OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

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JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

CHIEF JUDGE:

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

JUDGES:

HON. HENRY W. GREEN JR. ..... Leavenworth
HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. G. GORDON ATCHESON ..... Westwood
HON. DAVID E. BRUNS ..... Topeka
HON. KIM R. SCHROEDER ..... Hugoton
HON. KATHRYN A. GARDNER ..... Topeka
HON. SARAH E. WARNER ..... Lenexa
HON. AMY FELLOWS CLINE ..... Valley Center
HON. LESLEY ANN ISHERWOOD ..... Hutchinson
HON. JACY J. HURST ..... Lawrence
HON. ANGELA D. COBLE ..... Salina
VACANT .....

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B.E. v. Pistotnik	124,400	Sedgwick	09/23/2022	Affirmed in part; reversed in part; remanded with directions
Bailey v. State	124,346	Johnson	09/16/2022	Affirmed
Cid v. Butler	123,997	Riley	09/09/2022	Affirmed in part; reversed in part; remanded with directions
Danzman v. Herington Municipal Hosp. Bd. of Trustees	124,675	Dickinson	09/09/2022	Reversed; remanded
Dunerway v. State	123,250			
	123,503			
	123,761	Sedgwick	09/16/2022	Affirmed
Franco-Monserrate v. State	123,861	Shawnee	09/09/2022	Affirmed
Graf v. State	124,584	Douglas	10/21/2022	Affirmed
Hainline v. Board of Miami County Comm'rs	124,070	Miami	10/07/2022	Affirmed
Hickles v. Kansas Dept. of Revenue	124,261	Johnson	10/07/2022	Affirmed
Illig v. BeLieu	124,347	Johnson	10/14/2022	Affirmed
In re A.C.	124,934			
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	124,936	Sedgwick	09/02/2022	Affirmed
In re Adoption of H.S.	124,583	Sedgwick	09/30/2022	Affirmed
In re Adoption of S.C.	124,863	Anderson	09/09/2022	Affirmed
In re Care and Treatment of Merryfield	123,949	McPherson	10/07/2022	Affirmed
In re Care and Treatment of Ritchie	124,773	Barton	09/23/2022	Affirmed
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	124,564			
	124,565	Geary	10/21/2022	Affirmed
In re G.P.	124,862	Leavenworth	10/07/2022	Affirmed
In re H.M.	124,961	Sedgwick	10/21/2022	Affirmed
In re K.L.	124,873			
	124,874	Thomas	09/23/2022	Affirmed
In re K.M.	124,825	Johnson	09/16/2022	Affirmed
In re K.R.	125,054	Sedgwick	09/30/2022	Affirmed
In re Marriage of Holliday	124,116	Jackson	09/23/2022	Reversed
In re Marriage of Martin	124,721	Labette	09/09/2022	Reversed; remanded with directions

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In re Marriage of Shafer	124,529	Johnson	09/23/2022	Reversed; remanded with directions
In re Marriage of Williams	123,395	Sedgwick	09/16/2022	Affirmed
In re Parentage of R.R.	123,833	Barton	10/14/2022	Affirmed
In re Parentage of C.R.	124,696	Atchison	09/30/2022	Affirmed in part; reversed in part; remanded with directions
King v. State	124,241	Wyandotte	09/30/2022	Affirmed
K-State Federal Credit Union v. Glassford	124,457	Pottawatomie	10/07/2022	Affirmed
Nelson v. State	124,048	McPherson	10/21/2022	Reversed; remanded with directions
Northeast Comanche Tribe, Inc. v. Stumpf	123,642	Sedgwick	10/07/2022	Affirmed
Owens v. State	124,253	Sedgwick	09/23/2022	Affirmed
Robinson v. State	122,089	Sedgwick	09/09/2022	Affirmed
Samuels v. State	123,883 123,884	Butler	09/09/2022	Affrmed
Schrand v. Kansas Dept. of Revenue	123,931	Wyandotte	10/07/2022	Affirmed
South Mulberry Properties v. GT Management	124,039	Crawford	10/21/2022	Affirmed in part; reversed in part; remanded
Spear v. Mayes	123,714	Sedgwick	09/02/2022	Affirmed
State v. Abrams	123,328	Shawnee	09/30/2022	Affirmed
State v. Brown	122,350	Sedgwick	10/07/2022	Affirmed
State v. Cary	122,619	Sedgwick	10/14/2022	Affirmed
State v. Cazee-Watkins	124,030	Shawnee	10/07/2022	Affirmed
State v. Chizek	124,031	Riley	10/21/2022	Affirmed in part; vacated in part; remanded with directions
State v. Cole	124,330	Sumner	09/09/2022	Affirmed
State v. Coleman	124,716	Sedgwick	09/02/2022	Affirmed
State v. Contreras	124,075	Sedgwick	09/02/2022	Affirmed
State v. Coversup	123,319	Jackson	10/14/2022	Affirmed
State v. Davis	124,539	Sedgwick	09/02/2022	Appeal dismissed
State v. Dudley	124,370	Sedgwick	10/07/2022	Affirmed
State v. Endsley	124,504 124,505 124,506	Saline	10/14/2022	Appeal dismissed
State v. Evans	124,155	Johnson	10/21/2022	Affirmed
State v. Everett	124,321	Smith	09/16/2022	Affirmed

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
State v. Ferrell	124,188	Reno	09/02/2022	Reversed; remanded with directions
State v. Fullmer	123,540	Ellis	09/09/2022	Affirmed
State v. G.O.	124,676	Shawnee	09/23/2022	Reversed; remanded
State v. Garrett	124,329	Saline	10/21/2022	Reversed
State v. Garrett	124,016			
	124,017	Johnson	09/02/2022	Affirmed
State v. Goins	124,692			
	124,693	Sedgwick	09/09/2022	Affirmed
State v. Green	124,121	Sedgwick	10/07/2022	Affirmed
State v. Hall	124,552	Sedgwick	10/21/2022	Affirmed
State v. Howell	124,650	Sedgwick	09/02/2022	Sentence vacated; case remanded with directions
State v. Jackson	123,399	Cowley	09/16/2022	Affirmed
State v. Johnson-Fritz	124,733	Leavenworth	09/09/2022	Appeal dismissed
State v. Jones	125,121			
	125,122	Ford	10/14/2022	Affirmed
State v. Knapp	123,751	Douglas	09/16/2022	Affirmed
State v. Livingston	124,534	Douglas	09/02/2022	Affirmed
State v. Lovelace	124,575	Wyandotte	09/02/2022	Appeal dismissed
State v. Mangold	124,092			
	124,093	Marion	09/23/2022	Appeal dismised
State v. Marshall	123,764	Johnson	09/02/2022	Reversed; remanded with directions
State v. Mason	124,151	Pottawatomie	09/23/2022	Appeal dismissed in part,; sentence vacated; case remanded with directions
State v. Mott	121,013	Saline	09/30/2022	Affirmed
State v. Nelson	124,283	Sedgwick	09/02/2022	Affirmed
State v. Qualls	121,778	Shawnee	10/07/2022	Affirmed in part; vacated in part; remanded with directions
State v. Redmon	123,811	Sedgwick	10/07/2022	Affirmed
State v. Ritz	123,979			Reversed;
	123,980			remanded with
	123,981	Harvey	09/02/2022	directions
State v. Roop	124,208			Reversed;
	124,209	Republic	09/16/2022	remanded with directions
State v. Santos	124,466	Sedgwick	09/02/2022	Affirmed

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
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State v. Sinnard	123,687	Douglas	10/07/2022	Affirmed
State v. Solton	123,927	Saline	10/14/2022	Reversed; remanded with directions
State v. Stubbs	124,176	Sedgwick	09/16/2022	Affirmed
State v. Swartz	124,549	Shawnee	10/07/2022	Appeal dismissed
State v. Taylor	124,624	Shawnee	10/07/2022	Affirmed
State v. Thompson	124,827 124,828 124,829	Barton	10/14/2022	Affirmed
State v. Tiger	124,532	Sedgwick	09/09/2022	Affirmed
State v. Union	121,643	Wyandotte	10/21/2022	Affirmed in part; vacated in part
State v. Wallace	123,806	Johnson	09/30/2022	Affirmed
State v. Wheeler	124,807	McPherson	09/09/2022	Affirmed
State v. Zales	124,009	Reno	09/02/2022	Affirmed
Towne v. Unified School District No. 259	124,046	Sedgwick	10/21/2022	Affirmed
Unified Gov't of Wyandotte Co./KCK v. Estrella	123,999	Wyandotte	10/21/2022	Reversed; remanded
Walker v. Cline	124,359	Butler	09/02/2022	Affirmed
Wren v. State	124,438	Montgomery	09/23/2022	Affirmed
Zhu v. Kansas Dept. of Health and Environment	124,481	Shawnee	10/21/2022	Affirmed in part; reversed in part; remanded with directions

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ADMINISTRATIVE LAW:

Appeal to District Court Providing Trial De Novo—Determination Anew of Both Law and Factual Issues—Burden of Proof. An appeal to the district court providing a trial de novo—whether taken from an agency determination or from a different court—requires issues of both law and fact to be determined anew. The burden of proof in a trial de novo remains with the party who bore the burden in the underlying proceedings.
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Final Order Required to Identify Agency Officer Who Receives Service of Petition for Judicial Review—Thirty-Day Period for Filing Petition for Judicial Review. K.S.A. 77-613(e) requires an administrative agency's final order to identify the agency officer who will receive service of a petition for judicial review on behalf of the agency. The 30-day jurisdictional period for filing a petition for judicial review begins to run after service of an order that complies with K.S.A. 77-613(e).
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Interpretation of Written Documents by Court—Interpret Written Language in Reasonable Fashion. It is not the function of a court to read sections of a written document in isolation or highlight awkward phrasing. Instead, courts must endeavor to interpret written language in a reasonable fashion that does not vitiate the purpose of the writing or reach an absurd result. *Gilliam v. Kansas State Fair Bd.* ……..…..…. 236

APPEAL AND ERROR:

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

Interpretation of Supreme Court Order—Appellate Review. Interpretation of Kansas Supreme Court Administrative Order 2020-PR-58, effective May 27, 2020, presents a question of law subject to unlimited review.
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Interpretation of Workers Compensation Statutes—Appellate Review. Because the interpretation of workers compensation statutes involves a question of law, appellate review is unlimited. In interpreting a statute, appellate courts are not to give deference to the Board's legal analysis or determination. *Turner v. Pleasant Acres* ……...…….. 122

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Cross-Appeal by Appellee to Adverse Decisions of District Court—Failure to Cross-Appeal Prevents Appellate Review. Kansas law requires an appellee to cross-appeal a district court's adverse decisions before those rulings may be challenged on appeal. The failure to cross-appeal a district court's adverse decision creates a jurisdictional bar preventing appellate review.
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Cross-Appeal of Adverse Rulings—Not Required if Challenging Decision Subject to Appeal. While a cross-appeal is necessary to bring other adverse rulings before the appellate courts, it is not generally required when a party is merely challenging the district court's reasoning underlying a decision already subject to appeal.
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ATTORNEY FEES:

Grandparent Visitation Appeal—Court's Authority to Award Fees under Rule 7.07(b). In the appeal of a decision involving grandparent visitation, an appellate court has authority to award attorney fees under Supreme Court Rule 7.07(b) (2022 Kan. S. Ct. R. at 51) because the district court had authority under K.S.A. 2020 Supp. 23-3304 to award attorney fees in the proceedings below.
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Collateral Order Doctrine—Factors. The collateral order doctrine provides that an order may be collaterally appealable if it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separated from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.
In re Parentage of E.A. 507*

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

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Default Judgment—Statutory Definition—Terminates Action without District Court Considering Merits. A default judgment is entered when a "party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . ." K.S.A. 2021 Supp. 60-255(a). Like a dismissal under K.S.A. 2021 Supp. 60-241(b), a default judgment terminates an action without the district court's consideration of the merits.
Blue v. Board of Shawnee County Comm'rs 495*

Dismissal of Actions—Terminates Action without Considering Merits of Parties' Claims. A dismissal under K.S.A. 2021 Supp. 60-241(b) terminates an action or claim without consideration of the merits of the parties' claims. Such a dismissal contemplates a lack of action from the party pursuing the claim.
Blue v. Board of Shawnee County Comm'rs 495*

Distinction Between Types of Dismissal under Statutes. Kansas law supports a distinction between dismissals due to lack of action or missed deadlines, such as dismissal under K.S.A. 2021 Supp. 60-241(b) and default under K.S.A. 2021 Supp. 60-255, and those which are entered on the merits after consideration of the pleadings, discovery, and other evidence presented by the parties, such as K.S.A. 2021 Supp. 60-256. *Blue v. Board of Shawnee County Comm'rs* 495*

Doctrine of Collateral Estoppel—Bars Relitigating Issue Already Determined against Same Party – Elements. The common-law doctrine of collateral estoppel, like res judicata, also bars someone from relitigating an issue determined against that party. Under Kansas law, collateral estoppel may be invoked when there is a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based on ultimate facts as disclosed by the pleadings and judgment; the parties must be the same or in privity; and the issue litigated must have been determined and necessary to support the judgment. *In re Parentage of E.A.* 507*

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

Doctrine of Res Judicata—Common-law Rule of Equity—Four Elements. The doctrine of res judicata is a common-law rule of equity hoping to promote justice and sound public policy. In other words, a party should not have to litigate the same action twice. Before the doctrine of res judicata will bar a successive suit, four elements must be met: (a) the same claim; (b) the same parties; (c) claims that were or could have been raised; and (d) a final judgment on the merits.
In re Parentage of E.A. 507*

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Exception to One-Action Rule—Separate Actions by Plaintiffs against Tortfeasors if No Determination of Comparative Fault. An exception to the one-action rule allows plaintiffs to pursue separate actions against tortfeasors where there has been no judicial determination of comparative fault, but this exception does not allow defendants to bring separate actions.
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Joinder of Additional Parties—Determination of Percentage of Negligence Attributable to Each Party. The requirement to join additional parties under K.S.A. 2020 Supp. 60-258a(c) does not distinguish between tort and contract claims, but instead focuses on the need for a fact-finder to determine the percentage of negligence attributable to each party.
Great Plains Roofing and Sheet Metal, Inc. v. K Building Specialties, Inc. 204

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

Purpose of K.S.A. 60-258a—Impose Individual Liability for Damages on Proportionate Fault of All Parties to Occurrence. The intent and purpose of the Legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence which gave rise to the injuries and damages even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault. It was the intent of the Legislature to fully and finally litigate in a single action all causes of action and claims for damages arising out of any act of negligence.
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Service of Process—Restricted Mail Different than Certified Mail Service. Service of process by restricted mail is different from service by certified mail.
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CONSTITUTIONAL LAW:

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

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

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

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

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

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

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

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

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

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

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CONTRACTS:

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

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

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

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

Administrative Order of Supreme Court Addressing Timelines—Issuance of Show Cause Order Not Required before Summary Judgment Granted. A court need not issue a show cause order prior to granting summary judgment under Administrative Order 2020-PR-58.
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No Constitutional Authority to Issue Advisory Opinions. Kansas courts lack the constitutional authority to issue advisory opinions.
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Suspension of Deadlines under Administrative Order of Supreme Court—Exemption of Case if Procedures Met. A case may be exempted from the sus-

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pension of deadlines under Administrative Order 2020-PR-58 if certain procedures are met by the district court judge, appellate judicial officer, or hearing officer. *Blue v. Board of Shawnee County Comm'rs* ……..……..……..495*

CRIMINAL LAW:

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

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

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

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

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

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

Reckless Stalking—Consideration of Child's Maturity and Age in Decision by Fact-finder. Children are less mature than responsible adults. When deciding whether a child targeted by someone accused of reckless stalking in violation of K.S.A. 2019 Supp. 21-5427(a)(1) objectively feared for his safety, her safety, or a family member's safety, a fact-finder must consider the child's maturity and age in its analysis. *State v. Loganbill* . 552*

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— Statutory Requirements to Prove Stalking. K.S.A. 2019 Supp. 21-5427(a)(1) requires a person targeted by someone accused of reckless stalking (1) to subjectively fear the accused's course of conduct proving stalking and (2) to have an objectively reasonable fear of the accused's course of conduct proving stalking. *State v. Loganbill* ……..…….. 552*

— Targeted Person May Fear For His or Her Safety or Family Member's Safety to Prove Stalking. Under K.S.A. 2019 Supp. 21-5427(a)(1), a person targeted by someone accused of reckless stalking may fear for his safety, her safety, or a family member's safety after the accused engaged in the course of conduct proving stalking.
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Sentencing—Burden of Proof on State to Prove Criminal History of Defendant at Sentencing—Requirements. Under K.S.A. 2020 Supp. 21-6814, the State bears the burden to prove criminal history at sentencing. The State can satisfy its burden to establish criminal history by preparing for the court and providing to the offender a summary of the offender's criminal history. If the defendant provides written notice of any error in the summary criminal history report and describes the exact nature of that error, then the State must go on to prove the disputed portion of the criminal history. In the event the offender does not provide the required notice of alleged criminal history errors, then the previously established criminal history in the summary satisfies the State's burden, and the burden of proof shifts to the offender to prove the alleged criminal history error by a preponderance of the evidence. *State v. Hasbrouck* ……..…….. 50

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

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

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

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

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— Classification of Person Crime under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)—Elements of Out-of-State Felony Offense—Eight Circumstances. Under K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i), classification of a person crime is determined by looking at the elements of the out-of-state felony offense. The statute then lists eight "circumstances" that if any are found in the elements of the out-of-state crime, then the crime will be classified as a person crime in Kansas when a court establishes a criminal history score. The eight circumstances are found in K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i)(a)-(h). All eight circumstances depict dangerous situations in which innocent people may be harmed. The statute exempts a charged accomplice or another person with whom the defendant is engaged in the sale of a controlled substance or a noncontrolled substance. *State v. Hasbrouck* …….. 50

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

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

Stalking—Course of Conduct May Include Secretly Photographing and Filming a Person. Secretly photographing and filming a person repeatedly may constitute a course of conduct proving stalking as meant under K.S.A. 2019 Supp. 21-5427(f)(1)'s definition of "course of conduct." *State v. Loganbill* …….. 552*

— Question Whether Accused's Behavior Constitutes "Course of Conduct" as Defined by Statute. The key question when deciding whether an accused stalker's disputed behavior constituted a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1)'s definition of "course of conduct" is whether the accused's behavior evidenced his or her continuity of purpose to target the person in a way that would reasonably cause the targeted person to fear for his safety, her safety, or a family member's safety. *State v. Loganbill* ……..…….. 552*

ELECTIONS:

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

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

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EMINENT DOMAIN:

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

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

ESTATES:

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

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

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

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

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

EVIDENCE:

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

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Driving Under Influence of Alcohol—State's Requirements Met Even if Foreign Matter in Suspect's Mouth During Test. The State may meet the minimal foundational requirements of K.S.A. 2020 Supp. 8-1002(a)(3) for admissibility of a breath test even though a suspect has foreign matter in his or her mouth during the test. *State v. Fudge* 587*

KDHE's Testing Procedures for Breath Alcohol Tests—No Requirement to Check Subject's Mouth for Foreign Matter. The required testing procedures set out by the KDHE for evidentiary breath alcohol tests are in the written protocol published by the KDHE for the equipment used. KDHE's protocol for the Intoxilyzer 9000 does not require the test operator to check the subject's mouth for foreign matter. *State v. Fudge* 587*

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

INSURANCE:

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

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

JUDGES:

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

JURISDICTION:

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

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credible threat that to do so would subject them to adverse consequences. *League of Women Voters of Kansas v. Schwab* ……...…… 310

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

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

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

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

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

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

JUVENILE JUSTICE CODE:

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

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

KANSAS OPEN RECORDS ACT:

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

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

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

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

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

KANSAS TORT CLAIMS ACT:

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

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

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

LEGISLATURE:

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

MOTOR VEHICLES:

Driving under Influence of Alcohol— Statutory Requirements for Admission of Breathalyzer Test. The State meets the minimal foundational requirements for admission of a breathalyzer test by showing that the operator and the testing equipment were certified, and the testing procedures met the requirements set out by the Kansas Department of Health and Environment. K.S.A. 2020 Supp. 8-1002(a)(3). *State v. Fudge* ……. 587*

PARENT AND CHILD:

Competing Presumptions of Parentage—Determination by District Court of Best Interests of Child. When two competing presumptions of parentage arise and conflict with each other, a district court must determine which presumption is founded on the weightier considerations of policy and logic, including the best interests of the child. K.S.A. 2021 Supp. 23-2208(c). *In re Parentage of A.K*. ……..…… 536*

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

Kansas Adoption and Relinquishment Act—Purpose—Adoption Granted with Consent of Parent or Both Parents or Those in Place of Parents. The Kansas Adoption and Relinquishment Act recognizes the primary importance natural parents have in a child's life, and adoptions will be granted with the consent of a parent, or both parents, or from those who are legally in the place of parents such as an adoption agency. The Adoption Act permits any adult to adopt a minor child, but only with the parents' consent. Consent to an adoption shall be given by the living parents of the child whose rights

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have not been terminated unless one of the parents' consent is found unnecessary under certain rules set out in the Adoption Act. K.S.A. 2021 Supp. 59-2113; K.S.A. 2021 Supp. 59-2129. *In re Parentage of E.A.* ….….. 507*

Kansas Parentage Act—Legal Presumption— Any Person on Behalf of Child May Bring Action under Statute. The Kansas Parentage Act focuses on legal presumptions that arise from a child's circumstances. The Act provides that any person on behalf of a child may bring an action at any time to determine the existence of a parent and child relationship presumed under K.S.A. 2021 Supp. 23-2208. K.S.A. 2021 Supp. 23-2209.
In re Parentage of E.A. ……..…. 507*

Kansas Parentage Act—Statutory Definition of Parent and Child Relationship. According to the Kansas Parentage Act, a parent and child relationship means the legal relationship existing between a child and the child's biological or adoptive parents. K.S.A. 2021 Supp. 23-2205.
In re Parentage of A.K. ……..…… 536*

Presumption of Parentage Must Be Claimed at Time of Child's Birth. Anyone trying to establish a presumption of parentage by openly and notoriously claiming parentage must do so at the time of the child's birth.
In re Parentage of E.A. …….. 507*

Presumption of Parentage under Statute—Clear and Convincing Evidence of Paternity by Another Person May Rebut Presumption of Parentage. A presumption of parentage may be rebutted "by clear and convincing evidence," "by a court decree establishing paternity of the child by another man," or by another presumption. When a presumption is rebutted, "the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence." K.S.A. 2021 Supp. 23-2208(b). If two or more presumptions arise and conflict with each other, "the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control." K.S.A. 2021 Supp. 23-2208(c). *In re Parentage of E.A.* ……..…. 507*

Presumption of Parentage under Statute—Requirement of Consent of Birth Mother or Notoriously Recognize Maternity at Child's Birth. A presumption under K.S.A. 2021 Supp. 23-2208(a)(4) does not arise or is rebutted if either the birth mother did not consent to share parenting duties or the petitioner did not notoriously recognize maternity at the time of the child's birth. *In re Parentage of A.K.* ……..…… 536*

Presumption of Paternity—Marriage and Child's Father Named on Birth Certificate—No Time Limit under Statute. A man is presumed to be the father of a child if after the child's birth, the man and the child's mother have married and, with the man's consent, the man is named as the child's father on the child's birth certificate. The statute does not say how long after the child's birth. There is no time limit set by K.S.A. 2021 Supp. 23-2208(a)(3). *In re Parentage of A.K.* ……..…… 536*

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Presumptive Mother under Statute—Artificial Insemination Cases. A woman can be a presumptive mother under K.S.A. 2021 Supp. 23-2208(a)(4) without claiming to be a biological or adoptive mother. Such a presumption is a "legal fiction" of biological parentage in cases involving artificial insemination. Thus, a child can have two mothers rather than a mother and a father.
In re Parentage of A.K. 536*

Request for Grandparent Visitation under Statute—Factors for Consideration by Court. When considering a request for grandparent visitation, in addition to considering under K.S.A. 2018 Supp. 23-3301(b), the best interests of the child and whether a substantial relationship exists between grandparent and child, the court must presume that a fit parent is acting in the child's best interests and must give special weight to a fit parent's proposed grandparent visitation plan. The court cannot adopt a grandparent's conflicting plan without first finding that the parent's proposed plan is unreasonable. The burden is on the grandparent to rebut the presumption that a fit parent's proposed visitation plan is reasonable. Reasonableness is assessed in light of the totality of the circumstances.
Schwarz v. Schwarz 103

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

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

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

REAL PROPERTY:

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

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

SEARCH AND SEIZURE:

Exigent Circumstances—Allows Warrantless Search of Fifth-Wheel Camper. The exigent circumstances which allow warrantless searches of motor vehicles also allow warrantless searches of a fifth-wheel camper attached to a vehicle that is traveling on a public roadway and is so situated that an objective observer would conclude it was not being used as a residence at the time of the search. *State v. Crudo* 464*

Probable Cause to Search Vehicle—Allows Warrantless Search of Fifh-Wheel Camper and Containers Inside and Outside Vehicle. If officers have probable cause to search a vehicle, they have probable cause to search containers inside and attached to the outside of the vehicle which they have probable cause to believe may contain contraband or evidence of a crime. This includes searching a fifth-wheel camper attached to a vehicle when both are traveling on a public roadway in the possession and control of the defendant. *State v. Crudo* 464*

STATUTES:

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

SUMMARY JUDGMENT:

Process for Summary Judgment under Statute. The summary judgment process is initiated when any party seeks judgment on all or part of a claim by filing a motion, with or without supporting affidavits, under K.S.A. 2021 Supp. 60-256(a).
Blue v. Board of Shawnee County Comm'rs 495*

TAXATION:

Ad Valorem Tax Valuation—Property Management Contract—Consideration in Real Estate Valuation. A property management contract is a personal contractual obligation which may but does not have to be considered in valuing real estate for ad valorem tax purposes. A property management contract is a personal contractual obligation which may but does not have to be considered in valuing real estate for ad valorem tax purposes.
In re Equalization Appeal of Kansas Star Casino 443*

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

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

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

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

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

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

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

TORTS:

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

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

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

TRIAL:

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

Consolidation of Criminal Cases for Trial—Applying Base Sentence Rules Separately to Convictions Violates Equal Protection Clause. When two or more criminal cases are consolidated for trial because all the charges could have been brought in one charging document, then applying the base sentence rules under K.S.A. 2020 Supp. 21-6819(b) separately to the defendant's convictions in each case violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
State v. Myers ……..…….. 149

— Conviction of Multiple Charges—Compliance with Equal Protection Clause. For K.S.A. 2020 Supp. 21-6819(b) to comply with the Equal Protection Clause of the Fourteenth Amendment, when two or more cases are consolidated for trial because all the charges could have been brought in one charging document, and the defendant is convicted of multiple

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charges at trial, the defendant shall be sentenced using only one primary crime of conviction and one base sentence, as though all the charges had been brought in one complaint. *State v. Myers* ……..…….. 149

TRUSTS:

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

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

WORKERS COMPENSATION:

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

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

– – When Machine Manufactured by Employer Injures Employee—No Application of Doctrine. The dual capacity doctrine does not apply when a machine manufactured by the employer injures the employee since the employer has a duty to its employees to maintain a safe work environment. *Jefferies v. United Rotary Brush Corp*. ……. 354

Dual Purpose of K.S.A. 44-504. The Kansas Legislature enacted the provisions of K.S.A. 44-504 to serve a dual purpose. First, K.S.A. 44-504(a) preserves an injured worker's right to assert a claim to recover damages

PAGE

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

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

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

(518 P.3d 1243)

No. 122,201[1]

In the Matter of the Equalization Appeal of KANSAS STAR CASINO, L.L.C. for the Year 2018 in Sumner County, Kansas.

SYLLABUS BY THE COURT

TAXATION—*Ad Valorem Tax Valuation—Property Management Contract—Consideration in Real Estate Valuation*. A property management contract is a personal contractual obligation which may but does not have to be considered in valuing real estate for ad valorem tax purposes. A property management contract is a personal contractual obligation which may but does not have to be considered in valuing real estate for ad valorem tax purposes.

Appeal from Kansas Board of Tax Appeals. Opinion filed January 28, 2022. Affirmed.

David R. Cooper and *Andrew D. Holder*, of Fisher, Patterson, Sayler & Smith, L.L.P., of Topeka, for appellant Sumner County.

Jarrod C. Kieffer and *Frank W. Basgall*, of Stinson LLP, of Wichita, for appellee Kansas Star Casino, L.L.C.

Before GARDNER, P.J., SCHROEDER and CLINE, JJ.

CLINE, J.: This case is the most recent in a continuous succession of property tax disputes between Sumner County, Kansas (the County), and Kansas Star Casino, L.L.C. (Kansas Star), in Mulvane, Kansas. The County appeals the decision of the Board of Tax Appeals (BOTA) establishing a valuation of Kansas Star's real property for imposing ad valorem tax for the 2018 tax year.

While the parties continue to quarrel, they have significantly narrowed their dispute. This appeal involves the limited issue of Kansas Star's commercial use value; specifically, the valuation of its "ancillary facilities" (the indoor arena, conference center,

[1]**REPORTER'S NOTE:** Previously filed as an unpublished opinion, the Supreme Court granted a motion to publish by an order dated September 30, 2022, under Rule 7.04(e) (2022 Kan. S. Ct. R. at 47). The published opinion was filed with the Clerk of the Appellate Courts on October 7, 2022 .

and open-air pavilion). The County argues Kansas Star's management contract with the State is a land use restriction which requires consideration of the ancillary facilities in Kansas Star's fair market value. The County contends BOTA erred when it wholly depreciated those facilities as functionally obsolete for superadequacy.

Other panels of this court have rejected the County's arguments when considering BOTA's valuation decisions in past tax years. We see no reason to disagree with those well-reasoned decisions, so we affirm BOTA's valuation of Kansas Star for tax year 2018.

FACTS

In what has become a nearly annual event, the ongoing dispute between the County and Kansas Star concerning the value of Kansas Star's property continues. Panels of this court have considered appeals by these same parties for every tax year from 2012 through 2017. See *In re Equalization Appeal of Kansas Star Casino*, 52 Kan. App. 2d 50, 362 P.3d 1109 (2015) (2012 tax year); *In re Equalization Appeals of Kansas Star Casino*, No. 119,438, 2020 WL 2296977 (Kan. App.) (unpublished opinion) (2016 and 2017 tax years), *rev. denied* 312 Kan. 892 (2020); *In re Equalization Appeal of Kansas Star Casino*, No. 116,782, 2018 WL 3486173 (Kan. App. 2018) (unpublished opinion) (2015 tax year); *In re Equalization Appeal of Kansas Star Casino*, No. 116,421, 2018 WL 2749734 (Kan. App. 2018) (unpublished opinion) (2014 tax year); *In re Equalization Appeal of Kansas Star Casino*, No. 115,587, 2018 WL 2748748 (Kan. App. 2018) (unpublished opinion) (2013 tax year). Most recently, this court also issued an opinion concerning BOTA's decision on remand for the 2014 and 2015 tax years. *In re Equalization Appeal of Kansas Star Casino*, No. 121,469, 2021 WL 2021829 (Kan. App. 2021) (unpublished opinion), *rev. denied* 314 Kan. 854 (2021).

Many of the background facts, especially those concerning the history of the Kansas Expanded Lottery Act (KELA), K.S.A. 74-8733 et seq., and the ultimate decision to award Kansas Star the management contract, have been recounted in previous opinions by this court. Likewise, the arguments the County makes on

appeal are very similar to those previously argued. As such, we will summarize and discuss these facts and arguments as necessary.

KELA divided the state into the northeast, south central, southwest, and southeast gaming zones and authorized the Kansas Lottery Commission to operate a single gaming facility in each gaming zone. K.S.A. 74-8734(a), (d), (h)(19). Kansas Star operates one of four state-sponsored gaming enterprises authorized under KELA.

Under KELA, the State owns a casino's gaming operations but hires gaming facility managers through management contracts to construct and own improvements and infrastructure and manage gaming operations. KELA states that an approved management contract "allow[s] the lottery gaming facility manager to manage the lottery gaming facility in a manner consistent with this act and applicable law, but shall place full, complete and ultimate ownership and operational control of the gaming operation of the lottery gaming facility with the Kansas lottery." K.S.A. 74-8734(h)(17). Kansas Star—operating under its parent company—is the gaming facility manager of the south central gaming zone, which consists of Sumner County and Sedgwick County. K.S.A. 74-8702(f).

Every management contract must include terms and conditions for "ancillary lottery gaming facility operations" under K.S.A. 74-8734(h)(7), which has been defined as "additional non-lottery facility game products and services . . . [which] may include, but are not limited to, restaurants, hotels, motels, museums or entertainment facilities." K.S.A. 74-8702(a). The Kansas Lottery Commission is also the licensee and owner of all software programs associated with lottery facility games, and all such games are subject to Kansas lottery control. See K.S.A. 74-8734(n).

In 2010, the State entered a management contract with Peninsula Gaming, Kansas Star's former parent company. Paragraph 14 of the management contract stated, in part:

"[Peninsula], at its sole cost and expense, must diligently construct the buildings and related improvements for its Ancillary Lottery Gaming Facility Operations substantially in accordance with [its] Application for Lottery Gaming Facility

Manager . . . and [its] representations to the Kansas Lottery Commission, Lottery Gaming Facility Review Board, the Kansas Racing and Gaming Commission, or the governing body of the city or county where the Lottery Gaming Facility is to be located . . . ."

Later in the same paragraph it states:

"In addition to any other remedy available . . . under this Agreement, solely with respect to this Paragraph 14, [Peninsula's] failure to substantially perform its Ancillary Lottery Gaming Facility Operations obligations according to objectively verifiable standards (for example, if the plans provide for the building of a restaurant and the restaurant is not built) and, provided such failure cannot be disputed in good faith, will authorize the [Kansas Lottery] to withhold payment of [Peninsula's] compensation for which it would otherwise be entitled . . . less such amounts necessary . . . to meet all cash operating payments, obligations and liabilities payable pursuant to the Budget and debt service payments payable to third-party lenders . . . ."

Boyd Gaming Corporation acquired Peninsula—and Kansas Star—in 2012. But Kansas Star has continued to operate as the gaming facility manager for the south central zone.

Kansas Star's Property

Construction of Kansas Star's building complex took place in multiple phases beginning in December 2011. During the initial phase, Kansas Star constructed a temporary casino housed in its arena. During the next phase, Kansas Star constructed its permanent casino, which opened in December 2012. Once the permanent casino opened, Kansas Star converted the arena to its permanent configuration and held its first event in June 2013. The next phase of construction consisted of building the conference center and open-air event pavilion, which Kansas Star completed in January 2015. These buildings are all located on a 195.5-acre tract of land owned by Kansas Star.

It is undisputed that the Kansas Star Arena has not proven to be profitable. In every year that is has been fully operational, it has suffered an operating loss. Beginning in 2014, the arena suffered an operating loss of $707,691. It suffered an operating loss of $160,063 in 2015; $211,943 in 2016; and $9,452 in 2017. The operating loss only includes the total losses on individual events; it does not include fixed overhead expenses such as maintenance, utilities, and advertising.

Similarly, Kansas Star's equine facility has not been heavily used. In 2013, no equine events were held. In 2014, Kansas Star

hosted 5 equine events over 12 days. In 2015—after the open-air event pavilion and stalls had been constructed—Kansas Star hosted five equine events over nine days. In 2016, Kansas Star hosted three equine events over eight days. And in 2017, Kansas Star hosted two equine events over six days. As a result, Kansas Star negotiated with the Kansas Lottery Commission and was allowed to scale back its permanent equine facilities—including the amount of practice arenas and permanent stalls—in favor of conference space. According to Kansas Star, it is open to hosting more equine events, but it has not had success in attracting them.

The underlying concern in each of the parties' appeals has been the valuation of Kansas Star for ad valorem tax purposes. At the heart of this concern is their opposite positions on the depreciation of the ancillary facilities. That continues to be the case.

In April 2019, BOTA held a two-day evidentiary hearing to determine the valuation of Kansas Star's property. The County first presented testimony from appraiser Leslie Sellers, MAI. According to Sellers, BOTA needed to account for KELA and the management contract when determining the fair market value of Kansas Star. He noted that, even if Kansas Star might make more money without the ancillary facilities, the management contract required their construction. Thus, Sellers believed the property did not suffer from functional obsolescence except for the conversion of the temporary casino into the arena.

Next, the County presented the testimony of appraiser Richard Jortberg, MAI. Jortberg had appraised the Kansas Star for the County in each tax year since 2012, including 2018. Jortberg agreed with Sellers that BOTA needed to account for KELA and the management contract when determining the fair market value of Kansas Star. He noted that, even if Kansas Star might make more money without the ancillary facilities, the management contract required their construction. He said KELA enabled a casino to operate on the property, and the facilities built on the property had to comply with the management contract. He also believed Kansas Star's current configuration was the highest and best use of the property.

Since the current configuration of the Kansas Star property was the highest and best use, Jortberg explained this meant the

property did not have a functional problem. As a result, Jortberg concluded the property suffered from no functional obsolescence. After combining his land value and reproduction costs estimates, then deducting depreciation, Jortberg concluded $180,000,000 to be the rounded fair market value of the property under the cost approach.

In response, Kansas Star presented the testimony of Robert Jackson, MAI, a certified general real property appraiser. Jackson prepared an appraisal report for Kansas Star that served as the basis of his testimony. Kansas Star also presented the testimony of Scott Schroeder, Kansas Star's Director of Finance, and Cory Morowitz, a gaming consultant.

Jackson explained that the property suffered from functional and external obsolescence in the form of superadequacy (just as he had opined in tax years 2016 and 2017). See *In re Equalization Appeals of Kansas Star Casino*, 2020 WL 2296977, at *4-5. To support his conclusion, Jackson noted that gaming revenue stabilized in 2012, the first year of operation, and the opening of the ancillary facilities did not have a significant impact on gaming revenues, despite projections to the contrary.

Similarly, Jackson analyzed the net revenue and net income of Kansas Star from 2012 through 2017. From 2013 through 2017, net revenue had been relatively flat, while net income reached its peak in 2012 and had not reached that level since. This led Jackson to conclude the ancillary facilities negatively affected Kansas Star's net income. As a result, Jackson concluded the ancillary improvements were 100% obsolete. After adding his land value and reproduction cost estimates, and then deducting depreciation, Jackson concluded that Kansas Star's fair market value under the cost approach was $78,100,000 for tax year 2018.

Schroeder testified about Kansas Star's difficulties in booking events at the arena, explaining that Kansas Star competes in a saturated market (it is one of four arenas in the Wichita area) and is at a disadvantage related to location and size. Schroeder also explained that Kansas Star sees little uptick in gaming revenue on days when events occur. Schroeder said the arena has never operated at a profit after accounting for comp tickets.

Schroeder explained that the equine events have been similarly unsuccessful. In his experience, the events were costly to host because of the preparation required. For example, it costs Kansas Star about $14,000 to haul dirt in and out of the arena. This cost, as well as other costs associated with staffing, cleaning, and security, reduce the profitability of the equine events. They also do not generate tourism like Kansas Star had hoped. Like arena event days, the equine events also do not generate a large increase in gaming revenue. In sum, if Kansas Star could start construction from the beginning, Schroder believed it would not build the arena and conference center to maximize profitability.

Last, Morowitz testified about his analysis of the effect of the arena events on admissions and revenue. He said the arena operated "at minimal performance, it adds no value to the gaming operation, and it's—and from our terms as a gaming consultant, is functionally obsolete." To support his claim, Morowitz explained that Kansas Star's gaming revenue peaked midway through 2013, at approximately the same time the temporary casino had been converted to the arena. In the months following the arena's opening, gaming revenue declined before stabilizing near the end of 2014.

