krigel would have us conclude that under these circumstances the three owners of Shank agreed that should an owner leave the firm and take a contingent fee client with him, the firm would waive its right to be compensated through quantum meruit for all of its investment of time and money in the case should the departing client ultimately prevail.

The Operating Agreement is not an Express Waiver of Shank's Right to Quantum Meruit

There is nothing in the operating agreement that could be construed as an express waiver by Shank of its right to relief through quantum meruit upon Shouse discharging Shank and retaining Krigel in its stead. The provision of the operating agreement valuing in-process contingency fee cases at $0 is found within the long definition of Book Value. The provision is included in a list of "principles" to be used when calculating the firm's Book Value. There is no mention of quantum meruit within that definition or within the relevant provisions of the operating agreement included in the record on appeal. Thus, the issue is whether Shank, by its conduct or inaction, impliedly waived its right to seek quantum meruit.

The Operating Agreement is not an Implied Waiver of Shank's Right to Quantum Meruit

While waiver "may be implied from acts or conduct, or a course thereof warranting an inference of relinquishment of a right, there must normally be a clear, unequivocal, and decisive act of the relinquishing party." 31 C.J.S., Estoppel and Waiver § 99. Here, the "clear, unequivocal, and decisive act of the relinquishing party" is claimed to be the execution of the operating agreement years before Shouse entered the scene.

Does this disregard of pending contingent fee cases in calculating the firm's equity evidence "a clear, unequivocal, and decisive act" by the owners of Shank to waive the right to impose an attorney's lien on settlement proceeds and to recover in quantum meruit for work performed by the firm in some future contingent fee case should one of the firm's owners later depart the firm and take the contingent fee client with him to another firm? In answering this question our interpretation of the operating agreement must make business sense and cannot create an absurd outcome. See *Short v. Blue Cross and Blue Shield of Kansas*, 56 Kan. App. 2d 914, 921, 441 P.3d 1058 (2019) (affirming district court's interpretation of a contract because it reflected "a reasonable business practice, and the district court's interpretation of the contract does not lead to an absurd result").

The district court inferred from the language of the operating agreement that Shank waived its right to quantum meruit recovery. We find, for reasons that will be explained, that the more reasonable inference to draw from the evidence is that Shank did not intend to waive its right to quantum meruit recovery. Additionally, we will demonstrate that the district court's interpretation of the operating agreement leads to unreasonable results.

a. *Shank's Interpretation of the Operating Agreement is Reasonable*

One simple reason for the operating agreement to disregard the value of contingent fee cases is that the value of contingency fee cases would be virtually impossible for the firm's accountants to quantify. The operating agreement defined "Book Value" as "the aggregate amount of the Members' equity in the Company as reflected by the books and records of the Company, as determined by the accountants retained by the Company at the time that Book Value is to be determined." The company accountants were to value Shank's hard assets: company-owned real estate, buildings, improvements, fixtures, and equipment at their depreciated value as shown on the company books. The agreement called for the services of accountants, not appraisers. Thus, as a general rule, the accountants were not to consider "goodwill or any similar intangible asset." But they were to include in their valuation Shank's accounts receivable already billed, which were to be discounted by "an appropriate reserve for bad debts." They were to disregard accounts receivable yet to be billed and pending contingent fee cases.

There is no contention that the actual values to the firm of its contingent fee cases were "reflected by the books and records of the Company" as called for in the operating agreement. We would be shocked if it were otherwise so. Lawyers more often than not have a difficult time arriving at a reasonable valuation of a plaintiff's ultimate recovery, if any. The multitude of variables affecting the value of a contingent fee case—both in terms of the likelihood of any recovery whatsoever and the likely amount of any such recovery—would render such a valuation by lay accountants a virtual shot in the dark. See *In re Marriage of Hershewe*, 931

S.W.2d 198, 204 (Mo. Ct. App. 1996); *Musser v. Musser*, 909 P.2d 37, 38-39 (Okla. 1995). Thus, the only reasonable interpretation of this provision is that in settling up with a departing owner of the firm, the value of this asset—a yet to be realized fee for services in a contingent fee case—which is nowhere to be found in "the books and records of the Company," cannot be calculated with any degree of reasonable certainty so it simply will be disregarded.

Consideration of the cyclical nature of law firms also demonstrates why Shank's interpretation of the operating agreement is reasonable. There are a multitude of methods used by law firms to compensate departing attorneys. Some firms have followed the biblical observation we can paraphrase as: "Naked into this world we come and naked we shall depart, for the Lord giveth and the Lord taketh away."

Under this approach, young associates come to the firm with no clients or cases of their own but are compensated for working on matters previously brought to the firm over the years through the efforts of their seniors. As those young associates mature, they ultimately take the place of the senior attorneys who fed them business in the early years. So when it is their turn to retire or depart, they—like their predecessors—leave behind the clients and cases they, in turn, cultivated in order to provide a body of legal work for the next crop of young associates who follow in their footsteps. Thus, for the sake of firm continuity, the firm giveth a young associate business to develop and taketh it away when years later the young associate matures and decides to depart or retire.

Under such an arrangement, the departing senior attorney may be compensated for capital contributions to the firm and the attorney's share of the tangible assets of the firm but not for any intangibles such as goodwill or for work in progress or a share in unrealized recoveries in pending cases. Such an arrangement does not signal a disregard for the value of these intangibles for which a departing attorney realizes no monetary consideration. Rather, the arrangement recognizes the importance of husbanding the value of these intangibles for the cultivation and development of new attorneys who will carry on the task of maintaining and expanding clients for the future health of the firm. We fail to see how such

an arrangement could ever be viewed as an abandonment of the firm's right to seek relief through quantum meruit from clients who choose to take their legal business elsewhere.

b. *The District Court's Interpretation of the Operating Agreement is Inconsistent with Shank's Actions and the Concept of Principal-Agent Relationships*

Interpreting the operating agreement as a waiver of the right to quantum meruit recovery is inconsistent with actions Shank took after executing the operating agreement, particularly the engagement agreement it entered with Shouse. Shank took on Shouse's case on a contingent fee basis and spelled out in the engagement agreement its right to an attorney's lien against any recovery by Shouse if she went to another law firm. And when Shouse left and Krigel settled the case, Shank asserted its attorney lien for the work done on the case before Shouse left. None of this is consistent with waiver, but it is entirely consistent with the right to claim quantum meruit.

The district court believed that its interpretation of the operating agreement was reasonable because allowing quantum meruit in the Shouse case would allow Moore to make a quantum meruit claim in the cases that stayed at Shank and this was "[t]he result that the parties presumably sought to avoid when they set the contingency case book value at zero." Such an interpretation ignores the fact that Moore had no quantum meruit claim in cases he worked on while at Shank. The clients were the clients of Shank and Moore was paid for his work on the firm's clients through his compensation agreement with the firm. See *Shamberg*, 289 Kan. at 903 ("Oliver's employment contract would dictate that he be considered an agent of Wallace Saunders while performing attorney services during his period of employment."). This could not have been the reason for the accountants to disregard contingent fee cases.

There is no evidence—and we would be surprised if there were—that Moore, as either an associate or owner of the firm, had his own cases separate and apart from those of the firm for which he could claim fees solely for himself and not for the firm. All

indications are that Moore worked on firm business while employed by Shank. Moore had no quantum meruit claim to assert against Shank's contingent fee cases he worked on. The fees generated from those cases belonged to the firm, not to Moore. Based on the summary judgment standard expressed earlier in *GFTLenexa*, in considering Krigel's claim of waiver we must resolve all facts and reasonable inferences drawn from the evidence in favor of Shank, the party claimed to have waived it's right to quantum meruit relief. The district court's inference was not reasonable. The only reasonable inference we find is that the contingent fee cases were disregarded in calculating the equity of a departing owner of the firm because it was unrealistic to expect the firm's accountants to do so.

The present dispute is between Shank and Krigel. Krigel claims the only object of its suit is a declaration that Shank has no interest in the settlement proceeds from the Shouse case. Moore, an agent of Shank in his work on the Shouse case and an agent of Krigel after Shouse retained Krigel to take over prosecution of the claim, is not a party and has asserted no independent claim against the proceeds of the Shouse settlement. It would not be consistent with the general principles of contract law under which the operating agreement was executed to permit third parties like Krigel to utilize the operating agreement as a tool to defeat quantum meruit claims by predecessor counsel. For a third party to claim benefits from a contract, "an intent to benefit a third person must be clearly expressed in the contract." *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, Syl. ¶ 6, 107 P.3d 1219 (2005). No such intent is evident here.

c. *The District Court's Interpretation of the Operating Agreement is Unreasonable when Considered in the Context of the Entire Operating Agreement*

The district court's interpretation of the provision in the operating agreement valuing contingency fee cases at zero leads to unreasonable results when that interpretation is applied to other scenarios in which the operative language applies.

The operating agreement's provision for establishing the equity of a departing owner of the firm does not set different rules

depending on the circumstances under which a lawyer-owner departs. They are all treated the same. Book value is calculated in the same manner whether a member voluntarily withdraws, dies, is expelled, or is disbarred. Nothing in the operating agreement creates a special and distinct rule applicable when a member voluntarily withdraws from the firm. Accordingly, we must construe this provision in a manner consistent with all the alternatives to which it applies. Thus, under Krigel's theory, death of one of the owners necessarily would trigger these same provisions of the operating agreement; and because the value of contingent fee matters would not be calculated in arriving at the value of the deceased owner's equity in the firm, a contingent fee client—or all the firm's contingent fee clients, for that matter—would be free to pick up and move to a different firm and, in the process, insulate the proceeds of any recovery in their cases from a claim under quantum meruit by Shank for legal work performed on their behalf. The same could be said of the other means by which an owner of the Shank firm could depart: an owner being expelled from the firm or being disbarred. Such an outcome based on Krigel's interpretation of the operating agreement would be an absolute absurdity. Moreover, we cannot rewrite the operating agreement under the guise of construction in order to accommodate Krigel's theory of waiver. See *Quenzer v. Quenzer*, 225 Kan. 83, 85, 587 P.2d 880 (1978).

Additionally, from the plain reading of the operating agreement, the waiver of the right to assert a claim under quantum meruit, which Krigel seeks to impose on Shank, is not limited to Shank's interest in the recovery of fees in contingent fee matters. In arriving at the book value of the redemption interest of one of Shank's owners on separation from the firm, the firm's accountants are required to disregard the value of unbilled fees and expenses—accounts receivable for legal work performed but not yet billed. Extending Krigel's argument to its logical conclusion would result in Shank waiving its right to claim relief under quantum meruit for unbilled legal work performed for any client of the firm upon the departure of one of the firm's owners.

Finally, because the portion of the operating agreement at issue here deals only with calculating the equity interest payable to

an owner of Shank upon departure from the firm, it does not apply to nonowner Shank lawyers who may decide to leave the firm and take with him or her a client matter for which Shank has a contingent fee contract. Thus, under Krigel's theory of the case, Shank does not waive quantum meruit relief when a junior associate of the firm leaves and takes a contingent fee client with him or her; but when one of the firm owners leaves under identical circumstances, the firm waives its right to be compensated based on the doctrine of quantum meruit. We fail to see how such an outcome was intended or anticipated by the signers of the operating agreement or how such an arrangement satisfies the *Short v. Blue Cross* reasonableness standard. See 56 Kan. App. 2d at 921.

The district court's interpretation of the operating agreement raises many questions. Why would a law firm unilaterally waive its statutory right to an attorney's lien in all contingent fee cases when some future contingent fee client leaves the firm while the case is ongoing? Why would a law firm exert effort and advance fees and expenses knowing that at any time—particularly when discovery is complete and the case is ready for trial or ripe for settlement—plaintiff could take his or her file to another firm and stiff the original firm for all its work in the case? Why would a law firm ever take on a contingent fee case under these circumstances? The obvious answer to these questions is that a reasonable law firm would not accept contingency fee cases if the firm's operating agreement created such a substantial risk that the firm's investment in those cases could be eliminated.

Shamberg v. Oliver *is distinguishable*

This leaves us to consider whether the holding in *Shamberg* undermines these conclusions. In its rulings, the district court relied heavily on our Supreme Court's holding in *Shamberg*, 289 Kan. 891. *Shamberg* involved a dispute over a referral fee in a medical malpractice action. Michael Oliver was an attorney and shareholder at Wallace, Saunders, Austin, Brown & Enochs, Chartered (Wallace Saunders). The family of Sara Hotchkiss contacted Oliver after Hotchkiss experienced severe medical complications. Oliver met Hotchkiss' family to discuss a possible medical malpractice claim, but because Wallace Saunders was engaged

in the defense of medical malpractice actions, Oliver proposed referring the case to another firm. After meeting with several attorneys, the Hotchkiss family selected Victor Bergman of Shamberg, Johnson & Bergman, Chartered (Shamberg) to represent them. The Hotchkisses entered a contract with Shamberg under which they agreed to pay a contingent fee of 40% of any recovery.

In January 2003 and again in May 2004, Bergman wrote to Oliver on behalf of Shamberg and offered Wallace Saunders a referral fee. Under the proposed agreement, Shamberg would litigate and finance the case, but Oliver would assist and advise on certain specified matters. Oliver did not promptly respond. Oliver resigned from Wallace Saunders in January 2005 and took with him the Hotchkiss file and continued to assist the Shamberg firm with the case. After Oliver's resignation, both Oliver and Wallace Saunders wrote to Shamberg and claimed entitlement to the referral fee. Oliver had spent only 15 or so hours working on the Hotchkiss case while at Wallace Saunders, but he spent approximately 151 hours working on the case after his departure.

Oliver had an employment contract with Wallace Saunders as well as a Deferred Compensation Agreement (DCA). The DCA provided Oliver with compensation in addition to that established in his employment contract and provided a method for valuing Oliver's interest in active accounts receivable and work-in-process upon his departure from the firm. The DCA arbitrarily valued work-in-process files at $150, regardless of the expected recovery or whether the case was to be billed as an hourly or contingent fee case. When Oliver left Wallace Saunders, he was paid his share of $150 for each active account receivable and work-in-process file that remained with the firm. His deferred compensation was reduced by 32 files, which were withdrawn from the firm. Oliver took with him 12 of those 32 files, including the Hotchkiss file.

Ultimately the Hotchkiss case settled, resulting in a substantial referral fee. Shamberg filed an interpleader action when Oliver and Wallace Saunders continued to each claim entitlement to the referral fee. Unlike in our present case, Wallace Saunders did not claim recovery based on quantum meruit. Rather, it claimed it was entitled to the entire referral fee.

The district court granted summary judgment to Wallace Saunders. The Kansas Supreme Court reversed and granted Oliver the entire referral fee. 289 Kan. at 910. The court noted that the referral fee agreement was between Shamberg and Wallace Saunders and the agreement contemplated continuing obligations from Wallace Saunders, specifically Oliver's continued participation and assistance with the case. The referral fee was predicated on a contingency fee agreement. Because the contingency fee had not been earned at the time of Oliver's departure from Wallace Saunders, the referral fee likewise could not have been earned. The court reasoned: "Generally, an attorney who is discharged before the occurrence of the contingency provided for in a contingency fee contract may not recover compensation on the basis of the contract, but rather the attorney is entitled only to the reasonable value of the services rendered based upon quantum meruit." 289 Kan. at 904. But Wallace Saunders was not seeking a share of the referral fee based on quantum meruit; it claimed it was entitled to the entire fee.

The court concluded that "[w]hen Oliver took the Hotchkisses' file, he not only assumed the obligation to complete the performance that was due the clients, but he also received the benefits of the fee arrangement that was tied to that performance." 289 Kan. at 908. Wallace Saunders received its "contractually allocated share of the referral agreement" when it deducted Oliver's share of the $150 file valuation from his final compensation. 289 Kan. at 907. Because "Oliver paid the agreed-upon value for the Hotchkisses' file under the DCA . . . he . . . was entitled to the future fees generated by that file." 289 Kan. at 909. Wallace Saunders, through the DCA, agreed to place a fixed value on files-in-progress when a member left the firm "rather than to allocate value on the basis of quantum meruit." 289 Kan. at 909.

The Supreme Court briefly discussed the possibility of a quantum meruit claim by Wallace Saunders, stating:

"[P]art of the performance on the Hotchkisses' file was effected while Oliver was an agent of Wallace Saunders. Accordingly, the firm was entitled to that part of the compensation the clients consented to be paid to Oliver that was earned during his employment. Arguably, in such circumstances, an allocation between the firm and departing attorney could be made on the basis of quantum meruit. How-

ever, Wallace Saunders does not seek only a fair share of the fee and, more importantly, the firm had reached a prior agreement with Oliver, through the DCA, to place a fixed value on the file, rather than to allocate value on the basis of quantum meruit. [Citations omitted.]" 289 Kan. at 908-09.

The facts in *Shamberg* are *sui generis* and while they support the conclusion in *Shamberg*, they do not support Krigel's application of those conclusions to the facts now before us. The divergence of facts and legal theories between those in *Shamberg* and those now before us lead to the conclusion that *Shamberg* does not control.

In *Shamberg*, Oliver provided consideration to Wallace Saunders by paying for the Hotchkiss file under the DCA. Wallace Saunders "received all of its contractually allocated share of the referral agreement." 289 Kan. at 907. In our present case, it is apparent that Shank and its owners simply agreed to disregard the value of contingent fee cases because of the many difficulties in calculating their worth and the provision of the operating agreement that the accountants confine their calculations to values recorded on the books and records of the firm.