Morowitz reviewed admissions and revenue data for event and nonevent days. He explained that in the gaming industry, gaming revenue can be explained by the Pareto Principle, which states that roughly 20% of customers drive 80% of gaming revenues. On days when events take place, many of the people that come to a casino do not behave the same as a customer who comes to a casino specifically to game. Thus, while admissions and food and beverage revenues increase, gaming revenues do not enjoy the same positive impact. As evidence of this point, Morowitz presented data showing that Kansas Star had higher than average admissions 60% of Fridays and 71% of Saturdays when it had events. Yet during those same Fridays and Saturdays, Kansas Star experienced below average gaming revenues on 57% of Fridays and 47% of Saturdays. If admissions drove gaming revenue, Morowitz said the positive impact of admissions would more closely mirror the positive impact of gaming revenue. In

sum, Morowitz, like Schroeder, believed the arena events provided no statistically significant effect on gaming revenue. The profit and loss statements of the arena reinforced this conclusion.

As for obsolescence, Morowitz said it was not atypical for a casino to overbuild. He said casinos often build additional facilities they do not need hoping to attain more revenue, but these additions can add little or no value to the casino. He believed this to be the case with the arena, pointing to the fact that the arena is not often used.

Sometime after the hearing, BOTA issued its Full and Complete Decision. Both parties' experts testified the cost approach yielded the most reliable valuation results, and BOTA adopted this approach in its final valuation. BOTA adopted Jackson's conclusions about the commercial value of the casino and adopted factors from both parties' experts to determine the land value. As a result, BOTA concluded Kansas Star's total value was $78,913,590, which consisted of $78,903,300 commercial use value and $10,290 of agricultural use value. The parties have not appealed the portion of BOTA's opinion addressing the land value.

The County then petitioned for judicial review with this court.

ANALYSIS

Standards of Review

Under K.S.A. 74-2426(c)(4)(A), any aggrieved person has the right to appeal an order of BOTA by petitioning this court. This time, only the County petitioned for judicial review. We review BOTA's decision in the manner prescribed by the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq., because BOTA orders are subject to KJRA review. K.S.A. 74-2426(c).

Tax statutes must be construed strictly in favor of the taxpayer. Interpretation of a statute is a question of law subject to de novo review. *In re Tax Appeal of BHCMC*, 307 Kan. 154, 161, 408 P.3d 103 (2017). Thus, the agency's interpretation of a statute is given no deference. See *May v. Cline*, 304 Kan. 671, 675, 372 P.3d 1242 (2016); *Douglas v. Ad Astra Information Systems*, 296 Kan. 552, 559, 293 P.3d 723 (2013). This ruling was specifically

applied to BOTA decisions in *In re Tax Exemption Application of Kouri Place*, 44 Kan. App. 2d 467, 471-72, 239 P.3d 96 (2010).

"When determining the validity of an assessment of real property for uniformity and equality in the distribution of taxation burdens, the essential question is whether the standards prescribed in K.S.A. 2013 Supp. 79-503a have been considered and applied by taxing officials. *Krueger v. Board of Woodson County Comm'rs*, 31 Kan. App. 2d 698, 702, 71 P.3d 1167 (2003), *aff'd* 277 Kan. 486, 85 P.3d 686 (2004)." *In re Equalization Appeal of Tallgrass Prairie Holdings*, 50 Kan. App. 2d 635, 649, 333 P.3d 899 (2014).

Eight standards under which an appellate court must grant relief are set forth in K.S.A. 77-621(c). The County relies on K.S.A. 77-621(c)(4), (c)(5), (c)(7), and (c)(8) to support its argument that relief should be granted. Under K.S.A. 77-621(c)(4), we grant relief if we determine that BOTA "erroneously interpreted or applied the law." Under K.S.A. 77-621(c)(5), we grant relief if we determine that BOTA "engaged in an unlawful procedure or has failed to follow prescribed procedure."

Under K.S.A. 77-621(c)(7), we grant relief if we determine that BOTA's "action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole." The statute then defines "'in light of the record as a whole'" to include the evidence both supporting and detracting from an agency's finding. K.S.A. 77-621(d). "'Substantial competent evidence possesses both relevance and substance and provides a substantial basis of fact from which the issues can be reasonably determined.' [Citation omitted.]" *In re Equalization Appeal of Wagner*, 304 Kan. 587, 599, 372 P.3d 1226 (2016). When reviewing the record, we do not reweigh the evidence or engage in de novo review. K.S.A. 77-621(d).

Finally, under K.S.A. 77-621(c)(8), we grant relief if we determine that BOTA's "action is otherwise unreasonable, arbitrary or capricious." The test for arbitrary and capricious conduct under that subsection of the statute "relates to whether a particular action should have been taken or is justified, such as the reasonableness of an agency's exercise of discretion in reaching the determination, or whether the agency's action is without foundation

in fact." *Lario Oil & Gas Co. v. Kansas Corporation Comm'n*, 57 Kan. App. 2d 184, 205, 450 P.3d 353 (2019) (citing *Kansas Dept. of Revenue v. Powell*, 290 Kan. 564, 569, 232 P.3d 856 [2010]). The County, as the party challenging BOTA's action, has the burden of proving arbitrary and capricious conduct. See *In re Equalization Appeal of Tallgrass Prairie Holdings*, 50 Kan. App. 2d at 643.

General Concepts of Ad Valorem Taxation

Unless specifically exempted, all real and tangible personal property in Kansas is subject to taxation on a uniform and equal basis. Kan. Const. art. XI, § 1(a); K.S.A. 79-101. The Legislature enacted a statutory scheme to ensure property is appraised in a uniform and equal manner for ad valorem tax purposes. A central component of this statutory scheme is the requirement that property be appraised "at its fair market value as of January 1 in accordance with K.S.A. 79-503a unless otherwise specified by law." K.S.A. 79-1455.

Fair market value for ad valorem tax purposes has been defined as "'[a]bsolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat.' The Appraisal of Real Estate, p. 114 (13th ed. 2008)." *In re Equalization Appeal of Prieb Properties*, 47 Kan. App. 2d 122, 130, 275 P.3d 56 (2012); see also *In re Equalization Proceeding of Amoco Production Co.*, 33 Kan. App. 2d 329, 336-40, 102 P.3d 1176 (2004) (holding Kansas ad valorem valuation contemplates valuation of the fee simple interest).

> "Kansas tax statutes do not use the term 'fee simple'; however, it is clear that the legislative intent underlying the statutory scheme of ad valorem taxation in our State has always been to appraise the property as if in fee simple, requiring property appraisal to use market rents instead of contract rents if the rates are not equal. K.S.A. 79-501 requires that each parcel of real property be appraised for taxation purposes to determine its fair market value. In turn, K.S.A. 2010 Supp. 79-503a defines 'fair market value' as 'the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting *for property* in an *open and competitive market*, assuming that the parties are acting without undue compulsion.' (Emphasis added.) It is clear, therefore, that the fair market value statute values *property* rights, not *contract* rights." *In re Prieb Properties*, 47 Kan. App. 2d at 130-31.

This concept aligns with K.S.A. 79-102, which states: "[T]he terms 'real property,' 'real estate,' and 'land,' when used in this act, except as otherwise specifically provided, shall include not only the land itself, but all buildings, fixtures, improvements, mines, minerals, quarries, mineral springs and wells, rights and privileges appertaining thereto." This definition requires all rights and privileges in real property to be valued. But "[f]or purposes of ad valorem taxation, Kansas law requires the valuation of the fee simple estate and not the leased fee interest." *In re Prieb Properties*, 47 Kan. App. 2d 122, Syl. ¶ 6.

As stated, Kansas law assumes the hypothetical condition of an assumed sale as of January 1 of the applicable tax year when determining ad valorem valuation. As such, Kansas' statutory scheme "is a surrogate for a real marketplace event." *Hixon v. Lario Enterprises, Inc.*, 19 Kan. App. 2d 643, 646, 875 P.2d 297 (1994), *aff'd as modified* 257 Kan. 377, 892 P.2d 507 (1995). Practically speaking, the parties pretend "that each piece of property is sold on January 1 of the year in which the appraisal is done in an arm's length transaction." 19 Kan. App. 2d at 647. This is often called a hypothetical sale of the subject property.

Fair market value is the key to determining a value for the hypothetical sale. K.S.A. 79-503a provides:

> "'Fair market value' means the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. In the determination of fair market value of any real property which is subject to any special assessment, such value shall not be determined by adding the present value of the special assessment to the sales price."

Additionally, K.S.A. 79-503a contains a list of nonexclusive factors to provide guidance on the methods that may be used to determine fair market value:

> "Sales in and of themselves shall not be the sole criteria of fair market value but shall be used in connection with cost, income and other factors including but not by way of exclusion:
> (a) The proper classification of lands and improvements;
> (b) the size thereof;
> (c) the effect of location on value;

(d) depreciation, including physical deterioration or functional, economic or social obsolescence;

(e) cost of reproduction of improvements;

(f) productivity taking into account all restrictions imposed by the state or federal government and local governing bodies, including, but not limited to, restrictions on property rented or leased to low income individuals and families as authorized by section 42 of the federal internal revenue code of 1986, as amended;

(g) earning capacity as indicated by lease price, by capitalization of net income or by absorption or sell-out period;

(h) rental or reasonable rental values or rental values restricted by the state or federal government or local governing bodies, including, but not limited to, restrictions on property rented or leased to low income individuals and families, as authorized by section 42 of the federal internal revenue code of 1986, as amended;

(i) sale value on open market with due allowance to abnormal inflationary factors influencing such values;

(j) restrictions or requirements imposed upon the use of real estate by the state or federal government or local governing bodies, including zoning and planning boards or commissions, and including, but not limited to, restrictions or requirements imposed upon the use of real estate rented or leased to low income individuals and families, as authorized by section 42 of the federal internal revenue code of 1986, as amended; and

(k) comparison with values of other property of known or recognized value. The assessment-sales ratio study shall not be used as an appraisal for appraisal purposes."

When determining hypothetical conditions under which a January 1 sale would take place, the fee simple interest must also be considered. While the fee simple interest of real estate consists of every stick in the bundle of rights, the hypothetical sale must only include the sticks in the bundle of rights and not include intangible interests or enterprise value. See K.S.A. 79-102 (stating only tangible property is taxable); *In re Tax Protest of Strayer*, 239 Kan. 136, 142, 716 P.2d 588 (1986) (intangible property interests are not taxable for property tax purposes).

Appraisals for ad valorem taxation purposes must comply with the Uniform Standards of Professional Appraisal Practice (USPAP). K.S.A. 79-506(a). In addition, the ad valorem appraisal process must "conform to generally accepted appraisal procedures and standards which are consistent with the definition of fair market value unless otherwise specified by law." K.S.A. 79-503a. Whether an appraisal complies with USPAP, as required by K.S.A. 79-503a and K.S.A. 79-506(a), is an issue of

law subject to de novo review. See *In re Tax Appeal of Dillon Stores*, 42 Kan. App. 2d 881, 885, 891-92, 221 P.3d 598 (2009). For these reasons, "BOTA cannot apply a methodology the appraisers themselves could not." *In re Equalization Appeal of Kansas Star Casino,* 2018 WL 2749734, at *20.

With these concepts and standards in mind, we consider the County's arguments.

BOTA's Cost Approach Analysis

BOTA adopted the cost approach when calculating Kansas Star's fair market value, which neither party disputes as the proper approach. This court has stated that "[t]he cost approach has three components: (1) land value; (2) reproduction/replacement costs; and (3) depreciation." *In re Equalization Appeal of Kansas Star Casino*, 2021 WL 2021829, at *5. Neither party disputes BOTA's conclusions regarding land value or reproduction/replacement costs. BOTA valued Kansas Star's commercial use land at $10,124,400, which it arrived at by multiplying the per acre value of $76,700 by 132 acres of commercial use land. The parties stipulated that the 63.5 acres leased for agricultural purposes had an agricultural use value of $10,290. By adopting the rest of Jackson's conclusions, BOTA used a replacement cost new estimate of $159,210,363.

Obsolescence and Highest and Best Use

The County does not challenge any of these precise calculations. Instead, it argues BOTA's conclusion that the ancillary facilities are superadequate is erroneous because it does not comply with USPAP, is unsupported by substantial competent evidence, and is arbitrary and capricious. The County argues that BOTA erred in its depreciation analysis because it failed to consider the requirements of the management contract as part of its fair market value analysis. As such, the County argues Kansas Star's ancillary facilities do not suffer from functional obsolescence in the form of superadequacy as a matter of law.

"Functional obsolescence is caused by a flaw in the structure, materials, or design of an improvement when the improvement

is compared with the highest and best use and the most cost-effective functional design requirements at the time of the appraisal." The Appraisal of Real Estate, Appraisal Institute, 623 (14th ed. 2013).

Functional obsolescence can take two forms: functional inadequacy and superadequacy. The Appraisal of Real Estate, Appraisal Institute, 623 (14th ed. 2013). Here, the dispute centers on superadequacy. Superadequacy is "some aspect of the subject property [that] exceeds market norms." The Appraisal of Real Estate, Appraisal Institute, 623 (14th ed. 2013). After identifying the flaws in the improvements on a given property, an appraiser must compare those flaws to the property's highest and best use. As a result, a property's highest and best use must first be determined when analyzing functional obsolescence. The Appraisal of Real Estate, Appraisal Institute, 623-24 (14th ed. 2013).

The Appraisal Institute defines highest and best use as "[t]he reasonably probable use of property that results in the highest value." The Appraisal of Real Estate, Appraisal Institute, 332 (14th ed. 2013). The four criteria for the highest and best use analysis are: (1) physical possibility; (2) legal permissibility; (3) financial feasibility; and (4) maximum productivity. The Appraisal of Real Estate, Appraisal Institute, 335 (14th ed. 2013). A use must meet all criteria to be considered. The Appraisal of Real Estate, Appraisal Institute, 332 (14th ed. 2013). Legally permissible uses "conform to the land's current zoning classification and local building codes along with any other relevant regulatory or contractual restrictions on land use." The Appraisal of Real Estate, Appraisal Institute, 334 (14th ed. 2013).

The Appraisal Institute also has a seven-step process to analyze the potential for functional obsolescence.

"1. Identify the functional problem.

"2. Identify the component (or components) in the facility, or the lack of a component (or components), association with the Problem.

"3. Identify possible corrective measures and the related costs to cure.

"4. Select the most appropriate corrective measure.

"5. Quantify the loss caused by the functional problem, which results in added value if the problem is corrected.

"6. Determine if the item is curable or incurable. (If the value added is equal to or greater than the cost to cure, the functional problem is curable.)

"7. Apply the functional obsolescence procedure to calculate the amount of depreciation caused by the functional problem." The Appraisal of Real Estate, Appraisal Institute, 626 (14th ed. 2013).

When Jortberg visited the property, he did not observe any issues with the construction materials or mechanical systems. He also concluded the property as constructed served as its highest and best use, mainly focusing on the legally permissive aspect of the highest and best use analysis. In his opinion, the ancillary facilities were all legally required. He did not believe Kansas Star had a functional problem, rendering the rest of the steps in the analysis superfluous. Thus, in his view, the property suffered from no functional obsolescence.

But BOTA rejected this argument. BOTA's final decision stated, in part:

"The Board finds the County's argument that the subject ancillary facilities have no functional obsolescence as these non-gaming improvements are the only legally permissible use of the property is in error. This argument was presented and fully adjudicated by the Board in its recent remand decision on the 2015 tax year appeal of the subject property, wherein the Board held as follows:

"'Examination of KELA does not indicate that an arena is specifically required for the operation of a casino of Kansas. KELA authorizes the Kansas Lottery Commission to approve a management contract with a prospective lottery gaming facility manager to manage a "lottery gaming facility" or "lottery gaming enterprise." K.S.A. 74-8734(e). KELA defines a "lottery gaming facility" as just a casino, whereas a "lottery gaming enterprise" is a casino and ancillary lottery gaming facility operations. K.S.A. 74-8702(m) and 74-8702(l). KELA defines "ancillary lottery gaming facility operations" as "additional non-lottery facility game products and services . . . which may be included in the overall development . . . [that] may include, but are not limited to, restaurants, hotels, motels, museums or entertainment facilities." The subject property currently contains multiple restaurants and bars, as well as being attached to a separately owned hotel. Therefore, the subject property, both with or without the arena, satisfies the KELA requirements of either a "lottery gaming facility" or "lottery gaming enterprise." As such, while the arena is a requirement of Kansas Star's management contract, the arena is neither a statutory requirement of KELA, nor a specific requirement for obtaining a management contract.

"'The Board, further, finds that the County improperly equates Kansas Star's contractual obligations via the management contract with "legal obligations" or "land use restrictions" for purposes of determining fee simple real estate value for Kansas ad valorem taxation purposes. The Board finds this argument inconsistent with Kansas law. Kansas law is very clear that personal contractual obligations, such as leases, are not part of the fee simple interest in real estate to be valued for ad valorem tax purposes. *See In re Prieb Properties,*

L.L.C., 47 Kan. App. 2d at 131. (holding, in the context of sale leaseback agreements "[i]t is clear, therefore, that the fair market value statute values property rights, not contract rights.") Moreover, KELA explicitly provides that the management contract is not a land-use restriction as it "shall not constitute property, nor shall it be subject to attachment, garnishment or execution, nor shall it be alienable or transferable, except upon approval by the executive director, nor shall it be subject to being encumbered or hypothecated." K.S.A. 74-8734(m).

"'While the subject ancillary facilities were constructed to comply with the management contract and KELA, the Board has not been persuaded that the subject property, as currently comprised, is the only legally permissible configuration of the property as argued by the County. As such, the County's argument that the existing ancillary improvements are legally required and, therefore, the subject property suffers from no functional or external obsolescence is not supported.'"

Based on these conclusions, BOTA adopted Jackson's appraisal conclusions. As for the highest and best use as vacant, Jackson concluded it was "the development of a casino gaming facility that is appropriately sized and designed to meet the demand of the market, in order to maximize gaming associated revenues, while minimizing the capital investment."

The County believes KELA and the management contract prevents this conclusion because "[t]he management contract imposes use restrictions and building requirements that are legal requirements which are a factor that 'shall be used in connection' with determining fair market value under K.S.A. 79-503a(j)." Thus, the County contends BOTA cannot disregard the management contract when determining fair market value.

Yet as Kansas Star points out, a panel of this court rejected this argument in its opinion about the 2016 and 2017 tax years. See *In re Equalization Appeals of Kansas Star Casino*, 2020 WL 2296977, at *15-16. There, the panel held that "BOTA may take the management contract into consideration in valuing the subject property but is not required to do so." 2020 WL 2296977, at *16. The County essentially concedes this point, stating that it has filed a petition with our Supreme Court to review that decision. But our Supreme Court denied the County's petition for review shortly after it filed its brief in this case.

This court's most recent opinion on the 2014 and 2015 tax years reinforces this conclusion. Since the County did not have the benefit of seeing this opinion—which was released on May 21, 2021—before filing its brief here, it is unsurprising that its

arguments in this appeal are the same as those presented in that case. Even so, this court has already rejected them. As for BOTA's 2015 tax year conclusions—which BOTA explicitly relied on in its tax year 2018 decision—the panel stated:

"The County overly equates KELA and Kansas Star's personal management contract. Kansas Star does not dispute that KELA is a land use restriction that applies to all land used for a casino. But the management contract is a *personal* contractual agreement between Kansas Star and the State to operate a casino. KELA provides that the management contract is not a land use restriction, as it '*shall not constitute property*, nor shall it be subject to attachment, garnishment or execution, nor shall it be alienable or transferable, except upon approval by the executive director, nor shall it be subject to being encumbered or hypothecated.' (Emphasis added.) K.S.A. 74-8734(m).

"Kansas law has long held that personal contractual obligations are not part of the fee simple interest in real estate to be valued for ad valorem tax purposes. As discussed, Kansas valuation statutes do not use the term 'fee simple.' Nevertheless, Kansas ad valorem valuation contemplates valuation of the fee simple interest. See *In re Equalization Proceeding of Amoco Production Co.*, 33 Kan. App. 2d at 337-40. K.S.A. 79-501 requires that each parcel of real property be appraised for taxation purposes to determine its fair market value. In turn, K.S.A. 79-503a defines 'fair market value' as 'the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for *property* in an *open and competitive market*, assuming that the parties are acting without undue compulsion.' (Emphases added.) 'It is clear, therefore, that the fair market value statute values property rights, not contract rights.' *Prieb Properties*, 47 Kan. App. 2d at 131.

"Additionally, Kansas Star's casino management contract has been excluded as property by another panel of this court. See *In re 2013 Equalization Appeal of Kansas Star Casino*, 2018 WL 2748748, at *13 (noting 'the management contract itself is not property,' although it may influence the value of real estate). The fact that a management contract can influence the value of real estate does not mean that the real estate improvements cannot suffer from obsolescence. And the County provides no support for a different conclusion. Here, the fact-finder found Kansas Star's management contract did affect the value of the real estate—in a negative way, because the arena was superadequate.

"Viewing the County's argument practically, it asserts that the management contract via KELA, which is a land use restriction, allowed construction of the property. But this argument, when broken down, is not entirely correct. It is correct that the management contract via KELA permits gaming on the property. However, KELA does not demand that the property only ever be used for gaming. The management contract does not run with the land; it is an agreement between the State and Kansas Star. If Kansas Star were to sell the property, the contract would not follow it. As discussed, the ad valorem valuation assumes a hypothetical sale of the subject property on January 1. Assuming Kansas Star sold the property on January 1, 2015, its contractual right to operate the casino would *not* automatically pass with the sale of the property. True land use restrictions are like a piece of the twine holding a bundle of sticks together—the

restriction dictates what kind of sticks will fit in the bundle and holds the sticks together, passing with the sticks themselves. The buyer of the property at issue here would be free to do with that property as it wished, so long as it was legally permissible. The *management contract* is what makes gambling legally permissible at the subject property, not KELA, and that management contract does not run with the land. See K.S.A. 74-8734(m).

"Kansas Star's owner could have built the facility to the exact specifications the property currently possesses even without the management contract. It is not the contract that allowed the casino to be constructed. Rather, the contract allows gambling to take place inside of the building; it has no bearing on the permissibility of the actual construction of the building. It is true that for Kansas Star's owner to be awarded the contract, Kansas Star Casino had to be built in accordance with that contract, but the contract only permits gambling inside of the building; it did not address construction of the building itself. Stated differently, the contract did not give permission to build—it gives permission to run a casino in the building so long as the terms of the contract are followed, with one of those terms being construction of the ancillary gaming facilities. Practically speaking, a reasonably prudent person would not build a multimillion dollar facility such as the Kansas Star facilities without having secured such a contract, but just because such a person *would* not build a facility does not mean he or she *could* not.

"Additionally, KELA simply requires a management contract. K.S.A. 74-8734(f). It does not require that the south central gaming facility be built just as the specifics of Kansas Star's management contract require. . . .

. . . .

"An arena simply is not required under the text of KELA. See K.S.A. 74-8702(a) ('"Ancillary lottery gaming facility operations" means additional non-lottery facility game products and services not owned and operated by the state which *may* be included in the overall development associated with the lottery gaming facility. Such operations may include, but are not limited to, restaurants, hotels, motels, museums or entertainment facilities.' [Emphasis added.]). Even without the consideration of the arena, Kansas Star meets the definition with its hotel, bars, and restaurants. Looking outside of Kansas Star's situation, it is clear KELA does not require an arena. Hollywood Casino, the gaming facility in the northeast gaming zone, is an 'approximately 245,000-square foot building [that] includes a Las Vegas-style casino with a 94,444-square foot gaming floor; a steak house, buffet, sports bar, mid-level restaurant, coffee shop, and VIP lounge; office and administrative space; 1,253 covered parking spaces; and additional surface parking.' *In re* [*Equalization Appeal of*] *Kansas Entertainment*, [No. 117,406,] 2018 WL 6713975, at *2 [(Kan. App. 2018) (unpublished opinion)]. Notably, that KELA-approved casino does not have an arena. If such an ancillary gaming facility were truly a requirement of KELA, Hollywood Casino would not be in operation.

"To counter these considerations, the County cites to K.S.A. 79-503a, which requires 'other factors' be used when assessing fair market value. One of those factors is

'restrictions or requirements imposed upon the use of real estate by the state or federal government or local governing bodies, including zoning and planning boards or commissions, and including, but not limited to, restrictions or requirements imposed upon the use of real estate rented or leased to low income individuals and families, as

authorized by section 42 of the federal internal revenue code of 1986, as amended.' K.S.A. 79-503a(j).

"The County's argument overlooks the phrase 'imposed upon the use of real estate.' It is not disputed that government requirements and regulations are part of the fee simple estate. The plain text of this provision does not require that private government contracts be considered as part of the fee simple interest in real estate. But see *In re Equalization Appeal of Ottawa Housing Ass'n*, 27 Kan. App. 2d 1008, Syl. ¶ 7, 10 P.3d 777 (2000) ('Taxing authorities should consider the effects of low-income housing contracts when valuing property for ad valorem taxes.'). The management contract here was awarded, not imposed, and it is not a restriction or a requirement imposed on the land or any subsequent owner. By contrast, low-income housing contracts are recorded, run with the land, and bind future owners. *In re Equalization of Paola-Sundance Apartments*, No. 2004-8772-EQ, at *1 (Kan. Bd. Tax. App. 2006). The management contract is the vehicle by which Kansas Star is *permitted* to use the real estate for its gaming operations. It is not a restriction on all possible uses of the land and improvements thereto in and of itself. The contract is a personal obligation, not a consideration of the property.

"Essentially, the County argues that the ancillary gaming facilities can never be deemed superadequate as a matter of law. But superadequacy is a question of fact, and 'our job is not to make a factual determination of the value . . . . That task is for BOTA.' *In re Equalization Appeal of Andover Antique Mall, L.L.C.*, 33 Kan. App. 2d 199, 209, 99 P.3d 1117 (2004).

"With all these considerations in mind, we conclude that while BOTA *may* consider the management contract in valuing the property at issue here, it is not required to do so. . . ." *In re Equalization Appeal of Kansas Star Casino*, 2021 WL 2021829, at *20-22.

We also note that our Supreme Court similarly denied the County's petition for review of that opinion in September 2021.

We see no reason to depart from the persuasive analysis in those opinions. Thus, we similarly conclude that BOTA did not err when it concluded the ancillary facilities diminished the value of Kansas Star's real estate based on superadequacy. Next, we turn to whether BOTA complied with USPAP requirements when computing depreciation.

Depreciation Calculation

In our final step, we must determine whether BOTA's functional obsolescence calculation follows USPAP requirements. A panel of this court previously identified the USPAP-compliant five-part functional obsolescence method:

"In calculating depreciation for functional obsolescence, the Appraisal Institute provides a five-step formula: (1) identify the cost of the existing item; (2) deduct depreciation previously charged; (3) if functional obsolescence is curable, add up all of the costs associated with curing the item, and if incurable, add value of the loss; (4) if curable, subtract cost of the proper item if included in new construction, and if incurable, subtract depreciated cost of the proper item if included in new construction; (5) add up all the entries to derive the total functional obsolescence attributable to each factor. The Appraisal of Real Estate, Appraisal Institute, 627 (14th ed. 2013). . . ." *In re 2015 Equalization Appeal of Kansas Star Casino,* 2018 WL 3486173, at *15.

BOTA determined the Kansas Star property suffered from functional obsolescence based on undisputed evidence that Kansas Star's gross revenues were relatively flat from 2012 through 2017, despite construction spending spiking from 2012 to 2014. BOTA also found the evidence suggested the ancillary facilities were unprofitable, not needed to serve the market, and contributed to an overall reduction in earning before interest, tax, depreciation, and amortization from 2012 through 2017. While BOTA did not walk through each of the five steps stated above, it explicitly stated it adopted Jackson's functional obsolescence calculation.

Jackson estimated the cost of the original property to be about $70,474,972. To reach that number, Jackson combined the costs of "Phase 1A – Net Costs for Existing Subject Property" and "Phase 2 – Total Costs," less the costs of paving necessary to support the permanent casino and utilities. Jackson's cost figure, representing the costs of the ancillary facilities, accounted for 52% of the cost of the Kansas Star property. To calculate the final number used in his analysis, Jackson took the total replacement cost new ($159,210,363), subtracted 10% ($15,921,036) for physical deterioration, and then calculated 52% of that number, arriving at a total obsolescence figure of $74,510,450.

(Total Replacement Cost – Physical Deterioration) * .52 =
($159,210,363 - $15,921,036) * .52 = $74,510,450
(Total Replacement Cost – Physical Deterioration) * .48
($159,210,363 - $15,921,036) * .48 = $68,778,877

As mentioned above BOTA used the cost approach method to determine the tax year 2018 fair market value, as it had for tax

years 2015 through 2017. To do so, it added the land value and replacement costs, then subtracted the physical deterioration—assessed at 10%—and functional obsolescence. The following table depicts the calculation.

Land Value	$10,124,400
+ replacement cost (new)	+ $159,210,363
- physical deterioration (10%)	- $15,921,036
- functional obsolescence	- $74,510,450
= Commercial Use Value	= $78,903,277
Rounded Final Commercial Use Valuation	$78,903,300
+Stipulated Agricultural Land Use Value	+ $10,290
= Total Value	= $78,913,590

In this court's most recent opinion on Kansas Star, the panel approved the preceding depreciation analysis for tax year 2015. See *In re Equalization Appeal of Kansas Star Casino*, 2021 WL 2021829, at *17-18. The County offers no reason why this panel should not do the same.

Nothing distinguishes BOTA's decision and reasoning in the appeal from the 2018 tax year from its last two decisions on the ancillary facilities depreciation in the 2015, 2016, and 2017 tax years. As a result, we affirm BOTA's decision on the fair market value of Kansas Star.

Affirmed.

(517 P.3d 857)

No. 123,559

STATE OF KANSAS, *Appellee*, v. FRANK RAYMOND CRUDO, *Appellant*.

SYLLABUS BY THE COURT

1. SEARCH AND SEIZURE—*Exigent Circumstances—Allows Warrantless Search of Fifth-Wheel Camper*. The exigent circumstances which allow warrantless searches of motor vehicles also allow warrantless searches of a fifth-wheel camper attached to a vehicle that is traveling on a public roadway and is so situated that an objective observer would conclude it was not being used as a residence at the time of the search.

2. SAME—*Probable Cause to Search Vehicle—Allows Warrantless Search of Fifh-Wheel Camper and Containers Inside and Outside Vehicle*. If officers have probable cause to search a vehicle, they have probable cause to search containers inside and attached to the outside of the vehicle which they have probable cause to believe may contain contraband or evidence of a crime. This includes searching a fifth-wheel camper attached to a vehicle when both are traveling on a public roadway in the possession and control of the defendant.

Appeal from Geary District Court; BENJAMIN J. SEXTON, judge. Opinion filed September 2, 2022. Affirmed.

Peter Maharry, of Kansas Appellate Defender Office, for appellant.

Tony Cruz, assistant county attorney, and *Derek Schmidt*, attorney general, for appellee.

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

CLINE, J.: Frank Raymond Crudo appeals the district court's (1) denial of his motion to suppress, (2) admission of alleged expert testimony by one officer which he contends should have been disclosed under K.S.A. 60-456(b), (3) jury instruction stating the jury could infer an intent to distribute based on the amount of drugs found in the camper, and (4) denial of his motion to vacate based on double jeopardy violations. He also seeks reversal of his possession of marijuana conviction on double jeopardy grounds.

After carefully reviewing the record, we find no error and affirm.

FACTS

In January 2014, Frank Raymond Crudo's pickup truck and attached fifth-wheel camper were stopped for a traffic infraction. Officers searched the pickup after the officer who approached it smelled a strong odor of raw marijuana when the window was rolled down. They found a small piece of marijuana inside the pickup and then searched the camper, where they found 19 vacuum-sealed bags of marijuana underneath the bathtub and a small amount of marijuana (along with rolling paper and a grinder) under the stairs.

The State charged Crudo with: (1) possession of marijuana with intent to distribute in violation of K.S.A. 2013 Supp. 21-5705(a)(4) and (a)(7), a drug severity level 2, nonperson felony; (2) no drug tax stamp in violation of K.S.A. 79-5204(a) and 79-5208, a severity level 10, nonperson felony; (3) possession of marijuana in violation of K.S.A. 2013 Supp. 21-5706(b)(3) and/or (b)(7), a class A nonperson misdemeanor; and (4) conspiracy to possess marijuana with the intent to distribute in violation of K.S.A. 2013 Supp. 21-5302(a), a severity level 2, nonperson felony.

Motion to Suppress

Crudo was initially successful in suppressing the marijuana discovered in the camper. But after the State filed an interlocutory appeal, a panel of this court reversed and remanded the case for a new hearing on Crudo's motion to suppress before a different judge. *State v. Crudo*, No. 112,805, 2015 WL 7162274, at *13 (Kan. App. 2015) (unpublished opinion).

The new judge scheduled a hearing on the motion in September 2016. Crudo never appeared and was not before the court again until his arrest in 2019 for his failure to appear in 2016.

The district court held a new evidentiary hearing in November 2019 but ultimately denied Crudo's motion. The court clarified that its decision depended solely on the evidence presented at the November 2019 hearing. The case then proceeded to jury trial.

First Trial

At trial, Lieutenant Christopher Ricard testified that he stopped the pickup after noticing the tag lamp on the camper was not illuminated

and, when he ran the camper's registration through dispatch, the dispatcher told him there was no record of that registration. It was later determined a mistake occurred in the officer's relaying of the tag numbers and the dispatcher entering those numbers into the system, despite the officer's clarifying questioning of the dispatcher. But this mistake does not impact the appeal.

Upon stopping the pickup, Lt. Ricard approached the passenger side. Although Crudo was the registered owner of both the pickup and attached camper, he was in the back seat and another individual was driving. Lt. Ricard smelled a strong odor of raw marijuana coming from the pickup when the window was rolled down.

After Lieutenant Justin Stopper arrived as backup, Lt. Ricard told Crudo they planned to search the pickup. Crudo became combative to the point where the officers had to handcuff and place him inside a patrol car.

During their search of the pickup, the officers discovered a small piece of marijuana on the transmission hump between the passenger and driver's seats. They then obtained keys to the camper and searched it. They discovered 19 vacuum-sealed bags of marijuana beneath the bathtub in the camper. Some of these bags had writing which appeared to reflect the strain of marijuana contained within. Lt. Ricard testified that based on his training and experience, this quantity of marijuana would be consistent with possession with the intent to distribute. He confirmed none of the bags had any sort of drug tax stamp on them.

Lt. Ricard also testified a small amount of marijuana was found under the stairs along with rolling paper and a grinder—items he explained were consistent with personal use. But he clarified that finding rolling paper and a grinder in a different portion of the camper did not change his opinion that possession of 19 bags of marijuana was consistent with an intent to distribute.

The jury found Crudo guilty of possession of marijuana and possession of marijuana with no drug tax stamp but hung on the possession of marijuana with intent to distribute charge. At that point, the State told the district court it intended to retry Crudo on the possession of marijuana with intent to distribute charge. The State asked the court to declare a mistrial on that charge, which it did.

Motion to Vacate

After his first trial, Crudo moved to vacate, raising two double jeopardy arguments. He argued his convictions for possession of marijuana and possession of marijuana with no drug tax stamp were multiplicitous. He also argued his conviction for possession of marijuana was a lesser included crime of possession of marijuana with intent to distribute and, as a result, the State could not retry him. The district court denied Crudo's motion.

Second Trial

When the State retried Crudo for possession of marijuana with intent to distribute, the jury returned a verdict of guilty.

Sentencing

The district court designated count one, possession of marijuana with the intent to distribute, as the base sentence, with sentences for the other counts to run concurrently. The court then granted Crudo's motion for a dispositional departure and sentenced him to 36 months' probation with an underlying 108-month prison term.

Crudo timely appealed.

ANALYSIS

The district court correctly denied Crudo's motion to suppress.

Crudo argues the warrantless search of his camper violated his rights under the Fourth Amendment and section 15 of the Kansas Constitution Bill of Rights so the district court should have suppressed the evidence found there. Crudo contends this search was impermissible because: (1) the automobile exception should not extend to the camper, and (2) the officers had no probable cause to believe the camper contained contraband.

Standard of Review

Usually, when reviewing a motion to suppress, an appellate court reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and

reviews the ultimate legal conclusion de novo. *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021). But when the material facts supporting the court's decision are not in dispute, the question for this court—whether to suppress—is one of law, and we exercise unlimited review. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018).

Applicable Law and Analysis

"'[A] warrantless search by a police officer is per se unreasonable under the Fourth Amendment unless the State can fit the search within one of the recognized exceptions to the warrant requirement.'" *State v. Doelz*, 309 Kan. 133, 140, 432 P.3d 669 (2019). One recognized exception is probable cause plus exigent circumstances, and a subclass of this exception is the "automobile exception." 309 Kan. at 140, 143. "The automobile exception provides that a warrant is not required to search a vehicle as long as 'probable cause exists to believe the vehicle contains contraband or evidence of a crime' and the vehicle is 'readily mobile.'" 309 Kan. at 143.

The automobile exception applies to the camper.

Crudo first challenges the search of the camper by arguing the automobile exception that allowed for a warrantless search of the pickup did not extend to the camper. He argues the justifications which underly the automobile exception—(1) the "'practical challenges of obtaining a warrant for a vehicle that could be "quickly moved" out of the jurisdiction,'" and (2) the vehicle operator's reduced expectation of privacy in the operation of a vehicle on a roadway—do not support the application of this exception to the camper.

While Crudo contends the camper is not a vehicle and "could not be rapidly moved," he acknowledges courts have found trailers are mobile which brings them under the automobile exception, citing *United States v. Navas*, 597 F.3d 492, 499-500 (2d Cir. 2010) (finding tractor trailer was inherently mobile because it could be towed away); *United States v. Smith*, 456 Fed. Appx. 200, 209 (4th Cir. 2011) (unpublished opinion) (finding that tractor trailer "clearly was inherently mobile"). But he argues these

holdings are too broad and should not apply to the camper since it could not move on its own. Analogizing a camper to a residence, he argues expanding the exception to attached campers and trailers "allows for a highly intrusive search into the private lives of individuals and their personal possessions."

Crudo relies on *Collins v. Virginia*, 584 U.S. ___, 138 S. Ct. 1663, 201 L. Ed. 2d 9 (2018), to support his argument that the automobile exception should not be extended to the camper. In *Collins*, officers claimed the automobile exception allowed a warrantless search of a motorcycle covered with a tarp and parked in a driveway. But the United States Supreme Court disagreed, holding: "[T]he automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein." 138 S. Ct. at 1675. We find *Collins* distinguishable since it involved officers "physically intruding on the curtilage of Collins' home to search the motorcycle," which invaded Collins' Fourth Amendment interest in both the motorcycle and the curtilage of his home. 138 S. Ct. at 1671. Here, Crudo's camper was neither being used as a residence nor was it parked within the curtilage of one when it was searched—it was attached to a pickup traveling down a public roadway.

When extending the automobile exception to a motor home in *California v. Carney*, 471 U.S. 386, 393, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985), the United States Supreme Court refused to distinguish vehicles based on their capability of functioning as a home, noting: "In our increasingly mobile society, many vehicles used for transportation can be and are being used not only for transportation but for shelter, *i.e.*, as a 'home' or 'residence.'" 471 U.S. at 393. Instead, the court noted the automobile exception "has never turned on the other uses to which a vehicle might be put," but "has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation." 471 U.S. at 394.

In *United States v. Hill*, 855 F.2d 664 (10th Cir. 1988), a defendant challenged the warrantless search of his houseboat, claiming it was more like a home than a vehicle, so the automobile exception did not apply. In upholding the search, the Tenth Circuit

relied on the fact that the houseboat was navigating the lake when officers boarded it, so it was readily mobile and not being used as a residence at the time of the search. 855 F.2d at 667-68. Additionally, in *United States v. Ervin*, 907 F.2d 1534 (5th Cir. 1990), the Fifth Circuit upheld the warrantless search of a fifth-wheel camper officers had followed to a motel parking lot. That court applied the automobile exception to the camper after finding it was readily mobile and so situated that an objective observer would conclude it was not being used as a residence while parked at a motel parking lot and not a place regularly used for residential purposes. 907 F.2d at 1537-39.

Had the camper been unhitched, parked at a campsite, and being used as a residence, that situation would be more analogous to *Collins*. But here, as in *Carney*, *Hill*, and *Ervin*, the camper was readily mobile (since it was attached to the pickup), and it was being used for transportation rather than a residence (since it was traveling down a public roadway).

As for the second justification for the automobile exception, the United States Supreme Court discussed the rationale underlying vehicle operators' reduced privacy right in the context of the automobile exception in *Carney*, 471 U.S. at 392:

"'Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.'

"The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation. Historically, 'individuals always [have] been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts. [Citations omitted.]"

Like vehicles, campers are subject to extensive regulation when traveling on a roadway. See K.S.A. 8-1401 et seq. (defining terms in Kansas' Uniform Act Regulating Traffic); K.S.A. 8-1501 et seq. (containing the "Rules of the Road"); K.S.A. 8-1701 et seq. (containing regulation on the "Equipment of Vehicles"); K.S.A. 8-1901 et seq. (containing regulations for the "Size, Weight and

Load of Vehicles"). And these regulations provide law enforcement with the legal authority to stop and examine campers and trailers attached to vehicles traveling down the public roadway—just like Lt. Ricard did here. See K.S.A. 8-1759a; K.S.A. 8-1910; *Smith v. Kansas Dept. of Revenue*, 291 Kan. 510, 511, 242 P.3d 1179 (2010) (officer initiated stop because tail lights on trailer being pulled by pickup truck not working); *Lewis v. Kansas Dept. of Revenue*, No. 110,721, 2014 WL 6777438, at *1 (Kan. App. 2014) (unpublished opinion) (trooper initiated stop after observing driver hauling trailer without working tail lights on highway); *State v. Smith*, No. 101,831, 2009 WL 5062492, at *1 (Kan. App. 2009) (unpublished opinion) (trooper pulled over defendant, who was driving a pickup pulling a trailer, because trailer did not have working tail lights).

Thus, we find both the mobility distinction and reduced privacy expectation which justify the automobile exception similarly apply to attached campers traveling down a public roadway. Based on this analysis, we find the exigent circumstances which allow warrantless searches of motor vehicles also allow warrantless searches of a fifth-wheel camper attached to that vehicle when it is traveling on a public roadway and is so situated that an objective observer would conclude it was not being used as a residence when it was searched. The district court did not err in extending the automobile exception to Crudo's camper.

Probable cause supported the camper search.

Crudo next challenges the camper search by claiming it was not supported by probable cause. The automobile exception only satisfies the Fourth Amendment's warrant requirement; probable cause to believe the camper contained contraband or evidence of a crime is still required. *Doelz*, 309 Kan. at 143. "The probable cause analysis reviews the totality of the circumstances to determine the probability that the vehicle contains contraband or evidence." 309 Kan. at 143.

Neither party contests that the officers' detection of the odor of marijuana emanating from the pickup provided probable cause to search the pickup—they simply disagree as to the proper scope of that probable cause. The State argues detection of this odor and

the discovery of marijuana in the pickup provided probable cause to search both the pickup and the camper. Crudo contends the officers had no probable cause to search the camper since they did not smell marijuana coming from it and they only found a small amount of marijuana after searching the pickup.

The district court relied on three cases in finding the officers' probable cause to search the pickup extended to the camper. The first was *State v. Specht*, No. 106,272, 2012 WL 1970108 (Kan. App. 2012) (unpublished opinion), which involved the warrantless search of an enclosed camper shell attached to the back of a pickup. As in Crudo's case, officers searched Specht's pickup after smelling a strong odor of marijuana emanating from the cab area. And, also like here, they searched the camper shell after discovering marijuana in the pickup's cab. In *Specht*, the district court suppressed the drug evidence discovered in the camper shell because there were no odors emanating from the camper shell. But this court overturned that decision after finding the officers' discovery of marijuana in Specht's pickup cab provided sufficient probable cause to search the rest of the pickup, which included the enclosed camper shell. 2012 WL 1970108, at *7.

We agree with the district court that, while a camper shell is different from a fifth-wheel camper, the premise set forth in *Specht* still applies. As in *Specht*, the camper search was not based only on the odor of marijuana emanating from the truck—the officers discovered corroborating evidence of contraband in the truck before searching the camper. "[O]nce a police officer lawfully discovers contraband in the passenger compartment of a vehicle, probable cause exists to search the remainder of the vehicle, including a trunk or camper shell, for additional evidence of contraband." 2012 WL 1970108, at *7. Just like this court found in *Specht*, it was reasonable for the officers to believe Crudo's camper might contain additional evidence of illegal drugs. And Crudo cites no authority to support his contention that the quantity of marijuana found in the truck negates that probable cause.

The district court also relied on *United States v. Millar*, 543 F.2d 1280 (10th Cir. 1976), which addressed whether the detection of the odor of marijuana coming from and discovery of marijuana seeds within the vehicle pulling a U-Haul trailer provided

officers probable cause to search the trailer. The difference in *Millar* is the officers applied for a search warrant, while the officers here did not. Yet Millar challenged the affidavit in support of the search warrant on the same basis that Crudo challenges the camper search: both alleged marijuana odor coming from the vehicle where marijuana was ultimately found did not provide sufficient probable cause to search a trailer or camper attached to that vehicle.

In upholding the search warrant, the *Millar* court found it "unrealistic" to isolate the trailer from the vehicle that was pulling the trailer. 543 F.2d at 1283. Instead, it found the vehicle and trailer constituted a unit for purposes of the search. In so finding, the *Millar* court noted the trailer was attached to the vehicle and both were ostensibly traveling to the same destination. The court found the officer's detection of the odor of marijuana coming from the vehicle, coupled with finding seeds on the floorboard, provided probable cause to search the vehicle's trunk and then analogized the trailer search to a trunk search. It also found it important that Millar was in possession and control of both the automobile and the U-Haul trailer. It distinguished this situation from *United States v. Rodriguez*, 525 F.2d 1313 (10th Cir. 1975), where it held discovery of marijuana under a tarp in a trailer being pulled by a commercially operated bus did not support probable cause to search the baggage of the 12 paying passengers on the bus. *Millar*, 543 F.2d at 1283.

We similarly find it unrealistic to treat Crudo's pickup and camper separately for purposes of this search. Crudo was in possession and control of the pickup and attached camper, which were also both ostensibly traveling to the same destination. Once the officers discovered marijuana in the pickup, they had probable cause to search the attached camper for additional drug evidence.

The last case the district court relied on in denying Crudo's motion to suppress was *State v. Finlay*, 257 Or. App. 581, 307 P.3d 518 (2013). As in *Millar*, the Oregon appellate court viewed a vehicle and its attached trailer as one unit. It found that attaching a trailer to a vehicle expands the automobile exigency exception to the trailer, since the trailer now had the ability to move and be mobile. 257 Or. App. at 593 (noting the "'quality of mobility is as

true for the trailer attached to defendant's pickup as for the pickup itself'"). The *Finlay* court "fail[ed] to see a significant distinction between searching containers *inside* a vehicle, which is permitted under the automobile exception . . . and searching containers attached to the *outside* of a vehicle." 257 Or. App. at 593 (citing *State v. Brown*, 301 Or. 268, 721 P.2d 1357 [1986]). We agree with the district court that this logic is sound and supported by the findings in *Specht* and *Millar*.

We also note that in *State v. Overbey*, 790 N.W.2d 35, 42 (S.D. 2010), the South Dakota Supreme Court found probable cause existed to search an attached fifth-wheel camper after a drug dog alerted to the cab of the pickup. That court found the pickup and attached fifth-wheel camper were one unit once attached and the camper was "subject to search as long as the motor vehicle exception was satisfied as to any part of the pickup or camper." 790 N.W.2d at 42. Similarly, in *United States v. Torres*, No. 3-:05-CR-051, 2005 WL 3546677, at *7-8 (S.D. Ohio 2005) (unpublished opinion), the court found officers had probable cause to search the locked trailer of a tractor-trailer rig once a drug dog alerted on the tractor since it determined the tractor trailer should be treated as one unit.

Based on these cases, we find the automobile exception applies to the fifth-wheel camper attached to Crudo's vehicle. And once officers had probable cause to search Crudo's vehicle, they had probable cause to search containers inside and attached to the outside of that vehicle which they had probable cause to believe may contain contraband or evidence of a crime. This includes a camper attached to a vehicle when both are traveling on a public roadway in the possession and control of the defendant.

The district court properly exercised its discretion when finding Lieutenant Ricard's testimony was not expert testimony under K.S.A. 60-456(b).

In his next claim of error, Crudo argues several portions of Lt. Ricard's testimony constituted expert testimony under K.S.A. 2021 Supp. 60-456(b), and because the State did not comply with the expert disclosure requirements in K.S.A. 2021 Supp. 22-3212(b)(2), the district court erred in allowing it. He contends the following was expert testimony: (1) the packaging and quantity

of marijuana found in the camper suggested an intent to distribute; (2) wholesale marijuana prices; and (3) "the 'patterns' of marijuana traffickers"—specifically, that "the product is purchased in the western states and travels east on 'short trips,'" and that "traffickers would try to spend as little time on the road as possible as that increases the likelihood of being stopped." He argues these errors warrant reversal because the State's case for the intent to distribute charge hinged on this expert testimony and the quantity of drugs found.

Preservation

Crudo argues he preserved this issue because he objected to Lt. Ricard's testimony as improper expert testimony when the State asked Lt. Ricard whether the drugs found in the camper would reflect the intent to distribute. While we find Crudo preserved his objection to the first two portions of Lt. Ricard's testimony, he fails to identify the location in the second jury trial transcript where he objected to the third portion of testimony that he challenges—Lt. Ricard's testimony about "the 'patterns' of marijuana traffickers"—specifically, that "the product is purchased in the western states and travels east on 'short trips,'" and that "traffickers would try to spend as little time on the road as possible as that increases the likelihood of being stopped." Thus, the record reflects he only preserved a portion of the challenged testimony for our review. See *State v. Ballou*, 310 Kan. 591, Syl. ¶ 6, 613-14, 448 P.3d 479 (2019) ("A timely interposed objection, as required by the plain language of K.S.A. 60-404, is one that gives the district court the opportunity to make the ruling contemporaneous with an attempt to introduce evidence at trial.").

Standard of Review

We review the district court's decision as to whether Lt. Ricard's testimony was expert or lay opinion testimony and its admission of this testimony using an abuse of discretion standard. *State v. Aguirre*, 313 Kan. 189, 195, 485 P.3d 576 (2021); *State v. Hubbard*, 309 Kan. 22, 43-48, 430 P.3d 956 (2018) (analyzing whether officers' testimony about having smelled raw marijuana was lay or expert opinion testimony, concluding it was lay opinion

testimony and, as a result, holding district court did not abuse its discretion in admitting testimony; citing *State v. Sasser*, 305 Kan. 1231, 1243, 391 P.3d 698 [2017]).

Applicable Law

The statute governing opinion testimony, K.S.A. 2021 Supp. 60-456, provides:

"(a) If the witness is not testifying as an expert, the testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds: (1) Are rationally based on the perception of the witness; (2) are helpful to a clearer understanding of the testimony of the witness; and (3) are not based on scientific, technical or other specialized knowledge within the scope of subsection (b).

"(b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case."

Crudo relies on K.S.A. 2021 Supp. 22-3212(b)(2), which states:

"The prosecuting attorney shall also provide a summary or written report of what any expert witness intends to testify to on direct examination, including the witness' qualifications and the witness' opinions, at a reasonable time prior to trial by agreement of the parties or by order of the court."

And Crudo asserts that subsection (i) of that statute "authorizes the district court to 'prohibit the party from introducing into evidence the material not disclosed.'" In full, subsection (i) states:

"If, subsequent to compliance with an order issued pursuant to this section, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under this section, the party shall promptly notify the other party or the party's attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." K.S.A. 2021 Supp. 22-3212(i).

Lay or Expert Opinion Testimony

The State counters that it did not have to follow K.S.A. 2021 Supp. 22-3212(b) because Lt. Ricard's testimony was lay opinion testimony under K.S.A. 2021 Supp. 60-456(a)—not expert opinion testimony under K.S.A. 2021 Supp. 60-456(b). The State argues that Lt. Ricard testified to his opinion based on what he personally witnessed in his professional career as a law enforcement officer. It also notes the training he received pertaining to drug distribution did not fall into the category of specialized, scientific, or complex subject matter that would require a court to find him to be an expert witness. Last, it contends Crudo knew about Lt. Ricard's proposed trial testimony on these issues since he provided similar statements in his probable cause affidavit and in his testimony at the preliminary hearing (to which Crudo did not object).

The State cites *Hubbard* in support, where, according to the State, the "Kansas Supreme Court discussed the distinction between lay and expert opinion in regards to an officer's testimony regarding their recognition of the odor of marijuana," and "f[ound] that the district court did not abuse its discretion in admitting the officer's testimony, as lay witnesses."

In *Hubbard*, two police officers testified that they had smelled raw marijuana. On appeal, the Kansas Supreme Court analyzed whether the officers' testimony became expert opinion testimony because they had also testified their ability to identify marijuana odor came from their training and experience as police officers. 309 Kan. at 44-46. The *Hubbard* court first turned to *Sasser*, another case about the distinction between lay and expert opinion testimony, and noted: "In *Sasser*, the critical feature for the majority that made the testimony admissible as a lay opinion was that the special knowledge on which the [opinion] was based was not '*so . . . specialized* that it cried out for greater court control.'" *Hubbard*, 309 Kan. at 45. The *Hubbard* court also quoted *Osbourn v. State*, 92 S.W.3d 531, 537 (Tex. App. 2002), stating: "Similarly, '[w]hile smelling the odor of marihuana smoke may not be an event normally encountered in daily life, it requires limited, if any, expertise to identify.'" *Hubbard*, 309 Kan. at 45.

The *Hubbard* court found the officers' testimony about smelling raw marijuana was lay opinion testimony and admissible under K.S.A. 2017 Supp. 60-456(a). The court based this conclusion on the officers' opinions not being "'highly technical,'" stating: "[W]e are confident it is within the realm of common human experience to smell something and subsequently be able to recognize that same odor again." 309 Kan. at 45-46 (supporting its conclusion with the quote from *State v. Loudermilk*, 221 Kan. 157, 163, 557 P.2d 1229 [1976]: "'Whether a small wound is a cut or a puncture and whether it is old or new, would not appear *highly technical*.'" [Emphasis added.]). Lastly, in responding to the dissent's argument that the officers were giving expert opinion testimony because they had been exposed to raw marijuana from police training and on-the-job experience, the court found that the "officers did not learn how to smell at the police academy," *Hubbard*, 309 Kan. at 46, and clarified:

"'There are certain fields where a witness may qualify as an expert based upon experience and training, however, use of the terms "training" and "experience" do not automatically make someone an expert. All opinions are formed by evaluating facts based on life experiences including education, background, training, occupation, etc. While [the police officer] may have had the potential to be qualified as an expert because she possessed knowledge, skill, experience and education, she was not testifying as an expert when she identified the marihuana. Rather, she was testifying based on her firsthand sensory experiences. [The police officer] herself smelled the odor that she perceived to be burnt marihuana. The fact that she had smelled marihuana before in *the course of her employment as a police officer does not necessarily make her an expert. And, again, even if she was an expert, that would not preclude her from offering a lay opinion about something she personally perceived*." 309 Kan. at 46 (quoting *In re Ondrel M.*, 173 Md. App. 223, 244-45, 918 A.2d 543 [2007]).

Having determined the officers' testimony was lay opinion testimony, the *Hubbard* court determined the district court did not abuse its discretion by admitting the testimony. 309 Kan. at 43, 46, 48.

Lt. Ricard's testimony that the marijuana's quantity and packaging are consistent with the intent to distribute

Crudo challenges testimony Lt. Ricard provided in both trials on the basis that it improperly supported the intent to distribute

charge. But since Crudo was convicted of this charge in the second trial, we do not consider testimony from the first trial.

In the second trial, Lt. Ricard testified that, based on his law enforcement training, the quantity and packaging of the 19 vacuum-sealed bags of marijuana were consistent with the intent to distribute. Following our Supreme Court's conclusion in *Hubbard*, we find this testimony was lay opinion. Concluding that 19 vacuum-sealed bags of marijuana, labeled with strain names, which appeared to be of equal weight (approximately one pound), would evidence an intent to distribute does not involve a "'highly technical'" matter. See *Hubbard*, 309 Kan. at 45-46. Rather, it is "within the realm of common human experience" to know that marijuana packaged in this way would be intended for distribution rather than personal use. See 309 Kan. at 45-46. Thus, as in *Hubbard*, we find the district court did not abuse its discretion in admitting this testimony. See 309 Kan. at 43, 46, 48.

Lt. Ricard's testimony about marijuana prices

Crudo also claims Lt. Ricard's testimony on marijuana prices constituted expert testimony—specifically, his testimony that the wholesale price of marijuana on the West Coast ranged from $1,200 to $1,600 per pound, and that the same marijuana would be worth $4,500 to $6,000 per pound on the East Coast. Lt. Ricard stated this testimony was based upon drug interdiction training he received as part of his required 40 hours of annual training. He testified this training included how drug traffickers operate, bulk marijuana traffickers, and wholesale marijuana prices.

Crudo relies on two cases for his contention that Lt. Ricard's testimony rose to the level of an expert—*State v. Villa-Vasquez*, 49 Kan. App. 2d 421, 310 P.3d 426 (2013), and *State v. Tran*, 252 Kan. 494, 847 P.2d 680 (1993). Crudo asserts that in *Villa-Vasquez*, "this Court found the State's witness was an expert, even though he had no formal training. Rather, his expertise was based on his 'law enforcement work in the field' studying narco-saints." But the statement Crudo cites does not provide a complete representation of the expert's credentials in *Villa-Vasquez*. There, the expert was a United States marshal from Texas who was an expert on shrines used by drug dealers. He worked in law enforcement

since 1978 and spent 13 of those years overseeing a narcotics task force in Texas—where it was common for him to encounter shrines in drug cases. He then researched how criminals prayed to icons for protection from law enforcement, studied case reports and photos of scenes depicting narco saints, talked to drug traffickers with shrines about the connection between the shrines and drug trafficking, traveled to Mexico to visit shrines and study the topic, created a law enforcement training video on the topic, and presented that training video to officers around the nation. 49 Kan. App. 2d at 423-24.

On the other hand, Lt. Ricard has not developed an expertise on the subject at issue like the expert in *Villa-Vasquez*. Rather, Lt. Ricard's training on marijuana prices was merely included in the annual training all officers had to undergo.

The second case Crudo relies on, *Tran*, is similarly distinguishable. The expert there was a Wichita gang intelligence officer who accumulated knowledge and information on gangs and gang activity through his position. 252 Kan. at 502. Both cases Crudo cites predate the changes to K.S.A. 60-456 in 2014, but more recent caselaw appears to similarly require the officer to have received specialized training to be considered an expert. See L. 2014, ch. 84, § 2; see, e.g., *State v. Claerhout*, 310 Kan. 924, 932, 934-35, 453 P.3d 855 (2019) (finding officer to be qualified as expert in reading crash data retrieval when officer testified to having "training, proficiency testing, and extensive experience in accident reconstruction and using crash data retrieval").

Like his testimony about the packaging and quantity of marijuana, we do not find Lt. Ricard's testimony about wholesale drug prices to constitute the type of "scientific, technical or other specialized knowledge" which is contemplated by K.S.A. 2021 Supp. 60-456(b) or K.S.A. 2021 Supp. 22-3212(b)(2). Observations about wholesale drug prices do not require significant expertise nor are they based on any scientific theory. See *Osbourn*, 92 S.W.3d at 537. Such testimony is also not "based on information that was so scientific, technical, or specialized that it cried out for greater court control." *Sasser*, 305 Kan. at 1246-47. The district court did not abuse its discretion in admitting testimony about the quantity and packaging of the marijuana or wholesale marijuana prices.

The district court erred when instructing the jury, but it did not affect the trial's outcome.

Crudo next argues the district court erred in instructing the jury that it could "'infer that the defendant had the intent to distribute marijuana, if the defendant possessed more than 450 grams of marijuana.'" In full, the challenged jury instruction, which Crudo acknowledges followed PIK Crim. 4th 57.022 (2013 Supp.), provides:

> "You may infer that the defendant had the intent to distribute marijuana, if the defendant possessed more than 450 grams of marijuana.
>
> "The inference may be considered by you along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove that the defendant had the intent to distribute marijuana. This burden never shifts to the defendant."

Crudo argues the instruction was erroneous because it violated the Due Process Clause along with the constitutional right to a jury trial mandate that "the jury find each fact necessary for a conviction beyond a reasonable doubt." He asserts that "[m]andatory presumptions in jury instructions are problematic because they deprive a criminal defendant of due process protections afforded under [the] Fourteenth Amendment to [the] United States Constitution." Finally, he contends that for the possession with the intent to distribute charge, the State had the burden to prove both possession and the intent to distribute the marijuana, but the court's instruction reduced the State's burden of proof regarding the intent to distribute, thus this error warrants reversal because it affected the verdict. We are not persuaded.

The Kansas Supreme Court recently took up the precise issue Crudo raises in *State v. Holder*, 314 Kan. 799, 801-02, 502 P.3d 1039 (2022). Holder was charged with the same crime as Crudo—possession with the intent to distribute under K.S.A. 2020 Supp. 21-5705(a)(4)—and, also like Crudo, challenged a jury instruction based on PIK Crim. 4th 57.022. The court found the instruction did not accurately reflect the applicable law because it allowed for a "permissive inference" of an intent to distribute based on the quantity of drugs, where the statute on which the instruction is

patterned, K.S.A. 2020 Supp. 21-5705(e), provides for a "*rebuttable presumption*." (Emphasis added.) 314 Kan. at 800, 804-07. The court explained the distinction between the two concepts:

> "'A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the accused persuades the jury otherwise. That is, once the State proves certain facts, the jury must infer [the element] from those facts, unless the accused proves otherwise. . . .
>
> "'An instruction containing a permissive inference does not relieve the State of its burden because it still requires the State to convince the jury that an element, such as intent, should be inferred based on the facts proven.'" 314 Kan. at 805 (quoting *State v. Harkness*, 252 Kan. 510, Syl. ¶¶ 13-14, 847 P.2d 1191 [1993]).

The court applied Kansas' "rebuttable presumption" definition to K.S.A. 2020 Supp. 21-5705(e), explaining, "the statutory rebuttable presumption means that once the State proved possession of 450 grams or more of marijuana, the jury *must* infer [the defendant's] intent to distribute unless he proved otherwise." (Emphasis added.) *Holder*, 314 Kan. at 805.

The court concluded the instruction in *Holder* was legally erroneous because it did not accurately reflect the law. We similarly find the instruction here was legally inappropriate and erroneous. See 314 Kan. at 803 (noting one step in the multi-step standard of review for claims of jury instruction error involves determining if the instruction was legally appropriate).

Having determined the jury was instructed in error, we must now decide whether the error requires reversal. *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021). Because Crudo preserved the claimed instructional error, we apply the constitutional harmless error standard. See 313 Kan. at 256-57 ("[W]hen an instructional error impacts a constitutional right, this court assesses 'whether the error was harmless under the federal constitutional harmless error standard, *i.e.*, whether there was "no reasonable probability" that the error contributed to the verdict.'").

As the court did in *Holder*, we find the instructional error was harmless. First, we do not find the permissive inference instruction reduced the State's burden to prove Crudo's intent to distribute marijuana. *Holder*, 314 Kan. at 807 (applying a clear error standard since Holder did not preserve his jury instruction argument).

Not only did the instruction specifically reference the State's burden to prove Crudo's intent to distribute marijuana, but it also told the jury it could accept or reject the permissive inference that Crudo had an intent to distribute depending on whether the State met its burden. And it reminded the jury that the "burden never shifts to the defendant."

Next, the erroneous jury instruction contained a permissive inference, which was beneficial to Crudo in comparison to K.S.A. 2021 Supp. 21-5705(e)'s rebuttable presumption. If the court had not erred and, instead, applied the "rebuttable presumption" in K.S.A. 2021 Supp. 21-5705(e)(1), once the State proved possession of 450 grams or more of marijuana—which it did when the forensic chemist testified to the gross weight of the 19 bags of marijuana being 9.34 kilograms (i.e., 9,340 grams)—the jury would have had to infer that Crudo had the intent to distribute, unless he proved otherwise. See *Holder*, 314 Kan. at 805. Here, instead of being told it must presume the intent to distribute based on the quantity of marijuana (unless Crudo proved otherwise), the jury was told it could accept or reject the inference of such intent. The permissive inference arguably heightened the burden of proof on this charge for the State beyond what is required by K.S.A. 2021 Supp. 21-5705(e), yet the jury still convicted Crudo. If the jury found the evidence sufficient to convict Crudo under this heightened standard, we fail to see how there would be no reasonable probability it would convict under the lesser standard. See *United States v. Pinson*, 542 F.3d 822, 832-33 (10th Cir. 2008) ("An incorrect instruction that is beneficial to the defendant is generally not considered prejudicial."; citing *Killian v. United States*, 368 U.S. 231, 258, 82 S. Ct. 302, 7 L. Ed. 2d 256 [1961]).

Last, even setting aside the beneficial aspect of the instruction, given the evidence presented (including the quantity, packaging, and labeling of the 19 bags of marijuana), we find no reasonable probability the instructional error affected the trial's outcome. We do not find the jury would have reached a different verdict had the instructional error not occurred.

As for Crudo's constitutional argument, like in *Holder*, even if we found the statutory rebuttable presumption unconstitutional (an issue we do not reach here), Crudo's due process rights were

not violated since the rebuttable presumption was not applied to him at trial. See *Holder*, 314 Kan. at 807-08. Crudo suffered no prejudice from the error about which he complains.

Crudo's protection against double jeopardy was not violated.

"[T]he Double Jeopardy Clause of the Fifth Amendment 'protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.'" *State v. Dale*, 312 Kan. 174, 178, 474 P.3d 291 (2020) (quoting *State v. Schoonover*, 281 Kan. 453, 463, 133 P.3d 48 [2006]). Like the United States Constitution, the Kansas Constitution also prohibits a criminal defendant from being "'twice put in jeopardy,'" and the Kansas Supreme Court has interpreted the Kansas and federal double jeopardy provisions as providing a criminal defendant with the same protections. *State v. Hensley*, 298 Kan. 422, 435, 313 P.3d 814 (2013); see U.S. Const. amend. V; Kan. Const. Bill of Rights, § 10. A defendant's argument under any of the three categories of protection raises a question of law over which this court has unlimited review. *Dale*, 312 Kan. at 178.

Crudo argues (1) his convictions for possession of marijuana and for no drug tax stamp at the first trial were multiplicitous—or in other words, they were two separate punishments for the same offense, and (2) his conviction for possession of marijuana at the first trial barred a retrial on the possession of marijuana with intent to distribute charge because K.S.A. 2021 Supp. 21-5109(b) bars a conviction for both a greater and lesser offense. Possession of marijuana is a lesser included offense of possession of marijuana with intent to distribute. To prevail on either of these arguments, Crudo must establish the crimes at issue arise from the "same offense." *Dale*, 312 Kan. at 178.

The State denies these convictions were multiplicitous because it notes the jury could have only found Crudo guilty of the no drug tax stamp charge based on the 19 bags of marijuana found under the bathtub—not the marijuana found in the pickup or underneath the stairs in the camper. It points out the only testimony the jury heard pertaining to the weight of marijuana related to the 19 bags of marijuana found underneath the bathtub.

Invited Error

Before we analyze Crudo's claims, we must address the State's argument that Crudo invited the error and cannot complain about it on appeal. The State contends Crudo deliberately avoided requesting a lesser included instruction as to count 1—the possession with the intent to distribute charge—to nullify the jury. The State argues, "It was an all or nothing defense, that did not go in the defendant's favor, and no[w] the defense is attempting to argue that it now constitutes double jeopardy." But Crudo correctly notes the invited error doctrine does not apply. The issue he raised on appeal stems from whether the convictions are multiplicitous—not on the district court's failure to instruct the jury on a lesser-included offense.

Relevant Facts

The State charged Crudo with four counts in the complaint:

(1) possession of marijuana with intent to distribute in violation of K.S.A. 2013 Supp. 21-5705(a)(4) and (a)(7), "a drug severity level 2, nonperson felony (450grams-30kg)." Based on a review of the statute for this offense, the State's reference to "(450grams-30kg)" corresponds to K.S.A. 2013 Supp. 21-5705(d)(2)(C), which provides that a "[v]iolation of subsection (a) with respect to material containing any quantity of marijuana, or analog thereof, is a: . . . (C) drug severity level 2 felony if the quantity of the material was *at least 450 grams but less than 30 kilograms*." (Emphasis added.)

(2) no drug tax stamp, a severity level 10 nonperson felony, in violation of K.S.A. 79-5204(a) and K.S.A. 79-5208. The State alleged that Crudo, "a dealer of marijuana or other controlled substances as defined by K.S.A. 79-5201, unlawfully, feloniously and intentionally possessed such a controlled substance [*to wit: over 28 grams of marijuana*] upon which a tax is imposed without having affixed thereto an official stamp or other indicia of tax payment." K.S.A. 79-5201(c) provides that "'dealer' means any person who, in violation of Kansas law, manufactures, produces, ships, transports or imports into Kansas or in any manner acquires or possesses *more than 28 grams of marijuana* . . . ." (Emphasis added.) The statutes under which Crudo was charged reference a "dealer," which thereby incorporates the definition's weight requirement. See K.S.A. 79-5204(a) ("No *dealer* may possess any marijuana . . . upon which a tax is imposed pursuant to K.S.A. 79-5202, and amendments thereto, unless the tax has been paid as evidenced by an official stamp or other indicia." [Emphasis added.]); K.S.A. 79-5208 ("Any *dealer* violating this act is subject to a penalty of 100% of the tax in addition to the tax imposed by K.S.A. 79-5202 and amendments thereto. In addition to the

tax penalty imposed, a *dealer* distributing or possessing marijuana . . . without affixing the appropriate stamps, labels or other indicia is guilty of a severity level 10 felony." [Emphases added.]).

(3) possession of marijuana, a class A nonperson misdemeanor, in violation of K.S.A. 2013 Supp. 21-5706(b)(3) or (b)(7). The State did not specify a weight for the marijuana it alleged Crudo possessed for this crime.

(4) conspiracy to possess marijuana with the intent to distribute, a severity level 2, nonperson felony, in violation of K.S.A. 2013 Supp. 21-5302(a).

The jury instruction for possession of marijuana with intent to distribute provided, in relevant part:

"In Count I, the defendant is charged with the crime of unlawfully possessing marijuana with the intent to distribute *at least 450 grams but less than* 30 *kilograms*. . . .

"To establish this charge, each of the following claims must be proved:

"1. The defendant possessed marijuana with the intent to distribute.

"2. The quantity of the marijuana possessed with the intent to distribute was *at least 450 grams but less than 30 kilograms*.

"3. This act occurred on or about the 23rd day of January, 2014, in Geary County, Kansas." (Emphases added.)

The jury instruction for the charge of no drug tax stamp provided, in relevant part:

"In Count II, the defendant is charged with possession of marijuana, without Kansas tax stamps affixed. . . .

"To establish this charge, each of the following claims must be proved:

"1. That the defendant intentionally possessed *more than 28 grams of marijuana* without affixing official Kansas tax stamps or other labels showing that the tax had been paid.

"2. That the defendant did so on or about the 23rd day of January, 2014, in Geary County, Kansas." (Emphasis added.)

The jury instruction for possession of marijuana provided, in relevant part:

"In Count III, the defendant is charged with possession of marijuana. . . .

"To establish this charge, the State must prove each of the following claims beyond a reasonable doubt:

"1. That the defendant possessed marijuana.

"2. This act occurred on or about the 23rd day of January, 2014 in Geary County, Kansas."

Were Crudo's convictions for possession of marijuana and no drug tax stamp multiplicitous?

"'[M]ultiplicity is the charging of a single offense in several counts of a complaint or information'" and "'creates the potential for multiple

punishments for a single offense, which is prohibited by the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.'" *State v. George*, 311 Kan. 693, 696-97, 466 P.3d 469 (2020). This court reviews multiplicity challenges using an unlimited standard of review. 311 Kan. at 696.

The framework for determining whether convictions are multiplicitous involves first asking whether the convictions are for the "same offense"—an inquiry that requires this court to "decide whether 'the convictions arise from the same conduct.'" 311 Kan. at 697. In doing so, the "court examines the facts to determine whether the charges arise from 'discrete and separate acts or courses of conduct' or unitary conduct arising from "'the same act or transaction'" or a "'single course of conduct.'"" *Dale*, 312 Kan. at 178.

Courts generally consider four factors in determining whether conduct is "unitary" (i.e., the same conduct): (1) whether the acts occurred at or near the same time; (2) whether the acts occurred at the same location; (3) whether there is a causal relationship between the acts or an intervening event; and (4) whether a fresh impulse motivated some of the conduct. *Dale*, 312 Kan. at 179.

If the court determines the defendant's conduct was unitary, a double jeopardy violation is *possible*. At that point, the court's analysis turns to determining whether there are two offenses or only one. *Dale*, 312 Kan. at 180.

Crudo's argument involves convictions based on two statutes—the statute for possession of marijuana and the statute for no drug tax stamp. Convictions based on different statutes are multiplicitous only if "'the statutes upon which the convictions are based contain an identity of elements.'" *George*, 311 Kan. at 697. To determine whether there is an identity of elements, we ask "'whether each offense requires proof of an element not necessary to prove the other offense.'" 311 Kan. at 698. If each offense requires proof of an element unnecessary to prove the other offense, the convictions are not multiplicitous. See 311 Kan. at 698 (determining that statute for each offense required proof of element that was not required by statute for other offense, and concluding convictions were not multiplicitous).

The Kansas Supreme Court in *Hensley* discussed how this analysis is affected by K.S.A. 21-3107(2)(b)—which is now codified at K.S.A. 2021 Supp. 21-5109(b)(2). *Hensley*, 298 Kan. at 427, 435; see L. 2010, ch. 136, § 307. K.S.A. 2021 Supp. 21-5109(b) is the statute Crudo references in his double jeopardy arguments. The *Hensley* court explained the Kansas and federal double jeopardy clauses "prohibit a court from imposing multiple punishments under different statutes for the same conduct in the same proceeding *when the legislature did not intend multiple punishments*." (Emphasis added.) 298 Kan. at 435. The court explained the identity of elements test (calling it the "same-elements test") is merely a rule of construction used to determine whether the Legislature intended to punish the same conduct under the two statutes. 298 Kan. at 435-36. Under the test, if each statute contains an element not found in the other, we presume the Legislature intended punishment for both crimes. 298 Kan. at 435. But the *Hensley* court explained that legislative history can override this presumption and stated: "K.S.A. 21-3107(2)(b) clearly specifies a circumstance in which our legislature did not intend cumulative punishment, removing the need to turn to legislative history." 298 Kan. at 436. The court explained that "K.S.A. 21-3107(2)(b) is essentially the inverse of the same-elements test as it prohibits a defendant from being convicted of both a greater and lesser crime, and defines a lesser crime as 'a crime where all elements of the lesser crime are identical to some of the elements of the crime charged.'" 298 Kan. at 436. The court held that as a result, this statute "supplants the same-elements test" or the identity of elements test. 298 Kan. at 436.

Crudo contends the charges for possession of marijuana and for no drug tax stamp arose from unitary conduct because the drugs were all found at the same time—during the traffic stop. He argues "the fact some were in the camper and some in the pickup should not alter the calculus" and notes he owned both the pickup and the camper. He cites four cases in support of his assertion—*State v. Unruh*, 281 Kan. 520, 133 P.3d 35 (2006); *State v. Alvarez*, 29 Kan. App. 2d 368, 28 P.3d 404 (2001); *State v. Rank*, No. 122,893, 2021 WL 4032859 (Kan. App. 2021) (unpublished opinion); and *State v. Gilmore*, No. 97,362, 2008 WL 5234530 (Kan. App. 2008) (unpublished opinion).

Crudo explains that in *Unruh*, methamphetamine was found in multiple areas within a van, while various items commonly used to manufacture methamphetamine were found in the back of the van. He highlights that the State brought multiple drug charges against Unruh, and when addressing whether a unanimity instruction was warranted, the *Unruh* court found the case involved "multiple items of evidence but not multiple acts." 281 Kan. at 529. Crudo asserts that in *Unruh*, "[t]here were not multiple acts because 'there was no temporal, geographic, or other separation or severance of the acts.'" But these statements from *Unruh* are inapplicable. Although *Unruh* included a double jeopardy analysis, the holdings Crudo references did not come from the double jeopardy analysis but from the court's unanimity instruction analysis for the possession of methamphetamine charge. Thus, the court was determining whether the methamphetamine found in the various locations would be considered multiple acts that could each constitute the *single* crime of possession of methamphetamine. 281 Kan. at 528-29. And in the *Unruh* court's double jeopardy analysis, it never analyzed whether the conduct was unitary, because it determined the convictions were not multiplicitous. *Unruh*, 281 Kan. at 533-34.

Both *Alvarez*, 29 Kan. App. 2d at 369-70, and *Rank*, 2021 WL 4032859, at *2, are inapplicable for the same reasons—they did not involve double jeopardy challenges, but challenges to a district court's failure to give a unanimity instruction when the defendant believed the State presented multiple acts that could prove the charged crime of possession of methamphetamine.

The final case Crudo cites—*Gilmore*, 2008 WL 5234530—is the only one which bears any possible relevance. In that case, the court found Gilmore's convictions for possession of methamphetamine with intent to distribute and simple possession of methamphetamine arose from the same conduct based on the following analysis of the four factors:

"When we apply these factors to our case, we conclude that the charges did arise from the same conduct. All of the drugs and paraphernalia were seized at nearly the same time in or around the apartment when the search warrant was executed. All of the items were causally related to [the defendant's] alleged participation in the manufacture or acquisition of methamphetamine without any intervening fresh impulse. Although [the defendant] allegedly possessed several

different items, the charges all arose from the same conduct: his possession of drugs and paraphernalia." *Gilmore*, 2008 WL 5234530, at *1.

That said, the facts of Crudo's case and *Gilmore*'s are critically different. First, the evidence underlying the drug tax stamp conviction had to be the 19 bags of marijuana found under the bathtub in the camper because the drug tax stamp charge stemmed from a weight of "over 28 grams of marijuana." The jury was also informed of this weight requirement in the jury instruction for the drug tax stamp charge. The only evidence presented at the first trial about the weight of any of the marijuana related to the 19 vacuum-sealed bags of marijuana. Moreover, the only testimony referencing drug tax stamps was Lt. Ricard's testimony that these 19 bags did not have any such stamps.