Moreover, Wallace Saunders did not claim a share of the referral fee but rather the whole amount. Thus, resolution of the dispute did not turn on a claimed waiver of the right to assert an attorney's lien in order to secure a quantum meruit recovery. In *Shamberg*, the dispute was between the firm and its departing lawyer. There, the court focused on the ongoing obligation of Wallace Saunders "on the file after referral." 289 Kan. at 903. Here, Shank had no ongoing duty to Shouse when Shouse abandoned Shank and contracted with Krigel to handle the matter.

Conclusion

Shank represented Shouse for the majority of her case. It paid $2,401.68 in expenses, provided the staff needed to assist with the case, and paid the overhead costs that come with operating a law firm. It also compensated Moore for the time he worked at the firm. Interpreting the operating agreement as a waiver of quantum meruit recovery in the Shouse action would result in a windfall to Krigel, which has provided no consideration for the benefit.

Upon notice that Shouse was terminating Shank's representation and had hired Krigel to represent her in the matter, Shank served its notice of attorney's lien under K.S.A. 7-108. The lien was against the proceeds from Shouse's settlement of her claim from which Shank sought in quantum meruit the value of the legal services and expenses it had provided and incurred between the time it undertook Shouse's representation until Shouse discharged Shank from further representation in the matter. The terms of the operating agreement do not contain an explicit waiver of this right. Nor did Shank ever by implication voluntarily relinquish its statutory right to impose a lien on Shouse's settlement proceeds and to recover in quantum meruit from those proceeds the value of its legal services to Shouse during the period of its representation of Shouse.

Shank's interpretation of the operating agreement is reasonable whereas Krigel's—and the district court's—interpretation of the operating agreement is not. The district court's orders granting summary judgment to Krigel and denying partial summary judgment to Shank are reversed. The case is remanded to the district court for further proceedings consistent with this opinion (1) to determine the amount of attorney fees and expenses recovered in the Shouse action to which Shank is entitled and (2) to enter judgment accordingly.

Reversed and remanded with directions.

(528 P.3d 1042)

No. 125,316

STATE OF KANSAS, *Appellant*, v. ALEJANDRO MARTINEZ-DIAZ, *Appellee*.

SYLLABUS BY THE COURT

1. EVIDENCE—*Interlocutory Appeal Proper if Pretrial Order Suppresses or Excludes Evidence—Considerations.* An interlocutory appeal by the State is proper when a pretrial order suppressing or excluding evidence substantially impairs the State's ability to prosecute a case. In determining whether evidence substantially impairs the State's ability to prosecute a case, we consider both the State's burden of persuasion and its burden of production.

2. SAME—*Testimonial Hearsay Is Inadmissible—Exception*. To protect a defendant's constitutional confrontation rights, testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.

3. TRIAL—*Refusal to Testify by Witness—Unavailable Witness for Purpose of Confrontation Clause*. A witness who refuses to testify because he claims his or her trial testimony might subject him or her to a charge of perjury is an unavailable witness for purposes of the Confrontation Clause.

Appeal from Douglas District Court; BARBARA KAY HUFF, judge. Opinion filed April 21, 2023. Reversed and remanded with directions.

Jon Simpson, assistant district attorney, *Suzanne Valdez*, district attorney, and *Derek Schmidt*, attorney general, for appellant.

Michael R. Clarke, of Lawrence, for appellee.

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

GARDNER, J.: The State brings this interlocutory appeal challenging the district court's refusal to find Javier Romero unavailable and to admit his preliminary testimony or his police interviews. The State charged Alejandro Martinez-Diaz with attempted first-degree murder of Romero and Caylee Nehrbass. Just before trial, State's witness Romero informed the State he would not testify, claiming doing so might expose him to a charge of perjury. So the State granted Romero use and derivative use immunity, but he still refused to testify. The State then moved the district court

to find Romero unavailable and to admit his preliminary hearing testimony, or alternatively, his recorded police interviews. The district court denied that motion. Agreeing with the State's position, we reverse and remand.

GENERAL BACKGROUND

In May 2021, in Lawrence, Romero called 911 and reported that the driver and occupants of another car had fired guns at his car and shot his girlfriend, Nehrbass, in the head. Romero rushed Nehrbass to the hospital where she received treatment for gunshot wounds to the side of her head and neck. Nehrbass survived her injuries.

Law enforcement officers interviewed Romero and Nehrbass at the hospital, as well as later. During these initial interviews, Romero and Nehrbass identified Martinez-Diaz as the driver of the car that chased them. Romero described seeing Ontareo Jackson firing a rifle from Martinez-Diaz' front passenger window. Romero also told officers that Nehrbass was previously in an abusive, romantic relationship with Martinez-Diaz.

The State charged Martinez-Diaz and Jackson with two counts of attempted second-degree murder for shooting at Romero and Nehrbass. But at the end of Martinez-Diaz' bifurcated preliminary hearing, the State amended those charges to two counts of attempted first-degree murder.

Preliminary Hearings

In October 2021, Martinez-Diaz' preliminary hearing began. The State called Romero as its first witness. Romero refused to testify after the State asked its first substantive question, declaring, "I don't want to testify, and I will not testify." The district court paused the proceedings so Romero could speak with his attorney. When his attorney returned from speaking with Romero, he said that Romero still "does not want to testify," despite the attorney's counsel of the court order and obligation to testify truthfully. His attorney "wanted to make . . . clear to the court" that Romero was not choosing silence based on any fear of self-incrimination. With that clarification, the State resumed Romero's direct examination. But Romero again refused to answer the State's

questions. Romero answered a handful of questions, but after continued refusals, the district court held Romero in contempt until he purged it. Martinez-Diaz' preliminary hearing proceeded in part with other witnesses.

When the preliminary hearing resumed in November 2021, Romero purged his contempt. He was "duly sworn" and testified that he had no comments or concerns to address before resuming his testimony. So the State, Martinez-Diaz' counsel, and Jackson's counsel all questioned Romero about the events of May 27, 2021.

Romero testified that on that day, he and Nehrbass were driving across the Kansas River bridge into North Lawrence when a grey or silver Hyundai Sonata passed his navy-blue Hyundai Sonata. He noticed the grey Sonata "flip" around and get behind his vehicle. Romero took a couple of turns to "see if the car was following" them. The car remained behind him, so he concluded that the grey vehicle was following him and "somebody was yelling out the window" of that vehicle. For the next 5 to 10 minutes, the grey vehicle continued to follow him as he made about five turns, while driving different speeds. Finally, around the railroad tracks by Lyons Park, the grey vehicle "turned off a different way" and Romero "went back to [driving] the speed limit."

Soon after, Romero came to the intersection of North Seventh Street and North Street, approaching the intersection from the south. Romero started to turn left at the intersection to drive west on North Street. Yet, there, at the North Street stop sign, Romero saw the same grey vehicle facing him and "next thing [he] knew [he] was getting shot at."

The first person Romero noticed was Martinez-Diaz. He saw "muzzle flashes" from the "handgun" Martinez-Diaz was firing from the grey vehicle's driver's seat. He also witnessed Jackson hanging out of the passenger window, sitting with his legs in the car, his "butt on the window," and his hands on a compact "AR-15"-style pistol, which he fired from the "top of the car." Jackson's firearm had a drum-style magazine and a sticker of "some type of cartoon or something" that covered the middle of the drum. Romero testified it looked like someone may have been in the backseat of the grey vehicle, but he was not sure.

The gunfire lasted from when Romero "hit the intersection" to "after [he] had passed the" grey vehicle. When the shooting started, the grey vehicle was stationary at the stop sign and continued as both cars moved. Romero was not sure precisely how many shots were fired in total, but he did recall telling officers on the day of the incident that he had heard four or five shots.

Romero "ducked down" to avoid the gunfire as he rounded the intersection, and in doing so, he "swerved off into [a] ditch." He then hit a mailbox before speeding away. After fleeing, he looked at Nehrbass and soon realized blood was coming "down the back of her neck" and he feared she had been shot. He called 911 and tried to calm her while rushing to the hospital.

On cross-examination, Martinez-Diaz' counsel questioned Romero whether the State had made any promises or deals in exchange for his testimony. And counsel challenged his credibility by showing these statements to police on the day of the shooting, which differed from the testimony he had just given:

- Romero and Nehrbass went to North Lawrence because Nehrbass wanted to smoke marijuana;
- a road-rage encounter when he entered North Lawrence that evening involved a different vehicle than the one involved in the shooting; and
- he had seen only one person shooting at him and Nehrbass and did not recognize the shooter.

Romero testified that the version of events he had told officers followed the "street code" of "[n]ot snitching." Romero also admitted that he had a gun in his vehicle during the shooting.

Other evidence at the preliminary hearing aligned with Romero's testimony. Nehrbass testified that a "silver" Hyundai Sonata followed her and Romero as he drove "reckless[ly]" around North Lawrence "trying to get out." She confirmed that Romero eventually lost the car, but only momentarily. "A few minutes later," Romero stopped at a stop sign, she looked over, and "there was the car." She identified Martinez-Diaz as the driver of the vehicle and Jackson as the passenger. She also spotted "figures in the back" that she could not recognize. Before she "blacked out," she saw Martinez-Diaz and Jackson both "[h]alf in, half out"

of their windows, firing weapons. She regained consciousness to the sound of Romero's 911 call and "blood gushing out" of her head. At the hospital, she learned one bullet had "grazed the back of [her] head" and another bullet had "fractured [her] skull." She "still [has] bullet pieces in [her] head."

Officers inspected Romero's vehicle outside the hospital and discovered "three defects that were consistent with bullet holes" on the driver's side. At the North Seventh Street and North Street intersection, officers recovered "approximately 18" shell casings. These shell casings came from "[a]t least three separate firearms," including 9mm casings ("most commonly fired by a handgun"), .223 caliber casings ("most commonly chambered . . . for . . . an AR-15"), and .22 long rifle casings (which "a handgun or a rifle" can fire). The investigation led officers to the home of Roxanna Todd (another of Martinez-Diaz' codefendants), who lived "one long city block" away from the shooting. Todd told officers she came home to Martinez-Diaz, Martinez-Diaz' brother, Jackson, and "a young white kid" talking about how they "[had] returned fire and . . . shot at a person . . . named Javier," which is Romero's first name.

Romero Refuses to Testify at Trial

The case was set for trial in April 2022. Late afternoon on the Friday before jury selection was to begin, the State met with its key witness, Romero, whom they intended to call early in its case. But Romero stated he would not testify and, through counsel, advised he had concerns that his testimony could lead to perjury charges. Romero neither stated what testimony he thought might subject him to perjury charges, nor did he answer any substantive questions. The State told Martinez-Diaz' counsel of Romero's position on Monday when the parties broke for lunch during jury selection.

The next morning, before a jury was sworn, the State granted Romero use and derivative use immunity for any crimes but perjury committed while testifying at Martinez-Diaz' trial. The State believed Romero would testify if he were granted immunity. But to the contrary, Romero's counsel said Romero still intended to answer no questions at trial.

The parties and the district court judge then met to address Romero's expressed intent to not testify. Romero's counsel told the district court that Romero remained "concern[ed] about potentially committing perjury . . . by testifying today" regardless "of whether or not he's been granted immunity, and regardless of whether or not he no longer has the Fifth Amendment protections based upon that." The State asserted that Romero's perjury concerns were "a tactic to avoid testifying," so it asked the court to order Romero to testify, hold him in contempt if he refused, and if he refused, declare him unavailable and to let his preliminary hearing transcript be read into the record. It asked for a ruling before the jury was sworn, to permit an interlocutory appeal from any adverse ruling.

The court agreed to hear what Romero had to say, and called him in. Romero was sworn but he refused to answer any questions, including what his name was. The district court judge asked Romero, "why are you not answering questions?" In response, Romero put his hands up and shrugged his shoulders. The district court held Romero in contempt.

Romero's counsel told the court that Romero was concerned that his testimony either at the preliminary hearing or at trial would be perjury:

"Mr. Romero's position would be, it would be one, either here today he would be committing perjury or he would be committing perjury back when he testified at prelim based on what he believed he was going to—what he might testify to.

"So the issue would be, I'm not sure if it would be—I don't want to characterize for Mr. Romero that it was the testimony would be perjury today or perjury at prelim. I think he was concerned that if he testified today, he would perjure himself, either today or previously."

The district court explained her disappointment that the State had not informed Martinez-Diaz' counsel of the issue sooner, and concluded Romero would not answer any questions under oath and would not purge any contempt at that point.

The district court then determined whether Romero's preliminary hearing testimony would be admitted. Martinez-Diaz' attorney argued that it would violate due process for the State to offer preliminary hearing testimony tainted by a reasonable probability that it was perjured. But the State countered that it did not believe the preliminary hearing evidence was perjured; in its view, Romero was just looking for any reason to refuse to testify.

"We do not believe his testimony to be perjured. We just believe he is refusing to testify and looking for any excuse. And I don't think there's any basis to find we intend to knowingly use perjured testimony, because the, what Mr. Clarke [defense counsel] says is that the only conclusion is that he perjured himself at preliminary hearing.

"I think the Court could also make the opposite conclusion, that he intends to lie on the witness stand today, would not be protected from that perjury because the immunity doesn't protect him from that, and he does not have a right to come on the stand [to] lie. So I think the Court should find that is the basis for his refusal and find him to be unavailable and allow us to use his testimony."

The district court denied the State's motion to admit Romero's preliminary hearing testimony.

Because it could not use the preliminary hearing testimony, the State asked to admit videos of Romero's police interviews at the hospital and police station, stating they met both constitutional (*Crawford*) and statutory (hearsay exception) requirements. See *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Martinez-Diaz objected, asserting a Confrontation Clause violation.

The district court excluded the police interviews, holding:

"There are *Crawford* issues and confrontation issues that I think Mr. Clarke has the right of.

"These statements were taken by police in furtherance of litigation. I haven't heard or had a hearing on what may be reliable beyond that and I'm not going to sort it out during this trial.

"The fact that Mr. Clarke at one point had the right to cross-examine Mr. Romero, that cross-examination is not going to be heard by the jury because he's not available. The statements that were not subject to cross-examination are not going to come in at this time either."

The State made no proffer of this evidence after the court excluded it.

The State then filed this interlocutory appeal, arguing that the district court erred by excluding Romero's preliminary hearing testimony and the recorded police interviews.

ANALYSIS

Jurisdiction

Martinez-Diaz argues this court lacks jurisdiction over this appeal because the State has not shown that the trial court's ruling substantially impaired the State's ability to prosecute the case. He argues that Nehrbass' testimony and Romero's testimony would go to the same facts. In

other words, Romero's testimony was merely corroborative evidence. The State responds that the suppression of Romero's preliminary testimony substantially impairs its burden of persuasion so that jurisdiction is proper.

"Whether appellate jurisdiction exists is a question of law over which this court has unlimited review. To the extent the court's inquiry requires statutory interpretation, this court also exercises unlimited review. [Citation omitted.]" *State v. Garcia-Garcia*, 309 Kan. 801, 806, 441 P.3d 52 (2019).

"In Kansas, the right to appeal is entirely statutory and, as a general rule, appellate courts may exercise jurisdiction only when authorized to do so by statute." *State v. McCroy*, 313 Kan. 531, 534, 486 P.3d 618 (2021). The relevant statute here is K.S.A. 2021 Supp. 22-3603:

> "When a judge of the district court, prior to the commencement of trial of a criminal action, makes an order . . . suppressing evidence . . . an appeal may be taken by the prosecution from such order if notice of appeal is filed within 14 days after entry of the order."

But the term "suppressing evidence" as used in this statute has a broader meaning than the suppression of evidence illegally obtained. It includes not only "constitutional suppression" but also rulings of a trial court which exclude the State's evidence so as to substantially impair the State's ability to prosecute the case. *State v. Newman*, 235 Kan. 29, 34, 680 P.2d 257 (1984).

As Martinez-Diaz points out, "the appellate courts of Kansas should not take jurisdiction of the prosecution's interlocutory appeal from every run-of-the-mill pretrial evidentiary ruling of a district court, especially in those situations where trial court discretion is involved." *Newman*, 235 Kan. at 35. Rather, an interlocutory appeal is proper only when the pretrial order suppressing or excluding evidence places the State in a position where its ability to prosecute the case is substantially impaired. 235 Kan. at 35; see *State v. Mitchell*, 285 Kan. 1070, 1080, 179 P.3d 394 (2008) (finding no jurisdiction over the State's appeal, holding "[i]f the exclusion of evidence does not substantially impair the State's ability to prosecute the case, the State cannot raise the issue as an interlocutory appeal").

Martinez-Diaz argues that because the State can use Nehrbass' testimony, Romero's testimony is superfluous, thus its suppression does not "substantially impair" the State's ability to prosecute him. But this argument ignores that a substantial impairment of the State's ability to prosecute is more nuanced than the mere production of evidence of the crime.

We consider the State's entire burden of proof when determining whether suppression of evidence imposes a substantial impairment on the State's prosecutorial ability. That burden includes the burden of persuasion and the burden of production. See *State v. Ultreras*, 296 Kan. 828, 837, 295 P.3d 1020 (2013); see also *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 100 n.4, 131 S. Ct. 2238, 180 L. Ed. 2d 131 (2011) (discussing "'burden of proof'" and distinguishing "'burden of persuasion'" that "specif[ies] which party loses if evidence is balanced," "'burden of production,'" that "specif[ies] which party must come forward with evidence at various stages in the litigation," and "'standard of proof'" that specifies "'degree of certainty by which the factfinder'" or reviewing court must be persuaded by party bearing burden of persuasion).