The evidence underlying the possession of marijuana conviction, on the other hand, could have been the marijuana found underneath the stairs in the camper or the small piece of marijuana found in the pickup. Lt. Ricard and Lt. Stopper only testified that the 19 bags reflected possession with the intent to distribute. But they testified the marijuana found under the stairs in the camper contained items consistent with personal use—a grinder and rolling paper. And Lt. Ricard testified the piece of marijuana found in the pickup was a small "bud"—just after he confirmed that grinders are used to grind up marijuana buds and then those buds are put into rolling paper to form a joint. This would similarly suggest the small piece of marijuana found in the pickup was for personal use.

Turning to the first factor of the unitary conduct analysis, all the marijuana was found around the same time—during the search of the pickup and the camper. See *Dale*, 312 Kan. at 179. That said, as to the second factor, the marijuana was found in three locations—in the pickup, under the bathtub in the camper, and under the stairs in the camper. See 312 Kan. at 179. And there is no evidence of any intervening event, as considered in the third factor. See 312 Kan. at 179. The most significant factor here may be the fourth factor—which asks whether a "fresh impulse" motivated some of the conduct. 312 Kan. at 179. Here, the conduct leading to the no drug tax stamp conviction (the 19 bags) and the conduct leading to the possession of marijuana conviction (the marijuana

found underneath the stairs or the small piece of marijuana found in the pickup) would be prompted by separate impulses—the first being an impulse to distribute marijuana to others and the second being an impulse to personally use marijuana. See *State v. Thompson*, 287 Kan. 238, 248, 200 P.3d 22 (2009) (effectively providing examples of both separate and singular impulses by stating: "[O]rdinarily, . . . the possession of heroin would be prompted by a separate impulse from possession of cocaine or possession of methamphetamine. . . . In contrast, a defendant might gather several items listed in K.S.A. 65-7006(a)[—statute making it unlawful for any person to possess any of the listed substances with the intent to use the product to manufacture a controlled substance—]when motivated by a single impulse, *i.e.*, a unitary intent to conduct one manufacturing process."). The State cites *State v. Hekekia*, No. 101,781, 2010 WL 2852581, at *1-3, 5 (Kan. App. 2010) (unpublished opinion), in support of its conclusion.

In *Hekekia*, officers were dispatched to a motel and while there, an officer saw Hekekia push a spoon with white residue under her bed covers. After arresting the defendant, the officers obtained a warrant to search the motel room and found two bags containing "'$20 rocks'" in a nightstand drawer. 2010 WL 2852581, at *1. One bag contained nine rocks and the other contained four. Each rock was individually packaged. The officers testified the size of each rock was a common amount for sale. They also found a larger chunk of crack cocaine in the drawer, a pipe used for smoking crack cocaine on top of the nightstand, and a roll of toilet paper containing a chunk of crack cocaine on top of the television. The amount of crack cocaine found totaled 8.8 grams. During a police interview following the search, the defendant conceded there had been crack on the spoon which she intended to smoke, but she flushed it when the officers came. She denied any knowledge of the cocaine in the drawer. The State charged the defendant with seven counts, including possession of cocaine and possession of cocaine with intent to sell, distribute, or deliver and possession of cocaine. At trial, the defendant admitted to possessing cocaine for personal use, but she denied possessing with the intent to distribute or having any knowledge of the cocaine found in the drawer. The jury found her guilty of both possession

of cocaine with intent to sell, distribute, or deliver and possession of cocaine. On appeal, she claimed these two convictions were multiplicitous. The panel turned to the first question in the multiplicity analysis—determining whether the convictions arose from the same conduct (i.e., unitary conduct). The defendant argued all the evidence of cocaine possession stemmed from the same conduct. But the panel found the convictions were not based on the same conduct, relying on the "'fresh impulse' factor":

"More helpful is the 'fresh impulse' factor. Because the possession here was mostly simultaneous rather than sequential, a 'fresh' impulse may not be relevant, but there are at least different impulses. The large amounts of cocaine were, the evidence suggests, for sale rather than for personal use. The cocaine that was on the spoon and was flushed was obviously not for sale since [the defendant] said she had intended to use it. These were not the same conduct, and her convictions were not multiplicitous." 2010 WL 2852581, at *5.

Similar here, the 19 bags which led to the no drug tax stamp conviction were, as the evidence suggests, for distribution rather than for personal use, while the evidence suggests the marijuana found in the pickup and under the stairs in the camper was for personal use. Thus, we find different impulses motivated the conduct—an impulse to distribute marijuana versus an impulse to personally use it.

We find Crudo's convictions for possession of marijuana and for no drug tax stamp did not arise out of unitary conduct because the evidence was not found in the same location and separate impulses motivated the conduct that led to each conviction. Thus, the convictions are not multiplicitous and Crudo's double jeopardy argument fails. See *Dale*, 312 Kan. at 178.

Did the conviction for possession of marijuana with intent to distribute at the second trial violate double jeopardy because Crudo had been convicted of possession of marijuana at the first trial?

We analyze Crudo's second double jeopardy argument—wherein he claims multiple prosecutions for the same offense—the same away we analyzed his first double jeopardy argument. So, again, we must first determine whether the convictions for possession of marijuana and possession with intent to distribute arise from "unitary conduct," because, as explained above, "[d]ouble jeopardy concerns arise only if unitary conduct is at issue."

Dale, 312 Kan. at 175, 178, 180 (turning to defendant's successive prosecution double jeopardy claim rooted in K.S.A. 21-3107[2][a]—which court noted is now codified at K.S.A. 2019 Supp. 21-5109—only *after* finding conduct was unitary, stating, "[b]ecause [the defendant's] conduct was unitary, a double jeopardy violation is factually possible, and our analysis must continue").

As to this issue, Crudo simply repeats the argument he made regarding his convictions for possession of marijuana and no drug tax stamp. That is, he claims the drugs found constituted a unitary act. Still, just like those convictions, the convictions at issue—possession of marijuana and possession of marijuana with intent to distribute—did not arise out of unitary conduct.

The evidence underlying the possession of marijuana with intent to distribute conviction had to be the 19 bags. Again, this is because the complaint stated this charge was based on a weight of 450 grams to 30 kilograms. The statute for this offense required proving this weight to categorize the offense as a severity level 2 felony as the State did. See K.S.A. 2013 Supp. 21-5705(d)(2)(C). The jury was also informed that proof of this weight was required to establish this charge. The only evidence presented at either trial about the weight of any of the marijuana related to the 19 bags, as a forensic chemist with the Kansas Bureau of Investigation testified the total weight of the 19 bags amounted to 9.34 kilograms (i.e., 9,340 grams) and confirmed this amount would be between 450 grams and 30 kilograms. At the second trial, Lt. Ricard also testified to this weight in pounds. Neither the marijuana found in the pickup, nor the marijuana found under the stairs in the camper could have led to the conviction for possession with intent to distribute because there was no evidence presented of the weight of this marijuana. And both Lt. Ricard and Lt. Stopper testified possession of the 19 bags reflected marijuana with the intent to distribute. As noted when addressing the first two convictions Crudo challenged, the marijuana found in the pickup and the marijuana found under the stairs in the camper could have served as the evidence that led to the possession of marijuana conviction.

Turning to the four factors for determining whether Crudo's convictions for possession of marijuana and possession of marijuana with intent to distribute arose out of unitary conduct, it is again evident based on to location and "fresh impulse" factors that these convictions were not based on unitary conduct. See *Dale*, 312 Kan. at 179. The marijuana was found in three distinct locations—in the pickup, under the bathtub in the camper, and under the stairs in the camper. See 312 Kan. at 179. And the conduct leading to the possession of marijuana with intent to distribute conviction (the 19 bags) was prompted by a different impulse than the conduct leading to the possession of marijuana conviction (either the marijuana found underneath the stairs in the camper, the marijuana found in the pickup, or both). Again, the evidence suggests the 19 bags underlying the conviction for possession of marijuana with intent to distribute was motivated by an impulse to distribute marijuana, while the marijuana found in the pickup and under the stairs in the camper was motivated by an impulse to personally use marijuana. Thus, the convictions were not based on the same conduct. See *Hekekia*, 2010 WL 2852581, at *5. As a result, Crudo's double jeopardy arguments fail again because double jeopardy concerns arise only if unitary conduct is at issue. See *Dale*, 312 Kan. at 178.

We find Crudo's conviction for possession of marijuana with intent to distribute at the second trial after his conviction of possession of marijuana at the first trial did not violate Crudo's double jeopardy protections because the two convictions did not arise out of unitary conduct.

We find no trial errors whose cumulative effect require reversal.

Finally, Crudo argues the cumulative effect of the trial errors prejudiced his right to a fair trial and, as a result, we must reverse his convictions and order a new trial. But the district court's only error was the legally inappropriate jury instruction, which we found was harmless and did not require reversal. A single error that has been found to be nonreversible cannot establish reversible cumulative error. *Ballou*, 310 Kan. at 617.

Affirmed.

(517 P.3d 1280)

No. 124,355

WILLIAM DEAN BLUE, *Appellant*, v. BOARD OF SHAWNEE COUNTY COMMISSIONERS, et al., and CITY OF TOPEKA, et al., *Appellees*.

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Interpretation of Supreme Court Order—Appellate Review.* Interpretation of Kansas Supreme Court Administrative Order 2020-PR-58, effective May 27, 2020, presents a question of law subject to unlimited review.

2. COURTS—*Suspension of Deadlines under Administrative Order of Supreme Court—Exemption of Case if Procedures Met.* A case may be exempted from the suspension of deadlines under Administrative Order 2020-PR-58 if certain procedures are met by the district court judge, appellate judicial officer, or hearing officer.

3. SAME—*Administrative Order of Supreme Court Addressing Timelines—Issuance of Show Cause Order Not Required before Summary Judgment Granted*. A court need not issue a show cause order prior to granting summary judgment under Administrative Order 2020-PR-58.

4. CIVIL PROCEDURE—*Dismissal of Actions—Terminates Action without Considering Merits of Parties' Claims.* A dismissal under K.S.A. 2021 Supp. 60-241(b) terminates an action or claim without consideration of the merits of the parties' claims. Such a dismissal contemplates a lack of action from the party pursuing the claim.

5. SAME—*Default Judgment—Statutory Definition—Terminates Action without District Court Considering Merits.* A default judgment is entered when a "party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . ." K.S.A. 2021 Supp. 60-255(a). Like a dismissal under K.S.A. 2021 Supp. 60-241(b), a default judgment terminates an action without the district court's consideration of the merits.

6. SUMMARY JUDGMENT—*Process for Summary Judgment under Statute*. The summary judgment process is initiated when any party seeks judgment on all or part of a claim by filing a motion, with or without supporting affidavits, under K.S.A. 2021 Supp. 60-256(a).

7. CIVIL PROCEDURE—*Distinction Between Types of Dismissal under Statutes*. Kansas law supports a distinction between dismissals due to lack of action or missed deadlines, such as dismissal under K.S.A. 2021 Supp. 60-241(b) and default under K.S.A. 2021 Supp. 60-255, and those which

are entered on the merits after consideration of the pleadings, discovery, and other evidence presented by the parties, such as K.S.A. 2021 Supp. 60-256.

Appeal from Shawnee District Court; MARY E. CHRISTOPHER, judge. Opinion filed September 2, 2022. Affirmed.

Eric Kjorlie, of Topeka, for appellant.

Jonathan C. Brzon, assistant county counselor, for appellee Board of Shawnee County Commissioners.

Shelly Starr, chief of litigation, City of Topeka, for appellee City of Topeka.

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

COBLE, J.: William Dean Blue filed multiple claims against the City of Topeka (City) and Shawnee County (County) after he was publicly misidentified as the person arrested for various crimes. Both the City and County filed motions for summary judgment during the COVID-19 pandemic. Blue failed to respond to the dispositive motions. The district court analyzed the motions on the merits and granted the City and County's motions. Blue sought reconsideration of the summary judgment order but the district court denied relief.

On appeal, Blue contends the district court needed to issue a show cause order prior to granting summary judgment under Kansas Supreme Court Administrative Order 2020-PR-58, effective May 27, 2020, which suspended various deadlines due to the COVID-19 pandemic. We find Blue's argument unpersuasive because the district court exempted Blue's case from the deadline suspension. And, even if Order 2020-PR-58 applied here, the district court decided the case on the merits, not on default or due to a missed deadline, and this distinction is important. The district court did not have to issue a show cause order prior to granting summary judgment on the merits. We affirm the district court's ruling.

FACTUAL AND PROCEDURAL BACKGROUND

On August 28, 2019, Blue filed multiple claims against the County and City after he was publicly misidentified as a person arrested for various crimes. Blue's petition alleged causes of action for defamation, false light invasion of privacy, and negligence.

Upon motions filed by the City and County, the district court dismissed Blue's defamation claim. Blue then filed an amended petition

seeking to bolster his claim of false light invasion of privacy. A few weeks later, both defendants moved to strike and dismiss Blue's amended petition, arguing the district court should strike the amended petition because Blue did not obtain consent or leave of the district court before filing. Both defendants also alternatively argued Blue failed to state viable claims for relief.

On May 27, 2020, during the initial scourge of the COVID-19 pandemic, our Supreme Court entered Administrative Order 2020-PR-58. This Order suspended "[a]ll statutes of limitation and statutory time standards or deadlines applying to the conduct or processing of judicial proceedings." Order 2020-PR-58, at 2. On June 19, 2020, the district court ordered Blue's case to be exempted from the suspension of deadlines under Order 2020-PR-58. The district court entered the order of exemption "to avoid further delay, and impose[d] a deadline of June 30, 2020, for plaintiff to file a response to the defendants' Motion(s)." The order clearly stated: "After the June 30th deadline, this matter is no longer subject to the suspension of time in the Supreme Court's order."

Blue timely responded to the City and County's motions, but the district court ultimately dismissed his claim for invasion of privacy. The district court entered a case management order setting December 28, 2020, as the deadline for completing discovery and permitted Blue to file a second amended petition that added a claim of outrage.

On December 23, 2020, the City moved for summary judgment on Blue's two remaining claims: the tort of outrage or intentional infliction of emotional distress and negligence. The County joined the City's motion a few weeks later. Blue did not file a response to either motion.

On January 22, 2021, the City's counsel notified Blue's counsel by email that his response was overdue. Blue's counsel responded that he planned to file a motion for a status conference and request a revised case management order, largely given the disruption of the pandemic which caused him to be unable to review discovery with his client. But Blue filed no motion. On March 1, 2021, the district court granted the City and County's motions for summary judgment. Although the district court noted the lack of response from Blue, it examined the dispositive motions on the merits. The district court found Blue did not

meet his burden of showing the conduct at issue was extreme or outrageous, his distress was extreme, or that he was entitled to damages under his negligence claim.

A few weeks later, Blue moved to reconsider, alter, and amend the district court's order granting the City and County's motions for summary judgment. Blue alleged the district court erred in entering what he considered to be a default judgment without issuing a show cause order under the requirements of Order 2020-PR-58. He argued that the district court's dismissal "denied his procedural due process rights to conduct discovery; and the ability to provide information necessary to prove up this case due to COVID-19 . . . ." He also argued the district court erred in finding the tort of outrage required a showing of physical injury.

After the City and County responded, the district court denied Blue's motion to reconsider. The district court found it did not enter a default judgment or dismiss the case for "failure to prosecute or failure to meet a deadline," but that it granted the defendants' motions "based on its findings that there were no controverted material facts and Defendants were entitled to judgment as a matter of law." Blue appeals.

In May 2022, our court clerk's office notified counsel that this case was set on this court's oral argument calendar for July 11, 2022. Counsel for the City and County appeared before the panel for argument. But counsel for Blue failed to appear. After this court tried to reach Blue's counsel by telephone but failed, the City's and County's counsel said they would waive oral argument. Four days later, Blue's counsel moved to reschedule oral argument, outlining that he was subject to quarantine after having tested positive for COVID-19. After review of the parties' briefs, this court found oral argument would not materially assist the determination of the matter and denied Blue's motion, considering the case submitted on the briefs.

ANALYSIS

In his only issue on appeal, Blue argues the district court erred, or abused its discretion, when it failed to issue a show cause order prior to granting what he terms a default judgment. As in the district court, Blue contends Order 2020-PR-58 mandated the district court issue a show cause order and its failure to do so violated his due process rights. The City and County both respond that Blue's case was exempted from

Order 2020-PR-58 without objection from Blue. They also argue their motions for summary judgment did not trigger the show cause requirement.

Standard of review

Blue frames his issue as a question of law subject to unlimited review. But this is not altogether correct. Blue inaccurately frames his argument as an appeal from an order of default judgment and denial of a motion for new trial. As will be explained, Blue's appeal stems not from any such actions but from the district court's denial of his motion for reconsideration. The district court's denial correctly noted Blue's motion was governed by the parameters of K.S.A. 2021 Supp. 60-260(b), which offers relief from final judgment in certain circumstances.

"This court reviews a trial court's decision on a K.S.A. 60-260(b) motion for abuse of discretion." *Board of Sedgwick County Comm'rs v. City of Park City*, 41 Kan. App. 2d 646, 661, 204 P.3d 648 (2009). 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). As the party asserting the district court abused its discretion, Blue bears the burden of showing such abuse of discretion. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017).

But to the extent this court reviews Kansas statutes, our interpretation of those statutes is a question of law subject to unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). Similarly, when this court reviews Order 2020-PR-58, we interpret a Kansas Supreme Court administrative order, which also presents a question of law subject to unlimited review. See *Dawson v. BNSF Railway Co.*, 309 Kan. 446, 451, 437 P.3d 929 (2019) (interpretation of Kansas Supreme Court Rules); see also *Haney v. City of Lawrence*, No. 123,868, 2022 WL 1197468, at *5-6 (Kan. App. 2022) (unpublished opinion) (collecting cases; noting interpretation of a Kansas Supreme Court administrative order is a question of law). We first turn to our Supreme Court's administrative order.

Kansas Supreme Court Administrative Order 2020-PR-58

As noted, Order 2020-PR-58 became effective while this case was pending to "secure the health and safety of court users, staff, and judicial officers." Order 2020-PR-58, at 2. Paragraph (1) of the order states: "All statutes of limitation and statutory time standards or deadlines applying to the conduct or processing of judicial proceedings are suspended until further order or the termination of this order under the terms of [House Substitute] for [Senate Bill] 102." Order 2020-PR-58, at 2.

But the order permitted exceptions to the suspension of deadlines:

"3. Except as to a statute of limitation, any district court judge, appellate judicial officer, or hearing officer may exempt a case from the suspension of a statutory or other deadline by (a) entering an order in a case or issuing a notice of hearing that imposes a deadline or time requirement and (b) specifically stating that the deadline or time requirement is not subject to the suspension of time in this order.

"4. No action may be dismissed for lack of prosecution or for the failure to meet a deadline, except when a court has (a) invoked the exception in paragraph 3 and (b) issued an order to show cause why the action should not be dismissed." Order 2020-PR-58, at 2.

Blue's argument in his motion to reconsider, and now on appeal, hinges on his narrow reading of paragraph (4). Blue's argument improperly assumes the district court dismissed the case for failure to meet a deadline, and the district court therefore erred when it dismissed the case without issuing a show cause order in violation of paragraph (4) of Order 2020-PR-58. But the district court did not dismiss Blue's claims for lack of prosecution or for the failure to meet a deadline—despite Blue's framing the district court's action as the granting of default judgment. Rather, the district court granted summary judgment against Blue. The district court explained as much in its denial of Blue's motion for reconsideration:

"[Blue] repeatedly refers to the Court's March 1, 2021, Memorandum Decision and Order as a 'default judgment' and claims the Court entered said judgment due to [Blue] missing a filing deadline. This matter was not dismissed for failure to prosecute or failure to meet a deadline. In reality, the Court granted the Defendants' motions for summary judgment based on its findings that there were no

controverted material facts and Defendants were entitled to judgment as a matter of law."

Despite the district court's clarification, Blue continues to misinterpret the ultimate decision of the district court. In his appellate brief, Blue describes the district court's order granting summary judgment in different ways. In his issue statement, he correctly refers to the district court's action as granting "summary judgment." But the text of his analysis argues the district court erred in refusing to set aside a "default judgment."

Blue similarly tries to frame the district court's grant of summary judgment as simply a dismissal—presumably to meet the parameters of Order 2020-PR-58, though this is not entirely clear. For example, he argues the district court "entered summary judgment *dismissing* [his] claims" because he did not respond to the City and County's motions for summary judgment. (Emphasis added.) But as the district court clarified, it did not simply dismiss Blue's claims—it granted summary judgment against Blue after a review of the record led it to find there were no controverted material facts and the City and County were entitled to judgment as a matter of law.

Notably, Blue does not ask this court to review the district court's summary judgment decision on its merits, which would require us to undertake an examination of the evidence supporting the judgment. See *Fairfax Portfolio v. Carojoto*, 312 Kan. 92, 94-95, 472 P.3d 53 (2020) (outlining the appellate court's de novo review of a district court's decision to award summary judgment). Rather, he objects only to the district court's termination of the case without engaging in the show cause procedure required under paragraph (4) of Order 2020-PR-58.

Dismissal, default, and summary judgment: each distinct under Kansas law

Blue's varied characterization of the district court ruling leads us to articulate the differences between certain types of orders—a nonexhaustive list—that may terminate a case under Kansas law. Tied to Blue's descriptions are the requirements of paragraph (4) of Order 2020-PR-58, which references only cases "dismissed for lack of prosecution or for the failure to meet a deadline . . . ." As

noted, Blue classifies the district court order in three ways: as a dismissal, as a default judgment, and as a summary judgment. Each is briefly described for clarity.

First, Kansas law provides for outright dismissal of a civil case, whether voluntary or involuntary, under K.S.A. 2021 Supp. 60-241. The portion of the statute dealing with involuntary dismissal outlines that if a plaintiff "fails to prosecute or to comply with [rules of civil procedure] or a court order, a defendant may move to dismiss the action or any claim against it." K.S.A. 2021 Supp. 60-241(b)(1). A court may also dismiss a case without prejudice for lack of prosecution on its own initiative, if the court provides notice to counsel at least 14 days prior to the dismissal and invites the party to show cause why the case should not be dismissed. K.S.A. 2021 Supp. 60-241(b)(2). And dismissal, generally, is to terminate a claim without a hearing, especially before the trial of the issues involved, and without imposing liability on the defendant for the claims in that case. See Black's Law Dictionary 589 (11th ed. 2019) (defining "dismiss" and "dismissal").

As a result, a dismissal under K.S.A. 2021 Supp. 60-241(b) terminates a case or claim without consideration of the merits. A dismissal of this sort contemplates a lack of action from the party pursuing a claim—first, the claimant fails to comply with either civil rules or fails to prosecute a case; then the defending party seeks dismissal as a result, or the court dismisses the case on its own accord after a party's inaction. This is not what happened in this case—here, the City and County filed motions for summary judgment after Blue prosecuted his case through the discovery deadlines established in the case management order. Thus, the district court did not simply dismiss the action for failure to prosecute, as contemplated by Order 2020-PR-58.

Second, Blue erroneously calls the district court's order a default judgment. A default judgment is one entered when a "party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend." K.S.A. 2021 Supp. 60-255(a). A "default judgment" is a "judgment entered against a defendant who has failed to plead or otherwise defend against the plaintiff's claim." Black's Law Dictionary 526 (11th ed. 2019). And much like a dismissal under K.S.A. 2021 Supp. 60-241(b), a default

judgment terminates an action without a consideration of the merits. Although a party who is granted a default judgment may receive the relief or damages it seeks under certain parameters outlined by K.S.A. 2021 Supp. 60-254(c) and 2021 Supp. 60-255(a)—the merits of the action are not analyzed as a part of the district court's decision to enter default. The decision is entirely based on the responding party's failure to defend against a claim.

Again, this default statute does not apply to the facts or procedural posture of the matter at hand. The parties against whom relief was sought—the City and County—did not fail to defend this action. They affirmatively sought judgment through a different statutory mechanism. Blue's failure to respond to the defendants' motion did not then transform his lack of response into a default under K.S.A. 2021 Supp. 60-255.

The third, and correct, characterization of the district court's decision is one of summary judgment. The summary judgment process is launched when any party seeks judgment on all or part of a claim by filing a motion, with or without supporting affidavits. K.S.A. 2021 Supp. 60-256(a). When a party seeks summary judgment, the court should enter judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." K.S.A. 2021 Supp. 60-256(c)(2). As defined, summary judgment "allows the speedy disposition of a controversy without the need for trial." Black's Law Dictionary 1736 (11th ed. 2019); see Fed. R. Civ. Proc. 56.

Although summary judgment motions are normally denied where discovery is not complete, they are properly granted on review of the pleadings and any completed discovery, such as interrogatories answered, affidavits filed, etc., and where only a question of law is presented. See *Gragg v. Wichita State Univ.*, 261 Kan. 1037, 1061, 934 P.2d 121 (1997); K.S.A. 2021 Supp. 60-256(c)(2). Even if discovery is incomplete, the law permits a party against whom summary judgment is sought to petition the court to either deny the motion or continue its consideration if the defending party feels it needs more discovery to defend against the motion for judgment. K.S.A. 2021 Supp. 60-256(f). In this case,

the discovery period was days from closing when the summary judgment motions were filed, and Blue made no request for additional time to oppose the motion or pursue additional discovery. The granting of summary judgment prior to the completion of discovery was within the district court's discretion. 261 Kan. at 1061.

Despite Blue's attempt to lump these three types of case terminations together, the law supports a distinction between terminations resulting from a lack of action or missed deadlines—such as dismissal under K.S.A. 2021 Supp. 60-241 and default under K.S.A. 2021 Supp. 60-255—and those which are entered on the merits of a claim after consideration of the pleadings, discovery, and other evidence presented by the parties, such as K.S.A. 2021 Supp. 60-256. Labeling the district court's decision as a "dismissal" or "default" does not make it so. The collective attributes of the district court's order—including the process undertaken by the parties to seek judgment, the procedural timing of the court's decision, and whether the district court addressed the merits of the claims—are what properly distinguish each type of termination from another.

Kansas Supreme Court Administrative Order 2020-PR-58 does not apply to the district court's judgment.

Order 2020-PR-58 was not applicable to the district court's grant of summary judgment, and thus its decision to deny reconsideration, for two reasons. First, given the distinctions outlined here, Blue's improper attempt to frame the district court's action as a dismissal for lack of prosecution is fatal to his argument on appeal because without his claims being "dismissed for lack of prosecution or for the failure to meet a deadline," the district court did not need to issue a show cause order under the language of paragraph (4) of Order 2020-PR-58.

Second, the district court properly followed the procedure outlined in paragraph (3) of Order 2020-PR-58 when it invoked the exemption against suspending the deadlines in Blue's case. The district court filed an order referencing paragraphs (1) and (3) of Order 2020-PR-58, and this same order noted that Blue had not filed a response to some of the defendant's earlier motions and included a date for Blue to respond. The district court concluded:

"After the June 30th deadline, this matter is no longer subject to the suspension of time in the Supreme Court's order." The district court followed the directives of Order 2020-PR-58, and notably, Blue did not object to the order reinstating the deadlines.

Blue's failure to act sealed his fate but was not determinative of the district court's decision.

About six months after the district court reinstated deadlines in the case, and less than a week before the discovery deadline established in the case management order expired, the City and County moved for summary judgment. Blue had 21 days to file a responsive pleading to the motions for summary judgment. K.S.A. 2021 Supp. 60-256(c)(1)(B). But even after being contacted by the City's counsel about his tardy response, Blue did not respond to the City and County's motions. The record shows Blue neither requested deadline extensions, nor did he inform the district court that he was unable to take depositions or needed other discovery—as he alleged in his motion for reconsideration and now on appeal. As noted by the district court, and as occurred on appeal before this court, one of the exhibits included with Blue's motion was a filing from another case in which he sought such an extension, but Blue did no such thing in this matter. He also did not seek additional time to conduct discovery under K.S.A. 2021 Supp. 60-256(f). Blue simply took no action at all.

Given Blue did not object to reinstating deadlines and did not notify the district court or the parties of his alleged deficiencies in discovery, we do not find the district court abused its discretion when it denied Blue's motion for reconsideration of its summary judgment decision. As noted, paragraph (4) of Order 2020-PR-58 only requires the district court to issue a show cause order if the action is being "dismissed for lack of prosecution or for the failure to meet a deadline . . . ."

In conclusion, Blue's argument is not persuasive for two reasons. First, the City and County's motions for summary judgment—and the district court's ultimate granting of those motions—occurred six to nine months after the district court exempted Blue's case from our Supreme Court's order suspending

deadlines. Order 2020-PR-58 no longer applied to the case. Second, even if Order 2020-PR-58 did apply, the terms of paragraph (4) are not applicable because Blue's action was not dismissed for lack of prosecution or for failing to meet a deadline. Rather, the district court granted summary judgment against Blue because the facts were uncontroverted and the City and County were entitled to judgment as a matter of law.

As a result, Blue has not met his burden of showing the district court abused its discretion in denying his motion for reconsideration of the summary judgment decision. The district court did not make an error of law or fact. And given Blue did not object to the reinstatement of deadlines, it was not arbitrary, fanciful, or unreasonable for the district court to refuse to reconsider its judgment. See *Biglow*, 308 Kan. at 893.

Affirmed.

(518 P.3d 419)

No. 123,710

In the Matter of the Parentage of E.A., a Minor Child.

SYLLABUS BY THE COURT

1. PARENT AND CHILD—*Kansas Parentage Act—Legal Presumption—Any Person on Behalf of Child May Bring Action under Statute.* The Kansas Parentage Act focuses on legal presumptions that arise from a child's circumstances. The Act provides that any person on behalf of a child may bring an action at any time to determine the existence of a parent and child relationship presumed under K.S.A. 2021 Supp. 23-2208. K.S.A. 2021 Supp. 23-2209.

2. SAME—*Presumption of Parentage under Statute—Clear and Convincing Evidence of Paternity by Another Person May Rebut Presumption of Parentage.* A presumption of parentage may be rebutted "by clear and convincing evidence," "by a court decree establishing paternity of the child by another man," or by another presumption. When a presumption is rebutted, "the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence." K.S.A. 2021 Supp. 23-2208(b). If two or more presumptions arise and conflict with each other, "the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control." K.S.A. 2021 Supp. 23-2208(c).

3. CIVIL PROCEDURE—*Collateral Order Doctrine—Factors*. The collateral order doctrine provides that an order may be collaterally appealable if it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separated from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.

4. PARENT AND CHILD—*Presumption of Parentage Must Be Claimed at Time of Child's Birth.* Anyone trying to establish a presumption of parentage by openly and notoriously claiming parentage must do so at the time of the child's birth.

5. SAME—*Kansas Adoption and Relinquishment Act—Purpose—Adoption Granted with Consent of Parent or Both Parents or Those in Place of Parents*. The Kansas Adoption and Relinquishment Act recognizes the primary importance natural parents have in a child's life, and adoptions will be granted with the consent of a parent, or both parents, or from those who are legally in the place of parents such as an adoption agency. The Adoption Act permits any adult to adopt a minor child, but only with the parents' consent. Consent to an adoption shall be given by the living parents of the child

whose rights have not been terminated unless one of the parents' consent is found unnecessary under certain rules set out in the Adoption Act. K.S.A. 2021 Supp. 59-2113; K.S.A. 2021 Supp. 59-2129.

6. CIVIL PROCEDURE—*Doctrine of Res Judicata—Common-law Rule of Equity—Four Elements.* The doctrine of res judicata is a common-law rule of equity hoping to promote justice and sound public policy. In other words, a party should not have to litigate the same action twice. Before the doctrine of res judicata will bar a successive suit, four elements must be met: (a) the same claim; (b) the same parties; (c) claims that were or could have been raised; and (d) a final judgment on the merits.

7. SAME—*Doctrine of Collateral Estoppel—Bars Relitigating Issue Already Determined against Same Party – Elements.* The common-law doctrine of collateral estoppel, like res judicata, also bars someone from relitigating an issue determined against that party. Under Kansas law, collateral estoppel may be invoked when there is a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based on ultimate facts as disclosed by the pleadings and judgment; the parties must be the same or in privity; and the issue litigated must have been determined and necessary to support the judgment.

Appeal from Shawnee Court; MERYL D. WILSON, judge. Opinion filed September 9, 2022. Affirmed.

Joseph W. Booth, of Lenexa, for appellant D.A.

Allan A. Hazlett, of Topeka Family Law, of Topeka, for appellees C.A., D.P., and S.P.

Linus L. Baker, of Stilwell, for *amicus curiae* National Association for Grandparenting.

Lindsee A. Acton and *Warren H. Scherich III*, of Scherich Family Law, PC, of Shawnee, for *amicus curiae* National Association of Social Workers.

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

HILL, J.: Denied interested party status by the adoption court in his grandson's adoption, D.A. filed this Kansas Parentage Act action. In this case, Grandfather claims to be the "father" of E.A. due to his extensive history of fulfilling that role in the young boy's life. During those six years, E.A. has lived in Grandfather's home as Grandfather's son. Despite this history, the district court, relying on the adoption court's ruling, denied Grandfather's motion for summary judgment based on res judicata and collateral estoppel and dismissed the case. Grandfather appeals.

We agree with the district court that Grandfather is not entitled to summary judgment and with its dismissal of the case but for different reasons. In accordance with a recent Supreme Court ruling, we hold that Grandfather's claim of paternity fails because it is untimely. He did not claim paternity at the time of the boy's birth. He made the claim later. And, after considering the facts and the arguments, we conclude that a collateral attack upon an adoption proceeding should not be permitted in order to avoid inconsistent judgments of parentage from two courts. The resolution of such issues should be made in the adoption case. We therefore affirm the district court's denial of summary judgment and dismissal of the case.

A boy born out of wedlock moves in with his grandfather.

E.A. was born in December 2012. When he was seven months old, E.A.'s natural parents could not care for him and Grandfather took physical custody of E.A. and agreed to integrate him into his family and to raise E.A. as his own child. Grandfather is the biological paternal grandfather of E.A.

A month later, Grandfather started and paid for a paternity action on behalf of E.A.'s natural father in Shawnee County District Court. In that action, the court determined the parents of E.A. to be J.B.—natural mother, and C.A.—natural father. The court awarded C.A. sole temporary custody of E.A. subject to supervised visitation by J.B.

Then, in January 2014, C.A. signed a "Custody Relinquishment" assigning and releasing custody of E.A. to Grandfather, the "paternal grandfather of such minor child." The relinquishment stated that Grandfather would be "solely responsible and entitled to make medical, educational, financial and any other type of decisions to effectuate the purpose of this agreement." This document was never filed with any court.

Over four years later, in August 2018, C.A. signed a "Consent to Adoption of Minor Child" agreeing to "permanently giv[e] up all custody and other parental rights" over E.A. and to the adoption of E.A. by Grandfather, "his paternal grandfather." This document

was not filed with any court. By law, K.S.A. 59-2114(b)—the consent to adopt—expired after six months. Grandfather has never legally adopted E.A.

C.A. told Grandfather on August 1, 2018:

"Dad, this is your kid. Nobody will ever take him away from you while I am alive. Nobody that I know wants to. I don't want anyone else to know about this document other than you, uncle J[ ] and me. If I die and someone wants to take EJ from you, then you can use these documents to prove that he is your son."

The parties agree that from August 2013 to May 2019, E.A. lived continuously and exclusively with Grandfather's family. He lived as a full and equal member of Grandfather's family, which also consisted of a mother-figure and three brothers and sisters. He was raised just as his brothers and sisters. He believes that Grandfather is his father. He is widely known by friends, neighbors, teachers, and acquaintances as the youngest child of the family. And he is unaware of the existence of any other nuclear family members. Grandfather has provided a stable, fulfilling, and thriving childhood environment for E.A. Grandfather has notoriously—in writing, and by conduct—had a parent-child relationship with E.A. since E.A.'s infancy.

E.A.'s natural mother, J.B., accepted these arrangements over the course of E.A.'s life. During the past five years, she has had no contact with or provided any support to E.A. During the past five years, E.A.'s natural father has had minimal incidental contact with E.A.—as an older brother—not as a parent.

Circumstances change.

This arrangement abruptly changed in May 2019. Appellees S.P., E.A.'s biological paternal grandmother, and D.P., Grandmother's husband, asked for a visit with E.A. They picked up E.A. but have never returned him to Grandfather, and have prevented E.A. from having any contact with Grandfather and his family.

This appeal is, essentially, a legal struggle between Grandfather and his two opponents—Grandmother and D.P.

Grandmother and D.P. petitioned to adopt E.A. in Shawnee County District Court. Grandfather tried to intervene in the adoption proceeding, but the court denied his motion for lack of standing. The adoption court found that C.A.'s paternity of E.A. had

been legally established in the prior paternity case, and that Grandfather did not meet the statutory definition of a "party in interest" in the adoption proceeding. We cannot tell from the scant record here if Grandfather tried to appeal the adoption court's ruling.

We do know that in response, Grandfather promptly petitioned for the determination of parentage under the Kansas Parentage Act, K.S.A. 2021 Supp. 23-2201 et seq., and the holding in *Frazier v. Goudschaal*, 296 Kan. 730, 295 P.3d 542 (2013). Grandfather filed the petition as "next friend" of E.A. He alleged he had "openly and notoriously in writing" acted as E.A.'s father. He asked the court to determine that he was a presumed parent of E.A. Therefore, he was entitled to a presumption of parentage under the Parentage Act. Grandmother and D.P. opposed the parentage action.

Both parties moved for summary judgment in the parentage case. The district court found that because Grandfather did not have standing in the adoption proceeding, he was prohibited from attacking the adoption because of the doctrines of collateral estoppel and res judicata. The court made three rulings:

- there could be no presumption of parentage here because parentage was established in the 2013 paternity case in which the court found that C.A. was the father of E.A.;
- parental rights cannot be terminated in a Parentage Act case; and
- a child cannot have more than two parents under the Parentage Act.

The district court dismissed the case.

Grandfather appeals that ruling. Besides his brief, two amicus briefs have been filed supporting his position. One is from the National Association for Grandparenting, which discusses the unique and important position that grandparents can and do play in children's lives. The second is from the National Association of Social Workers. The social workers stress that early attachments children have with parental figures play an important emotional role in that child's life.

We are not bound by the district court's rulings.

When we consider Grandfather's motion for summary judgment, we are in the same position as the district court. We apply

the same rules and, when we find reasonable minds could differ on the conclusions drawn from the evidence, we will hold that summary judgment is inappropriate. Appellate review of the legal effect of undisputed facts is de novo. See *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981-82, 453 P.3d 304 (2019).

Grandfather did not notoriously or in writing claim parentage at the time of E.A.'s birth.

Grandfather contends the uncontroverted facts found in his summary judgment motion show he is a presumptive father of E.A. because he notoriously and in writing acknowledged E.A. as his child. He claims respondents "are unable to rebut that presumption with any evidence, much less, clear and convincing evidence." He contends that E.A.'s natural parents exercised their parental preference by providing physical and legal custody to Grandfather and thus "have nothing to give to respondents in the adoption process." In other words, their consent to Grandmother's and D.P.'s adoption is without legal effect.

In opposition, Grandmother and D.P. contend that Grandfather's consent to adoption and custody documents are not proof of parentage and that he has no document showing J.B., E.A.'s birth mother, wanted him to have parental rights.

We begin with K.S.A. 2021 Supp. 23-2208(a)(4). It states that a man has a presumption of paternity if the man "notoriously or in writing recognizes paternity of the child." This is the law that Grandfather is relying on. He argues that through a series of agreements with E.A.'s birth parents and the acquiescence of J.B., he has replaced C.A. as father and has acknowledged that in writing. And this presumption cannot be rebutted.

We reject Grandfather's argument that his presumption of parentage cannot be rebutted. A presumption may be rebutted "by a court decree establishing paternity of the child by another man." K.S.A. 2021 Supp. 23-2208(b). There is a 2013 court decree establishing C.A. as the father of the child. And there is the adoption decree. Thus, Grandfather has the burden "of going forward with the evidence" if this court remanded the case. K.S.A. 2021 Supp. 23-2208(b).

On closer inspection, Grandfather's argument fails under the ruling in *In re Parentage of M.F.*, 312 Kan. 322, 352, 475 P.3d

642 (2020), in which our Supreme Court added a timing element to the "notoriously or in writing" recognition of paternity presumption. Neither party acknowledges this recent case.

In re M.F. involved a woman attempting to establish a presumption of maternity of a child conceived through artificial insemination under K.S.A. 2019 Supp. 23-2208(a)(4) after she split with the child's birth mother. Our Supreme Court held that the presumption stated in K.S.A. 2019 Supp. 23-2208(a)(4) does not allow a person to "unilaterally pursue parenthood." 312 Kan. at 351. The court recognized the parental preference doctrine and held the birth mother must have consented, implicitly or explicitly, to share parenting with the person claiming the presumption. The court further held that the timing of the acknowledgment of the paternity/maternity was "critical." The court designated the time of the child's birth as when the birth mother must have consented to a shared parenting arrangement, and the person claiming the presumption must have notoriously recognized paternity/maternity of the child. 312 Kan. at 351-53.

When Grandfather became E.A.'s father in every meaningful way for the child, E.A. was at least seven months old when that arrangement began. Grandfather alleged, "On August 2013, at seven months of age, the natural parents of EJA became unable and/or unwilling to care for EJA." That is when Grandfather "took physical custody of EJA and agreed to integrate him into his family to raise him as his own."

But that was too late under the ruling in *In re M.F.* Moreover, in September 2013, Grandfather did not claim that E.A. was his own child. Rather, Grandfather "caused and funded" a court action so that C.A. would be legally named E.A.'s father. Later on, Grandfather and C.A. entered into written agreements pertaining to E.A.'s custody and C.A. told Grandfather that E.A. was Grandfather's son. But, at that point, Grandfather could not be E.A.'s legal parent without filing an adoption petition in a court—which he could have done but did not.

The general rule is that new opinions of the Supreme Court are binding on all other future cases and all cases still pending on

appeal when the new opinions are filed. We thus hold that the ruling in *In re M.F.* applies here. The exceptions to the general rule are when:

> (1) the new opinion establishes a new rule of law;
> (2) retroactive application would not further the principle on which the new opinion is based; and
> (3) retroactive application would cause substantial hardship or injustice.

Stechschulte v. Jennings, 297 Kan. 2, 18, 298 P.3d 1083 (2013). None of those exceptions apply here.

To sum up, Grandfather has failed to persuade us that he is entitled to summary judgment on this claim of paternity.

From this specific concern we have about the timeliness of Grandfather's claim of paternity, we turn to a more general concern. Should collateral attacks upon adoptions be permitted? To answer this question we reviewed the Parentage Act, the Adoption Act, and several cases. We conclude that collateral attacks on adoptions are not permitted and the resolution of those parentage issues must be in one case so a common resolution of all claims can be achieved with appropriate appellate review to follow.

STANDING TO CLAIM PARENTAGE

Grandfather contends the district court erred in determining that this action was prohibited by principles of collateral estoppel and res judicata because:

> (1) he was not a party to the adoption proceeding;
> (2) he filed this action before the adoption was fully litigated; and
> (3) the adoption case is not final and all of the court's rulings in it are interlocutory.

To the contrary, he contends he had standing because he was a presumptive father and thus an interested party under the Parentage Act. Grandfather contends the Parentage Act can be used to terminate a presumed parent's prior exercise of parental rights when another person has a presumption founded on weightier considerations of policy and logic and it is in the best interests of the child. He cites *Frazier*, 296 Kan. 730, *In re Marriage of Ross*, 245

Kan. 591, 783 P.2d 331 (1989), and *In re Marriage of Nelson*, 34 Kan. App. 2d 879, 882, 125 P.3d 1081 (2006).

In opposition, Grandmother and D.P. contend that Grandfather cannot indirectly appeal or collaterally attack the adoption using the Parentage Act. They cite *In re Adoption of T.M.M.H.*, 307 Kan. 902, 416 P.3d 999 (2018). They contend the termination of parental rights in the adoption proceeding had precedence over the parentage proceeding under K.S.A. 2021 Supp. 59-2136(d)(3). They contend Grandfather cannot attack the adoption because of the principles of collateral estoppel, res judicata, and law of the case. They contend there is no provision under the Parentage Act to terminate existing parental rights or to vest parental rights in a third person once the two parents have already been judicially determined.

In order to keep things straight, we offer one point of clarification. We are dealing with only one of two legal actions here—the lawsuit brought under the Parentage Act. We are not dealing with the adoption case. In fact, the record of the adoption case is not contained in this record even though the district court took judicial notice of the adoption case.

The district court in the adoption case ruled that Grandfather lacked standing as a party in interest. Whether that ruling is legally sound is not before us. The only standing issue here is whether Grandfather had standing to bring this Parentage Act action. He did.

A review of two Acts provides a legal context for our ruling.

THE KANSAS PARENTAGE ACT

This Act focuses mainly on parental relationships created by circumstance and not those created by blood. This law focuses on legal presumptions that arise from a child's circumstances. The Act provides that "*any person*" on behalf of a child may bring an action "[*a*]*t any time* to determine the existence of a father and child relationship presumed under K.S.A. 2021 Supp. 23-2208." (Emphasis added.) K.S.A. 2021 Supp. 23-2209.

The Supreme Court has ruled that under K.S.A. 23-2208 some circumstances create a presumption that a man is the father of a child. A parental relationship may be legally established without

the father being a biological or adoptive parent. See *Frazier*, 296 Kan. at 746; *Ross*, 245 Kan. at 594-602. Only one presumption requires a biological relationship to the child. Our Supreme Court has recognized these "legal fictions" of biological parenthood in limited circumstances. *In re M.F.*., 312 Kan. at 339. The presumptions include: the man's marriage to the child's mother, a court order requiring the man to support the child, and where the man "notoriously or in writing recognizes paternity of the child." K.S.A. 2021 Supp. 23-2208(a). A woman may also use the presumptions to establish a mother and child relationship, as was the case in *Frazier*. See K.S.A. 2021 Supp. 23-2220.

A presumption may be rebutted "by clear and convincing evidence," "by a court decree establishing paternity of the child by another man," or by another presumption. When a presumption is rebutted, "the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence." K.S.A. 2021 Supp. 23-2208(b). If two or more presumptions arise and conflict with each other, "the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control." K.S.A. 2021 Supp. 23-2208(c).

THE KANSAS ADOPTION AND RELINQUISHMENT ACT

Unlike the Parentage Act, the Kansas Adoption and Relinquishment Act begins with parental relationships created by blood. It recognizes the primary importance natural parents have in a child's life and adoptions will be granted with the consent of a parent, or both parents, or from those who are legally in the place of parents such as an adoption agency. The Adoption Act permits any adult to adopt a minor child, but only with the parents' consent. Consent to an adoption shall be given by the living parents of the child whose rights have not been terminated unless one of the parents' consent is found unnecessary under certain rules set out in the Adoption Act. See K.SA. 2021 Supp. 59-2113; K.S.A. 2021 Supp. 59-2129.

The Adoption Act requires the court to consider "all evidence . . . offered by any party in interest." K.S.A. 2021 Supp. 59-2134(a). A party in interest in an adoption under K.S.A. 2021 Supp. 59-2112(h) is defined as:

"(1) A parent whose parental rights have not been terminated;
"(2) a prospective adoptive parent;
"(3) an adoptive parent;
"(4) a legal guardian of a child;
"(5) an agency having authority to consent to the adoption of a child;
"(6) the child sought to be adopted, if over 14 years of age and of sound intellect; or
"(7) an adult adoptee."

And finally, if a court grants an adoption, "the court shall enter a final decree of adoption, which terminates parental rights if not previously terminated." K.S.A. 2021 Supp. 59-2134(a).

How the district court ruled

When the district court denied Grandfather's motion for summary judgment, it simply ruled that he could not make his arguments because of the application of two doctrines: collateral estoppel and res judicata. The judge did not give his reasons for reaching that conclusion, nor did he provide any analysis about how these two doctrines apply here. Because similar arguments are being offered to us, a review of the fundamental requirements of the two doctrines is necessary.

The doctrine of res judicata is a common-law rule of equity hoping to promote justice and sound public policy. In other words, a party should not have to litigate the same action twice. But as the court in *Cain v. Jacox*, 302 Kan. 431, Syl. ¶ 2, 354 P.3d 1196 (2015), said, before the doctrine of res judicata will bar a successive suit, four elements must be met: (a) the same claim; (b) the same parties; (c) claims that were or could have been raised; and (d) a final judgment on the merits.

Two of those requirements—the sameness of parties and finality of the judgment—may be lacking here. On the other hand, Grandfather tried to raise the same claim—that he was the presumptive parent of this boy in both cases—the adoption case and this parentage case. But when Grandfather tried to intervene in the adoption case, the adoption court closed the door to that attempt by holding that Grandfather was not a party in interest. If this is so, can res judicata apply to Grandfather since the court ruled he

was *not* a party in interest? And as far as we can tell from our record, the adoption case orders are not final and are therefore interlocutory. Thus, the requirement of finality of the judgment may be wanting.

But there is another way to look at the facts. For a brief time, Grandfather was a party in the adoption proceeding. When he tried to present his claims of being E.A.'s parent and that claim was litigated by the adoption court, it exercised jurisdiction over him and his claims. At the same time, Grandmother and D.P., the adoption petitioners, opposed Grandfather's claims of parentage. The adoption court resolved the dispute and kicked Grandfather out of the adoption case. The parties were the same. The issues were the same. Grandfather then pursued this collateral attack on the adoption proceeding. With this view of the facts, we could rule that res judicata did apply. But we need not go that far to resolve this question.

We do question whether the doctrine of collateral estoppel applies. That common law equitable doctrine, like res judicata, also bars someone from relitigating an issue determined against that party. Under Kansas law, collateral estoppel may be invoked when there is:

(1) a prior judgment on the merits which determined the rights and liabilities of the parties on the issue based on ultimate facts as disclosed by the pleadings and judgment;
(2) the parties must be the same or in privity; and
(3) the issue litigated must have been determined and necessary to support the judgment.

See *Huelsman v. Kansas Dep't of Revenue,* 267 Kan. 456, 458, 980 P.2d 1022 (1999).

Again, we ask, since Grandfather is not a party in interest in the adoption case, can collateral estoppel apply? In addition, the adoption court's denial of Grandfather's attempt to enter Grandmother's and D.P.'s adoption case as a party in interest determined none of the rights and liabilities of the parties in the parentage case. Collateral estoppel does not seem to apply.

Unlike the district court in this Parentage Act case, we do not hold that the adoption court's ruling denying Grandfather party in interest status bars him from seeking a judicial determination of

his parentage of this boy under the Parentage Act. But that determination should not take place in a separate case. We have other concerns that lead us to decide that a collateral attack on an adoption proceeding should not be permitted.

We review the parties' arguments about applying the Parentage Act.

The Parentage Act states that any person may bring an action "at any time" to determine the existence of a father and child relationship. K.S.A. 2021 Supp. 23-2209. The language "at any time" means there is no time restriction for filing the action. See *State v. Murdock*, 309 Kan. 585, 590-93, 439 P.3d 307 (2019) (interpreting K.S.A. 22-3504).

It also states that a parentage action "may be joined with an action for . . . adoption." K.S.A. 2021 Supp. 23-2210. In other words, the statute contemplates that an adoption action and parentage action may proceed at the same time given the interests involved and allows them to be joined without requiring the court to do so.

Grandmother and D.P. contend that the adoption proceeding has precedence over the parentage proceeding under K.S.A. 2021 Supp. 59-2136(d)(3). But that law has limited applicability. Subsection (a) of that statute states that "[t]he provisions of this section shall apply where a relinquishment or consent to an adoption has not been obtained from a parent and . . . the necessity of a parent's relinquishment or consent can be determined under this section." Subsection (d) identifies the procedure for terminating that parent's rights—the petition to terminate rights may be filed as part of a petition for adoption or an independent action. Subsection (d)(3) states:

"Absent a finding of good cause by a court with jurisdiction under this act, a proceeding to terminate parental rights shall have precedence over any proceeding involving custody of the child under the Kansas family law code, K.S.A. 23-2101 et seq., . . . until a final order is entered on the termination issues or until further orders of the court."

But then subsection (h)(1) commands: "When a father or alleged father appears and claims parental rights, *the court shall determine parentage*, if necessary pursuant to the Kansas parentage act,

K.S.A. 23-2201 et seq." (Emphasis added.) K.S.A. 2021 Supp. 59-2136. That provision gives an alleged father standing in an adoption proceeding until a determination of parentage is made.

The statute Grandmother and D.P. cite—K.S.A. 2021 Supp. 59-2136—does not apply here. They did not petition to terminate Grandfather's alleged parental rights but sought the adoption of E.A. with the consent of C.A. and J.B., the birth parents. But even if it does apply, the statute requires the court to determine parentage when an alleged father appears and claims parental rights, as Grandfather did here. See K.S.A. 2021 Supp. 59-2136(h). A determination of parentage is required for the adoption to proceed. That said, obviously there cannot be two separate cases that will decide the same issue. That could lead to conflicting results—one court finding Grandfather was a parent and the other court finding he was not a parent. That possibility of conflicting rulings is our chief concern here.

The problem of several people making parenting claims

A situation involving multiple parentage proceedings arose in *In re Adoption of C.L.*, 308 Kan. 1268, 427 P.3d 951 (2018). That case did not involve the same issue as here, but it provides useful guidance. Prospective adoptive parents petitioned for adoption in Wyandotte County. Father, having just learned about the baby, petitioned to establish paternity in Shawnee County. Mother moved to stay the Shawnee County case. Father appeared in the Wyandotte County case and objected to the adoption. Unlike here, the Shawnee County court then stayed the paternity case, noting that Wyandotte County had achieved jurisdiction and ordered paternity testing. The court recognized the paternity determination in the Shawnee County case would have been duplicative of the paternity determination in the Wyandotte County case. 308 Kan. at 1270-72. Father's parental rights were terminated in the adoption proceeding.

On appeal, our Supreme Court criticized what it characterized as the appellees' "race to the courthouse" to initiate adoption proceedings to preempt Father's ability to establish his paternity. 308 Kan. at 1283. The court stated, "Termination of parental rights should not be determined by which side schemes to be shrewder or more strategic." 308 Kan. at 1285. We share a similar concern

here. Did Grandmother and D.P. "race to the courthouse" and thus prevent Grandfather from presenting his claims of parentage in court?

Grandfather has a right to litigate his claim of parentage and should not be denied that right based solely on strategic maneuvering by Grandmother and D.P. But that right does not mean that Grandfather had the right to litigate the question of his parentage in two separate proceedings. Before we can elaborate on our concern, we must consider a recent Supreme Court decision.

In re Adoption of T.M.M.H. *must be considered in our analysis.*

A recent plurality decision from our Supreme Court involved a grandmother claiming to be a "parent" of her grandchild under the Parentage Act to contest the stepfather's petition to adopt the child. See *In re Adoption of T.M.M.H.*, 307 Kan. 902. There, Mother and Grandmother had an agreement that the child would live with Grandmother. Grandmother petitioned for grandparent visitation, which was litigated for several years. The court granted joint legal custody. After which, Stepfather petitioned for adoption. Mother consented to the adoption. Grandmother objected to the adoption. Stepfather responded that Grandmother was not an interested party in the adoption and therefore lacked standing. Grandmother contended she had standing because she was a permanent legal custodian or should be considered a coparent. Without hearing evidence, the court ruled Grandmother was not an interested party and lacked standing to participate in the case. Grandmother appealed and a panel of this court affirmed the district court. 307 Kan. at 904-06.

Grandmother argued to our Supreme Court that she should be considered a parent of the child. She asserted Mother had waived her parental preference and made Grandmother a coparent by agreement. She asserted she had been the child's primary caregiver for 90 percent of the child's life. The court found the record on appeal was insufficient to know "the exact contours of any of the agreements between Mother and Grandmother." Thus, Grandmother had not met her burden to establish that Mother "voluntarily and knowingly waived her parental preference." The Supreme

Court plurality held that she had failed to establish a record sufficient to show she was a parent to meet the interested party requirement, meaning the court lacked jurisdiction over her appeal. The Supreme Court plurality ruled on procedural grounds only, taking no position on the merits of Grandmother's claim that she was a parent because of an agreement with Mother, finding the record was insufficient to do so. 307 Kan. at 910-20.

Justice Stegall concurred in the result because he believed *Frazier* was wrongly decided and Grandmother should not be considered a parent, but he stated that Justice Rosen's dissent "gets this case correct under current law" and that the plurality had wrongly heightened the standing requirement for alleged parents. 307 Kan. at 923-26 (Stegall, J., concurring).

In his dissent, Justice Rosen criticized the adoption court's refusal to appreciate that the grandparent visitation case "occurring under the same courthouse roof" impacted the adoption case. He also stated:

> "The majority validates this judicial dysfunction by affirming that a stepparent adoption under these circumstances is a procedural mechanism that can bar a person who achieves the status of parent, both in fact and in law, from even being heard before potentially being cut out of their child's life." 307 Kan. at 938 (Rosen, J., dissenting).

Justice Rosen concluded Grandmother had presented a prima facie basis for her standing as a parent and the district court should have conducted an evidentiary hearing to determine whether Grandmother could sustain her burden. 307 Kan. at 939 (Rosen, J., dissenting).

Our conclusion is practical.

One lesson that arises clearly from the rulings in *In re Adoption of C.L.* and *In re Adoption of T.M.M.H.* is that adoption courts should not ignore other pending cases that bring up the parentage of a child who is to be adopted. The separation of the adoption and paternity cases in the district court here has caused the same "judicial dysfunction" that Justice Rosen criticized. But like the grandmother in *In re Adoption of T.M.M.H.*, here, Grandfather could appeal the determination that he lacked standing in the adoption case because he claims to be a parent of E.A.

That said, we recognize that one way to read the holding in *T.M.M.H.* is that an order denying anyone interested party status in an adoption case is unappealable. The court stated:

> "To explain our conclusion that this court lacks jurisdiction, we return to K.S.A. 2016 Supp. 59-2401a, which defines 'interested party' by listing eight categories of individuals. One provision relates only to adoption cases; it specifies that
>
> 'interested party' means: 'The parent in a proceeding pursuant to' the KARA. K.S.A. 2016 Supp. 59-2401a(e)(1). But two general provisions apply as well. One general provision allows an appeal by 'the petitioner in the case on appeal' and the other by 'any other person granted interested party status by the court from which the appeal is being taken.' K.S.A. 2016 Supp. 59-2401a(e)(7), (8)." *In re Adoption of T.M.M.H.*, 307 Kan. at 910-11.

The question arises, then, if a movant does not fall into that interested party status and is not a petitioner, can that movant appeal? The court did not say no.

The Supreme Court noted that the Court of Appeals panel determined a final order was not involved in *T.M.M.H.* but the appeal could still be brought under the collateral order doctrine. Stepfather did not cross-petition for review of this finality of the judgment issue, and the court did not review it on its own motion.

The collateral order doctrine provides that an order may be collaterally appealable if it: "(1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. [Citation omitted.]" *In re T.S.W.*, 294 Kan. 423, 434, 276 P.3d 133 (2012).

Whether a movant in an adoption case can appeal the rejection of their motion for interested party status affects our ruling here. If Grandfather can appeal the denial of his motion to be an interested party in Grandmother's and D.P.'s attempt to adopt E.A., then he cannot collaterally attack that adoption case in this parentage action for the reasons we will soon discuss. If Grandfather cannot appeal that denial decision, then he must be able to seek this collateral attack or he will be left with no way to obtain appellate review of the denial of his claim of parental rights.

We decline to read the tea leaves of a plurality Supreme Court decision. With no clear ruling by our Supreme Court that the denial of a claim of party in interest status in an adoption case cannot be appealed, we agree with the panel of our court in *T.M.M.H.* that such a denial is appealable under the collateral order doctrine. If it is appealable, then it follows that Grandfather should have appealed the denial of his party in interest status in the adoption case. This ruling prevents Grandfather obtaining an opposing ruling in a separate action.

Our reasons for this holding are practical. The problem we have with a collateral attack on an adoption case is the very real possibility of two courts rendering opposing rulings. How can such a problem be legally resolved? That is a legal dilemma that should be avoided. A child's legal parentage cannot be split.

The only reasonable way to resolve this dilemma is to consolidate the two cases into one so that all of the competing issues surrounding the parentage of a child can be determined properly. The proper case in which to decide these competing interests is the adoption case, for one simple reason. A court dealing with a Parentage Act case cannot grant an adoption. But an adoption court can resolve Parentage Act issues. Indeed, the Adoption Act recognizes that Parentage Act claims may have to be resolved before an adoption is granted. "When a father or alleged father appears and claims parental rights, the court shall determine parentage, if necessary pursuant to the Kansas parentage act." K.S.A. 2021 Supp. 59-2136(h)(1). The Parentage Act also recognizes that a parentage action may be joined with an adoption proceeding. See K.S.A. 23-2210(a).

While we do not agree with the district court's reasoning, the result is correct. If a district court reaches the correct result, its decision can be upheld even though it relied on the wrong ground or assigned erroneous reasons for its decision. See *Gannon v. State*, 302 Kan. 739, 744, 357 P.3d 873 (2015).

Any violation of the rule on summary judgment was harmless.

Grandfather contends that Grandmother and D.P. did not comply with Supreme Court Rule 141 (2022 Kan. S. Ct. R. at 223). Their motion for summary judgment did not:

- address whether Grandfather had established a presumption of parentage (an issue of fact);
- state the material facts not in dispute with references to the record;
- articulate the applicable law; or
- present argument and authorities.

He argues that he controverted Grandmother's and D.P.'s contention that the adoption was final.

After examining the record closely, we hold this is a harmless error. A review of the law is helpful at this point.

"A party against whom relief is sought may move, with or without supporting affidavits or supporting declarations pursuant to K.S.A. 53-601, and amendments thereto, for summary judgment on all or part of the claim." K.S.A. 2021 Supp. 60-256(b).

"The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits or declarations show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." K.S.A. 2021 Supp. 60-256(c)(2).

Rule 141 states that the movant must list its uncontroverted facts in separate paragraphs with precise references to the record:

"(a) A motion for summary judgment must be accompanied by a filing fee and a memorandum or brief that:
(1) states concisely, in separately numbered paragraphs, the uncontroverted contentions of fact on which the movant relies;
(2) for each fact, contains precise references to pages, lines and/or paragraphs—or to a time frame if an electronic recording—of the portion of the record on which the movant relies; and
(3) is filed and served on all counsel of record and unrepresented parties not in default for failure to appear." Supreme Court Rule 141(a) (2022 Kan. S. Ct. R. at 223-24).

"A motion for summary judgment may be heard only when the movant has complied with subsection (a)." Supreme Court Rule 141(f) (2022 Kan. S. Ct. R. at 224).

Our Supreme Court has cautioned that "Rule 141 is not just fluff—it means what it says and serves a necessary purpose." *McCullough v. Bethany Med. Ctr.*, 235 Kan. 732, 736, 683 P.2d 1258 (1984). But failure to comply with Rule 141 "may constitute harmless error if subsequent filings of findings of fact allow for

proper presentation of the uncontroverted facts establishing summary judgment is proper." *Rhoten v. Dickson*, 290 Kan. 92, Syl. ¶ 2, 223 P.3d 786 (2010).

In *Rhoten*, our Supreme Court held the movants' failure to comply with Rule 141 was harmless where:

- the basis of the motion for summary judgment was issue or claim preclusion;
- there was a question of law that required a minimal number of uncontroverted facts to decide; and
- the movants later submitted findings of fact presenting the minimal number of uncontroverted facts required to establish their claim.

290 Kan. at 103.

Here, paragraph three of Grandmother's and D.P.'s motion for summary judgment stated:

"The District Judge in the adoption case has already determined that [Grandfather] lacks standing to contest the adoption. Further, subsequent to making that determination, after a full and complete hearing, the court dismissed all remaining contentions by [Grandfather]."

Grandmother and D.P. then argued that Grandfather's claim was barred by collateral estoppel and res judicata. After the motion hearing, Grandmother and D.P. submitted additional findings of fact and conclusions of law, though without citations to the record. They never contested Grandfather's statements of fact.

Grandmother's and D.P.'s failure to comply with Rule 141 was harmless error. It is not a reason to reverse the district court's holding. Minimal facts were needed to decide the legal question of issue preclusion. Grandmother and D.P. identified the ruling on standing by the adoption court. Grandfather's uncontested statements of fact provided the added context needed. But it is true that Grandmother and D.P. did not provide proof that the adoption court had ruled on Grandfather's motion to reconsider.

Our holding

We hold that Grandfather is not entitled to summary judgment and the district court was correct to dismiss the case because he

has failed to show the timeliness of his "notoriously or in writing" acknowledgment of his paternity of E.A.

Turning to his claims of paternity, we are struck by the number of years that Grandfather has fulfilled the role of parent for E.A. and the suddenness of Grandmother's and D.P.'s taking the child, denying Grandfather access to the boy, and then quickly filing for adoption. We have no insight into the reasoning of the adoption court because of our very limited record. Had these facts been presented, would they have made any difference in the adoption court's ruling? We do not know.

But we do know that Grandfather had several years to adopt this child and did not. The consent to adopt that he had from E.A.'s father expired after six months. Given the facts here, the birth parents—the only two who could consent to an adoption—could have consented to Grandfather's adoption of their son earlier. But the fact remains, they did consent to Grandmother's and D.P.'s desire to adopt.

We recognize that fact patterns similar to these will arise again, given the nature of human relationships. The only reasonable way to litigate these issues, given the nature of the Parentage Act and the Adoption and Relinquishment Act, is for them to be decided in the same action. We hold that the proper action must be brought under an adoption case.

We affirm the district court's denial of summary judgment and dismissal of the case.

* * *

ATCHESON, J., concurring: I concur in the result the majority reaches here in finding that the Shawnee County District Court properly entered judgment against D.A. in this action in which he sought to be declared the father of E.A., his grandson, under the Kansas Parentage Act, K.S.A. 2021 Supp. 23-2201 et seq. I also agree the district court mistakenly used claim preclusion doctrines to do so. But Judge Hill's alternative reliance on *In re M.F.*, 312 Kan. 322, 352, 475 P.3d 642 (2020), probably unduly expands the holding of the case beyond its controlling facts to oust D.A. There are, however, two reasons grounded in the Parentage Act that D.A.

fails. Either of those is sufficient to affirm the district court's judgment, if not its rationale.

Because this is a published decision, I feel some obligation to explain my thinking, so readers may survey for themselves the route I have taken. Some discursive observations to that end follow.

First, this case is a something of a procedural mess. As Judge Hill explains, D.A. filed this parentage action after his ex-wife and her husband filed an action to adopt E.A. Because D.A. was not a named party in the adoption action, he sought to intervene, so he could counter their request to adopt E.A. with his arguments that he should be recognized as E.A.'s parent. His effort to intervene failed when the district court in that case determined he lacked standing. As far as the record on appeal in *this* case shows, the adoption action had not been concluded. We have only fragments of the record from the adoption case, stymying us in figuring out what exactly has gone on there.

Second, Kansas law governing the determination of parentage and who may be legally treated as the parent of a child has become labyrinthine. The Parentage Act, parts of which harken to much earlier times, has been augmented with court decisions ostensibly resting on contract law, constitutional doctrine, or other legal principles to afford rights and protections to partners in committed same-sex relationships, especially before same-sex civil marriages were recognized as a matter of right under the Fourteenth Amendment to the United States Constitution in *Obergefell v. Hodges*, 576 U.S. 644, 675-76, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). Before *Obergefell*, same sex-couples could not marry in civil ceremonies in Kansas. Some couples endeavored to create intricate legal workarounds that would, to some extent, replicate the rights and obligations accompanying civil marriage, including parenting children born during the relationship. The Kansas Supreme Court has recognized at least some of those efforts. See *Frazier v. Goudschaal*, 296 Kan. 730, Syl. ¶ 13, 754-55, 295 P.3d 542 (2013).

The decision in *In re M.F.* is one of the more recent of those efforts. The court recognized that the biological mother of a child could effectively share her parental rights with her same-sex partner by so stating at the child's birth, if her partner "notoriously . .

. recognize[d]" her own maternity at the same time—a process at least loosely consistent with the presumption of paternity outlined in K.S.A. 2021 Supp. 23-2208(a)(4). *In re M.F.*, 312 Kan. 322, Syl. ¶ 5. The court characterized its ruling that the Parentage Act countenanced such a result as a "legal fiction." 312 Kan. at 349. It is fictional in at least several ways.

The Parentage Act principally outlines mechanisms for determining the biological father of a child. The presumptions of "paternity" in K.S.A. 2021 Supp. 23-2208(a) are written that way, and the Parentage Act defines the relationship at issue as one between a child and his or her biological or adoptive father or mother. K.S.A. 2021 Supp. 23-2205. Almost as an add-on, the Parentage Act does recognize its provisions should be applied to women and efforts to determine maternity "[i]nsofar as practicable." K.S.A. 2021 Supp. 23-2220. But that is not really the same as permitting the mother of a child to share her maternal rights as a biological parent with a same-sex partner who obviously cannot be a biological parent.

Likewise, the statutory presumption of paternity based on notorious recognition of the child contains no time element or deadline for the recognition, let alone that it must be established contemporaneously with the birth of the child. Applying such a rule in all cases would undercut the broad purpose of the Parentage Act in establishing the identity of both biological parents of a child. Moreover, the rule would prevent a putative father who learns of the child only months or possibly years after the birth from being notoriously recognized as such, at least based on his own acknowledgments.[1]

[1] Notorious recognition of paternity is a legal doctrine of longstanding. It predates reliable genetic testing to prove paternity and rests on a commonsensical notion that a man typically would not acknowledge a child as his own or embrace community recognition of his paternity unless he had good reason to believe he had fathered the child. With the advances of science, paternity based on notorious recognition seems like a quaint relic. Genetic testing can establish paternity with near certainty—far more accu-

rately than a conclusion necessarily derived from inconclusive circumstances, notwithstanding significant notoriety accorded the conclusion.

The surgically written holding and the concomitant rationale in *In re M.F.* strongly indicate the requirement that notorious recognition be contemporaneous with the birth of the child entails a common-law overlay to the statutory language in K.S.A. 2021 Supp. 23-2208(a)(4) confined to same-sex couples that include the biological mother. 312 Kan. at 351-52. The treatment of the issue in the companion case of *In re W.L.*, 312 Kan. 367, Syl. ¶¶ 1, 5, 475 P.3d 338 (2020), seems to confirm as much.

The majority here cleaves those determinative facts from the rule in *In re M.F.* and then extends the rule to the demonstrably different facts here without explaining why that makes sense. The approach rests on doubtful judicial reasoning by analogy likely leading to an unwarranted expansion of the holding in *In re M.F.* I have elsewhere discussed the dangers of uncoupling essential facts from judicial holdings and applying the denuded rule as a governing legal principle across markedly different circumstances; I do not repeat that discussion here. See *State v. Pollman*, 56 Kan. App. 2d 1015, 1047-50, 441 P.3d 511 (Atcheson, J., dissenting), *rev. granted* 310 Kan. 1069 (2019), *dismissed as moot* March 23, 2021; *Brown v. Ryan*, No. 104,088, 2011 WL 6309451, at *7-8 (Kan. App. 2011) (unpublished opinion) (Atcheson, J., concurring).

Because D.A. has relied on the statutory presumption of paternity grounded in notorious recognition, the majority has broadly addressed how the presumption applies or (more precisely) doesn't apply to rescue his claim to be considered E.A.'s lawfully recognized father. I suppose we may fairly take on that task, although the district court did not directly do so, since it relied on preclusion rules in entering judgment against D.A. See *State v. Knight*, No. 105,092, 2012 WL 2325849, at *7 (Kan. App. 2012) (unpublished opinion) ("Appellate courts decide issues; they do not arbitrate or grade arguments."). Looking at that broad question, I see two reasons D.A.'s reliance on the presumption in K.S.A. 2021 Supp. 23-2208(a)(4) fails, and summary judgment, therefore, could have been properly entered against him.

First, the presumptions in K.S.A. 2021 Supp. 23-2208(a) set out predicate facts that trigger a presumption of a given man's biological paternity of a given child. Except for the presumption based on genetic testing, they do not depend on a direct link between the predicate fact and biological paternity. The Legislature, however, may craft rebuttable presumptions of that sort in many circumstances. See *State v. Haremza*, 213 Kan. 201, 203-04, 515 P.2d 1217 (1973). The predicate facts for most of the presumptions rest on the marriage or the attempted marriage of a man and the child's biological mother. If the presumptive circumstances have been met, the child will be treated as conceived in that union absent evidence supporting another presumption in a second man.

Statutorily presumed paternity, if unrebutted, creates a legal obligation to financially support the child, blunting a common-law rule that a man had no duty to support offspring born outside of his marital relationship. See K.S.A. 2021 Supp. 23-2215(c) (after finding party to be parent of minor child, district court may enter appropriate support order); *Green v. Burch*, 164 Kan. 348, 353, 189 P.2d 892 (1948) (noting long discarded common-law rule that parents owed no duty of support to child born out-of-wedlock). Similarly, the finding of paternity establishes a right of the child to inherit from the judicially recognized parent. See K.S.A. 59-501. That, too, reverses a common-law prohibition on children born out-of-wedlock from inheriting. See *Smith v. Smith*, 105 Kan. 294, 299, 182 P. 538 (1919). The presumptions of paternity for a child born to a married couple or for a child notoriously recognized by a man have roots reaching deep into history to temper the common-law inequities, if not the social stigma, attached to children of unwed parents. They were developed without the benefit of modern genetic testing. And while the presumptions have a certain logic to them, they, of course, pale in comparison to the near conclusive link between DNA results and paternity or maternity. Those presumptions, however, have been carried on in the Parentage Act.

Of central importance here, under the Parentage Act, the predicate facts create a presumption of biological paternity. So in asserting the presumption based on notorious recognition, D.A. seeks to be judicially declared the biological father of E.A. But as

everyone in this case knows—and the record amply demonstrates—D.A. is not E.A.'s natural father, and he has never claimed to be.

The presumption flowing from notorious recognition depends upon the man asserting it having a good faith belief he actually may be the child's biological father. Commonly, a man would not promote or even acquiesce in such recognition of himself absent a reasoned basis for believing his paternity. That's the legal and logical linkage of the predicate fact of notorious recognition to the presumed fact of biological fatherhood.

Without a good faith or honest belief requirement, an interloper could fairly assert paternity under the Parentage Act based on nothing more than his knowingly specious public representations of biological fatherhood. The Parentage Act should not be construed either to permit such claims or to require the courts to deal with them as facially appropriate. Treating those claims as legally colorable would so undercut the fundamental objective of the Parentage Act in determining the biological father of a child as to be an unreasonable construction of the Act. See *State v. James*, 301 Kan. 898, 903, 349 P.3d 457 (2015) (court should construe statute "to avoid unreasonable or absurd results"); *R.P. v. First Student, Inc.*, 62 Kan. App. 2d 371, 374, 515 P.3d 283 (2022).[2]

[2] D.A. apparently chose to take in E.A. with the best of intentions. I do not read the record otherwise. Why the arrangement unraveled in 2019 is less than immediately obvious in this case. In other circumstances, a man might have various base motives for falsely encouraging notorious recognition of his parentage. For example, a child might show great promise even at a young age for a lucrative career as a professional athlete. Or, sadly, the child might stand to benefit financially from a catastrophic injury to himself or herself or to his or her maternal parent. That sort of scurrilous subterfuge likely would be undone at some point with a DNA test. See *State ex rel. Secretary of DCF v. Smith*, 306 Kan. 40, 59, 392 P.3d 68 (2017).

A man doing so would effectively promote a fraud generally and, in acting under K.S.A. 2021 Supp. 23-2208(a)(4), would invite the courts to unwittingly endorse the fraud by falsely finding

him to be the biological father of the child. Courts need not and should not countenance such corrosive legal deceptions. See *Buchtella v. Stepanek*, 53 Kan. 373, 376, 36 P. 749 (1894) ("The courts never assist a party in the perpetration of frauds."); cf. *Bouton v. Byers*, 50 Kan. App. 2d 34, 58, 321 P.3d 780 (2014) (courts may decline to enforce statute of frauds if result "would produce injustice"); *Emprise Bank v. Rumisek*, 42 Kan. App. 2d 498, 519, 215 P.3d 621 (2009) (court may disregard corporation form to hold officers liable when they use corporation to promote or shield fraud or injustice). In that circumstance, I suppose the biological mother of the child and possibly the true biological father would resist the claim of paternity. And I expect the district court would, then, ultimately deny the claim, after finding genetic testing to be in the child's best interests and acting on the results that would necessarily undermine the presumption of paternity based on notorious recognition. But where the evidence shows the claimant has no good-faith belief in his biological parentage, that extended exercise should be unnecessary.

Courts in other jurisdictions have recognized that comparable statutes legitimating children through notorious recognition of paternity or similar mechanisms should be construed to apply only to biological parents. See *Succession of Robinson*, 654 So. 2d 682, 684 (La. 1995); *State on Behalf of Hopkins v. Batt*, 253 Neb. 852, 864, 573 N.W.2d 425 (1998), *overruled on other grounds by State on Behalf of Miah S. v. Ian K.*, 306 Neb. 372, 378-79, 945 N.W.2d 178 (2020); *Mace v. Webb*, 614 P.2d 647, 648-49 (Utah 1980). But a biological stranger to a child may become a parent through statutorily recognized adoption proceedings. 614 P.2d at 649. The avenue of adopting E.A. was open to D.A., but for whatever reason he chose not to travel that route during the six years he had physical custody of his grandson. See Kansas Adoption and Relinquishment Act, K.S.A. 59-2111 et seq. D.A.'s misguided Parentage Act proceeding is not a legally fungible substitute for that lost opportunity.

All of that is enough to dispose of D.A.'s parentage claim, even on summary judgment, since he knows he is not E.A.'s biological father and, therefore, cannot invoke a legal presumption

based on his false assertion of parentage to secure an order to that effect.

Apart from that deficiency, D.A.'s paternity claim fails as a matter of law on this record for another wholly independent reason. Assuming D.A. may properly assert the presumption for notorious recognition (an assumption I find unwarranted but indulge for purposes of disposing of this case), the presumption is rebuttable. Under K.S.A. 2021 Supp. 23-2208(b), a statutory presumption of paternity "may be rebutted . . . by a court decree establishing paternity of the child by another man." Here, the parties agree that in October 2013 the Shawnee County District Court filed a journal entry finding D.A.'s son to be E.A.'s "natural father." The 2013 journal entry comes within K.S.A. 2021 Supp. 23-2208(b) and rebuts the presumption upon which D.A. relies.