Martinez-Diaz focuses on the burden of production—the State's burden to present a prima facie case of guilt. The State concedes that the exclusion of Romero's prior testimony and statements do not substantially impair the State's ability to sustain its burden of production, because Nehrbass would testify to the same events.

But the State focuses on its burden of persuasion—its obligation to persuade the jury of a defendant's guilt "at the beyond-a-reasonable-doubt level of confidence." *State v. Mukes*, No. 117,082, 2018 WL 4264865, at *6 (Kan. App. 2018) (unpublished opinion). To meet this burden, the evidence must convince the jury beyond a reasonable doubt that Martinez-Diaz fired a weapon at Romero and Nehrbass with the premeditated intent to kill. See K.S.A. 2021 Supp. 21-5301 (defining attempt); K.S.A. 2021 Supp. 21-5402(a)(1) (defining premeditated first-degree murder). As detailed below, the State shows serious difficulties in meeting its burden of persuasion if it depends only on Nehrbass' testimony.

First, Nehrbass' testimony is vulnerable to impeachment because her ability to perceive and accurately recount the shooting

are suspect. Evidence suggests that she might have smoked marijuana around the time of the incident. And she testified that she "glanced" at the occupants inside the other vehicle for only "like . . . two seconds," "blacked out" after getting shot, "only remembered one shot," and sustained serious head injuries during the crime. Further, Martinez-Diaz may have abused her during their relationship, so her impartiality could be undermined without corroborating evidence like Romero's. As the State argues, without Romero's testimony, its case rests heavily on whether the jury credits a single eyewitness account, yet it loses its best way to prove that account credible.

Second, Nehrbass' testimony cannot replace Romero's. As the State argues, part of its burden of persuasion is satisfying jurors' expectations about trial, one of which is "expectations about what proper proof should be." *Old Chief v. United States*, 519 U.S. 172, 188, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). Jurors expect a prosecutor to prove certain crimes with certain evidence. "[F]or example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence." 519 U.S. at 188. If jurors' expectations go unsatisfied, "the effect may be like saying, 'never mind what's behind the door,' and jurors may well wonder what they are being kept from knowing" and "may penalize the party who disappoints them by drawing a negative inference against that party." 519 U.S. at 188-89. Given the facts and charges here, jurors will expect to hear Romero's testimony. Jurors will wonder where he is, why he is not testifying, and what the State might be hiding in his absence. The defendant's state of mind is paramount, and the jury will determine whether Martinez-Diaz fired a weapon at Romero and Nehrbass with the desire to kill them.

We find the lack of Romero's testimony substantially impairs the State's ability to prosecute the case. Romero and Nehrbass' testimonies reinforce each other. Standing alone, Nehrbass' testimony will not fulfill the court's truth-finding purpose. Even the district court described Romero's testimony as "critical." Its absence "may be determinative of the case." *Newman*, 235 Kan. at 35. Such an interference confers jurisdiction under K.S.A. 2021 Supp. 22-3603. See *State v. Quinones-Avila*, No. 120,505, 2019 WL 3210224, at *4, 7 (Kan. App. 2019) (unpublished opinion)

(finding interlocutory jurisdiction in a "close question" case in which the suppressed evidence "counter[ed defendant's] assertion" and "corroborate[d the victim's] testimony").

Exclusion of Evidence

We next address the State's claim that the district court erred by not finding Romero to be unavailable and by refusing to admit either his preliminary testimony or his recorded statements to law enforcement on the day of the shooting.

1. *Standard of Review*

The standard for appellate review of a district court decision that a witness is unavailable to testify is generally abuse of discretion. *State v. Reed*, 302 Kan. 227, 246, 352 P.3d 530 (2015). But when the underlying facts are undisputed, an appellate court's review of whether a witness was available or unavailable and whether a Confrontation Clause issue arose is de novo. Because Romero's testimony is of record, this court is as well-equipped as the district court to determine whether his refusal to testify made him unavailable and whether an issue arose under the Confrontation Clause. Our standard of review is therefore de novo. *State v. Carter*, 278 Kan. 74, 77-78, 91 P.3d 1162 (2004).

2. *Romero's Preliminary Hearing Testimony*

The State argues that the district court erred by excluding Romero's preliminary hearing testimony because he was unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant at his preliminary hearing. Martinez-Diaz responds that the admission of possibly perjured testimony violates his due process rights.

The district court excluded Romero's preliminary testimony based on her concerns about credibility and fairness:

> "[T]ruthfully, the Court can't say which one is true. First of all, we haven't heard what he would say even under a grant of immunity. But it is clear that one of these—well, it's clear that Mr. Romero believes that he could be charged for perjury if he testified. So I think it's fair to infer that there would be a change, and it would be a material change from what had been stated under oath, under cross-examination in the preliminary hearing.

"The problem with what you say is, I can't make that call, and you can't make that call, in all honesty. Issues of credibility are for the jury to find. But the jury's not hearing Mr. Romero and seeing him, and seeing his demeanor, and his body language as he refuses to answer questions. The jury's not getting the full picture of Mr. Romero and his credibility as they watch him in contempt of Court and refusing to answer questions.

"I'm not going to let the preliminary hearing testimony come in because there is more to the story that the jury hasn't heard. I do think it's unfair to Mr. [Martinez-]Diaz that the jury not know that Mr. Romero even under a grant of immunity, is refusing to testify, and is refusing to answer questions. It casts in doubt at that point, his preliminary hearing testimony, so it is suppressed."

But the district court failed to apply the correct analysis under the Confrontation Clause.

Generally, the Sixth Amendment's Confrontation Clause demands that an accused "enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI; see also *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (holding that Sixth Amendment's Confrontation Clause binds states through Fourteenth Amendment).

In *State v. Terry*, 202 Kan. 599, 601-02, 451 P.2d 211 (1969), a pre-*Crawford* case, the court's analysis shows that the unavailability requirement does not depend on the physical presence or absence of a witness but on the inaccessibility of his or her testimony. There two witnesses had been granted immunity and had testified and faced extensive cross-examination at the defendant's preliminary hearing but "flatly refused to testify" at trial. 202 Kan. at 600. The court found those witnesses were "just as 'unavailable' as though [their] physical presence could not have been procured." 202 Kan. at 603. It reasoned that the prior testimony of the witnesses may be introduced at the later proceeding because "the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." 202 Kan. at 602. *Terry*'s analysis is consistent with *Crawford* and decisions from other jurisdictions. See generally Annot., 92 A.L.R.3d 1138 (gathering cases about unavailability of witness who is present in court but refuses to testify without claiming valid privilege).

Federal rules of evidence define an unavailable witness, in part, as a declarant who "refuses to testify about the subject matter despite a court order to do so." See Fed. R. Evid. 804(a)(2). But

Kansas rules of evidence do not. Rather, K.S.A. 60-459(g), which lists situations when a witness is unavailable, says nothing about a witness who refuses to testify:

"'Unavailable as a witness' includes situations where the witness is (1) exempted on the ground of privilege from testifying concerning the matter to which his or her statement is relevant, or (2) disqualified from testifying to the matter, or (3) unable to be present or to testify at the hearing because of death or then existing physical or mental illness, or (4) absent beyond the jurisdiction of the court to compel appearance by its process, or (5) absent from the place of hearing because the proponent of his or her statement does not know and with diligence has been unable to ascertain his or her whereabouts."

Still, in *State v. Jefferson*, 287 Kan. 28, 37-38, 194 P.3d 557 (2008), the Kansas Supreme Court interpreted this list of situations as exemplary rather than exclusive, focusing on its use of "includes," rather than "includes only." It held that a witness who refuses to testify after being ordered to do so by the court is an unavailable witness under this statute. 287 Kan. at 37-38. *Jefferson* thus affirmed the district court's admission of the witness' preliminary hearing testimony, finding:

"His live testimony was just as inaccessible and just as necessary. His late-blooming reticence, likely generated by events that had transpired between Jefferson's preliminary hearing and trial, should not be permitted to undermine the court's truth-finding purpose." 287 Kan. at 38.

Jefferson addressed confrontation rights generally but not *Crawford*, which was decided a month after Jefferson's crimes occurred.

Crawford held that "[t]o protect a defendant's constitutional confrontation rights, testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68." *State v. Gleason*, 299 Kan. 1127, 1165, 329 P.3d 1102 (2014), *rev'd and remanded sub nom. Kansas v. Carr*, 577 U.S. 108, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016). The United States Supreme Court established a new analysis for Confrontation Clause claims in *Crawford*. *State v. Jackson*, 280 Kan. 16, 35, 118 P.3d 1238 (2005).

Under *Crawford*, the first step is to determine whether the statements are testimonial. 280 Kan. at 35. If so, the Confrontation

Clause bars their admission to prove the truth of the matter asserted unless (1) the witnesses are unavailable and (2) the defendants have a prior opportunity to cross-examine those witnesses. See *State v. Robinson*, 293 Kan. 1002, 1024, 270 P.3d 1183 (2012) (discussing *Crawford*); see also *California v. Green*, 399 U.S. 149, 165, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970). This unavailability exception arises from necessity and "has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." *Barber v. Page*, 390 U.S. 719, 722, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

The State argued this unavailability exception here. First, neither party disputes that Romero's statements are testimonial. The *Crawford* Court defined testimonial statements to include "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" 541 U.S. at 52. Testimonial statements include, at a minimum, "prior testimony at a preliminary hearing, before a grand jury, or at a former trial . . . and to police interrogations." 541 U.S. at 68. If the statement is not testimonial, the *Crawford* Court stated that it is wholly consistent with the Confrontation Clause to analyze the issue based on the applicable hearsay law. 541 U.S. at 68.

Second, the parties agree that Martinez-Diaz got the chance to cross-examine Romero, and did cross-examine Romero, at the preliminary hearing. When a witness is unavailable and has given testimony at a previous judicial proceeding against the same defendant which was subject to cross-examination by that defendant, the State may introduce the prior testimony of that witness at the later proceeding because "the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement." *Terry*, 202 Kan. at 601-02; see *Crawford*, 541 U.S. at 68-69 ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."). "The Sixth Amendment right of confrontation is satisfied if the accused confronted the witnesses against him at any stage of the proceedings in the same case and has had an opportunity of cross-examination." *State v. McCray*,

267 Kan. 339, 353, 979 P.2d 134 (1999); see *State v. Stano*, 284 Kan. 126, 141, 159 P.3d 931 (2007); see also K.S.A. 2021 Supp. 60-460(c)(2)(B).

The interest and motive of the adverse party on the prior occasion for cross-examination of a witness need only be similar, not identical, to the interest and motive at a later point. See *Stano*, 284 Kan. at 144-45. And although Romero's statements at the preliminary hearing may have been inconsistent with his statements to officers on the day of the crime, his counsel could have addressed any inconsistency by cross-examination during the preliminary hearing. Martinez-Diaz' inability to cross-examine Romero a second time at trial does not equate to a Confrontation Clause violation. See *State v. Young*, 277 Kan. 588, 599, 87 P.3d 308 (2004). At the preliminary hearing, Martinez-Diaz was defending against the same charges for which he was on trial. This satisfies the statute and the concerns underlying the Confrontation Clause. See *State v. Reed*, 302 Kan. 227, 246-47, 352 P.3d 530 (2015).

Third, the record shows that Romero was an unavailable witness because he refused to testify. See *Gleason*, 299 Kan. at 1167-68 (affirming district court's determination that witness' refusal to testify rendered him unavailable); *Young*, 277 Kan. at 599 (witness who does recall making earlier statements or who simply refuses to testify is unavailable as witness at trial); *Jefferson*, 287 Kan. at 37-38 (witness who refuses to testify after being ordered to do so by the court is an unavailable witness under this statute); *Terry*, 202 Kan. at 603 (a witness who "flatly refused to testify" at trial is "just as 'unavailable' as though [his] physical presence could not have been procured").

Martinez-Diaz does not contend that the prosecutor failed to make reasonable efforts to compel Romero to testify at trial. See *Gleason*, 299 Kan. at 1168-69. We agree that the record shows that the prosecutor met this duty. Romero was sworn and refused to answer any questions on the morning of trial. The district court asked for an explanation, then found him in contempt. His counsel told the judge that Romero was refusing to testify even though he had a grant of full immunity and even after being found in contempt. Because each element of the unavailability exception to the

Confrontation Clause was met, the district court should not have excluded Romero's preliminary hearing testimony on these grounds.

The district court was concerned that the jury would be unable to view Romero's demeanor and body language, limiting its ability to assess his credibility. But such a consideration is not proper as it would nullify the unavailability exception. "[T]he role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution's procedures for testing the reliability of that evidence are followed." *Hemphill v. New York*, 595 U.S. ___, 142 S. Ct. 681, 692, 211 L. Ed. 2d 534 (2022); see *State v. McMackin*, No. 109,022, 2013 WL 3970210, at *7 (Kan. App. 2013) (unpublished opinion) (rejecting argument that "jury should not be permitted to make decisions based on a 'cold record'" because that proposition "would all but invalidate" statute and caselaw excepting admission of prior testimony from an unavailable witness). The district court's holding was thus an error of law, and an abuse of discretion. See *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018).

Like the district court, this panel has no way to know whether Romero's preliminary hearing testimony was perjured. Any conclusion on that issue would be pure speculation. True, "a conviction based on perjured testimony is a violation of due process." *State v. Lewis*, 33 Kan. App. 2d 634, 651, 111 P.3d 636 (2003), *overruled on other grounds by State v. Davis*, 283 Kan. 569, 158 P.3d 317 (2006); see *State v. McKinney*, 272 Kan. 331, Syl. ¶ 5, 33 P.3d 234 (2001) ("A conviction obtained by the introduction of perjured testimony violates a defendant's due process rights if [1] the prosecution knowingly solicited the perjured testimony, or [2] the prosecution failed to correct testimony it knew was perjured."). But Martinez-Diaz has not been convicted, so any claim that he might be prejudiced by a due process violation is premature and speculative.

And given his broad grant of immunity, it is most unlikely that Romero could be charged with perjury. The State granted Romero

"use and derivative use immunity to Javier Romero on account of any testimony which said Javier Romero shall give in the trial . . . and . . . such testimony, or any evidence derived therefrom, shall not be used against the said Javier Romero in any prosecution . . . except for the crime of perjury committed in giving such evidence."

This means that the State could not use his trial testimony, if true, to convict him of any crime, including perjury for any contrary statements made during his preliminary examination. Only if Romero perjured himself at trial would he be subject to a perjury charge, given the broad scope of his immunity. Romero's refusal to testify at trial for fear of a perjury charge suggests that he intended for his trial testimony to differ significantly from his preliminary hearing testimony, but it does nothing to suggest that his preliminary hearing testimony was not reliable or true.

The district court was apparently concerned that Romero did not "choose" to withhold his testimony but was instead boxed into a situation in which his only option was to refuse to testify or to face a perjury charge. But we see no distinction between a witness' choice not to testify for fear of incriminating himself or herself on the charge laid against the defendant, and the choice of a witness who refuses to testify for fear of incriminating himself or herself on a perjury charge. "Admittedly, in each of these cases, the 'choice' presented to the witness to testify or not to testify is a hard one; but the witness nonetheless chooses not to provide evidence that existed all along and that was unavailable only because the witness . . . asserted a right against self-incrimination." *United States v. Earles*, 983 F. Supp. 1236, 1253 (N.D. Iowa 1997), *aff'd sub nom. United States v. Papajohn*, 212 F.3d 1112 (8th Cir. 2000).

In short, Romero's reason for refusing to testify—that he thinks his trial testimony might subject him to a charge of perjury—makes no difference under these facts. Romero was an unavailable witness and Martinez-Diaz had a prior chance to cross-examine him. We thus find that Romero's testimony given at Martinez-Diaz' preliminary hearing falls within the unavailability exception to the Confrontation Clause. Romero's testimony is not excludable on that basis.

Romero's Statements to Police

We find it unnecessary to address whether the district court also erred in excluding the videos of Romero talking to police officers on the day of the crime, at the hospital, and later that evening at the police station. These recordings were not played at the preliminary hearing

nor were they played during the hearing about Romero's refusal to testify, but Martinez-Diaz' counsel cross-examined Romero at length during the preliminary hearing about his statements to police.

CONCLUSION

The State asks us to reverse and remand with directions that if Romero again refuses to give immunized testimony at Martinez-Diaz' trial, then the district court must, subject to any applicable evidentiary rules Martinez-Diaz invokes, allow use of Romero's prior testimony. We do so.

Reversed and remanded with directions.

(528 P.3d 1054)

No. 125,352

BLUE VALLEY TELE-COMMUNICATIONS, INC., et al., *Appellants*, v. KANSAS CORPORATION COMMISSION, *Appellee*.

SYLLABUS BY THE COURT

1. ADMINISTRATIVE LAW—*Burden of Proof of Invalid Agency Action on Challenging Party*. The party challenging the validity of an agency's action bears the burden of proving such invalidity under K.S.A. 77-621(a)(1).

2. SAME—*Statutory Limited Review of Agency's Action by District Court and Appellate Court.* Appellate courts exercise the same statutorily limited review of the agency's action as does the district court, as though the appeal had been made directly to the appellate court. K.S.A. 77-601 et seq.

3. SAME—*No Deference to Agency's Statutory Interpretation by Appellate Court*. The appellate court does not extend deference to an agency's statutory interpretation.

4 CONSTITUTIONAL LAW—*Fifth Amendment's Takings Clause—Application to State and Local Government Entities Through Fourteenth Amendment.* The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without just compensation. The protections of the Takings Clause apply to the actions of state and local government entities through the Fourteenth Amendment to the United States Constitution.

4. KANSAS CORPORATION COMMISSION—*Regulation of Utilities Can Diminish Value Creating Compensable Taking.* The government regulation of privately owned utilities can diminish the utilities' value to a degree creating a constitutionally compensable taking.

5. SAME—*Constitutional Protection for Utilities.* The guiding principle in utility cases has been that the Constitution protects utilities from being limited to a charge for the property serving the public which is so unjust as to be confiscatory.

6. CONSTITUTIONAL LAW—*Burden of Proof on Party Asserting Takings Claim.* The burden of proving that the taking is confiscatory is on the party asserting the takings claim.

7. SAME—*Reduction of Utility's Profit or Rate of Return Does Not Establish Taking.* The mere reduction of a utility's profit or rate of return by some

unproven amount does not, without more, establish an unconstitutional taking.

8. STATUTES—*Interpretation of Statute—Appellate Review.* Statutory interpretation presents a question of law over which appellate courts have unlimited review.

9. SAME—*Construction of Statute—Intent of Legislature Governs—Appellate Review.* The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent.

Appeal from Shawnee District Court; THOMAS G. LUEDKE, judge. Opinion filed April 21, 2023. Affirmed.

Mark Doty and *Thomas E. Gleason Jr.*, of Gleason & Doty, Chtd., of Ottawa, and *Colleen R. Jamison*, of Jamison Law, LLC, of Tecumseh, for appellants.

Brian G. Fedotin, general counsel and special assistant attorney general, of Kansas Corporation Commission, for appellee.

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

COBLE, J.: To date, the Kansas Universal Service Fund (KUSF) has been subsidizing rural local exchange carriers—local landline telephone companies—for roughly 25 years. Because rural local exchange carriers (RLECs) operate in rural areas of our state where their costs of investment often exceed their returns, the KUSF subsidizes RLECs. In this case, a group of RLECs challenges the constitutionality of K.S.A. 66-2008(e)(3), which places a $30 million cap on annual support from the KUSF.

Though the $30 million KUSF cap has been in effect since 2013, the cap was not reached until 2021. Recognizing the subsidies were nearing this threshold, the Kansas Corporation Commission (KCC) applied the statutory cap by prorating KUSF disbursements to RLECs as required by statute. But the RLECs argue that implementing this $30 million cap amounts to an unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the

United States Constitution because the RLECs will not be able to earn their state-prescribed rate of return on their investments.

On our review, however, we find that some undefined diminished profit—the amount of which is unclear because the RLECs did not provide that evidence—does not alone amount to an unconstitutional taking. In fact, the United States Supreme Court and Kansas courts have held as much. We, then, affirm the KCC's orders implementing the statutory cap.

FACTUAL AND PROCEDURAL BACKGROUND

A thorough discussion of the history of the telecommunications industry and its evolution and regulation can be found in earlier opinions from this court, and it is unnecessary to delve into those details here. See, e.g., *Bluestem Telephone Co. v. Kansas Corporation Comm'n*, 52 Kan. App. 2d 96, 363 P.3d 1115 (2015) (examining the KCC's order changing the way in which the RLECs would receive support from the KUSF in light of a new order from the Federal Communications Commission and subsequent state statutory amendments); *Citizens' Utility Ratepayer Bd. v. Kansas Corporation Comm'n*, 264 Kan. 363, 956 P.2d 685 (1998) (addressing challenges to KCC's orders implementing the Kansas Telecommunications Act).

Regulatory context

Broadly, the Federal Telecommunications Act of 1996 was passed by Congress to "deregulate the telecommunications industry, open local and long distance telecommunications markets to competition, and ensure universal telephone service for all citizens at affordable rates." *Citizens' Utility Ratepayer Bd.*, 264 Kan. at 369. The 1996 Act required the federal government to establish "universal service funds" to ensure consumers in high-cost areas, such as remote and rural areas, receive services at rates comparable to consumers in lower-cost, competitive market areas. *Bluestem Telephone Co.*, 52 Kan. App. 2d at 98.

So long as they were consistent with the federal regulations, states were allowed to adopt their own universal service mechanisms, and Kansas passed its own Kansas Telecommunications

Act (KTA) in 1996. Under this Act, each RLEC in this case operates under traditional rate of return regulations and is designated as a carrier of last resort pursuant to K.S.A. 66-2009. Because these RLECs operate under traditional rate of return regulations and are designated as carriers of last resort, they must be prepared to provide service to anyone in their geographical area.

As required by the KTA, the KCC established the KUSF and was tasked with implementing the fund. *Citizens' Utility Ratepayer Bd.*, 264 Kan. at 370. The KUSF receives contributions from all eligible telecommunications providers, as defined by 47 C.F.R. 9.3, and the amount of those contributions are assessed yearly based on each provider's intrastate retail revenues. K.S.A. 66-2008(a). The KUSF then makes distributions to qualifying RLECs so that the RLECs may achieve their rate of return.

This case is about whether there is a proper statutory limit to those KUSF distributions set forth in K.S.A. 66-2008(e)(3). This 2013 amendment to the KTA implemented an annual cap on KUSF subsidies. The statute outlines:

> "Notwithstanding any other provision of law, the total KUSF distributions, not to include KUSF support for Kansas lifeline service program purposes, pursuant to K.S.A. 66-2006, and amendments thereto, made to all local exchange carriers operating under traditional rate of return regulation pursuant to K.S.A. 66-2005(b), and amendments thereto, *shall not exceed an annual $30,000,000 cap*. In any year that the total KUSF support for such carriers would exceed the annual cap, each carrier's KUSF support shall be proportionately based on the amount of support each such carrier would have received absent the cap. A waiver of the cap shall be granted based on a demonstration by a carrier that such carrier would experience significant hardship due to force majeure or natural disaster as determined by the commission." (Emphasis added.) K.S.A. 66-2008(e)(3).

After its adoption in 2013, the $30 million cap had not been reached until the KCC began studying the assessment rates for KUSF Year 24.

Procedural history

Two orders from the KCC form the basis of this appeal. In 2019, the KCC opened Docket No. 20-GIMT-086-GIT to determine the KUSF Year 24 assessment rate, which would be effective from March 1, 2020, through February 28, 2021. Through this

proceeding, KCC Staff (Staff) first raised the idea that the $30 million statutory cap outlined in K.S.A. 66-2008(e)(3) could be reached in the upcoming fiscal year. Staff stated that it would implement the cap by prorating support to RLECs, so the support did not exceed $30 million.

Although a group of RLECs sought to sever or defer issues related to the K.S.A. 66-2008(e)(3) cap from the rate proceeding to allow all parties to examine the cap issues in more detail, they did not object to the proposed 9.40% KUSF assessment rate. The RLECs sought an evidentiary hearing on the statutory cap issues but the KCC found such a hearing unnecessary, given the agreement on the assessment rate and the clear language of K.S.A. 66-2008(e). In its Order Adopting KUSF Assessment Rate of January 23, 2020, the KCC found that because "the Legislature ha[d] spoken" and "resolv[ed] any dispute over how to implement the statutory cap," there was "no need for the [KCC] to address implementation of the statutory cap." But this order left implementation of the cap for a later date.

The RLECs filed a petition for reconsideration and clarification taking issue with the KCC's finding that K.S.A. 66-2008(e) superseded their rights to recover their costs under traditional rate of return regulation. The KCC denied the petition and directed Staff to file a Report and Recommendation (R&R) identifying the month the cap would need to be implemented, the prorated KUSF support reduction for each RLEC, and the prorated monthly KUSF support distribution to each RLEC.

Staff filed the R&R several months later, stating they anticipated the KUSF disbursements would exceed the $30 million cap beginning in February 2021. The R&R included a list showing the prorated KUSF support each RLEC would receive. Staff recommended that the KCC implement the reduction to an RLEC's KUSF support for the months of January and February 2021, to be paid to the RLECs in February and March 2021, to try to minimize the impact to the RLECs. The monthly KUSF support reductions ranged from $163 up to $161,562.

Before the KCC adopted the Staff's recommendation, the RLECs requested a briefing schedule on legal issues and an evidentiary hearing on factual issues. The RLECs argued that imposition of the statutory cap would deprive them of the "reasonable opportunity to recover their respective intrastate embedded costs, revenue requirements, investments and expenses previously approved and authorized by the [KCC]." This deprivation, the RLECs argued, constituted a "taking of property for public purpose without just compensation, contravening the Fifth and Fourteenth Amendments to the Constitution of the United [S]tates." The RLECs also argued that Staff's assertion that any loss attributable to the cap could be recovered through other means was factually inaccurate. KCC Staff disputed this, contending the comments cited by the RLECs came from earlier proceedings, and there were no identified disputed facts in Staff's October 2020 R&R.

The KCC scheduled an evidentiary hearing but limited the scope of the hearing to determining whether Staff's calculations were correct, even though it acknowledged that the RLECs were not contesting Staff's calculations. The RLECs objected to the limited scope of the evidentiary hearing, arguing again that there was a dispute over whether the RLECs could recover the lost KUSF revenue through other means. The RLECs petitioned for reconsideration of the KCC's decision to limit the scope of the evidentiary hearing.

Staff and the RLECs each filed briefs on the application of K.S.A. 66-2008(e)(3). The RLECs also submitted written testimony from Douglas Meredith, the Director of Economics and Policy of a telecommunications consulting firm. Meredith explained how utilities operate under rate of return regulation, and how the KUSF "make[s] up the difference so the utility will have the opportunity to achieve its state-prescribed rate of return." Meredith believed that, to implement the statutory cap, the KCC had a responsibility to provide other opportunities to the RLECs to earn their prescribed rate of return.

Meredith next reviewed the potential sources of revenue for RLECs and explained why he did not think that "separate, effective and reasonably available sources of revenue" existed to offset

the loss of KUSF support. He addressed the decline of access revenues and the problems with raising local exchange rates and rates for call management services.

Staff moved to strike almost all of Meredith's testimony on the basis that it did not address Staff's calculations and, thus, went beyond the limited scope of permissible evidence in the case. The RLECs reasserted their position that the issue of whether they had adequate, alternative sources of revenue bore directly on the legality of the KCC's order accepting the plan to prorate KUSF funds. They requested a continuance of the scheduled evidentiary hearing so they could conduct discovery on the issue.

The case proceeded to an evidentiary hearing during which the KCC considered the RLECs' motion for reconsideration, the RLECs' motion for continuance, and Staff's motion to strike. The KCC denied the motion to strike and the motion for continuance. Because it did not strike Meredith's testimony and because it allowed Meredith to testify at the hearing, the KCC also denied the motion for reconsideration as moot. The hearing proceeded to argument and testimony. Sandy Reams, the Staff member who performed the calculations in the R&R, testified briefly. The RLECs did not cross-examine her. The RLECs submitted Meredith's prefiled written testimony and then the KCC cross-examined him.

In his written testimony, Meredith said that the cap on KUSF support would force RLECs to "provide service to the public at a loss." When the KCC asked him at the hearing to clarify what he meant by "loss," Meredith explained that the companies were not actually operating at a loss in the sense that their equity return was negative. They could still profit, they just had diminished returns. Meredith described it as a loss because the RLECs' diminished returns were "less than the prescribed rate of return of the company." While Meredith testified generally that RLECs would not achieve their rate of return, he had no specific information regarding the degree to which any RLEC would fall short of its rate of return. Additionally, he testified that "most rate of return companies in the country have rate of returns that are less than their prescribed rate of return."

Following the hearing, on January 14, 2021, the KCC issued an Order Enacting Pro-Rata Reductions in KUSF Support as Mandated by K.S.A. 66-2008(e). This is one of the orders forming the basis of the RLECs' present appeal. In the order, the KCC noted that it has no authority to disregard K.S.A. 66-2008(e). The RLECs' concerns, the KCC said, were best addressed by the Legislature. Additionally, the RLECs offered only speculation that they could not achieve their authorized rate of return through alternative sources—the RLECs did not support the speculation with any studies or empirical data. The KCC concluded by authorizing a pro rata reduction of the RLECs' annual KUSF support as calculated in Staff's R&R.

The next week, the KCC issued an order adopting the next year's assessment, the KUSF Year 25 assessment rate in Docket No. 21-GIMT-095-GIT. The RLECs also appeal from this order. As with the order setting the Year 24 assessment rate, the Year 25 order stated the KCC's intent to again prorate disbursements from the KUSF because of the statutory cap.

The RLECs sought reconsideration of both the January 14, 2021 Order Enacting Pro-Rata Reductions in KUSF Support As Mandated by K.S.A. 66-2008(e) and the January 21, 2021 Order Adopting KUSF Year 25 Assessment Rate and Affordable Rates; Adopting Methodology for KUSF High-Cost Support Cap Implementation. The KCC denied both petitions for reconsideration.

The RLECs petitioned the Shawnee County District Court for judicial review of the KCC decisions ordering pro rata reductions in KUSF support and implementing the KUSF statutory cap. The RLECs challenged the KCC's orders on several bases. First, they argued that by imposing the statutory cap, the KCC violated the RLECs' right to operate under traditional rate of return regulation by removing one source of revenue without identifying an alternative source of revenue. This action, the RLECs argued, constituted a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

The RLECs further argued that the statutory cap also violated their statutory rights by conflicting with three other statutory clauses in the KTA: K.S.A. 66-2005(b), requiring RLECs to choose between traditional rate of return regulation and price cap

regulation; K.S.A. 66-2008(e)(1), stating that KUSF support can only be modified as a direct result of changes in the factors enumerated within the subsection; and K.S.A. 66-2009(a), providing that a local exchange carrier serving as the carrier of last resort "shall be entitled to recover the costs of serving as carrier of last resort." Both parties submitted briefs and participated in oral argument before the district court issued its decision.

The district court denied the RLECs' Petition for Judicial Review. The district court accepted the premise that "any reduction in the KUSF funds received by a RLEC is a reduction to the already established reasonable rate of return." However, the district court found that a mere reduction in profit did not rise to the level of being a confiscatory taking for Fifth Amendment purposes. The court also found that application of the statutory cap would not contradict K.S.A. 66-2005(b), K.S.A. 66-2008(e)(1), or K.S.A. 66-2009(a).

The RLECs appeal.

DID THE DECISION TO IMPLEMENT THE $30 MILLION STATUTORY CAP ON RECOVERY FROM THE KUSF CONSTITUTE AN UNCONSTITUTIONAL TAKING?

On appeal, the RLECs continue with the same argument that they have presented throughout the life of the case: that implementing the statutory cap found in K.S.A. 66-2008(e)(3) is an unconstitutional taking under the Fifth and Fourteenth Amendments to the United States Constitution. The RLECs assert that they are entitled to a reasonable opportunity to earn a fair rate of return as determined by the KCC. The RLECs maintain that a taking occurred because KUSF support was reduced without providing the RLECs with other opportunities to earn their fair rate of return.

It is worth noting that, in addition to the pure takings argument, the RLECs contend that there is no opportunity to make up the compensation lost by reduction of the KUSF monies. Although the district court made contradictory findings on this topic, ultimately it ruled on the grounds that diminished profits do not equate to a confiscatory taking. Thus, the KCC was not required to provide guaranteed sources of revenue for the RLECs to make

up the reduction. Our analysis proceeds under the assumption that there are not reasonable alternative sources of revenue available to the RLECs. Because we ultimately find the district court was correct that "diminution of profit has not been legally defined as confiscatory either in law or common sense," then it is unnecessary to address whether there are alternative sources of revenue.

Guiding legal principles

The RLECs challenge the KCC's decisions under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq. See also K.S.A. 66-118a(b) (providing that judicial review of KCC decisions in non-rate cases shall be in accordance with K.S.A. 77-609). As the parties challenging the validity of the KCC's action, the burden of proving such invalidity is on the RLECs. K.S.A. 77-621(a)(1). The KJRA outlines the specific grounds on which a court may set aside an agency determination, including errors of law, unsupported factual findings, and constitutional defects. K.S.A. 77-621(c). Appellate courts exercise the same statutorily limited review of the agency's action as does the district court, as though the appeal had been made directly to the appellate court. *Bd. of Cherokee County Comm'rs v. Kansas Racing & Gaming Comm'n*, 306 Kan. 298, 318, 393 P.3d 601 (2017).

Because the RLECs assert that the statutory cap in K.S.A. 66-2008(e)(3) is unconstitutional, our standard of review is well established:

"We review the constitutionality of a statute as a question of law and apply a de novo standard of review. The constitutionality of a statute is presumed, and all doubts must be resolved in favor of the validity of the statute. Before the statute may be stricken, it must clearly appear to violate the constitution. This court must construe the statute as constitutionally valid if there is any reasonable way to do so. [Citations omitted.]" *Tolen v. State*, 285 Kan. 672, 673, 176 P.3d 170 (2008).