When a presumption of paternity has been rebutted, the party "alleging the existence of a father and child relationship"—here D.A.—has "the burden of going forward with the evidence." K.S.A. 2021 Supp. 23-2208(b). D.A., therefore, had the obligation to offer competent evidence, apart from the presumption of paternity based on notorious recognition, that he is the biological father of E.A. There could be no such evidence, given D.A.'s admission in his amended petition in this case that he is a blood relative of E.A. but not the child's "natural father." Documents appended to the amended petition further describe D.A. as E.A.'s paternal grandfather. Those factual representations in the petition and the attachments are admissions that may be used *against* D.A. on the cross-motions for summary judgment. See *Gray v. Freeman*, No. 112,248, 2015 WL 1125305, at *2 (Kan. App. 2015) (unpublished opinion) ("Although [a plaintiff] cannot rely on the petition to resist summary judgment, [a defendant] may properly treat the representations in the petition as admissions binding on [the plaintiff] for that purpose."); see also *Atlas Glass & Mirror, Inc. v. Tri-North Builders, Inc.*, 997 F.3d 367, 373 (1st Cir. 2021) (applying Federal Rules of Civil Procedure comparable to K.S.A. 60-256 and finding defendant may rely on factual representations in plaintiff's complaint as admissions supporting summary judgment); *Doe 2 by and through Doe 1 v. Fairfax County School Board*, 832 Fed. Appx. 802, 806 (4th Cir. 2020) (unpublished opinion).

D.A.'s indisputable inability to provide evidence he is E.A.'s biological parent or that he otherwise lawfully adopted E.A. dooms this Parentage Act claim. The district court would have been fully justified in entering summary judgment against D.A. on that basis. See *Oxy USA, Inc. v. Red Wing Oil, LLC*, 309 Kan. 1022, 1028, 442 P.3d 504 (2019).

For those reasons, I concur in the result we reach in affirming the district court's summary judgment against D.A. The latter portion of the majority opinion discusses how a Parentage Act claim might be joined with a separate action under the Kansas Adoption and Relinquishment Act in a single proceeding to avoid conflicting outcomes that would create both legal dissonance and practical complications of no small consequence. That's a laudable objective, but one that is not essential to how I would resolve this case. So I neither join in that discussion nor comment on it further.

(518 P.3d 815)

No. 124,288

In the Matter of the Parentage of A.K.

SYLLABUS BY THE COURT

1. PARENT AND CHILD—*Kansas Parentage Act—Statutory Definition of Parent and Child Relationship*. According to the Kansas Parentage Act, a parent and child relationship means the legal relationship existing between a child and the child's biological or adoptive parents. K.S.A. 2021 Supp. 23-2205.

2. SAME—*Presumptive Mother under Statute—Artificial Insemination Cases.* A woman can be a presumptive mother under K.S.A. 2021 Supp. 23-2208(a)(4) without claiming to be a biological or adoptive mother. Such a presumption is a "legal fiction" of biological parentage in cases involving artificial insemination. Thus, a child can have two mothers rather than a mother and a father.

3. SAME—*Presumption of Parentage under Statute—Requirement of Consent of Birth Mother or Notoriously Recognize Maternity at Child's Birth*. A presumption under K.S.A. 2021 Supp. 23-2208(a)(4) does not arise or is rebutted if either the birth mother did not consent to share parenting duties or the petitioner did not notoriously recognize maternity at the time of the child's birth.

4. SAME—*Presumption of Paternity—Marriage and Child's Father Named on Birth Certificate—No Time Limit under Statute*. A man is presumed to be the father of a child if after the child's birth, the man and the child's mother have married and, with the man's consent, the man is named as the child's father on the child's birth certificate. The statute does not say how long after the child's birth. There is no time limit set by K.S.A. 2021 Supp. 23-2208(a)(3).

5. SAME—*Competing Presumptions of Parentage—Determination by District Court of Best Interests of Child.* When two competing presumptions of parentage arise and conflict with each other, a district court must determine which presumption is founded on the weightier considerations of policy and logic, including the best interests of the child. K.S.A. 2021 Supp. 23-2208(c).

Appeal from Johnson District Court; ROBERT J. WONNELL, judge. Opinion filed September 16, 2022. Affirmed.

Valerie L. Moore, of Lenexa, for appellant A.M.

No appearance by appellees K.K. and Q.K.

Before HILL, P.J., MALONE, J., and PATRICK D. MCANANY, S.J.

HILL, J.: The Kansas Parentage Act recognizes claims of parentage, not only based on genetics but also based on a child's circumstances. These circumstances give rise to statutory presumptions of parentage, and sometimes two presumptions can conflict. In a case of conflicting presumptions, a court must decide which presumption is based on weightier considerations of policy and logic and account for the best interests of the child.

The district court here, on remand from this court, found circumstances had created two conflicting presumptions under the Act. First, the petitioner, A.M., had established a presumption of parentage based on the circumstances before and after the child's birth. Second, the district court found that Q.K., the birth mother's husband, had established a presumption of parentage because after the child's birth, he married the child's birth mother and, with his consent, he was named as the child's father on the child's Missouri birth certificate. And the child has been living with him as part of his family since his marriage.

The court weighed the presumptions, considered the circumstances, and held that Q.K. had the weightier presumption. The court decided that it was in the child's best interests to hold that Q.K.'s presumption prevailed. From our review of the record, we see that the district court did exactly what the Act calls for—to weigh conflicting presumptions and rule for the prevailing party. We find no error by the court and affirm.

Because the presumptions of parentage involved here deal with circumstances and not genetics or biology as some caselaw mentions, we will give a detailed case history.

A romantic relationship falls apart, a child is born, the birth mother marries a man after her child is born, and two people claim parentage.

A.M. and K.K. began a four-year romantic relationship when they were minors. The two young women started living together. In early 2013, K.K. had an affair with W.S. and became pregnant. A.M., at first, told K.K. to have an abortion, but sometime during the pregnancy A.M. got "on board" and became more enthusiastic.

A.M.'s family organized baby showers where she and K.K. both participated. A.M. attended all of K.K.'s obstetrical appointments.

K.K. gave birth in November 2013. A.M. and her mother were present in the room at the birth, and A.M. cut the umbilical cord. A.M. took time off from work to be with K.K. and the baby following the birth. A.M. referred to the child on Facebook as "[m]y girlfriend's and I['s]" child. The child was given A.M.'s last name on the original birth certificate. No father was listed on the birth certificate. A.M. said she was not permitted to sign the birth certificate because she was not biologically related to the child.

The parties continued to reside together and, at one point, were engaged to be married. But they ended their relationship in early 2015. The relationship between A.M. and K.K. contained instances of violent physical abuse initiated by both parties, including throwing things, punching, kicking, and a violent altercation that ended in a serious car accident. There were physical altercations after the birth of the child, and in the presence of the child. One violent altercation involved A.M. knocking K.K. unconscious while K.K. was holding the child. A.M. stated that the physical violence was the main reason they broke up, so the child would not be in that environment.

After the breakup, A.M. continued to spend significant time with the child, mostly to accommodate her and K.K.'s work schedules. But A.M. also had the child for two weeks at a time when K.K. temporarily moved to Kentucky. K.K. met A.M. in St. Louis to facilitate the child exchanges. A.M. celebrated some birthdays and holidays with the child. A.M. paid K.K. over $1,400 for the child's day care and school expenses. The payments were labeled "child support." But A.M. said that was "mostly . . . joking." K.K. made the parenting decisions about raising the child.

K.K. met Q.K. when the child was just over a year old. In 2016, K.K. had a son with Q.K. They moved in together and married. Q.K. is not biologically related to the child that is the subject of this case. He did not meet the child until she was about 18 months old.

K.K. started temporarily denying A.M. access to the child in 2015 for a few days to two weeks at a time. Then, in January 2018, K.K. stopped A.M.'s visitation with the child. The next month,

K.K. and Q.K. changed the child's last name on her birth certificate in Missouri and they added Q.K. on the birth certificate as the child's father. Q.K. prepared a petition for a stepparent adoption of the child but did not file it.

In March 2018, A.M. petitioned the Johnson County District Court for a determination of parentage, claiming that she "notoriously or in writing recognizes paternity of the child." See K.S.A. 2021 Supp. 23-2208(a)(4). The district court issued temporary orders giving A.M. visitation time with the child every other weekend, finding that A.M. had shown "an existing de facto custody arrangement."

At a hearing in May 2018, the court found that because K.K.'s and Q.K.'s marriage was in 2016, "I can't think of any reason why [K.K.'s] current husband would be a necessary party." K.K.'s attorney agreed that the timing would not give rise to a presumption. The attorney stated, "My client's husband does not claim to be the father of the child." The court stressed that "anyone claiming to be a parent" of the child needed to be joined as a party. Q.K. did not seek to be added as a party to the case.

In June 2018, W.S. was added as a party to the action. He filed no pleadings and attended only one court hearing in October 2018. He acknowledged he was the child's biological father. He signed a voluntary relinquishment of his parental rights and consent to a stepparent adoption which stated, "I am the biological father of the minor child." No genetic testing was performed. K.K. kept in touch with W.S. for the first year after the child was born and sent him pictures of the child, but he was not present in the child's life.

At a later hearing in October 2018, the district court, on its own motion, added Q.K. as a necessary party to the action because of the evidence presented that his name appeared on the child's Missouri birth certificate. The court cited K.S.A. 2018 Supp. 23-2208(a)(3)(B).

The court appointed a guardian ad litem for the child after W.S. made an appearance due to possible competing presumptions. At the bench trial in December 2018, the GAL gave her opinion based on her independent investigation. The GAL talked to the child, various people, and was present at the trial. The GAL's investigation revealed that A.M. and K.K. had intended to

coparent before the child's birth. The GAL considered the time A.M. spent with the child to be parenting time. The GAL stated that it was in the best interests of the child that A.M. be considered a legal parent.

A.M. testified the child calls her "Momma or Mommy," but K.K. testified that did not begin until this litigation had started, and at A.M.'s instruction. The child calls A.M.'s parents "Poppa" and "Grandma [S.]." K.K. testified that A.M. did not have a mother-child relationship with the child. Rather, it was a friend or aunt-type relationship.

The child calls Q.K. "Dad" or "Daddy." Q.K. testified he considered the child to be his child and did not differentiate between her and his son. He signed her birth certificate because they "wanted to be a family unit" and "wanted [the child] to share the same last name as the rest of us." He asked the court "[t]o make it official" that he was the child's parent. There was testimony that the child had a "normal father and daughter relationship" with Q.K.

During this litigation, A.M. told the child that Q.K. was not her biological father. Q.K. testified that the litigation had damaged the relationships between him and the child, and between the child and her younger brother.

The district court took the matter under advisement and then ruled that A.M. could not legally establish a presumption of parentage because she was not biologically related to the child and did not enter into a coparenting agreement with K.K. The court held both W.S. and Q.K. had established presumptions of paternity, weighed the presumptions, and determined Q.K.'s presumption was founded on weightier considerations of policy and logic, and it was in the best interests of the child for Q.K. to be declared the legal parent.

Our court reversed the district court's ruling and remanded the case.

The district court's ruling did not stand. A.M. appealed and a panel of this court reversed, holding the district court made an error of law in determining A.M. could not establish a presumption of parentage. The panel held the presumption stated in K.S.A.

2021 Supp. 23-2208(a)(4) does not depend on a biological connection to the child, nor does it require a coparenting agreement. The panel remanded the case to the district court for further proceedings since it did not make the factual determination whether A.M. had established a presumption of parentage under the correct law. The appeal did not concern Q.K.'s presumption of parentage. *McMullin v. Kirch*, No. 121,293, 2020 WL 4377905, at *3 (Kan. App. 2020) (unpublished opinion).

On remand, no new evidence was presented. The district court found that A.M. had established a presumption of maternity because she participated in a baby shower, she posted comments on social media claiming the child was part of her family, she cut the umbilical cord, and the child was given A.M.'s last name at the time of birth. The court then weighed A.M.'s presumption against Q.K.'s presumption and concluded that Q.K. had the weightier presumption and it was in the best interests of the child that he be declared the child's father. The court considered:

- it would be easier for the child to grow up in an intact family with her younger brother;
- the history of domestic violence between A.M. and K.K.;
- the child's belief that Q.K. was her father until A.M. told her otherwise;
- Q.K. had taken the child into his home and provided years of financial support and care;
- A.M. could have initiated a parentage action years earlier but did not; and
- K.K. and Q.K.'s ability to coparent.

A.M. appeals, contending that Q.K. cannot establish a legal presumption of parentage. No one else has filed a brief.

We have combined the several issues raised by A.M. to three:

1. Did the district court err in ruling Q.K. had a competing presumption of parentage?
2. Was it an abuse of discretion for the court to disregard the GAL's recommendation when the court made its best interests of the child analysis?

3. Does the Parentage Act violate the Equal Protection Clause of the 14th Amendment to the United States Constitution because Q.K., as a man, could sign a birth certificate as a father and thus claim a statutory presumption in this parentage action, while A.M. could not sign a birth certificate as a woman claiming paternity?

Was Q.K.'s claim of parentage untimely?

Citing two Kansas Supreme Court opinions, *In re Parentage of M.F.*, 312 Kan. 322, 339, 475 P.3d 642 (2020), and *In re Parentage of W.L.*, 312 Kan. 367, 383, 475 P.3d 338 (2020), as authority, A.M. contends that Q.K. could not establish a presumption of parentage because any intent for him to be the child's parent did not exist at the time of the child's birth. And allowing him to create under K.S.A. 2021 Supp. 23-2208(a)(3) a presumption of parentage five years after the child's birth is contrary to public policy and caselaw. She also argues that the district court improperly skipped the key burden shifting analysis that gives parties a chance to rebut a presumption.

The source of the statutory presumptions here is the Kansas Parentage Act.

According to the Parentage Act, a "'parent and child relationship' means the legal relationship existing between a child and the child's biological or adoptive parents." K.S.A. 2021 Supp. 23-2205. From that definition, the Act details various aspects of these relationships. A mother and child relationship "may be established by proof of her having given birth to the child *or under this act*." (Emphasis added.) K.S.A. 2021 Supp. 23-2207. This means that other than giving birth, the law can create a relationship that can be protected. To determine a mother and child relationship "under this act," the statute lists several presumptions of "paternity" that can, when practicable, apply to determine a mother and child relationship as well. K.S.A. 2021 Supp. 23-2208(a); K.S.A. 2021 Supp. 23-2220.

A.M.'s statutory presumption is created from language in the Act found at K.S.A. 2021 Supp. 23-2208(a)(4). Q.K.'s presump-

tion arises from K.S.A. 2021 Supp. 23-2208(a)(3). This is significant because the presumptions are different. We begin with A.M.'s presumption.

The K.S.A. 2021 Supp. 23-2208(a)(4) presumption

A woman can be a presumptive mother under K.S.A. 2021 Supp. 23-2208(a)(4) without claiming to be a biological or adoptive mother. Our Supreme Court has called such a presumption a "legal fiction" of biological parentage in cases involving artificial insemination. Thus, a child can have two mothers rather than a mother and a father. *M.F.*, 312 Kan. at 339; *Frazier v. Goudschaal*, 296 Kan. 730, 746-47, 295 P.3d 542 (2013). In the prior appeal in this case (which was decided after *Frazier* but before *M.F.*), the panel ruled that the petitioner could establish the same legal fiction under (a)(4) even though the pregnancy did not result from artificial insemination. See *McMullin*, 2020 WL 4377905, at *3.

Relying on *Frazier*, a panel of this court has also applied the K.S.A. 23-2208(a)(4) presumption to a man who had notoriously recognized paternity of a child since the child's birth or very soon after, but who was not married to the birth mother and did not claim to be the biological father. *In re E.G.S. ex rel. Larson v. Sonnier*, No. 108,778, 2013 WL 2972697, at *3-4 (Kan. App. 2013) (unpublished opinion).

Recently, our Supreme Court explained that *Frazier* "expand[ed] the definition of a biological parent to include those for whom an actual biological link was impossible but the creation of a legal fiction appropriate." *M.F.*, 312 Kan. at 344-45. But the court set a time limit for making claims of parentage under this section.

First, under K.S.A. 2019 Supp. 23-2208(a)(4), a woman need only show she "notoriously recognized her maternity, including the rights it would give her and the duties it would impose upon her." *M.F.*, 312 Kan. at 350. But the *M.F.* court also added a "constitutional overlay" to application of the (a)(4) statutory presumption based on the parental preference rule and *Troxel v. Granville*, 530 U.S. 57, 60, 73, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). The court "must ultimately be persuaded that the birth mother, at the

time of the child's birth, consented to share her due process right to decision-making about her child's care, custody, and control with the woman who is claiming parentage under the KPA." *M.F.*, 312 Kan. 322, Syl. ¶ 5.

The *M.F.* court was concerned that "[t]o interpret subsection (a)(4) of K.S.A. 2019 Supp. 23-2208 to allow anyone—even one with no relationship of any kind with the birth mother—to unilaterally pursue parenthood under this presumption has the potential to lead to unconstitutional as well as absurd results." 312 Kan. at 351. Implicitly the court recognized some claims of parentage would be so unreasonable that they should be rejected.

The *M.F.* court then discussed the type of evidence that could prove the birth mother's consent or the petitioner's notorious recognition of maternity, including direct or circumstantial, testimonial, or documentary evidence. 312 Kan. at 351-52. The court finally emphasized the importance of proof of timing of an acknowledgment and consent:

> "Further, as alluded to above, this case illustrates that proof of timing of an acknowledgment of maternity and a consent to share parenting is critical. The court must avoid giving either party a veto after the arrangement has been put in place and into effect at the time of the child's birth. Allowing unilateral action by either party to thwart the maternity of the other after a child has arrived and vital bonds with both have begun to form is unacceptable. On this question, we note that, under several of the KPA's presumptions, our Legislature has made the timing of the child's birth significant. See K.S.A. 2019 Supp. 23-2208(a)(1), (a)(2), (a)(3). These provisions support the idea that it is at the moment of birth when Kansas law deems a child to have either one parent or two." 312 Kan. at 352.

We note that the court referred to subsection (a)(3) of the statute in that list of presumptions that make the timing of the child's birth significant. The plain language of (a)(3), however, has no time limit. Even so, the court explained the significance of the timing of claims of parentage:

> "Designating the time of the child's birth as *the* time when a birth mother must have consented to shared parenting and a woman in K.L.'s position must notoriously recognize maternity also makes sense for another, practical reason. Although the current statutory language means we emphatically stop short of requiring a formal contractual arrangement, a demand that each individual have made up her mind as of the time of the baby's arrival incentivizes stability for that child over surmountable relationship disappointments that are bound to

occur. As with existence of premeditation when a trigger is pulled, the evidence of what is in the mind of the person pulling it may come from words and actions before, during, or after the event. [Citation omitted.] In the case of the birth of a child, the crystallization of the parties' individual intents at the time the child enters the world configures the family." 312 Kan. at 352.

In other words, a presumption under (a)(4) does not arise or is rebutted if either the birth mother did not consent to share parenting duties or the petitioner did not notoriously recognize maternity *at the time of the child's birth*. The *M.F.* decision deals only with the creation of the (a)(4) presumption. The case does not touch on any other statutory presumption or what to do when competing presumptions arise.

There is another consideration mentioned by caselaw. Parents will be held to their decisions. In a case decided the same day as *M.F.*, the Supreme Court reiterated that a child is born with one parent or two:

"[A] birth parent needs to make a decision and be held to it, not [be] given the power to change his or her mind whenever the bloom is off the rose of romance or it otherwise suits. A child is born with one legal parent or two. His or her birth mother does not get to change that reality once it arises by operation of law." *W.L.*, 312 Kan. at 383.

So we see that parentage can be created by birth or by operation of law through the enforcement of certain legal presumptions.

The K.S.A. 2021 Supp. 23-2208(a)(3) presumption

Q.K.'s presumption of paternity arose under (a)(3)(B) because he married K.K. and they added his name to the Missouri birth certificate as the child's father.

The statutes describe how these presumptions are to be treated by the courts. The K.S.A. 2021 Supp. 23-2208(a) presumptions are rebuttable by clear and convincing evidence, by a court decree establishing paternity of the child by another man, or by another presumption as provided in subsection (c). When a presumption is rebutted, "the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence." K.S.A. 2021 Supp. 23-2208(b). That burden can be satisfied by a preponderance of the evidence. *M.F.*, 312 Kan. at 341-42. When two or more presumptions arise that conflict with each

other, "the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control." K.S.A. 2021 Supp. 23-2208(c).

So we start with a statutory presumption. If it is rebutted by clear and convincing evidence, then the one claiming parentage can proceed and prevail if the court is convinced that the party has shown by a preponderance of the evidence that the facts are more probably true than not true.

The deep issue A.M. raises is whether the district court erred in even getting to subsection (c) because Q.K. could not have established a legal presumption of parenthood.

The statute does not set a specific time limit in all of the subsections. K.S.A. 2021 Supp. 23-2208(a)(3)(B) states a man is presumed to be the father of a child if: "*After* the child's birth, the man and the child's mother have married . . . and: . . . with the man's consent, the man is named as the child's father on the child's birth certificate." The statute does not say how long "after" the child's birth. There is no time limit set by that section of the statute. The Legislature did limit the application of the presumptions created in sections (a)(1) and (a)(2) to "within 300 days" but did not use similar language in (a)(3). That is significant.

There is language in the Act—K.S.A. 2021 Supp. 23-2205—that defines a "'parent and child relationship' [to mean] the legal relationship existing between a child and the child's biological or adoptive parents." Q.K. is not the biological father of the child. Thus, the question is whether "the creation of a legal fiction [is] appropriate" for someone the birth mother meets and marries after the birth of the child and for whom an actual biological link is impossible, but who otherwise would be a presumptive parent under K.S.A. 2021 Supp. 23-2208(a)(3). See *M.F.*, 312 Kan. at 344-45.

The *M.F.* court explained that a legal fiction was recognized in *Frazier* because when a woman is fertilized through artificial insemination, any biological link to the woman's partner is a legal fiction. *M.F.*, 312 Kan. at 339. The court also noted that recognition of the federally protected constitutional right to marry for same-sex couples may affect how the KPA is applied. *M.F.*, 312 Kan. at 337 (citing *Obergefell v. Hodges*, 576 U.S. 644, 675, 135

S. Ct. 2584, 192 L. Ed. 2d 609 [2015]). The court commented that the "creation of these legal fictions was and remains the choice of our Legislature, which has not reacted to 2013's *Frazier* or 2015's *Obergefell* with any relevant amendment of the KPA." *M.F.*, 312 Kan. at 339.

Kansas recognizes at least one other legal fiction of biological parenthood described in *In re Marriage of Ross*, 245 Kan. 591, 602, 783 P.2d 331 (1989). In *Ross*, the court held that when there is a presumed father to a child born into a marriage, the district court should consider the best interests of the child before ordering a genetic test that may reveal someone else is the child's biological father. 245 Kan. at 601-02. In *Ross*, the mother apparently brought the action because she did not like the custody arrangement with her ex-husband and wanted to use it as a bargaining chip against the suspected biological father to further her plan to have the child adopted by her current husband. The presumption in *Ross* arose when the child was born. There was no assertion, as there is here, that the mother's current husband was a presumptive father under the KPA.

The *Ross* legal fiction does not help Q.K. here because A.M.'s presumption arose before Q.K.'s presumption. Q.K.'s presumption arose in February 2018, when he signed the child's birth certificate. *Ross* supports the idea that it is the intention at birth that matters, and that paternity should not be later shifted to another person.

We have found no Kansas case in which a court has applied the K.S.A. 2021 Supp. 23-2208(a)(3) presumption to stepparents in the manner that the district court did here. In *Ferguson v. Winston*, 27 Kan. App. 2d 34, 37, 996 P.2d 841 (2000), this court listed several reasons that the plaintiff was the child's father, including the (a)(3) presumption because he was living together with the birth mother when the child was conceived and born and he married the birth mother after the child's birth. The court cited K.S.A. 1998 Supp. 38-1114(3) which is now K.S.A. 2021 Supp. 23-2208(a)(3). But the circumstances in *Ferguson* were much different from the facts here. After all, K.K. did not even know Q.K. until well after her child's birth.

Based on the plain language of K.S.A. 2021 Supp. 23-2208(a) with no statutory time limit, and the undisputed evidence, we hold that Q.K. has established a presumption of parentage under (a)(3)(B). He married K.K. after the birth of the child and, with his consent, he is named as the child's father on the child's birth certificate. We reject A.M.'s argument to the contrary.

Does the "time of birth" analysis used by the Supreme Court nullify Q.K.'s presumption?

We recognize that the Supreme Court's "time of birth" analysis in *M.F.* and *W.L.* applies only to a determination of whether a parent has notoriously recognized maternity or paternity under K.S.A. 2021 Supp. 23-2208(a)(4). But the court's concerns for preserving "vital bonds" that develop between parent and child and for the stability of the child do come into play in a case like this where A.M.'s parentage began at the birth of the child and Q.K.'s claim arose several years later.

The reasonable way for a court to consider the "time of birth" analysis in a stepparent case such as this is to consider that analysis as one more factor to be weighed. After all, the *M.F.* court was establishing a policy of preserving the "vital bonds" that begin to form at the time of birth and make incentives to create some stability for that child over surmountable relationship disappointments that are bound to occur. 312 Kan. at 352.

Our ruling tracks the statutory language establishing a presumption based on a marriage "after" the child's birth and requiring the district court to resolve conflicting presumptions by determining which presumption "is founded on the weightier considerations of policy and logic, including the best interests of the child." K.S.A. 2021 Supp. 23-2208(c). When in doubt, follow the statute.

This solution reflects the purpose of the Act. The law seeks to ensure that the legal obligations, rights, privileges, duties, and obligations incident to the father and child relationship are carried out. *In re Marriage of Phillips*, 274 Kan. 1049, 1057-58, 58 P.3d 680 (2002). Every child has an interest not only in obtaining support, but also in inheritance rights, family bonds, and accurate identification of their parentage. *Ross*, 245 Kan. at 597. It is not in a child's best interests to undermine the presumption of paternity absent any credible suggestion of paternity in another person. *In*

re Parentage of Shade ex rel. Shade, 34 Kan. App. 2d 895, Syl. ¶ 4, 126 P.3d 445 (2006). The Act can be used as both a sword and a shield.

This is a case in which two competing presumptions arise and conflict with each other. The district court determined which presumption "is founded on the weightier considerations of policy and logic, including the best interests of the child." In other words, the court followed K.S.A. 2021 Supp. 23-2208(c). We have found no fault in the court's weighing of the two presumptions. In fact, A.M. has not claimed the district court erred in making its best interests of the child analysis. We have found no legal error that would induce us to reverse the court on this issue.

The district court did not abuse its discretion in not following the guardian ad litem's recommendation.

A.M. argues that the district court ignored the GAL's recommendation that it was in the best interests of the child for her to be recognized as a parent.

We review a district court's best interests of a child determination for abuse of discretion. Judicial discretion is abused if judicial action

- is arbitrary, fanciful, or unreasonable—if no reasonable person would have taken the view adopted by the district court;
- is based on an error of law; or
- is based on an error of fact—if substantial competent evidence does not support a factual finding.

State ex rel. Secretary of DCF v. Smith, 306 Kan. 40, Syl. ¶ 4, 392 P.3d 68 (2017)

We agree with the holding of a panel of our court that stated that a GAL's recommendation on the best interests of the child is something the district court must consider, but it does not determine the case. See *Guth v. Wagner*, No. 103,398, 2010 WL 2978091, at *7 (Kan. App. 2010) (unpublished opinion). We think the district court did consider the recommendation here.

The district court mentioned the GAL only once in its journal entry. The court held that the GAL presented no evidence of problems in Q.K.'s and K.K.'s marriage or their ability to coparent the

child. At a hearing on A.M.'s motion to alter or amend the judgment, the court asked about A.M.'s contention that the court did not consider the GAL's recommendation in its decision. The court then reaffirmed its judgment. At a subsequent hearing on the GAL's fees, the court emphasized the value that the GAL provided to the case.

Simply put, the district court did not agree with the GAL's opinion, but that by itself is not an abuse of discretion. It is apparent from the discussion in the later hearings that the court did not ignore the GAL's opinion entirely. A.M. does not explain how the district court erred in its best interests of the child analysis. She has shown no abuse of discretion.

We find no equal protection violation here.

A.M. argues that the Act is not gender neutral and that she was held to a higher standard than a similarly situated male would be held. She contends that she was at a legal disadvantage because, before *Obergefell* she could not marry, and she could not sign a voluntary acknowledgment of paternity at the time of the child's birth. She argues that the court's recognition of Q.K.'s competing presumption because he was able to sign the child's birth certificate violated equal protection because she could not sign the birth certificate as a woman. In her words, she "was not able to just sign a sheet of paper and create a presumption of parentage."

Whether a statute violates equal protection is a question of law over which appellate courts have unlimited review. "The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution demands that '[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.' The guiding principle of the Equal Protection Clause is that similarly situated individuals should be treated alike." *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005).

We are not convinced. This case is not a challenge to a law preventing two women from signing a child's birth certificate or a voluntary acknowledgment of parentage, or from marrying. Instead, this is a case in which A.M. was ultimately able to establish a presumption of parentage based on K.S.A. 2021 Supp. 23-2208(a)(4). The presumptions in K.S.A. 2021 Supp. 23-2208(a) are not ranked in order of importance and can be used to establish

both paternity and maternity of a child. K.S.A. 2021 Supp. 23-2220.

A.M. fails to show how her equal protection rights were violated because Q.K. was also able to establish a presumption of parentage under K.S.A. 2021 Supp. 23-2208(a)(3). As the courts have applied the Act, A.M. could have signed a piece of paper that created a presumption of parentage under the written acknowledgment of maternity presumption. See K.S.A. 2021 Supp. 23-2208(a)(4); *M.F.*, 312 Kan. at 345. The district court ultimately found that A.M. did establish a presumption under (a)(4). A.M. and Q.K. were just as able to establish presumptions of parentage. Then the court's focus was on the best interests of the child.

We find no equal protection violation here.

Affirmed.

(518 P.3d 437)

No. 124,559

STATE OF KANSAS, *Appellee*, v. JAMES DICK LOGANBILL, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Reckless Stalking—Statutory Requirements to Prove Stalking.* K.S.A. 2019 Supp. 21-5427(a)(1) requires a person targeted by someone accused of reckless stalking (1) to subjectively fear the accused's course of conduct proving stalking and (2) to have an objectively reasonable fear of the accused's course of conduct proving stalking.

2. SAME—*Reckless Stalking—Targeted Person May Fear For His or Her Safety or Family Member's Safety to Prove Stalking.* Under K.S.A. 2019 Supp. 21-5427(a)(1), a person targeted by someone accused of reckless stalking may fear for his safety, her safety, or a family member's safety after the accused engaged in the course of conduct proving stalking.

3. SAME—*Stalking— Question Whether Accused's Behavior Constitutes "Course of Conduct" as Defined by Statute.* The key question when deciding whether an accused stalker's disputed behavior constituted a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1)'s definition of "course of conduct" is whether the accused's behavior evidenced his or her continuity of purpose to target the person in a way that would reasonably cause the targeted person to fear for his safety, her safety, or a family member's safety.

4. SAME—*Stalking—Course of Conduct May Include Secretly Photographing and Filming a Person.* Secretly photographing and filming a person repeatedly may constitute a course of conduct proving stalking as meant under K.S.A. 2019 Supp. 21-5427(f)(1)'s definition of "course of conduct."

5. SAME—*Reckless Stalking—Consideration of Child's Maturity and Age in Decision by Fact-finder.* Children are less mature than responsible adults. When deciding whether a child targeted by someone accused of reckless stalking in violation of K.S.A. 2019 Supp. 21-5427(a)(1) objectively feared for his safety, her safety, or a family member's safety, a fact-finder must consider the child's maturity and age in its analysis.

Appeal from Johnson District Court; THOMAS M. SUTHERLAND, judge. Opinion filed September 23, 2022. Affirmed.

Carl E. Cornwell, of Olathe, for appellant.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

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

GREEN, J.: James Dick Loganbill contends that there is insufficient evidence to support his reckless stalking conviction based on his interpretation of the reckless stalking statute, K.S.A. 2019 Supp. 21-5427(a)(1). According to Loganbill, K.S.A. 2019 Supp. 21-5427(a)(1) requires the reckless stalking victim, who is called the "targeted person" under the statute, to fear for his safety, her safety, or a family member's safety as the accused engages in the course of conduct proving stalking. Also, he argues that his disputed behavior did not constitute a course of conduct that could prove stalking under K.S.A. 2019 Supp. 21-5427(f)(1), which defines the term course of conduct. Alternatively, he argues that K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language is unconstitutionally vague because it allows the targeted person's subjective fear to control what constitutes a course of conduct proving stalking.

Nevertheless, there are several loose notions with Loganbill's arguments. His suggested statutory interpretation of K.S.A. 2019 Supp. 21-5427 is not supported by the clear text of this statute. In addition to ignoring contrary Kansas Supreme Court precedent, Loganbill's arguments are baseless as a matter of fact and wrong as a matter of law. As a result, we conclude that sufficient evidence supports Loganbill's reckless stalking conviction under a proper interpretation of K.S.A. 2019 Supp. 21-5427 and under Loganbill's suggested flawed interpretation of K.S.A. 2019 Supp. 21-5427. Thus, we affirm Loganbill's reckless stalking conviction.

FACTS

Loganbill was a teacher in the Olathe school district for many years. During the 2019-2020 school year, Loganbill worked as a fourth-grade teacher. A.A., who was 10 years old, was in Loganbill's fourth-grade class. A.M. and A.J., who were A.A.'s friends, were also in Loganbill's class.

Throughout the school year, A.A., A.M., and A.J. observed that Loganbill gave A.A. special treatment. For example, they noted that A.A. would not get in trouble when she did something wrong, like talking in class, while other students would get in trouble for the same misbehavior. A.A. noticed that unlike other students, Loganbill would specifically invite her to eat lunch with him. Additionally, A.A. noticed that she got extra help on her schoolwork. For instance, A.A. was able to use a calculator on her math tests while her classmates could not.

Although A.A. noticed this favoritism, A.A. did not question Loganbill's interest in her since it meant that he was "understanding" of her mistakes on schoolwork. Likewise, K.A., who was A.A.'s mother, did not question Loganbill's favoritism because A.A. had told her that Loganbill saw her as a role model for her classmates. A.A. even told K.A. that this was why he had her sit at the front of the class near him. Of note, from August 2019 to March 2020, A.A. sat directly in front of Loganbill's desk, with her back facing Loganbill. Meanwhile, A.M.'s desk was directly across from A.A.'s desk. So, A.M.'s desk faced both A.A.'s and Loganbill's desks.

In addition to this partiality, A.A. observed that Loganbill seemed interested in the fact that she was a competitive dancer. Loganbill would bring up A.A.'s dancing "almost every single day." Loganbill sometimes talked to A.A. about watching her dance performances that K.A. had posted on YouTube. He asked her where her dance studio was located. Once when Loganbill overheard A.A. talking to her classmates about having a dance competition that weekend, Loganbill asked A.A. where her competition was located. Also, once after seeing A.A. and her friends practicing "leg holds," a stretch that requires a person to hold his or her leg up to his or her ear, Loganbill asked A.A. and her friends to compete who could hold their leg up the longest.

When Loganbill had A.A. and her friends have the leg hold competition, he filmed it on either his cell phone or iPad. This was not unusual behavior for Loganbill. A.A., A.M., and A.J. all noticed that Loganbill often had his cell phone or iPad out. Loganbill told A.A. that he was filming the class in case anybody misbehaved. He explained to A.A. that by filming the class, he would

have proof of the misbehavior to show the offending student's parents later on. Yet, as the school year advanced, A.M. became concerned about Loganbill's cell phone and iPad use. She noticed that Loganbill "kept staring at [A.A.'s] butt a lot," which he also appeared to frequently photograph or film. Once, when A.A. stood up to adjust her pants, A.M. "noticed [that Loganbill] grabbed his phone and . . . pointed his phone at [A.A.'s] butt."

On Friday, March 6, 2020, because she was concerned about Loganbill's behavior, A.M. told A.J. that she believed that Loganbill might be photographing or filming A.A.'s buttocks. A.J. immediately told K.B., her mother, about A.M.'s allegation against Loganbill. Still, because A.J. had not seen Loganbill photograph or film A.A. herself, K.B. did not immediately notify the school's principal about A.M.'s allegation. Rather, she waited until the end of the day, Monday, March 9, 2020, to tell the principal that A.M. and A.J. believed that Loganbill was photographing and filming A.A.'s buttocks. After school that day, A.J. told her that she had seen Loganbill angle his cellphone at A.A.'s buttocks while studying math.

Once K.B. told the principal that A.M. and A.J. believed that Loganbill was photographing and filming A.A.'s buttocks, the principal immediately contacted the school district's safety service officer. The safety service officer, in turn, started investigating A.M.'s and A.J.'s allegation against Loganbill. But in an attempt (1) to further investigate A.M.'s and A.J.'s allegation against Loganbill and (2) to prevent Loganbill from destroying any evidence on his cell phone or iPad, the safety service officer told the principal to not tell Loganbill about the investigation. For this same reason, the principal told A.M. and A.J. to not tell A.A. about their allegation against Loganbill. Also, it seems for this same reason, the school allowed Loganbill to continue teaching.

The March 10, 2020 school day started normally for A.A. But during lunch, A.A. overheard A.J. ask A.M., "Did you tell the principal yet?" A.M. responded, "Yes." Upon hearing this, A.A. asked A.M. and A.J. what they were talking about. A.M. and A.J. initially resisted A.A.'s request. Yet, once on the playground for recess, A.M. and A.J. told A.A. that they believed that Loganbill was photographing and filming her from the "waist down."

When A.M. and A.J. told A.A. that Loganbill was photographing and filming her buttocks, at first, she did not want to believe them. But when she realized that "they weren't joking around," she started crying.

Following recess, A.A., A.M., and A.J. decided to "test" whether Loganbill would photograph or film her when she got up to get a tissue from across the room. During that test, A.M. and A.J. saw Loganbill "take out his phone and move the camera" towards A.A. As a result, A.M. and A.J. told A.A. to sit down immediately, which she did.

When K.A. picked up A.A. from school on March 10, 2020, A.A. could not stop crying. A.A. told K.A "that something really bad had happened at school that day, at recess, and that she didn't feel comfortable talking about it in front of her brother and sister," who were in the car. She also told K.A. that her stomach hurt. Once away from her siblings, A.A. explained everything that had happened that day to K.A. At this point, K.A. immediately contacted the principal, who confirmed the ongoing investigation into Loganbill for photographing and filming A.A.'s buttocks.

Before the school day started on March 11, 2020, the principal and safety service officer met with Loganbill. When the principal and safety service officer confronted Loganbill about photographing and filming A.A.'s buttocks, Loganbill admitted that he had done so throughout the school year. Loganbill told the principal and safety service officer that he was attracted to A.A. He explained that he particularly liked when A.A. wore black leggings to school. Also, Loganbill willingly gave the principal and the safety service officer access to his cell phone and iPad. When they searched his cell phone and iPad, they found numerous photos and videos that focused on A.A.'s buttocks. Regarding the videos specifically, the safety service officer noticed that many of the videos zoomed in on A.A.'s buttocks or were of A.A.'s buttocks as she bounced on a medicine ball chair that Loganbill allowed her to use instead of a standard chair.

Because the principal and safety service officer were concerned that Loganbill's conduct was criminal, they contacted the Olathe Police Department at the end of the meeting. Once the police arrived at the elementary school, Loganbill voluntarily left with them, agreeing to a formal interview with a detective at the

police station. During that voluntary interview, Loganbill once again admitted to photographing and filming A.A.'s buttocks. He told the detective that he realized that his behavior was "creepy" and that "it was something he shouldn't have done." By the conclusion of its investigation, the police found 210 photos and 31 videos of A.A.'s buttocks. None of the photos of A.A. showed her face.

Based on Loganbill's conduct, the State charged Loganbill with reckless stalking in violation of K.S.A. 2019 Supp. 21-5427(a)(1). This provision stated that a person recklessly stalks another by "[r]ecklessly engaging in a course of conduct targeted at a specific person which would cause a reasonable person in the circumstances of the targeted person to fear for such person's safety, or the safety of a member of such person's immediate family and the targeted person is actually placed in such fear." K.S.A. 2019 Supp. 21-5427(a)(1). The State alleged that Loganbill's course of conduct targeted at a specific person proving stalking was his secret photographing and filming of A.A.'s buttocks throughout the school year.

Eventually, Loganbill moved to dismiss his reckless stalking charge under K.S.A. 22-3208. He argued that under K.S.A. 2019 Supp. 21-5427(a)(1), the targeted person must fear for his safety, her safety, or a family member's safety as the accused engages in the course of conduct proving stalking. In making this argument, Loganbill conceded that no caselaw expressly supported his interpretation of K.S.A. 2019 Supp. 21-5427(a)(1). Even so, he alleged that the Kansas stalking cases he had reviewed "involve[d] repeated conduct that the targeted victim was then-presently aware of." He also argued that there was no evidence that A.A. feared for her safety as he photographed and filmed her buttocks. So, Loganbill argued that under his interpretation of K.S.A. 2019 Supp. 21-5427(a)(1) and the facts of the case, he had not recklessly stalked A.A.

The State countered that Loganbill was misinterpreting K.S.A. 2019 Supp. 21-5427(a)(1). It argued that K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language did not require the targeted person to fear for his safety, her safety, or a family mem-

ber's safety as the accused engages in the debated course of conduct proving stalking. It argued that Loganbill's interpretation was unreasonable because it allowed an accused stalker who completed a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1) to avoid prosecution if he or she completed that course of conduct before the targeted person learned about it. As an example, it argued that Loganbill's interpretation allowed an accused stalker to avoid criminal prosecution just because the targeted person learned that the accused repeatedly hid outside his or her house at night after later reviewing home-surveillance video. Alternatively, it argued that Loganbill's argument about whether A.A. feared for her safety when he photographed and filmed her was a factual dispute for the fact-finder to decide at trial.

After a hearing on Loganbill's motion to dismiss, the trial court denied his motion. Although the court determined that the targeted person must subjectively fear for his safety, her safety, or a family member's safety at some point, it ruled that K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language did not require the targeted person to experience this subjective fear when the accused engages in the course of conduct proving stalking. In making this ruling, the court stressed that Loganbill cited no authority supporting his interpretation of K.S.A. 2019 Supp. 21-5427(a)(1). Then, after finding that no Kansas caselaw addressed this specific issue, the trial court looked to persuasive authority for guidance. It found that the cases *State v. Russell*, 101 Conn. App. 298, 319-20, 922 A.2d 191 (2007), and *People v. Norman*, 75 Cal. App. 4th 1234, 1240-41, 89 Cal. Rptr. 2d 806 (1999), undermined Loganbill's interpretation of K.S.A. 2019 Supp. 21-5427(a)(1). The trial court explained that in both those cases, the respective courts found that the targeted person does not have to feel afraid while the accused engages in a stalking course of conduct. It explained that the cases were persuasive because like Kansas' reckless stalking statute, the stalking statutes at issue in *Russell* and *Norman* had "both a subjective and objective requirement that the victim experience fear." Additionally, the trial court agreed with the State's argument that Loganbill's suggested interpretation of K.S.A. 2019 Supp. 21-5427(a)(1) was unreasonable because it allowed an accused stalker to avoid prosecution just because he or

she completed the course of conduct proving stalking before the targeted person discovered or learned about that course of conduct.

Ultimately, the trial court held a bench trial, where the State relied on the testimony of A.A., A.M., A.J., K.A., K.B., the safety service officer, and the detective who interviewed Loganbill to prove its reckless stalking charge against Loganbill. During their testimony, the State's witnesses discussed their role in discovering that Loganbill was photographing and filming A.A. as well as how A.A. responded to this discovery. When asked about how she felt immediately after learning about Loganbill's conduct during recess on March 10, 2020, A.A. testified that she was scared.

"I was—first I was scared and frightened for me, my family, for [A.J.], for [A.M.]. Then second of all, I was heartbroken because I was in fourth grade and I didn't really know what a lot of the words that they were saying. And I just didn't think it was going to happen to me. Like I see all these stories, I see it on the news, and I just thought to myself, Why—like, this isn't—it's not—this isn't normal. Like, I live in Olathe where we have a nice house, I have a nice mom and dad, nice brother and sister, I play sports. And I just didn't think it was going to happen to me, to anyone.

"And I was very shocked. I was scared. And I just wanted to be with my mom and dad, and I just wanted to never go to school again."

Following the State's case, Loganbill did not present evidence in his defense or contest the State's evidence. Instead, Loganbill repeated the arguments in his motion to dismiss, asserting that the trial court wrongly denied his motion.

In the end, the trial court found Loganbill guilty of recklessly stalking A.A. In doing so, the trial court never found that secretly photographing and filming A.A.'s buttocks repeatedly constituted a specific course of conduct described under K.S.A. 2019 Supp. 21-5427(f)(1)(A)-(G)'s nonexclusive list of courses of conduct that may prove stalking. Rather, the trial court found that Loganbill's behavior was consistent with K.S.A. 2019 Supp. 21-5427(f)(1)'s definition of course of conduct. The court supported its conclusion by reasoning that Loganbill had repeatedly engaged in intentional behavior, evidencing his ongoing purpose to target A.A. with objectively fear-provoking behavior.

The trial court sentenced Loganbill to serve 12 months in jail. This was the maximum sentence that the trial court could impose

upon Loganbill, whose violation of K.S.A. 2019 Supp. 21-5427(a)(1) constituted a Class A person misdemeanor because it was Loganbill's first stalking conviction. See K.S.A. 2019 Supp. 21-5427(b)(1)(A).

Loganbill timely appeals his reckless stalking conviction.

ANALYSIS

Should Loganbill's reckless stalking conviction be reversed?

On appeal, Loganbill argues that there was insufficient evidence to support his reckless stalking conviction based on his interpretation of K.S.A. 2019 Supp. 21-5427 for two reasons: (1) because there was no evidence that A.A. feared for her safety when he secretly photographed and filmed her buttocks as required under K.S.A. 2019 Supp. 21-5427(a)(1), and (2) because there was no evidence that he engaged in a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1)'s course of conduct definition. In the alternative, Loganbill suggests that K.S.A. 2019 Supp. 21-5427(f)(1)'s course of conduct definition is unconstitutionally vague because it allows secretly photographing and filming a person's buttocks to prove stalking. Loganbill contends that if this behavior, which he describes as "facially benign," constitutes a course of conduct under K.S.A. 2019 Supp. 21-5427(f)(1), then the statute impermissibly allows the targeted person's subjective fear to control what behavior may prove stalking. Thus, Loganbill argues that we should reverse his reckless stalking conviction either because insufficient evidence supported his conviction under a proper interpretation of K.S.A. 2019 Supp. 21-5427 or because K.S.A. 2019 Supp. 21-5427(f)(1)'s course of conduct definition is unconstitutionally vague.

The State counter argues that Loganbill's arguments are baseless. Highly summarized, it contends that Loganbill's arguments misinterpret the clear text of K.S.A. 2019 Supp. 21-5427's statutory language. The State then argues that under the correct interpretation of the statute, sufficient evidence established that Loganbill recklessly stalked A.A. As for Loganbill's constitutional vagueness argument, the State argues that we should reject Lo-

ganbill's argument because he is raising it for the first time on appeal and because it ignores our Supreme Court's contrary precedent in *State v. Whitesell*, 270 Kan. 259, 269-70, 13 P.3d 887 (2000).

A. *Multiple Standards Apply When Reviewing Loganbill's Arguments.*

The issues of statutory interpretation and constitutionality involve questions of law over which we exercise unlimited review. *State v. Harris*, 311 Kan. 816, 821, 467 P.3d 504 (2020). Likewise, "review of a trial court's denial of a motion to dismiss on a strictly legal ground [is] unlimited." *State v. Garcia*, 282 Kan. 252, 260, 144 P.3d 684 (2006). Yet, when reviewing sufficiency of the evidence challenges, we must determine whether, after reviewing all the evidence in the light most favorable to the State, a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018). While engaging in this review, we must not reweigh the evidence or resolve evidentiary conflicts. This includes reweighing the trial court's credibility determinations against the defendant on appeal. 307 Kan. at 668.

B. *A Targeted Person May Fear for His Safety, Her Safety, or a Family Member's Safety After the Accused Stalker Engaged in the Course of Conduct Proving Stalking Under K.S.A. 2019 Supp. 21-5427(a)(1).*

As he argued before the trial court, Loganbill contends that K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language requires the targeted person to fear for his safety, her safety, or a family member's safety the exact moment that the accused stalker engaged in the course of conduct proving stalking. He asserts that in denying his motion to dismiss, the trial court wrongly agreed with the State's argument that his interpretation of K.S.A. 2019 Supp. 21-5427(a)(1) was unreasonable. He maintains that the trial court misinterpreted the facts and rulings of the *Russell* and *Norman* cases to reject his suggested statutory interpretation. Loganbill further contends that an amendment to the stalking statute

in 2021 supports his interpretation of K.S.A. 2019 Supp. 21-5427(a)(1).

The State counters that K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language proves that A.A. did not have to fear for her safety as Loganbill engaged in the course of conduct proving stalking. It counters that in denying Loganbill's motion to dismiss, the trial court correctly relied on *Russell* and *Norman* to reject Loganbill's argument. It argues that the trial court correctly agreed with its argument that Loganbill's suggested interpretation of K.S.A. 2019 Supp. 21-5427(a)(1) was unreasonable. Also, it argues that the 2021 amendment to the stalking statute does not support Loganbill's argument.

The most fundamental rule of statutory interpretation is that if our Legislature's intent is ascertainable, then our Legislature's intent controls this court's interpretation of the statute in question. *State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019). To determine our Legislature's intent, we must first consider the disputed statute's plain language. 309 Kan. at 314. Such analysis requires us to construe the words within the disputed statute in accordance with those words' ordinary meanings. *State v. Ayers*, 309 Kan. 162, 163-64, 432 P.3d 663 (2019). And such analysis requires us to construe the disputed statute's language reasonably. *State v. Smith*, 311 Kan. 109, 114, 456 P.3d 1004 (2020). Reasonable interpretations cannot render the plain language of the disputed statute meaningless. 311 Kan. at 114. Also, reasonable interpretations cannot read words into the disputed statute that are not readily found within its plain language. *Ayers*, 309 Kan. at 164.

If the plain language of the statute in question is clear, then we must not speculate about our Legislature's intent. 309 Kan. at 164. Rather, because our Legislature's intent is apparent in the disputed statute's plain language, we apply the disputed statute as unambiguously written. *LaPointe*, 309 Kan. at 314. Thus, the only time that we use canons of statutory construction, legislative history, or other background information to interpret the meaning of a statute is when our Legislature's intent is unclear after reviewing the statute's plain language. 309 Kan. at 314-15.

Here, Loganbill was convicted of violating K.S.A. 2019 Supp. 21-5427(a)(1). It criminalizes the following behavior:

"*Recklessly engaging in a course of conduct targeted at a specific person* which would cause a reasonable person in the circumstances of the targeted person to fear for such person's safety, or the safety of a member of such person's immediate family *and the targeted person is actually placed in such fear*." (Emphasis added.) K.S.A. 2019 Supp. 21-5427(a)(1).

Thus, K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language requires the State to prove three elements: (1) that the accused stalker recklessly engaged in a course of conduct targeted at a specific person; (2) that a reasonable person in the targeted person's circumstances would fear for his safety, her safety, or a family member's safety based on the accused stalker's course of conduct; and (3) that the targeted person was "actually placed" in fear for his safety, her safety, or a family member's safety based on the accused stalker's course of conduct. In turn, there are three elements that we must consider when analyzing whether the plain statutory language of K.S.A. 2019 Supp. 21-5427(a)(1) requires the targeted person to fear for his safety, her safety, or a family member's safety the exact moment that the accused stalker engages in the course of conduct proving stalking.

The first element of the reckless stalking statute addressing the accused stalker's course of conduct does not include language about when a targeted person must fear for his safety, her safety, or a family member's safety. Also, K.S.A. 2019 Supp. 21-5427(f)(1)'s definition of the term course of conduct does not include language on when *the targeted person* must experience this fear. The only language explicitly involving time under K.S.A. 2019 Supp. 21-5427(f)(1)'s course of conduct definition addresses when *the accused stalker* may commit acts constituting a course of conduct proving stalking. This part of K.S.A. 2019 Supp. 21-5427(f)(1) states that that the term "'[c]ourse of conduct' means two or more acts over a period of time, however short, which evidence a continuity of purpose."

Still, K.S.A. 2019 Supp. 21-5427(f)(2), which defines a communication that may constitute a course of conduct proving stalking, provides that a communication sent by regular mail or electronically "via a computer" may constitute a course of conduct proving stalking. Significantly, under K.S.A. 2019 Supp. 21-

5427(f)(2)'s plain statutory language, the communication constituting the stalking course of conduct happens when the accused stalker "impart[s]" the message through regular mail or electronically on a computer. K.S.A. 2019 Supp. 21-5427(f)(2).

Plainly, when an accused stalker imparts a communication to a targeted person through regular mail or electronically on a computer, the accused relies on either a real-world or an internet messenger service to transmit the communication to the targeted person. But by relying on a messenger service to transmit the communication to the targeted person, the accused avoids being in the targeted person's physical presence when committing the course of conduct proving stalking. So, in such instances, it necessarily follows that the targeted person cannot discover the accused's communication constituting the course of conduct proving stalking until the messenger service transmits it, which is necessarily after the accused imparted the communication. So, K.S.A. 2019 Supp. 21-5427(f)(2)'s plain statutory language establishes that a targeted person may discover an accused's communication constituting a course of conduct proving stalking after the accused has fully completed this communication.

Yet, because of the preceding, it further follows that our Legislature intended to criminalize certain courses of conduct that could be discovered by the targeted person only after the accused stalker has completed those courses of conduct. Thus, if we were to construe K.S.A. 2019 Supp. 21-5427(a)(1) as requiring the targeted person to experience the requisite subjective fear for his safety, her safety, or a family member's safety contemporaneously as the accused engaged in the stalking course of conduct, we would divine an unstated statutory purpose. Then, we would render part of K.S.A. 2019 Supp 21-5427(f)(2) meaningless. Put another way, we would make a portion of K.S.A. 2019 Supp 21-5427(f)(2) have no effect. See *Smith*, 311 Kan. at 114 (holding that courts must not interpret a statute in a way that renders its plain statutory language meaningless). So, the plain statutory language of K.S.A. 2019 Supp. 21-5427(f)(2) defining the communicative acts that may constitute a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(a)(1)'s first element establishes that the targeted person may fear for his safety, her safety,

or a family member's safety after the accused has completed the course of conduct proving stalking.

Next, and most importantly, although the second and third elements of the reckless stalking statute both address the targeted person's concern for his safety, her safety, or a family member's safety, neither element requires the targeted person to experience this fear the exact moment that the accused has completed the stalking course of conduct. The second element of K.S.A. 2019 Supp. 21-5427(a)(1) just requires the accused's stalking course of conduct to be reasonably fear-producing under "the circumstances of the targeted person." In other words, the second element of K.S.A. 2019 Supp. 21-5427(a)(1) just requires the targeted person's fear for his safety, her safety, or a family member's safety to be objectively reasonable based on the accused's course of conduct. On the other hand, the third element of K.S.A. 2019 Supp. 21-5427(a)(1) simply requires the accused's course of conduct to have "actually placed" the targeted person in fear for his safety, her safety, or a family member's safety. In other words, the third element of K.S.A. 2019 Supp. 21-5427(a)(1) simply requires the targeted person to subjectively fear the accused's stalking course of conduct.

As a result, the second and third elements of K.S.A. 2019 Supp. 21-5427(a)(1) require the targeted person to have a *subjective fear* of the disputed stalking course of conduct and an *objectively reasonable fear* of the disputed stalking course of conduct, respectively. Nevertheless, because neither element states when the targeted person must experience such fear, the plain statutory language of K.S.A. 2019 Supp. 21-5427(a)(1) does not require the targeted person to experience this fear the exact moment that the accused is engaging in the course of conduct proving stalking. To interpret the second and third elements of K.S.A. 2019 Supp. 21-5427(a)(1) otherwise would violate our rule against adding language into a statute that is not readily found therein. *Ayers*, 309 Kan. at 164.

Thus, to summarize, the plain statutory language of K.S.A. 2019 Supp. 21-5427(a)(1)'s three elements establishes the following: (1) that it criminalizes stalking courses of conduct discovered by the targeted person after the accused has fully completed the

stalking course of conduct, and (2) that it contains no express language requiring the targeted person to fear for his safety, her safety, or a family member's safety as the accused engages in the stalking course of conduct. Hence, contrary to Loganbill's arguments, K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language does not require the targeted person to fear for his safety, her safety, or a family member's safety at the exact moment that the accused engages in the course of conduct proving stalking. So, the trial court correctly ruled that K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language did not require A.A. to fear for her safety as Loganbill secretly photographed and filmed her buttocks repeatedly between August 2019 and March 2020.

Although the plain statutory language of K.S.A. 2019 Supp. 21-5427(a)(1) wholly undermines Loganbill's suggested statutory interpretation, we nonetheless point out that Loganbill never analyzed K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language to support his argument. In his brief, Loganbill's arguments take issue with how the State convinced the trial court that his interpretation was unreasonable, the caselaw that the trial court relied on to reject his argument, and later legislation inspired by his conduct in this case. In making these specific arguments, although Loganbill briefly addresses K.S.A. 2019 Supp. 21-5427(f)(1)'s course of conduct definition, he never analyzes the clear text of K.S.A. 2019 Supp. 21-5427(a)(1)'s statutory language. As a result, Loganbill's analysis disregards the most fundamental rule of statutory interpretation; he speculates about our Legislature's intent when enacting K.S.A. 2019 Supp. 21-5427(a)(1) based on outside information when our Legislature's intent is ascertainable from the clear text of K.S.A. 2019 Supp. 21-5427(a)(1). Thus, he does violence to the basic canons of statutory interpretation. See *LaPointe*, 309 Kan. at 314; *Ayers*, 309 Kan. at 164. And because Loganbill raises a statutory interpretation argument in which he never actually analyzes K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language, his argument is inadequately briefed. See *State v. Salary*, 309 Kan. 479, 481, 437 P.3d 953 (2019) (holding that an issue that is inadequately briefed is deemed waived and abandoned).

Notwithstanding the preceding, it is important to explain why Loganbill's specific arguments challenging the trial court's reasoning are unpersuasive. For starters, Loganbill's assertion that the

trial court wrongly agreed with the State's unreasonableness argument is illogical. Again, when contesting Loganbill's motion to dismiss, the State argued that Loganbill's interpretation of K.S.A. 2019 Supp. 21-5427(a)(1) was unreasonable because it allowed someone accused of repeatedly hiding outside the targeted person's house at night to avoid criminal prosecution just because the targeted person did not learn of the accused's conduct until later reviewing home-surveillance video. In denying his motion to dismiss, the trial court agreed with the State's reasoning, relying on the State's hypothetical to rule that Loganbill's suggested interpretation was unreasonable.

On appeal, Loganbill argues that this was error because "[t]his course of conduct, as contrasted with allegations against [him], clearly violated . . . K.S.A. [2019] Supp. 21-5427(f)(1)(C)." As considered in greater detail in our analysis below, K.S.A. 2019 Supp. 21-5427(f)(1)(C) is just one example in the nonexclusive list of examples of conduct that may prove stalking under (f)(1)'s course of conduct definition. Subsection (f)(1)(C) states that appearing outside a targeted person's house may constitute a course of conduct proving stalking. So, although his argument is not entirely clear, Loganbill seemingly believes that because covertly photographing and filming the targeted person is not expressly listed as a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1)(A)-(G)'s nonexclusive list of possible courses of conduct, a targeted person must experience fear as the accused completes the course of conduct proving stalking. But clearly, this argument is a non sequitur. It is an argument in which, on the face of it, there is no connection between the claim and the evidence. Here, the question if Loganbill's disputed behavior is expressly listed under K.S.A. 2019 Supp. 21-5427(f)(1)(A)-(G)'s nonexclusive list of possible courses of conduct proving stalking has nothing to do with whether K.S.A. 2019 Supp. 21-5427(a)(1) requires a targeted person to fear for his safety, her safety, or a family member's safety as the accused engages in the course of conduct proving stalking. Loganbill's argument would be an instance of what is called the fallacy of irrelevance.

As for Loganbill's arguments that the trial court relied on the wrong caselaw when denying his motion to dismiss, Loganbill's

arguments hinge on misinterpreting caselaw. Once more, when it denied Loganbill's motion to dismiss, the trial court relied on the *Russell* and *Norman* decisions as persuasive authority why a targeted person may fear for his safety, her safety, or a family member's safety under K.S.A. 2019 Supp. 21-5427(a)(1) after the accused completed the course of conduct proving stalking. For both the *Russell* and *Norman* cases, the trial court explained that it relied on the cases for two reasons: (1) because the stalking statutes at issue in those cases had fear elements that were similar to K.S.A. 2019 Supp. 21-5427(a)(1)'s fear elements, and (2) because the facts of those cases indicated that the targeted person need not fear for his safety, her safety, or a family member's safety as the accused engaged in the course of conduct proving stalking. Now, Loganbill argues that the trial court's reliance on *Russell* was wrong because there, the Connecticut Appellate Court never ruled that the targeted person's fear "does not need to be contemporaneous" with the accused's stalking course of conduct. Similarly, Loganbill argues that the trial court's reliance on *Norman* was wrong because there, the California Second District Court of Appeal never concluded that targeted people need "not fear for their safety when they learn of the conduct and then develop it as they learn more information."

In challenging the trial court's reliance on the *Russell* decision, Loganbill never contests the trial court's finding that Connecticut's reckless stalking statute—Conn. Gen. Stat. § 53a-181e—is like K.S.A. 2019 Supp. 21-5427(a)(1) because it has elements requiring the victim to subjectively experience fear that was also objectively reasonable under the circumstances. In any case, like K.S.A. 2019 Supp. 21-5427(a)(1), Connecticut's reckless stalking statute has an objectively reasonable fear element and a subjective fear element containing no express language as to when such fear must occur. *Russell*, 101 Conn. App. at 313. Given these similarities to K.S.A. 2019 Supp. 21-5427(a)(1), Connecticut caselaw analyzing its reckless stalking statute serves as persuasive authority when analyzing K.S.A. 2019 Supp. 21-5427(a)(1).

As for the trial court's reliance on *Russell*'s underlying facts, Russell never argued that the person he targeted needed to fear for her safety the exact moments he hid outside her house. Rather,

Russell argued that there was insufficient evidence that the targeted person feared for her safety since she told law enforcement that she was not afraid of Russell's behavior before she learned that Russell had repeatedly hid outside her house at night. 101 Conn. App. at 320. Even so, the Connecticut Appellate Court affirmed Russell's reckless stalking conviction because it concluded that Russell's argument "[chose] to focus on the victim's stated mindset within a narrow time frame, specifically, after she found out the dark figure was the defendant, but before she learned the full extent of his activities." 101 Conn. App. at 320. Because "unequivocal evidence" proved that the targeted person was reasonably afraid of Russell's conduct "outside of that particular time frame," the appellate court found that sufficient evidence established that the targeted person experienced a subjective fear for her safety. 101 Conn. App. at 320-21. In reaching this holding, the appellate court noted that following the targeted person's initial statement to law enforcement, she installed light sensors around her home, which evidenced her ultimate subjective fear for her safety. 101 Conn. App. at 320.

Thus, in *Russell*, the Connecticut Appellate Court ruled that sufficient evidence established that the targeted person feared for her safety based on evidence that she feared for her safety after the accused completed his stalking behavior. Because the objectively reasonable and subjective fear elements in the Connecticut reckless stalking statute are similar to K.S.A. 2019 Supp. 21-5427(a)(1)'s fear elements, the *Russell* court's reliance on the targeted person's fear after the accused completed the stalking course of conduct is persuasive authority that a targeted person under K.S.A. 2019 Supp. 21-5427(a)(1) may fear for his safety, her safety, or a family member's safety after the accused engages in the course of conduct proving stalking. Consequently, contrary to Loganbill's argument, the trial court's reliance on *Russell* was not error because the *Russell* court never ruled that the targeted person's fear "need not be contemporaneous" with the accused's stalking course of conduct. Put simply, Loganbill's argument ignores the *Russell* court's sufficient evidence finding. As a result, although the trial court should have rejected Loganbill's argument

based on K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language, the *Russell* decision supports that a targeted person under K.S.A. 2019 Supp. 21-5427(a)(1) may fear for his safety, her safety, or a family member's safety after the accused engages in the course of conduct proving stalking.

Turning to the *Norman* decision, we note that Loganbill never contests the trial court's finding that the California stalking statute—Cal. Pen. Code. § 646.9—is similar to K.S.A. 2019 Supp. 21-5427(a)(1) because it has elements requiring the targeted person to subjectively experience fear that was also objectively reasonable under the circumstances while lacking a "temporal modifier." Regardless, the California stalking statute in *Norman* simply required the accused's "course of conduct" to "'*be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person*.'" 75 Cal. App. 4th at 1238. Nothing in the statute specifically stated when the targeted person must subjectively fear "for his or her safety, or the safety of his or her immediate family . . . ." 75 Cal. App. 4th at 1238-39 (citing Cal. Pen. Code. § 646.9). Given these similarities to K.S.A. 2019 Supp. 21-5427(a)(1), California caselaw regarding its stalking statute serves as persuasive authority when analyzing K.S.A. 2019 Supp. 21-5427(a)(1).

Additionally, in *Norman*, the California Second District Court of Appeal ruled that because "there [was] nothing in the language of the statute [requiring] a concurrence of act and reaction," the targeted person may fear for his safety, her safety, or a family member's safety after the accused had completed the course of conduct proving stalking. 75 Cal. App. 4th at 1239-40. It determined that Norman's suggested interpretation ignored that electronic communications, which "necessarily encompass[ed] situations where there [was] a delay between the defendant's harassment and his [or her] victim's awareness of the defendant's conduct," could constitute a course of conduct proving stalking under the statute. 75 Cal. App. 4th at 1239-40. Afterwards, it affirmed Norman's stalking conviction because the person he targeted—director Steven Spielberg—ultimately feared for his safety and his family's safety after learning about Norman's ongoing efforts to enter his house and rape him. 75 Cal. App. 4th at 1237-38, 1240.

So, in *Norman*, the California Second District Court of Appeal rejected Norman's argument that Spielberg had to fear for his safety and his family members' safety as Norman completed the stalking course of conduct because California's stalking statute contained no such requirement. Then, the objectively reasonable and subjective fear elements of California's stalking statute are comparable to K.S.A. 2019 Supp. 21-5427(a)(1)'s objectively reasonable and subjective fear elements. So, the *Norman* court's holding that a targeted person may experience fear for his safety, her safety, or a family member's safety after the accused completes the stalking course of conduct is persuasive authority for this: that a targeted person under K.S.A. 2019 Supp. 21-5427(a)(1) may experience such fear after the accused completes the stalking course of conduct. Loganbill's sole argument—that the *Norman* court never concluded that the targeted people need "not fear for their safety when they learn of the conduct and then develop it as they learn more information"—completely ignores the *Norman* court's explicit holding that the targeted person does not have to fear for his safety, her safety, or a family member's safety "contemporaneous[ly] with the course of conduct that constitutes the stalking." 75 Cal. App. 4th at 1241. Therefore, although the trial court should have rejected Loganbill's argument based on K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory text, the *Norman* decision supports that a targeted person under K.S.A. 2019 Supp. 21-5427(a)(1) may fear for his safety, her safety, or a family member's safety after the accused completes the course of conduct proving stalking.

At this juncture, we point out that although neither the trial court nor the parties have cited to *State v. Kendall*, 300 Kan. 515, 522, 331 P.3d 763 (2014), for this purpose, our Supreme Court's analysis of K.S.A. 2010 Supp. 21-3438(a)(3)—Kansas' predecessor stalking statute—undermines Loganbill's argument. Of note, although Loganbill cites this court's *Kendall* decision, he does not cite our Supreme Court's *Kendall* decision, which reversed the portion of this court's *Kendall* decision that Loganbill relies on.

K.S.A. 2010 Supp. 21-3438(a)(3) mirrors K.S.A. 2019 Supp. 21-5427(a)(3). Like K.S.A. 2019 Supp. 21-5427(a)(1), both K.S.A. 2010 Supp. 21-3438(a)(3) and K.S.A. 2019 Supp. 21-

5427(a)(3) require the targeted person to subjectively fear the accused stalker's behavior constituting the course of conduct proving stalking:

> "[A]fter being served with, or otherwise provided notice of, any protective order . . . that prohibits contact with a targeted person, intentionally or recklessly engaging in at least one act listed in subsection (f)(1) that violates the provisions of the order and *would cause a reasonable person to fear for such person's safety, or the safety of a member of such person's immediate family and the targeted person is actually placed in such fear*." (Emphasis added.) K.S.A. 2010 Supp. 21-3438(a)(3).

When analyzing K.S.A. 2010 Supp. 21-3438(a)(3)'s fear elements, our Supreme Court determined that an attempted communication could not be a stalking course of conduct because the targeted person must ultimately experience a subjective fear for his safety, her safety, or a family member's safety. *Kendall*, 300 Kan. at 522. It "conclude[d] that the phrase 'act of communication' as used in the stalking statute requires evidence that a perpetrator transmitted a communication to a victim." 300 Kan. at 522.

Then, in rejecting Kendall's argument that insufficient evidence proved that he engaged in a communication constituting a course of conduct under K.S.A. 2010 Supp. 21-3438(f)(1), it suggested that the targeted person had a sufficient subjective fear of Kendall's conduct upon learning that Kendall had called her multiple times while in prison for crimes that he committed against her. It explained that given this history of abuse, there was sufficient evidence that Kendall completed a stalking course of conduct by calling the targeted person. 300 Kan. at 526. And in reaching this determination, it noted that sufficient evidence supported Kendall's conviction because the targeted person ultimately feared for her safety after realizing that Kendall was the person who kept calling her and then hanging up before saying anything. 300 Kan. at 526.

So, our Supreme Court's analysis of K.S.A. 2010 Supp. 21-3438(a)(3)'s fear elements as well as its reliance on the targeted person's ultimate fear for her safety upon realizing that Kendall made the phone calls in question supports that there is no requirement under K.S.A. 2019 Supp. 21-5427(a)(1) that the targeted person fear for his safety, her safety, or a family member's safety as the accused engages in the course of conduct proving stalking. If

our Supreme Court agreed with Loganbill's suggested interpretation of K.S.A. 2019 Supp. 21-5427(a)(1), it would not have stressed how the targeted person ultimately feared for her safety upon realizing that it was Kendall who had been calling her and hanging up. Thus, although the *Kendall* court never explicitly held that the targeted person may fear for his safety, her safety, or a family member's safety after the accused completed the stalking course of conduct, its analysis supports that it would agree with this proposition. As a result, our Supreme Court precedent does not support Loganbill's interpretation of K.S.A. 2019 Supp. 21-5427(a)(1).

As for Loganbill's remaining argument about the legislation he has inspired, he contends that our Legislature's 2021 amendment to Kansas' stalking statute "recognize[d] the legitimacy of [his] assertions." Likewise, he suggests that the Johnson County District Attorney's comments to our Legislature in support of this amendment recognized the legitimacy of his assertions. But plainly, Loganbill's argument is flawed because it looks to legislative history regarding a subsection of the stalking statute that was not in effect when he committed his crime of conviction against A.A. See *State v. Coleman*, 311 Kan. 332, 337, 460 P.3d 828 (2020) (explaining that the statute in effect when the defendant committed the crime of conviction controls what law applies to the defendant).

Also, despite these issues, Loganbill's contentions are baseless. When our Legislature amended the stalking statute in 2021, it amended it so intentionally engaging in a stalking course of conduct at a specific child under age 14 in a way that makes the targeted child reasonably fear for his safety, her safety, or a family member's safety is a crime constituting a severity level 7 person felony upon someone's first offense and a severity level 4 person felony upon someone's second offense. L. 2021, ch. 48, § 1; K.S.A. 2021 Supp. 21-5427(b)(4)(A)-(B). Outside of the preceding amendment, though, our Legislature did not amend K.S.A. 21-5427. So, in 2021, our Legislature created a new stalking crime with a more severe penalty upon its first offense than the penalty for first-time reckless stalking offenders. It did not add any language recognizing the legitimacy of Loganbill's argument that

K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language required the targeted person to fear for his safety, her safety, or a family member's safety as the accused engages in the course of conduct proving stalking. Hence, the 2021 amendment to the stalking statute does not support Loganbill's interpretation of K.S.A. 2019 Supp. 21-5427(a)(1).

C. *Secretly Photographing and Filming a Targeted Person Repeatedly May Constitute a Course of Conduct Proving Stalking Under K.S.A. 2019 Supp. 21-5427(f)(1).*

On appeal, although he never made the specific argument before the trial court, Loganbill complains that he could not have stalked A.A. by secretly photographing and filming her buttocks repeatedly. According to Loganbill, a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1) involves the accused stalker engaging in some overtly threatening and intrusive behavior that conveys a shared message to the targeted person. In making this argument, Loganbill relies on this court's decision in *State v. Kendall*, No. 106,960, 2013 WL 4404174, at *3 (Kan. App. 2013) (unpublished opinion), *aff'd in part, rev'd in part* 300 Kan. 515, 331 P.3d 763 (2014). This court's *Kendall* decision held that the accused stalker and the targeted person must "share comprehension of the communicative format of the idea" for the accused's communication to constitute a course of conduct proving stalking. 2013 WL 4404174, at *3. On the other hand, in suggesting that there is insufficient evidence that he engaged in a stalking course of conduct unless his motive for photographing and filming A.A.'s buttocks is considered, Loganbill argues that under K.S.A. 2019 Supp. 21-5427(f)(1)'s course of conduct definition, it is "statutorily irrelevant" why the accused stalker's course of conduct was targeted at a specific person. To support this argument, he cites our Supreme Court's *Whitesell* decision for the proposition that "the purpose of the stalking statute is to protect innocent citizens from threatening conduct, *irrespective of motive*, that subjects them to a reasonable fear of physical harm."

The State counters by arguing that Loganbill's argument ignores K.S.A. 2019 Supp. 21-5427(f)(1)'s plain statutory language. It contends that secretly photographing and filming A.A.'s buttocks repeatedly was consistent with the nonexclusive list of acts

constituting courses of conduct proving stalking under K.S.A. 2019 Supp. 21-5421(f)(1)(A)-(G). Additionally, the State argues that despite Loganbill's argument that his motive was irrelevant, the evidence regarding why he was photographing and filming A.A.'s buttocks repeatedly was relevant to establishing why A.A. reasonably feared Loganbill's course of conduct.

Of note, the State never contends that Loganbill's argument is not properly before us. Still, because Loganbill never explicitly argued that photographing and filming A.A. was not a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1) below, we point out that Loganbill's ultimate complaint involves the sufficiency of the evidence against him. Loganbill argues that under a proper interpretation and application of K.S.A. 2019 Supp. 21-5427(f)(1), the trial court could not find that secretly photographing and filming A.A.'s buttocks repeatedly was a course of conduct proving stalking. Our Supreme Court has recognized that a criminal defendant is not required to contest a sufficiency of evidence claim to preserve it for appeal: "There is no requirement that a criminal defendant challenge the sufficiency of the evidence before the trial court in order to preserve the question for appeal." *State v. Farmer*, 285 Kan. 541, Syl. ¶ 1, 175 P.3d 221 (2008). Also, at least in the context of alternative means arguments involving statutory interpretation, our Supreme Court has held that such statutory interpretation arguments may be raised for the first time on appeal because they implicate whether sufficient evidence supports the appellant's conviction. See *State v. Eddy*, 299 Kan. 29, 32, 321 P.3d 12 (2014). Thus, although Loganbill never argued that his behavior was not a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1) below, we will consider Loganbill's argument because it ultimately concerns whether there is sufficient evidence supporting his conviction under a proper interpretation of K.S.A. 2019 Supp. 21-5427(a)(1), (f)(1), and (f)(2).

To review, K.S.A. 2019 Supp. 21-5427(a)(1) criminalizes the following:

> "*Recklessly engaging in a course of conduct targeted at a specific person which would cause a reasonable person in the circumstances of the targeted person to fear for such person's safety, or the safety of a member of such person's immediate family* and the targeted person is actually placed in such fear." (Emphasis added.)

Subsection (f)(1) defines the term "course of conduct." It provides as follows:

"(1) 'Course of conduct' means *two or more acts over a period of time, however short, which evidence a continuity of purpose*. A course of conduct shall not include constitutionally protected activity *nor conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person*. *A course of conduct shall include, but not be limited to, any of the following acts or a combination thereof*:

(A) *Threatening the safety of the targeted person* or a member of such person's immediate family;

(B) *following, approaching or confronting the targeted person* or a member of such person's immediate family;

(C) *appearing in close proximity to, or entering the targeted person's* residence, place of employment, *school* or other place where such person can be found, or the residence, place of employment or school of a member of such person's immediate family;

(D) causing damage to the targeted person's residence or property or that of a member of such person's immediate family;

(E) placing an object on the targeted person's property or the property of a member of such person's immediate family, either directly or through a third person;

(F) causing injury to the targeted person's pet or a pet belonging to a member of such person's immediate family;

(G) *any act of communication*." (Emphases added.) K.S.A. 2019 Supp. 21-5427(f)(1).

Meanwhile, subsection (f)(2) further defines the term "communication." It states:

"'[C]ommunication' means *to impart a message by any method of transmission*, *including, but not limited to*: Telephoning, personally delivering, sending or having delivered, any information or material by written or printed note or letter, package, mail, courier service or electronic transmission, including electronic transmissions generated or communicated via a computer." K.S.A. 2019 Supp. 21-5427(f)(2).

Thus, to commit reckless stalking in violation of K.S.A. 2019 Supp. 21-5427(a)(1), the accused must recklessly engage in a course of conduct as defined under K.S.A. 2019 Supp. 21-5427(f)(1). Nevertheless, to qualify as a course of conduct under subsection (f)(1)'s plain statutory language, the disputed behavior constituting the course of conduct must involve at least two acts that show "a continuity of purpose."

Although the term "continuity of purpose" is not expressly defined under the stalking statute, it is readily apparent what our

Legislature meant by using the term "continuity of purpose." The purpose of K.S.A. 2019 Supp. 21-5427 is to criminalize stalking. K.S.A. 2019 Supp. 21-5427(a)(1)-(3) prohibits knowing or reckless behavior that reasonably causes the targeted person to fear for his safety, her safety, or a family member's safety. See *Whitesell*, 270 Kan. 259, Syl. ¶ 9 (explaining that the purpose of the stalking statute is to criminalize "recurring intimidation, fear-provoking conduct, and physical violence"). So, when our Legislature required the accused stalker's course of conduct to show a continuity of purpose, it follows that our Legislature intended for the accused stalker's course of conduct to show his or her continuity of purpose to engage in acts that would reasonably cause the targeted person to fear for his safety, her safety, or a family member's safety. *As a result, the key question when deciding whether the accused stalker's behavior constituted a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1) is whether the accused's behavior evidenced his or her continuity of purpose to target the person in a way that would reasonably cause the targeted person to fear for his safety, her safety, or a family member's safety. So, in deciding whether the accused's behavior constituted a stalking course of conduct, a fact-finder must consider whether the targeted person's fear was objectively reasonable.*

Here, A.A.'s fear was objectively reasonable because the evidence showed that Loganbill had a designed plan to secretly photograph and film A.A.'s buttocks over an extended period during her school year in a way that reasonably caused A.A. to fear for her safety. But Loganbill never truly engages in any analysis addressing whether covertly photographing and filming A.A.'s buttocks numerous times evidenced his continuity of purpose to engage in acts that would reasonably cause A.A. to fear for her safety under K.S.A. 2019 Supp. 21-5427(f)(1)'s plain statutory language. Indeed, just like his earlier statutory interpretation argument, Loganbill's current statutory interpterion argument is flawed for several reasons.