This court does not extend deference to an agency's statutory interpretation. *Hanson v. Kansas Corp. Comm'n*, 313 Kan. 752, 762, 490 P.3d 1216 (2021).

Because the primary argument advanced by the RLECs is one alleging unconstitutional taking, we examine the legal parameters involved. The Fifth Amendment prohibits the taking of private

property for public use without just compensation. U.S. Const. amend. V. The protections of the Takings Clause apply to the actions of state and local government entities through the Fourteenth Amendment to the United States Constitution. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). Although the Takings Clause is usually encountered when the government physically seizes private property, such as real estate, for public use, the government regulation of privately-owned utilities can diminish their value to a degree creating a constitutionally compensable taking. *Twin Valley Telephone, Inc. v. Kansas Corporation Comm'n*, No. 115,284, 2016 WL 3366024, at *4 (Kan. App. 2016) (unpublished opinion) (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08, 109 S. Ct. 609, 120 L. Ed. 2d 646 [1989]; *Kansas Gas & Electric Co. v. Kansas Corporation Comm'n*, 239 Kan. 483, 488-90, 720 P.2d 1063 [1986]; *Kansas City Power & Light Co. v. Kansas Corporation Comm'n*, 52 Kan. App. 2d 514, 542-44, 371 P.3d 923 [2016]).

Given the partially private, partly public status of utility companies' property, their regulation leads to a "distinct and sometimes arcane application of Fifth Amendment takings jurisprudence." *Twin Valley Telephone*, 2016 WL 3366024, at *5 (citing *Duquesne Light Co.*, 488 U.S. at 307). But the guiding principle in utility cases "has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory. [Citation omitted.]" *Duquesne Light Co.*, 488 U.S. at 307. The burden of proving that the taking is confiscatory is on the RLECs. *Lincoln Gas & Elec. Light Co. v. City of Lincoln*, 223 U.S. 349, 357, 32 S. Ct. 271, 56 L. Ed 466 (1912).

Analysis

A review of both United States Supreme Court and Kansas caselaw demonstrates that the district court correctly held that a reduction in profit does not amount to a confiscatory taking under the Fifth Amendment. We start our review with one of the seminal rate cases in Fifth Amendment jurisprudence, *Duquesne Light Co.*, 488 U.S. 299, which involved concepts like the present case.

Lessons from Duquesne Light Co.

In *Duquesne Light Co.*, Duquesne Light Company (Duquesne) and Pennsylvania Power Company (Penn Power), along with several other Pennsylvania electric utilities, embarked on a joint venture to construct seven nuclear generating units. Due to intervening events, plans to build four of the units were cancelled. It was undisputed that "the expenditures were prudent and reasonable when made." 488 U.S. at 301. Duquesne had invested over $34 million, and Penn Power had invested over $9.5 million at the time the projects were cancelled. The Pennsylvania Public Utility Commission (PUC) allowed the companies to recoup their expenditures over a 10-year period by increasing their rates. About a month before Duquesne's rate proceeding closed, Pennsylvania enacted a law that prohibited the PUC from including the costs of constructing or expanding facilities in a utility's rate until such time as the facility is used and useful in service to the public. The Pennsylvania Office of the Consumer Advocate moved for reconsideration of the PUC's order allowing the rate increases based on the change in state law. Upon reconsideration, the PUC affirmed its original rate order. The Commonwealth Court of Pennsylvania affirmed but the Pennsylvania Supreme Court reversed. The utilities appealed to the United States Supreme Court, which granted review.

The Supreme Court rejected the utilities' argument that implementing the new law constituted a taking for Fifth Amendment purposes. The Supreme Court noted that the total effect of denying plant amortization would only reduce Duquesne's annual revenue by 0.4% and Penn Power's by 0.5%. Even though denying the utilities the ability to amortize their costs would set a lower rate of return on equity, "[t]he overall impact of the rate orders [was] not constitutionally objectionable." 488 U.S. at 312.

Here, the RLECs argue that they are "constitutionally entitled to an opportunity to access revenue as a whole from all available sources sufficient to meet their state-determined revenue requirements." But *Duquesne Light Co.* demonstrates that this is not the case. Both Duquesne and Penn Power received less than their an-

ticipated rate of return when the new Pennsylvania law was applied to them. This was constitutionally permissible because the total effect of the rate order was not unjust or unreasonable. The United States Supreme Court found in *Duquesne Light Co*. that a reduction in profit is not always confiscatory.

Throughout this litigation, the RLECs have also stressed that they made investments in reliance on laws that ensure a reasonable rate of return and that it is unfair to make "after-the-fact state-mandated reductions to RLECs' established rate of return, with no available mechanism to avoid the effect of the statute." But in *Duquesne Light Co.*, the Supreme Court applied a Pennsylvania law that was not even enacted until after the utilities had made their investments. And although it was not reached until 2021, the statutory cap in K.S.A. 66-2008(e)(3) is not new but has been Kansas law since 2013.

Finally, though there is some evidence in this case that the RLECs will experience diminished profits, no specific numbers or other concrete evidence were provided as to the magnitude of the lost profits. There is no evidence that the losses are greater or less than those shown in *Duquesne Light Co*. In the evidence presented in the appellate record, we only know that the 2021 losses in the amount of KUSF subsidies ranged from $163 to $161,562, not how those losses would affect each RLEC's bottom line. The RLECs have not supported their claim that the loss is of such a magnitude that it is unconstitutional. As in *Duquesne Light Co.*, "[n]o argument has been made that these slightly reduced rates jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital." 488 U.S. at 312. Similarly, there has been no demonstration that the "rates are inadequate to compensate current equity holders for the risk associated with their investments . . . ." 488 U.S. at 312.

Kansas caselaw supports the KCC's findings

Our own Kansas courts have also rejected several of the arguments the RLECs advance in this case. One of the issues in *Bluestem Telephone Co.* was whether the KCC erred in finding

that KUSF support for RLECs operating under a traditional rate of return model could be less than a carrier's "'embedded costs, revenue requirements, investments and expenses.'" 52 Kan. App. 2d at 120 (quoting K.S.A. 2014 Supp. 66-2008[e][1]). The KCC had found "that the starting point for calculating KUSF support would be the carrier's embedded costs, etc." but that RLECs were not entitled to recover all their embedded costs from the KUSF. 52 Kan. App. 2d at 120.

This court rejected the RLECs' argument that a prior case "mandate[d] that KUSF be paid to *fully* fund an RLEC's embedded costs." 52 Kan. App. 2d at 122. As in this case, the RLECs argued "that the [KCC]'s current interpretation violates the concept of traditional rate-of-return ratemaking to the point of constituting a taking of the RLECs' property." 52 Kan. App. 2d at 123. But a panel of this court rejected that argument, stating:

"We are unpersuaded by this argument as it appears to be based upon a faulty premise. While the KTA permitted LECs to choose between price-cap and rate-of-return regulation, the KTA was not premised on the standard monopolistic models of other utility settings. The KTA, like the 1996 Act, was designed to improve competition, not preserve existing monopolies. This court has long recognized that the Commission has authority to determine whether expenses, debt-to-equity ratios, and other cost components are prudently incurred or determined.

"The policies of the KTA, like that of the federal statute, are consumer-focused to ensure that Kansans have access to first-class telecommunications infrastructure at an affordable price, that consumers realize the benefits of competition, that the range of services are comparable in urban and rural areas, and that consumers are protected from practices inconsistent with the public interest, convenience, and necessity. K.S.A. 66-2001. By focusing on encouraging competition, the principles of truly 'traditional' rate-of-return ratemaking are not as rigid in the telecommunications industry. The RLECs confuse the requirement that KUSF provide sufficient support for universal service within a market in which telephone service providers compete for customers, which federal law mandates, with a guarantee of economic success for all providers; the latter guarantee conflicts with the federal and state focus on encouraging competition. [Citations omitted.]" 52 Kan. App. 2d at 123-24.

Ultimately, this court found that because the RLECs failed to show how the KCC took any action that compensated them less than required by the KTA, the RLECs' "challenge to the [KCC]'s rulings regarding reimbursement for their reasonable embedded

costs and revenue requirements is not ripe for adjudication." 52 Kan. App. 2d at 124.

Even more pertinent is this court's decision in *Twin Valley Telephone*, which occurred against the backdrop of changing federal regulations and reductions to federal subsidies for rural telecommunications providers. Twin Valley provided traditional telephone service to rural customers and operated under traditional rate of return regulation. As a result of federal changes, Twin Valley lost a specific federal subsidy. And, in 2013 the Kansas Legislature amended "the statutes governing the KUSF to significantly curtail the allocation of those monies to make up for lost federal subsidies." 2016 WL 3366024, at *2. When Twin Valley asked the KCC to authorize a payment of $856,627 from the KUSF to make up for the lost federal subsidy, the KCC denied its request and Twin Valley appealed.

This court noted that K.S.A. 2015 Supp. 66-2008(e)(2) clearly precluded the relief sought by Twin Valley because the statute explicitly stated that KUSF support could not "be used to offset any loss of federal universal service fund support for such carrier." K.S.A. 2015 Supp. 66-2008(e)(2). Among other arguments, Twin Valley claimed that the KCC's denial of its request "amount[ed] to a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution." 2016 WL 3366024, at *4. The parties did not dispute that 7.26% would be a reasonable rate of return for Twin Valley, and the denial of Twin Valley's request for a subsidy would result in a rate of return of only 4.64%.

The *Twin Valley Telephone* court "assume[d] [without finding as much] Twin Valley could not enhance its rate of return to investors by cutting costs or increasing prices." 2016 WL 3366024, at *5. Like the RLECs in this case, Twin Valley "speculated that a price increase would prompt many customers to seek alternative telecommunications services, presumably from wireless providers." 2016 WL 3366024, at *5. This court "question[ed] whether the denial of a subsidy could be considered a constitutional taking without direct, substantive evidence—if only in the form of well-grounded expert testimony—that alternative business practices to

either cut costs or increase revenues would be ineffective in achieving a reasonable rate of return for investors." 2016 WL 3366024, at *5. Regardless of these evidentiary concerns, the court found that "Twin Valley's approach remains constitutionally infirm." 2016 WL 3366024, at *6. The court explained:

"Twin Valley essentially argues that a KCC order resulting in any rate of return for a regulated business less than what has been determined to be 'the reasonable rate' amounts to a compensable constitutional taking. That broadly framed argument is legally untenable, and we reject it. Twin Valley has not argued that the difference between the reasonable rate of return defined in this case and the lower rate of return the company will realize without the enhanced KUSF subsidy is of such a magnitude as to create a government taking. Nor has Twin Valley advanced some legal test or economic formula for determining when a deviation from an established rate of return amounts to a taking requiring compensation. So Twin Valley effectively says any shortfall between the projected actual rate of return and the determined reasonable rate of return violates the Takings Clause." 2016 WL 3366024, at *6.

The court examined *Duquesne Light Co.* and its predecessor, *Federal Power Comm'n v. Hope Natural Gas Co*., 320 U.S. 591, 602, 605, 64 S. Ct. 281, 88 L. Ed. 2d 333 (1944), outlining "a 'constitutional range of reasonableness' within which state regulatory agencies may act." *Twin Valley Telephone*, 2016 WL 3366024, at *6 (quoting *Duquesne*, 488 U.S. at 310, 312). And, the Kansas Supreme Court has also emphasized this "zone of reasonableness" standard when evaluating KCC orders. *Twin Valley Telephone*, 2016 WL 3366024, at *7 (citing *Kansas Gas & Electric Co*., 239 Kan. at 488-91). The court concluded that Twin Valley's evidence fell short of establishing a confiscatory taking and that its rate of return still fell within a range of reasonableness. *Twin Valley Telephone*, 2016 WL 3366024, at *7.

We find the analysis in *Twin Valley Telephone* ultimately persuasive. As did Twin Valley, the RLECs here essentially argue any shortfall between their projected rate of return—minus the reduced subsidy—and the determined reasonable rate of return creates a government taking. But the mere fact that the RLECs will lose profits, in and of itself, is not enough to establish a constitutional taking. The RLECs have simply not shown that their loss of profits, without evidence of the precise loss and resulting effect on their bottom lines, falls outside the range of reasonableness

such as to be considered unjust and thus confiscatory. See *Twin Valley Telephone*, 2016 WL 3366024, at *6 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 770, 88 S. Ct. 1344, 20 L. Ed. 2d 312 [1968]). Nor have the RLECs presented "some legal test or economic formula for determining when a deviation from an established rate of return amounts to a taking requiring compensation." *Twin Valley Telephone*, 2016 WL 3366024, at *6. In fact, here the RLECs submitted no evidence to show what their projected rate of return would be—thereby producing even less evidence than in the *Twin Valley Telephone* case, where the court could compare the projected 4.64% rate anticipated with the 7.26% agreed to be a reasonable rate at that time.

In sum, RLECs provide no support for the proposition that K.S.A. 66-2008(e)(3) creates an unconstitutional taking by simply reducing the RLECs' rate of return by an unknown amount.

DID THE KCC'S DECISION TO IMPLEMENT THE $30 MILLION STATUTORY CAP ON RECOVERY FROM THE KUSF VIOLATE OTHER KANSAS STATUTES?

The RLECs also argue that imposition of the statutory cap violates three other statutory mandates. They claim the cap violates: K.S.A. 66-2005(b), requiring RLECs to choose between traditional rate of return regulation and price cap regulation; K.S.A. 66-2008(e)(1), stating that KUSF support can only be modified as a direct result of changes in the factors enumerated within the subsection; and K.S.A. 66-2009(a), providing that a local exchange carrier serving as the carrier of last resort "shall be entitled to recover the costs of serving as carrier of last resort."

Guiding legal principles

Statutory interpretation presents a question of law over which appellate courts have unlimited review. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. Only if the statute's language or text is unclear or ambiguous does

the court use canons of construction or legislative history to construe the Legislature's intent. *In re Joint Application of Westar Energy and Kansas Gas and Electric Co.*, 311 Kan. 320, 328, 460 P.3d 821 (2020).

Analysis

Although we briefly examine each statute individually, we note at the outset that K.S.A. 66-2008(e)(3) states that it applies "[n]otwithstanding any other provision of law." This language is neither unclear nor ambiguous, and we must give the clause its common meaning. See Black's Law Dictionary 1281 (11th ed. 2019) (defining "notwithstanding" as "[d]espite; in spite of"). So, by the clear language of the statute, even if there were a conflict with any of the other statutes identified by the RLECs, the Legislature still intended for K.S.A. 66-2008(e)(3) to apply in spite of any conflict.

K.S.A. 66-2005(b)

K.S.A. 66-2005(b) requires local exchange carriers to "elect traditional rate of return regulation or price cap regulation." The RLECs argue that the statutory cap violates this statute "by reducing a utility's opportunity to earn one source of revenue without an equally available opportunity for other compensation and without a factual determination of record that the utility's revenue requirement should be modified." RLECs assert that they have "made extensive investments and incurred substantial continuing costs in reliance on the form of state regulation made available to, and elected of right by, the RLECs." By changing the relevant regulations by implementing the statutory cap on KUSF support, the RLECs argue, the Legislature has post facto changed the rules under which the RLECs elected to operate. This introduces uncertainty into the industry and adversely impacts investors.

As established herein, the State can take actions that result in a lower rate of return for RLECs without offending the RLECs' constitutional rights. Additionally, Meredith testified that "most rate of return companies in the country have rate of returns that are less than their prescribed rate of return." Further, it is not clear

how a statutory cap on KUSF support "violat[es] the RLECs' statutory right of election of traditional rate of return regulation." RLECs are free to continue operating under rate of return regulation, they must simply do so with the understanding that any KUSF support to RLECs is capped at $30 million.

The RLECs' argument is more of a policy argument than a legal argument. "Where the legislature declares the public policy and there is no constitutional impediment, the question of the wisdom, justice, or expediency of the legislation is for the legislature and not for the courts." *Bolz v. State Farm Mut. Ins. Co.*, 274 Kan. 420, 424, 52 P.3d 898 (2002). This court explored the policy underlying the Kansas Telecommunications Act, K.S.A. 66-2001 et seq., in *Bluestem Telephone Co.*, 52 Kan. App. 2d 96, and described it as focused on consumers and encouraging competition. If the RLECs believe their policy concerns are more important, they must convince the Legislature of that and not this court.

K.S.A. 66-2008(e)(1)

Next, the RLECs argue that imposition of the statutory cap violates K.S.A. 66-2008(e)(1), which provides:

> "For each local exchange carrier electing pursuant to K.S.A. 66-2005(b) . . . to operate under traditional rate of return regulation, all KUSF support, including any adjustment thereto pursuant to this section, shall ensure the reasonable opportunity for recovery of such carrier's intrastate embedded costs, revenue requirements, investments and expenses, subject to the annual cap established pursuant to subsection (e)(3). Any modification of such support shall be made only as a direct result of changes in those factors enumerated in this subsection." K.S.A. 66-2008(e)(1).

The RLECs highlight the language in the statute that says that KUSF support can only be modified as a result of changes in the factors enumerated in the subsection—intrastate embedded costs, revenue requirements, investments, and expenses. They argue that adjusting KUSF support based on the statutory cap is not one of these expressed factors.

But the RLECs' argument ignores the plain language of the statute. It is true that KUSF support is determined by a carrier's intrastate embedded costs, revenue requirements, investments, and expenses. But once that calculation is made, the support is

explicitly "subject to the annual cap established pursuant to subsection (e)(3)." K.S.A. 66-2008(e)(1). When considered as a whole, the plain language of the statute indicates that the KUSF cap applies.

Although the RLECs begin their argument by stating that K.S.A. 66-2008(e)(1) conflicts with K.S.A. 66-2008(e)(3), they later suggest that the statutory cap on KUSF support does not conflict with K.S.A. 66-2008(e)(1) as long as "an effective and sufficient additional source of replacement revenue is made available." This argument is based on the premise, rejected above, that the Takings Clause requires the State to provide some other source of compensation, and the RLECs provide no authority for the idea that the State is required to provide a substitute for capped KUSF subsidies. Accordingly, it does not provide a basis for reversal of the KCC's decision.

K.S.A. 66-2009(a)

Finally, the RLECs argue that the statutory cap conflicts with K.S.A. 66-2009(a). This statute says:

> "(a) Local exchange carriers . . . shall serve as the carrier of last resort in their exchanges and shall be eligible to receive KUSF funding. . . . The local exchange carrier serving as the carrier of last resort shall remain the carrier of last resort and shall be entitled to recover the costs of serving as carrier of last resort." K.S.A. 66-2009(a).

The RLECs assert that "full recovery of new costs is impossible under the KUSF cap."

The RLECs presented no evidence to show that they are unable to recover the costs of serving as the carrier of last resort. Again, they only argued they would realize less profit. As the district court succinctly held: "The RLECs conflate costs with profit," and we agree.

Affirmed.

M.T. v. Walmart Stores, Inc

(528 P.3d 1067)

Nos. 125,151
125,268

M.T. and M.T., as next friend of her minor daughter, M.K., *Plaintiffs-Appellees*, v. WALMART STORES, INC., et al., *Defendants-Appellants.*
M.T. and M.T., as next friend of her minor daughter, M.K.,*Plaintiffs-Appellants*, v. WALMART STORES, INC., and MARK SCHUKAR, *Defendants-Appellees*.

SYLLABUS BY THE COURT

1. PUBLIC HEALTH—*Immunity under Federal PREP Act for Covered Persons from Liability for Claim under Federal Statute.* The Public Readiness and Emergency Preparedness (PREP) Act immunizes "covered persons" from liability for any claim for loss that has a causal relationship with the administration of a "covered countermeasure." 42 U.S.C. § 247d-6d(a), (d) (Supp. 2020).

2. SAME—*Immunity under Federal PREP ACT—Failure to Obtain Parental Consent by Covered Person before COVID Vaccine Covered under PREP Act.* Failure to obtain parental consent by a covered person before administering the Pfizer COVID-19 vaccine to a minor has a causal relationship with the administration of the vaccine and is thus covered under the PREP Act.

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed April 28, 2023. Affirmed in part, reversed in part, and remanded with directions.

Linus L. Baker, of Stilwell, for plaintiffs-appellees and plaintiffs-appellants.

Samuel E. Hofmeier and *Grace E. Colato Martinez*, of Bryan Cave Leighton Paisner LLP, of Kansas City, Missouri; *Barbara A. Smith,* pro hac vice, and *Samual A. Garner*, pro hac vice, of Bryan Cave Leighton Paisner LLP, of St. Louis, Missouri; and *D'Lesli M. Davis*, pro hac vice, of Norton Rose Fulbright US LLP, of Dallas, Texas, for defendants-appellants and defendants-appellees.

Zach Chaffee-McClure, of Shook, Hardy, & Bacon L.L.P., of Kansas City, Missouri, and *Cary Silverman*, of the same firm, of Washington, D.C., for *amicus curiae* The Chamber of Commerce of the United States of America.

Before CLINE, P.J., ISHERWOOD, J., and PATRICK D. MCANANY, S.J.

CLINE, J.: This case tests the scope of immunity provided by the Public Readiness and Emergency Preparedness (PREP) Act, a federal statute that protects those who administer pandemic countermeasures from liability. 42 U.S.C. § 247d-6d (Supp. 2020). Other than providing a federal cause of action "for death or serious physical injury proximately caused by willful misconduct," the Act immunizes "covered persons" from liability for any claim for loss that has a causal relationship with the administration of a "covered countermeasure." 42 U.S.C. § 247d-6d(a), (d).

M.T. (Mother) sued Walmart Stores, Inc., and one of its pharmacists, Mark Schukar, after Schukar administered a Pfizer COVID-19 vaccine to her minor child, M.K., without parental consent. The district court dismissed most of Mother's claims after finding they were barred by the PREP Act. But it did not dismiss Mother's claims based on defendants' failure to obtain parental consent before administering the vaccine.

We find the district court erred in not dismissing all Mother's claims. The PREP Act immunizes "covered persons" such as Walmart and Schukar from "all claims for loss caused by, arising out of, relating to, or resulting from the administration to [M.K.] of a covered countermeasure," such as the COVID-19 vaccine. 42 U.S.C. § 247d-6d(a)(1). Mother's claims for vaccination without parental consent arise out of or relate to defendants' administration of the Pfizer vaccine to M.K. and thus fall within the broad scope of PREP Act immunity. We therefore affirm the district court's dismissal of most of Mother's claims and reverse its denial of defendants' motion to dismiss as to the rest of the claims.

MOTHER'S LAWSUIT

In the fall of 2021, 15-year-old M.K. visited a Walmart pharmacy seeking to be vaccinated for COVID-19 without parental consent. She came with her 21-year-old brother-in-law. Mother claimed Schukar, whom she described in her lawsuit as an "employee pharmacist of Walmart," "injected M.K. with a substance labeled a Pfizer covid vaccine . . . according to a vaccination record provided" to M.K.

Mother alleged a Walmart employee told M.K. she could receive the vaccine without parental consent because she was 15 years old. This advice was incorrect because Kansas law requires

parental consent for medical treatment or procedures if the minor is under the age of 16. See K.S.A. 38-123b.

Mother asserted claims for: (1) invasion of the right of privacy, by intruding on the private relationship between Mother and her child and violating Mother's parental right of control; (2) battery against Schukar; (3) negligence against Schukar, based on his failure to secure consent, warn of the vaccine's risks, and inform of acceptable alternative treatments, among other alleged failures; (4) negligence against Walmart based on vicarious liability and the failure to train employees and institute proper policies; (5) consumer protection violations, based on defendants' deceptive practices about consent and the experimental nature of the vaccine; and (6) punitive damages. She sought compensatory damages for unspecified physical injuries allegedly suffered by M.K., including an increased risk of developing adverse physical conditions, as well as physical pain, mental anguish, emotional distress, anxiety, loss of sleep, future inconvenience, and loss of enjoyment. Mother also sought to recover for her own mental distress and anguish, anxiety, loss of sleep, future inconvenience, and loss of enjoyment, and injuries to her intimate association with her daughter, her parental right of control, and her overall relationship with her daughter.

DEFENDANTS' MOTIONS TO DISMISS

While this case has a convoluted procedural history, the pertinent decision on appeal is the district court's disposition of defendants' essentially identical motions to dismiss Mother's petition. In those motions, Walmart and Schukar contended they were immune from liability under the PREP Act since all Mother's claims were causally related to their administration of the vaccine to M.K.

The district court agreed with defendants for the most part. It found the PREP Act barred all Mother's "claims for loss causally related to the covered countermeasure and its actual introduction by injection into" M.K.'s body, which included Mother's battery claim and "any claimed losses or damages . . . causally related to the Pfizer COVID-19 vaccination, *e.g.*, sickness, anxiety . . . ." It dismissed those claims as well as the claims based on "allegations of misleading or deception as to the efficacy of the vaccine and its approval status."

But the district court then pointed out the PREP Act "does not cover failing to do something or losses that are unrelated or not causally connected to a covered countermeasure." It determined Mother's claims involving "interference with parental rights, deception as to parental consent needed, and professional negligence in failing to obtain informed consent" fell within this category and, as such, were not barred by the Act.

The district court went beyond the parties' arguments in supporting its decision to deny defendants' motions in part. It noted that parenting is a fundamental constitutional right and issues of consent and the age of majority are traditionally state law issues. It determined the PREP Act could not interfere with or preempt parental rights or state laws over minority or parental consent since the Act did not express a specific intention to do so. It thus denied the motions to dismiss "as to any claims based upon the age of consent under Kansas law or the fundamental rights of the parent with regard to the care and upbringing of her child."

The district court certified its decision as final under K.S.A. 2021 Supp. 60-254(b) as to the portion of Mother's claims that it dismissed. It also certified two questions for interlocutory appeal under K.S.A. 2021 Supp. 60-2102(c):

(1) "Is the [PREP Act] and its immunity provision completely preemptive of all state law causes of action, regardless of the theory, so long as there is any connection or involvement whatsoever with a covered countermeasure?"; and
(2) "Does the [PREP Act] give covered persons absolute immunity to violate Kansas parental consent or age of medical consent for minors law?"

Both parties timely appeal from this order, but through different procedural vehicles. Mother directly appealed the portion of the district court's decision that it certified as final. Defendants, meanwhile, filed an application for interlocutory appeal on the certified questions, which this court granted.

While Mother's direct appeal (case No. 125,268) was docketed separately from defendants' interlocutory appeal (case No. 125,151), we have consolidated these appeals for purposes of this decision since we find the relevant facts, issues, and legal standards are identical in both cases. See Supreme Court Rule 2.06 (2023 Kan. S. Ct. R. at 19).

ANALYSIS

In her direct appeal, Mother argues the district court erred in granting the motions to dismiss in part. She contends the allegations in her petition did not provide sufficient basis for the court to find the PREP Act applied and, even if they did, her claims fell outside the scope of its immunity provision.

Defendants, in their interlocutory appeal, argue the district court erred in denying the motions to dismiss in part. They contend the PREP Act applies to all Mother's claims, including those based on the failure to secure parental consent, as they are all causally related to the administration of a vaccine.

In short, Mother seeks to have all her claims reinstated while defendants seek to have all her claims dismissed.

I. *Did the district court err in granting defendants' motions to dismiss in part?*

Our first task is to determine whether the district court properly dismissed some of Mother's claims. In doing so, we owe no deference to the district court's analysis of these claims or the PREP Act since a district court's decision on a motion to dismiss and its statutory analysis are subject to de novo review. *Lozano v. Alvarez*, 306 Kan. 421, 423, 394 P.3d 862 (2017). We apply this standard of review because we are in the same position as the district court when reviewing both the pleadings and the statute.

Just like the district court, we review the allegations of Mother's petition to determine whether she has stated a legal claim—based both on her theory of relief or any possible theory. We must accept all alleged facts as true, along with any inferences that can reasonably be drawn from those facts. *Cohen v. Battaglia*, 296 Kan. 542, 545-46, 293 P.3d 752 (2013). But we need not accept as true any conclusory allegations on the legal effects of events Mother has set out if these allegations do not reasonably follow from the description of what happened, or if these allegations are contradicted by the description itself. *312 Education Assn. v. U.S.D. No. 312*, 273 Kan. 875, 881, 47 P.3d 383 (2002).

Our analysis of Mother's claims necessarily involves interpretation of the PREP Act. To that end, we adhere to the key rule of statutory interpretation: The Legislature's intent controls. This means we examine the statute's text and apply plain and unambiguous language

as written. We must consider the entire act, reconciling different provisions to make them consistent, harmonious, and sensible, and we cannot consider provisions in isolation. *In re Tax Protest of Ann W. Smith Trust*, 272 Kan. 1396, 1404, 39 P.3d 66 (2002).

A. *The PREP Act*

The PREP Act was enacted on December 30, 2005. It authorizes the Secretary of Health and Human Services—in response to a public health emergency—to issue declarations recommending the manufacture, testing, development, distribution, administration, or use of "covered countermeasures." 42 U.S.C. § 247d-6d(b)(1). "Covered countermeasures" include, among other things, vaccines authorized for emergency use to combat a public health emergency. See 42 U.S.C. § 247d-6d(i)(1)(C).

When the Secretary has issued such a declaration, the PREP Act grants "covered persons" immunity "from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure . . . ." 42 U.S.C. § 247d-6d(a)(1). This immunity applies only if the countermeasure is used or administered: (1) during the effective period of the declaration; (2) for the category of diseases specified in the declaration; and (3) to an individual in the population and geographic area specified by the declaration. 42 U.S.C. § 247d-6d(a)(3).

The immunity granted under the PREP Act is broad and applies to

"any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure." 42 U.S.C. § 247d-6d(a)(2)(B).

The Act defines "'loss'" as "any type of loss, including—(i) death; (ii) physical, mental, or emotional injury, illness, disability, or condition; (iii) fear of physical, mental, or emotional injury, illness, disability, or condition, including any need for medical monitoring; and (iv) loss of or damage to property, including business interruption loss." 42 U.S.C. § 247d-6d(a)(2)(A).

The preemption clause is similarly sweeping, stating that during the effective period of a declaration of a public health emergency:

"[N]o State . . . may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that—

"(A) is different from, or is in conflict with, any requirement applicable under this section; and

"(B) relates to the design, development, clinical testing or investigation, formulation, manufacture, distribution, sale, donation, purchase, marketing, promotion, packaging, labeling, licensing, use, any other aspect of safety or efficacy, or the prescribing, dispensing, or administration by qualified persons of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter . . . ." 42 U.S.C. § 247d-6d(b)(8).

This language includes tort claims. See *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324, 128 S. Ct. 999, 169 L. Ed. 2d 892 (2008) ("[a]bsent other indication, reference to a State's 'requirements' includes its common-law duties"); *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 616-17, 886 P.2d 869 (1994).

The sole exception to this immunity is a federal action for death or serious physical injury caused by willful misconduct. 42 U.S.C. § 247d-6d(d)(1). Any such claim must be brought exclusively in the United States District Court for the District of Columbia. 42 U.S.C. § 247d-6d(e)(1). This exception does not apply to negligent or reckless conduct resulting in loss. 42 U.S.C. § 247d-6d(c)(1)(B).

Alongside the PREP Act's grant of immunity, Congress established an alternative administrative process for redressing the harm caused by covered countermeasures—the Covered Countermeasure Process Fund. See 42 U.S.C. § 247d-6e (2018). This fund provides compensation to "eligible individuals for covered injuries directly caused by the administration or use of a covered countermeasure pursuant to [a declared public health emergency] . . . ." 42 U.S.C. § 247d-6e(a). The fund furnishes monetary damages, including unreimbursed medical expenses, lost-employment income, and survivor death benefits to eligible individuals. 42 U.S.C. § 247d-6e.

In early 2020, the Secretary issued a declaration determining that COVID-19 was a public health emergency and activating the PREP Act's liability immunity for activities related to medical

countermeasures against COVID-19. This declaration identified the covered countermeasures for which liability immunity is in effect as "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19" that also meets the definition of "covered countermeasure" provided in the Act. Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198, 15202 (March 17, 2020).

B. *Does the PREP Act apply to this situation?*

Mother contends her petition does not allege enough facts from which the district court could determine the PREP Act applies. *Crosby v. ESIS Insurance*, No. 121,626, 2020 WL 6372266, at *2 (Kan. App. 2020) (unpublished opinion) ("When presented with a motion to dismiss, a district court's consideration is generally limited to the petition itself."). She claims her allegations do not establish the substance injected into M.K. qualifies as a covered countermeasure nor do they establish that Walmart and Schukar qualify as covered persons.

1. *Whether the substance injected was a covered countermeasure*

A "covered countermeasure" is defined under the PREP Act as: (1) a qualified pandemic or epidemic product; (2) a security countermeasure; (3) a drug, biological product, or device that is authorized for emergency use; or (4) a qualifying respiratory device. 42 U.S.C. § 247d-6d(i)(1). The term "biological product" includes vaccines. 42 U.S.C. § 262(i)(1) (2018).

Along with the declaration of COVID-19 as a public health emergency, the Secretary has declared any vaccine manufactured, used, designed, developed, modified, licensed, or procured to mitigate, prevent, or treat COVID-19 which also meets the statutory definition in 42 U.S.C. § 247d-6d(i)(1) to be a covered a countermeasure. Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Counter-

measures Against COVID-19 and Republication of the Declaration, 85 Fed. Reg. 79190, 79196 (December 9, 2020) (clarifying definition given in original declaration).

In finding that the substance injected into M.K. qualified as a covered countermeasure, the district court took judicial notice of declarations by the Department of Health and Human Services Secretary which proclaimed the Pfizer vaccine a covered countermeasure under the PREP Act and noted Mother alleged her child received the Pfizer vaccine after the declarations were issued.

a. *Mother alleged M.K. was injected with the Pfizer COVID-19 vaccine.*

Mother argues the district court misconstrued the petition as alleging that M.K. was injected with the Pfizer COVID-19 vaccine. She claims her petition only alleges the substance injected was *labeled* as the Pfizer COVID-19 vaccine and she directly disputed whether the Pfizer COVID-19 vaccine was actually a vaccine.

To begin, we agree with the district court that Mother's claims about the efficacy of the vaccine are beside the point. Application of the PREP Act does not turn on the effectiveness of the countermeasure. Next, while Mother alleged the Pfizer vaccine is not actually a "vaccine," she did not allege that M.K. was injected with anything but the Pfizer COVID-19 vaccine. And her opposition to the motions to dismiss depended solely on her contention that her petition alleged claims of inaction, which are outside the scope of the Act. She did not argue the Act did not apply because there was a question about what substance was injected into her child.