To begin with, Loganbill's analysis wrongly focuses on why secretly photographing and filming A.A.'s buttocks was not a communication constituting a course of conduct under K.S.A. 2019 Supp. 21-5427(f)(1)(G). He never explains why secretly

photographing and filming A.A. could not be considered evidence of his continuity of purpose to target A.A. in a way that would reasonably cause A.A. to fear for her safety under K.S.A. 2019 Supp. 21-5427(f)(1) generally or (f)(1)(A)-(F). In fact, he never recognizes that K.S.A. 2019 Supp. 21-5427(f)(1)'s course of conduct definition requires the accused stalker's course of conduct to show a continuity of purpose. His analysis never even mentions the term "continuity of purpose."

Yet, as just outlined, K.S.A. 2019 Supp. 21-5427(f)(1)(A)-(G) is a nonexclusive list describing acts that may constitute a course of conduct proving stalking. So, Loganbill's argument why secretly photographing and filming A.A.'s buttocks repeatedly was not a communication constituting a course of conduct under K.S.A. 2019 Supp. 21-5427(f)(1)(G) does not, in and of itself, establish that secretly photographing and filming A.A.'s buttocks repeatedly was not a course of conduct under K.S.A. 2019 Supp. 21-5427(f)(1). In turn, by failing to discuss why secretly photographing and filming A.A.'s buttocks repeatedly did not constitute a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1)(A)-(F), Loganbill failed to fully analyze K.S.A. 2019 Supp. 21-5427(f)(1)'s plain statutory language. In other words, Loganbill has inadequately briefed and thus abandoned his argument because he analyzes a single subsection of K.S.A. 2019 Supp. 21-5427(f)(1)'s nonexclusive list of acts that may constitute a course of conduct proving stalking without actually analyzing whether his behavior constituted a course of conduct proving stalking under K.S.A. 2019 Supp. 21-5427(f)(1) generally. See *Salary*, 309 Kan. at 481.

Next, even though Loganbill has not adequately briefed this argument, Loganbill's arguments are not supported by K.S.A. 2019 Supp. 21-5427(a)(1)'s plain statutory language, subsection (f)(1)'s plain statutory language, or our Supreme Court's *Kendall* decision. Loganbill seemingly believes that because his disputed behavior appeared "facially benign," his behavior was not a course of conduct as meant under K.S.A. 2019 Supp. 21-5427(f)(1). But even if we were to assume for argument's sake that Loganbill's disputed behavior seemed facially benign, nothing under K.S.A. 2019 Supp. 21-5427(a)(1)'s or (f)(1)'s plain statutory language supports Loganbill's contention that the accused stalker's course

of conduct must be overtly threatening and intrusive. The course of conduct element simply requires the accused stalker's course of conduct to evidence a continuity of purpose to target a person in a way that would reasonably cause the targeted person to fear for his safety, her safety, or a family member's safety. So, K.S.A. 2019 Supp. 21-5427(f)(1)'s plain statutory language contradicts Loganbill's argument.

Also, as already explained, in *Kendall*, our Supreme Court affirmed Kendall's stalking conviction based on his acts of calling the targeted person and hanging up before saying anything to the targeted person. 300 Kan. at 525-26. So, in *Kendall*, our Supreme Court determined that silent communications may constitute a course of conduct proving stalking. If the accused may complete a course of conduct proving stalking by transmitting silent communications to the targeted person, it follows that a course of conduct proving stalking need not be overtly threatening and intrusive. Thus, our Supreme Court's precedent in *Kendall* does not support Loganbill's suggested interpretation of K.S.A. 2019 Supp. 21-5427(a)(1)'s course of conduct definition. See *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017) (holding that this court is duty-bound to follow our Supreme Court's precedent absent some evidence that our Supreme Court is moving away from that precedent).

As for Loganbill's argument that it is "statutorily irrelevant" why the accused stalker's course of conduct was targeted at a specific person, subsection (f)(1)'s plain statutory language requires a fact-finder to consider the accused's purpose for engaging in the disputed behavior because K.S.A. 2019 Supp. 21-5427(f)(1) defines "course of conduct" as acts that "evidence a continuity of *purpose*." (Emphasis added.) In other words, under K.S.A. 2019 Supp. 21-5427(f)(1)'s course of conduct definition, the fact-finder must decide whether the accused stalker's disputed behavior evidenced the accused's continuity of purpose to target the person in a way that would reasonably cause the targeted person to fear for his safety, her safety, or a family member's safety. By contrast, Loganbill asserts that K.S.A. 2019 Supp. 21-5427(f)(1) prohibited the trial court from considering his motives for photographing and filming A.A. repeatedly. Under K.S.A. 2019 Supp. 21-5427(f)(1)'s

plain statutory language, the trial court had to consider whether Loganbill's designed behavior of photographing and filming her buttocks evidenced his continuity of purpose to target A.A. in a way that would reasonably cause A.A. to fear for her safety.

Lastly, we note that Loganbill's specific arguments are devoid of any recitation of proper authority why secretly photographing and filming A.A. were not communications constituting a course of conduct under K.S.A. 2019 Supp. 21-5427(f)(1)(G).

In this court's *Kendall* decision, when interpreting the term "communication" under K.S.A. 2010 Supp. 21-3438(f)(1)(G), we concluded that "[t]he notion of imparting or sending a message presumes the sender and recipient share comprehension of the communicative format of the idea. And it presupposes an underlying idea." 2013 WL 4404174, at *3. Relying on this language, Loganbill argues that secretly photographing and filming A.A. repeatedly were not communications under K.S.A. 2019 Supp. 21-5427(f)(1)(G) because he "made efforts to keep [A.A.] unaware of the photos" and films. Loganbill seemingly believes that because he attempted to hide his behavior, he and A.A. could not have shared comprehension of the communicative format or idea.

Yet again, when our Supreme Court reviewed Kendall's appeal, it determined that "the phrase 'act of communication' . . . requires evidence that a perpetrator transmitted a communication to a victim" before affirming Kendall's conviction based on evidence that the targeted person subjectively feared for her safety after Kendall completed the disputed communications. *Kendall*, 300 Kan. at 522. It never approved of this court's ruling that a communication constituting a course of conduct proving stalking requires the accused stalker and the targeted person to share comprehension of the communicative format or idea. 300 Kan. at 526. As a result, in *Kendall*, our Supreme Court, if not explicitly, implicitly rejected this court's ruling that the accused stalker and the targeted person must "share comprehension" of the communication constituting the course of conduct proving stalking. Thus, Loganbill's suggested interpretation of K.S.A. 2019 Supp. 21-5427(f)(1)(G) hinges on a holding in this court's *Kendall* decision that our Supreme Court did not approve in its *Kendall* decision.

Loganbill's reliance on *Whitesell* is similarly flawed. Loganbill contends that in *Whitesell*, our Supreme Court held that

"the purpose of the stalking statute is to protect innocent citizens from threatening conduct, *irrespective of motive*, that subjects them to a reasonable fear of physical harm." But the *Whitesell* court never held that motive was irrelevant when deciding whether the accused's acts constituted a course of conduct proving stalking. Whether the trial court could consider Whitesell's motive when analyzing the course of conduct element of the stalking statute was not an issue in Whitesell's case. In actuality, the portion of the *Whitesell* decision that Loganbill cites explains why the stalking statute is not unconstitutionally overbroad. See 270 Kan. at 272. So, Loganbill's reliance on *Whitesell* is wholly unpersuasive.

To conclude, although Loganbill argues that K.S.A. 2019 Supp. 21-5427(f)(1) requires the accused stalker's course of conduct to involve overtly threatening and intrusive behavior that conveys a shared message to the targeted person, K.S.A. 2019 Supp. 21-5427(a)(1)'s and (f)(1)'s plain statutory language do not support Loganbill's interpretation. Loganbill's arguments supporting his interpretation of K.S.A. 2019 Supp. 21-5427(f)(1) do not actually analyze K.S.A. 2019 Supp. 21-5427(f)(1)'s plain statutory language. Rather, his arguments rely on overturned caselaw in this court's *Kendall* decision and rely on an errant explanation of our Supreme Court's *Whitesell* decision. Thus, we reject Loganbill's requested interpretation of K.S.A. 2019 Supp. 21-5427(f)(1).

D. *K.S.A. 2019 Supp. 21-5427 Does Not Allow Subjective Determinations to Control What Constitutes a Course of Conduct Proving Stalking.*

In his alternative argument, Loganbill asserts that K.S.A. 2019 Supp. 21-5427 is unconstitutionally vague because it allows a targeted person's subjective fear to control what constitutes a course of conduct proving stalking. Nevertheless, there are several obvious problems with this argument.

As argued by the State, Loganbill is making this argument for the first time on appeal without ever acknowledging that he is raising this argument for the first time on appeal. Because Loganbill raises his constitutional vagueness argument for the first time on appeal, it is not properly before us. See *State v. Daniel*, 307 Kan.

428, 430, 410 P.3d 877 (2018) (holding that constitutional arguments are not properly preserved when raised for the first time on appeal); *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015) (holding that appellants who do not explain why they raised an argument for the first time on appeal risk improperly briefing and thus abandoning that new argument because they have violated Supreme Court Rule 6.02(a)(5) [2022 Kan. S. Ct. R. at 35] requiring such explanation).

Also, as argued by the State, even if we were to ignore that Loganbill has improperly raised this argument for the first time on appeal, it points out that Loganbill has never addressed our Supreme Court's holding in *Whitesell* that the stalking statute's "course of conduct" definition was not unconstitutionally vague. See 270 Kan. at 270. It is a well-known rule that we are duty-bound to follow our Supreme Court's precedent absent some indication that our Supreme Court is moving away from its previous precedent. *Rodriguez*, 305 Kan. at 1144. So, to adequately brief his constitutional vagueness argument, at the very least, Loganbill needed to explain why the *Whitesell* precedent does not apply to his constitutional vagueness argument. See *Salary*, 309 Kan. at 481 (holding that failing to show why an argument is sound in the face of contrary authority is akin to inadequately briefing the argument).

Finally, even if we were to ignore both the preceding preservation problems, Loganbill's constitutional vagueness argument hinges on his belief that K.S.A. 2019 Supp. 21-5427 contains no objective test for determining what constitutes a course of conduct proving stalking. But as explained in the previous section, under K.S.A. 2019 Supp. 21-5427(a)(1)'s and (f)(1)'s plain statutory language, a fact-finder must consider whether the accused's disputed behavior evidenced his or her continuity of purpose to target a person in a way that would reasonably cause the targeted person to fear for his safety, her safety, or a family member's safety. This means that the disputed behavior cannot constitute a course of conduct unless it would also cause an objectively reasonable person in the targeted person's position to fear for his safety, her safety, or a family member's safety. As a result, Loganbill's argument that K.S.A. 2019 Supp. 21-5427 is unconstitutionally vague

because it allows a targeted person's subjective fear to control what constitutes a course of conduct proving stalking is baseless.

E. *Sufficient Evidence Supported Loganbill's Reckless Stalking Conviction Under K.S.A. 2019 Supp. 21-5427(a)(1).*

Once more, Loganbill argues that there is insufficient evidence to support his reckless stalking conviction under his suggested interpretation of K.S.A. 2019 Supp. 21-5427(a)(1) and (f)(1). For the reasons explained previously, Loganbill's suggested interpretation of K.S.A. 2019 Supp. 21-5427(a)(1) and (f)(1) is wrong for several reasons. Accordingly, Loganbill's argument that insufficient evidence supports his reckless stalking conviction fails because it relies on his errant interpretation of K.S.A. 2019 Supp. 21-5427(a)(1) and (f)(1). Because Loganbill never argues that insufficient evidence supported his reckless stalking conviction under a proper interpretation and application of K.S.A. 2019 Supp. 21-5427(a)(1) and (f)(1), Loganbill has abandoned any argument that insufficient evidence supported his reckless stalking conviction under the statute's proper interpretation and application. See *Salary*, 309 Kan. at 481.

All the same, it is worth mentioning that there is ample evidence to support Loganbill's reckless stalking conviction under both a proper interpretation of K.S.A. 2019 Supp. 21-5427(a)(1) and (f)(1) as well as Loganbill's suggested improper interpretation of K.S.A. 2019 Supp. 21-5427(a)(1) and (f)(1).

Loganbill's statutory arguments emphasize the fact that A.A. believed that he was photographing and filming the classroom, not her buttocks specifically, until the final day that she was in his classroom. He refers to his disputed behavior as "facially benign." Yet, Loganbill's analysis conveniently ignores that he did not passively photograph and film A.A.'s buttocks. The evidence supports that Loganbill photographed and filmed A.A.'s buttocks after directing A.A. to answer a telephone and after directing A.A. to have a leg hold competition with her friends. Loganbill's analysis ignores that A.M. and A.J. discovered that he was photographing and filming A.A.'s buttocks without help from any adults. It ignores that after A.M. and A.J. told A.A. that they were worried about Loganbill photographing and filming her buttocks,

A.A., A.M., and A.J. "test[ed]" to see if Loganbill would try to photograph and film A.A.'s buttocks when she got up to get a tissue, at which point Loganbill took out his phone and pointed it toward A.A.'s buttocks. Also, it ignores A.A.'s and K.A.'s testimony that his behavior frightened A.A. to the point that she cried, became physically sick, and feared returning to school.

So, although he argues otherwise, Loganbill's behavior was not facially benign. This is why the three fourth graders recognized his behavior as troubling. In the context of photographing the leg hold competition, the evidence supports that Loganbill approached A.A. before directing her to have the leg hold competition. See K.S.A. 2019 Supp. 21-5427(f)(1)(B) (stating that approaching the targeted person may constitute a course of conduct proving stalking). And more generally, Loganbill's repeated acts of secretly photographing and filming A.A.'s buttocks constituted a course of conduct under K.S.A. 2019 Supp. 21-5427(f)(1) because they evidenced Loganbill's continuity of purpose to engage in behavior that would cause a reasonable fourth grader to fear for her safety. Because A.A.'s testimony supports that she subjectively feared for her safety upon learning about Loganbill's behavior from A.M. and A.J. at recess, it follows that A.A. continued to fear for her safety throughout the remainder of the school day. This would include when A.A., A.M., and A.J. tested whether Loganbill would photograph or film A.A.'s buttocks during the experiment with the tissue. Hence, although A.A. was not statutorily required to subjectively fear for her safety contemporaneously with Loganbill engaging in the course of conduct proving stalking, the evidence supports that A.A. feared for her safety as Loganbill took one of his final photos or videos of A.A.'s buttocks.

Next, in his brief, Loganbill strongly argues that "it is highly unlikely" that A.A. ever actually feared him because if she did, she would have not participated in the above-referenced test suggested by her classmates. This test revolved around whether Loganbill would secretly photograph or film A.A.'s buttocks if he was presented with an opportunity to do so. There are obvious weaknesses in Loganbill's argument. Let us consider some of the facts about Loganbill's relationship with A.A. First, it is obvious that Loganbill knew that A.A. was only 10 years old since he was her teacher. Second, the facts illuminate how he went about

grooming A.A. into becoming his teacher's pet. For example, throughout the school year, A.A., A.M., and A.J. observed Loganbill giving A.A. special treatment. They witnessed that A.A. would not get in trouble when she broke classroom rules, for instance, talking in class, while other students would get in trouble for doing the same thing. A.A. discerned that unlike other classmates, Loganbill would specifically invite her to eat lunch with him. Also, A.A. accurately perceived that she got extra help on her schoolwork. For instance, Loganbill would allow A.A. to use a calculator on her math tests while her other classmates could not use a calculator.

Children of A.A.'s age are generally curious and less mature than their adult counterparts. Also, they are less judgmental of others. In most cases, they view everyone as a possible friend. Indeed, Justice Sonia Sotomayor of the United States Supreme Court made these observations when stating how the law has historically viewed children: "Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and process only an incomplete ability to understand the world around them." *J.D.B. v. North Carolina*, 564 U.S. 261, 273, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). Justice Sotomayor further stated: "'Our history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." 564 U.S. at 274 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-16, 102 S. Ct. 869, 71 L. Ed. 2d 1 [1982]). So, when deciding whether a child targeted by someone accused of reckless stalking in violation of K.S.A. 2019 Supp. 21-5427(a)(1) objectively feared for his safety, her safety, or a family member's safety, a fact-finder must consider the child's maturity and age in its analysis.

We note a complete absence in Loganbill's appellate brief of any discussion about A.A.'s age while he was secretly photographing and filming her. As Justice Sotomayor pointed out, children are less mature and responsible than adults. Thus, they are more vulnerable or susceptible to adults who befriend them, especially teachers and coaches. They do not automatically believe the worst when presented with a new situation. As adults, we have

observed events that would leave a mature adult unshaken, but those same events would overwhelm a 10-year-old child. Nevertheless, the evidence here supports that A.A. feared for her safety when she became aware of Loganbill's designed behavior after he took one of his final photos of her buttocks. Thus, Loganbill's lack of fear argument rings hollow when considering A.A.'s age, immaturity, and Loganbill's successful grooming of her.

Affirmed.

(518 P.3d 1268)

No. 124,793

STATE OF KANSAS, *Appellant*, v. JEREMY R. FUDGE, *Appellee*.

SYLLABUS BY THE COURT

1. MOTOR VEHICLES—*Driving under Influence of Alcohol— Statutory Requirements for Admission of Breathalyzer Test*. The State meets the minimal foundational requirements for admission of a breathalyzer test by showing that the operator and the testing equipment were certified, and the testing procedures met the requirements set out by the Kansas Department of Health and Environment. K.S.A. 2020 Supp. 8-1002(a)(3).

2. EVIDENCE—*KDHE's Testing Procedures for Breath Alcohol Tests—No Requirement to Check Subject's Mouth for Foreign Matter.* The required testing procedures set out by the KDHE for evidentiary breath alcohol tests are in the written protocol published by the KDHE for the equipment used. KDHE's protocol for the Intoxilyzer 9000 does not require the test operator to check the subject's mouth for foreign matter.

3. SAME—*Driving Under Influence of Alcohol—State's Requirements Met Even if Foreign Matter in Suspect's Mouth During Test*. The State may meet the minimal foundational requirements of K.S.A. 2020 Supp. 8-1002(a)(3) for admissibility of a breath test even though a suspect has foreign matter in his or her mouth during the test.

Appeal from Anderson District Court; ERIC W. GODDERZ, judge. Opinion filed September 30, 2022. Reversed and remanded with directions.

Elizabeth L. Oliver, county attorney, and *Derek Schmidt*, attorney general, for appellant.

Russell L. Powell, of Monaco, Sanders, Racine, Powell & Reidy, L.C., of Leawood, for appellee.

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

GARDNER, J.: Jeremy R. Fudge, after being arrested for driving under the influence of alcohol, took a breathalyzer test which showed his breath alcohol content was above the legal limit. The State then charged Fudge with various crimes. Fudge moved to suppress the breathalyzer test results, arguing they were unreliable because he had a pouch of chewing tobacco in his mouth during the test. The district court agreed and granted the motion to sup-

press, finding the test results inadmissible because the test operator had violated Kansas Department of Health and Environment (KDHE) procedures by inadequately checking Fudge's mouth before administering the test. The State timely appeals, arguing that KDHE's protocol does not require a breathalyzer operator to check the subject's mouth. Agreeing with the State's position, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On December 24, 2020, Sheriff's Deputy David Harper-Head arrested Fudge for driving under the influence, in violation of K.S.A. 2020 Supp. 8-1567(a). Harper-Head transported Fudge to the Anderson County Jail where he administered a chemical breath test using an Intoxilyzer 9000. It showed Fudge's blood alcohol content was 0.106—over the legal limit.

The State charged Fudge with possessing a firearm under the influence, driving under the influence, transporting liquor in an open container, and speeding. Fudge then moved to suppress the results of his breath test, arguing he had a pouch of chewing tobacco in his mouth during the test, and that the deputy's failure to ensure his mouth was clear of foreign matter violated KDHE's procedures for operating the breathalyzer.

At the hearing on Fudge's motion to suppress, Deputy Kenneth Seabolt testified that before bringing Fudge to the county jail, he instructed Fudge to not bring any "chew, cigarettes, alcohol, guns, grenades, anything needles, anything contraband" into the facility. Seabolt also warned Fudge that his violation of these instructions could result in a felony charge. But Seabolt did not check Fudge's mouth for foreign matter.

In his testimony, Harper-Head explained that his habit is to check a suspect's mouth before administering the test: "To the best of my recollection I checked [Fudge's] mouth. I can't say with a 100 percent certainty, but I can tell you it's my normal standard practice in my many years of doing this job and my many years of DUI arrests that I check their mouth." Harper-Head also testified that he followed the protocol of the State of Kansas when he administered the test. He closely observed Fudge for the twenty-minute deprivation period and did not observe Fudge drink, belch, or chew anything during that period. Harper-Head turned off his

body camera to administer the test to avoid radio frequency interference with the breathalyzer test. Although there is normally video in the Intoxilyzer 9000 room, there was none from Fudge's test.

Fudge testified that he did not recall Seabolt's telling him that he could not bring any tobacco into the jail. Nor did he remember whether Harper-Head checked his mouth. But he testified that he had a pouch of chewing tobacco in his mouth during the breath test. Fudge also admitted a picture he had taken of himself inside the jail which showed a pouch of chewing tobacco in his mouth. The picture's caption, apparently added by Fudge, said: "Getting booked in had a chew in the whole time before breathalyzer 12-25-2020 breathalyzer on 12-24-2020".

Amanda Pfannenstiel, a Laboratory Improvement Specialist with KDHE, also testified. She repeatedly spoke to whether breathalyzer operators should first check the contents of the subject's mouth, saying:

- "It is our preference that they check their mouth and ensure that there's nothing there, but it is not a requirement of the protocol that they do so."
- "[I]t's a good practice to check the mouth . . . but it's never been an actual requirement of the protocol."
- Agreeing that checking the mouth of the subject is "best practice."

Pfannenstiel provided two reasons why checking the subject's mouth is a recommended practice. First, it is important to keep potential contaminants in a subject's mouth from being blown into the Intoxilyzer 9000. Second, it is important to provide a "fair and impartial" test because foreign matters could introduce alcohol into the mouth that could alter the results of the breath test.

The State admitted the published protocol from the KDHE for the Intoxilyzer 9000. That one-page protocol requires, among other matters, that the test operator observe the subject and deprive the subject of alcohol for 20 minutes, but it does not require the operator to check the subject's mouth for foreign matter.

After hearing the evidence, the district court found that KDHE's protocol requires the test operator to check the subject's

mouth. It also found that the purpose of the deprivation period is to ensure that no foreign substance is in the subject's mouth that could interfere with the accuracy of the test; yet it was uncontroverted that Fudge had a pouch of tobacco in his mouth when he took the test so Harper-Head either did not check Fudge's mouth or did not check it sufficiently. The district court found the results were inadmissible and granted Fudge's motion to suppress.

The State has taken an interlocutory appeal.

DID THE DISTRICT COURT ERR IN SUPPRESSING THE RESULTS OF THE BREATH ALCOHOL TEST?

Standard of Review

In *State v. Ernesti*, 291 Kan. 54, 64-65, 239 P.3d 40 (2010), the Kansas Supreme Court noted three possible contexts in which to determine the appropriate standard of review in this kind of case.

> "[O]ur focus is on the district court's determination that the State cannot meet the foundation requirements. The question of whether evidentiary foundation requirements have been met is left largely to the discretion of the district court. *Hemphill v. Kansas Dept. of Revenue*, 270 Kan. 83, 90, 11 P.3d 1165 (2000). Under an abuse of discretion standard, an appellate court will not disturb a district court's decision unless no reasonable person would have taken the same view. See *Vorhees v. Baltazar*, 283 Kan. 389, 393, 153 P.3d 1227 (2007). Yet, even under the deferential abuse of discretion standard of review, an appellate court has unlimited review of legal conclusions upon which a district court's discretionary decision is based. *Kuhn v. Sandoz Pharmaceuticals Corp.* 270 Kan. 443, 456, 14 P.3d 1170 (2000)." 291 Kan. at 64-65.

Fudge styled his motion not as a motion in limine but as one to suppress. We need not determine here whether the motion should have been one in limine rather than one to suppress. See *State v. Smith*, 46 Kan. App. 2d 939, 942-43, 268 P.3d 1206 (2011) (finding alleged failure of law enforcement officer to follow KDHE protocol "does not constitute the violation of a constitutional right and is not legally sufficient to support a motion to suppress"). Neither party has raised this issue and it matters not to our resolution of this case.

Our review of legal conclusions in a motion to suppress is also unlimited. *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021). Similarly, our construction of statutes relating to DUI and

the testing of blood alcohol content and the interpretation of administrative regulations promulgated by the KDHE is unlimited. *Ernesti*, 291 Kan. at 64. Because the district court's factual findings are uncontested, including that Fudge had a tobacco pouch in his mouth during the test, his appeal is subject to our unlimited review regardless of which contextual standard we use.

Analysis

The State argues that the district court erred in suppressing the test results based on Harper-Head's failure to ensure that Fudge had nothing in his mouth during his breath test. It contends that KDHE's protocol for the Intoxilyzer 9000 does not require the test operator to check the subject's mouth and that its evidence met all foundational requirements for admission of the test results. In response, Fudge argues that Kansas caselaw requires the State to establish that the testing procedures followed the manufacturer's operational manual and that the State has not done so. Fudge also argues that based on *State v. Campas*, No. 110,790, 2014 WL 4082408 (Kan. App. 2014) (unpublished opinion), officers violated the first step in KDHE's protocol because his mouth contained foreign matter during the test.

The certification requirements for admission of a breath test are established in K.S.A. 2020 Supp. 8-1002(a)(2) and (3). No one challenges the district court's findings under (a)(2)—that officers had reasonable ground to believe that Fudge was operating a vehicle under the influence and that they gave Fudge sufficient notice. At issue is solely the second subsection, K.S.A. 2020 Supp. 8-1002(a)(3), which establishes the "minimal foundation requirements" for the admissibility of breath tests. See *Ernesti*, 291 Kan. at 62.

This subsection requires the State to show, for admission of test failure results, certification of the testing equipment and the test operator, and compliance with certain testing procedures:

> "(A) The testing equipment used was certified by the Kansas department of health and environment; (B) the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment; and (C) the person who operated the testing equipment was certified by the Kansas department of health and environment to operate such equipment." K.S.A. 2020 Supp. 8-1002(a)(3).

The parties agreed that the testing equipment and the test operator were properly certified, as K.S.A. 2020 Supp. 8-1002(a)(3)(A) and (C) require. Fudge's motion challenged only whether "the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment," as K.S.A. 2020 Supp. 8-1002(a)(3)(B) demands.

The Minimal Foundational Requirements Are Those Set Out in KDHE's Protocol

The "requirements set out by the [KDHE]" for breath testing procedures are found in KDHE's published protocol for the specific testing equipment used. KDHE's protocol for the Intoxilyzer 9000 states in its entirety:

> "Effective January 1, 2016
> Intoxilyzer 9000
> Protocol
> "1. Keep the subject in your immediate presence and deprive the subject of alcohol for 20 minutes immediately preceding the breath test.
> "2. Check to determine the power switch of the instrument has been activated and is in 'Ready Mode'.
> "3. Press the green Start Test button and follow the instructions displayed by the instrument.
> "4. The instrument will begin the Kansas approved sequence automatically. The sequence is Air Blank, Diagnostic Check, Air Blank, Ext Std Check, Air Blank, Subject Test, Air Blank.
> "5. The acceptable range for the External Standard Check is 0.075 to 0.085.
> "6. When prompted for Subject Test, place an unused mouth piece into the breath tube and request the subject provide a breath sample.
> "7. After the final Air Blank cycle, a test result will be printed."

The plain language of this protocol shows that checking a subject's mouth before administering the test is not among the required testing procedures set out by KDHE. K.S.A. 2020 Supp. 8-1002(a)(3). See *State v. Hosler*, No. 108,111, 2013 WL 2321191, at *3 (Kan. App. 2013) (unpublished opinion) (holding that checking subject's mouth is not requirement for admission of breathalyzer test because it is not listed in KDHE protocols; declining to read language into statute that does not exist).

That conclusion was confirmed by KDHE Laboratory Improvement Specialist Pfannenstiel. She typically drafts the manual for the Breath Alcohol Program for the KHDE. She has received

training in the Intoxilyzer 8000 and Intoxilyzer 9000, trains law enforcement officers to use the Intoxilyzer 9000, and has trained thousands of officers how to use the Intoxilyzer. She identified the State's Exhibit 2 (set out above) as the relevant KDHE protocol for the Intoxilyzer 9000 and testified that checking the subject's mouth is not part of the required testing protocol.

True, Pfannenstiel characterized checking the subject's mouth as a "preference," "good practice," "highly recommended," and "the best practice." But even highly recommended or best practices are not requirements. See *State v. Vandenberg*, No. 110,236, 2014 WL 5312922, at *2 (Kan. App. 2014) (unpublished opinion) (holding that good practices that are not part of the "formal testing protocol" cannot violate the required testing procedures). See generally *United States v. Kahn*, 415 U.S. 143, 155 n.15, 94 S. Ct. 977, 39 L. Ed. 2d 225 (1974) (noting that warrants often "pass muster under the Fourth Amendment" even when they do not comply with "best practice"); *United States v. Glenn*, 966 F.3d 659, 661 (7th Cir. 2020) (Easterbrook, J.) ("The Fourth Amendment does not require best practices in criminal investigations."); *Henderson v. Board of Montgomery County Comm'rs*, 57 Kan. App. 2d 818, 834, 461 P.3d 64 (2020) (finding officers' best practices do not dictate acts officers are required to take). Best practices for officers, like best practices for attorneys, are not legal requirements. See, e.g., *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (*Strickland*'s standard for ineffective assistance of counsel does not ask whether attorney's representation deviated from best practices or most common custom); *Hartleib v. Weiser Law Firm, P.C.*, No. 19-02099-CM-JPO, 2019 WL 3943064, at *7 (D. Kan. 2019) (unpublished opinion) ("best practices generally recommend the clear and unambiguous communication of termination of the attorney-client relationship, but these practices are not required").

Our sole concern here is whether "the testing procedures used were in accordance with *the requirements set out* by the Kansas department of health and environment." K.S.A. 2020 Supp. 8-1002(a)(3)(B) (Emphasis added.). We use "requirements" in its ordinary sense as meaning "something required; something oblig-

atory or demanded, as a condition"; or "something needed; necessity; need." Webster's New World College Dictionary 1235 (5th ed. 2014).

Pfannenstiel consistently denied that checking a subject's mouth was a requirement of KDHE's breath test protocol. Rather, she testified that the protocol says nothing "about removing foreign substances or checking the mouth for anything." And she testified that if the breath test were conducted with a tobacco pouch in the subject's mouth, the operator could still comply with the Intoxilyzer 9000 standards and KDHE protocol. The record contains no evidence to the contrary.

Thus, per Pfannenstiel's expert testimony and KDHE's published protocol for the equipment used here, checking a subject's mouth before administering the test is not among the required testing procedures set out by KDHE. K.S.A. 2020 Supp. 8-1002(a)(3)(B).

Evidentiary Foundation Does Not Include the Manufacturer's Manual

Fudge argues that the State, in addition to showing compliance with the required testing procedures set out by KDHE, had to prove that the testing procedures followed the "manufacturer's operational manual." In support, Fudge cites *State v. Bishop*, 264 Kan. 717, 957 P.2d 369 (1998), which states that to create an evidentiary foundation for a breath test, the State must introduce evidence "that the testing procedures were used in accordance with the manufacturer's operational manual and the requirements set out by the KDHE." 264 Kan. at 725.

But the *Bishop* court never reached the protocol issue Fudge raises here. Defense counsel had not objected to the evidence about the breath test and its result on the grounds raised in the motion in limine—that the trooper who conducted Bishop's breath test failed to follow the proper test protocol. Thus, the Kansas Supreme Court found the issue was not preserved for appeal. 264 Kan. at 730-31.

More fundamentally, Fudge fails to recognize crucial changes in the law after *Bishop*. *Bishop* applied K.S.A. 1997 Supp. 8-1002(a)(3)(A)-(C), which it held required the State to show "that

the testing procedures were used in accordance with the manufacturer's operational manual and the requirements set out by the KDHE." 264 Kan. at 725. See *State v. Lieurance*, 14 Kan. App. 2d 87, 91, 782 P.2d 1246 (1989) ("[T]o introduce the results of a breath test, the prosecution must lay a foundation showing that the testing machine was operated according to the manufacturer's operational manual and any regulations set forth by the Department of Health and Environment.") The relevant statute requires the State to show, as to testing procedures, solely that "the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment." K.S.A. 2020 Supp. 8-1002(a)(3)(B).

KDHE's relevant administrative regulation in 1998, when *Bishop* was decided, required compliance with both the manufacturer's requirements and KDHE's protocol. K.A.R. 28-32-1(b)(3) (1997 Supp.) stated: "Equipment shall be operated strictly according to description provided by the manufacturer and approved by the department of health and environment." But this language was revoked effective March 14, 2008, thus it has no application here. The comparable language in KDHE's current regulations is found in K.A.R. 28-32-9(b)(4), which says nothing about the manufacturer's manual. It requires only that "[e]ach certified operator shall follow the standard operating procedure provided by the secretary for the EBAT device in use." ("EBAT" means evidential breath alcohol test, K.A.R. 28-32-8(i); "secretary" means secretary of KDHE, K.A.R. 28-32-8[m]). See *State v. Knox*, No. 104,204, 2011 WL 1197305 (Kan. App. 2011) (unpublished opinion).

Compliance with the manufacturer's manual was thus not among the required testing procedures set out by KDHE in the statute, in the administrative regulations, or in the protocol for the Intoxilyzer 9000 in 2020 when Fudge was arrested for DUI. See generally K.A.R. 28-32-9 (agency certification); K.A.R. 28-32-10 (operator certification); K.A.R. 28-32-11 (2020 Supp.) (EBAT device certification). As a result, the State had no need to show that the testing procedures followed the manufacturer's operational manual to establish the admissibility of Fudge's breath test results under K.S.A. 2020 Supp. 8-1002(a)(3)(B).

But even if compliance with the manufacturer's manual were required in 2020, Fudge fails to show that the "manufacturer's operational manual" for the Intoxilyzer 9000 requires an operator to check the subject's mouth before administering the test. To the contrary, Pfannenstiel testified that the Intoxilyzer 9000 Operation Manual does *not* recommend that anyone check the subject's mouth.

Prior Cases are Not on Point

Fudge also relies on *Campas*, 2014 WL 4082408, at *7, alleging it has similar facts. *Campas* asked whether the testing procedures used were in accordance with the requirements set out by the KDHE. And the *Campas* panel affirmed the district court's suppression of breathalyzer test results because the subject had tobacco in his retainer during the test.

But the similarity ends there. Other facts distinguish *Campas* from our case in one important respect. There, as the court recognized, "[l]ittle evidence was presented as to what the KDHE protocols actually require." 2014 WL 4082408, at *5. Not so here.

The only evidence in *Campas* about KDHE's testing protocol was one statement from a law enforcement officer:

> "'Q. Okay. Now your protocol—protocol number one, the 20–minute immediate presence requirement requires that you make sure that the subject does not have any foreign matter in his mouth; is that correct? 'A. It is correct that he's not to have anything. That is correct.'" 2014 WL 4082408, at *5.

In *Campas*, the State did not admit KDHE's written protocol for testing procedures, or expert testimony about the protocol, or any other evidence on the subject. The panel thus concluded, based on the only evidence presented, that KDHE protocol number one required a subject's mouth to be free of foreign matter. 2014 WL 4082408, at *7.

Here, in contrast, the State admitted KDHE's published protocol for the Intoxilyzer 9000 which says nothing about checking the subject's mouth. The State also admitted an expert witness who testified that KDHE's testing requirements do not include checking a subject's mouth. And our record contains no evidence to the contrary. We thus find *Campas* distinguishable and unpersuasive.

See Supreme Court Rule 7.04(g)(2)(B)(i) (2022 Kan. S. Ct. R. at 48).

Our Court has addressed similar evidentiary foundation issues in various contexts over the years. See e.g., *Mitchell v. Kansas Dept. of Revenue*, 41 Kan. App. 2d 114, 123, 200 P.3d 496 (2009); *City of Shawnee v. Gruss*, 2 Kan. App. 2d 131, 133, 576 P.2d 239 (1978), *overruled on other grounds by State v. Bristor*, 236 Kan. 313, 691 P.2d 1 (1984); *State v. Hosler*, No. 108,111, 2013 WL 2321191, at *4 (Kan. App. 2013) (unpublished opinion); *State v. Pfizenmaier*, No. 104,112, 2011 WL 1877831, at *l-2 (Kan. App. 2011) (unpublished opinion); *State v. Anderson*, No. 94,364, 2006 WL 903168, at *3 (Kan. App. 2006) (unpublished opinion). But each case is governed by its own facts and the relevant law. We find no case on all fours with this one.

The Purpose of the Deprivation Period is Not Undermined

We acknowledge that the general purpose of the 20-minute deprivation period in the first step of the KDHE Intoxilyzer 9000 protocol is "for the testing officer to make sure there is no residual alcohol in the subject's mouth at the time of the breath test." *Mitchell*, 41 Kan. App. 2d at 119. As stated in *Molina v. Kansas Dept. of Revenue*, 57 Kan. App. 2d 554, 559, 456 P.3d 227 (2019):

> "The whole point of the alcohol deprivation period is to assure that the test subject has neither placed alcohol in his or her mouth during the deprivation period nor allowed some other substance in the test subject's body which could interfere with the accuracy of the test that is about to be administered." 57 Kan. App. 2d at 559.

Pfannenstiel's testimony confirms this purpose.

Still, no evidence shows that the tobacco pouch in Fudge's mouth may have inflated the alcohol content measured by the Intoxilyzer 9000. Pfannenstiel testified that chewing gum in the subject's mouth during the breathalyzer would not affect the test's accuracy. And her biggest concern with having chewing tobacco in the subject's mouth is that flecks of it could be blown into the equipment and block its mesh filter, not that it could increase the

measured alcohol content. No evidence shows that Fudge's tobacco pouch in his mouth during the test may have increased the alcohol measured by the breath test.

But even if having a foreign matter in a subject's mouth may generally cast doubt on the accuracy of the breathalyzer test results, the court's role here is to determine only whether the State has met the minimal foundational requirements for admissibility. The fact-finder will determine the weight to give that evidence. See *Hosler*, 2013 WL 2321191, at *4.

CONCLUSION

Based on the evidence admitted at this hearing, we find that the operator of the Intoxilyzer 9000 is not required to check a subject's mouth as a requirement for admission of failed breathalyzer test results. The State met the minimal foundational requirements for admission of the breathalyzer test by showing that the operator and the equipment used were certified, and "the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment." K.S.A. 2020 Supp. 8-1002(a)(3). Thus, the district court erred by granting Fudge's motion to suppress. For these reasons, we reverse and remand with instructions to deny Fudge's motion to suppress.

Reversed and remanded with directions.