Mother does not explain why we can or should consider her claim for the first time on appeal. Thus, we find she has waived it. *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014).

That said, even if we considered Mother's argument for the first time on appeal, it is unsupported by the record: Mother's petition does not claim the substance administered to M.K. was anything but a COVID-19 vaccine and, in particular, the Pfizer COVID-19 vaccine. Mother alleged that M.K. went to the Walmart pharmacy to receive a COVID-19 vaccine, she was injected with a substance labeled a Pfizer COVID-19 vaccine, and

she claimed losses specifically from injection of the Pfizer COVID-19 vaccine. For example:

- She alleged Schukar "injected M.K. with [a] substance labeled a Pfizer covid vaccine . . . according to a vaccination record provided to [M.K.]."
- She claimed M.K.'s ability to develop long lasting natural immunities to COVID-19 is permanently diminished and that she faces a higher risk of developing myocarditis or pericarditis as a result of receiving a COVID-19 vaccine.
- Both her negligence and consumer protection claims are based in part on her allegation that Schukar failed to disclose dangers associated with Covid vaccines and her consumer protection claim is also partly based on her allegations that defendants did not inform M.K. that the Pfizer COVID-19 vaccine M.K. received was not fully licensed but only authorized for emergency use and that the "Pfizer FF2589 is experimental and not FDA approved."
- She alleged M.K. was "damaged by the vaccine injection," and she claimed various supposed harms associated with COVID-19 vaccines generally and the Pfizer vaccine in particular.

We find these alleged facts—which we accept as true—and the inferences that can reasonably be drawn from these facts support the district court's finding that the substance injected into M.K. was the Pfizer COVID-19 vaccine.

b. *The Pfizer COVID-19 vaccine is a covered countermeasure.*

Mother also claims one cannot determine from the allegations in her petition whether the Pfizer vaccine qualifies as a covered countermeasure. Again, she did not raise this issue below nor does she explain why we can or should consider it now. Thus, we would be within our discretion to decline to consider it for the first time on appeal. Yet because there is clear legal authority contrary to Mother's position, we will instead rely on that authority to dispatch Mother's claim.

Mother's primary complaint on this issue appears to be the district court's reliance on the declarations issued by the Secretary and FDA declaring the Pfizer COVID-19 vaccine "as a vaccination contemplated under" the PREP Act when finding it is a covered countermeasure. But both Kansas and federal caselaw allow a district court to take judicial notice of matters outside the pleading in ruling on a motion to dismiss when those matters are proper objects for judicial notice. *Rodina v. Castaneda*, 60 Kan. App. 2d 384, 387, 494 P.3d 172, *rev. denied* 314 Kan. 855 (2021); see also *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (courts may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment). And a district court may take judicial notice of federal administrative regulations. *Fasse v. Lower Heating and Air Conditioning, Inc.*, 241 Kan. 387, 394, 736 P.2d 930 (1987); see also K.S.A. 60-409(b) (courts may take judicial notice of specific facts "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy"). As a result, the district court committed no error in taking judicial notice of these declarations.

Next, Mother argues the allegations in her petition do not establish whether the substance injected was administered to mitigate, prevent, or treat the ongoing pandemic, as is necessary to meet the definition of a covered countermeasure under the declarations issued by the Secretary. On this point, we agree with defendants that, as a matter of common sense, the Pfizer COVID-19 vaccine qualifies as a vaccine developed and used to mitigate, prevent, or treat COVID-19.

The facts alleged in Mother's petition, combined with the declarations which the district court properly relied, are sufficient to reasonably infer that the substance injected into M.K. was a vaccine, authorized for emergency use by the FDA, developed and used to mitigate or prevent COVID-19. 42 U.S.C. § 247d-6d(i)(1); Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 and Republication of the Declaration, 85 Fed. Reg. 79190, 79196 (December 9, 2020); *U.S.D. No. 312*, 273 Kan. at 881 (In ruling on a motion to dismiss, a court must accept the plaintiff's factual description, along with any inferences reasonably to be drawn from those facts, as true.).

Finally, Mother notes that nothing in her petition establishes where or how Walmart obtained the injected substance, analogizing her case to *Avicolli v. BJ's Wholesale Club, Inc.*, No. 21-1119, 2021 WL 1293397,

at *4 (D. Pa. 2021) (unpublished opinion) (PREP Act's applicability at motion to dismiss stage could not be decided where plaintiffs did not allege, and defendant did not provide a basis for court to infer, that defendant obtained hand sanitizer at issue through one of the two means of distribution specified by the Secretary, i.e., under agreement with the federal government or in response to the COVID-19 pandemic). Mother argues that "nothing in the petition states that Walmart obtained the injection substance through one of the two means of distribution specified by the Secretary of Health and Human Services."

Again, we agree with defendants that Mother's argument is off base because she references an earlier set of requirements enacted at the outset of the pandemic that applied to countermeasures other than vaccines. See Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198, 15200 (March 17, 2020) (setting out limitations on distribution). As defendants point out, these requirements have now been loosened. See Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 and Republication of the Declaration, 85 Fed. Reg. 79190, 79196 (amending limitations on distribution to include countermeasures authorized by the FDA to prevent COVID-19).

Additionally, unlike in *Avicolli*, there is no evidence the countermeasure here was sold commercially before the pandemic. In *Avicolli*, which involved product liability claims based on tainted hand sanitizer, the plaintiffs purchased the hand sanitizer at issue from a retail store in May 2020, shortly after the Secretary's declaration of COVID-19 as a public health emergency. Because the plaintiff's allegations could be plausibly read to infer that the defendant retailer obtained and sold hand sanitizer before the onset of the COVID-19 pandemic, the court could not determine that the hand sanitizer sold to the plaintiffs qualified as a covered countermeasure at the motion to dismiss stage. *Avicolli*, 2021 WL 1293397, at *4. We cannot plausibly read Mother's petition the same way.

2. *Whether Walmart and Schukar qualify as covered persons*

Mother also argues the allegations in her petition are insufficient to establish that Walmart and Schukar qualify as covered persons under the PREP Act. Essentially, she contends that because she did not specifically allege defendants were covered persons, the district court could not find

that they were. Additionally, while she does not specifically address Walmart's status, she also points out that she never alleged Schukar was a "licensed health professional," a term used to define one type of covered person.

The PREP Act defines "covered person" in relevant part as a person or entity that is a distributor of a covered countermeasure, a qualified person who administered a covered countermeasure, or an employee or agent of a distributor or qualified person. 42 U.S.C. § 247d-6d(i)(2). The term "distributor" is defined as including retail pharmacies. 42 U.S.C. § 247d-6d(i)(3). The term "qualified person," in turn, is defined to include licensed health care professionals or other individuals who are authorized to prescribe, administer, or dispense a covered countermeasures under the law of the State in which the countermeasure was prescribed, administered, or dispensed. 42 U.S.C. § 247d-6d(i)(8).

Again, Mother did not dispute whether Walmart or Schukar qualify as "covered persons" under the Act in her opposition to the motions to dismiss—she only argued that her claims fell outside the scope of the Act because they were claims of inaction. Since she does not explain why we can or should consider her argument disputing their status as "covered persons" under the Act for the first time on appeal, we find she has waived it. *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014).

While we do not address the substance of Mother's arguments, we pause to clarify that the motion to dismiss standard does not require a plaintiff to specifically plead that a defendant is a covered person under the PREP Act. Instead, it only requires a plaintiff to allege sufficient facts to show the defendants meet the Act's definition of the term. Thus, if Mother had preserved her claim by raising it in the district court, then that court would be required to determine whether Mother's petition alleged sufficient facts to establish defendants are both covered persons, not whether Mother's petition specifically alleged that defendants were covered persons under the Act.

As a result, under the circumstances presented we find the PREP Act applies to the situation described in the petition.

C. *Are Mother's battery, negligence, and consumer protection claims outside the scope of the PREP Act?*

Mother next argues that, even if the substance injected into M.K. was a covered countermeasure and Walmart and Schukar are covered

persons, the PREP Act does not apply to her battery, negligence, and consumer protection claims, as these claims fall outside the scope of the Act's immunity provisions.

1. *Mother's negligence and consumer protection claims*

The district court dismissed Mother's negligence and consumer protection claims to the extent that they were based on her allegations that information or data was not provided about the safety or efficacy of the Pfizer vaccine, including her allegations that M.K. was deceived into engaging in "'a medical experiment.'" Mother contends the court erred because she characterizes these claims as "claims of inaction." She contends courts across the country have ruled such claims are outside the scope of the PREP Act. In the alternative, she argues her negligence claims are not covered because several courts have found the Act's federal cause of action for willful misconduct was not intended to displace state law claims for negligence and recklessness. We find her arguments without merit because she miscasts her claims and mischaracterizes the holdings of the cases she cites.

a. *The "claims of inaction" Mother references are claims for a failure to administer a covered countermeasure, not for improper administration of the covered countermeasure like Mother alleges occurred here.*

Mother cites a plethora of federal district court cases to support her contention that the PREP Act does not apply to "claims of inaction." See *Khalek v. South Denver Rehab., LLC*, 543 F. Supp. 3d 1019, 1027-28 (D. Colo. 2021); *Gwilt v. Harvard Square Ret. & Assisted Living*, 537 F. Supp. 3d 1231, 1240 (D. Colo. 2021); *Mackey v. Tower Hill Rehab., LLC*, 569 F. Supp. 3d 740, 745-47 (N.D. Ill. 2021); *Robertson v. Big Blue Healthcare, Inc.*, 523 F. Supp. 3d 1271, 1282-83 (D. Kan. 2021); *Anson v. HCP Prairie Village KS OPCO LLC*, 523 F. Supp. 3d 1288, 1293-1302 (D. Kan. 2021); *Brown v. Big Blue Healthcare, Inc.*, 480 F. Supp. 3d 1196, 1201-08 (D. Kan. 2020); *Eaton v. Big Blue Healthcare, Inc.*, 480 F. Supp. 3d 1184, 1192-95 (D. Kan. 2020); *Estate of Maglioli v. Andover Subacute Rehab. Ctr. I*, 478 F. Supp. 3d 518, 531-33 (D.N.J. 2020), *aff'd sub nom. Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393 (3d Cir. 2021); *Leroy v. Hume*, 554 F. Supp. 3d 470, 476-80 (E.D.N.Y. 2021); *Estate of McCalebb v.*

AG Lynwood, LLC, No. 2:20-CV-09746-SB-PVC, 2021 WL 911951, at *5-6 (C.D. Cal. 2021) (unpublished opinion), *appeal filed* March 31, 2021; *Baskin v. Big Blue Healthcare, Inc.*, No. 2:20-CV-2267-HLT-JPO, 2020 WL 4815074, at *3-8 (D. Kan. 2020) (unpublished opinion); *Rodina v. Big Blue Healthcare, Inc.*, No. 2:20-CV-2319-HLT-JPO, 2020 WL 4815102, at *2-8 (D. Kan. 2020) (unpublished opinion); *Parker through Parker v. St. Jude Operating Co., LLC*, No. 3:20-CV-01325-HZ, 2020 WL 8362407, at *5 (D. Or. 2020) (unpublished opinion); *Estate of Jones v. St. Jude Operating Co., LLC*, No. 3:20-CV-01088-SB, 2020 WL 8361924, at *4-10 (D. Or. 2020) (unpublished opinion); *Sherod v. Comprehensive Healthcare Mgmt. Services, LLC*, No. 20CV1198, 2020 WL 6140474, at *7-8 (W.D. Pa. 2020) (unpublished opinion); *Lollie v. Colonnades Health Care Ctr. Ltd. Co.*, No. CV H-21-1812, 2021 WL 4155805, at *3-5 (S.D. Tex. 2021) (unpublished opinion); *Ruiz v. ConAgra Foods Packaged Foods, LLC*, No. 21-CV-387-SCD, 2021 WL 3056275, at *4-5 (E.D. Wis. 2021) (unpublished opinion).

But these cases do not hold that the PREP Act does not apply to claims based on failures to act, as Mother alleges. Rather, the district court in each case found that while the Act applies to claims causally related to the administration or use of covered countermeasures, it does not apply to claims based on the failure to administer or use covered countermeasures.

For instance, in *Mackey*, the plaintiff—the executor of the estate of a nursing home resident who died from COVID-19—filed suit in state court against the nursing home, alleging the resident's death resulted from the nursing home's negligence in preventing and responding to the spread of COVID-19 in the facility. The claims included the nursing home's alleged failure to provide its staff with personal protective equipment and its failure to test the resident for COVID-19 after she got sick. The nursing home then removed the case to federal district court; *Mackey* addressed the plaintiff's motion to remand to state court for lack of jurisdiction. The nursing home argued the PREP Act was a complete preemption statute, providing federal question jurisdiction over the claims.

The court determined remand was required without reaching the question of complete preemption, however, because it found

the PREP Act did not apply to the conduct alleged in the plaintiff's complaint. *Mackey*, 569 F. Supp. 3d at 745-46. As the court explained, "although the PREP Act may apply to misfeasance, meaning the improper administration or use of covered countermeasures, it does not directly provide a defense to a claim of nonfeasance, or the failure to use such countermeasures." 569 F. Supp. 3d at 746.

Negligence claims—including those of action and those of omission—are covered by the PREP Act when they are causally related to the administration or use of a covered countermeasure. 42 U.S.C. § 247d-6d(a)(2)(B). The Act did not apply to the plaintiffs' claims in the cases cited by Mother because those claims were not causally related to the administration or use of covered countermeasures—they were causally related to the failure to administer or use covered countermeasures.

Unlike the plaintiffs in *Mackey* and the other cases Mother cites, Mother's claims are not based on defendants' failure to administer a covered countermeasure. Instead, they all relate to defendants' alleged improper administration of a covered countermeasure. Thus none of these cases support Mother's claim of error.

Mother also argues on appeal that her claims of withholding or misrepresenting information are not covered under the PREP Act because neither action meets the definition of "administration" of a covered countermeasure. She notes that although the Act does not define "administration," the Secretary has defined it through declaration as the "physical provision of the countermeasures to recipients." Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198, 15200 (March 17, 2020) (defining "administration of a covered countermeasure" as "physical provision of the countermeasures to recipients, or activities and decisions directly relating to public and private delivery, distribution, and dispensing of the countermeasures to recipients; management and operation of countermeasure programs; or management and operation of locations for purpose of distributing and dispensing countermeasures"). Mother contends withholding or misrepresenting information does not constitute the physical provision of anything, nor was M.K. a "recipient."

To begin, Mother did not present these arguments to the district court and does not identify why an exception to the preservation rule applies here. Accordingly, we would be justified in refusing to consider them. But we instead deny these claims on the merits as nonsensical. Mother's claims for withholding or misrepresenting information are properly characterized as claims for the alleged improper administration of a covered countermeasure. That is, they relate to how that covered countermeasure was administered and are thus covered under the Act.

b. *Mother's preemption argument is misplaced.*

Mother also contends her negligence claim is outside the scope of the PREP Act because federal courts have held the Act's federal cause of action for willful misconduct was not intended to displace state law claims for negligence and recklessness. See *Martin v. Petersen Health Operations*, *LLC*, 37 F.4th 1210, 1213-14 (7th Cir. 2022); *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 586-87 (5th Cir. 2022); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 688 (9th Cir.), *cert. denied* 143 S. Ct. 444 (2022); *Estate of Maglioli*, 16 F.4th at 410.

While Mother correctly recites the propositions from the cases she cites, those propositions are inapplicable here. First, in each of those cases, the courts were not analyzing whether the PREP Act's immunity provisions applied to negligence claims, but whether federal jurisdiction existed and thus whether removal of the suit to federal court was appropriate. Those removing defendants argued the Act "completely preempted" those plaintiffs' state law causes of action, meaning the claims were governed by federal and not state law.

Complete preemption occurs when a federal law is found to create an "exclusive cause of action" because it "'set[s] forth procedures and remedies governing that cause of action,' such that it 'wholly displaces the state-law cause of action.'" *Martin*, 37 F.4th at 1213 (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8, 123 S. Ct. 2058, 156 L. Ed. 2d 1 [2003]). In other words, the "federal law displaces all possible liability under state law so that any legal claim necessarily rests on federal law." 37 F.4th at 1213.

In the cases cited by Mother, the federal courts found they did not have jurisdiction because the PREP Act did not completely

preempt state law. They noted (1) the Act's immunity provision only created a defense to liability under state law and not a federal claim, and (2) while the Act created a new federal claim, this claim only covered a subset of potential wrongs and did not preempt any other kind of claim. 37 F.4th at 1213; *Mitchell*, 28 F.4th at 586-87; *Saldana*, 27 F.4th at 688; *Maglioli*, 16 F.4th at 410.

Whether the PREP Act completely preempts state law negligence claims for the purposes of federal jurisdiction is different from Mother's argument, which appears to be that her state law negligence claims are *exempt* from the Act's immunity provision. Mother appears to misunderstand the preemption doctrine, so her argument based on that doctrine is misplaced.

Mother's negligence and consumer protection claims all flow from the allegation that a COVID-19 vaccine was administered to M.K. These claims are based on the supposed harms associated with such vaccines, the alleged failure to sufficiently inform M.K. and Mother about the vaccine and its licensing status before its administration to M.K., misrepresentations in the medical charting associated with the administration of this vaccine, negligence in post-vaccination care, and negligence related to the employee training and policies surrounding vaccine administration. These claims would be meaningless had Schukar not administered a COVID-19 vaccine to M.K.

Because Mother's negligence and consumer protection claims are causally related to the administration of a covered countermeasure, we find the district court did not err in dismissing these claims.

2. *Mother's battery claim*

Mother also argues the district court erred in dismissing her battery claim as the PREP Act does not apply to intentional torts, citing *Ravain* v. *Ochsner Medical Center*, No. 21-2365, 2022 WL 3334694, at *5 (E.D. La. 2022) (unpublished opinion) (remanding case to state court, concluding that PREP Act's statutory scheme was not comprehensive enough to completely preempt state-law intentional tort claims). Mother essentially argues that the Act does not apply to intentional torts because the Act does not completely preempt state law intentional tort claims.

Again, Mother's claim on this point is meritless. As explained above, the doctrine of complete preemption has no applicability to the question before us. That the PREP Act does not completely preempt state-law intentional tort claims does not establish that its immunity protections do not apply to intentional tort claims causally related to the administration of a covered countermeasure.

Mother's battery claim is clearly causally related to the administration of a covered countermeasure. The unprivileged touching alleged by Mother is the injection of the vaccine without parental consent. We therefore find the district court did not err in holding the PREP Act applied to Mother's battery claim as well.

3. *Mother's other claims on appeal are meritless.*

Mother also argues the district court erred by: (1) applying an erroneous burden shifting framework in deciding the motions to dismiss; (2) treating her cases against Walmart and Schukar as one in ruling on the motions to dismiss; (3) deciding causation, as this is a question of fact properly left to the jury; and (4) issuing an advisory opinion.

First, Mother contends the district court misinterpreted the law of affirmative defense burdens in granting defendants' motions to dismiss in part. Mother claims the district court erred by shifting the burden onto her to prove that defendants' affirmative defense of PREP Act immunity did not apply. In support, she points out that the district court, in discussing the applicable standards, mentioned the burden-shifting framework that applies when considering a motion to dismiss based on the statute of limitations. However, although the district court mentioned this burden-shifting framework, it does not appear to have applied it. In its order on the motions to dismiss, the district court properly placed the burden of proving the Act's applicability on defendants, even finding that defendants failed to meet this burden as to some of Mother's claims. Mother does not identify how the burden was shifted onto her below or how the framework otherwise impacted the district court's ruling. Thus, it appears the district court simply misspoke but did not misapply the burden of proof to establish defendants' affirmative defenses.

Mother next contends the district court erred by consolidating her cases against Walmart and Schukar and ruling on both defendants' motions to dismiss in one order. But, as defendants point out, the parties agreed below that the cases involved identical claims and addressed the same controlling issue. And Mother joined in Schukar's motion to consolidate below, arguing to the district court that "[t]he defendants' preemption arguments in both their motions to dismiss are identical. The Court should consolidate these cases in the interest of judicial economy."

As a result, we need not address the merits of Mother's argument on consolidation, as it is both unpreserved and precluded by the invited error doctrine. *Water Dist. No. 1 of Johnson County v. Prairie Center Dev., L.L.C.*, 304 Kan. 603, 618, 375 P.3d 304 (2016) (a party cannot invite error and then complain of the error on appeal).

Mother also argues that the district court improperly decided a fact question: whether her claims had a causal connection to the administration of a covered countermeasure. She cites the generic proposition that causation is a question of fact usually left to the jury, not a question of law for the district court to decide. But this proposition is not universally true. A district court may decide causation in the context of a motion to dismiss, as it did here. This is because when all the evidence on which a party relies is undisputed and susceptible of only one inference, proximate cause becomes a question of law. *Hale v. Brown*, 287 Kan. 320, 324, 197 P.3d 438 (2008). Based on Mother's allegations, and construing them all in her favor, the district court found her claims for negligence, battery, and violation of the Kansas Consumer Protection Act were causally related to defendants' administration of a covered countermeasure. We see no error in the district court's resolution of the issue, as explained in detail above.

Finally, Mother argues the district court erred by issuing what she calls an "advisory opinion." She claims that since the district court incorrectly determined the PREP Act applied (according to her), its rulings applying the Act "were not justiciable, advisory, and hypothetical." Mother does not explain her argument, other than citing a general discussion in *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896-98, 179 P.3d 366 (2008), explaining why

courts cannot and should not issue advisory opinions. Beyond failing to adequately brief her argument, it is meritless. We have found the district court correctly dismissed Mother's claims and this ruling was not advisory.

Having found the district court properly construed the allegations in Mother's petition and applied the PREP Act's immunity provision, we find no error in its dismissal of most of her claims.

II. *Did the district court err in denying defendants' motions to dismiss in part?*

In their interlocutory appeal, defendants argue the district court erred in only partially granting their motions to dismiss. Defendants ask us to reverse this portion of the court's order and direct dismissal of all claims in Mother's petition, as they all fall within the broadly worded loss and causation provisions of the PREP Act.

Mother offers the same arguments in response to defendants' interlocutory appeal that she advances in her direct appeal. That is, she contends the district court correctly concluded the PREP Act does not cover failures to act and thus does not apply to her claims based on the failure to secure parental consent. She also argues that obtaining parental consent is not a covered countermeasure.

As explained above, Mother's arguments are misplaced. The cases Mother cites are inapplicable because they addressed the failure to administer a countermeasure rather than the improper administration that we have here. Similarly, the question before us is not whether obtaining consent is a covered countermeasure but whether claims based on the failure to obtain consent for a vaccination are causally related to the administration of that vaccine.

A. *Jurisdiction*

Mother first argues that defendants cannot seek interlocutory appeal from the district court's order, since the district court elected to convert a portion of the order into a final judgment under K.S.A. 2022 Supp. 60-254(b). Mother contends this eliminated the option of an interlocutory appeal from the order, as K.S.A. 2022 Supp. 60-2102(c) only applies if a district court's order is "not otherwise appealable."

Thus, Mother argues, this court lacks jurisdiction to hear defendants' interlocutory appeal.

This court, however, has already decided that it has jurisdiction to hear both appeals. As defendants note, Mother presented these same arguments in her Motion to Dismiss Appellants' Appeal. This court considered these arguments and held that jurisdiction exists to hear defendants' interlocutory appeal. In line with this conclusion, this court denied Mother's Motion to Dismiss Appellants' Appeal.

The district court properly certified the portion of its judgment where it dismissed Mother's claims as final under K.S.A. 2021 Supp. 60-254(b), so this portion of its order could be appealed under K.S.A. 2021 Supp. 60-2102(a)(4). And it properly certified the portion of its judgment where it denied defendants' motion to dismiss Mother's remaining claims for interlocutory appeal under K.S.A. 2021 Supp. 60-2102(c). Mother cites no authority which prevents a district court from proceeding this way, which aligns with the guiding principle of Kansas' rules of civil procedure, requiring those rules to be "liberally construed, administered and employed by the court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding." K.S.A. 2022 Supp. 60-102.

The cases which Mother relies on address the certification of a court's decision as a whole, not its component parts like the way the district court treated its decision here. For example, *DeMelo v. Woolsey Marine Industries, Inc.*, 677 F.2d 1030 (5th Cir. 1982), addressed a situation where a district court disposed of all claims against one defendant but rather than certifying that decision as final under Rule 54(b) of the Federal Rules of Civil Procedure (the federal equivalent of K.S.A. 60-254[b]), it referenced 28 U.S.C. § 1292(b) (the federal equivalent of K.S.A. 60-2102[c]). The 5th Circuit court found it had jurisdiction despite this mistake, noting "'practical, not technical, considerations are to govern the application of principles of finality' and that we should not 'exalt form over substance' to dismiss appeals.'" *DeMelo*, 677 F.2d at 1033. We similarly find Mother has provided no basis to revisit this court's prior decision to deny Mother's motion to dismiss defendants' interlocutory appeal.

B. *Identifying the issues on appeal*

In certifying this case for interlocutory appeal, the district court certified two questions for review:

(1) "Is the [PREP Act] and its immunity provision completely preemptive of all state law causes of action, regardless of the theory, so long as there is any connection or involvement whatsoever with a covered countermeasure?"; and
(2) "Does [the PREP Act] give covered persons absolute immunity to violate parental consent or age of medical consent for minors law?"

To begin, we note that courts are limited to answering questions presented in an actual case or controversy between parties; they have no power to issue advisory opinions. *Sebelius*, 285 Kan. at 888.

Defendants argue that we need not address whether the PREP Act covers all claims in all cases, only whether the claims here are covered. They contend that the limited question of this case is whether the PREP Act provides immunity to Walmart and Schukar for Mother's claims—nothing more.

Furthermore, appellate courts have some discretion in recasting the issues on interlocutory appeal from those certified by the district court. The Kansas Supreme Court has held that courts may go beyond the issues certified by a district court for interlocutory appeal where appealable issues are intertwined with nonappealable issues. *Williams v. Lawton*, 288 Kan. 768, 784, 207 P.3d 1027 (2009). This is in part because, as the court in *Williams* noted, interlocutory appeals originate from the district court's order itself, and an appellate court can and should address a different legal question if it controls disposition of the certified order. 288 Kan. at 784 (citing *Paper, Allied-Industrial v. Continental Carbon*, 428 F.3d 1285, 1291 [10th Cir. 2005]).

Therefore, we limit our review in the interlocutory appeal to the limited question controlling disposition of the certified order here: Does the PREP Act apply to Mother's claims based on the failure to obtain parental consent? We need not address the broad questions certified by the district court, as they go beyond the actual controversy below and thus improperly seek an advisory opinion.

C. *Whether the PREP Act applies to claims based on a failure to secure parental consent*

As defendants note, the Act provides immunity for "all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(1). And it explicitly instructs that this immunity applies to "any claim for loss that has a causal relationship with the administration to . . . an individual of a covered countermeasure." 42

U.S.C. § 247d-6d(a)(2)(B). Defendants argue that based on this text, as well as basic common-law principles of causation, the Act applies to Mother's claims based on parental consent.

Because the PREP Act applies to any claim for loss that has a causal relationship with the administration to an individual of a covered countermeasure, defendants argue that it must apply to a claim based on a failure to secure parental consent to administer the vaccine. Defendants claim that it is indisputable that all of Mother's claims are causally related to the administration of the Pfizer vaccine here, as the test for causation in fact is a "but for" test. See *Kudlacik v. Johnny's Shawnee, Inc.*, 309 Kan. 788, 793-94, 440 P.3d 576 (2019) (discussing requirements of causation in fact). Defendants note that but for the administration of the vaccine, Mother would have no claim based on the administration of the vaccine without consent or the failure to warn of its effects.

Defendants also point to the fact that other courts, in interpreting similarly worded statutes preempting state causes of action, have described the phrases "relate to" or "'relating to'" broadly. See *Pilot Life Ins. Company v. Dedeaux*, 481 U.S. 41, 47, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (explaining that "'[t]he phrase "relate to" . . . [has a] broad common-sense meaning, such that a state law "relate[s] to" a benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan"'") (quoting *Metropolitan Life Ins. Company v. Massachusetts*, 471 U.S. 724, 739, 105 S. Ct. 2380, 85 L. Ed. 2d 728 [1985]); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) (describing the term "relating to" as "'deliberately expansive'" and "'conspicuous for its breadth'"); *EagleMed, LLC v. Travelers Insurance*, 315 Kan. 411, 424, 509 P.3d 471 (2022) ("The United States Supreme Court has construed the 'relating to' phrase in the [Airline Deregulation Act] to 'express a broad pre-emptive purpose'") (quoting *Morales*, 504 U.S. at 383); *Burnett v. Southwest Bell Tel., L.P.*, 283 Kan. 134, 152, 151 P.3d 837 (2007) (explaining that ERISA's "preemption of any state law which 'relates to' employee benefit plans" is broad). Defendants argue that this shows that both the immunity and preemption provisions of the PREP Act should thus be construed broadly.

The district court seemed to recognize that the PREP Act's broad language implicitly included claims based on the administration of a covered countermeasure without parental consent.

But it concluded that Congress would not have made the Act applicable to such claims by mere implication, as they involve a fundamental constitutional right—parents' right to decide their children's care.

The district court concluded that "[i]f Congress intended to interfere with or to preempt [parents' fundamental rights] it would have said so, not left it up to individuals or Courts to guess or read into the statute by rules of construction or implication." Because the Act's preemption provision did not specifically state that the Act preempted claims based on parental consent, the district court found that it had no application to such claims.

Defendants concede the PREP Act does not expressly mention parental consent. But they argue the Act's broad preemption language, the sweeping immunity clause, and the availability of alternative remedies all reflect Congress' intent to preempt all state claims relating to the administration of a covered countermeasure, including those related to the administration of a vaccine to a minor without parental consent. In defendants' view, the text of the Act's immunity and preemption provisions is comprehensive and all-encompassing, and claims based on the failure to obtain consent cannot be carved out of it. In other words, "all claims" means all claims, not "all claims except for those based on a violation of a fundamental right."

D. *Existing caselaw supports Defendants' position.*

Defendants point out that a New York state appellate court has already squarely addressed this issue, holding that the PREP Act's immunity provisions extend to qualified persons who administer a covered countermeasure to an individual without consent, namely the plaintiff's minor child. *Parker v. St. Lawrence City Pub. Health Dept.*, 102 A.D.3d 140, 143-45, 954 N.Y.S.2d 259 (2012).

While the district court tried to distinguish *Parker* in its decision, we find the distinctions the court identified are inconsequential. The district court said *Parker* was unpersuasive because it involved an earlier version of the PREP Act, a different public health emergency, and a different standard for dismissal from Kansas. But, as defendants note, the analysis in *Parker* turned on the text of the statute's immunity and preemption provisions—which was the same then as it is now—not any unique aspect of New York law or meaningful difference between the emergency declaration at issue there and the one here.

Focusing on the plain text of the Act, the court in *Parker* determined that the broad language of the Act's preemption and immunity provisions revealed a congressional intent to immunize covered persons from all state law tort claims arising from the administration of covered countermeasures, including one based on a defendant's failure to obtain consent. *Parker*, 102 A.D.3d at 143-44. The court also noted this finding was bolstered by Congress' provision of exclusive alternative remedies for injuries stemming from covered countermeasures in the form of the Countermeasures Injury Compensation Program and the Act's separate cause of action for willful misconduct. 102 A.D.3d at 144. And it noted the policy decision made by Congress; namely its determination that potential tort liability arising from errors in administering a vaccine program "must give way to the need to promptly and efficiently respond to a pandemic or other public health emergency." 102 A.D.3d at 144.

Defendants also note that a federal district court has also recently ruled on the scope of the PREP Act, holding that the Act bars claims arising from the administration of a COVID-19 vaccine without consent. *Cowen v. Walgreen Co.*, No. 22-CV-157-TCK-JFJ, 2022 WL 17640208, at *3 (N.D. Okla. 2022) (unpublished opinion).

In *Cowen*, the plaintiff alleged that she had been injected with a COVID-19 vaccine without her knowledge or consent after seeking a flu vaccine from a Walgreens pharmacy. The plaintiff argued that because her injuries could have resulted from any vaccination or other medical procedure, the PREP Act did not apply. In dismissing her claims, the district court held that the PREP Act applied because the plaintiff's alleged injuries were all the result of the administration of a COVID-19 vaccine. 2022 WL 17640208, at *3.

While *Cowen* is not as factually similar to this case as *Parker*, we still find its analysis persuasive and supportive of our decision that the PREP Act applies here. Both cases hold that any claim causally related to the administration by a covered person of a covered countermeasure is covered by the Act, even claims based on the failure to obtain consent.

CONCLUSIONS

In line with *Parker* and *Cowen*, we find the PREP Act applies to Mother's claims based on the failure to secure parental consent. The text of the Act is unambiguous: The Act applies to all claims causally

related to the administration by a covered person of a covered countermeasure. The question presented by this interlocutory appeal is thus whether a claim based on the administration of a covered countermeasure without parental consent is causally related to the administration of a covered countermeasure. Reframed this way, the answer is yes.

Finally, we need not address the district court's unbidden constitutional concerns about the PREP Act. Because this case can be decided on the text of the Act and Mother never advanced any constitutional claim, we adhere to the long-standing doctrine of judicial self-restraint known as constitutional avoidance. As explained in *Butler v. Shawnee Mission School District Board of Education*, 314 Kan. 553, 502 P.3d 89 (2022), "[t]his rule strongly counsels against courts deciding a case on a constitutional question if it can be resolved in some other fashion, especially when the question concerns the validity of a statute enacted by our coordinate branches of state government." 314 Kan. at 554 (citing *Smith v. Kansas Dept. of Revenue*, 291 Kan. 510, 519, 242 P.3d 1179 [2010]) ("declining to reach constitutional concerns over statute authorizing field sobriety tests based on reasonable suspicion, when facts demonstrated probable cause"). Much like the district court in *Butler*, the district court here gratuitously shaped the contours of the PREP Act to accord with its own constitutional concerns when no such controversy was before it.

We reverse that portion of the court's judgment and express no opinion about the PREP Act's constitutionality.

In summary, we find the district court erred in denying defendants' motions to dismiss in part, and we reverse and remand the case with instructions to dismiss all claims.

Affirmed as to case No. 125,268, reversed as to case No. 125,151, and remanded with instructions to dismiss all claims.